THE ARTICULATION OF NATIVE RIGHTS IN CANADIAN LAW

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INTRODUCTION

The natural focus of any discussion in common law jurisdictions on the contribution of the social sciences to the reform of procedural law is the courts. In the common law tradition it is in the context of litigation presided over by an independent judiciary that a framework for the articulation and enforcement of legal rights has developed. In the twentieth century there has been, however, a great elaboration of the forums which are used in the development, interpretation and application of legal rights. In Canada the jurisdiction of the courts has been supplemented, and in some cases all but replaced, by administrative boards dealing with such vitally important matters as labour relations, workers’ compensation and social welfare entitlements. Also, both federal and provincial governments have made increasing use of commissions of inquiry to investigate and report on a wide range of issues affecting legal rights. These commissions are often headed by Superior Court judges, lending the imprimatur of an independent judiciary to the commissions’ work. The enabling legislation under which these commissions of inquiry are established gives the commissioners considerable discretion in how they conduct the hearings and otherwise gather evidence. Commissioners are authorized to issue subpoenae to compel

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Because of the wide discretion given to the commissioners with respect to the conduct of hearings, commissions of inquiry are capable of receiving evidence which might not be admissible in a court of law operating within the confines of the technical rules of evidence. Also, because the terms of reference of commissions of inquiry may be much wider than the very narrow focus which typically characterizes a cause of action before the courts, a commission may hear evidence which might well be deemed irrelevant in a court case dealing with the same subject matter. Commissions of inquiry typically are concerned with developing "the big picture" while courts focus the issues before them as narrowly as possible and limit consideration of the law and the evidence to those matters essential to a resolution of the dispute. In seeking to develop "the big picture" commissions of inquiry have introduced new procedural mechanisms to ensure that there is a full flow of information coming before the inquiry, procedures which a court of law would not countenance.

In this article I will be reviewing the work of a major commission of inquiry established by the Federal Government of Canada in 1974 to consider the environmental, social and economic impact of the then proposed Mackenzie Valley natural gas pipeline on the land and people in the Yukon and the Northwest Territories—Canada's northland. This commission of inquiry, which is commonly referred to as the Mackenzie Valley Pipeline Inquiry, was presided over by Mr. Justice Thomas Berger, a judge of the Supreme Court of British Columbia. One of the principal issues which quickly emerged in the work of the Inquiry was that of the legal and political rights of the aboriginal peoples of the North. One of the most significant contributions of the Inquiry was the establishment of new procedures which permitted a clear and comprehensive articulation by the aboriginal peoples of how they understood their rights. These procedures were not developed on an a priori basis but were derived from the \textit{volksgeist} and law ways of the aboriginal people. These procedures in turn resulted in the substance of abo-
original rights or, as they are generally termed, "native rights", being
given a radical content; radical in the sense that the rights as articu-
lated by native peoples, while much broader than those which have
been recognized by Canadian courts, reflected the original principles
which had governed the relationships between aboriginal peoples
and the European colonialists who came amongst them some 400
years ago. An analysis of the Mackenzie Valley Pipeline Inquiry in
the context of the articulation of native rights provides, therefore,
an opportunity not only to assess within the sociology of law the
important role of commissions of inquiry in developing new pro-
cedural forums but also to better understand the close relationship
between procedural and substantive rights as revealed in the his-
torical evolution of native rights in Canada.

PART I: THE EVOLUTION OF NATIVE RIGHTS
IN CANADA

A. NATIVE RIGHTS IN THE COLONIAL PERIOD, 1600-1763: THE
PRINCIPLE OF CONSENT AS THE CONNECTING FACTOR BETWEEN
PROCEDURAL AND SUBSTANTIVE LAW

The connection between procedural and substantive law is well
illustrated in the early history of native rights in what is now North
America. As one English commentator has observed:

It is never quite clear whether the rules of law were sanctioned by
an appropriate procedure or whether the rules were developed to
explain existing procedure; the truth no doubt in many cases was
that law and procedure grew together.²

The procedures within which the rights of the Indian tribes of
North America were asserted and recognized in colonial law were
significantly related to the substance of those rights. The principle
of consent was the connecting factor between substance and pro-
cedure. It was through the process of consensual treaty-making, in
which Indian tribes were recognized as independent nations, that
the terms of European settlement and the tribes' continued occupa-
tion of their hunting territories were mutually agreed. The basic
principle which emerged was that, save for lands that were un-

² A. W. B. Simpson, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW
(1961), at 43. See also the much quoted statement by Sir Henry Maine,
"Substantive Law has at first the look of being gradually secreted in the
intestacies of procedure"; Sir H. S. Maine, DISSERTATIONS ON EARLY LAW
AND CUSTOM (1856), at 386.
occupied or which were acquired by conquest, the consent of the Indian tribes was a prerequisite to the occupation of lands used by the tribes. Similarly, the tribes' right to self-government would not be interfered with save by their express consent. That the principle of consent lay at the heart both of the substance of Indian rights and of the procedures by which such rights were acquired by the European settlers is clearly expressed in some of the later Charters of the English colonies in North America. The Rhode Island Charter of 1663 indicates that the petitioners, upon arriving in America, settled amidst certain Indians, "who, are the most potent princes and people of that country. The petitioners are now seized and possessed, by purchase and consent of the said natives, to their full content."

The evolution of the principle of consent in colonial law is well illustrated in the treaties which were negotiated in the seventeenth and eighteenth centuries on the eastern seaboard of what is now the United States. These treaties show the acceptance by certain of the Indian tribes of a formal protectorate relationship with the English Crown, reserving to the tribes important powers of tribal sovereignty and rights to sell or retain all or part of their traditional lands. The treaties and compacts concluded with the Iroquois Confederacy in the eighteenth century most clearly articulate the nature of native rights in colonial law. The westward expansion of settlement among the British colonies of New England during the eighteenth century and the violation of Indian territorial integrity became a major issue for the colonial authorities. By mid-century, the group of the Six Nations of the Iroquois Confederacy, because of its military strength and political organization, was viewed as the lynch-pin in the security of the British colonies. Their military support, to either the French in Canada or to the British colonies, would threaten the stability, if not the existence, of the other colonial empires. The onset of the Seven Years' War with France in 1754 heightened British awareness of the strategic role which the Indian nations played in relation to the two European combatants.

Recent research into the role of the Indian nations during the

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4 For an excellent review and analysis of these documents see B. Slattery, The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of Their Territories (D. Phil. thesis, Oxford University, 1979, reprinted by the University of Saskatchewan Native Law Centre, 1979).
Seven Years’ War between England and France not only documents the crucial role that the Indian nations played in the major campaigns of the war but also shows that negotiations with the Indians proceeded upon the assumption that they were independent nations capable of pursuing their own foreign policies. Sir William Johnson, the representative of the British Crown, charged with the primary responsibility of engaging in diplomatic negotiations with the Indian nations, became convinced that the Indian alliance could only be assured by incorporating Indian policy into “a solemn public treaty to agree upon clear and fixed boundaries between our settlements and their hunting grounds so that each party may know their own and be a mutual protection to each other of their respective possessions.” In 1758, at Easton in Pennsylvania, a conference was convened which attracted one of the largest and most representative cross-sections of Indian delegates ever to assemble in one council. Spokesmen for each of the Six Nations, the Delawares of the Susquehanna and several other tribes of northern and western Pennsylvania, met with representatives of the colonial and British authorities to hammer out the terms of the continuing alliance between the tribes and the British. Many of the terms of this treaty, reached by mutual accord, were later to be restated in the famous Royal Proclamation of 1763 which has been described as the Magna Carta of native rights in North America.

In 1763, at the conclusion of the Seven Years’ War, Britain acquired from the French, through the Treaty of Paris, the French colony of Canada as well as the islands of Cape Breton and St. John (Prince Edward Island). Following the signing of the Treaty of Paris, the British Government sought to address the issues arising from the peace, in particular the organization of the newly acquired territories and the establishment of a consolidated policy with the Indian nations. Both of these objectives were embodied in the Royal Proclamation of 1763. The Proclamation is unilateral in form; however, in its provisions dealing with Indian policy, it is a restatement of the principles which had been previously embodied in compacts with the various Indian nations. Thus the Proclamation acknowledges the protectorate obligation of the Crown towards the Indian nations and recognizes that lands possessed by the Indian nations anywhere in British North America are reserved to them unless and until ceded to the Crown. This terri-

5 J. Stagg, Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 1763 (1981).
torial integrity is protected by restrictions on grants, settlements and purchases. The Proclamation also closes large parts of North America to settlement, reserving them for the use of the Indian nations as their hunting territories, subject to the right of the Crown to acquire the land with Indian consent. These tracts are designated as free trade zones. The recital to the Proclamation states:

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the 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...6

It is important to understand the comprehensiveness of this recital. It provides the clearest recognition that Indian nations have rights to territorial integrity in all those areas of North America in which they retain possession of their traditional lands, and where they have not entered into treaties of cession with the Crown for the consensual acquisition of those lands by the Crown.

The Royal Proclamation also formalized the procedure for the acquisition of Indian lands required for future settlement. The principle of consent is firmly entrenched again in this procedure, which required that any purchase be made in the name of the Crown at a public meeting or assembly held by the Governor or Commander-in-Chief of the colony.

When the English Lords of Trade were asked to prepare the Royal Proclamation of 1763 they were also requested to prepare a "general plan to regulate the conduct of free trade with the Indians of North America." A "Plan For The Future Management of Indian affairs" was consequently transmitted to the two Superintendents of Indian Affairs. The forty-second clause of the plan provides:

That proper measures be taken with the consent and concurrence of the Indians to ascertain and define the precise and exact boundary and limits of the lands which it may be proper to reserve to them and where no settlement whatsoever shall be allowed.7

This principle was implemented by further communication of the


7 Id., at 140 (emphasis added).
Lords of Trade in a letter to the King of England on the 7th of March, 1768. They reported:

In a plan for the management of the Indian affairs prepared by this Board in 1764, the fixing a boundary between the settlements of Your Majesty's subjects and the Indian country was proposed to be established by compact with the Indians, as essentially necessary to the gaining of their goodwill and affection and to preserving the tranquility of the colonies.\(^8\)

The Lords of Trade communication provides the clearest evidence that the implementation of the Royal Proclamation was conceived as a compact between the Indian nations and the Crown.

B. THE TREATY-MAKING PROCESS IN THE NINETEENTH CENTURY: THE DISSONANCE BETWEEN THE INDIAN AND EURO-CANADIAN LEGAL TRADITIONS

It is the procedure formalized by the Royal Proclamation of 1763 which has provided the constitutional basis for the hundreds of land cession treaties which have since been negotiated with the Indian nations across much of Canada. Up until 1850, the treaties covered relatively small areas and the terms of the treaty were limited in scope. In the period after 1850, as settlement moved westward, there was a dramatic increase in geographical scale. Moreover, post-1850 treaties contain provisions relating to the establishment of Indian reserves, Indian education and medical services, the payment of annuities and the supply of agricultural and farm implements as well as ammunition and twine for use in hunting and fishing. The treaties also guarantee to the Indians their continuing right to hunt, fish and trap.

Recent research undertaken by the Indian nations themselves, with the help of social scientists, has revealed some of the continuities between the treaty negotiations involving the Indian nations of western Canada in the late nineteenth century and the negotiations involving the Iroquois Confederacy in the previous century in the eastern colonies. As with the treaties negotiated in the eighteenth century with the Iroquois, the post-confederation treaties negotiated by the Indian nations of western Canada were viewed by them as establishing compacts to deal with the issues of territorial and political integrity within the framework of a protectorate relationship with the Crown. However, what had changed in the intervening century was the balance of power between the Indian nations and

\(^8\) Id., at 142.
the colonial authorities, and the condition of the Indians as the result of the encroachment of European civilization. More specifically, the Indians were facing increasing white settlement, devastating epidemics, the influx of whisky traders and the disappearance of the buffalo, the staple of the tribes' economy. The protectorate role embodied in the treaties was accordingly not confined, in the Indians' eyes, to preserving their territorial and political integrity within the lands which they were not prepared to cede, but also extended to the protection of the traditional Indian economy and assistance in the development of new forms of Indian economic self-sufficiency.9

The Canadian Government had a different view of what the treaties were intended to accomplish. They did not regard them as anything like a social contract in which different ways of life were to be accommodated within mutually acceptable limits. The government regarded the treaties primarily as the surrender of Indian rights to their land so that settlement and development could proceed. The payment of annuities, the provision of agricultural implements, the offers of medical and educational services and the establishment of reserves were conceived of in part as compensation but primarily as the means of change. The government's expectation was that a backward people would, in time, abandon their semi-nomadic ways and, with the benefit of the white man's religion, education and agriculture, take their place in the mainstream of the economic and political life of Canada.

As the result of the recent research conducted by Indian nations it has now become clear that the dissonance between the Indian understanding of the treaties and the government's understanding, as that is reflected in the text of the treaties, is directly related to the different legal conceptions about how agreements are negotiated, recorded and interpreted. For the Indian negotiators, who brought to the negotiations an oral tradition, the promises and discussions during the negotiations formed the centrepiece of the agreements. For the negotiators on the Canadian Government's side, it was the written text of the treaty which determined its scope and meaning.

It has also become clear from the Indian nations' research that basic Indian values relating to the sharing of resources and distinctive concepts about the nature of land informed their view of the treaty negotiations. According to the text of Treaty #6, which was

negotiated in 1876, the Indians, in the language of the treaty, "hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits." A more comprehensive surrender of rights would be difficult to draft. Compare this wording in the text of the treaty with the statement made by Chief Crowfoot during the treaty negotiations:

Our land is more valuable than your money. It will last forever. It will not perish as long as the sun shines and the waters flow, and through all the years it will give life to men and beasts.

We cannot sell the lives of men and animals and therefore, we cannot sell the land. It was put here by the Great Spirit and we cannot sell it, because it does not really belong to us. You can count your money and burn it with the nod of a buffalo's head, but only the Great Spirit can count the grains of sand and the blades of grass on these plains. As a present to you, we will give you anything we have that you can take with you, but the land we cannot give.¹⁰

The divergence between the text of the treaty and the Indians' understanding of the negotiations is illustrated in other areas. The treaty commissioners negotiated with the chiefs of the tribes. The terms of the treaties provide for annual payments to each member of the tribe, with larger payments for the chiefs. The chiefs also were provided with medals. To the Indians, in the context of negotiations in which their tribal governments negotiated with the Government of the Queen, these provisions affirmed the authority of their tribal governments and provided a diplomatic protocol for the annual review of the treaty agreements. The text of the treaty provides that each tribe shall be provided with a specific number of agricultural resources such as ploughs, scythes, oxen, cows and other farming animals. To the Indian negotiators, this was understood in terms of the protectorate relationship as a clause of economic aid, a prototype for the treaties of economic assistance which are now regularly entered into by the richer western countries with their allies in the Third World. The Indian negotiators understood these clauses to be a sharing by the white man of his forms of economic development to assist the Indian nations as they experienced increasing hardship in maintaining their traditional economies in the face of increased settlement.¹¹

¹⁰ *Id.*, at 12.
¹¹ *Id.*, ch. 5.
In one area the divergence between the text of the treaty and the oral negotiations has been specifically acknowledged by the treaty commissioners who negotiated on behalf of the Canadian Government. The Indian nations were insistent throughout the treaty negotiations that their traditional economy based upon hunting, fishing and trapping be protected. Recent research has shown that some of the treaty negotiations would have broken down had not the government negotiators given guarantees that hunting, fishing and trapping rights would not be curtailed. However, the actual text of the treaties in relation to these rights is qualified. In Treaty #8, for example, the clause reads,

And Her Majesty the Queen hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered... subject to such regulations as may from time to time be made by the Government of the country... and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. (emphasis added)

The treaty commissioners, in their report to the Government of Canada, make specific reference to the oral negotiations regarding the hunting, fishing and trapping rights clause:

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians... but over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and furbearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it... We assured them that any treaty would not lead to any forced interference with their mode of life... The Indians were generally adverse to being placed on reserves — it would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves.

In the eighteenth century, in the context of English and French colonial rivalry and Indian military strength, the Indian nations in

13 Treaty No. 8, 1899, Id., at 71-72.
14 Report of Treaty Commissioners, Treaty No. 8, at 84-85 (emphasis added).
the eastern parts of North America had the power to compel the colonial governments with whom they negotiated treaties to respect their understanding of these treaty negotiations. The Indians in the west of Canada, one hundred years later, lacked this power to compel. Government Indian policy proceeded along lines which breached the Indians' understanding of their treaties: the role of traditional Indian governments was replaced by the authority of Indian agents, traditional religious ceremonies were prohibited and punished as offences, the traditional Indian economies were undermined by the encroachment of agriculture development and game laws, and the promised agricultural economic assistance was not forthcoming. In the years since the signing of these treaties, when Indian nations have gone to the courts to enforce their rights under the treaties, the Canadian courts have, with rare exceptions, looked to the literal text of the treaties and have disregarded the oral promises or the Indians' understanding of the negotiations.

The process of judicial revision of treaty rights as they were understood by native peoples is well illustrated by cases interpreting the relationship between federal and provincial game laws and Indian hunting. Notwithstanding the solemn assurances given by the treaty commissioners that Indian hunting would not be interfered with, the Canadian Government, in the years following the signing of Treaty #8, passed legislation restricting native hunting and trapping. In 1917, closed seasons were established in the Northwest Territories and Alberta on moose, cariboo and other animals essential to the economy of the Dene. In 1918, the Migratory Birds Convention Act further restricted their hunting. The violation of the treaty promises by this legislation has been recognized by Canadian courts which, contrary to the Indians' conception of the binding character of the treaties, have consistently held that treaty promises may, as a matter of Canadian law, be abrogated by federal legislation without prior Indian consent. Canadian courts have thus sanctioned the federal government's unilateral alteration of treaty promises.\(^{15}\)

C. NATIVE RIGHTS AS ARTICULATED BY THE CANADIAN COURTS: THE PROCESS OF JUDICIAL REVISION

The Canadian courts have not only failed to adequately reflect the Indians' understanding of the treaties but have also engaged in a process of judicial revision of the original principles of native rights. Those principles developed in the treaty relationships entered into in the seventeenth and eighteenth centuries received their first judicial interpretation in decisions of the United States Supreme Court in a series of judgments in the 1820s and 1830s, culminating in the landmark decision of Chief Justice Marshall in Worcester v. Georgia (1832).

This case reviewed the colonial law antecedents of native rights in North America and affirmed that the Indian tribes had legal rights to their lands which could only be acquired in the name of the Crown by consensual cession by the Indians. Parallel to this principle of consent to the cession of lands was the recognition that the Indians retained their rights to self-government as nations, notwithstanding their assumption of a protectorate relationship with the colonial governments in North America.

Canadian courts, while purporting to rely upon the Marshall decision, have departed from these principles in significant ways. The Canadian courts have given no recognition to the principle of Indian self-government as a part of native rights. On the issue of native rights to lands and resources traditionally used and occupied by them, the Canadian courts have rejected the principle of consent as the basis for the acquisition of these lands and resources.

In the leading case of St. Catherine Milling and Lumber Company v. The Queen (1889), the Privy Council, while affirming the existence of the concept of aboriginal or native title to the land based on the Royal Proclamation of 1763, stated that "the tenure of the Indians was a personal and usufructory right, dependent upon the goodwill of the sovereign." According to the interpretation which has been given to this passage in subsequent cases, native rights to lands and resources are not in fact rights but rather privileges which exist at the sufferance of the Crown. It is important to note that the St. Catherine Milling case, which until 1973 provided

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17 (1889) 14 A.C. 46 (J.C.P.C.).
18 Id., at 54.
the judicial centrepiece for the Canadian concept of native rights, involved a dispute between federal and provincial governments arising from the ownership of lands which had been ceded by the Salteaux Indians in a treaty; there was, however, no Indian representation before the courts.

Subsequent to the St. Catherine Milling decision, in the wake of government policy designed to assimilate the Indians, the Canadian law of native rights went into an almost total eclipse. For example, in the Province of British Columbia, where with a few exceptions no treaties have ever been negotiated, the Indian nations found themselves faced with land policies of the Provincial Government which denied any entitlement of the Indians to their traditional lands, the policy of the Federal Government which denied them the right to maintain their traditional forms of government, and the policies of missionaries which, assisted by penal legislation enacted by the Federal Government, denied the Indians the right to maintain their most important religious ceremony, the Potlatch. The Potlatch, which is regarded by anthropologists as the hallmark of Northwest Coast Indian distinctiveness, combining elements of religious, economic and social organization, became an outlawed institution for the participation in which (for example, by dancing at the ceremony) Indian people were imprisoned in the 1920s. As part of this government policy of suppression and repression of the Indians' way of life, legislation was introduced in 1926, following a Federal Parliamentary Committee Report which found that the Indians of British Columbia had no rights to their land, which made it a criminal offence to raise funds for the purpose of pressing any Indian claims.\(^{19}\)

Even in the face of such draconian legislation Indian leaders never gave up their struggle to have their rights recognized. But from the 1920s until the early 1970s the issue of native rights ceased to be of major concern to Canadian politicians and ceased to exist in the minds of the legal profession. As late as 1969 a Federal Government policy paper on the issue of aboriginal rights' claims stated "These are so general and undefined that it is not realistic to think

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Aboriginal rights, this really means saying "We were here before you. You came and you took the land from us and perhaps you cheated us by giving us some worthless things in return for vast expanses of land and we want to reopen this question. We want you to preserve our aboriginal rights and to restore them to us." And our answer — it may not be the right one and may not be one which is accepted . . . our answer is 'No'.

In the same year as the Prime Minister so categorically denied the legal viability of aboriginal rights, a case was initiated by the Nishga Indian Nation in British Columbia (the Calder case) which was to cause the federal government to acknowledge the historical and legal reality of aboriginal rights to land. The Nishgas, who had never signed a treaty of cession with either the colonial or Canadian governments, sought a declaration that their aboriginal title to the Nass Valley, their homeland, had never been extinguished. The Calder case went to the Supreme Court of Canada which, in 1973, split on this issue. Three judges held that the aboriginal title of the Nishgas had been extinguished by colonial land legislation. Three other judges held that the Nishga rights had not been extinguished. A seventh judge held against the Nishgas on the purely procedural point that they needed the fiat or permission of the government to bring their case. While the Calder case is viewed as a major victory for native people in restoring to the legal and political lexicon the concept of aboriginal rights — all six judges who ruled on the merits acknowledged that such a concept existed in law — it is important to understand the limitations of the case from the perspective of the original principle of consent. The three judges who ruled that the Nishga aboriginal title had not been extinguished did so on the basis that an aboriginal title to land, once proven to exist by evidence of exclusive use and occupation by an Indian nation, could only be extinguished by specific legislation which showed a clear and plain intention to end the Indian rights. In the opinion of these judges there was no such legislation in British Columbia. Those rights were never extinguished.

21 Reprinted in NATIVE RIGHTS IN CANADA, supra, note 15, at 331.
judges who ruled in favour of the Nishgas did not, however, affirm the principle that Nishga lands could only be taken with their consent. The judgment in favour of the Nishgas conceives of their claims in this way:

They claim the right to remain in possession themselves and to enjoy the fruits of that possession. They do not deny the right of the Crown to dispossess them but say the Crown has not done so.\textsuperscript{23}

This statement is of great importance. It is quite clear that the Nishga Nation, as a matter of fact, does dispute the right of Canadian federal or provincial governments to dispossess them of their homeland. They have always asserted, and continue to assert, that their consent is a prerequisite to any changes in their territorial rights within their traditional homeland. As a matter of law, asserting their claims in court within the context of the Canadian jurisprudence on native rights, they felt compelled to acknowledge that their rights could be taken without their consent. The dissonance between the Indians' understanding of their treaty rights and the courts' interpretation of those rights is thus closely paralleled by the dissonance in the non-treaty areas between native and judicial articulation of aboriginal rights.

PART II: THE MACKENZIE VALLEY PIPELINE INQUIRY: THE DEVELOPMENT OF AN ALTERNATIVE FORUM FOR THE ARTICULATION OF NATIVE RIGHTS

The lawyer who represented the Nishga Nation in the Calder case was Thomas Berger. Shortly after his final argument in the case, he was appointed to the Supreme Court of British Columbia. Several years later, in 1974, he was asked by the Government of Canada to act as the Commissioner of the Mackenzie Valley Pipeline Inquiry. His mandate was to review the environmental, social and economic impact of the largest privately funded industrial project ever proposed in the western world, designed to bring natural gas from the north slope of Alaska across the Yukon Territory and down the Mackenzie Valley to markets in the United States. It was heralded by government and industry as the megaproject of the century, one which would show the measure of Canadian-U.S. economic cooperation and one which would pay rich economic dividends to the

\textsuperscript{23} Id., at 174.
economies of Canada and the United States. It was, however, a project which was viewed with the greatest alarm by the native people of the Canadian North who saw the project in apocolyptic terms as the culmination of a process of cultural genocide.

Mr. Justice Berger, in carrying out his mandate, held a series of preliminary hearings in which he sought advice on, among other things, how he should go about conducting hearings in the North. Representations were made to the Inquiry by organizations representing the Dene (the Indians of the Northwest Territories refer to themselves as the Dene, meaning “the people”), the Métis (the descendants of the interrelationship of Indians and whites) and the Inuit (or Eskimos). These groups proposed that the Inquiry hold hearings in the communities in which the native people lived. Furthermore they requested that these hearings not be held for at least one year to permit the native organizations to provide information to the communities concerning the proposed pipeline development and in order to prepare fully for the hearings.

At these preliminary hearings the issue of whether native rights were within the terms of reference of the Inquiry was raised by the pipeline companies who argued that native rights was a matter to be dealt with between the native people themselves and the Federal Government of Canada and that the Inquiry was limited to the assessment of environmental, social and economic impact with a view to recommending terms and conditions to be imposed upon the pipeline companies. Terms and conditions relating to native rights, they argued, was therefore beyond the jurisdiction of the Inquiry. Mr. Justice Berger rejected this argument and, in a series of preliminary rulings, further defined his terms of reference and established a structure for the Inquiry’s hearings.

This structure distinguished two types of hearings. The one kind was formal hearings to be held in the main centre of the Northwest Territories, Yellowknife, in which the evidence of experts — engineers, biologists, economists, sociologists, anthropologists — would be heard, subject to full cross-examination by lawyers. The second kind was community hearings which would be held in the towns and villages of the North, which would be subject to special procedural rules to be worked out by a committee consisting of Commission staff and all participants in the Inquiry. It was my task as Special Counsel to Mr. Justice Berger to co-ordinate the work of this committee. Mr. Justice Berger also ruled that the hearings would not begin for a period of nine months in order to permit all participants to prepare fully for the hearings.
At one of the preliminary hearings George Kodakin, a Dene chief from Fort Franklin, a native community of some 400 people on the shore of Great Bear Lake, told Mr. Justice Berger that if he really wanted to understand how native people felt about the proposed pipeline he should come and live for a summer in his village. The Judge, however, was committed to visiting as many places as possible in the Canadian North prior to the hearings to familiarize himself with the rich complexity of the land and all its people. It was agreed, however, by the native organizations, that in my capacity as Special Counsel with primary responsibility for the organization of the community hearings, my family and I would move to the North and spend as much time as possible living in several villages, including Fort Franklin, in order to better understand how existing procedures for holding hearings should be modified to enable the native people to make a full contribution to the Inquiry.

In the course of the next nine months, from a base in two of the native villages, I travelled with Mr. Justice Berger to many of the northern communities to discuss the issue of community hearings. While in Fort Franklin I sought the advice of people within the village: the elected chief and council, the elders and the young people. I went out on a number of occasions with hunting, fishing and trapping parties and visited groups who had established hunting, fishing and trapping camps in the bush. During this time I also consulted with native field workers, who had been hired by the native organizations with the assistance of monies provided by the Government of Canada on the specific recommendation of the Commission, whose task it was to help people in the communities prepare for the hearings. I also observed how meetings were held within the village, both amongst the people themselves on such issues as organizing the community caribou hunt and those which the chief and council regularly had with government officials. There was a stark contrast between the two kinds of meetings. The meetings with government officials typically dealt with agendas predetermined by the government upon which the chief and council were being “consulted”. Typically, government officials would fly into Fort Franklin (the only other access was by boat) and, while their planes waited on the runway or lake, the meeting would be hurriedly conducted. The meeting would be attended only by the chief and a few councillors and was held in a small room in the village office. On several occasions, when the temperature was forty degrees below zero, the engines of the waiting plane kept running and pro-
vided a noisy accompaniment to the consultation process being held in the office.

By contrast, meetings held by the Dene themselves dealt with agendas of their own making and were carried out in conformity with traditional patterns of decision-making. I quickly found out that the Dene not only have a rich oral tradition, which naturally develops oratory skills, but also have an entrenched pattern of decision-making which operates by consensus. Issues are discussed by heads of families and others who are respected for their skills and knowledge and eventually a position or decision will emerge to which everyone can subscribe. It is a participatory democracy which puts the democratic traditions of most western societies to shame. Issues are not necessarily settled at a single sitting. There is much informal discussion within the community to ensure that all members of the community are involved. The formal meetings are not held in the village office but in the large log community hall which is also used for traditional dances and other community events. A meeting on an important issue will often be preceded by a community feast or followed by a community dance.

It was clear from my discussions with Chief Kodakin and other people in Fort Franklin that when they heard that the hearings would be held in communities to enable them to speak on the impact of the Mackenzie Valley Pipeline they assumed that these meetings would follow the government model. Their expectation was that Mr. Justice Berger would fly in with his entourage, spend a few hours talking with the chief and council, and leave. Such was the accumulated experience of the Dene, Métis and Inuit with the process of government consultation and as a result it was a major task to persuade them that, in this inquiry, things could be done differently. I encouraged the community leaders to help fashion a procedure which would ensure that their traditional model of holding meetings would be respected by the Inquiry, consistent with the carrying out of its mandate.

In many ways my work during this period was indistinguishable from the anthropologist who was spending the year in Fort Franklin studying how native people use their traditional social structures in formulating hunting strategies. Like him I was to be seen visiting people in the village, sitting in their homes drinking tea, inviting them to my log cabin to share a meal, going to meetings and undertaking hunting trips. However, his task was to write an academic treatise for his university, whereas mine was to fashion a procedure to ensure that the Inquiry provided native people with a real oppor-
portunity to express their views on matters relevant to the work of the Inquiry.

It is here again that the integral relationship between procedure and substance emerges. Prior to my visits to the communities, meetings had already taken place between the native people, the government, and pipeline company representatives concerning the proposed Mackenzie Valley Pipeline. Native people had been asked to provide their views on the location of construction camps, compressor stations and landing strips in relation to their communities, the location of the pipeline route in relation to their tralines, employment opportunities and other matters to do with specific aspects of the pipeline infrastructure. This process conceived of the potential impact of the pipeline project in very limited ways. The pipeline was analogized to "a string across a football field". In these meetings government representatives sought to put to one side the issue of native rights as being irrelevant to the task at hand which, as they saw it, was to understand the specific impacts which the development of the project would have on Indian communities and, to a limited extent, on Indian economic activities. However, in my meetings with native people it became clear that they did not view the pipeline and its impact in this limited way. What emerged through many hours of discussions was that the pipeline development could not be separated from all the other developments which native people had experienced since the time of their first contact with the agents of colonialism. The pipeline was the latest and potentially the most extensive intrusion into their traditional territory but it was part of a continuous process. They talked of the treaties which they had negotiated in 1900 and 1921 with the Canadian Government. Although these treaties in their text, like the others, state that the Indians surrender all their rights to the land, the Dene insisted that they understood the treaty to be one of peace and friendship, which through its recognition of their rights to hunt and fish and trap amounted to a guarantee of their rights to the lands and resources on which their survival depended. They explained that their elders had told the treaty commissioners that they would not sign the treaty unless the government guaranteed that there would be no interference with their way of life and with their right to govern themselves. They described how, contrary to these treaty promises, government and industry had moved into their territory, how their traditional economic activities had been interfered with by mining and oil and gas exploration undertaken without their consent, and how they had been pressured into moving from their hunting camps.
into villages made in the image (albeit a poor image) of white settlements. Young people explained how their forced exposure to an educational system modelled exclusively upon white southern lifestyles had alienated them from their own communities and, in many cases, undermined their ability to communicate in their native language with their parents and grandparents. Most of all they talked of the sense of injustice and oppression which they felt as the original people of the North whose views and rights to govern themselves in their own homeland had been systematically disregarded again and again. They saw the pipeline project as the final assault on their right to territorial and political integrity, because it would bring about an influx of whites into the area and because the massive scale of the project would generate other industrial activity.

It also became very clear in my discussions with native people in their communities that not only did their concept of native rights extend far beyond the narrow one articulated in the Calder case but it also comprised claims to self-determination within Canadian confederation and the essential right to determine the pace and scale of development within their homeland.

What emerged from all this was that if the Inquiry was to understand the social and economic impact of the pipeline project it must understand the history of the native peoples, their cumulative experience with previous developments, the nature of their claims and the impact which the project would have on the settlement of those claims. In this way, the work of fashioning a procedure which permitted native people to fully express their views resulted in a much expanded conception of the substantive issues underlying the mandate of the Mackenzie Valley Pipeline Inquiry.

The structure of the community hearings grew out of an understanding of the native procedures for decision-making. Thirty-five community hearings were held in the Mackenzie Valley and the Western Arctic at which over 1,000 witnesses gave evidence. Instead of a typical government hearing lasting a few hours, hearings in many of the villages went on for two and three days. Hearings would start in the early afternoon and often would go into the early hours of the morning. In many villages a traditional dance would be held after the hearing to which the judge and the Inquiry staff would be invited. The hearings in the villages were scheduled to accommodate the natural rhythm of the native economy, revolving around the caribou, muskrat, seal or polar bear hunt, trapping of fine furs, and fishing. Thus the hearing in a particular village was not scheduled at times when the people were heavily involved in
these activities. In several cases where a number of families had established camps in the bush away from the main village, hearings were held in these camps. At one hearing at Willow Lake Mr. Justice Berger, accompanied by a court reporter and representatives from the pipeline company and the press, flew in to such a bush fishing camp and, after a meal of trout and moose meat, held the hearing in a tent. The meeting ended after midnight and the Judge and his party were then transported by canoe down river to the main village of Fort Norman where a hearing was held the next day. The hearing at Willow Lake was held in the middle of summer at a time when the northern sun does not set. Another such hearing was held in the Inuit hunting camp of North Star Harbour high above the Arctic Circle in February at a time when the sun barely arcs above the horizon. Though it was forty degrees below zero, the plane's engines were shut down and there was no mechanical accompaniment to the voices of the Inuit hunters who described for Mr. Justice Berger what life on the land meant to them.

The content of the hearings varied from village to village. In Fort Franklin elders spoke of their life before extensive contact with white people, before the establishment of the settlement. The most respected hunters were chosen to explain to the Judge the logistics of hunting and the impact of oil and gas exploitation on this activity. Similarly, the most proficient fishermen explained the impact of sports fishing by non-natives on fish populations in Great Bear Lake. Young people told of their experiences with the educational system. At this hearing and at many others people spoke about their relationship with the land: as security, the basis of identity, pride and self-respect. They spoke of their relationship with animals as the primary source of their distinctive economy, their value system, the sharing ethic which underpinned their community life, the role of the elders in maintaining cultural and historical continuity, their hopes for the future of their children and their demand that the Government of Canada recognize their rightful claims to self-government.24

While every effort was made to ensure that the hearing process accommodated native procedures for decision-making, there was also the need to ensure that the process was perceived as having integrity by other participants in the Inquiry and by the public. One issue that had to be confronted was the question of cross-

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examination of witnesses. This was a feature of the formal hearings and in most Inquiries is usually regarded as a necessary part of the hearing process. However, cross-examination by a lawyer in the context of an adversary process was calculated to intimidate native witnesses and effectively prevent their full participation. For the community hearings an accommodation was reached whereby all witnesses were sworn to tell the truth and in a case where one of the participants wished to ask questions of a witness these questions were referred to either Mr. Justice Berger or myself. During the course of the Inquiry other alternatives were developed, for example a representative from the pipeline company was permitted to make a statement at a suitable point in the hearing to deal with matters which had been raised through the evidence of other witnesses.

All evidence was recorded and reproduced in the form of a permanent transcript of proceedings in exactly the same way as in the formal hearings. There was to be no repetition of the treaty experience. Much of the evidence of the native people was given in their own native languages and the Inquiry paid for native interpreters chosen by the community. Due to the uniqueness of the Inquiry’s procedures and the intense national interest which the Mackenzie Valley Pipeline Inquiry had generated, representatives of the Canadian press corps were in attendance at almost every hearing. Part of the media coverage was provided by the Northern Service of the Canadian Broadcasting Company, the national radio and television network, which provided a full-time team of reporters to cover the Inquiry’s hearings. This team included native reporters who provided daily broadcasts of the proceedings in the five native languages spoken in the North. This meant that native people in all the villages were able to understand in their own language what had taken place in other communities. This had the effect of reinforcing the idea that the Inquiry process was indeed a break from the typical government consultation meetings and that the Inquiry was serious in seeking native people’s views.

The exposure of the hearings to the media meant that, over a three-year period, people in southern Canada saw for the first time on television and heard on radio broadcasts a clear articulation by native people of their rights as original people in North America and their demands that these rights be respected. The degree of articulation was so great indeed that allegations were made that these statements could not possibly be those of the native people themselves, that their speeches were being written by white advisers. No one in attendance at the community hearings would, however,
make such an allegation. The depth of feeling conveyed in the speeches of the native people of the North speaking in the main without notes, in their own languages, left no doubt as to authorship. To anyone who had spent time in the communities or who had come to understand the richness of native cultures it was not surprising that people steeped in the oral tradition were able to produce so many orators. Yet to the majority of Canadians this was all new. For the native people, of course, their concept of their rights was not new. However, as one native spokesman said, “While the people have always held these views, there was never a place for these views to come out.” The Mackenzie Valley Pipeline Inquiry provided such a place. Perhaps the most complete articulation of how native people perceive their rights was given by Robert Andre of the community of Arctic Red River in the Mackenzie Delta. He told Mr. Justice Berger the following:

We are saying we have the right to determine our own lives. This right derives from the fact that we were here first. We are saying we are a distinct people, a nation of people, and we must have a special right within Canada. We are distinct in that it will not be an easy matter for us to be brought into your system because we are different. We have our own system, our own way of life, our own cultures and traditions. We have our own languages, our own laws, and a system of justice. . . .

Land claims . . . [mean] our survival as a distinct people. We are a people with a long history and a whole culture, a culture which has survived. . . . We want to survive as a people, [hence] our stand for maximum independence within your society. We want to develop our own economy. We want to acquire political independence for our people, within the Canadian constitution. We want to govern our own lives and our own lands and its resources. We want to have our own system of government, by which we can control and develop our land for our benefit. We want to have the exclusive right to hunt, to fish and to trap. We are saying that on the basis of our [aboriginal] land rights, we have an ownership and the right to participate directly in resource development.

We want, as the original owners of this land, to receive royalties from [past] developments and for future developments, which we are prepared to allow. These royalties will be used to fund local economic development, which we are sure will last long after the companies have exhausted the non-renewable resources of our land. The present system attempts to put us into a wage economy as employees of companies and governments over which we have no control. We want to strengthen the economy at the community level, under the collective control of our people. In this way many of our young people will be able to participate directly in the community and not have to move elsewhere to find employment.
We want to become involved in the education of our children in the communities where we are in the majority. We want to be able to control the local schools. We want to start our own schools in the larger centres in the North where we are in the minority.

Where the governments have a continuing role after the land settlement, we want to have a clear recognition as a distinct people, especially at the community level. Also at the community level, powers and control should lie with the chief and band council. To achieve all this is not easy. Much work lies ahead of us.

We must again become a people making our own history. To be able to make our own history is to be able to mould our own future, to build our society that preserves the best of our past and our traditions, while enabling us to grow and develop as a whole people.

We want a society where all are equal, where people do not exploit others. We are not against change, but it must be under our terms and under our control. We ask that our rights as a people for self-determination be respected.

It was on the basis of such statements by the native people that Mr. Justice Berger in his report, *Northern Frontier, Northern Homeland*, was able to expand upon the definition of aboriginal rights which, as a lawyer, he had urged upon the Canadian courts, to encompass much broader rights which relate to the original concept of aboriginal rights in North America. This is how the Report of the Mackenzie Valley Pipeline Inquiry characterized this broader conception of aboriginal rights and its place in the Canadian legal and political system:

The Native People are seeking a fundamental reordering of the relations between themselves and the rest of Canada. They are seeking a new confederation in the North. The concept of native self-determination must be understood in the context of native claims. When the Dene people refer to themselves as a nation, as many of them have, they are not renouncing Canada or Confederation. Rather they are proclaiming that they are a distinct people, who share a common historical experience, a common set of values, and a common world view. They want their children and their children's children to be secure in that same knowledge of who they are and where they come from. They want their own experience, traditions and values to occupy an honourable place in the contemporary life of our country. Seen in this light, they see their claims will lead to the enhancement of Confederation — not to its renunciation.

25 *Id.*, at 171-72.
26 *Supra*, note 24.
27 *Id.*, at 172.
Mr. Justice Berger urged that no pipeline be built for at least ten years to permit the native people and the Canadian Government to negotiate and implement a settlement of native claims which would ensure the achievement of this new confederation in the North.

PART III: RECENT EXPERIENCE WITH THE NEW PROCEDURAL FORUMS

The lessons learned from the Mackenzie Valley Pipeline Inquiry in the shaping of a hearing process to permit native people a full opportunity to articulate their experiences as colonized peoples and their rights to self-determination as distinct peoples have not ended with the Inquiry. The lessons have been applied and sharpened in other subsequent public inquiries and more recently attempts have been made by lawyers acting for native people to incorporate some of these lessons into the conduct of court hearings. A review of two instances of this in which I was directly involved illustrates the importance of developing procedural forums which draw upon the experience and knowledge of native people and how in turn such forums extend and enhance an understanding of the cultures, societies and economies of the native people and a full appreciation of the substance of their rights.

The first instance concerns a public inquiry established in 1980 by the Federal Minister of Health and Welfare, charged with the mandate to inquire into Indian health and health care services in the Alert Bay region of British Columbia. This region is some 250 miles north of the Province's largest city, Vancouver, and is the home of about 2500 Indians of the Kwakiutl Nation. The inquiry was precipitated by a number of deaths of young Indian children which the Kwakiutl believed to be attributable to the incompetence of the local medical practitioner. The Commissioner appointed to head the inquiry was a doctor who had personal experience working with Indian people. The procedure adopted by the inquiry was to hold a series of community hearings in the main village of Alert Bay which lasted for one week. Although the focus of the inquiry to many outside observers seemed to be highly specific — the extent to which Indians received proper medical care — the native people in their evidence drew upon their own interpretations of health to develop a broader focus for the inquiry. Defining health in Indian terms as cultural, social and economic strength they described for
the Commissioner their experiences with those who, over the past one hundred years, had tried to draw the Kwakiutl's strength from them; how missionaries and Indian agents tried to accomplish this by changing the Indians' spiritual being by prohibiting the central institution of their legal, economic and cultural tradition, the Potlatch, by taking over the education of their children through the system of residential schools at which the speaking of native languages was punished. They described how the strength the Kwakiutl drew from their traditional reliance upon natural resources, particularly the fishery, had been weakened by the activities of government and industry, both of which drained away those resources and restricted Indian involvement in activities which predated the presence of non-Indians by many thousands of years. The Indian witnesses explained that the root causes of their lack of strength, poor health and alcoholism were directly related to the undermining of their spiritual, cultural and economic self-sufficiency. They described how in all these areas of non-Indian intrusions, they had resisted, that they had asserted that, as original people, they had a distinctive culture, a distinctive economy and distinctive rights. They told the Commissioner that, as Indian people, they must regain control over those matters central to their survival as Kwakiutl. Only then would they regain their strength.

They explained to the Commissioner how they saw their health in terms of the development of strong independent Indian communities drawing on the traditions of the past as their children faced the challenge of tomorrow. Their recommendations therefore went beyond the delivery of medical services and embraced the call for the recognition of their rights to the heartland of their traditional territory, the Nimpkish River Valley. They asserted that as original people the Kwakiutl were the rightful owners and custodians of the watershed and its resources, that they must be recognized as the people who have the right to a controlling voice in the development of those resources, that in the river was the source of their traditions, the representation of their cultural continuity, the sustenance of their people in the fish it provided for food and commerce, and in the rich resource it offered to their children in their education. They insisted that Indian priorities in the form of the enhancement of the river system as a salmon resource be recognized by both federal and provincial governments, that the competing activities of logging, mining, recreation and settlement must be controlled in recognition of the rights which the Kwakiutl have and the immense
significance that the river valley represented to them in economic and cultural terms.  

Because the inquiry came about due to a crisis in the delivery of medical services, the community hearings also resulted in the presentation to the Commissioner of a set of proposals related to the delivery of medical services. In formulating these proposals, the native people had been assisted by a two-day workshop which had been incorporated into the hearing process. This workshop, sponsored by the inquiry, brought to the community of Alert Bay individuals involved both in Canada and the United States with Indian health care programmes. These individuals related their experiences and the problems which their communities had encountered in seeking to take over and direct the delivery of medical services. Based on the workshop and upon their own ideas, the native people of Alert Bay proposed the establishment of a native-controlled health board which would take over from existing government services and shape a health care delivery service fully responsive to native people's needs. The health board would operate as an agency of Indian government. In addition to taking on the usual responsibilities of a health board the Kwakiutl envisaged that a native health board would, in terms of research, look to the important area of traditional Indian medicine — the native health sciences — and consider ways in which an understanding of this knowledge could be integrated into the treatment of Indian people.

Following the report of the Commissioner which broadly endorsed the Kwakiutl's proposals, the Kwakiutl signed an agreement with the Minister of Health and Welfare for the establishment of the first full-time native health board in Canada. As a direct result of the work of this health board and of the broader understanding reached with the Federal Government on the distinctive health needs of Indian people, a new Indian health centre has recently been completed in Alert Bay. The underlying problems which gave rise to this inquiry have not gone away but, as a result of the inquiry process, there has emerged a much more complete understanding of these problems and of how real solutions to them can be achieved.

The second example concerns litigation on the issue of Indian

28 See final submission of the Nimpkish Band Council to the Federal Inquiry into Health Care in Alert Bay, transcript of proceedings, vol. 3, at 906 et seq.
hunting rights. Broadly speaking, the Canadian courts have pro-
vided little legal recognition for traditional Indian hunting rights
and have subjected them to both federal and, with some exceptions
in the case of treaty guaranteed hunting rights, provincial wildlife
regulation. In large measure this represents an ethnocentric lack of
understanding of the cultural, social and economic roles which hunt-
ing and fishing still continue to play in the life of native commu-
nities; hunting and fishing are not simply recreational activities but
are the very stuff of a distinctive native identity. As I have de-
scribed, the kind of evidence presented at community hearings is
capable of clearly articulating the essence of native identity and the
relationship of Indian hunting and fishing to that identity. It is not
wholly surprising therefore that lawyers acting for native people
have sought to expand on the type of evidence which is presented
to the court in the defence of Indian hunting rights against the
intrusion of wildlife regulation.

*R. v. Jack and Charlie* illustrates this process. The case, which
started in 1979 and is now on appeal to the Supreme Court of
Canada, is unique in Canadian jurisprudence in that for the first
time Indian religious practices as they relate to hunting were put
before a court of law. In this case the two defendants, members of
the Tsartlip Indian Band of the Coast Salish Nation of Vancouver
Island, accompanied by the wife of one of them, were involved in a
hunt for deer which was required for a religious ceremony practiced
by the Coast Salish Indians. This ceremony involves the ritual burn-
ing of food for the dead in the belief that the smoke therefrom will
provide sustenance for the deceased person for whose benefit the
burning is undertaken. It is part of this religious practice that the
food which is burnt be of a kind that the deceased person usually
ate. In the *Jack and Charlie* case the burning was for Mrs. Jack’s
great-great-grandfather who died last century and whose usual food
was deer meat. Mrs. Jack had endeavoured to obtain such meat
from other members of the Indian band without success. The hunt
therefore had been organized as a religious mission. The charges
which were laid against the defendants involved the possession of
deer meat outside of the open season for the hunting of deer.

The defence of freedom of Indian religion had never been raised
before and it was only after the most careful deliberation that the

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29 The judgments of the B.C. County Court and Court of Appeal are reported
chief and elders of the Tsartlip Indian Band decided that they would describe for the court the nature of their religious practices. Their great concern was that these practices would be ridiculed and, in the process, their most cherished beliefs and spiritual values would be shown the same lack of respect as non-Indians had shown other integral aspects of Indian life. At the trial, elders of the Band described for the court the distinctive nature of the religious ceremony of burning food for the dead and the spiritual basis of the ceremony, that the deceased depart only in body but their spirits remain and require continuing sustenance. They described how this religious ceremony provided the necessary link over time between generations that already had passed and those that were yet to come and how the elders were seeking to use traditional religious ceremonies, including the burning ceremony, to help those members of the band who were experiencing difficulty with alcohol or drugs by reaffirming their roots as Indian people and their ties to the Indian community. Evidence was also given by the most respected elder of the Coast Salish people, the medicine man, who officiated at the burning ceremony and who visited the Coast Salish people both in Canada and the United States as a religious leader, cementing the historical, religious and cultural ties between peoples whose relationships had been established many thousands of years prior to the formation of the Canadian-United States boundary. The trial was attended by over one hundred Indian people from the Band who lent the weight of their presence to the commitment of the Indian witnesses to the way of life they were seeking to defend. What emerged clearly from this evidence was that the hunting of deer in this case was in pursuit of a religious quest, was integrally related to the practice of Indian religion and was rooted in the fabric of Coast Salish life.30

30 The evidence at trial is summarized by the Provincial Court Judge at (1981) 50 C.C.C. (2d) 337. The B.C. Court of Appeal (67 C.C.C. (2d), at 297), in a two to one decision affirming the conviction of Jack and Charlie, held that "while freedom of religion is a fundamental right, the authorities binding on us make it clear that the freedom must be exercised in accordance with the general law." Mr. Justice Hutcheon, dissenting, held at 307 that "the Wildlife Act ought to be read so as to acknowledge the right of Jack and Charlie on these facts to practise their religion where no competing interest of society exists."

A second hunting case, R. v. Dick (1983) 3 C.C.C. (3d) 481, illustrates the importance of introducing the evidence of native people as to the special significance of their traditional economic activities in order to permit a court to understand fully the legal issues involved. In this case, Arthur Dick, a member of the Alkali Lake Band, was charged with killing a deer out of
It is significant that in the *Jack and Charlie* case the evidence of anthropologists, which has been the primary evidence relied upon in cases in the United States where freedom of Indian religion has been raised, was given a secondary role. The evidence of an anthropologist was used in *Jack and Charlie* to provide ethnographic support for the primary evidence of the people themselves who were the rightful source of their own history and religion. This was in keeping with what took place in the Mackenzie Valley Pipeline Inquiry. I have described how, in addition to the community hearings, there were also formal hearings in which experts gave evidence. Many of these experts were anthropologists and sociologists who told Mr. Justice Berger about their research on the cultures and economies of the people of the North. Although this evidence was given careful consideration by the Judge, it was placed in the context of his direct exposure to the life of the native people and to the evidence of the one thousand witnesses who spoke at the community hearings. The new procedural forum of community hearings leaves no doubt as to who are the true experts on the history, culture, society and economy of the native people of Canada.

Season. Nine members of the Alkali Lake Band and three members of the Canoe Creek Band gave evidence describing their lives and the significance of the rituals of food gathering. They told of their dependence on moose and deer for food and for traditional and valued items of daily and ceremonial clothing. Mr. Justice Lambert, in summarizing the evidence, concluded at 491, "It is impossible to read the evidence without realizing that killing fish and animals for food and other uses gives shape and meaning to the lives of the members of the Alkali Lake Band. It is at the centre of what they do and what they are." The legal argument of Arthur Dick was directly related to this evidence. That argument was, firstly, that "there is a central core of Indianness that cannot be touched by provincial legislation but only by the Parliament of Canada under ss. 24 of s. 91 [of the Constitution Act, 1867] 'Indians and lands reserved for Indians'. Foraging for food by the active hunters of the Alkali Lake Band was an activity within that central core of Indianness. It was beyond the scope of the Wildlife Act" (at 485-86).

The second and closely related argument was derived from the judgment of Mr. Justice Dickson in *R. v. Manuel and Kruger* (1977) 34 C.C.C. (3d) 377, where he identified the indices by which a provincial law of general application which, under s. 88 of the Indian Act, is made applicable to Indians, would cease to be such a law. The argument was that in relation to the hunting activities of the Alkali Lake Band members, the Wildlife Act was not a law of general application but rather one which impaired their status and capacities as Indians. Mr. Justice Lambert alone of the three member Court of Appeal accepted this argument. As in *R. v. Jack and Charlie*, the issue is now before the Supreme Court of Canada. It is significant that in both the *Jack and Charlie* and the *Dick* cases, counsel for the Indian hunters had been involved in the West Coast Oil Ports Inquiry. This Inquiry, presided over by Dr. Andrew Thompson, had made extensive use of the community hearing process in order to better understand the relationship of Indian people to the fishery resources of the coast and rivers of British Columbia.
CONCLUSION

The Canadian experience illustrates how procedural forums which respect and reflect the law ways of native peoples can be developed, that through these procedural forums a fuller understanding of native societies and native rights can emerge, an understanding which, in the words of Mr. Justice Berger, can enhance the nature of Canadian Confederation. Canada has now given constitutional recognition to the rights of native people but has done so in highly equivocal terms. In the Constitution Act of 1982 it is provided in section 35 that:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.\(^{31}\)

The equivocation in this form of constitutional recognition relates directly to the central issues of this article. Whose concept of aboriginal and treaty rights is entrenched in section 35 of the Constitution Act, the concept of the aboriginal people themselves or that of the Canadian courts?\(^{32}\) To resolve what will otherwise be a collision course between these two concepts of substantive rights, the Constitution Act establishes a procedural mechanism in section 37. It provides that there shall be convened a constitutional conference which shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada. This constitutional conference was held in March 1983. Native people, in approaching the Section 37 Conference, formulated proposals which reflected their concept of their rights. They sought to entrench


\(^{32}\) For a further analysis of this equivocation see D. Sanders, The Rights of the Aboriginal Peoples of Canada (1983) 61 CAN. B. REV. 314; K. Lysyk, The Rights and Freedoms of the Aboriginal Peoples of Canada, in W. Tarnopolisk and L. Beaudoin (eds.), The Canadian Charter of Rights and Freedoms (1982), at 467; M. B. Slattery, The Constitutional Guarantee of Aboriginal and Treaty Rights (1983) 8 QUEEN'S L.J. 232. The original version of s. 35 did not contain the word “existing”. This version was dropped from the patriation package in the interests of achieving provincial consent to patriation. In the face of national protest the clause was reinstated. However, at the insistence of some of the provincial Premiers, the word “existing” was added to qualify the rights affirmed and recognized. To native people this only reinforced the argument that the form proposed of entrenchment ensured that native rights would be interpreted within the narrow contours of Canadian case law.
definitions of aboriginal and treaty rights which went beyond the narrow court interpretations and which included rights to self-government, rights to practise their own distinctive laws and religions, and rights to their traditional lands, waters and resources. They sought to entrench the principle of consent into the constitutional amending formula in relation to matters which affected native rights. Finally, they sought to entrench an ongoing process for future constitutional conferences to complete the task of constitutional renewal with native people. Underlying the discreet elements of their proposals was the assertion by Canada's native peoples that they have the right to self-determination. They have sought to buttress this claim, not only by reference to their status as the original peoples of Canada but also by reference to international covenants to which Canada is a signatory. In particular, the International Covenant on Civil and Political Rights provides:

All peoples have the right of self-determination. By virtue of that right they should freely determine their political status and freely pursue their economic, social and cultural development.33

Until the eighteenth century the native peoples of North America through diplomatic procedures girded by military strength were able to compel recognition of this right. The two hundred years since the Royal Proclamation of 1763 have witnessed in Canada the abrogation of this right by governments and the courts. Much has been learned through the new procedural forums exemplified by the community hearings of the Mackenzie Valley Pipeline Inquiry as to the original nature of native peoples' right to self-determination and the process of colonialism which has led to its abrogation. The Constitutional Accord of March 1983 provides for further constitutional conferences to discuss constitutional matters that directly affect the aboriginal peoples of Canada.34 The true measure of the accords which will emerge from future constitutional conferences will be whether they can reverse the process of internal colonization and pour real substance into the right of the original peoples of


34 1983 Constitutional Accord on Aboriginal Rights, First Ministers’ Conference on Aboriginal Constitutional Matters.
Canada to self-determination within the framework of a new Canadian Constitution.\textsuperscript{35}

\textsuperscript{35} Judged by this measure, the second First Ministers' Conference was not a progressive step. In November 1983, the Report of the Parliamentary Committee on Indian Self-Government (the "Penner Report") recommended that the right of Indian peoples to self-government be entrenched in the Constitution. In March 1984, on the first day of the two-day First Ministers' Conference, the Prime Minister tabled a constitutional amendment which, as explained by the Minister of Justice, was designed to entrench in a non-justiciable form a commitment to the principle of native self-government which would bind the federal and provincial governments only to an ongoing process of negotiation with native peoples to determine the content of the principle. Yet, even this limited proposal, which fell far short of the native people's own proposals, did not win the support of any more than three provinces. The conference ended without any Accord.