Indigenous Positions to Patriation Process in Canada

There was a historical process in Canada to have the **Constitution Act [1967]** amended such that the Parliament of Canada would have full legislative and political authority to deal with its nation status and sovereignty. Canada wanted to cut the umbilical cord from the United Kingdom which had enacted the British North America in 1867.

There were preliminary discussions between the Federal Government and the Provinces over an amending formula. Indigenous voices were never invited by the First Ministers in these discussions. Indigenous politicians began to assert that the Federal Government did not fulfill the promises that were made by Treaties in Canada since the 1700s.

Aboriginal title had been recognized in Common Law in Canada since the Privy Council, in **St. Catharines Milling v. The Queen (1888)**, characterized it as a personal usufruct at the pleasure of the Queen. This case did not involve indigenous parties, but rather was a lumber dispute between the provincial government of Ontario and the federal government of Canada. St. Catharines was decided in the wake of the Indian Act (1876), which laid out an assimilationist policy towards the Aboriginal peoples in Canada (First Nations, Inuit, and Métis), allowed provinces to abrogate treaties (until 1951), and made it a federal crime to prosecute First Nation claims in court, raise money, or organize to pursue such claims. St. Catharines was more or less the prevailing law until **Calder v. British Columbia (Attorney General) (1973).** All seven of the judges in Calder agreed that the claimed Aboriginal title existed, and did not solely depend upon the Royal Proclamation of 1763. Six of the judges split 3–3 on the question of whether Aboriginal title had been extinguished. The Nisga'a did not prevail because the seventh justice, Pigeon J, found that the Court did not have jurisdiction to make a declaration in favour of the Nisga'a in the absence of a fiat of the Lieutenant-Governor of B.C. permitting suit against the provincial government. The **Calder** decision was the first case brought by an Indigenous Nation. It was forbidden by the Indian Act of 1927 [Section 141] for such a court process:

S.141 "Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the Tribe or Band of Indians to which such Indian belongs, or of which he is a Member, has or is represented to have for the recovery of any claim or money for the said Tribe or Band, shall be guilty of an offense and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for a term not exceeding two months."

Prime Minister Pierre Trudeau was forced to aboriginal title in 1973 as a Comprehensive Land Claim Process.

The Treaties were not recognized by the Government of Canada when there were conflicts with Fishery Act and Migratory Birds Conventions Act. The only defense of those who were charged under the Game laws of the Provinces was for some beneficiaries of Treaties was through Section 88 of the Indian Act:

88 Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act. R.S., c. I-6, s. 88.

The Prime Minister and nine Premiers agreed to the **Constitution Act 1982**. The Parliament in the UK enacted the legislation and it became law in Canada. The Indigenous leadership across Canada were united initially in opposing the patriation process. No one trusted the politicians to accept indigenous points of view on aboriginal title, aboriginal and treaty rights. Indigenous leaders did not have the Premiers to be involved in the identification and definition of these fundamental rights.

However, the leaders representing the Indian, Metis and Inuit persons did reluctantly agree to participate in the First Ministers Conference [Prime Minister and Premiers]. There were a number of indigenous political voices who refused to participate at these three Conferences [1983, 1984 and 1985]. They were called the Coalition of First Nations.

The Conferences did take place as will be seen on this video **Dancing Around the Table, Part I**.