Canada: The State of the Federation 2003

Reconfiguring Aboriginal-State Relations

Edited by
Michael Murphy

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FOREWORD

This year’s

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 Gelinas, 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

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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I

Introduction

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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

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 m9.1(vinto cpubJJ T* 0)]Ttl bs20395 Twusti thl9l.1(
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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

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

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; McDonnel 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,

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

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

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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

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 prac-

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,

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 paramountcy in some but not all of their concurrently held jurisdictions, while rules of paramountcy 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 Weyerhauser, 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.

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.

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II

Urban and Off-Reserve Dimensions

2

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 sup-

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

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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

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

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

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

Organization	*Primary focus*	*Year established*
A Bah Nu Gee Child Care	Child care	1984

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

Organization	*Primary focus*	*Year established*
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 in-

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

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-31[12]

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

	Percent by Aboriginal group, 2001		*Percent of North American Indians not registered or band member, 1991*	
	North American Indian	*Métis*	*Registered*[1]	*Band member*[2]
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

[1]Statistics 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.

[2]These 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]

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,

There has been very little work on urban Aboriginal settlement patterns,

Figure 1: Proportion of the Pr

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

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

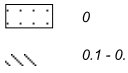

Figure 4: Proportion of the Total Aboriginal Population of the CMA in Each Census Tract, City of Winnipeg, 2001

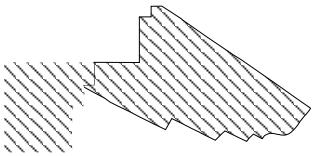

Figure 6: Pr

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

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

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,

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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3

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

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.

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"

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,

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 CUAI are that it be community based and Aboriginal led, and that it implement practical solutions.

CUAI'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 CUAI 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 CUAI. Contributing factors to CUAI'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;

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 vped

4

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 idéolo étr

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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, con-

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

the prior presence of Aboriginal societies and the sovereignty of the Crown (*R.* v. *Van der Peet*

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 t to se

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

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 government[13] (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

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

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

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

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.

Europeans arrived on the shores of North America, various Aboriginal socie-

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

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

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

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

5

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*

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

> 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

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

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 b017.4(e)0icticlaisdentang

existing problems and to turn the situation around. A related next step is to

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:

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 Quebec, 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*

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

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

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 w7 Tpre4Arough the impasse (Craik, in press). To establish these negotiations, broader regional concerns – such as forest clear-cutting, prolifer7 T3.1(ting mining acti)17.3(vity)72(, Cr)-5.1(ee economic a 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 e T3.1(xpedient to do so.)31.9(W)45.1(ithin Cr)-11(ee society)74(, the agreement in prin 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.

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*

While the co-management bodies themselves are consultative, by spelling out forest management procedures and standards in the agreement, these stand-

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

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,

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]

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-cha-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

- There is provision for balancing the institutional legitimacy of co-management bodies with that of local authority systems.

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

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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*.

THE JAMES BAY AND NORTHERN QUÉBEC AGREEMENT AND EEYOU GOVERNANCE

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

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

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

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(dance with a

- to provide effective mechanisms for the implementation of the agreement,

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-maaoo (Cree tallyman); plural Ouje-maaooch
Indoh-hoh Istchee (hunting territory or trapline)
Meeyou pimaat-tahseewin (holistic well-being)

ANNEX 1: AREAS OF EEYOU GOVERNANCE

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

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 Indoh-hoh 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-maaooch. 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-maaoo 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.

8

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

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*

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

that its First Nations policy is outdated. The Act has been outdated for more than a century – the original consolidated *Indian Act*

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

(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 promu467 ,Pe(0

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

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

> 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

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

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

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

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,

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

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IV

Intergovern-mentalism

9

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

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.

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 intergovernmental dimension.

The founding deputy ministers of Nunavut, appointed by the OIC in 1998

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 “

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 “

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 45 T*9 ahe ss f

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 meet-

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

Meeting	*Attended*	*Not attended*	*Total*	*Cancelled*
OF FIRST MINISTERS				
FPT[1] 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
PT[2] 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				
FPT[1] 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
PT[2] 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				
FPT[1] 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]
PT[2] 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

[1]Federal-provincial-territorial

[2]Provincial-territorial

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

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

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

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.

implementation of employment and training" initiatives in order to "increase Inuit participation in government employment in the Nunavut Settlement Area to a representative level"

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

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

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 intergovernmental 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

CONCLUSION

Governance in Nunavut is complicated by two central, competing demands. On the one hand, even though Nunavut is the youngest and least effectively

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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10

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. Mêmes si elles ont des

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,

tury, 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-

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

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,

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

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

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

Federal-provincial-territorial	*Canada-Aboriginal*
Jurisdiction is divided between orders of government, with each order possessing some autonomy	
Federal and provincial governments have constitutionally protected fields of taxation and considerable power to	

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

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 ratepayer 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 revivified 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-drangFetThe FNFSM,
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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

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

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

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.

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

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V

Judicial Reconfigurations

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,

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 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 abo-

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.

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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

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)*,

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 (

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 intervenors[17] 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 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 "langscape" (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 Weyerhauser 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 licencees' 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'

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-

Unger, R.M. 1987.

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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

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 precedent[2] 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.

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 policy[6] 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 episteme[10] 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

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

In *R.* v. *Sparrow*

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*distincvE139

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).

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

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).

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,"

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

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

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 cha frletw0,n frdigferent. The Métis, no less than the First Nations, are bound by the racial grammar underlying this judicial task. At present, this is pertw0,(ps mor)-12.6(e)-0.1(pr)10.5(ob)-6.1(lemhts).1(.d)sobth9afrdiis, no ceercha nu

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

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,oures am70.0ncetelu.1(seand ag)9s co12.8(v)19.(y i)]T

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VI

Conclusion

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

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

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 legiti-

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 *problematiques* 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 domina-

contested territory of Haida Gwaii and in adjacent ecologically sensitive areas. Most traditional indigenous cultural and philosophical imperatives direct com-

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

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"

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 legitimation 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 to 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

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.

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

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 wof storc6C4l esis incompre

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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

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 dis-

20 See Schouls 1996 for an examination of how well (or poorly) Canadian electoral processes represent Aboriginal people.

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VII

Chronologies

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Chronology of Events
January 2003 – December 2003

Aron Seal and Michael Munroe

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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

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

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

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

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

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

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

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, heath 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 Ac-

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 heath 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

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

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 budg3.4(v)mc9.2y3

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.

receiving a single formal vote; critics argue this ease of passage reflects a need for territorial electoral reform.

12 December
Political Leaders

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 of-

Chronology 2003: Index

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Chronology of Events
January 2001 – December 2001

Brett Smith

An index of these events begins on page 411

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

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, signalling 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 yearAm6 y wis scof retiNete0.1y .4(4

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

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

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

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.*

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/

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

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 though 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. Revamping 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,

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 sprees.

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 boarders, 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.

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

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 bailout 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 if 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 but 518ands of the p8(s fra sece feviire -t)5.15ifing for 8he orw y starv

chosen leader of the Progressive Conservative Party of

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.

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

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 associa-

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