CANADA'S INDIANS: FEDERAL POLICY, INTERNATIONAL AND CONSTITUTIONAL LAW*

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I. Equality and Discrimination of Minorities

In 1969, the Government of Canada issued a "White Paper" setting forth a number of policy proposals relating to Indian people in Canada.[1] This statement of policy is based on the central assumption that any legislation which sets a particular segment of the population apart from the main stream of the citizenry is ipso facto conducive to a denial of equality and therefore discriminatory and to be deplored. Such an assumption indicates a complete lack of understanding of the concept of equality, particularly in so far as this concept has been embodied in laws for the protection of minorities.

Problems of protecting minorities have arisen on both the international and the municipal levels. On the international level, minority protection became a major problem after World War I with the establishment of multinational states in Europe. The draftsmen of the peace treaties as well as of the Covenant of the League of Nations were concerned to see that no national group suffered discrimination for being a minority in an alien area. The Permanent Court of International Justice has on several occasions examined the concept of equality for minorities and the definition adopted may serve as a standard of measurement for any system of law. On the one hand, the Court examined the nature of a minority community, holding that:

> [A] "community" is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other. . . . Communities are of a character exclusively minority and racial, . . . [and their] existence . . . is a question of fact; it is not a question of law.[2]

This last reference to fact and law holds a clue to the nature of equality.

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[1] Statement of the Government of Canada on Indian Policy 1969 [hereinafter cited as Statement].

[2] Advisory Opinion on Greco-Bulgarian "Communities," [1930] P.C.I.J., ser. B., No. 17, at 22-30.

The Minorities Treaties guaranteed to racial minorities:

> the same treatment and security "in law and fact" as to other . . . nationals. The [fact] that no racial discrimination appears in the text of the law . . ., and that in a few instances the law applies to [non-minority] nationals . . . [makes] no substantial difference. . . . . There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law. [3]

The Court restated this principle in much the same terms on another occasion:

> [T]he prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law. A measure which in its terms is of general application, but in fact is directed against [in this instance] Polish nationals and other persons of Polish origin or speech, constitutes a violation of the prohibition. . . . Whether a measure is or is not in fact directed against these persons is a question to be decided on the merits of each particular case.
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> . . . . The object of the prohibition is to prevent any unfavourable treatment, and not to grant a special regime of privileged treatment. [4]

In their Advisory Opinion on Minority Schools in Albania, [5] the Court went to great lengths to make clear the importance of the distinction between equality in fact and equality in law:

> It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality . . . .
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> Equality in law precludes discrimination of any kind; whereas *equality in fact may involve the necessity of different treatment in order to obtain a result which establishes an equilibrium between different situations.*
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> It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situations and requirements are different, would result in inequality in fact; treatment of this description would run counter to [the minorities régime]. The equality between members of the majority and of the minority must be an effective, genuine equality; that is the meaning of the [requirement].
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> *Far from creating a privilege in favour of the minority, . . . [a] stipulation [in favour of minority rights,* e.g. schools] *ensures that the majority shall not be given a privileged situation as compared with the minority.*
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> . . . .
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> The expression "equal right" must be construed on the assumption that the right stipulated must always be accorded to the members of the minority. The idea embodied in the expression "equal right" is that the right thus conferred on the members of the minority cannot in any case be inferior to the corresponding right of other . . . nationals. In other words, the members of the minority must always enjoy the right stipulated . . ., and, in addition, any more extensive rights which the State may accord to other

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[3] Advisory Opinion on German Settlers in Poland, [1923] P.C.I.J., ser. B., No. 6, at 23-24.

[4] Advisory Opinion on Treatment of Polish Nationals in Danzig, [1932] P.C.I.J., ser. A/B, No. 44, at 28-29.

[5] Advisory Opinion on Minority Schools in Albania, [1935] P.C.I.J., ser. A/B, No. 65.

> nationals. The right provided . . . is in fact the minimum necessary to guarantee effective and genuine equality as between the majority and the minority; but if the members of the majority should be granted a right more extensive than that which is provided, the principle of equality of treatment would come into play and would require that the more extensive right should also be granted to the members of the minority. [6]

In the sphere of national jurisprudence, perhaps the clearest manifestation of this concept of equality is to be found in the attitude of the Supreme Court of the United States towards the idea of "separate but equal." This idea was considered first in *Plessy v. Ferguson* [7] in which it was specifically pointed out that "[a] statute which implies merely a legal distinction between the . . . races has no tendency to destroy the legal equality of the two races . . . ." [8] If, therefore, "the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically." [9] As a result, the provision of separate facilities was not considered to be inconsistent with equal rights. That was in 1896. In 1954, in *Brown v. Board of Education*, [10] the Supreme Court rejected the whole "separate but equal" doctrine. The case concerned the constitutionality of separate schools for whites and blacks, even though equalization of the facilities had taken place. The Court put the basic issue in simple terms:

> Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does . . . . [I]n the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. [11]

Judicial practice since then has shown that this view is not confined to education.

So far, discussion has been confined to the situation which arises when the rights of a minority have been adversely affected by actions taken in the name of equality and directed towards the achievement of formal equality, regardless of whether real equality ensues or not. In other words, attention has been directed towards the negative problem of denial of rights in so far as a minority is concerned. It may happen, however, that for reasons of an historical nature a minority group [12] can only achieve equality if positive rights are accorded to it, even though this may result in the appearance of placing the group in a privileged position since it enjoys rights addi-

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[6] *Id.* at 19-20 (emphasis added).
[7] 163 U.S. 537 (1896).
[8] *Id.* at 543.
[9] *Id.* at 551-52.
[10] 347 U.S. 483 (1954).
[11] *Id.* at 493-95.
[12] The term is here used in a sense wide enough to cover a numerical majority which finds itself economically or politically deprived in comparison with a privileged minority.

tional to those enjoyed by the rest of the population. Thus, the Indian Constitution, 1949 [13] recognizes that there are "socially and educationally backward classes" in India and by the Fifth Schedule of the Constitution regulations may be made prohibiting or restricting transfers of land by or among members of the scheduled tribes within a classified area, or regulating the allotment of land to such people or the activities of moneylenders among them. The Supreme Court of India is active in defending the rights of the Indian people and in condemning inequalities and discriminations. Yet it has never seen any ground for criticizing the protective measures that have been provided on behalf of the scheduled peoples. The provisions of the Constitution of Malaysia [14] are even more far-reaching. These are directed to the improvement of the lot of the Malays who constitute the majority of the population. Thus, while article 12 is directed against religious discrimination and specifically relates to educational institutions, it provides that "federal law or State law may provide for special financial aid for the establishment or maintenance of Muslim institutions or the instruction in the Muslim religion of persons professing that religion." This appears to be somewhat at variance with article 8 which declares:

> All persons are equal before the law and entitled to the equal protection of the law . . . . This Article does not invalidate or prohibit . . . any provision for the protection, wellbeing or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service . . . .

The most far-reaching section of this kind is article 153 which instructs the Head of State "to safeguard the special position of the Malays and the legitimate interests of other communities . . . ." To this end, he is to exercise his functions "in such manner as may be necessary to safeguard the special position of the Malays and to ensure the reservation for Malays of such proportion as he may deem reasonable of positions in the public service." He is similarly authorized to reserve a proportion of any licenses or permits that may be required by federal law for the operation of any trade or business, and to "ensure the reservation for Malays of such proportion as he may deem reasonable . . . of scholarships, exhibitions and other similar education or training privileges or special facilities given or accorded by the Federal Government . . . ."

It would thus appear that neither India nor Malaysia has the same inhibitions as has the Canadian federal government as to the compatibility of the concept of equality with legislation directed at preserving the rights of particular groups, even when such legislation has to be drafted in the form of positive concessions appearing to place the group in question in a protected position. The Government of Canada's *Statement on Indian Policy* appears to confuse protection with discrimination. It assumes that any legislation which sets a people apart, regardless of the purpose it is intended to serve,

[13] 2 PEASLEE, CONSTITUTIONS OF NATIONS, 308 (3d rev. ed. 1966).
[14] *Id.* at 652.

is of necessity a denial of equality and an example of discrimination which can only serve to breed discrimination.[15] It may well be that in applying the legislation relating to Indians, administrators and police officers have indulged in discriminatory treatment which has led the general public to assume that such treatment is proper and normal. The fact that administrators abuse their function and misinterpret or misapply the law under which they purport to act does not mean that the law itself is defective nor that it is discriminatory. Just as the *Statement* ignores the true meaning of equality in the legal sense, so it assumes that any form of different treatment is discriminatory and therefore bad.[16] Only draftsmen ignoring the meaning of concepts and unaware of the role of their own country on the international level could have made such an error. In 1963, Canada voted in favour of the United Nations General Assembly's Declaration on the Elimination of All Forms of Racial Discrimination[17] and in 1966 voted in favour of the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination,[18] although the constitutional separation of powers has delayed ratification.[19] Those responsible for dealing with the *Statement on Indian Policy* might, therefore, be well advised to look again at paragraphs 1 and 4 of the Convention:

> 1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or *preference based on race*, colour, descent, or national or ethnic origin which has the purpose or effect of *nullifying or impairing the recognition, enjoyment or exercise, on an equal footing*, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
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> 4. *Special measures* taken *for* the sole purpose of *securing adequate advancement of* certain *racial* or ethnic *groups* or individuals *requiring such protection* as may be necessary in order *to ensure such groups* or individuals *equal enjoyment or exercise* of human rights and fundamental freedoms *shall not be deemed racial discrimination, provided*, however, *that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*[20]

It is clear, therefore, that there is no question of racial discrimination involved when the purpose of legislation concerning a group is directed to enabling that group to take its full part in the national life, while recognizing as a practical situation that while the legislation subsists the group is disadvantaged and requires protective legislation to bring it up to the same level as the rest of the population. The only condition is that the legislation must terminate when the equality is achieved and the special measures are as a result no longer necessary. The *Statement on Indian Policy* states: "It cannot be accepted now that Indians should be constitutionally excluded from the

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[15] STATEMENT at 6-7.
[16] *Id.*
[17] Res. 1904 (XVII), [1963] U.N. Y.B. ON HUMAN RIGHTS 415.
[18] Res. 2106 (XX), 5 INT'L LEG. MATERIALS 350 (1966).
[19] 4 H.C. DEB., 4378-79 (1966) (reply by Mr. Martin to question 1303).
[20] Emphasis added.

right to be treated . . . as full and equal citizens with all the responsibilities and all the privileges that this might entail." [21] At first blush, such a statement may be considered completely unexceptionable. However, it would not remain so if it ran counter to any vested interests that the Indians might already possess. An examination of its practical consequences suggests that it leaves much to be desired. Let us consider but one example given in the *Statement.* The *Statement* says that "[t]he economic base for many Indians is their reserve land, but the development of reserves has lagged . . . . The transfer of Indian lands to Indian control should enable many individuals and groups to move ahead on their own initiative." [22] The philosophy underlying this is, in direct contrast to that embodied in the Constitution of India, to enable those who by reason of lack of sophistication or of education are in a position of inequality vis-à-vis large undertakings to use the one source of wealth and security which they may possess. Regardless of political or economic ideologies that may be involved, the experience of England during the Industrial Revolution, of Ireland in the hungry forties, of poor whites in the American south and of Canadian farmers during the depression should be sufficient warning against lightly accepting what purports to be a policy of freedom—but which may amount to no more than the freedom to starve.

II. Legal Status of Indian Treaties

Reference has been made to the possibility that Indians have certain vested interests arising out of the group of documents known collectively as Indian treaties. Before attempting to examine the contents of these documents, it is necessary to analyse their legal nature. In other words, are they in fact treaties? According to the definition adopted by the United Nations in the Vienna Convention on the Law of Treaties a "treaty" is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation . . . ." [23] Since the Indians cannot be considered to constitute a state, it is clear that any document signed with them would be excluded from this definition. The definition, however, is one for today and it is necessary to see what the position of the Indians and their documents was at the time of signature. To some extent, the practice of the United States throws light upon the situation, for the Indians in that country also entered into relations with, first, the British Government and later the federal government and roughly at the same time as similar relations were being entered into with the Canadian Indians. In 1871, the Indian Appropriations Act provided that "[n]o Indian nation or tribe within the territory of the United States shall be

[21] Statement at 9.
[22] *Id.* at 10.
[23] 8 Int'l Leg. Materials 679, at 681 (1969).

acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by Treaty . . . ." [24] From then on they were regarded as wards of the nation, [25] although prior to this there was a tendency, while denying them sovereignty, to recognize their treaty-making power. A typical statement by the Supreme Court appears in its judgment in *Worcester v. Georgia*: [26] "Great Britain [to which the United States succeeded] . . . considered [the Indians] as capable of maintaining the relations of peace and war; of governing themselves under her protection; and she made treaties with them, the obligation of which she acknowledged." [27] This tendency to speak of "treaties" is a little strange in view of the general attitude adopted by the Court that the Indians never constituted a nation and that if they did, their nationhood was extinguished by the British conquest. It was considered that the treaties made with them after that date were nothing more than contracts between a sovereign and a group of its subjects. Only a year earlier, in *Cherokee Nation v. Georgia*, [28] Chief Justice Marshall had described them as being in a "state of pupilage," [29] holding that any attempt by a third state to ally itself with them would amount to a hostile act. [30] Mr. Justice Johnson added:

> When this country was first appropriated or conquered by the crown of Great Britain, they certainly were not known as members of the community of nations; and if they had been . . . Great Britain considered them as her subjects whenever she chose to claim their allegiance; and their country was hers, both in soil and sovereignty. All the forbearance exercised toward them was considered as voluntary . . . . [31]

The treaties between the United States and her Indians have not only been subject to interpretation by municipal tribunals, but have also been the subject of international litigation. In the *Cayuga Indians Claim*, 1926, [32] the American-British Claims Commission had to consider the effect, as regards Cayugas who had settled on the Canadian side of the border, of treaties entered into with that nation by the State of New York between 1789 and 1795 as well as the Treaty of Ghent between the United States and Great Britain in 1814. The tribunal pointed out that the tribe had never constituted a unit under international law and had always been treated as under the protection of the power occupying its land, [33] and that "the 'Cayuga Nation,' with which the State of New York contracted in 1789, 1790 and 1795, so far as it was a legal unit, was a legal unit of New York law." [34]

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[24] 25 U.S.C. § 71 (1871).
[25] *See, e.g.*, United States v. Kagama, 118 U.S. 375, at 383-84 (1886).
[26] 31 U.S. (6 Pet.) 515 (1832).
[27] *Id.* at 548-49 (Marshall, C.J.).
[28] 30 U.S. (5 Pet.) 1 (1831).
[29] *Id.* at 17.
[30] *Id.* at 18.
[31] *Id.* at 26.
[32] Cayuga Indians Claim (Cayuga Indians (Great Britain) v. United States), Arbitral Tribunal (Great Britain — United States), 6 U.N.R.I.A.A. 173 (1926).
[33] *Id.* at 176.
[34] *Id.* at 177.

The tribunal further observed that the 1789 treaty "was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown." [35] The tribunal applied similar reasoning to the position of Canada, pointing out that the Canadian Cayugas "were and are dependent upon Great Britain, or later upon Canada, as the New York Cayugas were dependent on and were wards of New York."[36] The tribunal held that as the treaty was in the nature of a contract between New York and the Cayugas and was within New York's competence, there was no direct liability upon the United States. The latter was liable, not because of the Indian treaties, but because of the Treaty of Ghent, and it was liable, not to the Indians with whom the original commitment had been made, but to their sovereign which could, at its discretion, have decided to keep for itself the 100,000 dollars awarded. [37]

It was not only with North American Indians that treaties were made in the eighteenth and nineteenth centuries. Occasionally they were made by trading companies on their own behalf, although by the twentieth century the rights obtained by the companies had been acquired by the government of the country that had granted the charter. Both the Hudson's Bay Company and the Dutch East India Company operated in this way. Perhaps the best statement concerning the legal nature of such treaties is to be found in the award of Max Huber sitting as sole arbitrator in the Permanent Court of Arbitration when dealing with the *Island of Palmas* dispute [38] between the Netherlands and the United States:

> As regards *contracts between a State* or a Company such as the Dutch East India Company *and native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; they are none the less facts of which that law must in certain circumstances take account. [39]

It is true that the effect of this statement is merely to recognize the rights under such agreements of the state which entered into them, or which has succeeded to the trading company which negotiated with the native people. It does not recognize the rights of the people involved. In fact, since these people are not recognized as members of the community of nations they have, strictly speaking, no rights in international law whatever. This became clear in the *Eastern Greenland* case [40] in which the Permanent

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[35] *Id.* at 187.

[36] *Id.* at 177.

[37] *Id.* at 189-90.

[38] Island of Palmas Case (United States v. Netherlands), 2 U.N.R.I.A.A. 831 (Perm. Ct. Arb. 1928). As to the representative character of the Hudson's Bay Company in this respect, *see* Regina v. White, 52 W.W.R. (n.s.) 193, at 236-47, 50 D.L.R.2d 613, at 652-62 (B.C. 1964).

[39] Island of Palmas Case, *supra* note 38, at 858.

[40] Case of the Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A/B, No. 53.

Court of International Justice held that even when the indigenous inhabitants, in this case the Eskimos of the area, managed to exterminate the settlers and destroy their settlements this did not destroy the title of the settling power. "Conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State." [41]

Similarly, refusal to recognize the treaty rights of native peoples is to be seen in the attitude of Britain towards the treaties of protection when a treaty territory was to be joined to another nearby colonial territory to form a new independent state within the Commonwealth, as has happened in Africa. In no case have the treaty territories been able to prevent a transfer of their territory or to assert that, with Britain's abandonment of protection, the purpose for which the treaty was drafted has terminated and that, therefore, the treaty is no longer valid and they are once again independent. [42]

As early as 1926, the Judicial Committee of the Privy Council held that, in so far as Swaziland was concerned, "[t]he limitation in the Convention of 1894 on interference with the rights and laws and customs of the natives cannot legally interfere with the subsequent exercise of the sovereign powers of the Crown . . . ." [43] Nevertheless, it must be remembered that when legal documents are drawn up with unsophisticated peoples it would be inequitable and smacking of fraud to insist too rigidly on the technical meaning of the language used. Thus, in *Jones v. Meehan*: [44]

> In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; . . . that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is then imparted to them by the interpreter employed by the United States; [45] . . . the treaty must therefore be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. [46]

More recently, Lord Asquith of Bishopstone acting as arbitrator in the *Abu Dhabi* case [47] made exactly the same point. He had to interpret in

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[41] *Id.* at 47.

[42] *See, e.g.*, the problems concerning Uganda and Buganda, REPORT OF THE UGANDA CONSTITUTIONAL CONFERENCE, CMND. No. 1523, at para. 14 (1961).

[43] Sobhuza II v. Miller, [1926] A.C. 518, at 528 (P.C.).

[44] 175 U.S. 1 (1899).

[45] In Canada, in some of the negotiations the Indians were able to employ their own interpreter who, in one case at least, became official interpreter for the government. See the personal record of Peter Erasmus in Alberta, Buffalo Days and Nights (unpublished ms.).

[46] *Supra* note 44, at 11.

[47] Petroleum Development Ltd. v. Sheikh of Abu Dhabi, [1951] Ann. Dig. 144 (No. 37) (Int'l Arb.).

1951 a contract drawn up in English and in an archaic variety of Arabic which had about as much relation to the modern language as Chaucer's English does to modern English. Moreover, the dispute related to petroleum rights in the continental shelf, a concept of commerce and law undreamed of when the contract was drawn up in 1939. The arbitrator found that there was no local law he could apply and that English law as such was inapplicable. In his view "the inquiry extends at large to what each of the parties meant [the contract] to mean, and how and why each phrase came to be inserted." [48] He was dubious about the application of individual maxims of law, for instance:

> [T]he rule that grants by a sovereign are to be construed against the grantee . . . is an English rule which owes its origin to incidents of our own feudal polity and royal prerogative which are now ancient history, and its survival, to considerations which, though quite different, seem to have equally little relevance to conditions in a protected State of a primitive order on the Persian Gulf. [49]

As to the continental shelf doctrine (unknown at the time the contract in question was signed), the arbitrator went on to say: "Directed, as I apprehend I am, to apply a simple and broad jurisprudence to the construction of this contract, it seems to me that it would be a most artificial refinement to read back into the contract the implications of a doctrine not mooted till seven years later . . . ." [50] Before leaving this award, perhaps it should be pointed out that in the text of the contract it was provided that the agreement was to be executed "in a spirit of good intentions and integrity, and to [be interpreted] in a reasonable manner." [51] This enabled Lord Asquith to state that "[t]he terms of [the contract] invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilized nations—a sort of 'modern law of nature.' " [52]

Many of the foregoing comments would appear applicable to the type of agreement that was entered into between the representatives of the Crown and the Indians; presumably a similar modicum of good faith and good sense is essential in interpreting these agreements. This is particularly true if one bears in mind that true equality between the parties never existed and that behind the facade of free discussion was the reality that what the British negotiators wanted was what the Indians would have to concede. This becomes clear from the report of the negotiation between Governor Morris and the Cree Indians in 1876 at Carlton and Fort Pitt. According to the record left by Peter Erasmus, who acted as interpreter, [53] the governor explained that it was not within his powers to add any claim to the draft treaty he had put forward: "I will bring your request before the House at Ottawa.

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[48] *Id.* at 149.
[49] *Id.* at 150.
[50] *Id.* at 152.
[51] *Id.* at 148.
[52] *Id.* at 149.
[53] *Supra* note 45.

However I know it will not be accepted." [54] Despite the efforts of a careful interpreter, Chief James Serum assumed that since the governor had said he would refer his request for territorial adjustments to Ottawa, this was a promise of fulfilment. [55]

There does not appear to be the same room for misunderstanding in another of the governor's pledges: "They would be at liberty to hunt and trap on Government lands the same as before. Nor would they be compelled to go to war except on their own free will. A medicine chest would be placed in the house of every agent for the free use of the band." [56] As has been seen, the Privy Council has not felt that such treaties inhibit the Crown's freedom of action at a later date. This is particularly so in the international field in which the Crown has undertaken obligations to other states that are incompatible with the literal fulfilment of earlier undertakings to Indians. [57] At the same time, municipal law does not stand still and it may be necessary for later legislation intended to be of general application to be subjected to an interpretation that runs counter to what might formerly have been regarded as Indian rights. Thus, in *St. Catharines Milling & Lumber Co. v. The Queen*, [58] Mr. Justice Taschereau pointed out that:

> The necessary deduction from such a doctrine [that a legal Indian title existed as against the Crown] would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some of the writers . . ., influenced by sentimental and philanthropic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will *not* be *because of any legal obligation to do so, but as a sacred political obligation*, in the execution of which the state must be free from judicial control. [59]

However, as the Privy Council pointed out in confirming this judgment "the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Sovereign," [60] and the 1763 Proclamation from which all Indian rights spring originally makes it clear that they are reserved for the Indians "for the present," [61] and describes them as Indian tribes then living under the sovereignty and protection of the British Crown.

The content of this "political obligation" has been variously interpreted by the courts. In *Rex v. Wesley*, [62] Mr. Justice McGillivray held that the

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[54] *Id.* at 264.
[55] *Id.* at 266.
[56] *Id.* at 258.
[57] *See, e.g.*, Regina v. Sikyea, 46 W.W.R. (n.s.) 65 (N.W.T. 1964); Sikyea v. The Queen, [1964] Sup. Ct. 642; The Queen v. George, [1966] Sup. Ct. 267 for discussion of the Migratory Birds Convention Act, CAN. REV. STAT. c. 179 (1952).
[58] 13 Sup. Ct. 577 (1887).
[59] *Id.* at 649.
[60] St. Catharine's Milling & Lumber Co. v. The Queen, 14 App. Cas. 46, at 54 (P.C. 1889).
[61] 6 CAN. REV. STAT. 6127, at 6130 (1952).
[62] 26 Alta. 433, [1932] 2 W.W.R. 337.

Alberta Game Act did not interfere with the Indians' treaty rights to hunt:

> Assuming . . . that our treaties with Indians are on no higher plane than other formal agreements, . . . this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in their treaties with the exactness which honour and good conscience dictate . . . .[63]
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> It is satisfactory to be able to come to this conclusion and not to have to decide that "the Queen's promises" have not been fulfilled. It is satisfactory to think that the legislators have not so enacted but that the Indians may still [in the words of the Proclamation] be "convinced of our justice and determined resolution to remove all reasonable cause of discontent."[64]

In *Regina v. Sikyea*,[65] Mr. Justice Johnson in the Northwest Territories Court of Appeal quoted the words of Governor Morris at the signing of the Qu'Appelle Treaty:[66] "Therefore, the promises we have to make you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean."[67] To the court in *Sikyea*, it appeared likely that these obligations were overlooked when the legislation respecting the protection of migratory birds had been drawn up. Consequently, the court regretted its inability to repeat the words of Mr. Justice McGillivray in *Rex v. Wesley*.[68]

Perhaps the most telling statement on the treaties and their significance was made in *Rex v. Syliboy*,[69] a case frequently cited as the leading authority on this subject:

> "Treaties are unconstrained acts of independent powers." But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indans passed with it.
>
> Indeed the very fact that certain Indians sought from the Governor the privilege or right to hunt in Nova Scotia as usual shows that they did not claim to be an independent nation owning or possessing their lands. If they were, why go to another nation asking this privilege or right and giving promise of good behaviour that they might obtain it? In my judgment the Treaty of 1752 is not a treaty at all and is not to be treated as such; it is at best a mere agreement made by the Governor and council with a handful of Indians giving them in return for good behaviour food,

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[63] *Id.* at 450, [1932] 2 W.W.R. at 351.

[64] *Id.* at 451, [1932] 2 W.W.R. at 353.

[65] 46 W.W.R. (n.s.) 65 (N.W.T. 1964).

[66] This was a treaty signed on September 15, 1874 by representatives of the Salteaux and Cree Indians and by Lieutenant-Governor Alexander Morris of the Northwest Territories. By the treaty, the Indians ceded approximately 75,000 square miles of land to the Canadian government.

[67] A. MORRIS, THE TREATIES OF CANADA WITH THE INDIANS OF MANITOBA AND THE NORTH-WEST TERRITORIES 96 (1880).

[68] *Supra* note 64.

[69] [1929] 1 D.L.R. 307.

> presents, and the right to hunt and fish as usual — an agreement that . . . was very shortly after broken [by Indian raids].
>
> Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be *the Crown should not now be heard to say it is not a treaty* . . . . That is a matter for representations to the proper authorities — *representations which . . . could hardly fail to be successful.* [70]

It is difficult to disagree with the foregoing view that the Crown is at least morally bound to give effect to what its representatives held out as promises and binding obligations and what were regarded as such by the Indians with whom they were negotiating. Particularly is this so when government after government, court after court and commentator after commentator over the course of a hundred years or more described these agreements as if they were treaty-like in character and, to all intents and purposes, were not contradicted. In other words, even if they are not treaties in the strict sense of that term, it is difficult to argue that the Indians have not acquired a vested claim to what was held out to them as a right being conferred by the particular treaties. This would mean that the contents of any particular agreement should be construed in the way it was understood by both parties at the time it was made, and in accordance with the *contra proferentem* rule, should be interpreted on behalf of the one who was induced to enter the agreement on the basis of the promise, and against the party putting it forward. Nevertheless, as Mr. Justice Rand pointed out in *Francis v. The Queen*: [71]

> Appreciating fully the obligation of good faith toward those wards of the state, there can be no doubt that the conditions constituting the raison d'être of the clause were and have been considered such as would in forseeable time disappear. That a radical change of this nature brings about a cesser of such a treaty provision appears to be supported by the authorities available. [72]

In the same case, Mr. Justice Kellock emphasized that there were at least two different meanings to the term "treaty," the one international relating to agreements between states, and the other of a special kind applicable to the agreements with Indians dealt with in the Indian Act. [73] Even if this be true, the view of the Judicial Committee of the Privy Council in *Attorney-General for Canada v. Attorney-General for Ontario* [74] that the agreements created a "contract liability" [75] must be kept in mind.

There is, of course, the principle *rebus sic stantibus* by which a fundamental change in circumstances is recognized as being sufficient ground to invalidate or frustrate an agreement. However, this principle cannot be invoked subjectively and unilaterally. It is an equitable principle, and its

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[70] *Id.* at 313-14.
[71] [1956] Sup. Ct. 618.
[72] *Id.* at 629.
[73] *Id.* at 631.
[74] [1897] A.C. 199 (P.C.).
[75] *Id.* at 205 and at 213.

application should be conditioned by considerations of good faith and equity. This calls to mind the reasoning of Mr. Justice Taschereau in the *St. Catharines Milling & Lumber Co.* case[76] and of Lord Asquith in the *Abu Dhabi* case,[77] as well as the rule of temporal interpretation: while the existence of a right should be considered in the light of the situation that existed at the time of its alleged creation, the content of the right should be examined at the time of interpretation. In this way, innovations and changes in circumstances not going to the very root of the right may be taken into consideration, and the liability brought into line with current needs and realities. As an example of this, reference may be made to the medicine chest to be maintained by the Indian agent.[78] Nothwithstanding anything that might have been said in *Regina v. Johnston*[79] of *Re Manitoba Hospital Commission*,[80] the comment of Mr. Justice Angers in *Dreaver v. The King*[81] appears to be in accordance with good faith, common sense and the traditional rules of interpretation: "The clause might unquestionably be more explicit, but . . . I take it to mean that all medicines, drugs or medical supplies which might be required by the Indians, . . . were to be supplied to them free of charge."[82] This is merely another way of saying that, allowing for the changes that have taken place in the nature of government and of public medical services, what was then meant by a medicine chest would today be understood as a state medical service, while the house of the agent would be the equivalent of a government office.

From what has been said, it should be evident that in so far as the Indian treaties are concerned it matters little what their contents are, nor are their titles significant. A treaty is an agreement between independent powers giving rise to legal rights and obligations *inter se*. For this reason, it has been suggested by some that there is something incongruous in the thought of a treaty between a state and its own subjects, intimating that the Indian treaties would be unique if they were indeed treaties and arguing, *a contrario*, that since they would be unique such arrangements do not occur. This is to ignore such instruments as the Irish Free State Treaty, 1921, which was registered with the Secretariat of the League of Nations as an international instrument in 1924,[83] even though the British Government objected to its registration. It was not contended that the instrument was not a treaty, but that neither the League Covenant, under which the registration had been effected, "nor any conventions concluded under the auspices of the League, are intended to govern the relations *inter se* of the various parts of the British Commonwealth."[84] In fact, appearing before the Judicial Com-

[76] 13 Sup. Ct. at 618.
[77] [1951] Ann. Dig. at 144.
[78] P. Erasmus, Buffalo Days and Nights at 258 (unpublished ms. Alta.).
[79] 56 W.W.R. (n.s.) 565, 56 D.L.R.2d 749 (Sask. 1966).
[80] 67 W.W.R. (n.s.) 440, 4 D.L.R.3d 522 (Man. Q.B. 1969).
[81] An unreported decision of the Exchequer Court of Canada, *cited in* Regina v. Johnston, *supra* note 79, at 571, 56 D.L.R.2d at 754.
[82] *Id.*
[83] 26 L.N.T.S. 9.
[84] 27 L.N.T.S. 449.

mittee in *Moore v. Attorney-General for the Irish Free State*,[85] the British Attorney-General stated: "It would be a breach of treaty obligations if the Irish Free State legislature were to do away with the Treaty."[86] A similar view was expressed by Lord Hailsham in a speech in the House of Lords. He argued that "the Irish Free State derived its status from the Treaty [which had been drawn up between the English Government and its subjects in southern Ireland], which therefore imported obligations for the Irish Free State, which could not be set aside by an exercise of its legislative power, enlarged by the Statute of Westminster."[87]

This is not the only example of an agreement signed between Great Britain and a Commonwealth member before the passage of the Statute of Westminster. As a result of the recommendation of the 1930 Imperial Conference, a British Commonwealth Shipping Agreement was adopted in 1931 and registered with the League of Nations by the Union of South Africa.[88]

Of more significance perhaps is the Lateran Treaty of 1929.[89] After the Italian annexation of the Papal States and the establishment of Rome as the capital of Italy in 1870, the Pope's legal position depended upon an Italian statute, the Law of Guarantee, which gave him certain privileges but subjected him like any other national to the Italian civil courts. The fact that Italy tolerated a situation in which the Pope carried on diplomatic relations with other states did not affect the Pope's position vis-à-vis Italy, although the foreign states in question might have recognized the Holy See as an independent state. When, therefore, the 1929 Treaty was signed "assuring permanently to the Holy See a status of fact and of right guaranteeing to it absolute independence in the exercise of its mission in the world . . . ,"[90] it was a case of the King of Italy entering into treaty relations with one of his own subjects, recognizing that subject's independence and sovereignty.

What is important in cases of this kind is the intention of the parties at the date of the agreement, the recognition that they and others give to their agreement, and the legal consequences that they afford it during the years following its signature. In so far as the Indian treaties are concerned, there is little doubt that, at the time of signing, both parties were using terms that they thought covered their relationship, that both intended to create legal obligations of a permanent character and that both carried out the terms of the agreement for many years. These practices confirm that, whether or not they are treaties, they constitute mutually binding arrangements which have hardened into commitments that neither side can evade unilaterally.

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[85] [1935] A.C. 484 (P.C.).
[86] *Id.* at 489.
[87] J. FAWCETT, THE BRITISH COMMONWEALTH IN INTERNATIONAL LAW 156 (1963).
[88] 129 L.N.T.S. 179.
[89] 23 AM. J. INT'L L. 187 (Supp.) (1929).
[90] *Id.*

III. Federal-Provincial Constitutional Competence

In examining the rights and the status of the Canadian Indians it is not enough merely to consider the meaning of equality and discrimination or whether the agreements made with them were treaties. It is also necessary to examine their relations with the federal and the provincial governments and the separation of powers between the centre and the provinces, accepting at the same time Canada's succession to the British Crown.

It is a well established principle of constitutional law that the Crown owns all ungranted lands in a colonial settlement, and this rule also applied in French law at the time of the Seven Years' War. At that time, too, conquest was a recognized mode for the acquisition of title, so that with the defeat of France all French title in the ceded territories passed to the British Crown. However, by the Articles of Capitulation signed at Montreal in 1760, "[t]he savages or Indian Allies of His Most Christian Majesty shall be maintained in the lands they inhabit, if they choose to reside there; they shall not be molested on any pretence whatsoever, for having carried arms and served His Most Christian Majesty . . . ."[91] This was followed by the Royal Proclamation of 1763:

> [T]he several Nations or Tribes of Indians with whom We are connected and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds . . . .
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> . . . . Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do . . . strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name . . .; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give . . . .[92]

In so far as the reserved lands are concerned, this Proclamation has been summarized as providing that:

> [T]he Indians are not to be molested or disturbed in their possession of such lands; the various colonial governors are not to give grants of such lands; private individuals are not to purchase lands from the Indians; if any persons have settled on such lands, they are to leave them; and if the Indians wish to dispose of such lands, they may only be purchased in the

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[91] Section 40 of the articles *as quoted in* St. Catharines Milling & Lumber Co. v. The Queen, 13 Sup. Ct. 577, at 585-86 (1887).

[92] 6 Can. Rev. Stat., 6127, at 6130 (1952).

> king's name after a meeting of the Indians for that purpose has been held by the governor of the colony where the land is located (or in a proprietary government, in the name of the proprietaries in accordance with directions of the king or the proprietary).
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> . . . .
>
> Broadly, however, it may be said that the lands reserved under the proclamation include large portions of the area now comprising Ontario, Quebec, the Prairie Provinces, and probably British Columbia; it has even been held that the Maritimes fell within the area reserved by the proclamation, but this seems doubtful. [93]

There is no doubt that the provisions of a royal proclamation may be altered or abrogated by statute, but until that has been done the proclamation remains good law and its provisions are valid regardless of the lapse of time. Since the Queen is still the sovereign of Canada, it would appear that there is no need to examine the intricacies of international law concerning succession to obligations. [94] To the extent that the Proclamation is unamended, the Indian lands are still protected and sales to private persons are forbidden. The removal of this restriction is one of the main purposes of the federal *Statement.* At first sight, it would appear right and proper that in the present age of freedom and respect for a man's right to deal with his property as he pleases, subject to the overriding interest of the community at large, any restrictions on the freedom of conveyancing should be abolished. However, the history of land speculation and of the activities of mortgagees in places like Ireland and the southern states of the United States, as well as in more sophisticated and developed societies leads one to emphasize the words of the Proclamation: "Whereas Great Frauds and Abuses have been committed in Purchasing Lands . . . to the Great Dissatisfaction of the said Indians . . . ." [95] In view of the present upsurge of interest in Indian rights, this may well lead "to the Great Prejudice of our Interests" [96] and one is compelled to question the political wisdom of the proposed policy despite the idealistic fashion in which it is dressed.

In the hundred years that elapsed between the Proclamation and Confederation many of the reserved lands had been surrendered by the Indians, [97] but in so far as the remainder were concerned the British North America Act places Indians and lands reserved for the Indians under the exclusive legislative authority of the Parliament of Canada. [98] Should the federal government seek to divest itself of this power, it can be done in two ways.

In the first place, it can simply cease exercising this legislative power. This would throw upon the provinces the problem of deciding whether the Indians could be treated as such any longer or should be considered simply as individuals falling within provincial competence in the same way as any

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[93] G. LA FOREST, NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION 110-11 (1969).

[94] *Ex parte* O'Dell, [1953] Ont. 190, 3 D.L.R. 207.

[95] *Supra* note 92.

[96] *Id.*

[97] CANADA, INDIAN TREATIES AND SURRENDERS FROM 1680 TO 1890 (1891).

[98] B.N.A. Act § 91(24).

other inhabitant of Canada. Provincial failure to regard them in this way might result in allegations of discrimination contrary to the provisions of any provincial Bill of Rights, for the Canadian Bill of Rights [99] is only valid within the federal government's area of jurisdiction.

The other process would be by way of constitutional amendment of the British North America Act. While, in theory at least, it might be open to the federal government to seek such legislation from Westminster, it is now conventional to do so only with the consent and approval of the provincial governments when the proposed amendment is likely to affect provincial interests or spheres of activity. So long as the Indian remains a special type of Canadian, abandonment by the federal government of its legislative competence and responsibilities would tend, ispso facto, to place upon the provinces responsibilities which the constitution did not impose upon them and so would, indirectly, affect provincial powers under sections 92, 93 and 95 of the Act. However, these powers are permissive and not compulsive.

While section 91 gives legislative authority over the Indians and their lands to the federal government, sections 109 and 117 recognize that the provinces also own lands which may be inhabited by Indians. However, their rights are subject to "any Trust existing in respect thereof, and to any Interest other than that of the Province in the same." [100] Professor La Forest explains the nature of title to lands reserved for Indians in the following terms:

> [T]he underlying title to lands reserved for the Indians under the proclamation is vested in the Crown for the benefit of the provinces. The provincial title is subject, however, to the usufructuary title of the Indians thereto. This Indian title is under the control and administration of the Crown in right of the Dominion by virtue of its legislative power over "Indians, and Lands reserved for the Indians," and in exercising this right of control, the Dominion may accept a surrender . . . . But once the Indians surrender their title the province has the complete beneficial interest in the land and the federal government ceases to have the control and administration thereof. In most of the provinces, however, the Dominion government, by virtue of Dominion-provincial agreements, now has the beneficial title in surrendered Indian lands or the power to sell or otherwise dispose of it and use the proceeds for the benefit of the Indians. [101]

The point to be emphasized here is that these changes have been effected by agreement and in no way touch the federal government's exclusive power in so far as the Indians as such are concerned.

To a great extent, what are now known as the Indian treaties are the agreements for surrender in return for which the Indians acquired annuities, smaller reserves and special privileges with regard to hunting and fishing over the ceded territories as well as any special privileges, for example concerning medicine chests, detailed in any particular agreement. It is the legal status of these "treaties" which has already been considered above. But

[99] Can. Stat. 1960 c. 40.
[100] B.N.A. Act § 109.
[101] LA FOREST, *supra* note 93, at 114-15.

the problem that arises is whether the "liability" to meet the annuities is that of the provinces or the Dominion as successor to the Crown on whose behalf they were undertaken. In *Attorney-General for Canada v. Attorney- General for Ontario* [102] the Privy Council held that in so far as pre-Confederation treaties were concerned these liabilities were merely debts or promises to pay and not trusts, with the result that section 111 of the British North America Act made them the responsibility of the Dominion with the province liable to repay. As to the post-Confederation treaties, there is no doubt that, except where particular arrangements have been made between the federal government and the provinces, annuities in respect of surrender are the responsibility of the federal government. On the other hand, as a result of the treaties the province might, as has been seen, find itself bound to respect the Indians' right to hunt and fish at least in respect to food, regardless of provincial game laws. At the same time it must be recognized that any legislation purporting to interfere with the Indians' right to hunt for food, whether as a result of treaty, or proclamation or as an aboriginal right of historic origin, is legislation concerning Indians and as such solely within federal competence. [103]

As to the aboriginal rights of the Indians, these have probably been best summed up by Mr. Justice Norris of the British Columbia Court of Appeal. He pointed out that "(1) The fact of aboriginal rights on conquest or 'discovery' so called of 'new' lands has been recognized throughout the centuries by all the European nations which contended for power on this continent. (2) The proclamation of 1763 was declaratory and confirmatory of such aboriginal rights . . . ." [104] Mr. Justice Norris drew attention to both United States and British decisions relating to native rights, the motives for the recognition of which "varied from regard for fair dealing, through enlightened self-interest, to fear of death and destruction at the hands of savage tribes." [105] He adopted as his own the views of Chief Justice Marshall of the United States Supreme Court in *Johnson v. M'Intosh* [106]—and the words might well be remembered when recalling that the price paid by the Hudson's Bay Company for the surrender of their lands by 159 Indian chiefs and heads of families of the Nanaimo tribe in 1854 in what is now British Columbia was 636 white blankets, twelve blue blankets and twenty inferior blankets. [107]

> The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society

[102] [1897] A.C. 199.
[103] Regina v. White, 52 W.W.R. (n.s.) 193, 50 D.L.R.2d 613 (B.C. 1964).
[104] *Id.* at 210-11, 50 D.L.R.2d at 630.
[105] *Id.* at 211, 50 D.L.R.2d at 630.
[106] 21 U.S. (8 Wheat.) 543 (1823).
[107] 52 W.W.R. (n.s.) at 206, 50 D.L.R.2d at 626.

mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing these claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred. [108]

. . . .

The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they

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[108] 21 U.S. at 589-90.

> pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
>
> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and excercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.
>
> The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles. [109]

Chief Justice Marshall was not being egocentric in his references to Europe or to universal recognition. At the time of his judgment, there was little attention paid to any powers outside of Europe, and it was only powers from that continent that had settled in North America. Moreover, their practice with regard to aboriginal peoples was the same whether they were colonizing America, Africa [110] or Asia.

The court in *Regina v. White* emphasized that the judgment was rendered only sixty years after the 1763 Proclamation, to which Chief Justice Marshall had referred, and which applied equally to Hudson's Bay territories on both sides of what had since become an international boundary. The court also referred to the decision of the Canadian Supreme Court in *Prince v. The Queen* [111] which approved the reasoning in *Rex v. Wesley* [112] to the effect that provincial legislation could regulate the Indian's right to hunt for sport on the same terms as that of the white man, "but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food, and was by . . . [the Manitoba game legislation] reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."[113] *White* further indicated the necessity for pacification of the landmass after the conclusion of the Seven Years' War:

> [I]t was vital that aboriginal rights be declared and the policy pertaining thereto defined. This was the purpose and the substance of the royal proclamation of 1763. The principles there laid down continued to be the charter of Indian rights through the succeeding years to the present time — recognized in the various Treaties with the United States in which Indian rights were involved and in the succesive [*sic*] land Treaties made between the crown and the Hudson's Bay Co. with the Indians. [114]

As recently as 1926 it was held that "the proclamation of 1763 . . . has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed." [115]

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[109] *Id.* at 573-74.

[110] *See, e.g.*, the decision of the Privy Council in Amodu Tijani v. Secretary, Southern Nigeria, [1921] 2 A.C. 399, at 403.

[111] [1964] Sup. Ct. 81.

[112] 26 Alta. 433, [1932] 2 W.W.R. 337.

[113] *Id.* at 442, [1932] 2 W.W.R. at 344.

[114] 52 W.W.R. (n.s.) at 218, 50 D.L.R.2d at 636.

[115] The King v. Lady McMaster, [1926] Can. Exch. 68, at 72.

It has often been pointed out that the provisions of the Proclamation have been carried forward into section 91(24) of the British North America Act, while in *Ontario Mining Co. v. Seybold,* [116] Chancellor Boyd, basing himself upon the decision of the Privy Council in *St. Catharine's Milling & Lumber Co. v. The Queen,* [117] commented that the term "Lands reserved for Indians" in section 91 "is sufficient to include all lands reserved upon any terms or conditions for Indian occupation . . . . That is to say, the expression is to be traced back to the Royal Proclamation of 1763, is not to be limited to reserves set apart under the provisions of a treaty, but is of larger scope covering all wild and waste lands in which the Indians continue to enjoy their primitive right of occupancy even in the most fugitive manner." [118]

A further point of significance relates to the personal and territorial scope of the Proclamation and hence of the aboriginal rights. This point was discussed at some length in *Regina v. White*: [119]

> The proclamation, while referring principally to Indians who were at the time known to the British, brought within its purview all Indians on lands over which Great Britain *claimed* dominion, that land being the unlimited west — the territory which was then and for over a century after the Treaty known generally as Indian Territory. This land was known to exist, although a great part of it had not been explored. The proclamation is to be construed in accordance with the common understanding of the British expansionists of those days, who claimed the extension of dominion *not* in the terms of precise definition or of survey or of British settlement. In considering the applicability to Vancouver Island of the proclamation, we are not concerned with the validity of such claim, but merely that the territory *was claimed* and that in its very terms the proclamation covered all this territory. [120]
>
> . . . .
>
> If the conception of the British *claim* and continual extension of exploration be kept in mind, the use of the present tense in the expression "with whom We are connected, and who live under our Protection" is easily understood as referring to all the Indians on all territory claimed. The use of the term "for the present" presages the *anticipated* extension. [121]
>
> . . . .
>
> The proclamation was made on the basis of a *claim* to dominion and its protective provisions became applicable in fact to Indians as their lands (the Indian territory) came under the *de facto* dominion of representatives of the British crown. [122]

The rights, particularly those referring to hunting, embodied in the Proclamation are "inalienable except by surrender to the Crown." [123] Since it is

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[116] 31 Ont. 386 (1900).
[117] 14 App. Cas. 46 (1889).
[118] 31 Ont. at 395.
[119] *Supra* note 114.
[120] *Id.* at 221, 50 D.L.R.2d at 639.
[121] *Id.* at 224, 50 D.L.R.2d at 641.
[122] *Id.* at 227, 50 D.L.R.2d at 644.
[123] Attorney-General for Québec v. Attorney General for Canada, Re Indian Lands, 56 D.L.R. 373, at 377 (1921).

presumed that the Crown acts in good faith, it is to be assumed that these rights would be terminated only by agreement between the Crown and those entitled as beneficiaries. On the other hand, since Parliament has the sole right to legislate on Indian affairs and, subject to the terms of the British North America Act, its powers are untrammelled, it is within the power of Parliament to abrogate Indian rights by legislation. Particularly is this so in view of the fact that the courts have construed the Proclamation as if it were a statute [124] and Parliament is not bound by legislative acts of its predecessors. However, the fact remains that any such cancelling legislation could not have the effect of increasing the obligations of the provinces in so far as they are not already liable for burdens concerning the Indians, over and above those they bear in respect of other inhabitants. [125] Such legislation would, therefore, leave the Indian "unprotected" and constitute a clear breach of faith on the part of the Crown.

On the other hand, there is nothing to prevent the provinces agreeing to participate in the administration of Indian affairs. The federal view of such agreements has been stated in the following terms:

> Agreements of [this] sort do not in any sense amount to a "transfer of jurisdiction." They are simply an example of the Crown in right of Canada employing a provincial agency to carry out its obligations and duties under the Indian Act. The obligations and duties are as defined in the Federal Law. Control would be retained by the Crown in right of Canada through such devices as the setting of standards, the right to inspect, the right to cancel out the agreement if found unsatisfactory, but above all, through the fact that authority to do anything at all comes from the agreement with the Federal Government, and not from the laws enacted by the provincial legislatures.
>
> Hence, there is no transfer of jurisdiction — the province is being used as an agency for the accomplishment of a Federal objective. [126]

This statement on the nature of jurisdiction is applied to all treaty Indians [127] whether living on or off the reserves. [128] Since the province concerned would be acting only as an agent, it would not be possible in this way, without an amendment to the British North America Act, to increase its direct liabilities or to impose any financial burden upon it. The latter would remain the responsibility of the federal authority. It should be borne in

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[124] *Supra* note 115.

[125] *See, e.g.*, W. CLEMENT, THE LAW OF THE CANADIAN CONSTITUTION 679-80 (3d ed. 1916).

[126] CANADA, DEPARTMENT OF CITIZENSHIP AND IMMIGRATION (INDIAN AFFAIRS BRANCH), FEDERAL-PROVINCIAL CONFERENCE ON INDIAN AFFAIRS: REPORT OF PROCEEDINGS (App. J. 1964). *See*, however, Attorney General of Nova Scotia v. Attorney General of Canada, [1951] Sup. Ct. 31, in which it was held that the use of the word "exclusively" in §§ 91 and 92 of the B.N.A. Act precludes the possibility of the delegation of legislative power from the provinces to the federation or vice-versa, although this is not true where the delegation relates to existing legislation.

[127] In accordance with Rex v. Syliboy, [1929] 1 D.L.R. 307, treaty Indians are direct descendants of the tribe with which the treaty was made.

[128] FEDERAL-PROVINCIAL CONFERENCE ON INDIAN AFFAIRS: REPORT OF PROCEEDINGS, *supra* note 126, at 17.

mind that this agency potential applies to all the rights and duties of the federal government and therefore extends to all Indians covered by sections 11 and 12 of the Indian Act, [129] regardless of whether they are "treaty Indians," which would tend to exclude most Métis as well as some regarded in common parlance as Indians. This differentiation was taken note of in the Alberta Government's White Paper on Human Resources Development [130] which proposes that:

> [T]he Government of Canada and the provincial governments develop a comprehensive agreement which will supersede all previous separate municipal agreements, and which will make it financially possible for provincial and municipal governments to extend all their services to Indian people. Under this comprehensive agreement, existing separate services and facilities to Indian people would be phased out where provincial and municipal services are available. It is proposed that the Government of Canada accept total financial responsibility for all programs and services extended to registered Indians with reserve status . . .; and that the provincial governments be financially responsible for programs and services to all other Indian people to the same degree as it is to all other residents. [131]

Constitutional difficulties concerning jurisdiction arise not merely with regard to the aboriginal and proclamation rights of the Indians, but also in connection with rights under the treaties, a matter which is of some significance since section 87 of the Indian Act provides that:

> Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

It has already been pointed out that the word "treaty" and the agreement to which it refers are not used in the technical sense of that term in international law. Nevertheless, the arrangement made by the Crown or the Hudson's Bay Company as its representative with Indian tribes is at least a contract which, in the light of its historical significance and development, is entitled to more than the respect normally afforded to a contract, particularly one which amounts to a grant by the Crown and, it is submitted, has come in practice to be almost as hallowed as an international arrangement.

This special view of the treaties has been accepted consistently by Canadian judges and the Privy Council and is also to be found in the writings of eminent historians. Thus, A. S. Morton writes:

> The promise which won over the warlike Five Nations was that they would enjoy their territory undisturbed, and that no lands were to be taken from them but by formal purchase by His Majesty the King. Thus they would be protected from the dreaded encroachments of colonists. To us who have

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[129] CAN. REV. STAT. c. 149 (1952).

[130] GOV'T OF ALBERTA, WHITE PAPER ON HUMAN RESOURCES DEVELOPMENT (1967).

[131] *Id.* at 79-80.

> experienced the peaceful working out of such a policy, from the purchases by the Hudson's Bay Company of the rights to build their forts down to the long succession of Indian treaties which preceded the settlement of the North-West, this policy appears as doing no more than justice to the Indians, quite apart from the treaties which promised it to them — no mere scraps of paper, surely. So far from precluding the manifest destiny of the White Race on this continent, it really provided for an orderly and peaceful expansion. [132]

Similarly, Lord McNair in *The Law of Treaties* notes that "The Supreme Court of the United States has laid down the indulgent rule which requires treaties made with Indian tribes to be construed 'in the sense in which they would naturally be understood by the Indians.' " [133] Everything we know about the Indians and the treaties suggests they were understood by the tribes, as they have consistently been by their descendants, as constituting legal arrangements binding upon the Crown for all time.

In *Regina v. White*, [134] the court was fully conscious of the special status of the Indians, including their rights under the treaties, which "confirmed the Indians in their aboriginal rights of hunting and fishing, these being the rights essential to the survival of the Indians. These rights have never been surrendered or extinguished." [135] It is true that the case dealt with a provincial attempt to abrogate these rights, but even the federal government might bear in mind the court's comment that "[i]t is now too late for this Province alone to attempt to take away rights which the Indians have had from time immemorial." [136] The court envisaged the need for joint action between the province and the federal government, but it might with equal force be maintained that similar joint action would be necessary between the federal government and the Indians. Furthermore, as has been seen, any attempt by the federal government to abandon its financial obligations so as to increase those of the provinces would require consent by the latter. At the same time, one should not overlook the statement in the schedule of the Order in Council of 1871 effecting British Columbia's entry into Confederation. In the address from the Canadian Senate and House of Commons to the Queen it was proclaimed that "[t]he charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union." [137]

The question may arise whether a parallel may be drawn from international law concerning the unilateral denunciation of a treaty with a native people. It must be borne in mind, however, that at the present time in other

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[132] A. MORTON, A HISTORY OF THE CANADIAN WEST TO 1870-71 258 (1939).

[133] LORD MCNAIR, THE LAW OF TREATIES 470 (1961). The internal quote is from Jones v. Meehan, 175 U.S. 1 (1899).

[134] 52 W.W.R. (n.s.) 193, 50 D.L.R.2d 613 (B.C. 1964).

[135] *Id.* at 210-11, 50 D.L.R.2d at 630.

[136] *Id.* at 232, 50 D.L.R.2d at 648.

[137] 6 CAN. REV. STAT. 6264, at para. 13 (1952).

parts of the world this denunciation is being carried out by the native peoples themselves. As the colonial territories have achieved their independence, the newly independent governments have claimed the right under international law to decide which of the former treaties concerning their territories are to continue and which are to be denounced. Unlike the Indian treaties, these have been contracted between the former ruler and third powers and these third powers have, for the main part, acquiesced in the denunciation. Should a ruling power today decide to denounce or unilaterally evade its obligations under similar treaties made with the indigenous inhabitants of its territory, it is almost certain that it would be made the recipient of the obloquies of the world gathered at the United Nations.

Current discussions concerning the Indians revolve around the Indian Act, [138] for this seems to define the various rights of those Indians who are within it. Nevertheless, its significance should not be exaggerated in any consideration of the rights of the federal government and of the provinces respectively. In addition, while the act provides for federal responsibility for those Indians to whom it applies, and by section 109 stipulates that a person concerning whom an order for enfranchisement has been made is "deemed not to be an Indian within the meaning of this Act or any other statute or law," this provision is no so far-reaching as it sounds. The Indian Act is a Canadian statute and cannot amend the British North America Act, so that federal power still operates under section 91(24) with regard to enfranchised Indians.

Even without repeal of the Indian Act, its scope may be radically reduced. By section 4, the Governor in Council may declare by proclamation that, with the exception of sections 37 to 41 relating to land surrenders, the act no longer applies to "(a) any Indians or any group or band of Indians, or (b) any reserve or any surrendered lands or any part thereof," and presumably what he can do for particular Indians or their lands he can do generally. As it is, large portions of the act do not apply to Indians living off the reserves or off lands belonging to the Crown in the right of Canada or a province. By such a proclamation, it would be possible for the Minister of Indian and Northern Affairs, within whose jurisdiction the act falls, to divest himself of all the practical consequences of his responsibility. In the same way, it would be possible, by operation of section 35 of the act, to liquidate the reserves even without the agreement of the Indians. This section authorizes the extension to the reserves by way of Order in Council of any act of Parliament or of a provincial legislature incorporating a power of expropriation, payment therefor being made to "the Receiver General of Canada for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers [just mentioned] . . . ."

Among the reasons put forward by the federal government for termination of the special status of Indians is the contention that their lands must be

[138] *Supra* note 129.

freed and made available for mortgage purposes. This implies that at present the Indians are unable to make use of their land as fully as might otherwise be desirable and are unable to raise funds they may require because of their inability to pledge their lands. This, however, ignores the extent to which the Indian is at present able to do at least some of those things. Thus, by section 58 he may apply to the minister to effect a lease of land of which he is lawfully in possession without such land being surrendered, so long as the lease is for the benefit of the Indian. Similarly, under section 69 "[t]he Minister of Finance may . . . advance to the Minister out of the Consolidated Revenue Fund such sums of money as the Minister may require . . . ." to enable him to make loans even to individual Indians for a large range of purposes most of which are connected with agriculture, fishing, or native handicrafts, but also for motor vehicles and "any other equipment,"[139] and also for any other matter prescribed by the Governor in Council. The total of the sums outstanding by way of such advances is, however, limited to one million dollars.

The Indian Act does not attempt to take Indians out of the scope of the ordinary law. What it seeks to do is to preserve to them such additional rights as may be necessary in view of their less developed status or which they may have acquired by treaty or some other act. By judicial interpretation, the Proclamation of 1763 is treated as if it were an act of Parliament. This position is given legislative recognition by section 87 of the Indian Act:

> [S]ubject to the terms of any treaty and other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act.

It would appear that the Indian Act does not render Indian rights "vested" as is sometimes alleged. Even without amendment or repeal, much of the protection seemingly conferred upon the Indian may be removed by virtue of the exercise of powers granted by the act to the Governor in Council or the minister.

Unlike the British North America Act, the Indian Act is a piece of federal legislation similar to any other statute passed by the Canadian Parliament and it may be repealed in exactly the same way. Prima facie, however, the rights of Indians under the 1763 Proclamation and the various treaties would remain valid. But the federal government would then be able to pass legislation terminating the treaties and the courts would, in accordance with constitutional law, be obliged to give effect to the legislation thus invalidating all the rights that the Indians believe themselves to be entitled to enjoy. The Proclamation could be repealed in the same way, as could any aboriginal rights to fish or hunt. A problem would arise with

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[139] § 69 (1)(a).

regard to such rights as are enjoyed by Indians under international treaties like the Jay Treaty as distinct from the so-called treaties made between the representatives of the Crown and the Indians. Despite the decision in *Francis v. The Queen* [140] when the Supreme Court held that a statute overrode such international treaty rights, it would appear that Indians enjoying rights under such a treaty would continue to enjoy such rights, in the same way as do their brethren in the United States. The normal rule of statutory interpretation in such instances has been stated in the following terms:

> [T]he court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous they must be given effect to, whether or not they carry out Her Majesty's treaty obligations . . . . But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligation and another or others are not, the meaning which is consonant is to be preferred. [141]

The courts should be able to evade the rigours of the *Francis* decision by way of distinguishing, especially as "[t]he legislation in question in the *Francis* case did not expressly require breach of the Jay Treaty for nowhere in the legislation were Indians referred to." [142] Moreover, there are already indications that in some fields at least, such as tax and expropriation, the Supreme Court does not consider itself unquestioningly limited by precedent. It is not beyond the realm of possibility that, following the new practice of the House of Lords and other senior tribunals in common-law jurisdictions, the Supreme Court may itself be prepared to disregard such precedents as it considers wrong or obsolete. Even if this should not happen, and the Supreme Court continued to interpret legislation contrary to such an international treaty, the Government of Canada might find itself facing international claims by the other party to such a treaty, as Canada itself presented claims on behalf of the Cayuga Indians. [143] And if Indians protected by such international treaties continued to enjoy their rights under these treaties, the Government of Canada would find its difficulties with the Indians increased. For this would mean that a minority, with whom the Crown had never entered into any agreement, was entitled to rights and privileges denied to the majority with whom such agreements had been made.

On the other hand, the new tendency in the United Nations to talk of the fundamental rights of "peoples" rather than of individuals [144] may lead to

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[140] [1956] Sup. Ct. 618.

[141] Salomon v. Commissioners of Customs and Excise, [1966] 3 W.L.R. 1223, at 1233 (C.A.).

[142] 1 CANADA, DEPARTMENT OF CITIZENSHIP AND IMMIGRATION (INDIAN AFFAIRS BRANCH), A SURVEY OF THE CONTEMPORARY INDIANS OF CANADA 219-20 (1966) [hereinafter cited as the HAWTHORN REPORT].

[143] Sobhuza II v. Miller, [1926] A.C. 518 (P.C.).

[144] *See, e.g.*, Green, *The Impact of the New States in Int'l Law*, 4 ISRAEL L. REV. 27, at 40 (1969).

agitation by the newer members, who are themselves liberated from colonial rule and "coloured," on behalf of their suppressed brethren who must be granted equal rights and relieved of all traces of discrimination. However, since the Indians may consider that the "discrimination" to which they are subjected is in the nature of "privileges" rather than "disabilities," they may not be quite so willing to see their case taken up in this way. It will indeed be strange if the anti-colonialist segment in the United Nations finds itself agreeing with the Canadian Government in regarding the special status of the Indians as discrimination, while the "victims" regard it as their guarantee of legal rights and perhaps their ticket to equality.

Regardless of this issue of international politics, there is the fundamental problem of the attitude of the Indians themselves, particularly at a time when discontent appears to be growing and groups of dissidents seem likely to take advantage of any group dissatisfaction on which they may be able to capitalize. At the same time, it must be recognized that, despite the pleas for equal treatment, national and racial groups today demand full recognition of their independent and individual characteristics. It is unlikely that any Indian group would today go so far as the spokesman for the Six Nations in 1744 at the time of the negotiation with the Government of Virginia of the Treaty of Lancaster. In declining the offer of the commissioners to send six of the chiefs' sons to college at Williamsburg to learn the education of the white man, the spokesman said:

> We are convinc'd . . . that you mean to do us Good by your Proposal; and we thank you heartily. But you, who are wise, must know that different Nations have different Conceptions of things; and you will therefore not take it amiss if our Ideas of this kind of Education happen not to be the same with your. We have had some Experience of it; Several of our young People were formerly brought up at the Colleges of the Northern Provinces; they were instructed in all your Sciences; but, when they came back to us, they were bad Runners, ignorant of every means of living in the Woods, unable to bear either Cold or Hunger, knew neither how to build a Cabin, take a Deer, or kill an Enemy, spoke our Language imperfectly, were therefore neither fit for Hunters, Warriors, nor Counsellors; they were totally good for nothing. We are however, not the less oblig'd by your kind Offer, tho' we decline accepting it; and, to show our grateful Sense of it, if the Gentlemen of Virginia will send us a Dozen of their Sons, we will take great Care of their Education, instruct them in all we know, and make Men of them. [145]

Nevertheless

> [i]t remains a sore point with the present generation [of Indians] which feels that this [the 1752 treaty with Mick Mack Indians] and other agreements made in those days are binding on Canada. These agreements hold a special place in the hearts and minds of the Indians because they represent, for the Indians, a recognition of their identity as a people whose roots and traditions stretch far back into Canadian pre-history. [146]

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[145] 10 B. FRANKLIN, THE WRITINGS OF BENJAMIN FRANKLIN 97 (1907).
[146] 1 HAWTHORN REPORT (*citing* Indian Affairs Branch Officials).

IV. CONCLUSION

It matters little whether or not the agreements are treaties in the narrow sense of the word. The weaker party has always regarded them as such, while the stronger party and its legal interpreters have for more than a century accepted that they were in the nature of treaties and that the provisions embodied therein created legal obligations for the Crown and its representatives. Legally, there is no doubt that they can be abrogated, and since they are not true treaties this can be done unilaterally by the Crown. Such action would amount to bad faith and be regarded as such by the Indians, by large sectors of public opinion and by many members of the United Nations. In today's world, it is no good reminding one's critics of the statement in Matthew: "And why beholdest thou the mote that is in thy brother's eye, but considered not the beam that is in thine own eye?" [147]

If the Canadian Government is to remain true to its own past practice in so far as Indian rights whether under the treaties or not are concerned, it is essential that any alteration of these rights must be the result of equal negotiation between the Crown and the Indians, and if the latter are not yet prepared to come to terms it may be wiser from the political point of view for the Canadian Government to recognize the status quo, while working for revision. In the same way, even if the Canadian Government could achieve some measure of disengagement by non-fulfilment of its powers under the British North America Act or the Indian Act, thus throwing the Indians upon the charity of the provinces, it would be wiser for the sake of the federation that it achieve full provincial agreement to any amendment it may desire in the division of powers between the centre and the provinces. It may, therefore, be wise from a political and constitutional point of view to treat the Indian question as part and parcel of the whole problem of constitutional revision, rather than attempt to deal with it on its own or in a way that the provinces can only regard as high-handed. To attempt to maintain that the rights of the Indians result in discrimination against them or are evidence of a denial of their equality in the sense that their status is reduced thereby, is to indulge in an excessively narrow view of the meaning of words, of the purpose of equality and of the nature of discrimination. It is no longer a question of the good faith of the Crown that is involved but the good faith and repute of the Government of Canada—and this in a field in which reason as well as honesty demands that care be taken not to aggravate a situation which could easily erupt into civil disturbances. In its survey of Canadian Indians, the *Hawthorn Report* describes the process of breaking down the consequences of Indian status:

> An evaluation of Indian status and the consequences which have been attached to it by governments makes crystal clear that there is a remarkable degree of potential flexibility or "play" in the roles which have been, and in the future could be, assumed by either level of government. For the entire history of Indian administration this play has been exploited to the dis-

[147] *Matthew* 7:3 (King James ed.).

> advantage of the Indian. The special status of the Indian people has been used as a justification for providing them with services inferior to those available to the Whites who established residence in the country which once was theirs. Whether Indians should receive the same rates of social assistance as non-Indians, whether they should have the franchise in federal or provincial elections, whether their children should be given the same services from Children's Aid Societies as Whites receive, whether Indians should have the same liquor privileges, whether Indian schooling should be segregated or integrated, whether Indian local governments should be considered as municipalities for the purpose of numerous provincial grant-aided programs — these and numerous other queries share the common element of being policy questions unrelated in any inherent way to Indian status as such. These questions pertain to the consequences which are attached to Indian status. It should be noted that on the whole the consequences simply reflect what governments in their wisdom decide they shall be. Up until 1960, . . . Indian status was held to be incompatible with possession of the federal franchise. Since 1960 this particular consequence of Indian status has been eliminated by a change in federal policy which extended the franchise without interfering with Indian status. In general, it is in this area of the consequences which have been attached to Indian status that the most important changes have been, and will continue to be, made. The consistency with which Indian status was used in the past to deprive the Indian of services routinely provided to non-Indians is now breaking down. The process, however, is far from complete. [148]

Where the danger lies, however, is that in making the process complete the rights of the Indian as traditionally understood, and the desires of the Indian as an equal member of society, will be disregarded in blind worship of the god "equality"—and this is what the *Statement* of the Government of Canada on Indian Policy, 1969, appears likely to achieve.

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[148] 1 HAWTHORN REPORT 263.
(1967).