

## CHAPTER THREE

# Aboriginal Rights and Self-Government

### AS YOU READ

In the last chapter, you learned how Aboriginal peoples began to regain control over their lives after World War II. These changes accelerated in the 1970s until a significant step forward was made in 1982. That year, all Aboriginal peoples — First Nations, Métis, and Inuit — and their rights were recognized in Canada's constitution.

Since that time, Aboriginal peoples and their political organizations have become adept at working within Canadian institutions to further their people's rights to the land and its resources, as well as their inherent right to self-determination.

Canadian institutions are slowly adapting to make Aboriginal goals more possible. For example, the Supreme Court has ruled that oral history regarding land use and governance should be given as much consideration as written evidence when making decisions about Aboriginal rights. Testimony such as that on pages 76–77, by Mushkegowuk Cree Elder James Carpenter, is now of much value in pursuing Aboriginal political and economic goals.

Carpenter was born in 1924 in northern Ontario. In this statement, he describes his people's traditional relationship to the land and to other people on the land. In your own words, write a set of principles governing land use as described by Carpenter. How are these principles a form of governance? How might this system of governance contrast with non-Aboriginal ideas about land use and government? Discuss your ideas with a partner.

### FOCUS QUESTIONS

As you read this chapter, consider these questions:

- ▲ What Aboriginal rights does the Canadian constitution recognize?
- ▲ What have First Nations, Métis, and Inuit peoples done to assert their Aboriginal rights since 1982?
- ▲ What role does the Supreme Court play in Aboriginal rights?
- ▲ How do First Nations, Métis, and Inuit perspectives on self-government compare to one another?
- ▲ What are federal and provincial governments' perspectives on Aboriginal self-government?
- ▲ How are Aboriginal leaders establishing self-government in their communities today?

### Principles of Land Use

Excerpt from a statement by James Carpenter from *In the Words of Elders: Aboriginal Cultures in Transition*

I HAVE NEVER HEARD NATIVE PEOPLE SAY THEY OWN THE LAND. THE LAND IS FOR US TO USE AND TO LIVE, THIS IS WHERE THE FOOD IS, FISH, RABBITS, otter or any other animals for food. We know when freeze-up will happen. The Native person will know what he will need in order to hunt and fish. Wherever he meets another Native person on the land and if he has an abundance of fish, he will invite the person to fish there with him or he will tell another person you can trap with me where there are weasel, muskrat, and otter. That's what the Native person says to his fellow Natives. The Native person treats others with love. The Native person will not say to another Native person, "Don't trap there." He will never say to another person, "That is my land."

Before the mapping of this area and the boundaries were set, the Native people respected one another and their hunting grounds. It still goes on despite these limitations and boundaries. People took care of each other. If I see your trap with a fox, I would hang it on the tree for you so animals won't get at it. Before the metal traps were used, Native people used deadfall traps made of wood. The Native person had intelligence as he has survived for a long time. The Elders have taught how to make these



*A mace is a symbol of the power of the Speaker in a legislative or parliamentary assembly. Nunavut's mace is made of polished narwhal tusk and is embedded with northern jewels and tiny figurines of three types of seal — harp, bearded, and ringed. The crown consists of four interconnecting silver loons. The mace rests on four carved stone figures. The first represents an Elder, the second a woman carrying a baby, the third a child, and the last a man. Based on the symbolism of its mace, what principles would you expect Nunavut's government to uphold? How would a mace look that is based on principles described by James Carpenter?*

deadfall traps, as I have seen. People would tell each other about where there were rabbits, too, and they would go there to hunt. Native people used to gather and sit and tell each other where there is food and where they were going to hunt.

The lifestyle that the Native people had is gone. The lifestyle of the bush is gone. If a person happens to find moose tracks and night is falling, he will wait until the next morning. He will then ask someone to help him track the moose and they will wait for the wind. The wind blows the trees and makes noise so the moose will not hear them. That is how it is done. If you wanted to make a map, you would draw on the snow or on the ashes of the fire. Why do I ask you to join me in this hunt? The reason is that I want you to live too. The earth is not here just for me. Just like the river that you see, it is not there for only me to drink from, it is for all the Native Nations. I won't tell another Native person, "Don't get water from there." That is not the Native law.

If I were to come to Moosonee Ministik from Attawapiskat and I didn't know where they get nets around here, I would ask you where I [could] get them. You would tell me where the nets are set and you would also tell me where the water

does not flow swiftly. The information you tell is that you expect me to live too. I will live from the food you told me about....

Native people did not use compasses. They used their hands. They used the wind, [observing] which direction it would blow in the morning. You walked along the bay and when [it was] a blizzard, you [were] able to go anyway. First you look at the way the snow lays, blown by the wind.... For example, if I want to go to Attawapiskat, I'll go towards the bay, the bush is too thick to walk in and the snow is too deep. If you walk along the bay, you also look at the creeks and how they lay from the west. The blown snow also shows which way the wind blows, usually from the north. The sun also gives direction when you look to where it rises. If it is a grey day, you use the snow to give the direction. If you use all these things to help you find your destination, you will not be lost.

#### REFLECTION

1. Reflecting on James Carpenter's statement, describe his relationship to the land in your own words. Describe his relationship with other people on the land.
2. If possible, talk to an Elder about how they view the land and people's relationships with one another on the land. Compare the Elder's ideas with James Carpenter's views to find similarities and differences.

## The Era of Rights and Freedoms

### AS YOU READ

Pages 78–85 describe Aboriginal people's involvement in the process leading to the signing of the Constitution Act of 1982. As you read this section, make notes about why this event could be considered a turning point in Aboriginal peoples' history in Canada.

**I**N 1982, THE LANDSCAPE OF RIGHTS FOR ABORIGINAL PEOPLES IN CANADA CHANGED SIGNIFICANTLY. THIS WAS THE YEAR THAT CANADA'S CONSTITUTION WAS PATRIATED. THIS MEANT CANADA GAINED COMPLETE INDEPENDENCE FROM

- Britain, including the right to revise or amend its constitution without Britain's approval.

The Canadian constitution is the ultimate legal authority in the country. It describes Canada's most important laws and principles, as well as the responsibilities the government has to its people. This document has evolved since before Confederation in 1867 and will continue to evolve as the needs of citizens change.

The constitution is a written document, but it recognizes many unwritten traditions of the Canadian government that were inherited from Britain, which has no written constitution at all. For example, the British North America Act, which

*Prime Minister Trudeau and Queen Elizabeth II signed the Constitution Act in 1982. Trudeau was known for his highly individualistic view of human rights. He rejected the idea of collective rights and any expression of nationalism, including Quebec nationalism. How might his views on Quebec nationalism affect Aboriginal rights?*



created the Dominion of Canada in 1867, did not refer to the prime minister, even though it was understood through common law that there was one.

When the federal government, under Pierre Trudeau, announced in the late 1970s that it intended to patriate the constitution from Britain, Aboriginal peoples across the country took notice. Many leaders were concerned about how the patriation would affect their rights.

Other leaders saw the patriation as an opportunity to push forward their goal of self-government. If the new constitution recognized Aboriginal people's inherent right to self-government, the federal government would have to move forward with self-government negotiations more quickly.

However, when Aboriginal leaders tried to secure an active part in discussions about the new constitution, they were denied an official place alongside the federal and provincial governments. Aboriginal peoples' efforts to protect their rights had to take place from the sidelines.

This situation only added to the mistrust surrounding the patriation process.

In general, the federal government supported giving Aboriginal peoples some rights protection in the constitution, but hesitated to recognize an inherent right to self-government. They were concerned about the practical issues involved in providing self-government to all Aboriginal peoples, no matter where they lived in the country. Provincial governments, fearing a loss of their own powers, were generally opposed to guarantees of self-government.

## ABORIGINAL CONCERN GROW

In 1981, a compromise was reached between the federal and provincial governments to complete the patriation process. When the agreement was announced, neither women nor Aboriginal peoples were specifically mentioned in the constitution. Women's groups and Aboriginal groups mobilized such convincing protests that their rights were added to the document before patriation.

However, the Aboriginal rights included in the constitution were a compromise between the federal and provincial levels of government. They did not fully address the concerns of Aboriginal leaders and did not recognize their people's inherent right to self-government.

Aboriginal leaders also had concerns about the Charter of Rights and Freedoms. The Charter protects the individual rights of all Canadians, including Aboriginal people. Sections 2 and 7–15 include rights such as freedom of expression, conscience, and religion; the right to vote or run for elected office; the right to enter, leave, and move within Canada; and a number of protections from unjust actions by courts or law enforcement agencies.

Aboriginal organizations supported protections for individual rights, but with a significant difference. A focus on the individual is not part of the cultural heritage of Aboriginal peoples, where the community is viewed as most important. Aboriginal leaders were concerned that an individual whose interests came into conflict with an Aboriginal group's rights might use the Charter to override Aboriginal rights.



Traditional First Nations constitutions were based on natural law, which was given by the Creator and preserved for generations through social custom and the oral tradition. Read the statement by the Wet'suwet'en chief below and discuss with a partner how Aboriginal law and European law compare. Consider the source of the laws, the ways the laws are taught, and the position of law in each society.

Now this Court knows I am Gisdaywa, a Wet'suwet'en Chief who has responsibility for the House of Kaiyexwaniits of the Gitdumden. I have explained how my House holds the Biilenii Ben territory and had the privilege of showing it to you. Long ago my ancestors encountered the spirit of that land and accepted the responsibility to care for it. In return, the land has fed the House members and those whom the Chiefs permitted to harvest its resources. Those who have obeyed the laws of respect and balance have prospered there.

The means by which instructions were conveyed are described consistently as "sacred gifts" received through dreams and visions, in fasting huts and sweat lodges, as well as from human teachers.

In times of great difficulty, the Creator sent sacred gifts to the people from the spirit world to help them survive. This is how we got our sacred pipe, songs, ceremonies, and different forms of government ...

Included in the spiritual laws were the laws of the land. These were developed through the sacred traditions of each tribe of red nations by the guidance of the spirit world. We each had our sacred traditions of how to look after and use the medicines from the plant, winged, and animal kingdoms. The law of use is sacred to traditional people today.

— Gisdaywa, Wet'suwet'en chief, *Report of the Royal Commission on Aboriginal Peoples*

These excerpts from the Constitution Act of 1982 include the clauses that refer specifically to Aboriginal peoples. Clauses followed by a number in parenthesis indicate the year a change was made to that clause.

## THE CONSTITUTION ACT

In the end, some of Aboriginal leaders' concerns were addressed by the constitution.

Section 25 declared clearly that Charter rights could not override Aboriginal, treaty, or other rights held by Aboriginal peoples.

The constitution advanced Aboriginal rights in several other important ways:

- For the first time, Aboriginal and treaty rights were protected from arbitrary removal by the government.

## EXCERPTS FROM THE CONSTITUTION ACT, 1982

### Aboriginal rights and freedoms not affected by Charter

25. 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 recognized 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 be so acquired. (92)

### Recognition of existing aboriginal and treaty rights

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

### Definition of “aboriginal peoples of Canada”

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

### Land claims agreements

(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. (94)

### Aboriginal and treaty rights are guaranteed equally to both sexes

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “Constitution Act, 1867,” to section 25 of this Act or to this Part,

- (a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and
- (b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. (95)

- Aboriginal peoples were given a constitutional opening to play a more active role in defending their rights.
- For the first time, Métis and Inuit peoples were specifically recognized as Aboriginal peoples, giving them a legal foothold to protect their Aboriginal rights.
- Section 35 gave Aboriginal peoples a place to begin negotiations for land claims and self-determination.

### MEECH LAKE ACCORD

Although the Constitution Act fell short of Aboriginal leaders' hopes, it did include a mandate for further discussion of Aboriginal issues. Section 35 promised a constitutional conference involving the prime minister, the premiers, and Aboriginal representatives. Over the next five years, three conferences on Aboriginal affairs were held. None of them resulted in significant progress.

Quebec, however, made some progress in its demands. The province had refused to sign the Constitution Act in 1982 because it did not contain an acknowledgement of its "distinct status" in Confederation. Despite its refusal, Quebec was legally bound by the constitution, a situation that rankled with many Quebec residents. The province's leaders maintained pressure on Ottawa to make changes that would "bring Quebec into the constitution."

In 1987, after several rounds of discussions, a new Quebec proposal had taken shape. By that time,

Canada had a new prime minister, Brian Mulroney. On April 30, during a conference at Meech Lake, Quebec, Mulroney, and the ten premiers unanimously approved a package of constitutional amendments. These amendments became known as the Meech Lake Accord.

The accord recognized Quebec as a "distinct society," different from all other provinces. It also stated that Canada was the product of "two founding nations" and increased provincial powers over a range of previously federal responsibilities.

Before the accord could come into effect, however, each provincial legislature had to approve the agreement. If any province failed to pass the accord before the end of June 1990, the whole deal would die.

By 1990, the accord had gathered considerable opposition. Critics claimed that it gave Quebec too much power and that the agreement had not included enough consultation. In particular, Aboriginal leaders said that the accord addressed none of the important concerns of Aboriginal peoples as partners in shaping the future of Canada. They were concerned that increased provincial powers might lead to an erosion of Aboriginal rights.

Some Aboriginal leaders were particularly offended by the accord's reference to "two founding nations." John Amagoalik of the Inuit Committee on National Issues declared "It hurts us very much when political leaders like the prime minister continue to say that the two founding nations of this country are French and English. We have been saying for years now that we are of



*John Amagoalik played a critical role in the creation of Nunavut. His quest for Inuit rights was shaped by the injustice his family experienced when he was a child. In August 1953, his family and seventeen others were relocated from their home in northern Quebec to the High Arctic as part of the Canadian government's assertion of sovereignty in the region. Amagoalik is shown here with the National Aboriginal Achievement Award he received in 1998.*

this country. We are of the soil. We did not come on a ship or immigrate to this country. We are of it. We are getting tired of being ignored in this respect.”

In Manitoba, the government left its passing of the Meech Lake Accord to the last minute. On June 30, the legislature found itself rapidly approaching the midnight deadline. In Winnipeg, as the clock ticked closer to midnight, the premier attempted a legal strategy to gain more time. A unanimous vote in the legislature could extend the debate period and allow a vote to take place after midnight.

It was then that a lone voice said “No.” Elijah Harper, an Ojibwa-Cree member of the legislative assembly, declared that he could not support an accord that ignored Aboriginal people’s concerns and that he would not vote to extend the debate. With the support of the Assembly of First Nations, he decided it was better to kill the accord than to betray his principles by ignoring the concerns of Aboriginal peoples across the country. The Meech Lake Accord expired.

Research more about Elijah Harper’s actions during the Meech Lake Accord and the role the Assembly of First Nations played in supporting him. Write a short monologue that portrays some of the issues Harper may have wrestled with in making his decision.

- Holding an eagle feather, Manitoba MLA Elijah Harper halted passage of the Meech Lake Accord. This famous photograph of Harper in the legislative assembly ranks alongside the photograph on page 78, showing the prime minister and queen signing the Constitutional Accord. Both images symbolize this significant period of political history in the minds of many Canadians across the country.

## CHARLOTTETOWN ACCORD

The Meech Lake Accord was dead, but the quest for constitutional change continued. In 1991, the federal government released its report. Called *Shaping Canada’s Future Together*, the document put forward proposals to address the concerns of both Aboriginal peoples and Quebec residents. This led to more talks, more reports, and negotiations involving the federal, provincial, and territorial governments. This time, however, the Assembly of First Nations, the Inuit Tapirisat of Canada, and the Métis National Council were invited to the negotiating table.

From these discussions emerged a new constitutional package: the Charlottetown Accord. The Charlottetown Accord proposed a number of constitutional changes that would have the overall effect of reducing the powers of the federal government and increasing the powers of the provinces. It also repeated Meech Lake’s recognition of Quebec as a distinct society.



For Aboriginal peoples, the accord included several key features. It recognized Aboriginal peoples' inherent right to self-government and defined how self-government related to land, environment, language, and culture. It also recognized Aboriginal governments as a third order of government alongside the federal and provincial governments and guaranteed Aboriginal peoples' representation in the Senate.

Instead of ratification by the individual provinces, the Charlottetown Accord was to be approved in a national referendum. On October 26, 1992, Canadians were given the opportunity to vote on the so-called Unity Package. The yes side would have to win a majority both nationally and in each province to make the accord law.

The referendum campaign began on an optimistic note. All ten premiers backed the accord, along with many Aboriginal leaders, women's groups, and the media. However, the momentum soon began to slip. Many Canadians felt uneasy about the accord, finding it too complex, vague, and wide-ranging to absorb and understand. Others, particularly in the western provinces, objected to Quebec's recognition as a distinct society. Former prime minister Pierre Trudeau published a scathing condemnation of the accord in *Maclean's* magazine, arguing that it would cripple the federal government.

By the time referendum day arrived, the accord was in serious trouble.

Nationally, 54 per cent of voters rejected the accord. Only in New Brunswick, Newfoundland, Prince Edward Island, the Northwest Territories, and Ontario did a majority approve it. In the end, large numbers of Aboriginal peoples also voted against the accord. Aboriginal women's groups, in particular, worried that women's rights would not be sufficiently protected in the vision of Aboriginal self-government described in the agreement.



What point are the Treaty Six and Seven First Nations making in the message that follows? Why do you suppose they took a stand apart from that of the Assembly of First Nations, which participated in the negotiations on their behalf? If possible, invite a community member to your classroom who can discuss this message and why Treaty Six and Seven did not support the Charlottetown Accord.

**The First Nations of Treaty 6 and 7 have reviewed the proposed “Unity Package.” It is our opinion that the proposed constitutional amendments do not honour the binding sacred trust obligations set out in our sacred treaties.**

**The primary and fundamental concern of our First Nations is that any discussions respecting our treaties must occur in a bilateral, nation-to-nation process between our respective First Nations and the Crown. These discussions have yet to occur, and yet our sacred treaties have been discussed in the multilateral constitutional process, and amendments to the constitution have been agreed to by the parties to that process. This is a flagrant violation of our agreements with the Crown under Treaties 6 and 7.**

— Treaty Six and Seven First Nations,  
*A Message to all Canadians*

Since 1992, there have been no further attempts to amend Canada's constitution. Aboriginal leaders have instead focused their energies on building on the foundation of the rights enshrined under Section 35 of the constitution. Much of this work centres on legal action and court decisions, as discussed on pages 86–87.

## NATIONAL ORGANIZATIONS

After the success of the campaign to force the federal government to withdraw its 1969 White Paper, Aboriginal peoples became convinced of the effectiveness of speaking to the federal government with a united voice. However, Aboriginal peoples in Canada today are no more uniform than they were when Europeans first arrived on North American shores. If anything, Aboriginal peoples have become even more diverse.

Participation in the constitutional conferences led to an identification of diverse perspectives in the Aboriginal

Using the Internet, prepare a summary of the five main national Aboriginal organizations:

- Assembly of First Nations
- Congress of Aboriginal Peoples
- Inuit Tapiriit Kanatami
- Métis National Council
- Native Women's Association of Canada

You can link to the organization Web sites at [www.aboriginalcanada.gc.ca](http://www.aboriginalcanada.gc.ca). Research who the organization represents, its history, and its basic organizational structure. How does it keep in touch with Aboriginal people's views at the local level?

community. Today, these different perspectives are represented by five main national Aboriginal political organizations. These are the Assembly of First Nations, the Congress of Aboriginal Peoples, the Inuit Tapiriit Kanatami (formerly the Inuit Tapirisat of Canada), the Métis National Council, and the Native Women's Association of Canada.

National political organizations are influential because they each represent the views of many individuals with common goals. Most national organizations have community branches or affiliates to ensure their policies and actions are informed by grassroots needs. For example, the Métis National Council has five provincial affiliates, including the Métis Nation of Alberta (MNA). The Assembly of First Nations also has grassroots organizations at the community level.

Aboriginal political organizations must use lobbying and influence to achieve their goals — they do not have the kind of formal political power that provincial and territorial governments have. Federal and provincial government powers are guaranteed by the constitution.

National organizations influence the attitudes, values, and behaviours of Aboriginal peoples as well as Canadians' views of Aboriginal peoples. Media outlets often interview organization leadership to present Aboriginal people's views on the issues that affect them. Representatives are usually included in government discussions about policies that affect Aboriginal peoples.

## PROMOTING ABORIGINAL RIGHTS

How are Aboriginal leaders working today to affirm Aboriginal rights and freedoms?

### WHAT TO DO

1. Choose a national Aboriginal political organization. Imagine that you are a public relations expert working for this organization. Your job is to get your organization in the national news tomorrow night with an attention-getting press release. A press release is a short document that tries to intrigue the media with a story idea in the hope of getting publicity for an organization or cause.
2. Research the organization's position on Aboriginal rights. What work is it doing in this area? Start by visiting the group's Web site and searching periodical indexes online or at the library for recent activities in the news.
3. If possible, interview a member of your local community who is involved in the organization. Be prepared with knowledgeable questions. With your interviewee's permission, record the interview or write their answers down exactly as they are said. Your press release will be more interesting with quotations from the person you interview, but you must be accurate in your record.
4. Write the press release. It should not be any longer than one page and should use precisely chosen language and information. Assume your audience knows nothing about Aboriginal rights. Check that your release has a date and headline before you hand it in. Include your name on the bottom as the person to contact for more information.

"The Constitution Act of 1982 was meant to be a landmark in Canada's dealings with the original peoples of this land, both in content and process," said [Matthew Coon Come, National Chief of the Assembly of First Nations in 2002].

"Section 35 of the Constitution recognizes three groups of Aboriginal peoples in Canada: First Nations (or "Indians"), the Métis, and the Inuit. Equally important, section 35 recognizes and affirms 'existing aboriginal and treaty rights.'

"This is an important distinction because it affirms that our rights as Aboriginal peoples are inherent rights. They are rights that have always been within us and that stay with us regardless of where we live in this land. Section 35 does not give us any rights. It recognizes and affirms the rights we have always held as self-determining nations. Those rights existed before any settlers arrived on our shores. We had those rights at contact and they exist today," said the National Chief.

— Excerpt from an April 17, 2002 press release issued by the Assembly of First Nations

### LOOKING BACK

What Aboriginal rights were and were not recognized in the Constitution Act of 1982? How is the constitution particularly important for Métis and Inuit peoples? Imagine that you have the power to insert a clause into the Canadian constitution that will recognize a traditional Aboriginal law. Decide where this addition should go and write it exactly as it should be. If you can, use an Aboriginal language in the wording.



## Aboriginal Rights and Canadian Law

### AS YOU READ

Although it did not expressly recognize the inherent right to self-government, the Constitution Act of 1982 did much to further Aboriginal rights in Canada.

This section examines developments in Aboriginal rights since 1982. In particular, it deals with how Aboriginal people's rights have been recognized through court interpretations of the numbered treaties, Indian Act, Manitoba Act, Natural Resources Conservation Agreements, and Section 35 of the Constitution Act. As you read, make a concept map to organize your notes and indicate relationships between decisions, laws, and their implications for Aboriginal rights.

CANADA'S CONSTITUTION RECOGNIZES "EXISTING ABORIGINAL AND TREATY RIGHTS," BUT DOES NOT PRECISELY DEFINE WHAT THOSE RIGHTS INCLUDE. THIS HAS MEANT THAT THE DEFINITION OF ABORIGINAL RIGHTS IS

- slowly evolving. It is the result of many court decisions as Aboriginal people sue the government, the government defends its perspective, and the Supreme Court rules how Aboriginal rights should be interpreted in light of the constitution.



*The Supreme Court plays a large role in determining Aboriginal rights. What are the benefits and drawbacks of using the court to determine Aboriginal rights? What are the benefits and drawbacks of using other methods, such as negotiation or constitutional change?*

The relationship between the government and Aboriginals is trust-like rather than adversarial, and...contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.

— Supreme Court of Canada, *R. v. Sparrow* (1990)

The process is costly and slow, but has resulted in significant gains for Aboriginal rights since 1982.

### ABORIGINAL TITLE

As you learned in Chapter Two, all aspects of traditional First Nations, Métis, and Inuit cultures were intimately connected to the land. Many Aboriginal rights claims therefore involve the land and its resources.

Aboriginal title is a legal term that refers to an Aboriginal group's right to a specific territory. An Aboriginal group with title to a piece of land has the right to exclusive occupation of the land and the right to economic benefits from the land's resources. These land rights are based on the nation's longstanding occupancy and use of the land.

Having Aboriginal title is not the same as owning land in **fee simple**. If people own land in fee simple, they may do anything they like with it — keep it, sell it, lease it, give it away, or even destroy it.

A group with Aboriginal title cannot make use of the land in such a way that the land is alienated from the group's historic connection to it. For example, if an Aboriginal group

The fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.

This is what Indian title means...

— Supreme Court of Canada,  
*Calder v. Attorney General of British Columbia* (1973)

has title to a piece of land based on its significance as a hunting area, they cannot build a parking lot on it.

In legal terms, Aboriginal title is *sui generis*, which means it is unique and somewhat difficult to define in property law. Aboriginal title is a collective property right, not an individual property right. It is the right of the group to use, occupy, and determine the uses to which a piece of land will be put.

Aboriginal title is not the same as Aboriginal rights. Aboriginal rights can include a wide variety of activities, such as hunting, fishing, gathering, or ceremonial practices. Members of an Aboriginal group might have the right to hunt or fish on **Crown land**, for example, without actually having title to the land. Crown land is owned by the Crown and managed by the federal or provincial government.

A frequent legal argument that has important implications for Aboriginal rights concerns the source of Aboriginal title. First Nations and Inuit peoples maintain that their Aboriginal title comes from the Creator. As such, it long predates any legislative act of a European or Canadian government and is therefore an inherent right. It cannot be removed, limited, or even defined with certainty.

A different interpretation — one sometimes argued by Canadian governments — is that Aboriginal title stems from the Royal Proclamation. The proclamation declared that lands west of the Appalachian Mountains “are reserved” for “nations and Tribes of Indian.” The implication of this interpretation is

## TESTS TO ESTABLISH RIGHTS

In recent years, several Supreme Court decisions have outlined tests that can be used as guidelines for interpreting Aboriginal rights claims. These tests include one for Aboriginal title and one for Aboriginal rights.

### Aboriginal Title Test

- The group must have occupied the land before the Crown asserted sovereignty over the area. The group can prove occupation and use of the land using its traditional laws in relation to the land, as well as evidence of hunting, building, cultivation of fields, fishing, and so on.
- The group must have had exclusive occupation of the land.
- The group must still have a substantial connection to the land.

### Aboriginal Rights Test

- The activity the group is trying to protect must be integral to the group’s distinctiveness as a society.
- The group must have exercised the activity before contact with Europeans or before the Crown asserted effective control over the people.
- The group must still practise the activity, although it can be in a modern form.

### REFLECTION

Title claims are rooted in land, while rights claims are rooted in activities. A claim to Aboriginal title does not necessarily involve the right of self-government, but does imply possessing some authority over the uses to which land can be put. In small groups, research and briefly describe one court case dealing with Aboriginal title and one dealing with Aboriginal rights that highlight the distinction between the two.

that Aboriginal title comes from the Crown, not the Creator. This makes it a right that can be limited or extinguished by the Crown or by the government acting on behalf of the Crown.



Dr. John Snow is a respected Nakoda Elder, author, and storyteller who was chief of his band from 1968–1990. His book, *These Mountains Are Our Sacred Places*, contains the history of his people before, during, and after signing Treaty Seven.

## NUMBERED TREATIES

In legal terms, the Canadian government viewed the treaty process as the “extinguishment of Indian Title.” The government believed it was receiving title to the land in exchange for various treaty rights. From the government’s perspective, this made sense: First Nations had title to the land and they willingly agreed to surrender it to the government through treaties.

From a First Nations perspective, the treaties are agreements between nations to share the land and its resources. First Nations leaders maintain that their ancestors could not have given the land to the newcomers for one simple reason: it was not theirs to give.

In addition, many First Nations leaders argue today that written treaty agreements do not always include everything their ancestors agreed to during negotiations. The Supreme Court of Canada agrees. It maintains that interpretations of treaty agreements must go beyond the written text to include the “spirit and intent” of treaties as described through oral history. Where there is

This [treaty cession] was something that was difficult, if not impossible, for Indians to understand because we have no concept of individual land “ownership” in the European sense. In those days, we did not “own” the land by receiving title or patent from a tribal authority. My people had always believed that the land was created for its Indigenous inhabitants — animal, bird, and man. Our philosophy of life is to live in harmony with nature and in accordance with the creation of the Great Spirit. Anyone wanting to live by those principles is more than welcome, and, if he wants to, he may participate in our traditional ways, religion, and culture.

— Chief John Snow, Nakoda,  
*These Mountains Are Our Sacred Places*

doubt, the court suggests that treaty interpretations err on the side of generosity for First Nations.

According to oral history, for example, leaders of the Blackfoot Confederacy did not transfer ownership of the land in Treaty Seven. Rather, they promised to live in peace with settlers and, in return, asked for their help in adjusting to a new way of life. Oral history indicates that they were promised that they could continue to exercise control over most of their land and pursue their traditional livelihoods. The oral history from other areas report similar understandings of the treaty agreements.

For example, in the statement that follows, Lazarus Roan recounts stories told by his father and uncles, who were present at the Treaty Six signing:

He [the government negotiator] would indicate with his hands approximately one foot in depth: “That is the depth that is requested from you, that is what the deal is, nothing below the surface, that will always belong to you. Only land where agriculture can be viable; other areas where nothing can grow, that will always belong to you. You will always be the owner of that land.... And when the negotiation has been concluded, and settlers begin to homestead, it will only be their property that will be fenced off, that you will not be allowed to enter. Other areas which are not homesteaded and remain open will belong to you as long as the sun shines.”

As you learned on pages 50–52, different opinions about the nature of treaty promises stem from many factors. Translation issues and differences between oral agreements and the written treaties are among the most significant.

To further complicate Aboriginal title issues, many First Nations lost their traditional lands without signing any formal treaties. Most of the First Nations in British Columbia, for example, have never formally released title to their traditional lands. These First Nations believe that they still hold title to the land, in both the traditional and the European sense.

Land claims are legal actions taken by Aboriginal groups to restore their rights to the land and to address specific grievances with respect to

treaties or other agreements. The federal government established a process to deal with land claims in the 1970s, so most claims are pursued outside the courts. Aboriginal peoples generally resort to the courts to settle land claims only when negotiations fail. You will learn more about land claims in Chapter Four.

From a First Nations perspective, decisions about land rights covered by treaties or outside treaties need to consider oral testimony, such as that offered by Lazarus Roan. In the Supreme Court's landmark 1997 *Delgamuukw* decision, it ruled that oral history should be considered equal to other forms of evidence, such as written records, and that oral history can be used to establish Aboriginal title to land.

## COMPARING TREATY PROMISES AND TREATY TERMS

In approaching the terms of a treaty... the honour of the Crown is always involved, and no appearances of "sharp dealing" should be sanctioned.

— Ontario Court of Appeal,  
*R. v. Taylor and Williams* (1981)

What characterizes a treaty is the intention to create obligations ... Once a valid treaty is found to exist, that treaty must in turn be given a just, broad, and liberal construction.

— Supreme Court of Canada, *R. v. Sioui* (1990)

What rights are promised by treaties and how should they be interpreted?

### WHAT TO DO

1. On page 52, you did an activity that used written and oral treaty agreements regarding self-government. In your groups, use the resources you identified in that activity to compare treaty terms regarding Aboriginal title or other Aboriginal rights.
2. Prepare a chart of written treaty promises compared to oral history accounts. Note areas where the accounts coincide and where they differ.
3. Using the Supreme Court's guidance on interpreting treaties, write a new treaty that incorporates both oral and written treaty promises.

## ORAL HISTORY SKILLS

In 1912, Onondaga Chief John A. Gibson demonstrated just how much talent oral history requires, when he dictated the only complete written version of the Great Law of Peace. For more than four-and-a-half centuries, this law had been passed down orally with reference to a wampum belt. Chief Gibson's dictation was 514 handwritten pages.

Songs, stories, ceremonies, and dances form the heart of First Nations and Inuit history, law, and governance. They are all elements of a group's oral tradition, which varies in form and content from Aboriginal group to group. Oral history, as a distinct part of an oral tradition, is history from an Aboriginal perspective. The courts have identified three types of oral history:

- contemporary or past accounts of past events
- present-day speakers' memories of past events
- sworn statements of pre-contact ownership of land

In the Delgamuukw case, the Gitksan and Wet'suwet'en chiefs offered evidence of their people's traditional system of land tenure through a description of the *adaawk* of the Gitksan and the *kungax* of the Wet'suwet'en.

The *adaawk*, for example, explains information about a particular house (clan group) and how that house owns the land. It includes information about crests, names, and fishing stations connected to the house. It also describes how the house first attained the land and territory associated with it.

Such testimony attests to the Gitksan people's system of land tenure and laws regarding land use. Other First Nations and Inuit peoples have their own customs that relate to each group's needs and the conditions in their specific territory.

### Your Project

1. Choose one of the following options as the basis of an oral history you will tell your class:

**Topic A:** a story from an indigenous people's culture that relates some element of their history. You will need to also research the culture the story originates from so that you will understand the story's full meaning and purpose.

**Topic B:** an historical incident that you would like to tell as an oral history. You will need to think about how you can make the historical event come alive. Be sure to follow the facts of the story, but remember that you do not need to tell every detail. To keep your audience's attention, be choosy in your selection of what you relate.

**Topic C:** an event from your own life that you would like to share. You might want to start by writing down key parts of the story that you think are significant.

2. Prepare or research your story. Think about why you are telling it. What might others learn? Be sure your story will be meaningful to your audience — in this case, your classmates. Practise the story until you can tell it naturally, without referring to notes.
3. Share your story with the class.
4. What did you find most difficult about relating the story? What does your experience teach you about the skill needed to relate oral history? Write your responses in a paragraph to submit to your teacher.

### Going Further

Invite an Elder from your community to visit the class to share part of the oral history of his or her people. You might specifically request oral history related to land use and occupancy.



## MANITOBA ACT

Since 1982, Aboriginal rights cannot be extinguished by federal or provincial legislation. The only way they can be extinguished is through explicit surrender or constitutional change.

The Manitoba Act is often used as an example of explicit surrender. It clearly states that its purpose is to “extinguish the Indian title preferred by the Half-breeds.” Individuals who took scrip relinquished their title to land, although not necessarily their other Aboriginal rights.

In the case of Morin and Daigneault, the Saskatchewan Court of Queen’s Bench affirmed that Métis harvesting rights had not been extinguished by the Dominion Lands Act or Manitoba Act. This is because neither document explicitly mentions the issues of hunting and fishing.

Other cases in the courts will deal with how the scrip process affects Métis land rights. Some argue that the many documented cases of fraud that deprived Métis people of their land rights leaves their Aboriginal title to land intact.

## INDIAN ACT

Under the Indian Act, First Nations have only **usufructuary rights** to reserve lands. This term means they can use the land, but they do not own it in fee simple. A First Nations member may “possess” a piece of reserve land in the sense that their home and business may be on it, but he or she cannot sell it.

Reserve lands belong to the Crown and are held in trust for First Nations in perpetuity — forever. This establishes a trust, or **fiduciary**,



*Louis Nabess and Pierre Carriere of Cumberland House, Saskatchewan, pose after a successful hunting trip for wildfowl in 1953. Ways of life that include hunting, trapping, and fishing are an integral part of traditional Métis culture. In your opinion, are traditional harvesting rights justifiably restricted to protect endangered species? Discuss this question in small groups.*

relationship between First Nations and the government. A government’s fiduciary obligation means that it must act in a First Nation’s best interests in dealing with the nation’s land. For example, if the federal government makes an agreement to sell a First Nation’s land or resources, it must do so at fair market value. Some land claims today deal with instances where First Nations believe the government did not fulfill its fiduciary obligations. In some cases, land or resources were sold for far less than market value.

The Indian Act withheld land ownership in fee simple to prevent First Nations from selling, trading, or giving away the land that their children and grandchildren would eventually live on. However, this decision severely reduced First Nations’ economic power. First Nations communities and individuals cannot sell or mortgage their land. This restriction makes it difficult for a community to raise capital for business ventures or even for an individual to borrow money to build a house.



Ranchers spearheaded the campaign for provincial control of natural resources. They needed Crown land for their cattle. To this day, many provincial parks in Alberta are designated as multi-use, which allows some industries and ranching operations to use park land.

Many First Nations leaders see land ownership in fee simple as an important prerequisite for achieving self-determination for their people. Other people worry that ownership in fee simple could lead to the loss of land for future generations if a group sells or forfeits a mortgage on their land.

Each community that accepts the benefits of ownership in fee

simple must also accept the accompanying risks. This makes ownership in fee simple a controversial step in many communities.

## NATURAL RESOURCES TRANSFER AGREEMENTS

When Manitoba, Saskatchewan, Alberta, and British Columbia first became provinces, they had different status from other provinces. In the rest of Canada, Crown lands and resources fell under provincial jurisdiction. In the four western provinces, Crown lands and resources were owned by the federal government.

For years, the governments of the four provinces fought for equal treatment. In 1930, the federal government finally agreed. The Natural Resources Transfer Agreements (NRTAs) turned Crown land over to provincial jurisdiction.

### EXCERPT FROM THE NATURAL RESOURCES TRANSFER AGREEMENTS

#### Indian Reserves

10. All lands included in Indian reserves within the Province, including those selected and surveyed but not yet confirmed, as well as those confirmed, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, and the Province will from time to time, upon the request of the Superintendent General of Indian Affairs, set aside, out of the unoccupied Crown lands hereby transferred to its administration, such further areas as the said Superintendent General may, in agreement with the appropriate Minister of the Province, select as necessary to enable Canada to fulfil its obligations under the treaties with the Indians of the Province, and such areas shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof....

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

#### REFLECTION

Legalese is a slang term that is used to characterize the difficult language of legal documents. In plain and clear language, re-write the clauses from the Natural Resources Transfer Agreements.

Although Aboriginal peoples were not consulted about the transfer, the agreements had implications for their rights. First Nations reserves are on Crown land, and treaties guarantee signatories the right to hunt and fish on Crown land. Treaty agreements meant that the NRTAs needed to include a section outlining how reserves would be affected by the agreements.

In Section 10, the NRTAs clearly stated that the Crown land being transferred to provincial jurisdiction did not include reserves. Reserves would still be administered by the federal government. Furthermore, if the federal government needed more Crown land to fulfill its treaty obligations, the provinces would have to provide it.

This requirement could add up to a lot of land. For example, several Alberta First Nations believe that they never received the land they were entitled to by treaty. Since 1986, Alberta has turned over 72 146 hectares and paid \$57.6 million in compensation for land that remains under its control. Several other large claims are still in negotiation.

In addition, the NRTAs gave the provinces only limited power to regulate First Nations hunting and fishing. On unoccupied Crown land, First Nations people with treaty rights can hunt, fish, and trap year-round — provided they are doing so for food. Supreme Court decisions have ruled that they can even do so outside of the province in which they live.

In its 1996 decision in the Badger case, the Supreme Court ruled that Treaty Eight signatories

have the right to hunt on privately owned land if that land is not put to any obvious use. However, the court held that, although Treaty Eight protects the right to commercial activity on Crown land, the NRTAs limited harvesting to subsistence hunting, trapping, and fishing. In other words, the court interpreted the NRTAs as extinguishing commercial harvesting rights and overriding the treaty promise.

Whether or not Métis harvesting rights are protected in NRTAs is still being argued in the courts.

## SECTION 35

Since 1982, many court cases have clarified how Section 35's recognition of "existing Aboriginal and treaty rights" should be interpreted. This clarification is ongoing and will continue to be further defined in the future. In general, the court has indicated that Aboriginal rights are not absolute. Like other kinds of rights, they are subject to a balance of interests.

For example, the courts have been clear that they will not deprive innocent third parties of their rights in order to satisfy claims to Aboriginal rights. This means that settlements for land claims to areas such as Vancouver or Ottawa will not force all the non-Aboriginal people currently living there to move. Other ways of settling a successful claim in such cases would need to be found — most likely through financial compensation.

One question that is frequently tried in the courts concerns Aboriginal harvesting rights and the extent to which they can be limited



The Little Red River Cree Nation helps its members by developing traditional and non-traditional jobs on its land. Little Red River Forestry, for example, provides many full-time and seasonal jobs. It also consults with Elders, trappers, and other community members to be sure its forestry practices do not impinge on traditional ways of life and values.

- ❖ by federal or provincial laws.
- ❖ Harvesting rights include hunting, fishing, and trapping rights, but
- ❖ could potentially include the right to make a living from the land by logging or whatever other means necessary in the present time.

The Supreme Court's 1990 decision in the Sparrow case established a framework for assessing when aboriginal harvesting rights can be restricted by federal or provincial law. The court ruled that some objectives could override Aboriginal rights, such as economic development or the protection of endangered species. However, the government must have "compelling and substantial" reasons before taking this action. The court stated that any limitations must uphold the honour of



As her ancestors did, Loretta Mercredi makes a living from the land's resources. However, Mercredi works in a modern way. She works in the Central Maintenance and Supply Services department at Syncrude Canada.

Crown and must be consistent with "the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples."

In addition, the court clarified that Aboriginal rights are geographically specific. Just because one group has a right to fish off the west coast does not mean the rights will apply to other groups.

In a trio of 1996 decisions (Van Der Peet, Gladstone, and Smokehouse), the Supreme Court ruled that an Aboriginal right to sell fish commercially can exist if the right was an integral part of the culture and customs of the specific Aboriginal group before contact. The practice must be a part of the distinctive culture of the group, although it may have evolved into a modern form.

In its decision, the court affirmed that the constitution did not create Aboriginal rights — they already existed. Governments cannot extinguish rights, but can infringe upon or regulate them using guidelines established in the Sparrow case.

### Indigenous Knowledge

This page gives two examples of Aboriginal people who make a living from the land's resources. In your opinion, should Aboriginal harvesting rights include the right to make a living in any way from the land, including commercial, non-traditional practices? Discuss this issue with a partner.

In the Van Der Peet decision, the court was careful to say that the pre-contact provision for the rights test does not rule out Métis claims. It stated that other dates may need to be set for other groups of Aboriginal peoples, such as Métis groups that developed after contact. Each decision about Aboriginal rights would need to be reached on a case-by-case basis.

### The Powley Case

In 2003, the Powley case established an important precedent for Métis rights under Section 35. In the case, the Supreme Court upheld an Ontario court decision that asserted that Steve Powley and his son Roddy had Aboriginal hunting rights under Section 35. The Ontario appeal judge noted in his judgement that

Surely, at the heart of s. 35(1), lies a recognition that aboriginal rights are a matter of fundamental justice protecting the survival of aboriginal people, as a people, on their lands. The Métis have aboriginal rights, as people, based on their prior use and occupation as a people. It is a matter of fairness and fundamental justice that the aboriginal rights of the Métis which flow from this prior use and occupation, be recognized and affirmed by s. 35(1) of the Constitution Act, 1982.

One of the arguments the Crown made in its case against the Powleys was that the uncertainty



*Métis hunter Steve Powley attracted media attention across the country when the Supreme Court supported his Aboriginal hunting rights. How might this court decision impact Métis land claims?*

surrounding the identification of people entitled to Métis rights made it impossible to guarantee those rights. In the Powley decision, Mr. Justice Sharpe rejected this argument. He stated

I do not accept that uncertainty about identifying those entitled to assert Métis rights can be accepted as a justification for denying the rights...The basic position of the government seems to have been simply to deny that these rights exist, absent a decision from the courts to the contrary...The government cannot simply sit on its hands and then defend its inaction because the nature of the right or the identity of the bearers of the right is uncertain.

The court's statement clearly indicated that the federal government needed to take action to address Métis concerns. Although the Powley decision only applies in Ontario, Métis leaders across the country hailed it as a strong precedent in support of Métis rights everywhere.



*The status of Aboriginal women, such as Jeannette Corbiere Lavell and others who fought gender discrimination in the Indian Act, has improved since 1982. Section 35 of the Constitution Act gives explicit protection for gender equality. Supreme Court decisions have ruled that this equality takes precedence over even traditional practices that might otherwise be considered an Aboriginal right. What is your opinion on this issue?*

## TALKING CIRCLE

### THE JUSTICE OF RIGHTS

As you learned in this section, Aboriginal leaders are actively working to define and clarify what Aboriginal rights are and who holds them. In your talking circle, discuss some of the issues and ideas you have read in this section, along with the perspectives on pages 96–97. Consider the questions that follow as you read:



*As you hold your talking circle, listen carefully to each person's point of view so that you can remember as much as possible for your notes following the discussion.*

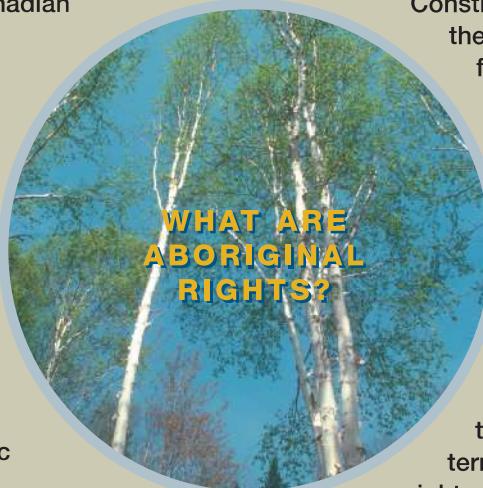
- How are Aboriginal rights protected by the constitution?
- How are Aboriginal people's individual rights protected?
- What does justice mean to you? How should justice be a part of interpreting rights as recognized by various laws?

One of the most persistent red herrings in public debates that consider Aboriginal rights of self-government, or treaties, is the idea that setting up Aboriginal governments, or negotiating treaties with people who are Canadian citizens, is “a form of apartheid, based on ‘racial background.’”... It is worth pausing to emphasize that “race” is an idea and not a biological fact. There are no biological races. The term is usually applied to a group singled out for special attention for political reasons. That the term has no scientific content is a fact that is beyond contention. Those individuals who happen to have one or more “Aboriginal” ancestors and who are treated adversely on that account, are entitled to the remedial benefits of the Charter [of Rights and Freedoms] as interpreted by the courts. But this does not mean that each such individual

has any Aboriginal rights. This is where the confusion often begins. Aboriginal rights are group rights, and not individual rights. They are expressly recognized and affirmed in Part II of the Constitution Act 1982, where they are carefully separated from the individual rights contained in the Charter, which makes up Part I of the Act.

The Supreme Court of Canada has explained that Aboriginal rights are held by historic groups that have lived and continue today to live in a particular territory or place. Aboriginal rights are specific to distinct historic societies in their own ancient homelands. They are not held by persons on account of their biological “heritage.” Aboriginal rights can only be exercised by persons by virtue of their membership in a particular historic community in a particular place.

— Paul Chartrand, “Debunking the ‘Race’ Myth in Debating B.C. Treaties”



Indian Nations in Canada were never conquered. European traders and, in later years, settlers, were made to feel welcome in a land and environment which was alien to them. Throughout years of European settlement and expansion, Indian Nations sought a mutual accommodation, one that would permit a bountiful land to be shared to the benefit of all.

Indian rights to land, resources, culture, language, a livelihood and self-government are not something conferred by treaties or offered to Indians as concessions by a beneficent government. These are the rights that Indian Nations enjoy from time immemorial. These rights are pre-existing and inviolable. A Canadian constitution can accommodate Indian rights, it cannot diminish, alter, or eliminate them.

Indian Nations understand the constitution to be a pact among founding peoples, among which we include ourselves. We understand our special constitutional relationship with the Federal Government to be in the nature of a partnership with the federative system, which was intended to permit us to survive and prosper as Indian Nations, while contributing to Canada's total development.

— Union of British Columbia Indian Chiefs



The ways that are remembered in story, song, and ceremony are the inherent rights of the Blackfoot people. That is, they have a right to determine how these traditional ways of governing relations can be interpreted in today's society. It is a big challenge, no doubt. But it starts with cross-cultural understanding. When you better understand the land that surrounds you, it comes alive for you and in turn, you treat it as you treat other life, with respect.

For the Blackfoot, much has changed, but the willingness to share the land has not. However, it must be done in a way that, like the many generations of Blackfoot that lived on the land, more generations to come from all races can continue to source the earth for sustenance, for life. It is the inherent right of the Blackfoot people to use their traditional land management and governance practices. It is the balance of the natural laws of the environment, and the spiritual laws of the ceremonies that allowed the Blackfoot to live so long and continue to live in their traditional territory. These rules are important not just for the Blackfoot people, but for biodiversity and the sustainable use of Earth's resources so that all people can benefit and live in balance and harmony with the earth.

— Paulette Fox and Duane Mistaken Chief, Kainai First Nation, "Blackfoot Land Governance"

### REFLECTION

What are Aboriginal rights? What ideas do each statement on pages 96–97 contribute to your understanding of Aboriginal rights? Think about ideas from your talking circle discussion and write notes covering your own ideas and those of your classmates.

### LOOKING BACK

Summarize your work in this section by researching one court case that relates to Aboriginal rights. Choose one mentioned in this section, or another that interests you. Prepare a summary that explains the case's significance in terms of Aboriginal title, Aboriginal rights, harvesting rights, self-determination, and so on.

## Re-Building Self-Government

### AS YOU READ

Since 1982, most progress on Aboriginal self-government has been made through negotiation, not court action, although court decisions continue to influence the federal government's policies and law-making.

As you read this next section, recall what you know about the diverse cultures and histories of Aboriginal peoples. Why might some communities have a harder time than others achieving self-government? Why do you think the greatest self-government progress has been made at the community level, rather than constitutional level?

MOST ABORIGINAL LEADERS AGREE THAT SELF-GOVERNMENT HAS GREAT IMPORTANCE FOR THE FUTURE OF THEIR PEOPLE. SELF-GOVERNMENT OFFERS THE OPPORTUNITY TO DETERMINE THE DIRECTION OF THEIR

- political, economic, cultural, and social futures. From this perspective, self-government promises
  - greater political control over decisions that affect their nations and independence from outside pressures and influences by Canadian federal, provincial, and municipal governments
  - greater opportunities for economic development to end poverty, unemployment, dependency, and the unequal distribution of wealth between Aboriginal peoples and other Canadians
  - greater opportunities for culturally sensitive services that will help overcome problems such as poor housing, ill health, inadequate education, and feelings of alienation

- greater protection of Aboriginal cultures, and support for Aboriginal languages, traditions, customs, and art

In addition, Aboriginal leaders agree that self-government is an inherent right. For First Nations and Inuit peoples, this right comes from the Creator. For Métis people, the right comes from their position as a uniquely Canadian people that are indigenous to this country in a way that no other people are. Métis people are a cultural, political, and economic blend of indigenous North American and immigrant European roots.

Aboriginal perspectives on self-government and many other topics were expressed in the *Report of the Royal Commission on Aboriginal Peoples*, published in 1996.

For this rebirth to be meaningful, anything short of true independence and complete freedom will not be acceptable. Trimmed to the bare bone, this means we must regain control over the basic decisions affecting our everyday lives, our communities, our children, our futures. Parents must regain the right to make decisions about the lives of their children; their education, the values they grow up with, their preparation for life. We are talking about the right to make the decisions that will allow our communities to flourish, the simple right to earn a living in the way we feel will best reflect our identity and our society.

— Harold Cardinal,  
*The Rebirth of Canada's Indians*

## ROYAL COMMISSION ON ABORIGINAL PEOPLES

The federal government established the Royal Commission on Aboriginal Peoples in 1990. The commission was charged with the task of assessing the social, cultural, and economic challenges facing First Nations, Métis, and Inuit peoples, and to recommend solutions.

Between 1991 and 1996, the Royal Commission held 178 days of hearings, with 3500 witnesses. In late 1996, the commission released its report in six volumes. It called for a far-reaching change in the relationship between Aboriginal peoples and the rest of Canada.

Among its many conclusions, the report recommended

- a proclamation by the federal government to admit past mistakes and establish a bilateral, nation-to-nation relationship between Canada and Aboriginal peoples
- constitutional recognition of the inherent right of Aboriginal peoples to self-government
- an Aboriginal constitutional veto on matters affecting the constitutional rights of Aboriginal peoples

The Royal Commission proposed that Canadian federalism be revised to include three orders of government: federal, provincial, and Aboriginal. The commission maintained that each level of government should have full powers over the areas in its jurisdiction, unlike municipal governments that have powers delegated to them by the provincial or territorial governments. The



*Georges Erasmus, former chief of the Assembly of First Nations, was co-chair of the Royal Commission on Aboriginal Peoples in 1996. The commission also included Viola Robinson, former president of the Native Council of Canada and Mary Sillett, former vice-president of the Inuit Tapirisat of Canada. What does their presence on the commission tell you about the influence of national Aboriginal organizations on the federal government?*

commission noted three basic models for self-government, asserting that a one-size-fits-all system could not work. The diversity of First Nations, Inuit, and Métis cultures and history would require a diverse selection of self-government models.

### Responses to the Royal Commission's Report

Most Aboriginal leaders agreed with the report's conclusions. Many felt that it clearly outlined Aboriginal peoples' situation in Canada and provided practical ways to improve their people's lives.

In January 1998, the federal government released its response in a document called *Gathering Strength: Canada's Aboriginal Action Plan*. In the document, the government expressed its regret for past actions that damaged Aboriginal peoples and communities. It then set out a plan to develop a new relationship between the federal government and Aboriginal peoples.

The plan included a pledge to fully implement the terms of all treaties, strengthen Aboriginal self-government, provide new funding arrangements for Aboriginal governments, and develop programs in consultation with Aboriginal peoples to promote greater social, cultural, and economic development for their communities.



## NEGOTIATING SELF-GOVERNMENT

The Royal Commission on Aboriginal Peoples listed core areas of jurisdiction it considered essential to self-government. These core areas included

- citizenship and membership
- government institutions
- elections and referendums
- access to and residence in the territory
- lands, waters, sea-ice, and natural resources
- protection and management of the environment
- economic life, including commerce, labour, agriculture, hunting, trapping, fishing, etc.
- regulation of businesses, trades, and professions
- management of public monies and other assets
- taxation
- family matters, including marriage, divorce, adoption, and child custody
- property rights, including succession and estates
- health
- social welfare, including child welfare
- education
- language, culture, values, and traditions
- some aspects of criminal law and procedure
- administration of justice
- policing
- housing and public works

### What powers are most important for self-government?

#### WHAT TO DO

1. Compare the Royal Commission's core areas of jurisdiction to the current powers of band councils as listed in Section 81 of the Indian Act. What additional powers did the Royal Commission recommend? Why do you think these might be significant for a self-governing body? Which powers do you think are most significant?
2. In any negotiation, parties must be flexible on issues considered of less importance in order to gain on issues considered critical. Work with a partner to select a list of essential powers for self-government from the Royal Commission's list.
3. Imagine a scenario in which you are negotiating with the federal government and you get all the powers you consider essential except one. Would you agree to give up the one power in exchange for the rest? Are there any powers that you consider so important that you would risk losing the whole deal? Which ones?
4. Compare your list of essential powers with other pairs to see if you can find consensus. Once you do, approach another group with the same goal. Repeat the process until you have classroom-wide consensus or until you run out of time.

#### Think About Your Project

Think about this activity in terms of the task facing negotiators. What did you learn? Write a paragraph expressing your ideas.

## FEDERAL GOVERNMENT PERSPECTIVES

In 1995, the federal government established a policy that moved self-government negotiations forward, even without constitutional support. The policy asserted the principles that the government would follow in self-government negotiations. Key principles from the policy are as follows:

- The inherent right of self-government is recognized as an existing Aboriginal right under Section 35 of the Constitution Act, 1982.
- Aboriginal self-governments should operate within the framework of the Canadian constitution, and self-government powers should be harmonious with other levels of government under the constitution.
- Provincial and territorial governments must be part of negotiations for self-government because some of the powers under negotiation may affect



*The federal government's 1995 policy on self-government reflected what it had already learned through land-claims negotiations: solutions usually require the involvement of a provincial or territorial government. Here, representatives of the Janvier First Nation in Alberta receive its land-claim settlement in 1993. (Left to right: Councillor Edith M. Janvier, Chief Fred Black, Councillor Stuart Janvier, Councillor Jimmy Janvier) The First Nation received 1376 hectares of land and \$5 000 000. The Government of Alberta contributed the land and \$1 800 000. The Government of Canada contributed \$3 200 000.*

provincial and territorial areas of jurisdiction.

- Aboriginal self-government does not mean sovereignty in an international sense, but rather an enhancement of Aboriginal peoples' participation in the Canadian federal system.
- The Canadian Charter of Rights and Freedoms will bind Aboriginal governments.

## STAGES IN SELF-GOVERNMENT NEGOTIATIONS

### Framework Agreement:

The first stage of negotiation results in a Framework Agreement. The groups involved agree on the issues to be discussed, on how they will be discussed, and on deadlines for reaching an Agreement-in-Principle.



**Agreement-in-Principle:** The Agreement-in-Principle (AIP) is the second stage in the negotiation process. AIP negotiations are often the longest stage because negotiators must address and resolve the issues set out in the Framework Agreement. The AIP generally contains all of the major elements of the Final Agreement.



**Final Agreement:** The Final Agreement is based on the AIP. It must be ratified and signed by all parties. It is then made effective through federal and, in some cases, provincial legislation. Final agreements include implementation plans.

### Implementation Plans

Each self-government agreement includes an implementation plan. The government describes implementation plans as the “who”, “how”, “when,” and “how much” of the self-government agreements. Implementation plans ensure that each partner to the agreement clearly understands its obligations, including how and when the obligations need

to be carried out. The requirement to have implementation plans ensures that self-government agreements cannot be concluded without agreement upon crucial issues, such as time frames and financial contributions. The goal of implementation plans is to have fewer misunderstandings between partners once an agreement is reached.

## INVESTIGATING THE FEDERAL POLICY ON SELF-GOVERNMENT

The federal government’s 1995 assertion that Aboriginal peoples have an inherent right to self-government made it possible for many communities to move forward with self-government proposals. Today, most land claims negotiations include negotiations for self-government.

**What is the federal government’s policy on self-government negotiations?**

### WHAT TO DO

1. Divide the class into enough groups that each can investigate one of the topics listed below. All are found in the federal government’s policy on self-government negotiations. The policy, called *Aboriginal Self-Government: The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, is available online.

#### Topics

- scope of negotiations
- fiduciary obligations
- accountability
- financial arrangements
- access to programs
- implementation of plans
- approach to First Nations
- approach to Inuit
- approach to Métis and First Nations groups that do not have a land base
- approach to Métis with a land base
- approach to the western Northwest Territories
- approach to the Yukon

2. Research your topic and prepare a lesson for the rest of the class. If possible, prepare notes that you can photocopy for your classmates or deliver using a tool such as PowerPoint™ or an overhead projector.
3. Prepare two or three questions related to your lesson and give them to the teacher. Your teacher will prepare a class quiz using questions from all the groups.
4. Deliver your lesson to the class and be prepared to answer questions. While other groups present, take notes and ask for clarification of any material you do not understand.
5. Take the quiz distributed by your teacher.



## **PROVINCIAL GOVERNMENT PERSPECTIVES**

First Nations relationships with Canada have historically been conducted through the federal government. The Royal Proclamation of 1763 and treaties established the relationship as one of nation to nation. First Nations leaders have been reluctant to include provincial governments in negotiations with the federal government because they did not want to lose any symbolic or real status as sovereign nations.

Métis and First Nations people without status have always fallen under provincial or territorial jurisdiction, but provincial governments have historically offered few, if any, programs to address their specific needs.

During the conferences to amend Canada's constitution during the 1980s, some provinces were vocal in their opposition to including self-government in the constitution. Most accepted Aboriginal peoples' right to self-government. The issue for them was how self-government would affect their own powers and financial obligations. Without a clear explanation, they refused to include the right to self-government in the constitutional amendments.

In addition, the provincial governments feared they would not be involved in self-government negotiations, preventing them from protecting their own political and financial interests. This concern was most evident in some western provinces, where Aboriginal peoples form a larger proportion of the

population than in eastern and central provinces.

In 1989, the federal government created a Federal–Provincial Relations Directorate to co-ordinate federal and provincial government activities. Since the federal government's 1996 policy on self-government negotiations, the provincial governments have become full participants in the process. Their inclusion alleviates many provincial concerns and makes them more receptive to self-government proposals.

First Nations leaders have generally accepted the practical reasons for inclusion of the provincial governments. Today, self-government agreements are generally **tripartite agreements**, which means they involve three partners: the federal government, a provincial or territorial government, and one or more Aboriginal governments.

At times, Aboriginal peoples' goals get caught up in the broad streams of issues the federal and provincial governments face. Each level of government has its own mandate and set of priorities. Sometimes these different mandates come to play at the self-government negotiating table, whether or not they have anything to do with Aboriginal peoples. This is the reason many Aboriginal leaders would prefer that Aboriginal peoples' right to self-government be recognized in the constitution. Such recognition would keep the governments focussed on Aboriginal people's rights and would keep negotiations progressing.



## MODELS OF SELF-GOVERNMENT

Aboriginal leaders agree that their communities have the right to self-government and that self-government is highly important to their communities' future. Most also assert the government's fiduciary responsibilities — meaning the government has an obligation to provide the resources needed to help communities achieve self-government. All agree that no single model of self-government will work for all communities. The diversity of cultures, histories, and current circumstances among First Nations, Métis, and Inuit communities across the country will, to a large extent, determine their views on what self-government should look like.

Where leaders sometimes disagree is whether individual communities should wait for self-government until all or most are in a position to achieve it, or whether communities should move forward individually as soon as they are able. This difference of opinion leads to different ideas about strategies for achieving self-government.

For example, the priority of the Inuit in Nunavut, who are a majority of the population in that territory, might be to increase the powers of provincial and territorial governments in relation to the federal government.

First Nations with land and many human and economic resources at their disposal often want to see the Indian Act and its history of paternalism gone forever. First Nations without

well-developed resources sometimes prefer a revised Indian Act that would keep their special status intact, along with more economic and political freedom. Some groups want a constitutional change that recognizes Aboriginal peoples as Canada's third founding nation. Others want stronger treaty agreements. Most models of Aboriginal self-government seek to maintain some special rights within the Canadian federal system.

Métis communities with a land base have a stronger case for self-government than those without, simply because they can propose self-government options that work within existing government systems. Urban Aboriginal peoples and others without a land base have different expectations for self-government. Aboriginal perspectives on self-government are too diverse to list completely, but these examples provide a sense of the complexity of the issues facing negotiators.

Pages 104–105 present several models of self-government from across the spectrum of hundreds or even thousands of options.

### Third Order Government

In this model, Aboriginal governments would form a third order of government in Canadian federalism alongside the federal and provincial governments. Powers of the Aboriginal governments would be detailed in the Constitution Act. Aboriginal governments would have the wide-ranging powers of provincial governments, with some areas of federal jurisdiction. Some guarantees for the rights of non-Aboriginal peoples living in areas governed by Aboriginal governments would need to be established.

**Benefits:** Enshrinement of self-government in the constitution would mean it could not be removed or changed by other levels of government. The change in Aboriginal peoples' status in Canada would have symbolic meaning along with practical powers. Aboriginal governments would be responsible to their communities, not another level of government.

**Drawbacks:** Reaching agreement for this level of change will be difficult and time consuming. It could take decades. The federal and provincial governments dislike the unknown and would likely insist on knowing the details of this model of government before inserting it into the constitution. This model might not be suitable for communities without significant resources.



*In November 2004, Enoapik Sageatok, an Elder from Iqaluit, lit the ceremonial qulliq to open the second session of Nunavut's legislative assembly. Although Nunavut has a public government, the Inuit majority in the territory ensures that Nunavut's government reflects Inuit culture and values.*

### Public Government

This model would be most appropriate for nations in which the majority of residents in the territory are Aboriginal people. In this form of self-government, both Aboriginal and non-Aboriginal peoples could participate equally in government. Public governments would likely be similar to other forms of government in Canada, with some adaptations related to Aboriginal heritage.

**Benefits:** This form of government may be easier to achieve because it uses existing breakdowns of government powers and systems of intergovernmental relations. Non-Aboriginal citizens do not need special rights guaranteed because all citizens in the public government's territory have the same rights.

**Drawbacks:** Few Aboriginal groups in the country would likely find that this model meets their needs. Nunavut is a current example of a public government. You will learn more about how Nunavut's government works on pages 153–155.

### Municipal-Style Government

A municipal-style Aboriginal government would receive self-governing powers through a change in legislation. Several First Nations in Canada have opted for this route and now have forms of community-based self-government. The first was in 1984, when the federal government passed legislation to give the Cree of Northern Quebec a municipal form of government.

In 1986, Bill C-43, the Sechelt Indian Band Self-Government Act, was passed to establish an “Indian government district,” a form of municipal government

#### REFLECTION

In a small group, prepare a list of issues and questions that negotiators face in trying to establish self-governments. Some questions include

- How will the government be funded?
- To whom are Aboriginal leaders accountable (their communities or the federal government)?
- How is self-government guaranteed (through the constitution, Indian Act, other legislation)?

Once you have your list, answer the questions using a particular self-government model. You can find many Final Agreements, Agreements-in-Principle, and Framework Agreements at [www.ainc-inac.gc.ca](http://www.ainc-inac.gc.ca).

with broad powers over education, health, social services, resource development, employment, and environment. The Indian Act no longer applied to Sechelt territory.

**Benefits:** This kind of government can be created relatively quickly and tends to be favoured by the federal government. It can achieve practical goals of economic and social development. Precedents now exist from which communities can begin negotiations.

**Drawbacks:** If another level of government delegates powers to the self-governing body through legislation, the powers or rights can also be changed or taken away. In addition, many bands are small and do not have sufficient resources to take on additional responsibilities to administer programs and services. Symbolically, the model does not reflect an elevated position for Aboriginal peoples' contributions to Canadian history.

### Community of Interest Government

This innovative model, proposed by the Royal Commission on Aboriginal Peoples, would assist the growing number of Aboriginal peoples living in urban centres to achieve a measure of self-government. This form of government would likely include powers delegated from other Aboriginal governments or the provincial government. It would control areas such as education, health care, economic development, and culture.

**Benefits:** Urban residents from diverse Aboriginal backgrounds could achieve some degree of cultural and linguistic protection, as well as some economic development assistance. It is one of the only self-government models that meets the needs of diverse communities without a land base.

**Drawbacks:** The details would be difficult to arrange among diverse Aboriginal interests and between Aboriginal and non-Aboriginal governments. With many groups involved, funding this type of government would likely be a problem.

#### LOOKING BACK

Create a diagram that shows as many perspectives on self-government as you can. As a minimum, include federal government, provincial and territorial governments, First Nations, Métis, Inuit, and non-Status Indian perspectives. Where do the various perspectives agree? Where do they disagree and why?

## Chapter Three Review

### Check Your Understanding

1. Who is Elijah Harper and what was his role in the Canadian constitutional process?
2. Why was the right to self-government not included in the Constitution Act of 1982?
3. What rights were guaranteed in the constitution?
4. What specific clauses refer to Aboriginal peoples?
5. Why is the constitution particularly significant for Métis and Inuit peoples?
6. Why do First Nations and Inuit communities consider self-government to be an inherent right?
7. Name five national Aboriginal political organizations and explain who each group represents.
8. What is the difference between Aboriginal title and Aboriginal rights?
9. Explain how each of the following are significant in terms of Aboriginal title: the Natural Resources Transfer Agreements, the numbered treaties, and the Manitoba Act.
10. Using two specific examples, explain how the Supreme Court has affected Aboriginal rights.
11. What was the Royal Commission on Aboriginal Peoples and what is its significance for Aboriginal rights?
12. What is the difference between inherent rights and the Aboriginal rights recognized by the Constitution Act of 1982?
13. How are land rights related to other rights, such as the right to self-government? Why might the second be dependent on the first?
14. What kinds of oral history has the Supreme Court recognized? Name at least five types of evidence an Aboriginal group might offer to establish its claim to rights or title.
15. Name two communities that have a form of self-government today and list characteristics that make them self-governing.

16. In what ways do First Nations view treaties as fundamentally different from the Indian Act? How does this impact their view of the rights in each?

17. List at least five issues or questions that must be addressed in self-government negotiations. Explain how each issue is significant to the negotiation participants (Aboriginal organizations and/or communities, federal and provincial governments).

18. In a chart, summarize the roles of Aboriginal organizations, the federal government, and provincial governments in self-government negotiations.

19. Name at least one contemporary Aboriginal political leader and describe how his or her organization is working for Aboriginal rights. In your opinion, is this leader and his or her group doing an effective job? Give reasons for your answer.

20. What is Crown land?

21. How did the Natural Resources Transfer Agreements affect First Nations land rights?

### Speaking and Listening

22. Find a story from the oral tradition of a First Nation from your area that could be used to support an Aboriginal rights claim, such as the right to hunt or fish.

(a) Learn the story and practise it until you can tell it in your own words without referring to notes.

(b) Working with a partner, tell each other your stories. Afterwards, the listener's job is to explain how the story supports a rights claim and to describe what kind of claim it might be used for.

(c) How does oral (traditional) teaching compare to contemporary forms of teaching and instruction? Work with your partner to describe the differences and similarities as well as you can.

23. Tell a story to your class from your own life and try to bring it to life so that students will remember it. After each story, listeners should recount what they remember about the story on a piece of paper and hand it in to the storyteller. Examine how well students understood your story. What does this tell you about the skill needed to transmit oral history so that other people will recall it accurately?
24. Hold a mock self-government negotiation. Divide your class into groups that represent the federal government, provincial or territorial government, and a First Nations, Métis, or Inuit community or organization. The type of Aboriginal group you choose will determine the kind of negotiation that will take place. For example, is the discussion about increasing a single nation's powers or inserting a clause into the constitution? Your teacher can help you set the class focus.

Each group should research its position thoroughly. Consider the demands other groups will likely make, and be prepared to be flexible on your own demands. As a group, reach consensus about what rights or powers you most want to achieve or protect.

### Going Further

25. How would self-government negotiations be different today if the right to self-government had been enshrined in the constitution? Would more communities have self-government? Explain your answer.
26. Instead of working for Aboriginal rights through an Aboriginal political organization, some Aboriginal people choose to participate in Canadian parliament. Two such people — James Gladstone and Ethel Blondin — are shown on this page. Research the names of all Aboriginal peoples who have ever served in parliament. What constituents did they represent? How can Aboriginal people make a contribution to the Canadian political system? How can they make a contribution to their own communities through this political system? How are their contributions different from people who work through Aboriginal political organizations? What goals are likely the same?



*In 1958, Kainai First Nation member James Gladstone became the first Aboriginal Senator in Canada's parliament. He was instrumental in helping Aboriginal people receive the right to vote in Canadian elections.*



*In 1988, the Honourable Ethel Blondin-Andrew became the first Aboriginal woman to be elected to the House of Commons. She was elected as a Member of Parliament for the Western Arctic and was re-elected for a fifth term in 2004.*

### LOOKING BACK

Look back to the photograph of the mace on page 77. Imagine that you have been assigned the job of creating a mace for a First Nations, Métis, or Inuit community that has just signed a self-government agreement. Design your mace on paper with an explanation of the symbolism you plan to use. Build a model of the mace.