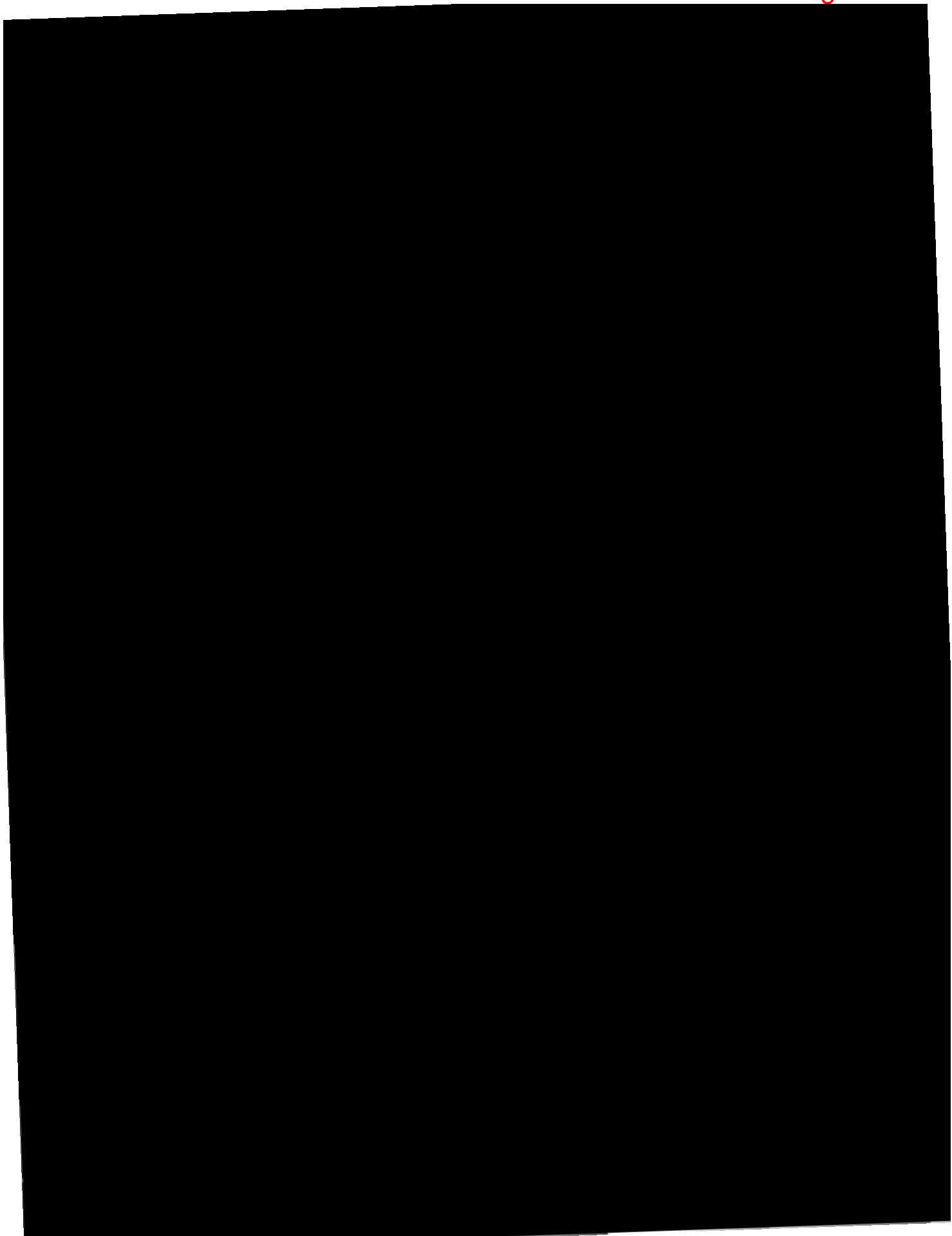




* Preliminary Draft

***ABORIGINAL/GOVERNMENT RELATIONS IN NEWFOUNDLAND AND
LABRADOR: ROLES AND RESPONSIBILITIES***

NOTE: This document represents historical analysis and interpretation only. It does not purport to represent a legal interpretation. The intent is to provide a historical basis for a legal analysis of the roles and responsibilities of the provincial and federal governments at Confederation and to determine current legal and fiscal obligations.

* The following draft will include endnotes and citations of all archival documentation and published source materials.

October 18, 1993

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ABSTRACT

The purpose of this paper is to define the scope of Aboriginal/Government relations in Newfoundland and Labrador from the historical perspective and to determine the roles and responsibilities of the provincial and the federal government in the funding and administration of Aboriginal affairs from the time of Confederation in 1949 to the present. This study covers three major historical periods; The Pre-Confederation Era, Confederation and The Terms of Union, Post Confederation and the Funding and Administration of Aboriginal affairs. These historical divisions may be briefly described as follows:

(1) The Pre-Confederation Era

The purpose of this section is to depict the relationship between governmental authorities and Aboriginal peoples from the period of initial settlement to Confederation. It sets out the origin and development of policies and general government relations with Aboriginal peoples against the background of the history of colonization, government administration, and colonial policy. The focus is to determine the essence of government policy toward Aboriginal peoples, and to indicate whether or not Newfoundland assumed, or had been charged with, any obligations by treaty, agreement, or other legal instrument to provide lands, financial support or other benefits for Aboriginal peoples.

(2) Confederation and The Terms of Union

The primary objective is to determine why Aboriginal peoples were not included in the Terms of Union between Newfoundland and Canada, and to ascertain the legal/constitutional status of Aboriginal peoples in Newfoundland at Confederation in 1949. Comparison with other provincial jurisdictions at the time of Confederation is discussed in detail to provide a context for comprehension of the Newfoundland situation in 1949. This section also deals with the application of federal and provincial laws, implementation of Confederation in Newfoundland, and the understanding of both Newfoundland and Canada regarding the status of Aboriginal peoples in 1949.

(3) Post Confederation and the Funding and Administration of Aboriginal Affairs

In order to comprehend the current status of funding and administration of Aboriginal affairs it is necessary to describe how the province and the federal government interpreted the Terms of Union and Section 91.24 of the Constitution Act (1867) following Confederation in 1949. Particular emphasis is placed on the interpretation of Section 91.24 (1867) and how this applies to Newfoundland in the absence of treaties, reserves, or pre-Confederation policies designed solely for the benefit of Aboriginal peoples. The focus of this section is development of the early federal/provincial Exchange of Letters Arrangements for Aboriginal peoples and the debate over funding

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and administration of Aboriginal affairs.

It is not the purpose of this paper to depict the history of Aboriginal peoples or describe relationships between Aboriginals and white settlers in Newfoundland and Labrador. The focus is imperial and colonial policy and whether or not government policy was implemented specifically for Aboriginal peoples or indirectly as a consequence of general colonial policy. It is important to define what, if any, role that Aboriginal peoples played in the implementation of colonial policies executed by government.

A major objective of this research effort is to determine if the Government of Newfoundland had assumed any obligations for Aboriginal peoples prior to Confederation. It is critical to determine the effects of the Terms of Union and the interpretation of Section 91.24 (1867) on the current relationship between the federal and the provincial government in program administration and delivery, and financial arrangements for the benefit of Aboriginal peoples. Analysis of the legal obligations and policy direction of the Government of Canada relative to other provinces when they became part of Canada provides the basis for comparing the implementation of federal and provincial policies and legal obligations in Newfoundland. The implementation of the Terms of Union, constitutional amendments, legislation, and formal or informal arrangements to interpret these instruments provides the context for comprehending the current relationship between the Government of Canada and the Government of Newfoundland and Labrador.

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I. INTRODUCTION

The primary objective of this paper is to analyze Aboriginal/government relations in Newfoundland and Labrador from a historical perspective, and to determine the roles and responsibilities of both the province and the federal government in the funding and administration of Aboriginal affairs. From the time of Confederation in 1949 to contemporary federal/provincial discussions, there is one fundamental question which has the potential to determine Aboriginal/Government relations in terms of legal obligation, financial responsibility, and access to lands and resources: is there any policy or legal precedent in the history of Newfoundland and Labrador which burdens or compels the province to accept any financial or other responsibility for Aboriginal peoples. This analysis does not involve questions requiring legal interpretation. The focus is a presentation of historical evidence to set the background for legal analysis and policy considerations.

This study will cover three major historical periods; the pre-Confederation Era from the time of discovery to 1949; Confederation and the Terms of Union; and the post-Confederation Era, or more specifically, the nature and course of federal/provincial discussions leading to the current funding and administration of Aboriginal affairs in Newfoundland and Labrador. The Terms of Union and the application of federal laws and regulations at Confederation can only be described against the background of any specific obligations Newfoundland may have had respecting Aboriginal peoples prior to April 1, 1949. In the post-Confederation Era the developing relationship between government and Aboriginal peoples, as well as between the province and the federal

government in the funding and administration of Aboriginal affairs, has been largely moulded by disagreement over interpretation of the Terms of Union and the issue of legal and jurisdictional responsibilities.

In the pre-Confederation Era it is necessary to determine whether or not there is any historical evidence to demonstrate that Newfoundland had assumed any particular obligation or responsibility for Aboriginal peoples beyond that which was afforded to other residents. Was there a specific policy by the Colonial or Dominion Government of Newfoundland which singled out Aboriginal peoples for special funding, programs, or access to lands and resources? Study of the Pre-Confederation Era must precisely define the status of Aboriginal peoples prior to and at the date of Confederation.

In other jurisdictions several historical developments in the Pre-Confederation Era determined the role of the provincial and federal governments at Confederation. Of particular relevance is Section 91.24 of the Constitution Act 1867 whereby the federal government assumed legislative authority for *"Indians and lands Reserved for the Indians."* A major objective in assessing historical evidence from the Pre-Confederation Era is to determine whether or not colonial authorities responsible for governing Newfoundland engaged in treaty negotiations with Aboriginal peoples whereby Aboriginal rights and title were surrendered for specific areas of land set aside for their exclusive use and benefit.

In other Canadian jurisdictions specific policies or legal instruments have determined the current status of Aboriginal rights as well the nature of governmental roles

and responsibilities. This includes the Royal Proclamation of 1763, the nature of colonial settlement, and social and economic relations between settlers and Aboriginal peoples. This will help to reveal the essence of government policy toward Aboriginal peoples, and indicate whether or not Newfoundland assumed any obligations by treaty, agreement, or other instrument to provide lands, financial support, or other benefits.

The Terms of Union between Newfoundland and Canada and the legal and constitutional status of Aboriginal peoples in Newfoundland at Confederation in 1949 must be carefully analyzed to determine why Aboriginal peoples are not included in the Terms of Union. As each province entered Confederation the federal government assumed legislative authority for *"Indians and lands Reserved for the Indians."* Across Canada the situation varied and Terms of Union, federal/provincial agreements, and other legal instruments often served to determine the level of responsibility for Aboriginal peoples. The Newfoundland situation in 1949 must be compared with the situation in other provinces at the time of Confederation to fully assess the impact of such matters as pre-Confederation legislation, the constitutional division of powers between the provinces and the federal government, application of the Indian Act and the process whereby Indians were registered and settled on reserved lands under federal authority.

The roles and responsibilities for the province and the federal government in the funding and administration of Aboriginal affairs must also be discussed within the context of other Canadian jurisdictions. In the absence of the treaties, reserved lands, and administration of special programs and services at the time of Confederation in

Newfoundland and Labrador it is necessary to assess the application of federal and provincial laws, the implementation of Confederation in Newfoundland, and the issue of absence of Aboriginal peoples from the Terms of Union against the background of historical evidence. A primary objective is to determine the understanding of both Newfoundland and Canada regarding the status of Aboriginal peoples in 1949 and how this understanding has affected the course of Aboriginal/government relations in the province.

Immediately following Confederation in 1949 both the federal and provincial governments were unable to precisely define their roles and responsibilities for the funding and administration of Aboriginal affairs. It is therefore important to determine how the province and the federal government interpreted the Terms of Union and Section 91.24 of the Constitution Act (1867). How did federal and provincial officials interpret the law and the Constitution in the absence of treaties, reserves, or pre-Confederation policies designed solely for the benefit of Aboriginal peoples?

The development of the federal/provincial Exchange of Letters Arrangements for Aboriginal peoples and the early debate between federal and provincial officials regarding the funding and administration of Aboriginal affairs reveals how both Newfoundland and Canada set aside the major constitutional issue. There was no formal agreement on constitutional principles; however, both levels of government were able to reach temporary arrangements without a formal agreement to clearly define their respective

roles and responsibilities. These arrangements focused on the provision of funding and the means of administering programs and services.

II. THE PRE-CONFEDERATION ERA

The analysis of pre-Confederation historical evidence is primarily to identify any specific policy, legal instrument, or act of state which can be interpreted as obligating the Government of Newfoundland and Labrador to provide land, financial support, or special programs and services for Aboriginal peoples. This analysis must address the issues of colonial laws and regulations; application of the Royal Proclamation of 1763; land and settlement policies; the nature of Aboriginal and settler relations; international conflicts and colonial competition; and the demographic movements of Aboriginal peoples resulting from colonization. It is also important to identify evidence of treaties, land allocations, or other obligations assumed by either imperial or local colonial authorities.

I. THE ORIGINS OF MODERN GOVERNMENT POLICY

As modern public policy did not emerge as a definable concept until the mid eighteenth century, there are several fundamental issues to resolve prior to historical analysis. It is necessary to ask the question what is meant by policy in the 18th century and in preceding years? How does this concept of policy differ or compare with the current concept of policy? These fundamental questions will be addressed through the formulation of a conceptual model or framework which is valid for both historical and contemporary concepts of "policy."

In 18th century terminology, policy referred to a specific course of action pursued by the legal governing body of a sovereign state. The Crown and Parliament represented the interests of the population or the polity. The actions of the Crown and Parliament to protect or enhance the interests of the polity or subjects under sovereign protection was, in contemporary terminology, termed a policy or course of action pursued by the legal institutions of Crown and Parliament.

Prior to the 18th century, there is a fairly low threshold of historical evidence to define a specific policy exercised by a sovereign state. However, with the emergence of a more sophisticated system of government in the 17th century, this threshold becomes elevated to a far greater level of clarity as well as complexity. There are two basic historical methods of defining a particular policy or policies of a sovereign state. Before the emergence of sophisticated legislative structures complemented by a departmentalized and professional bureaucracy, the delineation of policy is achieved by a simple but tedious method of historical investigation. This method involves the extraction of a policy derived from a course of events or series of actions carried out by a sovereign state. Such an approach often involves a chronological description of actions by a particular state over a long period of time and may require analysis of foreign affairs, defence and trade. The object is to define the nature and parameters of policy from what is revealed by the course of history. Such analysis may also be subjective and extremely vulnerable to interpretative error.

A more reliable measure to define a policy is to set out a specific set of acts of state; or those statutes or regulations lawfully enacted by the governing body of a sovereign state with a defined goal or objective to direct or enhance the interests of the state. These actions may relate to foreign trade, internal law and order, military strategy or relations with other sovereign governments. This is a more objective approach as it relates to specific actions by a legal entity to formulate and implement measures for the benefit of the polity or a specific group or interest.

From the period of discovery until the early 1700's, the first or "extractive" method must be employed in regard to policy within the context of Newfoundland history. This includes periodic personal accounts, acts of state and various commentaries. During the periods 1699 to 1763 and from 1763 to the time of Confederation information becomes increasingly complex and voluminous. Specific examples of various policy instruments or acts of state can be given with increasing frequency of occurrence and continuity over time. These include documents relating to:

- 1) the active role of the Lord's Committee of Trade and Plantations in formulating policy for Newfoundland;
- 2) the formalization of the governorship of Newfoundland in the 18th century and the increasing concern with the administration of fisheries, settlement, land allocation, resource utilization, and local justice; and
- 3) the increasingly active role played by governors in the day-to-day administration of Newfoundland towards the end of the 18th century and

their growing concern with the issues of settlement and internal order in addition to matters of defence and fisheries jurisdiction.

In the absence of a coherent and well-documented statement of colonial policy with respect to Aboriginal peoples in Newfoundland, it is necessary to examine the acts of colonial administrators in their efforts to exercise authority within the context of broader policies relating to defence, international relations and trade and commerce. It will be demonstrated that Aboriginal policy was a minor part of wider policy objectives.

2. THE NATURE OF EARLY EUROPEAN ABORIGINAL CONTACT IN NEWFOUNDLAND

Although there are numerous references to contact with Aboriginal peoples in Newfoundland in the period following discovery in 1497, there is very little detail concerning the precise nature of this relationship. We are certain, however, that periodic conflicts between the European fishermen and Aboriginals were commonplace. Captain Richard Whitbourne writing of his experience in Trinity (1622) in the year 1582 states that:

*"Many of them come secretly every yeare, into Trinity Bay and Harbour, in the night time, purposely to steal railles, lines, hatchets, knives and such like."*¹

The Charter of the London and Bristol Company (1610) which granted the Company exclusive use and ownership over a considerable area of the Island indicates that most of the Avalon and the surrounding coastal regions appear to have been vacated by the Aboriginal inhabitants.² In 1612, John Guy met and traded with Beothuks in the lower reaches of Trinity Bay; however, in 1613, a fishing ship fired cannon on a party of

Beothuks in the same location, apparently being unaware that Guy had previously established peaceful intercourse. Captain John Mason, in *"a brief discourse of the New Founde Lande, 1618,"* stated that northern Newfoundland was the only region where Aboriginal peoples still made a homeland *"There are few savages in the North, none in the South by whom the planter as yet never suffered damage ..."*³ Sir Richard Whitbourne verifies the statement of John Mason and hints that the area along the Strait of Belle Isle was still inhabited by Aboriginals who were trading with the fishermen residing there:

*"My first voyage thither, was about 40 years since (1582) ... we were bound to the Grand Bay (Belle Isle) which lieth on the north side of that land - proposing there to trade then with the savage people for whom we carried sundry commodities...."*⁴

There is no evidence of any particular policy regarding Aboriginal peoples at this point in time, except for what appears to be peripheral attempts to make peace and establish a trading relationship. We are only certain that some fishermen did not return home in the autumn as was characteristic of the seasonal or migratory fishery, but performed the function as security guards for the out-buildings, flakes, and dwellings used by the fishermen during the summer months. The Star Chamber Regulations for the Newfoundland fishery issued by King Charles I in 1634 describes an apparent state of disorder and confrontation between the fishermen and Aboriginal peoples in Newfoundland. The Regulations refer to an earlier period of peace and tranquillity which was shattered by increasing acts of violence and lawlessness. This is repeated in the

grant of Newfoundland to Sir David Kirke and Company in the year 1637, which refers to *"incursions and invasions by the savages of Newfoundland."*⁵ The Star Chamber rules and additions of Charles II in 1660 repeat the wording of the regulations for the Newfoundland fishery in the year 1634, and once again reveals a state of conflict or enmity between Aborigines and planters. These two regulations are important in that they compel British fishermen, Aborigines or any foreign fishermen using the coasts and waters of Newfoundland to be transported to England to be tried under the authority of the Lord High Marshall, who was responsible for the administration of justice in the various ports in the West of England involved in the Newfoundland trade. Thus, if there was indeed any policy, it simply states that murder and molestation by either party was punishable to the full extent of the law.

It is commonly believed that the Beothuks disappeared from the history of Newfoundland somewhere between the meeting with John Guy in 1612 and the documented expeditions to search for the Beothuks in the interior of Newfoundland beginning in the 1760's and continuing into the early 1800's. There is sufficient evidence to show that the Beothuk or Newfoundland Indians (frequently referred to as Red Indians) were seen quite frequently by Europeans in Newfoundland. There are even scant references to early trade between Europeans and Beothuks which had been soured by acts of violence and retribution. The Beothuks may have indeed become pawns in the often ruthless competition between British and French fishermen, particularly on the south and western coasts of Newfoundland. For example, in 1701 Governor Graydon reported that

"the Canada Indians come through Charles Straits in Canoes (Strait of Bell Isle) 70 Men in each to the French Ships fishing in these Harbours and trucked Furs with them for Firearms and other things..."⁶

Graydon also referred to *"great hatred between the Canada and the Newfoundland Indians."* This implies that the Beothuks did not suddenly disappear at some unspecified point in time but simply did not develop a complex or continuous trade relationship with Europeans. It should also be pointed out that between 1612 and 1765 other Indian peoples began to gradually extend the boundaries of their migration routes to include Newfoundland. For example, one planter, John Matthews (writing in 1670) reported that as early as 1662, he encountered Indians in the vicinity of Cape St. Mary's "... *who come to kill Beavers and other Beastes for furs.*"⁷ In 1676, another planter, John Downing, also described the presence of some Indians from Canada who had come to Newfoundland at the instigation of the French to hunt for furs "... *in french Shalloways with frensh fowling pieces...*"⁸ There are also increasing numbers of references to Indians who accompanied the French in their raids on Newfoundland during the colonial wars of the 1690's and early 1700's.

Regardless of apparent conflicts between Europeans and Aborigines, as well as between various Aboriginal groups, there is nothing to indicate the emergence of a policy to establish the basis for peaceful relations. Although various legal documents condemned acts of violence, there is no evidence or direction on how peace was to be achieved.

3. *THE EMERGENCE OF ABORIGINAL/GOVERNMENT IN NEWFOUNDLAND
AND LABRADOR 1713-1763*

(A) THE TREATY OF UTRECHT (1713)

Following the Treaty of Utrecht in 1713 there are numerous references to Indians accompanying the French to their summer beach installations on the "*French Shore*" which was awarded to France according to the terms of the Treaty. It should be pointed out that the presence of Indians was well recorded by British naval officers reporting to the Governor of Newfoundland in his role as Rear Admiral of the Newfoundland Squadron. If there was a particular policy on how to address the issue of sporadic Indian migrations to Newfoundland, it was only to prevent the trading of fur with French fishermen in violation of the terms of the Treaty of Utrecht, and to also prevent trading between British fishermen and sailors with the French. It is also evident that Micmac and Montagnais Indians acted alone in extending their furring expeditions to Newfoundland. Such was the case in two recorded instances in 1727 and 1737 where Boston fishermen were captured by Micmacs from Nova Scotia and had their vessels seized off Cape Ray. Both the French and British authorities acted in concert to suppress these activities and maintain peace and order in the Gulf of St. Lawrence.

The policy of the Governor of Newfoundland and his captains of naval vessels in the region was to prevent encroachment by all Indians into Newfoundland and ensure that the French did not abuse their treaty rights, trade with British fishermen or engage in any other activity not directly related to treaty rights. This was less an Indian policy than a

policy geared towards policing the implementation of the Treaty of Utrecht and preventing encroachments by either British or French fishermen on their respective spheres of influence in the region.

(B) THE NATURE OF SETTLEMENT IN NEWFOUNDLAND

The nature of settlement and the structure of the local economy mitigated against the forging of relations between Europeans and Aboriginal peoples in Newfoundland and Labrador. Newfoundland was not a colony suitable for agriculture or large scale settlement, which were discouraged as being contrary to the West Country fishing interest. Although some settlement was necessary to maintain the aura of sovereignty by actual possession and to prepare shore installations for summer fishery, most of the population was migratory in that fishermen came to Newfoundland at the beginning of the fishing season and returned home in the autumn. It was only towards the end of the 18th century that this settlement pattern began to shift toward a stable, fully resident population. There was no real competition for land per se as in the American colonies on the Atlantic seaboard or land sale and speculation as later experienced with the expansion of settlement in the west.

The lack of large scale agriculture and intensive colonization geared to industrial production or resource extraction did not lead to the type of conflict so prevalent in New England, Canada, and towards the west into the Ohio River Valley. On the other hand, unlike the Indian alliance with the French in Quebec and Acadia a strong relationship did not develop in Newfoundland between Europeans and Aborigines based on the trade in

fur. Aboriginal peoples in Newfoundland and Labrador were not bound to the system of barter whereby they exchanged furs in return for European manufactured goods. It is ironic that the fur trade in both Newfoundland and Labrador was pursued largely by Europeans, particularly by the planters or settlers during the winter months. In the absence of mutual involvement in resource harvest in return for European manufactured goods, competition between Europeans and Aboriginals developed as competition for the same resources, specifically fur, whale and seal. There is consequently no historical basis for a process of negotiating treaties, the reservation of lands for sole Aboriginal use, the development of policies for intensive settlement, or establishing a formal relationship between the Crown and the Aboriginal inhabitants.

Two factors serve to alter the common view that Aboriginal peoples were only a nuisance factor during the early stages of contact. Following the Treaty of Utrecht in 1713, British traders and fishermen began to expand their activities along the Strait of Belle Isle to the coast of Labrador. They were met with severe opposition from the Inuit inhabitants which resulted in a series of mutual raids and reprisals. In order to reap the plentiful harvest of seal, whale, fur and salmon on the Labrador coast, it was necessary to placate the Inuit inhabitants or tie them directly into the system of resource exploitation. Secondly, during the 1760's the Micmac Indians began to migrate in greater numbers from Acadia, particularly Cape Breton Island. According to contemporary sources, this led to confrontation with the Aboriginal inhabitants (the Beothuk) and the European planters and fishermen. As staunch allies of the French in past Anglo-French

colonial wars, the migration of Micmac Indians had to be stopped or at least strictly controlled to prevent conflicts with settlers in Newfoundland and prevent continuation of their past alliance with the French through trade and commerce.

(C) THE STRUCTURE OF COLONIAL ADMINISTRATION

If the essence of colonial policy is to be derived from various acts of state and administrative decisions, it is necessary to briefly outline the structure of 18th century colonial administration and the capacity of the Crown through governors of various colonies to enforce legislation and to enact policy. A governor of a colony derived his authority directly from the Crown. This authority or mandate was granted according to the terms of a particular commission of appointment. The governor performed his duties on the basis of a particular set of instructions, particularly in those colonies which did not possess an assembly for the purpose of approving local laws and regulations. Both the governor's commission and his instructions were drafted by the Lords Committee of Trade and Plantations. This Committee was appointed by the Crown and in contemporary terms held the same authority as the Privy Council to draft laws or regulations for approval by the Royal authority.

While the Commission appointing the governor contains the general grant of authority, the instructions to the Governor included the detailed directives of how that authority was to be exercised in a particular colony. It included particular rules and regulations and generally included a questionnaire to which the governor was compelled to respond in detail to the Lords of Trade and Plantations. A Commission is a binding

document issued in the form of Letters Patent under the Great Seal and read upon a governor's appointment or entry into office. Instructions are private communications from the Crown through the Lord's Committee issued under the Royal Signet or Sign Manual. This was the highest form of authority exercised under the royal prerogative. In the 18th century, these instructions were confidential except for those parts which were to be publicly disclosed for reasons of policy or to emphasize particular laws or regulations. If a governor deviated from the terms of his Commission or instructions all such actions were considered to be null and void and the governor deemed to be "*in excess*" of his Commission.

4. THE ROYAL PROCLAMATION OF 1763

The Seven Year's War (1756-1763) concluded with the signing of the Treaty of Paris in 1763. Almost immediately after, the "*Indian Question*" throughout both the old and the new British North America possessions was given detailed consideration by the highest imperial authorities. This resulted in the Royal Proclamation of 1763. The Royal Proclamation was intended to avoid the conflict and confusion between Britain and France experienced after the Treaty of Utrecht (1713) over boundaries and jurisdiction. It was a general policy framework designed to promote settlement in the New World and to encourage all subjects to engage in peaceful relations with the Aboriginal inhabitants. Aboriginal hunting territories were to be protected until such time as these lands were deemed to be required for settlement. Only duly authorized agents of the Crown were empowered to enter into negotiations with Aboriginal peoples. Private dealers and

contractors were specifically excluded from the purchase of Indian held lands or from entering into any private agreements with Aboriginal tribes or peoples. The Royal Proclamation in essence placed both Aboriginals and their hunting territories under the direct protection of the Crown.

The Royal Proclamation of 1763 is of particular relevance to Newfoundland and Labrador as it defines the boundaries of Labrador that were attached to the jurisdiction of the Governor of Newfoundland. Labrador was placed under the authority of the governor according to the same terms and conditions as the Island of Newfoundland:

*"... and to the end that the open and free fishery of our subjects may be extended to and carried on upon the Coast of Labrador, and the adjacent islands. We have thought fit, with the advise of our said Privy Council to put all that Coast, from the River of St. John's to Hudson's Streights, together with all the Islands of Anticosti and Madeleine, and all our smaller Islands lying upon the care and inspection of our Governor of Newfoundland."*⁹

That Coast was defined by general metes and bounds; and included what is now known as the Quebec North Shore, Anticosti Island and all the coast westward to present day Sept Isles, Quebec.¹⁰

The terms of the Royal Proclamation set out a specific policy to guide future relations with Aboriginal peoples. It states emphatically that Indians were not to be "molested or disturbed" in lands not legally ceded to or purchased by the Crown. These lands were clearly defined as "Hunting Grounds."¹¹ This statement of general policy is followed by a definition of the geographical extent of the territory to be protected from European settlement, often referred to as the "Indian Country." No warrants of survey

or patents were to be granted for any lands *"not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them."*¹² No colonial governor was empowered to grant lands beyond the sources of rivers which flow into the Atlantic from the north and northwest, which are exactly the boundaries of Labrador placed under the *"care and inspection"* of the Governor of Newfoundland. Labrador lies to the east of all sources of the major rivers flowing into the Atlantic Ocean as well as the boundaries of Rupert's Land, or lands belonging to the Hudson's Bay Company. According to this geographical description, Labrador is outside the boundaries of the *"Indian Country."* An excerpt from the Royal Proclamation describes the limits of the territory reserved for the Indians:

*"... all the lands and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company, as also all the lands and territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and Northwest..."*¹³

The question arises as to whether or not the Indian clauses of the Royal Proclamation bear any relevance to the coast of Labrador placed under the jurisdiction of the Governor of Newfoundland. The clauses relating to the purchase of lands, allocation of lands to military personnel, and other matters are directly contrary to the structure of colonial administration and settlement pattern of Newfoundland. On March 15, 1763 the Lords of Trade submitted a report and recommendation to the Crown on the subject of new instructions for the Governor of Newfoundland in direct consequence of the Treaty of Paris. This report recommended the attachment of Labrador to the jurisdiction of the

Governor of Newfoundland according to the same terms and conditions as his mandate to govern the Island of Newfoundland. The only reference in this report to Indians was that the French were not to continue "...to have the full benefit of the former commerce with the Indians of that Coast..."¹⁴ The draft of the instructions intended for the newly appointed Governor, Captain Thomas Graves was completed on March 29, 1763, a full six months before the Royal Proclamation, which was proclaimed on October 7 of that year. It is important to note that the definition of the Labrador boundary by the Judicial Committee of the Privy Council in 1927 coincides with the western boundary of Labrador included in the terms of the Royal Proclamation of 1763.

Governor Graves was given specific instructions on how to approach the issue of Aboriginal peoples. He was instructed to comment on whether or not any fort could be erected for "...the establishing and carrying on a commerce with the Indians residing in or resorting to the said Islands or inhabiting the coast of Labradore." The "subjects of any foreign Prince or State" were to be absolutely excluded from any manner of commerce with Aboriginal peoples.¹⁵ Land purchases, surrender of aboriginal title, licence to trade with the Indians to take furs, the treaty process or the setting aside of reserve lands were not contemplated in Governor Graves instructions. He was only instructed to;

"... use your best endeavours to conciliate their affections, and to induce them to trade with Our Subjects reporting to Us, by Our Commissioners for Trade and Plantations, the best account you can obtain of the number of said Indians, the places they frequent, the nature and extent of the

Commerce that is or may be carried on with them, and how the same may, in your opinion, be further extended and improved."¹⁶

This is consistent with the report previously submitted by the Lords of Trade which recommended that Labrador be placed under the jurisdiction of the Governor of Newfoundland for specific reasons:

*"Such we apprehend to be the case of New Found Land where a temporary fishery is the only object, and this we suppose has been the reason, which induce Your Majesty to annex the Coast of Labrador to that Government..."*¹⁷

The encroachment on Indian lands by settlers in their efforts to increase the boundaries of agriculture and settlement never did occur in Newfoundland. This appears to strongly negate the need for patents or warrants of survey to prepare for land cession and purchase.

The instructions to Governor Graves were repeated word by word in the instructions to Captain Hugh Palliser when he was appointed Governor and Commander in Chief of Newfoundland in 1764, significantly, after the Royal Proclamation of 1763 had come into effect. This instruction, with minor alterations, was repeated intermittently to the successive governors of Newfoundland throughout the 18th and early 19th centuries. The articles contained in the Royal Proclamation relating to Aboriginal peoples received absolutely no mention in the commissions and instructions given to successive Governors of Newfoundland. By the very nature of 18th century colonial government and administration, a governor of a particular colony would have been specifically instructed to enact the terms and conditions contained in a Royal Proclamation if it was applicable

to his jurisdiction. No such document or instruction exists for Newfoundland; however, following the Royal Proclamation of October 1763 instructions were issued to Governors of the various colonies where the Proclamation was deemed to be relevant; Nova Scotia, New Hampshire, New York, Virginia, North Carolina, South Carolina, Georgia, and West and East Florida. An example of such an instruction was made to the Governor of West Florida on November 3, 1763:

*"Whereas we have, by our Proclamation dated the 7th October in the third year of our Reign, strictly forbid, on pain of our Displeasure, all our subjects from making purchases or settlements whatever, or taking possession of any of the Lands reserved as of several nations of Indians, with whom we are connected, and who live under our protection ... and that the Trade with such of the said Indians as depend upon your Government be carried on in the manner and under the Regulations prescribed in our said Proclamation."*¹⁸

There is absolutely no record of any such edict being issued for Newfoundland. The Royal Proclamation was also strictly enforced in colonies where it was deemed to apply. For example, in 1768 encroachments on Indian lands prompted the Lords of Trade to advise the Crown that certain encroachments had occurred in defiance of the Royal Proclamation of 1763 in the colonies of Virginia and Pennsylvania. In their attempts to expand settlement in the west, particularly the Ohio River Valley and the Great Lakes Watershed, settlers had encroached on lands protected or reserved by the Proclamation as hunting grounds for the various tribes of Indians:

*"Under this Interdiction the country in question now falls as lying beyond the sources of the Great Rivers which empty themselves into the Atlantic..."*¹⁹

What will become clear later in this paper is that encroachments on lands in Newfoundland and Labrador were not treated as being contrary to the terms of the Royal Proclamation, but contrary only to legislation which was in effect to govern land and settlement in the colony; i.e. the Act of 1699 which preserved the entire shoreline and interior of Labrador for the exclusive use of the seasonal fisheries. In terms of land cession or purchase the Royal Proclamation has no relevance to Newfoundland. Moreover, the lesser-known clauses in the Proclamation purporting to regulate the fur trade with Indians through licences could never be relevant in a colony where the settlers were the primary harvesters of fur.

5. THE ORIGINS OF NEWFOUNDLAND ABORIGINAL POLICY, 1763-1800

At the same time as the provisions of the Royal Proclamation of 1763 were being implemented in the appropriate colonies it appears that the Lords of Trade and Plantations, with the assistance of Governor Palliser, were developing a distinct and separate policy to govern relations between Europeans and Aborigines in Newfoundland and Labrador. Although that policy was originally intended to advance the peaceful exploitation of the Labrador Coast it later helped to clarify the situation on the Island of Newfoundland when the Micmac Indians began to migrate from Nova Scotia after the fall of Louisbourg and the Capitulation of Quebec in 1760. Imperial policy was never clearly defined or annunciated. It primarily stressed the tenet that all inhabitants of the colony, as subjects of the Crown, were to live together in harmony. This suited Palliser's desire to develop trade and commerce in Labrador. In late 1764, Palliser responded to the Lords

of Trade and suggested a plan to carry out his original mandate in Labrador, as well as to develop communication with the Aboriginal inhabitants. He recommended the establishment of posts in Labrador to entice the Inuit into peaceful trade and to prevent them from going southward to trade directly with the seasonal fishermen.

In 1764 Governor Palliser issued a proclamation which echoed the wording of his instructions and his plan to implement his mandate. He condemned the fishermen and settlers in their behaviour towards the Inuit in particular and admonished the

*"Imprudent Treacherous or Cruel Conduct of some People ... such wicked practices are most contrary to His Majesty's Sentiments of humanity to his conciliating their affections and his endeavours to induce them to trade with his subjects."*²⁰

Palliser's proclamation did not include any reference to the clauses relating to settlement, licensing, and Indian matters included in the Royal Proclamation. His pronouncement only reflected the wording contained in his instructions as well as his own recommendations for introducing a policy geared to trade and the cessation of conflict between European and Aboriginal:

*"I hereby strictly enjoin and require all His Majesty's subjects, who meet with any of the said Indians to treat them in the most civil and friendly manner, and in all their dealings with them to act with the utmost probity and good faith..."*²¹

The essence of this policy initiative was peaceful trade. Law and order was to be strictly enforced and until the Inuit and fishermen developed the necessary level of "friendly intercourse," they were to be kept apart by restriction of movement and a controlled trade relationship.

The colonial authorities were more than acutely aware of the political problems caused by lack of definition in the boundaries for the exercise of fishing rights and other privileges granted to France according to the terms of the Treaty of Utrecht in 1713. The territorial expansion of the fur trade in fact sparked the initial skirmishes leading to the Seven Year's War. Following the Treaty of Paris in 1763 this deficiency (and the potential for further conflict) was to be corrected by a strict policy of preventing any trade between British and French inhabitants as well as completely severing all ties between the French and their former Indian allies. All users of the shores of Newfoundland were deemed to be under the protection of the Crown, including the Aboriginal inhabitants who roamed between Labrador and Newfoundland and within the vast wilderness of the Island of Newfoundland and its "*dependencies*" like Labrador. This was designed primarily to limit the potential for conflict between British and French authorities in the administration of law and order. Not only were Europeans not to inflict acts of violence on Aboriginals but they were not to quarrel amongst themselves:

*"... in case any of the said carolits or Esquemeaux Savages should go over to Newfoundland, they are not to be molested or ill treated, they (as well as the subjects of France whilst in His Majesty's Dominion) being under His Protection..."*²²

At the same time as the coast of Labrador was attached to the authority and mandate of the Governor of Newfoundland, it was intended that laws and regulations applicable to Newfoundland should also apply to Labrador. Of particular relevance is the statute of 1699 (10 and 11, William III, Chapter 25), "*An Act to Encourage the Trade to*

Newfoundland."²³ This Act protected fishing and property rights in all areas inhabited and used in the year 1685; however, all other coves, bays, creeks, and other properties were to be reserved for use by the migratory fishery, or the ships and men arriving each spring and returning home the following autumn. Thus, the coast of Labrador was to be utilized only for the purpose of the migratory fishery and the establishment of all permanent settlement and structures was to be discouraged to the fullest extent of the law. In fact, Governor Palliser was particularly adamant in this regard and seized the goods and properties of merchants who had been granted licences to trade in Labrador following the Capitulation of Quebec in 1760. The coast was to be kept absolutely free of any external influence, and the migratory fishery was to remain the predominant economic activity.

(A). THE MORAVIANS, INUIT AND NEWFOUNDLAND POLICY IN NORTHERN LABRADOR

The Unitas Fratrum or the Moravian Brethren expressed an interest in setting up a trading operation in Labrador in the early 1750's. The purpose of engaging in trade was to financially support teaching the Inuit the fundamentals of Christian doctrine and European culture. Several Moravians established a small, temporary trading operation in 1752 outfitted and supported by a firm in London, England. Involvement in trade and commerce by a small group of Moravian entrepreneurs led to considerable opposition from the Moravian establishment in England and Germany who contended that the Brethren were a religious establishment whose sole purpose was to preach the Gospel and propagate Christian doctrine. At the end of the Seven Year's War in 1763, financial

considerations and strategic problems of basic supply and sustenance helped to revive the idea of utilizing profits of trade to support religious instruction. Palliser's suggestion to establish trading operations in the north, permanently settle the Inuit and completely isolate the Inuit from the advancing European fishermen and traders in the southern parts of Labrador could now be implemented in accordance with the principles of religious guidance and Moravian tutelage. He was instrumental in advancing the Moravian case to his superiors at Whitehall. In 1769, the Moravians petitioned the Lords of Trade and Plantations for a tract of land in Labrador of 100 000 acres. The motive for requiring land was the creation of permanently settled communities in the north, combined with availability of resources for both food and trade. The location was to eventually be located: *"... where the Natives are most likely to find whereon to subsist, and of consequence to resort to in the greatest numbers..."*²⁴ The Moravians also requested the *"... right of forming Harbours and to be owners thereof under the gracious protection of the Crown of Great Britain..."* This right was not intended to exclude any British subjects but that *"... should ships and their crews be bound while there to conform to the Orders and Regulations made in our Settlement agreeable to the Laws ..."* Offenders were to be brought before the Governor of Newfoundland as provided for in the law in force in Newfoundland according to the Act of 1699 previously referenced. In each settlement the Moravians proposed that one or more members of the mission be appointed Justices of the Peace to enforce laws and regulations.

An Order in Council dated May 3, 1769 granted the Moravians a licence to occupy "*at His Majesty's pleasure*" and includes certain terms and conditions under which the Missionary effort was to be implemented. This licence, it was stated, was made at the request of the Moravians who were "*... desirous of prosecuting their intention of establishing a Mission on the Northern Coast of Labrador for the purpose of civilizing and instructing*" the Inuit. The suggestion of permanent settlement by Palliser is clearly indicated by the statement that "*... there is a necessity of having permission to occupy such a quantity of land on that Continent as we induce the Esquimaux to settle around the Missionaries.*" The Crown was therefore prepared to grant a licence to 100 000 acres "*as they shall find most suitable to their purpose,*" and the Moravians were also to appoint one or more of the principal missionaries to act as Justices of the Peace.²⁵

The policy initiated directly following the Treaty of Paris was continued throughout the 18th and 19th centuries. The successor to Palliser, Governor Lord Shulldham, continued this policy as part of his commission and instructions from the Lords of Trade and Plantations. His instructions also continued the policy of ensuring that the Inuit were under the guardianship of the Moravian missionaries. In 1772 Shulldham issued a Proclamation compelling all those frequenting the coast to respect both the Inuit and the Missionaries as "*... the said settlement is under His Majesty's immediate protection.*" In that same year, Shulldham issued a second Proclamation which encouraged the Moravians to "*use every fair and gentle means*" to prevent Inuit migrating southward and thereby coming into contact with the European fishermen and traders. Any Inuit travelling south

were compelled to carry written permission before leaving their settlement "... *till such time as other settlements should be formed and extended down along the coast.*"²⁶

An order in council of 1774 further extended the territorial influence of the Moravians: "*His Majesty ... doth hereby permit and allow*" the extension of settlement to the north and south of Nain. The Moravians were permitted to "*occupy and possess during His Majesty's pleasure*" and the licence clearly stated that any new settlement was to be "*under his Majesty's immediate direction and protection.*"²⁷ An additional licence was issued in 1821. In all a total of seven Moravian missions were established between 1771 and 1903; Nain, 1771; Okak, 1774; Hopedale, 1781; Hebron, 1829; Zoar, 1865; Ramah, 1818; and Makkovik, as late as 1903. In 1903 a normal Crown grant in fee simple was granted to the Moravians for the establishment of a mission station and settlement at Flounders Bay or present-day Makkovik.

In many respects the Moravian Missionaries became agents of the Crown authorized to administer and implement laws and regulations, limit European contact with the Inuit, control trade within the Moravian sphere of influence, and settle and resettle Inuit in new or alternate communities when and if the need arose. They were tutors, benefactors and governors within the Inuit sphere of influence in Northern Labrador. Both the imperial authorities and Governors of Newfoundland from Palliser onwards strongly supported the Moravians in their missionary efforts. A Proclamation by Governor Campbell in 1784 (Appendix I) indicates that he was specifically instructed to carry out this policy by the Imperial Government (ie. Lords of Trade and Plantations)

with the full concurrence of the Crown. The Mission settlements were placed under the "*immediate Direction and Protection*" of the King in an effort to warn those who may entertain disturbing the peace of the Labrador Coast.

Under the protection of the Crown and through the actions of the Governor of Newfoundland, and later the Colonial Legislature, the Moravians were able to dominate the economic, commercial, religious, social, and cultural life of northern Labrador until well into the twentieth century. The Brethren performed in the role of a third party or intermediary between the Crown and the Inuit.

The goal of Imperial and local nineteenth century Newfoundland policy regarding the Inuit is illustrated by the tenor of Campbell's Proclamation. The society and economy of 18th and 19th century Labrador did not lead to the promotion of agricultural or permanent settlement. European fishermen and Inuit did not compete for lands and resources as their spheres of influence were separated by a specific act of government policy. Agents of the Crown governed the Inuit through the institution of the Moravian missions.

Customary Inuit means and modes of production continued to support the Inuit social, economic and cultural fabric. However, they were also fundamental in securing the paternal bonds of the Inuit with the Moravians. The Moravians did achieve a considerable degree of success in encouraging the Inuit to congregate at specific points and reside in permanent or semi-permanent settlements focusing on the Mission stations. The Moravians were careful to construct these stations at locations where the Inuit most

frequently gathered to harvest wildlife in an effort to complement their religious goals with their practical desire for economic stability. They were also extremely cognizant of the fact that Mission stations would have to be closed or removed to other localities on the occasion of resource shortage, or if new harvest opportunities (and hence new markets for Labrador resources) were available. It was not government's chosen role to become directly involved in the daily affairs of the Inuit or to design a complex series of policy guidelines, but primarily to protect the authority already granted to the Moravians. This connection represents the essence of government policy towards the Inuit until the middle of the 20th century.²⁹

B. THE FRENCH SHORE AND COLONIAL POLICY

The policy adopted by Governor Palliser in the 1760's regarding Indians on the Island of Newfoundland was somewhat complicated by the larger political picture. Following the Seven Year's War (1756-1763), the French presence in eastern Canada was limited strictly to the islands of St. Pierre and Miquelon and the "*French Shore*" on the west coast of Newfoundland. Palliser was determined that the French would never be able to abuse their fishing privileges, particularly that of using the shore to dry fish during the summer, a right reaffirmed by the terms of the Treaty of Paris in 1763. The restriction of the coast of Labrador south of the Moravian lands for the benefit of the British migratory fishing interests also meant that all other interests were to be either strictly countered or simply removed. This restrictive policy was also directed toward English merchants from Quebec as so vividly expressed by the case of Baine and

Brymmer who were granted rights and privileges on the coast of Labrador by Governor Murray of Quebec and were later expropriated by agents of Palliser in Labrador.³⁰ The future of the fur trade was a matter of particular concern;

*"... it will be impossible to prevent the French continuing to have the full Benefit of their former Commerce with the Indians of that Coast, unless some British Settlement should be made there or sufficient Cruizers stationed with Instructions to the Commanders to seize all french Ships coming within a certain Distance of that Coast."*³¹

The loss of the Canadian fur trade by France with the surrender of Quebec in 1760 appears to have resulted in a thriving clandestine trade between the French and their former Indian allies. In fact, a French sea captain named Galliot attempted to bribe a British officer off the northern coast of Newfoundland. This mirrors the attempts of French fur traders to encourage Indian hunters to infiltrate Western Newfoundland after the Treaty of Utrecht in 1713. (Sieur de Courtemanche, for example, transported substantial hunting parties from the "King's Posts" on the present-day Quebec North Shore.) Despite his rebuff Galliot was determined to pursue the illicit trade and later decided to intimidate fishermen of both nations by entering into direct trade with the Indians and "... even invited them over to Newfoundland to the great terror of all the English and French fishermen."³² French fishing stations were frequently viewed as a front for this illicit trade, as goods stored in warehouses for the winter were believed to be deposited for easy success by French ships and crews bringing in fur from Labrador.³³ Similarly it was feared that St. Pierre would become a smuggling mecca and Micmac Indians would be used as middlemen to trade goods through an illicit trade in furs:

*"... communication between these islands and Newfoundland could be prevented from which the inhabitants of St. Peter will otherwise receive the double advantage of getting easily and cheaply the materials for building their boats and for circulating French produce and manufactures amongst British fishermen."*³⁴

Palliser was determined to cut the islands off from any communication with the surrounding coast of Newfoundland. Controlling or preventing the incursions of Indians into the area was critical to achieving this objective.

C. MICMAC MIGRATION TO NEWFOUNDLAND

The Micmacs, as former allies of the French, were a particularly difficult and persistent problem for both the Governors of Nova Scotia and Cape Breton. A large party of Micmacs followed their former Acadian allies to St. Pierre in the early 1760's. They were immediately sent back by the French authorities as they were no longer French citizens and could not settle on the tiny islands without seriously infringing on the ability of a small French fishing population to pursue their livelihood. In 1765, the Governor of Cape Breton, Colonel John Pringle proceeded to give "passports" or letters of safe passage to Cape Breton Micmacs to come to Newfoundland. This roused Governor Palliser to write a scathing note to Colonel Pringle. He complained bitterly that Pringle had greatly exceeded his authority and demanded that the passports be rescinded. Palliser stated that Pringle's action was contrary to the King's orders that fishers and traders "*quit this Country*" at the end of the fishing season. Encouraging the Indians to come to Newfoundland represented "*the most dangerous consequences to the King's Service.*"³⁵ Governor Palliser was not merely content to castigate Pringle for his

indiscretion, but proceeded to issue an order to all visitors or migrants who were not genuine settlers or fishermen to quit the Island of Newfoundland and *"to retire to the Government to which they respectively belong."*³⁶ This order may be interpreted as strict adherence to Palliser's instructions to implement the Act of 1699. All genuine settlers could remain, but the migratory fishermen or any others resorting to Newfoundland for fishing or other appointed purposes were to return to their place of residence at the end of the fishing season. It is obvious that Palliser intended this to apply directly to Micmac and other Indians resorting to Newfoundland.

The policy of separating the Indians from the French, particularly on the South Coast, was to be maintained by force if necessary. This position was quite adamantly explained by Palliser in a lengthy letter to Michael Franklin, Lieutenant Governor of Nova Scotia. Palliser explained in great detail why he took the passes from the Micmacs and ordered that they return to Nova Scotia. (Appendix II) The fact that Governor Palliser actually took these *"passes"* is irrefutable evidence that action against the Micmacs was actually taken to effect their return. In addition, he clearly stated his intention to employ two naval frigates to carry out his orders to prevent communication with St. Pierre and to keep the Micmacs from entering into the jurisdiction of Newfoundland.

The policy of isolating Newfoundland from trade and commerce with St. Pierre, and especially from Indian migrations which might otherwise destroy this isolation and result in illegal harvest of fur or clandestine trade the south coast of Newfoundland, did not seem to overtly hinder Micmac or Montagnais Indians from crossing over to the west

coast of Newfoundland. Although this was illegal according to the Act of 1699 (and of course discouraged) it was not treated in as serious a fashion as was communication with St. Pierre. It should also be pointed out that between 1698 and 1761 a series of treaties were negotiated between the Colonial Government of Nova Scotia and the Micmac Indians in an attempt to simultaneously break ties with the French and neutralize the Micmacs as a military force. Captain Thompson, HMS Lark, wrote to Governor Graves in 1763 to inform him that Cape Breton Micmacs were utilizing the south-western tip of Newfoundland as a means of penetrating the interior for fur:

*"At my return to Codroy I found the Cape Breton Indians were come over to Furr during the Winter between Cape Ray and Cape Anguil. This greatly intimidated the Settlers at Codroy, but on my having an Interview with the Indian Chiefs, their fears somewhat abated and part of them talked of Furring during the Months before they had made 50 pounds a Man. The Indians promised perpetual Friendship. They were very anxious to purchase a shallop of the people of Codroy to go to St. Pierre for a Priest. This I forbade on Pain of being carried Prisoners to the Garrison ..."*³⁸

This implies that the Indians were certainly obtaining furs and in fact trading with British merchants and fishermen in the area of Port aux Basques and the surrounding hunterland. In the following year, on April 16, 1764, Captain Thompson wrote to his Commander in Chief, Thomas Graves, reporting on a meeting with a group of Cape Breton Micmacs, probably off of Cape Ray. Although under the authority of the Governor of Newfoundland in his capacity of Governor and Rear Admiral, Thompson was approached by the Micmacs to renew a Treaty signed in 1761 between the Chiefs of the Micmac Indians and the Governor of Nova Scotia. They asked him to renew the Treaty and to

supply them with presents according to the treaty provisions which included cloth, powder, shot, hats, salmon nets, and other durables.³⁹ The Micmacs may have provided great benefit to certain merchants and settlers in western Newfoundland. In fact, colonial records reveal that a great amount of fur was being exported to England during the years of recorded Micmac infiltrations into Newfoundland. This continued throughout the 18th century. A letter dated July 29, 1764 by Mr. Jonathan Broom to Governor Palliser on the subject of Micmac requests for "*presents*," gives us strong indication that this was indeed the case. Palliser's response was only concerned with telling Broom that application for money or goods according to the terms of any treaty must be made "*through the Governor of Halifax as they belong to that government and not to Newfoundland.*"⁴⁰ On the other hand, there appears to be little evidence of a concerted effort to stop them from penetrating the Codroy and into the western portion of Newfoundland to hunt for furs, especially if they traded them with British merchants from Jersey who were then beginning to fully reap the plentiful resources of the region.

D. BEOTHUK AND MICMAC

During late in the 18th century numerous reports circulated of conflict between Micmac and Beothuk and successive proclamations by Governors of Newfoundland ordered both settlers and Indians "*resorting to Newfoundland*," and especially those from the "*Isle of Britain*," not to murder or otherwise molest the native Indians.⁴¹ It is interesting to note that the well documented attempts of various individuals to search out the Beothuks and establish a communication with them met with absolutely no success.

For example, the expedition of Lieutenant Buchan and his crew documented by Howley met with total failure. It only resulted in bloody conflict, followed by reprisals involving local furriers.

The policy of the Colonial Government was to protect the Beothuks from external influences, to establish a communication, discover their locations, establish a "*friendly intercourse*" and if possible to engage in trade and live in friendship. Although this can be considered the official policy of government in Newfoundland it was never implemented because of the gradual waning and disappearance of the Beothuk people. Without the bonds of trade in fur or other commodities, the only available option was to try and establish a friendship and to protect the remaining remnants of the Beothuk. With the death of the last Beothuk in 1827 this policy was never implemented. Under the Governor's orders, stores and supplies were set aside in the event that the Beothuk could be saved from destruction and a relationship established:

*"I am sorry to inform your Lordship that I am again disappointed in my hopes of coming at the native Indians (Beothuks); they still keep in the interior of the island (it is reported) from the dread of the Micmacs who come over from Cape Breton. The articles that were purchased for them are deposited in the naval storehouse in St. John's where I have directed them to be kept for some future trial of meeting with them."*⁴²

In 1810 Sir John Thomas Duckworth, Governor and Commander-in-Chief of Newfoundland issued a Proclamation to the various Aboriginal peoples regarding their activities in Newfoundland. He warned all other Aboriginal peoples resorting to

Newfoundland to desist from acts of violence against the Beothuk under pain of death.

There is no evidence to demonstrate that his warnings were carried out.⁴³

Duckworth's proclamation emphasizes the principle of law that subjects of the Crown are equal in terms of protection of the Crown. This protection was extended to all inhabitants and visitors to the Island of Newfoundland, settlers as well as Indians. The issue of equality is important in this regard as it infers that Indians and Europeans were subject to the same laws and regulations without distinction.

Although the search for the Beothuks was in vain, it appears that a settlement of Micmacs was permitted, or tolerated, or at least not totally suppressed on the Island of Newfoundland. In 1815 Governor Keats reported to the Secretary of State regarding the status of Micmacs in Newfoundland;

*"Some years ago the Micmac Indians formed a settlement in St. George's Bay on the west coast of Newfoundland which is thriving and industrious. The success of the settlement has probably introduced others to follow them and lately they have come over in more considerable numbers, penetrated into the country and shown themselves the present season on the eastern coast of Newfoundland. It is to be feared the arrival of these new comers will prove fatal to the native Indians of the Island whose arms are the bow and with whom their tribe as well as the eskimo are at war and whose number it is believed has for some years past not exceeded a few hundred."*⁴⁵

It appears that the apparent tolerance of Micmac furring activities by merchants in the Codroy region referred to in Palliser's correspondence provided the magnet for further penetration of the interior by the Micmacs and ironically, settlement in a region on the South Coast close to their former allies in St. Pierre.

(E) THE CONNE RIVER SETTLEMENT

It appears that some Micmacs began to defuse eastward along the South Coast of Newfoundland during the period from approximately 1820 till about 1860. During the 1820's Micmacs penetrating the South Coast and the interior watershed began to face opposition by settlers who feared their eastward advance. Complaints were made by local furriers to the authorities that the Micmacs were encroaching on their hunting territory and competing for the beaver harvest. Cormack, following his trek across the interior of Newfoundland, later reported that the Micmacs were anxious that King George pass a law regarding the harvest of beavers, especially during the spring. The 1857 Census of Newfoundland contains unmistakeable evidence that the Micmacs had established a permanent settlement in Bay d'Espoir:

"The Indians of Grandy's Brook and Lapoile do not fish except to spear for salmon and eels for the supply of their temporary wants but derive their subsistence chiefly from the chase. During the winter they frequently employ themselves making hoops and in the spring they strip off a large quantity of birch rinds which they readily exchange at the merchant store for bread, clothing, ammunition, etc."⁴⁶

The 1857 Census records a total of 26 Indians in the region of Grandy's Brook and Lapoile, consisting of 4 families. The Indians at Bay d'Espoir totalled 55, with only one recorded as being born outside Newfoundland. This seems to verify the hypothesis that the settlement at St. George's was the recipient of migrants from Nova Scotia, but the source of diffusion into other regions of Newfoundland. The 1869 census records no Indians residing near Grandy's Brook or

Lapoile. Conne River however, contains a total of 88 Indians plus 5 white families for a total population of 112. Conne River had emerged as a permanent site for the Micmacs to engage in furring and trade with local merchants without any apparent interference by the colonial authorities.

The Micmac settlement at Conne River was the cause of some concern for local settlers, especially as the Micmacs competed for depleting stocks of salmon and game. Acting on a request from the Micmacs, Alexander Murray, Geological Surveyor of Newfoundland, made recommendation to the Executive Council in 1869 that lands be surveyed in Conne River, and that plots of land be allocated to individual residents. This request was made in accordance with the provisions of the Crown Lands Act, 1844 Amendment, (23 Victoria, Chapter 3, 1860). His request was acceded to by the Executive Council in 1870 and a Minute of Council of that year was issued to give him authority to proceed with the survey of Conne River:

"His excellency of the Governor laid before the council a letter of Mr. Murray the geologist in reference to an application made by him to the Governor of 1869 and also in 1870 for a grant of land for the Indians of Conne River Bay d' Spoir; - the council concur in the propriety of the application and referred the matter to the Honourable Sir Mayor General with the view of carrying its objective into effect. "47

It should also be pointed out that Murray's action as well as that of the Executive Council was executed in accordance with a Statute passed for the "*reduction of pauperism*" (29 Victoria, Chapter 3, 1866). This Statute provided that grants of land be given to "*poor settlers.*" It was also intended to improve the lot of the "*able-bodied poor.*"⁴⁸ Conne

River was subsequently surveyed and mapped by Murray's assistant F.H. Balfour. According to the terms of the Crown Lands Title Act of 1860 each individual was granted a specific plot of land for his personal use. After five years that licence could be converted into a grant in fee for the payment of a minimal sum, providing that certain improvements were made to the property. It does not appear that the Micmacs took advantage of the licences to occupy and only a handful eventually applied for a grant in fee simple. In 1908 Governor Sir William MacGregor travelled to Conne River and summarized the situation on the "*reserve*." He stated that "*the reserve had no official sanction*" and that few improvements were made. MacGregor commented that no fee simple grants had been issued to any individual and that there was little evidence of compliance with the terms of the original licences.⁴⁹

The allocation of land to individual Indians in Conne River was obviously implemented in accordance with Newfoundland laws and regulations concerning the disposition of lands. It did not constitute a specific act or policy setting aside land for the collective benefit of a band of Indians. Land was only licensed to private occupiers on the condition of a temporary tenure, subject to specific conditions.

(F) NEWFOUNDLAND LAWS AND REGULATIONS

Canadian courts have raised the status, meaning and intent of colonial statutes and regulations to a high level of significance to determine such matters as the existence of Aboriginal title and the validity of land, resource and financial benefits. The primary question is whether or not colonial laws or regulations created any special rights for

Aboriginal peoples separate or distinct from other residents. Conversely, did colonial laws or regulations extinguish Aboriginal title, deny special rights or limit the use and ownership of lands and resources? The collective impact of laws and regulations on the exercise of Aboriginal rights must also be analyzed against the background of colonial policy regarding land and resource usage in a particular colony, as well as the nature of powers and authorities afforded to local colonial administrations.

While actions by the Lords of Trade and Plantations indicate a particular initiative, it is necessary to analyze the impact of colonial laws from the initiation of a local legislative assembly in 1833, to Responsible Government in 1854 and in the pre-Confederation era. Extensive research into Newfoundland laws and regulations from 1833 to Confederation illustrate that laws relating to the disposition of Crown lands, wildlife and game, and inland fisheries did not distinguish between any resident of the province, with the exception of certain statutes for fish and game exempting "*poor settlers*" from many of the restrictive provisions. There is nothing to indicate that Aboriginals received any special or different treatment. In fact, during the 1860's and 1870's government officials tried desperately to enforce harvest regulations. For example, Captain Malcolm, during the course of his patrols on the South Coast to enforce the salmon regulations, tried on numerous occasions to force the Micmacs to obey regulations regarding the harvest of salmon. In exasperation he wrote that "*in order to force an Indian to obey the law it seems that one must take his arms off.*"⁵¹

An extensive review of all pre-Confederation Statutes from 1833 to 1949 reveals but four specific references to Aboriginal peoples. However, there are some implicit references to matters which indicate that government intended to ban certain harvest practices by Aboriginal peoples. For example, An Act for the Protection of the Salmon Fishery (27 Victoria, Chapter 7, 1860) refers to the prohibition of spearing salmon. An Act Respecting the Preservation of Deer, (51 Victoria Chapter 8, 1896) refers to the prohibition of the hunting caribou by means of "*hatchet, tomahawk, or spear.*" This prohibition was also repeated in other statutes, namely, an Act for the Preservation of Deer, (Consolidated Statutes of Newfoundland, Chapter 147, 1916).⁵² The prohibition against spearing salmon appears coincidental with the statements of Captain Malcolm in 1872. However, the implicit references to spearing salmon or hunting caribou with tomahawks does not specifically mention Aboriginal peoples. However, if it was meant to refer directly to Aboriginals it was certainly intended to control their harvesting activities.

Regardless of possible references to Micmac harvest practices, the wording and intent of Newfoundland legislation clearly demonstrates that the Micmacs were considered as being equal or similar to all other residents of the Island of Newfoundland. There is nothing to indicate special rights or privileges. In Labrador, however, it has been demonstrated that the Inuit were under the care or tutelage of the Moravian missions, while the Naskapi and Montagnais Indians were tied by the barter system to the Hudson's Bay trading posts. This is not to say that government was totally inactive. In fact,

government was quite prepared to legislate or enforce regulations on behalf of both the Moravian Church and the Hudson's Bay traders. During the late 1800's, with the increase of trade and traffic on the northern coast of Labrador, government received representation from the Moravian Church to curb the sale of alcohol by fishermen and traders. As a result, government passed an act stating that; -

"No intoxicating liquor shall be given, sold, or delivered to any Eskimo Indians under a Penalty of \$200." (45 Victoria, Chapter 8, 1882)⁵⁷

Although government still maintained an arms-length role in its relations with Aboriginal peoples in Labrador, it could and did act when specific circumstances arose. This was the case following the disastrous epidemic of Spanish influenza in 1918. In 1920 (10 George V, Chapter 11, 1920)⁵⁸ government enacted legislation to provide for the administration of estates of Inuit who had died during the epidemic. It should be pointed out that this was a special measure to deal with a specific circumstance and does not indicate a long term involvement in Inuit affairs. Abuses by traders and attempts to limit disputes with trading companies and other jurisdictions arising out of the distribution of relief to Indians in Labrador prompted government to curtail abuses in the contracting and hiring of Indian guides and labourers. In 1911 government passed a statute respecting both the Inuit and the Indians resident in Labrador. This Act was entitled "*An Act Respecting the Eskimo and Indians Resident in Labrador.*"⁵³ The purpose of the Act was to control the practice of hiring Labrador Inuit and Indians to work as labourers in

other jurisdictions or to entice them to leave the colony through the promise of goods or money.

(G) THE STRUCTURE OF THE LABRADOR ECONOMY AND CHANGES IN
GOVERNMENT POLICY IN LABRADOR

The direct involvement of the Moravians and the trading companies in the affairs of Aboriginal peoples in Labrador was being eroded by upheavals in the economic environment. Increasing dependence on the fur trade subjected Labrador to severe price fluctuations while at the same time helped to destroy many elements of the local subsistence economy based on the harvest of renewable resources. These factors forced government to become directly involved in the daily affairs of Aboriginal peoples and abandon the previous policy of relying on other agencies or organizations to perform in the roles of administrators and benefactors.

During the late 19th and early 20th century various commercial interests were competing for the profits of the Labrador trade from whaling, sealing, and the taking of furs. This factor served to seriously disturb the comparative isolation of the Moravian missions and to eventually erode both their economic and social influence in the region. Newfoundland entrepreneurs were even able to penetrate the sanctity of the northern communities to trade directly with the Inuit, much to the dismay of the Moravians. The price of furs reach record heights during the 1920's. Although this should have naturally benefitted the Moravian trading operations, it had just the contrary effect. The Moravian operations long ceased to be the monopolistic domains of the past and they were forced to face the full impact of competitors from elsewhere, particularly the

Hudson's Bay Company. Although the commercial and financial dealings of the Moravian missions were originally established to support matters of the soul rather than the purse, the Moravians were compelled by financial pressures to try and regain some of their former monopoly. For example, in 1904 the Church purchased property at Port Burwell from Job Brothers, a St. John's registered commercial firm, for \$4000. However, by September, 1925 the property was sold to the Hudson's Bay Company for \$5000.

The Hudson's Bay Company began to engage in more direct competition with the Moravians by establishing a post at Davis Inlet and outright purchase of the Moravian post at Port Burwell on Killinek Island. Active involvement in commercial ventures by the Moravians ceased about 1927. As early as 1920-21, the Hudson's Bay Company began to negotiate directly with the Church to take over the missions' trading activities on the coast of Labrador. It was not until 1926 that a final agreement was reached to lease the Moravian stations in Nain, Hebron, Okak, and Makkovik for a term of 21 years. These leases were scheduled to expire on November 1, 1947.⁵⁴ Later, when the Hudson's Bay Company abandoned their trading operations on the Labrador coast, the leases were transferred to the Government of Newfoundland.

1. THE EFFECTS OF THE DEPRESSION IN LABRADOR

With the exception of measures designed to assist or supplement the activities of the Moravian missionaries or the fur trading companies, government involvement with Aboriginal peoples and in the day to day administration of Labrador was extremely limited until the 1940's. The Newfoundland Rangers were responsible for administering justice, maintaining the peace, and for allocating relief to both Aboriginals and non-Aboriginals who were in distress. There

is nothing to indicate that policies were designed or implemented for the sole benefit of Aboriginal peoples. In fact, laws, regulations, and policies were applied equally through Labrador as well as the Island portion of Newfoundland. Increasing distress among individuals, the penetrating effects of the Great Depression and the decline in markets for furs and other renewable resources combined to increase this role and give governmental authorities far greater visibility.

The high prices of fur during the 1930's and the clamour to meet market demands increased the dependence of Aboriginal peoples on the Hudson's Bay Company. The traditional subsistence economy and the extremely low level of commercialization was forsaken for concentration on the fur trade and the development of a cash nexus between the individual and the company store. It had a severe effect on the pattern of traditional harvest activities; autumn and winter sealing were largely abandoned and people decreased their level of participation in traditional fishing activities. Fur became the major currency on the Labrador coast and fur only, not fish or seal, could be traded at the company store for foodstuffs, clothing, and other goods. In essence, the company store, with its only goal of profit, replaced the Moravian mission and store, with its paramount concern for self-sufficiency and maintaining control over the religious and cultural lives of the inhabitants.

The depression of the 1930's spelled disaster for the economy and the social structure of Labrador. The price of furs fell to the point where trapping could no longer provide a living and the cost of outfitting for the harvest frequently exceeded the margin of profit. The barter system, consisting largely of the exchange of furs for durable goods, did not produce the amount of currency necessary to purchase foodstuffs and other supplies. Traditional subsistence harvest

activities were no longer viable as necessary equipment such as ammunition, seal nets, and other necessities were unavailable without hard currency, and the low price of furs often prohibited their purchase. The dispersed population of Labrador, lack of infrastructure, and limitation of economic activity could not provide alternate employment. In January 1939 it was estimated that 95 percent of the population of Hopedale was totally dependant on social assistance. In 1942 the population of all of Labrador was merely 1300 people living in 25 different settlements. The population ranged from about 4 in Zoar to about 275 in Nain.⁵⁵

By the early 1940's the price of furs once more rose to the point where harvesting was profitable. However, the lack of available cash still prevented trappers from obtaining adequate supplies to engage in harvest activities. It was also extremely difficult to revive the seal fishery after a long period of neglect while the cod fishery was characterized by poor markets and low prices. Isolation and distance from market centres meant that Labrador fish had to be salted; however the salt fish market was still depressed and sufficient supplies of salt were difficult to obtain. This was exacerbated by the fact that cash or other goods could not be traded to purchase the necessary salt. To conclude, a dispersed and sparse population, lack of currency and credit facilities, decline of markets for local products, and disintegration of the barter and credit system totally eroded the foundation of previous government policy in Labrador, if indeed there was a coherent policy or goal for development. Neither the Moravian missions nor the trading companies could continue to maintain their establishments and perform any role as benefactor and patron of Aboriginal peoples.

A report compiled by the Moravian Mission Board in 1939 illustrates many of the factors which led to more direct government involvement in the economic and social life of northern

Labrador.⁵⁶ This report indicated that the Inuit were *"losing the means they require to lift themselves out of their poverty"* and described in detail the reasons behind this desperate situation. The report mentions that the cause of poverty lay mainly in the *"fall in the prices obtained for the staple products"* and in the *"diminution of ... the demand for certain products"* produced by the Inuit. The Moravian missionaries were also compelled to contribute large sums of money for relief and to provide clothing, food, and other supplies directly to the Inuit from donations brought over from England. The report recommended the establishment of schools, hospitals, and other institutions. However, a more immediate problem was the monetary assistance given to the Inuit by the Newfoundland Rangers called *"relief."* The report mentioned that sickness and undernourishment could not be eliminated just through the provision of relief. It also castigated the *"relief"* policy. If food or money was given to an able bodied Inuk, regardless of whether or not there was any chance of repayment, it was treated as a loan and the money had to be returned from the sale of whatever products he could produce such as fish, fur, and other handicrafts. The report suggested direct remedial action by government rather than rely on relief *"doled out"* by the Newfoundland Rangers. The conclusion of these recommendations was direct and decisive involvement of the Commission of Government.⁵⁷

(2) THE CLOSURE OF THE POSTS (1942)

Reports and studies may have provided a vivid description of the situation in northern Labrador, but the request for direct government involvement was accompanied by coherent plans for addressing social and economic despair. However, a single event forced the Commission of Government to act decisively and become intimately involved in the affairs of northern Labrador. The reports on the economy and the inability of the Inuit to support themselves

through traditional activities destroyed another pillar of government policy toward Aboriginal peoples. If the role of the Moravians was severely diminished in the 1920's, the role of the Hudson's Bay Company was equally diminished owing to the depression in the late 1930's and early 1940's. As a charitable institution, the Moravians could still function as protectors and agents for donations from afar. However, a trading company was designed to merchandise goods for a profit and no other purpose. On March 9, 1942 a critical juncture was reached. Mr. Ralph Parsons, factor and representative of the Hudson's Bay Company wrote to the Honourable Sir John C. Puddister, Commissioner for Public Health and Welfare. He informed him that the Hudson's Bay Company intended to close its Labrador operations in the communities of Hebron, Nain, Hopedale, Nutak, and Davis Inlet effective May 31, 1942. Mr. Parson's correspondence was in fact an open invitation for government to assume all the responsibilities which it had previously delegated by design or in reaction to requests from other agencies:

*"As you are familiar with the conditions on the Labrador coast you will fully realize just what withdrawal from these posts will mean to the 1500 natives who will be affected and you will no doubt take such actions as you may consider necessary for their protection and assistance."*⁵⁸

Government's initial response was to request a delay of one year in the closure of the Hudson's Bay Company stores to investigate the effects this decision would have in northern Labrador and to devise a course of remedial action. This was refused. The Company only agreed to extend the deadline to July 15, 1942. However, they did agree to sell all of the provisions in hand; equipment, fishing gear, the Davis Inlet depot and leases held from the Moravian mission for the stores in Nain, Nutak, Hebron, and Hopedale at a reduced price to the Government of Newfoundland. An Agreement was reached between the Government of

Newfoundland and the Hudson's Bay Company on June 20, 1942. According to the terms of this Agreement, Newfoundland assumed the ownership and control of all Hudson's Bay Company assets in northern Labrador.

The policy established by Governor Palliser whereby non-government institutions exercised control and patronage without the direct involvement of government or officials had come to an end. The Moravians were forced to abandon their trading operations in favour of the Hudson's Bay Company and the Hudson's Bay Company was subsequently forced to abandon the same because of a totally deteriorated economic structure. Although the Moravians did maintain a position of tutor and benefactor to the Inuit and the Hudson's Bay Company was still involved in whatever fur trading activities would or could continue over the next decades, for the first time authority was exercised by government officials in direct contact with Aboriginal peoples in Labrador. The allocation of "*relief*" by the Rangers was replaced with bureaucratic and administrative involvement. Government became more than a storekeeper for northern Labrador and began to assume all the administrative and jurisdictional responsibilities at a level comparable to other communities in Newfoundland. In its role as storekeeper government involvement in Labrador was perhaps even more pervasive than that in other communities both small and large on the Island of Newfoundland. Direct involvement by government in the northern Labrador communities was not founded on the basis of special legislation or recognition of Aboriginal rights or special privileges. Government was forced to fill the gap when other institutions could no longer function and the

previous infrastructure had completely deteriorated. Modelled on the structure of the trading ventures of the Moravians and the Hudson's Bay Company, a new institutional framework was created.

3. NORTHERN LABRADOR TRADING OPERATIONS

The Commission of Government acted with great dispatch following the correspondence of Mr. Parsons in March 1942. By July of 1942 The Northern Labrador Trading Operations was created as a new division within the Department of Natural Resources. This new division was given a strong mandate which extended far beyond the normal role of government during this period. Northern Labrador Trading Operations was mandated to conduct all retail and trading operations in northern Labrador. It was also instructed to develop and implement programs to foster economic growth in the northern communities.⁵⁹ The role of government in the provision of programs and services was implanted quite rapidly and directly, along with the domination of retail and trading operations. Unlike on the Island of Newfoundland, government in Labrador was both merchant and trader, as well as administrator and provider of social benefits. It is necessary to provide a brief summary of government administration in Labrador following the establishment of the Northern Labrador Trading Operations. The functions of the Northern Labrador Trading Operations were transferred to the Department of Public Welfare in September 1951. The Deputy Ministers of Natural Resources, Health, Education, Fisheries and Cooperatives, and Public Welfare were appointed as a permanent Standing Advisory Committee to advise government on matters relating to

Labrador. A new division was created entitled Northern Labrador Services and an expanded mandate granted for intimate involvement in virtually every aspect of the social and economic life of the region.⁶⁰ Northern Labrador Services was given a dual functional mandate. It was to be responsible for all trading and retail operations in northern Labrador and given the additional responsibility for the administration and deliverance of all government programs and services to residents of the area on the same basis as those delivered to residents on the Island of Newfoundland.

III. CONFEDERATION AND THE TERMS OF UNION

1. THE CANADIAN CONTEXT

The purpose of this section is to determine the status of "*Indians and Lands Reserved for Indians*" on the entry of each province into Confederation, to delineate the parameters of federal and provincial responsibility, and to assess the liability of each province to provide lands or other benefits for Aboriginal peoples. The situation varied, often by a wide margin, between each province depending on the nature of pre-Confederation relations with Aboriginal peoples and the status of lands and resources allocated to each new provincial jurisdiction.

A detailed analysis of this issue is necessitated by the intensive scrutiny of the courts, historians and legal commentators on the issues of pre-Confederation legislation, the meaning and intent of federal constitutional responsibility and the legal and constitutional status of Indians and Indian lands at the time each colony became a province of Canada. Analysis of each Canadian province provides the legal and constitutional context to determine the status of Aboriginal peoples in Newfoundland at the time of Confederation. If Newfoundland differs from

the norm, then a basis of comparison must be established to comprehend the Terms of Union of 1949 and the controversy surrounding the absence of reference to Aboriginal peoples.

(A) PRE-CONFEDERATION LEGISLATION

Prior to 1850, legislation regarding Indians was incomplete, virtually unenforceable and often divorced from any long-term goals or policy objectives. At the date of the Robinson Treaties (1850) in Upper Canada, management of Indian affairs was still in the hands of the Imperial Government and administered under the auspices of the Governor General. In 1854 management of Indian affairs was shifted to the province of Canada. Responsibility or jurisdiction for Indian affairs was transferred from the Imperial Government to the Province of Canada in 1860 (23 Vict., C. 151).⁶¹ Under this Act, the Crown Lands Department assumed control over Indians and Indian lands and the Commissioner of the Department was designated as Superintendent for Indian Affairs.

Ontario, Quebec, Nova Scotia and British Columbia enacted legislation for Indians and Indian lands prior to their entry into Confederation. Most of this legislation focused on the protection of Indians from the vagaries of white society and dealt with such matters as liquor, morals, and effective isolation from settlers through limitation on access to reserves by outsiders. Of supreme importance was regulating the sale of Indian lands to prospective (and unscrupulous) buyers, prevention of encroachment by settlers, and the protection of traditional economic activities in order to ease the burden of public relief.

During this period, legislation was essentially geared to the raising of moral and intellectual standards whereby Indians could aspire to "*white status*" and participate on an equal basis in society. Protection was the key note. For example, Chapter 57 of the Revised Statutes

of Nova Scotia (1864) contained twenty provisions, among which were; appointment of a chief Commissioner for Indian affairs, regulations for Indian lands, schools, annuities and other monies, and surveys of reserves.⁶²

Two major categories of Native Affairs policy had emerged as a result of this early legislation:

- 1) the protection and management of Indian lands was to provide the economic base for future prosperity;
- 2) the social and economic well-being of Indians was to be promoted through the administration of programs and services.

Ideally, lands were to be developed to the point where specialized services would disappear and reserves would be self-supporting communities not distinguished from their non-Aboriginal neighbours.

(B) CONSTITUTION ACT (1867)

The Constitution Act, 1867, set aside for the Parliament of Canada the exclusive legislative authority with regard to "Indians, and Lands Reserved for Indians" under Section 91.24. The full text of the preamble to S. 91 reads as follows:

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all matters not coming within the classes of Subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next herein - after enumerated; that is to say, -

*24. Indians and Lands Reserved for the Indians. "*⁶³

In order to prevent conflict (and ensure the integrity of federal powers conferred upon Parliament by S. 91) between federal and provincial legislatures, and prohibit the provinces from claiming any jurisdiction regarding federal matters which directly affected individual provinces, the following clause was appended to S. 91:

"And any matter coming within any of the classes of subjects enumerated in this Section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

This effectively bars the provinces from enacting legislation for Indians and Indian lands.

Two other sections of The Constitution Act, 1867, Sections 109 and 111, also bear relevance to contemporary Native issues. Provincial ownership of lands and minerals is confirmed by Section 109:

*"All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the union, and all sums then due or payable for such lands, mines, mineral, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any interest other than that of the province in the same."*⁶⁴

The term "*Trusts*" has been interpreted as including any Indian lands set aside in the pre-Confederation era and falling within the ambit of Section 91.24 after Confederation. The four western provinces were placed in the same position by the Constitution Act, 1930 (21 Geo. V, C. 26, U.K.).⁶⁵ The phrase "*any interests other than that of the Province*" has also been interpreted by the Native groups to infer that unextinguished title to lands or resources is thereby protected. Such lands or resources are, therefore, effectively held in trust by the Federal Government. Section 111 addresses the problem of liability:

"Canada shall be liable for the debits and liabilities of each province existing at the union."

According to the same line of interpretation, Canada is, therefore, liable for the extinguishment of title to Indian lands, and for the provision of other benefits brought by the Province into Canada upon entry into Confederation. This reinforces the legislative powers under S. 91 (24). It also infers that, whatever the legislative authority under the Crown, the *"Indian title"* was always a burden to be addressed.

Section 92 enumerates the general categories which are exclusively within the realm of provincial legislative competence. Section 92.13 and Section 92.16 are the most far-reaching:

92.13 *"Property and Civil Rights in the Province."*

92.16 *"Generally all matters of a merely local or private nature in the Province."*

Thus, the right to legislate regarding lands, wildlife, forest and mineral resources lies within provincial jurisdiction but only to the extent that such legislation does not conflict with Indian treaties or reserves, or relate specifically to the legislative authority of Canada under *"Indians and Lands Reserved for the Indians."*

At Confederation, control of Indian affairs passed solely to the Federal Government. Provinces, therefore, had to relinquish this power. Responsibility was delegated to the Federal Department of the Secretary of State for the provinces. The Secretary of State became Superintendent - General of Indian Affairs.

(C) THE INDIAN ACT AND FEDERAL POLICY

In 1868, the Parliament of Canada passed an act to provide for the organization of the Department of the Secretary of State for Canada, and for the management of Indian and

Ordinance Lands.⁶⁶ The Superintendent-General of Indian Affairs was granted sole authority over the management of Indian lands and property, and all Indian funds. Section 8 regulated surrenders of Indian lands. Sections 30 to 32 placed all proceeds from Indian land sales, timber sales or leases of land with the Receiver General of Canada for the credit of the Indian Funds as well as all monies accredited to the separate Indian Funds of New Brunswick and Nova Scotia. According to Sections 26 and 34 to 36, the Secretary of State for Canada acquired jurisdiction over all Crown Lands in the Northwest Territories or any other lands under the jurisdiction of Canada. Section 37 authorized the Governor-in-council to make regulations for the protection and management of Indian lands and all timber thereon. It also classified the penalties for trespass and the illicit cutting of timber on reserves.

The Indian Act of 1869 was particularly significant in that it attempted to strictly define an "Indian:"

*"In the division among the members of any tribe, band, or body of Indians, of any annuity money, interest money or rents, no person of less than one-fourth Indian blood born after the passing of this Act, shall be deemed entitled to share in any annuity, interest or rents, after a certificate to that effect is given by the Chief of Chiefs of the band or tribe in Council, and sanctioned by the Superintendent - General of Indian Affairs."*⁶⁷

The object was to clarify who was - and who was not - an Indian, and reduce the level of expenditures by the Department.

In both the Acts of 1868 and 1869 there were three major areas of concern; status and band membership; enfranchisement; and land management. Government policy was based on the premise that Indians were to be tutored until the day arrived when they would seek "enfranchisement," and take their place in society as equal citizens. In the meantime, Indians

were to be protected and nurtured. This was the basis for the formulation of contemporary Indian legislation. In order to achieve this goal, the Federal Government, under a single authority, was to assert its constitutional prerogative and assume the burden of Indians previously shouldered by various provincial and colonial governments.

A new policy initiative was introduced in 1870. According to Article 14 of the Imperial Order in Council admitting Rupert's Land and the North Western Territory into Canada, Canada agreed to relieve the Hudson's Bay Company of the responsibility to satisfy Indian claims for compensation for lands required for the purpose of settlement.⁶⁸ Article 14 is clarified by the address to the Queen by the Senate and Parliament of Canada to petition for the purchase of Company lands:

*"... upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealing with the aboriginals."*⁶⁹

In effect, the Canadian Government, at least by intent if not by specific wording agreed to the basic principles contained in the Royal Proclamation of 1763. Article 14 led directly to the Canadian Government decision to enter into a series of treaty negotiations and settlements between 1871 and 1877 in the Northwest Territories, which then included most of the Prairie Provinces. These treaties initiated the formulation of the "*numbered treaties*," a process which continued until 1921, although many groups signed in subsequent years if they were excluded from the initial negotiations. The primary goal of government was to extinguish Aboriginal title in all frontier areas prior to the advance of settlement and to grant treaty rights and benefits in return for the surrender of Aboriginal title.

The Indian Act of 1876⁷⁰ was the most far-reaching development regarding Indians immediately after Confederation. The Act, as with previous Acts, derived its authority as of S. 91.24 of the Constitution Act (1867), and was intended to provide a vehicle for the exercise of those powers. The Indian Act of 1876 revised and consolidated all pre-existing legislation dealing with Indians, whether in the provinces or the federal territories. There were three basic areas of concern; land, membership in Indian bands, and reserve government. A Board of Reserve Commissioners was also established to settle the Indian reserve question in British Columbia, and define the legislative and jurisdictional responsibility of the two levels of government.

Control over Indian affairs necessitated the creation of a far more elaborate bureaucratic structure. In 1880 (43 Vict., C. 28)⁷¹ an independent Department of Indian Affairs was established. The Minister of the Interior, however, continued in his role as Superintendent - General of Indian Affairs and presided over the new department. By this time the multitude of local federal authorities were being replaced by the new central agency. For example, in 1882,⁷² the Central Indian Superintendency of Ontario was abolished and the Department of Indian Affairs assumed its functions. Distinct branches were also set up within the Department to deal with specific issues such as timber, accounts, and records.

(D) NOVA SCOTIA AND NEW BRUNSWICK

Nova Scotia and New Brunswick were initially settled by Europeans without the guidance of any prior colonial policy with respect to Aboriginal peoples. There is no record in the Maritime Provinces of any land cession treaties whereby the Indians agreed to cede or surrender their title to the land or any of its resources. No title to land or wildlife rights had ever been

extinguished according to the procedures set forth in the Royal Proclamation of 1763, despite the fact that many recent judicial decisions appear to favour the view that it applied to the Maritimes. Treaties were frequently made with Indian tribes or groups of tribes, but they were merely considered by the authorities to be treaties ending immediate conflict and forging military alliances.

Land in the Maritimes was parcelled out and granted to settlers by authorized representatives of the Crown. For example, the new colony of New Brunswick was created in 1784 largely to provide a home for the massive influx of United Empire Loyalists following the American Revolution. Lands were granted without any reference to Aboriginal lands or harvest rights.

Indians were being increasingly restricted to specific areas which were later set aside for their exclusive use and benefit owing to pressures created by the advance of settlement. Between 1780 and 1820 a number of reserves were created. They were usually located in areas of poor agricultural potential. During the same period, the governments of Nova Scotia and New Brunswick adopted a policy of issuing licences to Indians for the occupation of peripheral farm land. In Nova Scotia, there was a concerted effort to prevent traditional Indian nomadism in pursuit of fish and game through the encouragement of settlement and farming. Self-support was a paramount concern. Agriculture was to be promoted on the various reserves, while Indians were also granted occupation licences as ordinary settlers and given the necessary implements to commence farming.

Indian reserve lands were the object of constant erosion. Many squatters simply settled without any permission whatsoever, and they were often given a grant to the land after twenty

years' adverse possession. Moreover, it appears that a pattern of private deals were frequently made whereby land was either purchased or taken from Indian reserves by private individuals (sometimes directly from the chief) without the knowledge or consent of other members of the band.

Some lands were severed from reserves by direct legislative action. For example, in 1844 ⁷³ the Government of New Brunswick passed "*An Act to Regulate the Management and Disposal of the Indian Reserves.*" This Act provided for the sale of any unimproved Indian lands by the Government at public auction without requiring the consent of the Indians. Money received by the Government from these sales was to be expended for the benefit of the Indians. But Government first deducted the costs of surveying and auction, and then charged a 5% commission. This statute remained in effect until Confederation in 1867.

At Confederation, what remained of the original reserves allotted to Indians fell within the jurisdiction of the Federal Government, and Indians were later governed by the articles of the Indian Act. There was absolutely no qualification to either enter into treaty negotiations or entertain the concept of Aboriginal title beyond the confines of the reserves. Moreover, both provinces entered Confederation under the full impact of Section 109 of the Constitution Act, 1867, which guaranteed provincial ownership of all lands, mines, minerals, and royalties.

In 1959 two parallel agreements were enacted into law concerning Indian reserve lands; one between the Federal Government and New Brunswick and the other between the Federal Government and Nova Scotia. They were rooted in the fact that, since Confederation, certain Indian reserve lands had been surrendered to the Crown by the Indians. Letters Patent had been issued under the Great Seal of Canada "*purporting to convey said lands to various persons.*"

The Judicial Committee of the Privy Council had long before made two decisions in regard to Indian lands in Ontario and Quebec. They concluded that Indian lands could only have been lawfully conveyed by the authority of the Province. This was specifically mentioned in the two Acts and was the basis for the agreements between the provinces and the Federal Government. Conveyances by the Federal Government in Nova Scotia and New Brunswick had resulted in the grantees holding defective titles which had occasioned "*hardship and inconvenience.*" The Act was intended to clarify the tenure of previous grants and settle the contentious issue of mineral exploitation and royalties.⁷⁴

(E) QUEBEC

In Quebec, reserves were originally established in areas of land set aside in the pre-Confederation era by government or religious authorities. At Confederation in 1867, jurisdiction over Indians and Indian lands passed to the Federal Government. The right of reversion to all Indian lands, however, lies with Quebec.

In 1912, the boundaries of Quebec were expanded to encompass all of the Ungava region under Canadian jurisdiction. One of the stipulations of this transfer was that Quebec was compelled to recognize the rights of the Native population. This recognition was made law. Section 2 (c) of the Quebec Boundaries Extension Act (2 Geo. v, c. 45)⁷⁵ grants a considerable measure of responsibility to Quebec:

"That the Province of Quebec will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders."

Sections 2 (d) and 2 (e), however, emphasized the ultimate jurisdiction of Canada over both Indians and Indian lands:

"(d) That or such surrender shall be made or obtained except with the approval of the Governor in Council:

(e) That the trusteeship of the Indians in the said territory and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament. "

This Act was the basis for Quebec's involvement in comprehensive land claims. It was ruled in court, subject to negotiation of the James Bay Agreement, that Quebec was bound to honour its terms and fulfil the obligations divested by Canada. These clauses largely determined the spheres of jurisdiction between the two levels of government as set out in the benefits included in the land claim settlement.

(F) ONTARIO

A Report from the Select Committee on Aborigines in 1837:⁷⁶ sets out many of the principles currently accepted as the basis for contemporary Aboriginal rights.

The principles set out in the Report were summarized in an early 20th century legal decision, which stated that Federal Crown is under an obligation, stemming from the Imperial Crown and such instruments as the Royal Proclamation of 1763, to protect Native peoples. The Federal Government is therefore compelled to honour its obligations. In its relations with the Indians, the Crown was, and still should be, represented by the most central authority. The Indians are thus, "*wards of the state*" and their "*care and welfare*" is a "*political trust of the highest obligation*" (St. Ann's Island Shooting and Fishing Club Ltd. v. The King (1950) S.C.R., 211 at 219).⁷⁷

In 1850 the legislature of Upper Canada passed an Act for the Protection of the Indians (13 & 14 Vict., c.74).⁷⁸ This provided a model for future legislation. A number of provisions were enacted to assign a special status to Indians vis-a-vis the state (i.e. exemption from taxation) and to protect Indians in their dealings with other persons (i.e. prohibition of purchase of Indian lands without the consent of the Crown, protection against seizure by any legal process of the property purchased by Indians with annuity payments). This concept was emphasized in the Constitution Act 1867, which delineated a special class of persons as themselves constituting a particular subject of legislative competence in the distribution of powers between Canada and the provinces. It reflected the fact that the relationship of the Crown to members of this class of persons was different from its relationship to others. This obligation was further emphasized in the Order-in-Council admitting Rupert's Land and the North-Western Territory into Canada:⁷⁹

"That upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer."

The question of obligation, however, is political and not a matter of law. Except in cases which involve Indian property, the courts were deemed to have no competence to review the question of whether or not other obligations had been fulfilled. The case of *Henry et al v. The King* (1905), 9 Ex. C.R., 411 at 443-4 elucidates this concept:⁸⁰

"For the manner in which the affairs of the Indians are administered the Government of the Dominion and the Superintendent General are to all material times responsible to Parliament; and whenever in respect of such matters any power, authority or discretion is vested in and exercised by the Governor in Council, or in the Superintendent General of Indian Affairs, Parliament alone has the authority to review the decision come to or the action taken. In all such cases the court has no jurisdiction."

Thus, services or other benefits extended by the Canadian government generally should be extended to Indians pursuant to the obligation. Special benefits may, however, be provided to Indians under certain circumstances. Under the Constitution of Canada responsibility for the fulfilment of this obligation lies with the Federal Government.

Economics, efficiency and convenience has led to the utilization of provincial institutions and programs for the delivery of general services and for the provision of special services and benefits designed solely for Indians. In some instances (i.e. justice) there is a clear policy rationale for not distinguishing between Indians and other citizens in the matter of program delivery. The cost of the services delivered through provincial structures is to be paid by the Federal Government according to its constitutional obligation for Indians.

In Ontario the late nineteenth century was marred by federal-provincial conflicts regarding jurisdiction and obligation to Indians. The most spectacular was the dispute over the payment of increased annuities resulting from the Robinson Treaties of 1850. In 1879, Parliament voted an increase from 60¢ to \$4 per head, and insisted that Ontario should bear the responsibility for payment. A statement by a federal member from Ontario summarizes the position of the Dominion Government:

*"... the claims of the Indians of Lakes Huron and Superior formed, in fact, a lien on the land, and that as the Government of Ontario received revenues from the land, the Government should be called upon to meet the arrears due to the Indians."*⁸¹

The Supreme Court ruled that liability for these annuities lay with the Dominion, not the Province. This ruling was upheld by the Judicial Committee of the Privy Council.

A statute of 1924 (14-15 Geo. v, c. 48)⁸² defined the jurisdictions of the federal and provincial governments respecting Indian lands and the minerals thereunder. Any person

authorized under the laws of Ontario to prospect for minerals may enter upon Indian reserves with the permission of the Indian agent, but is subject to the terms set forth by the Agent. Staking of claims was to follow the provisions of the Indian Act. Royalties or rents were to be equally divided; one-half to be remitted to the Province of Ontario and the other half to the Dominion of Canada to be expended for the benefit of the Indians. This did not apply to lands ceded under the Treaty of 1873. All leases or sales made by the Dominion prior to the Act were also protected. Any lands or assets acquired by Ontario through surrender were to remain wholly under the ownership and control of the Province according to Section 10 of the Act.

(G) MANITOBA

Manitoba is unique in that it was the first province to be created following Confederation in 1867. The original province, however, was a small block of territory, formerly known as the Red River Colony. Prior to Confederation, there were no treaties or other agreements struck with Native people, either by the colony itself or by the Imperial or Dominion Government.

Section 30 of the Manitoba Act⁸³ of 1870 reserved all ungranted lands for the Dominion:

"All ungranted or waste lands in the province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion, subject to, and except and so far as the same may be affected by, that conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to her Majesty."

This Act in effect, set the pattern by which the Dominion Government was to retain control over lands and natural resources upon the creation of new provinces out of territorial lands previously under the jurisdiction of Canada.

The problem of the Metis or "*half-breeds*" was addressed by the allotment of lands to individual heads of families. Settlement and integration into an agricultural society was the foundation of this policy. Section 31 of the Manitoba Act sets out the basic structure of a land allotment scheme. In lands where the Indian title has not been extinguished, occupiers in peaceful possession could remain and have the right of first choice to the land.

Between 1873 and 1884 the distribution of Crown lands in Manitoba was the subject of eleven legislative acts. For example, one amendment to the Act of 1870 reduced the number of heads of Metis families eligible to receive land grants by about 40%. This was corrected by the amendment of 1874 which promised heads of families personal property in the form of "*script*" which was supposed to be redeemable for land. Section 31 of the Manitoba Act was responsible for the creation of this problem. The preamble to the 1874 Act elucidates the origin of exclusion of half-breeds from the system of land settlement designed for Indians. Rather than establish reserves for Metis or define who was or was not an Indian by establishing a stringent definition, all Metis or "*half-breed*" claims were to be extinguished by the grant of specific plots of land to individual heads of families or a grant of money in lieu of the same.⁸⁴

The Manitoba Boundary Extension Act of 1912,⁸⁵ unlike that of Quebec and Ontario contained no provision regarding either Indians or Indian lands. On the other hand, the Manitoba National Resources Transfer Agreement of 1930, contained the exact provisions as Alberta and Saskatchewan. By this Act, Manitoba was compelled to give

up Crown lands for the satisfaction of treaty entitlements. In 1978, the province of Manitoba adopted a general policy in order to fulfil this burden.(Appendix IV)

(H) BRITISH COLUMBIA

British Columbia became a Province of Canada in 1871. The thirteenth article of the Terms of Union resulted in an ongoing controversy between the Province and the Federal Government, especially as it relates to Indian land policy and administration:

"The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia after the union."

"To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the local government to the Dominion Government in trust for the use and benefit of the Indians, on application of the Dominion Government..." ⁸⁶

The former colony did not formulate its policies in a written code; nor did the Colonial Administration acknowledge any Indian land rights or titles. From 1867, a policy was pursued which allowed for a "fair" allotment of approximately ten acres to the head of every Indian family in the colony. In March of 1873, Ottawa requested that British Columbia allot eighty acres for each Indian family of five and accordingly adjust the size of established reserves in the province. Although the province claimed that Indian land entitlements had already been satisfied, it did compromise and only allowed for future allotments to not exceed twenty acres for each family of five. In May of 1874,

the Minister of the Interior (Canada) informed the Province that Canada did not intend to compensate the Indians for lands taken by the province.

A dispatch to Sir John A. MacDonald by Lieutenant-Governor Tritch in 1872, stated that British Columbia's Indian policies were totally inconsistent with those of the Federal Government. Tritch was particularly concerned about the allotment by Canada of quarter-section land grants to every Indian family of five and the payment of annuities to each member of the signatory bands. He also stated that there would be a strong public reaction from "white" settlements if reserve lands were extended: ⁸⁷

"The Canadian system as I understand it, will hardly work here - we have never bought out any Indian claims to lands nor do they expect we should - but we reserve for their use and benefit from time to time tracts of sufficient extent to fulfil all their reasonable requirements for cultivation or grazing."

The establishment of reserves in British Columbia was the subject of a Royal Commission of Inquiry, which tabled its final report in 1916. In 1920, a statute was enacted which enabled the government to "cut-off" unimproved or unused portions of reserves. The Act was intended for one purpose - the settling of disputes between the two levels of government, and not between the Indians and government. This enabled the Government of British Columbia to "cut-off" or in fact expropriate lands previously allocated to Indian reserves without surrender by the Indians to any interest in the same.

Relations between the Province and the Federal Government with respect to Indian lands remained fairly hostile. For example, when the Railway Belt and the Peace River

Block were returned to British Columbia from federal control in 1930, a special clause (S. 13) was inserted into the Constitution Act (1930): ⁸⁸

"Nothing in this agreement shall extend to the lands included within Indian reserves in the Railway Belt and the Peace River Block, but the said reserves shall continue to be vested in Canada in trust for the Indians..."

Ultimate ownership of lands, and the right of reversion, remains with the Province of British Columbia. In an agreement of 1912, Indian reserve lands were conveyed to the Dominion Government as trustee for the Indians. But precious metals under these lands were not incidents of such lands; they belonged beneficially to the Crown in right of British Columbia. The prospect of extensive mineral royalties compelled the two governments to reach a legislated agreement in 1943 (7 Geo. VI, C. 19): ⁸⁹ The terms of this agreement established that the administration, control and disposal of all minerals and mineral claims are subject to provincial law. Prospecting cannot be carried on without the permission of the Indian agent, subject to the terms and conditions set out by the agent. Such permission, however, could only be granted to persons approved by provincial authorities. The Department of Mines of British Columbia is responsible for the collection of all rents and royalties. One half of the revenue collected belongs to the province, while the other half is remitted to the Receiver-General of Canada. The Dominion portion is to be expended for the use and benefit of the Indians on the reserve.

(I) PRINCE EDWARD ISLAND

The Order in Council making Prince Edward Island a Province of Canada in 1873⁹⁰ was totally silent on the question of Indians or Indian lands. In 1765 the Island

was, in effect, divided into a grid of landed estates and then lotteried off to landowners. The recipients were largely absentees or soldier - settlers. In 1769, Prince Edward Island was separated from Nova Scotia and became a distinct colony. Throughout the course of these events, no mention at all was made of either Indians or Indian lands. No lands whatsoever were set aside and no reserves were created.

The number of Indians in Prince Edward island was and is extremely small. They were essentially Micmacs who had migrated from their mainland Nova Scotia home. Originally, the Island appears to have been an extended part of their territory, utilized for wildlife harvesting. As Indians were without reservations, they occupied Lennox Island and simply refused to be evicted. The Island was purchased for them by the Aborigines Protection Society of England. This "*reserve*" later came within the realm of federal jurisdiction. The Order in Council making Prince Edward Island a province of Canada did not address the issue of Indians or Indian lands. As in the case of Newfoundland the Order is conspicuous by its silence.

(J) ALBERTA AND SASKATCHEWAN

Alberta and Saskatchewan entered Confederation simultaneously in 1905. They were carved out of the North-West Territories, lands previously under the sole jurisdiction of the Dominion of Canada. Prior to 1905, treaties had effectively extinguished Aboriginal title, and reserves and hunting rights were established. It is important to note that both provinces entered Confederation with the burden of treaties

previously concluded by the Dominion Government, and were subject to federal legislation relating directly to Indians and Indian lands already in place.

Upon assuming control of the North-West Territories in 1870, the Federal Government began to draft legislation regarding the most important resource of the region - land. The fact of Indian title was recognized. For example, Section 42 of the Dominion Lands Act of 1872 (35 Vict., c. 23)⁹¹ dealt with extinguishment:

"None of the provisions of this Act respecting the settlement of agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished."

In 1879, recognition of Metis rights was considered in lands outside the original boundaries of Manitoba, - Alberta, Saskatchewan, Northern Manitoba and the present day Northwest Territories (Dominion Lands Act, 42 Vict., c. 31).⁹²

The Alberta Act (4-5 Edw. VII, c. 3) and the Saskatchewan Act (4-5 Edw. VII, c. 42) of 1905 contained no specific or implied reference to Indians or Indian lands. Both statutes contain similar or exact terms with regard to jurisdiction over lands and resources. Prior to Confederation all land was under federal jurisdiction, subject to treaty agreements and various land acts of the Dominion of Canada. It is important to note that both the Alberta and Saskatchewan Acts include clauses with respect to the assumption of debts and liabilities by the federal government. During the period from 1905 to the Natural Resources Transfer Agreements 1930, however, the Federal Government could

have resolved any debts of land or other rights to Native peoples where the Crown in right of Canada still held precedence.

In 1930, agreement was reached in which Alberta, Saskatchewan, and Manitoba were given complete control of the natural resources within their respective boundaries. The Agreements - The Natural Resources Transfer Agreements - were amendments to the Constitution Act, 1867: (20-21 Geo. V, C. 26, (1930)).⁹³ The Government of Canada was well aware in 1930 that commitments made to Indians under the various treaties had not been fulfilled at a time when these lands were solely under federal control. Thus, provisions were made in the Agreement whereby the province concerned would be legally obligated to allocate unoccupied Crown lands to Canada when the situation arose to settle unfulfilled treaty land entitlements. The phrase "*unoccupied Crown lands*" was defined in 1932 by the Saskatchewan Court of Appeal: "... *land which is vacant, idle, not used, not appropriated for a particular purpose.*" Section 10 of the Act dealt specifically with the question of reserves:

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

Thus, any lands chosen to honour this portion of the Agreement would become permanently alienated from the Province and placed under federal control. Section 12 of the Agreement guaranteed wildlife harvest rights:

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

Several court decision have been based on the literal interpretation of the Act, which has generally been upheld as paramount legislation and agreements affecting Indian lands or wildlife rights. The Act is also explicit in that, although the Province is compelled to supply lands to honour commitments made to Indians, it must be done by agreement; no particular process was established whereby this may be achieved.

The substantial catalogue of federal and provincial legislation, constitutional amendments, federal/provincial agreements and Terms of Union or similar agreements to enter into Confederation with Canada should provide some insight into the situation in Newfoundland in 1949. All these instruments were designed to address measures taken to deal with the issues of Indian treaties; the disposition of lands for the sole use and benefit of Aboriginals; the provision of special programs, funds and administrative structures; and the carving of provinces out of lands previously administered solely by

Canada. It is critical to discuss Newfoundland's Terms of Union against this varied and complex background.

2. THE TERMS OF UNION BETWEEN NEWFOUNDLAND AND CANADA

The Terms of Union between Canada and Newfoundland contain absolutely no mention of Aboriginal peoples. In recent years, several studies have raised various reasons for what seems to be an incredible anomaly. This has ranged from simple oversight, to subterfuge, to overt omission and any other permutation which could be interpreted as somehow leaving Aboriginal peoples out in the cold by either Newfoundland or Canada. Misguided attempts to place the blame on either order of government (or both) fails to take into account the process by which the Terms of Union were negotiated and the social, cultural, and economic situation in Newfoundland between 1947 and implementation of the Terms of Union during the early 1950's.

There were several stages in the negotiation process leading to the Terms of Union. First of all, the National Convention of Newfoundland was elected by the people of Newfoundland. This body consulted with the Government of Canada in 1947 to determine the basis for a possible union between Newfoundland and Canada. In other words, they had to determine whether or not this union could indeed occur given the political, constitutional, and economic situation. Following discussions with this Delegation, the Government of Canada submitted to the Governor of Newfoundland a statement of terms which the Government of Canada would be prepared to recommend to the Parliament of Canada *"as a fair and equitable basis for union, should the people of Newfoundland desire to enter into Confederation."* These proposed terms were debated by the National Convention in Newfoundland. A referendum was

held on July 22, 1948 in which the majority of Newfoundlanders expressed the desire to enter into Confederation with Canada. This put into motion another set of negotiations whereby representatives of both Canada and Newfoundland were to meet and determine the final terms for union between Newfoundland and Canada. Agreement on these terms was reached on December 11, 1948⁹⁴.

(A) ABORIGINAL ISSUES IN THE NEGOTIATIONS OF 1947

In June 1947, the Newfoundland Delegation, chaired by Mr. F.G. Bradley and including Mr. J.R. Smallwood met with members of the Federal Cabinet to establish the terms of reference for discussions. At this initial session the main items for discussion were set out in an agenda which included each general area of government jurisdiction and administration. The purpose was to exchange all information as to the functions of the various departments and agencies of each level of government. The subject of Indians and Inuit was included in these discussions. For example, a sub-committee was struck on Indians and Eskimos composed of Mr. R. Hoey and Mr. C. W. Jackson of the Public Service of Canada and Mr. T. G. W. Ashburn, Rev. Lester L. Burry and Mr. J. R. Smallwood of the Newfoundland Delegation. They were instructed to

"bring together and examine information on the numbers, economic conditions, and the general situation of the Indians and Eskimos of Labrador and how they would be provided for in the event of union. A preliminary statement regarding the position of Indians and Eskimos in the event of union is attached as Appendix XI."

Appendix XI sets out what federal officials perceived would be the position of Indians and Eskimos in Newfoundland in the event of union.(Appendix V)

It was also pointed out that there is provision in the annual estimates submitted to the Canadian Parliament for the amount of money necessary for the education, and medical care of the Indians and Inuit in addition to the amount of money necessary to provide rations for the old and destitute. The following quotation extracted from Appendix XI summates the contemporary understanding of federal/provincial responsibilities:

*"Provincial governments in Canada do not contribute in any way to the support of the Indian population. There are, however, certain specific projects from time to time with respect to which provincial governments cooperate with the federal authorities. These include conservation projects, construction of roads, irrigation projects, etc. Such undertakings have usually been entered into on the understanding that the costs will be borne equally by the Dominion and the province."*⁹⁵

It appears that this explanation of federal policy for Aboriginal peoples was accepted by the Newfoundland Delegation as what would actually occur in the event that Newfoundland entered into Confederation with Canada. Further questions and answers raised during the meetings of the National Convention with representatives of the Government of Canada do not appear to disagree with this principle. Queries were based not on the principle of what is contained in Appendix XI, but rather on more detailed explanation of the various clauses in view of the peculiarities of Newfoundland, particularly the potentially divisive issue of denominational education. The session beginning July 2, 1947 lists under each issue or heading a series of questions by the Newfoundland Delegation and answers by the Canadian representatives. Items 33 and 34 of the minutes of the above meeting are the only relevant indications of a concern with Aboriginal issues:

"33. The Newfoundland Delegation asks whether the denominational or state schools were used in the education of Indians and Eskimos.

34. The Canadian representatives stated that the general federal practice has been to cooperate with both provincial authorities and religious groups in Indian education using whichever seemed appropriate to local conditions."⁹⁶

Again, some additional questions were submitted by a memorandum to the Newfoundland Delegation entitled "*Some Notes*"

*"Page 16, Section 39, Could we have some amplification, you see education of Indians referred to done through state schools or is the denominational principle recognized, what of Eskimos?"*⁹⁷

It is important to note that the only questions asked or considered difficult by the Newfoundland Delegation focused on whether or not denominational education was to be recognized in schools run by the federal government. The major question was whether or not the federal government intended to recognize the denominational system as it existed on reserves on the same basis in Indian or Inuit communities which do not possess reserve status. It appears that this principle was also applied to Inuit communities in the north. Federal officials informed their Newfoundland counterparts that the Roman Catholic, Church of England, Presbyterian, and United Churches had specific roles through their missions for the education of Aboriginal peoples. This appears to have satisfied the Newfoundland Delegation. Regardless, the clauses in the eventual Terms of Union relating to the denominational system would apply to Indians and Inuit in Newfoundland. In the absence of reserves this would in effect be of no consequence. This was again considered and put to rest by the end of the July session.⁹⁸ It is important to note that the Department of Mines and Resources operated the "*day schools*" for Indians and Inuit according to Section 100 of the Indian Act of 1927 which was in effect at the time of the Convention and the discussions with the Government of Canada. The denominational question

was particularly relevant in that as a result of the session beginning September 13, 1947, it was recorded in the notes that the Rev. Mr. Burry discussed this matter with the Indian Affairs Branch of the Department of Mines and Resources. To quote the minutes of the meeting

*"25. The Rev. Mr. Burry observed that it would be helpful to have a clearer picture of the position of Indians and Eskimos in Labrador in the event of union. It was accordingly suggested that arrangements be made for a discussion of this subject with the Indian Affairs Branch of the Department of Mines and Resources."*⁹⁹

It can be concluded that following the meetings of the Convention with representatives of Canada between the spring and autumn of 1947, there was never any serious questioning of the principles contained in Appendix XI. The only major concern lay with the Newfoundland Delegation and its questions regarding the application of denominational education for Indians and Inuit. It appears that this principle was held so sacred by Newfoundland that in fact it was the only concern ever expressed.

An attachment to the minutes of proceedings provide some insight into the issue of education for Indians and Inuit, with particular emphasis on provisions in the Indian Act (1927) providing for denominational education in Indian residential schools. The description of the procedures for day or regular schools may have caused some consternation amongst members of the Newfoundland Delegation. However, it should be pointed out that denominational adherence in Aboriginal communities in Newfoundland and Labrador was fairly homogenous. The section entitled *"Education of Indians and Eskimos"* is quoted beneath in full.¹⁰⁰

"The Dominion assumes full responsibility for the welfare, including education of Indians and Eskimos and has the control and management of their lands and property."

It can be concluded that the Newfoundland Delegation believed that the federal government was at least responsible for the costs of educating Indians and Inuit.

(B) THE STATUS OF PROVINCIAL AND FEDERAL LAWS AND REGULATIONS AT CONFEDERATION

The Terms of Union (1949) must, at this point, be discussed in detail in order to provide some context to the question of why Aboriginal peoples were not given specific mention. It is important therefore to examine the status of laws in force in Newfoundland on April 1, 1949 when Newfoundland officially became a province of Canada. As previously described, not all provinces joined Confederation according to the same terms and conditions. Some were required to guarantee Indian peoples hunting rights on unoccupied Crown lands and to honour treaties previously entered into by the federal government and Aboriginal peoples. British Columbia entered Confederation on the promise of receiving the benefits of transcontinental rail service while other provinces such as Alberta, Saskatchewan, and Manitoba entered Confederation without the benefit of subsurface resources unlike, for example, Ontario and Quebec. Although it may appear somewhat trite, it is important to establish that Newfoundland entered Confederation as a province, a full partner in Confederation, equal in legal and constitutional status to other provinces of Canada. Term I establishes this basic fact:

"On, from, and after the coming into force of these terms (hereinafter referred to as the date of union), Newfoundland shall form part of Canada and shall be a province thereof..."

When Newfoundland became part of Canada, the jurisdictional powers of both the province and the federal government were defined on the basis of Section 91 (federal powers) and Section 92 (provincial powers) of the Constitution Act, 1867. Term 3 extends the provisions of the Constitution Act (1867) and the extension of federal legislative authority to Newfoundland:

"The British North America Acts 1867 to 1946 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."

In other words, unless altered by the Terms of Union, the laws of Canada were intended to apply on the date that Newfoundland officially formed part of Canada. But what of the laws in force in Newfoundland according to the powers and authorities included in Section 92 of the Constitution Act 1867? Term 7 deals with the *"Provincial Constitution"* and the laws applicable in Newfoundland at the operative date of Confederation according to those heads of powers under provincial jurisdiction:

"The Constitution of Newfoundland as it existed immediately prior to the 16th day of February 1934 is revived at the date of union and shall, subject to these terms and British North America Acts 1867-1946, continue as the Constitution of the Province of Newfoundland from and after the date of union until altered under the authority of the said acts."

In other words the laws in effect in Newfoundland in 1934 were revived on April 1, 1949 subject to both the Terms of Union and the Constitution Acts 1867-1946 inclusive. To sum, Articles 3 and 7 define the application of Sections 91 and 92 of the Constitution Act 1867 and subsequent revisions to 1946. The authority of the Parliament of Canada and the legislature of the province of Newfoundland as defined by Sections 91 and 92 of the Constitution Acts 1867 to 1946 were further set out according to Term 18:

"Subject to these terms, all laws enforced in Newfoundland at or immediately prior to the date of union shall continue therein as if the union had not been made. Subject nevertheless to be repealed, abolished, or

altered by the Parliament of Canada or by the legislature of the Province of Newfoundland according to the authority of the Parliament or of the legislature under the British North America Acts 1867-1946 and all orders, rules, and regulations made under any such laws shall likewise continue..."

There are therefore three sources of law relating to jurisdiction or the exercise of jurisdiction in the province of Newfoundland:

- (1) The Terms of Union 1949;
- (2) Section 91 of the Constitution Acts 1867-1946 relating to the powers and authorities of the legislature of Canada; and
- (3) Section 92 of the Constitution Acts 1867-1946 outlining the powers of jurisdiction of the provinces in Confederation.

Term 18(2) describes how the Statutes of the Parliament of Canada came into force in Newfoundland:

"Statutes of the Parliament of Canada in force at the date of union or any part thereof should come into force in the province of Newfoundland on a day or days to be fixed by Act of the Parliament of Canada or by Proclamation of the Governor General in Council issued from time to time and any such Proclamation may provide for the repeal of any of the laws of Newfoundland that (a) are of general applications; (b) relate to the same subject matter as the Statute or part thereof so proclaimed; and (c) could be repealed by the Parliament of Canada under paragraph 1 of this term."

It should also be pointed out that every Statute of Canada did not automatically come into force on the first day of April 1949. It was realized by the Fathers of Confederation that there would have to be a period of adjustment whereby many areas formerly under the jurisdiction of the Dominion of Newfoundland would have to be transferred to the government of Canada. For example, railways, lighthouses, fisheries, and of course, the transfer of public servants from one

jurisdiction to another. This process was not complete until several years after Confederation.¹⁰¹

(C) DIVISION OF CONSTITUTIONAL POWERS

The division of powers set out in the Constitution Act 1867 clearly denotes Aboriginal peoples as being solely within the federal domain. Section 91.24 of the Act reserves for Indians (and since the Supreme Court decision of 1939 the Inuit) any land specifically set aside for the exclusive use and benefit of Aboriginal peoples. The legal ability to legislate for Indians also lies solely within federal jurisdiction. The full text of the preamble to Section 91 reads as follows:

"It shall be lawful for the Queen by and with the advise and consent of the Senate and House of Commons to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces and for greater certainty but not so as to restrict the generality of the foregoing terms of this section. It is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next herein - after enumerated; that is to say, -

24. Indians and lands Reserved for the Indians. "

To assist interpretation, prevent conflict, and insure that the powers conferred by Sections 91 and 92 of the Constitution Act (1867) could be exercised without hindrance, the following clause was appended to section 91:

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces. "

Section 11 addresses the problem of liability:

"Canada shall be liable for the debts and liabilities of each province existing at the union. "

The phrase "*debts and liabilities*" has been interpreted to relate to the debts and liabilities of each province upon its entry into Confederation for the classes of subjects enumerated in Section 91. This can also reinforce the legislative power of the federal government under Section 91.24 and is a matter clearly within federal jurisdiction as precisely stated in that particular section. Section 92 enumerates the general categories (excluding of course Indians and Indian lands) which are exclusively within the realm of provincial legislative competence. Sections 91.13 and 91.16 are the most far reaching:

91.13 "*Property and civil rights in the province.*"

91.16 "*Generally all matters of a merely local or private nature in the province.*"

Thus, any matter contained in Section 91 cannot be construed as a matter of a "*merely local or private nature in the province.*" Once again this appears to exclude "*Indians and land Reserved for the Indians.*" It may also be interpreted as inferring that Aboriginal affairs are generally a matter of national rather than local concern and the object of a specific power allocated solely to the federal government under Section 91.24.¹⁰²

(D) THE ABORIGINAL ISSUE IN NEWFOUNDLAND

It is important at this stage to determine the level of comprehension of Aboriginal issues by the Delegation sent to Ottawa, members of the National Convention and the general public in Newfoundland at the time of Confederation. As far as the general public is concerned there is little evidence to show that there was any great consideration of an Aboriginal population on the Island of Newfoundland. The Indians and Inuit of Labrador were familiar to all Newfoundlanders by virtue of the long-term use of the "*Labrador*" by sealers, whalers and

fishermen, but there is nothing to indicate that people believed they had any special status or, taking into account their varying lifestyle, were citizens any different from other residents of Newfoundland and Labrador. During the pre-Confederation discussions the Newfoundland Delegation had experienced some exposure to the relationship of Aboriginal peoples in Canada with the federal government and of special federal government programs, services, and other mechanisms to address their particular concerns. There is little evidence that the matter was discussed in any detail. The National Convention debates only reveal a brief response by Mr. Smallwood to a question by Mr. Hollett. His response was only that Newfoundland did not have a division or department to deal with Aboriginal peoples or *"the welfare of the Indians or Eskimos."*¹⁰³

It is clear in this regard that Mr. Smallwood was referring only to Aboriginal people in Labrador. It was not until the time of the National Convention that the franchise or the right to vote in elections was extended to the Labrador coast and people were fully represented at the executive level of government. In fact, although all citizens of the Dominion of Newfoundland were enfranchised in that they could vote in the electoral process, the fact that Northern Labrador was not included in the electoral process until the Confederation Era may be misconstrued to infer that Indians and Inuit were not permitted to vote. The simple fact is that all residents of Labrador, including Aboriginals, could not vote because they did not have a representative. It is also clear that Mr. Smallwood understood the registration process, the special position of Indian reserves and the operation of the Indian Act in the rest of Canada as being mechanisms which prevented people from becoming full citizens of the country. The fact that *"any Indian in Canada can apply for citizenship"* was understood to mean that the Federal

Indian Affairs Division held the position of benefactor and tutor for Indians in Canada until they wished to participate in Canadian Society on par with other residents.

Discussion of the issue of Aboriginal peoples between 1947 and 1949 appears as an empty gap in documentary evidence. There was no great public debate; nor were there advocates for Aboriginal peoples beating on the doors of the Government of Newfoundland for any sort of special recognition. The number of Aboriginal peoples was extremely small and (as was popularly believed) limited solely to the coast of Labrador. It was simply not the most important issue of the time.

As previously noted, it was believed by the Newfoundland Delegation that Appendix XI of the Minutes of Meetings summarized the situation at Confederation. This means that if Newfoundland became a province of Canada, Aboriginal people would be the sole responsibility of the federal government. Existing legislation (ie. the Indian Act) would entitle Aboriginals to certain benefits and subject them to a different series of regulations. The level of general comprehension displayed by delegates to the National Convention appears to relate solely to the operation of the Indian Act and the special relationship of the federal government with Inuit in the north, which at that time consisted of federal territories and parts of northern Québec. If an Indian was not governed by the terms of the Indian Act then he was a full citizen and in effect no longer an "*Indian*." That person participated in the programs and services available to all citizens of Canada on the basis of equality, was entitled to vote in federal and provincial elections, and have all the benefits of other citizens. However, that individual could not receive any special

or additional benefits guaranteed to Indians and Inuit, or avail of the registration process or reserve residency. At the time there was no distinction between "*off reserve*" and "*on reserve*" Indians and Inuit in Canada. The line was clear, either an "*Indian*" lived on a reserve and was entitled to all special benefits and the provisions of the Indian Act, or that individual was simply not an Indian.

On the other hand it is as difficult to perceive how the bureaucracy, government, and leaders of public opinion were totally ignorant of the fact that there were Indians and Inuit in Labrador, especially in light of the well-documented activities of the Northern Trading Operations, the reports, the studies, and other efforts set out to relieve the distress in Labrador following the withdrawal of the Hudson's Bay Company from the northern stores.

(E) NEGOTIATION OF THE TERMS OF UNION (1948)

The final draft of the Terms of Union was signed by both the federal and Newfoundland Delegations in December 1948. To help explain why a special section for Aboriginal peoples was not included in the Terms of Union, a personal interview was held with Mr. Gordon A. Winter, ex-Lieutenant Governor of Newfoundland, and a member of the 1948 negotiating team. The structure of these negotiations also helps to explain how and why the Terms of Union took their final form. The meetings of 1947 were held to exchange information and determine whether or not a basis could be laid for Confederation with Canada. Once this information was received and studied by politicians and members of the Newfoundland Public Service instructions were prepared

to advise or guide the activities of the Newfoundland negotiating team mandated to negotiate the final draft of the terms with Ottawa. They were mandated directly by the National Convention of Newfoundland and instructed to return with a draft agreement. An acceptable draft was reached on the 11th day of September 1948. It is Mr. Winter's recollection that among the instructions and mandate which the team received there was absolutely no reference to Indians or Inuit, or to Aboriginal affairs in Newfoundland or Labrador. The topic was totally absent from the actual discussions of 1948. It was only raised in a single instance in Ottawa during the negotiation process. Mr. St-Laurent, Prime Minister of Canada remarked that it appeared there was some omission in the course of discussions on matters of jurisdiction; namely Indians and Inuit. A member of the Newfoundland Delegation responded that there simply were no Indians in Newfoundland and referred to the demise of the Beothuks. According to Mr. Winter, this is the only time that Aboriginal peoples were mentioned during the negotiations of 1948.

It appears that participants on both sides of these negotiations thought of Indians as being Indians under the Indian Act living on reserves, subject to a different administrative regime under the Department of Indian Affairs and having access to special programs and services designed to enable them to simply stop being an "*Indian*" and enter into the mainstream of society. Without reserves or any lands equivalent to those described in the Indian Act, or any special legislative or program initiatives there were

no "*Indians*" in Newfoundland at the time of Confederation as there were in the rest of Canada.

Mr. Winter's recollection is that Indians and Inuit were specifically omitted from the final negotiations regarding the Terms of Union. They were not omitted by accident, by stealth or by subterfuge. The political, social, and cultural fabric of Newfoundland at this time was particularly delicate. The debate over Confederation consisted of more than Confederates and anti-Confederates. It reinvigorated ethnic, religious, and other conflicts as parties jostled for support, each stressing what Confederation would take away or how it would benefit the average citizen. According to Mr. Winter, recognition of any group in Newfoundland at this time as a separate entity would have been fuel for the anti-Confederates. If Indians and Inuit were treated as a separate category of individuals with rights different or beyond that of other Newfoundlanders, it would have been extremely dangerous for the Confederate position. The anti-Confederates would have been quick to point out that union with Canada was dividing Newfoundlanders into separate categories of individuals, each with separate rights, privileges and benefits. Mr. Winter stated that although the number of Aboriginal peoples was small, the consequence of debating a different status for a single group would have been extremely significant. The position of those supporting Confederation was that a Newfoundlander is a Newfoundlander - and no group would be recognized as having any particular privilege or disadvantage.

(F) THE SILENCE OF THE TERMS OF UNION ON ABORIGINAL PEOPLES

Specific mention of Aboriginal peoples was not only absent from the Terms of Union but in fact from the heat of the Confederation debate. Mr. Winter provided some insight into what he and other members of the Newfoundland Delegation in Ottawa understood to be the legal and constitutional position of Aboriginal peoples at the time. As a very minor issue it was not worth the political grief to raise. In the absence of a specific department or ministry of government in Newfoundland prior to Confederation there was no reason for a specific term to deal with the transfer of public works, bureaucracy, or responsibilities to the federal government. The Northern Labrador Trading Operations was not in existence solely for the benefit of Aboriginal peoples, but continued as a Department of the Newfoundland Government to manage trading operations and to develop the local economy of Labrador. It was therefore well within the ambit of Section 92 of the Constitution Act (1867.) Mr. Winter stated that at Confederation, it was assumed that Canada would simply take over and implement its responsibilities under Section 91.24 of the Constitution Act (1867). Term 3 is the operative clause of the Terms of Union. The British North America Acts 1867-1946 therefore applied to Newfoundland exactly the same as if Newfoundland had been one of the original provinces of Canada. This Act was not altered by any term agreed between Canada and Newfoundland, or by any other provision resulting from legislation of the Parliament of Canada or the legislature of Newfoundland. Therefore, Section 91.24 applied to Newfoundland as of April 1, 1949. This interpretation of the impact of Term

3 of the Terms of Union is consistent with the understanding of both federal and Newfoundland officials when the issue was first discussed in 1947. It is also consistent with the current status of Aboriginal peoples in the Province.¹⁰⁴

If precisely what happened on April 1, 1949 is clear on the basis of Term 3, changing policies, varying interpretations concerning the Terms of Union, and a series of unique events which occurred between 1949 and 1954 requires more detailed explanation. It is at this critical period that the groundwork was laid for an alteration in federal and provincial government policies generally towards Aboriginal peoples in Newfoundland and Labrador. This policy change was focused on Labrador and did not relate to people of Indian descent on the Island of Newfoundland. The major difficulties in interpreting the administration of Aboriginal affairs during this period is the absence of pre-Confederation treaties; the setting aside of lands for the exclusive benefit of Aboriginal peoples (i.e. reserves); special programs or policies solely for the benefit of Aboriginal peoples; and a process of legislation or agreement between Newfoundland and Canada to implement the federal Indian Act following Confederation in 1949. How did policy makers address the issue of the presence of an Aboriginal population in the province? Much attention has been paid to the Indian Act; however, if registration was not to proceed and no lands were to be set aside, then it is reasonable to assume that the terms of the Indian Act could not be practically applied following Confederation. The fact that no such process occurred, or that no lands were set aside, eliminates any effect that the Indian Act may have had, despite the fact that the Indian Act and any other

federal legislation falling within the ambit of Term 3 of the Terms of Union would apply in Newfoundland if not specifically mentioned in the Terms of Union itself.

The Newfoundland documentation on Aboriginal issues during the Confederation debate is extremely scanty and does not provide detailed information. An official of the Northwest Territories and Yukon services branch, Departments of Mines and Resources, wrote in 1948 that if Newfoundland was to become a province like Quebec and Ontario, the federal government would have full responsibilities

*"for the welfare of Indians and Eskimo. It may be however, that the Indians and Eskimos of Newfoundland will be considered as full fledged citizens of the province and not come under the federal legislation."*¹⁰⁵

In fact, the question of jurisdiction may not have been well understood by either party owing to the rather peculiar situation in Labrador. The federal delegation to the negotiations in 1948 did complete some preparatory work on the questions of Indians and Inuit prior to the final negotiations with Newfoundland. H.L. Keenleyside, Deputy Minister of Mines and Resources, asked a particularly incisive question:

*"What would be the future political and civil status of Indians and Eskimos covering the franchise, income and other taxes, legal rights and political and related matters, including any rights to state pensions or allowances of any kind?"*¹⁰⁶

Sir Albert Walsh, Chairman of the Newfoundland Delegation, submitted several questions on October 13, 1948 that required further information. It is important to note that at this point the issue of jurisdiction over Aboriginal peoples in Newfoundland and Labrador was not included in the discussions between Newfoundland and Canada. A couple of weeks

prior to this meeting, K.J. Carter, Newfoundland's Secretary for Natural Resources, met with officials of the federal Department of Mines and Resources to discuss the issue of jurisdiction over Aboriginal peoples. An internal memorandum describes the views of Mr. Carter at the meeting. He felt that

*"It would be a retrograde step to bring the Indians and Eskimos under the restrictive provisions of the Indian Act... it would be desirable for the new province to continue to administer the affairs of all aborigines including the Indians, subject to a provision of appropriate grants of subsidies by the Dominion, rather than transfer to the Dominion administration under the Indian Act... Or under the Northwest Territories Administration in the case of Eskimos."*¹⁰⁷

As will be shown at a later point, Carter's opinion is reflective of what actually occurred with the first federal/provincial "agreement" in 1954. Mr. H.L. Keenleyside stated the federal position in a memo to Paul Pelletier, Secretary to the Interdepartmental Committee on Newfoundland on October 25, 1948. The essence of this memorandum was that the current system of administration in Labrador (specifically the Northern Labrador Trading Operations) should continue but be supported by federal subsidies. He perceived the situation in Labrador to be particularly unique in that the Aboriginal population was not ethnically homogenous and had intermarried with the white population. Also Aboriginal peoples were already enfranchised in that they participated in society along with other residents of the province on the basis of equal rights and privileges;

*"The present goal of Canadian Indian policy is enfranchisement and this is borne out by the discussion before the Joint Committee of the Senate and the House of Commons."*¹⁰⁸

Keenleyside was referring to an important factor which appears to have been missed by many commentators on the issue of jurisdiction over Aboriginal peoples in the province. Since about 1946/47, the federal government was undergoing a complete revision of the 1927 federal Indian Act, which was in effect until 1951. This was largely because of the important role played by Aboriginal peoples in the military during the Second World War and the fact that the federal government was trying to more strictly adhere to the original purpose of the first Indian Act - to give Aboriginal peoples the ability to participate as white people in Canadian society as a whole and not require special measures for protection. It may be assumed that application of the Indian Act to Aboriginals who were already participating in the mainstream of society in respect of their social, economic, or cultural condition would be a retrograde step. The Indian Act could obviously never apply to Indians who were already enfranchised. Any federal responsibility would have to be exercised through a grant or subsidy. This would be the only means of performing a federal role regarding Aboriginal affairs; however it should be

*"... subject to the conditions that any such grants or subsidies should not be in perpetuity but should be subject to a review after a period of years. This is considered necessary as it is thought that in time the need for any special assistance to Indians in Newfoundland including Labrador may disappear as they become fully self-supporting members of the community."*¹⁰⁹

Tompkins' study of the Confederation issue in Newfoundland contains an interesting assertion. He states that this proposal transcended the normal procedure for the federal

government's *"automatic involvement in the affairs of Canada's native people."* Tompkins then states that if the proposal was adopted, *"it is presumed that it would be necessary to have an amendment to the Indian Act to exempt them from its application."* Tompkins then goes on to state *"such an amendment was never passed."*¹¹⁰ It should be pointed out that the Indian Act was revised in 1951 did indeed contain such an amendment that Inuit or Eskimos were specifically excluded from the application of the Indian Act.

In November 15, 1948 a meeting was held between Major MacKay, acting Director of Indian Affairs Branch, and Mr. J. R. Smallwood. It appears that Mr. Smallwood was not informed of the previous discussions by Mr. Carter. Major MacKay, in a memorandum to the Deputy Minister, records the following: he stated that Mr. Smallwood was

"not aware of the discussions with Mr. Carter and up to that time has assumed that the administration of Indians in Newfoundland would be taken over by the federal government. He had in fact appeared rather resentful that Mr. Carter had been carrying on negotiations and pointed out that the decisions in such matters should rest with the Delegation not Mr. Carter. However, after discussion with Major MacKay in which the merits of Mr. Carter's suggestions were brought out and a view of the fact that the Canadian authorities and Indian Affairs approve of the message suggested by Mr. Carter. Mr. Smallwood departed evidently satisfied with the arrangement."¹¹¹

The current structure for funding Aboriginal peoples in the province appears to have been set out in a memorandum to Mr. Brooke Claxton, Vice Chairman of the Cabinet Committee on Newfoundland by the ubiquitous Mr. Keenleyside:

*"It is my understanding that arrangements were likely to be made with Newfoundland for the province to continue to be responsible for the administration of all matters relating to Indians and Eskimos subject however, to the payment to Newfoundland by the Dominion of a grant or subsidy to cover the cost of any special services required for them. However, I presume, this will be taken care of when the time comes to proclaim the Dominion Act in Newfoundland."*¹¹²

This is precisely the model followed by officials of both levels of government in negotiating the early Exchange of Letters Arrangements from 1954 to 1981.

(G) THE FEDERAL POSITION

Although the Newfoundland documentation is extremely meagre regarding financial and administrative responsibility for Aboriginal peoples, the same is not true of documentation in the Public Archives of Canada relating to the preparation of federal officials. On January 22, 1949, a "Memorandum for the Cabinet" was prepared by the Secretary to the federal Cabinet. Section 3 was entitled "Administration of Indian Affairs" prepared by Major MacKay, Chairman of the Interdepartmental Committee on Newfoundland. MacKay argued that Appendix XI of the 1947 summary of proceedings

"may have given the impression that these Indians and Eskimos would be granted the same benefits as those enjoyed by Indians in Canada under the Indian Act."

The memorandum states a number of reasons why Indians in Newfoundland could not be governed by the terms of the Indian Act, including; they were enfranchised and enjoyed the full rights of citizens; they would perhaps have to lose their right to vote; many of the Aboriginals in Newfoundland were already intermarried with the white population;

and a variety of other reasons why the Indian Act could not clearly be applied.

MacKay's document concludes with a rather terse summary of the situation:

*"In these circumstances it has been suggested that the Commission of Government might be informed that the Indian Act would not be brought into force in Newfoundland after union, at least until such time as some satisfactory arrangements can be found following a detailed examination by federal and provincial authorities of all the factors involved."*¹¹³

One side of this comment is the pencilled remark "*Cabinet approved.*" The Secretary of State for External Affairs advised the High Commissioner for Canada to Newfoundland on February 2, 1949 on what action to take. It was based on the comments contained in the document by MacKay:

*"It would seem inappropriate to take any action to alter this status before union... the matter should be left in obedience until after the establishment of a duly elected provincial government in Newfoundland when the two governments might reach an agreement by consultation as to the course to be followed. No provision will therefore be made in the estimates for any special service for Indians and Eskimos in Newfoundland territory after union."*¹¹⁴

This memorandum explains why there was no effort to establish a funding mechanism until 1954.

(H) DEFINING THE SCOPE OF FEDERAL JURISDICTION AND RESPONSIBILITY

Following Confederation, discussions relating to legal and fiscal responsibility for Aboriginal affairs appears to have lapsed for a short period of time; however, on September 13, 1949, H.L. Keenleyside advised N.A. Robertson, Secretary of the Cabinet that no further action would be taken by his department until some agreement had been reached on the question of jurisdiction between the province and the federal government.

Keenleyside stated firmly that this question should be settled between the Department of External Affairs and the Department of Mines and Resources *"in cooperation."*¹¹⁵ A week later, R. J. Carter wrote the federal Department of Mines and Resources requesting clarification. He wanted to know how the federal government planned to reimburse the province for relief expenditures for Indians and Eskimos.¹¹⁶ It also appears that lines of communications between the two governments and between officials within individual governments were frequently confused and no one person or department had a clear mandate. For example, as Mr. Carter wrote to the Department of Mines and Resources, the Newfoundland Minister of Education, Mr. Hefferton and the Superintendent of Education, Dr. Allen Frecker, met with Dr. Davidson, Federal Deputy Minister of National Health and Welfare, relating to the payment of family allowances to Inuit in Labrador. Frecker suggested the Inuit should be given food instead of cash as a means of improving diet, but Davidson pointed out this could only be done if the Inuit were a federal responsibility and believed that *"the legal position of the Labrador Eskimo should be clarified and their status determined."*¹¹⁷ Mr. Paul Pelletier, Clerk of the Privy Council took an active interest in attempting to resolve this issue and at one time suggested that an Interdepartmental Committee be set up to specifically address the problem of administration and financing Aboriginal peoples in the new province. He believed that the federal government, regardless of legal interpretations, did have some responsibilities: *"I do not think the federal government can escape assuming at least partial responsibility for Indians in the new province."*¹¹⁸

The first meeting of this Interdepartmental Committee on Newfoundland Indians and Eskimos took place on March 29, 1950 with Robertson as Chairman and Pelletier as Secretary. Two options were suggested at the meeting; the first was that the federal and provincial governments should enter into an agreement for the joint financing of a medical survey and immunization program in Labrador; the second was that the chairman seek a legal opinion from the federal Department of Justice as to the legal status of federal jurisdiction over Newfoundland Indians and Inuit.¹¹⁹ The response from the Deputy Minister of Justice, F.P. Varcoe, to Mr. Robertson on April 14, 1950 lay the foundation for future federal/provincial controversy regarding the legal and constitutional status of Aboriginal peoples in Newfoundland and Labrador. It encapsulates the Newfoundland position as well from Confederation to the present:

"I must point out that for the purposes of the British North America Act, "Indians" includes Eskimos.

The federal government has exclusive legislative authority in relation to "Indians and lands reserved for the Indians." Under head 24 of Section 91 of the British North America Act, which of course, means that the provincial legislature has no authority to enact legislation directed at dealing with or "in relation to" Indians. Legislative authority in relation to Indians carries with it for the federal government the executive authority in relation to Indians.

It is the responsibility of the federal government to formulate and carry out all policies that are directed with dealing with Indians 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."¹²⁰

This opinion echoes the pre-Confederation discussions and states clearly that Aboriginal peoples are a federal responsibility according to Section 91.24 of the Constitution Act (1867). Robertson's assessment of this memorandum is critical. He believed that Aboriginal peoples in Newfoundland should not be excluded from the terms of the Indian Act and that the *"federal government can hardly expect to escape assuming a healthy share of responsibility"* for the care of Labrador Indians and Eskimos. Lack of reserves or treaties and the issue of enfranchisement did not present insurmountable hurdles and he believed that the *"most practical solution to the problem would be simply to make the Indian Act applicable to Labrador Indians."*¹²¹ A memorandum of January 16, 1951 by Paul Pelletier, Chairman of the Interdepartmental Committee, is one of the most critical documents in federal/provincial relations regarding Aboriginal peoples in the province:

*"Section 3 of the Terms of Union stipulates that the provisions of the BNA Act shall apply to Newfoundland except in so far as varied in the terms. Since the Terms of Union did not refer to Indians and Eskimos, and since Head 24 of Section 91 of the BNA Act places "Indians and lands Reserved for the Indians" exclusively under federal jurisdiction, it seems clear that the federal government is responsible for the native population resident in Labrador."*¹²²

It may be concluded that the highest ranking and most influential federal officials have always accepted the fact that Canada bears ultimate financial and perhaps administrative authority in Newfoundland and Labrador. The precedent for exercising these responsibilities in the absence of treaties or *"Indian Lands"* may have inhibited the assumption of financial or administrative responsibility at a time when the Indian Act was

being revised to achieve the federal government's goal of reducing the number of Indians through enfranchisement. This is reflected in the negotiations leading to the federal/provincial agreement of 1954 and the unique situation whereby the federal treasury agreed to financially support provincial administration of a program designed solely for Aboriginal peoples.

*IV. POST CONFEDERATION AND THE FUNDING AND ADMINISTRATION
OF ABORIGINAL AFFAIRS*

I. THE FEDERAL/PROVINCIAL AGREEMENT OF 1954

In 1954 the province and the federal government signed the Labrador Health Agreement. The negotiations and the nature of this Agreement set the stage for current funding arrangements between the province and the federal government for Aboriginal peoples in Labrador. This was later extended to Aboriginal peoples on the Island beginning in 1973, and concluded with the registration of the Conne River Micmacs in 1985 and the creation of an Indian reserve in 1987. In the absence of any specific arrangements, the federal Inter-Departmental Committee agreed in January 1951 to pay for relief accounts for Eskimos submitted by the Newfoundland government for the fiscal years 1949-52 at the request of the Government of Newfoundland. Pelletier wrote to Robertson stating that these were "*interim measures*" and

*"there is every indication ... that the continuing arrangements may well be a series of ad hoc measures and arrangements reached between the federal and provincial departments concerned."*¹²³

The intense and lengthy negotiations toward this agreement appear to have been lost because of the agreement's simplicity and concentration on the single issue of health. It is interesting to note that Pelletier based his whole approach to the negotiations on the various legal opinions and memoranda of 1950. In a memorandum of February 24, 1953 Pelletier stated his personal view of the pre-Confederation negotiations and the basis for the federal negotiating position:

*"During the discussions which proceeded Newfoundland's entry into Confederation on April 1, 1949 the extent, if any, to which the federal government should assume responsibility for Indian and Eskimo affairs in the province was never settled. Indeed the subject was hardly mentioned. No provision was made, even indirectly. In the formal instructions which accompanied Newfoundland's entry into Confederation ... it is difficult to see how the federal government can escape at least some responsibilities 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 to this group ... there was no commitment made by the federal government in this matter either orally or in writing."*¹²⁴

In a series of proposals and counter proposals both sides in the discussions appear to treat the dispute itself as a precedent-setting exercise to establish how both orders of government should proceed in both capital financing and the administration of Aboriginal affairs. As early as March 1953, federal officials believed that Newfoundland was trying to develop northern Labrador by inflating the costs for Aboriginal peoples. The Newfoundland proposal included people who were not readily identifiable as Aboriginals owing to several generations of intermarriage. It is here where Pelletier played the careful bureaucrat to avoid the potential granting of special benefits to people who were

not bona fide Aboriginals. His solution was that the federal government should only fund the anti-tuberculosis program and be involved in paying

*"certain non reoccurring capital expenditures and not get entangled in continued financial commitments for a variety of undertakings which are wholly administered by the provincial government."*¹²⁵

This approach would also sidestep the more difficult issue of establishing a formal or legally binding agreement.

The basis of the 1954 Labrador Health Agreement was a memorandum by J.W. Pickersgill to Mr. H.L. Pottle on March 3, 1954. This proposal referred to a \$200,000 annual expenditure. All relief programs would be continued and a ten year anti-tuberculosis program enlarged to a ten year general health program. The federal department of International Health and Welfare would bear

*"full financial responsibility for the transportation, hospitalization and treatment of Indians and Eskimos during that ten year period regardless of the nature of the illness."*¹²⁶

The deliberations of federal and provincial officials between late 1949 and early 1954 were perhaps the most intensive discussions relating to financial costs and jurisdictional responsibilities for Indians and Inuit until the 1980's. It is interesting to note that one of the suggestions by Pelletier in the early 1950's was that the federal government simply take over the Northern Labrador Trading Operations as a means of administering Inuit affairs and of course providing a convenient mechanism to channel capital funds for programs and services beyond those ordinarily administered by the province.

In one respect, Northern Labrador Trading Operations was the descendent of the legacy of the Moravians and the fur trading companies. It was a separate operation with a specific mission. It was founded to develop the economy of northern Labrador and distribute relief and welfare benefits; however, following 1954 the Grenfell Health Association as well as the Northern Labrador Trading Operations provided the means by which both orders of government could exercise their responsibilities. The delegation of administrative functions to separately mandated organizations also prevented a direct association of Aboriginal peoples through bands and other organizations with the federal government. Unlike other parts of Canada, and specifically Atlantic Canada, there was no regional office of the Department of Indian and Northern Affairs and officials only dealt with provincial counterparts at the officials or ministerial level. Until very recently the federal government and particularly the Department of Indian and Northern Affairs maintained an arm's length relationship with Aboriginal peoples in the province. The relationship between federal and provincial officials was considerably more intimate than in other Canadian jurisdictions.

(A) THE NEWFOUNDLAND POSITION

The position of Newfoundland was that the federal government was responsible for the funding and administration of Aboriginal affairs regardless of whether or not Aboriginals were registered under the federal Indian Act. However, there is very little evidence to determine precisely how government officials interpreted this position. A previously unutilized document of the early 1960's provides detailed insight. This

document contains testimony from officials giving evidence before the Joint Committee of the Senate and House of Commons on Indian Affairs. Of particular interest is the testimony of Mr. Walter G. Rockwood, Director of Northern Affairs for the province of Newfoundland and Mr. H.M. Jones, Director of Indian Affairs, Department of Citizenship and Immigration on March 21, 1961. Mr. Rockwood described the Northern Labrador Affairs Division as a branch of the provincial Department of Public Welfare *"which handles certain special problems among the Indians and the Eskimos."* He referred to operation of the stores, radio telephones, fisheries, and other local industries as well as welfare services. However, health, education, law enforcement, and conservation of game was administered by the appropriate government departments. The Division operated the stores but in September 1958 the work of the Division was extended to include the Northwest River Indians. An office was set up there for that purpose. Mr. Rockwood quoted that *"all welfare benefits are available to the Indians as well as the Eskimos on the same basis as to all other residents of the province."* Health services for both Indians and Inuit was provided by the International Grenfell Association *"in cooperation with the Newfoundland Department of Health and the Federal Department of National Health and Welfare."* He stated that the full cost of the program from its beginning in 1954 was borne by the federal government. Mr. Rockwood summated this situation regarding Newfoundland in comparison with the rest of Canada in the administration of Aboriginal affairs:

"Newfoundland is the only province in Canada providing such services for the Indians and Eskimos. Elsewhere the work is done by two departments of the federal government; for the Indians by the Indian Affairs Branch of the Department of Citizenship and Immigration and for the Eskimos by the Department of Northern Affairs and Natural Resources. The federal government has however provided financial assistance in the amount of \$200,000 for capital expenditure projects such as schools, hospital, and Indian and Eskimo housing." ¹²⁷

The expenditure on health was gradually extended to other programs and services for Aboriginal peoples, as was noted in some of the correspondence relating to the negotiations leading to the signing of the health agreement of 1954. In 1957 a housing program was also initiated by the Division of Northern Labrador Affairs. Mr. Rockwood noted that the federal government contributed 2/3 of the cost of 25 houses built for the Inuit in 1956; however, he remarked that no assistance had been received toward Indian houses *"although it is hoped that this will be done."*¹²⁸ The social, economic, and political situation of the Labrador aboriginal was succinctly defined by Mr. Rockwood:

"The Labrador Indians, like the Eskimos, were enfranchised about ten years ago. In fact, they gained the right to vote in provincial elections at the same time as the English speaking people because it was not until 1949 that Labrador elected its first representative to the House of Assembly at St. John's." ¹²⁹

It is important to note that the question of *"enfranchisement"* appears to bring to mind only whether or not an individual is entitled in a particular society to vote in the electoral process. The enfranchisement of Aboriginal peoples was never an issue in Newfoundland and Labrador. This does not relate in any way to the question of enfranchisement of Indians or granting Indians throughout Canada to the right to vote. The simple fact is

that all residents were entitled to vote in this province when and if that particular area was given representation in the House of Assembly, regardless of ethnic origin.

The issue of enfranchisement and whether or not Indians and Eskimos were really "citizens" appears to be associated with the issue of whether or not Indians were actually included in the Terms of Union. Testimony at the Joint Committee of 1961 emphasizes the legal distinction between Aboriginals and other citizens at the time of Confederation.

"I do not know what went on at the time but as far as I can learn the position of the Indians and the Eskimos in Newfoundland at the time of Confederation was that they were citizens, that there was no legal distinction between Indians and Eskimos and myself at that time - and there was none after we went into Confederation."

Absence of mention in the Terms of Union was interpreted as evidence that Aboriginals in Newfoundland were full citizens and enfranchised as any other resident of the province. A particular issue which arose at the deliberation of the Joint Committee, is why Indians in Labrador were treated differently from those elsewhere in Canada and not considered eligible for registration and the full range of benefits provided by the Indian Act? Much of the difficulty in comprehending the situation in Newfoundland appears also to rest on the lack of any direct role by the Indian Affairs Branch of the federal government in Aboriginal matters, specifically those relating to social services, housing, and education, as well as health. Participants generally expressed disbelief that the social and economic situation of the Indians and Inuit in Newfoundland was more desperate than that of Aboriginal peoples elsewhere in Canada. A series of statements

before the Joint Committee elucidates this contention, but offers no concrete solution.

(Appendix VIII)

It is interesting to note that the question of citizenry appears to have been bandied about before the Joint Committee without any real comprehension or definition. What made an Indian a citizen of Canada, a citizen of Newfoundland, or indeed not a citizen at all? It was also believed that an Indian who was registered, resided on a reserve and availed of the benefits of Indian status was not a full citizen of Canada or the province, and did not have the same rights and privileges as non-Aboriginal citizens. There was a somewhat different level of citizenship which was less than other Canadian citizens in terms of political enfranchisement, yet somewhat more as it infers access to special financial arrangements or programs for education, health and social services. A statement by Mr. Rockwood inferred that Indians in Labrador were Newfoundlanders at Confederation and they were not "*Indians*" as those in the rest of Canada. It is assumed that he refers to two factors; the right of equal access to all programs and services as other residents of the province, and similar access to all other legal and political rights such as the right to vote or hold public office. Mr. Rockwood appears to have expressed the view that a status Indian could never be a full citizen of Canada or Newfoundland. The testimony before the Joint Committee illustrates the convoluted explanation of how an Indian became a citizen of Newfoundland or Canada, and how that could be lost or gained through status as an Indian. (Appendix IX) The Newfoundland position did not entertain the possibility that Indians and Inuit could not be citizens of the province or of

Canada. The federal responsibility for financial support of Aboriginals was a fundamental principle of constitutional authority. It could not be clouded by the administrative mechanisms of the Indian Act.

(B) THE GOAL OF FEDERAL INDIAN POLICY

The negotiations leading to the revision of the Indian Act in 1951 as well as the reaction following the Act of 1951 provides the national background to the earlier discussion on the status of Aboriginal peoples and governmental/Aboriginal relations in Newfoundland and Labrador following 1949. Without explanation of the development and goals of federal Indian policy, events in Newfoundland may appear unique, unnecessarily complex and even misdirected in light of some opinions expressed by senior federal officials during the 1950's and 1960's.

Research does not demonstrate that there is a direct linkage between revision of the Indian Act of 1951 and the establishment of a peculiar administrative structure to address Aboriginal issues in Newfoundland and Labrador. However, one can reasonably assume (especially in the mind of federal officials) that there was a policy or strategy which they had to pursue. It is interesting to note that following the Indian Act of 1951 the only new reserve created in Canada was that of Conne River in Newfoundland in the year 1987. The policy of the early 1950's was to limit the number of Indians living on reserves and availing of a special status provided by the Indian Act. The original purpose of the Indian Act was to raise Indians above their disadvantaged status and to prepare them for participation in the mainstream of society. The creation of reserves was

considered extremely retrograde. In fact, the last reserve created in Canada prior to Conne River was in the mid-1940's. Although many Indians bands had sold or ceded lands, or additional lands were purchased by bands to complement a particular reserve, the fact remains that the policy of the federal government was to neither create new reserves in Canada, nor to increase the number of registered Indians. It was therefore part of federal national policy that there be no genuine attempt to register Labrador Indians or to create reserves.

The testimony before the Joint Committee in 1961 referred to previously also occurs against a background of certain developments in the rest of Canada. During the 1950's the federal government embarked on a massive program to relocate Inuit throughout the Arctic, to build schools and other infrastructure in Inuit communities, and to exercise full responsibilities for Inuit throughout the Northwest Territories. A Supreme Court decision of 1939 stated that Eskimos were Indians for the purposes of Section 91.24 of the Constitution Act 1867. This led to a rush of federal activity in Northern Quebec. Although Inuit could not be registered or live on reserves, and were specifically excluded from the benefits contained in the revised Indian Act of 1951, the federal government was still deemed to be responsible for the provision of programs and services. It appears that Newfoundland officials as well as politicians were singularly unaware of what was occurring in the rest of Canada.

Was there some reluctance by provincial officials to see the federal government encroach or be seen to encroach on matters purely within provincial jurisdiction?

Although there is nothing to indicate a state of paranoia over jurisdiction, there appears to have been some reluctance for the federal government to take over the actual administration of matters directly related to Aboriginal peoples and following the revised Act of 1951, particularly the Inuit, who were specifically excluded from Indian Act benefits. This could explain why the division of Northern Labrador Affairs rather than officials from the Department of Indian Affairs maintained the sole physical contact with Aboriginal people in Labrador. Although the federal government could be persuaded to fund certain activities they were not on the ground in Labrador. The only relation between Aboriginal peoples and government was forged between Newfoundland officials and Aboriginal community leaders.

3. THE EMERGENCE OF THE FEDERAL-PROVINCIAL FUNDING ARRANGEMENTS

The negotiations between 1964 and 1965 to establish a general funding arrangement between Canada and Newfoundland for the benefit of Indians and Inuit in Labrador forged the basis for current federal/provincial arrangements in this regard. The patterns set during that year are still essentially in operation. The major variation is the actual participation of the Aboriginal peoples themselves in the planning and administration of funds, programs, and policies under the funding arrangements. The bottom line is that these arrangements are still arrangements between the province and the federal government whereby the funds are essentially funnelled through the province by the federal government without formal recognition by the Government of Canada of any ongoing legal or constitutional responsibilities.

(A) JURISDICTION, FINANCES AND ADMINISTRATION

During the early and mid 1960's Canada and Quebec were concluding a long and sometimes acrimonious series of negotiations regarding the administration of Inuit in Northern Quebec. Following the Supreme Court decision of 1939 whereby Inuit were considered Indians for the purpose of Section 91.24 of the Constitution Act 1967, the federal government had entered into a rampage of implementing programs and services for the Inuit of Northern Quebec to the point where growing Quebec nationalism was severely offended by the federal presence. Although Quebec had jurisdiction according to the Boundaries Extension Act of 1912 and was legally responsible for compensation and other matters relating to the extinguishment of Aboriginal title, this responsibility did not extend to the provision of programs and services according to Section 91.24. Quebec and Canada both agreed to work out a deal which was in the critical stage during the time when the 1965 Agreement between Canada and Newfoundland was being negotiated.

In Quebec, Canada agreed to transfer the administration of Inuit affairs to the provincial government. However, Canada reserved all rights entrusted to federal authorities by virtue of Section 91.24 of the Constitution Act (1867). This may be roughly interpreted as a mirror for the eventual Agreement of 1965 between Canada and Newfoundland: that the federal government would provide funding for programs and services to Aboriginal peoples for any benefits beyond what is provided to normal citizens of a province; however, programs as well as any financial benefits would be administered by the province. Although the federal Department of Indian Affairs maintained a strong

presence in Quebec as in other provinces of Canada, a close relationship was developed between the Quebec provincial department responsible for Aboriginal affairs with their Aboriginal clients as well as Indian and Northern Affairs Canada. The example of Quebec cannot be easily discounted in discussion of the situation in Newfoundland at this time.

It is important to also set the context for federal policy from the mid to late 1960's. Prior to 1968 "*Indians*" were not permitted to vote in federal elections. Although some provinces permitted registered Indians to vote in provincial elections, it was not until 1968 that the federal government, by statute, extended the franchise to registered Indians resident on a reserve. This was also the same year in which the federal government produced its infamous "*white paper*" which suggested that Aboriginal peoples enter into the mainstream of Canadian society without the prohibitions traditionally afforded to them by such measures as reserved lands, different citizenship status, the Indian Act and other restrictive measures. It must not be forgotten that part of this seemingly well meaning policy was primarily designed to enable the federal government to shed the costs for duplication of health, education, and other services normally administered and paid for by the province, and eventually eliminate the top heavy structure of the federal Department of Indian and Northern Affairs. In effect, this is the origin of the federal policy to shift the burden of costs and responsibilities to the province and to eventually eliminate what is frequently viewed as an anachronistic relationship between the federal government and Aboriginal peoples based on the Indian Act. It was

the purpose of the federal government in the late 1960's to end the special relationship in terms of legal and administrative mechanisms. Funding and the thrust of federal programs and services in this regard was intended to make all Aboriginals citizens of Canada equal to the rest of Canadian society, subject to the same laws, and having equal access to the same programs and services. It is against this background that we must view the federal/provincial funding agreement for Labrador Aboriginal communities signed in 1965.

The 1965 agreement set the foundation for future funding arrangements between the province and the federal government up to the present time. The major complaint of Newfoundland regarding the Agreement of 1954 was that Aboriginal peoples in the province were not funded on the same basis as Aboriginals in the rest of Canada. In fact the amount of funding was much less on a per capita basis. The Premier, Mr. J.R. Smallwood, took the matter to who was then the Newfoundland representative in Ottawa, Mr. J.W. Pickersgill. In a letter to Mr. Smallwood, Mr. Pickersgill outlined the importance of the Quebec negotiations and his belief that the federal government should exert its constitutional jurisdiction over Aboriginal peoples in the province. He wanted to "*put our government on the spot*" and engineered a means whereby Mr. Smallwood could actually force the Prime Minister to make a positive decision. Mr. Pickersgill condemned the federal government for not living up to its responsibilities in Newfoundland and emphatically referred to what he labelled a "*Pontius Pilate attitude*."¹³⁰ (Appendix X) Mr. Smallwood then sent Mr. Pearson a draft of a proposed letter seeking

Mr. Pearson's concurrence with the wording of his letter and his description of the situation as he saw it existing in Newfoundland:

*"I am sending you herewith a draft of a letter that I would propose to send to you formally ... Would you be so kind as to return the draft to me, together with any suggestion of change you would like to have in it. I will thereupon have it freshly typed, signed, and mailed to you."*¹³²

The draft letter of Mr. Smallwood contains an accurate view of the position of Newfoundland at this stage in the negotiations. It includes Newfoundland's interpretation of Term 3 of the Terms of Union; an interpretation as to the position of Aboriginal peoples in Newfoundland and Labrador according to the Canadian Constitution; and describes the controversy as to the responsibility for funding and administration of Aboriginal affairs. It reflects in poignant detail the essence of Newfoundland's position set out in *"The Newfoundland Position"* section of this paper, and echoes the legal and political interpretations by senior federal officials also referred to previously.

Mr. Pearson wrote a terse response to Mr. Smallwood. He saw *"no reason why the letter should be modified in any way"* and promised that his government *"gives it the consideration due to this important subject."*¹³⁴ Following reception of Mr. Smallwood's letter accepting receipt of the above, Mr. Pearson wrote an acknowledgement and indicated that there were really two points to consider; jurisdiction over Inuit and Indians, and financial assistance with particular reference to the Terms of Union.¹³⁵ Four months later, Mr. Pearson wrote a letter to Mr. Smallwood which can be considered a milestone in federal/provincial relations regarding Aboriginal peoples in the province. Mr. Pearson

wrote that:

"may I say at the outset that the federal government does not wish to disturb the established arrangements for provincial administration of Indian and Eskimo Affairs in Newfoundland."

Mr. Pearson then asked for detailed information regarding the Indians and Eskimos of Labrador and stated that any commitment of federal funds must be made

*"within the framework of a clear concept of your plans for the development of the region and the part the Indians and Eskimos will have in such development."*¹³⁶

The essence of Mr. Pearson's letter is that the province should continue to administer Indian and Inuit affairs in Newfoundland. The federal government provided funds as per its jurisdiction according to the Constitution in the matter of *"financial support."* This appears to be the genesis of the federal position that the province is responsible for the administration of Indians and Inuit in the province and that the federal government merely provides funds so that the province can carry out this responsibility. The federal position still remains that this arrangement is consistent with any responsibilities it may legally possess. It is important to note that the letter of Mr. Pearson did not give the reason for the federal assumption that it could provide this financial support and as to how it relates to Section 91.24 of the Constitution Act (1867) or interpretation of Term 3 of the Terms of Union between Newfoundland and Canada; however, it seems to have pleased Mr. Smallwood. It also appears that the Premier at that time accepted the responsibility for administration and the principle that the administrative efforts of Newfoundland in this regard were to be funded by federal money:

*"I was very pleased to learn from your letter of August 10th that the Government of Canada do not wish to disturb the established arrangements for provincial administration of Eskimo and Indian affairs in Newfoundland. It is most heartening that the Government of Canada are further prepared to provide such continuing financial support to the Government of Newfoundland as seems appropriate in the light of the needs of Indians and Eskimos in this Province and of the programme relating to Indians and Eskimos elsewhere in Canada as will enable us to discharge our responsibilities."*¹³⁷

The system of holding rounds of discussions between federal and provincial officials over funding and administration began with the Exchange of Letters discussions in the spring and summer of 1964. The request for information by the federal government was answered in a letter by Mr. R.L. Andrews, Deputy Minister responsible for the Division of Northern Labrador Affairs to Mr. G.H. Gordon, Assistant Deputy Minister of the federal Department of Northern Affairs in December 1964. Appended to this correspondence was a detailed note on the population, distribution, health, welfare, income, social problems, and other matters relating to Indians and Inuit in Labrador in the form of a proposal for general funding of social and economic programs. It described the state of the schools, how much Newfoundland had spent during the past five years on education, health, economic development and housing, and included a detailed summary of all administrative expenses by Newfoundland officials of the Division of Northern Labrador Affairs. It made recommendations for construction of houses and other matters included in what was entitled a *"rehabilitation program"* charged against the cost of the trading operation.¹³⁸

This proposal set the stage for an expanded role by the federal government in

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funding Aboriginal programs and services. That role did not extend to actual administration or direct involvement in Labrador. Newfoundland officials maintained direct contact with the Aboriginal communities and continued to administer programs and services; and to design policies and projects for the development of Labrador.

(B) THE "EXCHANGE OF LETTERS" ARRANGEMENT OF 1965

On May 25, 1965 the Honourable Lester B. Pearson wrote to Mr. J.R. Smallwood agreeing to the Newfoundland proposal based on the correspondence and report previously submitted by Mr. Andrews. Mr. Pearson repeated his commitment to the proposed financial arrangements and his assurance that he did not wish to *"disturb the established arrangements for provincial administration of Indian and Eskimo affairs in Newfoundland."*

He also went on to say, with reference to the previous statement, *"taking this as our starting point"* federal Cabinet agreed that Canada should enter into two agreements with Newfoundland and that Canada should as well pay a share of the capital cost incurred by Newfoundland in the period 1959-1964 for projects carried out for Indians and Inuit. The agreements were outlined by Mr. Pearson as being two ten year agreements, one covering the medical and hospital cost for Indians and Inuit which in effect expired on March 31, 1964. This would be extended for a five year period. The second item of agreement would be

*"a new agreement between Canada and Newfoundland in respect of all provincial expenditures on Indians and Eskimos, other than medical and hospital costs covered in the first item."*¹³⁹

This proposed agreement contains the essential elements of the current federal/provincial arrangements, the clauses of which are quoted in Appendix XII.

This Exchange of Letters Arrangement was the blueprint for the native peoples agreement of 1970 and subsequent funding arrangements. With the exception of revisions in the sums of money involved there was little alteration in the basic principles outlined above. These proposals were accepted at a meeting of the Executive Council of the province of Newfoundland June 1, 1965. Mr. Smallwood also appointed a committee to meet with federal officials; the Deputy Minister of Health, Deputy Minister of Education, Deputy Minister of Fisheries, Deputy Minister of Resources, and the Deputy Minister of Municipal Affairs, as well as representatives of the Power Commission, Director of Northern Labrador Affairs and the Deputy Minister of Public Welfare who was to act as the Chairman for the Newfoundland Committee.¹⁴¹

The 1965 agreement was not a signed federal/provincial agreement as in other areas of jurisdiction. For example, an agreement for federal funds to flow to Newfoundland for a development project such as forestry or agriculture would take the form of a formal agreement signed by the appropriate Ministers. The "*arrangement*" for the "*provincial administration*" of Indian and Inuit affairs took the form of an Exchange of Letters arrangement whereby the Ministers, in this case, the Premier of the province of Newfoundland and the Prime Minister of Canada, exchanged letters which agreed on the wording of particular attached documents outlining the roles, responsibilities, and financial arrangements between the two orders of government. These arrangements

became known as Exchange of Letters Arrangements for Aboriginal peoples. It was not until 1981 that a formal federal/provincial agreement came into effect.

(C) THE DEFINITION OF "ABORIGINAL" AND "COMMUNITY"

The Exchange of letters arrangements were viewed as development agreements for particularly disadvantaged communities. For example, in 1972 the community of Black Tickle was brought into the realm of the Exchange of Letters arrangements because

"the community has been sadly neglected and is badly in need of assistance with housing, roads, fishing premises, water and sewage, and other community services."

In 1973 the same rationale was utilized to include the community of Conne River on the Island of Newfoundland within the ambit of the Exchange of Letters arrangements, to fund what were essentially development projects to raise the community to a standard equal to other communities in the area.¹⁴² However, this community was included only because it was identified as a community with a particular proportion of aboriginal peoples. A letter to Premier Moores from the Honourable Pierre Elliott Trudeau in August 1973 indicates that the federal government would agree to include the community of Conne River only because a *"considerable number of the residents of this community are of Indian descent."* Another element of federal/provincial cost sharing emerges with this attempt to determine eligibility for federal funding; 90 percent federal and 10 percent provincial. This formula was customized for the benefit of Aboriginal peoples in Newfoundland and Labrador. In terms of Conne River the Prime Minister believed that

"it seems doubtful therefore, that the community could be covered by the 90/10 cost sharing formula that now applies to the residents of Davis Inlet and Northwest River. "

The Prime Minister suggested that another formula could apply which he included in quotation marks as *"90 percent of two thirds of the population. "* This reflected the ratio of Inuit/White people in the various northern communities. The Prime Minister was hopeful that

*"Some similar type of general proportion can be developed with our officials with respect to Conne River. This would avoid any conflict in the community that would quite likely result if a strict head count were attempted or if there should be a request for registration of those people who might qualify under the terms of the Indian Act. "*¹⁴³

It was clearly established, especially in relation to the inclusion of additional communities within the ambit of the Exchange of Letters arrangements, that federal money would only flow for programs and services designed specifically to benefit the Aboriginal proportion of those communities. The province must pay any remaining funds to permit the same level of programs and services to the non-Aboriginal population. This in fact recognized the long-standing Newfoundland principle that all citizens or residents were equal in terms of access to programs and services. If a particular group or community was particularly disadvantaged then remedial actions could be taken to ensure the principle of equality.

V. CONCLUSION

In the pre-Confederation Era it has been demonstrated that there were no treaties, legal instruments, or special allocations of land initiated by the Imperial government or the colonial authorities in Newfoundland which created a legal or financial burden on the

Government of Newfoundland for Aboriginal peoples at Confederation in 1949. The Moravian missionaries and the fur trading companies developed a paternal role in their dealings with Aboriginal peoples. They were in effect responsible for the day to day involvement with Aboriginal peoples. While the Imperial government and later the colonial government of Newfoundland complemented that role whenever possible, they did not choose to become involved in the formulation of specific policies for Aboriginal peoples or engage in financial or other support beyond that afforded to other residents of Newfoundland and Labrador. In other Canadian jurisdictions specific legal obligations were created by application of the Royal Proclamation of 1763; the establishment of reserves or land set aside exclusively for Aboriginal peoples; implementation of a treaty process; and the enactment of laws or regulations for wildlife of other matters.

According to Section 91.24 of the Constitution Act (1867) Indians and any lands set aside for the exclusive use of Aboriginal peoples prior to Confederation were placed under federal jurisdiction. As in other areas of public administration, provincial monies and bureaucracies were assumed to be transferred to the federal government for exclusive legislative, administrative and financial control. When Newfoundland entered Confederation there were no capital funds, administrative structures or special programs to be transferred to the federal government. Indians and Inuit were full citizens of the province of Newfoundland and Labrador as they were full citizens of the Dominion of Newfoundland prior to April 1, 1949. There was no change in their legal or constitutional status.

Examination of the various provinces as they entered Confederation has revealed a plethora of legislation, land allocation, programs and other measures designed for the benefit of Aboriginal peoples. Where Terms of Union with other provinces were negotiated specific clauses were generally included to address Aboriginal issues if there was a particular or unique aspect in the administration of Aboriginal affairs which deserved special notice. If this was not the case, then the federal government assumed responsibility for Indians and lands reserved for their specific use and benefit according to Section 91.24 of the Constitution Act (1867). There is no comparison with the situation of Newfoundland in 1949. The situation respecting Aboriginal peoples was unique in that there were no pre-existing legal or financial structures. The debates of the post-Confederation period regarding the roles and responsibilities of the provincial and federal government in the funding and administration of Aboriginal affairs were coloured by the fact that there was no precedent for the Newfoundland situation. In the absence of precedent it does not appear that federal or provincial officials were able to formulate the basis of an agreement to finally determine their respective roles and responsibilities.

In the absence of a formal, comprehensive federal/provincial agreement between the province and the federal government on Aboriginal issues, the legal/constitutional issues of financial, resource and program responsibility remains unclear. The Exchange of Letters and later the federal/provincial funding agreements were temporary solutions but ignored the essence of fiduciary responsibility for money or land according to Section 91.24 of the Constitution Act (1867). The federal government during the 1950's and

1960's undoubtedly believed that they were providing money to the province to administer Aboriginal affairs and that the province had a duty to be involved in this administration. Mr. Smallwood apparently agreed with this assumption, but yet insisted that the federal government had a financial or fiduciary responsibility for Aboriginal peoples. The attainment of a formal federal/provincial agreement in 1981 was a reflection of the policies and framework set out in 1965 which once again set aside the real issues of jurisdiction, responsibility, administration, and other legal/constitutional matters.

In one sense the federal government achieved its objective in reducing the application of the Indian Act by not actively seeking registration of Newfoundland Indians; refusing direct involvement in the administration of programs and services for Aboriginal peoples in the province; and by sidestepping the issue of responsibility for finance, administration, and the provision of basic programs and services. On the other hand, it appears that Newfoundland acquiesced. The correspondence of Mr. Smallwood clearly indicates he believed that Newfoundland was responsible for the administration of programs and services. This administration was to remain untouched and was to continue under the control of Newfoundland, but funding for development, additional services, and program enhancement not available to other citizens of the province was to be funded by the federal government.

Since Confederation each step in the growing relationship between Ottawa and St. John's regarding Aboriginal peoples must be set against the background of what was

happening in the rest of Canada. For example, the Health Agreement of 1954 was negotiated just after the massive revision of the 1927 Indian Act in 1951. It was the aim of federal policy as well as the Indian Act that no more "*Indians*" were to be created. If at all possible, Indians were to be sent into the mainstream of Canadian society and not be differentiated from other citizens. The negotiations with Quebec were particularly relevant to the federal/provincial Exchange of Letters Arrangement in 1965. At this point in time the federal government actually turned over the administration of Aboriginal affairs to the province of Quebec and funded those particular programs and services which were particularly designed for the benefit of Inuit. This objective closely resembles the Exchange of Letters Arrangements of 1965. Again, in the early 1970's, following the federal white paper of 1968 the actual roles of each level of government in program delivery began to mirror the most prominent feature of federal policy. If possible, the provinces were to treat Aboriginal peoples in the same manner as all residents of the province in terms of programs, services, and other opportunities. However, if Aboriginal peoples were to be afforded the benefits of federal programs and other special funding then other agencies were to be the funnels through which this federal funding was actually channelled.

By the late 1970's and early 1980's the critical problem throughout Canada was responsibility for programs and services, especially for Aboriginal peoples who were not registered or resident on reserves. Although the federal government claimed no direct legal or constitutional responsibility for these Aboriginal citizens, it did fund programs

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and services which were designed solely to bring Aboriginal peoples into the mainstream of Canadian life. For example, off-reserve Indians could have access to funds for education and housing; however, except in special circumstances requiring immediate financial or program support, these same "*Indians*" were not granted the full range of programs and services afforded under the Indian Act. The federal position remains that they are provincial residents and do not reside on Indian lands as per Section 91.24 of the Constitution Act (1867.) Once again, we see this fact reflected in the federal/provincial agreement of 1981 which was a federal/provincial agreement similar to those signed for forestry, fishing, or any other form of development activity. The only difference was that the proportion of funding per community depended upon the ratio of people who were deemed to be of Aboriginal descent.

It is obvious that from 1954 to the present neither the federal nor the provincial government appears to have altered its original position. The issues have been set aside and various mechanisms established to avoid the hard political, legal, and constitutional questions. The power of the greater federal purse has always been available to pressure not only Newfoundland but other provinces into a temporary agreement or arrangement for a specific term of years. In this respect, Newfoundland is no different and has at least been successful in extracting funds from the 1950's onwards for the benefit of certain Aboriginal communities.

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APPENDIX I

*"And whereas His Majesty did at the same time order that the Governor or Commander in Chief of Newfoundland, for the time being do give them all reasonable Assistance and Support in forming the said Mission Settlements, and in His Majesty's Name to warn all Persons from molesting or disturbing the said Mission Settlements; Therefore be it known to all Men that their said Settlements are under His Majesty's immediate Direction and Protection; And I do hereby enjoin all His Majesty's Subjects to live in Amity and Brotherly Love with the said Missionaries and with the Native Indians inhabiting that Country, in no wise molesting or disturbing the said Missionaries or those who should settle with them. And I do require that all His Majesty's Subjects, who shall come upon the Coast of Labrador to Act towards the Esquimaux-Indians justly, humanly, and agreeable to these Laws, by which his Majesty's Subjects and all Classes are bound throughout His Majesty's Dominions...."*²⁸

APPENDIX II

*"The Intercourse you complain of between these People and the French is carried on by your clandestine Traders with those Islands, particularly from the Island of Breton ... Likewise, by several passports that have been Granted by your Government to the Indians' Chiefs to come to this Country which I must say was very inconsiderate in those who granted them, without first having His Majesty's Ministers have Probation of it. And it might have been notified to me and that I might have known how to act respecting them. While it isn't possible to relent their communication with the French if they are admitted into any part of this island - in 1764 I wrote to Major Walters, the Chief Commanding Officer at Louisburg representing the consequences, beg'd he would recall those Passes (which I believe he did) and he gave no more. Notwithstanding which this last year the Chief Pegidawa Oulaut with a Tribe of about Two Hundred returned with fresh Passes to come to this Country dated at the Secretary's Office at Halifax July 22, 1765. Also from the Gentlemen who had a Congress with them at Nerickshag dated August 31, 1765 and from Lieutenant Colonel Pringle dated at Louisburg, August 17, 1765, under the Sanction of which They proceeded directly to St. Pierre's, and thence dispersed themselves through this Country in that Neighbourhood, through the great terror of all His Majesty's Subjects in that Part of this Island. I have taken those Passes from them and gave them preemptory Orders to return to their own Government. But I now despair of ever getting them Out of this Country... I shall leave tow of the King's Sloops to Guard the Coast in the winter, to drive away the indians, and to keep the French off. One of them at Grand Jarvis at the entrance of Baie Despoir the other at Placentia. The first rendezvous of the Ships on these Stations in the Spring will be about the island St. Pierre and at great St. Lawrence Harbour. I mention this for your Information that if at any time you should have Anything Proper to be Communicated to me or the Officers on that Part of the Coast in my absence for His Majesty's Service you may know it may have a ready Conveyance."*³⁷

APPENDIX III

*"To the Micmacs, the Esquimaux and other American Indians frequenting the said island, Greeting: WHEREAS it is the gracious pleasure of His Majesty, the King, my master, that all kindness should be shown to you in his Island of Newfoundland and that all persons of all nations at friendship with him should be considered in this respect as his own subjects and equally claiming his protection while they are within his Dominions. This is to greet you in His Majesty's name and entreat you to live in harmony with each other, and to consider all his subjects and all persons inhabiting in his Dominions as your brothers, always ready to do your service, to redress your grievances, and to relieve you in your distress. In the same light also are you to consider the native Indians of this Island; they too are, equally with ourselves, under the protection of our King, and therefore equally entitled to your friendship. You are entreated to behave to them on all occasions as you would do to yourselves ... you are hereby warned that the safety of these Indians is so precious to His Majesty who is always in support of the feeble, that if one of ourselves were to do them wrong he would be punished as certainly and as severely as if the injury had been done to the greatest of his own people, and he who dared to murder any one of them would be severely punished with death; your own safety is in the same manner provided for; see therefore that you do no injury to them... Do you not therefore deprive any one of our friends, the native Indians, of his life, or it will be answered with the life of him who has been guilty of murder."*⁴⁴

APPENDIX IV

"the reservation, it appears laid off for the Micmacs about 1872 by Mr. Murray, geological surveyor of the colony. It contained 24 blocks of about 30 acres each with a water frontage of 10 chains. From the copy of the plan of the reservation enclosed herewith, it would be noticed that each parcel was to form the subject of a personal grant to the individual whose name was on the allotment. The rate then conferred was in each case a "licence to occupy," of which I enclose a copy and blank form. The licence, it will be observed, would on the fulfilment of certain conditions have been replaced by a grant in fee after 5 years. In few cases, if any, have the terms of the licence been complied with and no grant in fee or other title has been issued to any of the occupants on this reservation. "⁵⁰

APPENDIX IV

- 1) *The date for the selection of a population count on which to base acreage will be the date of first application (or survey) for land.*
- 2) *Treaty entitlement transfers shall include mines and minerals as in all past entitlement transfers in Manitoba in accordance with Section 12 of the Manitoba Natural Resources (Transfer) Act.*
- 3) *Manitoba will not transfer lands that are clearly chosen for speculative purposes in respect of future public utility or public works projects such as highways, pipelines or transmission lines.*
- 4) *As much as possible, claims should be taken in single blocks contiguous to existing resources. However, the geography of northern Manitoba will not always permit this, requiring exceptions to provide land that can be of some use to the bands. Sites for settlement purposes will normally be smaller in size and will be chosen having regard for such factors as drinking water supply, access, and hydro availability on building sites.*
- 5) *The province will not transfer land within 99 feet of ordinary high water of navigable rivers and lakes; however, leases will be made available to bands for the use of these areas without Manitoba or its agencies assuming liability for flood or other damages.*
- 6) *The province will not transfer lakes or rivers or the beds of same to Indian reserves.*
- 7) *The province will not pay for access roads to new reserve lands.*
- 8) *The province will not transfer land to Canada for designation as Indian reserves if such transfers will work to the detriment or other residents of the area.*
- 9) *In all instances of land transfer the rights and needs of Manitoba society and in general the public interest of Manitoba shall be an overriding consideration in the negotiations.*

APPENDIX V

"Under the Indian Act, Indians and Eskimos in Canada are regarded as one race for purposes of administration. In the event of Newfoundland becoming a province of Canada the Indians and Eskimos of Newfoundland and Labrador would be the sole responsibility of the federal government and, under existing legislation, would be entitled to benefits and would be subject to regulations which include the following:

- 1. Free education, provided through day schools and boarding schools. Where boarding schools already exist subsidies ranging from \$165.00 to \$300.00 per pupil per year are paid.*
- 2. Free medical services including hospitalization.*
- 3. Family allowances on the same basis as white population and applied in the normal way wherever possible.*
- 4. Land reserves for settlements and trapping lines are set up by arrangements with the provincial government.*
- 5. Free conservation projects, fishing projects, handicrafts, and other aids are undertaken in their behalf.*
- 6. The federal government sets up trading posts, where there are no satisfactory arrangements for trading by private interests. This is done to help Indians eventually to buy and market cooperatively themselves.*
- 7. Indians and Eskimos are exempt from land tax on income earned on the reserve.*
- 8. An Indian is not entitled to vote, unless he has satisfied the conditions referred to in item 11, or unless he has served overseas in time of war in one of the services.*
- 9. An Indian is not allowed to use intoxicating liquors.*
- 10. Indians do not receive Old Age Pension but relief for the aged is provided.*

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11. *The right of franchise and full citizenship, if the Indian in question can prove that he is no burden on the province or municipality. In the event of an Indian assuming the status of full citizenship, he ceases to be regarded as an Indian and is no longer entitled to special benefits accorded to Indians."*

APPENDIX VI

Sections 9, 10, and 11 of the Indian Act set out the policy with regard to the operation of schools for the Indians of Canada.

There are tow main categories of schools in operation:

- (a) Day Schools, established for the children on local reserves.*
- (b) Residential Schools, established for children whose parents are hunters, trappers, or nomads.*

DAY SCHOOLS:

Day schools are operated directly by the Department of Mines and Resources, Section 100 of the Indian Act provides as follows:

"If the majority of the band belongs to any one religious denomination, the teacher of the school established on the reserve shall belong to the same denomination."

RESIDENTIAL SCHOOLS:

In residential schools it is provided in the Act that no Protestant child shall be assigned to a Roman Catholic school and no Roman Catholic shall be assigned to a Protestant school. It has been the practice for over 50 years now to have the following four religious denominations operate our residential schools: -

- (a) Roman Catholic*
- (b) Church of England*
- (c) United Church*
- (d) Presbyterian Church*

These denominations are given a per capita grant for each Indian or Eskimo child educated by them in these schools. In some instances the residential schools are church-owned and in other instances they are government-owned.

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The Indian Act provides or compulsory education of Indian children between the full ages of 7 and 16 years in either our day or residential schools.

In certain of the provinces the Dominion also pays tuition fees for Indian children who are attending elementary or high schools conducted by municipal school boards or by provincial departments of education."

APPENDIX VII

"Indian Affairs Division - we have no such thing in Newfoundland. (Laughter from Mr. Hollett). There happens to be 300 Indians in Labrador, and many more Eskimos, and I will remind him that in Canada, for the purpose of administration, Indians and Eskimos are all treated as Indians for purely legal reasons. We have many hundreds of them; Mr. Bay Boy may not feel like laughing when I say the Government of Newfoundland has no such division or department for the welfare of the Indians or Eskimos, of whom there are many hundreds in Labrador.

Mr. Hollett - *I did not laugh. Now that you have got that off your chest...*

Mr. Smallwood - *I apologise, but I do not apologize to the member who laughed, whoever it may have been.*

Mr. Bailey - *Is it true that we look upon our Indians as not being citizens?*

Mr. Smallwood - *Any Indian in Canada can apply for citizenship. Many prefer not to because they get more benefits by not being citizens. In Newfoundland we never even allowed them to be citizens. Until this National Convention we never even gave them a vote. All we gave them was a bit of dole. Let me pass on."*

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APPENDIX VIII

"MR. BALDWIN: What I am rather amazed about in this brief is the statement that the Indians in Labrador have been neglected, and it reveals a shocking state of affairs there, although they are small in numbers. Surely our Department of Citizenship and Immigration are conscious of that situation. I feel that means they will not be treating the Indian the same as Indians elsewhere, and if not, they should. Where does the blame lie for this neglect? After all, and if not, the Newfoundlanders have been in Confederation now for eleven years.

MR. JONES: I did not follow all that Mr. Badanai said, but I got the gist of it. The Indian affairs branch has no responsibility for the Indians in Newfoundland.

MR. CHARLTON: On the other hand, I see they have donated \$200,000 towards helping them.

MR. ROCKWOOD: This \$200,000 was for the Indians and the Eskimos.

MR. CHARLTON: Yes, yes, of course, for capital expenditure such as schools, hospitals, and housing.

SENATOR FERGUSSON: On page 9, the brief says:

The federal government contributed two-thirds of the cost of 25 similar houses built for Eskimos in 1965, but to date no assistance has been received toward Indians housing -

Could you say if any request has been made to the central government for assistance in Indian housing?

MR. ROCKWOOD: Yes. As the brief shows, twelve units have been built, seven in 1958 and five in 1959. The cost of the 1958 houses was just around \$10,500.

SENATOR FERGUSSON: Were these for Indians or Eskimos?

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MR. ROCKWOOD: A claim was sent, to the best of my knowledge and belief, to the department concerned, and to date we have not received any assistance on Indian housing.

SENATOR FERGUSSON: What do you mean by "the department concerned?"

MR. ROCKWOOD: The federal department concerned."

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APPENDIX IX

"SENATOR FERGUSSON: But Colonel Jones says the Department of Citizenship and Immigration has no responsibility.

MR. ROCKWOOD: That was part of the \$200,000 deal. It may be that that \$200,000 was fully spent or it may not have been fully spent, I do not think it was, but the claim was not paid.

SENATOR INMAN: When it came in, would they not automatically become citizens of Canada?

MR. CHARLTON: And a federal responsibility.

MR. ROCKWOOD: I think the distinction was made, in that the Indians of Labrador were considered to be Newfoundlanders and not Indians. We wanted to consider them as Newfoundlanders and not specially because they were Indians.

THE JOINT CHAIRMAN (MR. GRENIER): Is this the reason that there is no mention of the Indians in the agreements?

MR. ROCKWOOD: I think so, I would think that the legal status did not arise. They were already citizens of the province. They became citizens of Canada, just as all the other people of Newfoundland did, regardless of their origin.

THE JOINT CHAIRMAN (MR. GRENIER): Can you tell us if they want to remain so?

MR. ROCKWOOD: I do not know, I could not answer that as to whether they would prefer to have Indian status and share as the rest of the Indians in Canada, or whether they would prefer to remain citizens."

APPENDIX X

"Up to now, I have urged both Ministers not to press this matter while the negotiations with Quebec were going on. These negotiations have now reached the point where the Canadian Government has agreed, in principle, to transfer the administration of the Eskimos in northern Quebec to the provincial government while reserving all the rights entrusted to the federal authorities under the Constitution.

*As you and I know, the federal government has never been willing to assert its Constitutional jurisdiction over the Indians and Eskimos in Newfoundland but instead has adopted a "Pontius Pilate" attitude. I think the time has now come to put 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 the negotiations with Quebec are finally settled."*¹³¹

APPENDIX XI

"At the time we were negotiating the Terms of Union, the Government of Canada, as I understand it, did not accept the view that Eskimos were Indians under the Constitution; nor was the government of that day anxious to have the Indians of Labrador accepted as Indians under the British North America Act and brought under the administration of the Superintendent-General of Indian Affairs.

The Newfoundland delegation accepted this attitude and no reference was made to Indians and Eskimos in the Terms of Union. Subsequently, however, the Government of Canada did recognize a certain moral responsibility toward the Indians and Eskimos and an arrangement was made for a measure of financial assistance to Newfoundland in 1954.

This arrangement terminates on March 31, 1964, after which time, unless some new arrangement is made, there would be no financial support given by the Government of Canada in respect of Indians and Eskimos and no responsibility acknowledged by the Government of Canada for Indians and Eskimos in Newfoundland. It seen to us that 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 in other Provinces, and that therefore the Parliament and the Government of Canada can not divert 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 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 the full responsibility for the Indian and Eskimos of Labrador, as you would presumable have a right to do under the Constitution. However, 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.

The simplest way to do this would probably be to make a per capita payment to the Government of Newfoundland equal to the average per capita expenditure on Indians and Eskimos in the other Provinces.

Naturally, if such payments were to be 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.

*In view of the fact that we will be receiving no financial assistance in respect of Indians and Eskimos after March 31, it has now become an urgent problem for us and I would hope that your Government could give this matter early consideration."*¹³³

APPENDIX XII

- "(a) *Canada will reimburse Newfoundland for 90 per cent of the province's expenditures on Indians and Eskimos, as certified by provincial auditors and subject to federal audit commencing April 1, 1965;*
- (b) *such reimbursement will not apply to any part of such expenditures which Newfoundland recovers from Canada under any other federal-provincial agreement;*
- (c) *the total amount of reimbursement made by Canada to Newfoundland under this agreement will not exceed \$1 million per year for the first 5-year period;*
- (d) *provincial expenditures on programs for Eskimos and Indians will be subject to an annual budget recommended by a federal-provincial committee of officials and approved by each government;*
- (e) *There will be a continuation of the provision in the said original agreement (covering capital costs in the period 1954-59) that Newfoundland should bear, without cost sharing, the full first one third of capital expenditures in the Nain, Makkovik, Hopedale and Postville communities. This reflects the percentage of non-Eskimo residents in these communities.*
- Since the new agreement will cover both operating and capital expenditures, this provision, therefore, would apply both to operating and capital costs in these communities.*
- (f) *With regard to capital costs for regional institutions which will serve predominantly white communities as well as Indians and Eskimo communities, the federal 90 per cent share will only apply to that part of the cost representing the proportion of use which the Indians and Eskimos bear to the total enrolment.*
- (g) *this agreement will be renegotiated at 5-year intervals with the first review to take place April 1, 1970."* ¹⁴⁰