CONSTITUTIONAL PROVISIONS FOR PLURALISM, BICULTURALISM, AND MULTICULTURALISM IN CANADA AND NEW ZEALAND: PERSPECTIVES FROM THE QUÈBÈCOIS, FIRST NATIONS, AND MĀORI

DRAFT

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ABSTRACT

With globalization and the ever-increasing movement of emigration, the challenge of appreciating and accommodating cultural differences has become universal. Recognition of and accommodation for the duality, multiplicity and hybridity of national identities is necessary within the constitutional and political frameworks of a nation-state because it is through constitutional reform that ‘others’ such as the Québécois and First Nations in Canada and Māori in New Zealand can establish socially inclusive laws and political and legal institutions that actualize their ‘distinct society’ and ‘partnership’ status.

Historically, the Québécois were granted special constitutional provisions for political and legal representation in Canada while the First Nations were marginalized. On the other hand Māori were guaranteed numerous rights under the Treaty of Waitangi, four Māori seats in the House of Representatives and a separate justice system pursuant to s. 71 of the Constitution Act 1852 which was, to a lesser extent, similar to the representation, justice, and language rights of the Québécois. Nonetheless, these constitutional provisions were never fully implemented for similar reasons – political hegemony and overriding national (usually economic) interests. In recent times, the constitutional rights of the First Nations have been recognized and entrenched in s.25 of the Charter of Rights and Freedoms and ss.35 and 37 of the Constitution Act 1982. While the judiciary is still defining these rights, the First Nations have been granted the option of self-government as part of their self-determination rights included in negotiated comprehensive agreements. The Québécois were marginalized and have attempted to pursue their collective rights under the notion of a ‘distinct society’ which has been the cause of considerable political tension including from the First Nations claiming and being denied similar status.

As immigration increases in both nation-states, the place of the Québécois, First Nations, and Māori is significantly affected given the eclipsing nature of the multiculturalism discourse. In relation to the current ethnic policy, multiculturalism is central in Canadian public policy, whereas biculturalism forms the basis of ethnic management policies in New Zealand. Only an authentic multicultural partnership in Canada and an authentic bicultural partnership in New Zealand can achieve a socially just reality thus highlighting how the present time and political climate have never been more favorable to forge this new reality. A post-colonial future aimed at genuinely fusing two or more cultural identities requires the acceptance of differences and building upon affinities including at the constitutional level.
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INTRODUCTION

A persistent issue for culturally, linguistically or racially heterogeneous societies is providing an appropriate environment for a collective commitment in which all groups feel that they participate equally. Canada and New Zealand are ethnically heterogeneous societies. Like most nation-states these countries contain people of different ethnic backgrounds living together under one law and under one dominant set of political institutions. For many years ethnic diversity was suppressed or dismissed. It was common to describe Canada and New Zealand as homogenous societies. However claims of homogeneity were only appropriate if ‘others’ (i.e. indigenous peoples and other ethnic minority groups) were either ignored or assumed to be gradually assimilating into the dominant culture. Indeed, for many years assimilation was the official government policy of both nation-states. Official government policy has grudgingly but inevitably shifted from assimilation and monoculturalism towards pluralism, biculturalism, and multiculturalism. This article discusses the pluralistic, bicultural, and multicultural initiatives employed in the constitutional and political frameworks of Canada and New Zealand.

Constitutional Law

Tardi notes that a constitution is ‘both a society’s political visions of itself and the legal document, which expresses the juridical organisation of that collective existence.’ Constitutional reformers thus set out to redefine the State in accordance with changes in the socio-political consensus and to produce a legal document that can be interpreted by the courts. Constitutional reform has been a consistent and obstinate problem for both Canadian and New Zealand public life. This is partially attributed to the difficulty involved with reconciling diverse visions and the multitude of ways to express the concepts underlying those visions. In the current political context it is useful to remember that constitutional reform is closely linked to the issues of government relations and official languages.

In democratic countries such as Canada and New Zealand where the rule of law prevails, constitutional reform is predicated on the acceptance of the role of law in the reform process. Changes must be effected within the bounds of existing constitutional legality. Hence the 1982 amendment to the Canadian Constitution and the 1986 amendment to the New Zealand Constitution were fundamental in severing the links with the Parliament of the United Kingdom.

thus enabling changes to the legal process. However both events were enacted according to the prevailing legal prescriptions of the time.

**PLURALISM, BICULTURALISM AND MULTICULTURALISM**

Pluralism, biculturalism and multiculturalism are terms that are often referred to in the discourse of politics and jurisprudence. Cameron noted that integration, and pluralism are ideological constructs that provided rationale for responding to multicultural populations in particular ways. In this context, the goals of biculturalism and multiculturalism are varied depending on the context in which the terms are applied. Understandably, the goals of pluralism, biculturalism and multiculturalism will be influenced by their definitions. Moreover, like many political concepts, these terms are contested and are continually being negotiated. Therefore a brief definition of these terms within the context of this research is necessary.

**Culture**

When attempting to understand pluralism, biculturalism and multiculturalism it is imperative to first discuss culture. Culture has been defined in Canada as ‘a way of being, thinking, and feeling. A driving force animating a significant group of individuals united by a common tongue, and sharing the same customs, habits, and experiences.’ Similarly, Metge defined culture in New Zealand as a ‘system of symbols and meanings, in terms of which a particular group of people make sense of their world, communicate with each other and plan their lives.’ Culture is not considered to be static but evolving and constantly borrowing ideas and practices from others. In so far as culture is viewed as a living entity, it continually changes in accordance with its members’ drive and the course of development. It must be highlighted that the culture of a group should not be confused with a particular system of thought, that is, an ideology. Notwithstanding the correspondence between culture and ideology, it is possible for one ideology to be replaced by another. On the other hand, culture continues to exist. Finally, culture does not

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2 For an excellent discussion on the evolution of both countries’ constitutions and the severing of the links with the United Kingdom Parliament, see Oliver, P ‘Cutting the Imperial Link’ in Joseph, P (ed) Essays on the Constitution (Brookers, Ltd, Wellington, 1995) at 368-403.
3 Cameron, K ‘Biculturalism, Multiculturalism’ in Biculturalism: The Next Conversation (Lectures delivered at the invitation of Dr. Ken Nicholson, District Senior Inspector, Wellington Education Board, 1995) at 7.
4 Canada The Royal Commission on Bilingualism and Biculturalism (Ottawa, 1967) at XXXI.
determine the thoughts or actions of the group but does influence the group’s pattern of thinking and behaving. Culture is to the group what personality is to the individual.  

**Pluralism**

Pluralism arises in various contexts for example political pluralism, legal pluralism, and juridic pluralism. In each of these contexts, the crux of pluralism relates to some sort of normative multiplicity. Professor Merry defined legal pluralism as a ‘situation in which two or more legal systems coexist in the same social field.’ Stuart Henry noted that ‘legal pluralism holds that every society contains a plurality of legal orders and legal subsystems (or fragments of these).’

Pluralism assumes that in societies such as Canada and New Zealand, people are part of a large number of different groups with differing interests and values. Individuals belong to different economic classes, families, ethnic groups, localities, churches and so on. People’s social behaviour is largely understood in terms of these groups and interests. Pluralism is occasionally characterised as assuming that no significant inequalities exist, that all groups and interests compete on equal terms for political influence, and that the political system responds equally to each group’s demands. However, such an idealistic view of modern western societies is not a necessary part of pluralism. Most pluralists recognise that certain groups and interests, particularly dominant economic interests and certain gender and ethnic groups, have inherent advantages over other groups. Consequently, non-dominant groups are systematically disadvantaged in capitalist societies. Hence the urgency for cultural accommodation and pluralism.

**Biculturalism**

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6 Supra., n.4 (Royal Commission on Bilingualism and Biculturalism).
7 For a comprehensive discussion on legal pluralism, see Hazelhurst, K (ed) Legal Pluralism and the Colonial Legacy (Avebury, Sydney, 1995).
8 For an excellent discussion on juridic and political pluralism, see Morgan, G Institutions of Pluralism and Trust (Te Matarahuri Unit, Hamilton, LLIANZ, 1999).
11 Mulgan, R ‘A Pluralist Theory of the State’ in Mulgan, R Politics in New Zealand (Auckland University Press, Auckland, 1994) at 8, 10.
Biculturalism is a contested term and has been defined as a context where two founding cultures are entitled to make decisions about their own lives for mutual co-existence. Biculturalism supports the politics of affinity and difference based on mutual understanding, appreciation, respect, and power sharing. Within Canada and New Zealand biculturalism suggests that the subordinate group should be equally influential within the legal, political and institutional systems of the state. Indeed, biculturalism refers to a process where two separate nations exist within the geo-political jurisdictions of Canada and New Zealand with control over their own affairs. Furthermore, it is essential that both groups are recognised and defined in their terms.

The Canadian Royal Commission on Bilingualism and Biculturalism in 1967 stated that biculturalism covers two main realities. The first reality is the state of each culture (English and French) and the opportunity for each to exist and develop. The second reality is the coexistence and collaboration of these two cultures and their modes of co-operation. The Commission added:

What we are mainly asked to do is to establish whether both cultures possess the distinct institutions they need, whether they are properly represented within the principal common institutions, and whether persons who participate in each of them have the opportunity to conserve and to express their own culture. This latter point implies that complete effectiveness in these situations will require the individual to accept the existence of the other culture and to respect its particular character.

Biculturalism in New Zealand has been defined as giving particular prominence to two cultures and traditions – the dominant English-speaking Pākehā culture and Māori culture. It stresses the unique position of Māori as the country’s first inhabitants and signatories to the Treaty of Waitangi. Biculturalism indicates two styles of living which are distinct, even though they obviously have much in common. Cultural duality cannot be taken to mean a mixture of the two cultures (English and French in Canada; Pākehā and Māori in New Zealand); each has its own existence.

Biculturalism has been resisted by some because it has been equated with separatism or because of its implicit expectation that each individual would have to become bicultural. However, Benton suggests that biculturalism:
… involves the general recognition that two cultures are complementary each with its own integrity, and dominant in its own spheres … [requiring] the development of common understandings of each other by members of both cultural groups, … with institutional framework[s] in which the minority group’s language, world view, and behavioural norms are paramount.\footnote{Benton, R ‘Biculturalism in Education: Policy and Practice under the Fourth Labour Government’ in Holland, M & Boston, J (eds) The Fourth Labour Government: Politics and Policy in New Zealand (Oxford University Press, Auckland, 1990) at 193.}

Durie’s bicultural continuum is also informative.\footnote{Durie, M Māori and the State: Professional and Ethical Implications for a Bicultural Public Service (Public Service Senior Management Conference, Wellington, 1993).} He states that biculturalism refers to a greater participation of Māori in the legal, political, and institutional systems of New Zealand. At the framework level biculturalism includes representative Māori involvement with an opportunity to develop a Māori component within the legal system. Durie even proposes a parallel legal system that is committed to the same aims of the British legal system - maintenance of law and order, public safety, and a deterrence of crime.

**Multiculturalism**

Multiculturalism in its simplicity refers to the existence of more than two cultures. Extrapolating from our previous definitions of biculturalism, multiculturalism is the view that more than two cultures and ethnic groups exist, all with a right to flourish provided they do not infringe the basic rights of citizens. Metge noted that a multicultural society is one in which all cultural groups are able to make sense of their world, communicate with each other, and plan their lives as they deem appropriate.\footnote{Supra., n. 14 (Metge).} In view of these definitions Canada and New Zealand are not completely multicultural societies because Anglo-European values and culture continues to dominate their societies, constitutional frameworks, and public institutions. The current research aims to investigate to what extent mainstream Canada and New Zealand could be considered pluralistic, bicultural, and/or multicultural.\footnote{Supra., n. 11 (Mulgan) at 9.}

Biculturalism and multiculturalism have conflicting goals. For example, multiculturalism may be used to discredit attempts (implicit in biculturalism) at yielding special recognition to the Québécois\footnote{The generic term ‘Québécois’ was defined by Rênê Levesque: ‘Québécois for me means first of all that we must accept straight off the equality of all Quebec citizens in the eyes of every institution and the law and be ready to defend this principle whenever necessary, regardless of cultural, religious, or even political affiliations. Every Québécois is and must remain a fully-fledged citizen … A Quebec party (the Parti Québécois) must work tirelessly for the national interests of French Canadians and every day, in every field, must strive to bring us closer to the time when we will be, once and for all, maîtres chez nous (masters of our own house).’ Levesque, R Point de Mire (A publication of the Laurier Riding Liberal Association, 1 November, 1963) at 3. See also Taylor, D & Sigal, R ‘Defining Québécois: The Role of Ethnic Heritage,
minorities. Indeed, Canada and New Zealand are states with several different ethnic groups and cultural traditions and in a democratic society all citizens have the right to flourish free of ethnic prejudice and discrimination. Notwithstanding these rights, it does not mean that special recognition should not be given to the Québécois, First Nations and Mãori. All countries practicing equality of rights (civil, political, social and cultural rights) for all citizens have certain cultural traditions that predominate in their public institutions.

By way of example, the writer does not suggest that all democracies should officially recognise all languages. Neither does the author suggest that the language and customs of their predominant people and traditions should be entrenched. On the other hand, it does seem justifiable that the public practices of a community can be conducted in the culture(s) which have historical pride of place in that community. In Canada this means that the Anglophones, Québécois and First Nations can be given particular emphasis in the public institutions and cultural life of the nation because of their historical priority and/or predominance. Likewise, for the Mãori in New Zealand. Therefore, other cultures besides these can be guaranteed the right of survival and protection without necessarily being given the right of full public incorporation.22

POLITICAL FRAMEWORKS AND DEMOGRAPHIC REALITIES

Canada

Canada is a constitutional monarchy and a federal state with a democratic Parliament. The bicameral federal Parliament in Ottawa consists of the elected House of Commons and the Senate whose members are appointed. Canada has ten provinces and three territories including the recently established Inuit territory of Nunavut.23 The Northwest Territory, Yukon Territory, and Aboriginal governments are ultimately under federal jurisdiction. The remaining ten provinces have strong unicameral legislatures and jurisdiction over certain areas within their provincial boundaries. The principal ‘written’ constitutional provisions that govern federal-
provincial/territorial relations are the British North America Act 1867 and the Constitution Act 1982.\textsuperscript{24} In 1997, the population of Canada was 30.2 million.\textsuperscript{25} This is composed of three founding ethnic groups - Francophones (those of French descent), Anglophones (those of English descent), and First Nations\textsuperscript{26} (indigenous peoples). Francophones are concentrated in Quebec, Anglophones are concentrated in the West, Ontario and most of Atlantic Canada, and a high proportion of First Nations are in Canada’s north (a 62% majority in the North West Territories) with reservations scattered throughout each province.

Since the Constitution Act 1982 the official indigenous peoples of Canada are the North American Indian, the M	extethis (European-Indian descent) and the Inuit (Eskimos). In 1998, some 800,000 Canadians reported that they were of indigenous descent constituting North American Indians - 70%, M	extethis – 25%, and Inuit – 0.5%.\textsuperscript{27} In 1996 Ontario had more North American Indians than any other province. Alberta had the largest M	extethis population, while the Northwest Territories had the largest Inuit population. Approximately eleven language groups exist, with over forty tribes constituting 3% of the total population.\textsuperscript{28} The federal government has had constitutional, political and legal responsibilities for First Nations (Indians and Indian lands) since confederation in 1867. The Department of Indian Affairs and Northern Development (DIAND) is the government department primarily responsible for carrying out this function. Still, relations between the federal and provincial governments over indigenous matters have historically been a major source of friction.

Up until 1967, First Nation peoples could become enfranchised to vote in federal elections only if they forsook their status as an ‘Indian’ under the Indian Act. Their present rights include those exacted under the Royal Proclamation 1763, treaty rights, and rights under modern treaties in the form of a comprehensive claims settlements policy. Arising from the comprehensive claims policy and the inherent right to self-government policy, arrangements to facilitate varying degrees of self-government have been entered into since the 1970s. These rights were affirmed and entrenched into the Canadian Constitution under the Constitution Act 1982.

Interestingly, in the 1996 census more than 12 million Canadians (44% of the total population) reported at least one origin other than British, French or Canadian. The demographic

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\textsuperscript{24} For a comprehensive discussion on Canada’s Constitutional framework, see generally supra., n. 1 (Tardi). For a similar guide to constitutional law in New Zealand, see Joseph, P Constitutional and Administrative Law in New Zealand (Law Book Co., Sydney, 1993). Interestingly, Joseph states that ‘political and constitutional systems must yield to the public demand and government may be improved progressively.’ Ibid., at 36.

\textsuperscript{25} Canada Canada Year Book 1998 (Minister responsible for Statistics Canada, Ministry of Energy, 1998) at 70.

\textsuperscript{26} Not all indigenous peoples in Canada identify themselves as First Nations. Other aboriginal groups consist of M	extethis, non-status Indians, urban Indians, and Inuit.

\textsuperscript{27} Supra., n.25 at 76.

\textsuperscript{28} Idem.
\end{flushright}
realities of Canada are therefore multicultural. Moreover, 25% of the total population of Canada are Francophone which group also comprises 90% of the population of Quebec thus signifying how Quebec is a Francophone bicultural enclave. The Francophones throughout Canada are concerned about their language, culture, and survival in a continental sea of English. Anglophone Canadians express concern about the impact of educational and entertainment products flooding the Canadian marketplace from the United States. First Nations continue to seek recognition and accommodation of their rights and aspirations which inevitably influences their sense of belonging and the level of understanding and sharing they enjoy with other members of society. As illustrated, Canada is a multicultural and complex nation-state. In fact, the Royal Commission on Aboriginal Peoples in its final report in 1996 concluded that ‘Canada is a test case for a grand notion – the notion that dissimilar peoples can share lands, resources, power and dreams while respecting and sustaining their differences.’

New Zealand

New Zealand is a unitary state with a unicameral legislature since 1951. New Zealand consists of three main islands and, similar to the United Kingdom where its constitution derives, it does not have a ‘written’ constitution. There is no single document with the force of fundamental law. Certainly there are parts of some constitutional statutes that cannot be changed by a simple act of Parliament. Moreover, the Bill of Rights Act 1990 allows some judicial review of executive action. However, unlike Canada, New Zealand might generally constrain the legislative power of Parliament. New Zealand’s constitution is to be found in a number of different sources which include the principles of the rule of law, New Zealand statutes, United Kingdom statutes, conventions, decisions of the judiciary, and the Treaty of Waitangi.

The total population of New Zealand is 3.6 million of which Māori constitutes 15%. There are between 36 and 43 different iwi (tribal groupings) and Māori is one of the two official

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29 Ibid., at 483.
30 Indeed, Lord Cooke of Thorndon recently stated that ‘the present constitution of New Zealand is largely in writing. Its main provisions are enacted in the Constitution Act 1986 yet, except to a very limited extent, it is not what is commonly called a written constitution. A few provisions, including the maximum parliamentary term of three years and the minimum voting age of eighteen, are entrenched by section 17 of the Constitution Act 1986 and section 268 of the Electoral Act 1993. Cooke, R ‘The Role of the Judges’ in New Zealand Constitutional Conference (Institute of Policy Studies, Victoria University, Wellington, 2000) at 1.
31 Lord Cooke of Thorndon noted that the New Zealand Bill of Rights Act 1990 is regarded as one of the weakest affirmations of human rights, in that sufficiently clear legislation passed by ordinary Acts of Parliament can override it. Idem.
33 Ibid., at 15.
languages of New Zealand. Māori rights are enshrined in the Treaty of Waitangi and are recognised in statutes such as the Treaty of Waitangi Act 1975. Nevertheless, there is no entrenched constitutional recognition of Māori rights or of the Treaty, within the unwritten constitution of New Zealand.

From the inception of the Treaty of Waitangi in 1840, Māori were recognised as having the rights of British subjects. Four Māori seats were allocated in the House of Representatives in 1867 and presently the number of voters enrolled on the Māori electorate roll entitles them to five seats. Central government has jurisdiction over Māori development. New Zealand manages relations with Māori through units in mainstream departments guided by policy formulated in the Ministry of Māori Development and specialist policy commissions.

Canada is a multicultural migrant nation, New Zealand is a bicultural migrant nation, and both nations are built on the foundations of British common law, including the Austinian paradigm of the indivisible sovereign, which theoretically impeded notions of co-existence and pluralism. Nonetheless, there have been a number of significant accommodations in the legal, political and institutional systems of both countries to employ pluralistic, bicultural and/or multicultural initiatives.

BICULTURAL/ MULTICULTURAL CONSTITUTIONAL PROVISIONS

Canada – Québécois

In federal matters the members of the province of Quebec were traditionally isolationist and vigilant in the protection of their provincial rights against the rest of Canada. The Quebec members of the federal parliament since confederation have upheld these provincial rights. The Québécois claim that their right to their culture, language and values in the laws and institutions of society were explicitly and implicitly recognised in the British North America Act 1867 (the BNA Act), later re-named the Constitution Act 1867. One reason why the BNA Act created a federal

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rather than a unitary state was because of the concern of the Francophones to protect their distinct society in the territory of Quebec. The Act does in effect contain provisions that give recognition to the distinctiveness of Quebec.

Section 133 guaranteed the use of French and English within the courts and legislature of Quebec, within the Parliament of Canada, and the courts created by the federal parliament. Consequently, English and French became the official languages of Canada. In addition, Quebec is the only province with a system of civil law (as opposed to common law) which procedure is different from that of the other provinces. Section 94 authorised the federal parliament to make provision for the uniformity of laws relative to property and civil rights and civil procedure in Ontario, Nova Scotia, and New Brunswick. The assumption was that Quebec’s Civil Code and Code of Civil Procedure would remain distinct from the comparable laws in the common law provinces. Section 93 confers upon the provincial legislatures the power to make laws in relation to education. Section 93(2) applies only to Quebec to meet the special situation there. Beyond language and law, Quebec also has a host of public and private institutions that are unlike their equivalents in other provinces.

Quebec is allotted 75 of the 265 seats in the federal House of Commons. In the Supreme Court of Canada, 3 of its 9 members are appointed from the bench or bar of Quebec. Thus while the Constitution of Canada generally recognises the equality of the provinces, equality has never been a hard-and-fast rule, and the Constitution often recognises that differences of history, ethnicity and geography call for different treatment of people.36

Notwithstanding these constitutional accommodations, the Québécois perceived themselves to be second class citizens subjected to discrimination and oppression. For example, in the Supreme Court of Canada, the Francophone judges have dissented against the Anglophone majority in a number of cases causing divisions in the Court.37 In the Royal Commission on Bilingualism and Biculturalism, witnesses even compared the aspirations of Francophones with the aspirations of American Negroes, identifying the one with the other.38 Theoretically then, the Québécois have considerable bicultural accommodations within the constitution but they are still subjected to the tyranny of the majority.

Canada - First Nations

At the turn of the nineteenth century, official policy towards First Nations shifted from
securing allegiance and mutual protection to assimilation or removal to allow settlement. The *Act to Encourage the Gradual Civilisation of Indian Tribes 1857* promulgated the explicit assimilation policy. Indians who forfeited their right to register as Indians were extended the ‘privilege’ to vote like Europeans. Accordingly, in the BNA Act 1867, the First Nations were ignored. Indian affairs, policy, and legislation were placed under federal jurisdiction and authorities developed an elaborate and uniform system of external paternalistic controls.

The *Indian Act* amalgamated pre-confederation legislation passed by Parliament in 1876 and lay down broad outlines of tutelage over registered Indians on reserves established under *Gradual Civilisation Act 1857*. Early provisions discriminated against Indians by denying them the right to vote, to purchase and consume alcohol, and to participate in religious ceremonies such as the potlatch and sun dance. Furthermore, in 1927 the *Indian Act* was amended requiring Indians to obtain permission from the Superintendent-General of Indian Affairs to solicit funds for making legal claims which restricted their capacity to seek redress in court for treaty breaches. This draconian measure was not repealed until 1951. The *Indian Act* was again amended in 1930 making it an offence for pool hall operators to allow inordinate frequenting of poolrooms by Indians. In addition, residential school established to assimilate Indians increased. Consequently, the First Nations people were second class citizens susceptible to marginalisation, pauperisation, and discrimination.

**New Zealand – Māori**

The *Treaty of Waitangi* is the founding constitutional document of New Zealand and was signed between the Māori and the British Crown in 1840. Article II guaranteed Māori the use and protection of their lands, forests, fisheries and other cultural treasures, thus protecting their the tribal territories, governance structures, and customary laws. Article III provided Māori the rights of British subjects. Section 71 of the *New Zealand Constitution Act 1852* similarly recognised Māori laws and institutions. Section 71 stated that particular districts should be reserved wherein Māori laws, customs or usages should be observed. This provision was similar to the ‘domestic dependent nations’ concept of Marshall CJ in the United States of America in the early 1800’s.

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38 Supra., n.4 (*Royal Commission on Bilingualism and Biculturalism*), at XL.
39 In *Cherokee Nation v Georgia* 30 U.S (5 Pet.) 1 (1831) Marshall C.J likened the Indian tribes to ‘domestic dependent nations’ within a relationship to the United States that resembled that of a ward to his guardian. Marshall, however, held that the Cherokee people did not qualify as a ‘foreign state’ pursuant to Article III of
Unfortunately, the anomalous section 71 was never implemented. Another constitutional development transpired when Māori were allocated four seats in the House of Representatives pursuant to the Māori Representation Act 1867. On the other hand Māori numbered approximately 56,000, which should have entitled them to 20 of the 70 seats in the House of Representatives. Therefore, as compared to the First Nations, Māori had considerable political concessions within the constitutional framework of New Zealand particularly with the guarantee of their rights as British subjects (Article III) and the 4 seats in the House of Representatives. At the same time, the nation-state acknowledged Māori autonomy over their world with Article II rights and s. 71 native districts.

QUÈBÈCOIS ‘QUIET REVOLUTION’

Dissatisfaction in Quebec

The Francophones of Quebec reluctantly agreed to join the union in 1867 conditional upon their culture being protected through the guarantee of their language and code of civil law. Since confederation, French Canadians have expressed much dissatisfaction with the state of affairs. However, the United Nations and other international organisations that emerged after World War II provided some impetus for change in domestic. The United Nations Charter established the promotion of equal rights and self-determination of peoples, respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. Consequently, Francophones became more vocal about pluralistic, liberal democracy placing a premium on equality of treatment and strategies of compromise and conciliation in a search for consensus. Since 1960 Quebec has undergone an astonishing transformation – a ‘quiet revolution.’ New forces and new movements have removed previous politicians from their seats of power and the province has been governed by new administration. In an effort to resolve the United States Constitution which entitled a foreign government to invoke the Supreme Court’s original jurisdiction. Still, Marshall’s designation of qualified nationhood did not clearly identify the tribes as inherently inferior or as having a status necessarily outside the scope of the law of nations. The Indian tribes therefore retained and continue to possess much of their political autonomy within the geo-political boundary of the United States. See Faulkner, R The Jurisprudence of John Marshall (Princeton University Press, Princeton, 1968).

40 For a discussion on the development of, and attempts to implement, section 71 of the Constitution Act 1852, see Joseph, R Historical Bicultural Developments: The Recognition and Denial of Māori Custom in the Colonial Legal System of Aotearoa/New Zealand (LIANZ: Te Matahauriki Research Unit, Hamilton, 1998).
43 U.N Charter art 1, para. 2.
Francophones being treated as second class citizens the province has also attempted to secede from Canada. The question of whether a province has the constitutional power to do this became an issue after the election of the Parti Québécois (PQ) in Quebec in 1976. The PQ government held a referendum in 1980, asking voters whether they would give the government of Quebec a mandate to negotiate a ‘sovereignty association’ agreement with the government of Canada. However, Quebec voters rejected this proposal with a majority of 59.5%.

ROYAL COMMISSION ON BILINGUALISM AND BICULTURALISM (1963-70)

Royal Commission and the Québécois

In 1963 the Report of the Royal Commission of Bilingualism and Biculturalism (the Commission) declared that Canada was passing through the deepest constitutional and ethnic crisis of its history. In the same thrust, it set in motion a process of analysis intended to endow Canada with institutions that would be more representative of the peoples and cultures that had founded it. The most significant outcome of the Commission was the first Official Language Act 1969 that established the equality of French and English as official languages at the federal level.

Royal Commission and First Nations

The Royal Commission on Bilingualism and Biculturalism focused on the two ‘founding nations’ of Canada – English and French – with little reference to the First Nations or other ethnic groups. The Commission did note some comments when a First Nations woman stated:

Why is the Indians always forgotten? This was the first culture and this was the first language in Canada. We are told that the BNA Act was between the French and English – where was the Indian during this time?46

The Commission further noted comments from other Indian Bodies: ‘If the French people think that they lost a lot of their rights since Confederation, what should the Indian say? They lost the whole land.’47 In addition, the Commission noted that other ethnic groups feared the dualistic

45 Réné Levesque, Premier of Quebec and leader of the Parti Québécois, once announced the solution to Quebec’s political, social, cultural, and economic problems in 1964: ‘Quebec is suffocating within the confines of an outmoded, obsolete Confederation, and the status quo is untenable now that Quebec has finished merely surviving and knows it can live a full life. Therefore, either Quebec will become an associate state within Canada, with a status guaranteeing it the economic, political, and cultural powers necessary for its growth as a nation, or else Quebec will become independent, free to choose its own destiny within the limits, of course, imposed by the interdependence of nations in the twentieth century.’ See Levesque, R Le Devoir 17 May, 1964.

46 Supra., n.4 (Royal Commission on Bilingualism and Biculturalism) at 49.

47 Ibid.
concept of ‘two founding nations’ with an equal partnership. Their fears were based on what they termed ‘second class citizenship.’ A proposed solution was multiculturalism or the ‘Canadian mosaic.’ If two cultures are accepted, why not many? Was it possible for Canada to be a country where a multitude of cultural groups living together could contribute to a richly varied society?\(^4^8\)

**CONSTITUTION ACT AND THE CHARTER OF RIGHTS AND FREEDOMS**

**Constitution Act 1982**

As mentioned previously, Canada’s basic constitution is the BNA Act, which is an Act of the British Parliament. Although it has undergone amendments over the years, it remains the basic constitutional document. It establishes the House of Commons and Senate, as well as the composition, procedures, and powers of each. It sets out the constitutional structure of the provinces. It specifies the subjects on which parliament can pass legislation and those on which the provinces can legislate. It further defines the structure of the judiciary.

It was not until 1982 that significant changes were made. These consisted of two Acts:

- The *Canada Act 1982* transferred power to amend the constitution to the Canadian Parliament – a power formerly vested in the British Parliament; and
- The *Constitution Act 1982* includes the Canadian Charter of Rights which entrenches the protection of individual rights and freedoms including religion, assembly, association and the press, as well as a variety of other rights (eg. legal, democracy, equality, language and mobility).

The *Constitution Act 1982* was a major achievement resolving several longstanding defects in the constitution. As well as the adoption of domestic amending procedures (ss. 38-49), a Charter of Rights was adopted (ss.1-34), equalisation was guaranteed (s.36), the Constitution of Canada was defined and given supremacy over other laws (s.52), and aboriginal rights were finally recognised (ss. 25, 35, 37).\(^4^9\)

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\(^{48}\) Ibid., at 51.

Constitutional Context for First Nation’s Rights

In the late 1970s, Prime Minister Pierre Trudeau began steps toward patriation. A federal white paper on constitutional reform was issued in 1978\(^\text{50}\) that proposed the recognition of aboriginal rights and a treaty making process. Interestingly, the proposal did not include plans to involve First Nations’ organisations in constitutional discussions. Given the First Nations’ desire to incorporate aboriginal and treaty rights in the new constitution, their involvement was requisite. Discussions were held between the Prime minister and provincial premiers who considered their own interests to be of primary importance. First Nations responded with a vigorous lobbying campaign in London.\(^\text{51}\) A delegation of First Nation chiefs opened an office in London and petitioned the Queen concerning their rights.\(^\text{52}\) The result was the domination of Indian questions in the British House of Commons and House of Lords debates. Eventually Margaret Thatcher warned Prime Minister Trudeau that the Canada Act could be thwarted in the British Parliament if the Canadian government pressed ahead despite strong domestic opposition.\(^\text{53}\) The recognition and protection of aboriginal and treaty rights in s.35 of the Constitution Act 1982 was largely due to domestic pressure, some civil disruption, and complex lobbying by First Nations. After negotiations with the provinces, agreement was made on the wording of ss. 25, 35 and 37 of the new constitution. These clauses are fundamental to the future of First Nations in Canada. Section 25 of the Constitution Act states:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

(a) any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may so be acquired.

\(^{50}\) Canada *A Time for Action* (1978).
\(^{51}\) The National Indian Brotherhood (NIB) opened an office in London, England, to lobby British MPs against the passage of the federal resolution. The Native Council of Canada appeared before the Bertrand Russell Peace Foundation in Amsterdam; the Union of British Columbia Indian Chiefs chartered a train to take Indians from across the country to Ottawa and then on to the United Nations. For a good reference to these activities, see Sheppard, R and Valpy, M *The National Deal: The Fight for a Canadian Constitution* (Fleet Books. Toronto, 1982) at 167. It is interesting to note that the Parti Québécois also opened an office in London to lobby British MPs against the constitution.
\(^{52}\) For a good discussion of the lobbying by First Nations in London over the inclusion of aboriginal rights, see ‘The Charter and Inequality: Aboriginal Peoples and the Charter’ in Mandel, M *The Charter of Rights and the Legalisation of Politics in Canada* (Wall & Thompson, Toronto, 1989) at 247-255.
Section 25 provides guarantees and protection of aboriginal and treaty rights in relation to the Charter of Rights and Freedoms and confirms the Royal Proclamation 1763. Thus s. 25 ensures that the guarantees of Charter rights and freedoms do not abrogate or derogate from existing Aboriginal and treaty rights or any aboriginal rights acquired by way of comprehensive land claims settlements. For example, a fishing rights agreement negotiated as part of a land-claims agreement cannot be successfully appealed by non-indigenous peoples on the grounds that – following the Charter’s equal rights principles – it would be unfair to exclude the appellants from similar rights. Section 35 states:

(1) The existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed.

(2) In this Act, ‘aboriginal peoples of Canada’ includes Indian, Inuit and Mètis peoples of Canada.

(3) For greater certainty, in Subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in Subsection (1) are guaranteed equally to male and female persons.

Section 35 recognises and affirms aboriginal and treaty rights, extends aboriginals to include Inuits and Mètis, guarantees gender equality, and extends treaty rights to include existing and future treaties. Section 37 dealt with future constitutional conferences which include the Prime Minister, the Premiers, and aboriginal representatives. The new procedure for amending the constitution requires federal approval and at least seven provinces containing no less than 50% of the population. Canadian First Nations therefore have a unique constitutional status.

Following the amendment to the Constitution Act 1982, changes were also made to the Indian Act in 1985. This resulted in:

- the repeal of the sexually discriminatory provisions relating to entitlement to status as Indians under the Indian Act,
- the restoration of rights lost through sexual discrimination, and
- where requested, band control of band membership while retaining federal control over entitlement to Indian status.

Aboriginal Rights Defined by Litigation

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The Constitution Act 1982 therefore affirmed the existing aboriginal and treaty rights without specifying their magnitude or scope. The aboriginal rights of First Nations are thus defined in court. Prior to the Constitution Act 1982 aboriginal rights existed only at common law and could be extinguished or regulated by Parliament with or without aboriginal consent. However, section 35(1) of the Constitution Act 1982, however, recognised and entrenched aboriginal rights in the Constitution. Any interference with these rights must be justified consistent with the test adopted in R v Sparrow. In this case the Supreme Court of Canada ruled that aboriginal rights might only be extinguished by express and unambiguous means. Nevertheless, the aboriginal complainant must establish first the existence of the aboriginal right concerned and show that it was an integral part of life.

R v Van der Peet refined the test for recognising aboriginal rights by defining the rights identified by s.35 of the Constitution Act 1982. Lamer CJ expounded on the doctrine of aboriginal rights:

In my views the doctrine of aboriginal rights exists, and is recognised and affirmed by s.35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.

Lamer CJ found that in order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group at the time of contact with Europeans. In addition R v Pamajewon and Jones established that the exact nature of the activity claimed to be a right must be a defining feature of the culture in question prior to contact with Europeans.

In R v Adams and R v Cote the Supreme Court held that the above rights protected by s.35 are not confined solely to those inexorably linked to aboriginal title. Aboriginal land rights can still exist despite the nomadic nature of some indigenous peoples and their survival being unrelated to aboriginal title. In Delgamuukw v British Columbia Lamer CJ concluded that s.35(1) of the Constitution Act 1982:

59 Ibid., 310-315.
60 (1996) 2 SCR 821.
61 Ibid., at 833
63 (1996) 3 SCR 139.
64 Delgamuukw v British Columbia [1998] 1 C.N.L.R 14, (Supreme Court of Canada).
provides a solid constitutional base upon which subsequent [settlement] negotiations can take place. Those negotiations should also include other Aboriginal nations which have a stake in the territory claimed. ... Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in Van der Peet, at 31, to be a basic purpose of s.35(1) - ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’ Let us face it, we are all here to stay.

New Zealand Context

Prior to 1987, recognition of the Treaty of Waitangi in New Zealand law was obscure. In Wi Parata v Bishop of Wellington, Prendergast CJ denied the legal validity of aboriginal title, and concluded that the Treaty was a ‘simple nullity.’ Consequently, the application of the Treaty of Waitangi for protecting Māori aboriginal and constitutional rights was distorted and rapidly disappeared from the legal system. However, like the First Nations the primary impetus leading to increased recognition of Māori constitutional rights within government policy was litigation.

The Canadian approach to the doctrine of aboriginal rights is comparable with New Zealand. Although aboriginal rights have not received formal constitutional protection in New Zealand via an entrenched statute, comparisons can still be made to the Canadian approach. In the New Zealand Court of Appeal, Cooke P implicated the constitution-like status of the Treaty of Waitangi in New Zealand Māori Council v Attorney-General when he stated:

The Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms ... I accept that this is the correct approach when interpreting ambiguous legislation or working out the import of an express reference to the principles of the Treaty.

In addition, the common law has evolved in a manner that directly recognises aboriginal rights. In Te Weehi v Regional Officer, the judiciary consented to recognise the mana of local tribes over sea fisheries according to their customary law. The guarantees of the Treaty were also indirectly recognised in Te Runanga o Te Ika Whenua Inc. Society v Attorney General. In this decision Cooke P stated that unless special circumstances existed, aboriginal title should not be

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65 Ibid., at 86, paragraph 186, per Lamer CJ (Supreme Court of Canada).
66 (1877) NZIR 72.
68 Ibid., at 655-6 (per Cooke P).
69 (1986) 6 NZAR 114 (H.C).
70 Mana has been defined as prestige or authority which is spiritually endowed and maintained.
extinguished without Māori consent. It stands to reason that this standard should apply to all aboriginal rights.

The work of the Waitangi Tribunal has also been accepted at the highest levels of the judiciary. A significant decision was The Taranaki Fish and Game Council v McRitchie in 1997. Becroft J quoted the Muriwhenua Fishing Report wherein the tribunal discussed the emerging right to development found in international human rights law. Due to the tribunal’s findings Becroft J permitted the defendant’s fishing methods to be employed and extended this right to include fish species introduced after the Treaty. These legal and political developments have thus strengthened the constitutional status of the Treaty of Waitangi in New Zealand.

Finally, the Labour Government boldly attempted to constitutionally entrench the Treaty in the 1985 Draft White Paper on the Bill of Rights. The Paper proposed the incorporation of the Treaty into New Zealand law as a constitutional fact in the preamble. Interestingly, Clause 4 of the Bill read:

The Treaty of Waitangi

(1) … Rights of Māori people under the Treaty are hereby recognised and affirmed.

It seems that Clause 4 was extracted from section 35 of the Constitution Act 1982 in Canada. Unfortunately, the clause was abandoned from the New Zealand Bill of Rights Act 1990 because of opposition from civil servants, lawyers, and even Māori.

QUEBEC’S GRIEVANCE

Québécois Remain Marginalised

Unfortunately, the Constitution Act 1982 failed to accomplish one of the goals of constitutional reform - to better accommodate Quebec within the Canadian Confederation. The Quebec government was excluded from constitutional negotiations in 1981-82, and the Constitution Act 1982 was formulated despite Quebec’s lack of consent. Quebec even sought relief in the courts but without success. Since that time, Quebec has remained isolated, refusing any

72 Ibid., at 24.
73 The Taranaki Fish and Game Council v McRitchie, Wanganui District Court, unreported, 27 February 1997, ORN: 5083006813-14, per Becroft J (overturned by the High Court, 1998).
75 Palmer, G A Bill of Rights for New Zealand (Department of Justice, 1985).
76 The Supreme Court of Canada in the Patriation Reference (Re Resolution to Amend the Constitution [1981] 1 S.C.R 753.
dialogue on further constitutional reforms while certain conditions remained unsatisfied. The new Charter of Rights restricted the powers of the provincial legislatures, and in particular limited the capacity of the Quebec National Assembly to implement French-language policy. The new amending procedures also denied Quebec’s previous power to veto. Thus the outcome of the constitutional changes was a diminution of Quebec’s authority and a profound sense of grievance in the province.

**Supreme Court of Canada – Bicultural Institution**

As mentioned previously, three of the nine judges of the Supreme Court of Canada are to be appointed from the bench or bar of Quebec. This requirement was based primarily on the bicultural dimensions of the Supreme Court’s caseload. This measure was also considered necessary to ensure the presence of civilian jurists during appeals involving the application of Quebec’s distinctive system of civil law.

Moreover, both the French and English languages may be used before the Supreme Court. However, in the *Royal Commission on Bilingualism and Biculturalism* French speaking litigants frequently felt disadvantaged because only the three Quebec judges were fluent in French. Consequently, many French-speaking lawyers felt compelled to prepare briefs and to argue orally in their second language. In addition, there was no guarantee that trial by jury would be composed either entirely or partly of members of one’s own language group. Furthermore, the Francophone judges have dissented against the Anglophone majority in a number of cases causing divisions in the Court. As illustrated, while the Supreme Court does have extensive bicultural provisions including the three appointments from Quebec and the language provisions, these provisions are still subject to the interests of the majority and are frequently overlooked.

**Meech Lake Accord 1987**

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78 An analogous system is followed in England where the House of Lords as the United Kingdom’s highest court of appeal hears appeals from Scotland whose local law is not common law but rather is derived from the civil law tradition. By convention, some of the law lords in the House of Lords are always appointed from Scotland. See Gibb, A ‘Inter-Relation of the Legal Systems of Scotland and England’ in *Law Quarterly Review* LIII (1937) at 61; and Russell, P *The Supreme Court of Canada as a Bilingual and Bicultural Institution* (Documents of the Royal Commission on Bilingualism and Biculturalism, Information Canada, Ottawa, 1969) at 60.

79 Supra., n.12 (Royal Commission on Bilingualism and Biculturalism) at 61.

In 1984, the new Progressive Conservative government sought reconciliation with Quebec. A year later the Parti Québécois was defeated and the new liberal government moved to seek reconciliation with the rest of Canada. Subsequently, in 1987 the constitutional focus of the federal government shifted to finding an agreement suitable to Quebec. The resulting federal-provincial agreement in principle was the Meech Lake Accord. Quebec announced five conditions necessary before the Constitution Act 1982 would be accepted:

- recognition of Quebec as a ‘distinct society’,
- a greater role in immigration,
- a provincial role in the appointments to the Supreme Court of Canada,
- limitations on the federal spending power; and
- a veto for Quebec on constitutional amendments.

‘Distinct Society’ Controversy

It is an undeniable fact that Quebec constitutes a ‘distinct society’ within Canada. The most obvious distinction is the existence of a French-speaking majority. Quebec is also the only province that employs a system of civil law instead of common law. Furthermore, Quebec has a host of public and private institutions that are unlike their counterparts in other provinces. Apparently, the drive behind Quebec’s Meech Lake proposals was to protect its society from national interference. One reason why the BNA Act created a federal state was to protect Quebec as a distinct society. The obvious distinctions are the Francophone majority, the s. 33 guarantee for the use of both French and English languages, and the s. 93(2) provision giving Quebec power to make laws in relation to education to meet the special situation there. It was assumed that these provisions would assist Quebec to remain distinct from the comparable laws in the common law provinces. Therefore while the constitution of Canada generally recognises the equality of the provinces, it also acknowledges that historical, ethnic and geographical differences demand different remedies, which has resulted in Quebec being a de jure and de facto ‘distinct society.’

Moreover, the Constitution Act 1982 further protects Quebec in relation to language (sections 16-22) and educational rights (section 23). It seems that the distinct society clause in the Meech Lake Accord was merely the recognition of an established and historical fact. While Quebec is indeed different when considering language, law, and culture, ascertaining status as a

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81 The Meech Lake Constitutional Accord was made at Meech Lake, Quebec, on April 30, 1987. The actual constitutional text was settled at a second First Minister’s Conference in the Langevin Block, Ottawa, on June 3, 1987. The text, with explanatory commentary, is set out in Hogg, P Meech Lake Constitutional Accord Annotated (Carswell, Toronto, 1988) See also Schwartz, Fathoming Meech Lake (1987); Bowker, M The Meech Lake Accord: What Will It Mean to You and to Canada (Voyageur Publishing, Quebec, 1990).
distinct society was extremely controversial. This clause was threatening to minorities such as English speaking citizens, First Nations, and immigrants. If implemented there was no assured protection of the rights granted in the Charter (section 27) to all Canadians in respect to language, education and multiculturalism. A further possibility if ‘distinct society’ status was granted was renewed demands for secession. Predictably, the Meech Lake Accord failed to obtain provincial legislative ratification.

Interestingly, the Accord provided protection for aboriginal and treaty rights in the constitution. However, First Nations participated in its cessation because the Accord did not expressly recognise their self-government rights, and First Nations were excluded from the Meech Lake decision-making process. Moreover, some First Nation leaders asserted that they too were distinct societies with similar rights as Quebec. First Nations and Quebecers were thus disputing the application of the word ‘distinct’ to describe their respective political societies. On the other hand, some First Nations supported the Québécois struggle but not to the point where their collective linguistic and cultural rights were marginalised.  

Other First Nations reacted with aggressive confrontations and civil disruption. At Kahnesatake and Kahnawake in Quebec in 1990 (otherwise known as the ‘Oka’ incident) a bloody confrontation between Mohawk Indians and Quebec police vaulted Canada’s treatment of its indigenous peoples onto the world stage and embarrassed the Canadian government. The Mohawk protest and ensuing violence not only attracted international media attention but also worried United Nations human rights bodies.  

Predictably, the failure of the Meech Lake Accord led to an increase in nationalist sentiment in Quebec. Another referendum on sovereignty was subsequently held in 1995 and was only narrowly defeated 51% to 49%. At the same time, some First Nations lobbied against

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83 See Erasmus, G Presentation to the Special Joint Committee on Aboriginal Constitutional Affairs (Ottawa: Assembly of First Nations, March 26, 1987); and ‘First Nations and Quebec’ in Turpel, M & Mercredi, O In the Rapids: Navigating the Future of First Nations (Viking, Toronto, 1993) at 165-185.
85 On October 30th, 1995, residents of Quebec voted for the second time on whether to form a separate, sovereignty association with Canada. The ‘No’ side won by a margin of about 1%. Immediately following the referendum, Quebecois leader, Jacques Parizeau, gave a speech in which he blamed ‘money’ and ‘the ethnic vote’ for the loss. There followed considerable street violence, destruction of property, and burning of Canadian flags, as well as the constituency office of the Liberal leader, Daniel Johnson.
Quebec at the United Nations, while other First Nations and Inuit peoples held an independent referendum on Quebec sovereignty resulting in a 96% no vote of the Cree and 95% no vote of Inuits.

**SELF-GOVERNMENT RHETORIC**

**Constitutional Amendments**

Section 37 of the Constitution provided that a constitutional conference would be called within one year that resulted in the first amendment –

- a clause clarifying the status of land claims agreements as treaty rights (now section 35(3));
- a clause guaranteeing aboriginal rights equally to male and female persons (section 35(4));
- and a constitutional promise by the governments to consult aboriginal representatives before diminishing the federal constitutional jurisdiction over Indians and lands for Indians (section 35(1)); and
- more conferences.

In the last entrenched constitutional discussions in 1987 George Erasmus, president of the Assembly of First Nations, asserted that ‘any amendment to the Constitution must recognise our right to self-government.’ The federal government responded by recognising this right in ‘principle’ which effectively maintained the status quo.

**Charlottetown Accord 1992**

Later, in 1992 a constitutional amendment was proposed known as the Charlottetown Accord. This included the right of First Nations to self-government but was subsequently rejected. However, in 1995 the federal government announced a policy recognising this right and suggested that self-government provisions are based on key principles:

- the inherent right is an existing aboriginal rights under the Constitution,
• the Canadian Charter of Rights and Freedoms will apply to First Nations governments in Canada, and,
• where all parties agree, rights in self-government agreements may be protected in new treaties under section 35 of the Constitution, in addition to existing treaties, or as part of comprehensive land claims agreements.

**Political-Legal Devolution - Self-Government**

The concept of self-determination through self-government eventually evolved as the preferred discourse for aboriginal rights. The key elements are varied but encompass control over the process and power of self-government as a third tier of government; the procurement of cultural sovereignty and territorial groundedness as a basis for the healing process; and the re-alignment of the political agenda to accommodate indigenous authority alongside federal and provincial jurisdictions. In the words of the Royal Commission on Aboriginal Peoples:

> Indeed, we hold that Aboriginal governments are one of the three orders of government in Canada – federal, provincial/territorial, and Aboriginal. These three orders are autonomous within their own spheres of jurisdiction, thus sharing the sovereignty of Canada as a whole.

Accordingly, in the south First Nations bands are taking control of the design and delivery of government programs to overcome discrimination and neglect. In British Columbia, federal and provincial authorities are negotiating treaties for joint ownership of land and resources, service delivery, and regional government. And in the north, indigenous peoples are establishing land and political settlements on a regional basis, including the home-rule arrangement in the eastern Arctic region known as ‘Nunavut’. The contemporary settlement of First Nation’s claims has thus included the constitutionally entrenched commitment to negotiate self-government agreements.

One such agreement is the Nisga’a Settlement 1999. This settlement provides a fair opportunity for the Nisga’a to manage their affairs in a fashion similar to local governments, and subject to the overarching laws and principles of the Canadian Charter of Rights and Freedoms and the Criminal Code of Canada. Nisga’a laws will have priority, but they are limited and defined. In

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89 Fleras, A ‘Politicising Indigeneity: Ethnopolitics in White Settler Dominions’ in supra., Havemann at 198.
92 Supra., n. 23.
93 These settlements include the James Bay and Northern Quebec Agreement 1975, the Inuvialuit Settlement 1984, the Sechelt Settlement 1986, the Nunavut Settlement 1991, and the Nisga’a Settlement Agreement 1998 and other negotiations are under way with numerous First Nations groups.
general, they concern matters that are internal and local such as culture, or include a condition that
the laws meet existing government standards, such as for social services. The Canadian
government is, therefore, striving for a relationship based on partnership and the recognition of an
inherent right to aboriginal self-government.

MULTICULTURALISM

Contemporary Position

The 1965 Report of the Royal Commission of Bilingualism and Biculturalism\(^\text{94}\) initiated a
process of analysis intended to endow Canada with institutions that would be more representative
of the English and French peoples and their respective cultures. The Commission also examined
the contribution of ‘other ethnics’ to the cultural enrichment of Canada. The Commission made 16
recommendations that dealt with non-English and non-French groups. In particular, it
recommended that the government undertake initiatives designed to promote the preservation of
human rights, the development of Canadian identity, the reinforcement of Canadian unity, the
improvement of citizenship participation, and the encouragement of cultural diversity within a
bilingual framework. In summary, the government was encouraged to assist all cultural groups to
overcome cultural barriers to full participation in Canadian society.

In conjunction with these recommendations and in the face of demographic, social,
cultural, economic, and political changes in Canadian society, a multiculturalism policy was
announced in 1971. Accordingly, the government of Canada committed to supporting all of
Canada’s cultures, intercultural understanding, and the social development of cultural groups.
Human rights, employment equity and the media’s depiction of minorities were specific concerns
at the time and subsequently resulted in the Canadian Human Rights Act 1977, the Canadian
Charter of Rights and Freedoms 1982, the Employment Equity Act 1986 and the Multiculturalism

The Canadian Charter of Rights and Freedoms 1982 responded to issues of diversity and
multiculturalism in sections 15(1) and 27. Section 15 reaffirms the concepts of equality and
freedom from discrimination, and section 27 states that ‘the Charter will be interpreted in a manner

\(^{94}\) For the context of the Royal Commission, supra., n. 43.
consistent with the preservation and enhancement of the multicultural heritage of Canadians.’ The Canadian Multiculturalism Act 1988 introduced the concept of official multiculturalism for the first time in the world. Multiculturalism aimed to enhance the ‘sense of belonging’ experienced by Canadians primarily of European origin. It was not unusual for these ethnic groups to be excluded by the bicultural hegemony of the English and French. The new Act responded to international instruments and issues of diversity, human rights, and multiculturalism. The Canadian approach to diversity is thus situated within a pluralistic framework of civil, social, political, language, and minority rights.

Recently in the 1999 Annual Report of the Canadian Multiculturalism Act an update revealed what the Government is doing to address multicultural issues along with their suggestions for best practices in the civil services aimed at promoting multiculturalism. These best practices include the promotion of understanding and respect of cultural diversity, equal opportunities, policies that provide opportunities for minorities to contribute, the promotion of language skills and understanding, and future priorities.

Problems of Multiculturalism

Some commentaries, however, suggest that demands for multiculturalism create unnecessary and damaging controversy as a convenient vehicle for the majority to deny minority rights. Multiculturalism to the Québécois and First Nations tends to have a leveling effect by classifying differences equally among the various groups across the various sectors in Canadian society and as such neutralises the special status of both groups as ‘founding nations.’ Some critics of multiculturalism claim that it is decorative because it fails to uphold the ideals of justice and equality, as there is the continuation of the ideas of assimilation and racism in Canadian institutions. It further perpetuates a ‘vertical mosaic’ where ethnic minorities are maintained in job ghettoes and underclass status. Moreover, multiculturalism does not address the issue of aboriginal peoples’ status and their peculiar problems that have resulted from assimilation and the destruction of their land base, culture and identity.

Mulgan claims that describing New Zealand as a multicultural society is a political device for dismissing Māori claims for special treatment. In essence, this view of multiculturalism implies that it would be unfair to single out the Québécois, First Nations, and Māori. Each group is

96 Supra., n.15 (Vasil) at 1.
98 Supra., n.11 (Mulgan) at 8.
simply one of a number of cultural minorities each of whom could make a case for special protection and many of who are prospering without special assistance. A multicultural society is certainly used, whether consciously or unconsciously, as a means of denying separate recognition of the Québécois, First Nations and Māori.\textsuperscript{99} Undoubtedly, it may subsequently be used to deny them special rights.

CONCLUSION

Similarities and Differences

The Québécois, First Nations, and Māori share many similarities including historical ‘founding nations’ status; a history of Anglo-Commonwealth settlement and hegemony; imposed political economy and law; genocide and ethnocide; and a recent period of post-assimilationist accommodations and opposition to multiculturalism policies. Nevertheless, there are many significant differences. The Québécois have had special constitutional provisions since confederation including substantial representation in the House of Commons and the Supreme Court of Canada; official recognition of the French language; participation in their education; and special provisions for their civil law code. In comparison, the First Nations have been marginalised since Confederation and were not enfranchised to vote until 1967.

On the other hand Māori were guaranteed the protection of their lands, forests, fisheries and other cultural treasures pursuant to Article II of the Treaty of Waitangi. Māori were enfranchised to vote pursuant to Article III of the Treaty and were allocated four Māori seats in the House of Representatives since 1867. Moreover, Māori were guaranteed a separate justice system pursuant to s. 71 of the Constitution Act 1852 which was, to a lesser extent, similar to the representation, justice, and language rights of the Québécois in Canada since Confederation. Nevertheless, these constitutional provisions were never fully implemented in their respective countries for similar reasons – political hegemony and economic interests.

Notwithstanding this the contemporaneous constitutional rights of the First Nations are stronger than the rights of Māori especially given the entrenched Charter of Rights and Freedoms (s.25) and ss. 35 and 37 of the Constitution Act 1982. While the judiciary is still defining these rights, the First Nations do possess a right to self-government as part of negotiated land settlements. The Québécois have also attempted to pursue their rights under the notion of a ‘distinct society’ but this has been the cause of considerable contention with the First Nations similarly claiming ‘distinct society’ status.

\textsuperscript{99} Idem.
The Canadian nation-state advocates a multicultural discourse and the First Nations and Québécois are subordinate minorities within that discourse. In comparison, the New Zealand nation-state advocates a bicultural discourse wherein Māori are a subordinate minority. As the number of immigrants increases in both of these countries, the place of First Nations, Québécois, and Māori is affected particularly given the eclipsing nature of the multiculturalism discourse. In relation to the current ethnic policy, multiculturalism is central in Canadian public policy, whereas biculturalism forms the basis of ethnic management policies in New Zealand. The Québécois have fought constantly for the recognition and survival of their culture, which goals are similar to the First Nations and Māori. All three minority groups have resorted to litigation, lobbying, and even secession to advance their constitutional interests.

Post-Assimilationist Accommodations

The greater the diversity of the racial and cultural mix, the greater the need for tolerance and acceptance of one another as fellow citizens. With globalisation and the ever-increasing movement of emigration, the challenge of appreciating and accommodating cultural differences has become universal. If the nation-states of Canada and New Zealand are to flourish the national aspirations of the Québécois, First Nations and Māori peoples need to be accepted. These states have to create a space for their respective minority groups in the definition of their political systems. Recognition of and accommodation for the duality, multiplicity and hybridity of national identities is necessary within their constitutional and political frameworks.

Canada and New Zealand have witnessed some radical constitutional changes over the last 20 years. A post-colonial future aimed at genuinely fusing two or more cultural identities requires the acceptance of differences and building upon affinities. Based on self-government in Canada and proportional representation in New Zealand, a post-colonial society may indeed be possible. Only an authentic multicultural partnership in Canada and an authentic bicultural partnership in New Zealand can achieve a socially just reality thus highlighting how the present time, political climate and other opportunities have never been more favorable to forge this new reality. The future of Canada and New Zealand depends on the commitment of all its citizens to a unified identity, while still taking pride in the uniqueness of their individual heritage. Finally, it is through constitutional reform that ‘others’ such as the Québécois, First Nations and Māori can establish socially inclusive laws and political and legal institutions that actualise their ‘distinct society’ and ‘partnership’ status.
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