Liberal Theory as a Tool of Colonialism and the Forced Assimilation of the First Nations of Newfoundland and Labrador

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Between 1869 and 1985, the Indian Act presumed that once the Mi'kmaq of Nova Scotia could be christianised and civilised, they would voluntarily embrace enfranchisement. By 1949, almost no Mi'kmaq had volunteered. A Parliamentary review of the Indian Act concluded that voluntary enfranchisement as a policy of assimilation was not working. In 1949, when Newfoundland's confederation with Canada was negotiated, federal officials refused to assume their constitutional obligations to the Mi'kmaq, and other First Nations, in Newfoundland and Labrador, by not recognising them as Aboriginal peoples pursuant to the Indian Act. What the Indian Act had failed to accomplish in respect to assimilating Mi'kmaq people in Nova Scotia with their consent, federal officials attempted to make happen in Newfoundland and Labrador by their unilateral use of Liberal democratic theory. Federal officials asserted that because the Mi'kmaq and other First Nations peoples in Newfoundland and Labrador had been de-Indianized by their contact with white colonial society and because they had a theoretical right to vote, they could not be considered as Indians under the Indian Act. Federal officials applied a policy of "forced" enfranchisement for the first time in Canadian history to the Mi'kmaq and other First Nations peoples in Newfoundland and Labrador in 1965. This policy is still in force today in Newfoundland and Labrador.

Entre 1869 et 1985, la Loi sur les indiens supposa qu'après avoir été «civilisé» et «chrétienisé» le peuple Mi'kmaq de la Nouvelle-Écosse accepterait le droit de vote. Jusqu'à 1949, aucun Mi'kmaq se présenta comme volontaire. Une étude parlementaire de la Loi sur les indiens conclut que la politique d'octroyer le droit de vote aux volontaires ne marchait pas comme stratégie d'assimilation. En 1949, lorsque la confédération de la Terre-Neuve avec le Canada fut négociée, les fonctionnaires fédéraux refusèrent d'assumer leurs obligations constitutionnelles envers le peuple Mi'kmaq et les autres Premières Nations en Terre-Neuve et au Labrador en

† B.A. (Ohio), LL.B. (Dalhousie), LL.M. anticipated 1995 (Dalhousie).
ne leur reconnaissant pas comme un peuple autochtone selon la Loi sur les indiens. Les fonctionnaires fédéraux voulurent faire en Terre-Neuve et au Labrador en utilisant unilatéralement la théorie libérale de la démocratie ce que la Loi sur les indiens ne put pas faire en Nouvelle-Écosse. Les fonctionnaires fédéraux prétendirent que le peuple Mi'kmaq et les autres Premières Nations en Terre-Neuve et au Labrador n' aient pas pu être considéré comme des Indiens selon la Loi sur les indiens parce que ces peuples aient perdu leur identité «indien» à cause de leur contact avec la société blanche colonisatrice et à cause de leur droit de vote théorique. Les fonctionnaires fédéraux mirent en place une politique d'octroiement «forcé» de droit de vote pour la première fois dans l'histoire canadienne envers le peuple Mi'kmaq et des autres Premières Nations en Terre-Neuve et au Labrador. Cette politique est encore en force aujourd'hui.

Whenever legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people who are thereupon absolved from any further obedience . . .

John Locke, 1690

In 1949, Newfoundland confederated with Canada becoming the tenth province. The internal political process among Newfoundlanders in debating and voting on the kind of government they wanted exemplifies the basic concepts of Liberal democratic social contract theory. The process that took place in Newfoundland leading up to confederation illustrates the cultural values and norms British subjects in Newfoundland believed in, such as: formal equality—where everyone is entitled to an opinion and a vote; consensual, informed voluntary choice—where information is available (in theory since many were illiterate) in print or by speeches so that everyone could make his or her own informed choice; liberty—where each individual exercises their personal liberty in voting for the kind of government they wanted.

Kathleen Mahoney has summarized the basic principles of liberal theory that are the philosophical foundation of Anglo-Canadian society in *The Limits of Liberalism*.¹ Mahoney sees Canadian political and jurisprudential thought evolving from John

Locke, John Stewart Mill and other liberal theorists. Five general principles arise from this philosophy:

Because all human beings are equal, there is no justification for any person or class of persons to exercise self-realization more than any other.

... because each person has the right to pursue his or her own version of happiness, ... no one else has a prior claim on any other person's activities ... It is wrong for the state to interfere with the conduct of the lives of adults as long as they are not harming others. Political freedom is a further liberal value because it operationalizes abstract individualism and individual liberty by allowing individuals to decide best for themselves their own development and self-determination by choosing who will govern them. Each person must have the right to consent to a government or reject it if it threatens individual rights because freedom from arbitrary authority is essential to the individual pursuit of happiness. The purpose of democratic government is not to lead humanity to a higher moral purpose, but rather to preserve life, liberty and property.²

In his analysis of how Aboriginal rights have been conceptualized in Western legal thought, James Youngblood Henderson looks at how these Liberal principles influenced First Nation–British interaction. Henderson's work looks at Mi'kmaq–British interaction in Nova Scotia from the colonial period to 1985.³ His work provides a comparative basis for examining the development of Federal and Provincial policy applied by Anglo-immigrants to the Mi'kmaq Nation in Nova Scotia and the Mi'kmaq, Innu and Inuit Nations in Newfoundland and Labrador in their on-going colonization of these areas. This paper will focus on the negotiations that took place between Anglo-immigrants to include Newfoundland as a Province of Canada. The jurisprudence of confederation, specifically that portion revealing how the Federal and Newfoundland Governments wished to deal with the First Nations in

² Ibid. at 61.
Newfoundland and Labrador, will be analyzed with respect to its reflection of general principles of Liberal philosophy.

Were these general principles extended to First Nations on the basis of substantive equality, or were they applied to them in a unilateral manner that only reflected the preservation of Anglo-immigrant interests?

My analysis will attempt to illustrate the points at which the general principles of liberal philosophy and Canadian law could have been used to provide an opportunity for First Nations in Newfoundland-Labrador to introduce their own terms of union, but were not. Instead, the evidence will demonstrate that a pretentious policy of forced assimilation was applied to First Nations in Newfoundland-Labrador by the Federal Government based on underlying assumptions of racial and cultural superiority couched in the liberal language of "formal equality." That is, First Nations peoples were "declared" to be equal within white Anglo-immigrant culture. This assimilative equality was used to obscure the different rights Aboriginal peoples possessed.

The British and Canadian Crowns had initially recognized that First Nations were nations of peoples with legal rights and interests outside the jurisdiction of the Crown in the *Royal Proclamation of 1763*. The declaration of equality, however, was used by Federal officials to silence all questions concerning any need to investigate cultural and political differences between First Nations and the settler governments. This new policy departed from the legal requirement, which the British and Canadian Crowns had previously followed, that directed them to make agreements with First Nations.

The assimilative policy of deemed formal equality breached Canadian constitutional law in order to oppress the political rights of First Nations in Newfoundland-Labrador. Moreover, this policy denied First Nations in Newfoundland-Labrador the benefit of the Liberal-democratic ideology of free and voluntary choice to determine their relationship with Canada. Further, the declaratory policy of formal equality insured that First Nations people had no legal identity as Aboriginal people with Aboriginal rights that could be protected by the general principles of British common law. This policy enabled the Federal and Newfoundland Governments to confiscate First Nations territorial property while avoiding the legal duty of entering into consensual treaties of sale and compensation.
I. THE APPLICABILITY OF GENERAL PRINCIPLES OF COMMON LAW

James Youngblood Henderson has reviewed the recognition of Aboriginal Rights in Western jurisprudence. Henderson attributes the evolution of four general principles of English law as being influenced by the liberal social contract philosophy of John Locke.4 His explanation for the evolution of the modern democratic state is consistent with the five principles Mahoney derives from Liberal philosophy. Henderson reduces Mahoney’s five principles of Liberal philosophy to two principles, the principles of order and freedom:

Public laws were necessitated by the enmity of peoples competing for scarce resources and reinforced by the need for collaboration that marks social existence. Public rules placed limits on the pursuit of private ends, thereby ensuring that natural egoism and desires would not turn society into a free-for-all in which everyone and everything was endangered. This was called the principle of order. Public laws also facilitated mutual collaboration by granting the power to individuals to choose the ends and means of their striving without interfering with the striving of others. This was called the principle of freedom.5

The need for order and freedom led to the evolution of democratic government and the development of four general principles of common law, structuring relations between individuals and between individuals and the state. These principles are identified by Henderson as the legal principles of tort, restitution, contract, and property law. He defines these as:

The tort principle holds that one who causes harm wrongfully should put the victim in as good a position as he would have been in had no harm [occurred] .... The restitution principle holds that when one person has been enriched unjustifiably at another’s expense, the benefit should be restored [to the victim] based on the extent of the benefit to the person and not the extent of the harm inflicted .... The contract principle holds that persons should keep their promises, and if they do not, the law should place the deceived beneficiaries of a promise in

4 Ibid. at 196.
5 Ibid. at 185.
the position they would have been in had the promises been kept. The property principle defines the relationship that exists between animate persons and inanimate things and then applies the contract principle. 6

Henderson traces the historical development of the recognition of Aboriginal rights from the Papal edicts of the 1500s that were founded on the jurisprudence of Francis de Vitoria and Bartholomew de Las Casas. These Spanish jurists wrote that the "Indians" of the New World were human beings equal to Europeans whose rights and title to property should be respected, whether they were Christian or not. The thinking of Vitoria and Las Casas was based on the European conception of natural law and the underlying universal principles God had designed for mankind.7 Later, European jurists, such as Gentilis, Grotius and Pufendorf, expounded on Vitoria’s earlier writings, further developing and incorporating these ideas into the law of nations.

English jurists, however, were intellectually unprepared for incorporating the New World reality of independent Aboriginal Nations into English common law which had been, up to the discovery of the New World, inward looking:

Struggling to develop a national law and preoccupied with the issue of where sovereignty resided within England, the common [law] lawyers had little interest in the law of nations and no theory or doctrines of law. Instead, they believed in the history and experience of the ancient procedures and formulas of the common law. The common lawyers believed all political questions could be solved by reducing them to legal questions and deciding them on the basis of precedent.8

6 Ibid. at 186. Although it is not completely clear what Henderson meant with respect to the operation of the property principle, I am assuming he meant that when a promise is made to a party concerning the protection or disposition of their property it must be kept. Prior to his definition of the property principle he stated: “The contract and property principles permit persons to make use of protected rights and advantages by enforcing voluntary dispositions between and across private spheres” (ibid. at 186).

7 Ibid. at 188-89. See F. Vitoria, De Indis et de Jure Belli Rerlectionnes (1597) trans. J. P. Bate (1917); F. A. MacNutt, Bartholomew de Las Casas: His Life, His Apostolate, and His Writings (New York: G.P. Putnam’s Sons, 1909).

8 Henderson, ibid. at 191.
One of the initial English efforts to deal with the concept of legal jurisdiction over English settlements outside the territory of England was the decision of Sir Edward Coke in 1607. Henderson regards this decision as a summary of "fragmented medieval thoughts of the common law, which regulated private disputes among British subjects in newly acquired territories." Henderson summarizes the essential elements of Lord Coke's decision:

if the inhabitants of a country conquered or purchased by England were civilized, their existing laws remained in force until altered by the sovereign or, after the Restoration, by Parliament. If they were savages or pagans it was presumed they had no law, and English law filled the vacuum at once. If the country was uninhabited 'desert', Englishmen going abroad to occupy it took their law with them 'as their birthright'.

Henderson suggests that these principles evolved into three common law principles that vested the existing rights of First Nations in the evolving British law of nations. The Contractual Principle of Discovery,

was a limited right in international law. It gave a jurisdictional right to trade or to seek a voluntary disposition of existing rights and tenure from American nations. By analogy and precedent, the common lawyers understood discovery to assert a 'perfectible entitlement' or 'pre-emptive' right.

Such a pre-emptive right is consistent with the principle of free voluntary consent. I would suggest that this principle also demonstrates that Anglo-immigrants attributed Liberal individual "rights" to First Nations people, at this time recognizing a substantive equality and not an assimilative equality. In other words, First Nations were accorded the right to self-determination in trading with Anglo-immigrants. This is not to say that First Nations people were motivated by the same values and cultural norms as Anglo-Euro-immigrants, but only that the immigrants projected their own Euro-centric conceptions of individual interests onto their dealings with First Nations peoples.

9 Ibid.
10 Ibid.
11 Ibid. at 192–93.
Trading was done at the individual to individual level. When real estate became part of the trade between Europeans and First Nations a second principle evolved, The Proprietary Principle of Purchase:

Almost from the beginning of colonial expansion, British colonial governors in the New World had clear instructions to respect native land rights and to acquire territory only by purchase or treaty of purchase. The proprietary principle of purchase flourished among the British colonists in North America. By 1683, the New England Puritans considered that it was far more important to hold the land under a tribal deed by 'fair contract or just conquest' than under English law.\(^{12}\)

Here, a purchase of land from a First Nation, or First Nation's person, was seen as being a superior tenure to an English Crown grant (if the surrender of First Nations title was not obtained).

Henderson notes that in 1683, "the Lords of Trade instructed their commissioners to confirm all titles held under tribal deeds in Massachusetts."\(^{13}\) First Nations were regarded as having sovereignty over their lands and the Liberal right to freely determine the disposition of their properties. This demonstrates that in the early colonial period English colonists recognized First Nations as possessing political rights equal to the English on two distinct levels: the individual to individual level and the nation to nation level, where each nation was accorded rights similar to individuals.

Henderson sees this latter relationship further defined in a third common law principle, John Locke's Contractual Principle of Treaty Commonwealth:

Native Governments of America were characterized by Locke as independent states under 'kings' or 'rulers'. Under this theory of the social contract, 'those who have the supreme power of making laws in England, France, or Holland are to the Indian but like the rest of the world—


\(^{13}\) Henderson, *ibid.* at 194.
men without authority. This doctrine did not preclude American nations from entering into treaties with other European governments in order to create a more stable political environment, and it did not preclude England from entering into treaties in order to secure property rights from the natives. Locke called this 'treaty commonwealth' or 'treaty federalism' ... Treaty commonwealth was considered by Locke to be distinct from domestic consensual government. The major distinction between the two was that the former was a contractual alliance in the law of nations and hence was not a comprehensive subordination of will.  

The "social contract" between the British Crown and a First Nation would be limited to the specific purposes expressed in the treaty. Henderson contends that Locke saw the need to develop a direct treaty commonwealth between the British Crown and First Nations in order to avoid the assimilation of British subjects in the jurisdiction of First Nation governments. If the Crown allowed colonies, or individual British subjects, to purchase lands directly from First Nations these purchases placed the purchasers under the jurisdiction of the sellor First Nation's government, according to Locke's Liberal theoretical principle of tacit consent. This theory is derived from Locke's view that an individual should have the right to choose who will govern him or her.

The theory of tacit consent explains how a non-consenting individual "tacitly" becomes subject to the laws of a government to which they never consented. For instance, this can happen by birth, land purchases or one's physical presence in a foreign jurisdiction. A purchase of land from a First Nation was free of any duty to the British Crown and placed the purchaser beyond the Crown's jurisdiction:

Direct treaties between the crown and American nations were the sole cure for the mischief of the prior purchases of native lands. A prohibition against purchases by governors and subjects without expressed authority of the crown would resolve this problem in the future.  

This problem was highlighted in the Royal Instructions of 1761.

14 Ibid. at 196.
15 Ibid. at 197.
In 1761, there had been numerous up-risings by Atlantic First Nations as English settlers intruded into lands reserved for First Nations under prerogative treaties with the Crown in New England and Nova Scotia. First Nations expressed their dissatisfaction both in action and representations to the British Crown’s officials. His Majesty reacted by issuing the *Royal Instructions of 1761* to address these grievances. This Proclamation was sent to Governor Belcher for implementation in Nova Scotia. In the Proclamation:

... His Majesty acknowledged ‘the fatal Effects which would attend a discontent amongst the Indians in the present situation of affairs’ and asserted His Royal Determination ‘upon all occasions to support and protect the said Indians in their Just Rights and Possessions and to keep inviolable the Treaties and Compacts which have been entered into with them’. More specifically, the Proclamation forbade the passing of any grants in any territories reserved to the Indians by treaty, and required the removal of all persons who had settled on the reserved lands.\(^\text{16}\)

When Governor Belcher of Nova Scotia implemented these instructions by issuing a Proclamation reserving all the lands and coasts from the Muskquodobit River to the Bay of Chaleur, based on the long possession of this area by the Mi’kmaq, he was overruled by the Lords of Trade.\(^\text{17}\) The inconsistency between the directions to Governor Belcher in the *Royal Instructions of 1761*, Belcher’s faithful implementation of these directions, and the Lords of Trade’s position, raises the question of dishonourable behaviour by the Crown. The 1761 Instruction was incorporated in a stricter and more comprehensive document, the *Royal Proclamation of 1763*.

The *Royal Proclamation of 1763* forbade the purchase of Indian lands except by the Crown. I would suggest that it incorporates Henderson’s three common law principles of discovery, purchase and treaty commonwealth:

the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, [the

\(^{16}\) D. Johnston, *The Taking of Indian Lands In Canada: Consent Or Coercion?* (Saskatoon: University of Saskatchewan, Native Law Centre, 1989) at 10–11.

\(^{17}\) Ibid. at 12.
Discovery principle] should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds . . . . And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, . . . [the purchase principle] and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that if, at any Time any of Said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some public Meeting or Assembly of the said Indians, to be held for that purpose by the Governor or Commander in Chief of Our Colony respectively within which they shall lie . . . [the treaty principle].

Thus, the First Nations were seen as dependent domestic nations within the "Dominions or Territories" which the Crown claimed, but were still accorded the power to determine the relationship they would have with the Crown through treaties.

None of the terms or directions in the Royal Proclamation of 1763 suggest that the Crown claimed any right to interfere with the internal political organization of First Nations. In fact, there was implicit recognition of the consensual form of government conducted by First Nations in the process by which agents of the Crown could purchase First Nations' lands. That is: "but that if, at any Time, any of said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some public Meeting or Assembly of the said Indians." This prerogative law evolved into a Treaty process in the 19th century that included not only the purchase of land, but the kind of relationship First Nations citizens would have with the Crown.

19 In St. Catharines Milling & Lumber v. R. [1887] 13 S.C.R. 577, Strong J., in interpreting the status and effect of the Royal Proclamation of 1763 at 602–38, but particularly at 628–29, said it was the same as an Act of Parliament. Gwynn J.
Treaties of protection followed, enhancing the Treaty Commonwealth structure. This structure was repeatedly recognized in Privy Council decisions in North America, in numerous other countries occupied by England and in the United States. The treaties of Peace and Friendship the British negotiated with the Mi'kmaq explicitly recognized that the Mi'kmaq, as a nation of people, had a right to choose how they would pursue their own cultural vision of happiness within an accommodative relationship with the British Crown as a "protector." The treaties promised the application of the general principles of British law to protect their rights and properties in settling any disputes that might arise between Mi'kmaq and Anglo-immigrants.

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referred to it as the "Indian Bill of Rights" (ibid. 674). Strong and Gwynn JJ.'s interpretation of the Royal Proclamation was upheld by the House of Lords (1888) 14 A.C. 46 (P.C.) at 54.


21 Henderson, ibid. at 198–203.


23 The Treaty of 1726 promised:

That the Indians shall not be molested in their persons, Hunting, Fishing and Planting Grounds nor in any other of their lawful Occasions by His Majesty's subjects or their Dependents... That if any of the Indians are Injured by any of His Majesty's aforesaid Subjects or their Dependents they shall have Satisfaction and Reparation made to them according to His Majesty's Laws whereof the Indians shall have the Benefit Equall with His Majesty's other subjects.

The Treaty of 1752 declared:

It is agreed that the Articles of Submission and Agreements made at Boston in New England by the Delegates of the Penobscot Norridgwick & St. John's Indians in the year 1725 Ratified and Confirmed by all the Nova Scotia Tribes at Annapolis Royale in the month of June 1726 ... shall be and are hereby from this time forward renewed, reiterated and forever Confirmed ... Article 8—That all disputes whatsoever that may happen to arise between the Indians now at Peace and others His Majesty's subjects in this Province shall be tryed in His Majesty's Courts of Civil Judicature, where the Indians shall have the same advantages & Privileges as any others of His Majesty's Subjects.
In other countries the British colonized, such treaties eventually evolved into the founding of independent countries by the indigenous peoples. This historical evolution did not materialize in Canada, however, where indigenous self-government has been oppressed. Other previous British colonies where the self-determination and political evolution of indigenous peoples have been oppressed by the Anglo-immigrants include the United States, Australia, Hawaii and, until recently, New Zealand and South Africa.

Prior to the Royal Proclamation of 1763, the leaders of the Mi'kmaq nation had entered into treaties of peace, protection, friendship and trade with the British Crown. The first treaty was signed in 1726, followed by British treaty violations and the renewal of warfare between the Crown and the Mi'kmaq nation. In 1752 another treaty was signed renewing all of the articles of the 1726 treaty and adding additional British commitments, such as gift giving, to the Mi'kmaq at annual renewals of the treaty. Again the British violated the treaty of 1752 before all of the Mi'kmaq district Chiefs could consult and decide if they would ratify it. Warfare between the British and the Mi'kmaq erupted once again. In 1760 and 1761 treaties were signed between the Mi'kmaq Chiefs of all the Mi'kmaq districts in what is now Nova Scotia and Newfoundland. The Mi'kmaq viewed these treaties as renewals and adhesions to the 1752 treaty compact.

The Canadian Crown now claims the 1760–61 adhesions were new treaties that made the 1752 treaty compact void. These issues are now being raised in the current case of R. v. Marshall. However, the territory in question in the Marshall case is Nova Scotia. The Grand Council of the Mi’kmaq and the Mi’kmaq throughout Mi’kma’ki (Nova Scotia, New Brunswick, PEI, Gaspe, Newfoundland and the gulf islands) view the 1752 treaty and 1760–61 adhesions as covering all of Mi’kma’ki.

The Atlantic colonial governments disregarded the treaties, the directions in the Royal Proclamation of 1763, and from a Mi’kmaq

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24 R. v. Marshall. This case is being argued now. The Federal Crown has charged Donald Marshall Jr. with illegal commercial fishing. Donald Marshall contends that he was fishing for eels pursuant to his treaty rights under the 1752 treaty compact between the British Crown and the Mi’kmaq Nation.

25 For the purposes of this paper I only want to make the reader aware of the treaties as a live legal issue.
point of view, over-ran the Mi’kmaq homelands in Nova Scotia violating the treaties and the Crown’s prerogative law. Instead of protecting the reserved territories of the Mi’kmaq, the Atlantic colonial governments, with the exception of Newfoundland until 1832, granted and/or leased Mi’kmaq lands to Anglo or Euro-immigrants without legal authority. The Anglo-immigrant governments reserved small pieces of Mi’kmaq lands for the Mi’kmaq and encouraged them to gather at these spots so that the rest of the land would appear to be vacant and could be occupied by Anglo-Euro-immigrant squatters. The Atlantic colonial governments then confirmed the illegal taking of lands reserved to the Mi’kmaq by providing the squatters with grants or leases:

In their path to representative, then responsible, government the colonial settlers in Atlantic Canada ignored the prerogative treaties, instructions and proclamations. Their goal was to have the same relationship with the Crown that the First Nations enjoyed. Through various devices, the colonial authorities replaced the prerogative order with one based on their own self-interest. When the crown refused to justify their instrumental order, the colonials transformed colonialism and racism into local legislative power, creating an alternative order that was valid only within British settlements. The colonial order allowed the immigrants to take the land and rights the crown had reserved for the Indian nations and tribes.26

Thus, the local colonial assemblies denied the aboriginal and treaty rights of the Mi’kmaq. Mi’kmaq people had to petition the immigrants’ government as if they too were immigrants in order to get a license of occupation or a grant to occupy land in their own homeland.

In 1783, the colonial government of Nova Scotia attempted to dispose of any responsibility for the Mi’kmaq by making ten grants to Mi’kmaq groups along the rivers or bays they occupied. These were never surveyed and Anglo-immigrants soon encroached upon these lands, dispossessioning the Mi’kmaq.27

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27 Johnston, supra note 16 at 13.
In 1820, Lt. Governor Dalhousie initiated a plan to develop a comprehensive reserve system. The Province was divided into 10 regions with a one thousand acre reserve in each region. This plan also failed. The reserves were never surveyed, Anglo-immigrants again squatted on them and the government refused to remove the squatters. Another plan was enacted by legislation in 1842 called An Act to provide for the Instruction and Permanent Settlement of the Indians. For the first time a government official was appointed to supervise and manage all lands reserved for the Mi'kmaq people. He was also to protect the land from non-Mi'kmaq squatters. The various Nova Scotia Commissioners of Indian Affairs did little to dislodge the squatters, however. In 1866, shortly before confederation, Nova Scotia Indian Commissioner Fairbanks, in his final report, estimated that there were between 1400–1800 Mi'kmaq in the entire province and that 20,730 acres of land had been set aside as reserves, although this figure did not account for the reserve lands that were being squatted on by Anglo-immigrants.

It is important to note that up to this point neither the Imperial Government nor the Government of Nova Scotia attempted to legislatively interfere in the internal self-government of the Mi'kmaq people in Nova Scotia. This would drastically change under the Government of Canada and the Indian Act.

The English colonial period in Nova Scotia appears to have been a time when the assimilation of the Mi'kmaq was not an explicit part of government policy. The colonial government had no organized plan to transform the Mi'kmaq into farmers, or engage them in other Anglo vocations. Rather, the actions of the Nova Scotia Government suggest that what it wanted to do was curtail the seasonal pattern of movement between different resource areas that the Mi'kmaq people used. The setting aside of reserves was supposed to settle the Mi'kmaq and remove the possibility of confrontations with Anglo-immigrants who were exploiting Mi'kmaq resources.

The de-construction of the social and political structure of the Mi'kmaq by the colonial government was not an explicit government policy. However, this is not to say that Mi'kmaq society had not been changed by the efforts of the missionaries over the years. Mi'kmaq values were mixed with Catholic beliefs. Still, the Grand

28 S.N.S. 1842, c. 16.
29 Johnstone, supra note 16 at 14.
30 Ibid. at 17.
Council of the Mi'kmaq continued to function along side the traditional extended family order that dictated internal relations and when and where the family would move on their seasonal rounds.

Thus, up to the time of confederation, the Colonial Government of Nova Scotia did not want to assimilate the Mi'kmaq as formal equals. The settlers' government used its legal powers to push the Mi'kmaq out of the way while it usurped reserved Mi'kmaq lands. Once the Mi'kmaq were no longer a military threat to the English, the promises of protection under English law, with the built in philosophy of individual rights, and the implicit recognition of substantive equality in His Majesty's court, fell by the way side.

II. NOVA SCOTIA'S CONFEDERATION WITH CANADA AND THE APPLICATION OF THE INDIA

While colonial legislation was sparse and directed at the establishment of reserves in the Atlantic colonies, some legislation directly interfering in the internal workings of First Nations had been passed in Upper and Lower Canada by the Imperial administration. England had administered Indian Affairs until 1860 in Upper and Lower Canada. The British administrators had decided that since the Indians were no longer needed as British allies against American expansionism the best idea would be to "civilize" them by encouraging them to accept British culture. Thus began the British policy of assimilation.31

In 1857, the Act to Encourage the gradual Civilization of the Indian Tribes in this Province32 was passed. This was the first Act to contemplate the de-construction of a person's aboriginal identity. The Act provided that any adult male Indian who was of good character, with no debts, who was fluent in either English or French, would be eligible for full citizenship through "enfranchisement," that is they would be legally considered as a non-Indian. In theory, Indians would then enjoy equality and all the other democratic liberal privileges along with other Canadian citizens. Any Indian who

successfully satisfied these requirements would be given up to fifty acres of land and his share of his Band’s funds. These laws were adopted by the Federal Government carte blanche after Confederation.

In 1867, the British Parliament passed the British North America Act (hereinafter *BNA Act*). Section 91(24) delegated the Imperial Crown’s responsibility for Indians and lands reserved for Indians to the Federal Government of Canada. The Federal Government took responsibility for the management of Indians and Indian lands in Nova Scotia. It empowered itself to do this by passing *An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands*. Existing colonial Indian legislation was confirmed by the new federal government.

The Federal Government in Nova Scotia, not being subject to the exclusive tyranny of the electors in the province, moved against white squatters and removed them from reserve lands, unlike the accommodative policy the Nova Scotia colonial government had pursued. After an initial period of removing squatters from reserve lands in the Atlantic Provinces, the Federal policy changed. The growth of cities in the Atlantic area and the larger reserves set aside under treaties in the prairies created demands by whites to remove Indians from reserves near growing white towns or to lease out “unused” reserve lands to non-Indians. The Federal Government implemented these demands by amending the *Indian Act* in 1919, making the dispossession of First Nations from their reserves possible without their consent, via the infamous section 49A.

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34 *Constitution Act 1867*, (U.K.) 30 & 31 Vict., c. 3.
35 S.C. 1868, c. 42.
36 R. H. Bartlett, *Indian Reserves In the Atlantic Provinces of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1986) at 20–23.
38 Bartlett, *supra* note 36 at 26–27, citing S.C. 1911, c. 14. s. 2. Section 49A reads:

In the case of an Indian Reserve that adjoins or is situated wholly or partly within an incorporated town or city having a population of not less than eight thousand, and which reserve has not been released or surrendered by the Indians, the Governor in Council may, upon the recommendation of the Superintendent General, refer to the judge of the Exchequer Court of Canada for inquiry and report the question as to whether it is expedient,
This section of the Act was used to remove the Mi'kmaq from their Kings' Road reserve in Sydney, Nova Scotia in 1915, because the Mi'kmaq people and their reserve were inferior beings:

Now, this Reserve abuts on King's Road, which is one of the principal arteries of the city, a highway very much travelled and used by the public, and upon which a large number of fine residences are built. No one cares to live in the immediate vicinity of the Indians. The overwhelming weight of the evidence is to the effect that the Reserve retards and is a clog in the development of that part of the city. . . . The removal would make the property in that neighbourhood more valuable for assessment purposes. . . . The racial inequalities of the Indians, as compared with the white man, check to a great extent any move towards social development, a state of affairs which, under the system now obtaining, can only grow worse every day, as the number of Indians is increasing.39

Thus, it was the interests of the white English public and their Liberal right to "pursue their own version of happiness" that was recognized. The state intervened on behalf of white interests. This intervention disregarded the interest of the Mi'kmaq in continuing having regard to the interest of the public and the Indians of the band for whose use the reserve is held, that the Indians should be removed from the reserve or any part of it.

This section of the Act was developed after Parliament had to pass a special act to expropriate the Songhee's Reserve in Victoria, B.C. The Songhee Band would not voluntarily surrender their ancestral lands and the Indian Act provided them with unintended protection. In proposing this amendment to Parliament the Minister of Indian Affairs stated:

For while we believe that the Indian, having a certain treaty right, is entitled ordinarily to stand upon that right and get the benefit of it, yet we believe also that there are certain circumstances and conditions in which the Indian by standing on his treaty rights does himself an ultimate injury as well as does an injury to the white people, whose interests are brought into immediate conjunction with the interests of the Indians (House of Commons Debates, vol. IV, 3d sess., 11th Parl. 1-2 Geo.V, 1910-11, at 7827, per Frank Oliver, M.P.)

39 Re Indian Reserve, City of Sydney, Nova Scotia (1916), 42 D.L.R. 314 (Ex. Ct.) at 316-17.
to live at their traditional village at the mouth of the river in Sydney harbour which had been reserved to them by law.

The presence of the Mi’kmaq triggered the “harm” principle. The Mi’kmaq were “a clog in the development of the city” and thus “harmed” the pursuit of commercial development by the white folk. The Court, and the Federal Government, both obviously believed that Mi’kmaq were not to be accorded similar individual rights to pursue their traditional economic activities, or “happiness.” “The racial inequalities of the Indians . . . check . . . any move towards social development.”

The Indian Act also provided unintended protection for First Nations’ interests by requiring the consent of the majority of First Nation residents on a reserve to approve any surrender of reserve lands. Section 49A, however, removed this recognition of First Nations’ right to determine what was in their best interest. The amendment insured that when Indian interests in land conflicted with white interests, white interests would come first in law. Equal benefit of the general liberal principle of voluntary consent was denied to the Mi’kmaq. Thus, the court in Re Indian Reserve could invoke immigrant statute law that prevented the general principles of common law from protecting Mi’kmaq property interests. Law was created that was explicitly based on assumptions of the racial and cultural superiority of white interests.

Other sections of the Indian Act also directly attacked First Nations’ control of their identity, community, government and education. These sections of the Act oppress any expression of individual liberal-like rights of First Nations people to liberty (being able to live a traditional Mi’kmaq way of life), the pursuit of happiness, and consensual government.

Section 2 of the Indian Act declares that an Indian is a person “who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian.” Under section 6 of the current Act, a person entitled to be registered as an Indian is any person who was previously entitled to be registered before April 17, 1985, or omitted from the Indian Register before or after September 4, 1951.

41 These dates denote when Indian women began to be removed from Band lists because they married non-Indians or non-status Indians. The date of 17 April 1985 ensures that non-Indian women who were married to an Indian, or a person
or any person who is a member of a body of persons that has been declared by the Governor in Council to be a Band for the purpose of the Act. These sections empower the Federal Government to identify who is Indian and who is not. This strikes at the most basic level of First Nations self-determination, the right of individuals to define themselves politically and culturally.

This section of the Act denied the Nova Scotia Mi’kmaq the individual and societal right to define their personhood and themselves as a nation of peoples. The Federal government has also utilized this power to terminate the legal existence of thousands of Mi’kmaq women and children in Nova Scotia. If a Mi’kmaq woman married a non-Indian or non-status Indian, she, and any subsequent children of the marriage, were involuntarily enfranchised. By comparison, if a white Canadian woman married someone who did not have Canadian citizenship she was not forced to accept her spouse’s political and cultural identity and lose her Canadian citizenship. Instead, if the non-Canadian spouse resided in Canada he was able to become a Canadian citizen. A Canadian citizen could only lose their citizenship by voluntarily renouncing it.

In addition, section 17(1) of the Indian Act empowers the Minister of Indian Affairs to create new Indian bands, split or amalgamate old ones, and extinguish the legal existence of a Band through the enfranchisement of whole Bands.

In 1951, the Minister of Indian Affairs used this power to unilaterally split the Mi’kmaq nation in Nova Scotia into eleven separate bands. Formerly, all Mi’kmaq people in Nova Scotia were considered one Band and the traditional Grand Chief of the Mi’kmaq was considered the head of the Nova Scotia Mi’kmaq Band by federal authorities. The division of the Nova Scotia Mi’kmaq into eleven bands attacked the political, cultural, spiritual structure of Mi’kmaq society, the individual rights of Mi’kmaq to choose who would govern them and whose rules would be used in governing. This section empowered the Federal Government to impose its vision of political, cultural, and spiritual norms on the Mi’kmaq community. It gave Federal bureaucrats the power to withhold Liberal individual rights that would have provided Mi’kmaq people with the opportunity to choose between their tra-
ditional vision of community and the Anglo-immigrant vision of community.

Sections 114–122 are the most destructive sections of the Indian Act with respect to the maintenance of Mi’kmaq culture and values. These sections empower the Minister of Indian Affairs to force First Nations children to attend Anglo-schools that indoctrinate First Nations children in the racist history and ideology of the colonial immigrants. It teaches only one language, English. It awards the minds of First Nations children to whichever Euro-christian denomination claims the right to spiritually colonize a First Nation. These sections have made it impossible for grandparents to coherently pass on their language and culture to their grandchildren.43 These sections of the Act enabled the Minister of Indian Affairs, between 1940–1970, to take Mi’kmaq children from their families and communities and to put them in Catholic Boarding Schools in Nova Scotia. In these foreign institutions, Mi’kmaq children were punished for practising the Mi’kmaq language and subjected to mental, physical and, in many cases, to sexual abuse.44 This program has inflicted immeasurable injury on these children, now adults, who experienced this trauma.

This program withheld from Mi’kmaq parents the Liberal individual right of personal liberty to determine the kind of education their children would receive. Federal officials saw a traditional Mi’kmaq education as being “harmful” to their plan of assimilating Mi’kmaq children, thus justifying the use of force used to take Mi’kmaq children from their families and communities and to place them in boarding schools. Federal officials made individual decisions on what the “best interests” of the children were. They imposed their own liberty of choice in place of the Mi’kmaq parents right to choose how to educate their children.

The denial of the equal Liberal rights for Mi’kmaq people by the Nova Scotia and Federal Governments was mitigated to some extent by the Indian Act. Reserves were special zones. The Government created them as transitional areas for assimilation, but

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43 In Mi’kmaq communities the grandparents were the teachers for their grandchildren. Oral history of their families, their hunting territories, how to hunt different animals at different places at different times of the year, of exciting events in their lives, of the right thing to do in different circumstances and information about many other things were passed from grandparent to grandchildren.

First Nations used them to undermine the objective of the Act. As long as Mi'kmaq people did not voluntarily enfranchise themselves, remained on the reserve, and did not allow themselves to appear to be a candidate for involuntary enfranchisement, they were able to maintain some elements of the Mi'kmaq vision of community, language, and culture. By doing so, it could be argued that they were exercising the Liberal right to pursue their own vision of liberty and individual happiness. However, the opportunities for Mi'kmaq people to preserve their culture and values were limited. The assimilation objective of the Federal Government was pervasive. Indians were to be assimilated as quickly as possible. None of the white Liberal rights were to be accorded to Mi'kmaq people if it meant that they would have the opportunity to choose to live as Mi'kmaq instead of British immigrants. The rule of law would provide no protection to Mi'kmaq people trying to exercise Mi'kmaq liberties.

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45 Tidey, supra note 31 at 48–51. In 1920 the Deputy Superintendent of Indian Affairs, Duncan Scott, convinced his Minister to submit Bill 14 to Parliament to amend the Indian Act empowering the department officials to involuntarily enfranchise Indians whom they considered no longer in need of “wardship status.” Testifying before a Parliamentary committee on the Bill, Scott said:

I think it would be in the interests of good administration if the provisions with regard to enfranchisement were further extended to enable the Department to enfranchise individual Indians or a Band of Indians without the necessity of obtaining their consent thereto in cases where it was found upon investigation that the continuance of wardship was no longer in the interests of the public or the Indians.

When he was asked what the department’s ultimate aim was, Scott replied:

I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone. That is my whole point. Our objective is to continue until there is not a single Indian in Canada who has not been absorbed into the body politic, and there is no Indian question, and no Indian Department and that is the whole object of this Bill.

Tidey notes that Bill 14 was passed, but repealed two years later when McKenzie King’s Government was elected. However, the enfranchisement board was left in place, but the initiation of enfranchisement was to be considered by the board only upon application of an Indian.
The history of the relationship between the Mi’kmaq people in Nova Scotia and the Anglo-immigrants’ governments may be summarized in three themes:

First, there is legal acceptance of the doctrine of aboriginal rights and treaties existing in the law of nature and nations, with contractual principles ordering the jurisdiction of European nations and the American nations. Second, the law recognizes the necessity of uniting American nations in a political commonwealth by international treaties of protection, so that they can be protected by the ultimate sovereign against his subjects and other sovereigns. The third theme, the dark theme, is that once within the colonizer’s legal system, each protecting government is mystically given by its courts the unlimited power to extinguish Indian treaty and aboriginal rights for the good of the rest of the [Anglo] society. Moreover, the courts fail to question the legitimacy validity of the governmental actions under a command theory of law, and the basic contractual nature of political power in international law and political theory is ignored.46

III. LIBERAL THEORY AND THE PROCESS OF NEWFOUNDLAND’S CONFEDERATION

Newfoundland did not confederate with the other colonies in 1867. British subjects in Newfoundland were not allowed to settle and own land in Newfoundland until 1824 when the Act to Encourage the Trade to Newfoundland, 169847 was repealed along with the old customary law governing those who came for the seasonal fishery. There was no full time government until 1832. It was not until 1855 that British subjects in Newfoundland were granted the privilege of having responsible government. Newfoundland continued under responsible government until it went bankrupt in 1934. England took over its debts and direct administration from 1934 until confederation in 1949.48

46 Henderson, supra note 3 at 220.
47 Statute 10 & 11 Will. 3., c. 25, 1698.
In 1947, Newfoundlanders were permitted by the British Government to elect a National Convention for the purpose of debating the future political development of Newfoundland. The four options that were available were: continued Commission of Government, return to responsible government, confederation with Canada, or joining the United States. The later option was dropped by the National Convention. In 1947, a delegation from the National Convention was sent to Ottawa to enter into preliminary discussions to formulate the terms of confederation with Canada. In 1949, a referendum was held to determine which of the remaining three options the people of Newfoundland would choose as their system of government.

Prior to the referendum, the groups advocating for confederation or responsible government toured the outports delivering speeches and information on whichever political alternative they wished to encourage people to support. Thus, rural British subjects in Newfoundland were given some opportunity to be informed about the nature of the political alternatives available. Although a rough version of informed consent, it satisfied the British and Canadian Governments that the referendum vote could be seen as the free and voluntary consent of each individual to the outcome of the voting.

The first referendum failed to indicate a majority for any of the three options. The Commission of government, having the least number of supporters was dropped from the second referendum. The second referendum showed that 52% approved confederation with Canada as the country in which they would become citizens and as the kind of democratic government the people of Newfoundland preferred.49

49 R. Gwyn, Smallwood: The Unlikely Revolutionary (Toronto: McClelland & Stewart, 1972) at 111-12.

In attempting to obtain the break down of votes from each outport the author of this paper was informed by the Provincial archivists that the official ballot count for each outport were destroyed after being sent in to St. John’s. It is rumoured that the opponents to confederation wanted verification of the results from the First Nations communities in Newfoundland-Labrador. It was known that First Nations peoples had never voted in responsible government elections before, did not speak English and were rumoured to not have voted or were instructed to vote a certain way by their missionaries. The missionaries were known to be siding with the supporters of confederation and were suspected of influencing the voting in First Nation communities, if there was any voting.
The process of Newfoundland's confederation with Canada is a demonstration of the five basic principles of Liberal philosophy. The Imperial government granted British subjects in Newfoundland the opportunity to be self-determining in respect of the system of government under which they would live, thus operationalizing the ideas of individual liberty, freedom and the pursuit of happiness. It permitted individuals to be self-determining by choosing who would govern them and what kind of government it would be, thus determining the limits of its authority over them and, in their choice of democratic government, protecting their lives, liberties, and property by the rule of law.

IV. OUTSIDE THE TERMS OF UNION: DID FIRST NATIONS IN NEWFOUNDLAND AND LABRADOR CONSENT TO CONFEDERATION AND ENFRANCHISEMENT?

In 1947, Messrs. Burry (a Moravian Missionary from Labrador), Ashbourne (from St. John’s, Newfoundland) and J. R. Smallwood (from Gambo, Newfoundland), all representing the National Convention of Newfoundland, met with senior officials from the Department of Mines and Energy, the Department then responsible for Indian Affairs. The Federal officials were assigned to the sub-committee on Indian Affairs by the Department of External Affairs which led and coordinated the confederation negotiations for Canada. The purpose of this committee was to ascertain "how

As the organizer of the first Aboriginal political organization in Newfoundland-Labrador in 1973 this author spoke with Innu, Inuit and Mi’kmaq elders who said no voting took place in their communities until some years after confederation. If votes from First Nation communities in Newfoundland-Labrador were counted in 1949 they would appear to be grounds to view them as seriously suspect, or at the very least uninformed, and not voluntary in the sense of an exercise of self-determination. If the First Nations peoples had understood they were voting to oppress their identities as Aboriginal peoples it is unlikely they would have voted for confederation, if they voted at all.

Senior officials from the Department of External Affairs and other line departments of the Canadian government were assigned to discuss and draft the terms by which Newfoundland might consider confederation with Canada. R. Hoey was director of Indian Affairs and C. Jackson was acting Deputy Minister of Mines and Resources, the Department the Indian Affairs branch was in. These were the two most senior officials responsible for Indian Affairs in Canada.
the Indians and Eskimos in Newfoundland-Labrador, if any still exist, would be provided for in the event of confederation." The Canadian officials responsible for Indian Affairs advised that "in the event of Newfoundland becoming a province of Canada the Indians and Eskimos would be the sole responsibility of the federal government and that the following are some of the benefits that would come to them." Twelve benefits were listed: free education, free medical services, family allowances, land reserves for settlements and traplines; free conservation projects, fishing projects and handicraft projects; trading posts provided by the federal government if there were no private ones; exemption from land and income taxes; protection by law of Indian rights recognized in the [Indian] Act; voting rights if they were no burden on the province or a municipality; no right to vote if on welfare; no right to use intoxicating liquors; and relief for the aged, but no old age pension.51 These were the core federal services meant to assimilate First Nations people in a transitional manner over a period of time.

Newfoundland representatives held numerous discussions with their own lawyers and officials of the British and Canadian Governments. They also intensively debated the options of government that were available to choose from within the National Convention in Newfoundland. However, the Anglo-Newfoundland officials never consulted with the First Nations in Newfoundland and Labrador nor asked them to determine what their position might be on confederation issues. When the terms of union were confirmed in the Constitution Act, 1949, there was no clause that explicitly dealt with the relationship between Canada and First Nations in Newfoundland-Labrador. First Nations people had no representation in the confederation negotiations and none of the terms of union recognized their existence. They were not included, as First Nations peoples, in confederation between Canada and Newfoundland.

The terms of union between Canada and Newfoundland, however, did preserve federal legislative jurisdiction over "Indians, and Lands reserved for Indians." Section 3 states:

The *British North American Acts*, 1867 to 1940, shall apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada, as if the Province of Newfoundland had been one of the provinces originally united, except in so far as varied by these Terms and except such provisions as are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not all of the provinces originally united.\(^5^2\)

Subsection 91 (24) of the *BNA Act*, 1867 was not altered by any of the terms of union. Thus, Newfoundland and Canada were bound by subsection 91(24) of the *BNA Act*, 1867. The responsibility for “Indians, and Lands reserved for Indians” continued to be a federal constitutional responsibility. However, this did not stop federal officials from deliberately avoiding fulfillment of their direct and exclusive constitutional responsibility.

The denial of freedom of self-determination to the First Nations started with their exclusion from the Newfoundland National Convention in 1947. The exclusion of First Nations was continued in the Newfoundland referendums in 1947-48. The exclusion of First Nations was extended into the negotiations of the terms of union when their rights and interests were deliberately left out of the terms of union in 1949. As a result of their exclusion from the confederation process, the people of the First Nations communities in Newfoundland-Labrador never participated in nor consented to the process of confederation between Newfoundland and Canada. Past Newfoundland Colonial and Commission Governments had never made treaties nor passed any laws that applied directly to First Nations people. Up to the time of confederation, the First Nation societies in Newfoundland-Labrador had lived independently based on their own self-determined accommodative relationships with anglo-immigrants and their own customary law.

\(^{52}\text{The Constitution Act, 1949.}\)
The implementation of a new federal experimental policy to assimilate First Nations began in September of 1949. H. L. Keenlyside, Deputy Minister of Mines and Resources, the Department responsible for Indian affairs at that time, wrote to N. A. Robertson, Secretary to the Cabinet, informing him that Cabinet had decided on January 25, 1949, prior to confederation, that

'The government agreed that the decision respecting the case of Indians and Eskimos in Newfoundland and Labrador following union be deferred until such time as a satisfactory arrangement could be made with the Provincial government after an election of a Provincial Legislature in Newfoundland' . . . . I am writing to bring to your attention the fact that this department is not taking any action regarding the care of Indians and Eskimos in Newfoundland and Labrador pending the conclusion of the satisfactory arrangement referred to in this quotation.53

D. MacKay, the director of the Indian Affairs Branch under Keenlyside, prepared a "Secret" memorandum for his Deputy setting out recommendations as to what position the Federal government should take with respect to their responsibility for First Nations in Newfoundland-Labrador. MacKay stated that he had met with K. J. Carter, past Commissioner of Resources (British Commission Government in Newfoundland) and now Deputy Minister of Resources in the Newfoundland Government, on 7 October 1948, and with J. R. Smallwood on 15 November 1948. MacKay claimed that on both occasions it was agreed that the Province should administer Indian and Eskimo Affairs, "subject to a suitable grant or subsidy by the Dominion, rather than have the Indians brought under the Indian Act." His reasons for this were:

At the present time the Indians of Newfoundland have full citizenship status . . . and if placed under the Indian Act . . . their civil status would be reduced. It was felt it would be a retrograde step to deprive Indians of any political rights which they enjoy at the present time. This

view is in accord with the general aim of Indian administration in Canada which is that, in due course, the Indians should take their place as full citizens of Canada. This objective was emphasised in discussions before the Special Joint Committee of the Senate and the House of Commons which sat during the 1946, 1947 and 1948 Sessions of Parliament.

Another reason for not bringing the Newfoundland Indians under the Indian Act is that they do not live on reserves and could not be readily adapted to our system . . . It is understood that there are several hundred Indians in Central and Southern Labrador, who are not under any special supervision or restrictions except that they are not permitted to buy liquor. On the Island of Newfoundland, the Indians [Mi’kmaq] are merged with other citizens and have full citizenship rights. Their number is not known but is said to be small. I may mention that the Indians on the Island are descendants of Micmacs who emigrated from Prince Edward Island and Nova Scotia years ago. The original Indians of Newfoundland, the Beothucks, are extinct . . . . It will be noted that the expenses referred to in Mr. Carter’s letter are for the small group in Northern Labrador but a grant or subsidy would involve all the Indians of the Province with the exception of those on the Island of Newfoundland (emphasis added). 54

This letter set the position the Federal Government would take for the next 16 years.

During this time the Federal Government provided a few small grants to the Government of Newfoundland for tuberculosis programs in Northern Labrador, but refused to assume any responsibility for First Nations in the Province. Instead, federal officials would claim that First Nations in Newfoundland and Labrador were “enfranchised” and, therefore, were not Indians pursuant to the Indian Act or subsection 91(24) of the BNA Act. Thus, there were no federal obligations owed to them.

In 1962, the Hon. W. J. Browne, Solicitor General, referred a letter from the Roman Catholic School Board of Northern Labrador to Hon. Ellen Fairclough, Minister responsible for Indian

Affairs. The letter from the Catholic School authorities requested federal assistance for construction of Indian day schools in Sheshashit and Davis Inlet, Labrador, on the basis that the Federal Government had responsibility for Indians. Ms. Fairclough replied:

> As you are aware, this is a problem that has arisen on numerous occasions, and the position which has been taken by the federal government is that the Indians of Newfoundland were enfranchised and full citizens of the Province on the day when Newfoundland entered Canada in 1949, and that consequently the federal government has no constitutional responsibility for the persons of Indian ethnic origin in the Province.55

Thus, the Mi'kmaq, Innu and Inuit Nations of Newfoundland and Labrador were deemed to have been already assimilated even though this was not negotiated in the terms of union or accomplished by subsequent Federal legislation. At that time, in order for an Indian to be enfranchised he or she had to have de-Indianized themselves as set out in the Indian Act. If a First Nation’s woman married a non-Indian or a non-status Indian, she would have been involuntarily enfranchised. In order for a male Indian to be enfranchised he had to speak English or French, be free of debt and be considered of good character (by the local Indian Agent or Cleric). He could then apply for enfranchisement to the Indian Affairs board set up to review such applications.

In 1963, an exchange of views on the federal government’s policy of Indian assimilation between the Hon. Arthur Laing, Minister of Northern Affairs and National Resources, who was then responsible for Eskimo Affairs, and R. G. Robertson, Secretary to the Cabinet, transpired. Robertson wrote:

> The Indian Affairs Branch have felt for some time that the most fruitful line of progress for many of the Indians—perhaps for all of them—has to be in the direction of more complete integration with other people in the provinces where they live. The reservations are much too small to support anything like the total population and the special aspects of treatment create a separateness

that in many cases at least appears to operate, in the long term, to the disadvantage of the Indians.

A number of the provinces have problems with respect to the people of mixed blood that are essentially the same as those that involve the Indians and, in many respects, I understand that the problems are similar for large groups of economically depressed people who are simply 'white' with no racial mixture. For these reasons, some of the provinces too have expressed an interest in discussing arrangements under which differences in treatment would gradually disappear. I do not think anyone believes that a quick change in status or treatment is possible or desirable—it is rather a question of the direction in which gradual movement should occur. The Indian Affairs Branch are, like you, very much concerned that any changes should carry with it the general views and wishes of the Indian people. At the same time, I think they are aware that there might be insoluble problems if one assumed that there had to be a definite concurrence [by the Indians] expressed in a program of adjustment.56

After the election of Lester Pearson's Liberal government in 1964, J. W. Pickersgill, a Liberal M.P. from Newfoundland, was appointed as Minister of Transport. Pickersgill was the first M.P. from Newfoundland to witness and appreciate the full extent of federal services and expenditures on First Nations across Canada. What he witnessed must have impressed upon him the unfairness of the federal policy regarding First Nations in Newfoundland-Labrador. He had received copies of correspondence from Newfoundland ministers to other federal ministers concerning federal subsidies for Newfoundland's expenditures on Indians and Eskimos. The interim agreements that Newfoundland had with Ottawa for reimbursement for health programs and facilities for

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56 23 October 1963, Hon. Arthur Laing, Minister of Northern Affairs, to R. G. Robertson, Secretary to the Cabinet. This correspondence was provided to J. W. Pickersgill, M.P. (NF) after he had asked Prime Minister Pearson for a legal review of the federal position on Aboriginal people in Newfoundland (Letter of 21 October 1963). Pearson refused Pickersgill's request for a legal review saying that it was a matter of policy for Cabinet to review, but provided Pickersgill with Laing's and Robertson's correspondence to give him a sample of the policy issue of how assimilation of Indians should proceed (Letter of 24 October 1963).
Indians and Eskimos in Labrador were expiring and Newfoundland officials were under the impression that these subsidies would not be renewed. Pickersgill was asked by Newfoundland officials to take these matters up with Prime Minister Pearson.57

Pickersgill first tried to persuade the Prime Minister to begin a legal review or a reference put to the Supreme Court of Canada to determine if the Federal Government had responsibility for First Nations in Newfoundland-Labrador, but Pearson refused.58 Having failed to achieve any results from within, Pickersgill tried another political avenue. He wrote to Premier Smallwood on March 17, 1964, stating:

As you and I know, the federal government has never been willing to assert its constitutional jurisdiction over the Indians and Eskimos of Newfoundland but instead has adopted a “Pontius Pilate” attitude. I think the time has now come to put our government on the spot and my suggestion would be that you write a letter to the Prime Minister somewhat along the lines of the enclosed draft but that, instead of signing it and sending it as a formal communication, you send it along with a covering letter asking his advice as to whether it should be modified in any way. I see no other way of getting this matter brought into focus and I am sure it is very important that it be brought into proper focus before negotiations with Quebec are finally settled.59

In Pickersgill’s draft letter for Premier Smallwood to send to Prime Minister Pearson, he stated that during the terms of union it was Canada who refused to accept responsibility for Indians and Eskimos. The draft letter then pointed out that the terms of union had not changed Canada’s constitutional responsibility for Indians and Eskimos throughout Newfoundland:

since no reference was made to Indians and Eskimos in the Terms of Union, the B.N.A. Act as interpreted by the Courts must apply to them in Newfoundland to precisely the same extent as it applies to them in Quebec or

57 21 October 1963, Correspondence, J. W. Pickersgill, Secretary of State, to Prime Minister Pearson.
58 24 October 1963, Correspondence, Prime Minister Pearson to J. W. Pickersgill, Secretary of State.
59 17 March 1964, J. W. Pickersgill to Premier J. Smallwood.
in other Provinces, and that therefore the Parliament and the Government of Canada cannot divest themselves of their jurisdiction or their responsibility.

It would be particularly difficult for us to acquiesce in neglect of this responsibility in Newfoundland at the very time it is being asserted [federal responsibility] so strongly by the Government of Canada in relation to the Eskimos of Quebec.

We feel that Newfoundland is entitled to equal treatment with Quebec and other Provinces. We would be prepared to have the Government of Canada take over full responsibility for the Indians of Indians and Eskimos of Labrador, as you presumably have a right to do under the Constitution (emphasis added). 60

Thus, having built the bargaining position that, since Newfoundland was not being treated equally with other provinces in respect to federal expenditures on Aboriginal peoples, the Federal Government should take over all responsibility for Indians and Eskimos in Labrador, or, in the alternative:

if the Government of Canada would still prefer, as it indicated it would in 1948, to have the Indians and Eskimos of Newfoundland treated in precisely the same way as other inhabitants of the Province, we are quite prepared to continue on that basis provided the Government of Canada will give us the same degree of financial support as is given directly by the Government of Canada in respect of the Indians and Eskimos living in other provinces. Naturally, if such payments were made, we would be quite prepared to accept any reasonable measures of supervision or inspection which the appropriate departments of the Government of Canada felt should be imposed to make sure that the money was being used for the welfare and advancement of the Indians and Eskimos and that their Constitutional rights were fully safeguarded. 61

This letter was sent unaltered to Prime Minister Pearson by Premier Smallwood on March 23, 1964. As a result, Prime Minister Pearson directed his Minister responsible for Indian Affairs, the

60 Ibid.
61 Ibid.
Hon. Arthur Laing, to prepare a Cabinet Memorandum on the issue of Federal responsibility for Indians and Eskimos in Newfoundland and Labrador.

On April 22, 1965 this Memorandum was submitted to the Prime Minister. In the covering letter, the Minister makes it clear that the recommendations in the Memorandum are aimed at accomplishing the general objective the Federal Government had for all Indians:

Moreover, the arrangement with respect to Indians is a dynamic one and gives promise of the eventual achievement of Canada's objective which would see the Indians take their place in the larger community receiving services and accepting responsibilities on the same basis as all other citizens. 62

The objective of assimilation is described in these same terms in the "Background" summary of the Memorandum. It is totally inconsistent with the Federal premise that First Nations in Newfoundland-Labrador were enfranchised. To be enfranchised an Indian had to be considered assimilated. If the First Nations in Newfoundland and Labrador had already been assimilated, the Federal objective would have been already achieved, therefore, there was no need to give the Newfoundland Government any money for Indians and Eskimos who no longer existed in that "different" (unassimilated) state!

Despite this inconsistency, Federal officials had, on two occasions, requested legal opinions from the Federal Department of Justice on federal responsibilities for First Nations in Newfoundland and Labrador. The Department of Justice did not concur with the belief of federal officials that the Federal Government had no responsibility for First Nations in Newfoundland and Labrador.

In 1950, Deputy Minister F. P. Varcoe had been asked for an opinion by N. A. Robertson, Secretary to the Cabinet:

as to the precise legal extent of the federal government's responsibility insofar as Indians and Eskimos residing in Newfoundland and Labrador are concerned... with re-

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62 22 April 1965, Hon. Arthur Laing to Prime Minister Pearson.
Deputy Minister Varcoe replied:

It is the responsibility of the federal government to formulate policies and carry out all policies that are directed at dealing with Indian or Indian problems. Such policy is to be formulated by Parliament and the executive. This responsibility carries with it the responsibility of providing money to be devoted to the carrying out of policies in relation to the Indians.

Another opinion was sought by Mr. W. Fischer, Legal Advisor to the Department of Northern Affairs, in preparing the Cabinet Memorandum of April 1965. Fischer had contacted Deputy Attorney-General A. F. Dridger asking for his opinion on the draft memorandum. Fischer was troubled by the inconsistency between the Federal Government's past policy and new initiative with respect to Aboriginal peoples in Newfoundland. Fischer wanted to know how to explain why the Government of Canada had failed to accept Varcoe’s 1950 opinion and explicitly rejected responsibility in Hon. Ellen Fairclough’s letter of March 21, 1962. Mr. Driedger replied that Mr. Varcoe’s opinion of 1950, “as to the constitutional position is correct.” He added that he saw no conflict between Ms. Fairclough’s letter and Mr. Varcoe’s opinion because Mr. Varcoe was dealing with legislative authority, that is, the power to pass law, while in the fourth paragraph of his letter he was speaking of responsibility, or to use another word, the obligation to formulate and carry out policies. I suggest that it is this second aspect of the matter that is the subject of Mrs. Fairclough’s letter. Whether the situation of Eskimos and Indians in Newfoundland is such

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63 31 March 1950, N. A. Robertson, Secretary to the Cabinet, to F. P. Varcoe, Deputy Attorney General, Dept. of Justice.
64 14 April 1950, F. P. Varcoe, Deputy Attorney General, Dept. of Justice, to N. A. Robertson, Secretary to the Cabinet.
65 Supra note 58 for citation.
that special policies and programmes are required is, of course, not a legal question.66

Either Mr. Driedger had not read, or misinterpreted Mrs. Fairclough’s statement that the Federal Government had no “constitutional responsibility” for Indians and Eskimos in Newfoundland and Labrador. Mrs. Fairclough was speaking of legislative authority. Her statement is an obvious reference to the past federal position that subsection 91(24) of the BNA Act, 1867 does not apply to Indians or Eskimos in Newfoundland or Labrador.

The Memorandum of 1965 contains a legal review of the constitutional position of Indians and Eskimos in Newfoundland and Labrador. It summarizes the previous federal legal opinions and what the federal officials believed about First Nations in Newfoundland-Labrador:

The opinions make clear that the federal parliament has exclusive legislative authority with respect to Indians and Eskimos of the Province of Newfoundland, and the associated responsibility to formulate policies directed toward dealing with Indian and Eskimo problems.67

The drafter of the legal opinion in the Memorandum was still trying to reconcile why federal practice was not following the opinion Mr. Varcoe gave in 1950 with respect to federal constitutional responsibility for First Nations in Newfoundland-Labrador. The writer sets out Minister Fairclough’s position in 1962:

Thus, the Indians and Eskimos in Labrador were, at the time of union, in the same position as persons of Indian origin in the provinces who have been enfranchised or who are Metis . . . for whom the federal government has not considered itself obligated . . . .68

However, the review then acknowledges that to characterize the First Nations in Newfoundland-Labrador as enfranchised Indians


67 22 April 1965, Cabinet Memorandum, “Contributions to Newfoundland Respecting Indians and Eskimos.”

68 Ibid.
or Metis was discriminatory and inconsistent with the treatment of Western Aboriginal groups:

It is understood that the persons of Eskimo origin in Labrador have a high infusion of white blood and their situation, therefore, might to this extent be equated with that of the Metis. It should be noted, however, that the Metis, in Western Canada at least, were given a choice at the time the treaties were negotiated as to whether or not they would continue to be considered as Indians or accept script for settlement as ordinary citizens of the country. This option has never been extended to the Eskimos of Labrador. The other process whereby Indians no longer come within the scope of federal programs and policies also depend upon the individual’s decision through enfranchisement, by marriage, or by voluntary resettlement in non-Indian areas.

It is understood that the Indian population of Labrador has not had the same degree of relationship with non-Indians and that there is very little white blood amongst these people. In fact, it seems probable that the Indians of Labrador are much more Indian, in blood, in way of life and in attitudes and customs than many Indian groups on the mainland of Canada. As with the Eskimos, the Indians in Labrador have had no choice as had persons of Indian origin in Canada who are not now considered to be the policy or financial responsibility of Canada.

This interpretation of Mrs. Fairclough’s letter is therefore open to question on the grounds first that, contrary to enfranchised Indians, the Indians and Eskimos have been given no choice with respect to their status; second, that they (particularly the Indians) remain as distinct and separate communities clearly identifiable by language, culture, way of life and problems; third, that these two groups have required, and will need for some time in the future, special programs similar to those provided Indians and Eskimos elsewhere in Canada and, fourth, that these people in Labrador should have access to the same resources and programs as Indians and Eskimos elsewhere in Canada.

In light of the opinions given by Mr. Varcoe on April 14, 1950, and Mr. Driedger on November 23, 1964, it seems distinctly possible that Indians in the Province of
Newfoundland could demand to be registered under the Indian Act, thereby becoming eligible for the special assistance provided by the Act for persons registered in accordance with it, and it seems distinctly possible that such a demand would have to be complied with.

Although the constitutional position in terms of legislative authority is clear, the legal position really rests upon whether the Indians and Eskimos of Labrador can be considered as such in terms of the British North America Act. The conclusion to be drawn from the outline of the situation given above seems to support a substantial degree of federal obligation with respect to the formulation of policies and the voting of funds to provide for programs on their behalf (emphasis in original). 69

This review echoes R. G. Robertson's remarks in his 1963 letter to Hon. Arthur Laing, wherein he stated that there should be, at a minimum, consultation with First Nations on Federal policies that affected them. However, Federal and Newfoundland officials provided no such opportunity to First Nations in Newfoundland and Labrador. First Nations were kept deliberately ignorant of decisions by the Newfoundland and Federal Governments that would deny them the liberty to determine their relationship with Canada and Newfoundland.

With regard to the Mi'kmaq people on the Island of Newfoundland the position conveyed by the provincial premier and other officials in 1949–50 was added in the back pages of the Memorandum. It stated:

There are a certain number of Indians resident on the Island of Newfoundland, but since most of these people have been or are in the process of being integrated with the white population it has been informally agreed with the Provincial authorities that no special arrangements need be made on their behalf by the Federal Government (emphasis added). 70

This statement was incorrect. Conne River on the south coast of Newfoundland, Badger and Glenwood in central Newfoundland and St. Georges, in St. Georges Bay on the west coast of

69 Ibid.
70 Ibid.
Newfoundland, were functioning Mi'kmaq communities in 1949.\textsuperscript{71} Apparently there was very little research done on the history of First Nations in Newfoundland-Labrador by Federal officials. The drafters of the Cabinet Memorandum relate the history of the relationship between First Nations, the British Crown and the Colonial Government of Newfoundland in two very important sentences:

There are \textit{no treaties or agreements} with the native population similar to the Indian treaties which exist in the rest of Canada. Theoretically, at least, Indians and Eskimos are fully enfranchised except for the privilege of purchasing liquor (emphasis in original).\textsuperscript{72}

The first statement is accurate for the Innu and Inuit Nations in Labrador, but not correct for the Mi'kmaq on the Island of Newfoundland whose Chief signed an adhesion to the treaty of 1752 in 1761. The second statement is presumptuous and incorrect in light of the protection of the prerogative law of the \textit{Royal Proclamation of 1763} that set Indians and Lands reserved for Indians apart from Anglo-British subjects in North America. Further, it presumes that informal agreements between federal and provincial officials deeming First Nations people as enfranchised and dispensing with federal constitutional responsibilities to them would be sufficient to amend subsection 91(24) of the \textit{B.N.A. Act}.

The Cabinet Memorandum concludes:

From a purely constitutional point of view, it is difficult to see how the Federal Government can escape at least some responsibility for Indians and Eskimos in the new province as the British North America Act vests in the Parliament of Canada exclusive legislative authority in respect of this group.\textsuperscript{73}

In a draft letter from Prime Minister Pearson to Premier Smallwood, the Federal Government sought to circumvent its con-

\textsuperscript{71} As the organizer of the first Aboriginal political organization in Newfoundland-Labrador, I found distinct Mi'kmaq communities and groups in these same locations in Newfoundland in 1971. They still practiced an adaptive form of Mi'kmaq culture, considered themselves as Mi'kmaq and were identified by neighbouring communities of Newfoundlanders as Mi'kmaq.

\textsuperscript{72} \textit{Supra} note 67.

\textsuperscript{73} \textit{Ibid.}
stitutional responsibility for First Nations in Newfoundland and Labrador. In the letter, the proposal was that Newfoundland could administer Indian and Eskimo Affairs, that the Federal Government would provide a capped level of subsidy, and that the agreement would be reviewed and re-negotiated every five years. This periodic renewal was proposed by federal officials who hoped that in the next five to ten years federal responsibility for Indians would be shifted to the provinces throughout Canada as part of the federal assimilation scheme. First Nations in Newfoundland-Labrador would be used by federal officials as an example of the new policy. The five-year agreements would permit the federal government to phase itself out of all responsibility for Indian Affairs in the future.74

The proposal set out in the draft letter was approved without changes by Cabinet and was sent to Premier Smallwood on May

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74 22 April 1965, Memorandum for Cabinet:

Recommendations
13. After considering the various ways in which the problem can be met, the Committee has come to the conclusion that the federal government should not assume continuing commitments on a permanent basis in respect of Indians and Eskimos in Labrador . . . . Arguments supporting this point of view are set out in Appendix "A." . . . 17 . . . Although the proposal involves relatively large Federal disbursements during the first few years, it holds the dual advantage of enabling a really significant contribution to be made towards the rehabilitation of Labrador and, at the same time, of gradually relieving the Federal Government of all direct responsibility, both financial and administrative, for this segment of the Indian and Eskimo population of Canada.

Appendix "A" Arguments Against Continuing Federal Participation In Indian and Eskimo Affairs In Northern Labrador
1. The Government's Indian policy in the rest of Canada has been for a number of years to encourage voluntary enfranchisement in order to enable Indians to take their place in society on the basis of complete equality with other Canadian citizens. It would be a retrograde step if the Federal Government were to do anything that would result in converting the Indians and Eskimos of Northern Labrador into wards of the state.
Prime Minister Pearson concluded his unconstitutional proposal by reiterating the policy the Federal Government wanted to extend to every other province in Canada:

I know it is your objective, as well as ours, to see that the Indians and Eskimos take their place as full participating members of the provincial community, accepting all the responsibilities and receiving all the benefits of other citizens.76

What the Prime Minister openly admits in this final paragraph is that the Innu and Inuit are not enfranchised and still need to be assimilated. This makes them no different than any other First Nation in other areas of Canada with whom the Federal Government made treaties and who received special services—covertly aimed at assimilating them in a transitional process.

This Federal decision radically departed from previous Anglo-Canadian policy that had been followed since England’s contact with North American First Nations. The treaty-making process that the Royal Proclamation of 1763 codified in prerogative law and which Canada was founded on was ignored. Federal responsibility to carry out the treaty-making process was abandoned. Premier Smallwood accepted the Prime Minister’s proposal on June 2, 1965.

Between 1949 and 1965, the Federal Government had avoided declaring the Indian Act to be in effect in Newfoundland pursuant to subsection 18(2) of the terms of union:

Statutes of the Parliament of Canada in force at the date of Union, or any part thereof, shall come into force in the Province of Newfoundland on a day or days to be fixed by Act of Parliament or by proclamation of the Governor-General in Council issued from time to time . . . 77

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75 25 May 1965, Correspondence, Prime Minster Pearson to Premier J. Smallwood.
76 Supra note 75 at 6.
77 A review of Appendix 12 of the Revised Statutes of Newfoundland include all Proclamations of Federal laws in effect in Newfoundland by the Governor-General in Council. The Indian Act is not listed in any of these proclamations. The statutory provision that the laws of Canada are always speaking in the federal Interpretation Act does not over come the constitutionally prescribed process of bringing federal laws into effect in Newfoundland.
This ensured that the existence of First Nations would be hidden along with the Federal responsibility to enter into a treaty process with the First Nations in Newfoundland-Labrador.

VI. LIBERAL INDIVIDUAL RIGHTS AND GENERAL COMMON LAW PRINCIPLES

There are several underlying themes that are tenets of Liberal philosophy in the Federal and Newfoundland positions held between 1949 and 1964. The first is the federal position that Aboriginal peoples should be assimilated as quickly as possible. This would end federal expenditures for special services and move Indians onto provincial services where they would be treated the same as the non-Indian population in the provinces where they resided. The assimilation of First Nations flows from the Liberal tenant that posits formal equality.

The Federal decision to pretend that First Nations in Newfoundland and Labrador had already been assimilated and were “enfranchised” is inconsistent with the repeated federal wish to have them eventually take their place as “fully participating citizens.” The statements of federal officials and politicians demonstrate that First Nations peoples in Newfoundland-Labrador were not considered fully assimilated. First Nations in Newfoundland and Labrador, however, were given no choice between enfranchisement or entering into treaties and registering as Indians under the Indian Act.

Providing First Nations with such a choice would have made it possible for them to become informed of their rights under the Royal Proclamation of 1763. Even though the Federal Memorandum acknowledged that no treaties had been made in Newfoundland-Labrador, the standard step of treaty making that had been established by British and Canadian legal policy was not discussed. Had the rule of law been complied with, the Federal Government would have had to hold treaty discussions with First Nations. This would have led to setting aside reserves and registering First Nations peoples in Newfoundland-Labrador under the Indian Act as the legal review in the Memorandum for Cabinet highlighted. This was not the action that federal civil servants and politicians wanted to undertake in Newfoundland-Labrador.
Federal policy development with respect to Indian Affairs had been searching for a way to implement a faster method of assimilating First Nations since 1950. The protection from assimilation which the Indian Act and reserves provided were seen as creating "a separateness that . . . appears to operate, in the long term, to the disadvantage of Indians." The "disadvantage" appears to be that they were not being assimilated into British culture.

To support the fiction that Indians in Newfoundland and Labrador were already enfranchised, Federal officials pointed to the fact that the old Colonial and Commission of Government had never passed any laws with respect to Indians or Eskimos. Federal officials claimed this meant that Aboriginal people were already "enfranchised"—no longer Indian—the goal of the Indian Act. Therefore, the Federal Government could claim, as Hon. Ellen Fairclough did in her letter of 1962, that Aboriginal people in Newfoundland and Labrador had been enfranchised since the first day of confederation and that the Federal Government had no responsibility for them. However, as noted above, if this position was truly believed, then it would have been illogical to give funds to Newfoundland for the purpose of assimilating First Nations which Federal officials had claimed were already assimilated.

The opportunity for First Nations peoples to be fully informed of the Federal Government's legal obligations and then to exercise individual choice as to the relationship they wished to have with Canada was denied. The people of the First Nations in Newfoundland and Labrador were denied a process similar to that enjoyed by Anglo-immigrants in Newfoundland that was based on respect for individual liberty, informed choice, and consent.

The Newfoundland Government's position was also based on a tenant of Liberal philosophy. The Government of Newfoundland claimed that it, and those it represented, was not being treated "equally" with the other provinces of Canada. Newfoundlanders were paying for services for Indians and Eskimos in Labrador that the federal government was paying for everywhere else in Canada. In essence, the Government of Newfoundland claimed, on behalf of its constituents, that it was being "harmed." Newfoundland wanted the Government of Canada to intervene, to take over the

78 Robertson to Laing, supra note 56.
responsibility for Aboriginal people in Labrador or pay them to administer Indian and Eskimo affairs.

If funded to administer Indian and Eskimo Affairs, Newfoundland proposed that it would implement the policy of assimilation and formal equality which the Federal Government wanted to implement in other areas of Canada. Newfoundland stated it would not provide any special services for Aboriginal people. Instead Newfoundland would treat First Nations people "precisely the same way as other inhabitants (Anglo-immigrants) of the province."

In reality, what Newfoundland was attempting to obtain was a double payment for Aboriginal people. Aboriginal peoples were already counted once as members of the general Newfoundland population for purposes of transfer and other payments from the Federal Government and, under this proposal, the Federal Government would pay Newfoundland for them again as Aboriginal peoples. However, special services, as the Federal Government promised in 1947, would not be provided by the provincial government. This was the liberal vision of individual development Newfoundland officials had for Aboriginal peoples. This was their proposal that would satisfy their self-actualization as government officials in structuring Newfoundland society, and was adopted as government policy.

Absent from all this discussion is any acknowledgment by either level of government that Aboriginal peoples in Newfoundland had any right to be informed or to freely determine what their living arrangements with the Anglo-immigrants might be. It was suggested in the Federal Memorandum to Cabinet that this was done in western Canada, yet this precedent was not referred to in the recommendations drafted by policy makers.

Ironically, under the Indian Act, Mi'kmaq people in Nova Scotia were not seen as having any individual Liberal-like rights to freely determine their form of government unless they requested to be enfranchised. In Newfoundland and Labrador, Aboriginal peoples whose identities as Aboriginal people had been legally oppressed so that they could be considered "enfranchised" were not accorded the same right as Anglo-immigrants freely and voluntarily to determine what their status would be, who would govern them, and to which level of the Canadian government they would relate. Thus, it appears that being considered "enfranchised" did not mean
that First Nations people in Newfoundland-Labrador would be accorded Liberal democratic privileges. The right to pursue one's own vision of happiness, to determine one's government through a process of informed voluntary consent, to be free of state interference, and to expect protection of one's life, liberty and property from individuals and the state, was not provided to First Nations in Newfoundland and Labrador. Enfranchisement was used as an excuse to withhold the rights of First Nations peoples to negotiate their own terms of a social contract with Canada and Newfoundland.

The Cabinet Memorandum of 1965 demonstrates, I would suggest, that the Innu and Inuit Nations of Labrador were still considered as "Indians and Eskimos." Federal officials did not believe that these racial and cultural differences could be extinguished by involuntary enfranchisement. For the Mi'kmaq people on the Island of Newfoundland, the Government of Newfoundland had requested that the Federal Government ignore them entirely. The Government of Newfoundland was not even prepared to take extra Federal monies via the unconstitutional agreement of 1965 for the Mi'kmaq. The Federal Government was remarkably willing to accommodate the unconstitutional wishes of the Newfoundland Government without question, investigation, or consultation to determine what the wishes of the Mi'kmaq people on the Island of Newfoundland might have been.

Foreign people with foreign values unilaterally applied their vision of the Liberal principles of the social contract to First Nations in Newfoundland-Labrador, classifying them as "enfranchised." The element of free voluntary choice and consent to "enfranchisement" that the legal opinion in the Cabinet Memorandum of April 1965 highlighted was ignored. In order to relieve itself of its responsibility to enter into treaties and provide special services and protection as the Royal Proclamation of 1763 directed, the Federal and Provincial Governments secretly withheld information from First Nations in order to deny them the opportunity to exercise their Liberal individual rights in a "treaty commonwealth," an Aboriginal—Crown social contract.

Like the dispossession of Mi'kmaq properties in Nova Scotia, the Federal and Newfoundland Anglo-immigrant Governments dispossessed First Nations of their property and political rights in Newfoundland and Labrador by asserting that they had voluntarily
enfranchised themselves. This appears to have also been equated with a voluntary cession of political and territorial rights. Thus, the Federal Government could claim that First Nations had de-Indianized themselves and their reserved lands. There were no “Indians,” and no “Lands reserved for Indians” that the Federal Government had responsibility for in Newfoundland-Labrador.

Once again, Anglo-immigrants had acted so as to place their own Liberal individual rights over those of First Nations people. However, in Newfoundland and Labrador it was not accomplished by overtly racist legal decisions. Rather, it was accomplished by the Liberal theory of equality. The Liberal theory of equality put a kind and benevolent face on this nineteenth century form of colonial racism. It declared that First Nations people were formally “equal” in citizenship rights. What this really amounted to was the negation of First Nation’s Aboriginal rights by making it appear that First Nations had abandoned their political rights and territorial resources, permitting the immigrant governments to assume control and possession over them. This form of assimilative equality meant that First Nations people had gained nothing, but had lost their identities and rights as Aboriginal peoples. This arbitrary characterization as enfranchised Indians was meant to make them legally unrecognizable at law as Aboriginal peoples... or at least Canadian and Newfoundland officials believe this would be the outcome of any legal challenges to what they had “informally” agreed to do to the Aboriginal nations in Newfoundland and Labrador.

The Canadian rule of law now includes a direction to the Federal and Newfoundland Governments that existing aboriginal and treaty rights must be recognized and affirmed by them as required by subsection 35(1) of the Constitution Act, 1982. In R. v. Sparrow, the Supreme Court held that the British Crown assumed fiduciary obligations to protect First Nations peoples, their rights and their lands when it proclaimed the Royal Proclamation of 1763. These obligations were passed on to the Federal Government in subsection 91(24) of the Constitution Acts, 1867 and 1982. In summarizing the nature of these obligations, former Chief Justice Dickson stated:

In our opinion, Guerin together with R. v. Taylor and Williams (1981), O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is the Government has the responsibility to act in a fiduciary capacity with respect to
Aboriginal peoples. 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.\footnote{R. \textit{v. Sparrow} (1990), 111 N.R. 241 (S.C.C.) at 276. See 271–76 for the full development of the summary of this principle.}

As noted earlier, Henderson believed the general principles of common law could be applied to protect the rights and interests of First Nations and their peoples. However, in the past courts were bound by the command theory of law. If a statute abridged common law rights the courts felt compelled to apply the statute law in the appropriate circumstances. Parliament and the legislatures were supreme within their respective constitutional jurisdictions. In the past, the courts were also caught up in the Canadian belief of their cultural and racial superiority to Aboriginal peoples.

Now the courts are the guardians of the law as set out in the \textit{Constitution Act, 1982} and should permit no laws to abrogate or derogate from Aboriginal rights. If it can be shown that the Governments have breached their fiduciary obligations to protect Aboriginal peoples and their Aboriginal rights the courts can award damages. Damages for breach of fiduciary obligations usually require that the beneficiaries be put in as good a position as they should have been if no breach had occurred.

When the First Nations of Newfoundland and Labrador mount a challenge to the actions of the Federal and Newfoundland Governments the spotlight will be on the Newfoundland courts. Will the deliberate breaches of Federal fiduciary obligations be condoned or condemned? Will the ultra vires agreements be struck down or upheld? Will the abrogation and derogation of the Aboriginal and treaty rights of First Nations by the Federal and Newfoundland Governments be held to be a contravention of sub-section 35(1) of the \textit{Constitution Act, 1982}? Will the courts order the Federal and Newfoundland Governments to provide Newfoundland and Labrador First Nations with the opportunity to exercise Liberal-like individual rights to determine what their terms of union will be? Will the courts be prepared to order vast amounts of compensation for the withholding of federal services that First Nations peoples in Newfoundland-Labrador should have been re-
ceiving since 1949? Will Henderson’s dark theme of Canadian-First Nations relations prevail again or will the courts rule against their own governments, putting First Nations interests ahead of their own? Three quarters of the territory of Newfoundland and Labrador are claimed by First Nations. The past governments of Newfoundland have never made an attempt to explicitly extinguish First Nations Aboriginal or treaty rights. The clash of cultures will ring loudly when the First Nations of Newfoundland-Labrador challenge the illegal and dishonourable acts of the Federal and Newfoundland Governments.

If the Federal and Newfoundland Governments can be persuaded or harassed into rectifying their past acts of colonial oppression a unique opportunity could materialize. The First Nations of Newfoundland-Labrador could become a “pilot project” once again in charting a new course for Canadian-First Nations relations. Canada and Newfoundland could, for the first time in Canadian colonial history, agree to negotiate a treaty of confederation with Newfoundland and Labrador First Nations, recognizing their independent status as self-governing peoples.