media. The chattering classes of Canada will not lack for employment for as long as Canada may chance to endure.

If we have learned anything from the Meech debacle, it is that an aroused Canadian citizenry will no longer stand for backroom deals and high-pressure labour-style negotiations in re-making our constitution. Nor do we any longer have the luxury of a staged-in agenda, in which there is a Québec round followed by a native peoples round followed by a multicultural round followed by a round for disabled people, with women and the poor being told to wait their turn while the more severely disadvantaged take priority.

What I particularly want to urge on you is the further lesson that we can learn from many people, of whom the most authoritative, in traditional political-punditry terms, is Alan Cairns. I agree with Professor Cairns that the consciousness of Canadians vis-à-vis their relations to the state has radically changed during the past decade, straining our existing structures and political dynamics not merely to, but past, the breaking point. Thanks largely to the women's movement, and to feminist theorizing, the personal has become political and the political very personal. And yet where in the musings of our professional academic pundits, except for a handful of feminist political theorists – Catharine MacKinnon, Carole Patemen, Lynda Lange, Jill Vickers — and a few mavericks like Alan Cairns, is there an awareness of the huge gap between old-style understandings and new-style definitions of citizenship, the state, and the exercise of political participation and responsibility? In the multiplicity of think-tanks and colloquia and special journal issues that will no doubt proliferate through the next several years, it seems to me that it must be the so-called minorities – women, who of course are not a minority, and those other excluded groups who are minorities – whose voices must be present, and listened to, and heard. For increasingly it is precisely these groups who are developing a vision of a possible future together in which objectives, values and processes, other than those that poisoned our relations during Meech, are available as foundations for a transformed Canadian political community.

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FIRST NATIONS AND ABORIGINAL RIGHTS

Andrew Bear Robe

ABORIGINAL LAND CLAIMS

Any discussion today regarding land claims in Canada must begin with the proprietary concept of *Indian title*, which essentially means the full and complete aboriginal ownership, occupation and dominion over the North American continent. Aboriginal title essentially means the same as Indian title; both bespeak of an independent legal interest in land which must be satisfied by the Crown before it can claim unencumbered title to any piece of land in North America. Under the Canadian *Constitution* of 1982, aboriginal title can be asserted not only by Indians, but the Inuit and Metis as well, In any case, the Indian title is recognized and protected both by the British Imperial and Canadian Crowns through such Executive acts as the *Royal Proclamation of 1763*, s.109 of the *Constitution Act, 1867*, i.e Indian Trusts and Interests, the *Rupert's Land and North-Western Territory Order of 1870*, the pre- and post-Confederation land cession and peace treaties, the Natural Resources Transfer Agreements of the 1930s respecting the prairie provinces[1] and the more recent comprehensive land claims settlements for the northern regions. All of the foregoing executive undertakings must be read together in order to arrive at the common law and statutory pronouncements regarding Indian title and the associate aboriginal and treaty rights arising therefrom.

As a direct result of the dangerous and volatile situation created at Oka, Québec this past summer, between the Mohawks and the citizens of Québec, everyone in Canada that has expressed an opinion on the subject agrees that the federal land claims policy must be substantially revamped. That policy must now show fresh approaches, new attitudes and more flexible logic if Canadians are to enjoy calmer and lasting peaceful relations with aboriginal peoples. Firstly, the federal government and its huge bureaucracy can begin to appreciate the rich historical perspective of Indian land claims instead of attempting to fit those issues into narrow

property law concepts or restrictive federal land claims criteria. Aboriginal land ownership rights have a far more spiritual and democratic depth than the feudal land tenure system of England, France or Spain. Indian First Nations held communal ownership title and interests to their ancestral lands long before John Cabot or Captain Cook first set foot upon Indian territories. In some cases, as in British Columbia, the Chiefs held direct hereditary title based upon communal interests. Aboriginal land ownership title is no less politically and legally significant than the more individualistic fee simple ownership title of Europeans. Both systems of land tenure served their respective international communities equally well within their own times and continents.

Secondly, even though the Crown may presently claim the underlying title to the Canadian soil, nonetheless the Indian title must be dealt with before the Crown obtains a clear and unencumbered title. The Crown's title is derivative from the Indian title. In other words, before Indian lands become public lands and subsequently private lands, the Indian interests to the land must be purchased via treaty negotiations. This is clear in the land cession and peace treaty process in Canada as late as 1923, and also in the more recent comprehensive land claim settlements with the James Bay Cree and Inuit in 1975 and with the Naskapi of Northern Québec in 1978. Either method of Indian land purchase (i.e. treaty or comprehensive claim settlement) is used to satisfy the legal requirement for addressing the Indian title separately from the Crown's underlying interest. However, huge equity gaps remain to be fulfilled for the Indian side. As late as 1990, large blocs of Canadian soil remain which have never surmounted that legal requirement, hence, these regions are in constant land claim disputes as is the case now in British Columbia, Québec, Maritimes, Yukon, and the Northwest Territories.[2]

Thirdly, the federal government must abandon its dogged insistence that all aboriginal and treaty rights must first be extinguished in any land claim settlement. That line of argument and logic is not only contrary to s.35 of the Canadian *Constitution*, but it is also contrary to the permanent nature of those rights as guaranteed by the Sovereign and international law conventions.

Fourthly, there is an urgent need to create a judicial body outside of federal government structures that can effectively and equitably adjudicate Canada's long outstanding aboriginal land claims; it should be international in its origin, scope and composition. Such an independent body could speed up the land claims settlement process and thereby reduce the huge backlog that has built up over the years, plus diffuse the deep and bitter frustration levels of all aboriginal claimant groups. The federal departments of Justice and Indian Affairs must be removed from their respective central controlling roles in aboriginal land claims, simply because they are in a conflict of interest position. These departments are mandated to protect solely the federal interest and not the Indian interest; they are the judge and jury of all claims; they decide which claims should be negotiated and those to be rejected, irrespective of merit; they decide how much funds should be spend both for compensation and independent legal research. That "take it or leave it" policy must be terminated and a just and more reasonable negotiations process be established for the first time. Lastly, a Canadian Aboriginal Commission needs to be established soon to look into all aboriginal issues, including land claims, and propose some realistic long-term solutions, notwithstanding any other existing federal or provincial commission.

Indian nations prefer to seek redress through the negotiations process rather than through the courts. Let us hope that the next decade will garner a more positive atmosphere for aboriginal relations in Canada. We all have a stake in that goal, both Indian and white alike. Most importantly, the government of Canada must show proper and effective leadership towards resolving this thorny and long overdue national issue.

"There is an urgent need to create a judicial body outside of federal government structures that can effectively and equitably adjudicate Canada's long outstanding aboriginal land claims."

ABORIGINAL SELF-GOVERNMENT

The federal government's efforts in the recent past to integrate us into the mainstream of Canadian society have all failed. Those efforts have failed mainly for two reason: firstly, our societal and cultural values, customs, traditions and beliefs differ greatly from Euro-Canadian society; secondly, the Canadian government has always insisted that we, as Indian people, forget and relinquish all of our sovereign aboriginal and treaty rights as a price for entering mainstream Canadian society. For the above reasons, the federal government's proposal for integration or assimilation have never been acceptable to Canada's Indian First Nations.

There should be no price tag attached to our Canadian citizenship. We have already paid enough.

When Canada's constitution was repatriated in 1982, there was a great hope among the Indian First Nations that substantial changes would be made to our relations with Canada. It was hoped that our sovereign and inherent aboriginal rights would receive full recognition and affirmation; secondly that all outstanding land claims would be settled and; thirdly, that our treaty rights would be elaborated, defined and fulfilled. This great hope was engendered by the *Canadian Charter of Rights and Freedoms*, s. 25 and the *Constitution Act, 1982*, s. 35 and 35.1.

Section 35.1 commits the government of Canada and the provincial governments to the principle of aboriginal participation in a constitutional conference on the amendment of s.91(24) of the *Constitution Act, 1867* and s.25 of the *Charter*. As a moral issue under section 35.1, Indian First Nations should have an equal voice and voting power at such conferences. The Prime Minister should call for a constitutional amendment on that fundamental point.

Both the federal and provincial governments continue to insist that our aboriginal and treaty rights are essentially "empty" rights under the Canadian *Constitution* and that they must be defined through political negotiations. That line of argument ignores the historical development of Indian law and policy since the 15th century which always had shown deference for our sovereign rights to the land and our inherent right to self-determination.

The four First Ministers' Conferences dealing with our aboriginal and treaty rights, held during the 1980s, were failures. Indian First Nations did not fail in those negotiations. We stated our positions firmly and clearly. The main obstacles were the ten provincial Premiers who never took the F.M.C. process seriously. They feared that their own limited sovereignty and jurisdiction would be jeopardized if the aboriginal right to self-government ever became entrenched as constitutional law. Therefore, they simply refused to agree to a constitutional affirmation of our "existing" sovereign and inherent right to self-government.

Another obstacle was the unwillingness of Prime Ministers Trudeau and Mulroney to negotiate directly with Canada's Indian First Nations on the central issue of the aboriginal right to self-government. Both prime ministers were not willing to settle outstanding aboriginal and treaty issues, and they ignored the powerful leverage of the exclusive s.91(24) federal power. In contrast, John A. Macdonald's Conservative government dealt directly with Indian First Nations when the treaties were negotiated during the latter part of the 1800s. That constitutional convention and principle has not changed and there is nothing standing in the way of Parliament dealing directly with sections 91(24), 25, and 35 issues as presently found in the Canadian *Constitution* notwithstanding cooperative or executive federalism.

Since 1870, Indian First Nations in Canada have been governed by federal legislation called the *Indian Act*. The *Indian Act* was not of our making and we of the Siksika Nation were not notified of the application of this Act upon our lands and people at the time of Treaty 7 negotiations in 1877. This *Act* was simply foisted upon us without our discussion, input, and consent. The *Indian Act* gives too much power to the Minister of Indian Affairs and leaves very limited powers for the Siksika Nation to excercise either through referendum of the people or through their Chief and Council. It governs our adulthood, and even past death regarding the management of our estates. The *Act* controls and directs every facet of our lives, our communities, our education, our economic and social development, and it even tells us which individuals are entitled to become members of our nation.

The *Indian Act* is based upon the goal of essential disintegration and assimilation of our people into mainstream Canadian society. Its rules and regulations do not respect nor protect our aboriginal and treaty rights. In fact, the *Indian Act* allows the provincial governments to erode those rights. Indian First Nations had no input into the original design of the *Act* and, through the years, we have had very little impact upon its amendments and changes that affect our lives profoundly.

One of the major problems with the *Indian Act* is the limitations it places upon our ability to make decisions for ourselves or to take action for the benefit of our people. The *Act* simply assumes that the federal government can act unilaterally regarding our affairs and that the decisions of the Chief and Council can be overruled by the Minister of Indian Affairs at any time. The Minister does not even have to give reasons why he would overturn the Council's decisions. That is not democracy, it is *internal colonial dictatorship*.

Most glaringly, the *Indian Act* is based upon the belief that Indians do not have the legal capacity to be responsible for themselves. Legally, we possess rights very similar to minor children and the Minister of Indian Affairs is the

guardian. He is vested with the power to determine who is and who is not an Indian, how to dispose of Indian lands, minerals, tribal funds, and who may and who may not receive services such as education, social assistance, health services, and housing. In particular, we are restricted in the areas of land management, financial management, contract relations with third parties, economic development, and control over our natural and water resources.

Not so long ago, Dr. Lloyd Barber, the former Commissioner on Indian Claims, made the following observations at Yellowknife, N.W.T. in October 1974, which still ring true today. He said:

> I cannot emphasize too strongly that we are in a new ball game. The old approaches are out. We've been allowed to delude ourselves about the situation for a long time because of a basic lack of political power in native communities. This is no longer the case and there is no way that the newly emerging political and legal power of native people is likely to diminish. We must face the situation squarely as a political fact of life, but more importantly, as a fundamental point of honour and fairness. We do, indeed, have a significant piece of unfinished business that lives at the foundation of this country.

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[This essay is an excerpt from Mr. Bear Robe's forthcoming book, *Rebuilding the Siksika Nation – Treaty, Aboriginal and Constitutional Rights* (Gleichen: Siksika Nation, 1991).

1. Alberta's Memorandum of Agreement, dated Jan. 9, 1926, ss. 8, 9 and *The Alberta Natural Resources Act*, S.A. 1930, c.21, ss.10, 12.

2. For a more thorough elaboration see: Bruce A. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987).

THE CONSTITUTIONAL POLITICS OF LANGUAGE

A. Anne McLellan

INTRODUCTION: CULTURE AND LANGUAGE

At the heart of Québec's demands for constitutional reform is a concern for the continuation of Québec's cultural uniqueness. The Meech Lake Accord was viewed as a small, albeit important, step in guaranteeing and protecting Québec's uniqueness and "specificity." As the Minister of Intergovernmental Affairs, Gil Remillard, noted:[1]

> [Québec's] identity must not in any way be jeopardized. We must therefore be assured that the Canadian constitution will explicitly recognize the unique character of Québec society and guarantee us the means necessary to ensure its full development within the framework of Canadian federalism.
>
> Recognition of the unique nature of Québec gives rise to the need for obtaining *real guarantees for our cultural safety*. (emphasis added)

As the comments of Remillard suggest, culture is the principal factor which makes Québec unique and "language is the natural vehicle for a host of other elements of culture".[2] Claude Romand Sheppard, in a working paper prepared for the Royal Commission on Bilingualism and Biculturalism, describes the causal connection between language and the maintenance of cultural distinctiveness in the following terms:[3]

> To say that language is a mere means of communication is to state less than half the truth. It is also, and foremost, the foundation of a particular culture, the prerequisite of its survival and the vehicle of its propagation. In this perspective, language can no longer be treated as an incidental: it becomes the *essential element* of ethnic identity and cultural continuity. (emphasis added)

The Commission, in the General Introduction to its Report, acknowledges the vital link between language and culture:[4]