

# **ABORIGINAL RIGHTS IN CANADA: INDIGENOUS STRATEGIES FOR RELATIVE AUTONOMY WITHIN THE CANADIAN STATE**

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Over the last two decades the aboriginal peoples of Canada have been engaged in a complicated series of political and legal processes in an effort to protect their societies, and to provide the bases for their future development. This report is a brief survey and a partial analysis of these developments. In it I suggest how these diverse initiatives are linked: in time through their historical development; and in pragmatic terms by providing alternative or complimentary means to what may increasingly be described as a relatively integrated set of goals. While the paper is intended primarily as an introduction to developments in Canada, it is hoped that it may also be of some interest to those familiar with Canadian developments, by attempting to synthesise an often bewildering range of recent activities.

The aboriginal rights developments in Canada over the past two decades constitute one of the most sustained attempts to date to redefine the place of ethnically distinct minority native peoples within the structures of an existing nation state. And although the process is still underway and the outcomes are not at all clear, they have important implications for the efforts in other developed liberal democratic nation states, suggesting the potentialities and limitations of redefinition within the constraints of an encapsulating state established under the laws and structures of a dominant immigrant majority population.

Two decades ago some political commentators and some anthropological colleagues suggested that indigenous ethnic minorities in modern nation states would have essentially to content themselves with what could be attained as the by-product or spoils of the political activities of the major national political groups. This somewhat pessimistic view has not turned out to be the case in Canada, where the aboriginal rights issue has become a major political issue in its own right, although not solely because of the actions of indigenous peoples. Part of this paper is about how this has come about.

In the paper I am concerned not only with how the issue of aboriginal rights joined the political agenda in the national political arena, I am also concerned to address the question of how the aboriginal peoples were able to capture the aboriginal rights issue. That is, I try to examine not only how the government and the public came to recognise aboriginal rights were a problem requiring political action, but also how aboriginal peoples' organisations were able to make this an issue over which they exercised sufficient control that they could shape the

nature of the problem and the means by which it was being addressed. For it is one thing to say that the issue of aboriginal rights is being addressed, and quite another to say that the concerns which aboriginal people have about their own aboriginal rights are being addressed in the political processes directed at the issue.

Equally important will be an examination of how the aboriginal organisations have developed their positions on the basic aspects of the aboriginal rights issue. This is a distinct question because, as I will show, they had captured the problem well before having a comprehensive consensus on the basic issues at stake. The aboriginal views of the aboriginal rights issues have developed in the course of their political action, and although basic objectives are now well developed, the process of action is still ongoing, and the processes of defining goals and means are ongoing as well. I suggest the steps involved in the changes to date.

Finally, the paper examines the means by which the aboriginal peoples have sought their goals. With only a limited number of exceptions, the majority of aboriginal groups in Canada are now seeking to assure the future of their societies within the Canadian nation state. This paper concentrates on the latter groups. These groups do not assume that there are no fundamental conflicts between their own interests and those of the nation state in which they are encapsulated, but they also do not assume that such conflicts are all pervasive nor that the state is all powerful and monolithic. They appear to see themselves as confronting and dealing with a complex of political institutions and arenas, where state structures involve: a) a relative autonomy from economic interests, the degree of autonomy being variable and often difficult to predict in any conjuncture; b) a complex of self-interested government institutions, including several levels and branches of governing institutions, and diverse departments and agencies within branches and levels, characterised by their diverse institutionalised interests rather than functional unity; and, c) a range of ideological structures and popular cultures laden with inherently ambiguous meanings and values which are and can be mobilised by various political actors. The aboriginal organisations are, in effect, engaged in exploring the potentialities and constraints for protecting aboriginal interests within liberal democratic states.

In certain respects the present period in Canadian politics presents an unusual conjunction of opportunities for political action by Native people. For example, major changes in Indian policies and legislation are being sought by governments themselves; Canadians have been patriating and therefore revising their national constitution; and several colonial political jurisdictions within the Canadian state have begun a course of development towards full political status within the nation, at the same time that penetration of formerly remote regions of

Canadian territory by large-scale developers has accelerated. In this paper I try to note the role of these conditions in the process, but I hope not only to focus on the historical uniqueness of the context, but also to raise the broader issues raised by the possibility of establishing adequate conditions for the development of aboriginal societies within developed capitalist liberal democracies.

The questions which need to be asked of the Canadian experience concern the types of leverage and sources of power available to indigenous minorities within the state. This paper will demonstrate a range of such sources, each providing limited but not insignificant opportunities, as well as constraints on political action. These include, in addition to the multiplicity of state institutions and interests cited above: the historical residue of ambiguities and contradictions inherent in a legal system developed over 300 years of dealing with Native peoples under significantly varying conditions; the needs and processes of state political legitimation; the complementary development of necessarily multi-vocal or ambiguous public political cultures; and the need of the state for the support or at least the acquiescence of administered populations. In this paper I attempt to show how each has played a critical role at each stage of the development of the aboriginal rights issue.

I will begin by briefly reviewing the status and condition of the aboriginal peoples of Canada, and then analyse the history and development of the aboriginal rights issue focusing on four events or periods each marked by a major development: the government policy paper of 1969; the Supreme Court ruling on aboriginal rights of 1973; the aboriginal rights claims agreements starting in 1975; and the recognition of aboriginal rights in the patriated constitution.

#### ABORIGINAL PEOPLES OF CANADA: AN OVERVIEW

Under the Constitution Act 1867 the federal Parliament of Canada has the power to make laws affecting Indians and land reserved for Indians. The principal statute under this power is the Indian Act, the first version of which was passed the year after Confederation, and which has been revised periodically thereafter. While the constitutional mandate is a broad one extending to Indian and Inuit peoples, the Indian Act is restrictive defining Indian status and excluding Inuit, and in its application also creating a category of non-status Indians.

The Indian Act establishes the legal rights of Indians, and the government and ministerial responsibility for Indians, including: administration, education, reserves, band government, and management of money.

For present purposes, it is important to note that the act establishes a chief and council form of government for each administ-

rative band, and that all status Indians are administratively registered as members of specific bands. The powers and authority of band governments are established by the Act which reserves considerable powers to the Minister to act, to review, and to implement or to refuse to implement band decisions. Under the Act Indians can lose their status by voluntary relinquishment, and in the case of women by marriage to a spouse without Indian status; while non-Indian women who marry Indian men gain Indian status. The Act was designed on the assumption that Indian status was a temporary condition and that all Indians would be 'enfranchised', ie. they would lose or relinquish that status, in due time. It was based on the two hundred year old principles of protecting, civilising, and assimilating the indigenous populations.

In addition to Indian and Inuit peoples there are also Metis peoples who claim aboriginal status as descendants of marriages between Indian and non-Indian peoples, often stretching back to before the Confederation of Canada, and who until recently had no major national special recognition in the Canadian legal system.

In the 1981 census 493,000 people identified themselves as Indians, Inuit or Metis. 25,000 were Inuit, and 370,000 Indians including 80,000 non-status Indians. The figures for non-status and Metis are however disputed with respect to their accuracy, and estimates by some government departments put the total aboriginal population between 750,000 and 930,000. This would represent approximately 3.5% of the total population of Canada, and would constitute the fourth largest ancestral-origin group in the country, following the populations of British, French and German descent. While aboriginal people are widely dispersed throughout Canadian territory they constitute higher percentages of the populations of the northern regions, accounting for 17% of the population of the Yukon Territory, and 58% of that of the Northwest Territory.

Lands reserved for Indians comprise just over 10,000 square miles of Canada's approximately 3.5 million square miles of territory, approximately one-third of one percent. However, Indian and Inuit peoples continue effectively to use vast tracts of Northern Canada which may comprise over half the territory of the country. Indeed, it is their continued use of these lands which is a major impetus to and concern in the claims for aboriginal rights.

The lands specifically reserved for aboriginal peoples are divided into over 2200 separate parcels, allocated to 573 different Indian bands. The land which is reserved is therefore widely dispersed in small units.

The 573 Indian bands range in size from two members to approximately 10,000 members and average 525. 30% of bandmembers live outside the reserves set aside for Indians, and many of these live in urban centres.

The birth rate of Indians peaked in 1950 and although declining slowly is still almost twice the national average at 27 per 1000.

Elementary school participation by Indian children is now at the national level, but secondary is 12% below the national level, and university enrolment has only recently risen to half the national average. Approximately 60% of children entering school speak an Indian language, and this figure appears to be relatively stable in the last decade. There are ten language families recognised among aboriginal peoples of Canada.

Life expectancy for Indians is ten years less than the national average, and violent deaths are three times the national average. One in three Indian families lives in over-crowded conditions, and less than 50% of Indian housing is serviced, compared to 90% of all housing in the country. 33% of the working age population of Indians are employed, compared to 57% of the national population and the gap is widening, although employment levels are difficult to establish where domestic production is widespread as in many Indian communities. Per capita income comparisons are more unfavourable than employment numbers, and between 50 and 70% of Indians receive welfare, a percentage which had increased in recent decades.

Aboriginal peoples therefore are a significant ethnic grouping in Canada but one which is highly diverse and dispersed, with very limited control of basic resources, some improving access to government services, but which remains a socially and economically disadvantaged group within the population, and which is still subject to colonial forms of administration.

Nevertheless, a growing series of documents and evidence presented by aboriginal peoples, and supported by studies by anthropologists and social scientists indicates that the clear majority of aboriginal peoples retain viable communities, distinct social, cultural and economic systems, and an intense desire to maintain these communities, institutions and practices in the future, and to enhance their autonomy. Studies from Labrador across the north to British Columbia have demonstrated an extensive domestic economy based on the use of local wildlife resources which typically is capable of providing all of the meat and protein requirements of communities, and which is reticulately linked to social, cultural and religious structures. Production and exchange of country food are highly valued activities, and the reciprocities involved sustain cultural values and recreate social organisation and community.

While such systems appear to be widespread wherever aboriginal peoples have access to extensive wildlife resources, there is also evidence that similar reciprocity systems exist with respect at least to the distribution and consumption of specific types of goods in communities without domestic food production opportunities. While such systems have not been extensively studied

the retention of the distinct social and cultural structures of Indian communities throughout Canada testifies to the existence of these and other processes of community maintenance.

Poverty, relative deprivation and colonialism are therefore only part of the story, and cultural survival linked to distinctive social and economic structures is equally present, and is a critical part of the development of the aboriginal rights issue.

#### THE MAKING OF A NATIONAL POLITICAL ISSUE - THE 1969 WHITE PAPER ON INDIAN POLICY

The initial development of the contemporary aboriginal rights issue can be traced in the history of the 1969 federal government white paper on Indian policy. This development had roots both in the historical treatment of aboriginal people and in the contemporary political context. While the history of Indian policy is beyond the scope of this paper a few brief comments are essential.

At the initial establishment of British colonies and laws in North America there was a complex and often diverse dealing with aboriginal peoples which included irregular purchases of land, independent treaties, and a variety of alliances and diplomatic dealings. Motivated on the one hand by the establishment of settlements and on the other by the need for Indian allies in the wars for European control of North America the British Crown systematised its dealings in the Royal Proclamation of 1763. The proclamation regulated the process of taking aboriginal lands by establishing that only representatives of the Crown could purchase such lands and such transfers must be formally authorised by representatives of the aboriginal groups at public meetings attended by members of the groups. However the proclamation also established that nations or tribes of Indians 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'. This has become the most readily accessible legal recognition of the aboriginal rights of the indigenous peoples.

This document guided Indian policy in Canada through the next two centuries. That policy has been summarised in the key phrases: lawful and ordered taking of the land; protection; and, civilisation and assimilation. The actual nature of the interests affecting policy-making have however varied. Up until the war of 1812 Indians played a vital role as allies of European powers and in Canada Indian policy was under the Department of War, and Indians were treated often as sovereign nations. After this period, when central Canada and then western Canada were being settled, Indian Affairs was under the Department of Lands, and policy was focused around treaty-making which derived directly from the principles of the Royal Proclamation. Treaties

were made as settlements expanded in most of Canada from the 1830s to 1923 but did not extend to the whole of the Northern Territories of Canada or in colonies with distinct administrative histories: Quebec, Atlantic Canada and British Columbia. The treaties were not negotiated agreements, but rather take it or leave it offers in the face of a process of settlement which was presented as inevitable. They provided that aboriginal peoples 'cede, release, surrender and yield up all rights, titles and privileges to lands', and that they agree to observe the treaties and be good and loyal subjects. In return the government typically promised to reserve specific lands and to provide education, hunting and trapping benefits, agricultural development opportunities, and some token financial compensation. Recent research has supported Indian claims that treaties often lacked verbal commitments made during the treaty-making, they often lacked official tribal sanction, and they typically obscured the very different understandings which Indians and Euro-Canadians had of the transaction being concluded, given their different systems of tenure and of culture more generally.

After this period of intense settlement Indian policy became a matter for the Department of the Interior and later for the Department of Citizenship and Immigration, reflecting the shift in focus after the 1920s to the assimilation of aboriginal peoples into Canadian society. More recently in the mid-1960s Indian policy has been administered by the Department of Northern Affairs and National Resources, later renamed the Department of Indian and Northern Affairs, reflecting the relationship between large-scale northern resource developments and critical issues in Indian policy-making.

In the period following World War II federal Canadian political policy was dominated in part by the maintenance of the broad range of federal powers which has been extended during the war and which the government sought to maintain in peace time, in part through the promotion of social welfare policies. Education, health and social services are generally a provincial responsibility under the Canadian constitution. By providing for federal contributions for social welfare and education programmes which provinces were invited to establish, so long as they met basic criteria established by the federal government (eg. universality, portability and certain administrative conditions), the latter was able to engage in areas of policy-making which might otherwise have been beyond its mandate. The legitimization for such policies was provided by claims of the need for equalisation of opportunities among citizens living in regions of the country with manifestly different resource bases, and different levels of public needs for social services. This emphasis on the welfare state and liberal democratic ideologies was consistent with and further enhanced public liberalism during a period of rapid economic expansion and increases in the standard of living. It was a change in government legitimization and public culture with important implications for indigenous peoples.

During the early 1960s the quiet revolution in Quebec added another major dimension to federal political policy and public political culture. The increasing demands of a significant sector of Quebecers for additional control of their province and its economy directly conflicted with federal policy, and was legitimated by Quebec asserting the need to have special conditions in order to protect and enhance the national, cultural and linguistic institutions of Quebecers. An important part of the federal response was the promotion of bilingualism and bi-cultural policies, later to become multi-culturalism.

In the 1950s and 1960s aboriginal rights were therefore considered in the context of ideologies which emphasised equality of economic opportunity and legal treatment of citizens, and the linguistic and cultural diversity of the Canadian population, giving rise to debates over whether multi-cultural groups had specific needs. These ideologies, motivated mainly by government legitimation, rapidly became prominent parts of the liberal democratic popular political culture.

Indians and the Indian problem had existed for a long time before they became a major political issue in the late 1960s. The initial efforts to deal with them in the post World War II period coincided with the expansion of the welfare state and focused on its application to aboriginal peoples and the removal of some of the most blatant colonial features of the existing legislation. Revision of the Indian Act was examined in 1946-48 and in 1959-61 and changes were made in 1951 and intermittently thereafter.

These established, for example, the citizenship of Indians, their rights to hold ceremonies such as the potlatches and sun dances which had previously been outlawed, and their rights to attend colleges and to vote without being 'enfranchised' and losing their Indian status. It is sometimes difficult to appreciate how recent these changes were, and what their impact on public perceptions must have been.

Public recognition of these provisions linked with the growing concern for poverty and national unity shaped the perception of the Indian problem in the 1960s. The recognition that Canada was not a melting pot but rather a mosaic, along with efforts to deal with urban and rural poverty led to a growing and collective sense of guilt in public awareness of the treatment of aboriginal peoples. Liberal non-Natives formed the first associations (eg. the misnamed Indian-Eskimo Association) to promote awareness and research on the issues of aboriginal problems, and worked in close co-operation with the press and other media. The aboriginal problem was defined by liberal activists as paternalism, and the Indian Act and the Indian Affairs Branch became the main focus of criticism.

The government responses of the 1960s were diverse and aimed at finding a workable new policy. Social scientists were com-



missioned to undertake the first major national survey of Indians and their conditions. Community development programmes and grants for band self-administration were provided to attempt to reduce administrative control and tutelage by government bureaucrats. Transfer of selected programmes to provincial jurisdiction and administration was initiated in order to reduce the dependency of Indians on a special bureaucracy. Regional Indian advisory boards, and plans for an Indian Claims Commission were developed to provide inputs to the bureaucracy from Indian leaders and to attempt to deal with their outstanding claims. In general these initiatives each failed due either to opposition within the bureaucracies or to Indian resistance. Each policy in turn was either withdrawn, not implemented or continued in the face of explicit dissatisfaction and resistance by the Indians.

The clear failure of the government policies of the 1960s made the Indian problem more visible, and in 1968 and 1969 the government set about to develop a new Indian policy. A detailed account of the bureaucratic and policy-making procedure has been provided on the basis of an extensive collection of documents leaked after the policy was announced (Weaver, 1981). The policy-making process was a year-long conflict within senior levels of the federal government which resulted in the predominant emphasis of the policy finally adopted being on the political needs of the government.

While the policy was being developed in secret, consultations were being held with Indians across the country in which they were insisting on a recognition of their special rights and status within Confederation. Their position involved maintaining a modified Indian Act as a basis for some of those special rights, despite the colonial implications of such legislation. The federal policy was almost totally unaffected by their concerns and rather reflected the government's attempt to find a solution to its own discrediting.

The white paper proposed a global termination of all special treatment of Indians, including the Indian Act, and offered as an alternative equality before the law and non-discrimination. It claimed special rights had been the major cause of the Indian problem and proposed a transfer to provincial administration of all Indian services so Indians would receive the same services from the same sources as other Canadians.

The boldness of the white paper, the clarity and simplicity of what it proposed, and the long and vocal debate it generated, placed aboriginal rights on the political agenda of the nation. This was the culmination of a decade during which aboriginal problems slowly gained public attention and although aboriginal leaders and spokesmen played important roles in this process it was largely due to the growing concern among white liberals and the liberal press that the issue provoked a major government policy initiative. Indians were still relatively unorganised,

although the various government programmes of the 1960s and the abortive consultative process during development of the policy paper had initiated new political developments among Indians, by providing forums and resources for public political action.

Initial response to the release of the policy paper was slow and generally cautious among Indians, the press and the public. Several strong initial Indian responses indicated that the paper was a direct contravention of the demands they had expressed in the consultation process, focusing the protest issues on the process by which the paper had been developed. This issue exposed the government to new claims of paternalism and struck a cord which mobilised wide public support.

Public rejection did not emphasise that the policy failed to meet Indian demands, but rather that it was an extension of the previous treatment of Indians at the hands of the government. Thus the issue was one of paternalism rather than one of recognising the special concerns of Indians. The paper was also rejected by the public and the press because it failed to offer a plausible solution to the questions of poverty and social inequality, focusing only on legal and administrative equality.

The public emphasis on paternalism also helped to leave an open door for aboriginal peoples to develop a carefully prepared response to the policy proposals. While the policy paper and the debate it generated put the aboriginal problem into the national political arena, it was the Indian response to the paper which redefined the aboriginal problem as one aboriginal peoples themselves would control. Several Indian organisations set about developing a considered response to the white paper. Rather than simply reject the policy statement they adopted the position of proposing, in very general form, an alternative policy principle based on recognition of their special status within the nation; a position reflected in the title given the first of the policy responses, 'Citizens Plus' (a term which was taken from the national social science survey of Indians completed for the government in the mid-1960s).

A clear strategy of the aboriginal peoples in the development of an alternate policy was to raise the question of who could define the aboriginal issues, and to assert that they would define the issue rather than the government or public media. To emphasise this point they went to considerable lengths to indicate that they were seeking solutions within Canadian political institutions.

This approach was highlighted by arranging to present the first of the policy paper responses by an Indian organisation at a public meeting in Ottawa with the Prime Minister and his senior cabinet members and bureaucrats responsible for the government policy proposal. From comments which have been made since, it is now clear that the government representatives expected a series

of harsh attacks by Indian leaders, and that they had planned to adopt a position of examining the Indian submission and responding at a later date. In contrast to this, the Indian organisation arranged the meeting as a formal ceremony arriving in Plains Indian costumes and presenting formal speeches. The tone of their presentations was conciliatory but assertive, affirming their willingness to work with the government, but they insisted on special status. Caught up in the tone of the presentations and the ceremony the Prime Minister made a long and impromptu speech expressing his welcome for their initiatives, and the government's willingness to revise the application of its policy.

Once committed to revising the policy the government was also committed to responding to Indian demands. Not only had the policy itself been rejected, but major initiatives for control of the aboriginal problem had been shifted from the now discredited senior government ministers and bureaucrats to aboriginal organisations and leaders.

The transition to aboriginal control of the aboriginal problem was also aided and indicated by developments in the official organisations making representations on the questions of aboriginal rights. The Indian-Eskimo Association had only individual and unofficial aboriginal representatives among its directors. Following the formation of a National Indian Brotherhood which represented various provincial and regional Indian organisations, and responding to insistence by the new Indian leadership, the Association changed its name in 1972 to the Canadian Association in Support of the Native Peoples, a title which accurately reflected its new role.

Taking control of the aboriginal problem however was a major undertaking because aboriginal peoples were still relatively unorganised, regionally and ethnically diverse, and there was as yet little consensus beyond the need for some kind of special status. The events following 1969-1970 can therefore be analysed by examining the history of the aboriginal peoples' definition of the aboriginal problem as developed in the course of a series of political initiatives.

#### ABORIGINAL RIGHTS IN THE COURTS AND IN CLAIMS NEGOTIATIONS

Three developments provided the initial focuses for aboriginal actions and for clarification of the aboriginal issues, a court case which helped to focus aboriginal concerns around the question of rights, the negotiation of aboriginal rights agreements in Northern Quebec and elsewhere, which helped to focus attention on the question of the continuation of aboriginal societies rather than on poverty and assimilation, and the response of the aboriginal peoples of the Northwest Territories to the political evolution of the region, which furthered development of the political concepts implied by aboriginal rights (see Asch, 1984).

During the controversy over the development of the government white paper, the Nishga tribe from British Columbia had been pursuing a court case intended to test judicial recognition of special aboriginal rights within the Canadian legal system. They claimed aboriginal rights to hunt, fish and trap on traditional lands. In support of this carefully defined claim they presented three types of evidence. First, that at the time of contact the Nishga had a system of tenure reconcilable with British and Canadian law, which they supported with evidence from traditional chiefs and from an anthropologist who had worked among them for many years. Second, they presented documents to claim that there was sovereign recognition of their usufructary rights, in particular the Royal Proclamation of 1763. And, they presented historical evidence that no legislative act had explicitly extinguished their aboriginal rights. Their court case therefore raised three issues: Did aboriginal rights exist? Were they recognised in Canadian law? And, had they been extinguished?

The first court ruled in 1969 that their rights had been extinguished, without ruling on whether they had existed in the first place. The Appeals Court ruled in 1970 that they had no aboriginal rights, having been too uncivilised to have a system of tenure reconcilable in law, and that in any case their rights had been extinguished by legislation which although it did not explicitly refer to aboriginal rights clearly had the intention of providing for new land uses.

Their case came before the Supreme Court in 1971 and was ruled on in early 1973. The seven judge bench ruled against their claim in a split judgment with two written opinions each supported by three judges and the seventh judge tipping the balance on a technical question. Despite the loss, both opinions written by the judges went a considerable distance to establishing the credibility of aboriginal rights in general. The opinions both agreed that aboriginal rights existed and were reconcilable with English law. On the question of recognition by the Crown, one opinion concluded that there had been recognition by the Royal Proclamation, the other that there was no recognition but that title did not depend on recognition. The two opinions differed on whether title had been extinguished. One argued that once recognition had occurred it was protected as any other title under English law and could not be extinguished without specific legislation. It concluded that aboriginal title had not been extinguished and also that it was doubtful that the colonial authorities in the colony of British Columbia had the power to do so. The other justices said that title was extinguished by colonial legislation even though not explicitly mentioned because the general intent of the legislation was to provide for new land uses.

The ruling was a landmark in Canadian jurisprudence both with respect to legal position and legal argumentation. It established that aboriginal rights existed and continued to exist

after the establishment of colonial governments. This may seem an unduly delayed recognition, but it is important to note that it depended on the emergence of social science evidence. The burden of earlier rulings in Canada and other colonies from about the 18th century on had been to equate a recognisable system of land tenure with the existence of agriculture. It was in part the development of recognition of the systems of land tenure and social organisation found among hunting and gathering peoples which made plausible the claims that such peoples could have recognisable aboriginal rights.

The rulings also appear to have links to the developing liberal awareness of the aboriginal problem during the 1960s. During that period several lawyers had written on the need for legal argumentation to take into account not only contemporary knowledge of the societies and cultures of aboriginal peoples but also the need to interpret the law itself in its historical and social context. Several young lawyers had gone beyond prescriptive statements and had researched the historical contexts and meanings of the recognitions in English colonial law and policy of aboriginal rights. Whether or not these legal arguments influenced the court cannot be determined with certainty. However, this possibility is suggested by one of the opinions issued by the court, which included the argument that historical documents must be assessed and interpreted in the light of present day research, a position which ran against the long tradition of settling matters simply as questions of law rather than of history (a view which had been expressed earlier in the Nishga case by the Appeals Court).

The impact of the court ruling on government policy was clear. In the summer of 1973 the federal government announced that it was willing to deal formally with the rights of those aboriginal peoples who had never made treaties. This represented a complete reversal of a central part of the 1969 policy position.

The policy shift did not however represent a major change in the assumption that aboriginal societies would eventually assimilate into Canadian society. The new policy statement offered to compensate for the loss or relinquishing of aboriginal rights in order to provide resources necessary for the re-adaptation of aboriginal peoples to the contemporary Canadian context.

At the time of the Supreme Court ruling and of the federal policy statement, the James Bay Cree and the Inuit of Northern Quebec were fighting a court case against the ongoing hydro-electric development scheme initiated by the Province of Quebec. The initial court ruling, handed down in November 1973, went a considerable distance towards recognising continuing aboriginal rights and called for the suspension of work on the project as it trespassed on Indian lands. This demonstrated not only the contemporary existence of aboriginal rights in the northern Quebec region, it also made plausible the claim that aboriginal

rights had sufficient weight to prevent the exercise of competing claims, and in particular to stop or at least disrupt ongoing construction works. The injunction was almost immediately suspended by a higher court, but the stage was set for negotiations between the Cree and the Inuit and the governments of Quebec and Canada.

The Cree and the Inuit insisted that they would not negotiate for simple compensation of their interest in the land. Throughout the presentation of their testimony in the court case they had come to a consensus that the hydro project was but one of an ongoing series of intrusions into their lands, and they insisted that they would only settle through an agreement if the conditions for the protection and enhancement of their society, culture and economy could be achieved through negotiations. Otherwise they would continue court action. They thus refused to be bound by the terms of the federal policy statement.

This did not become an issue of confrontation, possibly because the major government party to the negotiations was Quebec rather than the federal government. And, in Quebec there was already considerable sensitivity to the issues of social and cultural protection, even by the federalist party then in power.

The James Bay and Northern Quebec Agreement was the first of what have come to be called comprehensive agreements. It covered matters of land rights, hunting, fishing and trapping rights, resource management, local and regional governments, financial compensation, aboriginal control of basic social and educational services, and aboriginal participation in government administration.

It was clearly directed to maintaining a way of life for the Cree and the Inuit, and it transformed the question of aboriginal rights from one of compensation to one of recognition of rights in the contemporary political context which would permit aboriginal people to develop their own futures. It represented a break with a long tradition of directing aboriginal policy towards the goal of assimilation.

The James Bay and Northern Quebec Agreement was signed in 1975 and passed into law in 1977. In 1978 the federal government revised its policy and officially established procedures for negotiation of other comprehensive agreements providing broad social, economic and cultural benefits. Public awareness of these issues was promoted both through the James Bay court case, which generated several books and a series of documentary films, and by the high public profile given to similar issues raised by Dene and Inuit peoples in presentations before the federally constituted public inquiry into proposals to build a pipeline down the Mackenzie Valley in the Northwest Territories in 1976. The inquiry was chaired by Mr Justice Thomas Berger, who had represented the Nishga in their legal action, and who turned the

Mackenzie Valley inquiry into a nationally reported public forum.

Since 1975 negotiations for approximately one dozen comprehensive claims have been initiated. Only one new claim has been settled, that of the Inuit of the Mackenzie Delta which was signed in December 1983. The drafts of various claims indicate important variations with the pattern concluded in Northern Quebec but each has been based on the broad objective of establishing the rights, programmes and means of protecting and enhancing aboriginal societies in the foreseeable future.

The next step in the development of the aboriginal rights issue was initiated in the Northwest Territories where the Dene issued a declaration during their mobilisation against the threatened Mackenzie Valley pipeline setting as their objective self-government within Canadian confederation. This objective reflected their desire to have legislative power rather than a delegated form of governmental authority derived from more senior levels of government. The issue reflected the fact that the Northwest Territories was still administered by the federal government, and it was slowly moving towards a yet to be defined form of self-government, provincial or otherwise.

When the Dene later sought to include questions of self-government in the comprehensive negotiations they were initiating the federal government refused to discuss the issues in such a forum, claiming it was inappropriate for a bilateral forum which excluded non-aboriginal NWT residents, and negotiations broke down.

In 1979 however the Dene and Inuit decided that their political objectives could be met through direct involvement in the Northwest Territorial government. In elections for the Territorial Council held that year aboriginal people systematically presented themselves for office for the first time, and elected fourteen out of the twenty-two members of the Council (nine Inuit, four Dene and one Metis). In control of the Territorial Council, which advises the Commissioner appointed by Ottawa, they proceeded to initiate discussions on the political evolution of the Territory. These led to an acceptance by the federal government that the Northwest Territories would evolve into two political jurisdictions, one approximately coincident with the areas occupied by Inuit and the other coincident with the land used by the Dene and the Metis. To date two political forums have been established with aboriginal and non-Native representation, empowered by Northwest Territorial government to examine ways of achieving territorial self-government. Discussions are still underway in both forums and negotiations are yet to begin.

The major development in the Northwest Territories, the claim that the right to self-government constitutes a part of

aboriginal rights, came to have national significance with the aboriginal responses to the patriation of the Canadian constitution.

#### THE RIGHT TO ABORIGINAL SELF-GOVERNMENT AND THE CONSTITUTION

Starting in 1978 the efforts to patriate the British North America Act provided a focus of growing importance for aboriginal organisations' efforts to define and gain recognition for aboriginal rights. The legislation by which the Canadian constitution would be patriated provided both an opportunity and a threat for the recognition of aboriginal rights. Any attempt of the federal government to relinquish or alter its responsibilities for Indians under the BNA Act would be easier to accomplish after legal authority for the Constitution would rest with the Canadian Parliament and the provincial assemblies. Protecting the rights of aboriginal peoples in the Constitution was therefore an essential objective.

The patriation of the Constitution also provided a unique opportunity to establish certain features of the rights of aboriginal peoples within Canadian law in a form which would be relatively immutable and resistant to the otherwise overriding authority of the federal Parliament on aboriginal matters. The Constitution would only be amendable through a relatively complex procedure, and one in which aboriginal peoples thought they should participate.

Developing aboriginal inputs to the patriation process was an extremely long and complicated process extending over several years. It was substantially aided by having an Inuit Member of Parliament, by the minority New Democratic Party whose support the federal government valued as it planned for a possibly unilateral patriation without provincial support, and by an extensive lobbying effort by aboriginal organisations in Ottawa and occasionally in London, England.

By 1980 the aboriginal organisations generally agreed that they were seeking six objectives: 1) assurances that the Bill of Rights, which was largely concerned with individual rights against the collectivity, would not adversely affect their aboriginal and treaty rights; 2) a statement recognising the existence of aboriginal rights, and the inclusion of a right to self-determination, within the Constitution; 3) a statement that aboriginal peoples included Indian, Inuit and Metis peoples; 4) the inclusion of documents affecting aboriginal rights on the list of documents with constitutional standing; 5) aboriginal participation in any amending formula; and 6) aboriginal participation in the meeting of federal and provincial First Ministers following patriation to work out residual aspects of the process.

In January 1981 the federal government agreed to parts of five of



these objectives: inclusion in the Constitution a recognition of aboriginal rights, a broad definition of aboriginal people, a protection against the impacts of the Bill of Rights, the inclusion of part of the list of aboriginal documents, and the inclusion of aboriginal peoples in the First Ministers conference. They did not agree to further specification of the nature of aboriginal rights which was left to the post patriation conference, nor to aboriginal participation in the amendment processes.

The major crisis in the patriation process occurred in November 1981 when the provincial First Ministers, except Quebec, agreed to support patriation but the draft constitution they proposed, with federal support, omitted all references to aboriginal rights. A provincial Premier defended the exclusion on the grounds that aboriginal rights were undefined and therefore could not be given constitutional recognition.

The significance which the aboriginal rights issue had achieved among the public of Canada was reflected in a wave of public criticism and protest over the exclusion. Government officials and aboriginal organisations were equally surprised by the spontaneous and forceful protest, which federal bureaucrats claimed they had tried but failed to mobilise on their own. The provincial First Ministers were forced to agree to the inclusion of the original provisions with minor alterations. These were finally incorporated into Sections 25, 35, and 37 (2) of the Constitution Act, 1982.

Following patriation, attention and organisation by aboriginal groups focused in part on preparation for the Conference of First Ministers scheduled for March 1983. Discussions tended to focus on three topics unresolved in the Constitutional text: the nature of aboriginal rights, potential forms of self-government and changes to the Indian Act, and treatment of women, a topic insisted on by the federal government. A general consensus was achieved that aboriginal rights included at least two sets of rights. Property rights in land including rights to hunt, fish and trap which flow from the occupation of territory since time immemorial. And rights of self-determination and self-government which flow as basic human rights to distinct collectivities.

At the time of the first ministerial conference aboriginal peoples argued that the aboriginal rights of self-government included jurisdiction over aboriginal peoples, over aboriginal lands and resources, over means of self-identity and of group membership, over forms of government and institutions, over systems of law and governance, and over rights to collective property, language, culture and religion. In addition, they argued that self-government was meaningless without an adequate land-base for each separate political jurisdiction, and that this implied the transfer of substantial additional lands to aboriginal jurisdictions.

The federal position at the 1983 Conference was that aboriginal rights are rights to use and occupy land and wildlife resources - based on continuing use and on treaties and land claims agreements - rights to aboriginal government institutions within Confederation, but under the laws of Canada, and rights to preserve and enhance cultures, traditions, religions, languages and education.

The major differences lie in the extent of the right to self-government and in the question of whether it exists only under the delegated authority of existing government structures or whether it has a degree of self-determination comparable to the federal or provincial governments within Canadian confederation.

No province presented a clear position at the 1983 First Ministers Conference and the main conclusion of that initial meeting was to hold a series of three more meetings over the succeeding five years. At the second meeting, in 1984, three provincial governments supported an essentially similar federal position, Quebec essentially abstained as a protest against patriation without its consent, and the remaining six governments indicated varying degrees of opposition or concern. The future of these conferences must now be considered uncertain.

In the year between the two conferences a new arena became the focus of political action on self-government and substantially advanced aboriginal organisations' positions on the specific forms and means to self-government. During 1983 a House of Commons Special Committee on Indian Self-Government held hearings across Canada with aboriginal peoples concerning the status, development and responsibilities of band governments on Indian reserves. For these consultations Indian organisations presented a range of proposals which the Committee, with the aid of its staff including aboriginal lawyers, adopted as a series of recommendations to the government supported by the all party membership of the Committee.

These recommendations included the proposals: 1) that a new relationship be established between aboriginal peoples and the government of Canada; 2) that this relationship be based upon a right to self-government which should be a distinct order of government separate from but comparable to the federal and provincial levels of government; 3) that legislation leading to a maximum degree of self-government be pursued immediately while efforts to entrench the provisions in Constitutional amendments continue; 4) that self-government be based on the recognition of Indian First Nation governments which would supersede the present band administrations; 5) that the legislation be flexible enough to accommodate a wide range of governmental arrangements as desired by each of the different Indian First Nations; 6) that such governments would have the right to determine their own membership subject to the criteria of international human rights conventions; and 7) that each First Nation government would

conclude its own agreements with the federal government concerning its rights and form of organisation, which would be recognised once it had demonstrated - support from its people, a system of accountability to the membership, a membership code, decision-making structures, and appeal procedures according to international covenants. The report also commented generally on the economic foundations, fiscal arrangements and land and resources requirements to make First Nation governments effective.

This proposal by most of the Indian organisations outside of the Northwest Territories effectively represents a broad consensus on the means of recognition of political rights of the aboriginal peoples. It deals with basic recognition of the rights, but it leaves it to negotiations by each First Nation to define its specific authority, its principles and institutions.

It is also important that this proposal includes the possibility of unilateral federal legislation on self-government, thus offering a possible means by which to by-pass deadlocks at First Ministers conferences, or in the Constitutional amendment process. Powers of self-governance would come from what are now both federal and provincial jurisdictions, although it is possible that federal jurisdiction over Indians would be sufficient to effect such a transfer unilaterally. These powers would include education, social services, policing, membership, financing and economic development, as well as joint participation with the federal government in international relations with other aboriginal peoples.

Self-government provisions would also, in the view of some aboriginal organisations, particularly the Metis, include direct representation in federal Parliament and provincial assemblies of Canada, by means of a fixed number of directly elected members. In the Northwest Territories the Dene-Metis and the Inuit are seeking different forms of self-government based on the future evolution of the territorial government. Emphasis is less on direct means of entrenchment than on non-ethnically based forms of public government which include both special protections for the rights of aboriginal peoples and special flexibility to permit government institutions adapted to aboriginal society and particularly to aboriginal forms of decision-making and authority allocation.

Discussions on the implementation of the report of the House of Commons Special Committee proceeded rapidly during the winter and spring of 1984, but were terminated by dissolution of Parliament and the calling of a federal election. The discussions appeared to accept the general thrust of the Committee proposals, but without agreement on establishing a level of government not dependent on federal legislation, and therefore not including a final federal veto or overriding power. With the change of government, the new government position on these proposals has not yet been made clear.

The federal government will presumably still be committed to making changes to the Indian Act, in part because it must still be anxious to rid itself of the anachronistic Act, for which it has received various reprimands from international agencies, continued criticism from within Canada, and increasing legal challenges by individuals whose human rights have been affected by the implementation of the Act. Women in particular have taken a series of court cases to assert their rights to retain Indian status when marrying non-status men, and although not successful to date, their cases have not only been an embarrassment to the federal government (and to Indian organisations), they could, if successful, elicit a court ruling which might make the Indian Act inoperative in its other aspects as well. The Act is thus an administrative problem as well as an embarrassment.

There is therefore some urgency to revise the Act, a goal which the government can no longer propose or pursue on its own initiative. It is this need which has provided part of the impetus for the consultations on Indian government which the aboriginal organisations have used to date to promote a bilateral aboriginal-federal approach to self-government. These consultations began with an Indian Affairs Branch proposal for revision of the Indian Act and devolution of additional administrative powers to Indian band governments. The House of Commons Special Committee report rejected this proposal in favour of those proposals put forward by the Indian organisations, and in particular recommended recognition of a prior Indian right to self-government rather than devolution of federal power, and new legislation rather than revisions to the existing Act.

The need to change the Indian Act is therefore closely linked politically with discussions on Indian self-government. It is also linked administratively, because an important feature of self-governance would be the right to define membership in Indian First Nations. Finally impetus for change also comes from the Constitution, which by entrenching recognition of aboriginal rights has presumably removed the possibility of federal legislation which unilaterally could extinguish aboriginal rights. This presumably strengthens the threat of court actions against future development projects on lands Indians claim, although there would still be extensive debate over the meaning of those rights, and it strengthens the impetus towards negotiated settlements of the issues as the only effective alternative.

This process is in sharp contrast to the consultations and policy-making which surrounded the 1969 white paper and it indicates the extent to which the primary initiative and the power to define the aboriginal problem has been transferred to aboriginal organisations.

The issue of self-government has been a powerful one for aboriginal peoples themselves and has been used as a basis for building a broad consensus across most aboriginal organisations.

Self-government is an issue which can unite groups which have signed treaties and those which have not because treaties extinguished rights to land but not other aboriginal rights such as those of self-government. This consensus in diversity has been expressed and aided by the reorganisation of the National Indian Brotherhood as the Assembly of First Nations. Similarly, the self-government issue unites Indians, Inuit and Metis, irrespective of their treatment under the Indian Act because it would involve replacement of that Act.

Nevertheless, a wide range of views and interests exists within this consensus, as noted above. Southern Indian groups in particular, which have experienced serious de facto extermination of their rights, emphasise a strong principled stand on their recognition as sovereign nations within Confederation, a position essential to the maintenance of identities built during decades of formal opposition to government domination. Several such groups indeed have refused to recognise that they are subject to Canadian legal structures in any sense and have refused to join the current consensus nor participate in any of the current political action. Other aboriginal groups, particularly those with comprehensive claims, emphasise the need for a third level of government whose authority does not derive from other levels but from the constitutional division of power, but are also concerned with gaining control of extensive lands and resources with some urgency as developments proceed on their lands.

Finally, the womens issue, which provides a major impetus for change, also raises complicated issues for Indian communities, concerned about being swamped by giving recognition and status to individuals who have been enfranchised and their offspring, many of whom have not participated in community affairs, and who may have fundamentally different interests from those who do. This issue looms increasingly large on the horizon as one that could significantly aid, or hamper, the next stages of political development, depending on whether a broad consensus can be reached among Indian organisations for its resolution. Some possible means of resolution are apparent in the comprehensive claims negotiations, but again the problem and its resolutions will have to vary widely if they are to respect the concerns and needs of the diverse aboriginal communities. The struggles of the indigenous people thus seem to be at another critical juncture.

#### SUMMARY AND CONCLUSIONS

To summarise, I would recount the following features of the processes described above. The aboriginal rights issue has become a major item on the Canadian national agenda first because of a combination of the need for the governments to respond to anomalies in the ideological sphere of liberal democratic state legitimation; and also because of the inherent need of the government for the participation or acquiescence of the populations it claims to service, and therefore the real if

limited opportunities in the state processes for the subjects of government policy to demand a role in its legitimate formulation and implementation. The aboriginal rights issue now remains on the national agenda because of these factors as well as because of the increased legal recognition given to aboriginal rights in the courts, the yet to be completed Constitutional recognition of aboriginal rights, the extent of northern resource developments, the uncertainties of continuing government administration under the existing Indian Act, the general public awareness of the issue and support for changes, and the active assertions of the indigenous peoples in the political process.

Aboriginal organisations have successfully taken control of the aboriginal problem and having captured it they have redefined it from one of poverty and paternalism to one of fundamental collective rights, which they have successfully legitimated in liberal democratic terms as comprising the means to social and cultural survival, including a range of property rights and associated programmes and benefits, and a range of rights to self-government through distinct institutions within Canada. The means of defining the problem have largely occurred in a series of legal actions, public inquiries, and negotiations with governments (both public and private), which have provided the impetus for both the development of broad general consensus among Native groupings, and for the articulation of Native views in the national media and in the public political arena.

With respect to each of the aspects of the aboriginal positions, except the issue of entrenching self-government in the Constitution, the aboriginal organisations have successfully changed federal government policy often substantially to conform to their position. The key factors have been the specific leverage provided by the same factors cited above: anomalies in the Canadian legal system, the desire of the governments to escape the criticism for overtly paternalistic administrative structures, their desire to promote economic and political development in the north, the recognised need to change the Indian Act, and a public consensus that these objectives should not be pursued without indigenous participation.

With respect to the popular political culture of Canada, the Native accomplishments are more difficult to assess. The public support for inclusion of aboriginal rights in the constitutional legislation indicates recognition and support among key sectors of the politically active public for the extension of the aboriginal problem to questions of rights. Public support for comprehensive claims has also been generally favourable. Reactions to the issues implied in self-government are not yet clear, although an initial favourable response may be assumed as an extension of the public support for measures to reduce paternalism in administration of aboriginal affairs.

The questions which emerge and remain unanswered in this account

are:

- non-  
- whether recognition of a form of indigenous self-government which does not derive its powers from other levels of government represents a limit on present possibilities, or just a temporary holding onto power that must ultimately give way in the face of the legitimated aspirations, the plausible compromise proposals, and the diverse levers available to the indigenous peoples;
- the extent of the possibilities and constraints deriving from economic considerations, as opposed to primarily power relations, also remains unclear in the Canadian experience, because the economic implications of aboriginal rights issue have not yet received extended attention, and therefore the economic viability of self-government itself, and the potential of self-government to alter the economic conditions of contemporary aboriginal life, have not as yet been systematically explored;
- and, at a yet more abstracted level, while the limits and potentialities for recognition of ethno-political rights in developed capitalist liberal democracies are more extensive than many analysts would have predicted, the existence of structural limits which can be established in advance of action appears to become questionable, given the complex governmental organisation of institutions, the inherent ambiguity of central values of both public culture and decision-makers, the contradictions inherent in the political and economic system, and the processual nature of political structures themselves.

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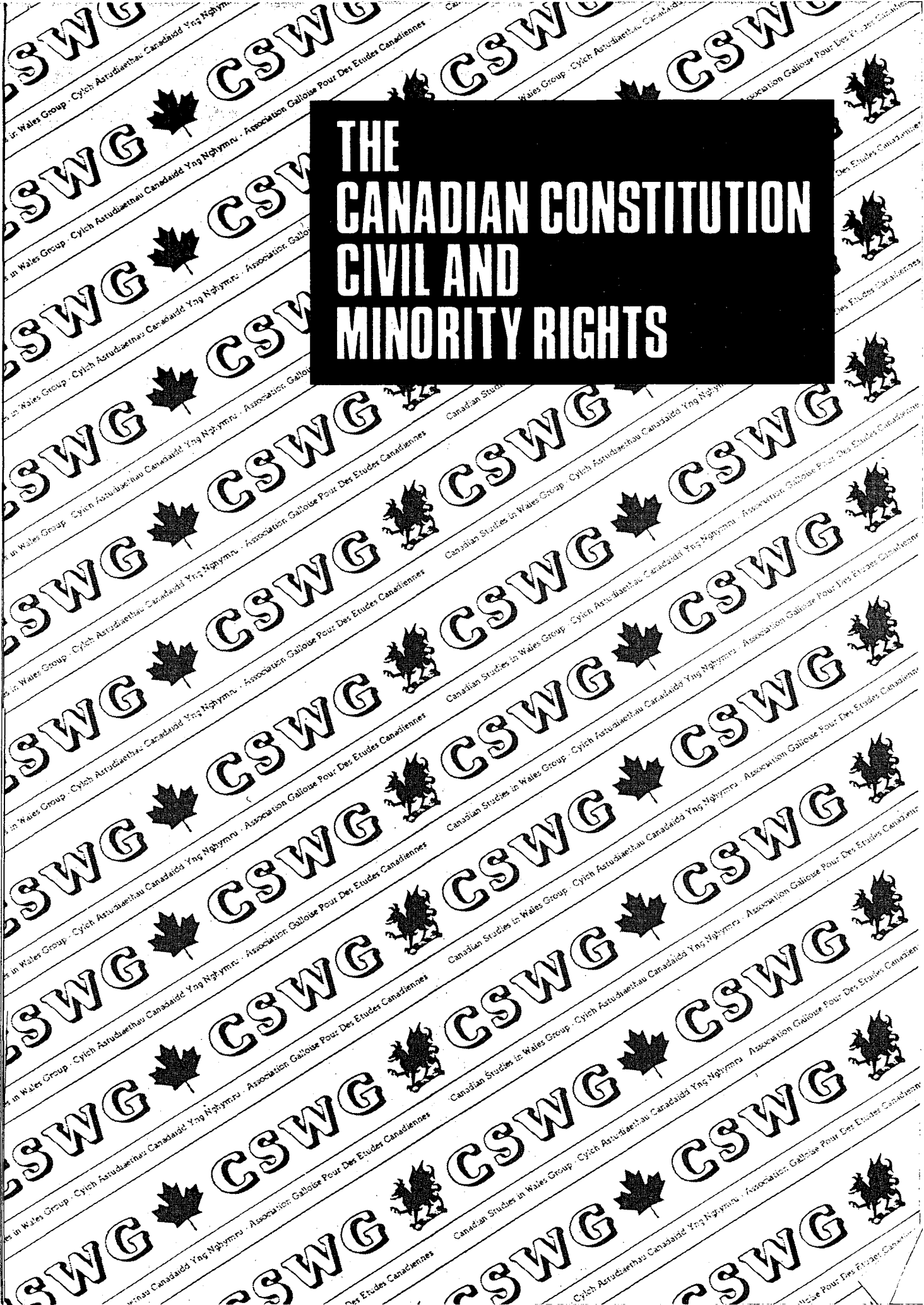
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# THE CANADIAN CONSTITUTION CIVIL AND MINORITY RIGHTS



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