EXECUTIVE SUMMARY

Both as Canadians and as native people, the Nuu-Chal-Nulth are concerned that the proposed Constitution Act, 1980 will seriously erode or eliminate various principles of constitutional law which have historically formed part of the Constitution of Canada. Section 52 should be of concern to all Canadians, in that it would appear to give constitutional significance to such documents as the British North America Act, but not to such fundamental historical instruments as Magna Carta. The particular concern of native people is the implied exclusion of the Royal Proclamation of 1763 from the definition of the constitution. In judgments of the courts and in the writings of scholars, the Royal Proclamation of 1763 has been considered to be a binding constitutional document.

The Nuu-Chah-Nulth have recently launched a land claim whereby aboriginal title is asserted over part of Vancouver Island. The implied de-constitutionalizing of the Royal Proclamation of 1763 may seriously undermine the legal position of the Nuu-Chah-Nulth, thus expropriating their historic rights. We have also expressed the concern that Section 24 of the Canadian Charter of Rights and Freedoms, in which "the native peoples of Canada" are specifically mentioned, may, through judicial interpretation, have the opposite effect from that apparently intended. The special position of native people in Canada encompasses a status and a sort of rights quite different from those envisioned in the Charter of Rights and Freedoms. The special status of native people is based on certain exclusive property interests, special rights to self-government, and the doctrine of aboriginal title. The Charter of Rights and Freedoms in which Section 24 is found deals with a quite different kind of right. For

the reasons contained herein, we argue that the special status of native people would be better protected by not mentioning native people in Section 24.

NUU-CHAH-NULTH

S U B M I S S I O N

TO THE SPECIAL JOINT COMMITTEE ON THE CONSTITUTION OF CANADA BY THE NUU-CHAH-NULTH TRIBAL COUNCIL OF VANCOUVER ISLAND, BRITISH COLUMBIA, CANADA, NOVEMBER, 1980

I N D E X

S U B M I S S I O N

TO THE SPECIAL JOINT COMMITTEE ON THE CONSTITUTION OF CANADA BY THE NUU-CHAH-NULTH TRIBAL COUNCIL OF VANCOUVER ISLAND, BRITISH COLUMBIA, CANADA, NOVEMBER, 1980

PROPOSED AMENDMENTS

The Nuu-Chah-Nulth Tribal Council proposes the following amendments to the Constitution Act, 1980:

With respect to the definition of the Constitution of Canada as set out in Section 52 of Part 6 of the Constitution Act, 1980, we respectfully urge that Section 52(1) be amended to read as follows:

"52.(1) The Constitution of Canada includes

a) the Canada Act;

b) the Acts and Orders referred to in Schedule 1;

c) the Royal Proclamation of 1763;

d) all treaties entered into between the Government of Canada or the Imperial Government or a former colonial government or the Hudson Bay Company and any of the native peoples of Canada;

e) any amendment to any Act, Order, Proclamation, or Treaty referred to in paragraphs a), b), c) and d);

f) the statutes, charters and proclamations of England of constitutional significance, to the extent that they were incorporated into the constitutional law of Canada on July 1, 1967; and

g) the constitutional doctrines of the English common law which apply to Canada and the common law constitutional doctrines which are or may become recognized in Canada."

The Nuu-Chah-Nulth Tribal Council also urges that Section 24 of the Canadian Charter of Rights and Freedoms be amended to read as follows:

> "24. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights and freedoms that exist in Canada."
>
> (reference to the native peoples of Canada is deleted)

THE DEFINITION OF THE CONSTITUTION

The Nuu-Chah-Nulth Tribal Council is concerned that Section 52 of the proposed Constitution Act, 1980, may have the effect of eliminating from constitutional significance various doctrines and documents which ought to be considered binding upon Parliament and the legislatures.

This is the first attempt in Canadian constitutional history to actually define the limits of the Constitution. The difficulty we find is that Section 52 as it now stands only includes the Constitution of Canada in a very narrow sense. We adopt the following passage from a leading constitutional expert to describe the broader sense of the word "constitution":

> "The word 'constitution' is, however, often used in a second, wider sense, as including all of the important rules, whatever their source, which allocate governmental power within a nation; in other words, all of the important rules which establish, empower and regulate the principle institutions of government. The wide sense of the word includes the rules which are contained in the basic constitutional document (if there is one), but it also encompasses the rules which are not containted in the basic constitutional document. [1]

We foresee the grave danger that judges will consider that components of the "wider" constitution have lapsed or have been impliedly repealed by passage of the Constitution Act, 1980. The particular sources of constitutional law which may be so affected are:

a) earlier Canadian constitutional documents;
b) early British constitutional documents;
c) doctrines of the common law.

We consider that all the various sources of constitutional law

form a composite constitution of Canada. The elements of the constitution have been overlaid, one upon the other, for centuries. The British North America Act of 1867 is a relative newcomer to a tradition which began at least as early as 1215.

Section 52, as it is now drafted, would exclude from the constitution the documents significant to Canadian constitutional law which preceded the British North America Act of 1867. Not mentioned are the Royal Proclamation of 1763, the Constitution Act of 1791, the Quebec Act of 1774, the Union Act of 1840, to name the most familiar. The Nuu-Chah-Nulth Tribal Council is most vitally concerned with exclusion of the Royal Proclamation of 1763, a point which will be expanded upon below. But our general point with respect to all of these early documents is that they cannot simply be considered as aids to the interpretation of the later British North America Act. In some cases, they contain substantive constitutional law which has neither been repealed or replaced. In keeping with our thesis that the Constitution of Canada is an overlay, we submit that a wholesale repeal of preceding constitutional documents, whether express or implied, would make nonsense out of the future Constitution of Canada.

Canada has also inherited from Britain some very early documents of constitutional signficance. The Magna Carta of 1215 is an example. We submit that the definition of the Constitution of Canada must include reference to such documents as Magna Carta or these great sources of constitutional law may be considered to have been impliedly excluded from the Canadian constitution. It might be argued, in reply to this submission, that the proposed Canadian Charter of Rights and Freedoms is adequate to preserve all of the rights

guaranteed by Magna Carta. We have studied this proposal and must respectfully disagree. Consider for example, Chapter 39 of Magna Carta:

> "No freeman shall be arrested or detained in prison or deprived of his freehold or outlawed or banished or in any way molested; and we will not set forth against him nor send against him unless by the lawful judgment of his peers and by the law of the land." [2]

It may be argued that the substance of this chapter of Magna Carta is reproduced in Sections 7 to 12 of the Canadian Charter of Rights and Freedoms. The new Charter will be a codification of the rights guaranteed by Magna Carta. But then consider Chapter 40 of Magna Carta:

> "To no one will we sell, to no one will we refuse or delay, right or justice."[3]

This guarantee, that justice will not be delayed, is not reproduced in the Charter of Rights and Freedoms. The provisions of Magna Carta apply equally to civil and criminal matters. But Section 11 of the Canadian Charter of Rights and Freedoms would only apply to criminal matters, in fact only those cases where some one is "charged with an offence". Chapter 40 of Magna Carta is meant to apply not only where a person is charged with an offence but in all cases, whether civil or criminal. We submit this as but one example of the future loss of constitutional rights which may arise by the narrow definition of the constitution contained in Section 52.

Aside from the great documents, there are certain principles of the constitution, which, though contained only in judgments of the courts are no less constitutionally significant

than the constitutional documents themselves. We refer, for example, to the summary of the principles of the constitution contained in Dicey, which principles must be considered to apply in their own way to Canada:

> "They are first, the legislative sovereignty of Parliament; secondly, the universal rule or supremecy throughout the constitution of ordinary law; and thirdly . . ., the dependence in the last resort of the conventions upon the law of the constitution." [4]

To conclude this point,therefore, we submit that all Canadians, not just native people, ought to be concerned about the possibility that the definition of the constitution as proposed in Section 52 may result in the implied lapse, repeal, or replacement of vital constitutional provisions. They apply in Canada no less than the specific words of the British North America Act. As native people, we are concerned that any diminution of the significance of the Royal Proclamation of 1763 could be devastating to our interests, but as Canadians we are also concerned with the broader problem caused by a rigid definition of the Constitution of Canada. Such a definition ought not be attempted without a full understanding of its implications.

THE ROYAL PROCLAMATION OF 1763

The Royal Proclamation of 1763 has long been considered a kind of "charter of native rights". The document is reproduced in the appendices to the Revised Statutes of Canada, 1970, presumably because it has statutory or constitutional significance. Following is an extract from the Proclamation which is of great significance to the native people of Canada:

> " 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 NorthWest, 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 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 the Purpose first obtained."

The above passage has never been amended or repealed, either directly or by implication. It is the principle document upon which the aboriginal title of Canada's native peoples is founded.

We submit that the Royal Proclamation of 1763 is not merely in effect as an ordinary statute, but that it is of constitutional importance. In this regard, we refer to the following passage from a recent book by Professor Brian Slattery:

> "3) The Royal Proclamation of 1763
>
> This instrument clarifies and confirms certain general legal principles already in place in many American colonies, and extends these to other British territories on the continent, in particular to those recently acquired by conquest and cession from France, and also to such older, but less developed, colonies as Newfoundland and Rupert's Land. The most important and enduring features of the Proclamation are its recognition that Indian peoples hold rights to unceded lands in their possession throughout British dominions in North America, and its provision that such rights may be extinguished only by surrender to the Crown or proprietary bodies, executed in a prescribed manner. We have submitted here that the provisions of this instrument were constitutionally valid and binding in the territories to which they referred, and that these territories, in 1763, comprised virtually the whole of modern Canada, including the west and north-west, long-standing claims to which had been advanced by the British Crown and its predecessor-in-title, the French Crown. In any case, it is submitted that the Proclamation presumptively applied to any American territories acquired after 1763 which satisfied the terms of that instrument, so long as it remained in force.
>
> The point cannot be documented here, but it may be added that although the position of Indian lands has subsequently been affected by statute in various parts of Canada, and their geographical extent has been considerably reduced by cession to the Crown, there has been, to the present writer's knowledge no general repeal of the Proclamation's basic provisions regarding Indian lands. The Proclamation thus has a continuing relevance in many parts of Canada today." [5]
>
> (emphasis added)

Apart from Professor Slattery's argument, there is good reason to consider this a constitutional document. The idea which inspired the establishment of a Federal system of government in Canada was the guarantee of rights to certain minorities within the larger state. The protection afforded to Canada's French speaking minority is well-known, and is beyond questioning. In our submission, the protection afforded to native people by the Royal Proclamation of 1763, incorporated as it has been into the constitutional fabric of Canada, must be preserved as effectively as other minority rights within the Constitution. Any attempt to alter that protection ought to be as solemn and formal, and indeed as difficult, as a constitutional amendment.

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

We have two difficulties with respect to the present wording of Section 24 of the Canadian Charter of Rights and Freedoms to present to your Committee. As you can see by the amendment we have proposed, we take the position that the inclusion of "the native peoples of Canada" in Section 24 as presently drafted, may be more detrimental to our interests than if that clause was left out entirely.

Our primary concern is that the specific mention of "native peoples" in Section 24 may have the effect of limiting any special status for native people to what is permitted by that Section only. In the course of future litigation, it would probably be argued that the failure to mention the special interests of native people in other parts of the constitution indicates that such mention has been considered, and then specifically excluded. For example, Section 31 in Part 2 of the Constitution Act, 1980 would commit the Government of Canada and the Provincial Governments to promoting "equal opportunities". Does this therefore specifically exclude the possibility of promoting special opportunities for the well-being of the native peoples of Canada? We assert that it is fundamental to the fabric to the Canadian Constitution that native peoples have a special status. It is unnecessary therefore for Section 24 to specifically enumerate the rights and freedoms of native people. Rather, the interests of native people ought to be entrenched in other places, such as Section 52, and then the special rights and freedoms of native people would be guaranteed as a natural consequence.

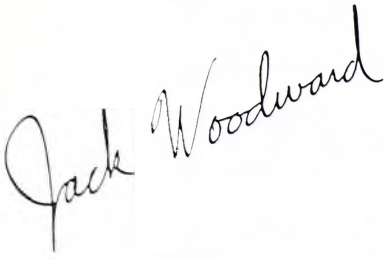
Additionally, we are concerned that the term "rights or freedoms" does not adequately describe the scope of interests

which comprise the special status of native people in Canada. The Canadian Charter of Rights and Freedoms is primarily concerned with guarantees of legal, democratic and individual rights. They are the same sort of rights one finds in documents such as the amendments to the American constitution. They are not the same sorts of rights we often associate with native claims. The native claim is most often an assertion of a special property interest of the tribal group, or of the special organization for self-government of the native group. Property rights and rights of self-government are not the sort of rights enumerated elsewhere in the Charter contained within the Constitution Act, 1980. We are in danger, therefore, of seeing a series of judicial decisions interpreting the "rights or freedoms" preserved for native people by Section 24 of the Charter as meaning only those "rights or freedoms" which are similar in nature to the rest of the rights and freedoms spelled out in the Charter. This would be a serious problem, of course, because it is the very uniqueness of native claims which makes them worth preserving.

For the foregoing reasons, we cannot accept that Section 24 as it is presently drafted is a suitable protection for the interests of native people in Canada. On the contrary, the process of judicial interpretation based on Section 24 as it now stands may tend to diminish or limit the special status of native people in Canada.

The Nuu-Chah-Nulth Tribal Council wishes to thank the honourable members of this Committee for their kind attention to this our submission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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