

INDIAN¹ SOVEREIGNTY : WHAT DOES IT MEAN?

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Abstract/Resume

The term “sovereignty” has been used in many different ways in Canada. The author suggests it be understood as “the right of self-government...which Aboriginal people neither surrendered nor lost by way of conquest.” He suggests this can be entrenched in the Canadian Constitution.

Le terme “souveraineté” a employé de beaucoup de façons différentes au Canada. L'auteur suggère qu'il faille entendre du terme “le droit à l'autonomie...que les autochtones n'ont ni abdiqué ni perdu à la suite d'une conquête.” Il suggère que ce fait puisse être ancré dans la constitution canadienne.

Since the events at Oka, Quebec in the summer of 1990, Canadians have become curious about a term which they had often heard in the past in a somewhat different context, but which is now being used in connection with the aspirations of the Aboriginal peoples of Canada, that is “sovereignty.” What started out in August, 1990 as an apparent Indian claim to land around Oka, Quebec soon transformed into a question regarding the very relationship between the Mohawk people on the one hand and the federal government of Canada and the provincial government of Quebec on the other hand. The Mohawk people claimed they represented a “sovereign nation” who were protecting their rights and territory against alien governments who had no legal jurisdiction to impose their laws on Mohawk people residing within Mohawk territory. Mohawk people, it was being asserted, were merely defending their “sovereignty.”

For the past several decades, and perhaps since Confederation, Canadians have attempted to grapple with the implications of the term sovereignty in connection with the province of Quebec. Not surprisingly therefore, any appreciation that the average Canadian has for the meaning of the word has probably been shaped and understood as it relates to Quebec and that Province's grievances and objectives. As a result, when Canadians attempt to comprehend the term in the context of Aboriginal peoples, they are naturally inclined to apply that same understanding. However, to do so as an absolute rule does not reflect the true wishes of many (if not most) Aboriginal people, and ignores the history of the term as it is used and understood by Aboriginal people in Canada.

Sovereignty to most Indians is synonymous with the term, “self-government.” And, until sovereignty was the term used, rather than “self-government,” nobody other than Indians ever really cared about the issue. That is, few Canadians ever really wondered what went on within Indian Reserves or how Indians actually made decisions, or what laws applied on Reserves. Few people cared whether Indian Band Councils (those governing bodies of Indian Bands established and auspicated in accordance with the *Indian Act* and defined by Section 2(1) of the *Indian Act*) could borrow money like municipalities, or how Indians made decisions about their children's education, etc. Indeed, most people never wondered if Indians even had a government, let alone how it was established or how it functioned. Now, however, because the term which is often currently applied is “sovereignty” rather than “self-government,” the ranks of those who are curious about Indians has grown ten fold. Today people want to know “what does it mean” “what will it look like” “will it protect minority rights” “will murder be allowed” and, “will it be a haven where fleeing criminals can escape prosecution?” And the reason many people want to know is so they can

decide whether or not they will “allow” Indians the privilege of being “granted” the ability to exercise such rights.

To understand the term sovereignty as Indian people interpret it one has to first understand, in the simplest of terms, the history of the settlement of this country and the Aboriginal/settler relations which evolved from the first moment of settlement by Europeans.

Upon first contact with what is now called Canada, settlers (or “discoverers” as they are often called), found the country already inhabited. Those already occupying the land were its original inhabitants, namely, the Aboriginal people. They were civilized, intelligent, self-sufficient, and self-governing within defined territorial boundaries. From the beginning, it was an absolute necessity for European settlers, in the interests of their very own survival, to make arrangements with the Aboriginal people. Many descriptions are applied to the various types of arrangements and agreements which were made; the most commonly referred to is the “treaty.”

The Supreme Court of Canada in the case of *Simon v. The Queen* [1986], 1 C.N.L.R. 153 at p.169 describes a Treaty as being “unique” and “an agreement *sui generis* which is neither created nor terminated according to the rules of international law.” In the case of *R. v. Sioui* ([1990] 3 C.N.L.R. 127 at p.139) the Supreme Court affirmed this definition and went on to say that “a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.”

It has been estimated that the Aboriginal people and Crown representatives have negotiated approximately 500 Treaties. The earlier ones are generally referred to as Treaties of “peace and friendship” and cover the period between 1700 to 1850, while those Treaties negotiated in 1850 and thereafter are generally called “land cessions.” Often the difficulty is being able to make the distinction between a Treaty and a “mere” land surrender; consequently estimates of the actual number of Treaties will vary anywhere from 100 to 500. For example, “Indian Treaties and Surrenders, 1680-1902” (Canada, 1891) is often cited as authority for the number of Treaties, yet the vast majority of the instruments reprinted therein are of surrenders of Reserve land rather than Aboriginal title. Notwithstanding the different descriptive terms applied to Treaties during these two periods, virtually all Treaties provided that Aboriginal people would surrender tracts of their lands in exchange for solemn promises on the part of the Crown.

Most Aboriginal people will suggest to those who care to listen, and many learned scholars and jurists would agree, that these arrangements, by whatever name one chooses to call them, were agreements of co-occupation and co-existence within the territory. That is, they were not, as has been suggested and indeed argued over the years, the surrender and

capitulation of any rights to sovereignty or self-government by the Aboriginal people. However, some judges have decided in the past, and indeed continue to do so, that the Aboriginal people of Canada were, upon discovery by civilized nations, merely savages and uncivilized and therefore unable to exercise any sovereignty. (See for example, *R. v. Syliboy* [1929] 1 D.L.R. 307 (N.S. Co. Ct.) and more recently *Delgamuukw v. B.C.* [1991] 5 C.N.L.R. 1.) And, contrary to popular myth, Aboriginal people in Canada are not people who were militarily defeated or conquered by those European nations attempting to settle the country.

I believe that it is with that background that one must begin to examine the Aboriginal meaning of sovereignty. It is simply *the right of self-government or self-rule which the Aboriginal people neither surrendered nor lost by way of conquest*. It is those rights which they have had since time immemorial and those which they continue to possess.

Rhetorically, at least, the Aboriginal view of the continuing historical right to self-government appears to be shared, more and more, by the governments of Canada. On April 23, 1991, in an address to the First Nations Congress in Victoria, B.C., Prime Minister Brian Mulroney said:

All Canadians are beginning to understand, now, what Aboriginal Canadians have tried to tell us for so long—that when the first Europeans set foot on North American soil, they were not venturing into unexplored, unoccupied wilderness. This land was not unexplored; it was only unexplored by them. The land was not unoccupied; in fact it had been occupied since time immemorial.

And, in an even more direct comment, Ontario Premier Bob Rae, in his remarks to the Assembly of First Nations in Toronto on October 2, 1990 stated:

Quite specifically I say to you this: We believe that there is an inherent right to self-government, that this inherent right stems from powers, and if you will, sovereignty, which existed prior to 1763, certainly existed prior to 1867 and certainly existed prior to 1982.

What does that mean in contemporary terms, and more particularly, how does the Aboriginal definition of sovereignty translate within the constitutional framework and overall make-up of Canada as it exists today? Do Indian people want “mini countries” within Canada?

Without attempting to sound overly simplistic, some Indians whose traditional territory is located within Canada might answer “yes,” while other Indians and Aboriginal people would say, “not quite.” As an example of the

former, at least some of the Mohawk people of Kanesatake and Kahnawake would argue that there continues to exist a separate and independent nation of Mohawks, inclusive of their territory, within the country of Canada. Further, they would argue that the laws of Canada do not apply within the boundaries of Mohawk territory. The answer respecting the views of most Aboriginal people can be found by again reviewing a little of Canada's history.

In the early 1980s many Aboriginal people were directly involved in the process to "repatriate" Canada's Constitution, the former *British North America Act, 1867* of the United Kingdom, retitled the *Constitution Act, 1867* in 1982. The repatriation process required that legislation to accomplish this had to be passed by the British Parliament as the Constitution itself was originally a British statute. Aboriginal people took the position that their sovereignty and their relationship with the British Crown, which had been established and confirmed since first contact, needed to be specifically recognized and affirmed in any British legislation passed respecting repatriation. Thus, in the period from late 1980 to early 1982, representatives of the Indian First Nations and other Aboriginal groups in Canada travelled to Great Britain and other parts of Europe to lobby the British Parliament. Their intention was to preserve and protect those Aboriginal and Treaty rights which Aboriginal people asserted had been recognized and established through historical relationships of the Aboriginal people of North America and the Imperial Crown. The need to preserve and protect these rights was essential, Aboriginal people argued, as they call into question the honour of the British Crown. Furthermore, it was argued, such preservation had to occur prior to the British Parliament legislating for the repatriation of the Constitution (the *British North America Act, 1867*). While this action on the part of the Aboriginal people was generally not acted upon by the British Parliament (although some members of that Parliament registered their support during debate) certain concessions and language changes to the *Constitution Act, 1867* were ultimately agreed to by the government of Canada.

Aboriginal people asserted that any "new" Constitution must include provisions which would recognize and afford lasting protection for Aboriginal and Treaty rights. While certain Constitutional provisions in this regard were in fact incorporated into the Constitution (for example, Section 35 of the *Constitution Act, 1982*, which recognized the existing Aboriginal and Treaty rights of Aboriginal people), they were not, at that time, seen as being satisfactory to the majority of Aboriginal people.² The word "existing" used in Section 35(1) was cause for serious concern on the part of Aboriginal people, although representatives of the federal government argued that the

section meant the same whether or not the word was included. Needless to say, since repatriation of the Constitution in 1982 (with the word “existing” included) there has been considerable litigation, much of which has been advanced by the federal Department of Justice, on the extent of the limitation of rights as a result of the word “existing.” The Ontario Court of Appeal in the case *R. v. Hare and Debassige*, ([1985] 3 C.N.L.R. 139) provides insight into how limiting the Crown argued the word “existing” should be interpreted (ie. “frozen” as at 1982 and as the right had been affected by legislation). However, the case of *R. v. Sparrow* ([1990], 56 C.C.C. 263), has since rejected such narrow and restrictive definitions and at p. 276 states: “Far from being defined according to the regulatory scheme in place in 1982, the phrase *existing aboriginal rights* must be interpreted flexibly so as to permit their evolution over time.” Thus as a result of Supreme Court of Canada decisions, most notably the Sparrow case, this initial concern of Aboriginal people may be subject to some reconsideration: the current provisions may prove to be more meaningful and beneficial to Aboriginal people than was first thought.³ They are certainly proving to be more significant than government lawyers have in the past been prepared to admit.

Some commentators as well as some Indian leaders have suggested that the Supreme Court of Canada case of *Sparrow* establishes that Section 35(1) of the *Constitution Act, 1982* does in fact provide for the entrenchment of the Aboriginal right to self-government and that no other Constitutional provisions may be necessary. I view such a position with considerable caution and do so for several reasons. Firstly, the court in *Sparrow*, in my view, very clearly articulates that any prior Aboriginal sovereignty was subsumed by the Crown upon settlement. (The court in *Sparrow*, [at p. 283]) stated that, “It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown...”) Secondly, even if the inherent right to Aboriginal self-government can be found in Section 35(1), the court in *Sparrow* sets out a test which allows for interference, and perhaps extinguishment, of the Aboriginal right through federal legislation (albeit under certain prescribed circumstances). *Sparrow* provides that while Section 1 of the *Charter of Rights and Freedoms* does not apply to Section 35(1), federal legislation which can justify an interference with the recognized right will be held valid. Such legislation must be enacted pursuant to a valid objective and must uphold the honour of the Crown. The court went on to say (at p. 289) that: “s. 35(1) does not promise

immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise." In this regard, see also Binnie, (1990). Based upon my reading and interpretation of *Sparrow*, I would submit that any Constitutional entrenchment of the Aboriginal right to self-government, as might be provided for in Section 35(1), as it presently reads, falls far short of Aboriginal peoples' aspirations.

However, the history of Aboriginal involvement in the repatriation of the constitution is significant in that it illustrates the place in which Aboriginal people see themselves in connection with the jurisdictional make-up of Canada. It is, in my view, clearly a desire for partnership based upon mutual respect and cooperation. "Sovereignty," as expressed by Aboriginal people, is a concept which allows for the recognition of their inherent right to self-government and provides guarantees that this right would have constitutional protection and thereby not be subject to the passing whims of non-Aboriginal governments. Perhaps more importantly, a specific constitutionally recognized right of Aboriginal self-government (ie. other than that which might be read into s. 35[1]) would not be subject to the "valid legislative objective" test permitting non-Aboriginal government infringement of the recognized right, as was established in *Sparrow*. Binnie refers to the test as "implied limitations" and notes that any limit to be drawn on Section 35 rights "is now subject to the vagaries of the judicial temperament" (1990:220). Sovereignty is, again in my view, an expression of a desire on the part of Aboriginal people to be an integral part of Canada. And, although the relationship between Aboriginal and non-Aboriginal today often appears strained, perhaps to the breaking point, I believe there is clear indication on the part of Aboriginal people that the desire for partnership remains.

(One obvious example of strain might be the extent to which the *Sparrow* doctrine appears to have failed, at least to date, to find its way into everyday conduct by both elements of the public and government officials. While *Sparrow* clearly sets out that Aboriginal people, in the exercise of their Aboriginal rights, have a priority right to the fish resource, members of the public cry "foul" and claim "reverse discrimination" when Aboriginal people attempt to exercise this right. In addition, Aboriginal people argue that there is no decrease in the laying of charges by Natural Resources enforcement officers against Aboriginal people in the legitimate exercise of their recognized right.)

It is important that the Canadian public understand the importance of the need for a clear constitutional expression of the Aboriginal right to self-

government, rather than what either exists today or is currently being pursued by way of government policy. In the simplest of terms, it is the difference between the granting of the right through some form of enabling legislation and the recognizing of an inherent right in the Constitution. Other commentators and authors have also referred to these as “contingent” rights as opposed to “inherent” rights (Asch and Macklem, 1991:489). In the former instance, Indian governments would be at the mercy of non-Indian law makers, whereas in the latter they would be protected from such tampering. An illustration of “granted” self-government is the *Indian Act* (R.S.C. 1985) wherein, of the total 124 sections, only 2 provide for regulatory powers which do not require approval or consent by either the Minister of Indian Affairs or the federal Cabinet. There are a total of 21 sections in the *Indian Act* which are specific respecting a Band or a Band Council. Of these 21 sections, one provides definitions of a Band and Band Council while the remaining sections deal with specified procedures and limitations in connection with the exercise of the respective authority. Of those sections of the *Act* which purport to “grant” authority to Bands and Band councils, only Section 85.1 (“make” liquor by-law) and Section 120(2) (approve denominational schools) do not require approval of the Minister or the Governor in Council. The remaining sections of the *Act* deal specifically with “Indians” (17 sections) and the power and authority of the Minister and the Governor in Council. The *Indian Act* can be amended (as it has been many times)⁴ or even repealed by the federal Government without Indian consent or approval. A Constitutionally recognized right to Aboriginal self-government would mean that Indian governments would have the exclusive responsibility for passing their own laws and would still have the protection against intrusion afforded by the Constitution. This would further mean that no other government could easily interfere with Indian laws.

The approach of the current federal and provincial government to self-government is to negotiate various components and forms of it with individual Indian First Nations⁵ or groups of First Nations. Enabling legislation by either one or both levels of government (depending upon the nature of the authority being “granted” to the First Nation), would then be passed to give legal effect to the concluding agreement. For example, if a First Nation were interested in exercising local control over family and child welfare matters (which are provincial areas of authority set out in the *Canada Act, 1982*) the province would then pass the necessary legislation to enable the First Nation to assume control of this matter.

I have some serious doubts as to whether such an approach can seriously be considered as providing for a true form of traditional Indian or Aboriginal government. This is particularly the case when, according to the

federal government's policy in this regard, negotiations must commence from a perspective that Aboriginal self-governments must be compatible with Canadian government institutions and, must conform to the *Charter of Rights and Freedoms* (Part 1 of the *Constitution Act, 1982*, being schedule B of the *Canada Act, 1982* [U.K.], c.11.). Some of the concerns which Aboriginal people have include the fact that in many cases they see their governing institutions as being radically different from those currently entrenched by the non-Aboriginal governments of Canada and the fact that the application of certain provisions of the *Charter* are viewed by Indian people as being contrary to (and indeed detrimental to) Indian peoples' objective of cultural survival. I will return to this point later. First Nations must of course (and indeed do) measure this approach against the long term objectives of Constitutional entrenchment.

At the same time First Nations are compelled to give necessary and serious consideration to the pressing need to immediately address the "third world" conditions many of them try to survive within. These conditions include such items as the fact that 29% of all housing on Indian Reserves is overcrowded as compared to 2% for the rest of Canada, and 38% of all dwellings are without central heating as compared to 5% for the rest of the country. And, while Status Indian people represent only about 1.6% of the total population of Canada they represent an unemployment rate of approximately 16% at any given time when the rest of Canada is around 7%. As of 1988, the life expectancy for Indians was about 8 years less than the Canadian average. Death by suicide was 2.5 times more common, death from injury or poisoning four times more common. Infant mortality was 1.7 times the national rate (see generally, *Unfinished Business: An Agenda for all Canadians in the 1990's*, The House of Commons Standing Committee on Aboriginal Affairs, Second Report, March 1990). For many the choice is made simply because there is no other choice other than to continue the futile task of attempting to confront the problems by relying on the confining and limited provisions of the *Indian Act*.

Entrenching the right to self-government for Aboriginal people in the Constitution would give them supreme authority over their territory and inhabitants, save and except as it may otherwise be subject to other provisions of the *Constitution Act, 1982*. One would presume that laws passed by Aboriginal governments would be subject (at least to some extent) to judicial scrutiny pursuant to the *Charter of Rights and Freedoms* save and except as Section 25 of the *Constitution Act, 1982* might be applicable. Section 25 provides that, in certain circumstances, Aboriginal rights and freedoms will not be affected by the *Charter*. Additionally, the application of the *Charter* would be determined by the actual language of

the entrenching provisions. Aboriginal self-government, together with Aboriginal territory, members and inhabitants, would represent a separate federated unit of Canada and be recognized along with Canada's other governments, each having responsibility for representing different peoples' rights and Status. Aboriginal governments would simply share with the other federated governments of Canada in the exercise of the overall jurisdiction of the country.

Nations which consist of several governing components representing different groups, all sharing in overall jurisdictional responsibility, are neither unheard of nor novel. Nor does such a concept necessarily spell disaster as some commentators would have us believe. The United States, within its jurisdictional make-up, has fifty states, as well as the District of Columbia, the commonwealth of Puerto Rico, various protectorates, and more significantly, Indian tribes which are recognized by the United States government (including the judiciary) as having "domestic dependent nation" Status.⁶ Indeed, within Canada itself people living in different provinces are treated differently by their respective provincial governments, partly as a result of the fact that there are 10 provincial legislatures and two territorial governments having jurisdictional variations arising from exemptions and opt-out clauses originating at the time of Confederation. Finally, as we in Canada have witnessed since 1982, different laws can apply and different treatment of inhabitants will also occur from province to province through the application of the "notwithstanding clause" found in section 33 of the *Constitution Act, 1982*. This section allows Parliament or a provincial legislature to declare that a law which it is passing, which otherwise offends the *Charter of Rights and Freedoms*, shall operate in spite of the *Charter* provisions.

If Canada is to be a nation which has as its foundation the protection of a multicultural society and the preservation of minority rights, then drastic changes are needed. And, if Canada intends to protect and preserve the inherent rights of the first inhabitants of this country, as it is legally and morally bound to do, then a dramatic shift in thinking coincident with action will be required. It may very well be the case (and I submit that it is) that federalism, as we have been attempting it to date in Canada, no longer works. In particular, all the evidence indicates that it especially does not work for Aboriginal people. If Section 35 of the *Constitution Act, 1982* truly does recognize the existence of special and different rights for Aboriginal people, then the notion that every citizen in Canada should have precisely the same rights and Status is an erroneous one. And, as the Supreme Court of Canada has determined that Section 35 does in fact recognize the continuing existence of such rights (for example in the *Sparrow* case), it is clear that it is time for this country's governments to catch up with the law

and properly allow Aboriginal people the Constitutionally protected means to govern themselves.

While I do not pretend to know exactly what actual form or forms Indian self-government will take when it ultimately occurs, I do believe I know upon what principles it will be based. To borrow from, and slightly paraphrase, Will Kymlicka:⁷

It (will probably) be non-racial and allow for the assimilation of people of other races through marriage and socialization. It (will probably be) non-coercive, allowing people to leave their community if they desire. It (will probably) respect freedom of conscience, allowing each person the right to express those aspects of their heritage that they see worthy of allegiance and to question those aspects that they do not. And it (will undoubtedly) be minimally restrictive of the rights of non-members, limiting voting or mobility rights only where necessary to preserve the community from engulfment (Kymlicka, 1981).

Indian self-government is essential for the very survival of Indian people. For centuries by the sheer use of force, and by Canadian law for the last 140 years, non-Indians have had total control over the lives of Indian people.⁸ Of the hundreds of Aboriginal languages spoken when settlers first arrived, it has been estimated that only 53 remain and some of those are presently threatened by extinction. In this bountiful and rich country, its first inhabitants are, and have long been, the poorest of the poor, living in communities which would rival the conditions of any third world country, as noted above. They are at the bottom rung of virtually every socio-economic indicator in Canada. The Canadian Human Rights Commission in its 1990 annual report describes the situation as:

Our 'Third World', as these native communities have come to be known, is a reminder of the price that aboriginal peoples continue to pay for a historic lack of imagination and for policies that for generations fostered economic dependence rather than autonomy and self-reliance (1990:16).

To survive, Aboriginal people require the ability to treat their communities and territory differently than from others, and they require the ability to opt out of laws and policies which are demonstrably threatening to their culture. Will Kymlicka uses the examples of Quebec and Aboriginal people, when dealing with cultural protection as it may be threatened through mobility rights and immigration, to demonstrate this point. In the case of Quebec, control is necessary because of an on-going need to increase or maintain a certain level of immigration into the province, while on the other hand

Aboriginal people may need to restrict immigration and mobility into Aboriginal territory. It is this capacity to deal with threats to cultural survival, in a manner that may be drastically different from that required by other elements of Canadian society, which is needed to ensure the survival of Aboriginal cultures.

Once again The Canadian Human Rights Commission in its 1989 annual report may have summed it up best when it stated:

If there is any single issue on which Canada cannot hold its head high in the international community, any single area in which we can be accused of falling down on our obligations, it is in this area of Aboriginal relations.

The possibility of a new deal is there, even if its exact nature is not completely clear. What is clear is that it must be based on a commitment by non-Aboriginal Canadians to meaningful political and cultural autonomy and much greater economic self-sufficiency for native Canadians (1989:15)

Non-Indian governments have been a dismal failure, in every sense of the word, at protecting the rights and aspirations of Aboriginal people. And, while Aboriginal people may not achieve any greater results through self-government, they can surely do no worse.

Cases

Cherokee Nation v. State of Georgia, United States Supreme Court [1831] 5 Peters 1- 80.

Delgamuukw v. B. C., British Columbia Supreme Court [1991] 5 Canadian Native Law Reporter (Special Edition) 1-380.

R. v. Hare and Debassige, Ontario Court of Appeal [1985] 3 Canadian Native Law Reporter 139-156.

Simon v. The Queen, Supreme Court of Canada [1986] 1 Canadian Native Law Reporter 153-179.

R. v. Sioui, Supreme Court of Canada [1990] 3 Canadian Native Law Reporter 127-159.

R. v. Sparrow, Supreme Court of Canada [1990] 3 Canadian Native Law Reporter 160-188.

R. v. Syliboy, Nova Scotia County Court [1929] 1 Dominion Law Reports 307- 315.

Notes

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1. The term "Indian" when used herein refers to those Aboriginal people defined as "Indians" in the *Indian Act*, R.S.C. 1985, c. 1-5 and commonly referred to as "Status Indians". The term "Aboriginal" when used herein refers to all Aboriginal people including Indians.
2. See also Sections 25 and 37 of the *Constitution Act, 1982*, which are also sections specific to Aboriginal people.
3. See also *R. v. Sioui*.
4. The first *Indian Act* was enacted in 1876 and remained substantially unchanged until 1951 when comprehensive amendments were finally undertaken. In 1985 several significant amendments were again made including removal of certain sections dealing with loss of Indian Status, perhaps the most controversial being the sections that provided that an Indian woman lost her Indian Status upon marriage to a non-Indian man, while on the other hand, an Indian man not only retained his Status upon marriage, but his non-Indian spouse was granted Indian Status.
5. The term "First Nation" as used throughout this paper is synonymous with the term "Band" as defined by Section 2(1) of the *Indian Act*. I am however, fully cognizant of the fact that these two terms are not always ascribed the same definition.
6. "Domestic dependent nations" is a term generally attributed to Chief Justice Marshall of the U.S. Supreme Court in the early 1800s in what are generally referred to as the "Cherokee Nation cases". Domestic dependent nations have been described as autonomous entities with significant powers of self-government, and weakened communities needing the protection of the United States. Thus, inherent in the domestic dependent nation concept are two contradictory principles: Indian sovereignty and Indian dependency. In the U.S. Supreme Court case of *Cherokee Nation v. State of Georgia*, (1831) 5 Peters 1, Chief Justice Marshall describes it at page 30 as: "The acts of our government plainly recognize the Cherokee Nation as a state and the courts are bound by those acts." And then, at page 31, he goes on to say "(t)hey may more correctly, perhaps be denominated domestic dependent nations ... Meanwhile they are in a state of pupillage. Their relationship to the United States resembles that of a ward to his guardian" (see also

- Russell [1991]).
7. Will Kymlicka is the author of *Liberalism, Community and Culture*.
 8. For a collection of articles and essays which outline and illustrate the magnitude of such control and the Aboriginal efforts to overcome it, see Richardson, 1989.

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