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INUIT COMMITTEE ON NATIONAL ISSUES

BRIEF TO THE JOINT SENATE AND HOUSE OF COMMONS COMMITTEE
ON THE CONSTITUTION

December 1, 1980

INUIT COMMITTEE ON NATIONAL ISSUES - LE COMITE INUIT SUR LES AFFAIRES NATIONALES
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<u>ITEM</u>	<u>PAGE</u>
IV <u>PROPOSED AMENDMENTS</u>	15
4.1 Limitation to Guarantee of Rights and Freedoms (section 1).....	15
4.2 Mobility Rights (section 6).....	16
4.3 Equality Before the Law and Equal Protection of the Law (section 15).....	18
4.4 Aboriginal Rights and Freedoms (new section).....	19
4.5 Undeclared Rights and Freedoms (section 24).....	24
4.6 Participation of Aboriginal Peoples at Constitutional Conferences (section 32).....	26
4.7 Amendments to Constitutional Provisions Referring to Aboriginal Peoples (section 51A).....	28
4.8 Relevant Omissions in Schedule 1.....	29
 CONCLUSIONS AND RECOMMENDATIONS.....	 31

<u>APPENDIX I:</u>	Royal Proclamation of October 7, 1763 (excerpt)
<u>APPENDIX II:</u>	Brief to the Foreign and Common- wealth Affairs Committee of the British House of Commons
<u>APPENDIX III:</u>	Letter from Prime Minister Trudeau dated October 30, 1980 to Messrs. Watt and Tagoona
<u>APPENDIX IV:</u>	Constitutional Status of the Order-in-Council Admitting Rupert's Land and the North-Western Territory into the Union, 1870 and the Royal Proclamation of October 7, 1763

INTRODUCTION

This is a critical period in the history of Inuit in Canada. During the past several years, federal-provincial discussions on constitutional reform have begun to take place with a renewed sense of purpose. Upon examination of the various proposals for constitutional reform, it has become apparent that the rights and interests of all Aboriginal peoples in Canada may be seriously jeopardized. In almost all cases, our aboriginal rights and other rights and interests have not been taken into account by governments.

The need for a special committee with national Inuit representation became evident in order to represent effectively the Inuit of Canada and to participate directly in the constitutional reform process. As a result, the Inuit Committee on National Issues (ICNI) was established by resolution at the annual general meeting of Inuit Tapirisat of Canada at Igloolik, Nunavut, (NWT) on September 3-7, 1979.

ICNI represents approximately 25,000 Inuit in Canada occupying Northern Quebec, Labrador and Nunavut. This area, the Inuit homeland, includes approximately one-third of all the land in Canada. Moreover, Inuit constitute the majority population in these areas.

In order to ensure that ICNI adequately represents the views of Inuit, six regional associations participate

equally within ICNI. These six Inuit regional associations include Labrador Inuit Association from Labrador; Makivik Corporation from Northern Quebec; and Baffin Regional Inuit Association, Keewatin Inuit Association, Kitikmeot Inuit Association, and Committee for Original Peoples' Entitlement (COPE) from Nunavut (NWT).

ICNI's purpose in appearing before this Joint Senate/ House of Commons Committee is to impress upon you the necessity for certain amendments to the Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada.

If given the force of law in its present form, the Proposed Resolution will have the effect of eroding the constitutional position of Aboriginal peoples in Canada. No reference is made to our special status and relationship with the Crown as confirmed in the Royal Proclamation of 1763. Moreover, the Proposed Resolution divides the amending power solely between federal and provincial legislatures and governments. The failure to provide for our participation and consent in the amending process unduly and severely minimizes the opportunity for beneficial constitutional reforms in the future.

In the following discussion, ICNI will define its concerns and proposals in detail -- politically and morally as well as legally.

What is at stake is our future relationship with Canada and our visions of contributing to its heritage and growth. Therefore, the essence of the fundamental principles we propose must not be lost or denied to us through narrow, legalistic interpretations. To achieve these goals, ICNI will provide you with the actual texts of our amendments to the Proposed Resolution for your consideration.

We wish to thank you for this historic opportunity.

I HISTORICAL BACKGROUND

1.1 The Principle of Inuit National Identity

Inuit have occupied the arctic and sub-arctic for thousands of years. The traditional lifestyle of Inuit, which adapted to the harsh demands of the arctic, was based on hunting, trapping, fishing, and whaling.

We lived communally, travelling the land which we respected. We worked co-operatively to feed and clothe ourselves, nourished our language, culture and traditions, and enjoyed collective self-government. We had our own accepted and commonly understood values which regulated our social, political, and economic practices. We were a self-sufficient nation.

In order to trace our history to the modern day, it is essential to have some appreciation of the relationship which existed between the Aboriginal peoples and the Imperial Crown.

Our status as a nation is given some legal confirmation and protection in the Royal Proclamation of October 7, 1763 (see Appendix I of this brief). This constitutional document, which states our special and unique historical relationship with the Imperial Crown, has been called both an "Indian Bill of Rights"¹ and a "Charter of Indian Rights"² due to its fundamental importance to Aboriginal peoples in Canada.

While the Royal Proclamation, by nature, is not a law of the Imperial Parliament, it does have the same legal effect as a statute. Furthermore, its provisions relating to aboriginal³ lands still have the full force of law in Canada.⁴

¹St. Catharine's Milling and Lumber Co. v. The Queen, (1887) 13 S.C.R. 577 at 652 per Gwynne J.

²St. Catharine's Milling and Lumber Co. v. The Queen, (1887) 13 S.C.R. 577 at 633 per Strong J.; Regina v. Koonungnak, (1963) 42 C.R. 143 at 160, 45 W.W.R. 282 at 302 per Sissons J. (N.W.T. Terr. Ct.)

³The term "aboriginal" is used instead of "Indians" so as to more clearly denote that references to "Indians" in the Royal Proclamation also include Inuit. See Sigeareak E 1-53 v. The Queen, (1966) S.C.R. 645 at 650. Also, "Indians" include Inuit purposes of the British North America Act. See In Re Eskimos, (1939) S.C.R. 645 at 650.

⁴See The King v. Lady McMaster, (1926) Ex. C.R. 68 at 72.

As indicated in our brief to the Foreign and Commonwealth Affairs Committee of the British House of Commons (see Appendix II of this brief), the Royal Proclamation clearly reflects several basic principles that underlie the relationship existing between the Aboriginal peoples of Canada and the Imperial Crown. These principles:

- (1) recognize the Aboriginal peoples as "nations"¹;
- (2) imply the necessity of mutual consent to alterations in the relationship;
- (3) confirm and protect the aboriginal rights in and to lands in Canada covered by the Royal Proclamation;
- (4) imply a right of aboriginal self-government in those areas not ceded to the Crown.

As evidenced by the Royal Proclamation, the Aboriginal peoples of Canada interacted with Imperial representatives very much like "nations" in the international sense. This status as "nations" within Canada vests in us rights not held by others who later immigrated to Canada. As original inhabitants, such rights flowed as a natural consequence from our historical status and position.

¹The use of "nations" here is in the sense of nations within Canada and not nation-states. Inuit commitment to a future within Canada is further exemplified on page 20 in regard to self-determination.

1.2 Erosion of Inuit National Identity

The bilateral nature of our relations with government, as witnessed in the Royal Proclamation, has gradually deteriorated in Canada over the past hundred years. Although the Royal Proclamation has never been repealed, unilateral legislation from time to time on the part of the Canadian Parliament has served to violate the essential principles of the Proclamation.

Despite Canada's trust responsibility in regard to Inuit, we were not consulted when Canada transferred jurisdiction over part of our homeland to Quebec by virtue of the Quebec Boundaries Extension Acts of 1912¹. Nor were we allowed to participate in the formation of a system of government in the N.W.T. established under the Northwest Territories Act². Nor were we consulted when Labrador joined Canada in 1949. In addition, we were denied the right to vote in federal elections until July 1, 1960.³ This legislative encroachment upon our capacity to predetermine our social order was compounded by various government policies that impeded Inuit local control.⁴

¹ S.C. 1912, c.45; S.Q. 1912, c.7.

² R.S.C. 1970, c.N-22. Basic principles of responsible government have not yet arrived in N.W.T. since the Inuit and Dene majority population are still deprived of electing the Commissioner of the N.W.T., who is appointed by Ottawa. See the Report of the Special Representative, Constitutional Development in the Northwest Territories (The Drury Report), January 1980, chapters 2, 4-6.

³ See An Act to Amend Canada Elections Act, S.C. 1960,

⁴ Bean, "Colonialism in the Communities", in Watkins, ed., Dene Nation - the colony within, University of Toronto Press, 1977 at page 130.

1.3 Present Situation of Aboriginal Peoples

From 1867 to the present time, governments in Canada have failed to confirm unequivocally the rights and status of their Aboriginal peoples. This continued state of uncertainty has permitted the ongoing erosion of our special rights and interests by both federal and provincial governments. This uncertainty has had a destabilizing effect on our society. Political and economic colonial policies have worked to deny us access to adequate resources. It has left us lacking in essential services and economic opportunities. It has offered us little or no cultural protection. We are today faced with unprecedented social problems, while our culture and traditional values are being eroded at an alarming rate.

This present situation is unacceptable. The economic, social and political disadvantages we suffer are not mere coincidence. They are, at least in part, the consequences of perpetuating the uncertainty of our constitutional rights and status while, at the same time, permitting their further erosion by the daily actions of governments. It is only through adequate constitutional protections that the Inuit can enjoy positive growth and deter the constant pressures of assimilation.

II EFFECTS OF THE PATRIATION RESOLUTION

2.1 Lack of Status in Proposed Resolution

The Proposed Resolution in its present form provides no definition for the status of Aboriginal peoples in Canada. Apart from the oblique reference to "the rights or freedoms that pertain to the native peoples" in section 24, there is no indication in the Resolution that the Aboriginal peoples have an intrinsic right to their own identities within Canada.

By failing to include the principles which form the basis of our special status, the Proposed Resolution may in effect assist only those who favour the elimination of such status. If the Constitution does not specifically provide for affirmation of such status, it may be assumed that it no longer exists.

2.2 Amendment Opportunities at the Post-Patriation Stage

In determining whether the Aboriginal peoples of Canada require certain amendments in Canada's Constitution at the pre-patriation stage, one must examine the situation of Aboriginal peoples following patriation.

It is the stated position of the Prime Minister (see Appendix III of this brief), that the mere act of patriating the Canadian Constitution shall have no adverse effect upon the Aboriginal peoples of Canada. According to the Prime Minister's letter, it may in fact facilitate the process of securing necessary constitutional amendments for Aboriginal peoples. In addition, the Prime Minister has confirmed his commitment to involve the Aboriginal peoples of Canada in the next Constitutional Conference of First Ministers by including "Native Peoples and the Constitution" as an agenda item.

However, the situation of Aboriginal peoples in the post-patriation period is not that simple. During the first two years following patriation, section 33 of the proposed Constitution Act, 1980 provides that any amendments to Canada's Constitution will require the unanimous consent of the ten provincial legislatures or governments as well as Parliament. Moreover, after the two-year period following patriation, amendments to the Canadian Constitution will still be subject to the individual veto of Parliament, or the legislative assemblies of either Quebec or Ontario, in addition to a possible collective veto by the Atlantic or Western provinces.

In light of the many possibilities for federal and provincial veto of future amendments, the assurances and commitments in the Prime Minister's letter in regard to the post-patriation stage hardly reflect the impending reality.

In regard to most constitutional matters, Aboriginal peoples have competing interests with the provinces. Therefore, there is little or no incentive for provinces to agree to constitutional amendments in our favour at the post-patriation stage¹.

If anything, there is greater likelihood that federal and provincial governments may jointly agree to affect our status or rights in a manner contrary to our wishes. According to the existing amending formulas in the Proposed Resolution, no safeguards exist to protect us, even in the case of amendments which make special reference to Aboriginal peoples.

2.3 Future Implications for Aboriginal Peoples

In summary, the effects of the Proposed Resolution appear numerous. It ignores the principles laid down in the Royal Proclamation of 1763 in favour of the Aboriginal peoples of Canada. It provides no specific protections for our existing rights and interests (except for section 24 of the Constitution Act, 1980). It adopts an amending formula which excludes any role for the Aboriginal peoples of Canada even for constitutional provisions which specifically refer to them. By such measures, the Government of Canada is unjustly and unilaterally altering the constitutional position of Aboriginal peoples in a manner which jeopardizes our distinct identity.

¹For a clear example of existing insensitivity on the part of provinces for the rights and status of Aboriginal peoples, see the comments of Premier Hatfield of New Brunswick at the Metis and Non-Status Constitutional Commission as reported in the Gazette, October 16, 1980, page 10.

This subtle but effective erosion of our status and rights may be the legacy we inherit under Canada's patriated Constitution. Our assimilation rather than our rights seem destined for entrenchment through the current constitutional reform process.

At best, the result may well be that the present economic, social, political and legal situation of Aboriginal peoples, namely the status quo, will be perpetuated. This status quo is unacceptable.

III INUIT OBJECTIVES

The only way that Aboriginal peoples may have a realistic opportunity of obtaining constitutional amendments in their favour after patriation is by including certain fundamental principles relating to Aboriginal peoples in the Proposed Resolution. ICNI recognizes that amendments in the post-patriation stage, if any, in regard to Aboriginal peoples may deal with substantive matters. However, the pre-patriation amendments that are being urged as a very minimum in this brief are of a fundamentally different nature. The amendments that ICNI is proposing have basically two essential objectives as discussed below.

3.1 Recognized Status

First, the amendments serve to enshrine in the Constitution some further indication of the special status of Aboriginal peoples as nations within Canada and their unique relationship with the rest of Canada. By necessity this principle embodies the element of mutual consent that is reflected in the Royal Proclamation of 1763.

ICNI acknowledges that the precise limits of the Imperial Crown's residual responsibilities in regard to Canada's Aboriginal peoples are not clear. We recognize that the Royal Proclamation must be read together with section 91(24) of the BNA Act, 1867, which conferred legislative jurisdiction and a trust responsibility in respect to Aboriginal peoples to the Parliament and government of Canada. In this regard, Canada should carry out its trust responsibility in a manner which upholds the principles reflected in the Royal Proclamation.

In regard to Britain, it is our contention that termination of our direct relationship with the Imperial Crown must not be a by-product of unilateral patriation without adequate protections. The residual responsibilities¹ of Britain must be transferred to Canada under the Proposed Resolution in

¹Further evidence of Britain's residual responsibility in regard to Aboriginal peoples is found in the Order-in-Council of 1870 respecting Rupert's Land. Section 14 provides for Indian claims for compensation to be disposed of by the Canadian Government "in communication with the Imperial Government".

such a way as to preserve the basic tenets of our special constitutional position. As stated earlier, the principles which we seek recognition of in the Proposed Resolution include both aboriginal rights and the right to self-determination¹ within the Canadian federation which must govern our future constitutional discussions.

Today we seek self-government within the Canadian federation. For instance, the Inuit of NWT have proposed a Nunavut government in a detailed proposal, a copy of which is available. The main thrust of this proposal is to create a new territory above the treeline which would become a province after an orderly transition period. The Nunavut government would initially have powers similar to the existing government in Yellowknife. All residents could vote, the government would be for all those in Nunavut, and Nunavut would adhere to the highest standards of human rights.

It was gratifying that the recent NWT Council session in Frobisher Bay supported in principle the concept of a new territory. This demonstrates the commitment of the elected representatives in NWT to seek responsible government in new creative forms.

¹The right to self-determination is being used here in the domestic (or internal) not international sense. For a similar usage under U.S. legislation, see Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450, 455-458.

3.2 Role in the Amending Process

Secondly, our proposed amendments serve to formalize, in the Constitution, the political commitments of federal and provincial governments to negotiate with us constitutional matters of concern to Aboriginal peoples. We do not believe that these political commitments create a heavy burden on federal or provincial governments. However, without some formalized commitment¹ in the Constitution, it is apparent that the uncertain constitutional position of Aboriginal peoples will continue to our detriment.

It is our position that the pre-patriation amendments proposed in this brief are both minimal and reasonable. In addition, they may be easily integrated with the Proposed Resolution. Without some constitutional protections in favour of Aboriginal peoples at this crucial stage, we sense that an increasing number of groups among Canada's Aboriginal peoples feel compelled to seek more radical solutions. This is primarily due to the continued lack of sensitivity and response from government.

ICNI supports patriation of Canada's Constitution. We look forward to further developing our relationship with governments in Canada once our Constitution is patriated. Under these circumstances, we have no desire to perpetuate our

¹See section 31 of the Constitution Act, 1980 for an example of a formalized commitment provided in the Constitution.

unique constitutional and legal ties with Britain. Nevertheless, in terminating the residual responsibilities of Britain which still exist in our favour, our special status and rights must not be eroded through either omission or neglect in the Proposed Resolution.

IV PROPOSED AMENDMENTS

*Translate from
here only*

4.1 Limitation to Guarantee of Rights and Freedoms (section 1)

Section 1 provides:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

The limitation in section 1 of the Charter has generated a great deal of controversy. Opposition to its scope has already been extensively voiced by numerous individuals and groups appearing before this Committee.

ICNI fully supports the principle of enshrining some flexibility in Canada's Constitution. However, we agree with the large number of people in Canada who object to such a broad limitation diluting the guarantee of rights and freedoms enshrined in the Charter.

Due to the many diverse groups who are already engaged in arriving at a better alternative, ICNI has not prepared

any specific amendments in regard to the limitation in section 1.

4.2 Mobility Rights (section 6)

Section 6 (as amended) provides:

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence;

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services; and

(c) any laws or practices as are reasonably justifiable to mitigate adverse environmental and social impacts on a community, culture, economy or society of the Aboriginal peoples of Canada. (Underlining denotes ICNI's proposed amendments.)

The main reason for including mobility rights in the Charter is to encourage the creation of a true economic union within Canada. ICNI supports this concept which is intended to strengthen the economy in all areas of Canada.

However for cultural, economic, social as well as environmental reasons, an additional limitation is required in subsection 6(3).

Both the northern environment and Inuit communities are particularly susceptible to significant environmental and social impacts when faced with large-scale development. "Laws or practices of general application", as provided in subsection 6(3)(a), may be sorely inadequate to meet the special needs of Canada's North and to protect Inuit culture.

The same is true in relation to our northern economy. The massive influx of a temporary workforce from southern parts of Canada when northern projects are announced, if unrestricted, may have severe consequences in the North. In such a situation, we would be unable to compete. Northern unemployment would not be reduced. Therefore, special protections are necessary in order to develop a viable northern economy and to establish a northern workforce.¹

The principle of priority of contracts and employment for northern residents appears to be inconsistent with the

¹ Similar concerns in regard to Aboriginal peoples and northern economies have already been expressed by both the Hon. George Braden to the Committee on behalf of the government of the Northwest Territories, and the Hon. Chris Pearson, on behalf of the government of the Yukon.

mobility rights in the Charter. Therefore, benefits owed to Inuit under the James Bay and Northern Quebec Agreement may never be realized.¹ The loss of this benefit, which presently has the force of law, is unacceptable.

4.3 Equality Before the Law and Equal Protection of the Law (section 15)

Section 15 (as amended) provides:

- (1) Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.
- (2) This section does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged persons or groups, or the recognition of the aboriginal and treaty rights of the Aboriginal peoples of Canada.

Although the proposed amendment is a relatively minor one, it has important implications for the Aboriginal peoples of Canada. Aboriginal rights are additional rights vested in Aboriginal peoples and are unique to us. It is our view that the Constitution, while establishing the general principle of equality before the law, must ensure that our aboriginal rights are not seen as discriminatory. While what we are requesting here may seem to be self-evident to

¹See, for example, section 29.0.31 of the Agreement which provides for "reasonable measures to establish Inuit priority in respect to employment and contracts" created by certain projects in northern Quebec.

some citizens of Canada, a large number are not familiar with the history of Aboriginal peoples in Canada, our special status, or with the fact that we possess and enjoy rights by virtue of our being this country's original inhabitants. The Canadian Constitution, therefore, must make it clear that the right to equal protection under section 15 cannot be invoked to challenge legally our unique status and rights.

4.4 Aboriginal Rights and Freedoms (new section)

Section 23A provides:

- (1) For the purposes of this Act, the "Aboriginal peoples of Canada" means the Indian, Inuit and Metis people of Canada.
- (2) Within the Canadian federation, the Aboriginal peoples of Canada shall have the right to their self-determination, and in this regard the Parliament and the provincial legislatures, together with the government of Canada and the provincial governments, to the extent of their respective jurisdictions, are committed to negotiate with the Aboriginal peoples of Canada mutually satisfactory rights and protections in the following areas, inter alia:
 - a) aboriginal rights;
 - b) treaty rights;
 - c) rights and protections pertaining to the Aboriginal peoples of Canada in relation to Section 91(24) and Section 109 of the Constitution Act, 1867;
 - d) rights pertaining to the Aboriginal peoples of Canada in relation to the Manitoba Act, 1870 and the Dominion Lands Acts;
 - e) rights or benefits provided in present and future settlements of aboriginal claims;

- f) rights of self-government of the Aboriginal peoples of Canada;
- g) representation of the Aboriginal peoples of Canada in Parliament and, where applicable, in the provincial legislatures;
- h) responsibilities of the government of Canada and the provincial governments for the provision of services in regard to the Aboriginal peoples of Canada;
- i) economic development and the reduction of regional disparities;

so as to ensure the distinct cultural, economic and linguistic identities of the Aboriginal peoples of Canada.

- (3) No aboriginal rights shall be subject to extinguishment by the Parliament of Canada.
- (4) The Aboriginal peoples of Canada have the right to the use and enjoyment of their collective property, and the right not to be deprived thereof except in cases of national emergency and for reasonable compensation.

The purpose of including a new section 23A in the Canadian Charter of Rights and Freedoms as provided in the Proposed Resolution is to enshrine in the Constitution a suitable commitment by legislatures and governments to end the uncertainty in regard to the constitutional position of the Aboriginal peoples of Canada. Generally, our section 23A provides some fundamental principles from which future constitutional protections may evolve. This section, therefore, serves as a cornerstone or at least a beginning to an "Aboriginal Bill of Rights".

Subsection (1) of section 23A merely provides for the obvious, namely, that the "Aboriginal peoples of Canada" include

Canada's three groups of indigenous peoples. Presently, there exist other artificial distinctions under Canadian law which have posed considerable problems for a great number of Aboriginal people in Canada and for which we must seek alternative solutions.

Subsection (2) unequivocally provides that the right of Aboriginal peoples to self-determination is solely within the Canadian federation. The intention here is to recognize the right of Aboriginal peoples to achieve greater control over matters affecting our lives while reaffirming our desire to contribute to a united Canada. It is important to note that the right of self-determination, as stated in this subsection, is not an absolute right but is merely a principle to be applied in future negotiations to establish mutually satisfactory constitutional rights and protections in favour of Aboriginal peoples. Moreover, the recognition of the principle of self-determination at this time adheres to Canada's commitment to the international community. The right of all peoples to self-determination is a fundamental principle in international law. This right is proclaimed in the United Nations Charter as well as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Canada has ratified all of these conventions.

The commitment to negotiate mutually satisfactory rights and protections with the Aboriginal peoples of Canada in

regard to specified subject matters, among others, is meant to create a political rather than a legal obligation. We consider a formalized political commitment essential since it provides some recognition of the fundamental principle of mutual consent presently witnessed in the Royal Proclamation. Furthermore, it increases the possibility that Aboriginal peoples will have a just and reasonable opportunity to negotiate constitutional protections with federal and provincial governments in areas of vital concern.

The items specified under subsection (2) have been included for several reasons. First, these items enjoy high priority among all Aboriginal peoples. Second, the items directly affect the rights and interests of Aboriginal peoples and often comprise of matters of sole application to them. Third, the items in subsections (a), (b), (f), (g) and (h) have been specifically mentioned by Prime Minister Trudeau in a major policy speech at the National Conference of Indian Chiefs and Elders held in Ottawa on April 29th, 1980. Therefore, all that is being provided for here is a formal affirmation of the commitment to negotiate subject matters of constitutional concern to Aboriginal peoples, as previously stated on different occasions by the Government of Canada.

The reference to "distinct cultural, economic and linguistic identities" at the end of subsection (2) reflects, in general terms, the essential attributes that Aboriginal peoples

associate with their concept of domestic nations within Canada. Furthermore, these attributes are guaranteed to Aboriginal peoples under international law. In particular, Article 27 of the above-mentioned International Covenant of Civil and Political Rights identifies specific minority rights in this regard.

In respect to subsection (3) of section 23A, it has often been stated by Aboriginal peoples that their aboriginal rights are inseparable from their identity, both individually and collectively, and must not be subject to extinguishment. For Canada's Constitution to permit the continued extinguishment of such unique cultural rights would be both to acknowledge and sanction the ongoing assimilation of Aboriginal peoples. As evident in the case of the James Bay and Northern Quebec Agreement, governments do in fact exert considerable pressure on Aboriginal peoples in order to convince them of the necessity for extinguishment. For example, in the case of Inuit of Northern Quebec, the Government of Quebec made extinguishment of aboriginal rights in and to land in the Province of Quebec an essential prerequisite to the settlement of aboriginal claims.

Subsection (4) of section 23A enshrines the right to the use and enjoyment of property presently found in The Canadian Bill of Rights¹ and is similar to the property rights provision in the United States Constitution. The collective nature of such rights is of vital importance to Aboriginal peoples since their property rights are generally held in such manner.

Although the Prime Minister did not choose to include this property right as part of the Charter in the Proposed Resolution, earlier drafts of the federal position on the Charter of Rights and Freedoms indicate the government's intention to provide for both individual and collective property rights. The special relationship which Inuit have with the land and the constant threats and pressures of erosion of our land base necessitate the inclusion of some protection of our property prior to patriation. Limitations on the right of Aboriginal peoples to the use and enjoyment of property have been narrowly stated in our proposed amendment due to the tremendous cultural significance of land to our people.

4.5 Undeclared Rights and Freedoms (section 24)

Section 24 (as amended) provides:

The guarantee in this Charter of certain rights

¹See The Canadian Bill of Rights, R.S.C. 1970, Appendices, NO 3, s.1(a).

and freedoms shall not be construed so as to abrogate, abridge or derogate from any undeclared rights or freedoms that exist in Canada, including the aboriginal rights and freedoms that pertain to the Aboriginal peoples of Canada and those rights acquired by or confirmed in favour of the Aboriginal peoples of Canada under the Royal Proclamation of October 7, 1763.

In discussing section 24 of the Proposed Resolution we find it particularly useful to compare this section with the equivalent provision found in the federal government's Constitutional Amendment Bill C-60, tabled in Parliament by the Prime Minister in 1978.¹

It should be observed that the present wording in section 24 "not...denying the existence of" dilutes the protection originally provided in the equivalent section under Bill C-60. In this regard, it is arguable that, while the Charter may not in the future "deny" the existence of certain Aboriginal rights and freedoms, it could "abridge" or otherwise modify their meaning or import. Secondly, the rights of Aboriginal peoples under the Royal Proclamation was specifically referred to under Bill C-60 but significantly has been omitted from section 24 of the Proposed Resolution. In both these instances, the federal government's intention to dilute our protections as evidenced in section 24 is clearly unwarranted. Our proposed amendment, therefore, purports to correct these weaknesses.

¹Section 26 of Bill C-60 provides as follows: "Nothing in this Charter shall be held to abrogate, abridge or derogate from any rights or freedoms not declared by it that may have existed in Canada at the commencement of this Act, including, without limiting the generality of the foregoing, any rights or freedoms that may have been acquired by any of the native peoples of Canada by virtue of the Royal Proclamation of October 7, 1763." (emphasis added)

A further element which we have added to section 24 is a specific reference to the fact that the rights and freedoms of Aboriginal peoples referred to in section 24 are "aboriginal" in nature. If Canada is truly committed to negotiate constitutional protections for aboriginal rights, then the Resolution should at least refer specifically to aboriginal rights if not define them. It has been suggested by certain government officials that one does not put a term in the Constitution if the meaning has not been made perfectly clear. We cannot accept this rationale. The terms generally found throughout Canada's Constitution are characteristically broad and general in nature and subject to considerable interpretation both judicially and politically.

Due to the lack of time to negotiate constitutional protections and to clarify the exact nature and scope of aboriginal rights, it is our position that the amendments in the pre-patriation stage should at least make reference to this most crucial element of our position as original inhabitants. To deny us a specific reference to our aboriginal rights in Canada's Constitution indicates to us that political commitments by governments to negotiate such rights in the post-patriation stage are of little consequence.

4.6 Participation of Aboriginal Peoples at Constitutional Conferences (section 32)

Section 32 (as amended) provides:

- (1) Until Part V comes into force, a constitu-

tional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada at least once in every year unless, in any year, a majority of these composing the conference decide that it shall not be held.

- (2) Such constitutional conferences shall (new section) include the direct participation of one representative of each of the Indian, Inuit and Metis peoples of Canada for matters on the agenda which affect them, in accordance with rules to be established in this regard by an appropriate person or body duly authorized for such purposes by the Governor-in-Council.

It has been repeatedly stated by the Prime Minister and his officials that the Government of Canada is committed to providing for the direct participation of the Aboriginal peoples of Canada in constitutional conferences for matters which affect them.¹ In order to formalize this commitment, subsection (2) has been added to section 32. Just as the first paragraph in section 32 has been provided in order to formalize the federal government's commitment to the provinces, so should a similar commitment be included in regard to Aboriginal peoples. This is of particular importance due

¹In his speech to the National Conferences of Indian Chiefs and Elders in Ottawa on April 29, 1980, Prime Minister Trudeau stated the following: "At the First Ministers' Conference on the Constitution February of last year, I succeeded in having placed on the agenda a discussion item entitled "Natives and the Constitution". It was agreed that native representatives would meet with the First Minister on that subject.....
.....
I want to reaffirm tonight that you will continue to be involved in the discussion of constitutional changes which directly affect you." (emphasis added)

See also the letter of Prime Minister Trudeau provided in Appendix III of this brief.

to the previously described difficulties that await Aboriginal peoples in the post-patriation amending process.

4.7 Amendments to Constitutional Provisions Referring to
Aboriginal Peoples (section 51A)

Section 51A provides:

(new section)

- (1) Nothing in Parts IV and V shall be construed as permitting any amendment to any constitutional provision that makes references to any of the Aboriginal peoples of Canada without the consent of each of the Aboriginal peoples of Canada so affected in accordance with rules to be established by an appropriate person or body duly authorized for such purposes by the Governor-in-Council.

The effect of this amendment is to require the consent of each of the Aboriginal peoples before amending any constitutional provision that makes specific reference to them.

It was discussed earlier that the special status of Aboriginal peoples has been continually eroded or otherwise altered by the unilateral actions of governments in Canada. In order to prevent such further alterations of our constitutional position, the principle of mutual consent, embodied in the Royal Proclamation, must be enshrined in Canada's Constitution prior to patriation.

It is important to note, however, that section 51A does not in any way prevent Parliament and the provincial legislatures

from dealing with other matters affecting all citizens in Canada. Section 51A is meant to provide minimal protections for the rights and status of Aboriginal peoples while, at the same time, fully respecting the doctrine of Parliamentary supremacy.

4.8 Relevant Omissions in Schedule 1

Schedule 1

- | | | |
|-----|-------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| 1A. | The Royal Proclamation of October 7, 1763. | (New Section) |
| 3A. | Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union, dated the 23rd day of June, 1870. | (New Section) |

The critical importance of the Royal Proclamation to Aboriginal peoples of Canada has already been emphasized in this brief. The Order-in-Council respecting Rupert's Land is also of fundamental importance to Aboriginal peoples. In section 14 of the Order-in-Council, and in an identical section of the attached Deed of Surrender, provision is made requiring the Government of Canada to dispose of claims of Indians to compensation for lands in communication with the Imperial Government. In essence, there exists an obligation upon the Canadian Government to settle all such claims.

Neither of these constitutional documents, although of particular relevance to Aboriginal peoples, has been included in Schedule 1 of the Proposed Resolution. Section 52 of the

Proposed Resolution delineates which documents shall comprise Canada's Constitution after patriation. Since the wording of section 52 could easily be interpreted as limitative, it may well result in a situation where any documents not referred to in section 52 and not included in the list of constitutional documents in Schedule 1 are deemed to be extraneous to the Constitution. In other words, documents which are presently considered to be part of Canada's Constitution could be deprived of their constitutional status if not specifically referred to in section 52 or in Schedule 1.

Unlike the United States, Canada's Constitution is made up of many different documents. There does not appear to be one clear and unequivocal definition of which documents make up what is known as the "fundamental law"¹ in Canada's Constitution. At the same time, however, there appear to be some criteria established under constitutional law which may assist in determining the constitutional nature of an instrument. In this regard, the legal and technical arguments have been included in Appendix IV of this brief.

In regard to the Royal Proclamation and the Order-in-Council of 1870 respecting Rupert's Land, it is our position that both these documents are constitutional instruments which should for greater certainty be included in Schedule 1 as part of Canada's Constitution. In light of the particular

¹For an indepth discussion of what constitutes "the fundamental law", see Gérin-Lajoie. Constitutional Amendment in Canada, University of Toronto Press, 1952, chapter 1.

relevance of these documents to the body of aboriginal rights, and to Aboriginal peoples in general, it is critical that they be enshrined in our fundamental law.

CONCLUSIONS AND RECOMMENDATIONS

1. Inuit have, and must continue to have, a homeland within Canada. This is our birthright. It is also our right in law, as reflected in the terms of the Royal Proclamation of 1763.
2. Our status as Inuit within Canada must not be altered without our consent.
3. Aboriginal rights are an inseparable part of our identity as Inuit.
4. The right to our identity is enshrined in international law, and this principle has been accepted by the Government of Canada.
5. There are constant pressures of assimilation in the existing political, legal and economic make-up of Canada which seriously threaten to erode our identity.
6. The Proposed Resolution further compromises Inuit status by refusing to recognize our status within Canada.

7. The Proposed Resolution compromises Inuit status by ignoring the necessity of obtaining our consent in relation to further changes in our status.
8. The Proposed Resolution leaves little real opportunity for obtaining constitutional amendments in our favour in the post-patriation period.
9. It is therefore critical that pre-patriation amendments in favour of Aboriginal peoples be obtained which give some indication of our relationship with governments in Canada.

IN THIS REGARD WE THEREFORE PROPOSE:

10. THAT our right to Inuit identity be enshrined as a principle in the Proposed Resolution.
11. THAT, in accordance with this principle, the future of Inuit in Canada be premised upon the principle of self-determination within the Canadian federation.
12. THAT within this context, the Government of Canada commit itself to negotiate a framework of constitutional rights and protections for Aboriginal peoples.
13. THAT our aboriginal rights, as an inseparable part of our individual and collective identities, must not be subject to extinguishment by Parliament.

14. THAT the participation of the Aboriginal peoples of Canada in future constitutional conferences as promised by the Government of Canada be formalized in the Proposed Resolution in a manner similar to the commitment made to the provinces.
15. THAT any further amendments to the Constitution that make specific reference to the Aboriginal peoples of Canada should not be permitted without the consent of those Aboriginal peoples so affected.
16. THAT the Royal Proclamation of 1763 and the Order-in-Council respecting Rupert's Land be included in Schedule 1 of the Proposed Resolution so as to be clearly recognized as part of the Constitution of Canada.
17. THAT mobility rights in the Charter be further limited so as to protect the cultural, economic, social and environmental interests of the Aboriginal peoples, particularly in light of special needs and conditions in the northern regions of Canada.

*End Translation
here*

THE ROYAL PROCLAMATION

October 7, 1763 (excerpt)

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.—We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.

And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves

Attendu qu'il est juste, raisonnable et essentiel pour Notre intérêt et la sécurité de Nos colonies de prendre des mesures pour assurer aux nations ou tribus sauvages qui sont en relations avec Nous et qui vivent sous Notre protection, la possession entière et paisible des parties de Nos possessions et territoires qui ont été ni concédées ni achetées et ont été réservées pour ces tribus ou quelques-unes d'entre elles comme territoires de chasse, Nous déclarons par conséquent de l'avis de Notre Conseil privé, que c'est Notre volonté et Notre plaisir et nous enjoignons à tout gouverneur et à tout commandant en chef de Nos colonies de Québec, de la Floride Orientale et de la Floride Occidentale, de n'accorder sous aucun prétexte des permis d'arpentage ni aucun titre de propriété sur les terres situées au-delà des limites de leur gouvernement respectif, conformément à la délimitation contenue dans leur commission. Nous enjoignons pour la même raison à tout gouverneur et à tout commandant en chef de toutes Nos autres colonies ou de Nos autres plantations en Amérique, de n'accorder présentement et jusqu'à ce que Nous ayons fait connaître Nos intentions futures, aucun permis d'arpentage ni aucun titre de propriété sur les terres situées au-delà de la tête ou source de toutes les rivières qui vont de l'ouest et du nord-ouest se jeter dans l'océan Atlantique ni sur celles qui ont été ni cédées ni achetées par Nous, tel que susmentionné, et ont été réservées pour les tribus sauvages susdites ou quelques-unes d'entre elles.

Nous déclarons de plus que c'est Notre plaisir royal ainsi que Notre volonté de réserver pour le présent, sous Notre souveraineté, Notre protection et Notre autorité, pour l'usage desdits sauvages, toutes les terres et tous les territoires non compris dans les limites de Nos trois gouvernements ni dans les limites du territoire concédé à la Compagnie de la baie d'Hudson, ainsi que toutes les terres et tous les territoires situés à l'ouest des sources des rivières qui de l'ouest et du nord-ouest vont se jeter dans la mer.

Nous défendons aussi strictement par la présente à tous Nos sujets, sous peine de s'attirer Notre déplaisir, d'acheter ou posséder aucune terre ci-dessus réservée, ou d'y former aucun établissement, sans avoir au préalable obtenu Notre permission spéciale et une licence à ce sujet.

APPENDIX II

BRIEF TO THE
FOREIGN AND COMMONWEALTH AFFAIRS COMMITTEE
OF THE
BRITISH HOUSE OF COMMONS

FROM THE
INUIT COMMITTEE ON NATIONAL ISSUES
NATIONAL INDIAN BROTHERHOOD
NATIVE COUNCIL OF CANADA

November 20, 1980

APPENDIX III



PRIME MINISTER · PREMIER MINISTRE
Ottawa, K1A 0A2
October 30, 1980

Dear Messrs. Watt and Tagooona:

Through a number of channels, including discussions with the Honourable John Munro, the uneasiness with which you and many of the people you represent view the actions of the government in seeking patriation of the Constitution has come to my attention.

Let me respond to your worries by saying that I am personally convinced that your people will lose nothing in this act of patriation. Under the old system, there was nothing which the Parliament of the United Kingdom could do on its own authority, in accordance with all our constitutional customs, to change the situation for the Native Peoples of Canada. That is a responsibility of all of us here in this country. I believe that Canadians, with new-found pride in their own Constitution and in their new maturity as a country, will be more than ever generous in considering the needs and wishes of our first citizens. In short, I believe that constitutional change after patriation will become easier, rather than harder, and I commit myself and the Government of Canada, again today, to working with the Native Peoples towards constitutional changes which will make Canada a better place for you and for all Canadians.

Messrs. Charlie Watt and Eric Tagooona
Co-Chairmen - ICNI
Inuit Tapirisat of Canada
4th Floor
176 Gloucester Street
Ottawa, Ontario

APPENDIX IV

Constitutional Status of the Order-in-Council Admitting Rupert's Land and the North-Western Territory into the Union, 1870 and the Royal Proclamation of October 7, 1763

There is no clear and unequivocal definition of which documents make up what is known as the "fundamental law"¹ in Canada's Constitution. At the same time, however, there appear to be some criteria established under constitutional law which may be of assistance in determining whether or not certain documents have constitutional status in Canada.

Constitutional status may be conferred on those documents which are safeguarded by law against repeal or amendment by the unilateral action of any legislative body in Canada. In relation to Canada, such documents may be classified under three broad headings: (1) Acts of Parliament of the United Kingdom; (2) British Orders-in-Council; and (3) Acts of Parliament of Canada (sometimes passed concurrently with Acts of one or more of a number of the provincial legislatures).

In the case of the Order-in-Council of 1870 respecting Rupert's Land and the North-Western Territory, it appears quite clear that it is a document of constitutional status under Canadian Constitutional law. In this regard,

¹For an indepth discussion of what constitutes "the fundamental law", see Gérin-Lajoie. Constitutional Amendment in Canada, University of Toronto Press, 1952, Chapter 1.