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The State
of the
Federation
2003**

**Reconfiguring
Aboriginal-
State Relations**

*Edited by
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FOREWORD

This year's *Canada: The State of the Federation* is focused on the reconfiguration of Aboriginal-state relations in the federation. The organizing assumption of the volume is that much of the recent intellectual and policy work in this area has not kept pace with an Aboriginal population that is becoming increasingly socio-demographically diverse, and whose relations with non-Aboriginal peoples and governments is becoming ever more complex. Particularly vital are fresh ideas and governance models that are relevant to the living experience of land-based, urban, and geographically dispersed Aboriginal populations. Accordingly, one of the central tasks of this volume is to assess whether the self-rule, shared rule, and intergovernmental features of Canada's federal geometry are sufficiently flexible to adapt to these challenges. While the authors tend to agree that much has changed on the surface of Aboriginal-state relations, they present a variety of perspectives on whether these changes represent genuine progress in terms of increased governing capacity, reconciliation, and meaningful self-determination. This volume aims to increase the understanding of scholars and public officials who are seeking direction in this complex and highly politicized domain of Canadian federalism, and to play a small part in helping to forge more just and lasting relationships among the Aboriginal and non-Aboriginal peoples of Canada.

Contributions to the volume emerged from the conference "Reconfiguring Aboriginal-State Relations," which was held on 1-2 November 2002 in the School of Policy Studies at Queen's University. The conference attracted more than 130 participants, including academics, government officials, consultants, students, and interested members of the general public. The theme was a natural choice for the Institute, given its importance to the federation, but also because it provided us with the opportunity to revisit a subject to which we had devoted substantial time and resources in the 1980s and early 1990s.

Neither the conference nor the edited volume would have been possible without the support of a large number of individuals and organizations. First of all, acknowledgments must go to the Social Sciences and Humanities Research Council of Canada (SSHRC) for a conference grant under the Federalism and Federations Program, and for a Standard Research Grant that aided the preparation of the volume's introductory essay. A special debt of gratitude is owed to David Newhouse and Kathy Brock for their assistance in the conceptual

development of the conference. I also received a wealth of valuable advice from, in no particular order, Alan Cairns, Alain-G. Gagnon, Calvin Hanselmann, Roger Gibbins, Peter Meekison, James Tully, Audra Simpson, John Borrows, Peter Russell, Richard Zuker, Natalie Oman, Will Kymlicka, Nathalie Gelin, Ron Watts, Doug Brown, Frances Abele, Kathy Graham, Mark Walters, Robert Bish, Kent McNeil, Brent Cotter, David Hawkes, and Bradford Morse. I wish to thank the Assembly of First Nations, the Congress of Aboriginal Peoples, and Indian and Northern Affairs Canada for sending representatives to participate in the Round Table on Indian Act Reform, and I offer a very special thanks to Dr Joseph Gosnell for delivering the keynote address during the conference dinner.

As always, the logistical dimensions of the conference were handled with remarkable skill and patience by Mary Kennedy and Patti Candido, who together comprise the administrative backbone of the Institute. Thanks in this regard also go to Adele Mugford, Aaron Holdway, and Katrina Candido, and to R. J. Candido and Caroline Mangosing for capturing the conference event on videotape. I am grateful to Rachel Starr and Tim Hansen of PinkCandy Productions for the development of the conference web site, and once again to SSHRC for financially supporting the Canadian Network of Federalism Studies, which allowed us to create an online archive of some of the conference presentations and essays from the edited volume. Patti and Mary also deserve a huge amount of credit for their work in preparing the edited volume for publication. It is also vital to mention our chairs, discussants, and anonymous reviewers, whose intellectual input added substantially to the overall quality of the contributions and which is gratefully acknowledged. Many thanks are offered to Michael Munroe and Aron Seal for preparing the chronology of events for 2003, to Brett Smith who prepared the 2001 chronology, to Carlotta Lemieux for her work on the copyediting of the volume, to Valerie Jarus for her meticulous and painstaking work on the desktop publishing, and to Mark Howes for the cover design. Finally, I wish to give my heartfelt thanks to Harvey Lazar for providing me with the opportunity and the encouragement to see this project through to completion, and for a wealth of friendly and constructive advice along the way.

Michael Murphy
September 2004

PREFACE

In recent years, the annual *Canada: The State of the Federation* volume has been edited by the director of the Institute of Intergovernmental Relations, either alone or in partnership with others. This is not the case this year. Michael Murphy, until recently the research associate of the Institute, is the sole editor of this most recent volume. Dr Murphy planned the project largely on his own, including both the conference that preceded the volume and the volume itself. In the editing process, he worked closely with the chapter authors and, far more than any other individual, is responsible for the final product.

Dr Murphy left his position with the Institute of Intergovernmental Relations in June 2004 but has continued with the project from his new academic home at the University of Otago in New Zealand. I thank him for his professionalism in seeing this important project through to completion.

The annual *State of the Federation* always contains a twelve-month chronology of recent events in Canadian intergovernmental relations. This volume covers two years, not consecutive, to compensate for a chronology that was inadvertently omitted from our 2002 volume.

Harvey Lazar
September 2004

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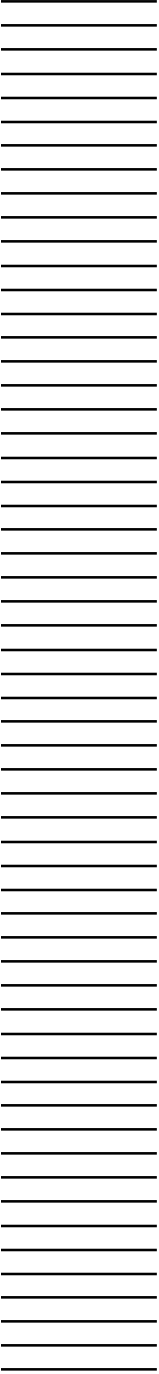
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I

Introduction

Relational Self-Determination and Federal Reform

Michael Murphy

Cet essai examine l'adaptation de la géométrie fédérale canadienne aux revendications d'autodétermination des Autochtones, dont la population se diversifie sur le plan sociodémographique et dont les relations avec les non-Autochtones et les gouvernements sont de plus en plus complexes. Il plaide une compréhension relationnelle de l'autodétermination qui intègre les dimensions autonomes, partagées et intergouvernementales du fédéralisme canadien. Ce modèle de réforme convient à la fois à l'autonomie des Autochtones et à leur interdépendance avec les sociétés et gouvernements non-autochtones; il correspond ainsi à l'expérience réelle des populations campagnardes, urbaines et dispersées. Cet essai en vient à la conclusion que ce processus continu de réforme fédérale a peu de chances d'atteindre son but sans un effort sérieux et soutenu pour cultiver un environnement politique où les peuples autochtones ne sont plus traités comme des acteurs passifs de l'établissement des politiques et de la création d'institution mais bien comme des partenaires égaux.

INTRODUCTION

In 1881 a delegation of Nisga'a journeyed from British Columbia to Ottawa to inform Prime Minister John A. Macdonald of their increasing dissatisfaction with government encroachment on their reserve lands and on their internal affairs. This journey would prove to be an important turning point for the Nisga'a, though not because of the success of this initial venture, for indeed they were not successful. Macdonald, like so many who succeeded him as prime minister, was convinced that Aboriginal peoples such as the Nisga'a would eventually disappear, assimilating into Canadian society, and that it was the duty of government to hasten rather than unduly prolong this process. But the Nisga'a did not disappear. On the contrary, their foray to Ottawa

signalled the beginning of a more aggressive Nisga'a campaign in favour of treaties, a secure and expanded land base, and the restoration of their powers of self-government (McKee 2000, 23–6). In 1998, after more than a century of struggle, these efforts finally bore fruit when representatives of the Nisga'a Nation, Canada, and British Columbia placed their signatures on the *Nisga'a Final Agreement*, a constitutionally protected land and self-government agreement and British Columbia's first modern treaty (Canada 1998a). In 2000 the agreement became law, signalling a turn in the federation that would have been inconceivable in Sir John's time. Along the way, the Nisga'a campaign helped inspire a new era of Aboriginal activism, not only in British Columbia but across Canada. Their persistence also led to broader changes in the federation, including a fundamental reorientation of the Supreme Court of Canada's jurisprudence on Aboriginal rights and a corresponding reorientation of federal Indian policy that helped usher in a new era of negotiating Aboriginal claims to land and self-government (Asch 1999). Closer to home, the Government of British Columbia was encouraged to join with representatives of the province's First Nations and the federal government to create, in 1993, the British Columbia Treaty Process, thereby abandoning its traditional stance of denying the existence of Aboriginal or treaty rights in the province.

These achievements bear testament to the vision and determination of the Nisga'a and to the courage of those in government and the judiciary who were willing to follow them along a new and more promising direction in Aboriginal-state relations. Yet it is important not to exaggerate either the significance of these transformations or the ease with which they were achieved. We should first of all remember that federal and provincial governments were not enthusiastic arrivals at the negotiating table. They were moved less by principled conviction than by a grudging recognition of the uncertain legal and economic climate created by the judicial shift on questions of Aboriginal title and unextinguished Aboriginal rights. Moreover, once they arrived at the negotiating table, they were reluctant to concede the lands, powers, resources, and jurisdictions claimed by the Nisga'a as both a right and a necessity of self-determination (Ratner et al. 2003). The *Final Agreement* itself proved to be simultaneously too much for many non-Aboriginal politicians and members of the general public, and too little from the point of view of many Nisga'a. In the ratification debates in the federal House of Commons, the agreement faced sustained and bitter opposition from Preston Manning's Reform Party, and on becoming law it was challenged in the British Columbia Supreme Court by Gordon Campbell leader of the provincial Liberal Party, which at the time was in opposition (Campbell 2000).¹ The Nisga'a Nation itself was divided in its support of the *Final Agreement*, and the deal was also criticized by other B.C. First Nations and by academic commentators on Aboriginal rights (T. Alfred 1999; Tully 2000a). Even Joseph Gosnell, the chief negotiator for the Nisga'a and one of the treaty's most committed champions, conceded that the

agreement fell short of what the Nisga'a consider is theirs by right (Gosnell 2002).² For many, it is difficult and disconcerting to imagine that more than a century of struggle was required to achieve such a modest level of progress.

In many ways, the Nisga'a Nation's struggle for self-determination is a microcosm of the broader universe of Aboriginal-state relations in Canada. Across the country, Aboriginal and non-Aboriginal parties often manifest profoundly different and seemingly irreconcilable views of the meaning of self-determination, the status of Aboriginal governments in the federation, and the desirability and character of state-Aboriginal intergovernmental relationships. Deep divisions also reign over the appropriate distribution of land, resources, and jurisdictions, and the choice between Aboriginal political traditions and Western liberal-democratic models of representation, accountability and governance. These divisions are also reflected in public opinion. Federal and provincial representatives face a public that is not unsympathetic to the plight of Aboriginal peoples, but whose understanding of the fundamental issues is frequently minimal and whose support can be fickle, particularly with regard to initiatives that require the commitment of substantial resources and public funds.³ On the other side of the table, Aboriginal leaders whose pragmatic intuition may be to cut an imperfect agreement in order to avoid further delays in the process of rebuilding their societies and economies, face significant opposition from members of their communities who believe they should hold out for a deal that is more consonant with what ideal justice requires. Aboriginal leaders must also contend with the fact that their communities continue to harbour significant levels of mistrust of Canadian governments, and the motivations underlying federal Aboriginal policy. Fuelled by the history of colonization and its lingering presence in Aboriginal Canada, the absence of trust continues to be one of the most significant barriers in the path of a more just and mutually beneficial relationship between Aboriginal and non-Aboriginal Canadians.

Nevertheless, as in the Nisga'a example, there is room here for both optimism and pessimism. Change is slow; the question of Aboriginal-settler relations precedes Confederation by more than two centuries, yet many of the same challenges, including treaties, land claims, and self-government, remain largely unresolved. Change is also difficult and is frequently attended by conflict, some of it violent.⁴ Consequently, a substantial investment of energy, resources, and commitment on both sides is necessary to attain even modest progress and imperfect compromises. Yet change has occurred, particularly in the four decades following the retraction of the white paper of 1969. Much of this change has been achieved in what might be called a post-constitutionalist phase of Aboriginal-state relations, wherein the goal of securing a more explicitly entrenched Aboriginal third order of government in the Canadian constitution has given way to a more piecemeal and pragmatic strategy of negotiating new institutional and policy arrangements within existing

constitutional parameters.⁵ It would be an exaggeration to call this change revolutionary, but it is difficult not to agree with Abele and Prince that “Aboriginal communities and governments constitute a significant network of institutional arrangements that are increasingly shaping our living Constitution and evolving federation” (Abele and Prince 2002, 233).

A CHANGING LANDSCAPE

In 1995 an important psychological barrier in Aboriginal-state relations was crossed when, after a long period during which no Canadian government could bring itself to contemplate an “inherent right of Aboriginal self-government” without invoking a fear of Aboriginal separatism, the incoming federal Liberal government simply adopted this proposition as the foundation for future negotiations and policy development (Canada 1995). Yet changes on the ground were already well underway prior to this policy’s announcement or even its conception. For example, in 1994 the Manitoba Dismantling Initiative was launched with the objective of dismantling Indian Affairs in Manitoba and, in its place, re-establishing First Nations governments in sixty-two communities in the province (Doerr 1997, 285).⁶ A more gradual process of change at the federal level brought approximately 85 percent of Indian and Northern Affairs Canada’s (INAC’s) program dollars under the administration of First Nations governments by 1997.⁷ Preceding both these initiatives, in the mid-1970s Inuit in the Northwest Territories began a process that would give them greater control of the land and governance regimes in the Eastern Arctic. This process culminated in 1999 with the creation of Canada’s newest territory, Nunavut, encompassing the largest land claim in Canadian history and a form of public government controlled by the territory’s Inuit majority.

By the summer of 2004, dozens of First Nations from Atlantic Canada, Ontario, Quebec, Alberta, British Columbia, and the Northwest Territories were involved in treaty and self-government negotiations with federal and provincial governments. More specifically, land and self-government agreements for the Nisga’a of British Columbia and nine of the fourteen Yukon First Nations joined agreements negotiated decades earlier for the Sechelt of British Columbia and the Cree and Inuit of James Bay.⁸ An innovative treaty process to negotiate a provincewide system of Aboriginal self-government in Saskatchewan is another prominent initiative that could lead to significant change in the near future (Hawkes, this volume). Even the troubled British Columbia Treaty Process was showing some new signs of life, with fifty-five First Nations participating, forty-one of whom were negotiating agreements in principle and five of whom were negotiating final treaties (BCTC 2004). Institutions for land and resource co-management, particularly in the Far North, are a less well known but increasingly prominent feature of the changing

landscape of Canadian Aboriginal-state relations (White 2002; Scott, this volume), as are the growing number of public-private economic development partnerships between Aboriginal governments and private corporations (Anderson 1997; Mandel-Campbell 2004).

Reforms to the machinery of intergovernmentalism and executive federalism have been slower, but here too there have been developments of some significance, with Aboriginal leaders of the territorial governments and representatives of the national Aboriginal organizations gaining increasing representation in federal, federal-provincial, and federal-provincial-territorial intergovernmental forums (Abele and Prince 2003a, 144–5; Timpson, this volume). Changes in response to the distinctive challenges and circumstances faced by Métis and urban Aboriginal populations have been the least forthcoming of all, but even here there is some room for optimism. The federal government's Urban Aboriginal Strategy (UAS) was introduced in 1998 to address the socio-economic needs of urban Aboriginal people through partnerships with stakeholder groups. Partly as a result of this process, cities across Canada have seen the introduction of a modest array of policies and programs directed specifically at the needs of Aboriginal urban dwellers (Hanselmann 2001, 2002a, 2002b). Through the Privy Council, the federal government also established the Métis and Off-Reserve Tripartite Self-Government Negotiations process to enable provincial, regional, and urban Métis and off-reserve Aboriginal organizations to partner with provincial and federal governments in support of increased governance capacity and service delivery, and improved access to federal and provincial programs and services (Canada, Privy Council 2004). Canada's Supreme Court also has recently moved to accord recognition to the rights and interests of Métis and off-reserve Aboriginal people, although, as Chris Andersen argues in his essay in this volume, the precise form of this recognition constitutes a mixed blessing from the point of view of contemporary Métis communities.

AN IMPROVING LANDSCAPE?

While it is difficult to dispute the fact that much has changed on the surface of Aboriginal-state relations, whether such change represents genuine progress in terms of justice, reconciliation, and effective self-government is an issue that continues to be strenuously debated. Indeed, when commenting on the same set of developments in Aboriginal-state relations over the last three and a half decades, some observers see a paradigm shift (Russell 1996; Abele and Prince 2002; Newhouse 2002), while others see paradigm paralysis (T. Alfred 1999; Ladner 2003; Ladner and Orsini, this volume). This curious analytical dissonance may be explained by a number of factors, including contrasting perceptions of the real motivations underlying Canadian Aboriginal policy

and disputes over when a policy of pragmatic compromise begins to shade into a policy of Aboriginal co-optation by the state. There are also conflicting visions of the desired endpoint of change, for example, whether this should comprise some form of shared citizenship and political participation in both Aboriginal and state-centred institutions or whether it should be an exclusively Aboriginal form of citizenship and self-rule.

More fundamentally, my feeling is that this debate continues to be clouded by the wide gap that exists between the theory and practice of Aboriginal self-determination. While there are many excellent discussions of Aboriginal rights and self-determination from the perspective of normative legal and political theory (Tully 2000a; Macklem 2001; Kymlicka 2001; Borrows 2002), there are far too few examples in the literature that link normative questions with detailed analyses of case studies, and the practical question of translating abstract ideals into concrete institutional forms and public policies.⁹ Moreover, too often these approaches are silent when it comes to proposing concrete alternatives to existing governance arrangements (T. Alfred 1999, but compare G. Alfred 1995; Ladner 2001; Holder and Corntassel 2002; Cairns 2000). One consequence of this disjuncture between norms and practice is that it becomes extremely difficult to assess either the critical purchase of normative theories on specific policies or governance agreements or to determine what sort of alternative policies and institutions may be preferred. As Newhouse and Belanger (2001) conclude, what is sorely missing from the literature are “nimble critiques of modern self-government agreements ... and how academics and community leaders see current Aboriginal self-governance evolving” (6).¹⁰ A second consequence of this theory-practice disjuncture is that it continues to hamper the capacity of normative theory to speak to an Aboriginal population characterized by increasing socio-economic and demographic diversity, and whose relations with federal, provincial, and municipal governments have become correspondingly more complex.

It is therefore imperative that existing research into what Abele and Prince (2002, 228) call the “high politics” of Aboriginal-state relations – for example, constitutional interpretation, high court jurisprudence, treaty principles, and the normative foundations of Aboriginal rights – be supplemented by research into the actors, institutions, and policy developments that are closer to the level of implementation and the day-to-day functioning of Aboriginal-state relations in Canada (228). Particularly vital are fresh ideas and governance models that speak both to the autonomy of Aboriginal populations and to their relationships of interdependence with non-Aboriginal societies and governments, and which are relevant to the living experience of land-based, urban, and geographically dispersed Aboriginal populations (Cairns 2000; Borrows 2000; Murphy 2004a). As I explain below, these new ideas and governance models will embody what might be called a relational understanding of Aboriginal self-determination.

RELATIONAL SELF-DETERMINATION

The twin ideas of Aboriginal self-determination and Aboriginal nationalism began to resonate within the ranks of the Canadian Aboriginal leadership in the latter half of the twentieth century. In strategic terms, the language of nationalism became a powerful rhetorical tool that tapped into the international momentum in favour of decolonization and the burgeoning discourse of universal human rights (Cairns 1999 and 2005). In Canada, this strategic shift towards a discourse of Aboriginal nationalism was cemented by the Trudeau government's white paper of 1969, whose assimilatory overtones helped inspire a new era of activism in support of Aboriginal rights. More than just a strategic tool, Aboriginal nationalism is deeply principled. It is an expression of the democratic right of Aboriginal peoples to determine their own political destiny free from external domination, as far as possible, and to negotiate relationships with other communities and governments predicated on principles of co-equality and mutual consent.¹¹

Nationhood, according to some critics, is an inaccurate label for Aboriginal communities that often have no more than a few hundred members. Such communities lack the size and capacity to operate a "national" government, never mind the fact that they would continue to be heavily dependent on the federal government for their financial viability (Cairns 2000; Flanagan 2000). Critics also feel that the notion of parallel and independent societies invoked by Aboriginal nationalism is ill-equipped to speak to the circumstances of the growing urban Aboriginal population, which is not only culturally heterogeneous but is also highly intermixed with non-Aboriginal populations. In essence, then, Aboriginal nationalism is taken to be empirically falsified on the ground and liable to raise the expectations of Aboriginal communities unnecessarily regarding their potential for political and financial independence. It follows that the metaphor of Aboriginal nationalism should be replaced – perhaps by benign assimilation (Flanagan 2000) or by the metaphor of "citizens plus" (Cairns 2000).

Important as they are, many of these objections are partially based on a tendency to conflate the normative and the empirical dimensions of Aboriginal nationalism. As Keating (2001, 104–5) helpfully puts it, self-determination is the normative core of nationalism. In this specific context it tells us that Aboriginal peoples claim a legitimate democratic right to guide their own fate – the very same right that is assumed and already exercised by Canada's non-Aboriginal people. The normative dimension of Aboriginal nationalism also challenges the state to justify its claim to jurisdiction and authority over Aboriginal societies. As Gordon Christie explains in his essay, the Crown's right to supersede the authority of Aboriginal societies by unilaterally asserting its sovereignty over them has consistently been assumed but never justified by Canadian courts and governments (see also Green, this volume). In place

of this unilateralism, Aboriginal nationalism challenges the state to recognize the co-equal rights to self-determination of Canada's Aboriginal and non-Aboriginal peoples. Neither of these groups has the right to dictate political terms to the other, and thus both must engage in free and open negotiations to determine the legitimate bounds of their autonomy and their interdependence.

To say that Aboriginal and non-Aboriginal peoples enjoy an equal right to self-determination does not wed us to the conclusion that the institutional terms by which this right is capable of being implemented in practice must be identical in both cases. This would be to ignore the very real limitations of size, capacity, and interdependence which must be accounted for in making Aboriginal self-determination both a just and a workable reality in the federation (Abele and Prince 2002, 221; White 2002, 90).¹² Some of this confusion surrounding the theory and practice of Aboriginal nationalism can be reduced by adopting a "relational" understanding of self-determination. Relational self-determination encompasses a sphere of autonomy for self-determining groups, but also recognizes that relations of complex interdependence place both practical and ethical limitations on autonomy, creating the need for shared or co-operative forms of governance to manage this interdependence in a manner which is both effective and democratic (Young 2000, 258–60).¹³ Many analysts of Aboriginal-state relations, including a number of contributors to this volume, have already begun exploring this relational understanding of self-determination.¹⁴ Moreover, as scholars such as Cairns (2000) and Hawkes (2001) remind us, federalism itself holds the potential for flexibly combining possibilities for both self-rule and shared rule for Aboriginal peoples, dimensions which together seem well equipped to embody the broader principle of relational self-determination (see also Henderson 1994; Borrows 2000). What follows is a critical sketch of relational self-determination as I see it emerging in the context of Aboriginal-state relations in Canada. The discussion proceeds by disaggregating and briefly exploring the three component dimensions of relational self-determination in a federal context: autonomy or self-rule, shared rule, and intergovernmentalism.

AUTONOMY (SELF-RULE)

Autonomy refers to an Aboriginal collective's right to govern itself without external interference or domination, as far as is possible. Autonomy is not an absolute quality; rather, it is something that is enjoyed in degrees, for even federal and provincial governments in Canada are constrained in their capacity to govern themselves autonomously, both by one another and by the international sphere of power relations, and in more limited cases by Aboriginal governments. In general terms, autonomous self-rule should provide Aboriginal peoples with the capacity to engage in collective decision making to determine their own laws, priorities, and policies. As such, it generally

involves more than the right to be consulted on matters of law and public policy where the agenda is set and the final decision made by another order of government; it means that Aboriginal leaders are in the position of being policy makers rather than simply policy takers. Self-rule should also provide Aboriginal communities with the capacity to choose their own political leadership and to shape the institutions through which these representatives are to govern and be held accountable to – institutions that reflect the political cultures and priorities of the Aboriginal groups in question. Another key dimension of self-rule is the freedom to decide what will be governed by the community in question, whether this refers to particular populations, territories, resources, policy jurisdictions, or specific programs and services. Indigenous governments may decide to delegate or share jurisdictions with other governments, but this will generally be with the stipulation that it be based on free and open negotiations and consent, and that the distribution of jurisdictions should not be unilaterally determined by the state at the outset.

The most complete form of self-rule is secession and formal independence, but this is neither a viable nor a desired objective for most Aboriginal peoples in Canada. Short of secession, there are several institutional variations on self-rule, a number of which have already been implemented in the federation. Recent examples include public government for the Inuit of Nunavut, who are guaranteed control of the territorial legislature by virtue of their demographic dominance. This governance arrangement provides the Inuit with command over a range of legislative jurisdictions similar to those exercised by Canadian provinces (Hicks and White 2000). Yukon First Nations exercise a slightly different form of territorial-specific self-government, which is open only to their regularly resident citizens but which provides them with their own legislative councils and access to a similar range of legislative jurisdictions (Catt and Murphy 2002, 75–7). More limited sectoral arrangements are another possibility, as in the example of the 1997 agreement to transfer legislative and administrative jurisdiction for Mi'kmaq primary, elementary, secondary and postsecondary education over to nine First Nations in Nova Scotia (McCarthy 2001).

Increases in autonomous self-rule may also be facilitated via economic levers, as in the recent agreement between the Government of Quebec and the James Bay Cree, which provides the Cree with massive increases in resources and benefits from forestry and hydroelectric power development in their territory and which correspondingly enhances jurisdiction and responsibility over their own community and economic development (Awashish, this volume). Another key initiative – spearheaded by Stephen Kakfwi, the Dene premier of the Northwest Territories – is the devolution of control over land and natural resources from the federal to the territorial government. The idea is to acquire decision-making authority over the nature and pace of development, but also to ensure that the benefits of this development, including royalties, tax revenues, and jobs, remain in the Northwest Territories. At the time of writing,

a memorandum of understanding had already been signed, and representatives of the Government of the Northwest Territories, the Aboriginal Summit, and the Government of Canada were negotiating a framework agreement that would set out the general approach for the eventual negotiation of a devolution transfer agreement.

Hybrid models capable of serving both landed and urban populations are another emerging option, the best example being the “made in Saskatchewan” approach to First Nations governance described in David Hawkes’s essay. The Saskatchewan initiative is innovative both in its approach to the treaty negotiations process and in terms of the governance provisions under discussion. The proposed governance model seeks to create an integrated and layered system of provincewide, regional, and local governments with jurisdiction over First Nations citizens both on-reserve and in urban centres. The current negotiations cover education and child and family services, but future negotiations are anticipated in areas such as justice, lands and resources, health, and housing (Hawkes, this volume; Saskatchewan, OTC 1998). Autonomy initiatives have been much slower to emerge for Aboriginal people in urban centres, and many of those that do exist are either highly informal or at a relatively low level of institutionalization. As Evelyn Peters reminds us in her essay, a variety of urban governance models have been suggested but never implemented. In their absence, she concludes, the most immediate access to self-government for many urban Aboriginal people is given by non-profit Aboriginal-run service providers and umbrella organizations such as the Aboriginal Council of Winnipeg, an organization generally dedicated to improving the lives of all Aboriginal people in the city.¹⁵

In mentioning these recent initiatives it is important to acknowledge their many critics. For some of these critics, existing self-government arrangements amount to little more than self-administration and are not really self-government. They are compared to municipalities or, at best, “municipalities plus,” enjoying little real depth or security of jurisdiction (Ladner 2003, 184–7). As such, they reproduce rather than replace the colonial nature of the Aboriginal-state relationship by preserving the dominance of federal and provincial over Aboriginal governments (T. Alfred 1999, 99–107; Tully 2000b, 42, 52; Ladner and Orsini, this volume). Other critics observe that the federal government still manifests a strong tendency to insist on the extinguishment rather than recognition of Aboriginal rights (Canada 1995) and to stipulate rather than negotiate the type of powers and jurisdictions to be made available to Aboriginal governments.¹⁶ Moreover, despite the promise of the new inherent right policy, many observers still perceive a federal reluctance to place final decision-making authority in Aboriginal hands except in a relatively restricted number of jurisdictions (Russell 1996, 66–7; Barnsley 2001, 11; Cornell, Jorgensen, and Kalt 2002, 11–12, 15). As Prince and Abele conclude with regard to Aboriginal-federal fiscal relations, for years the rhetoric has been one of partnership while

the reality has been federal domination and Aboriginal marginalization. Critics see further evidence of federal dominance in the fact that the models of governance currently on offer are more a reflection of the political traditions of non-Aboriginal Canadians than those of the Aboriginal societies whose interests these governance arrangements are supposed to serve (Boldt 1993; T. Alfred 1999; McDonnell and Depew 1999; Ladner 2003).

The closing years of the Chrétien government did much to confirm the sentiments expressed by these critics. One of the best examples is the ill-fated *First Nations Governance Act* (FNGA), whose parallels to the white paper of 1969 were lost on few observers outside government (see Ladner and Orsini, this volume). The FNGA served as a prime illustration of the federal government's unfortunate propensity towards unilateralism in the development of Aboriginal policy, treating Aboriginal peoples as policy recipients rather than equal partners in policy development. For instance, in the process leading up to the FNGA, the federal government sought to bypass First Nations leadership structures such as the Assembly of First Nations. Moreover, federal policy makers chose a model of limited community consultation that left no room for Aboriginal participation in either the initial development of the policy agenda or the drafting and approval of the resulting legislation (Murphy 2004b).¹⁷ Federal unilateralism was also in evidence in Robert Nault's announcement in November of 2002 that the government was walking away from thirty different sets of stalled land claim and self-government negotiations because it was no longer interested in feeding an Aboriginal industry of lawyers and consultants who had a vested interest in perpetually inconclusive negotiations.¹⁸ Whereas a sense of frustration with the sometimes glacial pace of treaty negotiations is not unreasonable, the federal government chose not to engage with the manner in which their own actions might be the source of those delays.¹⁹ More importantly, the government's chosen means of addressing this frustration looked more like political brinkmanship than a genuine effort to engage constructively with Aboriginal representatives in a process of alternative dispute resolution that would be capable of providing equal expression to the interests and grievances of both parties.

These types of criticism need to be faced with honesty and openness if progressive reform in this area of the federation is to be possible. Yet the same honest and open approach dictates that we do not simply accept all these charges uncritically. Indeed, a number of them seem to downplay or obscure important features of the landscape of Aboriginal-state relations that is emerging in twenty-first-century Canada. To begin with, it is by no means clear that all existing self-government arrangements can accurately be described as no more than self-administration, municipal governance, or even municipalities plus. For example, the Government of Nunavut exercises a range of powers that are more akin to those of a province rather than a municipality (and in fact it enjoys jurisdiction over its own municipal governments). Similarly,

Yukon First Nations councils and the Nisga'a Lisims government possess a wider and more secure range of jurisdictions than do *Indian Act* band councils, which are far more accurately described by the municipal model of governance.²⁰ Even the Sechelt model, which is most frequently dismissed as a form of municipal self-administration, is substantially different in that, unlike *Indian Act* governments and non-Aboriginal municipal governments that are restricted to the passing of bylaws, the Sechelt have a primary legislative capacity, and their laws enjoy paramountcy over provincial (though not federal) laws (Catt and Murphy 2002, 73–5). Similarly, the governance model currently under negotiation in Saskatchewan contemplates a level of legislative authority that substantially exceeds the label of self-administration and the municipal paradigm. Moreover, First Nations were included as full partners at all stages of the treaty discussions, including the process of defining the terms of the negotiations themselves, another apparent departure from previous federal policy (Saskatchewan, OTC 1998; Hawkes, this volume).

To achieve a broader perspective in this debate, there must also be a more sustained engagement with Aboriginal attitudes towards existing self-government agreements. For while it is important not to underestimate either the level of Aboriginal opposition to existing agreements or the number of difficult compromises necessary to get a deal done, it is equally important to understand precisely which aspects of these agreements meet with the approval of Aboriginal communities and why. The James Bay Cree, for example, have voiced their satisfaction with many aspects of the land and governance arrangements negotiated with Canada and Quebec, and continue to support these arrangements as a means of progressing towards their goals of self-determination and socio-economic renewal (Awashish, this volume; Moses 2004; Diamond 1985, 281–5). Similar sentiments have been expressed by the Inuit of Nunavut and Nunavik (Ittinuar 1985; Nunavut 2000 and 2002; Aatami, quoted in Panetta 2002) and the Sechelt (BCTC 1999; Gregory 1999) and Nisga'a of British Columbia (Gosnell 1998). Both sides of this story must be heard and weighed.

A crucial weakness of much of the critical literature on Aboriginal governance is that it is pitched at such a high level of generality that it misses much of the variety and complexity of the contemporary landscape of Aboriginal-state relations. While critics are essential, there is a pressing need for more empirically informed critiques that engage in concrete and detailed assessments of existing governance agreements and policy frameworks. Equally important, if alternative governance models are to be preferred, we need to know what they would look like and how they would constitute an improvement on existing arrangements. What governance structures and decision-making powers would they comprehend? Would there be jurisdictions which particular Aboriginal governments would be unable or unwilling to assume, and, if so, which other level of government – Aboriginal or otherwise –

would assume these jurisdictions on their behalf? What sorts of institutional arrangements can deliver a measure of self-determination to small and/or geographically dispersed Aboriginal groups? And to what extent does the structural (institutional) implementation of self-determination lead to real increases in governing capacity, access to resources, and the ability to secure improves in the community's quality of life? Most important of all perhaps is that critics must help us understand how specifically *Aboriginal* views of governance and the legitimate exercise of political authority can be translated into concrete political decision-making processes and institutionalized models of self-government (Timpson 2002; Newhouse and Belanger 2001, 3).

My sense is that the time is ripe for a new chapter in this debate and for a new generation of Aboriginal and non-Aboriginal researchers to engage the enormously important middle ground between the meta-theory and the practical implementation of Aboriginal self-government. To the wealth of existing research contributed by philosophers and legal and political theorists must be added the expertise of economists, business minds, and experts trained in empirically informed political science, public policy, and public administration.

SHARED RULE

While it is essential to come to terms with the autonomy dimension of Aboriginal self-determination, the living experience of an increasing number of Aboriginal peoples is characterized by relations of complex geographical, sociocultural, and economic interdependence with surrounding non-Aboriginal communities. This new reality means that a viable strategy of reconfiguring Aboriginal self-determination must come to terms with the presence and participation of Aboriginal peoples in shared rule institutions that are capable of governing this interdependence in an effective and democratic manner. A combination of self-rule and shared rule institutions is one of the defining features of federal systems of government, yet the concept has not figured prominently in discussions of Aboriginal self-determination and the reconfiguration of the Canadian federation. This should come as no surprise to anyone who knows the history of Aboriginal experience with shared rule institutions in Canada. This history has been marked both by the deliberate exclusion of Aboriginal people from the franchise (a practice continued well into the twentieth century) and by the proposed use of the franchise as a tool for gradually dissolving and assimilating self-governing Aboriginal communities (Johnston 1996; Cairns 2000). Aboriginal participation in shared rule institutions in the federation has therefore come to represent, for many, the very antithesis of self-determination.

In spite of these reservations, the idea of participation in shared rule institutions is attracting more attention of late among both Aboriginal and non-Aboriginal leaders and academics (Henderson 1994; Schouls 1996;

Borrows 2000; Knight 2001). Indeed, in 2004 the Assembly of First Nations (AFN) and the Native Women's Association of Canada combined efforts to encourage Aboriginal electoral participation to help influence a very closely contested federal election (AFN 2004).²¹ The message from both of these organizations seems to be that Aboriginal electoral participation should no longer be seen as a means of undermining the struggle for self-government; instead, it should be viewed as a strategy for pursuing Aboriginal ends by accessing alternative and complementary routes to political power. Observing recent Aboriginal electoral mobilization in the United States, Grand Chief Phil Fontaine commented at a meeting of the Assembly of First Nations in Charlottetown, "It brings to mind the issue of whether or not it is time for us to consider our strategies about federal elections ... We know that there is going to be a national debate on the merits of electoral reform and proportional representation. We need to look at this and see how our interests can best be served."²² Aboriginal participation in shared rule institutions can be viewed as simply one additional means of facilitating Aboriginal control over Aboriginal affairs – and this seems to be the view of the AFN – but a more radical vision of shared rule sees it as a means of introducing a much needed and valuable Aboriginal presence and influence over countrywide or Canadian affairs (Borrows 2000). This is one of the central themes of Joyce Green's essay, in which she asks us to imagine a genuinely postcolonial reconfiguration of the Canadian federation involving both self-government and the effective indigenization of the state in such a way that its institutions may also be a reflection of the aspirations, symbols, and traditions of Canada's Aboriginal inhabitants.

In practice, institutions of shared rule that combine Aboriginal and non-Aboriginal representatives are still very much in a developmental stage in the federation. Guaranteed forms of Aboriginal representation in federal and/or provincial legislatures have been proposed in the form of general Aboriginal electoral districts (Canada, RCER 1991a, 1991b), as districts representing different treaty First Nations (Henderson 1994), and even a parallel Aboriginal House of Representatives (Canada, RCAP 1996b, vol. 2, pt.1, s. 4.4), but none have reached the stage of implementation.²³ As Phil Fontaine suggests, it may be that such measures will become more likely if anticipated experimentation with forms of proportional representation come to fruition in such provinces as British Columbia and perhaps eventually at the national level. On the other hand, as Hanselmann and Gibbins illustrate in their essay, shared rule in the urban context is showing some initial signs of promise, with examples such as the Calgary Urban Aboriginal Initiative, a partnership among municipal, federal, and provincial governments, service providers and Aboriginal organizations, that was conceived to help meet the needs and challenges of urban Aboriginal populations. One of the reasons for the initial success of this initiative has been the acceptance by federal and provincial governments

of a shared rule or partnership model of governance and of the need to cede the leading role to the local Aboriginal community.²⁴

Probably the most institutionalized form of self-rule currently in existence is the land and resource co-management boards that have been negotiated as a facet of comprehensive land and self-government agreements, particularly in the more remote northern reaches of the country. These institutions generally provide for an equal number of Aboriginal and non-Aboriginal government-nominated representatives, who generally must be regular inhabitants of the jurisdictions in question.²⁵ Graham White describes co-management bodies as something of a new species of governing institution in Canada – one that exists at the intersection of the federal, provincial, and Aboriginal orders of government. They are not strictly a form of Aboriginal autonomy or *self-government*, but neither are they exclusively federal or provincial institutions. Instead, they are conceived as a means of achieving the sort of consensual and cooperative sharing of jurisdiction and resources that are characteristic of the historic treaty relationship and its corresponding principles of treaty federalism (White 2002, 92–4). Colin Scott echoes this sentiment in his essay, describing the potential of co-management institutions in the James Bay and other regions of Canada to realize the principle of relational self-determination that animates treaty federalism, wherein self-government coincides with a sphere in which power is shared and distributed with the mutual consent of the treating parties. These principles are already functioning in practice. For example, boards in Nunavut and the Yukon are mandated to protect the interests of the local Aboriginal communities, but they are also mandated to protect the interests of all residents of the territory in question, which includes both Aboriginal and non-Aboriginal peoples. This principle is reflected in the expectation that board members will remain independent of the governments that nominated them. They are expected to serve the public interest (that of Aboriginal and non-Aboriginal citizens) rather than being the delegates or representative of a particular government – a pattern that is also revealed in Scott's discussion of co-management practices on the west coast of Vancouver Island (White 2002, 103–4; ALSEK 2000; Scott, this volume).²⁶

Assessments of the capacity of co-management boards to facilitate greater Aboriginal self-determination vary. In cases such as Nunavut, where co-management boards are exercising considerable decision-making authority and are having a real impact on the policy areas over which they have been assigned jurisdiction, the conclusions are relatively optimistic (White 2002, 98–100, 108–9; Scott, this volume). In contrast, evidence from co-management institutions involving the James Bay Cree leaves considerable room for skepticism. The Cree experience has too often been that in any conflict with the agenda of either the federal or provincial government, the interests of the Crees were forced to take a back seat, to the extent that in many cases the institutions became dysfunctional and the Crees were forced once again to

resort to litigation in order to pursue the recognition of their rights and interests (Feit 1989, 82–3; Rynard 1999, 223; Awashish, this volume; Scott, this volume). Philip Awashish and Colin Scott both hold out some hope that revisions to these institutions included in the most recent agreement between the Cree and Quebec will herald the end of this more confrontational and dysfunctional approach to co-management, but both are cautiously waiting to see whether these revisions will yield a new approach in practice.

One final area of shared rule to consider, which may not even belong in the discussion in a strict sense but whose significance is simply too great to ignore, relates to shared economic development ventures and business partnerships between Aboriginal communities and Crown corporations or private economic actors. This is significant both because it speaks to the chronically under researched question of the economic levers of Aboriginal self-determination and also because of the quasi-governmental status of corporate actors doing business on Aboriginal land. This position is perhaps more obvious in the case of Crown corporations such as Hydro-Québec, but as Devlin and Murphy demonstrate in their essay, Canadian courts have recently blurred the line between the state and private economic actors (such as large natural resource harvesters) when it comes to the duty to consult the Aboriginal communities whose interests stand to be affected by any planned economic development on or near their traditional territories.²⁷ Economic partnerships between Aboriginal people and corporate developers must of course be approached with caution. Large-scale resource developments such as forest clear-cutting and hydroelectric schemes have often wreaked havoc on the environment and the traditional activities of local Aboriginal communities, while at the same time the benefits from these developments and the decision-making authority over them have not been delivered as promised (Awashish, this volume; Ratner et al. 2003, 230–1).²⁸

It is also important to bear in mind that some Aboriginal communities may simply reject capitalist forms of development and resource extraction as being too far removed from their traditional values and practices and too destructive of the environment that has sustained their communities for so many centuries. Yet many Aboriginal leaders across Canada have declared that they are not opposed to economic development per se, or even to forms of capitalist development that may involve some alteration or compromise of traditional practices and forms of life. Commenting on the recent conclusion of an oil-drilling partnership with Alberta's Western Lakota Energy Services, for example, Chief Stephen Didzena of the Dene Tha' Nation stated that this venture represented his community's desire to be a part of the competitive business world, and that such partnerships are the only way for Aboriginal communities to move forward both economically and politically (Finlayson 2002, H1).²⁹ Indeed, recent research by Robert Anderson and Aboriginal Business Canada indicates that many of the current Aboriginal-corporate

partnerships have achieved encouraging levels of success (Anderson 1997; Canada 1998b). A common message emerging from Aboriginal leaders across these cases, however, is that the key to these economic ventures is that they involve Aboriginal people as key decision makers, that Aboriginal communities are beneficiaries of the direct and indirect benefits of development, and that development be compatible with the long-term survival and well-being of their communities (Anderson 1997, 1485; Awashish, this volume; Mandel-Campbell 2004).

In spite of progress along these many fronts, the implementation of shared rule in the context of Aboriginal-state relations will continue to be a difficult sell in Aboriginal communities across Canada. According to its detractors, shared rule is simply a means of co-opting Aboriginal people, bringing them inside state institutions, where their concerns will remain marginalized, while deflecting vital energy, attention, and resources away from the imperative of autonomous self-government. Such fears have deep roots in the history of Aboriginal-state relations in this country and will only be overcome through the investment of substantial time, effort, and confidence-building measures. To begin with, greater effort must be made to elucidate the variety of functions that shared rule institutions may serve, and to emphasize that these modes of governance need not be corrosive of institutions of autonomous self-government but can play an invaluable complementary function. In particular, it is important to emphasize that since national institutions have the capacity to influence the nature and exercise of Aboriginal rights and interests, an Aboriginal presence and effective voice in these institutions may help ensure that this cannot be accomplished without Aboriginal consent (Schouls 1996; Knight 2001). Moreover, Aboriginal participation in shared rule institutions demonstrates that Aboriginal people also have the right, if they so choose, to play a meaningful role on the national stage and to help shape the political future of the country as a whole. In either case, much greater effort must be made to ensure that shared rule institutions are capable of placing Aboriginal representatives in roles where they have a real and substantive capacity to influence and direct the process of decision making and are not simply accorded a token presence only to be marginalized or subordinated vis-à-vis non-Aboriginal decision makers.

Progress on the self-rule dimension of Aboriginal self-determination also means confronting the thorny question of citizenship. For whereas self-rule seems to invoke a form of separate or group-differentiated citizenship in autonomous Aboriginal communities, shared rule invokes a sense of citizenship that is common to all the participants involved (Cairns 2000, 143–9). For many Aboriginal communities and individuals, the idea of common citizenship, like the idea of shared rule more generally, has come to represent the subordination or even elimination of their status as citizens of autonomous Aboriginal communities. As a result, many Aboriginal people reject any suggestion that

Aboriginal people are or should be citizens of Canada, insisting instead that they are exclusively citizens of Aboriginal nations (G. Alfred 1995, 104; T. Alfred 1999, 112–13; Ladner 2003, 186). Yet this sentiment is not shared by all Aboriginal people, many of whom seek a form of dual Aboriginal-Canadian citizenship that embodies respect for (rather than requiring the subordination of) Aboriginal rights, interests, and identities (Borrows 2000; Green, this volume; Newhouse and Belanger 2001, 13–14).³⁰ Citizenship, then, can mean different things to different Aboriginal people. These differences frequently depend on which of the different dimensions of citizenship are being invoked in the context of Aboriginal self-determination. For example, citizenship as a right or a duty means something quite different and has very different implications from citizenship as a form of identity and as a bond of trust among members of a political community (or among members of different political communities in a federal and multinational state). Given this dimensional understanding of citizenship, one could plausibly argue that Aboriginal people are citizens of Canada in the sense that they have access to the same basic rights and freedoms as non-Aboriginal Canadians (in addition to their Aboriginal rights) but that they need not necessarily be citizens of Canada in the sense of having a strong sense of identity as Canadians.³¹ It is vital, then, that we have access to more research that disaggregates the different dimensions of citizenship, describes their different functions and significance, and explores the different relationships and interdependencies by which they are characterized. Only in this way will we achieve meaningful progress in understanding the compatibilities and incompatibilities of Aboriginal and Canadian conceptions of citizenship.

INTERGOVERNMENTALISM

Self-determination, for the overwhelming majority of Aboriginal leaders, intellectuals, and spokespersons, has never meant separation from Canada. Instead, it has been conceived in the context of a renewed relationship with the other governments and societies in the Canadian federation. Even for land-based governments that enjoy a substantial degree of political autonomy and geographical distance from major non-Aboriginal population centres, there is a need to coordinate jurisdictions with federal, provincial, and municipal governments and possibly with other Aboriginal governments.³² For urban populations, which are characterized by a much higher degree of interdependence and intermixing, the need for intergovernmental coordination and cooperative forms of governance is that much greater. In addition to its more pragmatic function of coordinating interdependence, resolving conflicts, and generally ensuring the smooth and uninterrupted functioning of the federation, intergovernmentalism may also serve a more principled end by helping to cultivate a sense of shared enterprise among the various constituent

governments of the federation, thereby laying the foundations of a relationship grounded not just in mutual benefit but in mutual respect.

It is fair to say that Aboriginal involvement in the key intergovernmental forums in the Canadian federation is still far from where it needs to be. As evidence, more than six hundred *Indian Act* band governments across Canada remain, in effect, outside the orbit of Canadian intergovernmentalism. Aboriginal leaders were left out of the process leading up to the Social Union Framework Agreement and the more recently created Council of the Federation (Abele and Prince 2003b). Moreover, as Prince and Abele argue in their contribution to this collection, the ongoing marginalization of Aboriginal representatives in key processes of fiscal intergovernmentalism constitutes an immense obstacle along the pathway to increased Aboriginal self-determination. With the exception of the territorial leaders, Aboriginal representatives continue to be excluded from the Annual Premiers' Conferences and First Ministers' Conferences, although a very significant departure from this practice emerged at the September 2004 First Ministers' Meeting on Health, which opened with a special meeting with Aboriginal leaders, including Phil Fontaine, and with a federal offer of \$700 million in funding for Aboriginal health. Equally encouraging was a proposal for a future first ministers' meeting focused exclusively on Aboriginal health issues (Dunfield 2004).

Indeed, it would be untrue to say that Aboriginal representatives have been entirely absent from the realm of intergovernmental relations in Canada. On the constitutional front, representatives of the national Aboriginal organizations were included as participants in a series of key First Ministers' Conferences which sought (unsuccessfully) to clarify the meaning of the recently entrenched section 35 Aboriginal rights. While Aboriginal people were sidelined in the subsequent Meech Lake process – a move that helped seal the fate of the resulting accord – representatives of the four major national Aboriginal organizations as well the leaders of the Yukon and the Northwest Territories were included as full partners in the negotiations that produced the 1992 Charlottetown Accord. More recently, as Annis May Timpson emphasizes in her essay, the Aboriginal-led public governments of the Northwest Territories and Nunavut are now routinely involved in most intergovernmental forums in the federation. In the urban context as well, an extensive network of relations is emerging in cities across Canada involving Aboriginal representatives and their counterparts in municipal, provincial, and federal governments (Abele and Prince 2002, 227–8).³³ Also, British Columbia and Quebec have recently implemented measures that seek regular consultation with First Nations in areas of overlapping interest (British Columbia 2002; Quebec 2003). In the case of Quebec, this involved the creation of a joint council comprising an equal number of elected officials from the Quebec government and the Assembly of First Nations of Quebec. The council is intended to promote an exchange of ideas on various subjects, including territory and

resources, taxation and economic development, and services for Aboriginal people off-reserve.

There are a number of distinctive challenges associated with the reconfiguration of intergovernmentalism in the context of Aboriginal self-determination. As Timpson argues in her essay on Nunavut, it is a challenge simply to cope with the sheer volume of intergovernmental interactions associated with the operation of a territorial public government, especially given the shortage of trained and experienced personnel. Moreover, it is proving difficult for the Inuit to bring distinctly Aboriginal priorities and styles of governance into a system whose institutions and rules of engagement are defined by non-Aboriginal governments – a problem also flagged by Prince and Abele in relation to Aboriginal inclusion in federal-dominated processes of fiscal intergovernmentalism. Another challenge is to find ways of adequately representing the diversity of Aboriginal peoples in national intergovernmental forums such as First Ministers' Conferences or constitutional debates, a function which, at least in certain circumstances, seems to be at best imperfectly performed by such organizations as the Assembly of First Nations.³⁴ Finally, intergovernmentalism is a key component of the broader goal of reconciliation between Aboriginal and non-Aboriginal peoples in Canada, yet the intergovernmental processes intended to achieve this reconciliation – namely, the processes of treaty making – are still only dimly understood. Existing processes of treaty making are continually flagged as a barrier to just and sustainable relations among Aboriginal and non-Aboriginal societies in Canada (Canada, RCAP 1995; Venne 1997), yet there is precious little empirical research that keys on the institutional or procedural specifics of past or existing treaty negotiations and on concrete proposals for how they might usefully be reformed.³⁵ Be that as it may, if intergovernmentalism is to succeed in the context of Aboriginal-state relations, it is essential that it serve the interests of both the Aboriginal and non-Aboriginal partners, which means, most importantly, moving away from a model wherein the federal government is able to dictate terms to Aboriginal governments. This means a rejection of intergovernmental relationships based on unilateralism and domination in favour of those based on mutual recognition and consent, and the co-equality of Aboriginal and non-Aboriginal governments (Henderson 1994; G. Alfred 1995; Borrows 2002).

CONCLUSION

Aboriginal people bear a significance to the Canadian federation that far outweighs their relatively small numbers. Their claims to self-determination challenge us to confront some of the most fundamental questions of social justice, democratic legitimacy, and effective governance in our large and diverse

country. We should also remind ourselves that Aboriginal peoples are parties to historic treaties and that their rights are a fundamental feature of the Canadian constitution – facts that impose powerful obligations on Canadian governments. All the same, Aboriginal issues have rarely captured the same intensity and duration of attention among governments and the public as those garnered by perennial hot-button issues such as health care, education, employment, and wealth creation. Undoubtedly, the sparse and often fleeting nature of the attention devoted to Aboriginal issues stems partly from the fact that the costs of inaction will be most directly borne by Aboriginal peoples themselves, in the form of continuing socio-economic pathologies, political powerlessness, apathy, and lost opportunities for future generations. Yet there is some room for hope in the growing realization that the continuing socio-economic and political marginalization of Aboriginal peoples also entails costs for non-Aboriginal Canadians. These costs include profound strains on urban infrastructure and economies; loss of productivity and expertise because of an untapped Aboriginal workforce, not to mention the tremendous untapped potential of doing business and development in partnership with Aboriginal peoples; and a climate of conflict and uncertainty that could have a decidedly negative impact on political stability, on the climate for capital investment, and on Canada's international reputation as a defender of human rights.

Of equal consequence are the costs of failing to access the potential contributions of Aboriginal peoples to the future shape and direction of the federation as a whole. There are strong historical precedents for this broader Aboriginal contribution to the federation, including the key role played by Aboriginal people in early exploration, economic development, and military defence. Aboriginal peoples have also played a pivotal role in Canada's constitutional development, the movement for greater environmental awareness and protection, and now increasingly as leading members in our artistic and literary communities and in our courts of law, legislatures, and academies. Awareness of the broader costs of Aboriginal marginalization is perhaps growing much more quickly in areas with higher concentrations of Aboriginal peoples – for instance, the northern territories, such provinces as Saskatchewan, and an increasing number of large urban centres on the prairies and in western Canada generally. Yet governments across the country and at all levels are beginning to seek direction in this particularly complex and highly politicized domain of Canadian federalism.

If past experience is an accurate measure, any future reconfiguration of Aboriginal-state relations in the Canadian federation will be slow and incremental rather than rapid and revolutionary. To continue moving this relationship onto a more just, democratic, and mutually beneficial track will require significant modifications to existing policies, institutions, and processes of intergovernmentalism. More than this, however, what is required is a continuing evolution of political will among all the governments involved: municipal,

provincial, federal, and Aboriginal. Representatives from each must continue to demonstrate a sense of vision, patience, and a willingness to compromise and seek common ground. As the primary bearer of this country's colonial legacy, and as the dominant power broker in the Aboriginal-state relationship, the federal government bears the greatest responsibility in this regard. In fulfilling this responsibility, it must move away from an approach that too often has treated Aboriginal peoples as policy recipients rather than policy makers and as subordinates rather than equal partners in a cooperative and mutually beneficial relationship. It must continue to move away from a relationship with Aboriginal peoples that has been grounded in principles of paternalism and domination towards a relationship grounded in principles of democracy and self-determination.

No less important in the process of reconfiguring Aboriginal-state relations in Canada is the need to increase our basic understanding of the key issues and, perhaps most important, the living communities involved. One crucial step in this process of understanding is to work towards a more visible and integrated network of knowledge accumulation and dissemination among those with an interest and expertise in this still emergent domain of governance. Frank Cassidy's plea is as relevant today as it was almost fifteen years ago: "Researchers – academic and non-academic, governmental and independent, [A]boriginal and non-[A]boriginal – should communicate more actively. Developing ideas must be shared. New information technologies should be used to create an awareness of what has been done and what is being done" (Cassidy 1990, 98).³⁶ It is not enough, however, to increase the level of understanding and communication among experts and practitioners; this process must be expanded to include the wider public across Canada. This will require a much more rigorous and sustained effort at public education in relation to the historical and contemporary contours of Aboriginal-state relations, the nature of and justification for addressing these issues in negotiated forums and public policies, and the costs of inaction to Aboriginal and non-Aboriginal Canadians. Public education will not guarantee a spirit of reconciliation and compromise, but it may contribute to a more reasoned and informed debate on the future course of Aboriginal-state relations in this diverse federation. It is my hope that the essays in this volume will play a modest but constructive role in this debate.

NOTES

- 1 Although Campbell was unsuccessful in his court challenge, when he became premier of British Columbia he pursued his opposition to the British Columbia Treaty Process by using a provincial referendum to seek a harder line in future treaty negotiations.

- 2 Philip Awashish (this volume) expresses similar sentiments towards the agreements negotiated with Canada and Quebec by the James Bay Cree.
- 3 As Doerr (1997) concludes; “Even at its high-water mark, public opinion on the subject of aboriginal self-government was often found to be shallow and, sometimes, simply confused” (287). Moreover, according to Hylton (1999, 445), the Canadian public ranks spending on Aboriginal peoples among governments’ lowest budget priorities. Hylton’s observations are confirmed by a 2003 Strategic Council poll, which found that while a majority of Canadian’s say that improving the living conditions of Aboriginal people is important, only 3 percent say it should be the country’s top spending priority: “Given the choice, Canadians would rather the government put more money into the health care system, child poverty, the military or the infrastructure of the country’s big cities” (Mofina 2003).
- 4 As in the conflicts at Oka, Gustafson Lake, Ipperwash, and Burnt Church.
- 5 It is nevertheless essential not to underestimate the role played by the constitutionalization of Aboriginal rights in 1982, the subsequent articulation of these rights by the Supreme Court of Canada, and the influence of both these developments on the climate of negotiations and the Liberal government’s eventual recognition of the inherent right of self-government as the basis for future negotiations with Aboriginal governments (Canada 1995). The downside of this more pragmatic policy, according to Tully, is that it may cause us to lose sight of the distinctive principles of justice invoked by Aboriginal claims to self-determination, the consequence of which is self-government agreements that are incapable of satisfying these principles in practice (Tully 2000b, 52).
- 6 It should be noted that a review of the initiative published in 1999 indicated that it had not been a huge success and that the complexity of the task originally conceived had been underestimated. See McCaskill et al. 1999.
- 7 However, the more fundamental overhaul of INAC recommended in the *Final Report* of the Royal Commission on Aboriginal Peoples (RCAP) has not emerged. RCAP, for one, suggested the creation of two new departments to replace INAC: the Department of Aboriginal Relations (to assist in the implementation of self-government) and the Department of Indian and Inuit Services (to provide services and support to communities that had not made the transition away from the *Indian Act*) (Canada 1996b).
- 8 For background and discussion of these cases, see Catt and Murphy 2002, 53–107.
- 9 This does not mean that such research is entirely absent. See, for example, Cassidy and Bish 1989, G. Alfred 1995, Rynard 1999, Catt and Murphy 2002, White 2003, and many of the contributions in this volume. As I indicate in the conclusion to this essay, part of the problem here relates to a lack of dissemination. For example, the Royal Commission on Aboriginal Peoples commissioned twenty-five case studies of Aboriginal self-government, but these have yet to be published in print form. For the electronic version, see Canada, RCAP 1996a.
- 10 This section echoes a plea made in a seminal 1990 article by Frank Cassidy that Aboriginal self-government not be studied in isolation from its subject, which is

- the development of Aboriginal forms of government on the ground and in living communities (Cassidy 1990, 74).
- 11 The discussion in the remainder of this section draws on some of my previous work (Murphy 2004a; Harty and Murphy 2005).
 - 12 This is the conclusion drawn, in different ways, by many of the contributors to this volume. See the essays by Peters, Andersen, Hanselmann and Gibbins, Hawkes, Scott, and Christie on questions of the size, capacity, and cultural diversity of Aboriginal communities and their demographic, spatial, and economic interdependence with non-Aboriginal communities.
 - 13 For a broader application of this principle to the experience of substate nations in multinational states, see Harty and Murphy 2005, chap. 4.
 - 14 See in particular Colin Scott's essay on co-management and Joyce Green's discussion of the need to reimagine and indigenize the federation as a whole in the context of increasing Aboriginal self-determination.
 - 15 To a more limited extent, provisions have been made for urban Aboriginal dwellers to participate in the direction of self-government back in their home territory. Examples include the Nisga'a "urban locals" (Canada 1998, 162) and the Supreme Court of Canada's decision in *Corbiere* that urban-based band members retain the right to participate in band governance back on the reserve (*Corbiere v. Canada* 1999). I thank Peter Russell for bringing these two examples to my attention.
 - 16 In a particularly pessimistic assessment of federal policy, McDonnell and Depew (1999, 359) conclude that self-government negotiations have little to do with Aboriginal aims and priorities: "By and large, what such negotiations are about is teaching Aboriginal people ... what legislative, territorial, and administrative space is available for self-government."
 - 17 The FNGA also highlighted the problem of cultural marginalization, in that the federal government attempted to develop norms of democratic and accountable Aboriginal governance while disregarding how well these norms fitted with the traditions or political cultures of the Aboriginal communities to be governed by their terms. This aspect of the legislation drew criticism from a number of directions, including the architects of the Harvard Indian Project (HIP). According to HIP, neglecting the dimension of cultural match between governing institutions and a community's understanding of how political authority should be organized and exercised can have potentially fatal effects on the legitimacy of those institutions and their corresponding efficacy (Cornell, Jorgensen, and Kalt 2002, 4–7).
 - 18 Nault's comments leading up to this decision are reported in Lunman 2002.
 - 19 Such as, for example, the federal government's insistence on the extinguishment of Aboriginal rights, its domination of the procedural aspects of the negotiations, and its reluctance to cede final decision-making authority to Aboriginal governments. For discussion of these various points, see Canada 1995; Abele, Graham, and Maslove 1999, 264; and McDonnell and Depew 1999, 359.
 - 20 By "security of jurisdiction" I mean the degree to which a government's legislative power is structurally immune to external override by another order of

government. For example, *Indian Act* band councils can pass only bylaws, the vast majority of which can be disallowed by the minister of Indian affairs. The Nisga'a and Yukon First Nations, in contrast, have the capacity to pass primary legislation in a variety of jurisdictions, some of which are held exclusively while others are held concurrently with federal and provincial/territorial governments. The Nisga'a enjoy paramouncy in some but not all of their concurrently held jurisdictions, while rules of paramouncy have yet to be decided in the case of the Yukon First Nations. For more details of these cases, see Catt and Murphy 2002, 53–107. See also Hogg and Turpel 1995 for an assessment of the Yukon model as a means of implementing the inherent right of Aboriginal self-government.

- 21 To this end, a list of sixty-three Elections Canada electoral districts with a significant Aboriginal voting population, where Aboriginal voters could have a particularly significant impact, were posted on the AFN's web site.
- 22 Quoted in Moore 2004.
- 23 As Trevor Knight reminds us, shared rule proposals, particularly the creation of Aboriginal electoral districts, have received substantial support from Aboriginal representatives and organizations over the years. For example, George Manuel, the leader of the National Indian Brotherhood (now the AFN) advocated their creation in the 1960s when the franchise was being granted to Aboriginal people. They were also suggested in the 1980s post-entrenchment constitutional conferences by the Métis National Council and the Native Council of Canada; and more recently by Aboriginal representatives at the hearings of the Lortie Commission on electoral reform and party financing (including Ovide Mercredi, who was then vice-chair of the Manitoba Region of the AFN) (Knight 2001, 1075–8).
- 24 I recognize that there is some conceptual ambiguity between the use of the terms "shared rule" and "intergovernmentalism." For example, Hanselmann and Gibbins include the Calgary Urban Aboriginal Initiative as a form of intergovernmentalism, whereas I am using it as an example of shared rule. A similar case could, I think, be made for the land and resource co-management bodies described below. While such ambiguity may not sit well with some defenders of the federal canon, it does not substantially affect the underlying argument that forms of governance involving both Aboriginal and non-Aboriginal decision makers working together cooperatively are essential to complement institutions of autonomous Aboriginal self-government.
- 25 In cases such as Yukon and Nunavut, the number of Aboriginal board representatives can in practice be much larger. For example, the boards covered by Graham White's research ended up with an average of 80 percent Aboriginal membership. This is possible because although the Aboriginal and non-Aboriginal parties are authorized to nominate half the members of each board, they are both free to nominate either an Aboriginal or a non-Aboriginal person. In an interview I conducted with one of the members of the ALSEK Renewable Resource Council in the Yukon Territory, it was pointed out that the membership varies from council to council, depending on the makeup of the community. In most cases, the boards ended up with half Aboriginal and half non-Aboriginal membership, but there were also

- cases where the board consisted entirely of Aboriginal members and another case where the membership was predominantly non-Aboriginal (ALSEK 2000).
- 26 Moreover, in cases such as the Yukon Fish and Wildlife Management Board, Aboriginal and non-Aboriginal peoples are engaging in shared decision making over the entire Yukon Territory and over all its residents (Canada 1993), rather than over a particular land-claim settlement territory.
- 27 Devlin and Murphy conclude: "If these lower-court cases are eventually affirmed by the Supreme Court of Canada, the matrix of relationships they govern will need to be reconfigured. The conventional triangle of the federal government, provincial governments, and Aboriginal peoples will no longer be adequate to represent the actual participants in the complex social, economic, and political relationships that determine the conditions of Aboriginal lives and communities (269)." In fact, just before this volume went to print, the Supreme Court of Canada decided, in *Haida Nation v. British Columbia (Minister of Forests)*, that Weyerhaeuser, the relevant third party in the case, did not have a duty to consult (2004, sections 52–55). Nevertheless, the Court concluded that "The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable" (section 56). For a discussion of this decision see the postscript to the essay by Devlin and Murphy.
- 28 The burgeoning diamond industry in the Canadian Arctic and parts of northern Ontario is a case study in the possible risks and rewards of corporate-Aboriginal partnerships. For although the promised economic benefits are huge, so is the risk that pristine environments will be irreparably damaged and that the interests of the more powerful corporate players will run roughshod over those of their Aboriginal partners. For a variety of perspectives on this new northern industry, see Bielawski 2003, Mandel-Campbell 2004, and Kooses 2004. I thank Peter Russell for adding some much-needed nuance to my discussion here.
- 29 See also Gosnell 2002 and the report prepared for the Conference Board of Canada on corporate-Aboriginal economic relationships (Loizides and Greenall 2001).
- 30 See also Bruyneel's (2002) discussion of the different positions on citizenship taken by the candidates at the AFN's 1997 leadership convention. Borrows (2000, 340) pushes the debate one step further by encouraging Aboriginal communities to consider extending citizenship to non-Aboriginal people who demonstrate sufficient knowledge of and commitment to community values, priorities, and forms of life.
- 31 For two contrasting positions on the need for a sense of citizenship as identity, see Cairns 2000 and Williams 2004.
- 32 Here I disagree with Kiera Ladner (2003, 85–7) who emphasizes the watertight compartments view of Canadian federalism as one means of defending the exclusivity of Aboriginal jurisdictions. In my view, Ladner overlooks the fact that,

in practice, the Canadian federation is characterized by a substantial degree of overlap among federal and provincial jurisdictions that calls for a significant degree of shared or concurrent forms of authority and decision making. Given the significant degree of interdependence among Aboriginal and non-Aboriginal communities, ends, and interests, it is difficult to imagine that the same logic of shared and concurrent jurisdictions would not apply. The key from my point of view is to ensure that concurrent and shared jurisdictions are arranged through negotiation and consent rather than by imposition.

- 33 See also the essays by Hanselmann and Gibbins and by Peters in this volume.
- 34 For example, Turpel (1993) argues that the rejection of the Charlottetown Accord by Aboriginal voters signalled their unwillingness to trust the national Aboriginal organizations to negotiate an agreement that was sufficiently representative of local interests.
- 35 The type of work I have in mind is already well underway in Saskatchewan (Hawkes, this volume; Saskatchewan, OTC 1998). See also McKee's (2000) work on the British Columbia Treaty Process. An interesting research direction is also provided by Tully (2000b, 62) in his recommendation of the establishment of a decolonization commission – composed of Aboriginal and non-Aboriginal members and guided by the *Final Report* of the Royal Commission on Aboriginal Peoples – which would monitor the transition from a colonial to a non-colonial relationship between Aboriginal and non-Aboriginal peoples over the next decades. Also, Joyce Green speaks approvingly in her essay of Desmond Tutu's call for a truth and reconciliation commission for Canada.
- 36 Cassidy's call for the utilization of new information technologies to disseminate research on Aboriginal governance is of particular importance. A wealth of material that currently resides in relative obscurity in public and private libraries, archives, CD-ROM's (the entire corpus of material collected by RCAP, for example), microfiche, and in the files of various governmental and non-governmental organizations could be collected relatively easily and made available in a single searchable clearinghouse on the World Wide Web.

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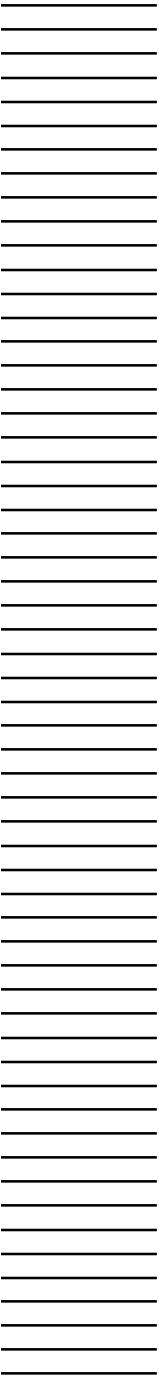
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II

Urban and Off-Reserve Dimensions

Geographies of Urban Aboriginal People in Canada: Implications for Urban Self-Government

Evelyn J. Peters

La croissance de la population autochtone en milieu urbain et le rôle important que le peuple autochtone jouera dans le futur de plusieurs villes canadiennes suggèrent qu'il est temps que la question de l'autonomie gouvernementale retourne à l'ordre du jour de la politique. Les approches pour entreprendre des initiatives en matière d'autonomie gouvernementale doivent tenir compte du nombre et des caractéristiques des autochtones. Ce travail explore l'implication des caractéristiques de la population autochtone sur la façon dont l'autonomie gouvernementale autochtone en milieu urbain est structurée. Il démontre tout d'abord que le nombre d'autochtones de certaines villes devrait être suffisant pour pouvoir soutenir en grande partie le développement de leurs institutions, mais que ce sera beaucoup plus difficile dans d'autres régions urbaines où la population autochtone est beaucoup plus petite. Les effets qu'ont les haut taux de mobilité et le retour des émigrés dans les réserves et dans les régions rurales sur la stabilité et sur l'administration à l'échelle appropriée sont ensuite considérés. Finalement, les habitudes d'établissement du peuple autochtone dans les villes ainsi que les implications des initiatives prises soit dans des régions précises soit dans un contexte urbain y sont considérés.

INTRODUCTION

The situation of urban Aboriginal people is gaining increasing exposure with recognition of the important role of cities in Canada's economy and society. Cities are back on the policy agenda, as evidenced by former prime minister Jean Chrétien's formation of the Caucus Task Force on Urban Issues in May 2001 (Canada, Sgro 2002). Because of the rapid growth and distinctive characteristics of urban Aboriginal people, their situation in cities also is under discussion.

Existing research has built on earlier themes of the marginalization of urban Aboriginal people, debates about government responsibilities, and the

spectre of ghetto formation. The Canadian Council on Social Development's statistical profile of poverty levels has described the disadvantage of Aboriginal people relative to other urban residents (Lee 2000), and other work has supported this theme (Drost 1995; Canada, PCO 2002; Hanselmann 2001; Richards 2001a; 2001b; Canada, Sgro 2002). Debates over government responsibilities for Aboriginal people off-reserve have a very long history, and the negative effects of these debates have received increasing attention (Bostrom 1984; Hanselmann 2001; 2002b; Peters 2001; Reeves and Frideres 1981; Ryan 1975). Recent federal statements have emphasized the need for coordination and collaboration between different levels of government (Canada, INAC 1997; 2002; Canada, PCO 2002, 12; Canada, Sgro 2002, 23). Long-standing concerns about Aboriginal ghettos and their implication for cities and for urban Aboriginal people are being replayed (Drost 1995; Richards 2001b; Canada, Sgro 2002, 21; Canada, PCO 2002), concerns which are often linked to the phenomenon of increasing poverty in urban areas and its spatial concentration. Two new themes have also been identified. The availability of better data has allowed researchers to demonstrate high mobility rates in the urban Aboriginal population and to hypothesize about their implications for the capacity of community building and program delivery (Canada, PCO 2002, 6; Clatworthy 1996; Norris, Cooke, and Clatworthy 2002a; 2002b). Finally, a number of sources have emphasized the importance of cultural survival and adaptation for Aboriginal people in urban areas (Cairns 2000; Canada, RCAP 1996, 537; Newhouse 2000; Peters 1996).

In light of the increasing interest in urban Aboriginal people, the absence of any contemporary focus on urban Aboriginal self-government is puzzling and somewhat worrisome. Cassidy's (1991) discussion provides a useful definition of self-government in the urban context. He distinguishes between self-determination, which he defines as the right of a people to be sovereign within a particular territory, and self-government, which he defines as the ability of a people to make significant choices about their own political, cultural, economic, and social affairs, without having sovereignty or experiencing self-determination. While most urban Aboriginal people do not live in a territory over which they can exercise sovereignty, there are various self-government arrangements that extend meaningful levels of control over issues that affect their everyday lives. Discussions about urban self-government emphasize capacity rather than dependency, empowerment rather than marginality, providers rather than clients, and rights rather than needs. Urban Aboriginal people have an important role to play in the future of cities, especially on the prairies, and this role must include self-government.

This broad definition of self-government can incorporate a wide array of levels of jurisdiction and power. Researchers might argue that some variants represent self-administration rather than self-government. Most of the work on urban self-government has focused on structures, but the Royal Commission

on Aboriginal Peoples (RCAP) described the characteristics of jurisdiction associated with self-government for those without a land base. Participation would be voluntary and would apply only to members of an Aboriginal group; the source of the right to self-government would be delegated; legislative powers would be limited to bylaw making, policy making, and administration; and areas of jurisdiction would be relatively circumscribed (Peters 1999, 418).

My main objective here is not to focus on whether or not certain initiatives represent "true self-government." My purpose instead is to explore the implications of the population characteristics of Aboriginal people with respect to the ways in which urban Aboriginal self-government is structured. In the next section I summarize some of the main dimensions of proposed approaches to self-government and the ways in which they have been worked out in contemporary negotiations. Then I turn to the size, characteristics, and mobility of Aboriginal people and explore what this means for different approaches to self-government for urban Aboriginal people. Finally, I examine the settlement patterns of Aboriginal people within cities and draw out their implications. Population characteristics and distribution do not strictly determine opportunities for self-government, but they do create some opportunities and impose some limits.

APPROACHES TO SELF-GOVERNMENT FOR URBAN ABORIGINAL PEOPLE

Many arguments have been advanced in support of Aboriginal self-government in Canada. Aboriginal people have argued that they have an inherent right to self-government, and RCAP suggested that section 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights, includes an inherent right of self-government (Canada, RCAP 1993, vi). In addition to rights-based and legal justifications for Aboriginal self-government, there are strong social policy reasons to support it. Increasing Aboriginal control over institutions that affect their lives represents an important break from colonial history (Armitage 1999). Many urban Aboriginal people wish to receive programs and services from fellow Aboriginal people (Hanselmann 2002a, 6). Aboriginal-controlled social services generally have greater scope in delivering programs that incorporate Aboriginal principles, beliefs, and traditions, and they create significant economic benefits for Aboriginal communities (Hylton 1999, 85–6). Aboriginal organizations can contribute to building cultural communities in urban areas, and self-government can play an important role in economic development (Cornell and Kalt 1992; Canada, RCAP 1996, 560).

Until recently, most of the Canadian literature on self-government focused on land-based populations (Groves 1991). According to Weinstein (1986), national Aboriginal organizations at the 1985–87 constitutional conferences on Aboriginal issues came to a tacit decision to downplay issues relating to

non-land-based self-government in order to concentrate on other priorities. While a handful of reserves are located in urban areas, the majority of urban Aboriginal people live off-reserve, dispersed among non-Aboriginal people. All of the existing legislated self-government agreements address the situation of Aboriginal people with a land base. Although the umbrella Final Agreement that was negotiated with the fourteen Yukon First Nations allowed First Nations to make some laws for their citizens throughout the Yukon, other agreements do not have similar provisions. As a result, most self-government agreements and negotiations do not address the situation of urban Aboriginal people.¹

Since the 1940s, the proportion of Aboriginal people living in cities has risen steadily. In 2001 almost half (49 percent) of those who identified themselves as Aboriginal lived in urban areas.² While some Native people have been relatively successful economically, the urban Aboriginal population as a whole is disproportionately represented in the most impoverished sectors of city populations (Lee 2000). RCAP found that urban Native people had more difficulty accessing cultural ceremonies and participating in cultural communities than people living on-reserve or in Métis communities. Aboriginal institutions and structures that support Native control over decision making can play an important role in meeting the needs of urban Aboriginal people. This raises an important question: how can Aboriginal people in urban areas participate in institutions of self-government?

Over the years, a number of researchers have elaborated approaches to self-government for urban Aboriginal people. These include incorporating native people as part of larger aggregates of First Nations or Métis communities (by province, treaty, or a First Nation's territory) or by organizing self-government within particular urban areas for all Aboriginal people living there. The following sections explore each of these models briefly and summarize some contemporary examples.

URBAN SELF-GOVERNMENT AS PART OF A LARGER FIRST NATIONS OR MÉTIS AGGREGATE

One approach to giving urban Aboriginal people access to self-government is to provide them with opportunities to participate in self-government structures for larger aggregates of people, including land-based populations. This approach has several variations. One variant, termed "extraterritorial jurisdiction," would involve an individual band or tribal association, which has jurisdiction over a land base, in providing programs and services for its members living off the land base, and creating political structures so that these members could participate in decision-making processes of the land-based body. This variation was suggested to RCAP by a number of First Nations groups (Young 1995). To date, however, responsibility for members living off-reserve has not been a consistent part of self-government negotiations,

and few First Nations reserve governments have the resources to provide services to members living in urban areas.

This state of affairs may change for First Nations organizations. In 1999 the Supreme Court of Canada rendered the *Corbière* decision that gave band members living off-reserve the right to vote in band elections and referenda. The *First Nations Governance Act* (tabled 14 June 2002) attempted to implement *Corbière* by requiring all First Nations to “respect the interests of all band members and ... balance their different interests, including the interests of on- and off-reserve members.”³ Giving off-reserve members the right to participate in band political institutions means that First Nations governments may increasingly be obliged to respond to the priorities and concerns of the off-reserve constituency. At the same time, however, off-reserve members will frequently be a minority of voters, and their concerns may yet end up being ignored.

Another variant of urban Aboriginal governance is based on traditional Aboriginal territories (Tizya 1992). Most Canadian towns and cities are located on the traditional lands of First Nations. Under this approach, a First Nation’s jurisdiction could be extended to Aboriginal people living within its traditional territory. Levels of jurisdiction of the host nations would vary off and on a land base, but in urban areas they would begin with program and service delivery (Canada, RCAP 1996, 589–99). The royal commission also proposed models of Métis and treaty nations governance as variations on the urban self-government theme. For example, the Métis variation would see urban residents represented in self-government through participation in one of a series of Métis locals. To date, however, this variation has not been taken up in self-government negotiations.

The RCAP report did not, on the other hand, highlight an approach in which provincially based Aboriginal political organizations would assume the responsibility and jurisdiction for the delivery of urban services. This may be related to RCAP’s emphasis on Aboriginal nations as the source of the inherent right of self-government. Also, the boundaries of First Nations territories do not coincide with provincial and territorial boundaries. Young (1995, 161) reported that an approach based on provincial Métis or First Nations aggregates had considerable support from some of the Aboriginal political organizations. In this approach, provincial Aboriginal representatives would establish or delegate the provision of programs and services to urban residents as part of their broader governance responsibility. This approach is reflected in current negotiations in Saskatchewan with the Federation of Saskatchewan Indian Nations (see Hawkes, this volume).

All of these approaches locate responsibility for governance with First Nations that have a land base or with Métis political organizations. On the smallest scale, individual reserve governments would represent and be responsible for their urban residents. On larger scales, provincial First Nations or Métis political organizations or representatives of traditional territories would provide access to self-government for urban Aboriginal people. Urban

Aboriginal people's access would depend on their affiliation with a particular band or larger First Nations grouping, or on their self-identification as Métis.

While these models are not new, the current reality is that there have been few attempts to provide access to self-government for urban Aboriginal people by incorporating them into larger First Nations or Métis governance initiatives. While a number of national Aboriginal political organizations have had an important role in policy formulation and advocacy for urban Aboriginal people, they are relatively unconnected to program and service delivery in urban areas at the present time. There are also networks of provincial First Nations and Métis organizations. Nevertheless, for the most part, First Nations have focused on reserve communities and have not had the economic resources or federal government support to establish initiatives for their members living in urban areas. In some cities, provincial Métis have established housing and have formed economic development organizations focused on urban populations. However, provincial First Nations and Métis political organizations have not been the main source of Aboriginal institutional development in urban areas.

SELF-GOVERNING URBAN ABORIGINAL INSTITUTIONS

Reeves's (1986) analysis is probably the earliest attempt to conceptualize self-government through institutional development for urban Aboriginal people. He proposed the constitutional entrenchment of a right to form Native societies that would be modelled on organizations in professions such as law and medicine, representing the interests of individual Aboriginal people in their dealings with institutions in the larger Canadian society. Reeves's suggestions have not been taken up in subsequent work on self-governing urban Aboriginal institutions. Instead, attention has been focused on the "community of interest" approach, a term suggested by Dunn (1986) writing for the Native Council of Canada.⁴ Dunn suggested that in urban areas, initiatives in self-government should be based on culture rather than territory. Areas of jurisdiction could begin with education, health services, and training programs, supported by legislation, delegation, or contractual arrangements. Dunn identified financing and eligibility criteria as major challenges to be worked out. Weinstein's (1986) analysis complemented Dunn's work, suggesting that in urban areas opportunities for self-government for Aboriginal people could involve Aboriginal control over the design and delivery of programs and services.⁵ Weinstein explored two models: an institutional model with specialized autonomous institutions and agencies in different areas of service delivery; and a political model, which involved central policy-making bodies administering service-delivery institutions as part of a larger objective of promoting the general aspirations of Aboriginal people.

The RCAP report subsequently identified the "urban communities of interest" model as a possible approach to self-government for urban Aboriginal

people. It defined “community of interest” as a “collectivity that emerges in an urban setting, includes people of diverse Aboriginal origins, and ‘creates itself’ through voluntary association” (Canada, RCAP 1996, 584). Following Weinstein, RCAP identified two possible forms, one involving a citywide body exercising some levels of jurisdiction in a range of policy sectors through a range of institutions, and a second involving individual institutions in a single policy sector. The geographic reach in both these forms would correspond to the municipal boundaries of the city or town, though urban communities that were interested would be able to enter into agreements with organizations in other urban or non-urban areas. Governance initiatives based on this model would not require participants to have a particular legal Aboriginal status or be affiliated with a land-based community. Programs, services, and political representative organizations would be status blind. This does not mean that cultural differences would not be respected or that organizations would not attempt to provide culturally appropriate services. However, access would not be determined by cultural or legal differences among urban Aboriginal people.

At present, urban Aboriginal service providers probably create the most immediate access to institutions of self-government for the largest proportion of urban Aboriginal people. There are different levels of institutional development in different cities; by way of example, tables 1 and 2 show the self-governing organizations in Winnipeg and Edmonton in 2002. The groups listed here were chosen on the basis of four criteria: (1) they provided services mainly to urban residents; (2) they were largely separate entities in terms of decision-making and service delivery; (3) they were owned or controlled by Aboriginal people; and (4) they were non-profit organizations. Clearly, the number of organizations and the number of policy sectors they address was greater in Winnipeg than in Edmonton. In both cities, the number and coverage of institutions has grown substantially since Clatworthy, Hull, and Loughran (1994) surveyed urban Aboriginal organizations in these two cities in 1993.

Besides the increasing number of urban Aboriginal service organizations, another important development is the emergence in some cities of umbrella organizations to coordinate services and spearhead important initiatives. For example, the Aboriginal Council of Winnipeg (ACW) is a political organization dedicated to improving the life of all Aboriginal people in the city⁶ (Munroe 2002). The council was central in purchasing Winnipeg’s CPR station in the heart of the core area and bringing under one roof a variety of Native organizations. Named the Aboriginal Centre, this building provided a focal point for the urban Aboriginal community. The council was also instrumental in building the Circle of Life Thunderbird House across the street – a striking building that acts as a cultural and spiritual facility. There are plans to expand the Thunderbird House complex by adding housing and other facilities. ACW is not affiliated with any of the Aboriginal political groups in the province.⁷

Table 1: Self-Governing Aboriginal Institutions in Winnipeg, 2002

<i>Organization</i>	<i>Primary focus</i>	<i>Year established</i>
A Bah Nu Gee Child Care	Child care	1984
Aboriginal Centre of Winnipeg	Community development	1991
Aboriginal Council of Winnipeg	Political and advocacy	1990
Aboriginal Health and Wellness Centre	Health	1994
Aboriginal Learning and Literacy Foundation	Education	1990
Aiyawin Corporation	Housing	1983
Anishinabe Oway-Ishi	Employment	1989
CAHRD/NES	Employment training	1983
Circle of Life Thunderbird House	Religious/cultural	2000
Indian Family Centre Inc.	Religious/social service	1973
Indian Métis Friendship Centre	Cultural/social service	1959
Kanata Housing	Housing	1982
Kateri Tekakwitha Parish	Aboriginal church	1978
Kinew Housing	Housing	1970
Lord Selkirk Women's Group	Youth services	1997
Ma Mawi Chi Itati Centre	Child and family services	1984
Manitoba Association for Native Languages	Native languages	1985
Métis Resource Centre	Cultural	1995
MMF – Winnipeg Region		
Native Clan	Inmates	1970
Native United Church	Religious	2000
Native Women's Transition Centre	Women's resources	1979
Nee-Dawn-Ah-Kai Day Care Centre	Child care	1986
Ndinawemaaganag Endaawaad	Youth shelter	1993
Neeginan Development Corporation	Community development	1998
Original Women's Network	Women's resources	
Owitisookaageedi Youth Organization	Aboriginal youth	2000
Payuk Inter-Tribal Housing Co-op	Housing	1985
Turtle Island Community Resource Centre	Community development	1992
Wahbung Abinoonjiiq	Family violence	1995

Source: Peters 2003

Table 2: Self-Governing Aboriginal Institutions in Edmonton, 2002

<i>Organization</i>	<i>Primary focus</i>	<i>Year established</i>
Aboriginal Consulting Services	Individual and family services	1992
Aboriginal Counselling and Employment Services	Employment	2000
Aboriginal Partners and Youth Society (Mother Bear)	Youth services	1999
Aboriginal Youth and Family Wellbeing	Family services	1996
Amisk Housing Association	Housing	1989
Ben Calf Robe Society	Family services	1981
Bent Arrow Traditional Healing Society	Counselling Group homes Employment services Youth and family services	1994
Canadian Native Friendship Centre	Cultural/social services	1962
Canative Housing Association	Housing	?
Edmonton Aboriginal Business Development Centre		?
Edmonton Métis Cultural Dance Society	Cultural	1999
Métis Child and Family Services Society	Family services	
Métis Urban Housing Corporation	Housing	1982
Native Healing Centre	Community development	1990
Native Seniors Centre	Seniors support	1986
Oteenow Employment and Training	Employment services	1999
Red Road Healing Society	Cultural support services	1997

Source: Peters 2003

These two approaches to self-government for urban Aboriginal people – urban self-government as part of a larger First Nations or Métis aggregate, and self-governing urban Aboriginal institutions – aggregate Aboriginal people in different ways. The former involves all First Nations or all Métis people in the province, but implies two sources of self-government for Aboriginal populations in each city. The latter aggregates all Aboriginal populations in an urban area. How do these approaches relate to the population characteristics of particular cities?

POPULATION SIZE AND CHARACTERISTICS

URBAN ABORIGINAL POPULATION SIZE

It is difficult to compare the size of urban Aboriginal populations over time. Changes in definitions, urban boundaries, census questions, and instructions to enumerators all contribute to statistics that are not directly comparable for different times (Goldmann and Siggner 1995). In 1951, however, the census reported that there were 805 individuals with Indian or Inuit ancestry in Toronto, 210 in Winnipeg, 160 in Regina, 48 in Saskatoon, 62 in Calgary, 616 in Edmonton, and 239 in Vancouver. These numbers are substantially lower than those found in table 3. Given the complexity of urban Aboriginal population growth, it is difficult to predict the future size of the urban Aboriginal population. However, table 3 shows that between 1991 and 2001, urban Aboriginal populations grew very substantially in census metropolitan areas (CMAs), almost doubling in some cities.⁸ Urban Aboriginal populations have received increasing attention in recent policy initiatives, and in view of their high rates of growth, we can expect that these issues will become even more central over time.

Table 3: Population Size, Various Measures, Aboriginal People in Census Metropolitan Areas, 2001

	<i>Aboriginal-identity population</i>	<i>Percent of urban population with Aboriginal identity</i>	<i>Percent increase, Aboriginal-identity population 1991-2001</i>
Halifax	3,525	1.0	197.5
Montreal	11,275	0.3	66.4
Ottawa-Hull	13,695	1.2	98.0
Toronto	20,595	0.4	45.0
Thunder Bay	8,255	6.6	n/a
Winnipeg	55,970	8.2	59.2
Regina	15,790	8.0	43.3
Saskatoon	20,455	8.8	71.6
Calgary	22,110	2.3	57.1
Edmonton	41,295	4.3	41.3
Vancouver	37,265	1.8	48.7

Sources: <http://www.statcan.ca/english/Pgdb/demo43b.htm> (accessed January 2003); Statistics Canada 1991

The size of urban Aboriginal populations provides the framework for these populations' structure and functions. The 2001 census showed that the proportion of urban residents who identified as Aboriginal people varied from 0.3 percent in Montreal to 7.4 percent in Saskatoon (table 3). Prairie cities had the largest Aboriginal populations, both in absolute and relative numbers. While statistics on Aboriginal populations in large urban areas are highlighted most frequently, Aboriginal people also make up a large percentage of some smaller cities. For example, in 1996 people with Aboriginal identity comprised 4.7 percent of the North Bay population, 4.3 percent of the Sault Ste Marie population, 5.2 percent of the Kamloops population, and 6.9 percent of the Prince George population.⁹ At 29 percent, Prince Albert had the highest concentration of Aboriginal people of any city in Canada.

However, there is no uncontroversial way of determining the size of the urban Aboriginal population. In the census, there are two main ways of defining the Aboriginal population. One is through the "ancestry question," which in recent years was: "To which ethnic or cultural group(s) did this person's ancestors belong?" Then, beginning in 1991, the Aboriginal Peoples Survey asked individuals who stated that they had Aboriginal ancestry whether they identified with an Aboriginal group. This "identity population" is smaller than the population that has Aboriginal ancestry. Which way of determining Aboriginal population numbers is most relevant for analyses of the demographic bases of urban Aboriginal self-government? The identity population is probably the group that most closely associates with Aboriginal cultural origins and would be most likely to participate in institutions of self-government. However, some recent analyses of census counts of Aboriginal populations highlight the process of "ethnic mobility," which suggests that ancestry populations are also important (Guimond 1999). Ethnic mobility refers to the change in ethnic affiliations or ethnic identity between censuses and between generations. Demographic analyses of urban Aboriginal populations suggests that their substantial growth between 1991 and 2001 was not due only to migration, or to high fertility rates (Clatworthy 1996; Norris, Cooke, and Clatworthy 2002b). Some of the growth in urban Aboriginal populations was due to legislation related to the 1985 amendments to the *Indian Act*, allowing for the reinstatement of individuals and their descendants who had previously lost status.¹⁰ Yet some of it was also due, especially among Métis populations, to changes in self-identification, or "ethnic mobility" (Guimond 1999). The substantial increases noted in table 3 are partly due to ethnic mobility.

We do not have a very good grasp of the factors that encourage individuals to change their ethnic identities, but changes in public attitudes seem to be an important contributing element. Positive changes with respect to Aboriginal self-government in urban areas may also encourage more individuals to identify themselves as Aboriginal. Aboriginal organizations provide a greater cultural visibility; they increase opportunities for community development; and they provide opportunities for employment. One implication is that in

cities where the population with Aboriginal ancestry is considerably larger than the population that identifies as Aboriginal, there is more scope for substantial increases in Aboriginal-identity populations because of ethnic mobility. The potential for this type of growth appears to be greatest in such cities as Montreal, Halifax, Ottawa-Hull, and Toronto, where a relatively small proportion of people with Aboriginal ancestry identify themselves as Aboriginal.

Whether we consider ancestry data or identity data, it is important to recognize that the numbers of Aboriginal people in urban areas are relatively small. They comprise less than 10 percent of all CMA populations, and Winnipeg, with the largest Aboriginal representation, has an identity population of only 55,970. In terms of size alone, what is the institutional capacity of these populations? Deloria (1998) points out that, internationally, there are many small independent nations in existence and population size is not an absolute deterrent to self-government. In this context, it is useful to note that in the year 2000 the Vatican had a population of less than a thousand; Nauru's total population that year was about 12,000, Monaco's and Liechtenstein's were both about 32,000, and Andorra's was about 67,000.¹¹ Another way to think of this is to compare urban areas in Canada with Aboriginal populations of similar size in census metropolitan areas. For example, both Montreal and Thunder Bay have Aboriginal-identity populations similar to that of the total population of Labrador City, Newfoundland. The Ottawa-Hull Aboriginal-identity population is similar to the population of Thompson, Manitoba. Toronto, Regina, Saskatoon, and Calgary all have Aboriginal-identity populations comparable to the total population of Portage La Prairie, Manitoba. The population of Moose Jaw, Saskatchewan, is much the same size as the Aboriginal-identity population in Edmonton and Vancouver; and the Winnipeg Aboriginal-identity population and the total Brockville, Ontario, population are of similar size.

Clearly, these are not straightforward comparisons. Urban areas serve individuals from non-urban catchment areas. Urban Aboriginal organizations may not serve the entire Aboriginal population in a city, and they may serve some non-Aboriginal people. Many programs and services are delivered in small urban areas even if they are not economically efficient, just as some Aboriginal organizations exist in urban areas even when not economically viable. In addition, population size is not the only criterion that contributes to a capacity for self-government. However, these comparisons suggest that in terms of population size, some urban Aboriginal communities may be able to support meaningful numbers of organizations and many levels of services.

SOCIO-DEMOGRAPHIC CHARACTERISTICS OF URBAN ABORIGINAL POPULATIONS

While the size of Aboriginal populations is important, the capacity of urban Aboriginal populations to administer a variety of organizations and deliver a

variety of services must also be considered. The census does not provide very good measures of capacity, but table 4 compares Aboriginal and non-Aboriginal populations in terms of age, education, family status and employment. The urban Aboriginal population is younger than the non-Aboriginal population, and fewer individuals have high levels of education. More Aboriginal adults are single parents and thus are burdened with high levels of family responsibilities. More urban Aboriginal than non-Aboriginal people are unemployed. Unemployment rates are probably partly related to experience and training, and this may affect the capacity for organizational development. These limited measures suggest that capacity building will need to be a major component of any movement towards Aboriginal self-government.

Table 4: Characteristics Related to Capacity: Aboriginal-Identity Populations in All Urban Areas, 1996

	<i>Aboriginal-identity population</i>	<i>Non-Aboriginal population</i>
Less than 14 years old	33%	20%
Without grade 12 ¹	48%	33%
With university degree	6%	17%
Lone parents	10%	4%
Unemployed	22%	10%

Source: Siggner 2001

¹Proportion of the population fifteen and older, not in school

It is also important to remember that there are considerable variations in the socio-economic characteristics of Aboriginal-identity populations in different cities (table 5). The eleven cities described here fall into three main groups. Thunder Bay, Winnipeg, Regina, and Saskatoon have the youngest Aboriginal populations with a greater proportion of single parents and individuals without grade 12 education. Unemployment and poverty rates are very high (although Thunder Bay has a lower poverty rate), and there are relatively few individuals who earned a good income of \$40,000 in 1995. Calgary, Edmonton, and Vancouver populations fall next on this continuum. In Halifax, Montreal, Ottawa-Hull, and Toronto, there are still differences between Aboriginal and non-Aboriginal people, but the gap is much smaller than for the other cities. The implication is that the capacity for the development of structures and institutions of self-government varies between Aboriginal populations in different urban areas.

Table 5: Demographic Characteristics of the Aboriginal-Identity Population in Selected Central Metropolitan Areas, 1996

	Less than 14 years old %	Single parents %	Sex ratios male: female 25-44	Without grade 12 ¹ %	Unemployment rates %	Poverty rates %	Earning \$40,000 + in 1995 ² %
Halifax	24.2	6.1	1:1.06	48.2	12.4	n/a	7.4
Montreal	24.7	7.3	1:1.15	49.9	21.0	57.7	10.9
Ottawa-Hull	24.8	8.7	1:1.06	47.5	16.3	51.2 ³	15.3
Toronto	24.4	7.0	1:1.09	47.6	15.7	43.2	14.2
Thunder Bay	32.8	10.4	1:1.49	71.1	28.0	47.8	8.5
Winnipeg	35.3	10.1	1:1.21	69.5	25.1	62.7	4.6
Regina	40.9	11.3	1:1.21	68.5	26.6	62.8	5.6
Saskatoon	40.9	10.8	1:1.35	69.6	25.1	64.9	6.0
Calgary	33.1	7.1	1:1.27	52.2	14.3	50.6	8.8
Edmonton	35.5	9.5	1:1.18	67.6	22.5	61.6	6.6
Vancouver	27.8	9.0	1:1.22	51.5	20.4	66.1	9.7

Sources: Statistics Canada 1996; Lee 2000, 39-40.

¹Proportion of the population fifteen and older and not in school

²Proportion of the population fifteen and older

³For Ottawa only

IMPLICATIONS OF LEGAL AND CULTURAL DIVERSITY FOR ACCESS TO FORMS OF SELF-GOVERNMENT

Access to existing opportunities for self-government is affected by legal status and cultural identity. Table 6 shows that in some cities (Winnipeg, Calgary, and Edmonton), Métis populations comprise about half of the Aboriginal-identity population. In Halifax, which has the lowest proportion of Métis, they still represent over one fifth of the Aboriginal-identity population. Self-government organized by First Nations and Métis aggregates would mean that in most large cities there would be duplicate organizations, each serving a proportion of the urban Aboriginal population. However, there are also differences in access within these groups, fragmenting urban populations even further.

The structure of First Nations political organizations is such that they are controlled by chiefs elected by band members. Prior to the *Corbière* decision, only band members living on-reserve could elect the band chief and council. Now, band members living off-reserve can also vote in band elections. However, it is not clear that all band members living off-reserve have up-to-date information on band elections. Some band members live in urban areas precisely because of their difficulty with band politics.

More importantly, a large number of individuals who identify as First Nations people do not have band membership. Band membership is a prerequisite for participating in band elections and for living on a reserve. Published data on 2001 band membership rates are not yet available from the most recent Aboriginal Peoples Survey. However, in 1991, a substantial number of urban residents who identified as North American Indians (the terminology used for First Nations people in the census) did not have band membership. The proportion of the North American Indian identity population in 1991 without band membership varied from a high of 57.4 percent in Toronto to a low of 6.4 percent in Saskatoon (table 6). These proportions would have increased by 2001. Clatworthy and Smith's (1992) study points out that while Bill C-31¹² is well known for reinstating people who lost registered Indian status and band membership prior to 1985, the implications of the bill for the entire First Nations population are less well recognized. Bill C-31 gave bands the ability to decide on criteria for band membership, and these criteria are based on descent. Given current patterns of parenting by band members and non-band members, many bands will eventually experience a declining membership, and under the two-parent descent rules, membership will decline within a generation.¹³ Individuals without band membership have no political rights in existing First Nation political structures. This population, therefore, does not have access to self-government through First Nations political organizations, and it will continue to grow.

Bill C-31 separated legal status as a registered Indian from band membership. Legal status as a registered Indian is a prerequisite for eligibility for a

Table 6: Cultural and Legal Composition of the Aboriginal-Identity Population in Census Metropolitan Areas

	<i>Percent by Aboriginal group, 2001</i>		<i>Percent of North American Indians not registered or band member, 1991</i>	
	<i>North American Indian</i>	<i>Métis</i>	<i>Registered¹</i>	<i>Band member²</i>
Halifax	72.6	22.7	28.3	32.9
Montreal	61.9	33.9	23.1	32.1
Ottawa-Hull	60.9	35.4	20.1	36.4
Toronto	72.1	25.7	52.6	57.4
Thunder Bay	77.2	22.5	n/a	n/a
Winnipeg	43.2	56.4	13.0	18.3
Regina	61.2	38.4	6.0	13.2
Saskatoon	57.9	41.5	0.1	6.4
Calgary	50.3	48.5	30.2	33.8
Edmonton	47.0	51.8	14.3	19.6
Vancouver	64.6	34.6	38.4	44.7

Sources: <http://www.statcan.ca/english/Pgdb/demo43b.htm> (accessed January 2003); Statistics Canada 1991

¹Statistics for percent registered and percent band members were calculated using the North American Indian-identity population as a base. Some of the registered or band-member population may not identify as North American Indian people. These inaccuracies are assumed to be relatively small, and the table should reflect the basic dimensions of the urban Aboriginal population.

²These data are from the 1991 Aboriginal Peoples Survey. Published statistics for 2001 are not yet available for census metropolitan areas. Clatworthy and Smith's (1992) analysis indicates that the proportion of the North American Indian population that has legal registered status or band membership will decline over time. Therefore 1991 statistics probably underestimate this population.

variety of rights and benefits (such as uninsured health benefits). Table 6 shows that in 1991 the proportion of the urban Aboriginal population that was registered was lower than the proportion that identified as North American Indian. Proportions varied from a high of over half (52.6 percent) of the North American Indian population of Toronto having registered Indian status, to a low of 0.1 percent in Saskatoon. Clatworthy and Smith's (1992) study of the implications of Bill C-31 for Indian status showed that the number of those who identify as First Nations but do not have legal status as registered Indians will

grow rapidly. Given current parenting patterns, Clatworthy and Smith (1992, ii) predict a moderate increase (about 10 percent) in the registered Indian population in the four decades following the passage of the bill. After that, they note, the projections “suggest a declining Indian Register population beginning in roughly fifty years, or two generations,” and they “anticipate that some First Nations, whose out-marriage rates are significantly higher than the national norms, would cease to exist at the end of the 100 [year] projection period.”

It is not clear whether registered Indian status would be the basis for funding formulas for urban First Nations governments. What is clear, though, is that the descent rules currently governing First Nations legal membership and status create classes of First Nations people who have no First Nations political rights and no access to the other rights and benefits of Indian status. First Nations people in cities, then, are divided in terms of their access to structures of self-government planned around existing First Nations political organizations.

There is no equivalent to the *Indian Act* or Bill C-31 as a means of defining Métis people. While the Métis were included in the *Constitution Act, 1982*, as people whose Aboriginal rights were recognized and affirmed, these rights have not been defined through legislation. However, the recent Supreme Court decision on the *Powley* case suggests that initiatives to define Métis status more specifically may have similar implications in fragmenting urban Métis populations.¹⁴ The *Powley* case concerned Métis hunting rights for two individuals living near the northern Ontario town of Sault Ste Marie. According to the Supreme Court, to be Métis for constitutional purposes, individuals must:

- self-identify as Métis (distinct from Indians and Inuit)
- be accepted as a member of a modern Métis community
- have some ancestral connection to the founding historic Métis community claiming the right.

The modern Métis community must also exist in continuity with the original historical Métis community. In other words, possession of this particular right is associated with descent and with continued association with a particular Métis community. The criteria for membership adopted by the Métis National Council have some similar characteristics. On 27 September, 2002 the council adopted a definition of Métis as follows: “Métis means a person who self-identifies as Métis, is of historic Métis Nation Ancestry, is distinct from other Aboriginal Peoples and is accepted by the Métis Nation.” The definition described the “historic Métis Nation” as the Aboriginal people “then known as Métis or Half-Breeds who resided in the Historic Métis Nation Homeland,” and it defined “Historic Métis Nation Homeland” as the area of land in “west central North America used and occupied as the traditional territory of the Métis or Half-Breeds as they were then known.”¹⁵

The increase in the Métis population in the last decade may include many individuals who have these kinds of connections to historic Métis communities but who previously did not choose to identify themselves as Métis. It is likely, though, that a substantial proportion of the increase is composed of people who identify as Métis because of their “mixed” (Aboriginal and non-Aboriginal) ancestry (Andersen 2003). This population would be excluded from citizenship in Métis governments where citizenship is based on criteria of descent from, and recognition by, historical Métis communities.

SUMMARY

The populations of some large urban areas seem capable of supporting a considerable number of self-determining organizations in a number of policy areas. However, levels of education and socio-economic characteristics suggest that the capacity to administer self-governing organizations may be lower than the population numbers suggest. Given the diversity of urban Aboriginal populations, the development of self-government initiatives that target particular cultural and legal groups may contribute to the fragmentation of urban Aboriginal populations, to service duplication, and to conflict that is exacerbated by competition for limited resources and small populations. The challenge may be even greater for small urban areas in which Aboriginal population numbers are quite low.

The challenge of small numbers can be ameliorated by aggregation, for example, at the provincial level, so that urban First Nations and Métis people are governed as part of provincial First Nations and Métis organizations. A major challenge to this approach to governance has to do with a growing Aboriginal population that is not affiliated with either group. This population will increase substantially in the future, eventually becoming the majority of the urban Aboriginal population.

At the same time, an impressive number of urban Aboriginal service organizations have emerged. While some of these are linked to Métis and First Nations political organizations, most are not, and their mandate is to provide services to all members of the urban Aboriginal community. In some cities, conflicts have developed between service and political organizations. Key informants in Hanselmann’s interviews of representatives from governments and service-delivery groups emphasized the importance of separating political and service organizations. “As one Aboriginal interviewee stated, ‘Keep politics out of social service delivery.’ According to a federal government official, the Winnipeg Core Area Initiative ‘worked because it was community groups rather than political groups’ ... Political organizations play important roles in providing a voice for urban Aboriginal issues and as a point of contact with urban Aboriginal communities. Neither of these roles, however, involves nor necessitates service delivery” (Hanselmann 2002a, 7).

In summary, the relationship between existing service organizations and First Nations and Métis political organizations, and the issue of urban Aboriginal residents who are not affiliated with First Nations and Métis political organizations, represent important challenges in contemplating and implementing urban Aboriginal self-government.

MOBILITY PATTERNS

The Aboriginal population is generally more mobile than the non-Aboriginal population in Canada. Between 1991 and 1996, 55 percent of Canada's Aboriginal people moved, compared with 40 percent of the non-Aboriginal population (Norris 1990, 1996). The population of major metropolitan centres is particularly mobile. Between 1991 and 1996, 70 percent of Aboriginal residents in major metropolitan centres moved, compared with just under 50 percent of non-Aboriginal residents in those centres (Norris, Cooke, and Clatworthy 2002a, 231). Concerns about high rates of mobility in the Aboriginal population have a long history (Frideres 1974). Earlier work assumed that mobility would decrease as Aboriginal migrants adjusted to city life (Frideres 1988). In this context, continuing high mobility rates among Aboriginal people raise some questions of interpretation.

Residential mobility – movement within the same community¹⁶ – represented more than half of the moves Aboriginal people made between 1991 and 1996, and this mobility is strongly related to housing conditions. In major metropolitan centres 45 percent of the Aboriginal population changed residences within the same community between 1991 and 1996, compared with 20 percent of non-Aboriginal residents. Residential mobility rates were similar for all Aboriginal groups, suggesting that they experienced similar pressures in urban areas (Clatworthy 1996; Norris, Cooke, and Clatworthy 2002a).

Migration refers to movement between rather than within communities.¹⁷ Migration patterns show that movement from reserves and rural areas to urban areas is not a major contributor to urban Aboriginal population growth.¹⁸ Table 7 shows that while a significant proportion of Aboriginal migrants moved from reserves and rural areas to cities between 1986 and 1996, the proportion migrating from cities to reserves and rural areas was slightly higher. It appears that the pattern of migration for contemporary Aboriginal people is not one of the depletion of reserves and rural areas by movement to urban areas. Instead, there appears to be circulation between reserves/rural areas and urban areas.

Analyses of the reasons for migration often emphasize “push” and “pull” factors that draw Aboriginal people from one location to another. While cities have attracted Aboriginal migrants because they provide more services and greater educational and employment opportunities, they also represent environments in which Native people experience racism, problems finding

Table 7: Origin-Destination Flows, Aboriginal Migrants, Identity Population, 1986–1996

	<i>1986–1991</i>	<i>1991–1996</i>
Urban to urban	44.9%	43.5%
Reserve/rural to reserve/rural	11.5%	11.4%
Reserve/rural to urban	20.6%	18.6%
Urban to reserve/rural	23.1%	26.4%
Total migrants	112,765%	149,720%

Source: Author's calculations, from Clatworthy 1996; Norris, Cooke, and Clatworthy 2002b¹

¹Clatworthy and Norris et al. use slightly different definitions of "migrant," but these differences should not affect the basic dimensions of the general migration patterns shown here.

housing, and difficulty connecting with cultural communities. Reserves and rural areas may provide fewer services and economic opportunities, and they may represent difficult social and political situations for some people, but they provide contact with culture and community that cities may lack. Also, housing may be less difficult for some migrants to obtain on reserves (Atwell 1969; Ellis et al. 1978; Gerber 1984; Hawthorn 1966; Lithman 1984; Lurie 1967; Maidman 1981; McCaskill 1981; Canada, RCAP 1996; Stanbury 1975).

A push/pull type of analysis suggests that if the factors pushing migrants from a particular location can be addressed, mobility rates can be lowered. Clearly, it is desirable to provide better housing, reduce unemployment and decrease racism. However, these initiatives may not eliminate relatively high levels of movement between cities or between urban and rural areas. Studies on migration internationally suggest that migrants are increasingly maintaining connections with both their areas of origin and their destinations by means of political and economic ties and by movement back and forth (Portes 1999). These connections are an important part of cultural identity. Many Aboriginal people emphasize ties to the land as a continuing element of their cultural identity, and migration may be one reflection of these ties (Todd 2000/2001; Dirlik 1996). Moreover, migration to rural and reserve communities may represent not only an escape from a difficult urban situation but an attempt to maintain vital and purposeful community relationships. In this context, circulation between urban areas and reserves and rural communities may remain a significant component of migration patterns.

The numerically largest component of migration in the contemporary Aboriginal population is movement between urban areas. Because of changes in definition, it is not possible to explore patterns over time for Aboriginal peoples

as a whole. However, information for registered Indians suggests that movement between urban areas has increased at the expense of movement between rural and reserve areas. Interpreting this pattern is not straightforward. The 1991 and 1996 censuses collected information about reasons for moving. While family and housing issues were important reasons for moves (in both directions) between reserves and cities and between cities, employment was a major reason for moving only between cities (Clatworthy and Cooke 2001). It is not clear, though, whether this pattern represents upward economic mobility or whether it is a response to unemployment in the city of origin. Because we do not understand this pattern well, we cannot predict that better employment opportunities will result in less city-to-city mobility.

Variable migration patterns emerge when mobility patterns are disaggregated to the level of particular metropolitan areas. For example, between 1991 and 1996 Edmonton and Toronto experienced the highest rates of outmigration by Aboriginal people, and Saskatoon and Thunder Bay experienced the highest rates of immigration (Norris, Cooke, and Clatworthy 2002b). Migration patterns were different for Aboriginal and non-Aboriginal people. In Saskatoon in the 1991–96 period, there was a net outmigration by non-Aboriginal people and a net immigration by Aboriginal people. In Calgary the patterns were reversed. Variations between cities suggest that migration patterns may be affected in complex ways by the social and economic characteristics of different cities, by provincial policies concerning social welfare and housing, and by regional economies. Aboriginal people and non-Aboriginal people may be affected in different ways. At present there is no research available to help us understand these patterns in more depth.

These migration patterns have three main implications for urban Aboriginal self-government. First, the high levels of mobility in the urban Aboriginal population can affect institutional and community development. It is difficult to build networks of relationships, experiences, and a dependable clientele when there are extremely high rates of movement. High rates of mobility can work against community building and the emergence of strong community organizations representing urban Aboriginal people. Clearly, reducing mobility associated with negative social and political environments and poor housing must be a priority for any government policies.

Second, the continued importance of reserves and rural areas as destinations for Aboriginal migrants raises questions about appropriate scales of governance. Even strategies to counteract negative conditions that encourage Aboriginal people to move frequently may not guarantee a stable population. Native people may continue to migrate in search of economic opportunity or as a way of maintaining connections with communities and cultures of origin. The information available about long-term migration patterns among Aboriginal people, as well as contemporary research about non-Aboriginal migrants, suggests that circulation between cities and rural and reserve areas

will remain significant, both in numbers and in terms of cultural identity. With respect to governance issues, this suggests that initiatives focused only on urban areas will not address some of the significant factors at work in urban Aboriginal communities. There needs to be careful attention to the appropriate scale for different facets of governance, and there needs to be careful attention to the interface between structures and organizations in different locales. Institutions of urban self-government may need to be designed to accommodate Aboriginal mobility rates.

Finally, self-government initiatives may affect migration patterns. The fact that different cities have different migration patterns suggests that local social and economic environments can have an impact on these movements. Developments in self-government may themselves affect patterns of Aboriginal mobility, and decisions to move or stay, in ways that we do not at present understand.

URBAN SETTLEMENT PATTERNS AND SELF-GOVERNMENT

Settlement patterns of urban Aboriginal people have been of concern to governments, social agencies, and academic researchers since the number of Aboriginal people in cities began to increase in the 1950s. Nevertheless, these patterns' implications for urban self-government have not been explored, despite the fact that the location of institutions and spatial targeting of programs are important components of self-government arrangements. The following paragraphs summarize existing interpretations of urban Aboriginal locations, describe current settlement patterns, and suggest some implications for self-government.

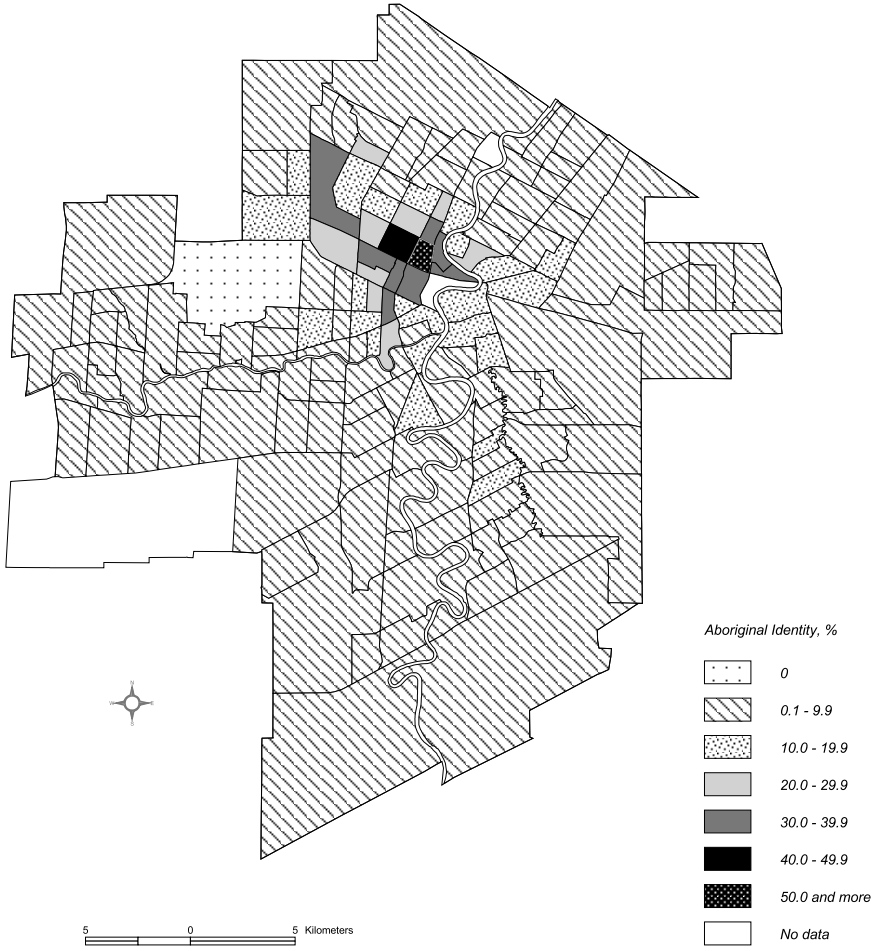
While material from the mid-twentieth century on demonstrates that migration to cities creates challenges for Aboriginal people, there has also been concern about the state of cities –how to maintain property values, keep down welfare rolls, and prevent inner-city decay (Peters 1996, 249–250). Similarly, the possibility of ghettoization has not evaporated: a number of writers have used the term “ghetto” to describe Aboriginal living conditions in Canadian cities (Kazempur and Halli 1999; Polèse 2002; Stackhouse 2001). Two recent pieces of Canadian research address the implications of Aboriginal segregation. Drost's (1995, 48) multivariate analysis of determinants of unemployment suggests that high Aboriginal unemployment rates may be related to residential segregation in poor inner-city neighbourhoods. Richards's (2001b) study of western cities, Toronto, and Montreal interprets lower rates of Aboriginal employment and education as evidence of the effects of poor neighbourhoods on life chances. Recent policy documents have also raised the issue of urban Aboriginal ghettos (Canada, PCO 2002, 8; Canada, Sgro, 2002, 21).

There has been very little work on urban Aboriginal settlement patterns, which is unfortunate, since studies of this nature could make an important contribution. However, it is also important to bear in mind that correlations do not necessarily entail causation, and with respect to Drost's and Richards's work it is important to ask whether residential patterns are results rather than causes of poverty.¹⁹ Moreover, references to ghettos usually employ the United States experience to draw policy implications for Canadian cities. In the United States, economies linked to welfare dependency and illicit activities emerge in areas that have extremely high levels of segregation, many contiguous census tracts of concentrated poverty, and a structure of urban taxation and service delivery that means that resources for inner-city education and community development are scarce. A situation similar to U.S. inner cities simply does not exist in Canada (Fong 1996; Ley and Smith 2000). "Neighbourhood effects" on people's life chances in the United States are quite different from those in Canada.

In addition, the assumption that most urban Aboriginal people are segregated in inner-city areas is not supported by existing studies. Clatworthy's (1996) analysis of data from the 1991 Aboriginal Peoples Survey showed that although the locational patterns of Aboriginal and non-Aboriginal populations differed, the levels of segregation were low to moderate. Sizable concentrations appeared to be typical of only three centres: Winnipeg, Regina, and Saskatoon. Census data for 2001 show that Winnipeg had one census tract where people claiming Aboriginal identity made up slightly more than half the population; one census tract where they comprised between 40 and 49 percent of the population; and eight additional tracts where they comprised about one-third of the population (figure 1²⁰). Edmonton, with the second-largest urban Aboriginal-identity population, had one census tract where Aboriginal people made up between 40 and 49 percent of the population, and one where they made up slightly over one-third of the population (figure 2). Regina had two census tracts and Saskatoon had four census tracts where Aboriginal people represented between 30 and 39 percent of the population, Calgary had one census tract where they comprised between 40 and 49 percent of the population, and in other large cities, the proportions were even lower (Peters 2003). Maxim et al.'s (2000) analysis of 1996 data for status Indians²¹ for fourteen census metropolitan areas (CMAs) showed that while status Indians were more likely to be located in central areas in some cities, this was not the only or even the main settlement pattern.

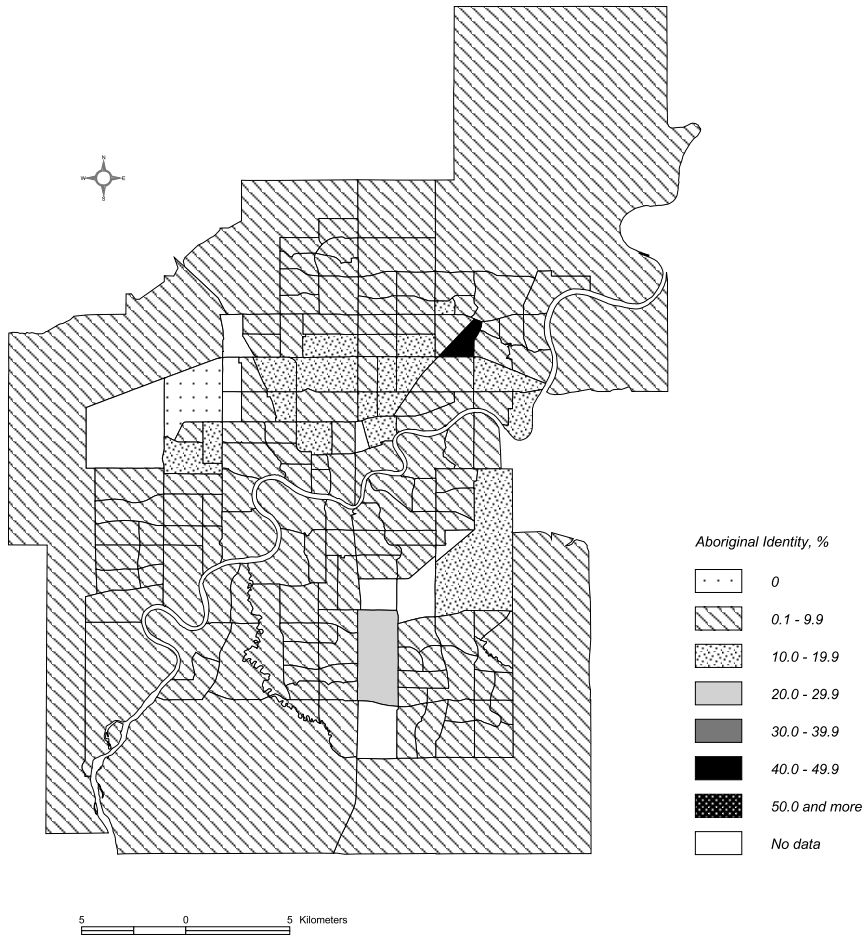
Change in the location of urban Aboriginal populations also raises questions about the ghettoization model. It is difficult to obtain comparable data over an extended period, but using an intercensal cohort survival method, Kerr, Signer, and Bourdeay (1996) found that, with the exception of the non-status Indian population, the Aboriginal populations identified by the 1981 ancestry question and by the 1991 Aboriginal Peoples Survey appeared to be sufficiently

Figure 1: Proportion of the Population in Each Census Tract That Is Aboriginal, City of Winnipeg, 2001



Sources: Statistics Canada 2001; Statistics Canada digital cartographic files

Figure 2: Proportion of the Population in Each Census Tract That Is Aboriginal, City of Edmonton, 2001



Sources: Statistics Canada 2001; Statistics Canada digital cartographic files

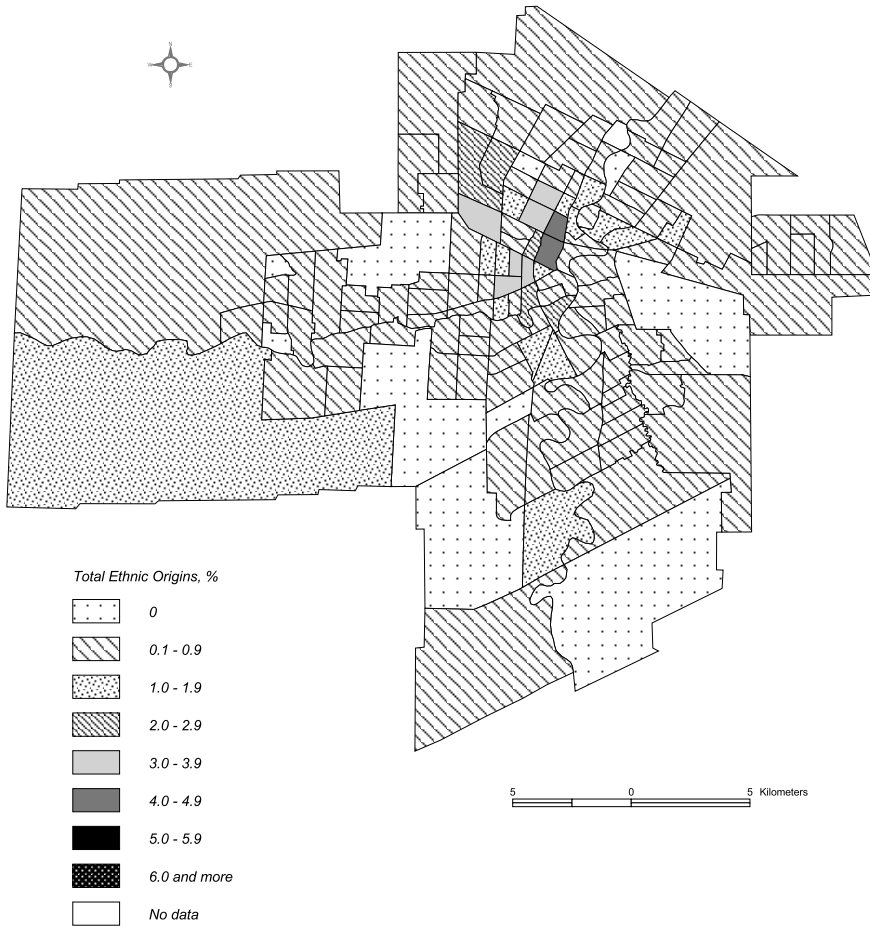
similar to support a comparison of some characteristics. Recognizing the problem of comparability with non-status Indians, we nevertheless suggest that the 1981 Aboriginal-ancestry question and the 2001 Aboriginal-identity question give a rough approximation of people who identify as Aboriginal. Using these measures, figures 3–6 show the proportion of the Aboriginal population of Winnipeg and Edmonton that lived in each census tract in 1981 and 2001. These maps attempt to assess the degree to which the growing Aboriginal population of these cities is restricted to a few census tracts or spreads over a large number of census tracts. The maps indicate that, over time, Aboriginal people are found in new areas – the Aboriginal population is spreading out. For example, in Winnipeg in 1981, two central census tracts contained between 4.0 and 4.9 percent of the total Aboriginal population. In 2001 no census tracts contained that high a proportion of the Aboriginal population. In Edmonton, between 1981 and 2001, some of their urban fringe areas had an increase in the proportion of the Aboriginal population, but this appears to be due mainly to changes in census tract boundaries in relation to reserves. No census tracts in the city of Edmonton itself increased in terms of the proportion of the Aboriginal population they contained.

The dynamics of these patterns are not clear. So far, no research has attempted to explore whether these patterns are a result of socio-economic mobility (either of people within the same city or of people moving into the city from other locations), of ethnic mobility, of gentrification or of neighbourhood decline. However, it is clear from these figures that Aboriginal people are increasingly found in a wide variety of locations in the city, rather than residing only in inner-city neighbourhoods.

With respect to urban self-government initiatives, the questions that emerge from settlement patterns are connected with choices between programs and institutions that are concentrated in or spatially targeted towards particular neighbourhoods, and initiatives that have a wider urban focus. Key informants in Hanselmann's research (2002a, 5) identified several principles with respect to service locations. On the one hand, the interviews emphasized that because of the poverty of many Aboriginal people, services should be located close to where they lived. "One-stop shopping" was a closely related theme, calling for the co-location of services and government departments in order to meet multiple client needs. On the other hand, some interviewees held that multiple-service locations were needed because of the dispersion of urban Aboriginal populations. While these interviews concentrated on service provision, similar considerations are relevant for the establishment of institutions of self-government.

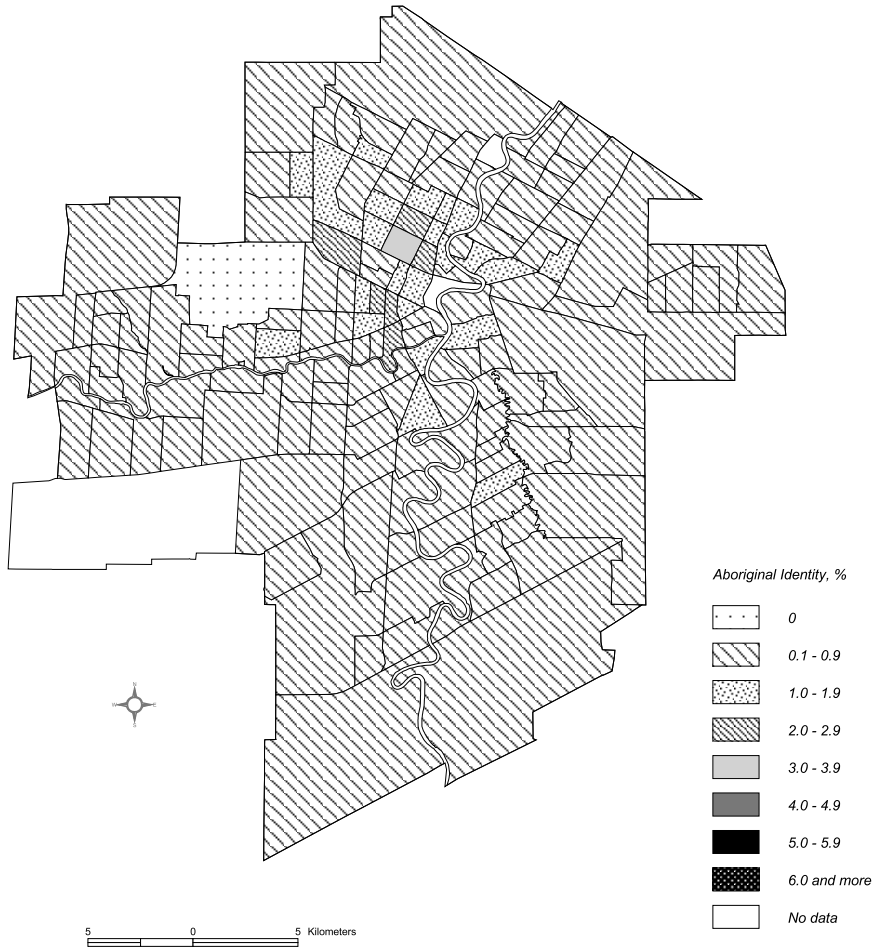
There are several advantages associated with spatially targeted initiatives of urban self-government. Neighbourhood institutions may be more responsive to local needs. They can serve to anchor an identity for a particular community, contribute to the empowerment of local residents who participate

Figure 3: Proportion of the Total Aboriginal Population of the CMA in Each Census Tract, City of Winnipeg, 1981



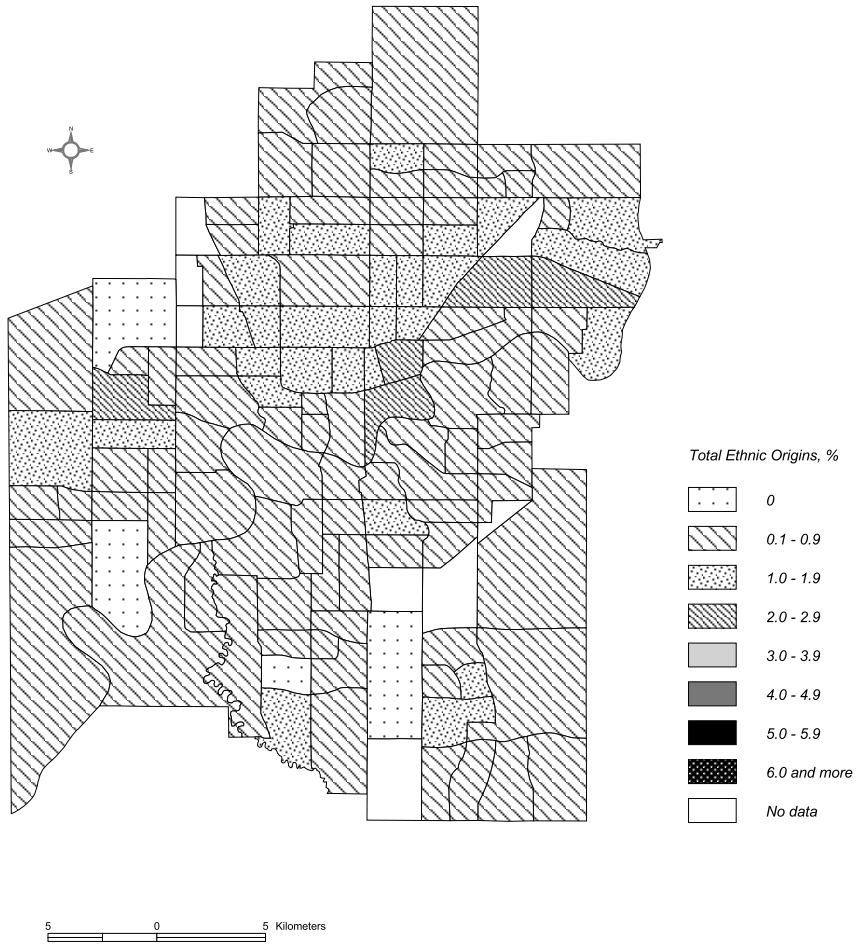
Sources: Statistics Canada 1981; Statistics Canada digital cartographic files

Figure 4: Proportion of the Total Aboriginal Population of the CMA in Each Census Tract, City of Winnipeg, 2001



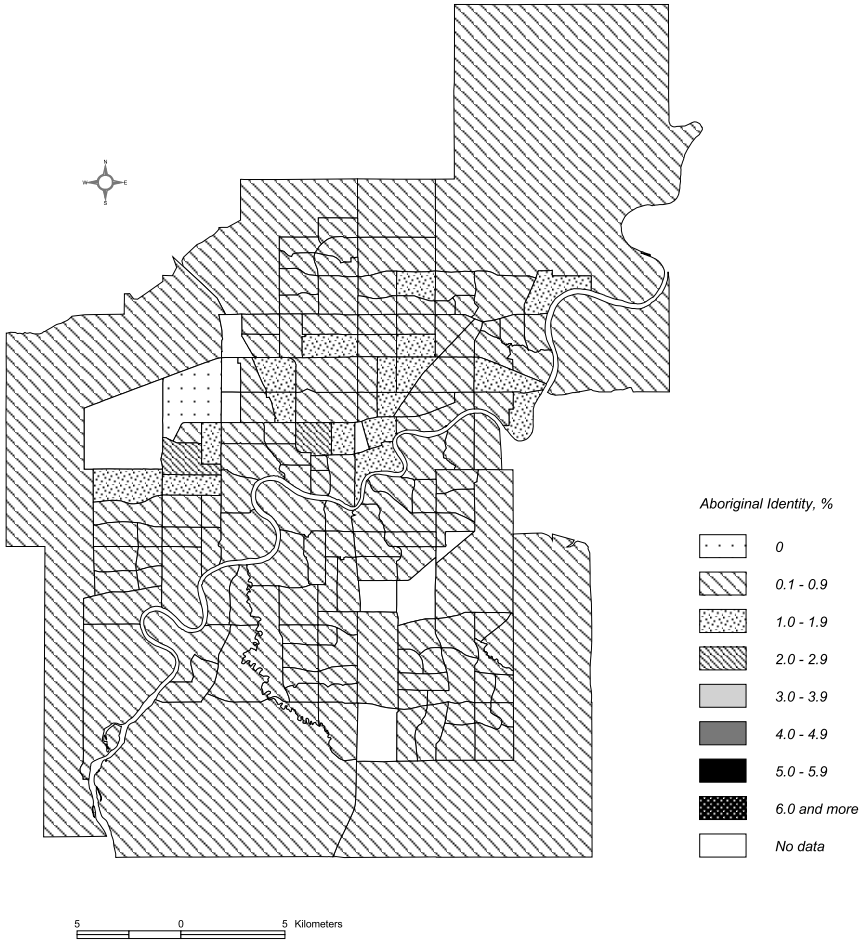
Sources: Statistics Canada 2001; Statistics Canada digital cartographic files

Figure 5: Proportion of the Total Aboriginal Population of the CMA in Each Census Tract, City of Edmonton, 1981



Sources: Statistics Canada 2001; Statistics Canada digital cartographic files

Figure 6: Proportion of the Total Aboriginal Population of the CMA in Each Census Tract, City of Edmonton, 2001



Sources: Statistics Canada 2001; Statistics Canada digital cartographic files

in these institutions, and help create a feeling of collective belonging. These are important elements in the context of the need for community building in urban areas that was identified by RCAP (Canada, RCAP 1996, 531–7). Urban Aboriginal people are overrepresented in poor neighbourhoods (Kazemipur and Halli 1999), and neighbourhood Aboriginal economic development initiatives may provide opportunities for building social capital and increasing economic integration and community development.

Information about settlement patterns suggests that in most cities Aboriginal people are not all clustered in one or two neighbourhoods. While it is not easy to interpret these settlement patterns, they may represent choices by some Aboriginal people not to cluster in distinct neighbourhoods. In this context, it is important to consider some of the ways that spatially targeted initiatives can have unintended negative consequences. They can sharpen the stigmatization of an area and increase the concentration of a marginalized group. Moreover, if initiatives are directed to a few neighbourhoods, they can create inequities because they do not reach the population outside these areas.

Maybe the implication for the spatial configuration of the institutions and programs is that some combination of spatial and aspatial would be the most appropriate approach. One option is to cluster service organizations and community development initiatives in the poorer neighbourhoods where there is a higher proportion of Aboriginal people, while developing Aboriginal-focused programs in education, culture, language, and so on, and making them available across urban areas.

CONCLUSION

The growing size of the urban Aboriginal population in Canada and the significant role that Aboriginal people will play in the future of many Canadian cities suggest that it is time that urban self-government return to the policy agenda. Approaches to designing self-government initiatives must take account of the realities of Aboriginal population numbers and characteristics. The intent of this essay is not to recommend a particular approach. Population characteristics are not the only consideration, and appropriate strategies may vary according to place. By way of conclusion, though, this section considers some of the implications of urban Aboriginal population size, mobility, and urban settlement patterns.

The urban Aboriginal population is growing. In some large cities it is big enough to be able to support considerable institutional development, while in other urban areas, the Aboriginal population is much smaller. Approaches that aggregate urban Aboriginal peoples into larger First Nations or Métis arrangements, most likely through provincial political representative organizations, overcome some of the problems of small size. However, this approach creates

duplication, and it leaves out a significant and growing urban Aboriginal population that is not affiliated with existing First Nations or Métis political organizations. At the same time, some cities have a long history of urban Aboriginal institutions that serve all urban Aboriginal people without reference to their legal status or political affiliation. These factors suggest that governments need to be aware of the population implications of different approaches to self-government, and they should take seriously the history of self-governing organizations in particular urban centres.

Information about mobility patterns shows that over 40 percent of the Aboriginal-identity population that migrated (moved to another community) either moved from an urban area to a reserve or rural community, or from a rural or reserve area to the city. This movement, or “churn,” suggests that there is a significant proportion of the urban Aboriginal population that maintains meaningful ties to its original rural community. This characteristic suggests that interface mechanisms between self-government arrangements in different places will be important. Finally, urban settlement patterns show that while a few census tracts in a few cities have one-third or more of their population that is Aboriginal, overall the urban Aboriginal population is not highly segregated. Moreover, Aboriginal people are found in all parts of urban areas. These settlement patterns suggest that while it might be useful for some urban Aboriginal organizations to focus on particular, especially marginalized neighbourhoods for the purpose of community development, many programs (especially those focusing on culture and language) should be targeted toward all areas of the city.

Discussions about self-government have often focussed disproportionately on structures and legal rights. Research on urban Aboriginal self-government is no exception. However, to be effective, arrangements need to be applied in real places, with real people.

NOTES

- 1 The Nisga’a Final Agreement called for the creation of an “urban local” to serve as a political link between the Nisga’a territorial government and citizens residing in urban areas. Citizens of each urban local are entitled to elect an individual to serve as their representative to the Nisga’a territorial government (Canada 1998, 162).
- 2 <http://www12.statcan.ca/english/census01/products/analytic/companion/abor/canada.cfm> (accessed May 2003).
- 3 www.fng-gpn.gc.ca/FNGA, Leadership Selection Code (accessed 1 October 2002). The FNGA was subsequently scrapped by the new Prime Minister, Paul Martin.
- 4 The Native Council of Canada is now the Congress of Aboriginal Peoples. It has historically defined its constituency as off-reserve Indians and Métis people living in urban, rural, and remote areas in Canada.

- 5 Weinstein defines this as self-administration rather than self-government (Weinstein 1986).
- 6 Interview with G. Munroe, vice-president of the Aboriginal Council of Winnipeg, 23 July 2002.
- 7 The Aboriginal Council of Winnipeg is unique in its longevity, its independence from provincial political organizations, and its trilevel agreement with governments. According to an anonymous reviewer, a similar organization is being established in Toronto – the Aboriginal Peoples Council of Toronto. In Vancouver, the Urban Representative Body of Aboriginal Nations (URBAN) was formed in 1990 as an urban-based umbrella organization representing more than sixty mostly Aboriginal societies and organizations (URBAN. n/d). It has since dissolved. Negotiations are currently underway to create an urban Aboriginal Peoples Council (Todd 2000). The Vancouver Aboriginal Peoples Council has the support of First Nations and Métis groups in the province.
- 8 A census metropolitan area is a very large urban area, including urban and rural fringes, with an urban core population of at least 1 million.
- 9 <http://estat.statcan.ca/cgi-win/CNSMCGI.EXE>, Statistics Canada, 1996 Census of Population (43 Large Urban Centres, Aboriginal Population) (accessed July 2002).
- 10 In June 1985 Parliament enacted a series of amendments to the *Indian Act*, known as Bill C-31. A Department of Indian Affairs publication indicates that the main objectives of this bill were to remove discrimination on the basis of gender from the Act, to restore Indian status and band membership rights to eligible persons, and to enable bands to assume control over their members.
- 11 <http://education.yahoo.com/reference/factbook/vt/popula.html> (accessed September 2002).
- 12 See note 10, above.
- 13 The main types of membership rules identified by Clatworthy and Smith were those under the *Indian Act*'s, one-parent rule, 50 percent blood-quantum rule, and two-parent rule.
- 14 *R. v. Powley*, 2003 SCC 43, 19 Sept.
- 15 <http://metisnation.ca/DEFINITION/home.html> (accessed June 2003).
- 16 Residential mobility refers to moves within the same census subdivision.
- 17 Migration refers to moves from one census subdivision to another.
- 18 Growth in urban Aboriginal populations has a number of sources other than migration. Some of these include ethnic mobility, differences between fertility and mortality rates, and patterns of intermarriage.
- 19 Ellen and Turner (1997) found, in the United States context, that while neighbourhoods had some effect on life chances, individual and family characteristics were much more important.
- 20 Due to space restrictions, figures 1 through 6 show only the city portions of the census metropolitan areas (CMAs).
- 21 There were some changes in the way the question was administered; for example, in 1996 respondents were encouraged to write multiple responses. The wording

for different Aboriginal groups that respondents could check also changed slightly. Maxim et al. (2000, 6) used single-origin responses for the census question about North American Indian origins as a proxy for First Nations status. They note that while the two categories are not identical, “analysis of the individual public use sample file suggest that most people who say they are single-origin North American Indians are also Status Indians.”

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Another Voice Is Needed: Intergovernmentalism in the Urban Aboriginal Context

Calvin Hanselmann and Roger Gibbins

L'intergouvernementalisme est un fait de vie inévitable en ce qui a trait à la politique sur les autochtones en milieu urbain. Ce qui manque dans tout cela, ce sont des voix autochtones qui font autorité et qui sont convaincantes. Les auteurs supposent que les solutions intergouvernementales n'auront qu'un succès mitigé tant et aussi longtemps que le peuple autochtone ne sera pas inclus dans le processus intergouvernemental. Par conséquent, on a besoin d'une voix autochtone en milieu urbain – une voix aussi englobante que possible – qui pourra amener les gouvernements fédéral, municipaux et provinciaux à s'engager par rapport aux sites urbains et à travers un large front politique. Les auteurs concluent leur travail en proposant des mécanismes grâce auxquels cette voix pourrait être entendue.

INTRODUCTION

The Aboriginal population of Canada is increasingly urban. Whereas in 1951 only 7 percent of Aboriginal people lived in cities (Drost 1995), by 2001 over one-half (50.6 percent) of the enumerated Aboriginal-identity population resided in urban areas. In just fifty years, Aboriginal people have become a visible presence in every city in Canada, the urban Aboriginal reality being particularly striking in western Canada. At the time of the 2001 census, for example, 9.1 percent of Saskatoon residents reported an Aboriginal identity, as did 8.4 percent of Winnipeg residents, 8.3 percent of Regina residents, 4.4 percent of Edmonton residents, and 2.3 percent of Calgary residents. Projections suggest, moreover, that by 2016, one-sixth of the labour force in

Winnipeg, Saskatoon, and Regina will be Aboriginal (Mendelson and Battle 1999, 22).

Unfortunately, this pattern of urbanization has not been matched by successful public policy. Aboriginal people in major Canadian cities tend to have lower educational levels, lower labour force participation rates, higher unemployment rates, and lower income levels than other urban dwellers (Hanselmann 2001). They are more likely to live in lone-parent families, have poorer health, higher rates of homelessness, and greater housing needs. Aboriginal people are also overrepresented in the criminal justice system – as both victims and offenders – and are more likely to experience domestic violence. Simply put, many Aboriginal people are not living the urban dream, and they experience much more difficult realities than non-Aboriginals. These realities, by no means news to Canadians who pay attention to policy issues, pose serious challenges to cities that have significant urban Aboriginal populations.

The urban Aboriginal policy arena is one in which successful outcomes have been far too rare, and reasons for this poor track record are not difficult to find. The policy environment has been characterized by a lack of jurisdictional clarity and, at least until recently, as much by policy avoidance as by intergovernmental collaboration. There is, moreover, a legitimate debate over the extent to which urban policy should explicitly recognize Aboriginality; whether there should be programming, for example, for the Aboriginal homeless as opposed to the homeless in general.¹ Nonetheless, one thing is emphatically clear: this is a policy environment in which intergovernmentalism must be part of the solution, for the federal, provincial, and municipal governments are unavoidably engaged and entangled. The federal government cannot escape at least residual responsibility for the off-reserve Aboriginal population; provincial governments have social service obligations covering all provincial residents living off-reserve; and municipal governments confront social problems and inner-city decay that challenge both quality of life and international competitiveness. No one can afford to withdraw from the policy arena. Therefore, urban Aboriginal policy inevitably must engage the federal, provincial, and municipal governments. Intergovernmentalism is an unavoidable fact of life in urban Aboriginal policy. Yet as we shall conclude, intergovernmentalism will not ultimately be successful *unless urban Aboriginal people are brought to the intergovernmental table*. Another voice is needed.

Fortunately, the often bleak situation for urban Aboriginal people is not entirely barren of opportunities. Like the on-reserve population, urban Aboriginal people have a younger age structure than the general urban population. The main differences in age structure fall at the beginning and end of the life cycle. To illustrate, in some western Canadian cities, such as Regina and Saskatoon, the proportion of the Aboriginal population under fifteen years of age is twice that of the non-Aboriginal population. At the other end of the cycle, non-Aboriginal people are up to nine times more likely than Aboriginal

people to be over sixty-five years of age. This younger Aboriginal age structure represents a future opportunity for cities, especially in western Canada. As the non-Aboriginal population ages and enters retirement, forecasts suggest that there will be shortages of skilled labour (AHRDCC 2002) which could be alleviated by the younger urban Aboriginal population as it comes of labour force age. Such an opportunity, however, will be lost if young Aboriginal people in Canada's cities are unable to compete successfully in the labour market. A significant portion may leave the city in search of more amenable environs, while others will live on the margins of urban society.

This unappealing choice, which has been foisted on urban Aboriginal people for decades, is historically related to intergovernmental squabbles over responsibility for Aboriginal policy. If we cannot address the intergovernmental aspects of urban policy, the policy's success will remain elusive, at the expense of both Aboriginal people and urban communities.

INTERGOVERNMENTALISM GONE WRONG

The question of responsibility for urban Aboriginal policy is surrounded by confusion, and the roots of the confusion lie in the Canadian constitution. Whereas the constitution clearly gives the federal parliament exclusive legislative authority for "Indians, and Lands reserved for Indians" (*Constitution Act, 1867*, s. 91(24)), authority and responsibility for other Aboriginal people is not so clearly delineated. The confusion is amplified in the case of Aboriginal residents of the cities, since they are at the same time urban and Aboriginal, and the division of powers in the constitution does not assign responsibility for urban residents to either the federal or the provincial governments; indeed, we could not have a federal state if legislative authority for 80 percent of the population was assigned exclusively to either order of government.² The federal government's traditional position has been that, flowing from the constitution, it has primary but not exclusive responsibility for registered or status Indians living on reserves, while the provinces bear primary but not exclusive responsibility for all other Aboriginal people. The provinces, however, historically have responded that all Aboriginal people are the primary responsibility of the federal government and that provincial responsibilities are limited to serving Aboriginal people as part of the larger provincial population (Canada, RCAP 1996). This debate is further compounded by the mobility of the Aboriginal population, which in effect means that there is no fixed reserve or off-reserve population.

As a result of these ambiguities and disagreements, both the federal and provincial governments have traditionally avoided launching concrete initiatives with respect to urban Aboriginal people. In this regard, Canadian federal-provincial relations are somewhat unusual. Unlike most areas, where

the federal and provincial governments jealously guard their policy domains, in this case both orders of government avoid taking responsibility for urban Aboriginal policy and are reluctant to create new policy initiatives. Thus, the ongoing disagreement can become an excuse to do nothing; the lack of agreement over responsibility has in the past led to “inconclusive activity” (Breton and Grant 1984, xxx) and a “policy vacuum” (Canada, RCAP 1996, 542). Where policies have existed, they “have evolved ad hoc” and are often seen as inadequate (*ibid.*, 544). Indecision and uncooperative behaviour become a substitute for action, and in the absence of federal or provincial action, it is the municipalities that are faced with the need to create policies to provide for urban Aboriginal people, but they generally lack the financial capacity to do so adequately (Vander Ploeg 2002).

The outcome of this policy confusion – what some might even call a policy void – has been that many urban Aboriginal people have fallen through the cracks. The Royal Commission on Aboriginal Peoples linked this outcome to three causal factors: “First, urban Aboriginal people do not receive the same level of services and benefits that First Nations people living on-reserve or Inuit living in their communities obtain from the federal government ... Second, urban Aboriginal people often have difficulty gaining access to provincial programs available to other residents ... Third ... they would like access to culturally appropriate programs that would meet their needs more effectively” (Canada, RCAP 1996, 538). While the royal commission put forth recommendations intended to close the policy gaps with respect to urban Aboriginal people, little concrete government action immediately resulted. With neither federal nor provincial governments willing to exercise primary responsibility for urban Aboriginal policy, intergovernmentalism would appear to be the answer, yet intergovernmentalism has been pursued with only limited success.

CONTEMPORARY POLICY AND PROGRAM RESPONSES

The extent to which federal and provincial governments have recently crafted urban Aboriginal-specific policies, and are implementing them with urban Aboriginal programming, can be instructive in discerning the degree to which governments remain hamstrung by their historical disagreements over primary responsibility for urban Aboriginal people. Recent research shows that despite continuing disagreement, both federal and provincial governments have implemented policies and programs specifically relevant to urban Aboriginal people. As of mid-2001, urban Aboriginal-specific policies existed in several policy fields in the western provinces (Hanselmann 2001). These findings, although based on research in selected western Canadian cities, point to several general conclusions about the urban Aboriginal policy landscape.

First, at the time of the research, some – but not all – of the federal, provincial, and large urban governments in western Canada had urban Aboriginal-specific policies in some (though not all), important policy fields. While urban Aboriginal-specific policies existed across governments in some fields, large gaps appeared in others. A particularly poignant finding is that the challenges confronting many urban Aboriginal people in fields such as income support, family violence, child care, addictions, suicide, and human rights appeared to be ignored *in terms of explicit policies*. Second, the policy landscape was inconsistent from province to province. Whereas, for example, the Alberta and Saskatchewan governments had (and continue to have) quite comprehensive policy frameworks that include urban Aboriginal people, the Manitoba government had no urban Aboriginal-specific policy – although recent initiatives in child and family services indicate that the province is actively working on urban Aboriginal policy. In short, the urban Aboriginal-specific policy landscape in western Canada shows inconsistencies: policies in some fields but not others, and in some provinces but not in all.

The situation, however, is not without its positive side. One concrete indication of government willingness to act on urban Aboriginal issues is the programs that have been put in place. Programming, after all, is the “meat” that governments place on policy “bones,” the critical implementation stage. In the western provinces, federal and provincial governments are noteworthy for their urban Aboriginal programming activities. Research conducted late in 2001 showed that federal and provincial governments had implemented “enhanced” urban Aboriginal programming in several, though not all, of the policy fields in which urban Aboriginal-specific policies had earlier been identified (Hanselmann 2002a). The research also showed that governments frequently implement enhanced urban Aboriginal *programming* in the absence of urban Aboriginal-specific *policy* (figure 1). While policy frameworks are all to the good, their absence is not an insurmountable barrier to program activity.

The research on urban Aboriginal programming suggests similar lessons to those gleaned from urban Aboriginal policies:

- First, like the policy landscape, programming was inconsistent. At the time of the research, programs existed in most, but not all, of the fields reviewed for urban Aboriginal-specific policies. As with policies, no enhanced urban Aboriginal programming existed in the fields of income support and suicide, and there was almost no programming in the field of human rights.
- Second, and again in a manner similar to the policy landscape, the provincial programming landscape is not consistent across the four western provinces. By contrast, and with a few notable exceptions – usually involving implementing individual urban development agreements (Gibbins 2001) – the federal government’s enhanced urban Aboriginal programming is similar from city to city.

Figure 1: Public Sector Urban Aboriginal Policy and Enhanced Program Landscapes

Urban Aboriginal-specific policy **E** Enhanced programming for urban Aboriginal people **S** Urban Aboriginal-specific program **X** Outside of jurisdiction

	PROVINCIAL					MUNICIPAL					
	FEDERAL	BC	AB	SK	MB	VANCOUVER	CALGARY	EDMONTON	SASKATOON	REGINA	WINNIPEG
EDUCATION	E	E	E S	E S	E S	E S X	X	X	X	E S X	X
TRAINING	E S		E S	E S	E S					E S	E S
EMPLOYMENT	E S		E	E S	E S		E S		E		E S
INCOME SUPPORT											
ECONOMIC DEVELOPMENT	E	E			E S				E		
FAMILY VIOLENCE	E	E S		E S	E S						
CHILDCARE	E S				E S				E S	E S	
HEALTH	E S	E S	E S		E S	X	X	E S X	X	X	X
ADDICTIONS	E		E S	E S						E S	
SUICIDE											
HOMELESSNESS	E S		E S	E S	E			E S			
HOUSING	E S *	E S			E S						
JUSTICE	E S	E S	E S	E S	E S	E S	E S	E S	E S		
HUMAN RIGHTS			E S								
URBAN TRANSITION	E S	E S		E S	E S	E S		E S	E S		
CULTURAL SUPPORT	E S	E S	E S	E S				E S	E S		
OTHER	E S		E S	E S	E S	E S	E S	E S	E S	E S	E S
FAMILY		E S	E S		E S			E S	E S	E S	
YOUTH	E S	E S	E S	E S	E S	E S		E S	E S	E S	E S
CORRECTIONS	E S		E S	E S	E S	X	X	X	X	X	X

* HOUSING: No new funding or projects since 1996; honouring outstanding commitments only.

Source: Hanselmann 2002a

- Third, the programming environment was not well understood by the actors involved, and most government sources did not have comprehensive information about the enhanced urban Aboriginal programming that they funded or delivered. The potential for inconsistencies in programming was therefore huge, because – with few exceptions – public servants were unaware of the extent of programming offered, the effectiveness, efficiency, or efficaciousness of that programming, and whether or not the programming efforts of other governments or other sectors of society were being complemented or duplicated.
- Fourth, and perhaps most important, the research paints a programming environment that is difficult for Aboriginal clients, and indeed potential clients, to navigate.³ The problem is not the lack of government activity, for governments are active across a reasonably broad front. Rather, the problem is more the lack of program and policy frameworks that can be readily accessed by those in need.

These findings show that federal and provincial governments are indeed engaged in both policy making and programming specifically for urban Aboriginal people. However, urban Aboriginal issues are not addressed systematically. No doubt part of the reason for the rather haphazard approaches being taken – and hence a contributor to the inconsistencies that were observed – is continuing disagreement over primary responsibility for urban Aboriginal policy.

INFORMAL INTERGOVERNMENTALISM AT WORK⁴

Perhaps surprisingly, although there is no formal agreement over primary responsibility for urban Aboriginal policy and no regularized intergovernmental mechanisms for the exercise of shared responsibility, this has not prevented federal and provincial governments from taking the initiative on this policy file. In short, governments have been able to move without a macro policy framework and without significant institutional change. Although illustrations of successful initiatives could no doubt be drawn from across Canada, we will draw from a handful of western Canadian examples that have often been the result of ad hoc initiatives – on-the-ground operational steps taken to address urban Aboriginal issues.

MULTILATERAL AGREEMENTS

Multilateral agreements, particularly memoranda of understanding (MOU), are becoming more frequent instruments through which federal and provincial governments work together and with third parties (Wong 2002). Often, the

third partner is a municipality, and frequently the agreement takes the form of an urban development agreement – such as has been seen in Winnipeg and Vancouver (Gibbins 2001). By their very nature, multilateral agreements facilitate urban Aboriginal policy and programming action by governments. Because at least two parties enter into the agreement as partners (though rarely as equals), no one government risks being seen as accepting primary responsibility for urban Aboriginal issues.

Winnipeg has been the site of several multilateral agreements in the last decade, including the Core Area Initiative, Core Area Initiative II, Winnipeg Urban Aboriginal Strategy, the Winnipeg Housing and Homelessness Initiative, and the Winnipeg Development Agreement. The capacity of multilateral agreements to address the urban Aboriginal policy file is clearly demonstrated by the Winnipeg Core Area Initiative, an agreement that resulted in significant investments by the municipal, provincial, and federal governments in targeted neighbourhoods throughout Winnipeg's inner city. The three governments have worked in partnership with the community – including a meaningful urban Aboriginal voice – on implementing programs that matched local priorities. As at-risk and in-need Aboriginal people constitute a significant portion – sometimes a majority – of the population of these neighbourhoods, the programming impact has been substantial.

Interestingly, Winnipeg is also the site of two formal agreements between Aboriginal organizations and governments. In the first instance, the Aboriginal Council of Winnipeg (ACW) signed an MOU with the Province of Manitoba and the Government of Canada. The second Aboriginal MOU involved the Manitoba Métis Federation and the two governments. The ACW agreement is designed to address priority issues identified by the Aboriginal community in Winnipeg, including employment, training, and economic development; children and youth; justice; and health and wellness. The MOU is cost-shared between the Province of Manitoba and the Government of Canada.

SASKATOON COMMUNITY PARTNERSHIP TABLE

As a way of implementing the federal government's Urban Aboriginal Strategy in Saskatchewan's three largest cities – Saskatoon, Regina, and Prince Albert – leading federal officials in each city invited the municipal, provincial, First Nations, and Métis governments to join them in working partnerships. The original intent was to seek formal multipartite agreements. However, in Saskatoon, each time the administrative staff believed they had negotiated an acceptable agreement, political interests prevented execution of the document.⁵ Therefore, building on an earlier project success where the working relationship had been strong and amicable (White Buffalo Youth Lodge), the Saskatoon participants chose to forgo a formal agreement and concentrate on a policy and programming field which the urban Aboriginal community identified as a priority.

The community identified the related issues of housing and homelessness, and these were the focus of the Saskatoon Community Partnership Table. Aboriginal involvement in the process was ensured in part because First Nations and Métis were recognized as orders of government, and all five governments had an equal voice regardless of the resources each brought to the table. All five governments had interests in housing, homelessness, or both and thus were able to apply existing programming. A strong Saskatoon Tribal Council, combined with the local presence of the provincial offices of the Métis Nation of Saskatchewan, contributed capacity to the urban Aboriginal community, and this helped facilitate their active involvement in the process. At the same time, the traditional partners in intergovernmentalism – the federal and provincial governments – modified their practices. The provincial government, and especially the federal government, approached the table as horizontal organizations rather than as several line departments, demonstrating early on a commitment to partnering – both within government and with outside organizations. Thus, despite the absence of either formal recognition of primary responsibility or a formal agreement setting out terms, the federal, provincial, municipal, First Nations, and Métis governments established an effective working relationship to address housing and homelessness in Saskatoon – areas in which urban Aboriginal people are disproportionately affected. Good will and the need for programming overcame jurisdictional ambiguity.

The Community Partnership Table experienced significant initial success. Table participants, building on the success of the Saskatoon Community Plan for Homelessness and Housing, worked together on other urban Aboriginal priorities. Following this period of productivity, however, the table suffered a series of setbacks. As some of its participants withdrew for health and other reasons, the table lost much of its earlier momentum and effectively dissolved.⁶

REGINA REGIONAL INTERSECTORAL COMMITTEE

Growing out of interdepartmental committees that had been in place since the mid-1990s, the regional intersectoral committees (RICs) are the vehicles by which the Government of Saskatchewan approaches human services through an integrated, collaborative, multi-stakeholder process. The province has been divided into nine regions, each of which has an RIC so that provincial policy directives can be brought to fruition through local implementation. Like the other eight committees, the Regina RIC is mandated to develop and deliver human services in a coordinated manner. The members of this committee are senior officials (senior enough to make funding allocation decisions) from provincial, municipal, and federal governments and from school boards, police services, the health district, the academic community, service providers, and Aboriginal organizations. The Regina RIC meets on a quarterly basis,

often to discuss issues of common concern; the meetings also provide an opportunity for members to interact with senior staff from other agencies.

Organizations involved in the Regina RIC also appoint representatives to round tables that address specific issues, such as food security, early childhood, children at risk, and youth justice. Other stakeholders, including members of the Regina Aboriginal community, take part in these meetings, which vet requests for program funding and human services project proposals. The decisions of these round tables are then approved by the RIC and are funded using resources from a common pot provided by the member agencies. One of the guiding principles of the Regina RIC is that multifaceted client needs are approached holistically. Effective intergovernmentalism is thus accomplished through an institutionalized structure and process – the Regina RIC – but without formalized agreement on the question of primary responsibility for urban Aboriginal programming. Rather, by working cooperatively and through collaboration, the organizations present at the Regina RIC – including, notably, urban Aboriginal people – are able to design and deliver services in a responsive, effective manner.

CALGARY URBAN ABORIGINAL INITIATIVE

The City of Calgary, in partnership with the federal and Alberta governments, charitable foundations, and Aboriginal organizations, organized a 1999–2000 consultation process and conference entitled *Removing Barriers: A Listening Circle*. The Listening Circle married traditional Aboriginal methodologies with participatory action research in an attempt to determine needs, challenges, and potential solutions to issues confronting Aboriginal people in Calgary. Urban Aboriginal issues were allocated among several “domains,” which included justice, education, health, services, funding, human rights, housing, and employment. One of the four most common concerns expressed across domains during the Listening Circle was “lack of involvement by the Aboriginal community in policy, program planning and institutional change” (Calgary 2000, 8). The final recommendation of the Listening Circle was that the process “be used to provide a foundation for coordinated action among community members, service leaders, and service providers” (*ibid.*, 43).

Out of the Listening Circle experience came the Calgary Urban Aboriginal Initiative (CUAI), a partnership involving municipal, federal, and provincial governments, service providers, and Aboriginal organizations. The CUAI was established to implement the lessons learned from the Listening Circle. Approximately thirty-five organizations from the Aboriginal, corporate, non-profit, and public sectors are involved. Core funding is provided by the City of Calgary, two provincial government departments, and three federal government departments – indicating the extent to which the partnership initiative is horizontal both within and across orders of government. Calgary’s

Aboriginal communities have been present since its inception, and both the Treaty 7 Tribal Council and the Métis Nation of Alberta were founding partners. Indeed, the guiding principles of the CUIAI are that it be community based and Aboriginal led, and that it implement practical solutions.

CUIAI's mandate is to facilitate and foster support for – rather than to simply define – initiatives to assist Aboriginal people in Calgary. As such, it attempts to work with existing organizations and structures in order to minimize duplication of efforts. Although the CUIAI is attempting to implement the recommendations of the Listening Circle, it also embodies the federal Urban Aboriginal Strategy at the local level. This merging of initiatives has occurred largely because local federal officials worked with the leadership of the Listening Circle to align federal priorities with the local CUIAI. Contributing factors to CUIAI's success include the federal and provincial governments' willingness to be involved in partnerships with other organizations and to recognize that the urban Aboriginal community must take the lead.

Although none of these very brief case studies represents a perfect situation, and although each has faced – and continues to face – challenges, they are instructive in at least four ways:

1. Each is a partnership between a provincial government and the federal government that avoids jurisdictional disagreements by sharing responsibility.
2. The partnerships embrace municipal governments and, in many cases, service providers.
3. They exemplify a common, coordinated approach to urban Aboriginal issues.
4. Most importantly, urban Aboriginal people are present and actively involved in each of these successes.

In summary, to their credit, all three orders of government have begun to address the urban Aboriginal policy landscape as a shared responsibility. This intergovernmentalism proceeds despite continued disagreement over primary responsibility and despite the absence of fully developed intergovernmental mechanisms through which shared responsibility can be exercised. These brief success stories therefore raise an important question: if federal and provincial governments can work around their outstanding disagreements over primary responsibility for urban Aboriginal issues through informal mechanisms that include urban Aboriginal people, how might this form of intergovernmentalism be more broadly instituted across the urban Aboriginal policy file?

CREATING AN URBAN ABORIGINAL POLITICAL VOICE

One of the central features of the urban Aboriginal policy file is that the federal, provincial, and municipal governments are necessarily and inextricably

involved. To repeat an earlier comment, the federal government cannot escape at least residual responsibility for the off-reserve Aboriginal population; provincial governments have social service obligations that cover all provincial residents living off-reserve; and municipal governments confront social problems and inner city decay that challenge both their quality of life and international competitiveness. As a consequence, intergovernmentalism must be a large part of the framework through which urban Aboriginal issues are addressed. Admittedly, this is a conclusion that we come to with some reluctance for, if anything, Canadian political life suffers from a surplus rather than a deficit of intergovernmentalism. It is not necessary to address every issue of public policy through the screen of intergovernmentalism. In this case, however, effective intergovernmental mechanisms are a necessary albeit far from sufficient condition for progress on a difficult policy file.

This conclusion stems not only from the fact that urban sites, containing 80 percent of the Canadian population, necessarily engage federal, provincial, and municipal governments. More importantly, through the recognition of self-governing First Nations, we have chosen intergovernmentalism as the policy framework for addressing the reserve-based Aboriginal population. This precedent, we would argue, will inevitably ripple through to discussions of policy design and programming relating to the off-reserve urban population. The reasonable expectation is that intergovernmental arrangements will be extended to give urban Aboriginal people an effective voice on policy. As the cases overviewed above show, urban Aboriginal involvement is crucial to policy and programming success.

However, to acknowledge the importance – indeed the inevitability – of intergovernmental mechanisms embracing not only federal, provincial, and municipal governments but also Aboriginal people in an urban context, is only the first step towards solving an extremely difficult conceptual and political problem. How can effective Aboriginal voices at the intergovernmental policy table be ensured? How can a voice with enough attributes of a government – legitimacy, policy capacity, and ability to enter into binding agreements – be created so as to make intergovernmentalism work?

Here it is useful to contrast First Nations and urban Aboriginal communities. The former are homogeneous communities with an entrenched land base and constitutionally recognized governments. Urban Aboriginal communities are virtually the opposite:

- They are very heterogeneous, encompassing not only members from a variety of First Nations communities but also Métis, Inuit, and non-status Indians.
- Apart from a few urban reserves, there is no land base.
- Aboriginal identities in the urban context are variable and complex.

- Urban Aboriginal communities and organizations, though not without capacity, do not have nearly the capacities of federal, provincial, municipal, or even First Nations governments.
- There is great diversity of circumstance within the urban Aboriginal population, ranging from street people to university graduates in professional occupations.
- There is considerable geographic fluidity as individuals move to and from urban communities.
- It is not at all clear what proportion of the urban Aboriginal population would choose to speak through Aboriginal organizations, if only in a complementary manner, rather than through more conventional political processes.

The contrast with reserve-based First Nations communities is extreme. As a consequence, creating an effective voice and appropriate governmental institutions for urban Aboriginal populations is extraordinarily difficult and underresourced policy challenge. Yet if intergovernmental mechanisms are to work, some way must be found of bringing urban Aboriginal people to the intergovernmental table so that this important but diverse “community of interest” can be represented effectively (Canada, RCAP 1996). Here a number of possible mechanisms can be identified beyond those discussed in the above examples.

In some cases, First Nations governments that are situated near to urban centres might act in an extraterritorial fashion, supplying both services and a political voice to off-reserve band members living in an urban environment. We find this, for example, in Calgary, where band governments have urban offices. In such large centres, however, even an aggressive outreach program would leave many urban Aboriginal people disconnected, particularly Métis and non-status Indians. Thus, while outreach programs will inevitably be part of the solution, they are at best one part of a larger puzzle, and in some cases they may contribute to further divisions among urban Aboriginal people.

A different extension of reserve-based Aboriginal governments to the urban scene could be achieved through the creation of urban reserves, along the lines of initiatives already underway in Saskatchewan. Residential urban reserves could provide a land base and thus the territorial shell for an urban Aboriginal government.⁷ Here again, however, it is not clear how services and a political voice would be extended to urban Aboriginal residents outside the urban reserve. The critical issue would be to design membership codes and to establish how the Aboriginal population living outside the urban reserve would be accommodated. In a similar fashion, members of an Aboriginal nation that comprise a significant population in a city, such as the Cree in Edmonton or Métis in Winnipeg, could join together using traditional processes

to create a political voice.⁸ Again, the challenge would be to ensure that the membership code did not discriminate against other Aboriginal people.

Municipal government committees might provide a more conventional forum for a variety of Aboriginal voices, although it would still be necessary to bring federal and provincial governments to the table. Urban-based friendship centres, if more adequately resourced and more effectively governed, might provide an effective and legitimate urban Aboriginal political voice, one that could be expressed through municipal institutions or independently. A more radical move could see the establishment of urban Aboriginal political institutions analogous to the separate (Catholic) and section 23 francophone school boards that exist in many western Canadian cities and provinces. Such boards would have a geographical jurisdiction coterminous with municipal boundaries, would be elected by a self-identified Aboriginal electorate, and would have a limited range of jurisdictional authority. They might, for example, run autonomous Aboriginal schools and/or provide electorally mandated input into the public and separate school systems.⁹

Finally, national Aboriginal organizations could provide a more effective political voice for urban Aboriginal people. Existing national organizations could speak more emphatically for urban Aboriginals, although this might be difficult given their political base. The Assembly of First Nations, for example, has a band- and chief-based political structure that would have great difficulty accommodating an urban constituency. Alternatively, a new national organization could be created and funded to provide an urban political voice. The catch would be to ensure that any national organization was sufficiently grounded in the local experience.

Admittedly, none of these proposals looks anything like a perfect way of providing an effective political and policy voice for urban Aboriginal populations. However, they do build on the creative ad hoc approach that is already at work and, at the very least, they may provoke discussion on finding that political and policy voice. If our earlier conclusion holds – that urban Aboriginal policy will inevitably be forged in an intergovernmental context – then the current absence of an effective urban Aboriginal voice impairs both the public policy process and the outcomes from that process.

CONCLUSION

This volume is built around the theme of “Reconfiguring Aboriginal-State Relations.” In our contribution, we suggest that this reconfiguration in the case of urban Aboriginal people is taking place along the conventional Canadian trajectory of intergovernmentalism, albeit with the increasing engagement of municipal governments along with their federal and provincial counterparts.

What is missing in this picture, however, is effective and authoritative Aboriginal voices. We suggest, furthermore, that intergovernmental solutions will have limited success so long as urban Aboriginal people are not incorporated into that intergovernmental process. This in turn means creating a self-defined urban Aboriginal voice that is as inclusive as possible and can authoritatively engage the federal, provincial, and municipal governments in urban sites and across a broad policy front.

In short, there may be a need to institutionalize, through negotiation, a new order of governance in the urban context in order to provide an effective political and intergovernmental voice for urban Aboriginal people. Ultimately, of course, any such intergovernmental device will have to be seen as legitimate, appropriate, and authoritative in the eyes of Aboriginal people. This means that it cannot be imposed. However, the search for potential solutions is everyone's search. The absence of effective urban Aboriginal voices in the intergovernmental policy process is a matter of concern for all governments and all Canadians, because it impairs the effectiveness and efficiency of public policy. After all, Aboriginal people are an important and growing feature of Canadian cities, particularly in the West, and the future prosperity of those cities will depend in large part on the degree to which Aboriginal people can successfully contribute. A more effective urban Aboriginal voice would be a step in this direction.

NOTES

- 1 This latter debate obviously does not complicate the design and implementation of public policy in First Nation communities.
- 2 The closest the constitution comes to the issue is to confer authority over municipal institutions to the provinces.
- 3 Because our research was not client-based, this conclusion is suggested, rather than empirically demonstrated, by the research findings.
- 4 The following section is largely based on interviews with individuals engaged in Aboriginal policy making and programming (Hanselmann 2002b).
- 5 The Regina and Prince Albert processes also failed to achieve agreements.
- 6 Intergovernmental efforts did not die with the dissolution of the Saskatoon Community Partnership Table, and, by late 2003, local Aboriginal organizations were again working with municipal, provincial, and federal officials, this time under the auspices of the Urban Aboriginal Strategy Pilot Projects Initiative.
- 7 Urban reserves established primarily for commercial purposes would be less useful in this respect.
- 8 The authors thank Larry Chartrand for this suggestion.
- 9 Gibbins thanks his University of Calgary colleague Bill Reeves for this suggestion.

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Challenges to Urban Aboriginal Governance

Gordon Christie

Si les structures d'un gouvernement autochtone en milieu urbain incorporent des processus de prise de décision de la part des autochtones, ceux-ci devront jouir de plus de pouvoir juridictionnel et les communautés autochtones en milieu urbain devront obtenir suffisamment de ressources pour pouvoir assumer la conception, l'implantation et la gestion des institutions autochtones à l'intérieur de ces structures. Avec plus de pouvoir juridictionnel et avec les ressources nécessaires pour que les structures gouvernementales puissent s'épanouir, il faudra que les communautés autochtones travaillent avec les gouvernements fédéral, municipaux, provinciaux. Étant donné que ces gouvernements seront peut-être peu disposés à l'idée de devoir partager des pouvoirs et des ressources avec les communautés autochtones en milieu urbain, il faut se pencher sur les arguments pour le droit (ou la demande irréfutable) à un gouvernement autochtone en milieu urbain. Ce travail commence par examiner les arguments pour un tel droit basés sur la jurisprudence contemporaine et sur les théories politiques canadiennes. Ces arguments doivent être bien compris parce qu'essentiellement, ils doivent se trouver à l'intérieur de paramètres établis dans une perspective idéologique partagée par l'État canadien et par les tribunaux canadiens. Dans la dernière partie de ce travail, la dynamique qui en résulterait si nous admettions que l'imposition de tels paramètres sur la question d'un gouvernement autochtone en milieu urbain est injustifiable, est observée.

INTRODUCTION

Much of the recent discussion around urban Aboriginal issues seems to be directed towards new service delivery programs and approaches. There seems to be a lot of talk about new ways in which federal, provincial, and municipal

governments are working together and with Aboriginal people, both to provide better access to existing programs and to create new programs, all with the aim of addressing the particular needs of urban Aboriginal people. The notion of urban Aboriginal governance suggests, however, much more than this. While the *Report of the Royal Commission on Aboriginal Peoples* spoke of improving service provision for the urban Aboriginal population, it also envisioned the creation of Aboriginal governance structures in urban contexts (Canada, RCAP 1996).¹ These structures would in some way be linked to land-based Aboriginal governments, forming part of a third order of government, so that work on service provision in the urban context would require cooperation between federal, provincial, and Aboriginal governments, all in the framework of municipal affairs. These structures would be designed, constructed, and maintained by Aboriginal people, and through these instruments urban Aboriginal governments would serve and assist the urban Aboriginal population, much in the manner of existing municipal governments.

Such a vision requires for its realization both jurisdictional space and some pool of resources adequate to the task of fulfilling the envisioned operations. Will the jurisdictional space be opened up? Will the resources necessary to bring this vision to life materialize? These queries naturally call into question the role that existing federal and provincial governments might come to play in assisting in the project of urban Aboriginal governance. Existing federal and provincial governments could open up the required jurisdictional space, and they could play a major role in providing resources directed towards the project of filling this space with acceptable Aboriginal governmental structures and institutions. Are there any reasons why existing governments should assist in these ways in the emergence of urban Aboriginal governments? Do urban Aboriginal people have the right to urban Aboriginal governance?

If such a right exists, this might serve to motivate existing governments, pushing them towards working on both jurisdictional questions and resource-sharing programs. This essay begins with an examination of legal and constitutional instruments, exploring the promise they might hold in support of the right to urban Aboriginal governance. I also discuss the challenges facing those who might use such legal and constitutional instruments to argue for the creation of urban Aboriginal governance structures, and I examine the types of structure that might be created if arguments for such governments won the day.² Unfortunately, this exploration into current jurisprudence on Aboriginal rights serves only to highlight principles and tests that are ill suited to the context of urban Aboriginal governance. The conclusion to draw is clear: legal and constitutional support for urban Aboriginal governance is deficient at present. While current jurisprudence does not go far in supporting a legal right to urban Aboriginal governance, perhaps legal reform might generate support for it. Canada's status as a liberal democracy, highlighted by the judiciary's deference to such liberal instruments as the *Canadian Charter of Rights and*

Freedoms, suggests that any such legal reform would have to be driven by liberal doctrine. The middle section of this essay investigates whether the law could develop along liberal democratic lines in such a way as to envelop and nurture Aboriginal rights to urban governance. However, while liberal legal reform might lead to the recognition of these rights, the nature and scope of the rights would likely leave urban Aboriginals with very little of substance to work with.

Where, then, does this leave the discussion on the status of the right to urban Aboriginal governance? This essay concludes with a brief journey outside the dominant jurisprudential/political box, with a few words on an Aboriginal perspective on urban governance. This Aboriginal perspective casts doubt on the legitimacy of the assumptions dominating both contemporary jurisprudence on Aboriginal rights and the theoretical literature framing current approaches to legal reform. I argue that it is not so much the content of this Aboriginal perspective as the alternative normative system out of which it emerges that helps support claims to jurisdictional space and resource allocation for urban Aboriginal peoples and governments. Recognizing the legitimacy of this alternative normative system and its call for negotiations on how Aboriginal "claims" should be accommodated in contemporary society promises a path out of the dead end of contemporary jurisprudence and mainstream political theory.

CONSTITUTIONALLY PROTECTED ABORIGINAL RIGHTS

If urban Aboriginals begin to enjoy the jurisdictional space within which to develop local governance structures, some Canadians will wonder why resources are being diverted to these projects, especially as they become more ambitious and costly. What could justify expending resources in ways which some would argue either duplicate existing institutions or create new structures that are unavailable to non-Aboriginal Canadians?

Jurisprudence around Aboriginal issues now centres on section 35 of the *Constitution Act, 1982*.³ This section recognizes and affirms the existing Aboriginal and treaty rights of Canada's Aboriginal people (who include Indians, Inuit, and Métis). Since the constitution is the supreme law of Canada,⁴ if urban Aboriginal people have a section 35 right to a measure of self-governance in their urban settings, not only would this begin to settle constitutional and jurisdictional issues, but it would go a long way towards addressing concerns about expending economic and social resources in fostering and maintaining urban Aboriginal governance structures. Is there, then, an Aboriginal (or treaty) right to self-governance in an urban setting? I begin this investigation with an overview of the jurisprudence on Aboriginal rights in general.

In *R. v. Van der Peet* the Supreme Court held that the purpose behind the constitutionalization of Aboriginal rights is to effect a reconciliation between

the prior presence of Aboriginal societies and the sovereignty of the Crown (*R. v. Van der Peet* 1996, paras. 30-41). Aboriginal rights work to accomplish this goal by protecting Aboriginal people *as Aboriginal people*; that is, they are limited to Aboriginal people and are designed to protect Aboriginality.⁵ Thus, these rights aim to protect the essence of Aboriginal cultural identity, certain cultural elements of Aboriginal societies – activities, practices, and customs – that are integral to the distinctive cultures of Aboriginal peoples.⁶ Since the rights are culturally based (protective of aspects of Aboriginal societies), they are collective in nature, with the collectivity defined on a community or “people” level (*R. v. Van der Peet* 1996).

The grounding of section 35 rights in the cultural identities of Aboriginal societies is evident in the requirement that in order for an activity to be integral to the distinctive culture of the claimant, the distinctive character of the people in question would be dissolved in its absence. This cultural grounding can create barriers, for the Aboriginality of the culture of the claimant is held to a “pure” standard. Consequently, if the activity today said to fall under an Aboriginal right is unduly “tainted” by European influence, or if the historical thread tracing the exercise of the activity from contact to the present is unreasonably broken, the activity will not be protected under section 35 (*R. v. Van der Peet* 1996, paras. 64–5, 73). Furthermore, insofar as the claimed right is itself couched in an Aboriginal world-view, potentially posing problems of conceptual incommensurability with European thought as crystallized in the common law, it may not be protected by domestic law.⁷

Furthermore, it should be noted that the constitutional protection afforded by section 35 is limited, for Aboriginal rights are non-absolute, and susceptible to justifiable legislative infringement. The test for justification (laid down in *R. v. Sparrow* 1990 and refined in *R. v. Gladstone* 1996)⁸ requires of the Crown that its infringing legislation have a substantial and compelling objective, and that the legislation itself demonstrate satisfactory Crown efforts at meeting its fiduciary obligations to Aboriginal peoples.

When an Aboriginal party acts pursuant to what it claims to be an Aboriginal right and is challenged by government legislation, the law begins its assessment of the situation by defining the impugned right. Aboriginal rights are defined on a level of general abstraction, in terms of the present activity claimed to fall under the right, the government legislation in relation to which the activity has run afoul, and the traditional practice or custom establishing the existence of the right (*R. v. Van der Peet* 1996, paras. 51–4). The right so defined is then assessed to establish whether it constitutes an activity, practice, or custom that was and continues to be integral to the distinctive culture of the people claiming the right, both at the time of contact with Europeans and in a suitably evolved contemporary form (*R. v. Van der Peet* 1996, paras. 55–67). If the assessment is positive, the impact of legislative action on the claimed right is scrutinized to determine whether the legislative end is suffi-

ciently compelling and substantial, and whether the regime established under the objective appropriately prioritizes the Aboriginal right in relation to other non-Aboriginal interests.

The Aboriginal right to self-government is felt by many to fall under section 35.⁹ Some have argued that besides locating the right to self-government directly under section 35, a measure of self-governing power may be identified under Aboriginal title (itself a form of Aboriginal right specifically tied to land).¹⁰ While cities all rest on Aboriginal land, they may not all, however, be on Aboriginal title-land.¹¹ Furthermore, the powers of governance falling under Aboriginal title have yet to be set out, and it is likely that all will relate to land use regardless. We can therefore leave aside consideration of the possibility of grounding self-government rights in Aboriginal title when looking at urban Aboriginal governance.

Direct claims to self-government under section 35 have been rare. A claim to “jurisdiction” at the trial level in *Delgamuukw v. British Columbia* was changed to a claim to self-government on appeal, and was then put aside by the Supreme Court, whose attention was focused on Aboriginal title (*Delgamuukw* 1997). In an earlier case, *R. v. Pamajewon*, the Aboriginal claimants attempted to gain recognition of a right to establish and regulate high-stakes gaming on reserve land (in defiance of Ontario’s claims to jurisdiction over gaming) but failed to meet the test laid out in *R. v. Van der Peet* (*R. v. Pamajewon* 1996). A measure of confusion was added to the jurisprudence in this case, as the court held that rights to self-government must be narrowly construed, while Aboriginal rights more broadly speaking are to be defined on a general level (*R. v. Pamajewon* 1996, 834).

However, one thing is clear: claims to Aboriginal self-government rights in urban settings pose particular (and perhaps insurmountable) problems. I propose to work through these problems in sequence, moving from problems with meeting the test for Aboriginal rights laid down in *R. v. Van der Peet*, to larger constitutional challenges, and finally to problems with arguments advanced from the perspective of liberal theory.

CHALLENGES IN MEETING THE TEST FOR ABORIGINAL RIGHTS

The obvious problem for urban Aboriginal governance lies in the nature of the community that might try to claim a right under section 35. Arguably, any Aboriginal urban community could be better described as more of an association of interests than a cultural or political community. In whatever manner such a community might be understood, clearly it would face tremendous challenges in its attempt to cultivate a claim to a right to self-government under section 35, for it would struggle to trace back a collective or communal right

to a particular time of contact with Europeans. The best it could do would be to attempt to ground its collective claim in an accumulation of individual claims, arguing that the Aboriginal persons in any given urban context were forced to their present location by external circumstances, such that regressing temporally each individual (or family) could trace its lineage back to a self-governing Aboriginal community. Under this description, the current collective, made up of such individuals (or families), can be viewed as having coalesced gradually over time as each individual (or family) came together with other similarly displaced persons to form a new urban Aboriginal collective.

For such an argument to establish the existence of an Aboriginal community capable of claiming rights under section 35, this narrative of dispersal and radical reformation would have to fit into the mould of acceptable evolutionary processes under the *R. v. Van der Peet* test.¹² The highest hurdle, though, is not the fact that the Supreme Court has failed to make clear what evolutionary processes are acceptable, but that whatever story of dispersal and reformation the urban Aboriginal population might tell, the new urban community would bear little resemblance to the collectivities that bore rights at contact and can now claim such rights under the constitution. This is a problem, then, that blends together difficulties with continuity, the identity of the community claiming the right, and the evolution of Aboriginal rights.

Undoubtedly, this is one reason why the Royal Commission on Aboriginal Peoples spoke of urban Aboriginal governance structures being grounded in historic land-based Aboriginal communities. All the separate people and families who now find themselves collected together in urban contexts are originally from “traditional” land-based communities, and these communities could argue for the right to self-government. The trick, then, would be to extend to the urban context whatever rights each source-community might have, blending together the multitude of source rights into a mandate to form an urban governance structure. Whether this governance structure would have to maintain ties to its source community is not clear, though probably some connection would be required (as the rights would be delegated, having their ground in the authority of the source community).

CHALLENGES IN CONSTITUTIONAL LAW

Direct constitutional challenges to the recognition of a right to urban Aboriginal governance centre on concerns over the division of powers and the potential emergence of the doctrine of sovereign incompatibility. (The *exercise* of urban Aboriginal governance rights raises other concerns, which are discussed later in this section.)

Some argue that any measure of Aboriginal self-government must be compatible with the division of powers found within sections 91 and 92 of the *Constitution Act, 1867*. Some go beyond questions of compatibility, arguing that the initial division of constitutional authority exhausted constitutional space, leaving no room for a third order of government¹³ (at least, not without a new round of constitutional talks and a new constitutional amendment, both rather unlikely events). While arguments about whether the original division of powers exhausted constitutional space have not been conclusively put to rest, they have lost some of their force in light of arguments concerning the ratification of the Nisga'a Final Agreement and in litigation about it (such as *Campbell* 2000).¹⁴ The jurisprudential struggle continues to centre on the notion that Aboriginal rights to self-government – as with all Aboriginal rights – are inherent and are not creations of domestic statute, case law, or Crown prerogative. If Aboriginal rights have their ground in the existence of Aboriginal societies prior to the assertion of Crown sovereignty, some vision of how these rights were able to move into the common law is required, as is some notion of a mechanism to work out how they are to fit within the Canadian political and legal landscape.¹⁵ I will return to this matter in the third section.

Here, I use the general concern over constitutional compatibility to slide into another constitutional argument that is now coming over the horizon, one with the potential to ignite a new storm of controversy. This is the doctrine of sovereign incompatibility. This doctrine emerges as one attempt to work out how inherent Aboriginal rights were able to move into the common law and how they are to be integrated into the Canadian political and legal landscape.

The notion of sovereign incompatibility was introduced into Canadian jurisprudence by Binnie J in his concurring judgment in *Mitchell v. Canada*. In that case, Binnie J held that there could be no Mohawk right to pass over the Canada-U.S. border without paying duty on goods. Such a right, he reasoned, would never have survived the event of sovereign succession, an event marking the transition from the legal regime in place before the establishment of Crown sovereignty to that attendant on the arrival of Crown sovereignty (*Mitchell* 2001). This notion of sovereign incompatibility may emerge as the tool by which the Supreme Court severely limits Aboriginal rights to self-government, since every claim to any particular sort of self-governance right would potentially come to be measured against its compatibility with the exercise of Crown sovereignty.¹⁶

There are clear parallels with the doctrine of division of powers, for the function of the doctrine of sovereign incompatibility is to define the parameters of any space that might exist for Aboriginal self-government, given the space already occupied by the Crown in right of the federal and provincial governments. Given this similarity, similar counter-arguments may rescue from

potential oblivion many of the self-governing powers that Aboriginal peoples will want to claim, because they can certainly argue that, in division of powers and sovereign incompatibility doctrines alike, there exists room for concurrent Crown-Aboriginal powers, and for the exercise of powers where there is only inconsistency or conflict and not incompatibility.¹⁷

This leads us to a mixed legal and constitutional challenge, since the task of appropriately defining the claimed Aboriginal right to self-government in the urban context will play a vital role in both (i) increasing the chances of having such a right recognized under section 35 and (ii) answering constitutional challenges based on concerns about the fit of such a right with powers of the Crown. If *R. v. Pamajewon* establishes an exception to the general rule that Aboriginal rights are to be defined in broad terms, Aboriginal rights to self-government will have to be presented narrowly, focusing on particularized powers. For example, one might imagine an urban Aboriginal population in a Canadian city grounding its claim in the Aboriginal rights of the source communities from which its membership originated, first arguing for an Aboriginal right to control the delivery of health services for its constituent population and then having to argue for an Aboriginal right to control the provision of education for its population.

Similarly, if legal challenges to urban Aboriginal governance structures were launched, each particularized power would have to be established individually. Over time, a bundle of self-government rights would be protected, the resulting package constituting the scope of self-government for the urban Aboriginal population. Besides the problem in establishing any particular right to urban Aboriginal governance, this bundle approach could have serious practical consequences for the urban population, because significant resources would have to be expended in defending each of these jurisdictions separately. While this alone is troublesome, equally problematic is the possibility that sovereign incompatibility concerns would arise just prior to this point, with each particularized power challenged under the argument that its exercise is incompatible with the exercise of Crown power. While in the above example such an argument would have considerably less force than in the context of *Mitchell v. Canada* (since Aboriginal peoples would likely have some chance of successfully arguing that health delivery could be concurrently managed by provincial and Aboriginal governments), in some instances the incompatibility argument (as with the division of powers argument) could be a roadblock to urban Aboriginal self-governance.¹⁸

The discussion of constitutional challenges concludes with a look into possible challenges to the *exercise* of urban Aboriginal governance rights. When the law turns to particularized governance powers, will it be concerned with the structures that an urban Aboriginal populace might instantiate under these powers? For example, might a challenge be raised if an urban Aboriginal gov-

ernment attempted to establish and control citizenship criteria in a discriminatory manner? What if, for example, citizenship in the new urban Aboriginal polity was restricted to those with a minimum of three years' residency in the city in question? Or to those from the handful of nearby reserves, while leaving out those with roots in more distant communities? Or to those meeting certain genealogical requirements? Furthermore, while such questions would naturally arise in the context of challenges launched by individual Aboriginal people, we can imagine challenges coming from other Aboriginal communities – those more commonly vested with recognition of authority. In an odd reversal of fortune, could land-based or reserve communities challenge the authority of urban Aboriginal communities (much as Aboriginal people in urban settings have – sometimes successfully – challenged the internal workings of reserve communities)?¹⁹

Inquiries such as these quickly lead to entanglement in larger complex webs, for they invite further questions about the nature of urban Aboriginal communities, about how boundaries are to be established, about what body has the authority (before boundary questions are settled) to address questions about membership, about the appropriateness of employing non-Aboriginal principles and processes in dealing with these types of questions, and about the role of section 25 of the *Constitution Act, 1982* (which on its face seems to protect – to some unknown degree – the exercise of Aboriginal governance rights from Charter interference).²⁰ Challenges along these lines might seem less immediately pressing, but only if memories are short. Much of the debate in the late 1980s and early 1990s on the proposed self-government amendments to the *Constitution Act*, for example, were about the application of the Charter to Aboriginal governments.²¹ Most likely, any negotiated forms of urban Aboriginal governance would also be subject to the operation of the Charter, since the Crown has been adamant that individual rights will be protected, even in the context of Aboriginal communities who might rather be free of this form of external imposition. But while application of the Charter would resolve one of the above questions, its application pushes to the fore the rest of the concerns introduced: how communal boundaries will be established, who will make decisions about boundary setting, who can launch Charter challenges (and on what particular grounds), and what role section 25 plays in light of these challenges.

CHALLENGES IN A LIBERAL DEMOCRACY

I noted above that challenges to the exercise of urban Aboriginal governance rights could issue from an interest in holding Aboriginal communities to the standards established by such liberal instruments as the *Canadian Charter of*

Rights and Freedoms. Perhaps, though, liberal doctrine might not only pose problems for urban Aboriginal governance but also could be plumbed for arguments suggesting legal reform. This presents an opportunity to look outside existing legal and constitutional parameters, considering arguments in liberal theory that might lead to possibilities for legal reform.

Within the liberal democratic paradigm, calls for reform can be grounded in arguments of efficiency as well as arguments centred on the extension of rights. If moving towards service delivery supported by urban Aboriginal institutions improves the lives of urban Aboriginal people without seriously increasing the costs of providing these services, arguments of efficiency might well uphold a significant measure of self-government. Support for such an approach could be bolstered if we considered it in conjunction with a scheme for delegated urban Aboriginal jurisdiction. This package would have the advantage that much of what might be accomplished could be achieved through nothing more than the delegation of federal and provincial power. There might not be any need to consider arguments for the existence of the Aboriginal right to urban governance (and the myriad of problems that such a route might have to overcome).

However, the fact that such an approach can so easily circumvent arguments based on the inherent nature of the right to self-government enjoyed by urban Aboriginals is itself a potential shortcoming. While this may not seem a particularly powerful objection from the vantage point of the dominant society (given that, from this vantage, grounding claims to self-government in “inherent rights” might seem to be basing rights in mere shadows), from an Aboriginal perspective this can be a serious concern. The same could be said of the fact that under a delegated model of governing authority, urban Aboriginal institutions would be subject to direct control by the federal and provincial governments; an objection to this would seem weak from the vantage point of the dominant society, fed as it is by tales of political corruption in Aboriginal communities. Indeed, from this point of view, cutting urban Aboriginal institutions free from Crown oversight might seem foolish. Nevertheless, from an Aboriginal perspective, “governments” exercising power delegated to them, under the control of those delegating the power, are not exercising powers of self-determination. Such institutions would simply be an extension of the current move to provide service delivery with Aboriginal people’s involvement.

In contrast, my purpose in this essay is to explore the possibility of instituting a measure of effective non-delegated Aboriginal self-government in the urban context. Given that arguing for such a right would be difficult under Canadian law and that arguments from efficiency are unlikely to push forward a non-delegated right, are there arguments for legal reform centred on the extension of rights that would be persuasive to the dominant (liberal) society?

Liberal support for the rights of Aboriginal peoples (as minority subpopulations within a dominant liberal society) begin with arguments illustrating either an instrumental or a derivative value in Aboriginal culture. Will Kymlicka argues for an instrumental value, holding that culture has value insofar as it provides options for the individual engaged in the task of examining his/her own beliefs and values, ever-questioning the path that his/her life will take as s/he searches for the good life (Kymlicka 1989). Denise Reaume argues for a derivative value, holding that culture must be seen as the expression of the will of the group, and it is worthy of protection because it is expressive of the autonomy of the cultural collective (Reaume 1995, 117). Further, given that Aboriginal cultures and societies are continually at risk of being overwhelmed by the choices and priorities of the non-Aboriginal majorities with whom they share a state, they should be accorded some protection. The rights of protection would serve either (a) to protect alternatives to ways of living that Aboriginal cultures provide or (b) to accord respect to group autonomy.

While other liberal approaches to the protection of Aboriginal cultures and peoples could be considered, they are all alike in their desire to avoid attribution of value to culture itself. For the liberal theorist, the individual is the ethical unit in which value inheres and through which value is generated (via choices made through the exercise of autonomy, preferably in accordance with reason). For the sake of brevity, then, we can consider the arguments advanced by Kymlicka and Reaume as paradigmatic of liberal arguments for expanded Aboriginal rights. Could either of these arguments support a call to establish urban Aboriginal governance structures? Both do, to a minimal degree, with Kymlicka's approach providing the weaker support of the two. Kymlicka's argument can support a call to establish urban Aboriginal governments mandated to protect the various Aboriginal cultures to which individual Aboriginal urbanites are historically attached. Any mandate beyond this, however, is hard to come by from within this liberal approach. The central problem noted in our discussion of legal arguments for the establishment of urban Aboriginal governments reappears in this context, since this liberal argument accords instrumental value only to pre-existing cultures (Aboriginal or otherwise). This requires some elaboration.

Kymlicka's argument falls short (a) because he focuses on those "cultures" that are grounded in shared histories, languages, and customs (and not other forms of association, such as those formed around sexual preference), and (b) because he distinguishes between the value attached to the mere existence of these cultures and the value that might attach to the "character" or content of any particular culture, thereby arguing for the protection of cultures as providers of meaningful options, not for their having any particular "character" or content (Kymlicka 1989, 166–9; 1995, 18–19). Thus, for there to be an Aboriginal culture worthy of legal protection, there must be the sort of collectivity we would associate with long-standing historic communities, com-

munities that are protected not because their cultural content is inherently valuable, but because they function to provide options for living. To what extent can we say that the urban Aboriginal collective has its own culture,²² especially the type that fits within Kymlicka's liberal defence of minority cultures? Only on a very general level of culture could one say that there are bonds that tie urban Aboriginals together into cultural communities. As individuals urban Aboriginals can be said to be bound by Aboriginal heritage, by their status in the dominant society, and by a shared history; but when considered as forming a collective, these shared elements do not serve as ties that bind. Furthermore, it is not at all clear how any particular urban Aboriginal community could be said to provide a site for the provision of meaningful culturally grounded life options.

A similar problem plagues the group autonomy approach, for before the argument can work, some sort of political creature must be presupposed – an entity capable of exercising its will in decision making. A cultural community can plausibly be considered a decision maker insofar as it regulates its internal operations, forming and reforming itself and its self-image. But the urban Aboriginal population in any particular Canadian city is, by and large, bound only by a shared heritage in diverse Aboriginal societies, by its status in the dominant society, and by a shared history of dispossession and oppression. Under contemplation is the emergence of a new sort of decision-making creature, a governance structure arising out of these shared experiences and characteristics. But until this occurs, there is little by way of a group whose autonomy should be respected.

In these terms, there seems little prospect of legal or political reform, for there is little call in a liberal democracy for the establishment of a separate level of government mandated to govern the affairs of loosely gathered urban collectives. Liberal arguments supporting the maintenance of such structures depend on there being urban Aboriginal communities with long and rich histories in Canadian urban settings so that one could argue that groups have been formed, bound by culture on a general level, and possessed of wills of their own, the expression of which should be respected. Clearly, then, support for urban Aboriginal governance must be sought outside the confines of liberal theory. In the next section, I examine support for urban Aboriginal governance from an Aboriginal normative perspective.

AN ABORIGINAL PERSPECTIVE ON QUESTIONS OF URBAN ABORIGINAL GOVERNANCE

That there is little prospect of liberal legal reform does not end all investigation into the possibility of urban Aboriginal governance, for liberal theory does not exhaust possible justificatory grounds for self-governing authority.

Unsurprisingly, Aboriginal people – those for whom such governance structures would be established – have their own arguments to justify their acting to design, create, and maintain such structures and the institutions they would encompass.

Consider how an urban Aboriginal community might decide to design and construct urban governance structures. Such a community would likely be primarily concerned not with the rights of the individual but with the responsibilities and obligations of the community and its members. Aboriginal people in urban contexts have many pressing needs. Those in need are not understood to be making strong claims against others (they are not seen to be asserting the *right* to assistance). Rather, in understanding and acknowledging the responsibility to respond to the needs of those in the greater community, an injunction issues from within the greater Aboriginal community to do what must be done to address the many and varied needs of its “citizens.” A sense of obligation is generated as those in need make calls on those capable of assisting them. At the foundation of these felt obligations are relationships between people; those striving to live good lives feel that in order to continue on the path to being good people they should respond to the call to assist those in need. In this manner, they acknowledge relationships with those in the larger Aboriginal community, and act on this knowledge. In turn the recognition of these “ties that bind” strengthens the ties, both on and by those who assist and those who are assisted. This is how an Aboriginal community can maintain itself and mature responsibly, just as Aboriginal people within such a community are simultaneously sustained and grow both spiritually and materially.

Such relationships can pull Aboriginal peoples in contemporary urban settings into resilient communities, with strong Aboriginal identities, but does this generate a strong claim against the Crown? Can or should such an approach be used to sustain a claim to the resources and powers necessary to design and implement urban governance structures? Such an approach, in my view, would be a mistake. Whereas non-Aboriginal minority communities might attempt to generate arguments on such lives in order to motivate the Crown to open up jurisdictional space in support of communal autonomy, such arguments do not capture what is of essential import in the Aboriginal context. The existence of alternative Aboriginal justificatory frameworks do not function to underscore “rights” possessed by urban Aboriginal peoples; rather, they call into question the very demand that Aboriginal communities justify their claims within the dominant system in the first place.

To understand this point, we need to consider certain aspects of the history of Crown-Aboriginal relations in what is now Canada. In particular, we need to focus on how the Crown/state has historically attempted to justify its assertion of control over the lives of Aboriginal communities and individuals. When

Europeans arrived on the shores of North America, various Aboriginal societies already occupied distinct territories that stretched from sea to sea. In its attempts to acquire jurisdiction and ownership over these territories, the Crown – in different settings, at different times, and in different ways – applied the doctrine of *terra nullius*. This doctrine has basically two forms: a literal sense, under which a colonizing power would lay claim to land it considered physically uninhabited; and an “enlarged” sense, under which a colonizing power would lay claim to inhabited land whose societies were considered too low on the scale of civilization to have native systems of laws and customs that were capable of sustaining native notions of “rights” that could be translated into rights demanding respect within the common law.²³

This doctrine, in both forms, was repudiated in Canada in 1973 in *Calder v. British Columbia*. Undeniably, Canada was not uninhabited during the period of colonization, and the notion that societies could be measured on some scale of “civilization” was at last decisively recognized for its suspect nature (a lesson seemingly entrenched in the post–World War II world). Repudiation of the doctrine of “empty land” has not, however, been complete – the law in Canada has not rid itself of the underlying substrata to this racist doctrine. The Crown continues to claim justifiable authority over the lives of Aboriginal communities and individuals on the basis that Aboriginal societies gave way to the “superiority” of Crown sovereignty, and Canadian courts have been unwilling to examine this dubious assumption critically.²⁴ As I noted earlier, domestic law in Canada begins with the basic assumption that pre-existing Aboriginal societies must be reconciled to the unquestioned *fact* of Crown sovereignty. In spite of consistent challenges from Aboriginal peoples,²⁵ all domestic Aboriginal law in Canada is grounded in the notion that by the mere assertion of sovereignty, the Crown justifiably subordinated Aboriginal systems of law and governance, thereby placing Aboriginal peoples and lands under Crown control.²⁶

In the context of our broader discussion, questioning the imposition of Crown sovereignty on Aboriginal peoples forces a reconsideration of the demand that Aboriginal urban populations frame descriptions of their sense of internal relationships and responsibilities in such a way as to generate arguments upholding their right to urban Aboriginal governance; for only within a system legitimately informed by overarching Crown sovereignty could such a demand justifiably be placed on Aboriginal peoples. In the absence of some satisfactory justification of the assertion of Crown sovereignty over Aboriginal peoples, such demands are misplaced and illegitimate.²⁷

Seeing the situation in this manner highlights the central challenge confronting the prospect of urban Aboriginal governance: denial by the Crown of the existence of two separate and distinct systems of justifying Aboriginal governance. The first system, built on notions of rights, treats Aboriginal peoples as subjects no different from the general Canadian population. The

major institutions of Canadian society unquestioningly accept that this system alone determines the validity of claims to which the Crown must respond. The second system, built on notions of responsibilities, encompasses the ways that Aboriginal peoples made (or would make) decisions affecting their lives and futures. The general challenge, then, is to call into question the hegemony of non-Aboriginal systems of justification, including both the judicially determined process for defining Aboriginal rights and the judicial test for determining which claims qualify as Aboriginal rights.²⁸ In the place of this hegemony, we must seek a reconciliation of non-Aboriginal “rights-based” systems of justification with Aboriginal “responsibilities-based” systems of justification.

INTEGRATION AND HARMONIZATION IN LIGHT OF COLONIAL HISTORY

Aboriginal interests are grounded in Aboriginal societies tracing their legal and political lineages far back before contact with Europeans – societies that maintain to this day their separate and distinct identities. Within these societies, Aboriginal peoples maintain separate and distinct normative systems that establish the parameters of the acceptable conduct of their members. Within any one society these systems operate both internally (with strictures establishing what people within this particular Aboriginal community may justifiably do in certain circumstances) and externally (with strictures establishing what this particular Aboriginal community may justifiably do in relation to other communities).

Complicating the situation for urban Aboriginals, however, is colonial history. Over the last few centuries, Aboriginal peoples in Canada were forced onto postage-stamp-sized reserves (by and large losing open access to their traditional territories); they fell under government control and regulation (imposed in conjunction with the denial of Aboriginal autonomy and sovereignty) and suffered countless attacks on their cultures (under such devastating government policies as residential schooling and the criminalization of religious practices). While some urban Aboriginals find themselves living in cities and towns of their own accord, the vast majority have stories to tell of their migration to urban settings centred on themes of dispossession and oppression – of themselves, their families, or their entire communities.

Besides accounting for the majority of the urban Aboriginal presence, this history has led, at least in large part, to (a) the fact that urban Aboriginal lives are interwoven with the lives of larger non-Aboriginal urban populations; (b) a dependency of urban Aboriginals on federal and provincial programs; (c) a lack of Aboriginal governance structures in urban contexts; and (d) the dismal economic conditions of individual urban Aboriginals and the larger urban Aboriginal communities. We are faced, then, with two interlocking tasks: the

illegitimacy of the assertion of Crown/state control must be addressed, but it must be done taking into account the effects of this assertion of control over the last few hundred years. These two tasks can be pulled apart. On the one hand, clearly the response to the illegitimacy itself is through negotiated agreements, working out how two jurisdictional authorities (grounded in two separate and distinct systems of justifying actions within and between communities) can coexist within one state; on the other hand, the response to the continuing legacy of colonialism will require the careful dismantling of oppressive institutions and structures alongside the opening up of economic, social, and political opportunities for Aboriginal peoples. Nonetheless the two tasks remain intertwined conceptually, for colonialism and its continuing legacy flow from the Crown's original denial of Aboriginal people's authority over their lives and lands – the long-standing denial of the possibility of legal and political pluralism.

In making claims for jurisdictional space and resources adequate to the task of governing urban Aboriginal communities, Aboriginal peoples need not bother fitting their arguments into systems of justification established by non-Aboriginal society. Instead, they can introduce Aboriginal normative regimes of justification and argue that the illegitimate denial of these systems places the burden of response on the Crown. The purpose of such an approach is not to ground Aboriginal claims in Aboriginal systems (asking that the Crown/state open up jurisdictional space because that is required if urban Aboriginal communities are to meet their responsibilities to members of their communities); rather, the purpose is to ground these claims in the cavernous space between the two types of systems. This space should have been filled long ago with negotiated agreements establishing sacred parameters for mutually acceptable coexistence. Since this space was never filled, the need to engage in the project of doing so continues to define the relationship between Aboriginal and non-Aboriginal societies. Time does not heal this form of injustice.²⁹ Until the vacuum in this space is filled, urban Aboriginal peoples can turn to the second task we all face by asking that the Crown/state address the legacy of colonialism.

CONCLUSION

Urban Aboriginals may feel they have certain responsibilities as the needs of their fellows call them to take up the task of designing, creating, and maintaining programs and services to meet those needs. Canadian law and the Canadian state recognize rights to urban Aboriginal governance only under such vehicles as section 35 of the *Constitution Act, 1982*, and would likely countenance expansion of the scope of rights beyond such instruments only if convinced by strong liberal arguments. In the absence of such groundings,

can Canadian domestic law (or that perspective which sustains and directs the law) come to see the necessity of working with urban Aboriginal populations as they strive towards laying the foundations for future urban Aboriginal governance structures? Will there be a space for urban Aboriginal governments when urban Aboriginal people begin to position themselves to reclaim control over their collective lives?

Originating in societies predating the arrival of Europeans, the interests that urban Aboriginal peoples have in establishing urban Aboriginal governance structures demand more of the legal and political institutions of Canada than Canadian courts or governments have so far been willing to concede. As the claims emanating from these interests originate in a time before – and under regimes distinct from – Crown sovereignty, and as their essential nature is marked by existence in separate and independent streams of juridical and political history (embedded in distinct legal and political regimes), arguably neither the courts of Canada nor the governments of Canada have the authority to unilaterally determine how “rights” tied to such claims will be defined and accommodated within Canada’s legal and constitutional framework.³⁰

I have noted that existing jurisprudence is ill suited to recognize the type of claims that urban Aboriginals may advance, and that standard pathways to legal reform are insufficient to support the kind of role that Aboriginal people may wish to play in controlling their own future as inhabitants of modern cities. In the previous section I presented an Aboriginal perspective on community responsibility and governance. Will this call fall on deaf ears? Given that this Aboriginal perspective is rooted in a fundamental challenge to the imposition of Crown authority over the lives and lands of Aboriginal peoples, there is good reason to believe that existing Crown policy in these matters will not deviate. Intransigence in the face of such fundamental criticism is unlikely to weaken. If the underlying racist substrata to the doctrine of *terra nullius* is to fade into history, both the governments and the courts of Canada must come to recognize the limits of their own horizons and must accept the need to work out, in a satisfactory way, how to coexist with Canada’s original self-determining communities. As was noted in the last section, this would require the Crown (1) finally to address colonialism (by opening up jurisdictional space and providing resources for fledgling urban Aboriginal governments – in essence, by undoing some of the wrongs historically committed); and (2) to negotiate agreements that work out how separate and distinct legal and political systems are to coexist over one territory.

While this envisions tremendous undertakings by the Crown (essential if Canada is to move towards a postcolonial existence), much of the struggle will continue to rest on the shoulders of Aboriginal people. Fortunately, the first steps for urban Aboriginal people on their way to establishing their own governance structures – towards regaining control over their lives and livelihoods – may not be to begin with immediate work on governance structures.

In view of the fact that the collective lives of people and families have been devastated by many years of neglect and oppression, Aboriginal people will likely need to continue the difficult work of creating the sort of foundations upon which they can build reinvigorated governance structures. Fractures within the larger Aboriginal community need to be healed, bridges between families, clans, and nations built and strengthened, relations between urban and land-based or reserve communities forged and reinforced, and traditional principles and values both reinfused into Aboriginal lives and retranslated to meet the challenges faced by urban populations.³¹ The latter project is especially pressing at this point, since many Aboriginal people are moving back to “traditional” world views but find a need to work out how the values and principles that sustain these world views could be turned to the task of making sense of lives lived in modern city settings.

Thus, the call within the urban Aboriginal population at this time may be not for the rapid creation of free-standing urban Aboriginal governments, but for the work that must be done to enable such governments to rise in the future, to support Aboriginal people in their struggle to reinject traditional meaning into their lives, and to find their own place in modern society. Given that the many obstacles to progress in these struggles arise out of the history and continuing presence of colonialism, one has to hope that the Crown will begin to acknowledge the impropriety of imposing control over Aboriginal peoples by quietly assisting urban Aboriginal communities as they attempt to put themselves in positions from which they can create new forms of Aboriginal governance.

Hopefully, by the time Aboriginal peoples are positioned to move into governing their own lives and livelihoods in urban contexts, recognition of the force of their challenge to the state will be possible. Ultimately, however, this will emerge not from the trajectory of contemporary jurisprudence – even should that trajectory be nudged by liberal democratic reform – but from the taking of a new path, one beginning with the initial step of recognizing the fundamental implications of acknowledging pre-existing Aboriginal legal and political systems.

NOTES

- 1 In the summary, the commissioners state: “Community of Interest Government: In urban centres, Aboriginal people from many nations form a minority of the population. They are not ‘nations’ in the way we define it, but they want a measure of self-government nevertheless – especially in relation to education, health care, economic development, and protection of their cultures. Urban Aboriginal governments could operate effectively within municipal boundaries, with voluntary

- membership and powers delegated from Aboriginal nation governments and/or provincial governments.”
- 2 In the background to this discussion is the very real possibility that legal challenges would be launched against attempts to move beyond improvements in service delivery to the establishment of urban Aboriginal governments involved in such service delivery. The recent referendum on the treaty process in British Columbia managed to show, if nothing else, that across a spectrum of Canadian citizens, just below a thin veneer of support for the struggles of Aboriginal peoples in Canada, lies a deep distrust of Aboriginal people and a desire to keep in check their aspiration to be self-governing and independent. It should be borne in mind as well that the man behind this referendum, the current premier of British Columbia, legally challenged the constitutionality of the Nisga’a Final Agreement on the grounds that it would lead to a ‘third order of government’ (Campbell 2000). Premier Campbell decided not to appeal his loss at the trial level after his election victory.
 - 3 Section 35 of the *Constitution Act, 1982*, states: “(1) The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed.”
 - 4 Section 52(1) of the *Constitution Act, 1982*, states: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”
 - 5 As section 35 refers to “existing” Aboriginal and treaty rights, it protects only rights not extinguished prior to 1982. See *R. v. Sparrow* 1990. On the notion of Aboriginality, see *R. v. Van der Peet* 1996, paras. 19–20.
 - 6 The test is at *R. v. Van der Peet* 1996, paras. 44–74.
 - 7 In earlier cases the court had held that the law should be careful to allow the expression of the right to be framed from within an “Aboriginal perspective”; but in *R. v. Van der Peet* the court constricted this Aboriginal perspective, requiring that expressions issuing forth must be comprehensible in the common law (*R. v. Van der Peet* 1996, para. 49). In other words, only those aspects of an Aboriginal perspective translatable into common law forms can be protected in domestic law.
 - 8 The court also expanded the reach of this test in *R. v. Badger* 1996, holding that it applies as well to treaty rights.
 - 9 Of course, this mood of optimism is fairly recent in origin, as there was hope in the 1980s of having a separate right to self-government added to the constitution, emerging from the conferences held pursuant to section 35. With the failure of these constitutional conferences, any Aboriginal right to self-government must, in the foreseeable future, be located under the umbrella of Aboriginal and treaty rights recognized and affirmed in section 35(1).
 - 10 See, for example, McNeil 1998, 253.
 - 11 Since Aboriginal title is an exclusive right to use and occupy land, requiring a demonstration of exclusivity at the assertion of Crown sovereignty, there are a number of reasons why it may be irrelevant for our discussion: (1) It may be im-

- possible for any Aboriginal community whose lands are now within city limits to demonstrate exclusive use and occupation of these lands. (2) It may be impossible for these people to demonstrate exclusivity at the time of the assertion of Crown sovereignty. (3) The people on whose territory the city lands now rest may no longer inhabit this area.
- 12 Recall that an Aboriginal practice loses its Aboriginal flavour if it can be said to have its current form due to European influence (*R. v. Van der Peet* 1996, para. 73). The court has allowed, however, for the evolution of Aboriginal practices (eschewing, it claims, the “frozen rights” approach), though this has seemed to be a matter of purely physical evolution (as a right to hunt with a bow and arrow has evolved, for example, into a right to hunt with a gun). See *Simon* 1985.
 - 13 See, for example, Smith 1995 and *Campbell* 2000.
 - 14 A general recognition has seemed to emerge that while the division of powers was meant to create fairly exclusive spheres of jurisdiction for the federal and provincial governments, just as there would inevitably be overlap between the two levels, there would be opportunities for an Aboriginal third order of government to exercise overlapping or concurrent authority. Kent McNeil has also argued that the path for Aboriginal peoples to take is simply one of re-establishing legal regimes regulating those aspects of their lives covered by section 35, as this constitutional provision was meant to be used by Aboriginal people to open up constitutional space from the inside, so to speak (see McNeil 1993).
 - 15 A discussion of this issue (for the most part lacking in Canadian jurisprudence) can be found in Brennan J’s judgment in *Mabo v. Queensland* 1992 at the High Court of Australia.
 - 16 In contemplating the transition from pre-existing Aboriginal legal regimes to the assertion of Crown sovereignty, contemporary courts have been cognizant of the need to develop an approach to the way in which legitimate legal interests grounded in pre-existing Aboriginal societies can be pulled up into domestic Canadian law. This is the concern introduced – though not directly addressed – in *R. v. Van der Peet* 1996, where the Supreme Court found that the purpose behind the constitutionalization of Aboriginal and treaty rights in section 35 is the reconciliation of the prior presence of Aboriginal societies to the sovereignty of the Crown. Once a scheme for the transition has been established, courts would need to implement this approach so that the modern rights of Aboriginal peoples could be worked into the political and legal landscape of Canada. But the very act of making the transition from one sovereign authority to another must either fall under a process acceptable to both sovereign parties or be the result of a negotiated arrangement.
 - 17 In the context of urban Aboriginal governance, the challenge is clear: to advance arguments for governance structures that could be located in the (likely small) constitutional space generally open for Aboriginal governments. As concurrence would likely be the order of the day, negotiations would be a preferable way of opening up and filling this space (both to ensure that there is no clear incompatibility and to smooth out the nature of the concurrence).

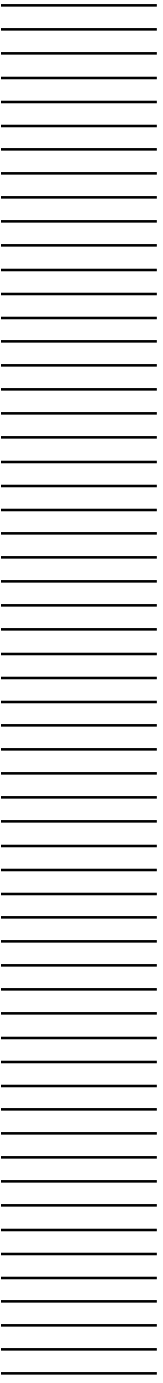
- 18 For example, some urban Aboriginal populations might wish to develop separate justice systems for urban Aboriginals, complete with separate jurisdictional spheres, separate court systems, and separate rehabilitation systems. Depending on the scope of jurisdiction claimed, the Crown could argue that some of the powers could not be exercised alongside absolute Crown authority over these areas.
- 19 For example, those living off-reserve successfully challenged the voting requirements – that of living on reserve – in *Corbiere v. Canada* 1999.
- 20 Section 25 of the *Constitution Act, 1982* states: “The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any [A]boriginal, treaty, or other rights or freedoms that pertain to the [A]boriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the *Royal Proclamation* of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreement or may be so acquired.”
- 21 See, for example, Turpel 1989–90, Borrows 1994b, and Monture-Angus 1999.
- 22 Could one speak of “cultures” of recently emergent urban collectives? On the one hand, this is clearly possible, insofar as one can likewise speak of the culture of a liberal democracy or the culture of any politically or socially defined collective. On the other hand, one would have to acknowledge that this is as much the result of the looseness of the term “culture” as it is a matter of picking out the types of collective that might have defensible rights in a liberal democracy, and again one would have to face the difficulty of tying such a collectivity to precontact Aboriginal societies.
- 23 In what might seem inconsistent with even the enlarged notion of *terra nullius*, the Crown also historically engaged in various treaty processes over large areas of Canada, apparently treating Aboriginal nations *as* nations. However, its systematic failure to treat treaties as sacred or as constitutional agreements after they were concluded reveals a fairly consistent mindset in relation to Aboriginal peoples.
- 24 See, for example, chapter 5 (“Questioning Canada’s Title to Land: The Rule of Law, Aboriginal Peoples, and Colonialism”) in Borrows 2002.
- 25 See, for example, Turpel 1989–90, Opekokew 1982, Borrows 1994a, Little Bear, Boldt, and Long 1984, Richardson 1989, and Venne 1997.
- 26 This very same notion grounds all of domestic Aboriginal law in Australia. In *Mabo v. Queensland*, the High Court of Australia justified the continuation of this racist doctrine (insofar as it supports the notion of underlying Crown title) on the basis that it was a necessary support for the doctrine of tenure, a doctrine considered a necessary and vital part of the “skeletal” structure of the common law. The “necessity” in maintaining a racist system cannot substitute, however, for justification.
- 27 The courts of the common law in a land previously occupied by Aboriginal societies may feel bound not to question the assertion of Crown sovereignty, for they may continue to view themselves as essentially constituting an arm of the government. In this position, they have sometimes argued, they are constrained from challenging certain fundamental “political” actions. This is the Act of State doctrine. See, for example, *Calder v. British Columbia* 1973. This unwillingness does

- not, however, justify the imposition of sovereignty (and its handmaiden, the common law) on Aboriginal peoples and their societies.
- 28 Not only must the authority of Canadian law and Canadian governments be bracketed, but the limits of liberal theory also must be put aside. Liberal theory is not the perspective from which Aboriginal people view the world, and it cannot be used to limit the possibilities of urban Aboriginal peoples.
- 29 One might suggest that during Canada's colonial history certain government objectives show that concern about the lack of justification for taking Aboriginal lands and undermining Aboriginals' rightful authority was thought to be answerable through the elimination of Aboriginal peoples.
- 30 See, for example, Lajoie, Brisson, Normand, and Bissonnette 1996 (a study commissioned by the Royal Commission on Aboriginal Peoples, with an English translation provided on the CD-ROM).
- 31 On the role to be played by traditional values and principles, see Alfred 1999.

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III

New and Renewed Initiatives

Rebuilding the Relationship: The “Made in Saskatchewan” Approach to First Nations Governance

David C. Hawkes

Ce travail explore l'approche utilisée par la Saskatchewan pour améliorer les relations entre les Premières nations et les gouvernements fédéral et provincial; et pour négocier l'exercice des pouvoirs des premières nations. Tout d'abord, la disparité socio-économique à laquelle doit faire face le peuple autochtone en Saskatchewan y est brièvement examinée, et des preuves du lien entre un «bon gouvernement» et le bien-être social et économique y sont ensuite fournies. Le processus utilisé par la Saskatchewan, y compris la Exploratory Treaty Table, la Common Table et le Bureau du commissaire aux traités est décrit avant de continuer avec la révision des éléments clés de l'approche incluant : (1) un système de gouvernement des premières nations à la grandeur de la province, (2) les programmes et services offerts aux premières nations, tant sur les réserves qu'à l'extérieur, (3) une stratégie tripartite (le Canada – la Saskatchewan – les Premières nations) sur le développement socio-économique et (4) l'amélioration des relations d'après les traités. Pour terminer, les prochaines étapes de ce processus sont discutées brièvement dans la conclusion.

INTRODUCTION

Innovative public policy is not new to Saskatchewan. Experiments in health-care policy in the Swift Current region of the province more than fifty years ago led to what we now know as the national medicare program. Developments are now taking place in Saskatchewan relating to First Nations that are every bit as bold and far-reaching as the founding of medicare. This chapter explores the “made in Saskatchewan” approach to improving federal–provincial–First Nations relations and focuses on several key elements of the

approach, including (1) a provincewide system of First Nations governance; (2) First Nations program and service delivery both on- and off-reserve; (3) a tripartite (Canada–Saskatchewan–First Nations) socio-economic development strategy; and (4) building on the treaty relationship. These matters are all subject to negotiations at this time, and it is too early to predict whether or not they will be successful. The cost of failure, as you will discover, could be extremely high.¹

The essay begins with a brief examination of the socio-economic disparity that Aboriginal people face in Saskatchewan. It then provides evidence of the linkage between “good governance” and socio-economic well-being. The “made in Saskatchewan” process is then described, including the Exploratory Treaty Table, the Common Table, and the Office of the Treaty Commissioner. This is followed by an analysis of the key subjects under negotiation, with a brief conclusion outlining the next steps in the process.

SETTING THE CONTEXT

The socio-economic disparity between Aboriginal and non-Aboriginal people in Saskatchewan has created a powder keg in terms of public policy. Unemployment among First Nations is five times that of the rest of Saskatchewan. Per capita income among First Nations is one-third that of the rest of Saskatchewan. Over two-thirds of persons incarcerated in Saskatchewan are Aboriginal (First Nation and Métis), though they form only 15 percent of the population. First Nations children are two to three times more likely to come from single-parent families than their non-First Nations counterparts, and they are sixteen times more likely to live in crowded conditions (greater than one person per room).² First Nations persons in Saskatchewan are in much poorer health as well. Infant mortality rates for the registered Indian population are 2.5 times the national average, while the incidence of tuberculosis is 25 times the national average.

About 30 percent of registered Indians over the age of fifteen have never worked in their lifetime, compared to 7 percent of the reference population of Saskatchewan. Almost one-third of the registered Indian population living on-reserve have less than a grade 9 education, compared with 12 percent for other Saskatchewan residents. The average annual income per capita for the registered Indian population on-reserve is \$5,452, compared with \$17,231 for the reference population in Saskatchewan. The situation in urban Saskatchewan is no better. The incidence of poverty among urban Aboriginal people is the highest of any population except non-permanent residents. Based on data from the 1996 census, Aboriginal people comprised 23 per cent of the poor population of Saskatoon, though they were only 8 percent of the total population. In Regina, the proportions were 24 percent and 7 percent, respectively (Lee 2000).

Other indicators tell a similar story. The Human Development Index (HDI) developed by the United Nations Development Programme attempts to calculate a single measure of well-being based upon life expectancy, education, and income. It is a familiar measure to Canadians, since Canada has consistently ranked near the top of the best countries in which to live. In 1999 the federal government conducted a study to determine how First Nations in Canada would fare in such a test. In 1994 Canada ranked first among states; in that same year the registered Indian population of Canada ranked forty-eighth (after Panama), while the registered Indian population of Saskatchewan ranked fifty-ninth (after Bahrain and just ahead of Fiji) (Beavon and Cooke 1999).

Demographic pressures in Saskatchewan will only make the situation worse. The First Nations population is young, 54 percent are under the age of 20 (compared with 30 percent of the reference population). The median age of the Saskatchewan First Nations population is seventeen years, compared with thirty-five years for the reference population. As this Saskatchewan First Nation “baby boom” approaches the labour market over the next few years and sees little chance for hope, the social costs could be enormous (Zuker 1999). The status quo is simply not sustainable.

GOOD GOVERNANCE AND SOCIO-ECONOMIC WELL-BEING

There is increasing evidence worldwide that socio-economic well-being is directly linked to “good governance.” It is worth quoting at length from the *Report of the Royal Commission on Aboriginal Peoples* on the attributes of good governance:

To be effective – to make things happen – any government must have three basic attributes: legitimacy, power and resources. Legitimacy refers to public confidence in and support for the government. Legitimacy depends on factors such as the way the structure of government was created, the manner in which leaders are chosen, and the extent to which the government advances public welfare and honours basic human rights. When a government has little legitimacy, leaders have to work against public apathy or resistance and expend more power and resources to get things done.

Power is the acknowledged legal capacity to act. It includes legislative competence (the authority to make laws), executive capacity to execute the laws and carry on public administration, and judicial jurisdiction to resolve disputes. The power of a government may arise from long-standing custom and practice or from more formal sources such as a written constitution, national legislation and court decisions ...

Resources consist of the physical means of acting – not only financial, economic and natural resources for security and future growth, but information and

technology as well as human resources in the form of skilled and healthy people. Resources are necessary to exercise governmental power and to satisfy the needs and expectations of citizens. (Canada, RCAP 1996, 163–4)

Good governance has also been the focus of the Harvard Project on American Indian Economic Development at the John F. Kennedy School of Government at Harvard University, which for over a decade has been studying why American Indian tribal governments succeed economically. Working with Indian tribes and national Indian organizations in the United States, the Harvard researchers have conducted comparative analyses of development efforts on selected reservations. More recently, the two founders of the Harvard Project, Professors Steven Cornell and Joseph Kalt, have been doing more work in Canada, including advising the parties to the “made in Saskatchewan” process.³

Based on this research, the Harvard researchers have found that a key to success is effective tribal governing structures that provide the following elements: stable institutions and policies; fair and effective dispute resolution; separation of politics from business management; competent bureaucracy; and cultural match. “Cultural match” is a term used to describe the relationship between the governing institutions and the prevailing ideas in the community about how authority should be organized and exercised (Cornell and Kalt 1992, 1–60). Cultural match must be high if citizens are to regard their governments as legitimate. To give an example of the importance of good governance, the Harvard Project found that the chances of being profitable rise 400 percent where tribal-run businesses are insulated from political interference in day-to-day operations.⁴

Similar findings are appearing in the international arena, as excerpts from the studies of many international organizations over the past few years attest. For example:

The World Bank believes that, for development to be sustained, a predictable and transparent framework of rules and institutions for the conduct of private and public business must exist. Good governance is epitomized by: predictable, open, and enlightened policy-making; a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs – all behaving under the rule of law. Participation is intrinsic to good governance. (World Bank 1996, 1)

Similarly,

The United Nations Development Program (UNPD) has been at the forefront of the growing international consensus that good governance and sustainable human development are indivisible. And we believe that developing the capacity

for good governance can be – and should be – the primary way to eliminate poverty. (UNDP 1997)

The attributes of bad governance, such as bribery and corruption, result in external aid – whatever the amount and intention – having little effect.

Translating this framework to the Saskatchewan setting, there is a strong relationship between the governance of First Nations and the socio-economic well-being of First Nations residents of Saskatchewan. Key to improving the lives of First Nations residents, therefore, is building the appropriate First Nations government structures and institutions. In negotiating an Agreement in Principle on governance, for example, the parties to the Saskatchewan process have agreed that all First Nations constitutions shall be consistent with the principles of good governance. These principles include legitimacy, accountability, transparency, responsibility, cultural appropriateness, and flexibility.⁵ I shall return to this theme after describing the “made in Saskatchewan” process.

THE “MADE IN SASKATCHEWAN” PROCESS

The “made in Saskatchewan” process is composed of two separate but complementary processes: the Exploratory Treaty Table process and the Common Table process. The Exploratory Treaty Table process is bilateral, involving Canada and the Federation of Saskatchewan Indians (representing seventy-four First Nations in Saskatchewan). It is one of a number of exploratory discussions on historic treaties which the minister of Indian affairs was mandated to undertake in 1995.⁶ The Office of the Treaty Commissioner (OTC), first created in 1989, successfully focused on resolving outstanding treaty land entitlements. Canada and the Federation of Saskatchewan Indian Nations (FSIN) renewed the OTC in 1996 in order to create an impartial and effective forum for advancing treaty discussions. Its mandate is to facilitate a common understanding between the FSIN and Canada on treaty rights and/or jurisdiction in the areas of child welfare, education, shelter, health, justice, treaty annuities, hunting, fishing, trapping and gathering, and lands and resources. The mandate of the OTC was renewed after its initial five-year term and was extended until 2005. The province of Saskatchewan is represented at the table by an observer, acknowledging the special treaty relationship between First Nations and Canada. Since the work of the Exploratory Treaty Table bears directly on the province, and since the provincial government’s cooperation is vital to implementing an improved relationship, provincial representatives attend most meetings and participate regularly (Saskatchewan, OTC 1998).

The OTC also has an important educative function vis-à-vis the Saskatchewan population at large. Working with the Saskatchewan Department of

Education, the OTC developed curricula for “Teaching Treaties in the Classroom,” which provide students from grades 7 to 12 with information about the numbered treaties in Saskatchewan and their contemporary implications. The OTC conducts in-service training for teachers and provides kits for the classroom. Another program is the Speakers’ Bureau, which sends both First Nations and non-First Nations speakers to communities, professional organizations, and service clubs to provide information on the treaties in Saskatchewan. These activities deliver an important message to the people of Saskatchewan – that everyone benefits from the treaties.

The objectives of the joint work plan of the Exploratory Treaty Table, as set out in 1996, provide a glimpse of the parties’ intentions. These objectives are to build on the forward-looking relationship that began with the signing of the treaties in Saskatchewan; to reach a better understanding of each other’s views of the treaties and of the results expected from the exploratory treaty discussions; and to explore the requirements and implications of treaty implementation based on the views of the two parties.

The most important work of the Exploratory Treaty Table to date is the *Statement of Treaty Issues: Treaties as a Bridge to the Future*, published in 1998, which describes the common understandings of the treaty relationship gained during the first phase of discussions. These common understandings have been endorsed by the chief of the FSIN and the minister of Indian affairs. The *Statement*, and subsequent reports on education, childcare, health, and housing provide a treaty context for the negotiations on governance and fiscal relations that are described below.

The Common Table process also began in 1996, when Canada, Saskatchewan, and the FSIN signed a protocol agreement to facilitate effective processes for negotiating and implementing First Nations governance in Saskatchewan, building on the existing treaty relationship. The purpose of the Common Table is to negotiate and implement self-government arrangements, discuss the interrelationship of jurisdictions and fiscal arrangements, and discuss treaty issues when they affect all three parties. A Fiscal Relations Table was established under the Common Table in 1997, and a Governance Table in 1998. Working groups were established in areas such as education and family and child services to help prepare for the negotiations. The tables have since been joined (2002) into a single Governance and Fiscal Relations Table.

One objective of the negotiations, as spelled out in the Framework Agreement on Governance and Fiscal Relations signed in 2000, is to develop effective and efficient governance structures that will allow for a legitimate, accountable, transparent, and culturally appropriate exercise of governance by First Nations that builds on the treaty relationship between Saskatchewan First Nations and Canada. A second objective is to develop a new fiscal relationship and appropriate funding mechanisms in support of First Nations governance, while a third objective is to identify principles that will allow for the evolution of harmonious intergovern-

mental relations. Other objectives include the identification of principles and procedures for the exercise of First Nations jurisdiction and authority; the recognition of First Nations jurisdiction and authority in agreed-upon areas in a way that reflects their values, traditions, and cultures; and the facilitation of a smooth transition from the *Indian Act* to a new system of governance by First Nations in Saskatchewan. Negotiations on this stage of a self-government and fiscal relations agreement were completed on 17 July 2003, when the chief negotiators initialled a bilateral Agreement in Principle and a trilateral Agreement in Principle.⁷

A PROVINCEWIDE SYSTEM OF FIRST NATIONS GOVERNANCE

A key element of the “made in Saskatchewan” approach is a provincewide system of First Nations governments, representing over 115,000 members and over 70 communities. First Nations in Saskatchewan have a long history of coming together to achieve collective goals. The FSIN, perhaps Canada’s most stable Aboriginal organization, recently celebrated its fiftieth year. Other provincewide First Nation institutions include the First Nation University (formerly the Indian Federated College) on the University of Regina campus, the Saskatchewan Indian Institute of Technology, the Saskatchewan Indian Cultural College and the Saskatchewan Indian Gaming Commission. The First Nations governance system builds on this history of collective action by proposing a single provincewide government, a series of about five regional governments (based on tribal areas or treaty areas), and more than seventy community First Nations governments. During the fall and winter of 2003, all three parties will be travelling to the province’s First Nations, tribal councils, and Treaty 4 areas, in addition to urban centres, to provide First Nations members with information on the Agreement in Principle and the tripartite Agreement in Principle.

In terms of governance arrangements, the plan is to have each of the First Nations communities in Saskatchewan enter into an agreement (perhaps in the form of an inter-First Nations treaty) that would see law-making powers delegated or aggregated to the provincewide First Nations government. In the areas of education and family and child services, for example, where negotiations have initially been focused, this would mean that there would be one law for all First Nations throughout Saskatchewan. In addition to achieving economies of scale, this would dramatically increase the possibility of meaningful, effective, and efficient governance. For example, First Nations throughout Saskatchewan would be able to develop a common, culturally relevant curriculum in education, while maintaining autonomy to manage their own schools at the community level.

Aggregation of jurisdiction is necessary for other reasons. Foremost among these is that First Nations laws must be harmonized with federal and provincial laws, and this is certainly easier to accomplish if there is only one First Nations law with which to harmonize, rather than the many that could result

from each of the more than seventy First Nations making laws in a particular field. Aggregating jurisdiction should also make it easier for First Nations to organize a professional public service and develop sound intergovernmental relations with the governments of Canada and Saskatchewan. The provincewide First Nations government would be responsible for intergovernmental relations, for negotiating fiscal arrangements, and for resolving disputes among the parties to the agreement. These arrangements would begin to normalize relations among the federal, provincial, and First Nations governments in Saskatchewan.

As I mentioned earlier, the Royal Commission on Aboriginal Peoples identified three key components of good governance: legitimacy, power, and resources. Legitimacy for a system of First Nations governments in Saskatchewan would be built on the principle of universal suffrage for all eligible First Nations members in Saskatchewan, both on- and off-reserve. The chief and vice-chiefs of the provincewide government would be democratically elected on this basis. The constitutions of the provincewide, regional, and community governments would be approved by referenda. A professional public service would be created. Fair and impartial dispute resolution and appeal procedures would be put in place for First Nations citizens who feel that they have been inappropriately treated by their governments. Conflict-of-interest guidelines would govern the actions of elected representatives and public servants.

Power, the second key element of good governance, would be addressed through self-government and fiscal relations agreements, and by companion legislation in Parliament and the Saskatchewan legislature, whereby the federal and provincial governments would acknowledge the exercise of First Nations jurisdiction. At this point in the negotiations, the agreement-in-principle stage, the chief negotiators of the three parties have initialled two intergovernmental agreements – a bilateral Canada-FSIN agreement and a trilateral Saskatchewan'-Canada-FSIN agreement. These agreements describe the jurisdiction to be exercised by First Nations in Saskatchewan and set out rules of paramouncy in the event of conflict.

Resources, the third element of good governance, would be tackled through a combination of measures. For the time being, federal transfers would continue to provide the major share of resources for First Nations governments. Over time, however, First Nations' own-source revenues, together with taxation agreements with other governments, would increase their self-reliance. Discussions are also underway among the three parties, on a parallel track, regarding a provincewide socio-economic strategy for First Nations.

The Harvard Project identified another key element of good governance for First Nations: cultural match. Chapter 5 of the Agreement in Principle states that all First Nations constitutions shall be consistent with the principles of good governance, including "cultural appropriateness, to develop governmental structures, institutions and programs and services that reflect the culture and priorities of the constituent group" (FSIN 2003).

OFF-RESERVE JURISDICTION AND AUTHORITY

A second key element of the “made in Saskatchewan” process is First Nations jurisdiction and authority off-reserve. First Nations in Saskatchewan wish to provide programs and services to their members both on- and off-reserve in certain areas. Let us continue with the education example. First Nations parents might wish to have their children study at First Nations schools, using the same curriculum, both on-and off-reserve. This could mean that, in urban settings, First Nations parents would have a choice of where to send their children – to public schools (whether non-denominational, Catholic or francophone) or to First Nations schools. Presumably, taxes would be paid through a checkoff to the appropriate school, and school boards of parents would oversee the administration of these schools. Any student – First Nations, Métis, or non-Aboriginal – would be free to attend a First Nations urban school. Such an arrangement would enable a First Nations child to transfer from reserve to city, or vice versa and between First Nations schools – all teaching the same curriculum. A provincewide First Nations school system could design a provincewide school curriculum, certify First Nations school-teachers, provide for regional First Nations school boards, and directly address the low high-school graduation rates of First Nations students.

Off-reserve jurisdiction and authority is closely linked to the aggregation of jurisdiction. Offering First Nations programs and services both on- and off-reserve in certain areas is only practical if First Nations have aggregated jurisdiction so that there is only one education law and system and the same curriculum is offered throughout Saskatchewan, both on- and off-reserve. Negotiations are now underway relating both to the possible financing of off-reserve programs and services and to the appropriate roles for First Nations, federal, and provincial governments.

A TRIPARTITE SOCIO-ECONOMIC DEVELOPMENT STRATEGY FOR FIRST NATIONS

A third key element to the “made in Saskatchewan” approach, which is in the early stages of discussion, is a trilateral (Canada–Saskatchewan–First Nation) socio-economic development strategy, linking good governance to concrete improvements in the lives of First Nations people. All three parties have been working – on a “without prejudice” basis and one that is consistent with the framework agreement – on how to address the gap in socio-economic conditions between First Nations people and other Saskatchewan residents. A business case has been built for a provincewide socio-economic strategy tied to a provincewide First Nations system of governance. One of the next steps is to build a business plan, outlining what the parties would do to address

existing problems and to turn the situation around. A related next step is to identify pilot projects that can be used either to demonstrate the effectiveness and efficiency of this approach or to build the First Nations' capacity to deliver programs and services across the province.

Discussions to date have been based on the working assumption that all three parties would be involved in the design, management, funding, and delivery of a socio-economic strategy. Canada already spends a great deal on First Nations people in Saskatchewan (approaching \$1 billion, compared with the total provincial expenditure budget for all residents of Saskatchewan of some \$6 billion), but without achieving the intended results. The determination of adequate resources would be based at least in part on the business plan that needs to be developed by the three parties. All three parties agree that a provincewide socio-economic development strategy should be measured against the results achieved. Early indicators of success would include a higher birth weight of babies and a reduced influence of fetal alcohol syndrome (FAS). Medium-term indicators would include increased graduation rates from high school, higher employment rates, and higher incomes.

First Nations in Saskatchewan need to continue developing governance structures to give effect to the principles of good governance. They must also take the lead in devising a clear vision and a strategic plan in cooperation with Canada and Saskatchewan. Among the lessons learned from past attempts at socio-economic development is that government programming is only part of the answer. It is most successful in addressing social issues, such as education, but in order to spur economic development, First Nations participation in the private sector must increase. There is both a challenge and an opportunity here. Over the next ten years, Saskatchewan will experience a severe labour shortage unless one of two situations develop: either there is a massive immigration of workers or First Nations begin to attain the education and skills needed in the modern workforce. Given the historical difficulty in attracting skilled workers to Saskatchewan and given the youthful population of First Nations, the latter situation seems to be the wiser course.

BUILDING ON THE TREATY RELATIONSHIP

Canada and the FSIN are committed to addressing any unresolved issues related to treaties through mutual discussion and decision, rather than through litigation. This provides a more stable political and economic environment in which to improve the lives of First Nations individuals and communities. The Exploratory Treaty Table provides the forum in which these discussions are held. The "made in Saskatchewan" approach is based on several common understandings of the treaty relationship that were achieved at the Exploratory Treaty Table and are contained in the *Statement of Treaty Issues: Treaties*

as a Bridge to the Future. These common understandings have been endorsed by the minister of Indian affairs and by the chief of the FSIN.

One common understanding has already been alluded to – that the treaty relationship is essentially political in nature, hence the parties expect to resolve differences through mutual discussion and decision, rather than through the courts (Saskatchewan, OTC 1998, 68). A second common understanding is that treaties were foundational agreements entered into for the purpose of providing the parties with the means of achieving survival and stability, anchored in the principle of mutual benefit (*ibid.*, 67). It is obvious that First Nations have not reaped the mutual benefit that was intended at the time of treaty making. A third common understanding is that treaties were to provide a means of livelihood for First Nations. In the changing economy of the prairie region at the time of historic treaty making, First Nations and the Crown both recognized that the former would need assistance to adapt to the new economy. The treaty provisions for agricultural machinery, oxen, carpenters' chests, fishing nets, and school houses were designed to provide First Nations with an alternative to their traditional economy and to help individuals and communities adjust to a new economy based on permanent settlements and agriculture. The treaties were to make it possible for them to have a continuing means of earning a livelihood (*ibid.*, 68). Today, First Nations people are not able to earn a living comparable to their non-Aboriginal counterparts in Saskatchewan, and addressing this issue is critical to the well-being of the Saskatchewan economy.

In all of these elements, the vision of the “made in Saskatchewan” process bears a distinct similarity to sentiments regarding the treaty relationship found in *Gathering Strength: Canada's Aboriginal Action Plan*, a key federal government policy document:

A vision of the future should build on recognition of the rights of Aboriginal peoples and on the treaty relationship. Beginning almost 300 years ago, treaties were signed between the British Crown and many First Nations living in what was to become Canada. These treaties between the Crown and First Nations are the basic building blocks in the creation of our country.

The treaties between Aboriginal people and the Crown were key vehicles for arranging the basis of the relationship between them ... The Government of Canada affirms that treaties, both historic and modern, will continue to be a key basis for the future relationship. (Canada, INAC 1997, 4)

CONCLUSION

The “made in Saskatchewan” approach to First Nations governance is one of several new and emerging approaches to Aboriginal governance in Canada. It attempts to address a number of issues often overlooked in other negotiations –

the foundation of the treaty relationship, the need to aggregate First Nations jurisdiction in order to provide for meaningful self-government, the provision of programs and services both on- and off-reserve, and the need to close the gap in socio-economic conditions between First Nations people and other Canadian citizens. These are issues that will need to be addressed if we are to rebuild the relationship between First Nations and other Canadians in terms of both intergovernmental and interpersonal relations.

The “made in Saskatchewan” approach may succeed, or it may fail. In order to succeed, it must secure the trust of individual First Nations before they will approve the aggregation of their law-making powers to a provincewide First Nations government. Trust is also essential between the governments of Canada and Saskatchewan so that they may agree on their respective roles and responsibilities – including financing – for off-reserve programming and services and for a socio-economic strategy. And it requires all three parties to acknowledge the foundational nature of the treaty relationship. To meet these objectives, all three parties will need to make accommodations in their existing approaches to First Nations governance.

A major hurdle was crossed when the chief negotiators from the three parties initialled the Agreement in Principle and the tripartite Agreement in Principle in July 2003. The next step is for all three parties to visit First Nations members throughout Saskatchewan, to inform them of the agreements in principle and to receive their feedback. The agreements in principle require that band council resolutions be passed to approve the agreements and to move to final agreement negotiations. Since there are seventy-four First Nations in Saskatchewan, the parties have agreed that “the support of a substantial number of Indian bands in reasonable geographic proximity is required” prior to signing the agreements in principle (FSIN 2003, chap. 21). If this condition is met, the agreements in principle will go to the Saskatchewan cabinet for approval and then to the federal cabinet for approval.

Several features of the “made in Saskatchewan” approach have contributed to its success – features not duplicated in many parts of Canada. These include a willing provincial government and a strong provincewide First Nations organization. But even with these strengths, success is not guaranteed. It is crystal clear that the cost of failure would be high. Let us hope that the will exists on all sides to succeed.

NOTES

- 1 Although the author is the federal representative at the Exploratory Treaty Table in Saskatchewan and chief federal negotiator at the Governance and Fiscal Relations Table, the views presented in this essay are his alone.

- 2 These data are from FSIN 1997.
- 3 Another example of recent Canadian work is Cornell, Jorgensen, and Kalt 2002.
- 4 Ibid., 32.
- 5 Article 5.6 of the Agreement in Principle, initialled by the chief negotiators on 17 July 2003, states:
All First Nations Constitutions shall be consistent with the following principles of good governance:
 - (a) legitimacy, to enhance public confidence in and support for the government, as reflected in the manner in which the structure of government is created, the manner in which leaders are chosen and the support and representation of constituents is assured, how people affected by government decisions are able to provide input and have access to the decision making process, and the extent to which the government advances public welfare and honours basic human rights;
 - (b) accountability, transparency and responsibility, to enhance responsiveness to and operation for the benefit of Members, as reflected in public policies that are readily understood by and available to the constituency, other segments of the population and other governments, and to which the constituency has provided input thus promoting the maintenance of integrity in government and public confidence in government leaders, officials and administrators;
 - (c) cultural appropriateness, to develop government structures, institutions and programs and services that reflect the culture and priorities of the group; and
 - (d) flexibility, to enable the ability to adapt over time in an orderly process, while providing equilibrium, reliability and predictability. (FSIN 2003)
- 6 The origins of this policy review are to be found in the federal Liberal Party's "Red Book" (LPC 1993). The Liberal Party made an election promise to "... seek advice of treaty First Nations on how to achieve a mutually acceptable process to interpret the treaties in contemporary terms, while giving full recognition to their original spirit and intent" (98).
- 7 The Agreement in Principle and tripartite Agreement in Principle can be found on the FSIN Web site (FSIN 2003).

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Co-Management and the Politics of
Aboriginal Consent to Resource Development:
*The Agreement Concerning a New Relationship
between Le Gouvernement du Québec and
the Crees of Québec (2002)*

Colin H. Scott

D'après une étude de cas sur l'Entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec (2002) et en tenant compte d'expériences comparables d'autres premières nations, ce travail examine les facteurs qui ont raffermi la prise de décision de la part des autochtones dans les accords de cogestion des ressources lors de la négociation de traités. Il y est soutenu que, dans de bonnes conditions, le droit à disposer de soi-même peut être rehaussé par «l'autonomie relationnelle» d'un traité fédéraliste. Les accords de cogestion comme instruments de traité fédéraliste doivent protéger certains pouvoirs (territoriaux et politiques) au nom de l'autogestion et du savoir des institutions autochtones; l'autogestion et le savoir des institutions autochtones doivent faire partie du même dialogue que celui de la gestion de l'État sans être subordonnées l'une à l'autre; et l'opinion de l'État doit être orchestrée de manière efficace ou de manière constructive tout en limitant son autorité en ce qui concerne les territoires et les institutions autochtones. Ce n'est pas seulement la conception des régimes de cogestion, c'est en fait le contexte des relations de pouvoir dans lequel ils sont négociés et maintenus qui détermine la réalisation des ces conditions. Un partenariat équitable entre les autochtones, les gouvernements provinciaux et le gouvernement fédéral doit s'appuyer sur une action politique soutenue de la part des autochtones, qui se base sur des sources de pouvoir complexes. De ce point de vue, il serait plus efficace que les gouvernements autochtones dirigent des organisations à l'échelle régionale et qu'ils maintiennent ainsi la plupart de leurs engagements juridictionnels. Sans cela, la connaissance autochtone, la tenure coutumière, et les pratiques de gestion des ressources sont facilement éclipsées et les accords de cogestion sont nettement biaisés et en faveur d'un état orthodoxe. Cependant,

quand les accords de cogestion sont efficaces, ils permettent d'entretenir une relation dans laquelle les gouvernements provinciaux et le gouvernement fédéral sont peu enclins à agir sans le consentement des autochtones.

INTRODUCTION

This essay is centrally concerned with the following question: In what circumstances and by what means do resource “co-management” regimes, beyond casting Aboriginal representatives in a merely advisory or consultative role vis-à-vis the state, facilitate real power sharing? This question concerns not just the administrative efficacy of resource and environmental management; it concerns the status of co-management as a vehicle for “treaty federalism” in the Canadian North (White 2002). Particular attention is devoted to what may be learned from the experience of the James Bay Crees of northern Québec, with some comparative discussion of other cases.¹ The Cree case is instructive, because Crees have worked with the co-management regime established under the original *James Bay and Northern Québec Agreement* (JBNQA) (Québec 1976) for more than twenty-five years. During that time, they have struggled to gain a stronger hand in the management of resources and development on their territory, and they have recently negotiated substantial amendments to the JBNQA in the form of the *Agreement Concerning a New Relationship between Le Gouvernement du Québec and the Crees of Québec* (the New Relationship Agreement) (Québec 2002).

A distinction must be made at the outset between co-management bodies that are embedded in, and derive much of their authority from, comprehensive claims agreements (modern “treaties”), and “stand alone” co-management bodies that have developed as ad hoc means of engaging and mediating “stakeholder” interests in the management of particular resources and habitats.² The former arise in contexts of jurisprudence and political negotiation wherein Aboriginal people enjoy rights that distinguish them from other stakeholder groups – including rights of title to and governance over lands and resources within their traditional territories.³ Co-management institutions established pursuant to comprehensive claims agreements, informed by a history of Supreme Court decisions and endowed with authority and permanence by virtue of their protection by the constitution, have greater potential for power sharing than stand-alone regimes.⁴ For this very reason, however, they may become sites of conflict, because state authorities are often prone to resist the fulfilment of this power-sharing potential. This category of co-management institutions is of central concern to the present discussion. To understand the significance of these institutions, they must be viewed within the broader context of nation-to-nation treaty negotiations.

As Usher observes, since 1975, with the signing of the JBNQA, “comprehensive claims agreements, or ‘land claims settlements,’ have created new management regimes for land, resources, and the environment across most of Canada’s North. These regimes create a permanent, institutionalized relationship between governments and representative Aboriginal bodies that is often referred to as ‘co-management.’ They guide activities on both public and Aboriginal lands, and they regulate hunting and fishing rights, throughout the claims settlement region” (Usher 1997a, s. 1.0).

While structures and powers of co-management boards vary from one agreement to another,

[t]he basic structure of co-management consists of boards or committees responsible for specific management areas such as wildlife, fisheries, impact screening and review, land use planning, and water management. Members are usually appointed in equal numbers by governments and beneficiary organisations. Geographically, the jurisdiction of these boards extends to all of the lands within the settlement area, whether in Aboriginal, Crown, or private tenure. The boards are technically advisory to the appropriate minister, and do not replace existing government agencies. They are intended to guide the overall direction of policy, and have a range of powers ... binding decisions, approvals, advice and research direction. (Usher 1997b,108)

In Usher’s view, however, co-management regimes do not result in self-determination or autonomy as such. While allocation and licensing are commonly delegated to boards or local harvester organizations, the boards’ role remains advisory, even if governments rarely reject their recommendations. Nevertheless, co-management “is much more than consultation or participation” (Usher 1997b, 119), because it is defined by negotiation rather than imposition, and it relies not just on the law of the state but on constitutionally protected agreements.

This assessment raises some important questions about what exactly we mean by “self-determination” and “autonomy” and how these values may be achieved in practice. Central to the idea of “treaty federalism” is the notion that what we might term “relational autonomy” through power sharing is a valid and practical basis for self-determination. Relational autonomy is premised upon mutual consent and cooperation, rather than separation and isolation.

Self-determination on this basis nevertheless demands that some space be preserved in which there is the option of survival for culturally unique institutions of “self-management”⁵ – even as these latter, through suitable co-management arrangements, have regular relations with “state management” (Feit 1988).

Co-management regimes generally have not received high marks for their accommodation of indigenous institutions. Usher (1997a, s. 4.2.3) observes

that “while it is the intent of most agreements to incorporate and utilize Aboriginal knowledge and systems of management ... none of the agreements specify how this shall actually be done or what the criteria or tests of implementation might be.” White (2002, 89) finds that one area in which success for existing co-management boards has been elusive is “the extent to which they bring Aboriginal cultures and worldviews to bear in decision-making.” In Nadasdy’s (1999, 1) even bleaker assessment, the controlling and selective way in which “traditional knowledge” has been integrated by scientists and resource managers in co-management settings has forced Aboriginal people “to express themselves in ways that conform to the institutions and practices of state management rather than to their own beliefs, values and practices,” the ultimate effect of which is to concentrate power in administrative centres rather than in Aboriginal communities. Aboriginal representatives may find that greater compromise is demanded of them than is demanded of government representatives, lest the legitimacy of the co-management process be undermined in the eyes of senior government bureaucrats who subscribe to the scientific paradigm (Kofinas, in press).⁶

The semantics of the terms “joint” or “co”-management of resources in the territorial homelands and waters of Aboriginal peoples suggest that First Nations’ jurisdictional rights are not subordinate to those of provincial and federal governments – nor are their proprietary rights subordinate to non-Aboriginal interests that have been provincially or federally licensed to conduct development activities in Aboriginal territories. Yet normally the power of co-management bodies to formulate, recommend, and/or review management policy has been subject to the final authority of the responsible provincial and federal ministers. Nevertheless, state-level authority may be strictly circumscribed by the terms of a treaty. For example, a provincial or federal minister may be required to accept and implement the recommendations of a co-management body (subject to these recommendations being consistent with the principle of conservation).⁷ Further, Aboriginal negotiators may succeed in having specific management principles, rules, and standards incorporated into the terms of a treaty, under which they will acquire constitutional protection. In summary, co-management regimes are binding frameworks to which state authorities, and their representatives on co-management bodies, must legally adhere.

Cree experience with the co-management regime established under the JBNQA shows that the capacity of the relationship to move beyond mere “consultation” of the indigenous party to genuine power sharing depends heavily on the circumstances of political action surrounding the creation and ongoing reinvention of co-management institutions. Improvements in the New Relationship Agreement compared with the original JBNQA have been hard fought. If power is now better shared, it is because power was won and not because it was happily conceded. The terms of the New Relationship Agreement were negotiated in the light of a twenty-five-year experience with co-management.

The principal vehicles for co-management established under the original JBNQA were a) the Hunting-Fishing-Trapping Coordinating Committee (HFTCC), with powers of policy review and recommendation concerning wildlife generally, and in some matters of supervision and regulation; and b) various committees and panels established for environmental assessment and review. The benefits and difficulties experienced by Crees in working with these processes have been the subject of a fairly extensive literature.⁸ It cannot be said that the overall verdict on these processes, on balance, has been positive. A few years prior to the signing of the New Relationship Agreement, Penn (1997, executive summary) commented that “the structures providing for participation in wildlife management and environmental protection have themselves so far proved cumbersome and ineffective ... Government policies, for public land administration, access, forest tenure, mineral exploration and especially hydro-electricity have all evolved substantially since 1975. These policy developments have taken place independently of and largely without reference to advisory structures in the Agreement, raising questions about the relevance or utility of these advisory bodies.”

Feit and Beaulieu (2001, 143), commenting on the experience in the forestry sector shortly before the New Relationship Agreement was struck, were similarly pessimistic:

[T]o date, neither the provisions of the JBNQA nor those for province-wide public participation in forestry decision-making have been effectively implemented. Indeed, the need for Cree involvement has been denied and subverted by statements and actions of senior government representatives ... Company initiatives have been concerned primarily with creating the appearance of consent (through the acceptance of payments and ongoing discussions) without negotiating effective protections. Each of these participatory initiatives has been shown to be more concerned with legitimating the existing decisions of governments and corporations than with creating effective participation for Cree or with changing environmental and social impacts on the ground.

As underlined by both of the foregoing analyses, developments in state management systems *external* to co-management arrangements can all too readily eclipse the role and authority of the latter. Alternatively, government initiatives have sometimes been vigorously pursued against Aboriginal interests *internal* to the co-management process itself, as with the imposition of a sport caribou hunt on terms unacceptable to the Aboriginal members of the HFTCC (Scott and Webber 2001).⁹ Thus, for co-management to advance Aboriginal self-determination effectively, it must do three things:

- 1 protect certain spaces (both territorial and political) for self-management by indigenous institutions and knowledge;

- 2 bring self-management institutions and knowledge into dialogue with state management;¹⁰ and
- 3 effectively and constructively orchestrate state inputs, while limiting state authority in relation to indigenous territories and institutions.

The tension between the principles of Aboriginal consent and pre-eminent state power seems intractable. On the one hand, in advocating the decolonization of indigenous peoples, it is difficult to escape the moral logic of their having primary or even exclusive decision-making powers within their legitimate territories. On the other hand, except for very circumscribed areas or specific activities not impinging on non-Aboriginal interests, such primacy seems to fly in the face of *realpolitik*. As Chief Justice Lamer concluded in the Supreme Court's *Delgamuukw* decision,¹¹ "let us face it, we are all here to stay" (decision as reproduced in Persky 1998, 122). Aboriginal self-determination, then, cannot be a matter of exclusively *self*-government jurisdictions or exclusively *self*-managed traditional lands, waters, and resources. But Lamer did set down legal principles with a view, seemingly, to a more equal partnership in the relationship between provincial and federal governments and First Nations that are still in full possession of Aboriginal title: "[T]he right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples, suggests that the fiduciary relationship between the Crown and Aboriginal peoples may be satisfied by the involvement of Aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation and, in most cases, the duty will be significantly deeper than mere consultation" (*ibid.*, 36).

Lamer CJ does not specify the circumstances in which the duty will run "significantly deeper than mere consultation," but consistent with his reasoning elsewhere in the judgment, these circumstances should include any provincial or federal infringement on Aboriginal title affecting the character and viability of the group's connection to its land. Significantly, Lamer stops just short of saying that Aboriginal *consent* is required in such circumstances. While it is difficult to conceive what lies "significantly deeper" than consultation, if not consent, the highest court remained unwilling to relinquish a position of ambiguity on the issue.

Where Aboriginal governments cannot have exclusive decision-making power for their territories, the moral and practical challenge that remains is to find means whereby both their ability to engage in decision making and their right to consent to decisions about resource development are not inferior to those of provincial and/or federal governments. Such parity can be advocated on grounds of justice and on the legal rights of Aboriginal title holders alone. And there is the additional argument that social peace is more likely to flow from relations based on mutual consent than on coercion and inequity. Social

peace on this basis will be especially attractive to state authorities when an Aboriginal group has sufficient political resources to vigorously oppose and seriously disrupt intrusive state agendas.

The Crees' success in this regard has been a major factor contributing to gains under the New Relationship Agreement. It appears to establish some new benchmarks for relations between a northern indigenous people and a provincial government. These include increased levels of revenue sharing with the indigenous inhabitants of the territory; the vision of robust involvement of Crees in the economic development of their region; recognition of Cree customary knowledge and authority at the level of extended family hunting territories; new status for these territories as management units in redefining state management practices; and the apparently bilateral attempt to transform an often bitterly adversarial relationship into one of cooperation between the Crees and Quebec.

Our analysis of these gains, and the processes that gave rise to them, concentrates on three themes. The first is that co-management, in the sense of equitable partnerships between Aboriginal, provincial, and federal and governments, depends on sustained political action, drawing on complex sources of power. As Pinkerton (1992, 339–40) observes, one of the conditions that facilitates successful co-management is “the use of multiple sources of power, such as courts, legislatures, public boards, and citizens’ initiatives at strategic times, creating a spill over effect from one to another.” First Nations operating at regional scales of organization have been best able to sustain effective legal and political action of this kind in precipitating negotiations and in concluding, defending, and renegotiating agreements with federal and provincial governments. They are big enough to command the necessary human and financial resources that would be beyond the means of a single community, and they have territories big enough to be viewed by provincial and federal governments as worth the investment in negotiating discrete administrative regimes. Yet they are still small enough to form relatively homogenous communities of interest and to bring nimble and concerted action to bear in achieving their goals.

The second theme, closely related to the first, is that co-management that is successful in these terms requires the backing of Aboriginal governments that are comprehensive with regard to their range of jurisdictional engagements. These governments advocate a combination of self-management and co-management regimes – governed by genuine consent – to apply across a full spectrum of land, water, and resource jurisdictions. Furthermore, these governments are constructing agendas for socio-economic development that depend heavily on a substantial share of resource development opportunities and revenues flowing to their communities, while simultaneously pressing for the reconfiguration of resource extractive activity more in line with the long-term sustainability of resource bases and viable communities within their traditional

territories. Recent negotiations with Aboriginal groups in the Northwest Territories over pipeline development and mining are important initiatives in this vein.¹²

The third theme is that Aboriginal jurisdictional latitude and political success are necessary to overcome the generally disappointing record of co-management regimes in giving true voice and effect to indigenous knowledge and customary management. It is sometimes assumed that when Aboriginal representative organizations are able to name an equal number of members to a co-management board or committee, this in itself will motivate a cultural hybridity of management knowledge and practice. It will not. More often, Aboriginal members on co-management boards have faced provincial and federal interlocutors who are ill equipped for the fundamental rethinking that would be necessary to accommodate indigenous epistemologies, tenure systems, and management practices. Yet these sorts of changes, surely, are at the very foundation of self-determination.

The foregoing themes have taken shape through a process of reflection on nearly three decades of Cree experience in trying to make co-management work, and on parallel experiences elsewhere. If the New Relationship Agreement is in part the fruition of these efforts, and if it represents some major advances in *design*, it must nevertheless be borne in mind that it is still too early to gauge its fulfilment in *implementation*. With this thought in mind, let us turn to a discussion of its specific features and some of the processes that gave rise to them.

THE "AGREEMENT CONCERNING A NEW RELATIONSHIP"

The preamble and "general provisions" of the agreement concluded in February 2002 between the Crees of Quebec and the Government of Quebec (Quebec 2002) speak of a nation-to-nation relationship of "cooperation, partnership and mutual respect" aimed at strengthening "political, economic and social relations." A global approach to enhanced Cree autonomy, responsibility, and participation in the sustainable and long-term economic development of the James Bay Territory is endorsed, one that embraces modernization while safeguarding the traditional way of life of the Crees. Quebec further undertakes to provide opportunities for the Crees to benefit from a stronger role in mining, forestry, and hydroelectricity through "partnerships, employment and contracts."

While the commitments of the parties under the *James Bay and Northern Québec Agreement* (JBNQA) are asserted to be the basis for the New Relationship Agreement, the latter in fact becomes a vehicle for addressing a number of issues unresolved by the former. For example, during the fifty-year term of the New Relationship Agreement, Quebec commits itself to supporting Cree community and economic development, an obligation undertaken but not spelled out in the 1975 agreement. More fundamentally, from Quebec's

perspective the New Relationship Agreement was aimed at unblocking hydroelectric development in the James Bay Territory; at clearing troublesome legal actions brought by the Crees, in particular over their grievance with the province's forestry management; and at remedying a relationship which over the years had become poisonously adversarial. These objectives responded to a number of important interests on both sides. Quebec had learned from Cree resistance to the Great Whale hydroelectric plan in the early 1990s that the Cree organization is capable of derailing major development plans. In the wake of shelving the Great Whale project in 1994, and having learned in the course of the referendum campaign on sovereignty in the mid-1990s that its posture towards indigenous nations was having an impact on international perceptions about the legitimacy of its own nationalist aspirations,¹³ the Parti Québécois government initiated a shift in the conventional rhetoric of northern development. New hydroelectric developments would not be entertained except with Cree cooperation and consent.

The Crees, for their part, were facing serious development dilemmas internally. Despite virtually full employment in the early 1980s, thanks largely to the rapid development of local and regional bureaucracy, social services, and community infrastructure associated with the implementation of the JBNQA, the Cree leadership had seen unemployment levels in their communities climb to around 30 percent by the early 1990s – a burden falling disproportionately on a rapidly expanding population of young adults (Scott 1992; also Craik, in press). Chronic political and legal struggles with Quebec over hydroelectricity, forestry, and other matters were humanly and financially draining.¹⁴ The opportunity to reach an agreement with Premier Landry's government – an agreement that involved a scaled-down and less environmentally destructive redesign of the original hydro engineers' plans, accompanied by much greater economic benefits for the Crees than heretofore offered – was attractive. Moreover, the declining popularity of the Parti Québécois meant the possibility of facing a new provincial government in the near future, one that might believe itself to have less at stake in achieving social peace through nation-to-nation agreement with the Crees.

A number of other factors help to explain why, at this particular moment, the two sides were willing to act more cooperatively. Quebec had decided to replace the multiwatershed Nottaway-Broadback-Rupert rivers megaproject with the more modest damming and northward diversion of the Rupert River (across the Eastmain watershed, which had already been heavily modified by previous hydroelectric works) into the existing La Grande hydroelectric complex – a decision that was attractive to Hydro-Québec, which was experiencing difficulties in maintaining sufficient water levels in the La Grande reservoirs. The diversion of the Rupert River, unlike the Nottaway-Broadbank-Rupert complex, did not fall within the infrastructure contemplated under the original JBNQA; hence it was a design modification that needed Cree approval. Quebec

could not impose it (as had been attempted with the Great Whale project), and the Crees were not pushed into an oppositional relationship.¹⁵

With the memory of the defeat of the Great Whale project still fresh, Quebec had first adopted the stratagem of negotiating directly with individual communities, rather than with the regional Grand Council of the Crees. But while the communities agreed to deal on a memorandum-of-understanding basis with Quebec on community infrastructure and other local projects, they refused to negotiate JBNQA-related issues (Craik, in press). Subscribing for the first time to a principle of “community consent” to development projects, Quebec attempted, with partial success, to initiate community-level dialogue and research in support of the Eastmain-Rupert River diversion.¹⁶ But the fact remained that the approval of the Grand Council, as signatory to the JBNQA, would be required for this engineering modification. And when the community of Waskaganish (Rupert House), which stood to endure the heaviest impacts, said “no” to the diversion proposal, Quebec was forced back into negotiating with the Grand Council to find a way through the impasse (Craik, in press). To establish these negotiations, broader regional concerns – such as forest clear-cutting, proliferating mining activity, Cree economic and social development, and revenue sharing from resource extraction in general – would have to be addressed.

Negotiations in October 2001 between small high-level teams of Grand Council and Quebec negotiators rendered an agreement in principle in a matter of a few weeks. The speed of these negotiations could partly be credited to their closed-door nature (and again, bilateral negotiations of this kind were possible because the Crees were not just another stakeholder but were in possession of a spectrum of litigable treaty rights and interests). The involvement of other interested parties – forest companies, mining companies, Hydro-Québec, environmentalists opposed to the damming of rivers and the clear-cutting of forests, etc. – would doubtless have protracted negotiations. But although Cree political strength owed a good deal to a history of alliances with environmentalists, the Grand Council was able to act alone when it was expedient to do so. Within Cree society, the agreement in principle attracted both support and opposition when presented in community consultations, prior to the finalized drafting in December 2001. But in a series of community referendums the final agreement was ratified by majorities of 70 percent of voters tallied regionally and 80 percent in the communities most directly affected by the Eastmain-Rupert project (Craik, in press).

RESOURCE MANAGEMENT MEASURES

The New Relationship Agreement explicitly addresses the economic sectors of forestry, hydroelectricity, and mining. While some common strategies are adopted across these sectors, each involves some unique features.

Forestry

Forestry management undergoes a major overhaul. Clear-cutting practices under Quebec's forest management regime had extensively damaged the hunting territories of Cree families in the southern third of the James Bay Territory in the quarter-century following implementation of the James Bay Agreement. Crees had no voice in forest policy making and regulation and had been unable to submit forestry operations to the environmental review procedures established under the JBNQA (see Penn 1997, s. 6) – procedures that the Crees had used to some effect in their opposition to the Great Whale hydro project. Litigation in the *Mario Lord* forestry case,¹⁷ undertaken by the Crees in July 1998 and discontinued under the terms of the 2002 agreement, was intended to remedy this state of affairs.

Section 22 of the original JBNQA, entitled "Environment and Future Development Below the 55th Parallel," established an environmental and social protection regime whose assessment and review procedures were to apply to large-scale forestry. The James Bay Advisory Committee on the Environment, which accords equal voting power to Cree and provincial or federal governments (according to the jurisdictional features of the issue at hand), had been established as the "preferential and official forum" in which laws and regulations relevant to environmental and social protection were to be assessed (Quebec 1976, para. 22.3.24). With respect to forestry, "major access roads built for extraction of forest products," "pulp and paper mills or other forestry plants," and "in general, any significant change in land use substantially affecting more than 25 square miles" (*ibid.*, s. 22, schedule 1.4) were "automatically subject to assessment." However, special provision was made allowing the Quebec Department of Lands and Forests (*ibid.*, para. 22.3.34) to approve actual forest management plans, subject only to making them available to the advisory committee for consideration and comment at least ninety days prior to approval. Forest cutting covered by these management plans was to be "exempt from the requirement for impact assessment" (*ibid.*, s. 22, schedule 2.i).

Cree grievances over both the inadequacy and non-fulfillment of these provisions were complicated by the coming into force of a new *Forest Act* in spring of 1987,¹⁸ which provided a major avenue for state management developments to bypass co-management structures. In the *Mario Lord* case,¹⁹ the Crees argued that subsequent to the implementation of JBNQA but prior to the *Forest Act*, forestry operations had taken place pursuant not to "management plans," but to mere "allocation plans," none of which were submitted to independent assessment and review under JBNQA section 22 provisions. Under the *Forest Act*, annual allocation plans were replaced with timber supply and forest management agreements, based on forest management plans prepared by the forest companies that entered into these agreements with Quebec. Five-

and twenty-five-year plans (but no annual plans) were to be made available for “public” examination forty-five days prior to approval, with the forest company obliged to “consult” only those members of “the public” who responded within twenty days. The Crees attacked the lack of provisions relating to Quebec’s section 22 obligations as an effort to short-circuit their special rights and as a breach of the JBNQA. They also argued that Cree land tenure, customary law, and hunting territory leadership were not taken into consideration either before or after implementation of the *Forest Act*.

In the 1990s, Quebec also implemented new policies for public participation, again with no special provision for Cree rights under the JBNQA. Under these policies, direct consultation by forest companies at the local community level implied that Quebec was passing off its duty of consultation to third parties. Some of the larger companies began to negotiate agreements with individual Cree hunting territory leaders and with local First Nation community administrations. As Feit and Beaulieu (2001) describe, this had a divisive effect within the communities. While some hunting territory leaders gained compensation for disruption to their land and felt that compensation agreements represented recognition of their authority, other community members were concerned that collective community rights in land, and Cree land rights in general, were being eroded and that the distribution of compensation was skewed. A degree of community consensus was re-established when community administrations found a new role in negotiating and ensuring fulfilment of agreements with the companies, on behalf of the hunting territory leaders, countering the piecemeal and ad hoc nature of the agreements. But major difficulties could not be resolved at either the hunting territory or the community level. Hunters wanted much larger portions of their territory excluded from cutting than the companies were willing to accept. Where companies did agree to temporary exclusions of land from cutting plans, these were subject to reconsideration in three to five years, whereas Cree hunters wanted excluded areas reconsidered only after cut areas had regenerated sufficiently to support hunting. Frustration over these issues, after failed attempts to engage the province in negotiations, led to the *Mario Lord* litigation (ibid.).

The Cree push for substantial reforms to forest management coincided with considerable public disillusionment with the deterioration of forest resources and habitat under provincial government management (Desjardins and Monderie 1999). The Crees’ hand in negotiations, and in the preceding litigation, was doubtless strengthened by the fact that they could present themselves as plausible champions of wider public values and interests in protecting forest, a posture lent credibility by their alliance with environmentalists.²⁰ As it had done to such effect during their opposition to the Great Whale hydroelectric project, the Grand Council of the Crees also began gearing up for a campaign in the United States, seeking the support of legislators, major buyers of forest resources, and human rights and environmental activists. These

sources of power, together with legal action and lobbying at home, contributed to Quebec's motivation to negotiate a resolution to the impasse.

The New Relationship Agreement undertakes to better adapt forestry management practices to Cree traditional forest-based activities, to incorporate the principle of sustainable development, and to provide for "participation, in the form of consultation, by the James Bay Crees in the various forest activities operations planning and management processes" (Quebec 2002, para. 3.1). It established the Cree-Québec Forestry Board, with five members appointed by the Crees and five by Quebec. An eleventh member, the chair, is appointed by Quebec, normally with Cree consent, but if three successive candidates are rejected by the Crees, Quebec may appoint the chair,²¹ whose term is limited to three years except by mutual agreement of the parties. Board resolutions are by majority vote. The board's function is to "monitor, analyze and assess" implementation of measures under the agreement, to recommend changes as appropriate, and in general to advise the Quebec minister responsible on laws, policies, and regulations concerning forest management. The board will review implementation measures for the joint working groups (also established by the agreement), in connection with forest management plans for the James Bay Territory.

The joint working groups – established in each Cree community affected by commercial forestry – comprise two members appointed by the community and two members appointed by the *Ministre des Ressources naturelles*. The working groups may submit unanimous or dissenting positions to the Forestry Board and to the minister. The working groups are intended to ensure a reciprocal flow of local knowledge and technical information between the community and provincial offices, to resolve conflicts, and to devise measures that give effect on the ground to measures adopted under the agreement.

While both the Forestry Board and the working groups are consultative in the sense that the final decision-making authority is reserved for the minister, procedures are specified that are meant to maximize ministerial accountability:

The *Ministre des Ressources naturelles* shall consider the comments and views of the Cree-Québec Forestry Board and shall provide information about his position or, as the case may be, about the main reasons justifying his decision. (ibid., para. 3.31)

Similarly:

In all cases in which the *Ministre des Ressources naturelles* receives recommendations from the joint working groups, he must take into consideration the recommendations of the joint working groups, of their members and of the conciliator appointed pursuant to Schedule C-4, he must explain his position and must inform the joint working groups of his reasons for not accepting the recommendations or corrections sought, as the case may be. (ibid., para 3.42)

While the co-management bodies themselves are consultative, by spelling out forest management procedures and standards in the agreement, these standards acquire the force of treaty rights. Forestry management units are to be harmonized with Cree hunting territory boundaries, putting decision makers in a better position to regulate the impact of forestry on Cree socioterritorial organization. These new forestry management units are to comprise groupings of three to seven contiguous Cree hunting territories. Sites of special ecological, cultural, and economic significance to hunters, not normally comprising more than 1 percent of each hunting territory, will be altogether off-limits to forestry except with permission of the Cree hunting territory leader (or trapline "tallyman"; *ibid.*, para. 3.9). A further 25 percent of each hunting territory will be designated areas of "special wildlife interest," "under the direct responsibility of the tallyman," these being areas that are especially bioproductive or intensively used by Crees. Within these areas, "forest management activities will be planned with the priority of maintaining and improving a diversity of ecoforest stands, in terms of plant species, age classes and spatial distribution" (*ibid.*, para. 3.10). Mosaic cutting must be applied in these areas, unless better techniques are developed, from the standpoint of wildlife management. Residual blocks must be interconnected and are to be planned in cooperation with the tallyman. Fifty percent of residual forest must be at least seven metres in height, 10 percent must be at least ninety years old, and rates of cutting are subject to declining limits as the percentage of disturbed hunting territory increases.

Over the whole of each Cree hunting territory, at least 30 percent of the productive forestry area must be in stands averaging more than seven metres in height. Mosaic cutting with "protection of regeneration and soils" must become the predominant harvesting method, and size limits are imposed on blocks cut. Logging is not permitted in a hunting territory that has had more than 40 percent of its area cut or burned in the last twenty years, and again, rates of cutting are subject to declining limits as the percentage of disturbed hunting territory increases. Silviculture techniques are to foster the maintenance of diverse habitats and mixed stands. Protective strips of uncut forest and low-impact methods in cut areas adjacent to these strips are to be maintained along the margins of lakes and rivers (*ibid.*, paras. 3.11, 3.12). Measures are also specified for limiting the proliferation of roads, aiming in part to limit the influx of recreational hunters and fishermen and to reduce poaching (*ibid.*, para. 3.13).

Available information makes it difficult to judge the likely impact of these measures from the standpoint of either ecological sustainability or the sustainability of Cree hunting. One fears that percentage designations for various categories excluded from cutting may be as much the product of political compromise as forestry science or local knowledge. When hunters in the 1990s were attempting to negotiate directly with forestry companies (Feit and Beaulieu 2001, 141), they indicated that they needed anything from 10 to 40

percent of their territories to be excluded from cutting, and their primary considerations, according to Feit (personal communication) were how much moose yard and shoreline/riverine beaver habitat needed to be protected to maintain hunting.²² Hunters have more recently expressed disappointment that under the New Relationship Agreement, cutting (albeit at restricted intensity) is still permitted in the 25 percent of each hunting territory designated as areas of special wildlife interest. One can say with confidence only that, given the state to which many Cree hunting territories have been reduced under conventional forestry practices, the standards and measures specified in the new agreement are a comparative improvement.²³

Hydroelectricity and Mining

Under the New Relationship Agreement the Crees agree not to oppose a project known as EM-1, accepted in 1975 as a possible extension of the La Grande complex. Furthermore, subject to assessment and review under the environmental regime set forth in the original JBNQA, the Crees agree to a new project known as the Eastmain 1-A/Rupert Project (a.k.a. the Eastmain-Rupert diversion, *supra*). The latter project represents a significant redesign of hydroelectric engineering plans, entailing as it does the “definitive abandonment” (*ibid.*, para. 4.18) of the Nottaway-Broadback-Rupert complex – a much larger project originally planned by Hydro-Québec as one of three major phases of James Bay development that would have dammed and flooded or diverted every major river draining into eastern James Bay and Hudson Bay. The revised Eastmain 1-A/Rupert Project involves the flooding of less than one-tenth the area that would have been flooded by the Nottaway-Broadback-Rupert complex.²⁴

Hydroelectric and mineral development projects continue to be subject to the section 22 environmental and social protection regime stipulated in the JBNQA (Quebec 2002, paras. 4.1 and 5.1). Cree and Inuit involvement in the review bodies and procedures of this regime already constituted a significant joint management role in the assessment of hydro projects and mines, a role that had been denied them in the context of forestry prior to the New Relationship Agreement. One arena for Cree resistance to the Great Whale hydroelectric project, referred to earlier, was the JBNQA environmental and social protection regime. It has sometimes been suggested that the politically polarized use of the regime by Quebec and the Crees in that dispute was an abuse of “co-management” properly speaking. But it is also the case that conflicting interests are at the root of the need for co-management power sharing, and it is not necessarily a perverse development or a sign of failure when political blows are exchanged via co-management bodies and processes. On the contrary, when conflicts of this kind lead to regularized and more stable acceptance of the need to proceed by agreement, the long-term consequences of conflict may be positive.²⁵

Economic Development Measures

Under the New Relationship Agreement, Quebec undertakes to promote opportunities for Crees through employment and contracts in forestry, hydroelectric, and mining activities.²⁶ Cree involvement in forestry joint venture partnerships will be promoted, and in support of the Crees' own forestry enterprises "an annual volume of three hundred fifty thousand (350,000) cubic metres of timber volume within the limits of the commercial forest" will be reserved for the Crees" (*ibid.*, para. 3.55). Quebec, through its public corporations, undertakes to encourage joint ventures and partnerships with Cree enterprises in mineral exploration, tourism, transportation, and regional infrastructure maintenance. Furthermore, Quebec will fund a new Mineral Exploration Board (comprised mainly of Cree members) that will support the development of Cree mineral exploration enterprises.

Another major element of the new agreement is a cash component with a nominal value of roughly \$3.5 billion, to be paid by Quebec to the Crees over the fifty-year life of the agreement. From the year 2005 forward, the greater of a base value of \$70 million annually or this value indexed to "the evolution of the value of hydroelectric production, mining exploitation production and forestry harvest production in the Territory" (*ibid.*, para. 7.4) will be paid.²⁷ While this amount is rationalized in part as the fulfilment of outstanding commitments by Quebec to contribute to community and economic development of Cree communities and the Cree region, it is also clearly a form of revenue sharing from resource extractive industries. This cash component is an order of magnitude greater than the compensation agreed to under the original JBNQA (although paid out over twice as many years), in exchange for Cree acceptance of a hydro project that will yield only a fraction of the generating potential of the original La Grande complex. Further, this is not a "final" settlement. It discharges Quebec's specified obligations under the JBNQA and in relation to the New Relationship Agreement only for the fifty-year term (1 April 2002 to 31 March 2052) of the new agreement.

Monies will be paid to the Cree Regional Authority, or its designated limited partnership or trust on behalf of the Crees, and may be allocated or distributed "to any Cree Enterprise, any Cree Band or to any trust, foundation or fund whose beneficiaries include Crees or Cree Bands or Cree Enterprises or any combination thereof" (*ibid.*, para. 7.22). The monies will be devoted in part to supporting the activities of a newly established Cree Development Corporation (CDC). Its design includes an eleven-member board, comprising five Cree appointees, five Quebec appointees, and a chairperson "appointed among the Crees by the Cree Regional Authority after consultation with Québec ... in order to attempt to appoint a Chairperson who is mutually acceptable" (*ibid.*, para. 8.6). Cree members, including the chair, are to have two votes each; Quebec members one vote each. The general mandate of the CDC is to

promote opportunities and expertise among Crees for economic development, through job creation, enterprise development, and partnership initiatives with non-Cree public and private enterprises. Investment, training, and the provision of financial services all fall within the mandate.

DISCUSSION AND COMPARISON

“Senior” governments, of course, are normally loath to reopen treaties, so it is significant that Quebec has done so in this case. The New Relationship Agreement tackled two major items of unfinished business. First, it extended to forestry management an improved version of the kind of participation that Crees already exercised under the original JBNQA. Forestry was an activity that Crees had found themselves unable to influence through either the environmental protection regime or the Hunting-Fishing-Trapping Coordinating Committee (HFTCC) under the JBNQA. The newly added co-management bodies may remedy the contradiction, from the Crees’ point of view, of having a role in managing wildlife but no effective role in managing forest wildlife habitat. Although the new bodies remain consultative in nature – they can formulate or recommend policy only subject to ministerial approval – they oversee agreed-upon management standards and procedures that are incorporated as amendments to the JBNQA, and as such they are the expression of constitutionally protected Aboriginal and treaty rights. This strategy is commonly found in comprehensive claims agreements elsewhere in Canada, both in the provinces and in the northern territories. But arguably the Crees’ New Relationship Agreement – through detailed specification of allowable forestry practices, adaptation to the indigenous tenure system, and inputs of knowledge by traditional authorities – has taken this strategy further than usual. This may render the new Forestry Board and working groups less vulnerable to internal capture by provincial agendas than was the case with the HFTCC over caribou sport hunting, for example.

Second, the Crees appear to have been successful in getting a provincial government to acknowledge the need for, and workability of, Aboriginal consent to megaproject development, along with agreement to a more substantial sharing of revenues from resource development on Aboriginal territory. Provincial governments have normally resisted the idea of revenue sharing as threatening the doctrine of Crown lands as the common property of the general public. However, revenue sharing is preferable to having development blocked or subjected to costly uncertainties.

In summing up the factors that made the Crees’ achievements possible under the New Relationship Agreement, we may return to the three themes set forth in the introductory section of this essay. The reopening of the JBNQA was possible because the Crees had developed a strong regional political

organization and over time have made use of a range of political resources – not least, the original JBNQA and its provisions (both defined and open-ended), but also the Crees' history of mobilizing environmentalist, human rights, and other allies, whose support through domestic and international networks and popular media helped to deliver a measure of power out of proportion to Cree numbers in earlier conflicts. Hence co-management, as an equitable partnership with the province, is an achievement that has required sustained political action, drawing on complex sources of power (the first theme).

Regional and Cree government structures are relatively comprehensive with regard to their range of jurisdictional engagements (wildlife management, environmental impact assessment, economic development), and this has bolstered Cree capacity in pressing for a broad-spectrum partnership with the province in managing lands, waters, resources, and resource-based development (the second theme). This has promoted the technological and political redesign of resource extractive activity to bring it closer in line with the long-term sustainability of resource bases from the standpoint of Cree communities. Without this jurisdictional scope, Crees could not have parlayed Hydro-Québec's interest in the Eastmain-Rupert diversion into a new agreement addressing co-management and revenue sharing across the gamut of industrial resource sectors.

The Crees' jurisdictional latitude and political success are enlarging the potential of co-management regimes to give true voice and effect to customary tenure and indigenous knowledge (the third theme). The terms of the New Relationship Agreement require close consultation with each traditional hunting territory custodian in devising forest management plans. The bureaucratic routines required by the wildlife management and environmental assessment bodies established under the original JBNQA were less tied in this way to the exchange of information with local experts. The original JBNQA reinforced a measure of "self-management" in its recognition of the status of Cree hunting territories ("traplines") and the authority of territory custodians ("tallymen"), bolstered through a program of income support for hunting families (Scott and Feit 1992). But state management of forests largely ignored these aspects of tenure and authority, rendering them moot when habitat destruction or extensive intrusions by sport hunters along hydro and forestry roads overwhelmed local management processes. Stronger roles for customary tenure and indigenous knowledge in forestry co-management reform under the New Relationship Agreement highlight the interdependence of self-management and co-management.

Comparison with co-management experience in other contexts of Canadian "treaty federalism" yields a number of illuminating parallels and contrasts. I mention just a few here. The case of Nunavut differs most significantly from that of the James Bay Crees because of the absence of competing provincial jurisdiction, with the Inuit of Nunavut forming a political majority within a

quasi-provincial framework of territorial “public government.” The federal government remains the key interlocutor in the co-management relationship, “the only significant provincial power not yet devolved to the territories [being] ownership of land and non-renewable natural resources” (White 2002, 97).

In the Nunavut Final Agreement concluded in April 1992 (Canada 1993), a key objective of the Inuit negotiators was to improve the existing regime for land, sea, and resource management. Five institutional bodies were established: the Nunavut Wildlife Management Board, the Surface Rights Tribunal, the Nunavut Impact Review Board, the Nunavut Planning Commission, and the Nunavut Review Board. Regional land use plans are to provide the basis for decision making with regard to land and water use. As at James Bay, these co-management institutions apply throughout the traditional territory of the Aboriginal signatories, providing for Inuit participation in the governance of areas and resources not necessarily included in their collective “fee simple” property endowments, as also defined in the claims agreement. As at James Bay, the co-management bodies are consultative in nature – they may have a strong role in planning and recommending policy, but this is subject to final approval of the responsible minister. As with the JBNQA, details of the purposes, mandates, and decision-making procedures of the bodies are spelled out by agreement, lending them a weight and permanence that goes beyond mere consultation. The appointees of Inuit representative organizations to co-management boards and committees are generally matched in number by federal and territorial government appointees. However, the political majority status of Inuit in the new territory of Nunavut, coupled with jurisdictional devolution from the federal government, confers something of an advantage compared with the position of Crees and others in the provincial north. In the Nunavut context, Inuit are represented both through Inuit beneficiary organizations of the Nunavut Final Agreement and through the elected territorial government. Hence, the ratio of Inuit representation on co-management bodies is typically enhanced, since both the beneficiary organizations and the territorial government are likely to appoint Inuit individuals to these bodies. Further, because the constituencies of the territorial government and the beneficiary organizations overlap quite substantially, there is perhaps less danger that they will operate at cross-purposes in co-management deliberations.

If the Nisga’a Final Agreement (British Columbia 1998) is any indication, co-management institutions will continue to figure as central elements in comprehensive claims agreements in the provincial north; but the approach to balancing self-management and co-management may differ from that taken in the Cree agreements. The Nisga’a Lisims Government makes laws to administer the Nisga’a Nation’s rights and obligations regarding aquatic resources, provided that Nisga’a Lisims laws are consistent with the Nisga’a Agreement, a separate trilateral Harvest Agreement (with a twenty-five-year term), and Nisga’a annual fishing plans. This self-management is accompanied by a co-

management dimension. A Joint Fisheries Management Committee makes recommendations to the minister and to the Nisga'a Lisims Government in all matters relevant to the management of fish and aquatic plants throughout the Nass area. The Nisga'a, the provincial, and the federal government each appoints two members to the committee. Recommendations are preferably by consensus, but in the event of disagreement the parties submit separate recommendations. Similarly, in regard to the management of wildlife and migratory birds, the Nisga'a Lisims Government makes laws regarding the Nisga'a Nation's rights and obligations, consistent with the terms of the agreement and with annual management plans. At the same time, a joint management wildlife committee, consisting of equal numbers of Nisga'a- and British Columbia-appointed members (to a maximum of four per party) plus one federally-appointed member, submits recommendations to the provincial or federal minister.

The Nisga'a Agreement also recognizes the authority of the Nisga'a Lisims Government for the environmental assessment of projects and environmental protection on Nisga'a lands (roughly 2000 km², as defined in the agreement, held in collective fee simple), but with provincial and federal laws prevailing in the event of any conflict with Nisga'a laws. Also provided for is Nisga'a-governed management of timber and non-timber resources on Nisga'a lands, provided that Nisga'a standards meet or exceed those of the province.

The Nisga'a Agreement, then, places emphasis on self-regulation of Nisga'a resource use throughout the Nass area, within the terms of the agreement, and on a more complete form of self-government jurisdiction over Nisga'a lands held in collective fee simple. It may be noted that these lands are several times larger than Cree collective fee simple (category 1) lands. But in addition to category 1 lands, Crees have category 2 lands (roughly 30 percent of their traditional territory) in which they have exclusive rights to traditional subsistence resources. They also have certain preferential and exclusive rights to subsistence resources in category 3 lands, which more closely approximate provincial Crown lands in the conventional sense, and which comprise the balance of their traditional territory. Under the terms of the JBNQA (Quebec 1976), Crees were left to self-manage their subsistence harvesting and commercial trapping through the indigenous institutions of family hunting territories and territory stewards, subject only to intervention by the minister should this be needed in the interest of conservation. Conservation itself was defined to include maintenance of the Cree hunting way of life.

In summary, through the combined effects of the original JBNQA and the New Relationship Agreement, Crees appear to be in a position to exert more control over forest management, environmental assessment, and environmental regulation on category 2 and 3 lands than Nisga'a are able to do outside their fee-simple lands. The different approaches reflect, in part, different histories and patterns of non-Aboriginal settlement and intrusion on the Aboriginal

territories in question, as well as the changing state of the law in the more than twenty years separating the signing of their respective comprehensive claims agreements. A considerably longer period of post-agreement political action, in the Cree case, is also a factor. Activism may, in time, favour increasing Nisga'a control throughout their traditional territory.

Another British Columbia First Nation that has yet to reach a comprehensive claims agreement with federal and provincial governments – Nuu-chah-nulth from the west coast of Vancouver Island – provides an excellent example of the grounding of genuine co-management in effective political action. Nuu-chah-nulth, like the Crees, have developed regional governmental organizations that have been proactive in addressing extensive resource-extractive actions by non-Aboriginals, on behalf of communities with a strong attachment to traditional lands and waters. But they deal with a much larger resident non-Aboriginal population and with a greater diversity of competitors for local resources – forestry companies and unions, commercial fisheries, salmon and shellfish farming, tourism and recreational enterprises, to name the major ones. Although Nuu-chah-nulth are at a relatively advanced stage in comprehensive claim negotiations with British Columbia and Canada, agreement has so far eluded the parties. Nevertheless, Nuu-chah-nulth accomplished something quite extraordinary in the interim: co-management arrangements that require their *de facto* consent to development decisions in their region.

In a mode reminiscent of the Cree campaign against the Great Whale hydroelectric project in the early 1990s, and at about the same time, Nuu-chah-nulth parlayed political capital from local and international protests, involving a combination of environmental and human rights concerns over Clayoquot Sound, into the 1994 Interim Measures Agreement and its extension, the 1996 Interim Measures Extension Agreement (see Goetze 1998). The Interim Measures Agreement established the Central Region Board (CRB), a co-management body

composed of one representative of each of the five Central Region Nuu-chah-nulth tribes and an equal number of provincial appointees, positions held by members of local communities. The provincial appointees also happen to represent, whether through direct affiliation or elected office, most of the key local non-Native groups with a stake in the management of the Sound's resources; representatives of the municipalities of Tofino, Ucluelet, and the District of Port Alberni as well as a long-time environmentalist sit on the Board. However, the Board is intended not to represent the special interest groups of the Sound, but to ensure that the broad interests of the communities and the province are considered in the decision-making process. It functions as a linking mechanism between First Nations, local communities and the Province. (Goetze 1998, 18)

The CRB, then, departs from the bipartite indigenous/"senior" government model typical of comprehensive claims settlements; its diversity of member

interests is more in the nature of a multistakeholder body. Some interesting features result from the combination of this diversity and from the political sensitivities of Clayoquot Sound. First, the CRB has opted to make decisions by consensus, and up to the time of Goetze's research it had managed all decisions on this basis. Second, should a vote ever become necessary, there is a "double majority" rule; both a majority of the board as a whole and a majority of Nuu-chah-nulth members on the board are required to carry a decision – effectively a veto for Nuu-chah-nulth. Third, the CRB has direct access to cabinet: "Though the provincial cabinet may overturn CRB decisions, it may only do so if either the Board or the ministry involved has explicitly requested it review a particular decision. If a reversal occurs, the Board could assemble the Central Region Resource Council (CRRC), composed of Nuu-chah-nulth Hereditary Chiefs and Cabinet ministers, to conduct a public inquiry into the reversal and the dispute leading to it. Given the inherent volatility of resource issues in Clayoquot Sound this is a situation the provincial government would rather avoid" (Goetze 1998, 19). The Interim Measures Agreement, though it lacks the constitutional protection of a finished comprehensive claims agreement, has achieved a measure of genuine power sharing. This it owes in part to the legal authority of Aboriginal title. But it is also anchored in a demonstration by Nuu-chah-nulth of their political ability to interrupt unwanted development.

All of the aforementioned cases illustrate the advantages of regional-scale political action and of elaborating co-management in more comprehensive negotiations of Aboriginal title through treaty making. These advantages are being realized elsewhere in the country, even in areas covered by older treaties where it has been difficult to engage federal and provincial governments in comprehensive negotiations. A recent case in point is the strategy of the Atlantic Policy Conference of Mi'kmaq/Maliseet/Passamaquoddy Chiefs in regard to the management of fisheries and other natural resources (Atlantic Policy Conference Secretariat 2003a, 2003b). In the wake of the *Thomas Peter Paul*²⁸ and *Marshall*²⁹ decisions, which recognized treaty bases for Native commercial forestry and fisheries rights, respectively (see Coates 2000), the piecemeal negotiation of dozens of forestry and fisheries interim and longer-term agreements have not produced strong outcomes in regard to Native involvement in resource management. The acceptance of these agreements has been highly variable from community to community; indeed, they have proved deeply contentious and divisive in several instances. The Department of Fisheries and Oceans (DFO) represents its interim and longer-term agreements as fostering not only improved First Nations fishery "access" and "capacity" building but also "development of opportunities for co-management of the fishery resource" (Fisheries and Oceans Canada 2003). DFO acknowledges Indian and Northern Affairs Canada's negotiation of Aboriginal and treaty rights to land, resources, and self-government as "complementary" to its own process, yet quite implausibly it states that "an

agreement reached with one Department does not affect negotiations with the other” (ibid.). The Atlantic Policy Conference, for its part, is challenging the DFO’s handling of commercial fishing as a narrowly sectoral treaty right, and it is contesting DFO’s defence of its pre-eminence in fishery regulation, by reframing the Aboriginal role in co-management as a function of inherent self-determination rights, flowing from both Aboriginal title and treaty rights.³⁰ It is entirely conceivable that in coming years these Atlantic peoples will succeed in developing a more regionally integrated process of comprehensive negotiations.

CONCLUSION

In practice, the power of Aboriginal partners in co-management institutions is highly variable. In some instances (as in Nunavut) co-management bodies become *de facto* centres of resource policy and management, with ministerial “override” a rarely exercised, if still theoretical possibility. In other instances (as at James Bay over the years) their influence has been more regularly curtailed by the conflicting agendas of provincial and federal ministries. Cooperation and partnership are early casualties when the Aboriginal partner must resort to protracted litigation and political action on multiple fronts to have treaty rights enforced. This is the exhausting circuit that was travelled by the Crees with Quebec before undertaking the most recent steps towards a “new relationship.”

It is too early to predict how enduring this relationship may be. In both the Cree and Nuu-chah-nulth cases, real power sharing was achieved only after the Aboriginal party succeeded in demonstrating that the political and economic costs to the provincial and/or federal governments, and their constituencies, of not gaining Aboriginal consent would be high. The conflicts at Burnt Church and elsewhere on the Atlantic Coast may lead to a similar conclusion. Multipronged oppositional strategies, including direct action, litigation, domestic and international public relations campaigns, and coalition building are needed from time to time to focus provincial and federal government leaders on the benefits of proceeding via agreement. The cumulative impact of episodes of conflict and resolution can bring these levels of government to a more routine recognition of the pragmatic advantage of policies premised on Aboriginal consent.

Several factors to which other analysts (Pinkerton 1989, 27; Usher 1997b, 112; Kofinas, in press) have attributed success in implementing and developing co-management seem to apply in the case of the Crees’ “new relationship” with Quebec:

- The mandate, rationale, and operation of co-management structures have been reached through a process of negotiation.
- These claims-based arrangements are legally formalized and permanent.

- There is provision for balancing the institutional legitimacy of co-management bodies with that of local authority systems.
- The Aboriginal members of co-management boards are appointed by and accountable to the Aboriginal party to the agreement – they are not just “stakeholders” or “users” of resources.
- There is a return to the communities in the form of a share of wealth generated by resource use and management decisions.
- Mechanisms for resource conservation and enhancement support the continuity and enhancement of a cultural order.
- The Aboriginal party enjoys external support, both knowledge based (e.g., university researchers) and political (e.g., public advocacy organizations).
- There is a mechanism for conflict resolution.

On these grounds, there is some room for optimism. The better power balance in relations between the parties should yield greater cooperation internally to existing and new co-management bodies. The inclusion of staged and mandatory dispute resolution procedures in the event of conflict over agreement provisions is promising.³¹ But divergent agendas on the part of Cree and Quebec representatives on co-management bodies may still limit their capacity for concerted action on resource management and environmental protection. When board representatives on both sides are united in their perception of a threat to resources within their mandate, unity of action is enhanced (Kofinas, *in press*); but interests in development versus conservation of forests or recreational hunting versus subsistence hunting will often continue to pull Cree and Quebec representatives in different directions.

As signatories, defenders, critics, and renegotiators of a comprehensive claim agreement now more than a quarter of a century old, Crees have managed not only to build on the strengths of this agreement but to repair some of its original gaps and deficits. Their ability to do so has depended on a regional organization that has gradually accumulated political expertise and the material means of waging a sustained political campaign. They have had to cope with a more challenging economic and political environment than some more remote northern groups, both in terms of jurisdictional competition from the province and in terms of the scale and variety of resource extractive interests impinging on their territory, and this has contributed to the adversarial pitch of recent decades. But the sources of this difficulty have also brought opportunity. Nationalist competition demanded nation-to-nation compromise, because Quebec’s earlier denial of Aboriginal sovereignty claims proved damaging to its own sovereigntist agenda. And the high combined value of hydroelectric, forest, and mineral resources has made “affordable,” from Quebec’s point of view, a level of revenue sharing that Cree leaders and planners believe will enable them to build a vigorous regional economy for their communities.³²

At the same time, many (but not all) Crees are optimistic that they have emerged with stronger institutional means for managing resource extractive activities in line with the long-term sustainability of habitats, and in balance with the protection of hunting, fishing, and trapping as viable elements of a mixed economy and distinctive Cree culture. The Forest Board represents some improvements over pre-existing co-management bodies. The discretionary latitude of a minister who might wish to influence or override the Forestry Board as merely consultative or advisory has been circumscribed by tightly worded forest management standards that have treaty status, making it more difficult for state authorities either to manipulate the co-management body against Cree interests or to bypass it.³³ Second, a connection between “self-management” and “co-management” institutions has been specified and required through local working groups and the direct involvement of hunting territory leaders.³⁴ Indigenous institutions of tenure and local knowledge in resource management, which have endured mounting external challenges as forms of self-management, have been legally strengthened to shape resource management procedures under the coordination of new and existing co-management bodies.

Hence, we may be seeing a reduction in the institutional isolation and marginalization of indigenous institutions, which have been at grave risk of eclipse by those of the mainstream society. In legal definition, at least, indigenous institutions have become more powerful, but this has required them to move in the direction of increased density of interaction, via co-management, with state managers. Enhanced self-determination *can* be a function of cooperation and partnership with provincial and federal governments; but it requires organization and sustained political activism on the part of First Nations in order to induce governments to recognize the benefits to themselves of operating on the basis of First Nations consent, of accommodating and building upon indigenous knowledge and institutions, and of renegotiating the Aboriginal-state relationship as conditions change.

NOTES

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- 1 For a comprehensive comparative discussion, see Usher's (1997a) examination of Canadian Aboriginal experience with co-management institutions, which emphasizes arctic and subarctic regions and Aboriginal groups who have entered into comprehensive claims agreements.

- 2 Stand-alone co-management agreements and bodies with Aboriginal communities have, however, sometimes been referenced in comprehensive claims agreements, which may confer constitutional authority similar to that which accrues to co-management arrangements that are negotiated as integral parts of comprehensive claims agreements. An example is the Porcupine Caribou Management Agreement (Kofinas, in press)
- 3 Accordingly, the factors affecting the emergence and success of treaty-embedded co-management, and indeed the standards by which success is measured, differ in certain respects from those that apply to stand-alone regimes. Treaty-embedded co-management, for example, is less likely to hinge on an originating resource depletion crisis or on stakeholders who are willing to make financial commitments (Pinkerton 1989, 27), because Aboriginal parties are concerned to gain broad-spectrum control of resources (whether or not the resources are in crisis), and Aboriginal commitment, often by necessity, is measured more in terms of political will than in terms of financial investment.
- 4 However, the constitutional protection afforded Aboriginal harvesting rights may also apply solidly in the case of stand-alone regimes in which Aboriginal people are involved.
- 5 “Self-management” in this context implies strong self-government in matters of resource management.
- 6 At the same time, Kofinas finds that the Porcupine Caribou Management Board is a stage for presenting different perspectives and is regarded in local communities as a legitimate forum for airing concerns about caribou.
- 7 For instance, under the JBNQA (Quebec 1976, para. 24.4.30) the Hunting-Fishing-Trapping Coordinating Committee “may establish the upper limit of kill for moose and caribou for Native people and non-Natives ... Subject to the principle of conservation, decisions of the Coordinating Committee pursuant to this paragraph shall bind the responsible Minister or government, who shall make such regulations as are necessary to give effect thereto and shall bind local and regional governments.”
- 8 The earlier experience of Crees with co-management bodies under the JBNQA has been assessed elsewhere in some detail (Feit 1988; Berkes 1989; Penn 1997; Scott and Webber 2001; Mulrennan and Scott, in press).
- 9 The Hunting-Fishing-Trapping Coordinating Committee recommended implementation of the hunt on the strength of the tie-breaking vote of a committee chair appointed by the provincial government.
- 10 This second point is important; one anonymous observer hesitates even to refer to the HFTCC as co-management, in part because subsistence hunting and recreational uses of wildlife by non-Cree are separate worlds in management terms.
- 11 *Delgamuukw v. British Columbia*, Supreme Court of Canada, 11 December 1997.
- 12 Pending resolution of their comprehensive claims, the Deh Cho of the southern Mackenzie Valley recently agreed with the federal and NWT governments to establish an extensive network of protected areas while keeping open more than 50 percent of their territory to oil, gas, and mining development, subject to certain

- terms and conditions set by the Deh Cho, with resource royalty revenue sharing (Northwest Territories 2001; Struzik 2003).
- 13 For a legal assessment of the issues at stake, see Grand Council of the Crees (1995, 1996).
 - 14 For example, the New Relationship Agreement resulted in the discontinuance of fifteen different legal actions launched by the Cree against Quebec.
 - 15 I am indebted to Harvey Feit (personal communication 2003) for this observation.
 - 16 In Craik's (in press) view the stratagem was an attempt to undermine Cree unity at the regional level.
 - 17 *Mario Lord et al. v. The Attorney General of Québec et al.*, Quebec Superior Court, SCM 500-05-043203-981.
 - 18 *Forest Act* (Bill 150, LQ 1986, ch. 108/ F-4.1, RSQ).
 - 19 *Mario Lord et al. v. The Attorney General of Québec et al.*, Quebec Superior Court, SCM 500-05-043203-981, Particularized, Up-dated and Amended Declaration (incorporating particulars furnished by plaintiffs on 12 March 2001).
 - 20 Pinkerton's (1992) analysis of State of Washington Indian tribes' negotiations to participate in the protection of fish and wildlife habitat makes a similar point.
 - 21 In this regard, the province has the power, in the last instance, to ensure a majority vote in its favour. The Kativik Environmental Quality Commission (KEQC) established by the JBNQA (Quebec 1976, para. 23.3) is more balanced in this regard. With Inuit and Quebec parties each appointing four members, a chairperson who can vote only in cases of deadlock must be acceptable to the Kativik regional government. The KEQC "shall ... decide whether or not a development may be allowed to proceed by the Québec administrator and what conditions, if any, shall accompany such approval or refusal" (para. 23.3.20), and this decision may only be changed by the Quebec minister (para. 23.3.21).
 - 22 Feit comments that the variability from hunter to hunter in the percentage exclusions sought also reflected differences in the concessions that individuals believed were possible to get from the forestry companies.
 - 23 There is a possible "downside," however; it is rumoured that in order to get peace with the forest companies Quebec agreed to underwrite the costs of litigation that the companies had incurred; and that Quebec apparently also undertook to maintain the current allowable annual cuts in order to avoid further financial liability vis-à-vis the companies. If that is so, the problem of harvesting at levels beyond the probable sustainable yield remains, and the consequence of heavier restrictions on cutting in hunting territories already forested could be to accelerate the geographical expansion of forestry operations to maintain allowable annual cuts (Penn, personal communication, 2003).
 - 24 According to Craik (in press), 640 km² for the Eastmain-Rupert project, compared with 8000 km² for the NBR project.
 - 25 It should also be remembered that if there is agreement between empowered parties in a bilateral relationship – in pursuit of mutual economic benefit from a development project, for example – then unless one or both parties remains devoted

- to upholding environmental values, rigorous and sustained environmental assessment and monitoring may be compromised.
- 26 Forestry enterprises will be required to specify the number of jobs and contracts held by Crees, as a proportion of overall employment and contracting (Quebec 2002, para. 3.60). The parties have also settled on “the employment of one hundred and fifty (150) Crees in permanent Hydro-Québec jobs as contemplated under subsection 11.2 of the La Grande (1986) Agreement” (ibid., para. 4.19).
 - 27 To put this amount crudely in context, provincial and federal transfers to the Crees for regional and local government administration, infrastructure programs, health and social services, education, and hunters’ income support total something in the order of \$200 million per annum, according to my conversations with administrators.
 - 28 *Her Majesty the Queen v. Thomas Peter Paul*, New Brunswick Court of Appeal, 22 April 1998.
 - 29 *Donald Marshall Jr. v. Canada*, Supreme Court of Canada, 17 September 1999.
 - 30 Native peoples in the Atlantic region who were party to colonial-period treaties of “peace and friendship” are more strongly positioned than peoples who signed later treaties of “cession and surrender” to argue that their Aboriginal title remains intact.
 - 31 A Standing Liaison Committee is established under the New Relationship Agreement, with equal numbers of Cree and Quebec representatives, including senior officials from both sides. The committee’s mandate, as a forum for exchange and coordination, is to strengthen political, economic and social relations between the Crees and Quebec; to achieve harmonious implementation of the new agreement as well as resolution of issues in the implementation of the JBNQA; to resolve any disputes over implementation; and to address other matters as mutually agreed upon. Disputes that are not settled through consultation and cooperation between the parties, and that cannot be resolved by the Standing Liaison Committee, may be referred to third-party mediation. In the event of failed mediation, the mediator by mutual consent of the parties may be afforded powers of arbitration. The Crees and Quebec undertake to do their utmost to avoid recourse to litigation; but litigation, of course, remains a last resort should mediation or arbitration fail.
 - 32 While it is beyond the scope of this essay to speak to the economic impacts, it is clear that a good deal of the monies paid, whether regarded as “compensation” or “revenue-sharing,” will go to support the further administrative elaboration of an already heavily administered Cree population, partly as a means of running the various entities to be formed under the terms of the New Relationship Agreement and partly as a means of getting income into the hands of households that need it. Entrepreneurial initiatives, if on the rise, are simply not capable of keeping pace with population growth. Meanwhile, Crees whose primary occupation is hunting, even if stable in absolute numbers, will continue to decline as a percentage of the total population.
 - 33 The less optimistic assessment, in the words of one anonymous observer, is that although the drafting of the New Relationship Agreement is tight, “the subject matter was handled by a tiny group of individuals largely unconnected with the

technicalities of the subject matter and largely unwilling to consult to deal with those uncertainties.”

- 34 Again, there is a contrary view, that “micro”-level co-management will prove so complex, cumbersome, and costly as to be incapable of implementation.

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From Board to Nation Governance: The Evolution of Eeyou Tapay-Tah-Jeh-Souwin (Eeyou Governance) in Eeyou Istchee

Philip Awashish

Ce travail examine les formes traditionnelles et contemporaines de gouvernement autochtone tel qu'exercées par les Eeyou (le peuple Cri) de Eeyou Istchee dans le Nord du Québec. L'accent est mis sur les dynamiques et sur l'évolution du gouvernement Eeyou de Eeyou Istchee qui a énormément changé au cours des trente dernières années. Ce travail décrit comment les Eeyou de Eeyou Istchee exerçaient les formes traditionnelles de gouvernement avant et après le contact avec les Européens; il explique aussi comment les Eeyou ont développé des formes de gouvernement contemporaines suite aux changements politiques, économiques et sociaux du territoire de Eeyou Istchee ainsi qu'à la suite de négociation de traités/ ententes contemporains tels l'Entente entre la Baie James et le Nouveau-Québec et l'Entente concernant une nouvelle relation entre le gouvernement du Québec et les Cris du Québec.

INTRODUCTION

This essay is about Aboriginal governance as it relates to the Cree Nation of Eeyou Istchee, the *James Bay and Northern Québec Agreement (JBNQA)*, and the recent *Agreement Concerning a New Relationship between Le Gouvernement du Québec and the Crees of Québec (New Relationship Agreement)*. I am writing on these matters on the basis of my experience and observations as a negotiator, signatory, and beneficiary of these agreements. The opinions expressed are personal and are not intended to express the position of the Grand Council of the Crees or the Cree Regional Authority. In

order to promote a better understanding of Eeyou governance in Cree territory (Eeyou Istchee), the essay begins with some history and background material. This is followed by a discussion of the negotiation and implementation of the JBNQA and of the recently signed New Relationship Agreement between the Crees and Quebec. This is followed by a brief summary and conclusion.

BACKGROUND

The Cree people, as they are known in contemporary Canadian society, have the individual and collective right to self-determination. This includes, most importantly, the right of self-identification. The Cree people identify themselves as Eeyouch, as they have done for millennia. Self-determination also encompasses the right of Eeyouch to belong to their own local communities and to the Eeyou Nation, within their historic homeland, which Eeyouch call Eeyou Istchee. The Government of Quebec recognizes Eeyouch as a nation, and the New Relationship Agreement between the Crees and Quebec is a nation-to-nation agreement.¹

Eeyouch number about 14,000 people living in nine communities: Whapmagoostui, Chisasibi, Wemindji, Eastmain, Waskaganish, Nemaska, Ouje-Bougoumou, Mistissini, and Waswanipi. The present generations of Eeyouch of Eeyou Istchee are the descendants of Eeyouch who occupied and governed Eeyou Istchee millennia before the arrival of European nations. In their capacity as the original inhabitants, Eeyouch named the rivers, lakes, bays, islands, and other features of the geographical landscape of Eeyou Istchee. This act of place-naming was and is a significant means of exercising sovereignty over Eeyou Istchee. Eeyou Istchee consists of nine communal lands and about three hundred Indoh-hoh Istchee (Eeyou hunting territories, or “Cree traplines.”² As the land that Eeyouch have used and occupied for millennia, Eeyou Istchee is essential for the *meeyou pimaat-tahseewin*, or holistic well-being, of Eeyouch. Eeyou Istchee comprises the foundation of Eeyou governance, culture, identity, history, spirituality, and traditional way of life. The unique and special relationship between Eeyouch and their homeland is a fundamental part of the nature of being Eeyou.

Eeyouch of Eeyou Istchee have always been a self-governing people. Indeed, there is no more basic principle in Eeyou history than the right of Eeyouch to govern themselves and their territories in accordance with their traditional laws, customs, values, and aspirations. It is through their self-governing nation that Eeyouch express their personal and collective autonomy. The right of Eeyou governance (Eeyou *Tapay-tah-jeh-souwin*) is inherent and permanent in the sense that it finds its ultimate origins in the collective lives, traditions, and laws of Eeyouch rather than in Canadian or colonial statutes. Nevertheless, the sovereign claims and colonial regimes of the British and

French powers were established in virtual disregard of the fact that Eeyou Istchee was already occupied by self-governing Eeyou people. Although the self-governing status of Eeyouch was greatly diminished by the encroachment of outside governing regimes during the nineteenth and twentieth centuries, it managed to survive in an attenuated form. Hence, it is important to emphasize that Eeyou governance is not something that is waiting to happen in the future. It is something that Eeyou have practised for centuries and will continue to practise in accordance with Eeyou law, rights, and aspirations.

In recent years, the Government of Canada moved to recognize that self-government is an inherent Aboriginal right protected under section 35 of the *Constitution Act, 1982*. However, the federal government has been slow to follow up this verbal recognition with concrete initiatives to advance Eeyou governance or Eeyou-Canada relations. Although the Government of Quebec has not formally recognized the inherent right of Aboriginal self-government, it has taken concrete steps to improve Eeyou-Quebec relations.³ Below I describe how the recognition and exercise of the inherent right of Eeyou governance have evolved since the negotiation of the JBNQA; but in order to understand these developments, we must first consider the state of Eeyou governance before the JBNQA.

EEYOU GOVERNANCE BEFORE THE JAMES BAY AND NORTHERN QUÉBEC AGREEMENT

In the early 1970s, prior to the signing of the JBNQA, Eeyouch numbered about 6,000 people. A traditional way of life based on hunting, fishing, and trapping was (and still is) an essential component of Eeyou culture and society. Eeyouch exercised their traditional land tenure and governance systems; and Indoh-hoh Ouje-maaooch (Cree tallymen) governed their respective Indoh-hoh Istchee (hunting territories or traplines). Eeyouch resided in six isolated villages in inadequate housing without suitable water and sewage infrastructure. With the exception of the Ouje-Bougoumou Eeyouch, these communities all had “band” status under the *Indian Act*. However, only three communities – Mistassini, Waswanipi, and Eastmain – were allocated “reserve” lands, and only the Mistassini Eeyouch were living on their reserve. Some Eeyouch, such as the Waswanipi and Ouje-Bougoumou Eeyouch, were dispersed throughout their traditional territory in small crude encampments, while others resided in non-Aboriginal municipalities. The Nemaska Eeyouch, having left the old Nemaska Post because of pending hydroelectric development, resided in the Eeyou villages of Mistassini and Rupert House.

In political terms, the *Indian Act* imposed a system of limited and supervised local government on the Eeyou Bands. Eeyouch continued to use their traditions and customs for band elections and for decision making over local

matters, but the *Indian Act* regulated almost every other important aspect of their lives. The federal government, through the Department of Indian Affairs and Northern Development, asserted control over local governmental and administrative matters, land administration and management, community development, and the social and economic development of the Eeyou bands. While the department provided programs and services to the Eeyou bands, it also made arrangements to permit some Eeyou bands to manage a limited number of federal programs and services, such as the operation of local schools. Relations with the Government of Quebec were virtually non-existent in most Eeyou communities. Quebec considered the welfare of the Eeyou “Indians” to be the responsibility of the Government of Canada and hence provided little or no services and programs to Eeyouch. The obligations of Quebec to settle land and other claims of Aboriginal people when its boundaries were extended in 1898 and 1912 also remained unfulfilled.

In the early 1970s neither the Government of Canada nor the Government of Quebec recognized Aboriginal rights, particularly not the right to self-government. The Canadian Constitution was also silent on the issue of Aboriginal and treaty rights. In essence, the federal and provincial governments held the view that Aboriginal people had no rights of government other than those that federal or provincial representatives chose to legislate or impose under regimes such as the *Indian Act*. However, in the aftermath of the landmark *Calder* decision on Aboriginal title, the Government of Canada acknowledged the legitimacy of “Indian” land claims and initiated a policy of negotiating comprehensive land and self-government agreements. This development coincided with Eeyou concerns over resource development within their traditional territories, and over the restrictions and limitations on Eeyou governance under the *Indian Act*.

JAMES BAY AND NORTHERN QUÉBEC AGREEMENT

The JBNQA arose out of what was initially opposition by Eeyouch to proposed hydroelectric development in Eeyou Istchee. Litigation against the development, initiated by Eeyouch, eventually led to a treaty process and a negotiated settlement. For Eeyouch, the treaty process was the desired means of securing Eeyou rights and redefining their relationships with Canada and Quebec. In the early 1970s, Eeyouch had preferred the cancellation of the proposed James Bay Project. However, outright cancellation was never an option considered by the Government of Quebec and Hydro-Québec. Hence, it is important to recognize that, from the outset, the government’s political and economic agenda set certain limitations on the resulting treaty negotiations.

The negotiations that led to the signing of the JBNQA lasted from 1973 to 1975. These negotiations presented a rare opportunity for Eeyouch to achieve

recognition of their Aboriginal rights and the protection of their distinct society and way of life, based on the special relationship they enjoyed with their traditional territories. The negotiations and the resulting agreement also provided a means of achieving, to some extent at least, the Eeyou vision of self-government. By 1970 Eeyouch had concluded that progress in self-government and socio-economic development was not possible within the confines of the *Indian Act* and under the dominating administrative arm of the Department of Indian Affairs. Under the *Indian Act*, the minister of Indian affairs and northern development enjoyed disallowance and veto powers over decisions taken by the chief and council of each Eeyou community. The *Indian Act* was also a serious barrier to economic development, since it denied bands status as legal entities with the capacity to assume contracts and other legal obligations. In summary, the *Indian Act* and the Department of Indian Affairs came to be regarded by Eeyouch as instruments of intrusion and domination of Eeyou affairs and Eeyou governance. For Eeyouch, the comprehensive control and domination asserted by the federal government over Eeyou society through the *Indian Act* and the Department of Indian Affairs was a substantial catalyst for change in Eeyou-federal relations.

With this in mind, the Eeyou Nation negotiated a change in relations with the Government of Canada and the Government of Quebec, through the terms and provisions of the JBNQA. On 11 November 1975 the JBNQA was signed by the Grand Council of the Crees (of Quebec), the Northern Quebec Inuit Association, the Government of Canada, the Government of Quebec, and certain crown corporations such as Hydro-Québec (Quebec 1976a). The JBNQA is both an out-of-court settlement and a land claims agreement, or treaty. On 4 May 1977, Parliament passed the *James Bay and Northern Quebec Native Claims Settlement Act*, which gave effect to the JBNQA (Canada 1977). In turn, the National Assembly of Quebec enacted numerous statutes to give effect to particular sections of the JBNQA (Quebec 1976b, 1978a, 1978b, 1978c).⁴

On the whole, the JBNQA treaty helped enhance the status of Eeyou as a people and as a nation. It provided the foundation for new relationships between the Eeyou Nation and the governments of Canada and Quebec. Nevertheless, the goals of Eeyouch were constrained by the political and legal environment within which the JBNQA was negotiated. These constraints resulted in a very complex and perplexing agreement, many of whose provisions the governments of Canada and Quebec neglected to implement.⁵ The shortcomings of the JBNQA, particularly in relation to its proper implementation, prompted numerous subsequent negotiations to amend its terms. As of October 2002, the JBNQA had been formally amended fifteen times by a series of complementary agreements negotiated by the parties to the original agreement. Before I take up these concerns in greater detail, it is necessary to consider the development of Eeyou governance in relation to some of the treaty's main provisions.

THE JAMES BAY AND NORTHERN QUÉBEC AGREEMENT AND EYYOU GOVERNANCE

One area of governance that is central to Eeyouch is land and natural resources. Eeyouch consider themselves the guardians and stewards of Eeyou Istchee. Eeyouch, as a nation, have established traditional laws and customs respecting the use and occupation of Eeyou Istchee. For example, Eeyouch implemented the system of Indoh-hoh Istchee (Cree traplines) as part of the Eeyou land tenure system. Accordingly, Eeyouch have established units of Indoh-hoh Istchee throughout a substantial portion of Eeyou Istchee. Before the existence of the JBNQA, registered traplines were licensed under the *Fish and Game Act* of Quebec.⁶ Under the terms of the JBNQA, the continuity of the system of Cree traplines is recognized. The Indoh-hoh Istchee of Eeyouch is in effect, the “Cree trapline” under paragraph 24.1.9 of section 24 of the JBNQA, which defines a Cree trapline as “an area where harvesting activities are by tradition carried on under the supervision of a Cree tallyman.” The Cree trapline system contemplated by the agreement is intended to reflect the Indoh-hoh Istchee system as determined by Eeyou traditional law and customs. Paragraph 24.1.8 of section 24 of the JBNQA defines a Cree tallyman as “a Cree person recognized by a Cree community as responsible for the supervision of harvesting activity on a Cree trapline” (Quebec 1976a). However, according to traditional law and customs the tallyman – the Indoh-hoh Ouje-maao – enjoys more than supervisory functions. In general, such men have the authority and responsibility for the proper guardianship and stewardship of Indoh-hoh Istchee. Traditionally, their responsibilities include but are not limited to the following:

- management and conservation of wildlife and other natural resources;
- control of access to Indoh-hoh Istchee;
- determination of the size and limits of Indoh-hoh Istchee;
- resolution of territorial disputes respecting limits of Indoh-hoh Istchee;
- maintenance of the territorial integrity of Indoh-hoh Istchee;
- determination of names of places and sites within Indoh-hoh Istchee;
- transfers of portions or all of Indoh-hoh Istchee by agreement or inheritance;
- sharing of history, information, and traditional knowledge;
- sharing of wildlife resources to ensure survival;
- application and enforcement of customary practices and rules respecting life and activities within Indoh-hoh Istchee; and
- political representation.

In addition, Eeyouch have, by way of traditional law and customs, established a code of conduct for harvesting activity throughout Eeyou Istchee and within Indoh-hoh Istchee.

The terms of the JBNQA also contain a number of measures to replace the *Indian Act*, to enhance Eeyou governance, and to bring to reality the concept of a new relationship between Eeyouch of Eeyou Istchee and the governments of Canada and Quebec. These measures included institutions such as the Cree School Board,⁷ the Cree Board of Health and Social Services of James Bay,⁸ and local government regimes. In particular, pursuant to federal obligations to Eeyouch under the JBNQA, special federal legislation – the *Cree-Naskapi (of Quebec) Act* (hereafter the *Cree-Naskapi Act*) – enacted by Parliament and assented to on 14 June 1984, provides for an orderly and efficient system of Cree and Naskapi local government and for the administration, management, and control of local community lands by the Cree and Naskapi First Nations, respectively (Canada 1984).⁹ The *Cree-Naskapi Act* replaces the *Indian Act* for the Cree Nation of Eeyou Istchee and for the Naskapi Nation of Kawawachikamach. During the course of negotiations leading to the signing of the JBNQA, Eeyouch of Eeyou Istchee rejected the restrictive and imposed local government regime of the *Indian Act*. Consequently, except for the purpose of determining which of the Cree and Naskapi beneficiaries are “Indians” within the meaning of the *Indian Act*, the *Indian Act* does not apply to the Cree and Naskapi First Nations, nor does it apply on or with respect to their community lands.

The *Cree-Naskapi Act* established the Cree-Naskapi Commission, which has the responsibility of reporting biennially on the implementation of the Act and related matters. The commission’s 2000 report outlines some of the key differences between the source, terms, and provisions of the *Cree-Naskapi Act* and the *Indian Act* which it replaced. To begin with, the *Indian Act* was enacted by Parliament unilaterally and without consultation with First Nations. Moreover, it was enacted pursuant to the federal government’s jurisdiction over “Indians and Indian lands” under the Canadian constitution rather than pursuant to negotiated treaties between Canada and First Nations. In substantive terms, the *Indian Act* provided for a limited and supervised regime of local government, with extensive veto and disallowance powers by the minister of Indian affairs and northern development, and it did not take into account traditional Eeyou law, customs, and governing practices. In contrast, the terms and provisions of the *Cree-Naskapi Act* were discussed by representatives of the Cree and Naskapi peoples and the Government of Canada. Furthermore, the *Cree-Naskapi Act* flows from federal obligations and undertakings pursuant to the JBNQA and the *Northeastern Québec Agreement* as treaties. These treaty rights, including the exercise of Cree and Naskapi local government and administration, and control and management of settlement lands, are recognized and affirmed by the *Constitution Act, 1982*. The *Cree-Naskapi Act* also provides the Cree and Naskapi band corporations and local governments with increased authority and control over their communities, lands, and local affairs. For example, the authority of the minister to approve,

disallow, or veto and the Governor in Council to approve or regulate is more limited than it was under the *Indian Act*. In addition, provincial laws of general application do not apply where they are inconsistent with the Act. The *Cree-Naskapi Act* also takes into account certain Eeyou traditions and customs, such as the manner of adoption and successions, and it recognizes the right to use the Cree or Naskapi languages in council meetings.

Eeyou governance consists of four levels of Eeyou authority. First, the Eeyou Indoh-hoh Ouje-maaooch (Cree tallymen) exercise authority over their Indoh-hoh Istchee or Eeyou hunting territories. There are over three hundred such hunting territories throughout Eeyou Istchee.¹⁰ Second, Eeyou local governments exercise authority in accordance with Eeyou law, the JBNQA, and the *Cree-Naskapi Act*. In addition, the Cree Regional Authority, Cree School Board, and Cree Board of Health and Social Services of James Bay provide services and programs to the Eeyouch and to residents of the Eeyou communities in accordance with their jurisdictions and responsibilities under the JBNQA. These regional authorities are not merely administering programs and services but are determining policies and regulations and in some cases designing programs and services. For example, the Cree School Board has developed and implemented a Cree Language Program for the school curriculum. Fourthly, the Grand Council of the Crees (of Eeyou Istchee) is the Eeyou national political authority that exercises treaty making and other powers in the conduct of nation-to-nation relations with Quebec, Canada, and other Aboriginal governments.

The Grand Council of the Crees (of Québec) was established by Eeyouch of Eeyou Istchee in August 1974 and subsequently was legally incorporated pursuant to federal legislation. It began life as a body representing the Cree Nation in the protection of Eeyou rights and interests, and it represented Eeyouch of Eeyou Istchee in negotiations that led to the signing of the JBNQA and the New Relationship Agreement between the Crees and Quebec. The Grand Council of the Crees also represented the Eeyou Nation, along with each local Eeyou government, in litigation to protect Eeyou rights and interests. It is important to recognize that the Eeyou Nation is the traditional and historical locus of Eeyou authority and self-government. The Grand Council of the Crees is the contemporary manifestation of this national form of governance for and by Eeyouch of Eeyou Istchee. It is also important to recognize that, aside from the regime of local governing authority conferred under the terms of the *Cree-Naskapi Act* and related provision of the JBNQA, the powers and authority of Eeyou governance arise from long-standing practices based on Eeyou law, traditions, and customs. Moreover, Eeyouch continue to incorporate Eeyou law, traditions, and customs in the exercise and practice of local government and Eeyou Nation governance. In other words, the JBNQA, the *Cree-Naskapi Act*, and other enabling legislation of Quebec and Canada are not exhaustive of the inherent right of Eeyou governance. Therefore, whereas

the Grand Council of the Crees exercises a form of governance as an incorporated *board* under Canadian and Quebec law, it exercises a form of *national* governance under Eeyou law.

IMPLEMENTATION OF THE CREE-NASKAPI ACT AND THE JBNQA

In spite of the improvements that accompanied the negotiation of the JBNQA, the full potential of local Eeyou government has not yet been realized by Eeyou of Eeyou Istchee. Much of this is connected with the difficulties experienced in the implementation of the *Cree-Naskapi Act* and the broader JBNQA. For Eeyouch of Eeyou Istchee, the proper implementation of this important modern-day treaty is essential for the advancement of Eeyou governance. While progress has been made in the implementation of certain provisions of the JBNQA – such as section 30, pertaining to the Income Security Programs for Cree Hunters and Trappers – essential sections of the agreement have been misinterpreted and ignored by the governments of Canada and Quebec. Pursuant to its mandate, the Cree-Naskapi Commission has submitted, to date, a total of seven biennial reports to the minister of Indian affairs, who tables each report in both houses of Parliament. The commission's findings concern issues relating to the implementation of the JBNQA and the *Northeastern Québec Agreement*.¹¹ In particular, the commission recommended appropriate amendments to the *Cree-Naskapi Act* with the object of enhancing Eeyou local government. Specifically, it recommended that an amended Act provide for the recognition and implementation of an inherent right of Eeyou governance and the application of Eeyou traditional law and customs within Cree territory. The JBNQA was intended to allow Eeyouch of Eeyou Istchee to decide, to a large extent, the course of their future, to be a self-sufficient and self-governing people, and to play an important role in the development, management, and administration of the lands and resources within their homeland. Yet following the agreement, the Canadian and Quebec governments continued to exercise outright domination and control over the lands and resources of Eeyou Istchee while excluding Eeyouch from the exercise of power. As a result, natural resource development policies with a direct impact on the Eeyou hunters and trappers of Eeyou Istchee have been planned and implemented without consultation and input from Eeyouch.

The Government of Canada, for the most part, has chosen to ignore the findings and recommendations of the Cree-Naskapi Commission. As a result, since its enactment by the Parliament of Canada eighteen years ago, the *Cree-Naskapi Act* has remained an inflexible instrument that has not evolved with the changing realities of Eeyou local government. A number of problems stand out for particular attention. With regard to funding for local government and administration, the Cree and the Government of Canada concluded an

understanding on a mechanism for funding Cree local government and administration and Cree regional administration of certain services and programs. Under the terms of these initial agreements, the Crees and Canada were to review the funding formula periodically to take into account evolving needs and circumstances that might not have been anticipated in the original negotiations. However, Canada has refused to engage in such a review process and has continued to insist on the extension of the original funding agreement. The governments of Canada and Quebec have similarly breached their commitments and obligations, under the JBNQA, relating to the participation of Eeyouch in economic and social development and the proper protection of the environment. By way of illustration, the Joint Economic and Community Development Committee established by section 28 (Economic and Social Development – Crees) of the JBNQA has met only a handful of times since the execution of the JBNQA and is essentially a non-functioning decision-making body.

As a result of these failures, Eeyou communities continue to suffer from the soul-destroying effects of inadequate housing, unsafe and uncertain water supply, and rampant unemployment. These aspects of community development and infrastructure and socio-economic conditions are intimately connected to the health and well-being of Eeyou people. This is a key point, because healthy Eeyouch – as individuals, families, and communities, and as a nation – are essential to provide a strong foundation for Eeyou governance.

Management of land and resources is another problem area. On their hunting territories, Eeyouch of Eeyou Istchee depend on the wildlife and natural resources that provide for their spiritual and physical well-being in the pursuit of their traditional way of life. This traditional way of life is as important and essential today as it was a quarter of a century ago. The JBNQA provides for the recognition and protection of the rights of Eeyouch to pursue their traditional way of life and to maintain thereby a close relationship with Eeyou Istchee. Once thought of as a barren wasteland by governments and industries, the Eeyou homeland has been identified as a frontier of rich timber, minerals, and turbulent waters for the production of hydroelectric energy. Eeyouch are deeply concerned about the manner in which the Government of Quebec, along with its crown corporations and industries, has plundered the Eeyou homeland during the exploration, development, and exploitation of renewable and non-renewable resources without due and proper regard for Eeyou rights, interests, and concerns under the terms of the JBNQA. This is most serious in the case of hydroelectric and commercial forestry development. These industries have been promoted and implemented within Eeyou Istchee without proper environmental and social impact reviews, as provided for in the JBNQA. Moreover, in the past quarter-century, the development of natural resources such as hydro power and forestry have not led to the employment of a large number of Eeyouch or to the economic advantage of Eeyouch as a whole.

To a large extent, despite the commitments of the governments of Canada and Quebec under the JBNQA, Eeyouch of Eeyou Istchee have been excluded from the development and conservation of natural resources within their homeland.

Eeyouch do not share the visions of the governments and industries that the Eeyou homeland is primarily a frontier for the development and exploitation of natural resources. However, Eeyouch do not oppose resource development in principle. What they do oppose are resource development projects that are irrational and disrespectful from a social, economic, moral, and environmental perspective. Past resource development such as commercial forestry, and water for hydroelectric energy, have resulted in the loss of hunting territories, wildlife habitat, and other resources, thereby greatly limiting the options of the present and future generations of Eeyouch, particularly those who depend on the use and availability of the land and its wildlife and natural resources for the maintenance of a traditional way of life.

The JBNQA was supposed to provide a basis for a strengthened local and regional Eeyou economy grounded in the beliefs and values of a hunting culture but with scope for diversification and growth. As of 2001, these intentions had not been fully realized as promised in the JBNQA. The present and proposed use of the Eeyou homeland and its resources confirms Eeyou fears that the actual course of events on the ground denies the promises that appear on paper in the JBNQA and its enabling laws. After all, actions do speak louder than words. The signing of the JBNQA did not mark the end of the disputes with government. Rather, it signalled the beginning of continued confrontation between Eeyouch of Eeyou Istchee and the governments of Quebec and Canada over the proper implementation of the JBNQA. Over the past quarter-century, Eeyouch of Eeyou Istchee have engaged in numerous reviews with the governments of Canada and Quebec regarding the proper implementation of the terms and provisions of the JBNQA. These review processes resulted in a vicious circle of lies, deceit, and broken promises as the JBNQA fell in line with the long trail of broken treaties. Eeyouch eventually resorted to litigation in defence of their rights, since reviews of government obligations and negotiations to resolve disputes over the letter, intent, and spirit of the JBNQA have in most cases failed. As a matter of fact, Eeyouch of Eeyou Istchee have initiated or joined in about thirty lawsuits respecting enforcement of Eeyou rights since 1972. Most of these lawsuits pertained to the failure of Canada and Quebec to honour their commitments to Eeyouch of Eeyou Istchee under the JBNQA. In particular, they dealt with the application of the environmental and social protection regime under section 22 of the JBNQA and the requirement for Cree consent on resource development. As they did in the era preceding the negotiation of the JBNQA, these lawsuits helped gain the attention of governments (at least, the Quebec government) and contributed to a new round of political negotiations.

AGREEMENT CONCERNING A NEW RELATIONSHIP BETWEEN THE GOVERNMENT OF QUÉBEC AND THE CREES OF QUÉBEC

The Cree people continue to view their treaty – the *James Bay and Northern Québec Agreement* – as the primary means of acknowledging and structuring their relationships with the governments of Canada and Quebec. In this regard, the proper implementation of the letter, intent, and spirit of this treaty is an essential means of maintaining these relationships over time. However, from the Eeyou perspective, a relationship among peoples and nations is not a static thing – it changes and develops in response to new needs and conditions. If constant efforts are not made to negotiate and update the agreements in which these relationships are embodied and maintained, the relationships themselves can easily deteriorate. With this goal in mind, the Cree Nation of Eeyou Istchee recently concluded a historic agreement with the Government of Quebec. On 7 February 2002, in Waskaganish, Eeyou Istchee, the Grand Council of the Crees/Cree Regional Authority and the Government of Quebec signed the *Agreement Concerning a New Relationship between Le Gouvernement du Québec and the Crees of Québec* (the New Relationship Agreement). This is a nation-to-nation agreement between Quebec and the Eeyouch of Eeyou Istchee, which promises to strengthen political, economic, and social relations between Quebec and the Crees. The New Relationship Agreement was approved by Eeyouch in February 2002 through a national Eeyou referendum that was conducted in each Eeyou community. A substantial majority of Eeyou electors voted in favour of approving the agreement.

The New Relationship Agreement marks an important stage in a new nation-to-nation relationship based on openness, mutual respect, an expanded sphere of Cree autonomy, and increased responsibility of the Cree Nation for its own economic and community development. With respect to economic development in particular, the agreement recognizes an important right of Eeyou to benefit directly from resource development within Eeyou Istchee. The New Relationship Agreement has the following purposes:

- 1 establishment of a new nation-to-nation relationship;
- 2 assumption of greater responsibility by the Cree Nation for its economic and community development;
- 3 establishment of the means to allow the parties to work together with regard to the development of mining, forestry, and hydroelectric resources in the territory;
- 4 settlement, with discharges, of the provisions of the *James Bay and Northern Québec Agreement* pertaining to the economic and community development of Eeyouch;
- 5 settlement or the withdrawal of certain legal proceedings launched by the Crees;

- 6 consent of Eeyouch for the construction of the Eastmain 1-A/Rupert Project; and
- 7 facilitation of the construction of the EM-1 Project.¹²

For the period of fifty years, commencing 1 April 2002, Eeyouch are to assume the obligations of Quebec concerning economic and community development under the provisions of the JBNQA. Furthermore, for a period of fifty years, commencing 1 April 2002, Quebec shall pay to Eeyouch an annual amount to enable them to assume these obligations. This annual payment from Quebec for the first three financial years shall be as follows: for 2002–3, \$23 million; for 2003–4, \$46 million; for 2004–5, \$70million. For each subsequent financial year between 1 April 2005 and 31 March 2052, the annual payment from Quebec shall be the greater of the two following amounts: \$70 million; or an amount corresponding to the indexed value of the amount of \$70 million as of the 2005–2006 financial year in accordance with a formula that reflects the evolution of the value of hydroelectric production, mining exploitation production, and forestry harvest production in the territory (Quebec 2002, 30–4).

The assumption of these obligations with the accompanying financial resources will undoubtedly advance Eeyou governance, since Eeyou local and regional governments will now exercise power and jurisdiction over the social and economic development of their own communities. In fact, especially over the past three decades, Eeyou governments have already been exercising such powers and jurisdictions for economic and community development. The New Relationship Agreement simply formalizes these arrangements and provides them with a more secure funding base. The New Relationship Agreement also refers to separate agreements between the Grand Council of the Crees and Hydro-Québec. These separate agreements promise to facilitate the participation of Eeyouch in hydroelectric development in Eeyou Istchee through partnerships, employment, and contracts. For example, the *Nadoshtin Agreement*¹³ sets out the terms, conditions, and measures respecting the EM-1 Project

The general objectives of the *Nadoshtin Agreement* include:

- to reduce the impact of the project on the Crees, particularly those of Eastmain, Mistissini, Nemaska, and Waskaganish and to provide compensation for it;
- to enhance community development and provide other opportunities for the Crees;
- to foster increased understanding and respect between the parties and to promote better relations;
- to provide a more efficient framework for cooperation between the parties with respect to the project and to Cree traditional activities;

- to provide effective mechanisms for the implementation of the agreement, especially the carrying out of environmental, remedial, and mitigating measures in connection with the project; and
- to ensure contract, employment, and training opportunities to the Crees, in particular those of Eastmain, Mistissini, Nemaska, and Waskaganish, in connection with the project.

The Government of Quebec has further undertaken to promote and facilitate the participation of Eeyouch in the development of other natural resources, such as mining and forestry. This participation was intended in the JBNQA but has not been implemented. For example, under the New Relationship Agreement (Quebec 2002, 8), the Quebec forestry regime will be applied in a manner that allows for:

- adaptations to take into account the Eeyou traditional way of life;
- integration of concerns relating to sustainable development; and
- participation, in the form of consultation, by Eeyouch in the planning and management of the various forestry operations.

Prior to the signing of the New Relationship Agreement, the rights, activities, and concerns of Eeyou hunters and trappers had been virtually ignored by the Government of Quebec and the forestry industry. This was one of the most serious breaches of the JBNQA. In order to address this breach, the New Relationship Agreement calls for an adapted forestry regime to determine rules and procedures designed to reconcile forestry development initiatives with traditional Eeyou activities such as hunting, fishing, and trapping (Quebec 2002, 8–22). Part of this new regime involves the creation of the Cree-Québec Forestry Board. Its purpose is to permit close consultation of Eeyouch during the different steps of planning and managing activities relating to the implementation of the adapted forestry regime. The Cree Regional Authority and the Government of Quebec shall each appoint five members to the Forestry Board. In addition, a chairperson shall be appointed to this board by Quebec in consultation with the Cree Regional Authority. The vice-chairperson of the Forestry Board shall be appointed by the members of that board from among those members appointed by the Cree Regional Authority. Quorum at meetings of the board shall be a majority of its members insofar as at least three members appointed by the Cree Regional Authority and three members appointed by Quebec are present (Quebec 2002, 15–18). The participation of Eeyouch in managing the new forestry regime is a positive step in the development of Eeyou self-government – a step which, as noted above, was not taken in the implementation of the JBNQA. In this sense, the New Relationship Agreement sets out a bold new way of setting in motion certain provisions of the JBNQA which for so long have not been properly implemented.

As part of the new agreement, Eeyouch of Eeyou Istchee have agreed to suspend their lawsuits against the Government of Quebec in relation to matters that are purportedly settled by the New Relationship Agreement. In fact, the Government of Quebec hails the New Relationship Agreement as the *Paix des braves*. However, Eeyouch of Eeyou Istchee will continue to adopt a watchful approach until the provisions of the New Relationship Agreement have been properly implemented. After all, a peaceful, beneficial, and effective nation-to-nation relationship is not simply about the absence of conflict. Most importantly, it is about the presence of social justice.

One final point: the New Relationship Agreement does not affect the obligations of the Government of Canada to Eeyouch, including those stipulated in the JBNQA. Moreover, it remains to be seen whether Canada intends to follow the lead of Quebec in fulfilling its obligations to Eeyouch of Eeyou Istchee in a manner that addresses the spirit and intent of the JBNQA and sets an acceptable standard of the nation-to-nation relationship between Eeyouch and Canada. To date, the Government of Canada has demonstrated neither good faith nor the political will to do so.

SUMMARY AND CONCLUSION

Eeyou governance is about rights, freedoms, values, culture, and responsibilities. More specifically, it is about the guardianship and stewardship of Eeyou Istchee. For Eeyouch of Eeyou Istchee, the journey towards full Eeyou governance begins and ends with the people of the land. In our terms, mutual recognition of coexisting and self-governing peoples is fundamental to ongoing Eeyou relationships and partnerships with Canada and Quebec. Unfortunately, the history of Eeyou relations with other governments in Canada has frequently been a story of conflicts over land, natural resources, and the exercise of power. It is a story wherein Eeyouch have been excluded from the exercise of power and denied their right to govern their historical and traditional territories – Eeyou Istchee. The negotiation of the JBNQA was supposed to bring about an end to such conflicts. The JBNQA has indeed been beneficial, to some extent, in advancing Eeyou governance. Eeyou authorities and Eeyou governments are now exercising substantial control over their destiny and affairs at the local and regional (national) levels. For example, the Eeyouch of Eeyou Istchee are currently using their local and regional governments and administrations as well as other Eeyou authorities to meet needs such as public works, housing, policing, and education.¹⁴ Moreover, officials, agents, and employees from INAC are noticeably absent in Eeyou Istchee. In many instances, Eeyouch of Eeyou Istchee have adopted a “just do it” approach. After all, Eeyou self-determination is the power of choice in action.

Nevertheless, the JBNQA has also been a disappointment and a source of ongoing conflict. Part of the conflict derives from the different interpretations

of the provisions of the treaty. For Eeyouch, the JBNQA is a charter of Eeyou rights – Eeyou rights to lands, natural resources, and the exercise of power. More than this, for Eeyouch of Eeyou Istchee, the JBNQA was meant to bring about the sharing of powers and responsibilities in the governance of Eeyou Istchee. For the non-Eeyou governments, the JBNQA has been more about the extinguishment of rights, the taking of lands and resources, and the assertion of their power over these territories and resources. Hence, a quarter of a century after its signing, the JBNQA remains a partial and incomplete expression of the inherent right of Eeyou governance. The second major source of conflict stems from an absence of will on the part of non-Eeyou governments to implement the letter and spirit of the treaty. The true realization of Eeyou self-government will come not just through legislation and policy statements but, most importantly, through appropriate and timely actions to translate these legal instruments into political practice. Therefore, the “powers that be” must find within themselves the will, wisdom, courage, good faith, and sense of social justice to live up to their promises and end the politics of exclusion.

Eeyou governance has evolved dramatically over the last quarter of the past century, moving beyond the *Indian Act* and now beyond the JBNQA. Yet too often, treaties, agreements, and enabling federal or provincial legislation have remained inflexible and unchanging instruments, which have failed to evolve with the nature, scope, and exercise of the Eeyou right of governance.¹⁵ The New Relationship Agreement with Quebec appears to be a step towards rectifying this problem by promising better relations with Eeyouch in the development of the natural resources of Eeyou Istchee. In particular, economic development as well as community development should now be able to evolve in accordance with the aspirations of the Eeyouch of each community. Time will tell whether or not the initial promise of this agreement is fulfilled. The Eeyou relationship with Canada is another matter completely, and the reconciliation of the pre-existing and inherent rights of Eeyou with the sovereignty of the Crown continues to be a major political, legal/constitutional, and socio-economic challenge. In order for Eeyou and Canada to work together, Canada must explicitly recognize the inherent right of Eeyou governance (and Eeyou laws and traditions) within its constitution and fundamental laws. It must journey with Eeyouch to find justice in the governance of this country, which is founded on Aboriginal lands and territories.¹⁶

GLOSSARY OF TERMS

Eeyouch (Cree people)

Eeyou Istchee (Cree territory)

Indoh-hoh Ouje-maao (Cree tallyman); plural Ouje-maaooch

Indoh-hoh Istchee (hunting territory or trapline)

Meeyou pimaat-tahseewin (holistic well-being)

ANNEX 1: AREAS OF EYYOU GOVERNANCE

public works	health
housing	social services
membership	human resources development
elections and referenda	employment
economic development	training
traditional (hunting, fishing, and trapping) pursuits	remedial works (measures to remedy the impact of industrial developments)
land administration and registry	intergovernmental affairs and relations
cultural development	participation in international community
language development	provision of services to the communities
social development	administration of services and programs
policing	community development
disbursement and management of Eeyou funds	environmental protection
resolution of disputes	values and traditions
policy making	treaty making
Eeyou law (Eeyou weesouwehwun)	protection of Eeyou rights and interests
administration of justice	political representation
education	corporate affairs and relations
preservation and maintenance of culture, values, and traditions	nation-to-nation relations
general welfare of members	
youth development	

NOTES

- 1 On 20 March 1985, Quebec’s National Assembly adopted a resolution that still forms the basis of relations between Quebec and Aboriginal people. The resolution states “that this Assembly recognizes the existence of the Abenaki, Algonquin, Attikamek, Cree, Huron, Micmac, Mohawk, Montagnais, Naskapi, and Inuit nations in Quebec.”
- 2 In order to determine the exercise of governance and authority over each Indohoh Istchee, Eeyouch established the system of Indo-hoh Istchee Ouje-maaooch or Indoh-hoh Ouje-maaooch – Cree tallyman (the singular – tallyman – Indoh-hoh Ouje-maaoo).
- 3 On 9 February 1983 the Quebec cabinet adopted the fifteen principles referred to in the resolution of the National Assembly. One of these principles is as follows: “The Aboriginal nations have the right, within the framework of existing legislation, to govern themselves on the lands allocated to them.” Considering the nature of an inherent right and Aboriginal title to Eeyou historical and traditional

territories, this particular principle of the Government of Quebec does not constitute the recognition of an inherent right of Aboriginal self-government.

- 4 In an important parallel development, in 1982 the Constitution of Canada was amended, among other reasons, to affirm and recognize the existing Aboriginal and treaty rights of Aboriginal peoples. As a modern treaty or land claims agreement, therefore, the JBNQA receives constitutional protection under section 35 (Canada 1986).
- 5 Issues of implementation are discussed below on pages 173–5.
- 6 The Indoh-hoh Istchee system predates the trapline system created by the Government of Quebec for the purpose of managing the harvesting of fur-bearing animals. In fact, the organizational plan of the Government of Quebec respecting its beaver preserve and registered traplines reflects elements of the Eeyou Indoh-hoh Istchee system.
- 7 The Cree School Board was established pursuant to section 16 of the JBNQA, providing the means by which Eeyouch assumed authority and control over education throughout the Cree territory (Quebec 1976a).
- 8 The Cree Board of Health and Social Services, established pursuant to section 14 of the JBNQA, is responsible for the administration of appropriate health and social services for all persons normally resident in the Eeyou communities (Quebec 1976a). It is under Eeyou control.
- 9 Eeyouch consider themselves the historical and traditional bearers of the right to self-government. In practice, Canada delegates this authority through federal legislation. For Eeyouch, the inherent right of Eeyou self-government cannot be a derivative of federal authority.
- 10 The recent agreement with Quebec also enhances the authority of the Indoh-hoh Ouje-maaoch. For example, under the New Relationship Agreement, no forest management activities may be undertaken in sites of special interest to Eeyouch without the consent of the Indoh-hoh Ouje-maao concerned (Quebec 2002, 10–11).
- 11 The *Northeastern Québec Agreement* is the lands claim settlement entered into on 31 January 1978 by the Naskapis, the Government of Quebec, the James Bay Energy Corporation, the James Bay Development Corporation, the Quebec Hydro-Electric Commission (Hydro-Québec), the Grand Council of the Crees (of Québec), the Northern Quebec Inuit Association, and the Government of Canada. This agreement was signed slightly over two years after the JBNQA. Its intention was to recognize in favour of the Naskapis substantially the same rights and benefits as those recognized in favour of the James Bay Crees and the Inuit of Quebec in the JBNQA. Therefore, section 7 of the *Northeastern Québec Agreement* provides for a similar federal obligation respecting special legislation on Naskapi local government. This federal obligation, as well as the obligation under section 9 of the JBNQA, led to the enactment and implementation of the *Cree-Naskapi Act*.
- 12 The Eastmain 1-A/Rupert and EM-1 are hydroelectric development projects to be constructed under the terms and conditions of the agreement. These projects are extensions to the existing hydroelectric development under the JBNQA. These

- new projects are intended to depart from their predecessors, however, by involving Eeyouch as partners and beneficiaries in the process of economic development.
- 13 Unpublished document on file with the author.
- 14 For a more complete listing of these functions, see annex 1.
- 15 Section 9 (Cree Local Government) of the JBNQA has never been amended or updated. The *Cree-Naskapi Act*, enacted by Parliament pursuant to the said section of the agreement, has also never been either amended or updated, despite the recommendations of the Cree-Naskapi Commission for appropriate and specific amendments to the said Act.
- 16 Aboriginal governance, including Eeyou governance of Eeyou Istchee, should be recognized and constituted as a third order of government within the Canadian federation. Without such recognition, the non-Eeyou governments continue to exercise outright domination and control over lands and resources of Eeyou Istchee. The Royal Commission on Aboriginal Peoples has recommended the recognition of Aboriginal self-government as a third order of government within the Canadian federation (Canada, RCAP 1995).

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The Persistence of Paradigm Paralysis: The *First Nations Governance Act* as the Continuation of Colonial Policy

Kiera Ladner and Michael Orsini

Ce travail examine la malheureuse Loi sur la gouvernance des premières nations du gouvernement de Chrétien qu'à son arrivée, au début de 2004, le gouvernement de Paul Martin a abandonnée. Les auteurs soutiennent que cette loi par laquelle on prétendait pouvoir moderniser les éléments de la Loi sur les Indiens, n'a pas été à la hauteur des promesses de transformation du domaine de la politique autochtone. En utilisant des éléments de la théorie historique-institutionnaliste, notamment la notion de dépendance de parcours, les auteurs soutiennent que la Loi sur la gouvernance des premières nations illustre l'incapacité du gouvernement fédéral à surmonter sa paralysie habituelle en ce qui concerne la population autochtone. Les auteurs discutent également des principaux problèmes survenus lors de l'exercice de consultation au cours duquel on devait faire connaître cette nouvelle loi, en notant que cela n'a pas permis de totalement engager les premières nations dans un dialogue politique sérieux.

The First Nations Governance Initiative is for our generation what the White Paper was for the First Nations of 1969.

Roberta Jamieson, Chief of the Six Nations Reserve

Mr. Speaker, early in our mandate, I asked my Cabinet to find new and better ways to close the gap in life chances between Aboriginal and non-Aboriginal Canadians... We will take important new steps in this direction with an ambitious legislative agenda to create new institutions and investments to build individual and community capacity: investments in children, education and health care, investments in social, cultural and economic development ... Our approach will be unified and tailored to the diverse needs and aspirations of aboriginal people. And it will be in partnership.

Prime Minister Jean Chrétien, responding to the 2002 Speech from the Throne

INTRODUCTION

In 1998 the federal government responded to the recommendations of the Royal Commission on Aboriginal Peoples by announcing the arrival of a “new Aboriginal agenda.” *Gathering Strength: Canada’s Aboriginal Action Plan* was designed to renew the partnership between Aboriginal peoples and Canadians, strengthen Aboriginal governance, develop a new fiscal relationship, and support strong communities, people, and economies (Canada, INAC 1997, index). *Gathering Strength* became the foundation for the government’s renewed interest in transforming the Aboriginal policy field and in “reconfiguring” the relationship between Aboriginal peoples and the state. In its 1999 Speech from the Throne, the government reiterated its commitment to realizing the objectives laid out in *Gathering Strength*. These included “building stronger partnerships with Aboriginal people ... improving their living conditions ... strengthening their economies ... fostering good governance ... and providing the climate needed for partnerships, investments, and economic opportunities” (Canada 1999). Subsequent throne speeches have articulated similar visions of a transformed Aboriginal policy field. For example, in the 2002 Speech from the Throne, the government pledged to “strengthen First Nations governance institutions – to support democratic principles, transparency and public accountability, and provide the tools to improve the quality of public administration in First Nations communities” (Canada 2002a).

The federal government is using a multipronged legislative approach to transform the Aboriginal policy field. Originally, this strategy was supposed to comprise four independent yet related pieces of legislation: Bill C-6 (the proposed *Specific Claims Legislation Act*), Bill C-7 (the proposed *First Nations Governance Act*, or FNGA), Bill C-19 (the proposed *First Nations Fiscal Institutions Act*), and Bill C-49, the proposed *Land Management Act*. However, the full extent of the federal government’s plans for transforming Aboriginal policy has not yet been made public, and there are indications that as many as five more pieces of legislation may be forthcoming. One thing is clear, however. The controversial FNGA is now dead. Prime Minister Paul Martin had indicated before assuming power that he had some serious concerns with the FNGA, and in January 2004 he made it official that the FNGA would be scrapped. In its first Speech from the Throne on 2 February 2004, his government announced its commitment to “improve governance in [Aboriginal] communities – to enhance transparency and accountability – because this is the prerequisite to effective self-government and economic development” (Canada 2004). In addition, the government outlined plans to create an independent Centre for First Nations Government, the details of which have not yet been made public.

Although the Speech from the Throne indicates that Aboriginal people are a government priority, how this will materialize has yet to be determined. For

this reason, we have chosen to focus on what we do know and to ask whether the Chrétien government's legislative agenda pertaining to Aboriginal peoples was transformative or merely a reinforcement of the existing policy paradigm. We argue that the Chrétien government's approach upholds the Aboriginal policy paradigm that was established in the early 1800s. As space does not permit us to examine the full slate of policy initiatives developed by the Chrétien government, we will construct our argument primarily around the FNGA. Our essay begins with an overview of the terms of this piece of legislation, followed by a discussion of reactions to the Act in the Aboriginal, academic, and policy communities. The final section of the essay uses elements of historical-institutionalist theory to explain why the FNGA is illustrative of the government's inability to overcome its habitual paralysis in relation to Aboriginal policy.

THE FIRST NATIONS GOVERNANCE INITIATIVE

As part of a multifaceted effort to implement its Aboriginal Action Plan, the government announced the *Communities First: First Nations Governance Initiative* on 30 April 2001. This initiative, asserted Indian and Northern Affairs Canada (INAC), was "about providing First Nations people with the opportunity to replace elements of the *Indian Act*, which will provide them greater control over how their communities are governed" (Canada, INAC 2001b). At a "technical presentation" to the Standing Committee on Aboriginal Affairs and Northern Development in February 2003, INAC officials defended their decision to replace elements of the *Indian Act*:

The *Indian Act* was never designed to promote effective First Nations governments and, given its colonial policy orientation, it is a glaring anachronism in the contemporary context. Specifically it is based on federal government control where First Nations have minimal authority. The Minister, not the Chief and Council, is ultimately accountable and responsible; and, the federal government retains decision-making or review powers on day-to-day transactions (e.g., land management, by-laws disallowance, approving the appointment of electoral officers, and setting aside election results etc.). (Canada, INAC 2003)

Moreover, they argued, the *Indian Act* needed to be revised in order to create financial and political accountability structures, which would allow for "effective internal governance" (ibid.). According to INAC, this would alter the current system of accountability, whereby *Indian Act* band councils are more accountable to INAC than to their electorates.

The first thing that is puzzling about the government's stated rationale for a legislative overhaul and transformation of the *Indian Act* is the suggestion

that its First Nations policy is outdated. The Act has been outdated for more than a century – the original consolidated *Indian Act* was created in 1876 – yet it has undergone only the most minor changes during this period. In particular, the band council system, which was created by the *Indian Act*, has never undergone a substantial transformation – nor, for that matter, even a minor readjustment. The federal government framed its *First Nations Governance Initiative* as a response to the problems associated with the *Indian Act's* colonial system of band governance. It is puzzling that the federal government would claim that a revamped *Indian Act* could pave the way to self-government, given the fact that the proposed Act provides little more than the tools necessary for self-administration, which is a far cry from First Nations' aspirations for self-government. Moreover, the failure of the First Nations Governance Act to adequately fund capacity building would probably have stalled the realization of self-government.

INAC acknowledged that it was necessary to “modernize” the *Indian Act* system of government. It cited a number of reasons for this legislative change, including important court decisions, academic research, and demands from Aboriginal peoples, especially vocal organizations such as the Assembly of First Nations. The department released a discussion paper in April 2001 in which it identified a list of “problems” that demanded attention:

- The *Indian Act* and its policies have been harmful to First Nations government systems.
- The *Indian Act* allows very little freedom for the band government and the band as a whole to make decisions.
- There are some gaps in the *Indian Act* regarding leadership selection, for example with regards to whether or not candidates have to meet certain requirements to be able to run for elected office, the term of office and other related matters.
- The rights and interests of all members need to be balanced.
- Political and financial responsibilities and duties as they affect the community, including the protection of individual members' rights, are not covered by the *Indian Act*.
- Women's concerns need to be heard and acted upon.
- There is a need for First Nations to be able to have their own local authority as it affects leadership selection, finances, training and other everyday business impacting on the quality of life in the community. (Canada, INAC 2001a, 4)

From this list of problems, INAC concluded that legislative change was necessary in three areas: the legal standing and capacity of First Nations and their governments; the accountability of band councils to members; and leadership selection and voting rights. It is interesting to note that unlike past attempts at legislative change in this policy area (e.g., the *White Paper* of 1969), the

Canadian government had no intention of pursuing limited public consultations. Instead, INAC launched an “extensive national consultative initiative” and requested the input of First Nations in the three aforementioned areas. In so doing, the government promised extensive multidimensional and multistage consultations, the results of which would subsequently be incorporated into legislation to strengthen Aboriginal communities and governments.

Consultations got underway in April 2001, following the release of INAC’s consultation package, *Communities First: First Nations Governance*. These consultations engaged a variety of different mechanisms, including questionnaires, interactive media, correspondence, a toll-free information line, community consultation, information sessions, and focus groups. When participating in these different forums, First Nations and their leaders were asked for their ideas pertaining to “the basics of First Nations governance.” From the information gathered, INAC promised to “develop models or options” that could be used to craft legislation. Within months of wrapping up the consultations – and before any policy options, governance models, or pieces of legislation could be examined by First Nations (as had been promised) – the minister of Indian and northern affairs, Robert Nault, tabled the *First Nations Governance Act*. In introducing the bill in the House of Commons on 14 June 2002, Nault explained that the new legislation represented “a fundamental shift from the colonial approach to governance embodied in the *Indian Act*. It puts authority in the hands of the First Nations people” (Nault 2002). The bill outlined three objectives: “(a) to provide bands with more effective tools of governance on an interim basis pending the negotiation and implementation of the inherent right of self-government; (b) to enable bands to respond more effectively to their particular needs and aspirations, including the ability to collaborate for certain purposes; and (c) to enable bands to design and implement their own regimes in respect of leadership selection, administration of government and financial management and accountability, while providing rules for those bands that do not choose to do so” (Canada 2002b).

The centrepiece of the legislation concerns the creation of regimes (or codes) to deal with the issues outlined above in (c). These issues are addressed in three ways. First, with regard to elections, bands are given two years to establish leadership selection codes comprising a number of mandatory elements, such as a delimited term of office (not to exceed five years), a definition of corrupt electoral practices, and a policy for the removal from office of elected and non-elected members of the council. The decision to include leadership selection as one of the three pillars of the governance initiative was sparked by the 1999 *Corbière* decision of the Supreme Court of Canada. In that decision, the court ruled that subsection 77(1) of the *Indian Act*, which restricted the right to vote in band elections to on-reserve members, violated the equality provisions contained in section 15 of the *Canadian Charter of Rights and Freedoms*. In light of this decision, new leadership codes were necessary to

provide off-reserve members with the right of participation in band politics and to ensure the constitutionality of the *Indian Act* band council system of government.

Second, with regard to the administration of government, the legislation stated that bands were required to draft rules concerning, among other things, meetings of the members of the band, meetings of the council, and rules for the creation of band laws, including procedures to allow band members to have a say in laws before they are passed. Third, with respect to financial management and accountability, band codes had to include rules regarding the preparation of annual budgets, the control of expenditures, and “internal financial controls on deposits, assets management, and the purchase of goods and services” (Canada, INAC 2002, 6). Bands that did not adopt such codes would be subject to a default code established by the Governor in Council (the minister of Indian and northern affairs).¹

The proposed Act also contained a provision to redress breaches of a code by the council or a band employee. Under the Act, the band would be required to create a law that authorizes “an impartial person or body to fairly and quickly consider complaints for breach of a code ...” (Canada, INAC 2002, 8). In addition, the bill would remove the section of the *Canadian Human Rights Act* which previously exempted First Nations from human rights protection.

ASSESSING REACTION TO THE FIRST NATIONS GOVERNANCE ACT (FNGA)

The tabling of the Act provoked widespread discontent in First Nations communities. It has also been criticized by Aboriginal political organizations such as the Assembly of First Nations and the Assembly of Manitoba Chiefs, both of which denounced the legislation as a return to colonialism. Even organizations such as the Congress of Aboriginal Peoples,² which supports the legislation in principle, have been critical of the Act. The FNGA has also provoked criticism from non-Aboriginal organizations such as the Canadian Taxpayers Federation, which argued in a presentation before the Standing Committee on Aboriginal Affairs, Northern Development and Resources, that the FNGA perpetuates a paternalistic attitude towards Aboriginal people. In addition, a team of academics that conducted the Harvard University study of Native American governance and economic development examined the FNGA and found it lacking.

In this section, we group reaction to the Act under two main themes: criticism of the process (of consultation) and criticism of the substance of the Act as a continuation of colonialism. The two criticisms are linked, of course, since groups or individuals who are viewed as “target populations” – as objects of public policy rather than active political agents – are rarely consulted on public policy matters in a manner that can be called genuine and transparent

(Ingram and Schneider 1993, 334–47).³ Indeed, one of the main challenges faced by target populations is their seeming inability to be taken seriously as active participants in all stages of the policy process. It is not surprising, then, that recent efforts to “engage” First Nations in policy discussions have failed to depart from traditional models of public consultation,⁴ since the policy legacy of colonialism virtually freezes out any possibility of establishing a meaningful two-way dialogue. The policy legacy of colonialism leaves no room for active citizen engagement, although it should be stressed that the department has boasted on its Web site about its efforts to “engage” Aboriginal people (Canada, INAC 2001a).

Despite assurances from Minister Nault that there was “no hidden agenda, no secret pre-determined outcome,”⁵ the consultations on the Act were beset with problems from the outset. First Nations were not involved in the “problem-definition” stage, arguably a key dimension of the policy process, and most First Nations political organizations were not involved (directly or indirectly) in the consultation process; instead, the government opted to involve political organizations that represented Métis and non-status people – populations with no vested interest in the *Indian Act*. As well as criticizing the consultation process for its lack of First Nations participation, the Assembly of First Nations argued that the consultations themselves were too limited in scope and that INAC’s first consultation reports distorted the findings. With regard to the latter criticism, the AFN noted that INAC’s reports failed to reflect the fact that many participants were opposed to the consultation process and felt that they did not have enough information to “offer informed comment.” Further, “in many cases, the bulk of the comments – which reflect First Nations real priorities – are lumped into the ‘other’ category” (Assembly of First Nations 2002a, 2). INAC made no attempt to address or incorporate these “other” comments.

The government, on the other hand, boasted that it heard from more than 10,000 people through consultation meetings and questionnaires (online and mail-in). According to INAC, “these numbers are not insignificant” (Canada, INAC 2001a).⁶ However, they mask the fact that the consultations were boycotted by a number of First Nations political organizations, including the Assembly of First Nations and the Assembly of Manitoba Chiefs, and that INAC consulted with less than half of the more than six hundred First Nations. Turnout at consultation meetings, which were advertised as information sessions, was poor. In the Northwest Territories, for instance, where 14,945 First Nations people reside, only 129 (less than 1 percent) of the territory’s residents participated, none of whom lived on-reserve. Participation rates in the provinces ranged from 1 percent to a high of approximately 5 percent in Alberta (Elias 2002, 9). On average, meetings involved about twenty-five participants, of whom twelve were women, but in four communities a consultation meeting was convened and no one attended, and seven meetings were held in which government officials outnumbered the participants. Other statistics are

even more telling. When it comes to the representation of women, Elias notes that the three meetings convened by women's organizations account for almost 20 percent of women's participation in the consultation process. If these groups are excluded, the rate of women's participation drops from 47 to 10 percent (*ibid.*).

INAC's consultation exercise was not based on scientific sampling; it produced anecdotes rather than reliable management data, and it was not consistent with the type of open-ended consultation process recommended by the Royal Commission on Aboriginal Peoples. In reviewing the exercise, Elias concluded: "The consultation process cost a lot of money and wore out a lot of goodwill. In the end, the results of the process will be extremely vulnerable to cynical manipulation" (Elias 2002, 2). Nor, of course, do these figures reflect the quality of engagement. For instance, anyone who contacted the "FNGA hotline" to request more information would be counted among the 10,000 consultees.

An analysis prepared by a group of American academics associated with the respected Harvard Project on Native American economic development also raised several pointed criticisms of the FNGA. The extensive research commissioned by the Harvard Project demonstrates that the economic success and well-being of Aboriginal governments is dependent on much more than the typical predictors, such as natural resources and educational achievement. These factors are only likely to make a significant difference in the lives of Aboriginal people where the following elements are in place:

Practical Sovereignty. – The Indian nation has taken effective control of reservation affairs, resources, institutions, development strategies, and the like. In short, genuine decision-making power over matters of substance has moved into indigenous hands.

Capable Governing Institutions. – The Indian nation has backed up jurisdictional power with governing institutions capable of exercising that power effectively, responsibly, and reliably. This typically means, among other things, that it has developed a reliable and politically independent court system, has decoupled politics and business management, and has developed the ability to make and implement decisions in a timely fashion.

Cultural Match. – There is a fit between the formal institutions of government and indigenous conceptions of how authority should be organized and exercised, thus winning the support of the community for the institutions themselves. (Cornell, Jorgensen, and Kalt 2002, 4–5)

The coordinators of the Harvard Project found it curious that the Canadian federal government had taken an active interest in the project's research findings pertaining to "good governance" whilst generally ignoring its findings with regard to practical sovereignty. As they note, "Good governance without sovereign powers is about as effective as sovereign powers without good governance: the two have to go together" (Cornell, Jorgensen, and Kalt 2002, 11). While their

analysis is not explicitly framed in terms of colonialism, their main criticisms – that the legislation fails to advance community aspirations for self-government and “practical sovereignty” – suggest that the FNGA constitutes a new form of colonial rule in which the federal government is dictating, once again, the terms and conditions of Aboriginal governance.

Similarly, First Nations leaders, scholars, and political organizations have expressed profound disappointment with the Act. The Assembly of First Nations noted that the proposed legislation invests new executive authority in the minister and the cabinet, which is subject neither to public scrutiny nor to parliamentary oversight. For example, sections 4(3) and 32 specify that the Governor in Council has the authority “to make regulations applicable to bands during any period when a band code is not in force and on all other matters related to First Nations governance covered in the Act. In other words, Cabinet will set the ‘default regime’ for those First Nations that do not comply with the requirements to enact codes with the Act” (Assembly of First Nations 2002b, 11).

Criticism has also come from the Assembly of Manitoba Chiefs, which argued that the Act contravenes the Aboriginal and treaty rights contained in section 35 of the *Constitution Act, 1982*. Roberta Jamieson, chief of the Six Nations Reserve, agreed, adding that Aboriginal people are not prepared to give up the hard-won fight to enshrine these rights in the constitution. “And now the Minister would have us believe that that didn’t happen,” she told a reporter. “That’s why reaching back to the Indian Act, pulling it forward and tinkering with it as a blueprint for our future just doesn’t cut it, and it shouldn’t cut it with Canadians either. Because if our constitutional rights can be ignored, who’s next?” (Jamieson 2002).

The National Aboriginal Law Section of the Canadian Bar Association also recommended that the FNGA be withdrawn and replaced by a “more comprehensive legislative initiative ... that recognizes the changing and diverse nature of First Nations, reinforces their right to create self-government structures suited to their traditions and aspirations and confirms their unique place in society” (Canadian Bar Association 2003, 11). The bar association added that if the government was unwilling to withdraw the Act and start anew, it should, at the very least, adopt a series of recommendations to improve the FNGA. These should include, for example, provisions that would allow bands to develop codes for leadership selection, for government administration or financial management and accountability, and a recommendation that any codes established be interim and transitional, pending any agreement on self-government between a First Nation and the federal government.

As these reactions demonstrate, the FNGA is significantly flawed. While some of these flaws could be rectified with minor revisions, the majority are not specific to this legislation. Rather, they are the product of Canada’s historical approach to Aboriginal policy which, we have argued, cannot be

divorced from its colonial vestiges. Of course, colonial policies do not exist in an institutional vacuum; they are part and parcel of the institutional configuration that is Canada's political system.

ANALYSING THE FNGA

Institutions have re-emerged as important variables in the study of political science generally and in public policy specifically. By institutions, we refer not only to formal bodies or organizations but also to rules of conduct that may structure the web of interactions that take place in political systems and that ultimately affect the content and context of public policy. As Immergut has observed, institutions are best conceived as configurations: "By mediating political conflicts in distinctive ways, political institutions bring together different constellations of organized actors and change the ways in which they interact" (Immergut 1992, 25). Institutional analysis is as varied as the institutions it seeks to examine and has been applied to a number of policy fields, including social policy, health, the environment, and immigration. Although there is some disagreement in the literature, it is generally accepted that there are at least three distinct institutionalist approaches: historical, rational choice, and sociological. This essay draws mainly on the first approach, arguably the most prominent of the three. According to Peter Hall, institutions are important for two reasons: "On the one hand, the organization of policy making affects the degree of power that any one set of actors has over the policy outcomes ... On the other hand, organizational position also influences an actors' definition of his own interests, by establishing his institutional responsibilities and relationship to other actors" (Hall 1992, 2-3). In rational choice analyses, institutions form the strategic context within which actors find themselves.⁷ Although historical institutionalists also accept the notion that "institutions provide the context in which political actors define their strategies and pursue their interests" (Thelen and Steinmo 1992, 7), institutions assume a greater role in politics beyond simply defining the strategic context, as rational choice analysts are more likely to emphasize.

Path dependence is a popular concept among historical institutionalists, not to mention rational choice institutionalists. Generally, it refers to the idea that policy choices may be restricted or constrained by previous action or inaction. Moreover, path dependence has an important impact on the strategies employed by political actors who are attempting to influence public policy.⁸ It is important to stress, however, that path dependence, as a method for explaining policy continuity, can be misconstrued as stating little more than the obvious. It is hardly novel to say that the policy decisions of today are in some way affected by those of yesterday. But as Hansen explains, path dependence is more specific than this:

Path dependence does not simply mean that “history matters.” This is both true and trivial. Path dependence has to mean, if it is to mean anything, that once a country or region has started down a track, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain institutional arrangements obstruct an easy reversal of the initial choice. Perhaps the better metaphor is a tree, rather than a path. From the same trunk, there are many different branches and smaller branches. Although it is possible to turn around and to clamber from one to the other – and essential if the chosen branch dies – the branch on which a climber begins is the one she tends to follow (Hansen 2002, quoting Levi 1997, 270)

If the term “path dependency” is to have any resonance, Hansen argues, it must fulfill two prerequisites. First, we must be able to locate instances of path-dependent effects. One can speak confidently about a path-dependent effect when one can demonstrate that the rejection of a proposed policy change is related to the “sunk costs”⁹ associated with previous policy initiatives. Second, one must identify the mechanisms, such as lock-in and disincentive effects, that are driving this process. The difference between lock-in and disincentive effects is a matter of degree: “lock-in” refers to instances in which “certain options are rendered wholly unattainable by original choices” (Hansen 2002, 271), while “disincentive effects” refers to instances in which original choices may structure future choices, but not in the overly deterministic way that “lock-in” describes.

Examining the FNGA from a historical institutionalist perspective provides a different standpoint from that which is dominant in the Aboriginal policy literature. It emphasizes the extent to which the federal Aboriginal “policy paradigm” has remained stagnant and compels us to explain “policy continuity” just as rigorously as we explain “policy change”. Following Peter Hall, we understand a policy paradigm as “an overarching set of ideas that specify how the problems facing them (policy makers) are to be perceived, which goals might be attained through policy and what sorts of techniques can be used to achieve these goals ... Like a gestalt, it structures the very way in which policy-makers see the world and their role within it” (Hall 1992, 91–2). We use the concept of path dependence as a means of trying to grapple with our assertion that changes in Aboriginal policy have been glacially slow.

Many have argued, to the contrary, that “changes over the last thirty years in this policy field have been remarkable” (Abele, Graham, and Maslove 1999, 252). While we do not dispute the fact that there have been positive developments over the past thirty years – for example, the *Constitution Act, 1982* formally recognizes and affirms Aboriginal treaty rights – we contend that none of these changes has overturned the colonialist policy paradigm. What is remarkable is that minor policy alterations continue to be viewed as proof of a radical transformation of the Aboriginal policy paradigm and that it has

taken more than thirty years to realize these changes. Moreover, we contend that these changes in discourse and policy – however minor – were spurred mainly by Aboriginal activism, landmark court decisions such as *Corbière* (1999), and past policy failures such as the Inherent Right Policy of 1995 and the *Indian Act* (1876), each of which catapulted these issues onto the agenda. Perhaps the FNGA will serve as a catalyst for a renewed cycle of “contentious politics” in Aboriginal communities, in much the same way as the *White Paper* of 1969 politicized Aboriginal peoples against its adoption.

INAC claimed that the FNGA would transform the colonial structures of *Indian Act* band councils into governments that are financially viable, able to operate with secure, predictable government transfers, accountable to their members, and reflective of and responsive to their communities’ needs and values (Canada, INAC 1997, index). As one INAC official stated, “The bill [*First Nations Governance Act*] itself is an interim step toward the negotiation of full self-government with the Crown but there is a need to build community capacity before this goal can be reached” (Bird 2003). The claim that the FNGA would assist INAC in transforming Aboriginal governance has been supported by many scholars, bureaucrats, and Aboriginal people. We do not dispute the claim that a transition is underway, but we argue that this transition is not from colonialism to postcolonialism; it is from one form of colonial rule to another “kinder, gentler” form of colonial management. Under the proposed FNGA, *Indian Act* band councils are supposed to become more self-governing using the same administrative framework and structure imposed by the *Indian Act*. A true paradigm shift requires abandoning the form of government imposed by the *Indian Act* and investing in the capacity of First Nations (as nations) to redefine and renew indigenous forms of governance.

Thus, the FNGA represents a continuation of colonialism, which can be demonstrated both historically, by considering the FNGA in relation to other federal policies aimed at Aboriginal people, and theoretically, by using the lens of historical institutionalism. From the perspective of path-dependency theory, the *First Nations Governance Act* represents a continuation of a policy paradigm that predates the creation of the *Indian Act*. Historical institutionalists have drawn our attention to the presence of “sunk costs,” which render the idea of radical policy reversals unattractive. Similarly, in the case at hand, it should be stressed that there are enormous investments – financial, political, moral, and social – in maintaining a vision of Aboriginal policy that reflects the ideals of protection, civilization, and assimilation. At the federal level, any serious overhaul of Aboriginal policy could lead to the dismantling of the bureaucratic infrastructure that was built to colonize Aboriginal people. One need not subscribe to the somewhat extreme view that bureaucrats are uniformly self-interested, utility-maximizing individuals to argue that they might be threatened by a new Aboriginal policy paradigm. Moreover, a policy paradigm that recognizes and affirms Aboriginal nationhood not only threatens

bureaucratic legitimacy, but it challenges Canada's sovereignty and territorial integrity, and compels us to ask difficult questions regarding the redistribution of resources to Aboriginal communities.

Notwithstanding the changes that have occurred in Aboriginal affairs during the past thirty years, the goals of protection, civilization, and assimilation continue to define and drive this policy field (Tobias 1991, 127). While the language describing the government's domination of Aboriginal governance has shifted, the central objectives of colonization remain the same: civilizing or creating the capacity necessary for Aboriginal people to exercise good governance; and assimilating civilized governments into the Canadian body-politic as "federal-municipalities plus."¹⁰ More than a century ago, Prime Minister John A. Macdonald argued that the *Indian Act* political system of elected band councils would accustom "Indians to the modes of government prevalent in the white communities surrounding them" and would "thus tend to prepare them for earlier amalgamation with the general population of the country" (Daugherty and Madill 1980, 12). First Nations were gradually "civilized" through the imposition of municipal-style government with limited authority and no autonomous jurisdiction. This imposed regime change altered indigenous structures and processes of governance by replacing consensual and inclusive democracy with elected majority rule. It also limited the scope and authority of First Nations governments, since responsibility and authority was vested in the minister of Indian affairs with *Indian Act* band councils permitted to govern only in areas of relative insignificance (e.g., noxious weeds and poultry raising).

In order to further its policy objective of "municipalizing" First Nations governments, the federal government has continually tinkered with the *Indian Act*. Finally, in 1969, after nearly a century of such tinkering, the Government of Canada attempted to realize its policy objectives by integrating First Nations (individually and collectively) into Canadian society. Cast neither as a "final solution" nor as the "assimilation of the civilized," the white paper entitled *Statement of the Government of Canada on Indian Policy* advocated "integration" as a modern solution to colonialism, an initiative that resonated with Trudeau's individualistic vision of Canada as a "just society." The 1969 white paper is often remembered as a statement of the government's intentions to assimilate or integrate individuals by eliminating "Indians" as a legal category, dissolving reserves, absolving the federal government of its responsibility for or jurisdiction over First Nations people and their lands, and dismantling the *Indian Act* and its system of bureaucratic rule. While the white paper did focus on recreating "Indians" as "Canadians" with the same set of individual rights, it is generally forgotten that the proposal would have recreated, where numbers warranted, *Indian Act* bands as municipalities with "the mode of government prevalent in white communities." The white paper was thus a continuation of the colonial policy legacies of civilization and

assimilation. The Trudeau-Chrétien vision of the just society did not in fact deviate from the goals of pre-existing Aboriginal policy; it merely attempted to jumpstart the long-delayed process of assimilation. Rather than supporting the dual goal of decolonization and the retraditionalization of governance – which would have represented a major (not to mention costly) policy reversal – the Trudeau government opted to maintain the colonial policy paradigm.

Many viewed the “defeat” of the white paper as the defeat of the government’s policy goals of protection, civilization, and assimilation. In this view, the white paper represented colonialism’s last stand and was immediately replaced by a new policy paradigm, characterized by the discourse of self-government. But many have argued that the government has “stayed the course,” altering the colonial policy paradigm slightly but neither dismantling nor radically transforming it (Ladner 2003, 51–5; Monture-Angus 1999, 12). Aboriginal people have not been provided with the opportunity to rebuild themselves as nations with their own political systems. Instead, the long-standing goals of civilization and assimilation have taken on a slightly new form and have been dressed up in new language – namely, “self-government” and a “new relationship” between the colonized Aboriginal “Canadians” and the colonizing non-Aboriginal Canadians. Viewed in this light, self-government, as it is conceptualized by the government and many academics (see Alfred 1999, 54–60; Henderson 1994, 316), is another assimilationist strategy for Indian bands that are “civilized” enough to assume responsibility for their own affairs and to do so using a municipal form of government or the “mode of government prevalent in white communities.”

This interpretation of the policy field since the white paper is consistent with the animating principles of the *First Nations Governance Act*, which strives to build capacity for First Nations that are not ready or able to negotiate self-government and function as federal municipalities “plus.” Aside from a few minor adjustments, the FNGA follows the same policy trajectories that were institutionalized in the *Indian Act* in the nineteenth century and inspired both Macdonald’s *Indian Advancement Act* and Trudeau’s white paper. It does so by strengthening the colonial structures of government and thereby furthers the process of civilizing and assimilating or “municipalizing” First Nations governance.

Everyone does not accept this argument that the Aboriginal policy, past and present, intends to recreate First Nations governments (specifically, the *Indian Act* band councils) as “municipalities.” The federal government, for one, claims that the FNGA “would not turn First Nations communities into municipalities. Instead, the Act will give First Nations bands legal capacity. This means that First Nations governments will be able to easily conduct the business of a government in a way that no one can question. It will give bands clear authority to enter into contracts and agreements. This will promote investment and help tear down the barriers to economic development. The goal

is to build stronger, self-reliant communities. Legal capacity will not incorporate bands or affect their status as bands” (Canada, INAC 2002).¹¹

Regardless of how the federal government wants to reframe this issue or adjust the terms of the existing colonial policy paradigm, it nevertheless continues in the same policy direction that it has followed for decades. All of the initiatives in this policy paradigm (the *Indian Act*, the *Indian Advancement Act*, the 1969 white paper, and the *First Nations Governance Act*) are grounded in slightly different versions of the municipal model of government. The *Indian Act* sought to create the capacity of First Nations to govern themselves as municipalities. The *Indian Advancement Act* sought to create First Nations as ideal-typical municipalities. The white paper sought to eliminate First Nations and in so doing to force populations either to govern themselves as ordinary municipalities or be incorporated into existing municipalities. For its part, the FNGA sought to recreate *Indian Act* band councils as federal municipalities with rights and responsibilities reflecting a special status and a special relationship with the Crown as “municipalities plus.”

CONCLUSION

The arrival of the *First Nations Governance Act* was heralded as a sign of radical transformation in the relationship between Aboriginal peoples and the state, placing greater power in the hands of First Nations. We have argued that the FNGA failed to live up to the rhetoric. This was demonstrated forcefully when Bill C-7 was referred to the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources after first reading in the House of Commons. This was an unusual step, as bills normally are referred to committee only after second reading, but it was seen as necessary given the vocal opposition expressed by many Aboriginal people. The committee’s report, which was tabled in the House of Commons in the Spring of 2003, included more than a hundred proposed amendments to the Act.

We have argued that the problems associated with the FNGA could not be resolved by minor alterations. This explains why we did not undertake, as the committee did, a clause-by-clause review of the bill. Rather, we attempted to demonstrate how the FNGA perpetuates the same colonial policy paradigm that the federal government had vowed to dismantle. We argued, furthermore, that this “paradigm paralysis” that has characterized contemporary Aboriginal policy is related directly to the historical policy legacies of protection, civilization, and assimilation. While our findings are preliminary, the use of historical institutionalism, especially the notion of path dependency, provides a promising theoretical lens through which to examine the historical evolution of First Nations policy. In particular, such an approach focuses our attention on the enduring influence of institutions and their respective logics,

which might be useful when assessing Prime Minister Martin's ability to move forward on the Aboriginal agenda. The new Indian affairs minister, Andrew Mitchell, has said he would consider all available options, including reintroducing legislation. "At some point in time, there may need to be a change," he told the *Globe and Mail*. "I'm not going to rule anything out."¹²

INAC's first round of consultations confirmed that federal Aboriginal policy is "locked in" to a particular approach to consultation, one that views Aboriginal peoples as a target population unable to contribute meaningfully to policy learning. Hearing and "heeding the voices" of First Nations, who are too often the objects of policy, is a crucial step towards the creation of a new, postcolonial policy paradigm. For many, this means decolonization, a return to traditional political systems, and a respect for indigenous sovereignty. As was noted by the Harvard team that examined the FNGA, good governance is not enough. A truly reconfigured relationship demands "practical sovereignty" and a respect for Indigenous traditions.

NOTES

The authors wish to thank Michael McCross, Miriam Smith, Michael Murphy, and the anonymous reviewers for their comments on earlier drafts of this essay.

- 1 It should be stressed that the Act does not apply to bands that have already negotiated self-government agreements, including the Cree-Naskapi of Quebec, the Sechelt, the Nisga'a Nation, and the Yukon First Nations.
- 2 This national organization represents non-status Indians (those not recognized in or affected by the *Indian Act*), off-reserve Indians, and Métis people.
- 3 Ingram and Schneider argue that public policies reflect crude assumptions about the target populations under the microscope: "The social construction of a target population refers to (1) the recognition of the shared characteristics that distinguish a target population as socially meaningful, and (2) the attribution of specific, valence-oriented values, symbols, and images to the characteristics. Social constructions are stereotypes about particular groups of people that have been created by politics, culture, socialization, history, the media, literature, religion, and the like" (1993, 335).
- 4 Citizen engagement differs from public consultation in that it normally includes both government- and citizen-convened involvement. Moreover, it generally refers to a process of deliberation that contributes to public policy decisions in a transparent and accountable manner. Citizen engagement would "exclude much of the activity that passes for public consultation because the latter does not produce a genuine dialogue, nor give citizens any real influence over policy outcomes" (Phillips and Orsini 2002, 4). Admittedly, the term "citizen" is deeply problematic when applied to Aboriginal people, many of whom view themselves as citizens of

their own nations. Whether citizens or not, however, we believe that the literature on citizen engagement is helpful in shedding light on the deficiencies of the federal government's current attempt to reform the *Indian Act*. Moreover, a focus on citizen engagement complements our path-dependent approach to Aboriginal policy, which suggests that federal Aboriginal policy is "locked in" to a particular approach to consultation, which views Aboriginal people as a target population unable to contribute meaningfully to policy dialogue.

5 Taken from Letter to the Editor sent by Nault to the *Drum*. Available at http://www.fng-gpn.gc.ca/NR_LetEdA11_e.asp

6 It is worth noting that these numbers include non-First Nations people.

7 Pierson is one of the most influential writers who employs a rational choice approach to institutions. His book *Dismantling the Welfare State?* stressed that institutional factors – including the structure of formal institutions and the consequences of previous policy initiatives (policy legacies) – helped to explain the successes/failures of retrenchment policies in the Reagan and Thatcher governments. See Pierson 1994.

8 One should note, however, that there are at least two uses of the term, one from the literature on economics and technology and the other from the work of "new institutional" sociologists. The first use of the term came from economists who were concerned with the impact of new technologies. The most common example used by economists to illustrate the concept of path dependency concerned the use of the QWERTY keyboard, which became the accepted standard although it was inferior to other keyboards. For a more general discussion, see Thelen 1999. On QWERTY, see David 1985.

9 The term "sunk costs" is borrowed from economics to refer to costs that, once incurred, cannot be recouped. Normally, it is used by economists to understand the behaviour of firms and their possible reluctance to enter a market that might entail significant irreversible costs if their foray fails.

10 We are referring to the idea that *Indian Act* band councils are being recreated as little more than municipalities exercising those responsibilities delegated by other levels of government, "plus" responsibilities granted them in areas not typically associated with municipalities, such as hunting and fishing rights. This, of course, is a far cry from the nation-to-nation relationship elaborated by the Royal Commission on Aboriginal Peoples and in the treaties.

11 "Myths and Facts," available at http://www.fng-gpn.gc.ca/NEW_MF_e.asp.

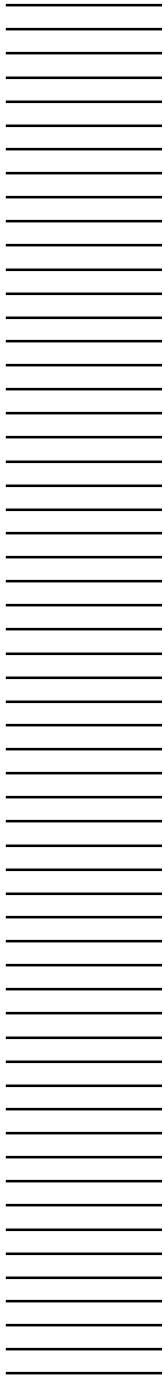
12 Quoted in Kim Lunman, "Breaking with Past a 'Mistake' for Martin, Nault Says," *Globe and Mail*, 4 Feb. 2004.

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IV

Intergovern- mentalism

The Challenges of Intergovernmental Relations for Nunavut

Annis May Timpson

Cette dissertation cherche à déterminer si les relations intergouvernementales peuvent servir de mécanisme à la reconfiguration des relations entre les autochtones et le gouvernement du Canada. En utilisant le cas du Nunavut (la juridiction canadienne dans laquelle on retrouve la plus grande proportion d'autochtones), la question de la complexité à concevoir et à implanter une stratégie sur les affaires intergouvernementales qui est centrée sur la perspective autochtone y est explorée. L'engagement du Nunavut dans l'arène intergouvernementale y est examiné et les aspects de ses relations bilatérales avec les gouvernements fédéral, provinciaux et territoriaux y sont considérés. Cette dissertation démontre que tandis que le gouvernement du Nunavut a essayé d'intégrer la perspective autochtone dans sa stratégie sur les affaires intergouvernementales, les procédures établies par un gouvernement populaire et par le fédéralisme exécutif au Canada empêche de garder la perspective autochtone à l'avant-plan des préoccupations en ce qui concerne les négociations intergouvernementales.

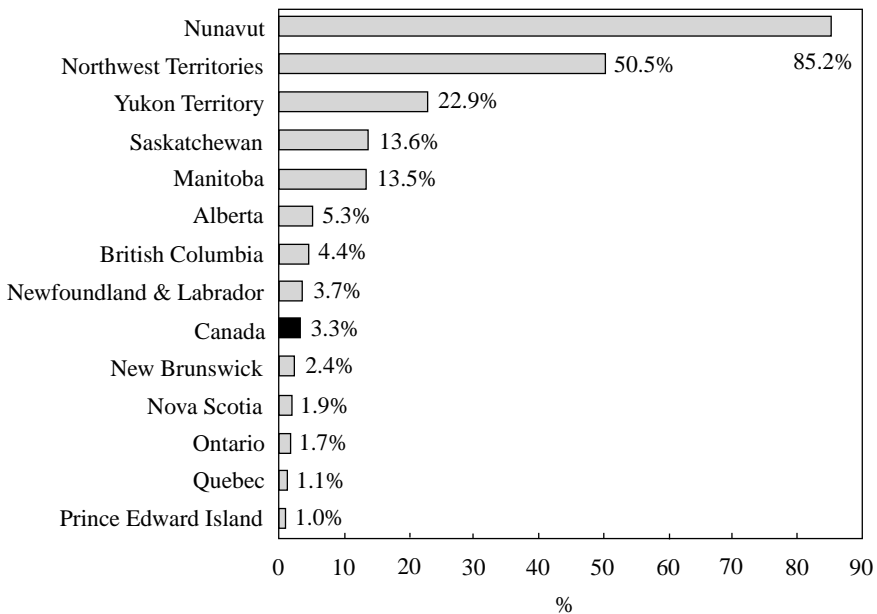
INTRODUCTION

Discussions of intergovernmental relations in Canada pay scant attention to the territorial governments' participation in the Canadian federation. Although the territories are increasingly acknowledged at the outset of publications on intergovernmental relations in Canada, the federal-provincial paradigm still dominates scholarship on this subject (Simeon 2002, 204; O'Reilly, Inwood, and Johns 2002, 1). While this pattern reflects the way that territorial governments have been drawn into the web of executive federalism without the constitutional or revenue-raising powers of the provinces, the dominance of the federal-provincial paradigm in the scholarship on intergovernmental relations gives rise to two major problems. First, it overlooks the fact that territorial

governments “have gradually taken on more province-like powers, and are now routinely involved in most intergovernmental forums” (Simeon 2002, 204). Second, it misses the opportunity to assess the extent to which public governments serving jurisdictions with high proportions of Aboriginal people are able to represent the interests of those Aboriginal citizens in intergovernmental negotiations (figure 1).

Even though scholars of Canadian federalism have begun to argue that “the aspiration for self-determination of Canada’s Aboriginal peoples ... is having a significant impact on intergovernmental relations” in Canada, no one has yet analysed how this occurs in practice (Cameron 2002, 10, 13). This essay is therefore designed to contribute to a broader inquiry into how the aspiration for self-determination amongst Canada’s Aboriginal peoples is shaped by the practices of intergovernmental relations in Canada. It does so by exploring how the new Government of Nunavut, which was established in 1999 to govern a jurisdiction that is 85 percent Inuit, has addressed the challenges of developing intergovernmental relations with other governments in Canada.

Figure 1: Territorial and Provincial Population Reporting Aboriginal Identity According to Their Percentage of the Total Population, 2001



The focus on Nunavut is pertinent because its government was specifically designed to protect Inuit interests and culture within a framework of public government. Moreover, even though Nunavut's population is small by national standards, it contains the highest proportion and most ethnically unified group of Aboriginal citizens in any provincial or territorial jurisdiction in Canada. In addition, it is the youngest member of the "federal-provincial-territorial club" and is actively involved in cultivating bilateral, trilateral, and multilateral relationships with other governments, both inside and outside Canada (Simon 2001, 432). As a result, it provides an excellent opportunity to explore whether the integration of Aboriginal priorities into the operation of a public government can be sustained within the framework of executive federalism and in relations that the Government of Nunavut cultivates with other governments in Canada.

The essay begins by examining the formal connection between Aboriginal interests and public government in Nunavut, first by clarifying the relationship between the 1993 Nunavut Land Claims Agreement and the creation of a new territorial government in 1999, and then by examining how the Government of Nunavut has sought to formalize this relationship in practice. The essay then considers how far the objective of integrating Aboriginal interests into a model of public government can be sustained in Nunavut's relations with other governments in Canada. This issue is addressed, first by outlining the bilateral, trilateral, and multilateral relations in which the Government of Nunavut has been engaged since its creation in 1999, then by examining the infrastructure and strategies developed to facilitate its participation in federal-provincial-territorial forums, and, finally, by considering the most significant relationships that Nunavut has established with other governments in Canada since its creation in 1999.

PROTECTING ABORIGINAL INTERESTS WITHIN A PUBLIC GOVERNMENT

1993: THE NUNAVUT LAND CLAIMS AGREEMENT AND THE NUNAVUT ACT

The intention to integrate Aboriginal priorities into a model of public government can best be understood by considering key aspects of the founding documents of Nunavut. Although the Government of Nunavut was established through the 1993 *Nunavut Act* to be a public government with elected legislators who are accountable to all Nunavummiut,¹ regardless of their race or ethnicity, Nunavut's existence as a territory (and the Government of Nunavut's existence as a government) is underscored by the 1993 Nunavut Land Claims Agreement (NLCA). Government adherence to this agreement is carefully monitored by Nunavut Tunngavik Incorporated (NTI), the birthright corporation elected by the Inuit of Nunavut to ensure that the land claims agreement

is respected and implemented by both the federal and Nunavut governments. Thus, even though in a formal, legal sense, the Government of Nunavut is a non-ethnic government, it is distinct from other governments in Canada because its existence is underscored by a contemporary treaty which asserts Inuit interests and is protected by section 35 of the *Constitution Act, 1982*. Moreover, as the population of Nunavut is 85 percent Inuit, the Government of Nunavut, as a public government, has a commitment to protect and promote the interests of the majority Inuit population it serves.

The NLCA was designed to establish Inuit ownership of land in the Eastern Arctic and to compensate the Inuit financially for historic injustices. On signing the final agreement, the Inuit relinquished “all their aboriginal claims, rights [and] title ... to lands and waters within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada,” as well as any interests they might have in these areas (Canada, INAC and TFN 1993, 11). In return, the federal government recognized the Inuit’s collective title to 350,000 square kilometres of land and their right to harvest wildlife in Nunavut (*ibid.*, 17–21, 39–52). In addition, the federal government agreed to pay NTI, \$1.173 billion over fourteen years for the collective benefit of all Inuit (*ibid.*, 217).

Issues of governance were also addressed through the NLCA – in a way that reflected the federal government’s resistance (at that time) to the concept of Aboriginal self-government and Inuit concerns about political and cultural autonomy. The federal government agreed to introduce legislation to create “a new Nunavut Territory, with its own Legislative Assembly and public government” and, in addition, to establish a range of co-management boards through which representatives of the federal and territorial governments and NTI could work together in a trilateral process of planning and resource management (*ibid.*, 23, 28–34, 93–5, 101–4, 123–8).

The NLCA required both the federal government and the territorial government to assume responsibility for the development of social, economic, and cultural policies to enhance the self-reliance and well-being of Inuit. In particular, it encoded plans to promote Inuit employment within government and, in time, develop a territorial public service that reflected the ethnic composition of Nunavut (*ibid.*, 191–5). Moreover, the final agreement laid down procedures to increase Inuit participation in business opportunities, in competition for government contracts and in private-sector employment within Nunavut (*ibid.*, 196–201). In addition, it ensured that Inuit had “the right to participate in the development of social and cultural policies, and in the design of social and cultural programs and services, including their method of delivery, within the Nunavut Settlement Area” (*ibid.*, 223). In short, the NLCA brought to fruition the Inuit dream not just of having a territory they could call their own but of having much greater control over the use of that land. It also laid the foundations for enhanced political and economic opportunities for Inuit through the creation of a new public government and through the

expansion of government employment and contracts in the territory. Above all, it recognized the significant connection between land, government, economy, and culture for the well-being of Inuit in the new territory of Nunavut.

INTEGRATING ABORIGINAL INTERESTS INTO THE NEW GOVERNMENT OF NUNAVUT

The objective of integrating Inuit values and interests into the work of the new public government was clear from the earliest stages of its establishment. This goal was articulated by the Office of the Interim Commissioner of Nunavut (OIC) as it oversaw the government's bureaucratic development. It was then affirmed by Nunavut's first elected legislative assembly shortly after it took office and encoded in a formal agreement signed by the premier of Nunavut and the president of NTI. In each case, the integration of Inuit values and interests into the development of public government was seen to have an inter-governmental dimension.

The founding deputy ministers of Nunavut, appointed by the OIC in 1998 to establish the new government departments, were given specific instructions to respond to "the wishes of the people for a fair, open and responsive form of government" that was "respectful of traditional forms of government, but modern in its use of technology to improve service delivery and facilitate dialogue amongst us all" (OIC 1998a, 5). In delivering a model of public government that reflected Inuit interests, the founding deputy ministers were informed that they should ensure that the provisions of the NLCA were fully respected within the work of their departments. In addition, they were asked to prioritize "the negotiation or amendment of intergovernmental agreements" to ensure that there was "continuity [in the] delivery of core services" to Nunavummiut and that the work of their departments meshed with policy frameworks of the Canadian federal system (OIC 1998b, 4).

Shortly after the first set of legislators were elected to office in Nunavut, the premier (Paul Okalik) and his cabinet worked out their vision for Nunavut's coming of age in 2020, tabled as the *Bathurst Mandate* in the legislative assembly on 21 October 1999. This document articulated the Government of Nunavut's commitment to meet its obligations under the NLCA and to develop socio-economic policies to promote the health, education, economic well-being, and self-reliance of all Nunavummiut. Moreover, it emphasized how "the accumulated wisdom of the elders," and "Inuit Qaujimajatuqangit" (Inuit traditional knowledge) would provide the context for developing "an open, accountable government" that "serves Nunavut's needs, with the most effective use of resources" (Nunavut 1999, 4).

Interestingly, the *Bathurst Mandate* also pointed to a number of ways in which intergovernmental relations would shape the process of making this vision a reality. It noted the importance of concluding "agreements with the Government of Canada for public investment in key infrastructure," ensuring

that “all government functions contracted to the Government of the NWT on April 1, 1999” were either brought to Nunavut or reviewed and renegotiated (*ibid.*, 6). Furthermore, the mandate asserted that the Government of Nunavut would “work to allow Nunavut to take its place and develop its role as an active, articulate, patient and conciliatory partner within Canada and the circumpolar world” (*ibid.*). In other words, the new government recognized, near the outset of its term of office that the protection of Inuit interests within the context of public governance was not a project that could be realized without the involvement of other governments, both inside and outside Canada.

The relationship between the interests of Nunavut Inuit and public government was also clarified in the *Clyde River Protocol*, signed in October 1999 by the premier of Nunavut and the president of NTI. This document specified the procedures that would govern the relationship between the Government of Nunavut and NTI and (like the *Bathurst Mandate*) provided a good indication of Inuit priorities. In particular, it noted the importance of collaboration over “hunter income support, and income support programs more generally, jurisdiction over crown lands, including mineral rights, and economic development within Nunavut; the status, protection and promotion of Inuit language and culture within Nunavut ... the status and substance of aboriginal and treaty rights ... and Nunavut’s place in Canada and the world ” (Nunavut and NTI 1999, 4).

While some of these matters would be addressed by public policies developed within the territory, it is interesting to note how the Government of Nunavut and NTI recognized the importance of locating Nunavut within the federation and the circumpolar world. Indeed, the Protocol noted: “The Government of Nunavut and NTI are committed to conducting their relationships with the Government of Canada, the governments of the provinces and other territories in Canada and with governments in other countries in ways which balance, and build upon, both the status of the Inuit of Nunavut as an aboriginal people of Canada and the jurisdictional competence and administrative capacity of the Government of Nunavut” (*ibid.*, 5). In other words, the Protocol recognized how relations with other governments were critical to realizing the objectives of Aboriginal self-determination, on the one hand, and public governance, on the other.

As the new government has become established in Nunavut, its politicians and bureaucrats have become increasingly aware of the way that intergovernmental relations affect policy development. For example, they were quick to realize that the impact of global warming on traditional hunting practices in the Eastern Arctic, like the lobbying of Ottawa for improved health-care funding, had to be raised and addressed within an intergovernmental framework. Similarly, the public servants who were responsible for developing the territory’s human rights legislation had to think how best to reconcile Inuit

understandings of rights, community and justice with models of human rights legislation that have been developed primarily in southern Canada.

Given that the framework for intergovernmental relations in Canada was not designed with Aboriginal priorities in mind, we need to consider how far the intergovernmental arena can facilitate a reconfiguration of Aboriginal-state relations. As David Cameron has argued, the new forms of Aboriginal governance that are emerging in Canada raise “complex conceptual and policy issues concerning the appropriate relationship between these emergent political entities and the traditional structures and processes of Canadian federalism” (Cameron 2002, 13). I would argue that if the intergovernmental arena is to become a political space in which Aboriginal-state relations are reconfigured it must engage Aboriginal personnel, respect Aboriginal perspectives and reflect Aboriginal policy interests. However, before we can assess whether this has occurred with Nunavut’s entry into the federation, we need to identify the network of intergovernmental relations in which its fledgling territorial government has become engaged (table 1).

Table 1: Government of Nunavut’s Key Intergovernmental Relations

Established Bilateral Relations	Canada Northwest Territories Manitoba Greenland
Emergent Bilateral Relations	Nunavik Alaska/USA Prince Edward Island
Established Trilateral Relations	Canada – NTI – Nunavut Nunavut – Northwest Territories – Yukon
Established Multilateral Relations	Annual Premiers’ Conference Western Premiers’ Conference FPT ¹ meetings and working groups Inuit Circumpolar Conference Arctic Council

Source: Author’s research for this essay

¹Federal-provincial-territorial

GOVERNMENT OF NUNAVUT'S INTERGOVERNMENTAL RELATIONS

The Government of Nunavut's established bilateral relationships are first and foremost with the federal government, on which it remains fiscally dependent; second, with the Government of the Northwest Territories, from which Nunavut was formally divided in 1999; third, with the Government of Manitoba, with which it has strong historical ties developed through trade, transportation routes, residential schooling, religious institutions, and hospital provision for the Kivalliq region (in the southwest of Nunavut) and northern Manitoba; and, finally, with the Greenland Home Rule Government, with which it has strong cultural ties reinforced by the fact that both Inuit communities have succeeded in establishing unique forms of government. Interestingly, Nunavut moved quickly to formalize the latter two connections by signing memorandums of understanding with Manitoba in February 2000 and with Greenland in October of that year (Nunavut and Manitoba 2000; Nunavut and Greenland 2000).

Nunavut also has emergent bilateral relations with subnational governments in Canada and the United States. The common experience of addressing the delivery of services to Inuit communities in remote northern regions has led to consultations with regional government officials in Nunavik (northern Quebec). The need to reduce the negative impact of the United States' 1972 *Marine Mammals Protection Act* on Nunavut's economy and lend support to the Alaska Federation of Natives has led to discussions with the governments of the United States and Alaska (Baldino 2002). In addition, the shared experience of representing jurisdictions with small populations at the intergovernmental negotiating table, mutual economic interests in the development of wind energy, and possible cooperative ventures in the production of fish and fur products led to a memorandum of understanding being drafted in 2003 with the Government of Prince Edward Island.

The Government of Nunavut is also engaged in significant trilateral relationships, primarily with Nunavut Tunngavik Incorporated (NTI) and the Government of Canada, and increasingly (since the 2002 Yukon elections) in triterritorial negotiations with Yukon and the Northwest Territories. The "three-cornered federalism" that characterizes the trilateral relationship between Nunavut, NTI, and Canada (though not entirely intergovernmental given the status of NTI) is manifest in the complex process of implementing the Nunavut Land Claims Agreement and renewing the contract necessary to bring this about (Prince and Juniper 1997, 263). It is also evident in the design and operation of co-management boards – trilateral institutions of public government established under the land claims agreement to ensure that representatives of the federal and territorial governments work with representatives of NTI to assess the socio-economic impact of any proposed development in Nunavut; to oversee the regulation, use, and management of water; to manage and regulate the harvesting of wildlife; and to guide the planning of land use in the territory.²

More recently, the significance of the trilateral relationship between the federal government, Nunavut and NTI has been reinforced at a bureaucratic level through the creation and operation of the Nunavut Senior Officials Working Group. This group appears to have been initiated by Indian and Northern Affairs Canada when its officials suggested that it would be useful if its deputy minister and Nunavut's secretary to cabinet could meet at routine intervals to discuss issues of common concern. Apparently, the Government of Nunavut insisted that the executive director of NTI also be invited to such meetings. As a result, the three officials now meet twice a year, taking turns to chair the meeting and decide its location. To date, this group has addressed questions about resource devolution, offshore fishing rights for Nunavut and Labrador, boundary/overlap issues with the Manitoba Dene, and the potential for renewal of the former Northern Economic Development Agreement. The hope, in the longer term, is that the group's meetings can become more visionary, focusing on economic and social development in the territory, rather than simply ironing out tensions in the relationship between the federal government, Nunavut, and NTI.

These trilateral meetings mirror the federal-territorial-Inuit triad of interests that shaped the Nunavut Land Claims Agreement. In this respect, they are an attempt to ensure that the commitment to meshing Aboriginal and public governance is institutionalized in Nunavut's intergovernmental relationships. By contrast, the trilateral relations that Nunavut has developed with the two other territories are rooted in a model of public governance through which the three territorial governments join forces to lobby Ottawa on issues such as the need to re-establish a northern economic development agreement and to designate a specific fund "to support the delivery of basic health care services in Canada's territories" (Nunavut 2003a). The triterritorial health-care lobby met with considerable success in February 2003 when (to the amazement of many provincial government representatives present) the three territorial premiers refused to agree to the level of health-care funding proposed by Ottawa and, as a result, secured significant additional federal funds to support health-care provision in the territorial north (Rideout 2003; Nunavut 2003b). At the bureaucratic level these triterritorial connections are encouraged by the fact that all three governments' representatives in Ottawa are located in the same downtown office block and meet on a monthly basis to exchange ideas and strategize about the most effective way to lobby the federal government on matters of mutual concern. At a political level, they appear to have been facilitated by the territorial victory in the health-care negotiations of February 2003 (which many observers view as a fundamental turning point in the territories' role at intergovernmental meetings). These efforts should be reinforced in years to come by the signing of the 2003 Political Accord (Nunavut 2003c).

Multilateral relations with other governments occur internally within the federation and beyond Canada in the sphere of circumpolar governance. The

multilateral relations within Canada are evolving – as they would in any jurisdiction – through a range of federal-provincial-territorial meetings and working groups. Given the costs and time involved in the extensive travel required for these meetings (most of which are held in southern Canada), it is worth noting that Nunavut's participation at senior-level political and bureaucratic meetings has been high, running at an average participation rate of 87 percent (table 2). However, while Nunavut's participation at these senior intergovernmental meetings is well documented, it is harder to ascertain the extent to which it is able to participate fully in the intergovernmental framework of federal-provincial-territorial working groups. Despite its limited staff, Nunavut's office in Ottawa does what it can to ensure that the territory is represented at these meetings but anecdotal evidence from officials in other jurisdictions suggests that Nunavut's participation in the working groups is not as strong as at senior intergovernmental meetings. Various reasons were suggested, including the high turnover of public servants in the Nunavut government; the minimal relevance of some working groups to Nunavut's core interests; the limited intergovernmental experience of some territorial officials attending these forums; and, significantly, the relative cost of Nunavut officials travelling to meetings that are primarily concerned with securing per capita funding from the federal government for specific projects.

The Government of Nunavut is also engaged in a range of multilateral circumpolar relationships, which have been developed through its participation in the Inuit Circumpolar Conference and its links with the Arctic Council. Such is the importance of these relations that the Government of Nunavut has appointed a circumpolar adviser to facilitate its engagement in Arctic politics – for example, to explore connections with the Russian Association of Indigenous Peoples of the North and respond to the United Nations' Working Group on Indigenous Populations.

In short, the impact of intergovernmental relations on Nunavut is daunting, particularly given that it has a fledgling government, with a bureaucracy that is still operating well below capacity. How, therefore, has the Government of Nunavut begun to approach the task of developing intergovernmental relations within Canada?

DEVELOPING AN INTERGOVERNMENTAL RELATIONS STRATEGY IN NUNAVUT

CREATING AN OFFICE OF INTERGOVERNMENTAL AFFAIRS

Although intergovernmental relations inform the work of all program departments within the Nunavut government, the office responsible for the management of Nunavut's formal intergovernmental relations is nestled within

Table 2: Government of Nunavut's Participation at Intergovernmental Meetings of First Ministers, Ministers, and Senior Officials, 1999–2002

<i>Meeting</i>	<i>Attended</i>	<i>Not attended</i>	<i>Total</i>	<i>Cancelled</i>
OF FIRST MINISTERS				
FPT¹ First Ministers				
April 1999–March 2000	1 (100%)	0	1	0
April 2000–March 2001	1 (100%)	0	1	0
April 2001–March 2002	1 (100%)	0	1	0
PT² Premiers				
April 1999–March 2000	4 (80%)	1	5	0
April 2000–March 2001	2 (67%)	1	3	1(2) ³
April 2001–March 2002	3 (75%)	1	4	0
Total Attendance	12 (80%)	3	15	1(2)
OF MINISTERS				
FPT¹ Ministers				
April 1999–March 2000	29 (88%)	4	33	4
April 2000–March 2001	23 (85%)	4	27	0
April 2001–March 2002	29 (88%)	4	33	3
PT² Ministers				
April 1999–March 2000	11 (85%)	2	13	2
April 2000–March 2001	11 (73%)	4	15	0
April 2001–March 2002	18 (95%)	1	19	1
Total Attendance	121 (86%)	19	140	10
OF DEPUTY MINISTERS				
FPT¹ Deputy Ministers				
April 1999–March 2000	30 (83%)	6	36	3
April 2000–March 2001	26 (87%)	4	30	4(1) ³
April 2001–March 2002	23 (100%)	0	23	4(2) ³
PT² Deputy Ministers				
April 1999–March 2000	10 (71%)	4	14	0
April 2000–March 2001	16 (84%)	3	19	0
April 2001–March 2002	14 (100%)	0	14	2
Total Attendance	119 (88%)	17	136	13(3)

Source: CSIS 2002

¹Federal-provincial-territorial

²Provincial-territorial

³No record of attendance held by CSIS for number of meetings in parentheses

its central agency – the Department of Executive and Intergovernmental Affairs (EIA). At first, the administration of intergovernmental relations was overseen by the secretary to cabinet, who is also the deputy minister of EIA (OIC 1998a, 5–6). Then, in January 2000, the Intergovernmental Affairs Secretariat was created within EIA, with Ken MacRury (the founding deputy minister of Nunavut’s Department of Health and Social Services) appointed as its first deputy minister. When MacRury retired in the fall of 2001, Scott Clark moved from his post in the Department of Justice to become the acting deputy minister of intergovernmental affairs, until David Omilgoitok (then deputy minister of human resources) became the first Inuk deputy minister of intergovernmental affairs in June 2002. Such rapid movement of senior personnel from one department to another has been common in the early stages of the Government of Nunavut.

Even though Nunavut was designed to integrate Aboriginal concerns into a model of public government, it was not until November 2002 (a few months after Omilgoitok took office) that officials with responsibility for the public government side of Nunavut’s intergovernmental mandate and those responsible for Aboriginal affairs, circumpolar relations, and matters relating to the implementation of the Nunavut Land Claims Agreement began reporting to the same deputy minister. Prior to this, those responsible for intergovernmental relations had reported to the deputy minister of intergovernmental affairs, and those responsible for Aboriginal/circumpolar relations and claims implementation had reported directly to the secretary to Cabinet.

Explanations for this former bifurcation vary. However, it is clear that when David Omilgoitok was appointed deputy minister of intergovernmental affairs, he secured agreement to restructure the department so that the bifurcation would end and both the public government and the Aboriginal governance aspects of Nunavut’s management of intergovernmental relations would be brought together in a single administrative unit (table 3). Although all departments within the government are expected to respect the NLCA and maintain good working relations with NTI, the centrality of the final agreement as a framework for the operation of government in Nunavut means that the restructuring of Intergovernmental Affairs is significant. Since 2002, greater emphasis has been placed on making appointments that focus attention on the centrality of the NLCA in the Government of Nunavut’s intergovernmental relations strategy. Nonetheless, in a department where the majority of employees are Qallunaat³ (non-Inuit), and where English is the dominant language of operation, it is questionable how much Inuit understandings of the relationship between the NLCA and public governance can fully inform the strategies developed by this central department. After all, it is only when this department (along with other central agencies in the Nunavut government) reflects the Inuit aspirations for a population-representative public service, as

specified in article 23 of the NLCA, that Inuit cultural perspectives can fully inform the Government of Nunavut's approach to intergovernmental relations.

While the headquarters of Intergovernmental Affairs are in Iqaluit, the Government of Nunavut's office in Ottawa keeps the territory's political antennae attuned in the national capital. In terms of public government issues, this office represents Nunavut at a wide range of federal-provincial-territorial forums across southern Canada, liaises where appropriate with other territorial government representatives in Ottawa, maintains crucial relationships with senior officials at Indian and Northern Affairs, the Privy Council Office, and the Treasury Board, and works to circumvent the residual perception in federal program departments that Indian and Northern Affairs is the clearing house for programs relating to Nunavut. In terms of issues arising from the NLCA, staff in the Ottawa office were also involved in protracted trilateral negotiations with the federal government and NTI to renew the initial ten-year NLCA implementation contract (which expired in July 2003). In addition, they took the lead on negotiations to secure long-term federal funding to support the creation of a population-reflective public service in Nunavut and resolve boundary overlap issues with the Saskatchewan and Manitoba Dene.

Table 3: Location and Ethnicity of Officials in Intergovernmental Affairs, 2002

Premier (Inuk)	
IQALUIT OFFICE	
Before 1 Nov, 2002	Deputy Minister (Inuk) Executive Secretary (Qallunaaq) ¹ Intergovernmental Affairs Adviser (Qallunaaq) Protocol Officer (Vacant)
	+
At 1 Nov, 2002	Director, Circumpolar and Aboriginal Affairs (Qallunaaq) Claims Implementation Manager (Vacant) Circumpolar Adviser (Inuk) Administrative Assistant (Qallunaaq)
OTTAWA OFFICE	
	Assistant Deputy Minister (Qallunaaq) Office Manager (Qallunaaq) Administrative Assistant (Inuk)

Source: Nunavut, Human Resources, 2002a and 2000b

¹Qallunaaq is the Inuktitut word meaning "white person" and is used to refer to someone who is non-Inuk (regardless of their race).

RELATIONSHIP BETWEEN INTERGOVERNMENTAL AFFAIRS AND PROGRAM DEPARTMENTS IN THE GOVERNMENT OF NUNAVUT

The relationship between departments of intergovernmental affairs and program departments is never straightforward in any jurisdiction, particularly as the need to hone political antennae in “intergovernmental” departments sometimes conflicts with the pressures of policy development and service delivery in program departments (Woolstencroft 1982, 77–8). Interestingly, there is very little evidence of this kind of tension within the Government of Nunavut. At the same time, however, there seems to be relatively limited routine contact between Intergovernmental Affairs and program departments, except in the run-up to the Western Premiers’ Conference and the Annual Premiers’ Conference. The energies of officials in Intergovernmental Affairs are focused outwards – on building relations with other governments and also with circumpolar organizations and NTI. As a result there may be insufficient attention being paid to developing a coordinated intergovernmental strategy amongst Nunavut’s program departments. Such a strategy would encourage program department officials to share ideas about how best to position Nunavut at intergovernmental meetings and working groups in a way that would reflect the unique cultural mission of its public government. It could also provide a mechanism for training new staff about the intergovernmental context of program development in their departments. Moreover, it would encourage awareness within the Government of Nunavut about the policy stands of governments in other jurisdictions. It would also enable officials to pool information about strategies used to reflect the cultural uniqueness of Nunavut at the intergovernmental negotiating table.

PARTICIPATION IN FEDERAL-PROVINCIAL-TERRITORIAL FORUMS

At the time of Nunavut’s creation, there was great excitement amongst its politicians and officials that they would be the newest and therefore most visible participants at intergovernmental meetings. (In fact, it took only three years before Ed Picco, Nunavut’s first minister of health and social services, became the longest serving health minister in Canada.) Nonetheless, the process of joining these federal-provincial-territorial meetings has been challenging. While officials in other jurisdictions have begun to notice how officials from Nunavut grow in stature and confidence, they have come to the intergovernmental table as the representatives of the youngest and least populated jurisdiction. Although Nunavut, as a public government with Aboriginal interests at stake, enjoys the benefit of routine participation at intergovernmental meetings in a way that major Aboriginal organizations (such as the Inuit Tapiriit Kanatami, the Assembly of First Nations, and the Métis National Council) do

not, the process of coming to the intergovernmental table has presented a variety of challenges for Canada's youngest territorial government.⁴

Government of Nunavut officials have had to deal with the complexities of pitching their positions at intergovernmental meetings that are not only dominated by the larger jurisdictions but are often attended by officials from other governments who have minimal (if any) direct experience of the conditions facing bureaucrats and politicians in the Eastern Arctic. Moreover, the geography of Nunavut and the design of its government have not matched the existing institutions of executive federalism. For example, even though Nunavut defies the geographical split embodied in the Council of Atlantic Premiers and the Western Premiers' Conference, its premier appears to have been put under pressure by some other jurisdictions to attend one or other of these organizations. To the disappointment of many officials in the Maritimes, Nunavut opted to join the Western Premiers' Conference. This decision undoubtedly reflects the fact that the conference would be attended by all three territorial premiers and by the provincial governments with the greatest proportion of Aboriginal citizens (figure 1). In addition, it was recognized that questions concerning land-based resource extraction would be more likely to feature on the agenda of the Western Premiers' Conference than on that of the Council of Atlantic Premiers.

Ironically, the federal-provincial-territorial framework proved particularly complex for the two most innovative departments in Nunavut's first government, namely Sustainable Development (DSD) and Culture, Language, Elders, and Youth (CLEY). These departments were designed to transcend the traditional departmental divides found in other jurisdictions and create a political approach and bureaucratic framework more directly in tune with Inuit culture. However, their mandates placed enormous intergovernmental demands on their ministers, deputy ministers, and officials, not least because they had to attend a multitude of intergovernmental meetings located at considerable distance from Iqaluit. For example, former deputy ministers of sustainable development – who had responsibility for the management of renewable and non-renewable resources, the environment, tourism, and conservation – had to ensure that officials in the department were represented at thirteen or fourteen federal-provincial-territorial meetings a year, including high-profile meetings relating to climate change, northern development and resource-related issues.⁵

In the case of CLEY, the minister and deputy minister continue to attend meetings relating to heritage, official languages, seniors, status of women, and youth – responsibilities that are spread among several departments in most other jurisdictions. If one considers the physical strain of travelling to all these meetings while at the same time trying to insert Nunavut's policy priorities into well-established forums, one can see how difficult it becomes for

Nunavut's representatives to contribute to such meetings in a way that reflects the linguistic and cultural priorities of the Inuit population they serve. For example, it is complex to articulate Nunavut's concerns about the promotion of Inuktitut at intergovernmental meetings that focus on the conventional Canadian understanding of bilingualism. Similarly, it is not easy to highlight the cultural significance of elders in Nunavut, or the value placed on their knowledge, at intergovernmental meetings on seniors that are primarily concerned with the fiscal costs of maintaining medicare and pensions.

When I asked officials of the Government of Nunavut about the complexities of positioning Nunavut within federal-provincial-territorial forums, there was clear evidence of frustration, particularly on health matters, that the federal government's focus on developing programs to meet the needs of First Nations, on-reserve, often made it difficult to articulate the distinct needs of Inuit, who did not fall into this category. They also reflected on the problems of inserting the very specific needs of Nunavut into these trilateral forums. A now former director of the Nunavut Housing Corporation noted how Nunavut's housing problems were often lumped into a triterritorial framework, despite the fact that territorial housing issues are very diverse, in terms both of need and funding. Similarly, deputy ministers reported the difficulty they sometimes faced in inserting Nunavut's concerns into debates about Canada-wide developments. On questions of transport, for example, then deputy minister of community government and transportation reported that Nunavut could not easily participate in debates about the creation of a national road infrastructure, except to point out that the territory did not have any roads linking its communities.

There was some evidence that ministers and deputy ministers used these meetings to raise awareness about Inuit culture and lifestyles. The most obvious example was the premier's widely reported rebuffing of Premier Ralph Klein of Alberta at the 2002 Premiers' Conference because Klein's opposition to Canada signing the 1997 *Kyoto Protocol on Climate Change* took no account of the impact of global warming on traditional economies of the North (McCarthy 2002; *National Post* 2002; *Calgary Herald* 2002). Similarly, the founding deputy minister of justice reported some difficulties in getting other governments to recognize the practical problems which the Government of Nunavut would face if the age of consent for sexual relationships was raised. However, she also reported that there was significant interest among delegates from other jurisdictions about justice issues that arise in a jurisdiction such as Nunavut which is seeking to develop new approaches to community justice that reconcile Inuit and Qallunaat perspectives.

Ministers and deputy ministers alike repeatedly commented on the importance of using these forums to get the provinces on side and build support to challenge the federal government's approach to particular issues. However, it

appears that when Nunavut has succeeded in securing provincial support, its success has been a reflection either (as in the case of health care) of provincial officials recognizing that Nunavut is a new, sparsely populated jurisdiction with high infrastructure and service delivery costs, or (as in the case of opposition to the federal government's 2003 reallocation of shrimp fishing quotas) of officials in other governments wishing to support Nunavut in order to reinforce their own government's stance on a particular issue or principle (Nunavut 2003d). In other cases – for example, on questions of housing, transportation, and justice – officials reported the need to build support among the provinces and territories by situating Nunavut's concerns in relation to those of rural, remote, or northern regions. More often than not, officials reflected on the way they tried to enhance their position by building alliances, at (or before) these conferences, with representatives of jurisdictions in which they had previously been employed, with representatives from the other territories, or with delegates from smaller provincial jurisdictions.

Officials in other jurisdictions clearly watch the Government of Nunavut with interest, particularly as they engage in their own deliberations about the creation of new self-government agreements with Aboriginal peoples. However, the alliance building in which Nunavut engages at intergovernmental forums is most often based on an established model of building intergovernmental support around a policy position that has clear commonalities with other governments rather than rallying support for a unique cultural approach to governance in Nunavut.

In short, the process of meshing an approach to governance that prioritizes Aboriginal interests with one that slots the public government of Nunavut into the broader intergovernmental framework of Canadian federalism has not been straightforward. While the Government of Nunavut has begun to approach this dilemma head on by restructuring its Intergovernmental Affairs unit to link public and Aboriginal governance, its officials have had much more difficulty sustaining the link between Aboriginal and public governance in the intergovernmental work they carry out. In an intergovernmental system with thirteen or fourteen actors at the table, it is perhaps inevitable that the cultural priorities of Nunavut become submerged in a broader discourse about intergovernmental approaches to policy development. Indeed, the innovative departmental structures that have been developed in Nunavut to give meaning to Inuit priorities – such as maintaining culture and language, passing traditional knowledge between generations, and sustaining Inuit connections to the land – have not fitted easily into the battery of intergovernmental meetings that have been established to reflect the structures of southern Canadian governments. In many ways this limits the opportunities for the Government of Nunavut to approach issues in a way that might encourage the reconfiguration of Aboriginal-state relations at the intergovernmental table.

KEY BILATERAL RELATIONS WITH OTHER GOVERNMENTS IN CANADA

While the pressures to conform to established models of governance in the sphere of intergovernmental relations are perhaps inevitable, we need to consider whether the bilateral relations in which Nunavut has become engaged with other governments have provided any greater opportunity for it to integrate its Aboriginal priorities into relations with governments of other jurisdictions. In the final part of this essay, I therefore explore how the juxtaposition between Aboriginal interests and public governance is managed in the Government of Nunavut's relations with the federal government (on which it remains financially dependent), with the Northwest Territories (from which it was formed in 1999) and with Manitoba (the provincial jurisdiction with which the area that is now Nunavut has strong historical ties).

RELATIONS WITH THE FEDERAL GOVERNMENT

Nunavut's relationship with Ottawa is complex. The federal government was a signatory of the NLCA and passed the legislation necessary to secure the creation of Nunavut. It also provided \$150 million in start-up costs for the new territory and currently funds 92 percent of the territorial government's budget (Nunavut, Finance 2002, v). Without doubt, the federal government is tremendously proud of the fact that it has created a public government designed to serve a population that is predominantly Aboriginal, and it revels in the attention this brings Canada on the international stage. At the same time, now that the celebrations marking the creation of Nunavut have entered into collective memory, there has been considerable debate in Ottawa about the viability of maintaining an extensive financial commitment to Nunavut in the longer term. Even though federal bureaucrats with responsibility for the delivery of social policies in the Canadian North are keen on emphasizing the federal government's fiduciary responsibility for Aboriginal peoples in Nunavut, it is noticeable that senior federal bureaucrats in Canada's central agencies emphasize that Nunavut is a *public* government with responsibilities to deliver services to all Nunavummiut and that it cannot rely on special treatment simply because of the NLCA.

The tension between the idea of the Government of Nunavut as a public government and as a government with clear responsibilities to respect the NLCA became readily apparent in the 2002–3 negotiations between Nunavut, NTI, and the federal government, in connection with renewal of the implementation contract specified in article 37 of the final agreement. Significantly, negotiations proved particularly difficult over the question of federal funds for the long-term implementation of article 23. This article obliges the federal and territorial governments and NTI to “cooperate in the development and

implementation of employment and training” initiatives in order to “increase Inuit participation in government employment in the Nunavut Settlement Area to a representative level” (Canada, INAC and TFN 1993, 191–2). While the negotiators from Nunavut saw this funding support as a central element of the contract between Canada, Nunavut, and NTI, the negotiators from Indian and Northern Affairs Canada (INAC) argued that the level of financial support requested by Nunavut and NTI to sustain Inuit training and employment initiatives (as defined by article 23 of the claim) was beyond their negotiating mandate. As a result, negotiations regarding the funds necessary to support the implementation of article 23 had to be hived off into separate negotiations, which (at the time of writing) remain incomplete. Yet programs to increase Inuit participation in the government workforce in Nunavut are most likely to encourage major reconfigurations of Aboriginal-state relations in the longer term.

These tensions reflect how the parties to the NLCA hold different assumptions about the relationship between the final agreement and the development of public government in Nunavut. The prevailing view of the Government of Nunavut and NTI is that the final agreement is a constitutional document that cannot be fully implemented without long-term financial support from the federal government to sustain the training necessary to run such a substantial affirmative action program and ensure that the Government of Nunavut employs a population-representative workforce in the longer term. By contrast, federal government officials want to demarcate the boundary between the costs of implementing the NLCA (which they acknowledge must be managed by all signatories in the longer term) and the incremental costs associated with the development of a new public government (which include the management of its human resources). The federal government considers the latter costs to be the direct responsibility of the Government of Nunavut and argues, therefore, that these should be funded by the territorial government through monies received from the federal government in its annual federal-territorial transfer payments.

The relationship between Nunavut and Ottawa has in some senses become more confused by the fact that INAC’s regional office in Nunavut has grown in size since the division of the Northwest Territories. Housed in a shipshape federal government structure (symbolically positioned adjacent to the Legislative Assembly of Nunavut), it contains four interrelated directorates, which are designed to manage resources, oversee federal government responsibilities for the implementation of the NLCA, and – in keeping with commitments made in *Gathering Strength: Canada’s Aboriginal Action Plan* – implement a range of social and economic programs to build capacity and promote development in the Canadian North (Canada, INAC 1997 and 2000). Ironically, therefore, although federal government officials argue that the Government of Nunavut is a public government, which must use its territorial budget to

underwrite the development of social and economic programs in Nunavut, INAC has intensified the development of its social and economic programs for Inuit in Nunavut since the territory was created. In other words, at the juncture that Inuit politicians have finally achieved their dream of establishing an autonomous territorial government with paraprovincial responsibilities for developing healthy, sustainable communities in Nunavut, the federal government department with primary responsibility for Aboriginal peoples in Canada has intensified its connections with Inuit organizations in Nunavut.

Inevitably, the expanding regional presence of INAC in Nunavut has caused resentment within the Government of Nunavut. While these tensions are rooted in the “client-patron” relationship which has long characterized the connection between the territories and Ottawa (Brown and Rose 1997, 11), they have been reinforced by tensions over resource devolution, unresolved matters relating to fishing quotas for Nunavut and Nunavik, and strained relations between the premier of Nunavut (Paul Okalik) and the former federal minister of Indian and northern affairs (Robert Nault).⁶

It is clear that while INAC is heavily engaged in the politics of devolving control of natural resources to Yukon and the Northwest Territories, it is not prepared to consider this option for Nunavut at the present time. The Government of Nunavut has tried to use the Nunavut Senior Officials Working Group to advance its claim that the territory should be put on a par with the other territories and acquire the revenue-raising powers that accompany the devolution of resources. Nunavut officials admit that the proposals concerning resource devolution have made little headway. The bureaucratic argument within INAC is that the federal department could not cope with the politics of devolution in three jurisdictions at once. However, the greatest resistance seems to have been in political circles – a point reinforced when Nault suggested that Nunavut was not yet “sufficiently mature” to cope with the devolution of resources (*Hill Times* 2002).

Federal-territorial relations have also been strained as a result of the federal government’s initiative to permit the Inuit-owned Makivik Corporation in northern Quebec to take 15 percent of the fishing quota that had been allocated to Nunavut in territorial waters off the Nunavut coast. Although an agreement in principle on this issue has now been reached between the Makivik Corporation and Canada, there is a strong feeling in Nunavut that the federal negotiators did not pay sufficient attention to the rights of Nunavut Inuit, as specified in the NLCA. In this respect, it is interesting to note that in 2003 the Government of Nunavut appointed a transboundary claims manager within Intergovernmental Affairs.

In short, it seems that relations between Nunavut and Ottawa are at a complex stage: first, because they remain on a highly dependent financial footing; second, because there is confusion about the appropriate relationship between INAC and the Government of Nunavut; and third, because there are very

different understandings in Ottawa and Iqaluit about the extent to which the relationship between the Government of Nunavut and the Government of Canada should be shaped by the paradigm of public governance, on the one hand, and by the framework of the NLCA, on the other. However, while Nunavut's relationship with the federal government is, without doubt, the most significant for the territory's current and future development, it is important to review aspects of two other intergovernmental relationships that have played a key role in the development of Nunavut.

RELATIONS WITH THE GOVERNMENT OF THE NORTHWEST TERRITORIES

In the years before division, criticisms of the Government of the Northwest Territories (GNWT) were prominent in political discourse in the Eastern Arctic. It is interesting, therefore, that within six months of Nunavut's existence as a territory, references to the GNWT and its headquarters in Yellowknife almost disappeared from political discourse in Nunavut. Nonetheless, the process of dismantling the old relationship and attempting to forge a new interterritorial relationship merits attention: first, because it raises questions about the dynamics of intergovernmental relations between territories that have shared a long administrative history; and, second, because communities throughout the Northwest Territories are also grappling with questions about the appropriate balance between Aboriginal and public governance.

In the course of my interviews in Yellowknife I heard two contrasting accounts of the process of territorial division. Those who oversaw the financial and administrative aspects of division looked back at the process with pride. They acknowledged that there had been some difficult moments and had some regrets about the temporary solutions that had to be reached with regard to the Power Corporation (which was subsequently divided) and the Workers Compensation Board (which was not). Nonetheless, they were proud that the division had been achieved in a way which ensured that both the NWT and Nunavut had the fiscal and administrative means to run their own governments. Moreover, even though these officials acknowledged that there had been differences of opinion at the outset between those representing the Office of the Interim Commissioner of Nunavut and those representing the Western Coalition (which was formed to represent the interests of those citizens who remained in the Western Arctic after division), they argued that the process of dividing the assets and liabilities had proceeded in a relatively efficient manner once the principles of how to proceed with division had been agreed.

On the other hand, bureaucrats on the front lines of various program departments provided a more complex account of the politics of division. Their stories included tales of phenomenal frustration in working towards division at a time when the GNWT itself faced significant cutbacks and the threat of downsizing. They also recounted the problem of dealing with officials in the

emergent Government of Nunavut who insisted they were developing a fresh administrative approach (in the run up to Nunavut) but then sought frequent advice from their GNWT counterparts (once division occurred). There were several accounts not only of the complexities of contracting back services from Nunavut once division had occurred but also of the relief experienced when the process was over. Finally, there was considerable resentment among bureaucrats in program departments that the time spent preparing for division of the NWT meant that critical issues relating to the development of self-government agreements in the western NWT were delayed.

The story was not, however, entirely negative. Indeed, my interviews at the Workers' Compensation Board and the Prince of Wales Heritage Museum suggested that in the period since division there has developed a genuine openness to working out a more positive process of developing an interterritorial agency, in the first case, and dividing up the chattels in the second. Although provision for divorce is written into the legislation that created the new Workers' Compensation Board of the NWT and Nunavut, officials of the board certainly hope that for economic reasons an interterritorial board will survive. Moreover, while there was fierce contestation over the final resting place of certain artifacts (identities are even harder to divide than territories), officials in both Nunavut and the NWT have now successfully completed the necessary agreements to ensure as smooth a termination of this process as possible.

Despite the complexities of the process of division, officials in the NWT appreciated why the Inuit wanted a separate territory in the Eastern Arctic. However, while they were supportive of the Inuit's desire for self-determination within a framework of public government, they were highly skeptical about the speed with which Government of Nunavut officials hoped to achieve this goal. In particular, they argued that the rush to create a representative bureaucracy was destined to fail and that Inuit interests would be more effectively served if this objective was achieved in the longer term. In addition, they were openly critical of Nunavut's decision to decentralize its government, arguing that this was unfeasible in bureaucratic terms. However, both criticisms may imply some defensiveness on the part of GNWT bureaucrats, not only about the extent to which their own government's affirmative action programs have diversified its public service but also about the degree to which public service operations in the NWT are concentrated in Yellowknife.

Although the picture may change with the completion of Aboriginal self-government negotiations in the NWT, it seems at present that connections between the governments of the NWT and Nunavut will focus primarily on shared interterritorial concerns and not be used to highlight the different ways in which the two territories have sought to bridge the gap between Aboriginal interests and public governance. Indeed, given the intensity of the debates about Inuit self-determination prior to the creation of Nunavut and the fact

that citizens of the NWT are so directly involved in their own debates about balancing Aboriginal and public governance, it is perhaps inevitable that the current relationship between Nunavut and the NWT is one of public government to public government, built around lobbying Ottawa for improved funding to support the delivery of government services to remote arctic regions.

RELATIONS WITH THE GOVERNMENT OF MANITOBA

The tourist literature for the Manitoba Legislative Assembly notes that the Golden Boy atop the legislature's dome faces north in the direction of "the province's bright future" (Manitoba 2002a). Indeed, Nunavut's emerging relationship with Manitoba provides grounds for optimism. The connection between the governments of Manitoba and Nunavut builds on an established historical connection between residents in the north of Manitoba and those of the Kivalliq region in the southwest of Nunavut. While the relationship between the Manitoba Dene and the Inuit is far from straightforward, particularly with regard to the borders of the Nunavut land claim settlement area, which crossed traditional Dene hunting grounds, other historical factors have facilitated cross-border relationships between Nunavut and Manitoba.⁷ Shared experiences of residential schooling in Churchill forged significant political connections between people in both jurisdictions who have now become Aboriginal leaders in their communities. Other connections between Manitobans and Nunavummiut arise not only because these regions come under the same archdiocese in both the Anglican and Catholic churches but also through a long history of Kivalliq residents travelling to Manitoba for the birth of their children and for more general hospital care.

Interestingly, both economic and political factors led to the development of the memorandum of understanding between Nunavut and Manitoba, signed at Rankin Inlet in February 2000 by Premier Okalik of Nunavut and Premier Doer of Manitoba. At an economic level, it is clear that the memorandum was encouraged by each jurisdiction's hope that one day there would be a road built to truck (yet to be discovered) resources in Nunavut down through Manitoba and on to continental markets.⁸ It was also driven by the Government of Manitoba's fear of losing \$100 million to \$200 million of annual trade in the Kivalliq region as the hub of the new territory moved east. Indeed, Manitoba government officials feared that with the location of the territorial capital in Iqaluit and territorial transportation routes increasingly focused on the nexus of routes between Ottawa, Iqaluit, and Montreal, Nunavut's links with Manitoba would decline, and the possibility of building hydroelectric power lines, pipelines or roads between the two jurisdictions would be lost. At a political level, the alliance between the two governments is seen as mutually beneficial, given the concerns of both premiers to minimize the negative impact of

climate change on the economies of each jurisdiction (Benzie 2002). Moreover, it ensures that Nunavut has a strong bond with one of the provinces attending the Western Premiers' Conference.

The signing of the memorandum of understanding was not driven by inter-governmental factors alone. Officials in Manitoba's Department of Transport and in its Department of Municipal and Intergovernmental Affairs were very keen to create such a document. This would not only help to promote their causes intergovernmentally but would assist claims to get funding from their own government to support the development of transportation links and community infrastructure in northern Manitoba. The memorandum between the two governments states that "the parties agree to pursue discussions with a view to signing more detailed agreements, where appropriate, which may include, but are not limited to ... transportation, mining, energy, health, tourism, cultural development, arts and crafts, value-added processing, resource development, trade and commerce, regional and community economic development, education and training" – areas which in most cases necessarily involve trilateral relations between Manitoba, Nunavut, and NTI (Nunavut and Manitoba 2000, 2).

The memorandums of understanding and intent have already made a significant impact on cross-border links between the two jurisdictions. The formal connection has led to the signing of additional sectoral memorandums and the securing of funds for regional cross-border meetings of community activists who are concerned about the future of youth, the movement of caribou and regional economic development (Manitoba 2002b). They have also led to the Manitoba government's involvement in bureaucratic training and evaluation in Nunavut. For example, in the summer of 2002, Nunavut's newly appointed intergovernmental affairs adviser spent a week in the federal-provincial relations office of Manitoba's executive council and was given significant access to files. In addition, the program review carried out by the Government of Nunavut in September 2002 drew substantially on bureaucratic expertise within the Manitoba government.

The original memorandum of understanding between Nunavut and Manitoba contains no reference to the NLCA. It appears, therefore, to have been developed solely on the basis of one public government negotiating with another. However, subsequent sectoral agreements in the areas of transportation and energy do specify that initiatives must not only "respect Nunavut Land Claim obligations and interests, including the Nunavut Final Agreement" but must also "respect Manitoba First Nations land claims entitlements and the land claims entitlement process" (Nunavut and Manitoba 2001, 2; 2002, 2). Clearly, therefore, there has already been some shift in understanding that intergovernmental relations between Manitoba and Nunavut cannot just take place within the framework of public governance.

CONCLUSION

Governance in Nunavut is complicated by two central, competing demands. On the one hand, even though Nunavut is the youngest and least effectively resourced jurisdiction in Canada, its government is a public government that is expected to operate in a similar fashion to other subnational jurisdictions in the Canadian federation. On the other hand, the Government of Nunavut is unlike any other public government in Canada because its work is framed by the 1993 Nunavut Land Claims Agreement, which ensures that the interests of the dominant Inuit population in the territory are placed front and centre of its operations. Nonetheless, although Nunavut was designed to ensure that the public and Aboriginal aspects of governance in the territory would be complementary and would reinforce each other, the evidence that has emerged from this study suggests that in the sphere of intergovernmental relations there are significant pressures on departmental officials to operate within a public government framework that does not prioritize Nunavut's commitment to integrate Inuit values into its method of government.

The evidence in this study suggests that these pressures are greatest in the multilateral sphere of executive federalism, where the Government of Nunavut has entered into an intergovernmental negotiating process whose rules of engagement were framed within the paradigm of public governance. At the bilateral level, it appears that while Nunavut's relations with the NWT are currently framed in terms of intergovernmental relations between two public governments, those with the federal government and with Manitoba are more complex. In the case of the federal government, bilateral relations are shaped by the fact that both governments are responsible for the long-term implementation of the NLCA. However, they are also affected by understandings in Ottawa about the extent to which the Inuit politicians who signed the final agreement bought into a model of public government. In the case of Manitoba, bilateral relationships between the two governments appear to have been developed within a framework of public governance but with a recognition that any sectoral developments that do occur must respect the land claims of Aboriginal peoples on either side of the provincial-territorial border.

By including in its Intergovernmental Affairs unit, officials who are working on Aboriginal affairs, transboundary claims, circumpolar governance, and intergovernmental relations, the Government of Nunavut may have developed a mechanism for ensuring that Aboriginal priorities are firmly rooted in its formal intergovernmental negotiations. However, I would argue that only when Nunavut develops institutional mechanisms to link the work of its Intergovernmental Affairs unit more directly with the intergovernmental policy work being carried out in its program departments will its officials begin to find ways to challenge the southern Canadian, public governance paradigm that

shapes so much of the way that formal intergovernmental relations are conducted in Canada.

In conclusion, the Government of Nunavut's concern to maintain Aboriginal priorities in the development of relations with other public governments depends not only on the internal workings of its own government but on other governments being able to understand how the NLCA shapes public governance in Nunavut. It is important, therefore, that Nunavut encourage awareness about this issue in other jurisdictions by keeping the relationship between the final agreement and public government in Nunavut front and centre of its intergovernmental negotiations. The time is ripe to do so, particularly as governments in other jurisdictions are increasingly focusing on the development and completion of self-government agreements with Aboriginal peoples and on the creation of appropriate mechanisms for implementing these agreements in the longer term. Consequently, it is possible that the experience which Nunavut officials have developed over the past few years in trying to integrate Inuit world views into modes of public governance can become a starting point for creating new models of executive federalism that will improve the integration of Aboriginal perspectives into intergovernmental negotiations in Canada.

NOTES

This study draws on seventy interviews I conducted with senior government officials in Iqaluit, Yellowknife Winnipeg and Ottawa in September and October 2002 and with intergovernmental officials in Quebec and the Maritimes in June 2003. I greatly appreciate their assistance and that received from public servants at the Canadian Intergovernmental Conference Secretariat. I would also like to thank the anonymous referees for their insightful comments on an earlier draft of this essay, and Simon Hardinge-Tapp and Richard Tufft for assistance with interview transcription. The research was funded by the Government of Canada and the Foundation for Canadian Studies in the United Kingdom through the Canadian Studies Development Program.

- 1 Nunavummiut can be translated as "citizens of Nunavut."
- 2 For a fuller discussion of the way that treaty federalism is realized through the work of claims boards in northern Canada, see White 2002.
- 3 Inuit is the plural of Inuk; Qallunaat is the plural of Qallunaaq ("white person").
- 4 For further discussion of ITK's attempts to gain entry to these meetings, see Hill 2003.
- 5 Following the 2004 territorial election, the functions of DSD were channelled into the Department of Environment, on the one hand, and the Department of Economic Development and Transportation, on the other (Nunavut 2004).
- 6 The tension between Premier Okalik and Minister Nault came to the fore in December 2001 during the two men's exchanges during the House of Commons Standing Committee hearings on Bill C-33 (Canada, House of Commons 2001).

- 7 For details of NLCA-related transboundary issues with the Manitoba Dene, see Canada, INAC and TFN 1993, 264–6.
- 8 For more extensive discussion of this potential development, see Manitoba Highways and Government Services 2000.

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Paying for Self-Determination: Aboriginal Peoples, Self-Government, and Fiscal Relations in Canada

Michael J. Prince and Frances Abele

Ce travail porte sur la perspective du droit des autochtones à disposer d'eux-mêmes en se penchant sur un aspect très peu étudié, c'est-à-dire les relations financières intergouvernementales entre le Canada et les autochtones. Même si elles ont des traits communs avec les accords financiers entre le fédéral et les provinces, les relations financières autochtones sont totalement différentes du fédéralisme financier conventionnel. Au cours de l'histoire, les relations entre le gouvernement canadien et les communautés autochtones ont été très importunes, paternalistes et hiérarchiques au niveau des dynamiques de pouvoir. Encore de nos jours, les accords financiers demeurent la pierre d'achoppement à la mise en valeur du potentiel et à la pleine réalisation du droit à disposer de soi-même. En conséquence, les auteurs proposent des principes qui serviront de guides à l'incorporation des autochtones au fédéralisme et qui permettront d'assurer un meilleur fondement aux droits autochtones, à leur autonomie, et à l'exercice de leurs pouvoirs.

INTRODUCTION

Surveying Canadian fiscal federalism, Bird and Chen (1998) found that there are two very different worlds in intergovernmental financial relations. With respect to transfers, taxation, and debt, they suggest that an essential dichotomy exists in Canada's fiscal system at the two intergovernmental interfaces of federal-provincial versus provincial-municipal relations. This essay is an examination of what might be called the third realm (or third world!) of Canadian public finance: Canada-Aboriginal intergovernmental fiscal relations. This third realm of fiscal federalism is virtually absent in texts on Canadian government, politics, and federalism. Despite this low profile, it is fundamental to the realization of Aboriginal self-determination.

Our purpose is to examine the history, current standing, and possible future direction of Aboriginal-Canada fiscal relations.¹ “The role of the analyst of federal finance in Canada,” suggest Bird and Chen (1998, 70), is “a difficult and context-specific one, with no simple answers – and indeed few simple questions – and no obvious analytical guides to be found in the [economics] literature.” We have experienced a similar challenge with respect to analytical guides in the political science literature on fiscal federalism. Accordingly, this essay is a modest contribution to the nascent literature on the theory and practice of Aboriginal fiscal federalism and to the older literature on the fiscal design of multigovernment states. We maintain that Aboriginal-Canada fiscal relations have some features in common with federal-provincial financial relations (and even with provincial-municipal fiscal relations), but that on balance Aboriginal fiscal relations are profoundly different from conventional fiscal federalism in several ways. We also contend that current fiscal arrangements between Canada and Aboriginal governments and communities are a stumbling block in the process of self-determination. Paraphrasing K.C. Wheare’s well-known phrase about federalism as each order of government “within a sphere, co-ordinate and independent” (Wheare 1963, 10), Aboriginal governments in Canada by and large remain in a struggle and are still controlled and dependent.

In the next section we list some important features of the current constitutional and political circumstances of Aboriginal peoples in Canada. These together suggest that amendments to the system for funding Aboriginal self-determination are required. In the second section we offer a brief history of Aboriginal-Canada fiscal relations, while in the third we compare the situation of Aboriginal governments with those of other governments in Canada, seen through the lens of intergovernmental fiscal relations. Finally, in the fourth section we review recent federal initiatives that have implications for Aboriginal governments’ fiscal situation, and we conclude by proposing some principles to guide future development of a more secure funding basis for Aboriginal self-determination.

ABORIGINAL ACTIVISM AND THE NEW RELATIONSHIP

For much of Canadian history, Canadian political leaders expected that Aboriginal peoples, as distinct societies, would disappear. In some cases, public authorities acted purposefully to ensure that this would be the case (Scott 1931; Kulchyski 1988; Tobias 1991; Milloy 1991; Cairns 2000, 47–58). For Aboriginal people living in northern Canada, federal policy wavered between benign neglect and mild protectionism, on the grounds that the people of the North were “best left as Indians” (Coates 1991; Rea 1968; Grant 1988). There was quite a different picture in southern Canada, at least for status Indians,² who were subject to the *Indian Act*. During the first half of the twentieth cen-

ture, the Act reflected a frankly assimilationist federal policy. Status Indians did not have the right to vote in federal elections; those who did wish to vote had first to relinquish their status. The *Indian Act* also prohibited traditional political and religious practices (such as the potlatch and the Sun Dance), and it forbade status Indians from raising funds for the purpose of taking collective legal action. In this period, Métis were largely ignored by federal government policy, and many families continued to suffer from the losses incurred during and after the Northwest Rebellion in the late nineteenth century.

This situation was dramatically transformed by the mobilization of First Nations, Inuit, and Métis in the decades after the Second World War and by consequent changes to Canadian law and political institutions. Indigenous people formed representative organizations at the regional, provincial and territorial, and Canada-wide level.³ It would consume far more space than is available to us to provide even a brief summary of the major events in Aboriginal-Canada relations over the last thirty years, and these events have in any case been treated thoroughly in many publications. Instead, we would note the following outcomes:

- Since 1973, the federal government and relevant provincial jurisdictions have been engaged in negotiating modern treaties with indigenous nations where no agreements existed. This has resulted in treaties for northern Quebec and Nunavut, and for parts of the Northwest Territories, Yukon, and British Columbia.
- The *Constitution Act, 1982*, entrenches “existing Aboriginal and treaty rights” and protects the status of treaties, both historical and modern.
- Jurisprudence leading up to constitutional entrenchment and continuing after it has gradually (and in quite a ragged fashion) increased the scope of what is recognized in the category “Aboriginal rights” (Asch 1997; Culhane 1998).
- Federal policy and policy in Quebec, Ontario, Yukon, Northwest Territories, and Nunavut recognize that Aboriginal people have an inherent right to self-government.
- There is a general movement to rehabilitate and revive the historic treaties, a process undertaken in many and various ways across Canada.
- In a parallel process linked to modern treaty negotiations, in several places self-government agreements are being negotiated that will create Aboriginal governments with separate funding but complex relations with provincial, territorial, and federal governments.
- Métis in the west and north of Canada have built innovative forms of self-government, such as the Métis Settlements in northern Alberta.
- Inuit in Nunavut and Nunavik (northern Quebec) have opted for a model of self-government known as “public government” – new jurisdictions that include non-Inuit as well as Inuit voters.

- In the course of all these developments, hundreds of Aboriginal organizations have been formed – for political representation, economic development, international, political, and cultural activity, cultural development, social services provision, and health and welfare.

These developments, taken together, have brought Canadian federalism to a new juncture, because they create an opportunity and also a very complex challenge. In the following sections, we examine the fiscal relations between Canada and Aboriginal organizations and governments, and we then compare these relations with the other systems in place in the country for financing government activities.

A BRIEF HISTORY OF ABORIGINAL-CANADA FISCAL RELATIONS

The history of Aboriginal peoples within Canadian Confederation is infrequently recounted, and even more rarely told is their experience within fiscal federalism. Standard texts in political science and economics as well as government and parliamentary reports typically devote only fleeting attention to the past or present situation of Aboriginal-Canadian financial arrangements. A stylized version of the conventional narrative of Canadian fiscal federalism is outlined in table 1: placed beside this mainstream story is the missing story of the place and experience of Aboriginal peoples in Confederation and fiscal federalism.

The mainstream narrative describes Confederation, in part, as a financial settlement for the new dominion with the principal fiscal role to be played by the federal government rather than the provinces. In the early years of the country, federal revenue and expenditures were about three times those of the provinces (Krelove, Stotsky, and Vehorn 1997, 202). Over the first three decades of Confederation, as the Rowell-Sirois Report observed, “Privy Council decisions confirmed the provinces in possession of a large sphere of action beyond the Dominion. But the provinces were caught in a financial strait jacket from which they laboured, as yet unsuccessfully, to free themselves” (quoted in Canada, House of Commons 1981, 12). “Over time, however, demand grew faster for those public services assigned to the provincial level, and they expanded relative to the federal level” (Krelove, Stotsky, and Vehorn 1997, 202).

A constant theme in the history of Canadian fiscal federalism concerns arguments about and efforts undertaken to address the imbalance between the limited revenues and expanding expenditure responsibilities of the provinces, which possess varying degrees of economic wealth and fiscal capacity. So we have the federal subsidies to the provinces from the time of Confederation, the appearance of income taxation, early specific-purpose cost-shared transfers, wartime tax rental agreements, the rise of the modern welfare state, tax collection agreements, equalization payments, the transfer of tax points, the

Table 1: Canadian Confederation and Fiscal Federalism: The Mainstream Narrative and the Missing Story of Aboriginal Peoples

<i>Mainstream narrative</i>	<i>Missing story</i>
Confederation as a financial settlement and political accord among colonies and between two founding nations of English and French	Absence of indigenous nations in the confederation settlement and the omission of the <i>Royal Proclamation of 1763</i>
Intended dominance of the federal government over the provinces in the <i>British North America Act of 1867</i>	Federal power and dominance over Indians and subordination to the Crown, through the <i>Indian Act</i> of 1876 and other measures
Legislative responsibility for Indians and lands reserved for Indians assigned to federal government under section 91 (24) of the <i>BNA Act</i>	System of band councils imposed on Indian communities Métis and Inuit largely left out of considerations of federalism
Slowly, gradually, and significantly, balance of power shifts towards provincial governments in the early part of the twentieth century and later again from the 1950s onward	Continued federal dominance and control vis-à-vis Aboriginal peoples and communities, with prohibitions and a weakening of indigenous laws, customs, and governance practices; top-down administration mixes protection and control
Province building: rise of active and expansive provinces	Indian agents: increasing dependency and ongoing efforts at assimilation Inuit: virtually ignored until after Second World War, then vigorous, externally controlled administration Métis: ignored by federal government; for some a negotiated land base in Alberta
Pattern of evolution: continual change in public finance systems between the two orders of government	Pattern of continuity: ongoing federal control and rigidity in financial arrangements
Substantial fiscal decentralization	Relentless fiscal centralization Some delegation of administrative authority
Fiscal federalism seen as adaptive with considerable praiseworthy achievements	Fiscal federalism seen as highly problematic for Aboriginal governments, communities, and individuals

rise of unconditional transfers, cutbacks and partial restorations in health and social transfers, and reforms again to tax collection.

Thus, a large part of the history of fiscal federalism is of constitutional flexibility: adjustments, accommodations, agitations, and readjustments of tax and transfer arrangements between the federal and provincial governments. More than the stuff of numbers and accounts, the master narrative suggests that it is often a history of high-profile political debates over fundamental principles and ideologies. The story moves back and forth, and perhaps back again, tracing shifts in the balance of power in the roles, resources, and relationships of the two orders of government in Canada (Smiley 1987; Simeon and Robinson 1990; Rice and Prince 2000).

Along with a description and explanation of events, the master narrative contains an element of evaluation. In general, the assessment of fiscal federalism in Canada offered by economists and political scientists is positive. Hobson and St-Hilaire (1993, 1), for example, have written that the achievements are considerable and the praise, for the most part, is well deserved. Boothe (1998, 1) states that "Canada's system of fiscal transfers is the envy of many developing countries." Similar comments appear throughout the literature on Canadian fiscal federalism (Simeon and Robinson 1990; Krasnick 1986; Lazar 2000).

Of course, like any story or theory, this narrative is selective and therefore incomplete, partial, and unrepresentative. It is incomplete in that it virtually ignores the historical status of Aboriginal peoples and governments; it is partial or biased because it examines certain dimensions of power relations and highlights patterns of change while overlooking the structural relations of the continual domination of the Canadian government over Aboriginal communities; and it is unrepresentative or misleading of the experience of Aboriginal peoples within Confederation.⁴ These are among the risks of the master narrative, in addition to its contributions to enhancing our understanding of federal-provincial relations in their economic and financial as well as social policy dimensions.

In sharp contrast to the shifts and swings in authority, influence, and political prominence within federal-provincial relations, which began in the 1890s and have been playing out ever since, the fiscal relations and even wider power dynamics between Canada and Aboriginal peoples remained remarkably static from the 1860s to the 1970s. Indeed, it was possible for a parliamentary task force on federal-provincial fiscal arrangements in the early 1980s to describe the federal funding of Native governments and organizations as an "emerging issue" of fiscal relations worth further examination (Canada, House of Commons 1981).

The most sustained parliamentary examination of the financial relationships between the federal government and First Nations governments (Indian bands and band councils) is still the 1983 special committee report on *Indian*

Self-Government in Canada, the so-called Penner Report (Canada, House of Commons 1983). This report provides many of the elements of the missing narrative of the experience of Aboriginal peoples (especially First Nations peoples) within Canadian Confederation and the system of fiscal federalism.⁵ As the Penner Report observed, because of a hundred years of near total government control, previously free, self-sustaining First Nation communities moved to a “state of dependency and social disorganization.” The Canadian government “removed from Indians the access to and control over their own resources,” and indigenous governmental systems, customs, and practices (in short, Aboriginal constitutionalism) were suppressed and outlawed by federal authorities. This history of colonialism and control has been told many times before, and over the last generation it has become more widely known, but it is not usually connected with the issue of fiscal federalism. Yet it should be, because the goal of self-determination is very much linked to matters of economic and fiscal arrangements.

Several key themes of the narrative of Aboriginal peoples in Canadian Confederation and fiscal federalism can be itemized as follows:

OMITTED FROM CONFEDERATION

“The Indian people played no part in negotiating Confederation, or in drafting the *British North America Act* of 1867” (Canada, House of Commons 1983, 39). Neither, of course, did Inuit or Métis, whose later attempt at regional self-government in what is now Manitoba was put down as rebellion. In one of the few comments by a political scientist on this topic, Roger Gibbins notes that the “nation-to-nation underpinnings of the 1763 Royal Proclamation were not explicitly imported into the 1867 Act” (Gibbins 1999, 265), thus leaving out a set of relationships between key political communities. Recent analyses of Confederation by historians do make some mention of this exclusion.⁶ Neither was anything contained in the 1867 Act about the fiscal roles of First Nations or any other potential Aboriginal governments; no expenditure functions, legislative powers, or taxing powers were assigned or recognized by this settlement.

CONTROLLED BY THE INDIAN ACT

This isolation and status of subordination was embedded in the *Indian Act* of 1876, which ensured the fiscal weakness of Aboriginal governments and communities. Aboriginal-Canada fiscal federalism, if it can be called that, operated under the highly intrusive and extremely paternalistic and hierarchical framework of this legislation. While certain tax exemptions were granted to Indians on reserves, the legislation’s more powerful fiscal consequence was the absence of real governing powers for First Nations. None of the elements of fiscal

federalism were contained in the 1867 or 1876 Acts because, in the words of a recent minister of Indian affairs, “the assumption [was] that First Nations would gradually be absorbed into the larger Canadian society.” Even today, the *Indian Act* “makes 120 references to how ‘the Minister may’ do this or that, but only three references to how ‘the band may’” (Nault 2002, 1).

IMPOSITION OF A STANDARDIZED NON-ABORIGINAL FORM OF “GOVERNMENT”
CLOSELY BOUND BY INDIAN AFFAIRS OR, IN THE CASE OF INUIT, BY OTHER
INSTITUTIONS OF TERRITORIAL AND FEDERAL GOVERNMENT

Government authorities rejected the variety of indigenous political and governmental structures, processes, and practices that were in place across Canada. First Nations governments were replaced under the *Indian Act* with band councils, a variant of a municipal form of governance with considerable constraints and limitations over their ability to govern themselves effectively. Band councils are the only form of Indian government provided for in the *Indian Act*, and their powers, as recognized by Ottawa, are only those permitted and set out in the Act. Band councils thus exercise only delegated powers over a limited range of matters, which are determined by the federal Parliament and are subject to disallowance or override by the minister of Indian affairs. As a result, their legal status and their capacity to enter into contracts with other governments and with corporations has been limited, and their independence is, on the whole, far less than that of other governments in Canada. In northern Canada, Inuit were centralized and administered in small communities established on the conventional Canadian model, though along with northern First Nations and Métis they soon enough began to take control of local government institutions and ultimately of territorial governments as well.

BROKEN PROMISES AND FORGOTTEN TREATIES

Another strong theme in the missing narrative concerns the legacy of broken promises and unfulfilled constitutional commitments by the federal government under treaties between the Crown and First Nations (Canada, House of Commons 1981, 188). The 1991–96 Royal Commission on Aboriginal Peoples examined this issue in some depth. From the vantage point of fiscal federalism, this meant the loss of resources and lands, the underfinancing of services, and a breach of trust between the parties to these treaties.

LIMITED EXERCISE OF FEDERAL LEADERSHIP AND RESPONSIBILITIES

This issue, as expressed by the Penner Report, concerns the fact that “Parliament has not attempted to exercise the full range of its powers under section 91(24), which sets apart ‘Indians, and Lands reserved for Indians.’”

Consequently, the limits of these powers have not been established. In the past, Parliament has, through the *Indian Act*, legislated in a manner that has regarded Indian communities as less than municipalities” (Canada, House of Commons 1983, 46). In a similar vein and around the same time, the parliamentary task force on fiscal federalism made the point, which still applies today (Prince 2001), that “continued intergovernmental manoeuvring” between the federal and provincial governments over responsibility for services to status Indians off-reserve, non-status Indians, and Métis “leads to serious problems” (Canada, House of Commons 1981, 189).

SERVICE DELEGATION IS NOT SELF-DETERMINATION

A shift away from this tightly controlled and hierarchical relationship toward greater recognition of Aboriginal communities with rights of jurisdiction did not begin until the 1960s, building momentum only in the 1990s. The shift can be said to have started with the policy introduced in the late 1960s of transferring to individual bands the administrative responsibility for managing and delivering certain services (e.g., child care, education, and social assistance). Control over the budgets and policy frameworks governing these programs and services remained, however, in the hands of the Department of Indian Affairs. Service delegation was subject to monitoring, reporting requirements, and controls by federal officials. In most service fields for most First Nations, real decision-making powers have still not devolved.

FISCAL TRANSFERS AS A POLITICAL WEAPON

Another theme in the history of Aboriginal fiscal relations with Canadian governments is the real or perceived apprehension that funding is used as a political weapon. This means that federal organizations make use of funding to reward bands or other Aboriginal organizations that endorse or adopt particular government initiatives, while punishing others that criticize and reject such measures (Canada, House of Commons 1983, 24). From Ottawa’s perspective, this may be seen simply as just one example, across many policy fields, of the “carrot and stick” approach to implementing programs. From the perspective of First Nation members and leaders, it can be viewed more sceptically and seriously as yet another example of the living model of colonialism.

PERSISTENT FISCAL AND POLICY CENTRALIZATION

In a submission to a federal task force on fiscal federalism, the Federation of Saskatchewan Indians (now Federation of Saskatchewan Indian Nations) emphasized that First Nations governments were still subject to severe external regulation; to externally determined expenditure priorities; to overly complex

program arrangements; to unpredictable fiscal flows; and to onerous accountability obligations to Indian Affairs and other federal departments (Canada, House of Commons 1981, 188–9). In contrast to federal-provincial fiscal and policy relations – which are routinely characterized as among the most decentralized in the world – the state of federal-Aboriginal relations reveals a history of relentless centralization. Despite the call in the early 1980s by the Penner and Breau reports for major reforms, little progress has been made on adopting innovative and fundamental changes to financial arrangements between Canada and Aboriginal governments. The prevailing form of fiscal transfer today remains the one-year conditional grant.

SUMMARY

The above trends are a powerful indictment and provide a strikingly different historical analysis than the traditional narrative of intergovernmental relations and fiscal federalism since Confederation. It is true that in the past generation some changes and reforms have been introduced (Prince 1994); yet the early years of the twenty-first century reveal tensions and disputes between Ottawa and Aboriginal governments about fiscal matters and arrangements which are still rooted in the colonial policies and precepts of the nineteenth century. First Nations and Inuit governments and other Aboriginal organizations in Canada continue to labour within “a financial straitjacket.”

COMPARING THE TWO SYSTEMS OF FISCAL RELATIONS

For Aboriginal peoples and their governments in Canada, two systems of fiscal relations are in effect. One is the traditional federal-provincial system of fiscal federalism, from which Aboriginal peoples and communities, as citizens, program clients, and delivery centres, receive various types and forms of funding. The second is a related but distinctive system of Canada-Aboriginal fiscal arrangements that has been emerging over the past generation and is still far from fully developed.

In this section we set out the basic elements of fiscal federalism as a working model in the Canadian context,⁷ and we then outline the similarities and differences between the traditional federal-provincial system and the newer Aboriginal-Canada system of fiscal relations. Our aim is both to increase understanding of how Canada’s existing network of fiscal arrangements interfaces with Aboriginal peoples and to highlight the implications of fiscal federalism for Aboriginal self-determination.

Adopting a broad view of fiscal federalism, grounded in the law, economics, politics, and social policy of the country, intergovernmental financial relations can be said to include the following key elements:

- the constitutional allocation and division between the orders of government of legislative powers and the associated expenditure roles and responsibilities; this takes in much of Canada's social policy and the program and service activities of the welfare state, including aspects of the federal spending power (e.g., Ottawa spending in areas of provincial jurisdiction);
- the constitutional allocation and division of taxing and borrowing powers and thus the revenue sources for each order of government;
- agreements for the collection and disbursement of revenues, and the coordination and harmonization of income and sales tax systems among governments;
- the transfer of tax points ("tax room") from the federal government to provincial governments;
- equalization payments from the federal government to provincial governments whose fiscal capacity is determined to be below the national average;
- intergovernmental transfer payments from the federal government to provincial and territorial governments; these payments may be conditional specific-purpose grants, semi-conditional general-purpose grants, or unconditional block grants; the federal spending power has long played a critical and frequently controversial role in this aspect of fiscal federalism (examples are the Canada Health and Social Transfer and Territorial Formula Financing and a host of other small transfer programs in housing, crop insurance, disability services, and justice programs);
- political and administrative structures and processes for consultation, bargaining, planning – and, at times, making joint decisions about intergovernmental fiscal arrangements, economic and social policy, and procedural relationships.

These seven elements constitute the overall architecture of fiscal federalism as it stands in Canada today. We do not propose to describe the historical development or current patterns and specifics of these elements, since they are well covered in the literature on federalism, public finance, and social policy. Our interest is to use these elements as a framework for determining what to examine when assessing the fiscal relations between the federal government and Aboriginal peoples and governments.

Do Canada-Aboriginal fiscal relations have all the elements of fiscal federalism as conventionally understood and practised? Should they? If so, how can the elements of conventional fiscal federalism be extended to include relations between other Canadian governments and Aboriginal governments? We cannot hope to answer these questions in this essay, but we raise them in an effort to broaden the current narrowly constructed debate on First Nations governance, and to influence subsequent dialogue and research on Aboriginal self-determination and Canadian public finance and policy. The issue of fiscal relations is central to some of the most pressing and profound political issues

of our time: the fiduciary obligation of the Crown to the First Nations in Canada; the building of economic and social capacity, and the rebuilding of cultures and languages across the many indigenous communities; and the negotiation of honourable and just treaties between Canada and Aboriginal peoples to replace colonial attitudes, structures, and laws.

Fiscal relations between Canadian governments and Aboriginal governments, under modern treaties (land claims agreements or settlement) and current treaty-making processes, include several elements:

- the clarification and identification of (a) certain law-making powers to be held exclusively by First Nations governments, (b) other powers to be shared with non-Aboriginal governments, and (c) many others that will remain with the federal or provincial governments;
- revenue-raising powers allocated to First Nations governments;
- agreements about the harmonization of local taxes between First Nations and neighbouring municipalities;
- federal loans and federal-provincial contributions for First Nations participation in treaty negotiations;
- cost-sharing agreements between federal and provincial governments regarding Aboriginal-related programs and service provision;
- equalization-like commitments in modern treaties with respect to ensuring levels of service provision that are comparable to levels prevailing in the region;
- compensation arrangements with third parties affected by land and resource settlements;
- financial transfer arrangements with First Nations or regional or national Aboriginal organizations, within or outside treaties.

This list is drawn from a variety of arrangements and negotiations currently underway in Canada. We provide this expansive list in order to illustrate the broad range of fiscal arrangements that now exist or are being contemplated.

A brief examination of the list reveals several policy and political characteristics that are shared by Canada-Aboriginal fiscal relations, on the one hand, and by federal-provincial fiscal relations on the other. Both systems embody considerable technical complexity and some asymmetry in the number and types of financing formulas, programs, revenues, and processes. Beyond the technical and financial details, arrangements in both systems carry significant political symbolism, rooted in the histories and strongly held conceptions of the federation and its fundamental constitutional relationships. Both systems, given the extent to which agreements are made between officials and ministers in closed forums, have been criticized for a lack of transparency and accountability to the public and to legislatures. Both systems are no stranger to political controversy and intergovernmental disputes, in large part because

of the centrality of such arrangements to revenues and budgetary choices, to the social policy union, and to constitutional law and politics. Transfers not only distribute monies but are also expressions of multiple values. A mixture of politics, economics, and management, these values can include autonomy, accountability, efficiency, equity, control, and evaluation. In both the Canadian and Aboriginal fiscal systems as well, the federal spending power looms large as a factor in the jurisdictions and finances of other governments. Moreover, the stakes concern the capacity to govern and the intergovernmental balance of power and visibility. We would extend recent observations made about fiscal federalism in Canada (Lazar 2000; Brown 2002) and suggest that low levels of mutual trust between governments mark both systems.

Canada's fiscal relations with Aboriginal peoples also differ in significant ways from federal fiscal relations with the provinces and territories, as is illustrated in table 2. For the purposes of this comparison, we treat the Government of Nunavut as a territory, not as an Aboriginal government. Although Nunavut exists as a result of the choice made by Inuit for a "public government" expression of their self-determination – and thus is often seen as a form of Aboriginal self-government – it functions in the federal system as a territory like the other two.

The political essence of federalism is the division of jurisdiction between orders of government in a given territory, with each order possessing a degree of autonomy and final decision-making authority over certain activities. With respect to Aboriginal governance and self-determination, the power of First Nations, Inuit, and Métis communities derives from their own historical experience and status as the original inhabitants of North America, as well as from the *Constitution Act, 1982*, and from negotiated self-government agreements, treaties, and settlements with the federal government and perhaps with provincial or territorial governments. However, in contrast to the federal and provincial governments, the real politics of contemporary Canada are such that most Aboriginal communities still have little autonomy and few exclusive fields of jurisdiction. For example, Aboriginal governments that seek to take responsibility for child welfare must confront two issues. First, federal and provincial governments together occupy all tax fields and tax "room," seriously limiting the Aboriginal government's capacity to fund programs in this field; similarly, jurisdiction over child welfare is a provincial responsibility, so Aboriginal authorities seeking to work in this area are understood to have only delegated responsibility from the province. Within these basic constraints, a variety of "work-arounds" have been developed, but the framework (and thus the starting point) for all Aboriginal governments remains the same.

Historically, most Aboriginal governments have been unable to raise funds through borrowing, and most still have few taxing powers or other sources of revenue of their own. First Nations and Métis governments lack access to the broadly based personal and corporate income tax and to the sales and payroll

Table 2: Differences between Canada's Two Systems of Fiscal Relations

<i>Federal-provincial-territorial</i>	<i>Canada-Aboriginal</i>
Jurisdiction is divided between orders of government, with each order possessing some autonomy	Jurisdiction in many places is in dispute, and most Aboriginal governments have little autonomy and few if any fields of exclusive jurisdiction
Federal and provincial governments have constitutionally protected fields of taxation and considerable power to borrow	Some First Nations governments have limited taxing power by special agreement, but this is not a universal capacity. Access to taxation powers is likely to improve in the future, as more Aboriginal governments take up this power. Governments chosen by Métis and Inuit in various parts of Canada do have taxing power and also access to resource royalty sharing <i>Indian Act</i> governments face serious constraints on borrowing, though some mechanisms to facilitate this are under development
The principle of equalization results in large transfers of capital and in improved fiscal stability for poorer provinces. Territorial governments, while not part of the equalization formula that applies to the provinces, are funded by another mechanism that ensures that the principle of equalization applies North of 60°.	Aboriginal governments do not benefit from any measures similar to the federal-provincial equalization formula, and so they do not enjoy the same stability, predictability or income equalization, as do other governments.
Most federal transfers to provinces and territories are unconditional and multi-year.	Most federal transfers to First Nations governments are still annual and highly conditional, though there are some First Nations governments that have negotiated more favourable arrangements.
The system of meetings and negotiations between federal Ministers and officials and their provincial and territorial counterparts, known as executive federalism, provides a forum for information sharing and decision-making.	There is no direct counterpart to the system of executive federalism. A number of ad hoc committees, working groups, tables and other bodies have been formed to meet the need for discussion and negotiation.

tax sources available to the federal and provincial governments. Traditional treaties nowhere referred to matters of taxation (Bartlett 1992). Powers of taxation under the *Indian Act* have always been extremely limited.⁸ The situation is gradually being ameliorated. The First Nations Finance Authority has been functioning as an investment pool for a number of years, and if currently proposed legislation passes, this authority will be able to lend capital as well. Amendments to the *Indian Act* in 1987 opened the way for taxation on leaseholds on reserves, and currently about a hundred bands levy such taxes. Some have also negotiated sales tax agreements with the federal Department of Finance (Canada, INAC 2002a, 1). Similarly, some bands now levy provincially equivalent excise taxes on fuel, alcohol, and tobacco under agreement with their provincial government, which administers the taxes and remits the revenue to the bands.⁹

Further changes, which are being introduced by the modern treaties and agreements signed in the North and in British Columbia, are addressing tax policy in terms of phasing out tax exemptions for status Indians under section 87 of the *Indian Act*¹⁰ and incorporating revenue-sharing provisions and assigning new own-source revenue responsibilities. The Nisga'a Treaty is a recent example of taxation provisions for self-government that "represents the beginning of a greater attempt to weigh aboriginal interests in tax policy [although] much remains to be done" (Borrows and Rotman 1998, 809). Conflicts will no doubt increase as Aboriginal governments, on their path to self-determination, seek "to capture a greater share of the wealth that circulates in and around their communities" (ibid.). In this respect, Aboriginal fiscal politics will come to resemble more closely Canada's conventional fiscal federalism. A related aspect of harmonization is the work of the Aboriginal Financial Officers Association of Canada and the Knowledge Sharing Infrastructure Project, which aim to develop and disseminate First Nations' "best practices" in financial administration and governance.

Debate over the transfer of tax room and other forms of revenue sharing is likely to become an important feature of Aboriginal-Canada fiscal relations. In this context, the transfer of tax room entails the reduction of the federal and/or provincial share of a specified tax base, thus creating room for the Aboriginal government to collect a corresponding increased share. Where Aboriginal polities abut cities and towns, and especially where new reserve lands are purchased or negotiated, there are also questions of municipal tax revenue to be resolved (Mountjoy 1999, 325). Federal finance officials have noted that "self-government agreements, comprehensive land-claim agreements, and other recent developments (such as the opening of casinos run by First Nations) are increasingly resulting in a sharing of tax room between provincial and Aboriginal governments" (Boucher and Vermaeten 2000, 151). Land claims settled in the North – for example, with the Inuit of Nunavut and the Gwich'in, Sahtu, and Dogrib of the Northwest Territories – include resource

royalty sharing with the federal government respecting mineral, oil, and gas royalties. The extent to which these funds should be spent on social welfare and other programs, which elsewhere in Canada are generally funded by federal and provincial governments, has not yet been resolved (Finlayson 2002).

As these discussions develop, one important point will certainly be the absence of an equalization program in Aboriginal-federal fiscal relations. Contrast this with mainstream fiscal federalism, in which equalization has been described as “probably the best understood and the most broadly supported,” of all the intergovernmental arrangements, “strongly underpinned by a constitutional commitment,” and making “fiscal and program decentralization possible in Canada” (Brown 2002, 76). Aboriginal governments, like the three territorial governments (and the two “have” provinces, Alberta and Ontario), do not receive equalization payments from the federal government. The Nisga’a accord is noteworthy because a variant of the equalization principle is enshrined in the fiscal arrangements, namely, “to enable the provision of agreed-upon public services and programs to Nisga’a citizens and, where applicable, non-Nisga’a occupants of Nisga’a Lands, at levels reasonably comparable to those prevailing in Northwest British Columbia” (Prince and Abele 2000, 358). There is no mention of the other half of the equalization concept, that is, at reasonably comparable levels of taxation. The intent is that, over time, the Nisga’a governments will contribute in an increasing fashion to the cost of program and service provision.¹¹

Like provinces and territories, Aboriginal governments have a gap between their expenditure requirements and the revenues to finance them; hence the need for intergovernmental transfers. With weak fiscal capacity, Aboriginal governments are heavily dependent on transfers, even more so than the territories or the poorest provinces. Yet while most federal transfer payments to provinces and territories are unconditional and are multiyear, most federal transfers to First Nations governments are annual and remain conditional. Elsewhere (Prince and Abele, 2000), we have outlined and examined the range of existing practices and emerging possibilities in Aboriginal financial arrangements. The overwhelming situation today is that fiscal arrangements between Canada and Aboriginal governments are restrictive, with curtailed powers, limited autonomy, and incomplete local accountability. In the great majority of federal transfers to First Nations governments and other Aboriginal organizations, Indian and Northern Affairs Canada (INAC) makes them conditional payments with a strong emphasis on program compliance. For the year 2002–3, 92 percent of INAC’s \$4.2 billion in transfer payments for Indian and Inuit programming was conditional. Transfers were for a specific purpose and were subject to audit. Any unspent balances were to be returned to the federal government. Most federal funding agreements are of one-year duration, with considerable reporting and reapplication requirements.¹² In contrast to the

fiscal federalism system (where Ottawa effectively vacated the field of social welfare with the termination of the Canada Assistance Plan in 1996), the federal government retains a direct role in funding social assistance and social services to First Nation and Inuit communities. Elementary and secondary education is another major spending priority by Ottawa in relation to Aboriginal peoples.

There is no direct equivalent to executive federalism in the Aboriginal fiscal system, although a host of committees, tables, working groups, and other consultative and bargaining bodies have been formed to manage the evolving relationships between Canada and Aboriginal governments on fiscal issues and other policy and program matters. The National Table on Fiscal Relations, the Saskatchewan Common Table process, and the B.C. Fiscal Relations Working Group are all instances of structures established to underpin this newly forming system of fiscal federalism. These structures are advisory in nature, intended to share information, assess approaches, and develop models for fiscal arrangements. The federal, provincial, and territorial ministers of Aboriginal affairs and national Aboriginal leaders have been meeting once or twice a year since 1997 (Prince 2002), usually with a focus on discussing and planning policy initiatives. In addition to these national and regional tables, specific structures result from particular treaties and settlements. Under the Nisga'a Final Agreement, which came into effect in May 2000, Canada, British Columbia, and the Nisga'a Lisims Government have established a tripartite finance committee to ensure that the parties have a similar understanding and expectation regarding the implementation of treaty obligations. Federal government departments, especially INAC, Human Resources Development Canada, and Health Canada, have also formed joint working groups to review policies and to develop programs in areas such as child and family services, disability issues, and adult care.

Many Aboriginal people in Canada thus interact with two systems of fiscal relations. Our focus here has been to illuminate the system that is lesser known in the literature on federalism and public finance. The two systems share some features, but our main finding is that there are many fundamental structural differences. This survey reveals the increasing institutionalization and elaboration of the Canada-Aboriginal fiscal system, a trend joined by growing politicization. Over the last thirty years, since the modern period of wide-scale Aboriginal activism began, some adaptations and changes in fiscal arrangements have occurred, but the overall pattern has shown relatively little change in the direction of a more vigorous model of self-determination. For Aboriginal peoples and their governments, fiscal relations with the Canadian government involve a high degree of conditionality in transfer payments and little taxing powers, underscored by a continuing struggle with Ottawa and the provinces over the meaning and scope of inherent jurisdiction and Aboriginal title and rights.

RECENT FEDERAL INITIATIVES

Before turning to the question of what should be done to begin to untangle this situation, we would like to consider, briefly, the importance of some recent federal initiatives in the arena of funding status Indian governments. (Now former) Minister of Indian Affairs Robert Nault proposed several pieces of legislation designed to overhaul the relationship between the federal government and the governments of Indian bands, including the *First Nations Governance Act* (which provoked considerable public controversy, and was subsequently scrapped by the Martin government) and the *Specific Claims Resolution Act*. Although both of these initiatives are somewhat relevant to the issues we have been discussing, for reasons of space we will not treat them here. It is important, however, to consider some of the accompanying legislative measures proposed by Minister Nault, since these were aimed directly at the renovation of fiscal affairs for status Indians.

The minister proposed that four public institutions be established under the *First Nations Fiscal and Statistical Management Act* (FNFSMA):¹³

- The First Nations Finance Authority would establish means for First Nations governments to borrow long-term private capital at preferred rates for public infrastructure projects such as roads, sewers, and water systems.
- The First Nations Financial Management Board would establish the financial standards and provide independent assessment services to First Nations seeking to use the First Nations Finance Authority.
- The First Nations Statistical Institute “would assist all First Nations in meeting their information needs while advising Statistics Canada on how First Nations may be better represented in the national statistical system.”
- The First Nations Tax Commission “would assume and streamline the real property tax bylaw approval process and help balance community and rate-payer interests.”

As the federal press release noted, these measures all reflect advice provided by the National Table on Fiscal Relations, which includes representatives from the Assembly of First Nations, Health Canada, Finance Canada, Statistics Canada, the Canada Customs and Revenue Agency, and Indian and Northern Affairs Canada. The proposed legislation has not yet been introduced in the House of Commons.

The different provisions of the FNFSMA, if implemented with some determination and dispatch, seem likely to improve the ability of *Indian Act* bands to manage their affairs in a more “governmental” fashion. Like other levels of government in Canada, they would be empowered to borrow for capital projects. Improvement of the system for collecting taxes on reserves (or from band members) would support governmental development. With these badges

and capacities of public government in hand, First Nations governments should be in a better position to enter fiscal federalism in some fashion. In this regard, the inclusion in this package of the First Nations Statistical Institute is interesting: most federal-provincial and federal-territorial funding relationships incorporate some form of per capita calculation, but this would be difficult in First Nations communities, where census refusal rates are high (though falling) and sometimes include entire reserves.¹⁴ At the moment, any programs requiring per capita calculations rely on band membership lists registered with INAC. The availability of accurate census data would therefore put First Nations on the same basis as all other people in Canada.

The FNFSMA reforms will make some difference to First Nations governments. They represent incremental change, in the right direction. If approved, they will join the array of other recently negotiated arrangements that must be considered as part of the articulation of the Aboriginal order of government within the framework of fiscal federalism. These other arrangements include the terms of the modern and revived historic treaties, the funding arrangements established for the territorial governments, and, in the case of the Northwest Territories and Yukon, for the First Nations governments within them.

Alongside this initiative on fiscal institutions, comprehensive funding arrangements between Canada and First Nations are another planned innovation in financial relations in support of self-determination. Unlike the FNFSMA and related measures on governance and land management, this is not a legislatively based reform but one that is grounded in administrative practices and procedures. Nonetheless, the minister and departmental officials regard comprehensive funding as an important part of enhancing governance in and by First Nations.

Given the existing high conditionality of transfers to First Nation and Inuit communities, it is unrealistic to speak of their governments possessing an "Aboriginal spending power" to expend funds in any policy or program field which they see as appropriate to meeting their needs and goals. INAC's plans and priorities for the period 2003–5 specify the intention to "implement a Canada–First Nations Funding Agreement that will provide a single funding instrument and provide a common accountability framework for federal departments that provide funds to First Nations" (Canada, INAC 2002b, 25). This Canada–First Nations Comprehensive Funding Agreement (CFNCFA) reform is seeking a level of harmonization of funding types and processes within the federal bureaucracy. It addresses the current situation in which at least thirteen federal departments fund programs directed to First Nations and to Aboriginal people more generally.¹⁵

The idea of the CFNCFA is to reduce the duplication, complexity, paper burden, and inefficiencies of current practices within and among federal departments, thus creating a more encompassing approach to Canada–First Nations fiscal relations. The "single funding instrument" envisaged appears

to be a five-year transfer covering a range of health and social policy areas across a number of federal departments. First Nations governments would have increased authority to reallocate funds across functional areas and exercise more authority than presently over program design and delivery. Yet the comprehensive funding model is not a conditionless block transfer. It seems that it will still embody various rules, conditions, and reporting requirements by First Nations to the federal government. Thus, the block-funding model recommended by the Penner Report twenty years ago remains an unfulfilled vision in Canada-Aboriginal fiscal relations.

INDIGENISING FEDERALISM

In this essay we have striven to demonstrate that a number of recent developments in the realization of Aboriginal self-government, and the history of Aboriginal-Canada relations, spotlight the need for a serious consideration of how the Aboriginal order of government could be knitted into fiscal federalism. If the knitting is not undertaken with care and goodwill, there is a real risk that the great governing systems of Canada that are expressed and fuelled by fiscal federalism will operate only to undermine the political and constitutional progress that Aboriginal peoples have made.

What could be achieved by artful knitting? The different and various institutions of Aboriginal self-government could enjoy the same fiscal conditions enjoyed by other governments in Canada (however imperfectly); they could enjoy stable, regular, predictable, and consistent funding roughly adequate to the needs of their citizenry. What are the risks? These are many. We have already spoken of the risks attending a failure to act. Constitutional powers are certainly a basic precondition for decolonization, but they are not the only precondition; for the rest, it is necessary to spend money. Risks also arise in the process of joining Aboriginal governments to the federal system. As indicated by the experience of band councils in the past and the Government of Nunavut today, small governments rarely set the terms of interaction. The pace and shape of fiscal negotiation are set by the larger orders of government, where the power, human resources, and funds overwhelmingly arise. The simple act of joining fiscal federalism in some regularized, stable way will create many institutional obligations for Aboriginal governments taking up this possibility. In record keeping, planning, expenditure management, and policy development, the governments will be profoundly affected by the system of funding that is put in place (Prince and Juniper 1997). We think that this aspect, too, requires some careful research and consideration – impact assessment, if you like.

In very recent years, the story of federal-provincial fiscal relations has seen numerous developments: a renewed style of partnership and equality between

governments; public policy initiatives arising from either order of government; federal block transfers with fewer conditions than before; and considerable potential for asymmetry in provincial and territorial program design and delivery and in their tax systems; but it has also seen the continued dominant role of Finance Canada in the federal budget and policy processes, and ongoing tensions between the two orders of government over past federal cuts in health and social transfers (Lazar 2000). By comparison, for many long years the story of federal-Aboriginal fiscal relations has seen a rhetoric of partnerships yet a reality of a hierarchical relationship with the supremacy of Ottawa. Ideas for reform have continued to come mainly from within the federal government, with charges of little or no consultation with Aboriginal governments and peoples. Federal transfer payments have been highly conditional and regulated. There has been significant asymmetry in funding arrangements and opportunities between First Nations, Inuit, Métis, and non-status Indians, and a continued dominant role played by INAC in policy, programming, and funding. And as in the past, there are ongoing tensions and issues of mutual trust and respect.

Looking back on events and looking ahead at trends, we detect a gradual recognition and accommodation of different legal and political institutions and cultures within and alongside the Canadian federation. This process, agonizingly slow for many and not without its own puzzles and challenges for all, is producing an ever more diverse country and set of fiscal and policy relationships. Judging from media coverage and political discourse in Canada, we are still some distance from appreciating that the form or *shape* of fiscal arrangements, not only the *scale* of funding, is a critical precondition and element of self-government for Aboriginal peoples.

As is suggested by our analysis of the two stories of federalism and our subsequent comparison of Canada-Aboriginal relations and federal-provincial/territorial fiscal relations, some further institutional development needs to be achieved. The appropriate mechanism for the participation of Aboriginal governments in executive federalism is not self-evident (Prince and Juniper 1997; Abele and Prince 2002, 2003). What is certain is that there must be some institutional means of their regular inclusion, through institutions that “aggregate up” appropriately and legitimately. As former minister of Indian affairs Robert Nault clearly recognized, some reforms are also necessary in order to establish normal governing powers for First Nations governments. These are also in the process of development or implementation for Inuit in Nunavut, Nunavik, and Labrador. There remains a huge gap between these initiatives, incomplete as they may be, and the circumstances of Aboriginal people living in cities, and those of Métis everywhere (Newhouse and Peters 2003; Graham 1999; Prince and Abele 2000). Finally, there is the matter of equalization. If any principle is sacred to Canadian fiscal federalism, it is the principle of equalization. This principle needs to be extended, thoroughly and

efficiently, to Aboriginal governments. Some partial movement in this direction is evident in the Nisga'a Treaty as we noted above, but by and large Aboriginal governments do not share in the benefits and obligations of equalization. Just how this should occur is not at all obvious. Some developmental work by experts in fiscal federalism is required, and perhaps they may design a policy experiment.

Aboriginal governance and the role of Aboriginal peoples will become more visible and important in Canadian politics and federalism over the coming decades of the twenty-first century. This will certainly be so in the North with regard to both territorial and Aboriginal self-government and in western Canada with growing Aboriginal populations in cities and on reserves, and with the ratification and implementation of treaties and claims. Other provinces also will be affected in varying degrees, through further capacity-building initiatives in human, physical, financial, and spiritual resources; through strategic court decisions and the growing body of Aboriginal case law; and through the unfolding of Aboriginal activism and self-determination, not only in Canada but around the globe. The test, in the words of philosopher James Tully, "is to ensure that Aboriginal peoples are able to draw on and innovate with their older constitutions and traditions ... in the transition to self government" (Tully 1995, 193). In that transition, matters of public finance, as always in political affairs, will figure prominently.

NOTES

We thank Michael Murphy, Robert Bish, Graham White and an anonymous reviewer for perceptive comments on an earlier draft of this paper.

- 1 This is an unwieldy topic, in which the specific circumstances of Métis, Inuit, and First Nations – and their variations in different parts of Canada – nearly defeat brief general discussion. Though we attempt to take into account the funding situations for all Aboriginal peoples in Canada, we are aware that in this essay there is greater attention to First Nations issues than to those of Métis, Inuit, or non-status Indians. For a different balance on fiscal questions, see other works by us in the list of references below.
- 2 "Status" refers to status under the *Indian Act*. It applies to individuals who are registered with the Department of Indian Affairs as Indian band members and who are thus entitled to benefit from the *Indian Act* provisions and from policies directed towards status. Status is inherited. Persons who have status had ancestors who were signatories of a treaty or who were "given" status by the Department of Indian Affairs. Non-status Indians are Aboriginal people whose ancestors "lost" status or gave it up for any one of a number of reasons. There is no status/non-status distinction for Métis or Inuit, and the *Indian Act* does not apply to them.

- 3 The Canada-wide organizations were generally federations or creations of the local, regional, or provincial and territorial bodies, and they included the National Indian Brotherhood (now the Assembly of First Nations), the Métis National Council, the Native Council of Canada (now the Congress of Aboriginal Peoples), and Inuit Tapirisat of Canada (now Inuit Tapiriit Kanatami). Organizations representing the interests of Aboriginal women were formed soon after these national bodies: the Native Women's Association of Canada, and Pauktuutit – (the Inuit women's association). It is the four national bodies first mentioned (the Assembly of First Nations, the Métis National Council, the Congress of Aboriginal Peoples, and Inuit Tapiriit Kanatami) that are most frequently consulted on matters related to the federation – as is, sometimes and irregularly, the Native Women's Association of Canada.
- 4 Consider the following highly problematic statements in Simeon and Robinson (1990, 324–5): that Canada's Aboriginal peoples are an example of communities that did not fall within the traditional concern of the federal system; that the activism of Aboriginal peoples is a new movement; and that “while emerging movements have often challenged federalism, it is also true that federalism at its heart legitimates the concept of a Canada based on diverse communities, at once autonomous and part of the whole.”
- 5 We purposefully say it provides *many* of the elements of the story because its focus was on First Nations, and it did not consider the historical experiences of the Inuit and Métis.
- 6 One contemporary historian has written of the negotiation and ratification of Confederation between 1864 and 1867 as follows: “The confederation-makers never imagined seeking participation from the native nations. In the mid-nineteenth century, British North Americans looked ahead to the rapid extinction or assimilation of native society. Native peoples were seen as foreigners, and they would be dealt with through treaties rather than by inclusion in colonial politics” (Moore 1997, 49). History would show, however, that the treaties were not respected and Native peoples were in fact governed by colonialist policies and politics.
- 7 This discussion of fiscal federalism draws on Boadway 2000, Brown 2002, Hobson and St-Hilaire 2000, Hogg 2000, Lazar 2000, Prince and Juniper 1997, Ter-Minassian 1997, Vaillancourt 2000, and Watts 2000. While there are differences of emphasis and focus among Canadian writers on fiscal federalism, many adopt a fairly broad view, looking not only at the division of economic powers between governments but also at processes of adjustment and coordination and social policy and constitutional matters.
- 8 In principle, as of 1884, the *Indian Act* allowed Indian bands to assess and tax lands of Indians, subject to approval of the minister, and in 1951 the power to license businesses was added. In 1988 an amendment to the Act enabled bands to tax reserve lands leased to non-Indians.
- 9 We are indebted to our colleague Bob Bish for improving our understanding of taxation and borrowing on reserves.

- 10 As the federal government explains, “In general, Aboriginal peoples in Canada are required to pay taxes on the same basis as other people in Canada, except where the limited exemption under Section 87 of the Indian Act applies. Section 87 says that the ‘personal property of an Indian or a band situated on a reserve’ is tax exempt. Employment income and purchases of goods and services may also be exempt under certain conditions. Métis and Inuit are not eligible for this exemption ... The Indian Act prevents non-Aboriginal governments from taxing the property of Status Indians on a reserve” (Canada, INAC 2002a, 1).
- 11 Perhaps a piecemeal, limited form of fiscal equalization between governments may be identified in the loans that Indian and Northern Affairs provides each year to Aboriginal claimants across the country, and to First Nations in British Columbia for supporting their participation in the treaty process in that province. From an equalization perspective, these loans, which were estimated to be \$75 million in the 2002–3 fiscal year, are in recognition of the low or non-existent tax-raising capacity of most First Nation communities. On the other hand, since the loans are not forgiven once an agreement is reached, but have to be repaid immediately, they are clearly not in the full spirit of equalization grants as enjoyed by other governments in Canada.
- 12 For further details on these funding agreements, see http://www.ainc-inac.gc.ca/ps/ov/agre_e.html.
- 13 This information is drawn from <http://www.ainc-inac.gc.ca>. Much more information on the same topics may be found there and at the linked Web sites that are referenced. It should be noted that none of these initiatives are designed to effect any change in the situation of Métis and Inuit.
- 14 The number of reserves refusing the census declined from 77 in 1996 to 30 in 2001. The data on individual refusals on participating reserves are not yet available.
- 15 While a baker’s dozen of federal agencies have funding relations with Aboriginal governments, communities, and peoples, in 2002–3 INAC accounted for 69 percent of this funding, Health Canada for another 19 percent, Human Resources Development Canada for 5 percent, and Canada Mortgage and Housing Corporation for 4 percent. Another nine federal departments accounted for the remaining 3 percent of this funding (Canada, INAC 2002b).

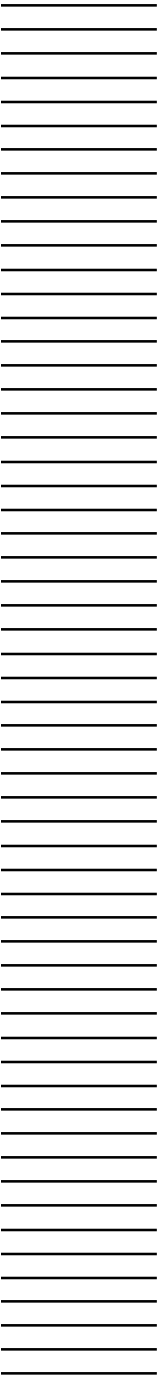
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V

Judicial
Reconfigurations

Reconfiguration through Consultation? A Modest (Judicial) Proposal

Richard F. Devlin and Ronalda Murphy

Les auteurs suggèrent tout d'abord que l'impasse actuelle dans les relations entre les autochtones et l'État est reliée à trois contradictions dans la nature des relations entre la Couronne et les peuples autochtones; la première est idéalisée, la deuxième est gestionnaire et la troisième est fonctionnaire. Les auteurs soutiennent ensuite que c'est seulement le tiers des relations qui, tout en respectant totalement l'impasse et tout en demeurant sensible à la nature historique et contemporaine de cette relation, a le potentiel de reconfigurer les relations entre les autochtones et l'État. Pour appuyer cette affirmation, les auteurs soutiennent que certains membres du milieu judiciaire au Canada ont pris conscience de ce défi et ont commencé à essayer de le relever en développant une doctrine appelée «l'obligation d'engager dans un processus de consultation». Les auteurs suggèrent que cette obligation de consulter constitue un nouveau droit des métis, un droit qui est plus qu'une question de procédure et moins qu'une entité positive : un droit de solidarité. Les auteurs proposent que le développement de cette obligation de consulter fournit non seulement l'occasion de reconfigurer la relation entre la Couronne et les peuples autochtones, mais aussi celle entre les autochtones et le secteur privé puisqu'un pouvoir économique important se rapportant aux peuples autochtones y est exercé.

Whereas Aboriginal peoples were once like trees growing in relative isolation on an open plain, they are now more like trees in a grove, co-existing with others in a complex ecological system. So, while the ancient pine of Aboriginal governance is still rooted in the same soil, from which it draws its sustenance, it is now linked in various ways with neighbouring governments.

Royal Commission on Aboriginal Peoples, 1993

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* ... to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Let us face it, we are all here to stay.

Chief Justice Lamer, 1997

The government will reintroduce legislation to strengthen First Nations governance institutions – to support democratic principles, transparency and public accountability, and provide the tools to improve the quality of public administration in First Nations communities. It will work with these communities to build their capacity for economic and social development, and it will expand community-based justice approaches, particularly for youth living on reserves and Aboriginals in the North. The government will also work with Aboriginal people to preserve and enhance Aboriginal languages and cultures.

Throne Speech, 2002

INTRODUCTION

Relations between the Crown and Aboriginal peoples are in a sad state as we enter the first decade of the twenty-first century – witness the intense hostility generated among leading members of the Aboriginal communities by the Chrétien government’s proposed (and since abandoned) *Indian Act* reforms (Laghi 2002). The dysfunctional nature of Aboriginal-state relations in turn continues to fuel the marginalization of Aboriginal peoples in economic, social, and political terms. On all three of these fronts it is impossible to deny that Aboriginal peoples rank among the most disempowered of the Canadian citizenry.¹ Progress on reducing Aboriginal marginalization is inextricably linked to progress on breaking the impasse that lies at the heart of the Aboriginal-state relationship. The three opening quotations given above provide an insight into why this impasse has come about, by suggesting three different levels at which the Aboriginal-state relationship can be conceptualized and (mis)understood. The first is idealist; the second is functionalist; and the third is managerialist. By “idealist” we mean a vision that is grounded in agreed-upon values such as harmony and cohesion; by “functionalist” we mean a vision that is pragmatic, perhaps ad hoc, but typically sensitive to broader social, cultural, political, and economic contexts; by “managerialist” we mean a bureaucratic and technocratic vision that is deeply instrumentalist and teleological in its assumptions.

One of the central arguments of this essay is that if Aboriginal peoples remain exclusively idealist and if governments persist in clinging to technocratic managerialism, there will be little hope of moving their relationship onto a more progressive footing. Our particular interest is in the role of the law in moving the parties towards this more progressive position. The role of law in the relationship between the state and Aboriginal peoples is complex. While law is not, in our view, inherently negative or positive, it has certainly become a critical site of political contestation for Aboriginal people. Careful attention to it is merited. In this essay we propose to identify one *possible* opening that may create an opportunity to reconfigure Aboriginal-state relations in Canada: the judicially created doctrine known as the duty to consult. While we acknowledge some problems with the duty to consult, we argue that as Canadian courts have developed the doctrine over the last two decades (especially in the last five years), they have created a functional mechanism that promises to move the relationship between the government and Aboriginal peoples forward. Our modest suggestion is that some courts sometimes do some good things.

To support this argument the essay is divided into seven sections. In the next part, we identify two competing approaches to the duty to consult: one restrictive and legalistic, the other imaginative and reflective of the historical relationship between Aboriginal peoples and the settler communities. In the third section we analyze the issue of the timing of the duty to consult, while the fourth section interrogates the intensity of the duty to consult. Here we argue that the courts have created a new hybrid right which Aboriginal peoples can invoke. It is a claim to more than mere process, but one that will not generally constitute a veto.² We characterize this as a solidarity right. The advantage of such a right is that its primary focus is on the relationship between Aboriginal peoples and the state. In this conception, both the process and the substance of consultations must reflect a good faith commitment to the undeniable fact that “we are all here to stay” (*Delgamuukw* 1997, 1124). The fifth section examines the nature of the relationship between Aboriginal peoples and the state by considering whether the duty to consult imposes any reciprocal obligations on Aboriginal peoples. The sixth part analyses the scope of the duty to consult and explores recent case law, particularly a number of recent decisions that have applied this duty not only to state actors but also to non-state actors. If these lower-court cases are eventually affirmed by the Supreme Court of Canada, the matrix of relationships they govern will need to be reconfigured. The conventional triangle of the federal government, provincial governments, and Aboriginal peoples will no longer be adequate to represent the actual participants in the complex social, economic, and political relationships that determine the conditions of Aboriginal lives and communities. The seventh section is a brief conclusion.³

TWO COMPETING APPROACHES TO THE DUTY TO CONSULT:
JUSTIFICATION OR A FREE-STANDING LEGAL AND
EQUITABLE DUTY?

The duty to consult is a doctrine of relatively recent vintage. In a period of less than twenty years it has morphed from being a comment in a Supreme Court of Canada decision to being a doctrine that has the potential to reconfigure Aboriginal-state relations in Canada. In this section, we trace this development briefly and then explain the two approaches to the doctrine that are dominant in the case law to date.

The first rumblings of the duty to consult were heard in 1984 in *Guerin v. The Queen*. In *Guerin*, the Supreme Court of Canada held that the federal government breached its fiduciary duty with regard to Aboriginal title land “[i]n obtaining without consultation a much less valuable lease than that promised” to the band in question (*Guerin* 1984, 389). The court located the duty in the special nature of Indian title and the historic powers and responsibilities assumed by the Crown over Aboriginal peoples. The doctrine lay fallow for six years until *R. v. Sparrow* (1990), when the Supreme Court considered for the first time the significance of section 35 of the *Constitution Act, 1982*, and held that it incorporates a fiduciary relationship between the Crown and Aboriginal peoples. It is important to note, however, that the court also held that section 35 rights – like all rights – are not absolute. Because section 35 was not subject to section 1 of the *Canadian Charter of Rights and Freedoms*, which provides a mechanism for limiting rights, the court had to create an analytical structure to permit the balancing of section 35 rights against other rights and interests. Consequently, in *Sparrow* and several other cases in the 1990s, such as *R. v. Van der Peet*, the court outlined a three-part test, against which the legitimacy of any Crown infringement of Aboriginal rights would be measured. The test is comprised of the following three questions:

- (1) Is there an existing Aboriginal or treaty right?
- (2) Has there been a prima facie infringement of that right?
- (3) Can the infringement be justified?
 - (a) Is there a “compelling and substantial” objective?
 - (b) Were the Crown’s actions consistent with its fiduciary duty towards Aboriginal people?

It was further held that the burden of proof for steps 1 and 2 was on Aboriginal peoples; if they met this burden, then it shifted to the Crown to demonstrate that the infringement was justified. This is a shifting burden of proof that is standard in rights adjudication.

The important point for the purposes of this essay is that consultation was conceptualized as kicking in only at stage 3b. In other words, the Crown could

demonstrate that its actions were in conformity with its fiduciary obligations by showing that it had consulted with the affected Aboriginal peoples.⁴ Such a characterization led many to believe that the duty to consult is not a free-standing entitlement of Aboriginal peoples, but instead is merely a regulatory safeguard that Aboriginal people can invoke to curtail high-handed unilateral infringements by the Crown. For example, in 1997 in *Perry v. Ontario*, the Ontario Court of Appeal held that “[t]he government’s fiduciary obligation ... is intended as a shield and not a sword. It is a restraint against regulation improperly affecting aboriginal rights, not an affirmative obligation to initiate negotiations ... there is no positive duty on government to negotiate with aboriginal communities” (*Perry* 1997, 733–4). This essentially defensive conception of the duty to consult was adopted by many governments in Canada, both federal and provincial. It is consistent with a classical liberal view that understands rights as essentially negative; rights are a guard against state action, but they do not impose positive obligations on a sovereign state. As such, the doctrine did little to enhance the power of Aboriginal peoples or to redefine their relationship with the state.

There is another line of cases, however, that suggests a significantly different conception of the duty to consult, and one that is potentially more empowering for Aboriginal peoples. The starting point for this analysis is *Guerin* itself, where Chief Justice Dickson characterized the relationship between the Crown and Aboriginal peoples as a *sui generis* (unique/special) fiduciary relationship and proclaimed that the “Crown first took this duty upon itself in the Royal Proclamation of 1763” (*Guerin* 1984, 378). This line of analysis was picked up in *Delgamuukw v. British Columbia*, a 1997 land title case, wherein the Supreme Court reiterated the conventional three-part *Sparrow* justification test, but in discussing 3b (whether the infringement proceeded in a manner consistent with the fiduciary duty owed by the Crown) Chief Justice Lamer announced:

There is always a duty of consultation ... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. (*Delgamuukw* 1997, 1113)

In 2002, Lambert JA of the British Columbia Court of Appeal picked up on these dicta in *Haida Nation v. British Columbia (Minister of Forests)* to suggest

a significantly different genealogy for the duty to consult than the reactive justification test. He claimed:

[T]he roots of the obligation to consult lie in the trust-like relationship which exists between the Crown and the aboriginal people of Canada ... [which] is now usually expressed as a fiduciary duty ... a duty of utmost good faith ... [a] duty [which] permeates the whole of the relationship between the Crown ... and the aboriginal peoples ... [This] trust-like relationship was reflected in the Royal Proclamation of 1763 ... [and] it grounds a general guiding principle for s. 35(1) of the Constitution Act, 1982. (*Haida Nation no.1* 2002, paras. 33, 34, 36)

It is important to note the significance of Lambert JA's analysis. He is identifying the origins and nature of the duty to consult in the *relationship* between the Crown and Aboriginal peoples. He therefore uncouples consultation from the section 35 case law (which began only in the 1990s) and disentangles it from the limited confines of the *Sparrow* justification test. Consequently, towards the end of his decision in *Haida Nation no.1*, Lambert JA advances the argument that the Crown is bound by the guiding principle of its fiduciary duty to "Indian peoples": "[T]he obligation to consult is a free standing enforceable legal and equitable duty ... [that] must take place before the infringement. The duty to consult and seek an accommodation does not arise simply from a *Sparrow* analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection" (*Haida Nation no.1* 2002, para. 55).

Two points emerge from the preceding analysis: first, the duty to consult arises from the historical and political conditions of Aboriginal peoples and the Crown; second, courts might identify a duty to consult wherever the facts generate a concern that Crown conduct may affect the specific legal interests of Aboriginal peoples. The ramifications of this conception of the duty to consult will become more obvious in the next section, which addresses the timing of the duty.

THE TIMING OF THE DUTY TO CONSULT

At what time does the duty to consult kick in? Is it triggered early, at the moment when Aboriginal peoples assert an Aboriginal right? Or is it much later, only after Aboriginal peoples have proved they have such a right? If the latter approach is adopted, the duty to consult is likely to have a relatively minimal impact on Aboriginal-state relations; but if the former is adopted (that the duty is triggered when Aboriginal rights are asserted), this will put a significant burden on governments. This also affects the intensity of the obligation, which we will consider in the next section.

The answer to this question of timing is contingent on the analysis developed in the previous section: that is, whether consultation is merely a dimension of the *Sparrow* justification test or whether it is a free-standing legal and equitable duty. For twelve years (1990–2002) the dominant view was that the duty to consult arose quite late, only after the Aboriginal claimants had demonstrated an Aboriginal right. Two decisions from the Ontario Court of Appeal illustrate this point of view. In *Perry*, as we have seen, the court characterized the duty to consult as a shield and not a sword, and held that it could be used to defend against the infringement of an existing Aboriginal right but could not be used to impose prior consultative obligations upon a government. *TransCanada Pipelines v. Beardmore (Township)* is even more explicit about the consequences of the timing question. In this case, plans were introduced to amalgamate several rural municipalities over the objections of two local First Nations bands, which were claiming a violation of section 35 rights to a particular territory. The Ontario Court of Appeal rejected the argument that the Ontario government owed a duty to consult on the basis of the potential claim by the First Nations to Aboriginal rights. In reaching this conclusion, Borins JA drew on the logic of the three-point *Sparrow* test and held that the duty to consult came into being “only after” the First Nations had established (1) the requisite treaty right, and (2) the infringement of such a right. Specifically, Borins JA determined that “what triggers a consideration of the Crown’s duty to consult is a showing by the First Nation of a violation of an existing aboriginal or treaty right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action” (*TransCanada Pipelines* 2002, para. 120). The Ontario Court of Appeal characterized the section 35 claim as “speculative” and therefore insufficient to trigger the duty to consult (*TransCanada Pipelines* 2000, para. 121). The court’s concern was that a requirement of consultation prior to proof of an Aboriginal right would impose too great a burden on government and would encourage frivolous claims.

A similar position was advanced by the government of British Columbia in several recent cases. While the argument has a certain appeal, it has the devastating effect of making it impossible for Aboriginal communities to invoke the duty to consult to prevent an infringement of their rights. In *Cheslatta Carrier Nation v. British Columbia*, the First Nations argued that the Crown’s position was unfair and put them in a catch-22 situation. The Cheslatta Nation’s basic argument was that, given the reluctance of the Crown to recognize Aboriginal rights, the primary way First Nations could advance the claim that the Crown had a duty to consult was by going to court to litigate the existence of such a right. At that point, however, the Crown would frequently claim there was no such Aboriginal right, often on evidentiary grounds; or, if that did not work, the Crown would argue that the right had been extinguished. If

the extinguishment argument did not work, the Crown might then argue that there was a compelling and substantial objective that justified infringement, and only after that was it willing to discuss whether there had been sufficient consultation. In other words, the Crown is likely to take the position that it has no duty to consult until after an expensive and time-consuming process of litigation has successfully demonstrated that there is an existing right. This is problematic, especially when one considers that Aboriginal rights litigation is not usually launched proactively by Aboriginal communities but is generally triggered by state action. Typically, the state will allege that an Aboriginal person has breached some regulation, and the defendant will invoke an Aboriginal right as part of his/her defence. If the duty to consult is triggered only after the right has been proven, it is of minimal value and does little to alter the imbalance of power between the state and Aboriginal peoples, because the latter are placed in the situation of reactive petitioners.

In two recent decisions the British Columbia Court of Appeal has suggested a very different triggering moment for the duty to consult, one that generates a potentially significant realignment of state-Aboriginal relationships. In one of these cases the Taku River Tlingit objected to a government decision to reopen a mine in northern British Columbia. They asserted that the creation of an access road for the mine infringed their rights and would have a negative impact on wildlife habitat and on their culture. They claimed that the government had not adequately consulted them on the issue. On appeal, the provincial Crown, emboldened by the Ontario precedents discussed above, invoked the “only after” argument in the clearest of terms. Drawing on a number of cases, including *R. v. Sparrow*, *R. v. Adams*, *Delgamuukw v. British Columbia*, and *R. v. Marshall*, the Crown argued: “[T]he constitutional or fiduciary obligation to consult with First Nations, as distinct from any administrative law duty of procedural fairness, *only arises after* there has been a determination that the First Nation has existing aboriginal or treaty rights under s. 35 of the Constitution Act, 1982, and that those rights might be infringed by Crown sanctioned activities” (*Taku River* 2002, para. 106: emphasis added).

Rowles JA for the majority, restated the argument as follows: “In essence, the Crown’s position is that before there is any obligation on the part of the Crown to consult with aboriginal peoples concerning an aboriginal right, the aboriginal right must first have been established in court proceedings” (*Taku River* 2002, para. 154). After a fairly lengthy review of the Supreme Court jurisprudence and the passages relied upon by the Crown, Rowles JA rejected the doctrinal foundations of the Crown’s claims as a “misreading of the decisions of the Supreme Court of Canada” (*Taku River* 2002, para. 194). Central to her analysis was a discussion of the shifting burden of proof identified by the Supreme Court of Canada in its Aboriginal rights cases. As noted earlier, the typical Aboriginal rights case involves a regulatory offence. The Crown will bear the burden of proving the offence is committed. The Aboriginal

litigant will assert in his or her defence an Aboriginal right to engage in the specific activity that gave rise to the charge. The defendant in the proceeding will bear the onus of proof of the existence of the right and whether it has been violated by the prosecution of the charge. If successful, and only if successful, the onus then shifts back to the Crown to prove that the infringement was a reasonable limit on the section 35 right being claimed. But Rowles JA pointed out a flaw in the argument. She explained: “While it is so that the onus of proving a *prima facie* infringement of an aboriginal right under s. 35(1) of the *Constitution Act, 1982*, lies on the individual or group challenging legislation or regulations, it does not logically follow that until an aboriginal right has been established in court proceedings, the right does not exist” (*Taku River* 2002, para. 183). On the contrary, Rowles JA emphasized the importance of considering the original rationale for section 35:

To accept the Crown’s proposition that the obligation to consult is only triggered when an aboriginal right has been established in court proceedings would ignore the substance of what the Supreme Court has said, not only in *Sparrow* but in earlier decisions which have emphasized the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation ... Indeed, if the Crown’s proposition were accepted, it would have the effect of robbing s. 35(1) of much of its constitutional significance.

Moreover, decisions of the Supreme Court of Canada have referred to the importance of s. 35(1) of the *Constitution Act, 1982*, in providing a foundation for the negotiation and settlement of aboriginal land claims. To say, as the Crown does here, that establishment of the aboriginal rights or title in court proceedings is required before consultation is required, would effectively end any prospect of meaningful negotiation or settlement of aboriginal land claims. (*Taku River* 2002, paras. 173–4)

Consequently, she claimed that “the jurisprudence supports the view that, prior to the issuance of the Project Approval Certificate, the Ministers of the Crown had to be ‘mindful of the possibility that their decision might infringe aboriginal rights’ and, accordingly, to be careful to ensure that the substance of the Tlingits’ concerns had been addressed” (*Taku River* 2002, para. 193). In short, for Rowles JA, the duty to consult is an antecedent obligation, one that is triggered by the very nature of the Crown’s trustlike relationship with Aboriginal people. On the facts, Rowles JA concluded that because of the ministers’ “abrupt truncation” of the consultation process, the Crown had failed to meet the standard, and she directed the ministers to revisit the decision to issue the certificate (*Taku River* 2002, para. 117).

A few weeks later, bloodied but unbowed, the Government of British Columbia reiterated the “only after” argument in *Haida Nation no. 1*. Once again

the facts were straightforward and the issues clear. The Haida Nation applied for a declaration that the minister of forests had breached his fiduciary duty when he renewed Tree Farm Licence 39 (TFL 39) for Weyerhaeuser Company Ltd. on the Queen Charlotte Islands/Haida Gwaii, pursuant to section 29 (now s. 36) of the *Forest Act*, without adequately consulting the Haida people who claimed to hold Aboriginal title to the islands. In response, both the Crown and Weyerhaeuser advanced the same argument as the Crown had advanced in *Taku River* – that there was no obligation to consult the Haida people about logging until the Haida had established Aboriginal title and rights, and had also demonstrated a prima facie infringement of such rights (*Haida Nation no.1* 2002, para. 9).

In *Haida Nation no.1*, Lambert JA followed the decision of Rowles JA in *Taku River* in highlighting the significance of determining the time at which the duty to consult might be triggered: “If the Crown can ignore or override aboriginal title or aboriginal rights until such time as the title or rights are confirmed by treaty or by judgment of a competent court, then by placing impediments on the treaty process the Crown can force every claimant of aboriginal title or rights into court and on to judgment before conceding that any effective recognition should be given to the claimed aboriginal title or rights, even on an interim basis” (*Haida Nation no.1* 2002, para. 10). In Lambert JA’s mind, such stonewalling tactics are inconsistent with the fiduciary relationship owed by the Crown to Aboriginal peoples. He therefore rejected what he called the “timing fallacy,” the idea that there can be no duty to consult “until after” Aboriginal rights have been determined (*Haida Nation no.1* 2002, paras. 41–7). To make this point, Lambert JA asked, and answered, a rhetorical question designed to demonstrate the flawed logic of the Crown’s position: “How could the consultation aspect of the justification test with respect to a prima facie infringement be met if the consultation did not take place until after the infringement? By then it is too late for consultation about that particular infringement. By then, perhaps, the test for justification can no longer be met and the only remedies may be a permanent injunction and compensatory damages” (*Haida Nation no.1* 2002, para. 42).

In support of this argument, Lambert JA invoked *Sparrow*, *Gladstone*, and *Delgamuukw* to suggest that “the major aspects of justification, including consultation, must be in place before the infringement occurs and, normally, before the aboriginal right is proven in court” (*Haida Nation no.1* 2002, paras. 43–4). Elsewhere in his decision he suggested, perhaps a little awkwardly, that the duty to consult is triggered “after title is asserted and before it is proven to exist, if, were title to be proved, there would be an infringement” (*Haida Nation no.1* 2002, para. 41).

Lambert JA’s comments, like those of Rowles JA, move the government’s duty to consult to an earlier time. They explicitly raise the question, however, of whether the mere assertion of an Aboriginal right generates a duty to consult.

On the facts of *Haida Nation no.1*, this question did not have to be addressed specifically by the Court of Appeal, because the trial judge found that the Haida Nation had a good prima facie claim for Aboriginal title and Aboriginal rights (*Haida Nation no.1* 2002, para 51). In other words, this was a strong case that did not trigger concerns over burdens being improperly imposed on the state and the judiciary. Nevertheless, the question of burdens is relevant when it comes to weak cases. Both the state and the courts require a mechanism for screening out frivolous claims, and indeed it was argued by governments that the likelihood of such claims should dictate an approach that required a claim to be proven, rather than merely asserted. Lambert JA responded to this by articulating a proportionality principle: "I am not saying that if there is something less than a good prima facie case then there is no obligation to consult. I do not have to deal with such a case on this appeal. But certainly the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim" (*Haida Nation no.1* 2002, para. 51).

This comment suggests that the Crown has an obligation to engage in some degree of consultation upon the assertion of an Aboriginal right, but the greater the potential soundness of the right, the higher should be the standard of consultation.⁵ The Court rejects managerialism as a valid basis for the state's policy on the duty to consult and instead adopts a functionalist interpretation: good faith requires engagement, not denial or deference. If this is right, then it presents a significant opportunity for reconstructing the relationship between Aboriginal peoples and the Government of Canada, because it undercuts the Crown's traditional strategy of hardball legalism. This is reinforced by our discussion in the next section, which addresses the issue of the intensity of the obligation to consult.

THE NATURE AND INTENSITY OF THE DUTY TO CONSULT: A SOLIDARITY RIGHT?

What is the intensity of the duty to consult? In other words, what must a government do to fulfill the standard of legally sufficient consultation? The short answer is that "it depends." Conventionally, legal rights have been understood as either procedural or substantive, the right to a fair trial being an example of the former, freedom of expression being an example of the latter. At first blush, it is tempting to understand the duty to consult as quintessentially procedural, as part of the process that a government must adopt to justify its infringement of Aboriginal rights. Viewed in this light, it is a cognate of the rules of natural justice: aggrieved parties have a right to be informed, meet with decisionmakers, and be heard, but they have no right to a particular outcome. The courts have resisted such an emaciated conception of consultation in favour

of what we will characterize as a solidarity right. A solidarity right is hybrid in the sense that it offers more than just procedure but, in most cases, less than a veto.

Before we define solidarity rights, we must first revisit the context-sensitive proportionality test described by Lamer CJ in *Delgamuukw*.⁶ The British Columbia Court of Appeal developed Lamer's analysis further to suggest a twofold "adequate and meaningful" standard of consultation that includes: (1) "a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns"; and (2) an obligation "to ensure that their representations are seriously considered and, whenever possible, demonstrably integrated into the proposed plan of action" (*Halfway River* 1999, paras. 160, 191). More recently still, the same court has invoked a number of other descriptors that appear to intensify the obligations of governments even further. For example, governments are charged with "ensur[ing] the substance of the concerns are addressed" (*Taku River* 2002, para. 193); determining whether the "needs" and "concerns have been met or accommodated" (*Taku River* 2002, para. 202); and seeking a "workable accommodation" (*Haida Nation no. 1* 2002, paras. 51, 52, 60). Other cases have suggested that Aboriginal concerns should be "demonstrably integrated into the [government's] proposed plan of action" (*Mikisew* 2002, para. 131).

Such dicta indicate a relatively full-bodied conception of consultation, but a critical question remains unanswered, namely what is the difference between a duty to consult and a substantive right to a particular outcome (in effect, a right to veto the state action at issue)? Several courts have held that the duty to consult does not give a veto right to Aboriginal claimants (*R. v. Jack* 1995, 223; *R. v. Ned* 1997, 268), and this is surely correct, since otherwise there is little point in characterizing something as consultation and little incentive for the state to engage in any process at all. Equally, however, a duty to consult cannot mean that no weight is given to the fact that the claims being made are not merely "interests" but are actual constitutional "rights" that exist independently of any specific consultative process. Thus, the confusion centres around the question of whether the duty to consult is procedural only or whether it is also substantive. If it is only procedural, it is not sensitive to the fact that there are rights being claimed. If it is fully substantive – and as such requires recognition of the rights claims themselves – it is difficult to see what there is to "consult" about.

It is our suggestion that this newly emerging right of consultation is a hybrid right, a manifestation of what Roberto Unger has characterized as a "solidarity right." Solidarity rights recognize our vulnerability as social beings and attempt to "give legal form to social relations of reliance and trust" by imposing an obligation on those who are in a position of power to "take other people's situations and expectations into account." Unger elaborates:

The domain of solidarity rights is the field of the half-articulate relations of trusting interdependence that absorb so much of ordinary social life ... The situations calling for the exercise of such entitlements include family life, continuing business relationships (as distinguished from one-shot transactions), and the varied range of circumstances falling under fiduciary principles in contemporary law. The trust such relations require may be voluntary and reciprocal or half-deliberate and unequal, usually in the setting of disparities of power or advantage ... People bound by solidarity rights are prevented from taking refuge in an area of absolute discretion within which they can remain deaf to the claims others make upon them. (Unger 1987, 536–7)

Evidence of this solidaristic interpretation of consultation can be found in both *Taku River* and *Haida Nation no. 1*. In *Taku River*, the Court of Appeal suggested that if the government had taken steps to accommodate the concerns of the Tlingit (for example, by simply changing the location of the road from the mine) the court might have found in favour of the government (*Taku River* 2002, para.199). The implication here is that the focus of the court is on the relationship and not merely the process or the outcome. A process-based approach would be insensitive to the content of the Tlingit demand and insist only on the Tlingit being informed of, and having opportunity to affect, the decision-making process. By contrast, an outcome-based approach would mean that the Tlingit had a right to a specific road location and a veto over any other decision by the state. The court adopted, instead, a view that reflects a concern with both substance and procedure.

The reasoning of Lambert JA in *Haida Nation no. 2* is similar. Here the court held that the duty to consult had not been met by either the provincial Crown or the logging company with respect to claims by the Haida that their section 35 rights had been violated, and in doing so it articulated a conception of the duty to consult that insists on the centrality of the relationship between the Aboriginal peoples and the relevant decision makers in the community. Lambert JA reached two important pragmatic conclusions that demonstrate our point. First, as we will discuss in the sixth section, the reason why the logging company, Weyerhaeuser, also owed a duty to consult was that it was the key actor at the level of the day-to-day operations of the tree farm licences, and Lambert JA indicated that if Weyerhaeuser had been able to engage in “the sharing of economic opportunities,” for example, by “employing Haida people in its operations,” perhaps that would have been sufficient fulfilment of that duty (*Haida Nation no. 2* 2002, paras. 88, 101, 119). Secondly, Lambert JA was at pains to point out that “aboriginal interests” were not the only interests at stake in the case; there was also the “overall public interest of the people of British Columbia in the Queen Charlotte Islands, or Haida Gwaii,” which included Weyerhaeuser as a significant employer (*Haida Nation no. 1* 2002, paras. 26, 60; *Haida Nation no. 2* 2002, para. 97).⁷ Consultation as a manifestation of

solidarity does not mean that an Aboriginal right trumps all other interests; rather, it rejects managerialism in favour of the politics of inclusion.⁸ These points are confirmed in the next two sections, which address the question of a reciprocal Aboriginal obligation and the scope of the duty to consult.

RECIPROCAL ABORIGINAL OBLIGATION

The idea that the duty to consult is a hybrid, solidarity-type right, which is more than procedural but less than fully substantive, is reinforced by judicial dicta that impose reciprocal Aboriginal obligations. Several courts have made it clear that the duty to consult is a two-way street – for example, in the case of *Cheslatta Carrier Nation v. British Columbia* (*Cheslatta* 1998). While the primary obligation is on the Crown to consult, there is a reciprocal obligation on Aboriginal peoples to participate fully and in good faith in the consultation process.⁹ As we have noted, courts have held that the duty to consult cannot be used to give Aboriginal people a veto power,¹⁰ nor does it necessarily require the “agreement,” “consensus,” or “informed consent” of Aboriginal peoples.¹¹ Aboriginal peoples “cannot frustrate the consultation process by refusing to meet or participate, ... by imposing unreasonable conditions” (*Halfway River* 1999, paras. 161, 182; *R. v. Aleck* 2000, para. 71) or by making unreasonable demands for further information (*Cheslatta* 1998, para. 23). Nor can they, “in good faith, refuse to actively participate in the consultation process and then complain that [they have] not been consulted” (*Vuntut Gwitchin* 1997, para. 23; *Cheslatta* 1998, para. 23; *Kelly Lake* 1998, para. 159). If they initially participate in a process, they cannot abandon it and then complain of lack of consultation (*Cheslatta* 1998, para. 73; *Kelly Lake* 1998, para. 164; *R. v. Aleck* 2000, para. 71). Indeed, there are even dicta to indicate that Aboriginal peoples cannot even require that the consultations take place “on their own terms” (*Cheslatta* 1998, para. 13).

It is clear that the doctrine of reciprocal obligations imposes a responsibility on Aboriginal peoples for the “formation and implementation” of governmental policies which they allege will affect them specifically (*R. v. McIntyre* 1991, 569). To the extent that this recognizes that the duty to consult is a “democratic right,” this is clearly a welcome development (*ibid*). Democratic engagement, however, is not cost-free. Because the duty to consult generates obligations on First Nations to participate, two obvious questions are: (1) Do Aboriginal communities have the resources to participate? and (2) Who pays? (*Kelly Lake* 1998, para. 90). Aboriginal communities are often extremely poor, with few surplus resources. The issues at stake are frequently complex, and effective participation is contingent on specialized knowledge. In *Kelly Lake Cree Nation v. British Columbia (Minister of Energy and Mines)*, the Ministry of Energy and Mines refused to fund a specialist to advise a First

Nation on the consultation process; instead, it offered to make available a member of the ministry to advise on the technical aspects of the project (*Kelly Lake* 1998, para. 90).¹² The judge seemed to think that this was unproblematic, but the First Nation could hardly be faulted for doubting that its interests would be adequately accounted for by a member of a bureaucracy whose very purpose is to promote development of resources.¹³ Such cases strain the legitimacy of the consultation process to the breaking point.

The reciprocal nature of the duty to consult may cause concern for First Nations for other reasons as well. As Lilles CJ of the Territorial Court has noted, “[n]ative people are afraid that any information provided could be used against them in the future” (*R. v. Joseph* 1991, 272). Lilles CJ does not elaborate on this point. However, we suggest that the concern is valid. The duty to consult does not attract legal privilege, and thus the information passed between parties would be admissible in court. There is widespread concern within Aboriginal communities that any communications will be interpreted by a court as “consultation” and then used by governments to try to justify infringements. The fear itself undermines the possibility of authentic engagement by the parties to the dispute.

Whether or not it makes sense to equate the position of the state and Aboriginal communities by imposing a reciprocal requirement to participate, it is crucial that the specificity of the relationship remain central to the elaboration of consultative duties. A clear and, we believe, appropriate recognition of this fact can be observed in the *Mikisew* case. There, the Crown argued that because it had provided opportunities for public consultations that were open to all stakeholders, the First Nations had a duty to participate in these fora and not frustrate the consultative process. In *Mikisew*, however, this argument was rejected, and the judge went so far as to argue that “[a]t the very least, [the First Nation] is entitled to a distinct process if not a more extensive one” (*Mikisew* 2002, para. 153). Consultation, in other words, gives legal and political form to the idea that Aboriginal peoples are “citizens plus,”¹⁴ and this is important because it emphasizes the uniqueness of Aboriginal rights in Canadian legal and political discourse.

SCOPE OF THE DUTY

The advantage of a solidaristic conception of consultation is best appreciated by considering the issue of the scope of the duty to consult. There are two questions to be addressed in this regard: (1) Who must initiate the consultations? and (2) Who must be consulted? While these questions may seem to generate technical points only, we suggest that they are indicative of how the duty to consult highlights the importance of developing relationships of integrity and equality that are, in one sense, even more important than the

outcomes in particular cases. For this to be meaningful, however, it is essential that the participants included be those who are in fact in a position to affect the relationship. The recent case law, we argue, successfully achieves this goal, even if it is not always articulated clearly in the reasons for judgment.

WHO?

The onus of proof is on the Crown to demonstrate that it provided for meaningful consultations with Aboriginal peoples. In contrast, Aboriginal peoples do not have to prove that the government did not adequately consult them (*Mikisew* 2002, para. 157). Once again, the judicial articulation of this onus undercuts the temptation on the part of government to refuse outright to engage in consultation or to do so in a meaningless way.

The duty to consult applies to the Crown, that is, both the federal and provincial governments (*Haida Nation no. 2* 2002, para. 61). In particular it applies to civil servants who, as agents of the Crown, are exercising governmental authority that infringes Aboriginal rights.¹⁵ In cases where there is more than one ministry or government department involved, the obligation will fall on the “responsible authority” (*Union of Nova Scotia Indians* 1997, 328). In *Makivik Corp. v. Canada (Minister of Canadian Heritage)*, for example, it was held that the federal government was obliged to consult with a First Nation with which it had entered into treaty negotiations with regard to matters within the sphere of federal jurisdiction, even if a provincial government refused to recognize the existence of such a First Nation.

Nevertheless, there may be some important limitations to this principle. First, not every relationship between the Crown and Aboriginal peoples generates an automatic fiduciary duty. Fiduciary duties only apply where there is a cognizable Aboriginal interest, for example, an interest arising directly from the surrender of land or the infringement of an Aboriginal right recognized by section 35 of the *Constitution Act, 1982* (*Wewaykum* 2002, para. 85; *Tsartlip* 2000, para. 35). Second, in discussing the fiduciary relationship more generally (without addressing the particular issue of the duty to consult) the Supreme Court of Canada has held that “not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation” (*Quebec* 1994, 183; *Wewaykum* 2002, paras. 81, 86). Courts are not subject to such a duty (*Quebec* 1994, 183–4). Nor are all creatures of the executive branch of government. For example, quasi-judicial tribunals (such as the National Energy Board) are independent from the state and litigants, and thus the duty does not apply to them.¹⁶ Finally, as noted earlier, the duty does not mean that the government is obliged to address only Aboriginal interests in making decisions (*Wewaykum* 2002, para. 96); other interests and rights, such as those held by non-Aboriginal Canadians, also are entitled to consideration.

WHAT ABOUT THIRD PARTIES?

The Crown cannot delegate, devolve, or divest its duty to consult onto interested private parties (*Treaty 8 Tribal Association* 1998, paras. 9, 21). Consulting by such third parties does not relieve the Crown of its duty under section 35(1) (*Mikisew* 2002, para. 156). Governments can, however, require private developers whose projects may have an impact on Aboriginal rights to conduct direct consultations with affected First Nations, based apparently on the theory that this is an efficient, though not necessarily adequate, way of providing information to, and receiving feedback from, the affected communities (*Kelly Lake* 1998, para. 164).

In 2002 the British Columbia Court of Appeal radically expanded the potential scope of the duty to consult to private corporations, a move that may suggest a monumental reconfiguration of Aboriginal-state relations. What historically has been seen as a triangular relationship (between the federal government, provincial/territorial governments, and Aboriginal peoples) may now be converted to a quadrangular relationship that includes the private sector. In *Haida Nation no. 1*, Lambert JA speaking for a unanimous court, declared that both the provincial Crown and the logging company, Weyerhaeuser (as well as MacMillan Bloedel, Weyerhaeuser's predecessor), were subject to an enforceable legal and equitable duty to consult with and accommodate the Haida with regard to their economic and cultural claims (*Haida Nation no. 1* 2002, paras. 48, 52, 58, 60, 61, 62). He did not expressly address the reasons for this apparent expansion, except to note in passing that "Weyerhaeuser [was] aware of the Haida claims to aboriginal title and aboriginal rights ... through evidence supplied to them by the Haida people and through further evidence available to them on reasonable inquiry, an inquiry which they were obliged to make" (*Haida Nation no. 1* 2002, para. 49). But Lambert JA never explicitly explained the source of such an obligation. Thus, it was unsurprising that Weyerhaeuser and several intervenors¹⁷ petitioned the court to reconsider its position. To their undoubted dismay, the British Columbia Court of Appeal – though this time only by a 2:1 majority – reaffirmed that third parties might owe a duty to consult in good faith and endeavour to seek a workable accommodation, and that this is a duty separate from that owed by the Crown (*Haida Nation no. 2* 2002, para. 103).

Weyerhaeuser's principal, and principled, argument was simple: since the foundation of the duty to consult is the fiduciary duty owed by the Crown to Aboriginal people then Weyerhaeuser, as a private corporation rather than a state actor, cannot be subject to its terms. Lambert JA rejected this argument on three distinct but connected grounds. First, while Weyerhaeuser's argument sounds logical in the abstract, it does not fit with the statutory, administrative, and factual context of the case. Second, the conventional law

of fiduciary relations recognizes certain situations in which a third party may be burdened with fiduciary obligations. Third, a pragmatic and contextual understanding of the duty to consult, and its role in the justification test, necessarily entails the possibility that third parties might also bear fiduciary obligations to consult and seek accommodation.

On the first point, Lambert JA was able to identify explicit provisions in the *Forest Act* that mandate licensees in their management plan to identify and consult with other “persons” who might be potentially affected by the licensee’s operations. Clearly, the Haida people qualify as such “persons” (*Haida Nation no. 2* 2002, paras. 48–52), given the “social history and background of the Queen Charlotte Islands (Haida Gwaii)” (para. 99). Moreover, TFL 39 itself expressly mandated consultation with Aboriginal people “claiming an aboriginal interest in or to the area” (paras. 53, 54). On the basis of this statutory, administrative, and factual context, Lambert JA easily concluded that not only did Weyerhaeuser have a duty to consult, but it also had an obligation to “seek accommodation” with the Haida people (para. 60).

On the second point, Lambert JA located the case in the larger context of conventional fiduciary legal principles. He began his analysis by reconfirming the reasoning of *Haida Nation no. 1*, that the provincial Crown was in manifest breach of its fiduciary duty of utmost good faith to Aboriginal people when it issued and renewed TFL 39. Lambert JA held that the equitable doctrines of “constructive trust” and “knowing receipt” can extend obligations to strangers to a trust if they “actually know or ought as an honest reasonable man to have known” of the trust relationship (*Haida Nation no. 2* 2002, paras. 65, 68). Consequently, Lambert JA held that Weyerhaeuser, as a constructive trustee in knowing receipt, owed obligations of consultation and accommodation closely corresponding to, but not necessarily coextensive with, those of the breaching trustee, the provincial Crown.

The third argument assessed Weyerhaeuser’s obligations from a different direction, one that is again decidedly pragmatic, contextual, and functionalist. Essentially, it is a “benefits matching the burdens” (eating the cake and having it) type of argument. Lambert JA explained that Aboriginal rights have been guaranteed under section 35 of the *Constitution Act, 1982*. Following *Delgamuukw*, he pointed out that such rights provide Aboriginal people with an entitlement to exclude all others, both state and non-state actors, and to hold such others liable for compensatory, and possibly aggravated/punitive, damages for any such breach (*Haida Nation no. 2* 2002, para. 75). Such rights, however, are not absolute. They can be infringed, but there is a constitutional obligation on any party who infringes such rights to justify that infringement (para. 77). Drawing on a point that he had made in passing earlier in the decision – that “privatization” has eroded “the interface between government functions and private functions” (para. 35) – Lambert JA adopted a functionalist analysis to determine that

[Weyerhaeuser] is unquestionably a party to every one of the Crown's infringements except the passing of the Forest Act. It accepted the Tree Farm Licence, put forward the Management Plans, and applied for the cutting permits. In relation to those infringements, Weyerhaeuser must surely have had to satisfy itself by reasonable inquiry that the infringements in which it was participating with the Crown, were justified. If justification requires consultation or the payment of compensation, then Weyerhaeuser would have been obliged to ensure that consultation took place and that compensation would be a binding commitment. (*Haida Nation no. 2* 2002, para. 87)

Lambert JA's functionalist analysis was carefully attuned to the factual reality of the natural resource industry. The opinion addressed the "level of activities and operations" and the "day to day control of activities which may ... increase or ... lessen the impacts of infringement" (*Haida Nation no. 2* 2002, paras. 88, 93), and it explained how this drove the conclusion that the duty must extend to the corporation:

[I]n my opinion, there was an additional level to any claim by Weyerhaeuser that there was justification for its infringement. When Weyerhaeuser took the initiative in relation to its harvesting functions and engaged in an activity or operation that was within its management discretion, Weyerhaeuser itself must surely have to have met the justification tests, particularly the tests of necessity, minimal impairment, and consultation. At that level, that is, the level of activities and operations, the justification action must fall on Weyerhaeuser alone and cannot be expected to be shared by the Crown. (*Haida Nation no. 2* 2002, para. 87)

As evidence of this sense of shared but discrete obligations, Lambert JA suggested that "there are some areas, such as employing Haida people in its operations, or the sharing of economic opportunities, where no consultation with Haida people could be effective without the participation of Weyerhaeuser" (*Haida Nation no. 2* 2002, para. 101). In other words, because Weyerhaeuser is an effective agent with significant discretion and control over the day-to-day management of the resource and because it is a beneficiary of the infringement of Aboriginal rights in partnership with the Crown, "each [would] have to meet the justification standards appropriate to their share of the activity" (paras. 89, 92).

Chief Justice Finch concurred with Lambert JA that Weyerhaeuser's duty to consult with the Haida Nation was a "lawful, necessary and appropriate part of the remedy in this case" (para.108). Indeed, in certain respects, Finch CJ's decision is even more explicitly functionalist and context-sensitive than that of Lambert JA for Finch CJ was blunt in acknowledging that if he were to accept Weyerhaeuser's claim that it had no duty to consult, the remedy to the

Haida Nation would be “completely hollow or illusory” (para. 118) because “the Crown would lack effective power to address many of the Haida’s concerns, or to accommodate their legitimate economic objectives” (para. 120). He opined:

There is a broad range of issues on which the Haida might reasonably seek consultation and accommodation. TFL 39 fully allocates all timber exclusively to Weyerhaeuser. The Crown has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser’s consent or co-operation. Within the tree farm licence, the AAC [annual allowable cut] is dependant upon the management plan prepared by the licensee. The Crown’s ability to reduce unilaterally the AAC is limited by statute, and the licensee has no power to do so without the Crown’s consent. The ability to vary the AAC is therefore a power shared by the Crown and Weyerhaeuser. Other issues of concern to the Haida would include employment opportunities for their people, as well as opportunities for sub-contracting. (*Haida Nation no. 2* 2002 para. 119)

In light of these statutory and economic realities, Finch, CJ concluded that “a declaration against the Crown alone is no remedy at all. Justice cannot be done in these proceedings without a declaration against Weyerhaeuser as well” (*Haida Nation no. 2* 2002, para. 128). Such claims undoubtedly reconfigure and complicate the matrix of relationships involving Aboriginal peoples, and it is not surprising that the Supreme Court of Canada has decided to involve itself in the issue by granting leave to appeal.¹⁸

WITH WHOM?

Just as important as the question of who has the duty to consult is the question, “With whom must the Crown consult?” Aboriginal communities can be complex political units with difficult issues of representative legitimacy (*R. v. Ned* 1997, 268).¹⁹ There can be personal and political differences within a band, between band members and non-band members, between bands, between First Nations, between local bands and regional organizations, and so on. To date, the courts have had little to say on this important issue, but what they have said reflects the broader proposition that the components of the duty to consult are highly fact-dependent. In other words, the answer to the “with whom” question is, once again, “it depends.” For example, in *R. v. Jack*, while the Court of Appeal of British Columbia indicated that it is not necessary that there be a vote by the band council or that there be unanimous consent by a band to a particular governmental policy, it also indicated that there may be situations where a vote will be essential (*R. v. Jack* 1995, para. 81). In *R. v. Sampson*, the same court seemed to suggest that conversations with a band manager might be inadequate consultation. Lambert JA, in his dissenting

opinion in *R. v. Gladstone*, stated that consultations with the Native Indian Brotherhood rather than the Heiltsuk band itself were not sufficient (*R. v. Gladstone* 1996, para. 97).

In another case, *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)*, a regional umbrella organization representing various First Nations was held to be entitled to consultation. Again, the complexity is increased, but the larger point remains: Aboriginal peoples are communities that have a special relationship with the state. This relationship is as important as any particular decision that may or may not violate section 35 rights. As a result, courts have required the state to develop concrete processes that respond to, incorporate, and accommodate the social, political, and economic needs and rights of Aboriginal peoples. In doing so, the courts have improved the actual relationship between the state and Aboriginal peoples in Canada.

CONCLUSION

This essay documents the emergence of the duty to consult in the case law to date. The Supreme Court of Canada has yet to rule on several developments that we identify as prominent and legally significant. As a result, there is a great deal of uncertainty and speculation regarding the precise impact of these developments, especially in the resource sector. Aboriginal peoples appear to be both cautious and hopeful with respect to these decisions.²⁰ Governments are beginning to take seriously the Supreme Court of Canada's injunction to negotiate Aboriginal claims and, as far as is consistent with justice, to avoid recourse to the judicial branch as the arbiter of particular disputes.²¹ The problem is not merely the enormous financial cost associated with complex Aboriginal litigation; there is also the damage to the parties' ability to develop sustainable visions for the future. The business community – which generally abhors unpredictability – needs to incorporate the changing law into its project plans and develop respectful relationships with Aboriginal communities. Everyone awaits the outcome of several appeals before the Supreme Court of Canada. In the interim, it remains useful to identify, at a conceptual level, the role of legal developments in creating the conditions for changing relationships in society.

Our ambition in this essay has been quite modest. Our claim is that the judicially invented doctrine of a duty to consult creates a moment of opportunity. By focusing on the fiduciary nature of the relationship between the state and Aboriginal peoples, it forces governments to abandon their managerialist construction of the "Aboriginal problem." By giving consultation a solidaristic spin, it goes beyond the recognition of abstract, disembodied, and formalistic rights to the enforcement of pragmatic rights with the potential to respond to pressing social and economic needs, even to the extent of imposing obligations

of interdependence upon the private sector. At the same time, it also places participatory obligations on Aboriginal peoples. However, these are just opportunities: judicial dicta do not necessarily engender political, social, and economic change. Law is only a part of the larger constellation of relationships between the state and Aboriginal peoples. But the discourse of consultation provides us with a new “landscape” (Henderson 1995, 205) by which to conceive of ongoing relations and, as Wittgenstein noted, “to imagine a language means to imagine a form of life” (Wittgenstein 1963, 8).

POSTSCRIPT – 15 DECEMBER 2004

A few days prior to the scheduled date for this book going to print, the SCC came down with its decisions in *Haida Nation* [2004] SCC No. 73 and *Taku River* [2004] SCC No. 74. The Court unanimously upheld the lower court’s decision with respect to the Crown but not the developers in *Haida Nation*, and it allowed the appeal in *Taku River*. The Court’s articulation of the parameters of the duty to consult occurs in *Haida*. The judgment is consistent with many of the points we have made in this essay, while it simultaneously expands and contracts on other key concepts. A detailed analysis is beyond the scope of this postscript, but it is important to emphasize a few significant aspects of the decision.

We continue to assert that the duty to consult is potentially one of the more hopeful developments in the field of Aboriginal-state relations. The Court clearly rejects the government’s arguments that the duty to consult is simply an element of the *Sparrow* justification test. Rather, it locates the duty in the “core precept” of the “honour of the Crown” (at para. 16). However, it did not go so far as to say it is part of the fiduciary duty owed by the Crown to Aboriginal peoples, reaffirming the statements quoted earlier in this essay to the effect that the fiduciary duty is not a generalized source of legal responsibility owed by the Crown. In a case where Aboriginal rights are asserted rather than proven, the fiduciary duty is not triggered, and therefore the Crown is not required to act in the best interests of the Aboriginal community when exercising its discretionary control over the subject or the right claimed (at para. 18). The notion of “honour” nonetheless dictates that even potential rights must be “determined, recognized and respected” through a process of consultation and, depending on the circumstances, reasonable accommodation (at para. 25). The Court thus agrees that the duty to consult can be triggered prior to proof of an Aboriginal right and, indeed, took umbrage at the opposite line of reasoning (at para. 27): “To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to the resource, may be to deprive Aboriginal claimants of some or all of the benefit of the resource. *That is not honourable*” (emphasis added). The duty is triggered as

soon as the Crown knows, or ought to know, of the potential existence of an Aboriginal claim and contemplates conduct that might adversely affect those rights or title claim (at para. 35).

The Court emphasizes, as we did, that the intensity of the obligation to consult and accommodate will depend upon the factual matrix of each case. As we noted in this essay, however, good faith requires engagement, not denial or deference, and this is exactly what the Supreme Court of Canada concluded. There is no veto (at para. 48), but in situations where there is a strong case that a significant right may be infringed, and the risk of non-compensable damage is high, “deep consultation, aimed at finding a satisfactory interim solution, may be required” (at para. 44).

The holding in *Haida* implicitly acknowledges the hybrid nature of the rights of consultation and accommodation, noting specifically that while reconciliation is the purpose of s.35, “[r]econciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from the rights guaranteed by s.35(1)...” (at para. 32) and thus the duty is intended to require each party to make a good faith effort to understand and address the concerns of the other (at para. 50). The Court thus confirms the lower court holding that the duty is reciprocal (at para. 42).

There are two aspects of the case that are somewhat negative with respect to Aboriginal interests, though perhaps not surprisingly so. First, the Court may be in danger of retreating to a proceduralist approach in that it explicitly endorses the creation in the future of an administrative regime for the speedy and fair resolution of complex disputes between the state and Aboriginal peoples, including claims to consultation (paras. 44, 51). For example, it found that in *Taku River* the Crown had proven that it had done enough to accommodate Aboriginal claimants by engaging in a detailed process of negotiation that nonetheless failed to achieve the result Aboriginal litigants requested (the relocation of a road leading to a mine development). Most disappointing is that rather than following the pragmatic and grounded analyses of the British Columbia Court of Appeal in *Haida*, the Supreme Court of Canada retreated to a formalistic public/private dichotomy in reaching the conclusion that the duty to consult does not attach to third parties at all. This conclusion flows from the Court’s view that the Crown alone is responsible for third party conduct that affects Aboriginal peoples and the Crown’s honour cannot be delegated (though procedural aspects of the consultation itself may be delegated, and often are, to the industry developers) (at para. 53). The Court was crystal clear on this point: “The remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result” (at para. 55). However, the Court also rejected the assumption that fed the holding on this point in the Court of Appeal, namely that if Weyerhaeuser was not held to the duty there would be no remedy, pointing to recent legislation in British Columbia that claws back 20 percent of all forest licences’ harvesting rights partly to make land available to Aboriginal people.

It is hard to predict the effect of these cases but much seems to turn on the assumption that the state is willing to learn and meet Aboriginal concerns, and not perpetuate the long-established patterns of the past. The Court sounds optimistic. It is too early to tell whether that optimism is well-placed. It requires a new relationship with the state, and a state willing to seriously devote itself to that task.

NOTES

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- 1 For example, whereas Canada was recently ranked third in the United Nations' Human Development Index, when Aboriginal communities in Canada were assessed by the same standard, they ranked sixty-third (ARC 2001).
- 2 In cases involving Aboriginal title, the full consent of title holders may be required, and this, in effect, would function as a veto of the proposed state action. See *Delgamuukw* 1997.
- 3 We offer a more detailed analysis of the recent cases in Devlin and Murphy 2003, 167.
- 4 The other two mechanisms were to demonstrate a minimal impairment of Aboriginal rights and a willingness to pay fair compensation.
- 5 The Supreme Court of Canada in *Wewaykum* has held that the fiduciary duty imposed on the Crown does not exist at large but only in relation to specific Indian interests. The particular content of the duty and extent of any attendant fiduciary obligations will vary with the nature and importance of the right claimed by Aboriginal people. It is not a general indemnity. See *Wewaykum* 2002, at paras. 81, 86.
- 6 This test is described above at page 271.
- 7 This point was emphasized by the Supreme Court of Canada when it held that "[w]hen exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interests of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting" (*Wewaykum* 2002, para. 96).
- 8 By the politics of inclusion, we mean a form of participatory democracy that acknowledges the inequalities engendered by deeply entrenched structural differences and seeks to give institutional effect to projects designed to address real inequalities. See, more generally, Young 1990, 2000.
- 9 Ryan 1994, para. 6; *Halfway River* 1999, para. 161; and *TransCanada Pipelines Ltd* 2000, 455. In *Kitkatla Band* 1998, the court stated: "There is, however, no

- duty on First Nations to consult with the Crown. And there is no correlative right in the Crown to compel consultation” (para. 45).
- 10 *R. v. Jack* 1995, 223; *R. v. Ned* 1997 268. In *Haida Nation* 2002, para. 26, Lambert JA pointed out that governments have a responsibility to bear in mind not just the claims of First Nations but also industries’ interests when considering the overall public interest, including industrial development.
 - 11 *R. v. Sampson* 1995, 251, 252; *R. v. Ned* 1997, 268; *R. v. Aleck* 2000, B.C.J. No. 2581 (B.C. Prov. Ct.), paras. 54–57. Note that where title is involved, consent will be required for surrender (see *Delgamuukw* 1997).
 - 12 In another case, *R. v. Aleck*, the court held that the bands in question would have to prove that funding for an independent analyst was “necessary,” but this requirement itself may impose a significant, perhaps insurmountable, financial burden on First Nations communities (*R. v. Aleck* 2000, para. 62).
 - 13 In a later case, a different government department did provide funding to hire an independent analyst. See *Kelly Lake* 1998, para. 104.
 - 14 Cairns 2000. The idea of “citizens plus” was first articulated in Hawthorne et al. 1966 and was revived in Cairns 2000. At its core, “citizens plus” suggests that Aboriginal peoples are Canadian citizens who share much in common with all other Canadians but may have some additional entitlements because of their unique position in the Canadian confederation. For an argument that Cairns has not given sufficient substance to the “plus” dimension, see Dobrowolsky and Devlin 2002.
 - 15 *Halfway River* 1999, paras. 55, 86. But see the spirited objection by Southin JA who argues that this imposes too high a burden on government administrators who have no legal knowledge or training (*ibid.*, paras. 227–31).
 - 16 In *Quebec* 1994, 184, it was stated that the National Energy Board’s quasi-judicial nature “is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.”; See also *Treaty 8* 1998.
 - 17 Of the five intervenors, four supported Weyerhaeuser: the Council of Forest Industries, the Business Council of British Columbia, the British Columbia Chamber of Commerce, and the B.C. Cattlemen’s Association. Only one supported the Haida Nation, namely, the Squamish Indian Band.
 - 18 *Haida Nation no. 2* leave to appeal to SCC granted (*Haida Nation no. 1*). There was a dissent in *Haida Nation no. 2*, but it was tied to the procedural history of the case and did not address the substance of the majority’s analysis (see para 131).
 - 19 For illustrative examples of how differing Aboriginal groups and interests can come into play, see *Perry* 1997; *Kelly Lake* 1998; *Cheslatta Carrier Nation* 1998; *Makivik Corp.* 1998; and *R. v. Aleck* 2000.
 - 20 Gilbert Parnell, vice-president of the Council of the Haida Nation, said, “We really grabbed them [Weyerhaeuser] by the ear with that court case [*Haida Nation v. British Columbia (Minister of Forests)*]. They are responding somewhat now ... they are saying, ‘What cedar areas do you want to preserve?’” (as quoted by P. Shukovsky, “B.C. Court Ruling Could Change How Weyerhaeuser Logs,” *Seattle Post-Intelligencer*, 9 May 2002).

21 As Lamer CJ stated in *Delgamuukw* 1997, “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides ... that we will achieve what I stated ... to be a basic purpose of s. 35(1) – ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’ Let us face it, we are all here to stay.” More recently, the court made a similar plea: “As this and other courts have pointed out on many occasions, the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi’kmaq rather than by litigation” (*R. v. Marshall* 1999, para. 550).

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Residual Tensions of Empire: Contemporary Métis Communities and the Canadian Judicial Imagination

Chris Andersen

Ce travail examine les structures judiciaires de l'aboriginalité des métis, plus spécifiquement comment les tribunaux ont associé l'authenticité des métis en tant que peuple autochtone, à leur différence visible par rapport aux Canadiens non autochtones, et démontre aussi comment les tribunaux ont utilisé des structures racistes de la culture qui délimitent l'aboriginalité des métis dans le temps et dans l'espace. Ce travail se penche aussi sur la possibilité d'élaboration de la structure de droits culturels qui émanent de ce processus, et énumère certaines limites qu'engendre l'utilisation de la culture comme étant à la base des droits autochtones. La culture est ensuite juxtaposée à une conception de l'aboriginalité qui se base plutôt sur la socialité et enfin, l'utilisation du concept de socialité est souligné afin de démontrer comment on peut définir les droits autochtones de manière à ne pas exclure ses communautés urbaines contemporaines, auxquelles appartiennent désormais plus de deux tiers des métis au Canada.

The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is *not* that it be *distinct* to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is *distinctive*. A tradition or custom that is *distinct* is one that is unique – “different in kind or quality; unlike” (*Concise Oxford Dictionary, supra*) ... By contrast, a culture that claims that a practice, custom or tradition is *distinctive* – “distinguishing, characteristic” – makes a claim that is not relative; the claim is rather one about the culture’s own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture.

R. v. Van der Peet 1996, para. 71

INTRODUCTION

Can indigenous communities be indigenous without being different? If so, what would this look like in practice? If not, how will these communities sustain themselves in the face of a Canadian nation-state focused on protecting indigenous difference at the cost of their collectivity? The legacy of *R. v. Sparrow* (1990), the first substantive Supreme Court Aboriginal rights case after the *Constitution Act, 1982*, set in motion two possible paths for protecting Aboriginality. The first protected Aboriginal distinctiveness, creating an autonomous space within which Aboriginal collectives could evolve as self-governing entities to meet their needs as contemporary communities and nations.¹ In other words, it protected Aboriginal autonomy. The second protected only those cultural practices that most non-Aboriginals would not themselves engage in (Povinelli 2002). That is to say, it protected Aboriginal difference.

Six years later, through the infamous “distinctive to an integral culture” test penned in *R. v. Van der Peet* (1996), the Supreme Court chose decisively to protect Aboriginal difference. In doing so, it reaffirmed the central place of racial difference – and thus colonialism – in the judicial imagination and in Canadian society. Racial difference constituted a founding modality of order (Foucault 1973) for all colonial nation-states. Canada was no exception. Historically, racial difference served as a lynchpin for categorizing citizenry and for distributing property rights and wealth in post-1870 Canada (Tough 1996). To the extent that racial difference continues to function as a dominant orienting discourse in important contemporary cases such as *Van der Peet*, there is nothing “post” about Canada’s colonialism. These residual tensions of empire continue to mire relations between indigenous communities and the Canadian state. Although *Van der Peet* dealt specifically with First Nations issues, the power of precedent² in judicial decision making is such that it sets the boundaries within which most future Métis rights cases – the topic of this essay – are decided. These issues are explored directly through the various levels of a leading Métis rights court case, *R. v. Powley* (1999, 2000, 2001, 2003).

The argument anchoring this essay is that the danger of emphasizing racial difference rather than distinctiveness – especially in the courts – is that it requires Aboriginal communities to emphasize historical identities that offer only a partial glimpse of who they were. And although all historical accounts may be considered partial, the judicial illumination of indigenous histories involves far more shadow than light. The interpretive boundaries and perceptual circumscriptions encourage distortions, stereotypes, and partial histories which, through judicial pronouncements, are given the status of truth. This forces communities to chase historical shadows that never really existed. Moreover, it limits how contemporary indigenous communities are permitted to be indigenous.

In theoretical terms, this essay is premised on the idea that there is no such thing as a “core” Native identity – or at least, not one that means the same thing to all or even most Native people. Those searching for a stable nucleus subscribe to what is commonly known as an “essentialist” conception of identity. Essentialists believe that we can point to an element or core of elements and say, “There! *That’s* what makes Aboriginal people Aboriginal” (a spiritual connection to “the land” is a usual suspect in these arguments). The problem with essentialist conceptions is that they assume a broad agreement about which elements are the “correct” ones to point to, and they then posit that these elements possess a fairly stable, unchanging character, since a changing character would lead to a whole series of disagreements about what constitutes change or whether sufficient change has actually occurred to warrant discussion, etc.

Here, identity and issues of identification are used in an explicitly anti-essentialist fashion. Anti-essentialist understandings of identity are rooted strongly in the idea that social reality is constructed and thus that identity is not fixed, stable, or unitary but is contingent on and anchored in socially constructed and empirically specifiable material and discursive boundaries. Furthermore, identities are constructed in opposition to other identities, a process that occurs vis-à-vis a group’s position within a hierarchy of social power. In this day and age, “identities are never unified [but are] increasingly fragmented and fractured; never singular but multiply constructed across different, often intersecting and antagonistic, discourses, practices and positions” (Hall 1996, 4). This is partly why protecting autonomy or sociality per se, rather than protecting difference, is so crucial to ensuring the survival of Native communities, especially in light of the radical impact of industrial and consumer capitalism on the day-to-day practices of these communities, because it leaves open the possibility of “intersecting and antagonistic discourses, practices and positions” (ibid.).

This essay is divided into four substantive sections and a conclusion. The first section positions the courts as a racialized field, one instance of a broader interlocking web of social fields (Bourdieu 1997, 1992; Bourdieu and Wacquant 1992). It emphasizes that the constitution of judicial decisions results from both internal judicial practices and larger “whitestream”³ understandings of Aboriginality. The second examines judicial constructions of Aboriginality, emphasizing how Aboriginal authenticity is conceptualized as difference, and thereby channelled through imperial/racist constructions of culture that attempt to fix and preserve Aboriginality “in ancient form” (see Magnet 2003). This section focuses on the contrast between distinctiveness and difference through a juxtaposition of culture and society. Society and sociality are presented as viable alternatives to protecting Aboriginal cultures, because rather than requiring the Métis to prove their difference, it simply requires them to prove their collectivity. The third section focuses specifically on Métis rights,

examining how Métis indigeneity is racialized/differentiated in the context of time and space, and in the way in which the authenticity of the Métis as indigenous people is positioned vis-à-vis that of First Nations communities. It also explores the specific constructions of cultural rights that emanate from this process, juxtaposing them with alternative formulations. The fourth and final section focuses on the issue of distinctiveness versus difference in the context of urban Aboriginal communities. This context serves as a useful foil for exploring how the judicial logic of protecting difference breaks down, precisely because urban communities are thought to be quintessentially non-Aboriginal spaces and as such are clearly located outside the boundaries of judicial constructions of Aboriginality. Moreover, it is particularly apt in a Métis context because the Métis population is becoming increasingly urban (see Statistics Canada 2003).

POSITIONING THE CANADIAN COURTS AS A RACIALIZED FIELD

Canadian courts are fixated on finding the “essence” of indigenous difference. As a result, they effectively reproduce Canada’s cultural and material hierarchies by freezing indigenous identities in time and space. Commentators exploring these hierarchies usually focus on the relationship between colonialism and “Canadian law.” However, it is analytically useful to distinguish between the judicial and legislative spheres of Canadian law. On the one hand, both are colonially inscribed and both are backed by the threat of state coercion. Consequently, both act as structures of domination (see generally Tully 2000). On the other hand, courts and legislatures constitute distinctively different social fields. The courts are distinct from the legislature in that their aspirations to rationality and logical positivism require them to explain and justify their decisions using internal and (largely) autonomous logics and procedures. These explanations, and the justifications used to ground them, provide an opportunity to study the fabric out of which judicial discourses of Aboriginality are woven.

What does it mean to understand the courts as a social field? Social fields are organized arenas of action wherein competing actors, be they individuals or institutions, struggle to legitimize their own view of the social world, and to compel its adoption by the other actors in the field (Bourdieu 1992). In the judicial field, various actors struggle to ensure that their interpretation of the law is ultimately victorious and comes to comprise the actual substance of “Law.” Social fields are characterized by a number of features that make them sociologically attractive. First, they are hierarchically organized: their internal struggles do not occur on a level playing field. Second, their actors sincerely believe in the field’s legitimacy: they believe in its ultimate value, even if they disagree with its present form. Third, struggles are focused around the

attainment of resources considered valuable to the field (Bourdieu refers to these resources as “capital”). Finally, and most importantly for our purposes, the struggles in the social field are shaped according to internal rules and logics, irreducible to those of other fields.⁴

Now, there is nothing startlingly original about arguing that courts are sites of conflict and struggle. Popular television and media reports depicting courtroom battles and backroom negotiations beam these images into our households on a nightly basis. What is interesting, though, is the degree to which such depictions emphasize the integrity of the prosecutors and their commitment to a set of rules that are said to comprise “the Law.” The judicial field’s power and legitimacy stem from its stated ability to symbolically transform social conflicts into technical legal issues by the exercised integrity and the use of legal rules (see Dworkin 1986). In fact, these are crucial to its appearance of neutrality in transforming its decisions from acts of naked violence to legitimate acts of rationality and objectivity (Bourdieu 1987, 824). “The transformation of irreconcilable conflicts of personal interest into rule-bound exchanges of rational arguments between equal individuals is constitutive of the very existence of a specialized body independent of the social groups of conflict” (ibid., 830).

But Bourdieu suggests that if a large part of “Law’s” presumptive certainty and autonomy is derived from such claims, we misrecognize how relations of inequality are (re)produced through “law.” For example, despite the pretensions of legal positivism,⁵ Aboriginal jurisprudential critiques make it clear that the rationalities underpinning the Supreme Court’s numerous Aboriginal rights decisions are shot through with “extralegal” racial grammar. This grammar, although rarely acknowledged in court decisions, plays an important role in governing Aboriginality. It sets a range of tolerable variation within which the content of Aboriginal rights are constructed. In turn, it shapes the judicial rationalities that are eventually translated into public policy⁶ and against which Aboriginal communities often struggle.⁷

There is nothing natural about the racial grammar of court decisions. Like all manifestations of race and all social fields, it has a history. Race, ownership/exploitation, and legal position were part of the complex scheme of categorization that proliferated during the eighteenth and nineteenth centuries, particularly in colonial geographies. Race, in this instance, was positioned as a strategic coordinate for understanding one’s relationship to property and ownership, and it reflected changes in the position and utility of “Law.” This is evidenced in such historical legal fictions as *terra nullius*⁸ (see Tully 1993, 1998). Since eighteenth-century law was originally meant to govern relations between things (e.g., possession and exchange), individual status (prior to the arrival of unencumbered individualism) was relatively unimportant.⁹ However, as exploitation of labour superseded physical domination in the form of slavery, the appropriation of this labour was sanctioned through similar racial

taxonomies, now understood in terms of intrinsic, individual-level physical characteristics (Guillaumin 1980, 48). Thus, “the ability or inability to exercise one’s rights came to be explicitly ascribed to ‘nature,’ and somatic characteristics came to occupy a central ... place in the practical and legal determination of the rights of social groups” (1980, 49). Eventually, the notion of race became a natural legal category, alongside age, sex, and so on.

The historical processes that led to the formation of deeply held stereotypes about Aboriginal peoples penetrated (and were penetrated by) judicial and legislative processes to such an extent that the racism evident in earlier colonial relationships was formalized and codified in British and (later) Canadian common and statute law, thereby establishing the eventual boundaries of Aboriginal rights. Hence, if we broadly define rights as entitlements, Aboriginal people were able to access certain kinds of entitlements based on who the court perceived – and wished – them to be. This is no different in form today than it was centuries ago; and if it differs in content, the difference is one of degree rather than kind. Ultimately, the same processes and rationalities embedded in historical court decisions continue to operate in contemporary judgments; in other words, the Canadian courts operated, and continue to operate, as a racialized field.

Importantly, their operation as a racialized field means that courts and their cases set in motion (or maintain the centrifugal force of) a particular episteme¹⁰ for perceiving indigeneity. This episteme is shaped both by contemporary Aboriginal participation in the court cases and, more importantly, by the boundaries of precedent set during early colonial relationships (see Bell and Asch 1997). Ultimately, despite their pretensions, the courts continue to produce interpretations that cling desperately to notions of “long ago and far away” Aboriginal culture(s). This is not surprising. Canada is a colonial nation-state in which cultural difference plays a constitutive role in contemporary constructions of Aboriginal identities (Denis 1997; Said 1993; Stoler 1995; Young 1995), and the ability of contemporary members of indigenous communities to live contemporary lives is washed away in a flood of judicial decisions that shine their light only on practices that are manifestly *pre-modern*. Ultimately, courts – and judges in particular – play both creator and curator, fashioning and preserving what they perceive to be these strands of authentic Aboriginality.

There are numerous examples to support the contention that Canadian courts operate as a racialized field. Asch and Bell (1994) illustrate the Supreme Court of Canada’s continued usage of “civilized versus primitive” classification systems in discussing the low level of organization of past Aboriginal societies (Asch 2000, 2002; Denis 2002). For example, the four-part test for establishing Aboriginal title, set out by the trial Federal Court of Canada in the *Baker Lake* decision, which was deeply immersed in this civilized/primitive distinction, is “distorted by ethnocentric reasoning and the misinterpretation of the

nature of culture” (Asch and Bell 1994, 524; also see Asch 2000). Additionally, Barsh and Henderson (1997) elaborate the difficulty of attempting to determine cultural centrality (i.e., to define a culture’s central traits) given the inextricably interwoven character of culture. The fact that the courts even attempt to catalogue historical indigenous cultures is, they argue, the result of deep-seated racist attitudes about the assumed simplicity of historical Aboriginal societies. In a way, the problem goes even deeper, since it seems that the Canadian courts cannot decide which sets of indigenous practices are central to a given culture at any given point (see Asch 2000, 132–3). The Supreme Court of Canada appears to treat Aboriginality in much the same way as a U.S. Supreme Court justice understood pornography when in 1964 he said that he couldn’t define it but knew it when he saw it (*Jacobellis v. Ohio* 1964).

Now, fields do not simply “act” in particular ways. Rather, their outcomes are produced in the wake of internal struggle. Those holding dominant positions within the field attempt to maintain the status quo by controlling the pace and form of the field’s change, while those in more marginal positions attempt to alter it radically. This struggle between incremental and rapid change often works to obscure the boundaries of the field (i.e., what sorts of issues are considered germane and which practices are deemed appropriate). In the case of the judicial field, a key figure in attempting to maintain stability is the judge. An important argument here is that insofar as judges act as the final arbiters in translating social issues into legal ones by rendering decisions, these decisions result from the judges’ location in both their professional and their personal communities. So although precedent is an important factor in how court cases are decided, it disciplines rather than determines the outcome of judicial decisions (see Macklem 2001).

Thus, in addition to the use of precedent (which may be vague, open to multiple lines of interpretation, or even non-existent), judges make decisions based on what they understand to be a “fair” outcome. In other words, they fulfill an important interpretative task by putting meat on the bones of existing case law or by interpreting legislative intent. In any case, since Aboriginal (and specifically Métis) rights cases are in their infancy, there is little precedent upon which to base decisions. Consequently, judicial discretion becomes all the more important in shaping the form and content of Aboriginal rights and, in the process, in reconfiguring the relationship between Aboriginal communities and the Canadian state.

An additional feature of social fields, mentioned earlier, is that their actors generally believe in its overall stakes. For example, a successful lawyer who fails to believe in the value of law is rare. This is because of what Pierre Bourdieu refers to as their *habitus*. One’s *habitus* is the result of childhood and professional socialization experiences. It sets the parameters within which we normally act and, importantly, it is “pre-reflective” (Bourdieu 1977). Thus, when agents make decisions, they do so in a calculating manner, but these

calculations take place within previously established perceptual boundaries. Similarly, when judges read a text (any text), certain meanings “attach” themselves to the reading as a result of their reader’s *habitus* (see generally Bourdieu 1992, 1977; also Fish 1988). In this sense, rather than following rules, judges (like all of us) act according to an “embodied understanding” (Taylor 1995). Thus, they approach texts (again, as we all do) with a circumscribed capacity to understand the text’s meaning(s). In a colonial nation-state such as Canada, dominant “whitestream” assumptions about race and culture attach themselves to judicial readings of legal texts pertaining to Aboriginal issues. The next section explores this issue in greater detail.

ABORIGINALITY AND THE COURTS

SOCIETY VS. CULTURE

When Aboriginal grievances are brought before the courts, they are translated into questions about rights. Aboriginal rights are legal rights that govern the constitutional relationship between Aboriginal peoples and the Canadian Crown (Slattery 2000, 198). The contemporary legal rights of the Métis (or at least, those that have been recognized thus far) are recognized in section 35 of the *Constitution Act, 1982*; and because “unextinguished Aboriginal rights ... [give] rise to enforceable legal obligations” (Gibson 1996, 273), determining the basis and scope of these rights provides us with an opportunity to better understand their relevance for contemporary Métis communities. We need not spend much time describing the similarities and differences of the different classes of rights,¹¹ as it is clear that the recognition of contemporary Métis constitutional rights is still in its infancy and falls squarely within the ambit of site-specific rights¹² (see *Delgamuukw v. British Columbia* 1997).

Two major cases articulate the purpose and framework for interpreting section 35 rights: *R. v. Sparrow* (1990) and *R. v. Van der Peet* (1996). These cases cast a large shadow over *R. v. Powley* and produce the episteme within which the *Powley* court bounds Métis rights. Both attempt to preserve Aboriginality, but their conceptions of acceptable Aboriginality lead them down radically different paths. One path potentially allows for a space within which Aboriginal communities can decide for themselves what Aboriginality means (autonomy), while the other seeks to preserve it in its “ancient” (different) form (see Magnet 2003). The difference between preserving autonomy and preserving difference is integrally important to how Native communities – urban communities, in particular – are perceived as legitimately Aboriginal and therefore as eligible to receive the protection required to grow and evolve in their relationships with the broader Canadian society.

In *R. v. Sparrow* (1990), the Supreme Court stated explicitly that “the phrase ‘existing Aboriginal rights’ must be interpreted flexibly so as to permit their evolution over time ... Clearly ... an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate ‘frozen rights’ must be rejected” (1990, 171). Achieving this interpretive flexibility required that section 35(1) rights be construed in a purposeful¹³ way, which allowed for a generous, liberal interpretation of constitutional wording (*ibid.*, 179). Moreover, comprehending Aboriginal rights through the lens of section 35 demanded that judges be “sensitive to the aboriginal perspective itself on the meaning of the rights at stake” (*ibid.*, 182).

R. v. Sparrow was the first Supreme Court of Canada case to apply principles of constitutional law directly to Aboriginal rights; and, perhaps predictably, it raised as many questions as it answered. Of particular relevance here is Bell’s (1998) query, written as though *Van der Peet* had not yet transpired: “Is *Sparrow* a precedent for rejecting the process of freezing Aboriginal rights; that is, does *Sparrow* reject limiting contemporary Aboriginal rights to the exercise of practices at the date sovereignty was asserted, or does adoption of the interpretive principles in *Sparrow* call for *recognition of more abstract fundamental rights* which can be exercised in modern ways (1998, 43–4)?¹⁴ Only six years later, the Supreme Court of Canada responded with *R. v. Van der Peet* (1996), a decision that shredded the liberal constitutional principles applied in *Sparrow* and left no doubt about the place of Aboriginal rights and, by association, Aboriginal societies in the imagination of the Supreme Court. The *Van der Peet* court argued that although “the appellant is correct to suggest that the mere existence of an activity in a particular Aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of Aboriginal rights, the position she would have this Court adopt takes s. 35(1) too far from that which *the provision is intended to protect*.¹⁵ Section 35(1), it is true, recognizes and affirms existing Aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are *Aboriginal*” (*R. v. Van der Peet* 1996, 189–90).

The obvious question that arises from this statement is, What exactly was the provision intended to protect? The general wording of *Sparrow* allowed the courts to address this question in one of two ways: that it was intended to protect the collectivity of indigenous societies, or that it protected isolated elements of their culture. *Van der Peet* chose the latter. The problem, as the *Van der Peet* court characterized it, was how to “define the scope of s. 35(1) in a way which capture[d] *both* the Aboriginal and the rights in Aboriginal rights” (1996, 190; emphasis in original). After all, Aboriginal rights cannot be interpreted in the same manner as more abstract liberal rights, since by their very characterization as Aboriginal, they are not universal. Responsible fulfilment of section 35 must therefore focus on deciding the correct characterization of

the claim (1996, 202) and determining whether the practice, custom, or tradition was “integral to the distinctive culture of the Aboriginal group claiming the right” (ibid., 201).

Juxtaposing *Van der Peet* with *Sparrow* demonstrates the disparity in logic between the original tracks laid down in *Sparrow* and their radically narrowed interpretation in *Van der Peet*. In giving substance to the meaning of Aboriginal rights, the *Sparrow* court applied general principles of constitutional law to give broad protection to Aboriginal societies. Importantly, these general principles made comparatively little mention of protecting isolated elements of cultural distinctiveness. For example, “[t]he evidence reveals that the Musqueam have lived in the area as an *organized society* long before the coming of European settlers, and that the taking of salmon was an integral part of their *lives* and remains so to this day” (*R. v. Sparrow* 1990, 171; emphasis added). Further, when the *Sparrow* court introduced the notion of cultural distinctiveness, it was as an aspect of this Aboriginal society: “[F]or the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture . . . The Musqueam have always fished for reasons connected to their cultural *and physical* survival” (ibid., 175; emphasis added). Further, the *Sparrow* court argued that section 35(1) rights “are rights held by a collective and are in keeping with the culture *and existence* of that group” (ibid., 182; emphasis added).

In other words, there is an argument to be made that the relationship between Aboriginal communities and the Canadian state envisioned in *Sparrow* is largely silent on the role of the constitution in protecting indigenous culture *qua* culture; a liberal interpretation of the references to the cultural distinctiveness of Aboriginal communities should be understood as part of a larger discussion about the overall survival of these societies. Conversely, the *Van der Peet* court gained the “necessary specificity” (1996, para. 20) required to characterize Aboriginal rights correctly by conflating *society* with *culture*. Specifically, in the space of two dozen paragraphs, Lamer, CJ, completed the slide from society to culture by moving from a discussion about the importance of “prior occupation” (1996, 195–7) to the importance of “traditional law” and “traditional customs” (198–9), then to the “distinctiveness” of “Aboriginal *societies* occupying the land” (199), to identifying the “*practices, customs and traditions* which made those *societies* distinctive” (200; emphasis added), and finally to “identifying those traditions, customs and practices that are integral to distinctive Aboriginal *cultures*” (200; emphasis added).¹⁶

Conflating society with culture is not a mistake unique to the Canadian courts. The problem of society, as Frisby and Sayer (1986) suggest, has “proved too grand an abstraction by far for modern sociological tastes” (1986, 121), and the more recent absence of sustained dialogue about society has resulted in its conflation with such sociological terms as “community,” “state,” “nation,” and even “country” (see Denis 1993, 256–7, 260–2). Recent sociological

arguments go so far as to suggest that we should do away with the concept of “society” altogether (see Bauman 1992; Giddens 1990). It may be, then, that situating society as distinct from community, state, nation, country, or even culture is merely a conceit of historical sociology (here we might think of the work of Emile Durkheim), in which case it does not much matter whether the courts use society or culture.

On the other hand, conflating society with the cultural codes that arise within it has serious consequences, if by “society” we mean a distinct moral and political entity that shapes social relations (see Denis 1993, 266–7). Because if we agree that society, rather than culture, is the appropriate entity within which to ground the rights of Aboriginal people (as the *Sparrow* decision arguably permitted), then it follows that which cultural practices they engage in, or even how those practices are framed (for example, attempting to present differences between cultural, social, or economic, practices), is relatively unimportant. The importance of constitutional protection lies instead in protecting indigenous societies per se, not protecting a particular form of society. Michael Asch (2000, 133) eloquently addresses this issue: “Aboriginal rights ought not to be determined on the basis of similarity or difference with colonial culture. Aboriginal rights are defined in law as arising from the fact that Aboriginal societies were not extinguished by the mere presence of colonists. Yes, they were distinctive. But certainly the salient fact is not that Aboriginal people were distinctive, but that they were here, living in organized societies ... Therefore, their rights should flow from that fact and not from whether or not they were distinctive culturally.”

Asch argues that the Canadian courts base Aboriginal rights in culture rather than in society in order to avoid discussion of the political nature of these rights. But what made it so easy for the courts to perceive Aboriginal rights as cultural rights? If their focus on culture wasn't entirely innocent, neither was it purely intentional. The representations of Aboriginality generated by judges, lawyers, and other Canadians – whether Aboriginal or not – are shaped by Canada's colonial historiography and in particular how we think about the relationship between culture and indigenous difference in this context. Certainly, the differences emphasized between cultures represent crucially important demarcation markers for how whitestream societies perceive indigeneity, but they do more than just that. Colonialism engenders an “enunciative poverty” (Foucault 1972, 120) which attributes culture to “the other,” while Western whitestream societies remain blithely oblivious of their own culture (Goldberg 1993; Young 1995). The kinds of hierarchies embedded in the span of colonialist relationships in Canada limit the range of statements considered competent or reasonable to those who fixate on indigenous difference, so that “culture,” when talked about in the context of indigeneity, does not simply distinguish, it subordinates (see generally Derrida 1981, 41).

It follows that the importance of the cultural differences inscribed in Canadian judicial decisions, such as the two presented here, stems not just from the differences they are thought to manifest but from the framing of those differences as “cultural.” Contemporary judicial discourses, in particular, are reminiscent of the nineteenth-century anthropological debates that focused on the divide between “great civilizations” and “primitive societies,” or “warm” and “cold” societies, respectively (Denis 2002, 116). In this scenario, warm societies have politics; cold societies have “culture.” The Canadian courts’ reproduction of Aboriginal “cultural” communities effectively anthropologizes them, shearing from academic thought and popular imagination the political and economic contexts within which these societies produced their culture (see Wilmsen 1989, xii) and pushing them completely outside the “flow of history” (Wilmsen 1989, 8; Wolf 1982).

Stemming from its monolithic conception of indigenous culture, the Supreme Court of Canada ultimately narrows the vast and unwieldy cacophony of symbols, institutions, and material practices, which allow Aboriginal people to be social in contemporary Canada, into a fixed and isolated set of cultural practices. This judicial labour is reminiscent of the tendency of 1970s American social scientists to essentialize black ghetto culture, relying on such “a narrowly conceived definition of culture” that they tended to use “behaviour and culture interchangeably” (Kelley 1997, 16). Thus, culture was treated as though it was simply an observable set of behaviours; “[t]hey assume[d] that there is one identifiable ghetto culture, and what they observed was *it*” (ibid., 22; emphasis in original). For Kelley, this essentialization constructed black ghetto culture as either an expression of pathology or a coping mechanism created to deal with racism and poverty (ibid., 17). The more relevant issue here is that *what* counts as culture seems less important than *who* decides what culture is. More on this below.

Obviously, culture includes certain lifestyles and practices while excluding others; rules for inclusion and exclusion form the basis of how identities are sustained (Hall 1996, 6). The important question here, though, is what constitutes the appropriate lens through which to perceive such practices. To explore this issue, let me provide an example I use with my introductory Native Studies class (I’ll come back to this later, in the fourth section.) At the beginning of the university semester, I present a scenario to the students to get them to think about what it means to be “traditional.”

There is a 26-year-old Native youth, Jonas. He grew up between the city and a small northern Alberta community. Jonas’s uncles are trappers and loggers; he is the first in his family to attend university. After five years of university, he beats the odds and lands himself a fairly well-paying job with a local Native-run media organization which caters to a largely Aboriginal clientele. Now, as it turns out, his kokum (grandmother) lives in the same city as he does. She moved

there several years ago to get more accessible treatment for her diabetes and her gout. She is getting on in years, but she is still fiercely independent, even though she lives alone now that mushum (grandpa) has passed on. Unfortunately, Jonas's kokum doesn't have band status so has only her government pension to support her (which these days isn't much). To remedy this, each week when Jonas visits, he brings a little bit of food: sometimes flour and lard, sometimes sugar and baking powder, sometimes condensed milk or dry macaroni or even, when he manages to visit his family up north, moose meat. He knows she can use these items, but on such a low budget they are luxuries she simply can't afford, particularly the meat. He doesn't stop to think about why he's doing it. It just feels right to him – she's his kokum, and he knows she's having a tough time, and although she's far too proud ever to ask for anything, he's been brought up to be responsible and to act for others.¹⁷ He visits for a bit, talking in both English and Cree (he's fairly fluent in Cree, although his kokum secretly shudders at his accent), and then he heads off to the local friendship centre, where he volunteers one day a week to teach jigging to a young dance troupe that's getting ready to dance publicly for the first time at the upcoming Métis Fall Festival. Jonas doesn't hunt much, though he likes to fish for pickerel, and when he manages to visit "home" he loves to two-step to his uncle's band at the local bar. Would you say this is a traditional person?

Now, whether the students think this is traditional behaviour is beside the point. The purpose of the exercise is not simply to get them to think about what they take to be traditional behaviour but to decide where they draw their boundaries. Anecdotally (in my classes, at least), Native kids are usually more accepting of this behaviour as traditional. Conversely, non-Native students are less sympathetic, since many of them are able to "locate themselves" within at least part of this narrative. Clearly, most non-Native students, even thoughtful ones, think that authentic indigeneity cannot be authentic unless it is unique or exotic; so attempts to demonstrate why we might think about the youth in the scenario as "traditional" flounder – or at least are viewed suspiciously – to the extent that his activities are seen as normal.

Obviously, the youth's city of residence does not constitute what we might consider indigenous territory (though historically it was someone's indigenous territory). Yet sharing and taking care of others is integral to many indigenous cultures, as is the importance of extended family; although Jonas doesn't think about why he does it, ensuring his kokum has enough to eat (and even providing a little extra) is very important to him. However, none of the activities in this narrative – perhaps aside from speaking Cree – are something the courts would move to protect. Nevertheless, these practices, whether bringing food or teaching jigging, are indigenous practices, since they are grounded in the ethics that were and still are crucial to grounding the social relations of the community where Jonas's extended family lives. More importantly, however,

they should be considered indigenous practices because they are grounded in the sustenance of an indigenous collectivity within the city itself.

My point here is that practices – whether indigenous, non-indigenous, or somewhere in between – are grounded in particular ethical considerations about one’s place in the world, about one’s relationship to self, to “significant others,” acquaintances, and strangers, and about material conditions. However, in much the same way that ghetto culture was reduced to pathology and resistance in the earlier Kelley critique, judicially constructed indigenous culture is reduced to “a fixed inventory of traits or characteristics” (Barsh and Henderson 1997, 1002) in which the central or “integral” traits are required to remain static (a characteristic of “cold” societies). In this instance, according to judicial thinking, the distinctiveness of indigenous communities arises from their historical relationship *to the land* and the identifiable practices they engage in on that land. Moreover, with respect to the matter of Métis indigeneity, the Ontario Court of Appeal framed it in the context of their relationship to “other Aboriginal groups.” In this framing, Métis culture cannot stand on its own as legitimately indigenous but must be examined through the lens of its First Nations neighbours. Although reversed in the Supreme Court, the time frame within which Aboriginality is located is problematic for contemporary Métis communities. In the next section I shall examine the question of Aboriginality and land use and tenure, and its link to culture, specifically in the context of the Métis.

MÉTIS AND THE CANADIAN COURTS

To contextualize this discussion about the Métis, let us look at *R. v. Powley* (2001, 2003), the recently decided Supreme Court of Canada’s Métis Aboriginal rights case and its antecedent, the Ontario Court of Appeal’s decision.¹⁸ The facts of the case are as follows. A father and son shot a moose in the area of Sault Ste Marie, Ontario. Lacking an Ontario “outdoors card” or a moose hunting licence, Steve Powley (the father) attached a tag to the carcass containing various pieces of information, including his Ontario Métis Aboriginal Association registration number. Conservation officers investigated the Powley residence, and after determining that a crime had occurred, they seized some of the Powleys’ hunting gear (principally the gun and moose carcass) and charged the Powleys with hunting without a licence and unlawful possession of a moose, under sections 46 and 47(1) of the *Fish and Wildlife Conservation Act, 1997* (*R. v. Powley* 2003, paras. 2–6).

Although this case is enormously detailed, I am specifically interested in two issues: how the Powleys’ Aboriginality is characterized, and the types of rights that emanated from this characterization. First, we focus specifically on how the courts perceive Aboriginality in time and space (and the place of

Métis culture in this spatial and temporal framework) and how they perceive the relationship between Métis indigeneity and that of First Nations. Second, the issue is presented as a juxtaposition of “cultural” rights with alternative ways of constructing the Powleys’ hunting practice. This sets the stage for a movement away from Aboriginal culture(s) to that of Aboriginal sociality or collectivity.

ASSESSING THE LEGITIMACY OF THE MÉTIS

Capturing Aboriginality in Time and Space

Following the path laid out in *Van der Peet*, the *Powley* courts concerned themselves with both prongs of the test for Aboriginal rights: the correct characterization of the right, and whether it was integral to the distinctive culture of the Métis in the Sault Ste Marie area. In this case, although the provincial Crown argued that the correct characterization of the right was the right to hunt moose (as opposed to other species of game), the Supreme Court of Canada upheld the practice as the right to hunt for food in general (*R. v. Powley* 2003, paras. 20, 50). Moreover, although the Crown submitted that hunting had been a marginal activity during the period in question (1850, the agreed-upon date of the Crown’s effective sovereignty), this was because of a scarcity of moose and not because of its lack of importance to the historical or contemporary Métis community (see Ray 1998). Hence, the original trial court found that “hunting was an integral part of the Métis culture prior to the assertion of effective control by the European authorities” (*R. v. Powley* 1999, 179). This original finding was upheld in the Ontario Court of Appeal (2001, para. 126) and the Supreme Court of Canada (2003, para. 44).

In upholding this right, however, the Ontario Court of Appeal side-stepped a fundamental issue, namely whether these rights emanated from the distinct Métis culture which emerged in the region in the seventeenth and eighteenth centuries, or from the Métis’ pre-contact Ojibway ancestors (appellant’s factum 2000, 35-6; respondent’s factum 2000, 15; *R. v. Powley* 2001, 321). In other words, were these practices Aboriginal because the Métis practised them or because they had been practised by their Ojibway progenitors? Since the characterization of the right fitted both scenarios (because both the Métis and the Ojibway hunted for food), the Appeal Court saw no need to answer the question: “It is conceded by the appellant that the Ojibway ancestors of the Sault Ste. Marie Métis did engage in the practice of moose hunting and accordingly, even if the Métis right depends upon a pre-contact practice, the issue will not be determinative in this case” (*R. v. Powley* 2001, para. 100). However, the judge did not stop there, continuing: “On the other hand, this issue goes to the heart of the nature of Métis rights protected by s. 35 and to some extent, informs the entire interpretive and analytic exercise” (2001, para. 100), and he went on to make a number of *obiter* comments.

He began by noting that since the Métis are formally recognized in the constitution as a “discrete and equal subset” of Aboriginal peoples, their distinctness must be recognized. To position the legitimacy of the Métis under the umbrella of an ancestral First Nation – in other words, to subordinate them, as the Ontario provincial Crown would have it – would be to “ignore the distinctive history and culture of the Métis” (2001, para. 101). “Of course,” the judge continued, “one cannot ignore that s. 35 protects ‘aboriginal’ rights and that [it] is the aboriginality of the Métis that is constitutionally protected” (para. 103). He then quoted approvingly from Dale Gibson, a noted Aboriginal rights lawyer and law professor (who wrote for the Royal Commission on Aboriginal Peoples), noting that it seemed difficult to justify “an entirely distinct second order of Aboriginal rights held by new social entities that did not exist when the European-based order first asserted jurisdiction” (para. 102). Most tellingly, the judge argued:

As the Métis culture was not a mere “cut and paste” affair, it may well be difficult in some cases to determine whether a Métis practice, custom or tradition was inherently Aboriginal in nature. There is, however, a discernible conception of Aboriginal rights arising from the distinctive relationship the Aboriginal peoples have with the lands and waters of their traditional territories, and one would expect the nature of Métis rights to correspond in broad outline with those of Canada’s other Aboriginal peoples. (*R. v. Powley* 2001, para. 104)

This paragraph is key to unlocking the racialized logic orienting the judicial reasoning of the justices of the Ontario Court of Appeal, and it contains a number of contentious assertions. In the present context, one of these is that the Aboriginality of Métis practices must “arise from the distinctive relationship” they hold with their lands. Importantly, not just any lands are relevant in this context. Specifically, “their lands” consist of a precisely specified geographical space located in and around Sault Ste Marie. Equally importantly, Métis litigants must prove that their people had used and occupied these lands and waters prior to the imposition of European institutions and political regimes or “effective control” (*R. v. Powley* 2001, para. 96).

The Supreme Court of Canada (SCC) upheld this framing of the issue, affirming the Ontario Court of Appeal’s construction of a ‘historic, rights-bearing community.’ Actually, the SCC initially offered two constructions of community: the Sault Ste Marie Métis community, and also “a distinctive Métis community [which] emerged in the Upper Great Lakes region in the mid-17th century, and peaked around 1850” (*R. v. Powley* 2003, para. 21). But instead of grappling with the question of which community to choose (and why), the SCC simply chose the former construction by affirming evidence of the fur-trade post contained in the respondents’ expert reports (paras. 21–3). In doing so, its construction mimicked that of the Ontario Court of Appeal. Moreover,

the SCC affirmed, if somewhat more vaguely, the appeal court's logic regarding the relationship between the Métis as Aboriginal people and the lands and waters of their territories: "In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land" (para. 50). Importantly, the SCC affirmed this construction of Aboriginality while also affirming the relevant time frame for assessment of Aboriginal rights as being the period prior to effective Crown control (para. 38).

The problem here is not that the courts' recognition of the territory around Sault Ste Marie wasn't generous, given the evidence before them. What is problematic is the manner in which they perceived "community," emphasizing the importance of historical use and occupancy within a defined geographical space and historical time frame. The SCC's choice is not surprising, given that Aboriginal rights are strongly shaped by common law conceptions of property rights and, as such, are located in specific conceptions of legitimate property use (see McNeil 1989). These concepts of earlier property rights give Aboriginal rights their site-specific character. Moreover, moving the date of relevance forward prior to effective control – rather than, say, prior to contact or prior to the assertion of sovereignty – is an extremely positive step for Métis litigants. What we might note here, though, is the extent to which the site-specific character of Métis rights (an otherwise unstated element of their Aboriginality) and the time frame considered appropriate in assessing Métis Aboriginality severely limit the ability of Métis communities to form outside the geographical areas of their ancestors – particularly in urban centres, where the bulk of the Métis population of Canada now lives (see Statistics Canada 2003).

"Corresponding to Canada's Other Aboriginal Peoples"

In addition to framing the Aboriginality of Métis culture within the context of a historical relationship to "the lands and waters of their traditional territories," the Ontario Court of Appeal added another criterion, namely that "one would expect the nature of Métis rights to correspond in broad outline with those of Canada's other Aboriginal peoples" (*R. v. Powley* 2001, para. 104). Similarly, the court suggested that although "the Métis culture was not a mere 'cut and paste' affair, it may well be difficult in some cases to determine whether a Métis practice, custom or tradition was inherently Aboriginal in nature" (*ibid.*). Apparently, Métis are not "inherently Aboriginal." But how can that be so if they are an equal and distinct subset of Canada's Aboriginal people? While not explicitly addressing this issue, the Court of Appeal proposed a solution, as noted above, suggesting that "Métis rights [should] correspond in broad outline with those of Canada's other Aboriginal peoples" (*ibid.*). And although the appeal court was quick to assure us that the Métis

are a distinct and equal subset of Canada's Aboriginal people and therefore their position may not be subservient to that of Canada's First Nation's people, the court failed to explain why Métis practices require juxtaposition with those of First Nations communities.

The question that arises, of course, is: How can the Ontario Court of Appeal rationalize such a relationship between Métis and "Canada's other Aboriginal people" when these "other Aboriginal people" are not required to juxtapose their practices with those of the Métis? To make sense of this, we need to look more closely at the Court of Appeal's decision. A dozen or so paragraphs before its discussion of Métis Aboriginality, the court makes a comment that is both obvious and – insofar as it was directed specifically towards the Métis – deeply revealing. In following the reasoning laid out by Lamer CJ in the *Van der Peet* (1996) decision, the Court of Appeal justices remind us that the framework for interpreting First Nations rights will not necessarily be the same as that utilized for the Métis, because the Métis are a group "whose origins, history and culture is both indigenous and European" (*R. v. Powley* 2001, para. 94). Similarly, the court argued that the Métis "are peoples with bicultural origins. No culture, however distinctive, is free from the influences of those who came before. The distinctive Métis culture necessarily drew heavily upon the Aboriginal ancestors of the Métis" (2001, para. 120). If in these quotes the Court of Appeal is referring to the obvious fact that culture was transmitted intergenerationally by the Métis ancestors of the Métis, this is as banal as it is true. Alternatively, if one assumes that the distinctive Métis culture drew upon its "Indian" or indigenous roots, two assumptions must be made: first, that the Aboriginality of Métis culture is suspect and thus requires comparison to First Nations culture(s); second, that although Métis culture is bicultural, First Nations cultures are not. After all, if everyone admitted bicultural origins, the term would lose its differentiating power.

The Supreme Court of Canada offered a more generous framing of the Métis by explicitly constructing Métis culture as fully Aboriginal and the Métis as a distinctive people:

We reject the appellant's argument that Métis rights must find their origin in the pre-contact practices of the Métis aboriginal ancestors. This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The right claimed here was a practice of both the Ojibway and the Métis. However, as long as the practice grounding the right is distinctive and integral to the pre-control Métis community, it will satisfy this prong of the test. This result flows from the constitutional imperative that we recognize and affirm the aboriginal rights of the Métis, who appeared after the time of first contact. (*R. v. Powley* 2003, para. 38)

Rather than comparing Métis practices with those of their Ojibway neighbours – an element of the test fashioned by the Ontario Court of Appeal – the SCC placed the issue directly in the headlights of an earlier SCC Aboriginal rights decision, *R. v. Sparrow*. *Sparrow* had focused issues of Aboriginal resource use in the context of conservation. Therefore, in determining allocation with respect to resource use, conservation was the paramount concern after which Aboriginal resource users acting pursuant to an Aboriginal right were given priority. Thus, the SCC's interpretation puts the Métis on an equal footing with First Nations and, perhaps more cynically, in an equally subservient position when in competition with non-Aboriginal resource users.

CULTURE VERSUS ...? REFORMULATING ABORIGINAL RIGHTS

The previous section emphasized the point that Canadian courts hold a very narrow – and in many ways peripheral – view of Métis identity, based on a refusal to recognize broad geographical or cultural change. This results partly from how courts perceive Aboriginal rights but also, to a certain extent, from the fact that Métis litigants agree to play by the existing rules of the court. This section is juxtaposed with the preceding one through a conceptual discussion of “rights” in order to critique the courts' characterization of the Powleys' hunting trip as a cultural right/practice. This juxtaposition reveals an alternative formulation to the conventional cultural rights approach, with potentially enormous implications for many contemporary Métis communities.

The *Powley* courts' cultural formulation of rights faithfully employs *Van der Peet*'s two-pronged test, mentioned earlier, especially in its emphasis on determining “practices integral to a distinctive culture.” For most of us, and certainly for those formally involved in the case, this “rights as indigenous cultural practices” characterization feels intuitively correct. This is so even for the most politically conscious of non-Aboriginals and even (or perhaps especially) for Aboriginal people themselves. In any event, all of the legal actors involved in the case agreed to this framing. The only real issue at trial was whether the cultural practice should be properly characterized as a species-specific practice or as a more general right to hunt for food. Regardless, all sides argued that hunting constituted an integral part of the historical and contemporary Métis culture around Sault Ste Marie.

My argument, on the contrary, is that there are equally viable alternatives to constructing the Powleys' hunting trip as a cultural activity. One alternative is to describe the Powleys' hunting practice as an instance of a social, economic, or even political right, whose source emanates from the collectivity of the group, rather than from its judicially circumscribed distinctiveness. To put it another way, the group's distinctiveness is necessarily drawn from its collectivity, rather than judicial ruminations about its cultural boundaries. As

the collective's boundaries change, so too will its distinctiveness. To explain why no natural connection exists between rights and cultural practices requires a brief digression into a conceptual discussion of rights.

In the liberal tradition, rights have been characterized as a "powerful bulwark against the manipulation of humans by governments and other institutions in the modern world" (Tully 1993, 5). They are presented as "domains of freedom" that prevent unjustifiable interference (Macklem 2001, 160) and are said to mediate the interests of and conflicts between individual and state interests (see especially Dworkin 1977). To wit, "[w]hen rights and state interests are perceived to be in conflict, each with their claim to legitimacy, courts are drawn toward 'weighing' the 'strength' of state interests against the 'degree' of intrusion on individual rights" (Pildes 2002, 180–1).

Part of the allure of rights is that they protect certain sets of interests, normally perceived as the liberty of the individual against unjustified state encroachment. In a more concrete context, context-specific and critically important jurisprudential questions revolve around establishing which interests the courts should protect and how they should protect them (Macklem 2001, 161). Judges engage in purposive reasoning to establish the underlying purpose or interests which the right is meant to protect (Bakan 1997; Macklem 2001; *R. v. Sparrow* 1990). The important thing to remember about purposive reasoning, however, is that "the right's purpose does not magically arise from the text and announce its presence to the interpreter" (Macklem 2001, 164; also see Bakan 1997). Instead, the judicial process requires that judges glean it from the array of competing interests and then select, through the use of convention, precedent, academic commentary, and their own sense of balance, those that intuitively appear correct or reasonable (Macklem 2001, 164). More often, though, a right is characterized "in the absence of an explicit inquiry into the interests it ought to protect, leaving the reader with the task of discerning the right's underlying interests by comparing the purpose ascribed to the right with the types of activities that it authorizes" (ibid.). Ultimately, then, determinations about the "which" and the "how" are predicated upon the right's characterization.

Thus, deciding how to characterize a right correctly requires a decision on which interests the right is meant to protect – or, to turn the statement slightly, the kind of interests to be protected. It is clear that the courts and the lawyers in the *Powley* case understood Aboriginal rights to be cultural rights. On the other hand, there are various ways to characterize rights, depending on the kind of interests that appropriately warrant protection. Cultural rights, although privileged in this context, are but one construction of rights. For example, civil and political rights might include "freedom of conscience, religion, assembly, association, as well as voting rights and rights associated with a fair trial and equality," while social and economic rights might include "rights to health, education, culture, housing, social assistance, and nutrition" (Macklem

2001, 239). Civil and political rights protect our participation in civil and political society, while social and economic rights protect our economic and social welfare (*ibid.*, 240). Clearly, the Powleys' hunting trip, although framed as a cultural practice, was a social and economic practice: for the cost of a rifle cartridge, the Powleys saved about \$1,500 in meat costs. However, my intention here is not to frame this practice as an economic *rather than* a cultural right; this is not an either/or scenario, because Métis rights involve a complex intersection of political, social, economic, and cultural interests. Rather, it strikes me that the issue here is the level of abstraction at which the right is pitched (see Rotman 1997). In this vein, how would the Powleys' hunting be construed if seen as an instance of their connection to a historical Métis society rather than to a distinct Métis cultural practice?

For our purposes, it is important to remember that, constitutionally speaking, rights emanate at least partially from the historical Métis society that existed before the effective assertion of sovereignty by the Canadian state; they do not emanate solely from Métis cultural distinctiveness or difference (which, in the judicial field, amounts to the same thing). Since the rights spring from the historical society and not just from their cultural practices, constitutional protections should spring from the same source; that is to say, they should protect the maintenance (or rebuilding of) remnants of the Métis society, not only the fragmented practices that comprise a particular part of it. The society's distinctiveness cannot be used as the marker, since it would be difficult to look at any society and not find something distinctive about it. For example, none of us give much thought to questioning the distinctions between Saskatchewan and Manitoba, say, despite their similar history, economy and population. Their jurisdictional separateness is largely taken for granted, both politically and in popular consciousness, such that those who live within the boundaries of the respective provinces can spend hours expounding the differences, while an outsider can simultaneously describe similarities.

Moreover, focusing on the protection of Aboriginal societies *per se*, rather than on some pre-conceived notion of what those societies *essentially* are, allows these collectivities the geographical and cultural space to change and adapt so as to ensure their viability into the future. Take, for example, the following statement from the Métis National Council's submission to the Reference Group of Ministers on Aboriginal Policy:

[O]ur people continue to be the poorest of the poor within this rich country. Due to the on-going jurisdictional game played between the federal government and the provinces the gap between our children and the children of other Canadians continues to widen at an alarming rate. Are our children not worthy of basic health care needs that are readily available to other Canadians? Are our veterans not worthy of the same recognition given to other soldiers who have gone off to

defend Canada? Are our communities not worthy enough to be able to position themselves to become economically viable? Unfortunately, the answer under the current federal approach to all of these questions is “yes.” (MNC 2002, 2)

The Métis National Council’s frustration stems not from the fact that the federal government refuses to acknowledge their indigenous difference but because the government refuses to treat them as distinctive from, but with needs similar to, other Canadians. Fundamentally, then, the problem with Aboriginal rights as they are currently conceived is that they refuse to recognize indigenous modernity. As one noted Aboriginal scholar concludes, “It is a good thing the rights of other Canadians do not depend on whether they were important to them two or three hundred years ago. What would it be like for Canadians to have their fundamental rights defined by what *was* integral to European peoples’ distinctive culture prior to their arrival in North America?” (Borrows 1997, 30).

Métis culture and society, like whitestream Canadian culture and society, have changed over the past centuries. Moreover, all Aboriginal societies, including Métis societies, far predate Canadian society, whose legitimacy as both real and intrinsically dynamic is largely taken for granted. Thus, Canadian statute and common law do not work to prevent Canadian society from changing. Change is expected, and thus the law is concerned with shaping its pace and form. Yet Aboriginal rights law, at least as it pertains to the Métis, is charged with doing precisely the opposite. Its role is to act as a curator to ensure that Aboriginal culture does not change, or at least that it does not change in a way that erases the perceived difference of the Métis from mainstream Canadians.

The point to take away from this section is that courts accomplish their assigned task of protecting difference by focusing on the aspects of Aboriginality that render it different. The Métis, no less than the First Nations, are bound by the racial grammar underlying this judicial task. At present, this is perhaps more problematic for Métis than for First Nations, for two reasons. First, a large number of First Nations communities possess specific treaty rights, many of which are more explicitly delineated than Aboriginal rights and, as such, are not bound by *Van der Peet*’s logic. Moreover, some are also in a position to make title-based Aboriginal rights claims which, since the Supreme Court of Canada Canada’s 1997 *Delgamuukw* decision, allow them to evade the *Van der Peet* test.¹⁹ Second, the Métis are proportionately more likely than First Nations to live in geographical locales that lie outside the judicial boundaries of Aboriginality; Nearly 70 percent of the Métis population of Canada reside in urban communities, a situation that raises a number of interesting issues about the extent to which the “legal imagination” (Macklem 1991) of Canada’s courts can be stretched to conceive of urban Aboriginal communities as legitimately Aboriginal. I turn to this issue now.

DISTINCTION WITHOUT A DIFFERENCE? URBAN COMMUNITIES

This final section is brief and is used to make some comments regarding the difference, for urban Métis, between protecting Aboriginal distinctiveness (broadly defined) and difference. The 2001 census estimated that there are approximately one million Aboriginal people in Canada, or 3.3 percent of the total population (Statistics Canada 2003, 6). This is probably a somewhat conservative estimate for various reasons relating to underenumeration (*ibid.*), a result of a lower rate of fixed addresses, and the hypermobility of the urban Aboriginal population in Canada (Hanselmann 2001). More than two-thirds of this population live off-reserve and about 50 percent, close to a half million people, live in Canada's urban centres (Statistics Canada 2003, 10). Between 1996 and 2001, the urban Aboriginal population grew by 22.2 percent, compared with only 3.4 percent for non-Aboriginal Canadians.²⁰

The Métis in particular comprise an increasingly large part of the urban population. More than two-thirds of Métis are urban, which means that they represent approximately 40 percent of the total urban Aboriginal population. Moreover – and this is an important if obvious point to make – urban Métis are not wandering aimlessly around the city; they have coalesced into viable, enduring communities that handle much of the service delivery to their community members, in addition to the numerous community activities they sponsor. These urban communities have second and third-generation members who have never been to, nor have any particular connection with, the land of their parents, grandparents, and ancestors. This generation lives in a melting pot where they interact and associate with a diversity of people on a scale unimaginable to their parents or grandparents (see Newhouse 2000). Yet many continue to identify themselves with an indigenous culture.

It may be²¹ that these children are knowledgeable of a broader, panindigenous culture, appropriately reflecting their cultural and geographical context of intermixing with numerous indigenous cultures and with whitestream Canadian culture. They may participate in tea and bannock socials, urban powwows, fiddling or jigging competitions, and in rare cases they may even understand or speak an indigenous language. Regardless, they also hang out with their own and other Native families, playing X-Box, skateboarding, being bored at school, playing hockey, or engaging in freestyle rap competitions – things that many teenagers do. My point here, to quote from *Van der Peet* (1996, para. 162), is that conceptions of Aboriginality “should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not.” Clearly, despite their own admonition against it, the justices of the Supreme Court of Canada have based the logic of their Aboriginal rights test precisely on the degree to which Aboriginal communities are able to differentiate themselves from broader Canadian norms. Yet there is

little about urban Native communities that is different enough – according to judicial tests – to warrant protection by the Supreme Court of Canada under section 35. In many cases, the aspirations (or lack thereof) and material conditions of the members of urban Aboriginal communities are difficult to distinguish from those of non-Native people (many of whom are part of the same community).

This is not to say that urban Métis (or Native) communities are not distinct from other communities or are not recognizably autonomous. Distinctiveness does not exist *au naturel* but is found and strategically employed in the context of larger identity projects. Thus, choosing elements of distinctiveness is a fairly arbitrary process, in that one might choose different elements of distinctiveness based on one's strategies in a specific context. To phrase this more theoretically, "identities are about using the resources of history, language and culture in the process of becoming, rather than being" (Hall 1996, 4). Insofar as this is the case, the important issue is not whether Native communities (or any community, for that matter) are distinctive; but rather, who makes the decision about what counts as distinctive. The litany of statistics (see Statistics Canada 2003) demonstrates that urban Métis face many of the conditions faced by other impoverished citizens. Yet they continue to use the resources at their disposal – history, language, elements of culture – to construct indigenous collectivities. Many will recognize things about them that are indigenous; others (judges included) may not. In this context, however, urban Métis will continue to identify themselves as indigenous and will continue to coalesce into distinctive urban communities.

My point here is not that any old set of practices can be called indigenous. Clearly, many who grew up close to the land will recognize themselves in conventional descriptions of indigeneity that lack an urban element. For those who do, that is great. However, there is an exponentially increasing urban Native population that will recognize little of themselves in conventional narratives but will still identify themselves as Métis (or Cree or Dene or whatever other identity community they feel an allegiance to). Alternatively, in a more complex sense they may begin to identify themselves as Métis (or Cree or Dene) from Edmonton, for instance, or from Alberta.²² We are long past the time when urban residence can be understood as a recipe for assimilation. Urban Aboriginal people may recognize themselves as Native in different ways from those living on-reserve, in a Métis settlement, or in a more remote area (such as the Northwest Territories or Nunavut), but they still recognize themselves as indigenous. They still self-identify and they still attach themselves to an urban indigenous collective.

CONCLUSION

By way of conclusion, let me try to bring together some loose threads. An apparently unresolved tension in this essay revolves around the contrast

articulated between ideas of difference and distinctiveness or, as the *Van der Peet* court articulated it, between the terms distinct and distinctive. For the *Van der Peet* court, “distinct” was defined as activities that were unique to a cultural group; by contrast, “distinctive” consisted of those activities that made a community or culture just that – distinctive – without forcing it to prove that its culture was unique, sharing no similarities with any other cultures. I pushed the logic of this distinction a step further, arguing that insofar as identity is contingent, there is nothing about indigenous identities beyond re-evaluation of their membership. That is to say, the issue of who gets to decide what it means to be indigenous is far more important than what counts as indigenous, because, as we have seen, culture will change as the social conditions of indigenous communities change. Living in contemporary Canada, especially in a relatively resource-weak position, requires hard choices; this may lead communities to go back to the bush, but more likely it will require that community members leave reserves and settlements to reform, in different but analogous ways, in Canada’s towns and cities. Either way, it is the principle of collective self-identification that is of primary importance, not the “content” of a particular culture.

Policing cultural content is, however, the purpose of section 35 of the *Constitution Act, 1982* –or at least it is, according to the Supreme Court. The problem, as identified earlier in this essay in the quotation from John Borrows, is that tests of Aboriginal rights force Aboriginal litigants to define their contemporary selves in terms of elements that were important to them centuries ago but are no longer as important today (for example, hunting for food). In this scenario, racial difference is reiterated in the form of narrow historical narratives that emphasize a close connection to the land. The light of judicial reasoning shines brightest on indigenous practices that conform to pre-contact practices, and consequently urban Métis practices and geographies tend to fare poorly in this light. Thus, to the extent that the Métis litigants emphasize certain aspects of their historical selves, they are deemed appropriately indigenous.

However, the Ontario Court of Appeal issued a veiled warning. It suggested, almost off the cuff, that only those aspects of Métis culture that are Aboriginal in character are eligible for protection. Although the Supreme Court of Canada backed off this requirement and replaced it with a construction more considerate of the Métis as a “fully Aboriginal” people, it nonetheless locates authentic Aboriginality in the era prior to “effective sovereignty” (in this case, around 1850). Ultimately, Métis must submit their cultural papers to the courts to make sure they are in order. The problem with court litigation strategies is that they work – until they don’t. Michael Asch suggests that “the courts [open] a door for the Canadian State to rethink its relations with indigenous peoples and to re-imagine a Canada founded on premises that disavow the ethnocentric legacy of colonial law” (1999, 428). When they fail, courts simply and “overtly articulate ... support for the status quo” (ibid.). On the one hand, what other options do the Métis have in a place such as Canada where the

Supreme Court holds such a powerful position in the political field? (See Manfredi, 2001.) There is, in such a context, little to be lost and much to be gained by using litigation strategies. Yet the issue is more dangerous than this. Court cases result in Métis fixing dangerously narrow streams of Métis culture in the minds of one of the more powerful actors in the Canadian political field – even, as in the *Powley* case, when they are victorious.

NOTES

- 1 Bear in mind, however, that the *Sparrow* decision affirmed for the Government of Canada the underlying sovereignty of the Canadian state and as such did not meet all the conceivable aspirations of indigenous communities and nations.
- 2 The role of precedent requires that judges use cases previously decided on analogous grounds to help shape the parameters of future decisions. A case's precedential value depends on when it was decided and at what level of court. Supreme Court of Canada cases have precedential value for all lower court decisions in Canada and are considered binding. Appeal court cases are persuasive but not necessarily binding, and the same is true of international high court cases.
- 3 The term "whitestream" is borrowed from Claude Denis's excellent book *We Are Not You: First Nations and Canadian Modernity*. The term is used to indicate how, although Canadian citizenry comprises numerous cultures, the dominant institutional arrangements tend to reflect a predominately Euro-Canadian bias (Denis 1997, 13).
- 4 For an accessible and useful discussion of Bourdieu's notion of a social field, see Bourdieu and Wacquant 1992. Also see Swartz 1997, ch. 6.
- 5 Legal positivism is based on the premise that judicial lawmaking is derived from a straightforwardly rational relationship between legal fact and legal principle. Thus, judges work to mechanically apply the correct legal principle to the legal facts before them.
- 6 At the risk of stating the obvious, using "law" in an artificially uniform fashion (i.e., both for the courts and for the legislature) makes it analytically difficult to register the tensions between courts and legislatures. In the specific instance of Métis rights, this tension is crucial for understanding how litigation strategies are helpful (or not) to the Métis in their political struggles. At the very least, making an analytical distinction between courts and legislatures allows us to account for the fact that people break laws, not court cases; that is, courts do not make laws, whereas legislatures do. Courts generate judicial rationalities that set the parameters for more direct policy making – nothing more, nothing less.
- 7 Although beyond the scope of this essay, it is important to note that as active agents, successful court struggles often require that Aboriginal communities "battle harden" their identities in ways that emphasize their cultural difference.

- 8 Eighteenth-century international law subscribed to a labour theory of value, meaning that in order to demonstrate proper ownership of land one had to be putting labour into the soil. Since many indigenous groups did not, the land was often considered *terra nullius*, or empty.
- 9 For example, around the time of the French Revolution and the American War of Independence, slaves were still sold by the tonnage (Guillaumin 1980, 48).
- 10 I am using the term *episteme* slightly more specifically than did Michel Foucault, with whom the term is normally associated. For Foucault, epistemes set the parameters within which the validity of discourse is evaluated. They constitute the *a priori*, “defin[ing] the conditions within which [one] can sustain a discourse about things that are considered to be true” (Foucault 1973, 157). Modernity, with its attendant knowledge systems, is the dominant episteme of our age. My argument here is that race, as constitutive of Canadian modernity, constitutes a key *a priori* in contemporary Canadian society. However, owing to Bourdieu’s more complex understanding of how social reality is mediated through a series of more “local” social fields, *episteme* is used more locally to indicate the *a priori* upon which courts base decisions about Aboriginal rights.
- 11 See Slattery 2000 for a clear and sophisticated discussion of the different classes of rights.
- 12 Site-specific rights are just that: rights that are exercisable only in a specific geographical location, which usually is determined by judges in the course of rendering a court decision. In the *Powley* decision, the judge argued that the appropriate community was the area in and around Sault Ste Marie, rather than the city itself, despite the Crown’s argument that the Powleys lived within the city and despite the respondents’ reference to a larger “Upper Great Lakes” Métis community.
- 13 Purposeful or “purposive” reasoning requires the judge to examine “Canada’s history, traditions, and fundamental values ... to determine a right or freedom’s purpose” (Bakan 1997, 22). Purposive reasoning is supposed to act as a governor of judicial choice by limiting decisions to a right’s underlying purposes and principles (ibid., 23).
- 14 *Sparrow* is italicized in the original, but the italicized phrase “recognition of more abstract fundamental rights” is my emphasis.
- 15 This phrase is my emphasis. All other italicized words in the quotation were italicized in the original.
- 16 The contact/pre-contact divide is central to *Van der Peet*’s construction of indigenous legitimacy. Note the movement from the contact/pre-contact divide to the pre- and post-effective control paradigm presented in the *Powley* case.
- 17 Williams, Jr, 1997.
- 18 Both the SCC decision and the Ont. CA decision are used because a bulk of the SCC decision merely confirms or denies the findings of the Ont. CA decision, which constructed a far more in-depth analysis of the issues at hand.

- 19 In cases of title-based Aboriginal rights assertions, mere occupancy at the time of the Crown's assertion of sovereignty is used to encompass cultural practices, rather than being forced to prove specific cultural practices.
- 20 These growth estimates should be read cautiously; part of the huge growth is due to the increased numbers of people who have begun to identify themselves as Métis. The Métis population has jumped by 43 percent since 1996 (Statistics Canada 2003, 7). Moreover, it is not clear what these newly self-identifying Métis take the term "Métis" to signify.
- 21 I use "may also be" because there is little research to show this to be the case. However, I have been to enough cultural events and have seen enough urban social service delivery programs that include a cultural focus (albeit often reified) to believe that remaining viably indigenous in an urban area is not impossible or even, in the bigger urban centres, difficult.
- 22 I would like to thank Roger Maaka, a Maori scholar and chair of the Department of Native Studies, University of Saskatchewan, for his helpful discussion in this regard.

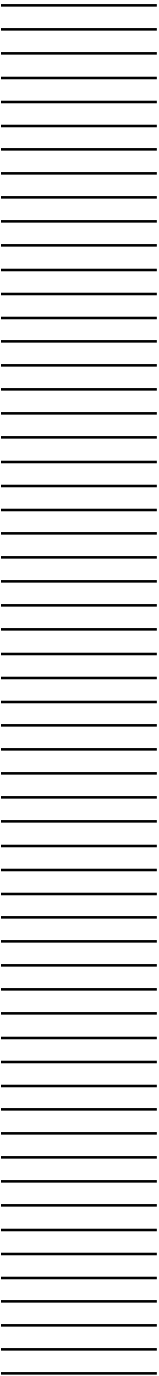
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VI

Conclusion

Self-Determination, Citizenship, and Federalism: Indigenous and Canadian Palimpsest

Joyce Green

Le colonialisme au Canada est une relation historique et continue qui favorise principalement les pionniers aux dépens des nations autochtones colonisées. La pratique du colonialisme a amené cette lourde relation à changer au cours des différentes époques selon le contexte politique, technologique et économique, mais il s'agit essentiellement d'une relation de pouvoir exploitante. Cette relation est le palimpseste du Canada, c'est une partie intégrante de notre ordre contemporain. Plusieurs techniques de propagande culturelle, juridique, politique, mythologique et intellectuelle la rejettent, l'obscurcissent, ou la légitiment de telle sorte que la majorité des pionniers canadiens ne se soucient pas de l'histoire ni de la réalité politico-économique des peuples autochtones ni de leurs privilèges par rapport aux peuples autochtones. Ce travail soutient que cette relation doit être rendue visible afin de pouvoir la soumettre à une analyse critique et y apporter des changements politico-économiques. C'est seulement en s'engageant dans un processus de décolonisation que le Canada réussira à transcender ses origines coloniales, à légitimer son existence, à concrétiser son identité et à se tourner véritablement vers un ordre post-colonial.

INTRODUCTION

Canada is, in historical terms, a fairly recent political manifestation. The name, so myth tells us, is drawn from at least one Aboriginal language. It is the history of the name itself that is significant, a mutated fragment of the language of an indigenous nation, which left its mark on the colonial state. Turtle Island is a name used by several Aboriginal nations to refer to this continent. It is also a mythic reference, drawn from the cosmology of some indigenous cultures, in the way that “the Dominion” reference to Canada is derived from the biblical myth of Genesis. Historically a geographical rather than a political

designation, Turtle Island is now a political invocation. There were and are politics, of course, between the many nations resident on Turtle Island, including the sequence of colonial populations that eventually formulated Project Canada. Turtle Island and other original names exist as a palimpsest for the myth and reality of contemporary Canada, whose name comes from Turtle Island folk who are themselves contemporary residents (if not all unequivocally citizens) of Canada.

A palimpsest is “(1) a piece of writing material or manuscript on which the original writing has been effaced to make room for other writing; (2) a place, experience, etc., in which something new is superimposed over traces of something preceding it” (*Canadian Oxford Dictionary* 2002). Palimpsest can be written or experienced, but all layers of palimpsest define its totality. When newer images are superimposed over older ones, the pre-existing material shapes the subsequent addition – even when it is suppressed and unacknowledged. And settler Canada routinely denies the original layers of the political, economic, and cultural palimpsest. Consider the remarkable example offered at Lethbridge City Hall.

Lethbridge is a small city in southern Alberta, in the heart of Blood (Kainai) territory. The Bloods are members of the Blackfoot Confederacy. The territory is constituted by Kainai history and constitutionally located through Treaty 7. City Hall is an impressive building, with landscaping, green spaces, fountains, and some attention to aesthetic detail. The cornerstone of the first city hall, dated 1885, has been retained and placed in an archway. Fourteen brick pillars line a curving walk around part of the building; each contains a masonry sculpture depicting Lethbridge notables and notable historical events. Off to one side, the Chinese Cultural Society of Lethbridge and District has raised a monument to Chinese immigrants and has acknowledged Canada’s racist immigration and related policies. The result is a celebration of some, an erasure of others, and the apparently grudging inclusion of yet others, in a formula that Razack (2002) conceptualizes as “racialized spaces.”

The masonry sculptures were presented to the city by the Independent Order of Odd Fellows (IOOF) in 1999; IOOF had instituted its Lethbridge Lodge in 1889. The first sculpture shows Red Crow – Mi’kai’sto in Blackfoot – though it does not identify this prominent Kainai chief who signed Treaty 7. In front of Mi’kai’sto are two settler farmers, and this defines the consciousness of southern Alberta settler culture with regard to the role of the Bloods in the community. This role is portrayed as historical, not contemporary, and as having been replaced by settlers and “progress.” The inscription reads: “In the 1870s treaties between the Blackfoot Confederacy members and the Dominion Government established reserves; with settlement came the North-West Mounted Police and the traders like Jerry Potts.” So the advent of capitalism and colonial law are heralded by the pillar, along with the confinement of the Kainai to the reserve.

The second pillar features Sir Alexander Galt who, in the fine tradition of mixing politics and business interests, received money from “several British friends while he was the Canadian High Commissioner to London to establish a large scale coal industry in southern Alberta.” The third commemorates Elliott Galt, son of Sir Alexander, for buying the Nicholas Sheran coal mine and other resource holdings (but with no acknowledgement that Kainai resources were being taken). The fourth notes that in the 1890s Lethbridge was a “male dominated” and “isolated single resource” town. The fifth celebrates the Canadian Pacific Railway, and the sixth notes that North-West Mounted Police men became ranchers (but not a word about on whose land they ranched). The seventh says that “immigrants flooded southern Alberta” and shows an elevator and a white man. The eighth commemorates the irrigation canals from the St Mary River and shows a white farmer (the St Mary is one of the Blood Reserve’s boundaries). The ninth and tenth pillars have a military theme and name particular notables. The eleventh commemorates Galt Hospital and the first (white) woman city councillor, Lillian Parry (no Blood has ever served on Lethbridge City Council). The twelfth celebrates white women’s organizations in Lethbridge’s history. The thirteenth celebrates the University of Lethbridge and the fourteenth commemorates the musical contributions of citizen Anne Campbell. Thus, Lethbridge – or Sikohkotoki, in Blackfoot (Black Rock, for the coal, according to one account; for a sacred and missing stone, according to another) – stands symbolized by these pillars, which erase both the reality of its historical grounding on Kainai territory and the reality of the existence and claims of the contemporary Kainai Nation against the colonizing state and its citizen beneficiaries.

The meaning and practice of self-determination, citizenship, and federalism are imbued with the histories of colonizing and colonized populations and with the power relations between these now contemporary communities. The recent past – a couple of centuries – has been characterized by relationships of dominance and subordination, of colonizing occupier and the displaced and regulated colonized. Subsequent to the historical treaty-making phase that ended with Treaty 11 in 1921, indigenous peoples were invisible in the dominant political landscape until the 1960s, apart from nominal federal policy pursuant to the *Indian Act*.¹ Non-status Aboriginals didn’t get even that much attention. Profound injuries exist in the bodies, souls, and histories of the indigenous now, evidence of “Wrong Relationship.”² Yet settler communities and their indigenous counterparts – and the many different forms of hybridity that human relationships between the two have created – live here, now, and must find a space for accommodation.³ The preponderant weight of this accommodative obligation falls to those who have benefited from colonization. Reconciliation is in the best interests both of the health of Turtle Island and its many nations and of the viability of Project Canada.⁴

In this essay I show how colonialism in Canada is an historic but also a continuing relationship that operates to benefit settler elites especially, but

also the entire settler population, at the expense of colonized nations. The practices of colonialism transform this fraught relationship in the economic, technological, and political contexts of different times, but the basic power relationship is exploitative. This relationship is denied, obscured, or legitimated by a variety of intellectual, mythological, political, legal, and cultural propaganda techniques, so that the majority of settler Canadians are oblivious of the history and contemporary politico-economic reality of indigenous peoples, as well as being oblivious of settler privilege relative to indigenous peoples. I argue that this relationship must be made visible and thus amenable to critical analysis and to politico-economic transformation. Finally, I suggest that only by engaging in a decolonization process can Canada transcend its colonial origins, legitimate its existence, concretize its identity, and move to a genuinely postcolonial order.

CONCEPTUAL TOOLS FOR REVISITING RELATIONSHIP

It is a considerable challenge to transform an historic relationship characterized by dominance and subordination into a more mutual arrangement in which the parties understand that their interests, values, voices, and rights are honoured in materially and politically meaningful ways. Particularly when one party has enjoyed privilege because of the subordination of the other, changing the relationship balance means a loss of privilege in the interests of mutuality. Yet those in a position of dominance also have something to gain through this transformation; sociopolitical stability, increased economic capacity, moral consonance, international respect, and cultural invigoration are evident benefits for a postcolonial Canada. How, then, can an argument be framed and strategies identified to create the theoretical tools, political will, and public buy-in for a project of postcolonial transformation? In part, conceptual tools exist in the language of rights and of democracy.

Canada is a colonial state that continues to dominate its colonized nations. At the same time, both the fundamental principles of Canadian constitutional law and Canada's support for international law seem to indicate this country's preference for metaconstitutional political orders in which fundamental human rights are guaranteed by democratic and representative governments. As such, the Canadian state appears to be both the abuser and the guarantor of indigenous human rights. As Canada becomes more responsive to its role as guarantor of rights, its political culture and elites are less comfortable with state violations of indigenous human rights. Indigenous nations, too, contest state oppression nationally and internationally, using the tools of politics, law, and public opinion. The result is a set of shifts towards ameliorating the historical and contemporary negative consequences of colonization and towards a political state that can be described as postcolonial. "Post-colonial" implies

that “colonialism [is] finished business” (Smith 2001, 98). However, Canada is not currently in a postcolonial state of grace.

Canada also struggles with the perpetual political contestation of identity, agency, and structure that originates not only from colonized indigenous nations but especially from the contemporary Québécois descendants of an original colonial component of the state. Other provincial governments also have adopted this pose of staking political, economic, identity, and cultural claims in contradistinction to the federal whole.⁵ In the elusive search for constitutional peace and jurisdictional rationality, for a coherent political culture, and for the prerequisite affirmation of identities, some Canadian scholars and activists have taken up the latent potential of citizenship and federalism to meet the demands of these often contradictory constituencies.

Citizenship must be practised within the federal structure, which itself is subject to change at the hands of citizen contestation and deliberation. Federalism is a structural arrangement enabling divided sovereignty and the practice of relationship between the federal components, which are also committed to the encompassing state that is understood to be more than the sum of its constitutional parts. In practice, in the condition of colonization in Canada, federalism “promotes unequal distribution of political influence” (Borrows 1997, 420). Canadian federalism permits conversation and negotiation between the national and provincial governments, but there are no formal mechanisms to facilitate similar conversations with Aboriginal governments. “With no formal tools to allow for this communication, Indigenous peoples must use very blunt instruments to make their point, such as highly charged political demonstrations, blockades, and litigation” (ibid., 444–5).

These ideas – human rights, citizenship, and federalism – are central to the Canadian conversation about how the colonial state, colonized nations, and various territorial and non-territorial hybrid populations can understand their historical and contemporary relationships. Less clear are the pathways to decolonization that do not run through the standard domestic and international dogmas concerning state sovereignty, national composition, and contested claims to resources and territory. Theorists and practitioners of international politics are partial in their representations of the world, educated in and perpetuating the dominant ideas and ideologies. Indigenous peoples must be able to raise other *problématiques* and propose other theories of political coherence and coexistence if they are not to be captured by the language and contained by the ideas of those who oppress them – what Linda Tuhiwai Smith calls the “reach of imperialism into ‘our heads’” (Smith 2001, 23, 133–4). John Borrows has implied something similar about indigenous intellectual originality in his contention that Canadian law is informed by “First Nations law” and should take a more systematic and conscious account of it, in the service of a better quality of justice: “First Nations law originates in the political, economic, spiritual and social values expressed through the teachings

and behaviour of knowledgeable and respected individuals and elders. These principles are enunciated in the rich stories, ceremonies and traditions of the First Nations” (Borrows 1996, 646).

Postcolonialism, in conditions of continued coexistence framed by more equitable power relations and processes of reconciliation, implies that the colonizer also changes. Post-colonialism is far more radical than the various “self-government” options that have been floated to date, because it requires the effective indigenization of the state – its institutions, economy, cultures, and populations – in ways that have never been contemplated by those with power. Post-colonialism requires not concessions but mutual accommodations for a common (though not necessarily assimilated or homogenized) future. The processes and institutions of a reimagined political order must be a representation of indigenous aspirations, symbols, and practices as well as those of the colonizers.

Indigenous peoples in Canada are culturally, historically, geographically, and politically diverse, though all share the experience of colonial domination. While the focus of non-Aboriginal Canada is generally on the status Indian constituency with a land base, there are at least as many indigenous people who are landless and urban. The 1867 constitution contemplated two orders of government – provincial and federal – with constitutionally defined sovereignty and jurisdictions and with mechanisms for managing their inter-governmental relations. Yet Aboriginal intellectuals and activists generally take the view that this order was forced on Aboriginal nations, which had and continue to assert original sovereignty and, on that basis, the right of self-determination. This claim constitutes a profound challenge to the legitimacy of the sovereignty and constitutional organizing structure of the Canadian state. It also challenges the accommodations the state has offered – inadequate *Indian Act* revisions,⁶ land claims processes circumscribed by requirements for the extinguishment of Aboriginal title, and various delegated non-constitutional governance packages – as a mess of politico-administrative potage. Foundationally, then, the contemporary relationship between Aboriginal and settler Canadians is corrupt because the original relationship was colonial, with all of the violence that implies. The kinder, gentler contemporary colonial relationship is still conditioned by domination and legitimated by racism.

JURISDICTIONAL SPACE AT THE FEDERAL CONSTITUTIONAL TABLE

Over the years, federal and provincial governments have dealt with Aboriginal peoples as a subject matter over which the two dominant orders of government claim and deny jurisdiction.⁷ Aboriginal peoples are treated as civic problems, economic liabilities, and political conundrums. Historically,

some Aboriginal people have found their interests used as a political frisbee, tossed between the federal and provincial governments, as each denied jurisdiction and therefore economic and political responsibility for Aboriginal constituencies. Off-reserve status Indians, and all Aboriginal peoples except for reserve-based status Indians, are typically considered by the federal government to be a subject for provincial responsibility. Some provinces have tried to claim that all Aboriginal people are or should be a federal responsibility, regardless of residence, especially in the calculation of funding formulas for shared-cost programs. Municipalities (creatures of provincial governments, except in the territories, where they are federal creatures) also have a track record of claiming to have no responsibility for funding the social, economic and political claims of urban Aboriginals unless dedicated funds are provided from federal or provincial governments. In the political frisbee game, the interests, citizenship claims, and human rights of Aboriginal people are casualties. Worse, the message Aboriginal peoples continually receive is that they are considered liabilities rather than assets to the communities in which they live.

Both of the 1867 orders of government are uncomfortable with the proposition that there are three orders of government, the third being Aboriginal. This, of course, implies a measure of political sovereignty, constitutional legitimacy, and original jurisdiction that emerges from the existing federal mix, supported by the 1982 constitutional recognition of Aboriginal peoples and their rights. In section 35 of the *Constitution Act, 1982*, Aboriginal and treaty rights are constitutionally recognized and affirmed for Indians, Inuit, and Métis in Canada. These rights are recognized through the mechanism of citizenship in the colonial state. Yet the existence of these rights also challenges the state's sovereignty – its right to assume jurisdiction over territory and populations. These rights were given shape, scope, and federal and provincial political support in the failed Charlottetown Accord – an accord that was characterized by the (former) chief of the Assembly of First Nations, Matthew Coon Come, as “the all-time high point in Crown-Aboriginal relations” (Coon Come 2002, 70).

Arguably, the first of these rights is self-determination, which applies to peoples.⁸ Self-determination encompasses cultural, economic, legal, political, and jurisdictional content (Green 2003). Self-determination arguably includes the right of self-definition or citizenship – citizenship in the Canadian state but also in a pre- or postcolonial indigenous political entity. A new trilateral federalism may also entail a different political economy from the one that currently prevails in the federation. Not all Aboriginal jurisdictions will choose the liberal capitalist paradigm of development, though some individuals and some political leaders do. Corporate interests are especially alive to the implications of this, and they have political influence with federal and provincial governments; consider, for example, the corporate and government marshalling of science in early 2004 to support offshore oil drilling in the

contested territory of Haida Gwaii and in adjacent ecologically sensitive areas. Most traditional indigenous cultural and philosophical imperatives direct communities to non-capitalist, cooperative and collaborative economies. As Smith suggests, “Indigenous peoples offer genuine alternatives to the current dominant form of development. Indigenous peoples have philosophies which connect humans to the environment and to each other and which generate principles for living a life which is sustainable, respectful and possible” (2001, 105).⁹

Claims to indigenous self-determination can (and have) helped shepherd the structures and practices of federalism from a colonial towards a postcolonial order. In historic terms, indigenous peoples, who once were considered wards lacking the capacity for citizenship¹⁰ and who once were the subject of a federal proposal to eliminate Indian status, reserves, and treaties,¹¹ were suddenly elevated by the Supreme Court’s 1973 recognition of Aboriginal title in *Calder v Attorney-General of British Columbia* (*Calder* 1973), a decision that invited Canadians to “seriously contemplate the possibility that Aboriginal peoples would be a permanent part of the political and legal landscape” (Borrows 2001b, 18). In more recent times, dominant legal and political paradigms have been challenged by international legal decisions and norms (Anaya 1996, 97–125) to recognize that indigenous peoples are victims of human rights violations by Canada.¹² This challenge has been bolstered by the constitutional recognition of Aboriginal peoples and their rights, by the explicit acknowledgment of the Métis as a rights-bearing (and therefore rights-enforcing) Aboriginal people (*R. v. Powley* 2003), and by the framing of those rights as expressions of human rights and self-determination. From this perspective, Aboriginal peoples have travelled a path from where they were once deemed unfit for citizenship without proper training by the colonial state (for example, through gaining a university degree and renouncing one’s Indian status) to an ambivalent contemporary status either as dual Aboriginal and Canadian citizens or as members of a decolonizing Aboriginal entity in opposition to Canada.

Throughout this transformation, the federal policy lens for considering status Indian issues has – beginning with the Penner Report of the all-party parliamentary Special Committee on Indian Self-Government (Canada 1983) – been “self-government.” Yet it is not clear that self-government is a panacea for the social and economic pathologies generated by colonialism. Self-government is not an uncontroversial decolonization mechanism (Green 1997). For example, it is unclear how governance by communities would function if those communities are indeterminate or diasporic (urban, non-status, Métis, or hybrid) or if they are unaccountable to the principles of international human rights law. It is also unclear how these communities will be positioned in relation to the constitutionally recognized governments and financing mechanisms of the Canadian state. None of these challenges is fatal to reconceptualizing a contemporary postcolonial federal order, but all of these questions beg for serious theoretical and policy engagement.¹³ More recently, self-government has been

superseded in some circles by the language of self-determination, identified as a human right that is exercised in community with others. This is a far more potent claim than the anaemic, indeterminate “self-government.”

THE RIGHT OF SELF-DETERMINATION

Originally exercised as sovereignty by indigenous nations, self-determination continues to be a fundamental human right recognized in international law, and arguably it has been affirmed by the Canadian constitution. James Anaya (1996, 75–80) defines self-determination as “a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies.” He considers it to be a collective right and its content and application to be understood in relation to the consensus on colonialism’s illegitimacy and the universal benefit of internationally recognized rights. Anaya argues that international human rights law imposes a duty on states to guarantee enjoyment of indigenous rights and to provide remedies for their violation. Moreover, securing indigenous peoples’ rights requires “contemporary treaty and customary norms grounded in the principle of self-determination” (*ibid.*, 129–33). This is consistent with the principles articulated in the Draft Declaration on the Rights of Indigenous Peoples, currently proceeding through the United Nations bureaucratic hierarchy en route to the General Assembly, for ratification or rejection.

Self-determination first moved into elite policy language in relation to Aboriginal peoples in 1977, in the landmark Mackenzie Valley Pipeline inquiry chaired by Thomas Berger (Berger 1977, cited in Canada 1983, 41). Self-determination in the Canadian context is generally (but not unanimously) taken to mean “within Canada” – that is, without violating the state borders and sovereign character of Canada. It is typically associated with what has come to be called self-government. Self-government, according to Michael Murphy, “is the most fundamental of all democratic rights, and ... provides the framework within which most other rights derive their force and significance” (Murphy 2001, 109). Conceptually, however, self-government only makes sense as a claim for those who have been denied self-determination. Those who control the levers of political power and who are comfortable with its structural and constitutional practices have no need to place the modifier “self” before “government.” Logically, self-government only has conceptual purchase in conditions of external political domination.

The self-determination exercised by indigenous peoples on Turtle Island was impeded by colonialism. Colonialism did not affect all of them at the same time or in the same way. Consequently, the decolonization analyses and strategies of Aboriginal peoples vary. Following Confederation in 1867,

however, colonialism advanced in tandem with the implementation of the 1868 National Policy. Aboriginal peoples were impediments to the economic and social vision of the founding fathers, and therefore policy and legislation for removing the impediment emerged.¹⁴ Canada's political elite was explicit in legislating and bureaucratizing the practice of colonialism in Canada. Law was an instrument in the service of this elite, which was actively securing the interests of the capitalist classes. The consolidation of law, policy, popular culture, and economics into an edifice that denied indigenous authenticity and violated indigenous sovereignty and human rights continues to frustrate decolonization efforts while it perpetuates the racism and race privilege that legitimated the original colonial project (Green 1995, 2003).

It is therefore ironic that the law itself has led the political elites of the colonial state to reconsider Aboriginal rights and to revisit the indigenous-colonial relationship. The initial incentive was provided by the 1973 Supreme Court decision in *Calder* that acknowledged the existence of Aboriginal title. This acknowledgment led the assimilationist Prime Minister Trudeau to concede that Aboriginal and treaty rights had more legal purchase than he had thought. Moreover, *Calder* and subsequent legal decisions created a context that, combined with the political pressure from Aboriginal organizations, women's organizations, and concerned Canadians, impelled Canadian governments to reconsider their political authority in relation to indigenous contestation. The 1982 constitutional recognition of Aboriginal and treaty rights emerged not as *noblesse oblige*, nor as altruism, but as a result of the weight of law and politics on the Canadian constitutional patriation process: these rights were recognized because they had to be recognized.¹⁵ The 1983 constitutional amendment that gave constitutional protection (as treaties) to contemporary land claims agreements further strengthened the Aboriginal constitutional presence. The Penner Report intimated the legal, constitutional, and structural sea-change flowing from this: "According to traditional constitutional interpretation prior to the recognition and affirmation of 'existing Aboriginal and treaty rights' in the *Constitution Act, 1982*, all primary legislative powers were deemed to be vested either in Parliament or in provincial legislatures. The inclusion of existing Aboriginal and treaty rights in the constitution may have altered this situation. If, as many assert, the right to self-government exists as an Aboriginal right, there could be a substantial re-ordering of powers" (Canada 1983, 43).

Subsequently, Canadian elites and citizens briefly grappled with the "re-ordering of powers" in various components of the Charlottetown Accord, especially with the widely supported Aboriginal component. However, following the collapse of Charlottetown and subsequently the collapse of public support for broad constitutional initiatives, federal and provincial governments backed away from the transformative politics of decolonization and moved to more limited initiatives, such as tinkering with the *Indian Act*, a process that

Matthew Coon Come characterized as “a neo-colonial, assimilation and extinguishment agenda” (2002, 72).

In terms of the ongoing legal struggle, it is framed on a case-by-case basis: hunting rights here, federal probity there, and so on. But the broader struggle is about self-determination and about the accountability of colonial governments for their relationship with indigenous peoples. Moreover, because colonialism is understood in international law to be a wrong and an injury to human rights, and because human rights include the right of peoples to self-determination, and because international law informs domestic law, Canada has moved to rupture the historical colonial relationship and to bind indigenous communities to the state with sets of intergovernmental and occasionally constitutional agreements. Yet this movement has been equivocal, as is evident in the contradictory policies and legal decisions that seek, above all, to protect the political and economic status quo.

For example, consider the ambivalent and sometimes contradictory principles identified by the Judicial Committee of the Privy Council and subsequently by the Supreme Court of Canada in a series of precedent-setting cases dealing with Aboriginal title and Aboriginal and treaty rights. From the shockingly limited conception of usufructory rights in *St. Catharines Milling and Lumber Co.* (1888) to the acknowledgement of Aboriginal title in *Calder* (1973), to the more general yet still problematic notion of *sui generis* rights relied upon in *Guerin* (1984), colonial law struggled to reconcile evidence of Aboriginal sovereignty with the common law and its myths of pre-existing and paramount Crown sovereignty. Michael Asch (2003) suggests that this resistance to Aboriginal sovereignty derives from the legal fiction of *terra nullius* encoded in colonial law, legitimating racist explanations of why Aboriginal peoples did not need to be considered in colonial claims for sovereignty that now undergird the contemporary settler state’s justifications for its claim to incontestable sovereignty. In *Delgamuukw* (1997) the court found that the Aboriginal title of the Gitksan and Wet’suwet’en people persisted – yet it declared that there was never any doubt about the undisputed sovereignty of the Canadian state (Asch 1992). The essence of the colonial relationship in this and subsequent cases is precisely the contestation over sovereignty. The dispute arises from colonial assumptions embedded in colonial law. Bell and Asch (1997, 46–7) suggest that Canadian law embraces the following as fundamental principles:

- 1 Sovereignty and legislative power is vested in the British Crown.
- 2 Ownership of Aboriginal lands accompanies sovereignty over Aboriginal territory.
- 3 Aboriginal peoples have an interest in land arising from original occupation that is less than full ownership.
- 4 The British Crown obtained the sole right to acquire the Aboriginal interest.
- 5 Aboriginal sovereignty was necessarily diminished.

Thus, the strategy of litigation is fraught for Aboriginal liberatory purposes, because the game is defined by colonial history, cultural assumptions, legal and economic dogmas, and politics. Still, there are moments of opportunity to rupture the colonial practices of governments and courts and to replace them with a radically new relationship premised on decolonizing protocols. Arguably, these moments arise even in the colonial courts, which especially since the 1982 *Constitution Act* have been struggling to find a way to reconcile the Aboriginal reality with the myth of colonial law. One such moment, no matter how contested subsequently, exists in the *Marshall* decision (*R. v. Marshall* 1999), which recognized Mi'kmaq treaty rights to contemporary commercial activity; another exists in *Powley*,¹⁶ which recognized the harvesting rights of Métis people. In these cases, the law “grew” as in the “living tree” metaphor, to acknowledge treaty rights that include (in the case of the Mi'kmaq) a right of contemporary participation in an economic sector (the fishery); and (in the *Powley* case) to acknowledge the Aboriginal hunting rights of at least some Métis people. Prior to this growth, the “frozen rights” thesis (Borrows 2002, 56–76) of the law confined Aboriginal and treaty rights to “traditional” precolonial practices and contained the Métis in a form of conceptual purgatory, where they were Aboriginal according to the *Constitution Act*, yet without justiciable or recognized rights.

Decolonization is an indeterminate process and a capacious category, including not only the separation option but also what Benedict Kingsbury calls “relational self-determination” predicated on “the structuring and maintenance of relations, rather than separation” (Kingsbury 2002, 111). Relational self-determination provides some conceptual room for framing Aboriginal autonomy in the context of the geotemporal proximity and interdependence of Aboriginal and non-Aboriginal communities in the federation. As such, it demonstrates substantial potential for accommodating a robust third order of government within the federal structure (see Abele and Prince, this volume). Kingsbury’s conception is similar to Iris Marion Young’s notion of self-determination premised on solidarity, non-dominance, and relational autonomy (Young 2000, 196–235, 258–9, 264–5). Elsewhere, the possibility of self-determination within a web of relationships has been framed to include the possibility of an integrated self-determination that effectively indigenizes and therefore legitimates the colonial state (Borrows 2002, 138–58). Taking into account the differences between these theorists, the common focus on relationships *and* self-determination still links them conceptually to a project of finding space for political and cultural autonomy, while acknowledging that all political communities are constrained ‘by the realities of the international state system and by the commonality predicated by our common humanity. Young is especially mindful of this, arguing that self-determination must occur within the parameters of solidarity of all, insiders and outsiders, who hold

political units accountable to the international framework of human rights. (2000, 258–9, 264–5).

CITIZENSHIPS AND IDENTITIES

The Canadian colonial state has established and policed Indian citizenship (status) through instruments such as the *Indian Act* in order to define a policy community and to administer policy bureaucratically for the defined community. In this way, colonial racism was bureaucratized (Green 1995). Indian status, however, says nothing about the identity of a particular community or nation. It is a restrictive pan-national formula that erases indigenous particularity. Nor does it speak to the complex relationships between indigenous communities. Rather, it homogenizes history, cultural particularity, and political aspirations into the category “Indian” even as it restricts this status to a select list of recognized Indians based on patrilineality and colonial recognition.¹⁷

Does this pose a problem for decolonization? It may, for the community of identity largely restricts itself – and therefore its leadership recruitment and political analysis – to a small, similarly interested segment of the entire colonized community. This in turn erases the national and historical particularity of both settler and colonized communities, while it maintains a colonial relationship – the legitimization of colonial definitions in selecting who to talk to and about what subjects. Further, the ethnic or racial pan-Indian category may be so simplistic that it is politically impotent as an instrument for decolonization. A postcolonial relationship, in contrast, would provide the potential for a citizenship that is chosen, not imposed, and that is not an erasure of indigenous nationhood but an affirmation of it.

Citizenship has become a focus of political theorists and political contestants, especially since passage of the 1982 constitution. It is both a contested term and a normative goal, as demonstrated by Alan Cairns’ argument in *Citizens Plus*. For Cairns, citizenship is “the core concept of the democratic welfare state” (Cairns 2000, 155). It is inclusive, non-racial, and non-oppressive. Moreover, it is based on empathetic solidarity among different communities within the state (*ibid.*, 210–15) and is framed by the state (90). However, neither Cairns nor most other theorists of citizenship and self-determination acknowledge the problematic nature of the state, itself an imposition on Aboriginal peoples. They are inattentive to the effect on the construction of theories of citizenship and self-determination of the intellectual inheritance of non-Aboriginal thinkers located unproblematically in relation to colonial states.¹⁸ This partiality both shapes the conceptualization of citizenship, decolonization, and the state and ignores the different formulas, models, and possibilities that a more catholic intellectual base produces.

Citizenship is considered by Cairns and others to be the grand unifier of Canadian diversity that makes the many parts cohere. Yet for others, citizenship is at best an unattained promise; at worst, a colonial imposition (Green 2004). The 1967 Hawthorne Report's proposal for "citizens plus," radical at the time, perceived Aboriginal rights as additional to Canadian citizenship ((Hawthorne 1966–67). Hawthorne had it backwards: by definition, Aboriginal rights come first, and Canadian citizenship is additional. This is not merely a semantic quibble. Canadian citizenship can only be a legitimate package for Aboriginal people to the extent that it is additional to state-recognized Aboriginal rights, which logically and necessarily precede the state's existence and its rights. Indeed, the Draft Declaration on Indigenous Rights, in article 32, recognizes this in the following terms: "Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live" (Anaya 1996, 214). Aboriginal rights are a species of human rights (Anaya 1996), and their existence emerges from and against the colonial relationship. A citizenship that encompassed the primacy of Aboriginal rights would be less a colonial imposition and more a mechanism for "Right Relationship" in a decolonizing community.

There is no consensus among political and intellectual elites about the relevance and applicability of Canadian citizenship to Aboriginal peoples. In 1969 Harold Cardinal, head of the Indian Association of Alberta, noted that Canadians "have to accept and recognize that we are full citizens, but we also possess special rights" (Cardinal 1969; Cairns 2000, 10). Mohawk political scientist Taiaiake Alfred dismisses Canadian citizenship in favour of the traditionally grounded political identities of sovereign Aboriginal nations (Alfred 1999). Cairns advocates a common contemporary citizenship that transcends the gulf between the historical legacies of imperialist assimilation and the separation and segregationist solutions implied by advocates of "maximum exit" (Cairns 2000, 9). Between these positions lies much political terrain.

Kevin Bruyneel documented the range of opinion on citizenship among the candidates for national chief of the Assembly of First Nations at the 1997 leadership convention. In reply to a question from the floor – "Do you consider yourself to be a Canadian citizen?" – three candidates claimed dual citizenship in their First Nations and in Canada, and three rejected Canadian citizenship, with different provisos. The most interesting of the latter was the reply of the incumbent national chief, Ovide Mercredi, who stated that before serving as national chief he had considered himself to have dual citizenship, but following six years of leading the Assembly of First Nations (a period fraught with conflict with the federal government and especially with the minister of Indian and northern affairs), he considered himself Cree, not Canadian: "[P]eople can't serve two masters, only one." This can be contrasted with the reply from the successful candidate (in 1997, and again in 2003) Phil Fontaine,

who said, “Aboriginal people in Canada have a right to both Canadian citizenship and Aboriginal citizenship, with all the rights and responsibilities that go with both” (Bruyneel 2002, 21–2).

Logically, then, Aboriginal peoples hold Aboriginal rights and, additionally, the rights to and of Canadian citizenship, to the extent that these secondary rights do not conflict with Aboriginal rights. Indigenous status is defined as historical anteriority (that is, indigenous peoples were established in nations and cultural formations, controlling their territories and functioning as self-determining peoples, prior to colonial occupation) and on non-dominance in the political formation in which they now find themselves – the colonial or settler state. Aboriginal rights are the enabling factor for Canadian citizenship. When indigenous peoples choose citizenship in the settler state, in addition to the Aboriginal rights which the settler state recognizes and enables, then a new relationship is forged, one that is postcolonial. And in this new relationship, the otherwise tainted sovereignty of the settler state is transformed and the state itself is indigenized.

Similarly, the reality of Aboriginal rights in relation to the colonial state produces a legitimating mechanism for non-Aboriginal citizenship. Canadian citizenship, like Canadian sovereignty, relies for its legitimacy on Aboriginal concurrence through processes of indigenization. Following John Borrows’s argument (2002, 138–58), these processes include transforming the institutional structures, political and economic processes, academic canon, and popular culture not only so that they incorporate indigenous assumptions and content, but so that the structures, processes, canon, and culture are themselves constructed by indigenous imaginations rather than simply “including” some indigenous content. In other words, the colonizer, via state structures, processes, canon, and culture, cannot merely tolerate the colonized but must itself change. Until such processes are undertaken, Canadian citizenship and sovereignty remain suspect in their origins in a colonial relationship.

Citizenship as self-definition is arguably one of the most fundamental expressions of the human right of self-determination and of the right to live and associate within one’s own cultural community. Aboriginal political consciousness is inherently oppositional, rejecting the state’s appropriation of the sovereign and self-determining capacity of colonized nations and instead claiming an indigenous right of self-definition. Yet the right to indigenous self-definition poses its own conceptual and political challenges. Whereas the traditional liberal universalist formula for citizenship assumes that the particular characteristics (race, culture, ethnicity, etc.) of citizens are irrelevant in framing the relationship of citizens to the state, Aboriginal identity in community is likely to be an essential component of Aboriginal self-determination, for particularity is an essential attribute of that identity. Although not in itself problematic, indigenous anticolonial claims are sometimes nationalist, and nationalist claims are sometimes problematically fundamentalist, deploying

racist conceptions of “we.” Therefore, although indigenous nations require, as a matter of right, sufficient autonomy and security over “boundary maintenance” to deploy cultural and social criteria for belonging, it must be borne in mind that Aboriginal and postcolonial governments are equally bound by the international human rights regimes that constrain their erstwhile colonizers, and this may challenge how the “we” is identified and how national boundaries are maintained. Boundary maintenance via membership and citizenship codes cannot be based on race or racist formulas such as blood quantum – currently used by some First Nations governments.

TOWARDS A POSTCOLONIAL FEDERATION AND FEDERALISM

A definitive characteristic of the multinational state of Canada is its federal organization, constitutionally encoded and refereed by the judiciary. Traditionally conceived as the contested distribution of jurisdictional powers and equally contested notions of national compact and community, federalism is capacious in both its political flexibility and its mythic symbolism. Indeed, since 1982, federalism in practice and as a subject of academic study has shifted from a focus on the competition and collaboration of governments to the “mobilization and empowerment of social groups that defined their interests in non-territorial terms” (Simeon 2002, 7). But most Aboriginal nations have territorial claims. Can federalism accommodate a postcolonial relationship, one that must be constructed through confrontation with the colonial past and is thus premised on acknowledging agency – historical accountability and contemporary liability? The answer lies in law and politics, not in technical or structural limitations. As Borrows has argued, courts have defined and redefined the federal relationship and the jurisdiction of its components by drawing on federalism’s unwritten principles. They should be able to do the same for the interpretation of (historic and contemporary) treaty relationships by looking to Aboriginal traditions and oral histories (Borrows 2001, 627).

The politics, however, are fraught by the power relations inherent in electoral majoritarianism, capitalism, and white privilege.¹⁹ The class and race interests of the settler majority are expressed through the superficially neutral electoral system, which produces false majorities for largely unrepresentative governments.²⁰ That is, the process of representative democracy in Canada produces primarily majority governments via the plurality or “first past the post” electoral system, which benefits regional concentration of political support and regional population concentration at the expense of broad national support and regional representation. This is a structural consequence of electoral dominance by political parties in which perhaps 2.7 percent of Canadians participate, for which only 61.2 percent of eligible voters voted in 2000, and

in which Aboriginal people have no likelihood of controlling electoral outcomes even if a block vote could be organized (Dyck 2004, 228–30, 275–9). What purchase do Aboriginal alternatives have against this reality? The party system itself is characterized by colonial, racial, patriarchal, and class privilege in ways that filter out most potential candidates who do not fit the template of political success (Voyageur and Green 2001a; 2001b, 200–1). Yet it is not only Aboriginal people who would benefit from replacing the unsatisfactory status quo with an indigenized federal structure; the depth and breadth of Canadian democracy and political culture also would benefit.

Constitutional politics have expanded federalism's players from the constitutionally recognized two orders of government, and implicitly they now include Aboriginal governments (Abele and Prince, this volume) as well as the citizens' communities that contributed to the debate over the 1982 constitutional package and subsequently the Charlottetown Accord. Citizens have become players in federal engagements. Yet as Peter Russell has noted, this intense and often symbolic politics "raises the fundamental question of whether the citizens of a nation-state share enough in common, in terms of their sense of political justice and collective identity, to go on sharing citizenship under a common constitution" (Russell 1993, 75). Citizens surged to the foreground of the constitutional arena in two ways: first, as players in the constitutional debates and, secondly, as the bearers of the rights and freedoms guaranteed in a charter that explicitly made governments accountable, through the courts, for their observance of these rights and freedoms. Recent constitutional debates, most importantly preparatory to the Charlottetown Accord, included citizens, Aboriginal organizations, and interest groups whose participation was sanctioned by governments (Russell 1993, 168–9). Simultaneously, Aboriginal peoples joined the conversation not only (and sometimes not at all) as citizens but as historic communities with rights, including the right to self-determination. Federalism, and Canadian constitutionalism, was no longer only about the two orders engaging each other over jurisdictional disputes. Citizenship was no longer an individual's passive relationship with government.

But more profoundly, as Russell (1993) suggests, the Canadian constitutional and federal process has been fraught by an ambivalence about the nature of the political project of Canada, an ambivalence that foundationally is about the lack of a coherent corporate identity. Kevin Bruyneel talks about this ambivalence as the result of the triangulated political geometry between Quebec, Anglo-Canada, and Aboriginal Canada, a geometry in which each component of the equation is established in tension with other components, and in which state sovereignty and national identity are always contentious (Bruyneel 2002). In Canada, identity is always contextual, conditional, and referenced to the historic political forces that came together in the crucible of colonialism and now struggle to be politically and historically authentic, in the context of the contemporary state. One's identity as Aboriginal or Canadian, for example,

arises in the context of the historical processes and constituent political communities that influenced the formation of the Canadian state. Identity is a profound dialectic, not an essential formation reducible to a timeless set of characteristics. Canadian identity is more complex now than in the early years of state formation. Increasingly, describing identity requires taking account of the personal consequences of state politics over time – politics that defined and limited immigration, regulated and criminalized certain communities, promoted certain regions and elites, recognized some cultures, and sought to erase others. What does it mean to be Canadian? Consensus is achieved only on the most general level – specificity requires inclusion of more qualifiers. Moreover, Canadian identity is contextual and always subject to renegotiation. Yet Canada seems to yearn for a singular coherent identity.

Successful at incorporating many identities and federal regional entities, the Canadian state nevertheless is evidently not amenable to consensual definition. It is assuredly more than the sum of its parts and more than its bureaucratic and political apparatus. Canada is seeking authenticity; it is authentic in each of its parts, but as a whole it lacks coherence because it denies, whitewashes, and finesses its history.

CONCLUSION

Relationship is the constant shifting motif in federalism and citizenship. The colonial relationship is the fraught foundation of settler states. “Right Relationship,” formulations that are grounded in international human rights law and consensual politics, may produce stability and coherence for a postcolonial Canada. Or Right Relationship may emerge as a negotiated and maintained process between a reconfigured postcolonial Canada and postcolonial, physically incorporated but conceptually separate, Aboriginal jurisdictions.

The Royal Commission on Aboriginal Peoples proposed renewed relationships by way of treaty negotiation and implementation, processes that assume the sovereign capacity of all parties. Valuable in its focus on the primacy of relationship, this formulation is also problematic because it assumes permanent “settler” and “indigenous” categories that hinder the historical evolution of cultures, practices, and peoples. It presumes a perpetual preference for separation and thus presupposes that future generations will find the proposed renegotiation of contemporary relationships satisfying and compelling. Ahistoric political formations are not durable over time, and boundary maintenance is potentially problematic from both bureaucratic and human rights perspectives.

John Borrows has suggested the far more radical measure of legitimization via indigenization of the state (2000). Not limited to self-government or to physical enclaves for the maintenance of indigenous particularity, indigenization also means the infusion of indigenous cultures, values, myths,

and political and social structures and processes into the similar existing processes and structures of the state, so that the result is a fundamental transformation rather than the mere “inclusion” of Aboriginal content in a thin layer pasted over a colonial foundation. Borrows’s formulation can be logically extended to the goal of legitimating the state by taking it over, while guaranteeing basic human rights and political rights to settler Canadians.

Right Relationship will not be a variation on the theme suggested by the Supreme Court of Canada in *R. v. Delgamuukw* which found, in Borrows’s words, that “colonialism is a justifiable infringement of Aboriginal title” (Borrows 2001a, 648). Right Relationship can never be achieved by an act of beneficent incorporative accommodation on the part of the colonial state, which amounts only to a kinder, gentler colonialism.

How can this difficult birth of a contemporary, composite, authentic political culture be expedited? The palimpsest must be read in all of its complexity and all stories honoured in meaningful ways. Without this, Canada will remain stuck, a colonial entity designed by and for economic elites, who in turn were and are serviced by political elites. The quest for indigenous self-determination is contrary to these elite interests, and it is incomprehensible to the racist superficial consumer mass culture that has been so carefully cultivated by the colonial state over the years. Canada’s corporate identity can emerge by a process of indigenization, a process that requires the settler state, its sovereignty, and its constitution to be authenticated especially by indigenous consent, indigenous participation, indigenous reconstruction, and indigenous mythology. In other words, mutual recognition with meaningful political consequences will generate a sense of common purpose via the state structure and will reshape the structure of federalism and the function of citizenship by facilitating self-determination. Finally, identity emerges both personally and corporately by acknowledging all of our history, as part of the narrative process of national formation identified by the late Edward Said: “nations *are* narrations” (1993, xiii). As identity is acknowledged for its political and historical significance, it paradoxically becomes less significant: those who are secure in their personal and community identities do not need to politicize or racialize them. As identity claims become less fraught by way of their mutual acceptance, space will emerge for the children of processes of hybridity, and ultimately, for cultures of hybridity, thereby eroding racial and racist categories in favour of historical and cultural alternatives. Only then will Canadians be positioned to accept both our diversity and our common humanity in a collectively envisioned future.

NOTES

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- 1 The 1983 report of the Special Committee on Indian Self-Government in Canada (Penner Report) said: “In the evolution of Canada from colonial status to independence, the Indian peoples were largely ignored, except when agreements had to be made with them to obtain more land for settlement” (Canada, 1983, 39).
- 2 I use the term “Wrong Relationship” contextually to suggest that these injuries and, subsequently, related phenomena occur within the context of a colonial relationship rather than in a sociopolitical vacuum. An example of Wrong Relationship is the outstanding claim of the now aged Aboriginal veterans of both world wars, who were denied the benefits and supports given to other Canadian veterans. The Canadian government refuses to settle this claim honourably, offering only token (and largely rejected) compensation as of 2002.
- 3 Settler communities are those originally formed by immigrants at the expense of “the dispossession and near extermination of Indigenous populations” (Razack 2002, 1).
- 4 The report of the 1996 Royal Commission on Aboriginal Peoples called for a new relationship, but a decade earlier the Penner Report had also made that call: “A new relationship would be beneficial to Canada ... In a democratic age, it is incongruous to maintain any people in a state of dependency” (Canada 1983, 41). Both reports have been largely ignored by federal and provincial governments.
- 5 This was most evidently a feature of provincial consensus in the Meech Lake Accord, since the quid pro quo for consensus was the guarantee that powers made available to Quebec, to recognize its unique position in Canada, would be available to all provinces.
- 6 For a useful discussion of the federal government’s 2001–2 First Nations Governance Initiative, see Boisard 2002a, 33–5. Boisard develops this discussion in her unpublished paper, 2002b, 1–25.
- 7 Section 91(24) of the *Constitution Act, 1867*, gives the federal government exclusive jurisdiction over Indians and lands reserved for Indians. The first significant federal-provincial legal contest using Indians was played out in *St. Catharines Milling and Lumber Co.* (1888), in which the province of Ontario and the federal government used Indian rights as a proxy in their dispute about jurisdiction over land and resources; the decision held that Indians had only a “personal and usufructory right” to their traditional land. Despite the centrality of Aboriginal interests to the case, no Aboriginal community was represented in court.
- 8 Anaya argues: “Extending from core values of human freedom and equality, expressly associated with peoples instead of states, and affirmed in a number of international human rights instruments, the principle of self-determination arises within international law’s human rights frame and hence benefits human beings *as human beings* [emphasis in original] and not as sovereign entities as such” (1996, 76).

- 9 Yet she acknowledges that a “new generation of indigenous elites also walk across the landscape with their cell phones, briefcases, and assets” (Smith 1999, 99).
- 10 The franchise was not extended to status Indians until 1960.
- 11 The 1969 federal white paper *Choosing a Path*, introduced by the minister of Indian affairs, Jean Chrétien.
- 12 In 1977 Sandra Lovelace, a Maliseet woman, successfully prosecuted a claim against Canada through the United Nations Human Rights Commission (UNHRC) for violating her cultural rights, which are guaranteed in section 27 of the International Covenant on Civil and Political Rights, by instituting the sexist provisions of the *Indian Act* membership provisions that stripped Lovelace of her Indian status upon her marriage to a non-Indian. Similarly, the Lubicon Lake band, under chief Bernard Ominiyak, has been successful in its claim that Canada and Alberta have violated the human rights of the Lubicon band’s members. The UNHRC found Canada to be in violation of article 27 of the International Covenant on Civil and Political Rights (which protects culture) and wrote: “Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue” (UNHRC, 38th session, International Convention on Civil and Political Rights, CCPR/C/38/167/1984). See also Magallanes 2000, 256.
- 13 For insights into some of the questions raised in this paragraph, see the essays in this volume by Andersen, Abele and Prince, Gibbins and Hanselmann, and Hawkes.
- 14 This included the making of the numbered treaties, the creation of reserves, the *Indian Act*, and related policy regimes imposed by Indian agents and enforced by the North-West Mounted Police and subsequently the RCMP, and the subjugation and dispersal of the Métis.
- 15 Both Aboriginal and treaty rights and women’s equality rights were inserted in the 1982 constitution late in the day, as a result of fierce lobbying by both constituencies and over the objections of most first ministers.
- 16 *R. v. Powley*, (2003) upheld the lower court decision that Métis people “in and around Sault Ste. Marie have, under s. 35(1) of the *Constitution Act, 1982*, an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation.” http://www.lexum.umontreal.ca/csc-scc/en/pub/2003/vol2/html/2003scr2_0207.html
- 17 Similar erasure occurs with the application of pan-Maori identity and membership in the Aotearoa/New Zealand case (Sharp 2002, 15–19).
- 18 This phenomenon is well discussed by Linda Tuhiwai Smith, 2001.
- 19 I use the terms “white” and “white privilege,” not to indicate ethnic colonial categories but to indicate that in a racialized society such as Canada, certain forms of privilege are normatively incurred by the fact of racial dominance. The converse, racial discrimination, is also normatively true: it affects those who are seen as suspect outsiders, “others,” by the dominant white community. For a useful discussion of how racism functions to protect white privilege, see Olson 2002.

20 See Schouls 1996 for an examination of how well (or poorly) Canadian electoral processes represent Aboriginal people.

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VII

Chronologies

Chronology of Events January 2003 – December 2003

Aron Seal and Michael Munroe

An index of these events begins on page 379

8 January
Gun Control

Federal Justice Minister Martin Cauchon announces that the federal gun registry will remain, despite demands from eight provincial governments that spending on the program be halted. The provinces say they may refuse to prosecute those who fail to register their weapons. They seek the program's suspension pending a full audit of spending.

13 January
Aboriginal Peoples

Federation of Saskatchewan Indian Nations (FSIN) Chief Perry Bellegarde calls for the *First Nations Governance Act* to be entirely rewritten, warning that Aboriginal people and organizations will enthusiastically oppose it in its current form. The Act, he argues, violates the treaty rights of Aboriginal bands while doing little to address First Nations issues.

14 January
Political Parties

Liberal leadership contender Allan Rock withdraws from the Liberal leadership race. Rock is believed to have been in second place. Among his reasons for dropping out of the race, Rock cites the difficulty of fundraising against the clear favourite, Paul Martin. Rock states that he will continue his campaign for re-election in his riding of Etobicoke Centre.

15 January
Political Parties

Sheila Copps, in a speech to the Vancouver Board of Trade, outlines her platform for the Liberal leadership campaign. Included are commitments to recognize gay marriage and efforts to increase the percentage of women in Parliament.

18 January
Political Parties

The British Columbia Federal Liberal Council votes to amend the party's membership rules to increase to 1,000 the number of membership forms that declared leadership candidates can collect at once. Liberal leadership contenders Manley and Copps had argued that the previous rules favoured Paul Martin by making recruitment campaigns more difficult.

23 January
Health Care

The premiers, in anticipation of their 4 February meeting with the prime minister, release the "2003 First Ministers' Accord on Sustaining and Renewing Health Care for Canadians," calling for federal Canada Health and Social Transfer (CHST) funding to be increased to 18 percent of total health and social expenditures immediately and to 25 percent by the end of the decade. It further requests that health-care transfers be removed from the CHST through the creation of the Canada Health Transfer (CHT). Additionally, the report calls for greater flexibility in provincial health spending choices.

The premiers' calls are a response to a federal health-care reform plan released earlier in the day that calls for increased accountability in provincial spending of federal funding. The federal plan seeks to establish an advisory body to report annually on the state of health care and to increase the number of health indicators on which provinces report. While it commits to replacing the CHST with the CHT and to establishing a five-year Federal Health Reform Fund to facilitate expansion of health-care services, the premiers note that amounts of funding increases are unspecified.

25 January
Political Parties

Jack Layton wins the leadership of the federal New Democratic Party, obtaining 53.3 percent of first-ballot votes. His platform includes increased attention to urban issues (particularly pollution and homelessness) and to uniting social and peace movements across the country.

4–5 February
Health Care

The First Ministers' Conference on Health Care produces a new Accord on Health Care Renewal between the federal and provincial governments in which the federal government commits to increasing health-care funding by \$34.8 billion over five years. The first ministers further agree to create a National Health Council, an independent institution for the regulation of health-care provision, and to pursue numerous reforms in, among other areas, home care, record keeping, technology access, and drug coverage. Critics of the plan note the unclear mandate of the council and the fact that funding increases fall short of previous targets. The three territorial leaders, believing the funding increases to be insufficient, refuse to sign the agreement.

11 February
British Columbia

The Speech from the Throne highlights the government's commitment to the Aboriginal treaty process, promising additional financial resources and more equitable agreements. It further notes the importance of partnership and cooperation with the federal government, particularly with respect to extension of the Trans-Canada Highway and development of offshore oil and gas resources.

18 February
Finance

The 2003 federal budget is released by Finance Minister John Manley. The document projects a 20 percent increase in federal spending over three years and a reduction of the debt to \$507.7 billion by December 2003, and a balanced budget for 2003–5. Highlights include \$17.3 billion over three years and \$34.5 billion over five years for health care, an increase of the National Child Benefit to \$2,632 for the first child in 2003 and \$3,243 by 2007, \$3 billion for the environment over five years, and \$3 billion for infrastructure (including roads, sewers, and other municipal projects) over ten years. The budget also includes \$2 billion directed towards health care, education, policing, and water systems on First Nations reserves. Critics argue that the budget is a demonstration of the fiscal imbalance existent between levels of government and that infrastructure investment falls short of urban needs.

18 February
Alberta

The Speech from the Throne highlights a feeling of discontent with Alberta's relations with the federal

government. It describes how the province is often ignored on national issues. In the words of Premier Ralph Klein, the speech is designed to send a warning that Alberta must not be ignored on key national issues such as the national gun registry, the Kyoto Accord, and Senate reform. He insists, however, that the speech is not an expression of Albertan separatist sentiment.

25 February
Political Parties

The federal Liberal Party announces that 10–16 November is the date of its leadership convention. The party further sets out the rules for the campaign, including a \$75,000 entry fee, a 40 percent tax on campaign spending beyond \$400,000, and a \$4 million cap placed on spending during the campaign period (excluding polling and travel). Leadership candidate Sheila Copps alleges that party officials biased towards frontrunner Paul Martin could compromise the fairness of the race, calling most notably for the resignation of Bill Cunningham, president of the party's British Columbia wing.

25 February
Aboriginal Peoples

Federation of Saskatchewan Indian Nations (FSIN) Chief Perry Bellegarde presents an agreement-in-principle with the federal government and the province of Saskatchewan to the federation's winter assembly. The agreement gives band leaders the power to determine their membership and increases their jurisdiction over education, family and child services, and taxation while maintaining the federal and provincial governments' authority over law enforcement, the environment, fisheries, and gaming. Bellegarde presents the agreement-in-principle as a step towards an alternative to the *First Nations Governance Act*. Some Aboriginal chiefs argue that individual bands would be better off negotiating self-government agreements on their own.

Bellegarde goes on to decry federal FSIN funding cuts, arguing that bands will as a result be forced to turn increasingly to alternative funding sources such as gaming revenue.

26 February
Political Parties

Sheila Copps files her nomination papers for the Liberal Party leadership. She criticizes Paul Martin for his recent low profile, arguing that he should be publicly debating policy.

- 6 March
Political Parties Paul Martin files his nomination papers for the Liberal Party leadership. His nomination includes 3,700 signatures, well beyond the required 300, and includes 259 of the 301 Liberal riding association presidents as well as the president of every provincial Young Liberals' organization and Liberal women's commission.
- 7 March
Political Parties John Manley files his nomination papers for the Liberal leadership.
- 17 March
Canada- U.S. Relations Prime Minister Jean Chrétien announces in a statement to the House of Commons that Canada will not support the U.S.-led invasion of Iraq in the absence of United Nations authorization of the war. Critics fear the decision will strain relations with the United States.
- 19 March
Newfoundland and Labrador The Speech from the Throne, alongside initiatives in such areas as education and economic development, emphasizes a governmental commitment to electoral reform. Specific topics include fixed election dates, limits on financial campaign contributions, and a fixed cabinet size.
- 21 March
Canada- U.S. Relations Federal Energy Minister Herb Dhaliwal criticizes President Bush's decision to attack Iraq, accusing him of not acting in a statesmanlike manner. The comments draw criticism from American and Albertan politicians. Alberta Energy Minister Murray Smith calls for Dhaliwal's resignation. Dhaliwal later apologizes for his statements.
- 24 March
Alberta Ralph Klein makes a ministerial statement in the Alberta legislature pledging his government's support for the U.S.-led war against Iraq. Klein had already sent a letter to U.S. Ambassador Paul Celluci stating his support for the war.
- 30 March
Alberta Premier Ralph Klein, in an address to the Alberta Conservative Party's annual convention, affirms his position against Albertan separatism. The premier makes a clear distinction between the federal government's current policies and the principles and institutions of the Canadian federation, stating that his grievances are with the former. He presents the current policies of the federal government as the cause of separatist sentiment among members of his party and among the Alberta population.

- 1–2 April
Education
- Provincial education ministers develop an action plan for strengthening collaboration on educational issues at the 83rd meeting of the Council of Ministers of Education, Canada (CMEC.) They seek streamlined assessment standards, enhanced online learning and teacher training, and developments in the teaching of official languages. They criticize the federal creation of the Canadian Learning Institute, arguing that it duplicates work already done by the CMEC and encroaches on provincial jurisdiction.
- 2 April
Aboriginal Peoples
- NDP MP Pat Martin speaks for 26 hours at a meeting of the House of Commons' Aboriginal Affairs Committee in opposition to the *First Nations Governance Act*. He seeks to prevent committee members from voting on a motion to limit Commons debate on the bill. The motion passes easily, however, when a procedural loophole is used to end Martin's filibuster.
- 14 April
Quebec
- The Quebec Liberal Party, led by Jean Charest, wins 75 of the province's 125 seats and is elected Government of Quebec. The incumbent Parti Québécois wins 45 seats and the Action Démocratique du Québec wins 4. The result is interpreted as a reflection of declining support for Quebec sovereignty. Charest states his commitment to working with other governments in the Canadian federation. His campaign had downplayed national unity issues in favour of health care and fiscal management.
- 14 April
Municipalities
- Saskatchewan municipalities are promised \$20 million by the federal and provincial governments for infrastructure projects through the Canada Saskatchewan Infrastructure Program. Support for the announcement largely overshadows complaints about the uneven distribution of the funds among Saskatchewan municipalities.
- 16 April
Housing
- Federal and provincial ministers and municipal councilors responsible for housing meet in Winnipeg to discuss investments in affordable housing and renovation programs. David Collenette, federal minister of transport and minister responsible for the Canada Mortgage and Housing Corporation, emphasizes the \$704 million in new funding committed to housing projects in the 2003 federal budget. Issues discussed include housing in rural, remote, northern, and Aboriginal communities.

- 24 April
Aboriginal Peoples
- Indian Affairs Minister Robert Nault reaffirms his commitment to the *First Nations Governance Act*. He dismisses the significance of a protest planned for Parliament Hill, saying that protests are becoming so common that politicians are growing immune to them. Opponents of the Act, including the Canadian Bar Association, are enraged by Nault's comments and warn that the Act could be defeated in court for undermining constitutionally protected Aboriginal rights.
- 24 April
Fisheries
- Federal Fisheries Minister Robert Thibault announces a ban on cod fishing in much of the East Coast. The announcement is expected to have a significant negative impact on East Coast economies, particularly those of Newfoundland and Labrador.
- 24–26 April
Alberta
- Mark Norris, Alberta's economic development minister, attends a three-day conference in Washington, D.C., sponsored by the U.S. Council for National Policy. Norris discusses Alberta's role in George Bush's plan for a continental energy strategy and lobbies the U.S. administration to allow Albertan companies to bid on contracts for postwar operations in Iraq. Federal Foreign Affairs Minister Bill Graham is untroubled by Norris's attendance at the event, saying Canadian provinces are welcome to promote their interests independently in the United States.
- 28 April
British Columbia
- The Citizens' Assembly on Electoral Reform is formed to review the provincial electoral system. The assembly will be chaired by Jack Blaney, former president of Simon Fraser University, and will be composed of 158 randomly selected citizens, two from each of the province's ridings. All assembly recommendations will be put to referendum and implemented if the results satisfy two criteria: firstly, 60 percent popular support overall and, secondly, majority support in 60 percent of electoral districts.
- 28–29 April
Fisheries
- Newfoundland and Labrador Premier Roger Grimes travels to Ottawa seeking a reversal of the federal government's cod-fishing moratorium. Although his lobbying is unsuccessful, he remains committed to pushing for a reversal of the decision.

- 30 April
Quebec
- Quebec Premier Charest's cabinet is sworn in. Yves Séguin, who in 2002 published a report detailing the fiscal imbalance between the federal and provincial governments, is appointed finance minister. Benoit Pelletier, newly appointed minister of Canadian intergovernmental affairs and Native affairs, emphasizes his government's commitment to the Canadian federation and to improving the state of federal-provincial relations.
- 3 May
Political Parties
- Paul Martin, in the first of six Liberal Party leadership debates, pledges that he will not support the *First Nations Governance Act* in its current form, criticizes the federal government on its treatment of the Kyoto Accord, and promises measures to address western alienation. John Manley criticizes Martin for keeping secret the contributors to his campaign trust, to which Martin responds that he is following campaign rules to the letter. Sheila Copps emphasizes her "new vision" for Canada, highlighting education and immigration.
- 4 May
Environment
- Paul Martin criticizes the Chrétien government for ratifying the Kyoto protocols without a plan to meet the emission targets and without consultation with the premiers. Martin calls Kyoto an issue best dealt with through cooperation with provincial and territorial leaders.
- 8–14 May
Newfoundland and Labrador
- The Newfoundland legislature unanimously passes a bill calling for a renegotiation of the province's terms of constitutional union with Canada. Premier Roger Grimes is seeking increased provincial control of fisheries in the wake of the federal decision to halt cod fishing in much of eastern Canada. Federal Intergovernmental Affairs Minister Stéphane Dion responds to the bill by reiterating the need for the moratorium because of depleting cod stocks in the region. Prime Minister Chrétien speaks against constitutional renegotiation. Alberta Premier Ralph Klein expresses his support for Grimes. Manitoba Premier Gary Doer argues that other issues should take precedence over constitutional change.
- 15 May
Alberta
- A resolution is presented to the Alberta legislature outlining a proposal for federal Senate reform. The plan calls for an elected Senate, with six senators elected from each

province and two from each territory, with veto power over legislation affecting areas of provincial jurisdiction.

20 May
BSE

The World Reference Lab in England confirms that a cow from northern Alberta has tested positive for bovine spongiform encephalopathy (BSE). The United States, Australia, Japan, and South Korea ban Canadian beef imports. Although Alberta and federal government officials insist that the public risk is contained, by the end of week seventeen Canadian farms are quarantined for BSE: twelve in Alberta, three in British Columbia, and two in Saskatchewan.

27 May
Premiers

Quebec Premier Jean Charest releases a proposal for the creation of a Council of the Federation. The council will help provincial leaders develop common positions on issues of joint significance and evolve united strategies for dealing with the federal government. The plan will be formally presented to the other premiers at the Annual Premiers' Conference in July.

29 May
Municipalities

Paul Martin, in an address to delegates at the Creative Cities Conference, promises to transfer a portion of federal gasoline taxes to municipalities if he becomes prime minister. The announcement is welcomed by the Federation of Canadian Municipalities. Winnipeg Mayor Glen Murray calls Martin's plan a landmark for federal-municipal relations. John Manley has rejected the idea of fuel-tax sharing.

29 May
BSE

Helen Johns, Ontario's agriculture minister, calls for discussions with the United States to restrict the American beef ban to western Canadian beef. Her proposal, considered by Ontario, Quebec, and Prince Edward Island, would also involve an interprovincial ban of western Canadian beef. Alberta Premier Ralph Klein is outraged by the suggestion. Ontario Premier Ernie Eves later apologizes for his government's proposal.

30 May
Drug Legislation

Provincial government representatives from Alberta, British Columbia, Ontario, and Quebec affirm their opposition to the federal government's plans to reform marijuana laws. Concerns include the possibility of reduced trade because

of tighter border controls with the United States, the message being sent to children, and the implications for police operations against organized crime.

31 May
Political Parties

Peter MacKay is elected leader of the federal Progressive Conservative Party of Canada, winning 64 percent of fourth-ballot votes over Jim Prentice. MacKay's victory comes after making an agreement with third-place finisher David Orchard promising, among other policies, a review of NAFTA and a commitment not to pursue a merger with the Canadian Alliance. MacKay opposes gay marriage and supports decriminalization of small amounts of marijuana.

4 June
Manitoba

Gary Doer is re-elected premier of Manitoba. His New Democrats win 32 seats, the Progressive Conservatives win 24, and the Liberals win one. Doer had campaigned on his government's record, highlighting rate freezes on electricity and public automobile insurance.

5 June
BSE

Saskatchewan Premier Lorne Calvert is enraged that an exception to the two-week waiting period on employment insurance given to Ontario workers affected by SARS will not be extended to beef industry workers affected by mad cow disease. Federal Human Resources Minister Jane Stewart insists that, in its current form, employment insurance is well suited to helping beef industry workers.

9 June
New Brunswick

New Brunswick Premier Bernard Lord is re-elected. His Progressive Conservatives win exactly the 28 seats needed for a majority in the provincial legislature, down from the 46 the party had held at legislature dissolution. The Liberals take 26 seats, up from 7, and the New Democrats retain the one seat they previously held. The decline in Tory support is largely attributed to large increases in automobile insurance rates during Lord's previous term.

8–10 June
Western Canada

The 2003 Western Premiers' Conference is held in Kelowna, B.C. The premiers agree to pursue non-constitutional reforms to the Confederation. The leaders seek from the federal government more regular first ministers' meetings, full involvement in discussions relating to natural resources and trade, and consultation on Senate

appointments. They further call on the federal government to be more active in lobbying for the reopening of the United States border to Canadian beef exports.

14 June
Aboriginal Peoples

Roberta Jamieson, chief of Ontario's Six Nations, affirms her opposition to the *First Nations Governance Act*. She argues that the Act would give First Nations a level of status in intergovernmental relations that would be lower than that enjoyed by cities.

17 June
Alberta

Alberta Justice Minister Dave Hancock vows to fight a federal bill in favour of same-sex marriages. Hancock, calling marriage a clear provincial jurisdiction, affirms a willingness to challenge the legislation as far as the Supreme Court if the federal government fails to recognize the province's position. Premier Ralph Klein has already stated his intention to invoke the notwithstanding clause to protect the traditional definition of marriage. Cauchon's bill is a response to a 10 June 2003 Ontario Court of Appeal ruling requiring recognition of same-sex marriages as a Charter right. Ontario and British Columbia have already legalized same-sex marriage in response to the ruling.

17 June
Aboriginal Peoples

Jean Charest, Quebec premier, and Ghislain Picard, regional chief of the Assembly of First Nations of Quebec and Labrador, undertake the creation of a Joint Council of Elected Representatives. The council will be composed of an equal number of Aboriginal and non-Aboriginal elected officials and will seek to facilitate exchanges on issues concerning Aboriginals living both on and off reserves. The council will begin its work in the fall.

17 June
BSE

A federal-provincial aid package is announced to assist farmers who owned cattle on 20 May when the U.S. border was closed to imports. The package, worth \$320 million, will subsidize beef producers by offsetting a portion of the losses resulting from price decreases. It includes a \$50 million fund from which farmers can receive compensation if they agree to empty their freezers of beef processed before the BSE finding.

18 June
Atlantic Canada

The Council of Atlantic Premiers meets in Charlottetown. The premiers seek increased communication and

cooperation with the federal government on cross-jurisdictional issues through annual first ministers' meetings. They further agree to create a common regulatory framework to control automobile insurance rates, and they call on the federal government to undertake a comprehensive review of the equalization program.

19 June
Health Care

The federal government offers Ontario an assistance plan worth \$250 million to cover economic losses associated with Severe Acute Respiratory Syndrome (SARS). The plan falls short of the Ontario government's request for 90 percent of the \$1.13 billion in additional health-care costs borne by the province. Ontario Municipal Affairs Minister David Young calls the amount "outrageous" and rejects the offer in protest.

25 June
Economic Growth

In a speech to the Economic Club of Toronto, federal Finance Minister John Manley forecasts 2.2 percent growth for 2004, one percentage point lower than had been foreseen in his February 2003 budget. Manley cites SARS, BSE, and the rising value of Canadian currency against the American dollar as the reasons for lower growth. Despite the slowdown, however, Manley insists his government will maintain a balanced budget and will not have to cut back on program spending. While he acknowledges the benefits Canada will reap from the American decision to cut taxes and run deficits to provide economic stimulus, he does not believe Canada should follow suit.

25–26 June
Finance

A provincial-territorial meeting of finance ministers is held in Halifax, Nova Scotia. The ministers discuss issues relating to fiscal imbalance, equalization, health care, census revisions, and disaster relief. They compile a list of recommendations to be presented at the Annual Premiers' Conference in July.

28 June
Premiers

Quebec Premier Jean Charest travels to Manitoba to meet with Premier Gary Doer. They discuss a range of issues, including health-care funding, federal-provincial relations, and plans for a Council of the Federation. Charest hopes to speak with as many premiers as possible before the Annual Premiers' Conference in July; he has already met with Newfoundland's Roger Grimes and Prince Edward Island's Pat Binns when the two visited Quebec.

23–28 June
Alberta

Alberta Premier Ralph Klein undertakes a mission to Washington and New York to promote the Canadian cattle industry and energy sector. He reports that U.S. Vice-President Dick Cheney, though committed to lifting the American ban on Canadian beef as soon as possible, cannot provide a precise date for when Canadian imports would be allowed. Klein suggests the possibility of co-hosting an energy summit with Cheney in the near future to discuss ways to reduce the cost of exploiting oil sands, an idea later endorsed by federal cabinet minister Anne McLellan. In reference to Canada's decision not to support the American-led invasion of Iraq, Klein argues that Canada can maintain an independent foreign policy while pursuing a positive relationship with the United States.

30 June
*Newfoundland and
Labrador*

The provincial government's Royal Commission on Renewing and Strengthening Our Place in Canada releases a 214-page report assessing the progress of Newfoundland and Labrador since the union with Canada in 1949 and the current state of the province's role in the federation. While the report rejects separation, the commission stresses that the status quo of the province's place in Canada, marked by fiscal dependency, high debt, and high levels of emigration and unemployment, is unacceptable. The report calls for a new collaborative relationship with the federal government and the other provinces and territories. It seeks institutional change, including Senate reform, more organized and regularly scheduled first ministers' meetings, and a stronger federal presence in the province. Specific proposals are made for more cooperative arrangements to deal with fisheries issues, a more equitable sharing of oil revenues under the Atlantic Accord, and federal partnership in hydro development. The report also addresses issues directly applicable to the provincial government, such as the need to eliminate the budget deficit and to initiate a broad public dialogue on the sustainability of rural communities.

2 July
Sport, Tourism

Vancouver wins the right to host the 2010 Winter Olympics over Pyeongchang, South Korea, and Salzburg, Austria. The bid is strongly supported by both the federal and the provincial governments. The total cost of the games is estimated at \$2 billion, not including planned highway

improvements between Vancouver and Whistler. Former Quebec Premier Bernard Landry expresses disappointment with the decision, claiming that Quebec City might have been the one receiving these games if Quebec had opted for sovereignty.

9 July
Nunavut

A temporary injunction is granted to exempt Inuit from having to register their firearms under the federal *Firearms Act* pending the outcome of a lawsuit filed by Nunavut Tunngavik Inc. The challenge argues that, under the terms of the Nunavut Land Claims Agreement, Inuit are not required to obtain licences or pay fees to hunt and fish. The suit is expected to go to court next year.

9–10 July
Agriculture

The Annual Conference of Federal-Provincial-Territorial Ministers and Deputy Ministers of Agriculture takes place in Winnipeg, Manitoba. Ministers discussed the state of Canadian agriculture since the detection of BSE in May. They agreed that ensuring reinstatement of access to American markets should be their first priority. They further reviewed safety options to prevent future risk.

10 July
Aboriginal Peoples

David Nahwegahbow, a former aide to Jean Chrétien who helped create the 1993 Red Book's policies on Aboriginal issues, releases a letter criticizing Chrétien and Robert Nault for ignoring promises and misleading the public and Aboriginal groups. Nahwegahbow claims that Chrétien's record fails to live up to his statements on Aboriginal issues and that Nault has been misleading the public to promote the *First Nations Governance Act*.

9–11 July
Premiers

The forty-fourth Annual Premiers' Conference takes place in Charlottetown, Prince Edward Island. Among the accomplishments of the conference is a unanimous agreement among the premiers to create the Council of the Federation. The premiers call for better communication and coordination by the federal government on intergovernmental decision making, most notably with respect to public health emergencies, relations with the United States, and equalization reform. They intend to hold the federal government to its promise of a \$2 billion increase in health transfers and call for a further \$3 billion to bring federal funding to 25 percent of provincial and

territorial health and social expenditures. Division exists, however, with respect to the proposed National Health Council. Jean Charest, Ernie Eves, and Ralph Klein express concern about the possibility of withholding subsidies if health-care delivery conditions are not met. The premiers agree to support the principle of the council's creation while waiting for the new prime minister to discuss mandate details.

16 July

Aboriginal Peoples

Phil Fontaine is elected grand chief of the assembly of First Nations, defeating incumbent Matthew Coon Come and Ontario Six Nations Chief Roberta Jamieson. After defeating Coon Come on a first ballot, Fontaine obtains 61 percent of second-ballot votes over Jamieson. Fontaine had previously served as grand chief from 1997 to 2000. Fontaine seeks equal First Nations participation in meetings between provincial and territorial leaders and will work for significant amendments to the *First Nations Governance Act*. His platform emphasizes working with governments rather than alienating them through rhetoric.

22 July

Political Parties

John Manley withdraws his bid for the Liberal Party leadership, pointing to a campaign poll showing 75 percent of delegates supporting Paul Martin and expressing no propensity to change their minds. Sheila Copps reaffirms her commitment to staying in the race despite polls indicating support for her as low as 5 percent.

28 July

Aboriginal Peoples

The Government of British Columbia and the Tsawwassen Nation release an agreement-in-principle granting the Tsawwassen \$10 million and ownership of a 700 ha area in British Columbia's lower mainland. The agreement further provides the band with commercial fishing rights and \$1 million allocated to increase fishing capacity. The agreement-in-principle must now be approved by band members.

5 August

Nova Scotia

The Nova Scotia Conservative government of John Hamm is reduced to a minority, winning only 25 of 52 legislature seats. The New Democratic Party takes 15 seats and the Liberal Party wins 12. Hamm had campaigned on his government's record, notably the province's first balanced budget in four decades and a 10 percent income tax cut.

Analysts attribute Hamm's fall to increases in automobile insurance premiums and the cost of living during his term in office.

15 August
Ontario

A joint task force is struck to investigate the cause of the 14 August power outage in Ontario and the eastern United States. The task force, to be co-chaired by Canadian Natural Resources Minister Herb Dhaliwal and U.S. Secretary of Energy Spencer Abraham, will bring together government officials and energy providers from both countries. Ontario Premier Ernie Eves later claims the province should have been given an active role on the task force. While Dhaliwal welcomes the province's participation and input, he rules out a top-level role.

23 August
Aboriginal Peoples

Prime Minister Jean Chrétien announces that the *First Nations Governance Act* will not be a priority of his government when Parliament resumes. His statement is taken as an indication that the Act will not be ratified before Chrétien's retirement.

29 August
British Columbia

Selection of voters to sit on the Citizens' Assembly on Electoral Reform begins. Jack Blaney, assembly chairman, announces that preliminary letters will be sent to 200 randomly selected people in each provincial riding, 158 of whom – a man and a woman from each riding – will join Blaney and two electoral reform experts to develop recommendations for reform of the electoral system in the province. The assembly will hold its first meeting in January 2004.

1 September
BSE

The U.S. government partially lifts its ban on Canadian beef. Exports of boneless cuts of animals are allowed on condition that animals of different age groups are slaughtered in different plants. No full lifting of the ban is planned in the near future.

3 September
Western Canada

The Canada West Foundation releases "An Action Plan to Reduce Western Discontent." The report outlines ten recommendations for improving the relationship between the federal government and the western provinces, including reduced party discipline in the Commons, Senate appointments based on provincial and territorial recommendation, and non-constitutional Senate reform.

- 4 September
Health Care
- The Annual Conference of Federal, Provincial, and Territorial Ministers of Health takes place in Halifax, Nova Scotia. The ministers commit to expediting discussions regarding the mandate of the National Health Council and also announce progress on the implementation of a number of initiatives from the February 2003 Accord on Health Care Renewal.
- 7–9 September
Eastern Canada
- The 28th Annual Conference of New England Governors and Eastern Canadian Premiers takes place in Groton, Connecticut. Issues discussed include cross-border security, air pollution control, biotechnology, information technology, and the August power blackout.
- 20 September
Aboriginal Peoples
- Assembly of First Nations (AFN) Grand Chief Phil Fontaine announces a full review of the organization's decision-making processes. The AFN's organizational structure had been heavily criticized, most notably by Indian Affairs Minister Robert Nault. A similar review under Matthew Coon Come, Fontaine's predecessor, had failed when reform proposals were rejected by governing chiefs. Fontaine stresses his commitment to improving social conditions among First Nations through job training operations and through land claims that increase access to natural resources.
- 23 September
Political Parties
- Over 90 percent of elected delegates to November's Liberal leadership convention support Paul Martin, unofficially ensuring his victory over Sheila Copps. Copps vows to stay in the race until the end.
- 29 September
Prince Edward Island
- The Prince Edward Island Conservative Party, led by Pat Binns, wins its third term as the province's majority government with 23 seats. The Liberal Party comes in second with 4 seats and the New Democratic Party takes one. The election proceeds despite the impact of Hurricane Juan. Binns's victory is attributed largely to his government's past success and his personal popularity. His plans include more doctors and nurses, lower automobile insurance rates, investments in health care, and encouragement of economic growth.
- 2 October
Ontario
- The Liberal Party, led by Dalton McGuinty, wins 72 of 103 seats and is elected Government of Ontario. The

incumbent Conservatives are reduced to 24 seats and the New Democratic Party, winning only 7 seats, loses official party status. McGuinty's platform includes rolling back corporate tax cuts, freezes to postsecondary tuition, and increasing the minimum wage. Analysts and media predict an improved relationship between the province and the federal government as a result of McGuinty's victory.

3 October

Aboriginal Peoples

The Maa-nulth agreement is signed by the British Columbia government, the federal government, and six Vancouver Island bands. The agreement will give the bands \$62.5 million and 20,900 ha of land. This is the first multination agreement-in-principle reached under the treaty negotiation process; a final agreement must now be negotiated.

8 October

Western Canada

Premiers Ralph Klein of Alberta and Gordon Campbell of British Columbia hold a joint meeting of their cabinets. The agenda focuses on economic issues, health care, and education. The premiers announce plans to jointly lead a trade mission to Houston, Texas, and Silicon Valley, California, the following week. Klein insists that the premiers do not seek to provoke the federal government.

10 October

Aboriginal Peoples

Indian Affairs Minister Robert Nault acknowledges that the *First Nations Governance Act* will not pass before Jean Chrétien's retirement as prime minister. Chrétien's expected successor, Paul Martin, has publicly stated his intention not to pass the Act in its current form.

10 October

Finance

Federal Finance Minister John Manley meets with his provincial counterparts to discuss health-care funding and changes to the equalization program. Barring an unexpected shortfall in the federal government's budget surplus, Manley reiterates his earlier commitment to providing a \$2 billion increase in transfers for health care. The provincial ministers demand a new equalization arrangement using a ten-province payment calculation standard that would make amounts more predictable. Manley agrees to have further talks on equalization reform in January 2004.

17 October

Political Parties

Canadian Alliance leader Stephen Harper and Progressive Conservative leader Peter MacKay announce plans to

merge their two parties. The deal seeks to end the vote splitting between the two conservative parties to which the leaders largely attribute Liberal electoral dominance. The agreement must now be approved by the memberships of both parties. The deal is seen by a number of prominent Progressive Conservatives, including former party leader Joe Clark and former leadership candidate David Orchard, as a selling-out of the party to the Alliance.

17 October
Alberta

Alberta Premier Ralph Klein meets with Liberal leadership front-runner Paul Martin in Calgary. Martin expresses his support for more regular first ministers' meetings. Klein does not, however, obtain strong commitments from Martin on a number of other western Canadian issues, such as the Kyoto Accord, Senate appointments, and the Canadian Wheat Board.

20 October
Premiers

Premiers Jean Charest and Dalton McGuinty meet to discuss a range of issues, including electricity supply, economic and labour issues, and intergovernmental relations. The leaders commit to a cooperative working relationship. McGuinty plans to pursue a similar relationship with Manitoba.

21 October
*Newfoundland and
Labrador*

The Newfoundland Liberal Party, which had held power for nearly fifteen years, is defeated by the Conservative Party. The Conservatives, led by Danny Williams, take 34 seats; the Liberals win 12, and the New Democratic Party wins 2. The defeat of incumbent Premier Roger Grimes, who had inherited the leadership two years earlier from Brian Tobin, had been widely expected. The campaign was marked by little policy debate, with Williams promoting his business experience and dedication to promoting the province's economic development. He also seeks to strengthen the province's relations with the federal government.

24 October
Ontario

On its first day in office the Liberal government of Dalton McGuinty creates the Democratic Renewal Secretariat, headed by Attorney General Michael Bryant, to modernize the province's democratic structure. The secretariat hopes to engage voters on the state of Ontario's electoral system through public consultation and referendum.

Proposals that the secretariat will consider include fixed election dates, Internet voting, party spending limits, and banning partisan government advertising.

30 October
Aboriginal Peoples

The first meeting of the Joint Council of Elected Representatives is held between Quebec First Nations leaders and cabinet ministers. The joint council, a project undertaken by Quebec Premier Jean Charest and the regional chief of the Assembly of First Nations of Quebec and Labrador, Ghislain Picard, is a permanent forum designed to promote interaction between the Quebec government and Aboriginal leaders. Issues to be discussed by the council include autonomy for First Nations, territory, resources, and economic and social development.

1 November
Tourism

At the close of a two-day meeting in Quebec City, federal, provincial, and territorial ministers responsible for tourism sign the Quebec Declaration, a commitment to work together to promote tourism through governments and the private sector. They further create the Canadian Council of Ministers of Tourism, an organization for the strengthening of links between the ministers. The ministers seek to achieve a \$75 billion increase in Canadian tourism by 2010.

3 November
Finance

Federal Finance Minister John Manley delivers his 2003 Economic and Fiscal Update speech to the House of Commons Standing Committee on Finance. He projects that the federal government will maintain a balanced budget for the year despite economic shocks such as SARS, BSE, the Ontario power blackout, and a rising Canadian dollar but that the size of the budget surplus will be reduced. He foresees GDP growth of 1.9 percent in 2003 and 3 percent for 2004, smaller than had been foreseen at the time of the 2003 budget. Manley warns, however, that continued appreciation of the dollar and/or a slowing in American economic recovery could further reduce Canadian economic growth.

5 November
Saskatchewan

Lorne Calvert is elected premier of Saskatchewan for a fourth consecutive term. His New Democratic Party wins 30 seats, two more than the Saskatchewan Party. Calvert had been criticized for rising provincial debt, lagging

growth, and high emigration. He wins on a platform that includes continued ownership of Crown corporations, “sustainable” income and small business tax cuts, and tax incentives to discourage emigration among recent postsecondary graduates.

6 November
Nova Scotia

The Supreme Court of Canada, in a 5-4 ruling, upholds a lower court decision obliging the Nova Scotia government to report its progress on the construction of French-language schools. The decision places the court in a supervisory role over the government, a judicial power which, while often seen in the United States, is unprecedented in Canada. Dissenting judges and officials from federal and provincial governments warn that the decision may set a precedent for the extension of judicial power into other areas of government.

6 November
Aboriginal Peoples

Prime Minister Chrétien spent his last day in Parliament as leader of the federal Liberal Party. A number of bills, including the *First Nations Governance Act*, do not reach the voting stage. The decision to reintroduce any leftover bills will be left to Chrétien’s successor.

14 November
Political Parties

Paul Martin is officially elected leader of the Liberal Party of Canada at the party’s leadership convention in Toronto. Martin, supported by 3,242 delegates, overwhelmingly defeats Sheila Copps, who is supported by only 211. Martin’s plans include improving the federal government’s relationship with the West, reducing the overall size of cabinet, increasing the powers of MPs to influence government policy, and consideration of non-constitutional Senate reform.

16 November
First Ministers

Paul Martin meets with provincial and territorial leaders in Regina. He commits to a \$2 billion increase to health-care funding if budget surpluses allow, and to scheduled annual first ministers’ meetings with agendas set jointly by federal and provincial leaders. The premiers are generally satisfied with Martin’s agenda and approach.

16–17 November
Health Care

Paul Martin reports that he received unanimous support for the creation of the National Health Council from the premiers and territorial leaders at their meeting in Regina.

Premier Klein denies any agreement, emphasizing that he will only support the council when mandate and funding issues are addressed.

21 November
BSE

Federal Agriculture Minister Lyle Vanclief announces the creation of a federal subsidy program to encourage farmers to expedite the slaughter of older cattle. The plan seeks to offset lost revenue due to the continued American ban on all beef imports from cattle older than 30 months. Farmers under the plan receive a subsidy for every cow sent to slaughter before the end of 2004. The Alberta government decries the proposal, arguing it will do more harm than good by driving down prices though an artificial increase in beef supply. The province plans to create its own alternative assistance plan.

24–25 November
Environment

The Canadian Council of Ministers of the Environment meets to discuss national water pollution standards, waste from electronic products, and climate change. The ministers reaffirm their commitment to the Canada-U.S. Air Quality Agreement.

1 December
Environment

A coalition of Aboriginal, environmental, and business concerns signs the Boreal Forest Conservation Framework. The agreement proposes rules for the preservation and development of the 529,000,000 ha forest. Various areas of the forest will be designated for conservation, development, and lumber production. The federal government expresses preliminary support for the principles of the agreement but will review the plan in full before extending a full endorsement.

5 December
Premiers

The Council of the Federation is created by the thirteen premiers to strengthen provincial and territorial ties and to enhance relations with the federal government. Stated priorities for the council include health-care reform, enhanced trade, labour mobility, and streamlined regulation.

10 December
Northwest Territories

Joe Handley is acclaimed premier of the Northwest Territories by the members of the legislature. Roger Allen and Floyd Roland had earlier decided not to oppose Handley's bid for premier. Handley, who also won his seat in the legislature by acclamation, becomes premier without

receiving a single formal vote; critics argue this ease of passage reflects a need for territorial electoral reform.

12 December
Political Leaders

Paul Martin is sworn in as Canada's twenty-first prime minister.

Of the 38 portfolios in Martin's cabinet, 22 are assigned to new ministers. Appointments include Anne McLellan to deputy prime minister and minister of public safety and emergency preparedness, Ralph Goodale to finance minister, Pierre Pettigrew to minister of health, intergovernmental affairs, and official languages, Irwin Cotler to minister of justice and attorney general, Stephan Owen to minister of public works, and John Efford to natural resources. Twenty-two former Chrétien ministers are not awarded cabinet spots, including Sheila Copps, Robert Nault, and Stéphane Dion.

Martin also announces a restructuring of government operations. He creates the Department of Public Safety and Emergency Preparedness to improve government responsiveness to emergencies such as SARS and the Ontario blackout, and he creates the Canada Public Health Agency to study health risks and handle emergency disease outbreaks. He splits Human Resources Development Canada into Human Development, handling income security for seniors, families, and the disabled, and Human Resources and Skills Development, treating labour and human capital issues.

Martin declares a commitment to taking measures to restore trust in the federal government. He promises more free votes and MP influence over policy as well as the reintroduction to Parliament of legislation to create an MP ethics commissioner.

17 December
Quebec

The Quebec Court of Appeal rules that the federal *Personal Information Protection and Electronic Documents Act*, designed to regulate the collection of customer and employee personal information by businesses, violates Quebec's authority on civil rights issues. The Quebec government argues that the Act allows the federal government to assess the validity of provincial privacy law. The decision opens the door for Quebec to present a constitutional challenge of the legislation to the Supreme Court of Canada.

- 20 December
Aboriginal Peoples
- Incoming Indian Affairs Minister Andy Mitchell announces a cross-country tour to meet with Aboriginal leaders beginning in January. Mitchell's agenda includes improving relationships between his government and Aboriginal leaders and reducing the gap in living conditions between Aboriginal and non-Aboriginal people. He states that the *First Nations Governance Act*, will be substantially amended if reintroduced at all.
- 27 December
BSE
- The United States Department of Agriculture releases information indicating that a Washington State cow infected with BSE was likely imported from Alberta. Industry officials fear that such a connection will compromise efforts to have American beef markets reopened to Canadian exports.

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Chronology of Events January 2001 – December 2001

Brett Smith

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3 January
Alberta

The Government of Alberta reduces its flat rate tax from 10.5 percent to 10 percent. Last spring the province introduced the flat tax rate to separate from the federal tax system, but it made the current reduction coincide with the recent federal tax cuts put into effect on 1 January, since earners in the \$35,000 – \$65,000 bracket would have been better off in the federal tax system. This move is also made to ensure that Alberta has the lowest tax regime in all of Canada.

8 January
*Health Care/
Organized Labour*

Thirteen hundred physicians across New Brunswick reluctantly go on strike to protest poor medical fees and the refusal of the provincial government to hire more doctors. Blame is also placed on federal transfers to the province. The strike is ended three days later without resolution, and there is warning of an exodus of physicians from New Brunswick because of their inability to negotiate with the Progressive Conservative government.

9 January
Health Care

Federal Health Minister Allan Rock confirms the verbal warnings made by federal officials to the health ministers of New Brunswick, Prince Edward Island, Quebec, and Manitoba to begin covering the full cost of abortions performed outside hospitals. Mr Rock also faces pressure from

multiple sources regarding the proliferation of private magnetic resonance imaging (MRI) clinics across Canada.

11 January
Political Leaders

Premier Lucien Bouchard retires from politics. Although disagreeing with his goal of sovereignty for Quebec, several current, retiring, or retired premiers praise Bouchard's intellect, civility, political acumen, grasp of policy, and personal integrity. Prime Minister Jean Chrétien states, "While our visions of the future of Quebec in Canada were fundamentally irreconcilable, I want to salute Lucien Bouchard as an able parliamentarian who has fought for his beliefs with passion and determination."

15 January
Supreme Court of Canada

Justice Michel Bastarache states that the Supreme Court of Canada is not the best forum for resolving disputes over Aboriginal land claims and other "ill-defined" native rights, arguing that such complex conflicts are better settled by negotiation instead of litigation. Two days earlier he made statements referring to the tendency of the Supreme Court of Canada to rule in favour of the rights of the accused over the rights of society in Charter cases.

17 January
Constitution

Quebec Liberal Party leader Jean Charest leaves the door open to an eventual referendum on Meech Lake – style constitutional improvements that would be presented within the first mandate of a Liberal government. The ultimate aim is to include Quebec as a signatory to a Canadian constitution modified to suit the province's interests.

21 January
Health Care

Nurses and doctors across Canada warn of widespread strikes unless governments raise wages and recruit more professionals to enhance the workforce. This threat is issued as the federal and provincial governments are poised to inject billions of dollars more into health care.

22 January
Aboriginal Peoples

Indian Affairs Minister Robert Nault makes proposals to strengthen the democratic process and government efficiency at the band-council level, which he hopes to introduce as legislation next fall. These include the creation of professional services at the band-government level, having Elections Canada oversee band-council elections instead of Indian Affairs, and lengthening the terms of band-council government from the current two years.

- 26 January
Parliament Prime Minister Jean Chrétien appoints Liberal Senator Dan Hays from Alberta as the new Speaker of the Senate. He replaces Manitoba Senator Gildas Molgat.
- 26 January
Party Politics Supporters of Finance Minister Paul Martin win a critical power struggle to force an early vote on Jean Chrétien's leadership if he does not announce his intention to resign by the fall of next year. The Liberal Party's constitution requires that the next convention, which would include an automatic leadership vote, be held in March 2002, but the management committee of the party's national executive agreed to an extension out of respect for Mr Chrétien's winning a third majority government. This means that the next party convention, and therefore the next leadership review, will likely be held in the fall of 2002.
- 29 January
Parliament Liberal Member of Parliament Peter Milliken of Kingston, Ontario, is elected the new Speaker of the House, winning by secret balloting by fellow members. As Speaker, he is expected to function in a non-partisan manner, overseeing debates and the House of Commons' approximately \$250 million budget.
- 30 January
Aboriginal Peoples The departments of Indian and Northern Affairs and Fisheries and Oceans earmark \$500 million to help Aboriginal peoples in the fishery and to expand First Nation reserves throughout Atlantic Canada. The fund is to be spread over the next three years.
- 30 January
Speech from the Throne The new session of the 37th Parliament officially gets underway with the Chrétien government spelling out its agenda for the nation. The throne speech promises a world-leading economy and a more inclusive society to improve the lives of disadvantaged Canadians in the twenty-first century, with particular reference to children and the problems facing Aboriginal peoples. The Liberal government also announces its goal to negotiate a comprehensive free trade agreement that will include the three Americas by 2004 to ensure Canada's economic growth.
- 30 January
Parliament The leader of the Canadian Alliance, Stockwell Day, uses a major speech in the House of Commons to distance himself from western separatists while appealing to Jean

Chrétien to address what he calls the growing alienation of Canadians from coast to coast.

8 February
Municipalities

Ontario Premier Mike Harris confirms that future amalgamations will be at the request of municipalities – they will not be imposed by legislative decisions: “If other municipalities come to us and say, ‘Will you help us save money, operate services more efficiently, be able to deliver more for less?’ then it would be our responsibility and obligation to assist them any way we can.”

8 February
Ontario

Ontario Premier Mike Harris shuffles his cabinet, signaling what many call a pronounced shift to the right for the Progressive Conservative Government of Ontario. Among the key changes is the replacement of retired Finance Minister Ernie Eves by Jim Flaherty, who will also take on the role of deputy premier, and Canadian Alliance supporter Tony Clement as the new minister of health. Other changes are Chris Hodgson as the minister of municipal affairs, Bob Runciman as minister of economic development and trade, and Elizabeth Witmer as the minister of environment.

8 February
Saskatchewan

Roy Romanow is officially replaced when Lorne Calvert is sworn in as the thirteenth premier of Saskatchewan, along with his New Democrat-Liberal coalition cabinet. Three new members are added to the cabinet while fourteen remain from the former cabinet. Mr Calvert was elected to succeed Mr Romanow as the New Democratic Party leader on 27 January this year, garnering 57.6 percent of the party vote in the fourth round of ballots.

9 February
Aboriginal Rights

Minister of Indian Affairs Robert Nault and Minister of Fisheries and Oceans Herb Dhaliwal officially announce a two-track process to address the Supreme Court of Canada’s decision to uphold the 1760 treaty rights allowing Mi’kmaq and Maliseet bands to earn a moderate livelihood through hunting, fishing, and gathering. One track, under Indian Affairs, is a long-term process aimed at reaching agreements on treaty issues and economic development. The other, under Fisheries and Oceans, is aimed at expanding Aboriginal access to the East Coast

fishery through agreements with bands that can last up to three years.

9 February
*Ministerial
Conferences*

Provincial and territorial ministers of agriculture meet in Regina to discuss the critical situation in the agricultural sector. The ministers maintain that integrated risk management in agriculture will require a joint response, meaning a substantial contribution from the federal government. They also agree that the aid must be available without delay and must be flexible enough to take into account the strategy developed by the ministers to meet the acute needs of farmers.

13 February
*Newfoundland and
Labrador*

Former Minister of Health Roger Grimes is sworn in as the new premier of Newfoundland. On the third of this month, at the Liberal Party convention, he won the leadership on the second ballot with a fourteen-vote margin, defeating former Fisheries Minister John Efford.

15 February
Aboriginal Peoples

In an effort to increase fiscal accountability of native leaders across Canada, Minister of Indian Affairs Robert Nault states that he will delay cash transfers to twenty-two First Nations this year until they complete last year's audits.

19 February
Political Leaders

Former premier of Saskatchewan Roy Romanow retires from politics as he resigns his seat in the provincial legislature. Mr Romanow was born in Saskatoon on 12 August 1939 and obtained law and arts degrees from the University of Saskatchewan. He was first elected to the Saskatchewan legislature in 1967 in the Saskatoon Riverdale riding as a New Democrat, and he served as deputy premier as well as Saskatchewan's attorney general from 1971 to 1982, becoming the minister of intergovernmental affairs in 1979. He was elected leader of the province's NDP in 1987 and on 21 October 1991 became premier of Saskatchewan.

23 February
Aboriginal Rights

In the case of *R. v. Powley*, the Ontario Court of Appeal throws out a provincial bid to charge two Métis men with hunting without a licence, stating that they share the same hunting rights granted to Aboriginal people by the Canadian constitution. This is believed to be a landmark decision with implications for Métis across Canada.

25 February
Municipalities

Mayors and councillors from twenty of Canada's largest cities agree that the upper levels of the federal and provincial governments need either to share tax revenues or to provide more money for infrastructure programs. Discussion continues to the following day at the Federation of Canadian Municipalities mayors' caucus, where most attention is placed on the inability of cities to unilaterally keep up with demands on municipal infrastructure and social programs through property tax collection.

26 February
Natural Resources

At the annual dinner of the Canadian Association of Petroleum Landmen, Nova Scotia Premier John Hamm asks for the same rules on energy royalties with the federal government that Alberta experiences: "We want simply to have our resource treated exactly the same way as the resource was treated here [in Alberta] during a comparable stage of development." For every dollar of royalties from Nova Scotia's offshore oil and gas development, the province keeps \$0.19, while \$0.81 is kept by the federal government as the result of jurisdictional arrangements.

26 February
Equalization

Federal Finance Minister Paul Martin, at a meeting with three of four of his Atlantic provincial counterparts in Halifax, states that amendments will not be made to the equalization formula. The provincial ministers argued that it is a matter of fairness for Ottawa to lift restrictions on the payments to East Coast governments, but Mr Martin states that nothing will change until the end of the current fiscal arrangement in 2004.

27 February
Nunavut

In presenting his third budget, Nunavut Finance Minister Kelvin Ng reveals that the territorial government is in financial crisis and is expected to have a \$12 million deficit in the next fiscal year. Mr Ng warns that the crisis will worsen unless his federal counterpart intervenes to provide the territory with more transfers.

27 February
Health Care

A for-profit cancer treatment clinic opens in Toronto. According to the Canadian Union of Public Employees (CUPE), this is a violation of the guidelines set out by the *Canada Health Act* and is the first step towards a two-tier health-care system. CUPE officials warn that this clinic, as well as other small-scale for-profit clinics across

Canada, will open the door to American and European investments in large-scale private health-care institutions within Canada's borders.

1 March
Agriculture

Among a number of announcements made by the federal government in preparation for its fiscal year-end of 31 March is the statement that Canadian farmers will receive \$500 million in emergency aid this spring. After the expected provincial contributions, the total package will be worth \$830 million, but farm leaders and provincial agriculture ministers say this is not enough to compete with U.S. and European subsidies. They originally lobbied for \$900 million.

1 March
Budget

The federal government expects a \$16.5 billion budget surplus for the fiscal year ending on 31 March. Last October, Finance Minister Paul Martin pledged at least \$10 billion towards reducing the \$457 billion federal debt. Earlier projections placed the budget surplus at \$12.2 billion, and any unspent surplus at the end of the fiscal year is automatically used to reduce the federal debt.

2 March
*Health Care/
Organized Labour*

Around 6,000 hospital workers across New Brunswick go on strike after talks break off between the provincial government and the Canadian Union of Public Employees. A 12.5 percent pay raise over four years was rejected by CUPE, initiating the strike. Workers are forced back into the hospitals after the passage of back-to-work legislation three days after the strike begins, and one day later hospital workers vote for a tentative agreement in favour of the province's previously proposed pay increase.

6 March
*Health Care/
Organized Labour*

Quebec's Coalition of Physicians for Social Justice states that the provincial government must inject \$1 billion immediately to stabilize the ailing Quebec health-care system. Overcrowding and waiting lists for surgery have reached a critical situation in Quebec; these also are issues facing hospitals and governments across Canada.

7 March
Aboriginal Peoples

At the First Nations Summit in Vancouver, Minister of Indian Affairs Robert Nault states that the federal government's *First Nations Governance Act* will provide the tools to achieve effective, accountable, and responsive local

government for Aboriginal communities. Mr Nault speculates that the legislation, which could be tabled in the fall, may be an interim step towards self-government.

8 March
Quebec

Former Finance Minister Bernard Landry is sworn in as Quebec's twenty-eighth premier (fifth Parti Québécois leader) and successor to Lucien Bouchard. Mr Landry announces that eliminating poverty and promoting sovereignty will be the two main objectives of his cabinet. Many believe that Mr Landry will be a stronger force in the goal of Quebec sovereignty when compared to his predecessor. Alberta Premier Ralph Klein states that he is a threat to national unity, to which Mr Landry replies, "Damn right."

10 March
Aboriginal Rights

First Nations bands in British Columbia sign a treaty with the provincial and federal governments that gives these groups self-rule, a large cash payment, and shared control with non-Aboriginals of old-growth forests and other natural resources. Twelve separate bands within the Tribal Council are given autonomous rule over almost 760 square kilometres of old-growth forests, beach fronts, and mountainsides on Vancouver Island and nearby Meares Island.

12 March
Alberta

The Progressive Conservatives are re-elected as the governing party of Alberta under Premier Ralph Klein, maintaining their strong hold on provincial governance. Of the 83 legislative seats, the Conservatives win 74, with a popular vote of 61.8 percent. Mr Klein assures Albertans that the goals of his government are "of having a very competitive tax regime, very low fees and premiums, being debt-free, the ability to invest in education and health care." The expanded Cabinet is sworn in on 19 March.

20 March
Parliament

The Canadian Alliance introduces a bill in the House of Commons calling for an additional \$400 million in emergency aid for the agriculture industry. The party hopes that Liberal backbenchers will validate their claims of fighting for farmers by voting in favour of the bill. Farming all over Canada, particularly in the West, has been suffering from export bans, poor crop production, and competition from U.S. and European subsidies to agriculture. The bill is defeated.

- 21 March
Political Leaders
- Preston Manning, the founder and former leader of the Reform Party and the Canadian Alliance, announces that he will resign his Calgary Southwest seat in the federal legislature by the end of the year, quitting elected politics: “As a former leader, I’m in an awkward position in our own party and in our own caucus ... If I vigorously advocate new ideas for change, there’s a danger of that being misconstrued as being competitive or undermining the current leadership. If I don’t do anything like that, it can also be misconstrued as being not supportive [of the leader].”
- 28 March
Environment
- Premier Roger Grimes states that Newfoundland is prepared to defy federal and provincial governments as it pushes ahead with plans to revive the debate over bulk water exports. The previous day, he resurrected the idea of exporting large quantities of fresh water from Gisborne Lake, a plan rejected in 1999 by Premier Brian Tobin.
- 29 March
Aboriginal Peoples
- In a signed letter read during the opening ceremonies of the Indigenous Summit of the Americas, Prime Minister Jean Chrétien pledges that he will put the concerns of indigenous peoples on the agenda of the upcoming Summit of the Americas in Quebec City. As well, Chrétien invited the national chief of the Assembly of First Nations, Matthew Coon Come, to be present at the Quebec Summit to be held on 20–22 April. This is the first time in its history that an indigenous leader has been invited.
- 29 March
Quebec
- Quebec Finance Minister Pauline Marois announces a tabled \$3.5 billion cut in personal income tax over three years in Queen’s 2001–2 budget. The cuts are made to provide the most benefit to lower-income earners. The minister adds that the new budget will help prepare Quebec for independence, making it “into a country capable of taking its place at the forefront of the new world emerging.”
- 1 April
Newfoundland and Labrador
- Two unions representing 19,000 public workers reject a last-minute offer from the provincial government and begin the largest provincewide strike in history. Provincial Finance Minister Joan Marie Aylward admits that public-service workers deserve raises but states that the province can only afford 13 percent over three years and not the 15

percent the unions are asking for. The strike is ended five days later after a severe snowstorm places enormous pressure on both sides to reach an agreement.

4 April
*Health-Care
Commission*

The former NDP premier of Saskatchewan, Roy Romanow, is appointed by Jean Chrétien to head a national inquiry into Canada's health-care system. The report, expected to be finished by the end of next year, will assess a wide range of questions pertaining to the future of health care in Canada, such as privatization, payment methods for doctors, and whether medicare should insure new and expensive drug treatments and technologies. Quebec Health Minister Remy Trudel states that he will not participate in the inquiry, because the Government of Quebec sees the commission as a federal intrusion in provincial jurisdiction.

4 April
Municipalities

In the ongoing battle between the city of Toronto and the Ontario government, Finance Minister Jim Flaherty announces that provincial caps on commercial property taxes will not be raised to allow city council to initiate tax increases in this sector. Mr Flaherty states that the industrial and commercial property taxes are already above average, and raising the taxation cap will perpetuate discrimination against business owners.

5 April
Revenue

The federal government introduces a tax hike on cigarettes across Canada and at the same announces that it will pour money into anti-smoking and anti-smuggling initiatives in the hope of reducing the number of smokers and cigarette sales; \$480 million and \$10–15 million, respectively, will be spent on each initiative.

6 April
*Supreme Court of
Canada*

At a legal conference at York University, Chief Justice Beverly McLachlin appeals to the legal profession and academia for more research to assist the Supreme Court of Canada's "daunting" struggle to set limits on equality rights. She states that new claims are raising increasingly cumbersome and abstract issues that were not contemplated in the infancy of the Charter of Rights and Freedoms, which has led to the "uncertain sea of value judgements" with which the Supreme Court is now faced.

- 17 April
Natural Resources
- The former premier of Alberta, Peter Lougheed, is enlisted by Nova Scotia's premier, John Hamm, to assist in the battle for greater provincial control of revenues produced from its offshore oil and natural gas. Mr Lougheed successfully battled the federal government in the 1970s over royalties from similar resources. The current Alberta premier, Ralph Klein, is also a strong supporter of Nova Scotia's bid for a larger share of royalties, stating that the province should experience the same arrangements that exist between Alberta and the federal government.
- 19 April
Party Politics
- Supporters of Prime Minister Jean Chrétien and Finance Minister Paul Martin reach a truce, deciding to hold the federal Liberal Party's leadership review in February 2003 instead of the fall of 2002. This formally ends a push by some Paul Martin supporters to force Mr Chrétien to make a decision about his political future early in his third mandate.
- 26 April
Equalization
- With the possibility of federal budget surpluses of up to \$17 billion, finance ministers from Atlantic Canada state that the federal government should raise the \$10 billion ceiling on equalization payments to allow a larger share for the "have-not" provinces. The main purpose of this federal transfer is to supply each province with the funding to support basic standards of public goods and services, but the Atlantic ministers argue that the cap on equalization is increasing the gap between the wealthier and poorer provinces.
- 26 April
Agriculture
- The United States announces the terms of a deal that will dissolve the ban on Prince Edward Island potatoes. All potatoes exports from PEI were banned in October of last year because a single commercial field suffered an outbreak of potato wart, a harmless but disfiguring virus. The ban posed an economic crisis for potato farmers and the province. All restrictions are to be lifted on 1 August.
- 30 April
Aboriginal Peoples
- Minister of Indian Affairs Robert Nault announces that an overhaul of the 125-year-old *Indian Act* will be introduced to the legislative assembly after a cross-Canada consultation with about six hundred bands and Aboriginal

associations. The changes will include the legal status of First Nations in terms of self-government, development of democratic and accountable institutions for native self-government, and women's issues. This means that much of the federal control over Aboriginal affairs will be assigned to the Aboriginal peoples.

9 May
Ontario

Ontario Finance Minister Jim Flaherty unveils the new provincial budget. The only major surprise is the installation of tax credits for private schooling. The tax credit will begin by reimbursing 10 percent of the first \$7,000 of fees for private schools, and when fully implemented it will cover 50 percent, or \$3,500. Some see this as the end of a century of constitutional discrimination against ethnic and religious minority groups, in terms of education in Ontario, while others speculate that this will weaken the already ailing public school system.

10 May
Aboriginal Peoples

National Chief of the Assembly of First Nations Matthew Coon Come publicly rejects federal plans to overhaul the outdated *Indian Act*, stating that First Nations should undertake such changes or at least play an active part in the legislation, rather than having the federal government acting unilaterally. He also calls for all First Nations communities to boycott any consultations with the federal government regarding changes to the *Indian Act*.

14 May
*Ministerial
Conferences*

Provincial and territorial tourism ministers, at a meeting in Toronto, call upon the federal government to take a more active role in ensuring continued growth of the industry in Canada. Tim Hudak, the minister of tourism, culture, and recreation in Ontario, states that "all levels of government must work together and with the industry if Canada is to get its fair share of the estimated \$1.5 trillion the world's tourism industry is expected to generate by the year 2010." The ministers concede that a meeting with their federal counterpart, Brian Tobin, is essential to address key issues such as intergovernmental funding agreements and airline restructuring.

15 May
Party Politics

Eight Canadian Alliance members of parliament announce that they will not sit in the House of Commons under the leadership of Stockwell Day. Of the eight members (Chuck

Strahl, Val Meredith, Gary Lunn, Grant McNally, Jim Gouk, Jay Hill, Jim Pankiw, and Art Hanger), two of them – Mr Lunn and Mr Hanger – have already been removed from the Alliance for earlier comments against the party leader. The other MPs will also be suspended by the party. On 24 April 2001 Deborah Grey, the deputy leader and longest-serving Canadian Alliance MP, resigned her position, as did Chuck Strahl as House leader.

16 May
British Columbia

Winning 77 of 79 seats in the provincial legislature (the New Democratic Party wins the other two), the Liberal Party, headed by Gordon Campbell, becomes the new governing party of British Columbia. The former premier, Ujjah Dosanjh, loses his seat in the legislative assembly. He previously stated that he would resign as leader of the NDP if the party failed to obtain the required four seats for official party status. One of the Liberals' major campaign promises was tax relief within the first ninety days of the new government's term and to have, by the end of its term, the lowest personal income tax rate in Canada for the two bottom brackets. Mr Campbell's government is sworn in on 5 June, with the new premier promising accountability from his cabinet by restricting 20 percent of ministerial salaries if goals and campaign promises are not met.

17 May
Budget

Federal Finance Minister Paul Martin announces that there will be an estimated \$15 billion surplus from last year after year-end adjustments are calculated, but he warns that the government must remain prudent in spending due to a slowing Canadian economy, which signals lower surpluses for the upcoming years. To cover election campaign promises, he states that in 2003–4 the Liberal government may have to use reserves from the contingency fund, which is kept by the Treasury in case of unexpected costs and shortfalls.

24 May
*Health Care/
Organized Labour*

A report released by the British Columbia Medical Association suggests that the provincial government should hand the managerial responsibilities of its health-care system to an independent, non-partisan body, depoliticizing the decision-making process. The recommendation makes British Columbia the third province to propose the

administration of health care through an independent body, Ontario and Quebec being the others.

24 May
Aboriginal Rights

In the case of *Mitchell v. M.N.R.*, the Supreme Court of Canada rules against the Akwasasne Mohawks' claim to an Aboriginal right to import goods from the United States without having to pay duties. The Cornwall, Ontario, native group argued that transporting goods across the border was a necessity prior to European contact and that this made them exempt from paying duties, but the court unanimously decided there is lack of evidence to support the case. Native leaders argue that steps towards Aboriginal self-government will be impeded if they cannot control taxation pertaining to First Nations.

25 May
*Ministerial
Conferences*

Ministers responsible for consumer affairs from all governments meet in St John's to take action on the growing number of consumer issues related to e-commerce. The ministers set a collaborative action plan to modernize and harmonize consumer legislation and policies, to develop effective marketplace practices in cooperation with business and consumer groups, and to provide reliable consumer information regarding online transactions.

30 May–1 June
*Western Premiers'
Conference*

The annual Western Premiers' Conference takes place in Moose Jaw, Saskatchewan. The conference provides a forum for the leaders of the four western provinces and three territories to discuss issues and coordinate efforts in areas such as energy, climate change, agriculture, postsecondary education, health, transportation, and trade. Among the major agreements is the reaffirmation of their commitment to continue to strengthen the relationship between the provinces and territories, both on a western and on a Canada-wide basis, in order to make progress on key priorities and when dealing with the federal government, as well to demand that the federal government give energy-producing provinces a seat at the table during negotiations on a continental energy policy.

4 June
Aboriginal Rights

The Federal Court of Appeal rules that Aboriginal people who do not live on reserves must pay federal income tax. This ruling, which reverses an earlier Federal Court of Canada decision in the *Shilling v. Canada* case of 9 June

1999, is expected to save the Canada Customs and Revenue Agency hundreds of millions of dollars and allow for 750 Aboriginal tax files to be processed, which were on hold pending the ruling.

6 June
British Columbia

Carrying through with his election promise, Premier Gordon Campbell announces a cut on the provincial portion of personal income tax by about 25 percent over the next two years. The intent of the reduction is to stimulate economic growth in British Columbia. When fully implemented, it will give the province the second-lowest marginal tax rate in the country, with the lowest rate for the bottom two brackets.

7 June
Parliament

The House of Commons votes 211 to 52 to adopt a bill that gives members of parliament and senators a 20 percent salary increase. The base pay of members will move from \$109,000 to \$131,400, while the prime minister will make \$262,988, a 42 percent increase from the original \$184,600. Senators will now earn \$106,000. The bill was introduced by the Liberals and supported by MPs from all federal parties except the NDP.

9 June
*Health Care/
Organized Labour*

Over 12,000 Saskatchewan health-care workers begin a strike after talks end between the provincial government and the Canadian Union of Public Employees. The union is asking for a 14 percent increase in wages and benefits over the next three years but is being offered only 3 percent in each year of a three-year deal. The strike is ended on the 15 June with a package that includes the latter proposal as well as enhanced benefits and pensions.

14 June
*Ministerial
Conferences*

Provincial and territorial finance ministers meet in Montreal to advance their work on fiscal arrangements in response to the direction by premiers at last year's Annual Premiers' Conference. They will be reporting to the premiers at this year's conference on options and solutions to issues revolving around federal social service transfers. The ministers issue an urgent call to the federal government to revitalize the federal-provincial relationship by funding an increased and more equitable share of vital social programs, such as health care and education. One of the key arguments discussed involves the diminished

federal financing of services within provincial jurisdictions. Since the federal government has lately been experiencing budget surpluses in the billions, the ministers feel that money should be used to return federal/provincial transfers to the 1994/95 levels.

19 June
*Health Care/
Organized Labour*

Fourteen thousand members of the Health Sciences Association in British Columbia conduct a provincewide walkout. Along with the B.C. Nurses' Union, the association is protesting provincial legislation to end the nurses' overtime ban and an initiative to disallow a strike by health-care workers. The legislation, if passed, will end the job action by 40,000 health-care workers. The association members return to work two days later, and legislation is passed to prevent a ban on overtime work by nurses.

27 June
British Columbia

British Columbia Premier Gordon Campbell has initiated a "first" in the history of Canadian politics by opening the doors of a cabinet meeting to the public and the media. The meeting was televised, and twenty reporters and twenty members of the public (first come first serve) were invited to view the talks directly. This is to be the first of many such occasions in the province.

28 June
Municipalities

Justice Maurice Lagace of the Quebec Superior Court dismisses a court challenge against plans to merge eighteen municipalities into an amalgamated Montreal. The municipalities state that they will continue to fight the imposed amalgamation which, according to them, poses a threat to their bilingual status and constitutional rights.

28 June
*Supreme Court of
Canada*

In a landmark decision, the Supreme Court of Canada, in the case of *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson*, rules that it is in the jurisdiction of the town of Hudson to ban or restrict the use of pesticides. The court decision for this Quebec town implies the same right for municipalities across Canada. According to Stéphane Brière, who represented Hudson, the judgment would apply "in principle to all 10 provinces, conditional on whether they bring in specific legislation governing pesticide use."

- 29 June
Ministerial Conferences
- Agriculture ministers from all governments take a step towards securing the long-term success of the sector at a meeting in Whitehorse. They agree in principle on a national action plan to make Canada the world leader in food safety, innovation, and environmental protection by initiating a range of technological advancements and updating farming equipment across Canada. Safety net programming is also discussed in the meeting.
- 3 July
Health-Care Commission
- Although initially opposing the commission, the Quebec government appoints an official from the Department of Intergovernmental Affairs to assist in the national inquiry on the future of health care, headed by Roy Romanow.
- 4 July
Alberta
- To strengthen the provincial agriculture industry, the Alberta government will assume legislative responsibility for intensive livestock operations. Agriculture Minister Shirley McClellan states that money is being lost from operations running outside the province due to relaxed regulations posed by municipalities. Beginning on 1 January 2002, municipalities will hand approval authority for operations to the Natural Resources Conservation Board. The industry accounts for more than 60 percent of Alberta's farm cash receipts.
- 12 July
Aboriginal Rights
- British Columbia Supreme Court Chief Justice Don Brenner finds the United Church 25 percent and the federal government 75 percent liable for the sexual assaults against six Aboriginals at the Alberni Indian Residential School on Vancouver Island. The *B. (W.R.) v. Plint* case is seen as a precedent-setting case, since it is the first civil trial in Canada to reach the stage of determining damages for abuse in the Indian residential school system. Across the country, thousands of similar lawsuits have been launched by Aboriginal people seeking restitution for long-term suffering caused by the school systems.
- 18 July
Equalization
- Ontario Premier Mike Harris states that "have-not" provinces should not receive equalization payments from the federal government if they are allowed to keep all offshore oil and gas royalties. As Ontario is a "have" province, federal revenues from the region are used for transfers to

the poorer provinces. Nova Scotia Premier John Hamm has previously stated that the province should remain an equalization recipient if it is allowed to keep the royalties.

19 July
Party Politics

Twelve rebel Canadian Alliance members of parliament announce they will create a new parliamentary caucus in the House of Commons, although they will not form a new party. Naming the group the Democratic Representative Caucus, the MPs state that they cannot return to the Alliance caucus because of the uncertainty of Stockwell Day's promise of resignation.

20 July
Environment

An annual report by the North American Free Trade Agreement Environmental Agency places Ontario behind the American states of Ohio, Texas, and Pennsylvania as the worst polluter on the continent, based on data from 1998 that covers 165 chemicals, including 49 known carcinogens. The report also shows that Canadian facilities, on average, produce 30 percent more pollution than American facilities.

23 July
Environment

As 180 countries, including Canada, discuss the Kyoto Protocol in Bonn, Germany, Alberta Premier Ralph Klein announces that the adoption of the accord will cost the provincial economy billions of dollars. The protocol is an agreement among most nation-states in the world to reduce greenhouse gas emissions 6 percent from 1990 levels by 2012. Since Alberta's economy is centred around industries with high emissions of these gases, the province is expected to be hardest hit by the adoption of the accord.

23 July
*Health Care/
Organized Labour*

Eleven thousand health-care workers go on illegal strike after failed meetings between the British Columbia Health Employers Association and the provincial government. The health-care workers are asking for a 24 percent wage increase but are offered only 5.5 percent to 15 percent, depending on profession. The strike is called off by the representing union two days later without resolution. This incident comes nearly a week after Health Services Minister Colin Hansen announces that British Columbia has already spent \$400 million more than budgeted just three months into the fiscal year. He warned that if spending is not controlled, an additional \$1 billion will be needed to

fund the health-care system for the rest of the fiscal year, which would result in dollars being taken from other important social programs. B.C. nurses are still negotiating with the province over contracts, having recently rejected an offer of a 22 percent wage increase.

30 July
Education

A report by Statistics Canada reveals that Canadian universities received \$8.2 billion for the 1999–2000 school year from federal, provincial, and municipal governments – a 15 percent increase over the previous school year. This indicates funding similar to that of the early 1990s, before transfers were reduced and reorganized by the federal government to create the Canada Health and Social Transfer.

31 July
Health Care

A day before the Annual Premiers' Conference, Finance Minister Paul Martin tells the provinces to halt demands for federal health-care funding, stating that the federal government does not have the extra money to distribute: "I certainly don't know where we would find that kind of money ... if you take a look at the amount that we have already transferred to the provinces for health care and education, it would be very hard to find that kind of money." Although the provinces are claiming fiscal imbalances, Mr Martin states that increased spending will create much larger problems in the long run, particularly for the future of the federal pension program and the aging baby boomer generation. This comment is reaffirmed after the premiers' meeting, when the federal government states that provincial demands are unrealistic and threaten to place Ottawa spending on a track towards deficit.

1–3 August
Annual Premiers' Conference

At the 42nd Annual Premiers' Conference in Victoria, British Columbia, government leaders across the country agree that they will push to restore Ottawa's share of health-care funding, a share that has been steadily dropping over time, since health-care costs have been rising at a much higher rate than federal transfer payments. To achieve adequate and sustainable fiscal arrangements over the immediate and medium term, the premiers ask the federal government to immediately remove the equalization ceiling; to immediately work on the development of a strengthened and fairer equalization program formula; to restore federal health transfers through the Canadian Health

and Social Transfer to at least 18 percent, combined with an appropriate escalator; and to work on alternative CHST measures such as tax points.

Among other discussion topics is the energy sector and its importance to the Canadian economy, as well as the effort for a coordinated North American focus on energy supply and development, but the premiers express concern for the federal government's exclusion of provincial and territorial representatives from the North American Working Group discussions. The premiers also review technology advancements for a variety of energy sources, such as Atlantic oil and gas, additional nuclear and hydropower, and the development of environmentally friendly "green power." They ensure that new projects will adhere to the principles of sustainable development. Re-vamping equalization payment methods and allowing Newfoundland and Nova Scotia to keep all oil and gas royalties are also some of the main discussion topics in the three-day meeting.

12 August
*Supreme Court of
Canada*

In a speech to the Canadian Bar Association, Chief Justice Beverly McLachlin states that the capabilities of the Supreme Court of Canada are being pushed to the limit by mandatory appeals that can waste valuable resources. She states that the rising workload and limited space for additional staff is causing administrative backlog, thereby compromising the number of cases the court can handle. She suggests moving the Federal Court of Canada to a separate building, in order to free up space, a move long requested by federal judges.

13 August
Health Care

In its 2001 National Report Card on Health Care, the Canadian Medical Association gives the nation a B, noting that the major deficits in the system are access to specialist services, access to technology, and emergency room services. Another report, released on 24 September, warns that the Canadian health-care system is heading to ruin as a result of systemic underfunding by both the federal and the provincial governments.

13-16 August
*Ministerial
Conferences*

A series of meetings take place in London, Ontario, involving ministers and deputy ministers responsible for local government and housing from all provinces and

territories. Drinking water safety is a high priority. They state that the federal government must assist the provinces and territories by building on the work of these governments to meet drinking-water safety needs. The ministers also discuss the provision of the necessary tools and flexibility for local governments to fulfill their responsibilities properly, as well as covering the issues of new legislative frameworks for local governments. On the final day of meetings, all ministers of housing agree on the urgent need for a coordinated effort on an affordable housing program, which is boosted by a federal contribution of \$680 million.

26–28 August 2001
*Annual Conference
of New England
Governors and
Eastern Canadian
Premiers*

The 26th Annual Conference of the New England Governors and Eastern Canadian Premiers takes place in Westbrook, Connecticut. A number of formal resolutions are made: to cooperate in the development, improvement, and promotion of the information technology workforce; to adopt the 2001–3 work plan of the Standing Committee on Trade and Globalization; to accept the Climate Change Action Plan and have the related committees and state/provincial officials oversee and coordinate its implementation; to do further study and hold conferences regarding specific environmental issues and to do the same for energy development and management.

28 August
Parliament

The Democratic Representative Caucus, the informally recognized group of Canadian Alliance rebels, strikes an unprecedented deal to work together with the Progressive Conservative members of parliament, both in the House of Commons and in committees. They announce plans for a joint strategy meeting in Edmonton on 10 September. At the same time, Jim Gouk, one of the dissident Alliance MPs, announces that he will return to his party's caucus if his suspension is lifted, stating that Alliance leader Stockwell Day's promise of resignation makes it satisfactory for him to return.

6 September
Budget

The Organization for Economic Cooperation and Development urges the Canadian government to restrict spending, especially on social programs, during the current economic slowdown in order to reduce its relatively high deficit and taxes. In its annual assessment of the country's economic performance and outlook, the organization

expresses particular concern at the rising health-care spending by provinces, the increasing social assistance disability claims, and the federal government's year-end spending spree.

13 September
Finance

The federal government announces a \$10.7 billion surplus for the first quarter of this fiscal year. Even after tax cuts at the beginning of the year, which are said to be costing the federal government billions of dollars, it is higher than last year's accumulation for the same quarter of \$10.5-billion.

17 September
National Security

Members of parliament return to the House of Commons today in unified form to discuss the terrorist attacks against the United States, the role Canada should play in combatting terrorism inside and outside national borders, and what steps need to be taken to ensure greater national security and the prevention of terrorist activity. Anti-terrorism legislation is proposed by many, including Stockwell Day, who also suggests that border control and immigration policies should be reviewed in order to strengthen national security. Federal Finance Minister Paul Martin announces that the government is prepared to spend whatever it takes to ensure the security of the nation. The extra spending will be afforded by using federal reserves, he says; tax cuts and health care/education spending will not be affected, though he admits that it likely will decrease revenues.

18 September
Aboriginal Peoples

Mi'kmaq fishermen set lobster traps in Miramichi Bay, against federal government regulations. Although a benign action in itself, this comes after thirty gunshots are fired between native and non-native fishermen who are at odds with one another about fishing rights. A month earlier, there was controversy from both sides of the debate concerning the communal licence issued by federal Fisheries and Oceans Minister Herb Dhaliwal. The licence lasted for a week, beginning on 22 July. Mi'kmaq fishermen stated it was too short a time and was against a Supreme Court of Canada ruling, while non-native fishermen argued against the differential treatment of both groups.

- 19 September
Intellectual Property
- Ontario Premier Mike Harris states that his administration will continue to pay \$800 for predictive breast and ovarian cancer testing, even though Myriad Genetic Laboratories Inc., an American company demanding \$3,850 for the test, threatens legal action. The test involves BRCA 1 and BRCA 2 genes, both of which are patented by the company. Mr Harris argues that patents should not be placed on discoveries such as genes, for they are not inventions, and he states that Canadian laws should be amended to prevent further patenting of human genes.
- 22–23 September
Ministerial Conferences
- Among a wide array of initiatives for the reduction of toxic chemical emissions, the Canadian Council of Ministers of the Environment, in a meeting in The Pas, Manitoba, reaffirms its commitment to clean and secure water for the health and safety of all Canadian citizens. The ministers initiate a series of collaborative actions to complement their individual initiatives, which include reviewing existing and additional water quality guidelines and development; setting research priorities for addressing human-induced water quality issues; and providing extensive information to Canadians through the CCME web site pertaining to water quality.
- 26 September
Ministerial Conferences
- Health ministers from both levels of government meet in St John's, Newfoundland, to discuss progress in the sector since their meeting last year. It is agreed that, since the last meeting, intergovernmental collaboration has resulted in significant advances on the action plan developed by the first ministers, which includes developing a multifaceted and collaborative approach to pharmaceuticals management; addressing the issue of the supply and retention of health-care professionals; ongoing development of performance indicators; and setting the groundwork for better integration of home care and community care into the health system.
- 27 September
British Columbia
- After tax cuts and a growing provincial deficit, Premier Gordon Campbell asks all his ministers, except those of health and education, to examine three scenarios: budget cuts of 20 percent, 35 percent, or 50 percent over the next three years for their respective departments. Many have

criticized the tax cuts as a means of stimulating the British Columbia economy, stating that they will merely throw the province into a deeper deficit.

27–28 September
*Ministerial
Conferences*

Ministers from both levels of government responsible for northern development conclude a two-day conference in La Ronge, Saskatchewan, with an agreement to establish a Northern Development Ministers Forum with a mandate to advance the common and diverse interests of northerners, which will be designed over the next few months.

1 October
Quebec

Quebec Liberals win two of the four open seats in the National Assembly in the provincial by-elections. Françoise Gauthier wins in Jonquière – the riding of the former premier, Lucien Bouchard – and Julie Boulet wins in the Laviolette riding, which has been a Parti Québécois stronghold since 1976. PQ members Sylvain Page and Richard Legendre win in the other ridings.

3 October
British Columbia

British Columbia Finance Minister Gary Collins announces that the provincial government will freeze health-care and education spending and will cut the rest of government spending by 35 percent in order to achieve a balanced budget in three years.

5 October
Agriculture

Just days after the announcement of a \$160 million bail-out package by the federal government to compensate loss of business for Canadian airlines (due to the terrorist attacks in the United States), Saskatchewan Agriculture Minister Clay Serby states that the federal government should compensate Canadian farmers as well: “Like the airlines, agriculture needs interim support to address factors beyond their control.” Farmers across Canada have been dealing with severe cases of drought, which is threatening yields and revenues.

11 October
*Ministerial
Conferences*

Provincial and territorial ministers of finance meet in Vancouver, British Columbia, to discuss economic security, fiscal stability, and the uncertainties that the terrorist attacks on the United States pose for the short-term economic outlook. Low interest rates, reduced taxes, and sound fiscal management on behalf of all governments are

recognized as the key to providing a secure base on which to build economic recovery. The ministers announce their support of federal measures to enhance security while maintaining a strong relationship with the United States, but they call on the federal government to follow through on the demands of the premiers from their annual conference to remove the equalization ceiling and restore transfer funding to 1994–95 levels.

15 October
Aboriginal Peoples

In a town near Yellowknife, a consortium of energy companies (Imperial Oil, Shell Canada, Conoco Inc., and ExxonMobil Canada) signs a deal with the representative group, Mackenzie Valley Aboriginal Pipeline Corporation, which will give northern Aboriginal people a one-third share in the natural gas pipeline project. The deal, which is believed to be the first of its kind in Canada, will cost about \$3 billion and could take up to ten years to become operational after regulatory applications and construction are completed.

16 October
Aboriginal Peoples

The Assembly of First Nations issues layoff notices for 70 of its nearly 150 employees, stating that federal funding for the organization has dropped from \$19 million to \$10 million for this fiscal year. National Chief Matthew Coon Come states that the funding shortage is a reactionary measure by Indian Affairs Minister Robert Nault because of Aboriginal opposition of the proposed overhaul of the *Indian Act*. Mr Nault has previously stated that funding will be delayed if annual financial audit requirements (which the AFN has not yet completed) are not met by the 31 July deadline.

16 October
Political Leaders

Said to be one of the most controversial and confrontational premiers in the history of Ontario, Mike Harris announces his retirement from politics after twenty years on the provincial stage. He will officially step down when his replacement as party leader is chosen. Mr Harris was born on 23 January 1945 in Toronto but grew up in North Bay, Ontario. He became a Trustee of the Nipissing Board of Education in 1974 and president of the Northern Ontario Trustees' Association in 1980. A year later he was elected to the Ontario legislative assembly for Nipissing, keeping this riding for his entire political career. He was

chosen leader of the Progressive Conservative Party of Ontario in 1990 and served as premier when his party was voted into government for two consecutive terms – in 1995 and 1999. He is most widely known for his “common sense revolution.”

18 October
Alberta

Alberta Finance Minister Pat Nelson announces she is cutting \$1.3 billion from the government budget to bring order to provincial finances that were caught off guard by plummeting natural gas prices.

28 October
*Health-Care
Commission*

Roy Romanow, the head of a national inquiry in the future of health care in Canada, reiterates that the commission will examine all options and alternatives to medicare in Canada, promising that the \$15 million inquiry will be the most extensive review since the 1960s Royal Commission on Health Services. “The only thing that is not on the table is the status quo.”

30 October
Constitution

The House of Commons approves an amendment to the constitution that officially changes the name of the last province to join Confederation, in 1949. The most eastern province will henceforth be called Newfoundland and Labrador.

4 November
Aboriginal Peoples

After less than a year of operation, the federally appointed First Nations Governance Institute announces that it will shut down because of a recent decision by federal Indian Affairs Minister Robert Nault to cease funding. The federal government originally pledged \$5 million for the institute, which received \$1.4 million for start-up. Aimed at providing an information-sharing network on Aboriginal self-government for communities across Canada, the institute was expected to become self-sustaining after a few years of operation.

8 November
Atlantic Canada

The four Atlantic premiers agree to set up an expert panel to review drug policies for the entire region, with the goal of eliminating duplication and reducing costs in bulk purchases through regional cooperation.

10 November
Environment

At a United Nations–sponsored conference in Morocco, environment and energy ministers from nations all over the world, including Canada’s David Anderson, reach an

agreement on the fine print of the Kyoto Accord. The deal provides a detailed rulebook governing the complex treaty aimed at reducing global emissions of greenhouse gases, particularly carbon dioxide.

13 November
Budget

The federal Department of Finance announces that the budget surplus is continually shrinking because of declining tax revenues, although the surplus is still at \$14 billion after the first half of the fiscal year.

21 November
Revenue

Don Drummond, Toronto Dominion Bank chief economist and former senior official of federal Finance Minister Paul Martin, urges the government to increase the GST to 10 percent and spend all additional revenues from the 3 percent increase towards a cut in income taxes. According to Mr Drummond, doing so would boost economic growth because sales taxes, unlike income taxes, do not drive investments out of the country.

28 November
*Anti-Terrorism Bill
(Bill C-36)*

Bill C-36 passes final reading in the House of Commons with a voting result of 190 to 47 with strong support from Liberal, Canadian Alliance, and Progressive Conservative/Democratic Representative Caucus members of parliament. The anti-terrorism legislation receives royal assent on 18 December after passing through the Senate.

29–30 November
*Ministerial
Conferences*

Ministers responsible for housing from both levels of government, in a meeting in Quebec City, reach an agreement on a framework to increase the supply of affordable housing across Canada. Under this agreement, the federal government will negotiate bilaterally with each province and territory in an effort to create more affordable housing throughout Canada more effectively.

30 November
Health Care

An official for Health Canada announces that the department is setting aside \$600,000 to commission a major study on the affects of growing privatization of health care in Canada. The two-year research project has three purposes: to quantify current private services by province or territory and the type of service; to identify existing mechanisms to regulate private services delivery; and to explain the role of guidelines in preventing conflicts of interest in cases of similar services offered by private and public health-care providers.

- 5 December
Aboriginal Peoples
- The Assembly of First Nations votes 126 to 49 against a strategy for cooperation between the organization and the federal government to change the outdated *Indian Act*. Federal Indian Affairs Minister Robert Nault, who worked with an AFN committee to outline the new governance law, states that the federal government is “going to move ahead with the governance initiative, with or without the AFN.”
- 7 December
Municipalities
- The Supreme Court of Canada refuses to hear an appeal by thirteen of the twenty-eight Montreal suburbs that are contesting the constitutionality of Bill 170. The municipalities contesting the bill state that the amalgamation will create a primarily francophone city and will limit services to the anglophone population.
- 10 December
Budget
- As a result of the terrorist attacks on the United States and the implications the events have had on national security issues and the economies of the world, the federal government unveils a new budget. Naturally, the focus is on security, which will receive \$12 billion over the next five years (this includes extra funding for the military and defence, border control, airline security, and intelligence). The other big announcement is the future of the contingency fund. If it is not needed, the government has earmarked \$500 million for an assistance package for Africa. Finance Minister Paul Martin also mentions investments in technology, improving the living status of Aboriginal people, and enhancing basic infrastructure by working with provincial and municipal governments.
- 12 December
Political Leaders
- Stockwell Day resigns as Leader of the opposition, bringing an end to his eighteen-month tenure as head of the Canadian Alliance. He will retain his seat in the House of Commons for the Okanagan-Coquihalla riding.
- 18 December
Anti-Terrorism Bill (Bill C-36)
- As was done in the House of Commons, the Liberal majority in the Senate forces closure on the controversial Bill C-36, and the anti-terrorism legislation is given royal assent shortly afterwards. The major implications of the new law will allow the government to create lists of suspected terrorists; and allow the suppression of evidence to protect classified information; impose consecutive sentencing

for terrorists; allow preventative arrests for suspected terrorists; allow law enforcement officers to force self-incriminating evidence from suspects in court.

20 December
Justice

In an 8 to 1 ruling of the *Dunmore v. Ontario* case, the Supreme Court of Canada rules that Ontario's *Labour Relations Act* violates constitutional freedom of association rights. The decision is a victory for the United Food and Commercial Workers, since Ontario farmers are now legally able to unionize. This ruling may also have implications for Alberta, which has a law similar to the *Labour Relations Act*.

Chronology 2001: Index

Aboriginal Peoples 22 January, 30 January, 15 February, 7 March, 29 March, 30 April, 10 May, 18 September, 15 October, 16 October, 4 November, 5 December

Aboriginal Rights 9 February, 23 February, 10 March, 24 May, 4 June, 12 July, 1 November

Agriculture 1 March, 26 April, 5 October

Alberta 3 January, 12 March, 4 July, 18 October

Annual Conference of New England Governors and Eastern Canadian Premiers 26–28 August

Annual Premiers' Conference 1–3 August

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Atlantic Canada 8 November

British Columbia 16 May, 6 June, 27 June, 27 September, 3 October

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