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Governance

IN THE TIME BEFORE *there were human beings on Earth, the Creator called a great meeting of the Animal People.*

During that period of the world's history, the Animal People lived harmoniously with one another and could speak to the Creator with one mind. They were very curious about the reason for the gathering. When they had all assembled together, the Creator spoke.

"I am sending a strange new creature to live among you," he told the Animal People. "He is to be called Man and he is to be your brother.

"But unlike you he will have no fur on his body, will walk on two legs and will not be able to speak with you. Because of this he will need your help in order to survive and become who I am creating him to be. You will need to be more than brothers and sisters, you will need to be his teachers.

"Man will not be like you. He will not come into the world like you. He will not be born knowing and understanding who and what he is. He will have to search for that. And it is in the search that he will find himself.

"He will also have a tremendous gift that you do not have. He will have the ability to dream. With this ability he will be able to invent great things and because of this he will move further and further away from you and will need your help even more when this happens.

"But to help him I am going to send him out into the world with one very special gift. I am going to give him the gift of the knowledge of Truth and Justice. But like his identity it must be a search, because if he finds this knowledge too easily he will take it for granted. So I am going to hide it and I need your help to find a good hiding-place. That is why I have called you here."

A great murmur ran through the crowd of Animal People. They were excited at the prospect of welcoming a new creature into the world and they were honoured by the Creator's request for their help. This was truly an important day.

One by one the Animal People came forward with suggestions of where the Creator should hide the gift of knowledge of Truth and Justice.

“Give it to me, my Creator,” said the Buffalo, “and I will carry it on my hump to the very centre of the plains and bury it there.”

“A good idea, my brother,” the Creator said, “but it is destined that Man should cover most of the world and he would find it there too easily and take it for granted.”

“Then give it to me,” said the Salmon, “and I will carry it in my mouth to the deepest part of the ocean and I will hide it there.”

“Another excellent idea,” said the Creator, “but it is destined that with his power to dream, Man will invent a device that will carry him there and he would find it too easily and take it for granted.”

“Then I will take it,” said the Eagle, “and carry it in my talons and fly to the very face of the Moon and hide it there.”

“No, my brother,” said the Creator, “even there he would find it too easily because Man will one day travel there as well.”

Animal after animal came forward with marvellous suggestions on where to hide this precious gift, and one by one the Creator turned down their ideas. Finally, just when discouragement was about to invade their circle, a tiny voice spoke from the back of the gathering. The Animal People were all surprised to find that the voice belonged to the Mole.

The Mole was a small creature who spent his life tunnelling through the earth and because of this had lost most of the use of his eyes. Yet because he was always in touch with Mother Earth, the Mole had developed true spiritual insight.

The Animal People listened respectfully when Mole began to speak.

“I know where to hide it, my Creator,” he said. “I know where to hide the gift of the knowledge of Truth and Justice.”

“Where then, my brother?” asked the Creator. “Where should I hide this gift?”

“Put it inside them,” said the Mole. “Put it inside them because then only the wisest and purest of heart will have the courage to look there.”

And that is where the Creator placed the gift of the knowledge of Truth and Justice.¹

IN THIS CHAPTER, WE FOCUS on Aboriginal governance. In the process, we try to uncover some portion of the gift of knowledge of Truth and Justice as it applies to the relationship between Canada and the people who have called it home for hundreds of generations.

Canada's future development must be guided by the fact that there are three orders of government in this country: Aboriginal, provincial and federal. In this chapter, we consider how these three orders of government might evolve in the future. We ask what forms Aboriginal governments might take and how their development can best be fostered. We discuss how they can relate to federal and provincial governments to create a truly vital and flexible federation. As travellers covering new territory, we have found paths that are tentative and sometimes uncertain. We hope, nevertheless, that our findings will guide others who embark on this important journey.

In this chapter, we highlight the views of Aboriginal people, expressed in the Commission's public hearings, briefs and studies. We begin this section by examining Aboriginal perspectives on sovereignty, self-determination and self-government. We then explore traditional Aboriginal concepts of governance and the visions that Aboriginal people hold of self-government in contemporary society.

Next, we analyze the legal and political principles that underlie and inform the emergence of an Aboriginal order of government in Canada. We discuss the right of self-determination in international law and its application to the Aboriginal peoples of Canada. We consider the status of the inherent right of Aboriginal self-government in the Canadian constitution. We review the legal and political origins of this right and its entrenchment in section 35 of the *Constitution Act, 1982*.

We also describe three basic models of Aboriginal governance that emerged from our hearings and research. These models demonstrate how the basic visions espoused by Aboriginal people might be put into practice. They show what Aboriginal self-government might look like, how it might be financed and how it might relate to the other orders of government.

Finally, we identify the concrete steps needed to restructure the relationship between Aboriginal peoples and Canada. We recommend strategies for Aboriginal people to strengthen the governing capacities of their nations and to establish constructive working relationships with other Canadian governments. We also identify some fundamental reforms to the structure of Canadian governments that are needed to achieve constructive relationships with Aboriginal people and their nations.

Our first step is to provide a common understanding of the basic terms used throughout the chapter.

- *Aboriginal peoples* (in the plural) refers to organic political and cultural entities that stem historically from the original peoples of North America (not collections of individuals united by so-called racial characteristics). The term includes the Indian, Inuit and Métis peoples of Canada.²

- *Aboriginal people* means the individuals belonging to the political and cultural entities known as Aboriginal peoples.

- *Aboriginal nation* refers to a sizeable body of Aboriginal people who possess a shared sense of national identity and constitute the predominant population in a certain territory or collection of territories.
- *First Nation* means an Aboriginal nation composed of Indian people.
- *Aboriginal local community* (or simply, local community) refers to a relatively small group of Aboriginal people living in a single locality and forming part of a larger Aboriginal nation or people. The terms First Nation community, Inuit community and Métis community are also used in this sense.
- *Community* (rather than local community, First Nation community and so on) refers to any group with a shared sense of identity or interest. In this broader sense, Aboriginal nations, peoples and local communities are all communities.

1. Aboriginal Perspectives

1.1 Basic Concepts

As our opening story suggests, human beings are born with the inherent freedom to discover who and what they are. For many Aboriginal people, this is perhaps the most basic definition of sovereignty — the right to know who and what you are. Sovereignty is the natural right of all human beings to define, sustain and perpetuate their identities as individuals, communities and nations.

Many Aboriginal people see sovereignty as much as a human right as a political and legal one. Seen in this way, sovereignty is an inherent human attribute that cannot be surrendered or taken away.

What is sovereignty? Sovereignty is difficult to define because it is intangible, it cannot be seen or touched. It is very much inherent, an awesome power, a strong feeling or the belief of a people. What can be seen, however, is the exercise of Aboriginal powers. For our purposes, a working definition of sovereignty is the ultimate power from which all specific political powers are derived.

Roger Jones, Councillor and Elder
Shawanaga First Nation
Sudbury, Ontario, 1 June 1993*

As an inherent human quality, sovereignty finds its natural expression in the principle of self-determination. Self-determining peoples have the freedom to choose the pathways that best express their identity, their sense of themselves and the character of their relations with others. Self-determination is the power of choice in action.

Self-determination is looking at our desires and our aspirations of where we want to go and being given the chance to attain that ... for life itself, for existence itself, for nationhood itself

Self-government is one path Aboriginal people may take in putting the principle of self-determination into effect. Self-government flows from the principle of self-determination. In its most basic sense, it is the ability to assess and satisfy needs without outside influence, permission or restriction. In a study prepared for the Commission, the Metis Family and Community Justice Services of Saskatchewan asserts the following:

The political movement towards Métis self-government may be understood as a viable alternative to a mainstream political and administrative system that has consistently failed to address our goals and needs. Our desire to control our own affairs should be viewed as a positive step, as an expression of nationhood, built upon a history in which the right to self-determination was never relinquished, in which the governing apparatus will have legitimacy in the eyes of its citizens.³

Of course, self-government may take a variety of forms. For some peoples, it may mean establishing distinct governmental institutions on an ‘exclusive’ territory. For others, it may mean setting up a public government generally connected with modern treaties or land claims agreements. Alternatively, self-government may involve sharing power in joint governmental institutions, with guaranteed representation for the nations and peoples involved. In other instances, it may involve setting up culturally specific institutions and services within a broader framework of public government. We discuss these arrangements in greater detail later in the chapter.

While the terms sovereignty, self-determination and self-government have distinct meanings, they are versatile concepts, with meanings that overlap one another. They are used by different peoples in different ways. Here we explore some of the main ways Aboriginal people use and understand these terms, as shown in the Commission’s hearings, briefs and research studies. Later we will offer our own ideas on this matter.

Sovereignty, in the words of one brief, is “the original freedom conferred to our people by the Creator rather than a temporal power.”⁴ As a gift from the Creator, sovereignty can neither be given nor taken away, nor can its basic terms be negotiated. This view is shared by many Aboriginal people, whose political traditions are infused with a deep sense of spirituality and a sense of the inter-connectedness of all things. Such concepts as sovereignty, self-government and the land, which for some Canadians have largely secular definitions, all retain a spiritual dimension in contemporary Aboriginal thinking. Dave Courchene, Jr. alluded to this point in his testimony to the Commission:

The underlying premise upon which all else was based was to recognize and fulfil the spirit of life within oneself and with all others in the circle of individuals, relationship or community and the land. This was achieved through concerted effort on developing the spirit through prayer, meditation, vision quests, fasting, ceremony, and in other ways of communicating with the Creator.

Dave Courchene, Jr.
Fort Alexander, Manitoba
30 October 1992

From this perspective, sovereignty is seen as an inherent attribute, flowing from sources within a people or nation rather than from external sources such as international law, common law or the Constitution. Herb George of the Gitksan and Wet'suwet'en stated:

What is required here is not an inquiry of the current law or international law to determine the source of our rights. What is required here is the recognition that our rights exist in spite of what international law says, in spite of what the common law says, and in spite of what have been the policies of this government to the present day.

If this issue is to be dealt with in a fair way, then what is required is a strong recommendation from this Commission to government that the source of our rights, the source of our lives and the source of our government is from us. That the source of our lives comes from Gitksan-Wet'suwet'en law.

Herb George
Gitksan-Wet'suwet'en Government
Commission on Social Development
Kispiox, British Columbia, 16 June 1992

While Aboriginal sovereignty is inherent, it also has an historical basis in the extensive diplomatic relations between Aboriginal peoples and European powers from the early period of contact onward. In the eyes of many treaty peoples, the fact that the French and British Crowns concluded alliances and treaties with First Nations demonstrates that these nations were sovereign peoples capable of conducting international relations. The president of the Union of Nova Scotia Indians said to the Commission:

We see our right of self-government as an inherent right which does not come from other governments. It does not originate in our treaties. The right of self-government and self-determination comes from the Mi'kmaq people themselves. It is through their authority that we govern. The treaties reflect the Crown's recognition that we were, and would remain, self-governing, but they did not create our nationhood ... In this light, the treaties should be effective vehicles for the implementation of our constitutionally protected right to exercise jurisdiction and authority as governments. Self-government can start with the process of interpreting and fully implementing the 1752 Treaty, to build onto it an understanding of the political relationship between the Mi'kmaq people and the Crown.

Alex Christmas
Eskasoni, Nova Scotia
6 May 1992

Some interveners spoke of the need for caution in using the term sovereignty. They noted that the word has roots in European languages and political thought and draws on attitudes associated with the rise of the unitary state, attitudes that do not harmonize well with Aboriginal ideas of governance. For example, in some strands of European thought, sovereignty is coloured by theories suggesting that absolute political authority is vested in

a single political office or body, which has no legal limits on its power. The classic notion of the sovereignty of Parliament as developed in British constitutional thought reflects such an approach.

This understanding of sovereignty is very different from that held by most Aboriginal people.

I don't even like the word sovereignty because ... it denotes the idea that there's a sovereign, a king, or a head honcho, whatever. I don't think that native people govern themselves that way ... I think native peoples' government was more of a consultative process where everyone was involved — women, men and children.

Greg Johnson
Eskasoni, Nova Scotia
6 May 1992

Gerald Alfred makes similar observations in a study dealing with the meaning of self-government among the Mohawk people of Kahnawake:

The use of the term 'sovereignty' is itself problematic, as it skews the terms of the debate in favour of a European conception of a proper relationship. In adopting the English language as a means of communication, Aboriginal peoples have been compromised to a certain degree in that accepting the language means accepting basic premises developed in European thought and reflected in the debate surrounding the issues of sovereignty in general and Aboriginal or Native sovereignty in particular.⁵

A better term for political authority, Alfred suggests, is the Mohawk word *tewatatowie*, which means 'we help ourselves'. *Tewatatowie* is linked to philosophical concepts embodied in the Iroquois *Kaianerekowa*, or Great Law of Peace. It is understood not only in terms of interests and boundaries, but also in terms of land, relationships and spirituality. The essence of Mohawk sovereignty is harmony, achieved through balanced relationships. This requires respect for the common interests of individuals and communities, as well as for the differences that require them to maintain a measure of autonomy from one another. For the Mohawk, as for many other Aboriginal peoples, sovereignty does not mean establishing an all-powerful government over a nation or people. It means that the people take care of themselves and the lands for which they are responsible. It means using political power to express the people's will.

Commissioners heard differing views about what Aboriginal sovereignty means for the relationship between Aboriginal peoples and Canada. Some Aboriginal people spoke about degrees of sovereignty and joint jurisdiction. A number of treaty nations used the term 'shared sovereignty' and maintained that their treaties created a confederal relationship with the Crown, or a form of treaty federalism. For example, the Federation of Saskatchewan Indian Nations outlined a vision of shared but equal sovereignties, affirmed by treaties between First Nations and the Crown. This view envisages relations among First Nations governments, provincial governments and the federal government that are based on principles of coexistence and equality.⁶

Others adopt a more autonomous stance. For example, the Mohawk people draw a clear distinction between co-operating with Canada at an administrative level and surrendering sovereignty. They hold that the first does not necessarily involve the second.⁷ They consider the freedom to make associations an essential element of self-determination and self-government. The point is elaborated in a joint statement by the Mohawk Council of Akwesasne, Kahnawake and Kanasatake:

*We see self-determination and governance as discrete concepts. But by believing that our Nation constitutes a sovereign power, we are not precluding political or economic cooperation with Canada. Self-determination is a right we have and which must be respected, but we recognize that it is a right which operates within the context of a political and economic reality. From our perspective, our right to self-determination is not detrimentally affected by the arrangements and agreements we reach with Canada for the mutual benefit of our peoples. Our position with respect to any agreement must be based upon our assessment of our current capabilities to govern and administer, it in no way derogates from the unlimited right to change those arrangements in the future upon reflection.*⁸

The right of self-determination is also a basic concept for Inuit. This right is grounded in their identity as a distinct people, the strong bonds they have with their homelands, and the fact that they have governed themselves on those lands for thousands of years. They call for their rights to be viewed within a human rights framework as opposed to an ethnic rights framework:

*If more emphasis was placed on examining the self-government question from a human rights perspective, the dominating principles would be the universality of human rights and the equality of all peoples. This would lead to a recognition of the right of aboriginal peoples, like other peoples, to self-determination. Self-determination is not defined as an ethnic right internationally. It is a fundamental human right of peoples, not of ethnic groups.*⁹

In the eyes of Inuit, self-determination has both international and domestic aspects. Nevertheless, they have clearly indicated that they wish to exercise their right of self-determination mainly through constitutional reform and the negotiation of self-government agreements. Rosemarie Kuptana, former president of Inuit Tapirisat of Canada, has expressed this position as follows:

*The implementation of our right to self-determination will be pursued in a cooperative and practical manner with all Arctic States including Canada, but the Inuit agenda is first and foremost premised upon our recognition as a people. We are a people who have been subjected to the sovereignty of Canada without our consent, without recognition of our collective identity as a people and in violation of our right to self-determination under international law. This must be rectified by several initiatives: the negotiation of regional self-government agreements, constitutional entrenchment of the inherent right of self-government, and the full recognition of the right of indigenous peoples to self-determination, under international human rights standards.*¹⁰

Métis people also maintain that they have a right of self-determination as a distinct people. This right forms the background to their assertion of the right to govern themselves and, more generally, to control their own social, cultural and economic development.¹¹ The Métis right of self-determination arises from their distinctive political history, which has taken different forms in different parts of Canada. For example, the political consciousness of Métis people in western Canada is rooted in the unique character and status of the Métis Nation, which emerged in the prairies during the eighteenth and nineteenth centuries in the course of activities centred on the fur trade and buffalo hunting. The historical dimensions of self-determination are emphasized in a study by the Metis Society of Saskatchewan:

At the outset, it is important to note that our self-determination objectives, through self-government, are not new. Metis history bears witness to a lengthy legacy of struggles aimed at asserting our fundamental right to control our own destiny. In what is now the province of Saskatchewan, for example, ever escalating political, economic, social and cultural disputes between the Metis and the European settlers culminated in the well known Metis resistance to Ottawa in 1885. Other sites in nineteenth century Western Canada were also scenes of conflict over many of the same issues. As might be expected, while the military conflicts that sometimes erupted were relatively short-lived, the political struggle to protect Metis economic, social and cultural values and goals has persisted.

This enduring theme in our Metis history — that we as a people have struggled against often overwhelming odds to reclaim our traditional Homeland and assert our sense of nationhood — lies behind much of the current drive towards self-government.¹²

Métis people in eastern and central Canada also point to their long-standing and unique history, their position as mediators between First Nations and incoming Europeans and their involvement in the earliest treaties of peace and friendship. They also emphasize the continuity between their own traditions and those of other Aboriginal people.¹³

While they ground their right of self-determination in international law, Métis people see Canada as the main venue for exercising that right.

The Métis Nation, while believing that it possesses the right of self-determination in the context of international law, has consistently pursued the recognition of its autonomy within the confines of the Canadian state and has vigorously advocated the need to negotiate self government arrangements.¹⁴

Métis organizations have urged Canadian governments to ratify a Métis Nation accord, similar to the Charlottetown Accord of 1992.¹⁵ They have also called for the explicit entrenchment of the inherent right of Métis self-government in the Canadian constitution. Such measures would allow Métis people to negotiate self-government agreements as a “nation within a nation”.¹⁶

In summary, while Aboriginal people use a variety of terms to describe their fundamental rights, they are unanimous in asserting that they have an inherent right of self-determination arising from their status as distinct or sovereign peoples. This right entitles them to determine their own governmental arrangements and the character of their relations with other people in Canada. As Elder Moses Smith of the Nuu-chah-nulth Nation told Commissioners:

What we have — the big thing within our system ... Ha Houlthee. That is the very basic of our political setup, is Ha Houlthee, which is, we might say, putting it in English, that is true sovereignty ... That is absolutely the key, the key of why we are today now, is that we have always been. That was never taken away from us.

Moses Smith
Port Alberni, British Columbia
20 May 1992

In their presentations to the Commission, Aboriginal people asserted consistently that their inherent rights of sovereignty and self-determination have never been extinguished or surrendered but continue to this day. They said this fact must be recognized and affirmed by Canadian governments as a basic pre-condition for any negotiations on self-government.

1.2 Traditions of Governance

In most Aboriginal nations, political life has always been closely connected with the family, the land and a strong sense of spirituality. In speaking to the Commission of their governance traditions, many Aboriginal people emphasized the integrated nature of the spiritual, familial, economic and political spheres. While some Canadians tend to see government as remote, divorced from the people and everyday life, Aboriginal people generally view government in a more holistic way, as inseparable from the totality of communal practices that make up a way of life.

This outlook is reflected in Aboriginal languages that express the concept of government in words meaning ‘our way of life’ or ‘our life’:

If you take the word bemodezewan, you will find that it is a way of life ... That is why it is difficult when you ask an Indian person to describe self-government. How do you describe a way of life and its total inclusion of religious rights, social rights, government rights, justice rights and the use of the family as a system by which we live? ... We are not prepared at this time to separate those things. They are a way of life for our people.

Leonard Nelson
Roseau River, Manitoba
8 December 1992

Most Aboriginal people continue to be guided, to some degree, by traditional outlooks in their approach to matters of governance. In some instances, Aboriginal communities have made traditional laws, practices and modes of leadership the basis of their contemporary

governmental institutions. In other cases, however, traditional systems of governance have fallen into disuse or been replaced by new systems, such as those imposed by the *Indian Act*.

Faced with these changes, many Aboriginal people have called for a revitalization of traditional values and practices and their reintegration into institutions of government. Aboriginal people see this process occurring in a variety of ways. A number of representations made to the Commission emphasized the need to root contemporary governmental initiatives in traditional attitudes and institutions:

*If self-government is to become the vehicle by which Native people resume their rightful place in North American society, it must grow, unaffected, out of a strong knowledge of the past. Only in this way, is it assured that the Anishinabek, and other traditional governing structures, will be resuscitated for future growth and developmentKnowledge of pre-contact Native societies will serve as the proper base upon which we can carefully and slowly construct models of governance. These models will be founded in the past and developed to consider environmental changes and the realities of today.*¹⁷

Nevertheless, in calling for governmental structures that are grounded in Aboriginal peoples' cultures and values, some interveners also spoke of the need to adopt certain features of mainstream Canadian governments.

The Lheit-Lit'en solution was to recognize what had been lost, which is a traditional form of government. What had been lost was culture. What had been lost was any relationship between the community, the children, the adults and the elders as well as language. And that needed to be regained, the community decided.

But at the same time, the community also felt that since we live in a contemporary non-Aboriginal world that it would be impossible to regain that out of contextAs a consequence, the Lheit-Lit'en decided to combine traditional and contemporary methods of governments, contemporary as well as traditional methods of justice.

Erling Christensen
Prince George, British Columbia
1 June 1993

In what follows, we consider some important aspects of Aboriginal traditions of governance, drawing on testimony in the Commission's hearings, briefs and studies. These aspects are

- the centrality of the land
- individual autonomy and responsibility
- the rule of law
- the role of women
- the role of elders
- the role of the family and clan
- leadership

- consensus in decision making
- the restoration of traditional institutions.

There is no uniform Aboriginal outlook on these topics, many of which are the focus of lively discussion and exchange among Aboriginal people. Nevertheless, the very fact that they are the object of such interest shows their continuing importance in the panoply of indigenous approaches to governance.

One point needs to be emphasized. For most Aboriginal people, 'tradition' does not consist of static practices and institutions that existed in the distant past. It is an evolving body of ways of life that adapts to changing situations and readily integrates new attitudes and practices. As a study of traditional Inuit governance explains:

This ... Inuit approach to 'traditions' and the 'traditional culture' moves 'traditional culture' away from its exoticized state depicted in books and displayed in museums and presents it instead in the everyday actions of northern individuals. This insider view grounds 'traditional culture' not in a time frame (the pre-contact period) but instead in a set of practices engaged in by Inuit of both the recent or distant past.¹⁸

Here, Aboriginal people are no more prisoners of the past than other Canadians are. They do not need to replicate the customs of bygone ages to stay in touch with their traditions, just as Parliament does not need to observe all the practices of eighteenth-century Westminster in order to honour the parliamentary tradition. Aboriginal people, like other contemporary people, are constantly reworking their institutions to cope with new circumstances and demands. In doing so, they freely borrow and adapt cultural traits that they find useful and appealing. It is not the heedless reproduction of outmoded practices that makes a vigorous tradition, but a strong connection with the living past.

The centrality of the land

Among many Aboriginal people, 'the land' is understood to encompass not only the earth, but also lakes, rivers, streams and seas; the air, sky, sun, moon, planets and stars; and the full range of living and non-living entities that inhabit nature. In this all-encompassing view, the land is the source and sustainer of life. In return, people must act as stewards and caretakers of the earth.

The Mi'kmaq people and other First Nations believe that this land existed before man's short stay on earth and it will exist long after we have gone; therefore, it is something to be respected as it is a gift from the Creator for us to use. As a Mi'kmaq, I believe that our ancestral territory is our home. This is where our people lived and hunted. This is where our Mother Earth is consecrated with the bodies of our ancestors.

John Joe Sark
Kep'tin, Micmac Grand Council
Charlottetown, Prince Edward Island, 5 May 1992

Our responsibilities to Mother Earth are the foundation of our spirituality, culture and traditions.

Chief Harold Turner
Swampy Cree Tribal Council
The Pas, Manitoba, 20 May 1992

This philosophical approach to governance, based on respect for the land and the need for responsible action, differs from conceptions of governance that emphasize domination and control. According to the Aboriginal approach, people do not have dominion over the land; they are subject to the land's dominion.

The whole underlying concept behind the Anishinabek view of resources was based on man's role within the environment. Man was equal to the earth and played a role that would benefit his surroundings. Man was not to dominate the environment and attempt to control it at his will, but cherish it and respect it for the gifts it had to contribute.¹⁹

The importance of the land in shaping the values and codes of Aboriginal people is noted in a Commission study of Dene living in the Treaty 11 area:

According to our beliefs, the spirit and the land are the boss of Dene life. At the time Treaty 11 was signed Dene culture was still intact in its social, political, and spiritual manifestations. Our leaders of the day were bound by the social norms, the beliefs and customs of a culture which spanned more than ten thousand years.

The land is the boss. She provides all the necessities of life. The Dene are given the responsibility to continue to live with her in that part of her being which has generated the Dene way of life, to govern themselves at personal, family, regional and national levels in a manner which honours and respects her. This is fundamental to survival. To disrespect the spirit of the land is to disrespect life.

In the traditions of the Dene elders, because The Land is the boss and will teach whoever She wants, they will accept as Dene anyone who comes to know and live as they know and live. At that time they will be only too eager to share their responsibility for jurisdiction and governance. This is not a note on racial relationships, it is a statement to the belief of the Dene that The Land is the boss of culture, that culture is inextricably tied to The Land, and that people are required to adapt their way of life to the teachings of the Land.²⁰

Over the past several centuries, Aboriginal relationships with the land have been altered fundamentally by historical processes that have distorted and in some cases severed these relationships. Some Aboriginal people have been left with virtually no recognized land base of their own. Even where an exclusive land base exists, it is often very small, a mere fraction of the people's traditional territories. Moreover, Aboriginal people frequently have only limited access to their traditional territories and little or no priority when use of those lands and resources is allocated. They have little say in decisions concerning the development of those territories and derive little benefit from such development. All

these circumstances have profoundly affected the collective lives and welfare of the people concerned.

Individual autonomy and responsibility

In most Aboriginal societies, an individual is imbued with a strong sense of personal autonomy and an equally strong sense of responsibility to the community. Since the welfare of the community depends on the ingenuity, initiative and self-reliance of its individual members, individual rights and responsibilities are viewed as serving rather than opposing collective interests.

One of the most important and respected attributes of a person in Inuit society is their degree of independence and ability to meet life challenges with innovation, resourcefulness and perseverance. Traditionally, these were traits that would greatly increase the chance of survival for the individual and groupIn addition to a strong value being place on individual independence, the practice of sharing was held to be of the utmost importance.²¹

In general, the Dene governed themselves with recognition and acceptance of the individual's right and responsibility to live according to the demands and needs of the gifts which the individual carriedIt is in the context of mutual benefit to all individuals concerned that collective rights and responsibilities are exercised.²²

Understanding the individual's status and role has important implications for governance. In a number of Aboriginal societies, this understanding has fostered a strong spirit of egalitarianism in communal life. As the Deh Cho Tribal Council affirms, "No one can decide for another person. Everyone is involved in the discussion and ... the decision [is] made by everyone."²³

From this perspective, interfering with the fulfilment of an individual's responsibilities can be seen as interfering with natural law. It is only when the actions of individuals threaten the balance of society and the fulfilment of collective responsibilities that justice, as a mechanism of government, is brought to bear:

Justice was prescribed as a code of individual duties and responsibilities first; then when the correction of a wrong was ignored, the community could and would institute sanctions — ranging from restitution by apology, retribution, to outright ostracism. But always the rehabilitation and healing of the individual was central to the wellness and normal functioning of the community within the nation.²⁴

The rule of law

In Aboriginal societies, as in mainstream Canadian society, the rule of law is accepted as a fundamental guiding principle. However, the law is not understood in an exclusively secular sense. For many Aboriginal people, the law is grounded in instructions from the Creator or, alternatively, a body of basic principles embedded in the natural order. Thus

basic law is viewed as the 'law of God' or 'natural law'. This basic law gives direction to individuals in fulfilling their responsibilities as stewards of the earth and, by extension, other human beings. The law tells people how to conduct themselves in their relations with one another and with the rest of creation.

*The Creator gave us our instructions in which are ordained our duties and freedoms; our roles and responsibilities; our customs and traditions; our languages; our place on Mother Earth within which we are to enjoy peace, security, and prosperity. These are the spiritual ways by which we live.*²⁵

Included in the spiritual laws were the laws of the land. These were developed through the sacred traditions of each tribe of red nations by the guidance of the spirit world. We each had our sacred traditions of how to look after and use medicines from the plant, winged and animal kingdoms. The law of use is sacred to traditional people today.

Dennis Thorne
Edmonton, Alberta
11 June 1992

Since the law ultimately stems from God, any failure to live by the law is to turn one's back on the Creator's gifts, to abdicate responsibility and to deny a way of life. The law helps people fulfil their responsibilities as individuals and members of the community.

The traditional laws of most Aboriginal peoples are customary and usually unwritten. They are embodied in maxims, oral traditions and daily observances and are transmitted from generation to generation through precept and example. This practice is often misunderstood. Some outside observers, accustomed to thinking of the law as rules laid down by legislatures and embodied in written statutes, have denied that custom truly can constitute law. They forget that, even in mainstream society, few individuals are familiar with more than a small portion of the written law; in practice, ordinary people conduct their lives in accordance with what amounts to a living customary system. Moreover, English common law, which is the basis of the legal system in Canada outside Quebec, originated as a body of customary law under the supervision of the courts. To this day, it is largely uncodified.

The *Kaianerekowa*, or Great Law of Peace, of the Haudenosaunee Confederacy is perhaps the most frequently cited example of traditional Aboriginal law. While versions of the *Kaianerekowa* have been reduced to written form, the Haudenosaunee maintain that it is essentially a law based on the mind and can be discerned only through oral teachings.

Five centuries ago and today, Haudenosaunee law was and is based on peace. The lawmakers, in weighing any decision, must consider its effects on peace. It is a law based on rational thought, on using the mind both for the good and to its fullest potential. The lawmakers, in weighing any decision, must cast their minds seven generations ahead, to consider its effects on the coming faces. The lawmakers must consider the effects of each decision on the natural world.²⁶

From the time they emerged as a new nation on the plains of western Canada, the Métis people had their own customary rules of behaviour. During the 1870s, these rules were partially codified in the *Laws of St. Laurent*, as described by the Métis National Council:

In establishing a permanent settlement in the South Saskatchewan Valley, the Métis updated and formalized the old laws of the prairies into what came to be known as the *Laws of St. Laurent*. These written laws were adopted during the Assemblies of 1873 to 1875 in the absence of any other government presence in that area. They set out the civil rule for the life of the community including twenty-five Articles concerning the *Laws of the Prairie and Hunting*.²⁷

This code contained provisions governing the proceedings of the council and the daily life of the community. For example, Article 16 provided that any contract made without witnesses was null and void and would not be enforced by the council. This rule was qualified by a further article stating that any contract written in French, English or Indian characters would be valid, even if made without witnesses, if the plaintiff testified on oath as to the correctness of contract. A further glimpse into communal life is furnished by Article 21, which provided that any young man who, under pretext of marriage, dishonoured a young girl and later refused to marry her would be liable to pay a fine of fifteen Louis; the article added: “this law applies equally to the case of married men dishonouring girls.”²⁸

Inuit society provides another example of how customary law was successful in regulating individual behaviour and resolving disputes within the community. Although Inuit law was unwritten, it nevertheless constituted a strict code of personal conduct that was understood by all members of the society. People who departed from this code could expect to face a range of sanctions from other members of the community. These sanctions were usually sufficient to bring offenders into line and restore balance within the community. In this manner, Inuit communities were able to maintain a relatively peaceful and stable existence as self-governing units.

Inuit society governed the behaviour of its members with a complex system of values, beliefs and taboos that clearly outlined the expectations of how people should behave. These rules were retained and passed on by the elders through oral traditions as well as by example to the children.²⁹

Some Aboriginal people, with the help of their elders, have remained in close touch with their traditional legal systems. These systems are not static but continue to evolve and provide a strong basis for contemporary communal life. Other communities have not been as fortunate and are only just beginning to rediscover and revitalize their traditional laws. They recognize that the process may not be easy and will require time, sustained effort and the commitment of scarce resources. Nevertheless, they are hopeful they will succeed.

Our traditional laws are not dead. They are bruised and battered but alive within the hearts and minds of the indigenous peoples across our lands. Our elders hold these laws

within their hearts for us. We have only to reach out and live the laws. We do not need the sanction of the non-indigenous world to implement our laws. These laws are given to us by the Creator to use. We are going to begin by using them as they were intended. It is our obligation to the children yet unborn.

Sharon Venne
Saulteau First Nation
Fort St. John, British Columbia, 20 November 1992

The role of women

In many Aboriginal societies, women's roles were significantly different from those of men in governance and politics as in other areas of life. This was the subject of widely varying interpretations and comments among interveners. In some cases, views reflected differences in personal experience and circumstances, but in others they represented conflicting evaluations of similar experiences. We will give only a brief sampling of these views in this chapter. More detailed discussion of the subject can be found in Volume 4, Chapter 2.

Some interveners maintained that traditional differences in roles did not necessarily mean a lack of respect for women. In some societies, they said, the roles of women, while distinctive, were broadly equivalent in importance to those of men. For example, the importance of the family in political organization ensured that women were often involved in decision making, even if normally they did not act as public spokespersons or play a prominent role in political life beyond the family.

One version of this view is presented in the brief of the Stó:lo Tribal Council:

Broadly speaking, Stó:lo women did not have complete social and political equality with men. This does not mean women did not hold positions of power or achieve high social rank, but rather that their roles were different, and the power and authority at their disposal was exercised in different ways. For instance, much has been said concerning the fact that only male heads of households were permitted to speak at official public gatherings. However, it was universally recognized that a family leader spoke on behalf of his entire family, and therefore everything he said had theoretically been approved previously by the family.

It was at family gatherings of family members that women's opinions were strongly expressed. Indeed, current Elders point out that while the formal interfamily gatherings (where only men could speak) have fallen into disuse, informal family meetings have not, and that more often than not, families today continue to be controlled, in large part, by powerful matriarchs who exercise their considerable power behind the scenes.³⁰

Others pointed out that certain Aboriginal societies are matrilineal; the female line is used to determine membership in the kinship group and to trace the descent of names and property rights. In these societies, it was said, women often had primary responsibility for the appointment and removal of leaders. Such roles were extensions of women's

responsibility to ensure that peace and balance were maintained within the community and the nation.

[Although] men were usually in the official leading role as chiefs, diplomats and negotiators, these men were frequently selected and dismissed by a woman (or women) of the tribe.³¹

However, such viewpoints were not universally shared. Other commentators held that in many cases women did not traditionally enjoy governmental power equivalent in importance to that of men, even if government is understood in a broad way as incorporating the familial, social and spiritual spheres. For example, a study of governance traditions in an Inuit community presents a more varied picture:

As the testimonies demonstrate, at times, elders or even younger participants, when looking to the past, remember scenarios that they experienced or which were recounted to them in which women seemed to have been empowered — times for example when they provided clothing and care for their families or acted as midwives out on the land. Those same participants may in the same interview remember other times when, as women, they were powerless and victimized, such as when they were forced into arranged marriages or made to obey their husbands and their in-laws. These opposing testimonies attest to this view of power as a subjective state; their contradictory nature reflects a temporal approach to women's power.³²

The same study also found that, notwithstanding the settlement process of the 1950s and 1960s, which put women's roles in a state of flux, Inuit women feel that they are more empowered today and have a larger say in the political affairs of their communities. This is in part the product of their active participation in the numerous councils and committees that are a standard feature of contemporary political life in the North.

Almost all of the testimonies attest to the fact that women in Pond Inlet today have a voice that was denied them in traditional culture Women describe a new political power available to them through their participation on committees and councils and with the development of Nunavut.³³

According to these views, the advent of modern, electoral-style governmental systems has in some instances provided greater scope for women to participate actively in communal decision making. Nevertheless, others felt that modernization has sometimes had the opposite effect. For example, some First Nations interveners maintained that the disempowerment of women in their communities is largely a product of the *Indian Act* and other colonial impositions, which introduced alien and unsuitable forms of government.

Presently the women in our communities are suffering from dictatorship government that has been imposed on us by the Indian Act. We are oppressed in our communities. Our women have no voice, nowhere to go for appeal processes. If we are being discriminated

against within our community or when we are being abused in our communities, where do the women go?

Joyce Courchene
Indigenous Women's Collective
Winnipeg, Manitoba, 3 June 1993

The existing system is one that was imposed upon our societies as a way of destroying the existing political system, and as a way of controlling our people. Contrary to our traditional systems, the Indian Act system provides a political voice only to the elected chiefs and councillors normally resident on reserves, and usually male. The Indian Act system silences the voice of elders, women, youth and off-reserve citizens of First Nations.

Marilyn Fontaine
Aboriginal Women's Unity Coalition
Winnipeg, Manitoba, 23 April 1992

There were differing views on how this situation might be remedied. Not everyone agreed that self-government would be a sufficient cure for the sense of powerlessness experienced by some Aboriginal women. Some even expressed the fear that certain forms of self-government are in reality male-dominated processes that will contribute further to the marginalization of women.

Many women do not trust their leadership, indicating people like the idea of self-government but do not trust those who would run the government or dislike the present provisions on self-government as set out by the federal government. As one woman said: "I don't believe in the type of self-government that is being developed by the political leaders. Self-government comes from the people. It's up to us to go back to our traditional ways, no one can give us our power."

Unidentified intervener
Saskatoon, Saskatchewan
13 May 1993

Others warned of the dangers of fundamentalist approaches to self-government, which treat traditions as sacrosanct and fail to scrutinize them adequately in the light of present-day realities and values. Certain traditional practices, they argued, may have oppressive aspects that need to be recognized for what they are. Such practices should not be resurrected simply in the name of tradition without assessing their potential effects in the modern context.

Tradition is invoked by most politicians in defence of certain choices. Women must always ask — whose tradition? Is 'tradition' beyond critique? How often is tradition cited to advance or deny our women's positions? ... Some Aboriginal men put forward the proposition that a return to traditional government would remedy the abusive and inequitable conditions of women's lives. We have no reason to put our trust in a return to 'tradition', especially tradition defined, structured and implemented by the same men who now routinely marginalize and victimize us for political activism.³⁴

Many others pointed out the need for a rekindling of traditional values and ways before genuine self-government could be realized. They suggested that it was imperative for people to return to their own customs, languages and healing processes.

We believe that true Aboriginal government must reflect the values which our pre-contact governments were based upon. We point out that, according to traditional teachings, the lodge is divided equally between women and men, and that every member has equal if different rights and responsibilities within the lodge ... The structure and functions of the traditional lodge provide a model for the exercise of self-government.

Marilyn Fontaine
Aboriginal Women's Unity Coalition
Winnipeg, Manitoba, 23 April 1992

Before we can achieve self-government our communities and nations need to be revitalized and our people have to be given an opportunity to grow and develop healthy lifestyles.³⁵

These varying viewpoints present troubling and difficult issues, which we discuss in greater detail elsewhere in this report.

The role of elders

Elders have traditionally held special roles and responsibilities in matters of governance, stemming from their positions as esteemed members of the family and the larger community. Elders are teachers and the keepers of a nation's language, culture, tradition and laws; they are the trusted repositories of learning on history, medicine and spiritual matters. Their roles include making decisions on certain important matters, providing advice, vision and leadership, and resolving disputes within the community (see Volume 4, Chapter 3).

In some traditional forms of government, councils of elders were the primary decision-making bodies.

The oldest members of each clan ... were the ones who formed what we called the Council of Elders. They came together to sit in Council, the oldest members of each clan. They were the ones who made decisions.

The only type of hierarchy that we did have was what we could call a natural hierarchy. Because they have learned all the skills of their clan through their long life, that earned them the right to sit in Council and be part of the decision making.

Chief Jeannie Naponse
Whitefish Lake
Toronto, Ontario, 18 November 1993

With the arrival of new systems of government and services, the roles and responsibilities of elders have often suffered, not only in the area of communal decision making but also

in areas such as health and justice. For example, a study of Inuit decision making suggests that many factors helped to disenfranchise elders and segregate them from the mainstream of Inuit society. These factors include a decline in the importance of the extended family, the suspension of many traditional sharing practices, the erosion of the obligation to provide for one's kin, and the mixing of populations. This process has gone so far that elders have now formed their own interest groups, a trend that has been reinforced by governmental authorities in creating special elders committees, conferences and centres.

In our effort to expand the role of elders in society ... we must be careful not to isolate elders gratuitously from the mainstream or emphasize their roles to the extent that their relationships to their ilagiit [kin group] are undermined or jeopardized. Rather, we must first endeavour to promote traditional extended family values, decision-making structures, authority relationships, etc. at the grassroots level, where these features are given value and meaning.³⁶

In some contexts, elders have been able to maintain some of their traditional roles and responsibilities despite changes in the formal structures of communal decision making.

Elders continue to play a major role in maintaining harmony and peace within the community. Many problems and disputes are resolved through the mediation of elders. Thus, the key role of elders in traditional community governance continues to partially survive in many nations.³⁷

An example is furnished by the operations of the mental health committee in Pangnirtung, Baffin Island. This committee helps people heal emotional wounds related to sexual abuse, chronic depression, suicide of friends and relatives, and other matters. People are often referred to the committee by the local health centre or the Royal Canadian Mounted Police. In other cases, they go voluntarily or on the advice of family and friends. The committee is made up of 10 members, mostly volunteers and mostly women. The proceedings are informal; the usual procedure is to discuss the problem until all participants have had their say and then to reach consensus on how the matter should be resolved. Decisions are never taken without consulting elders, at least two of whom are present at each meeting. Elders are also available for consultation at any time, as the need arises. It is said that the advice of the elders invariably carries the most weight and forms the basis of most committee recommendations.³⁸

Some Aboriginal people have taken formal steps to restore elders to positions of responsibility. For example, in 1992 the Lheit Lit'en Nation moved to reinstate its elders council as the centre of its structure of governance. The elders council is now responsible for choosing the traditional chief and sub-chiefs of the nation, in accordance with its traditions and culture.³⁹ However, some interveners stated that contemporary efforts to ensure a greater role for elders in governance have not always brought an increase in genuine authority or respect. They maintained that such arrangements often constitute mere lip-service to the idea of involving elders in mediation and consensus-building procedures.

Beneath the surface appearance of these arrangements there may be very little genuine respect paid to elders and their advice. Often, although formally recognizing and respecting the leadership of elders, the elected politicians seem to regard elders and traditional government structures as threats to their authority.⁴⁰

The role of the family and clan

Traditionally, the family or clan constituted the basic unit of governance for many Aboriginal peoples. For more detailed discussion, see Volume 3, Chapter 2.

Before the white nations had any dealings with the Indian people of this nation, the whole realm of Indian being Indian meant that we had a clan system. It's a system of relationships that are defined by our birth right.

The clan system is a social order. The clan system is a justice system. The clan system is a government. The clan system is an extended family unit.

Leonard Nelson
Roseau River, Manitoba
8 December 1992

It is my personal view that the culture of any people is centred and perpetuated through the family unit. It is for this reason that I do not believe one can legislate the perpetuation of cultural values. I believe that if you destroy the family unit you will also lose the culture of a people. In this regard, I cannot overstate the importance of recognizing the integrity of the family unit as an integral part of any initiative leading toward Aboriginal self-government.

Dennis Surrendi
Elizabeth, Alberta
16 June 1993

Families and clans fulfilled a number of essential governmental functions. They determined who belonged to the group, provided for the needs of members, regulated internal relations, dealt with offenders and regulated use of lands and resources. They also imbued individuals with a sense of basic identity and guided them in cultivating their special gifts and fulfilling their responsibilities.

The clan system gives each member of the community clear knowledge of his or her place, in a number of ways. In a community with a functioning clan system, it tells individuals who their spiritual and political leaders are. It tells the person where to sit in the ceremonies. It often tells people about the others to whom they bear a special set of obligations — to help and guide them, but also that they are responsible and accountable to a particular individual as well as to all members of the clan.⁴¹

There was, of course, a great deal of variation across Aboriginal nations in the precise roles played by families, clans and kinship groups. In many Aboriginal societies, the family or extended family was the major self-governing unit. It was responsible for

regulating internal social and economic activities, and it provided for the needs of individuals and the security of family members. This situation is exemplified by Inuit, prior to their settlement in permanent communities in the 1950s and 1960s, and also by some groups among them that continue to practise a semi-nomadic lifestyle at certain times of the year.

The family is the foundation of Inuit culture, society and economy. All our social and economic structures, customary laws, traditions and actions have tried to recognize and affirm the strength of the Inuit family unit.

Henoch Obed
Labrador Inuit Alcohol and Drug Abuse Program
Nain, Newfoundland and Labrador
30 November 1992

Until 40 years ago, most Inuit lived amongst their families and extended families in small camps. Hunting and fishing provided food for the family and furs were exchanged for tea and other goods. Each member of the family had their own roles to fill in camp lifeBecause life was based on the family and family needs, community or camp problems were solved within family units; there was little need for such southern methods of problem solving as boards or committees.⁴²

Other peoples, such as the members of the Haudenosaunee Confederacy and the nations of the northwest coast, have traditionally lived in relatively permanent communities. Here clans often play a central role in governance. The clan system identifies who belongs to the group and in some cases determines the particular responsibilities and rights of both individuals and the clan itself. As the basic units of political organization, families and clans participate in the broader political and social relations of the community, the nation and, in some cases, the confederacy.

There are also great variations among Aboriginal nations in how family and clan systems affected the roles and opportunities of individuals. In some nations, clan structures were fairly rigid and confined individuals to the social positions and roles they were born into or inherited. In other nations, such as the Stó:lo, the structures were more flexible and permitted individuals to move from one position or role to another, depending on the degree of respect they were able to command.

Traditional Stó:lo society was centred around the extended family unit, and broken into well defined stratas which they defined as “Chiefs, notables and base folk” ... Stó:lo extended families were characterized by distinct, but fluid, levels of stratification. Each nuclear family within the extended family structure, and each individual within the various nuclear families, was rankedAmong the Stó:lo high rank could not be inherited, rather it had to be earned.⁴³

Finally, social specialization played a larger role in some clan systems than in others. Among certain peoples, such as the Anishnabe, particular clans had distinctive functions that they alone could fulfil:

Our structure was based on the five clansThe five clans actually addressed five functions in a community. In any community there is a need for leadership, for someone to take on that responsibility. There is also the need for protection in any community. There is also the need for sustenance, and there is also the need for learning and medicineWhen children were born into a clan, if they were part of the Medicine Clan, then all the skills and knowledge related to that clan would be passed on to that child. By the time the child reached adult age, they would know the skills of their clan. They would know their responsibility to the community, and that was their function.

Chief Jeannie Naponse
Whitefish Lake
Toronto, Ontario, 18 November 1993

Among other peoples, such as the Gitksan and Wet'suwet'en, each house (a smaller family grouping within the clan) fulfilled similar functions in government, with limited specialization of functions across clans within the nation.

Leadership

In many Aboriginal societies, political power was structured by familial relationships and tempered by principles of individual autonomy and responsibility. As described in one brief, leaders were viewed as servants of the people and were expected to uphold the values inherent in the community. Accountability was not simply a goal or aim of the system, it was embedded in the very make-up of the system.⁴⁴

Within families, clans and nations, positions of leadership could be earned, learned or inherited. Frequently, these methods operated in conjunction.

The selection of Chief was hereditary through a patriarchal line; the first born descendant would not automatically enter this position, it had to be earned. From a very young age the candidate for leadership would be trained and advised by his peers to ensure that he would be ready to assume his roleThe selection of leadership was a process that required much time and devotion. To become a leader was a great honour. The role of Chief was not one of power, rather it was a responsibility to fulfil the needs of the people.⁴⁵

In many instances, elders were viewed as community leaders. They sat in their own councils, which were frequently composed of both men and women. Decisions made by the elders council were expected to be observed and implemented by other leaders in the community.

In some First Nations, leadership functions were dispersed among the holders of various positions:

We do not follow the present day concept of chief and band council that was created by Indian Affairs. We have a traditional spiritual chief who is a medicine man; also we have four thinkers whose responsibility is for the welfare of the clan and to look into the

future. Then we have our Tukalas whose responsibilities are for the protection and security of the clan.

Dennis Thorne
Edmonton, Alberta
11 June 1992

In other cases, leaders were expected to take on a variety of roles and had to possess a wide range of personal qualities. For example, a study of leadership among Dene identifies the functions of spokesperson, adviser, economic leader (as hunter and trapper), spiritual adviser, prophet and role model. Qualities associated with these functions include oratorical skill, wisdom, authority, economic proficiency, generosity, spiritual insight and respect.⁴⁶

Among certain Aboriginal people, one clan was vested with responsibility for leadership and its members were expected to cultivate the relevant skills.

If one was born into the Leadership Clan, then there would be the gift of speech, to be able to have the power to influence by using language. Again, they learned all those skills as they were growing up, and also to have a good understanding of what leadership meant in those days.

Chief Jeannie Naponse
Whitefish Lake
Toronto, Ontario, 18 November 1993

In other instances, clan mothers had the responsibility of choosing leaders from among the members of families holding leadership titles. The clan mothers also had the power to remove leaders who were derelict in the performance of their duties.⁴⁷ In such societies, children were identified as potential leaders by the women of the clan.

Within the Haudenosaunee Confederacy, positions of leadership were specialized. Each clan within the nation was represented at the Council of the Confederacy by *rotiianeson*, or hereditary chiefs. These offices were hereditary in the sense that eligibility to fill them was inherited by the individual. Pine tree chiefs, who were not from families holding hereditary titles but earned their titles through merit, sat with and advised the councils of their nations. War chiefs as military leaders had the responsibility of executing decisions made in council by the *rotiianeson*.⁴⁸

Traditional Inuit societies exhibited a variety of patterns of leadership, as revealed in Marc Stevenson's study of traditional decision making in the Nunavut area. Among the Iglulingmiut of the Foxe Basin and north Baffin Island, the institution of leadership was well developed, with the eldest resident hunter in a band usually assuming the role of *isumataq*, the one who thinks. The authority of the *isumataq* often extended to socio-economic matters affecting the entire camp, including the sharing and distribution of game and other food. Iglulingmiut society placed great emphasis on the solidarity and hierarchical structure of the extended family, with a person's place in the hierarchy being

determined by age, generation, sex and blood affiliation. The Iglulingmiut also recognized a broader tribal identity, beyond the extended family and the band.⁴⁹

A second pattern of leadership is represented by the Netsilingmiut, who live on the Arctic coast west of Hudson Bay. Originally, most local Netsilingmiut groups were based on the relationship between men, ideally brothers. Although the eldest active hunter in the group was usually regarded as the leader, important decisions affecting the community were generally made jointly by several adult males. In effect, leadership took second place to the maintenance of co-operative relations among the males in the group. Male dominance and solidarity were expressed in the separation of men and women at meal times, the close bonds of affection and humour between male cousins, and the high incidence of female infanticide, which was the man's prerogative. There was little sustained co-operation among local groups and much mutual suspicion and hostility. There seems to have been no recognition of an overall tribal identity.⁵⁰

Another distinctive pattern is represented by the Copper Inuit, who lived on Banks and Victoria islands and the adjacent mainland in the central Arctic. The Copper Inuit were organized around the nuclear family, whose independence was absolute in all seasons of the year, whether during the summer when people were dispersed inland or during the winter when they assembled in large groups on the sea ice. In social structure and ideology, the Copper Inuit were highly individualistic and egalitarian, and in this respect differed notably from other Inuit of the Nunavut area. As Stevenson notes:

So great was the emphasis on egalitarianism that there were no positions or statuses demarcating certain individuals as standing above or apart from others outside the nuclear family ... While a man because of his ability or character might attain a position of some influence, as his powers faded, so too did his prestige and authority ... Even women outside the domestic sphere enjoyed equal status with that of men in decision making.⁵¹

The emphasis on individual autonomy made communal action very difficult, and there was no common council for decision making, no recognized leader to provide direction, and no special deference to the views of elders. As a result, murders and other transgressions against society often went unpunished.

Generally, however, traditional Inuit societies recognized two types of leadership. The first type is *angajuqqaq*, a person to be listened to and obeyed, and the second is *isumataq*, one who thinks. Both types of leadership were earned. However, in the first case, leadership depended on a person having a certain position in an organized system, while in the second case leadership depended more on individual merit and the ability to attract and maintain a group of followers. Nevertheless, the distinction between the two types of leadership was not hard and fast, and most successful leaders combined the features of both. Such persons could not abuse their authority or neglect their other leadership role without risking the loss of respect and ultimately an erosion of their influence and authority.⁵²

In speaking of their traditions of governance, many Aboriginal people emphasize that their leaders were originally chosen and supported by the entire community. This was especially true in non-hierarchical societies where leaders were equal to all others and held little authority beyond that earned through respect. In such societies, support for leaders could be withdrawn by the community as a whole or by those (such as clan mothers) with specific responsibilities in the matter.

Part of the principles under our traditional system of government was that the leader does not have a voice in his own right. He has to respect the wishes of the people. He cannot make statements that are at odds with what the people believe.

Margaret King
Saskatoon Urban Treaty Indians
Saskatoon, Saskatchewan, 28 October 1992

Leadership was reflective of the people's faith and confidence in that particular individual's capabilities as a Chief. If for some reason these duties as leader were not fulfilled or met satisfactorily by the people then they could "quietly withdraw support".⁵³

Many First Nations interveners spoke of how the *Indian Act* system of government had eroded traditional systems of accountability, fostered divisions within their communities, and encouraged what amounted to popularity contests. The first past the post system, whereby the greatest number of votes elected a candidate, was seen as especially problematic. It permitted large families to gain control of the council and shut other families out of the decision-making process.

A number of First Nations, such as the Teslin Tlingit, the Lheit-Lit'en, and the Gitksan and Wet'suwet'en, have taken steps to replace leaders elected under the system imposed by the *Indian Act* with traditional leaders.

Our Clan leaders have always been alive and well and thriving in Teslin, but their duties were mainly confined to cultural activities ... They were stripped of all the powers they traditionally held. They were consequently stripped of their respect.

What the constitution does is it puts the Clan leaders and the Elders in their rightful spot in Tlingit society, and that is at the top of the totem pole.

Chief David Keenan
Teslin, Yukon
27 May 1992

In some cases, this objective is being achieved through a return to band custom, by means of a procedure laid down in the *Indian Act*. In other instances, as with the Teslin Tlingit, traditional systems are being revived through self-government agreements. Certain communities are in a transitional period, with band councils operating side by side with traditional leaders. We return to this topic later in this chapter.

Consensus in decision making

The art of consensus decision making is dying. We are greatly concerned that Aboriginal people are increasingly equating 'democracy' with the act of voting[W]e are convinced that the practice of consensus decision making is essential to the culture of our peoples, as well as being the only tested and effective means of Aboriginal community self-government.⁵⁴

Decision making took a variety of forms in traditional Aboriginal societies. For example, decentralized systems of government often relied on the family and its internal structures to make decisions. In such societies, the autonomy of family groups was a fundamental principle.⁵⁵ Societies with a more complex political organization made decisions not only at the level of the family but also through broader communal institutions. The potlatch, as practised among the peoples of the northwest coast, is an example of a communal institution serving multiple functions.

The potlatch was a gathering of people, often including people from surrounding nations. According to the Lheit-Lit'en Nation, the potlatch was usually a culmination of smaller earlier meetings where individual issues were dealt with. At this final gathering, all people were included so that everyone could participate in final discussions and be aware of the decisions and agreement reached. The gathering dealt with territorial and justice issues and was generally the main instrument of community control, community watch, defence of territory and any issues relating to the community.⁵⁶

Whatever their system of government, many Aboriginal people have spoken of the principle of consensus as a fundamental part of their traditions. Under this principle, all community members should be involved in the process of reaching agreement on matters of common interest. Among some peoples, discussions generally begin at the level of the family. In this way, the views of women, children and all who are not spokespersons may help shape the view expressed by the family or clan. Discussions may then proceed at a broader level and involve all family spokespersons, clan leaders or chiefs. In certain cases, all members of the community meet in assembly. Through a prolonged process of formulation and reformulation, consensus gradually emerges, representing a blend of individual perspectives.

In describing how an Anishnabe nation with seven clans came to decisions through a consensus-seeking process, an intervener made these observations:

Peter Ochise ... said seven twice is eightIt's taken me some time to grasp what he meant. Seven perspectives blended, seven perspectives working in harmony together to truly define the problem, truly define the action that is needed makes for an eighth understanding. It's a tough lesson that we don't know all the answers, we don't know all the problems. We really own only one-seventh of the understanding of it and we only know one-seventh of what to do about it. We need each other in harmony to know how to do thingsThis process that we had was 100 per cent ownership of the problem.

Mark Douglas
Orillia, Ontario
14 May 1993

In consensus-based political systems, the concept of ‘the loyal opposition’, as in parliamentary systems, does not exist. As Williams and Nelson point out, decision making by consensus, often referred to as coming to one mind, is gradual, and the resolution of issues is built piece by piece, without confrontation.⁵⁷

A study of Dene governance traditions notes that “consensus among the Dene is more a quality of life than a distinct process, structure or outcome.”⁵⁸ It permeates all levels of decision making, from the extended family to local and regional communities and the nation as a whole. Nevertheless, the same study observes that certain conditions are necessary for consensus systems to operate properly. These include face-to-face contact among members and the opportunity for those affected by decisions to take part in them. Consensus systems also require a broad pool of shared knowledge, including recognition of the leadership qualities of particular individuals, their family, history, spiritual training and so on. These conditions presuppose a basic political unit having strong continuing ties, such as those found in the extended family.

In many First Nations communities, the family-based consensus process has been displaced by majority-based electoral systems, which have altered the roles of women, elders and other members of the community. According to some interveners, these electoral systems have had the effect of splintering viewpoints, alienating the community from decision making, and breeding distrust of leaders and officials. Electoral systems have also been susceptible to domination by numerically powerful families in the community.

When you look at elections in communities with the DIA elected system it’s common knowledge that the ones with the bigger families are the ones that get elected in these positions today.

Jeanette Castello
Terrace, British Columbia
25 May 1993

As the submission of the Stó:lo Tribal Council observes, if a community has only five extended families, it is relatively easy under the plurality system for one large family or interest group to dominate council and monopolize power. Indeed, it has been reported that councillors representing minority families often feel so politically redundant that they stop attending meetings. For some interveners, such a system lacks legitimacy:

To the Stó:lo Elders, it is intellectually inconceivable that any government can be viewed as legitimate when a leader can be chosen, for example, from a list of three candidates and be declared winner despite up to 66% of the people voting against him.⁵⁹

Numerous First Nations interveners called for their governments to revive traditional methods of decision making that incorporate broader and more balanced systems of accountability. In their view, to gain legitimacy and credibility, First Nations governments and leaders must reflect the entire group they represent. Decision-making

processes must be accessible and responsive to the views of communities, families and individuals.

The leadership must pursue a course of increased accountability to the people. This begins with returning authority and responsibility to the community. It means opening the lines of communication and providing a network of dialogue. This dialogue will be fundamental in building the bridge between the leaders and the Anishinabek people.⁶⁰

The restoration of traditional institutions

Many Aboriginal people see revitalization of their traditions of governance as playing an important role in reform of current governmental systems. The Assembly of First Nations states:

The move to re-establish and strengthen First Nation governments must be encouraged by all levels of government. The establishment of First Nation governments based on First Nation traditions, including hereditary systems, clan systems and other governing structures, should be encouraged and innovative institutions developed to reflect both these traditions and contemporary governing needs.⁶¹

For some groups, a return to traditional systems of government would mean the restoration of the primary role played by extended families and clans.⁶² For example, the extended family might be given initial responsibility for matters affecting the welfare of individuals and the family, such as domestic conflict, child welfare and some aspects of the administration of justice, such as the healing of offenders. Representatives of families or clans might come together as a community council, which would exercise a range of governmental functions and responsibilities. Chiefs or chief spokespersons would then be selected in a traditional manner, which in some cases might involve mutual agreement among families. Such arrangements would be designed to avoid the situation that sometimes results under conventional electoral arrangements, whereby one or two families in a community are able to dominate the entire apparatus of government.

In some approaches, special roles and responsibilities should be assigned to women and elders in a revival of traditional institutions. Such approaches would place women and elders at the centre of government and decision making and give them particular responsibilities for the selection and removal of leaders. Other approaches would assign women and elders mainly advisory and supportive roles. Approaches of the latter kind are cause for scepticism and concern for many Aboriginal women, who express the fear that such arrangements may disenfranchise them or muffle their voices under a blanket of tradition.⁶³

Such concerns are not confined to women. Several men have expressed the view that any revival of traditional institutions and laws need not (and should not) involve reinstating practices that discriminate against certain individuals and groups.

I think a lot of the traditional laws and traditional concepts make a lot of sense and that is how our society functioned in the past and it can function again very well, but in doing so we have to be careful that we do not take away rights from people and that individual rights and collective rights are properly addressed and that traditional laws are clearly defined and apply to everybody, not only to certain groups and not to other groups.

Chief Jean-Guy Whiteduck
Maniwaki, Quebec
2 December 1992

The Teslin Tlingit Nation in the Yukon is an example of a group that has taken significant steps toward restoring its traditional system of government, particularly in the areas of leadership and decision making.⁶⁴ It has done so as part of a self-government initiative that is parallel to its negotiation of a comprehensive land claims settlement. The new arrangements are embodied in a written constitution developed pursuant to the self-government agreement. The constitution represents an adapted version of traditions that have been observed from time immemorial. It envisages a multi-level governmental structure, with institutions both at the clan level and at the level of the nation as a whole.

The five clans of the nation play an important role in the new arrangements. They determine who is a member, select leaders and assume certain governmental responsibilities for the internal affairs of the clan. For example, each clan has its own court structure called a peacemaker court. At the level of the nation, there are several distinct branches of government, including an executive council, an elders council, a justice council and a general council, which acts as the main legislative body. While these councils are not exact duplicates of traditional Tlingit institutions, they reflect the nation's clan-based structure and strike a balance among the various sectors of the community. Thus, each clan is awarded five representatives on the general council. Council decisions are taken by consensus and require the presence of at least three members from each clan as a quorum. Moreover, the leader of each clan has a seat on both the executive council and the justice council.

Other Aboriginal nations envisage adopting governmental structures that combine mainstream Canadian institutions with certain traditional elements, such as decision making by consensus or clan-based selection of leaders. For example, the Nlaks'pamux Tribal Council in British Columbia has proposed a constitution that blends traditional and contemporary structures of tribal government. It features a council consisting of the hereditary chiefs of the various member tribes, 13 elected councillors and an elected head chief.⁶⁵ Another example is the public governments being established by Inuit in the territories and northern Quebec. While these governments will probably borrow features from Canadian models, it is also anticipated that Inuit values and perspectives will inform their structures and day-to-day operations.

Likewise, the Metis Nation of Alberta has created a senate of elders selected in recognition of their service to the nation. In addition to being custodians of Métis culture and traditions, senators are charged with presiding over ceremonies and settling certain matters, such as membership disputes. According to a brief submitted to the Commission,

a similar approach has been taken by other provincial Métis organizations and by the western Métis Nation.⁶⁶

Other interveners noted that the revival of traditional institutions should not be seen as an end in itself but as a means to the larger goal of serving the contemporary needs of the community. As Chief Edmund Metatawabin of the Fort Albany First Nation stated, “While we are free to follow traditional means of collective decision making, the pragmatics of real life politics dictate that a structure must be functional in terms of today’s legal and economic reality”.⁶⁷

In conclusion, many Aboriginal people are in the process of revitalizing their traditional approaches to government as part of a larger process of institutional innovation and reform. While some nations propose to establish institutions based on traditional forms, others favour approaches that use contemporary Canadian models, while drawing inspiration from traditional Aboriginal governance. Written constitutions do not tell the whole story, however. Whatever form Aboriginal governments take, they will likely be influenced by less tangible features of Aboriginal cultures. The fact that some Aboriginal governments may resemble Canadian governments in their overt structure does not preclude their being animated by Aboriginal outlooks, values and practices.

1.3 Visions of Governance

One of the most striking characteristics of Aboriginal people is their diversity. They speak many different languages. They have distinctive cultures and traditions. Their social, political and economic circumstances vary. A number of Aboriginal peoples have extensive land bases, others only modest tracts of land, and still others no recognized land base at all. Some have outstanding land claims, others have entered into land claims agreements. Some Aboriginal people make up the majority population in a territory or region, while others are significantly outnumbered by the general population where they live. Some enjoy relatively broad governmental powers and administer a wide range of services and programs, while others are in the process of assuming greater governmental powers. Some follow age-old pursuits and ways of life; others have embraced new and adapted ways.

This diversity is also reflected in Aboriginal people’s visions of governance. However, these visions have a common core. Ultimately, Aboriginal people want greater control over their lives. They want freedom from external interference. They do not want to be dependent on others. They want to realize their own visions of government. Aboriginal people affirm that they have the inherent right to determine their own future within Canada and to govern themselves under institutions of their own choice and design. No one can give them this right, they say, and no one can take it away.

Many Aboriginal people also feel a special relationship to the land, which they associate with their right to be self-governing. This relationship is spiritual in its origins, but it has important practical dimensions. Lands and waters, and the varied resources that they harbour, can provide the basis for economic self-sufficiency. At the same time, these

resources must be safeguarded and enhanced for the benefit of future generations. In most instances, lands and waters are central to Aboriginal visions of government.

Just as they speak with one voice on the critical importance of the land, most Aboriginal people stress the importance of their national cultures, languages and traditions. They see these as central to their collective and individual identities. However, over time, Aboriginal cultures have been subject to erosion and direct assault from governmental policies designed to assimilate Aboriginal people into an undifferentiated Canadian identity. Aboriginal peoples see self-government as one of the main vehicles for repairing the damage done to their national cultures and restoring the vitality of their languages, way of life and basic identities.

Accordingly, Aboriginal visions of self-government embrace two distinct but related goals. The first involves greater authority over a traditional territory and its inhabitants, whether this territory be exclusive to a particular Aboriginal people or shared with others. The second involves greater control over matters that affect the particular Aboriginal nation in question: its culture, identity and collective well-being.

The first goal is broadly territorial, in that it takes a definite territory and its inhabitants as the central focus. The second is broadly communal, in that it concentrates on a specific Aboriginal group and its members, wherever they happen to be located. These two goals are complementary rather than contradictory. To varying extents, many governmental arrangements envisaged by Aboriginal people aim to achieve both. Nevertheless, depending on which goal predominates, such arrangements tend to revolve around either territorial or communal forms of jurisdiction.

Territorial jurisdiction involves governmental authority over a specific territory and all its inhabitants, whether those people are Aboriginal or non-Aboriginal, the members of a single nation or many nations, permanent residents or transients. Ordinarily, this form of jurisdiction is mandatory. That is, the government has the authority (although it might choose otherwise) to pass laws that bind all individuals in the territory, even if those individuals disagree with the laws or would prefer to be exempt from the government's authority. For example, a government exercises mandatory territorial jurisdiction when it passes a law regulating the use of motor vehicles in the territory. This law applies to all individuals located in the territory — citizens, residents and visitors.

By contrast, when we speak of communal jurisdiction, we mean jurisdiction that relates exclusively to the members of an Aboriginal group living in an area with a mixed population and an existing government. In our discussion, we treat communal jurisdiction as generally voluntary rather than mandatory. That is, it depends on individuals freely identifying themselves as members of the group in question and submitting to the authority of its governing body. In this respect, it is similar to the authority held by a religion-based school board, which depends on parents voluntarily signing up as supporters of the board.

Many concepts of Aboriginal governance centre on territorial jurisdiction. They envisage governments that exercise mandatory jurisdiction over a definite territory and all the people located there. However, there is a good deal of variation in the particular arrangements envisaged. Under some proposals, residency in the territory is limited to members of a specific Aboriginal group; under others, it is open to Canadians generally. In certain cases, the right to vote and stand for public office is available to all residents; in others, it is restricted to individuals who meet citizenship or membership requirements.

Other visions of Aboriginal governance involve a form of communal rather than territorial jurisdiction. They envisage institutions serving the particular needs of Aboriginal people who live in areas with a mixed population and an existing government. The proposals usually relate to urban and semi-urban areas and centre on the creation of special Aboriginal service agencies, cultural institutions, school boards and so forth. These institutions would exercise voluntary rather than mandatory jurisdiction and so depend on the consent of the people they serve.

These two basic forms of jurisdiction, while different, are not incompatible. As we will see, many Aboriginal visions of governance feature a mixture of territorial and communal elements. For example, some envisage governments that exercise mandatory jurisdiction over a specific territory and also a form of voluntary jurisdiction over citizens located outside that territory. Other proposals contemplate multi-level governmental structures incorporating a variety of semi-autonomous units, some exercising territorial jurisdiction, others communal jurisdiction.

We will now examine in greater detail how Aboriginal people have expressed their visions of governance. First, we will review proposals that centre on territorial jurisdiction. Then we will turn our attention to proposals for communal jurisdiction. Finally, we will consider Aboriginal perspectives on an issue that arises in both territorial and communal contexts: the most desirable level or levels for governmental functions. That is, should self-government be implemented at the level of the local community, the nation, the treaty group, the region, the province, or indeed Canada as a whole?

Territorial jurisdiction

Many Aboriginal people already possess territorial bases that they govern through a variety of institutions, often established under federal or provincial statutes. For the most part, these bases fall into three categories: reserve lands, settlement lands recognized under land claims agreements, and lands set aside by a province (the case of the Métis settlements in Alberta). These territories are exclusive in the sense that they are occupied primarily by Aboriginal people and are owned by them or held in trust for them. However, with some notable exceptions, the governmental authority that Aboriginal people actually exercise over these territories is very limited. Moreover, the territories are often small and poorly endowed with resources — inadequate to accommodate and maintain their current populations, much less future generations.

In addition to these territorial bases, many Aboriginal people also have a range of special rights and interests in larger traditional territories that they now share with others. Many Aboriginal people in this situation want more influence in the governance of these shared lands and resources. In some cases, they seek to share power with other parties through institutions involving co-jurisdiction or co-management. Such arrangements are particularly appealing to Aboriginal people when they constitute a minority in a territory and find it difficult to secure adequate representation of their interests through ordinary electoral processes. However, where Aboriginal people make up a majority of the population, other options become more attractive. For example, they might try to attain greater control over their shared traditional territories through the creation of regional or local public governments. In this way, by dint of numbers alone, they would be able to play a leading role through the operation of normal electoral processes.

Finally, some Aboriginal peoples lack any territorial base or governmental institutions. Moreover, they have little or no involvement in the exercise of authority over their shared traditional territories. Most non-status Indian and Métis people find themselves in this situation, as do certain Inuit, such as those of Labrador, and some First Nations people, such as the Mi'kmaq of Newfoundland and the Innu of Labrador.

In seeking to strengthen or restore traditional links with their territories, Aboriginal people have proposed a great variety of governmental initiatives. These initiatives fall into three groups:

- arrangements that involve a broad measure of Aboriginal authority on an exclusive territorial base, whether existing, expanded, or newly created;
- arrangements that involve a significant measure of joint jurisdiction and control over shared traditional lands and resources; and
- public governments that allow for significant Aboriginal participation in decision making.

In the following pages, we consider a selection of Aboriginal initiatives from each of these three categories.

Authority over exclusive territories

There are many Aboriginal governments that currently exercise authority over exclusive territories, such as Indian reserve lands and Métis settlement lands. However, as a matter of practice, these governments exercise only delegated statutory powers, which are handed down by the federal government or a provincial government. These powers are often very limited in scope and are subject to the paramount authority of the government that delegated them.

Aboriginal people want this situation of relative powerlessness to end. They assert the inherent right to govern their own territories within Canada and reject the notion that their

powers are delegated from other governments. They claim this right to be free of undue interference from other governments in relation to an extensive range of matters. We consider section 35 of the *Constitution Act, 1982* a recognition of this right as an existing Aboriginal and treaty right (see discussion in the section on Aboriginal self-government later in this chapter).

Aboriginal people take a variety of approaches to this objective. While some groups emphasize the exclusive nature of their jurisdiction, others consider their jurisdiction shared or concurrent with other governments, at least in certain areas. Some Aboriginal groups anticipate resuming the exercise of their inherent authority in a gradual manner, beginning with high-priority areas and progressively expanding their jurisdiction in a series of planned stages. Others anticipate moving fairly swiftly to resume jurisdiction over a comprehensive range of matters. We see a blend of these approaches in the examples that follow.

The Federation of Saskatchewan Indian Nations maintains that First Nations governments possess inherent and treaty powers in the legislative, executive and judicial branches of government. It asserts that First Nations have authority over their territories and citizens in a wide range of areas. These areas include citizenship; the administration of justice; education; trade and commerce; property and civil rights; lands and resources; gaming; taxation; social development; language and culture; housing; family services and child welfare; and hunting, fishing and trapping. The federation also recognizes, however, that some aspects of these areas may be subject to the concurrent jurisdiction of other governments, particularly in relation to the activities of First Nations citizens beyond their exclusive territories. In particular, concurrency may exist in the areas of health; economic development; hunting, fishing and trapping; justice; natural resources; and property and civil rights.⁶⁸

The Siksika Nation of Alberta maintains that First Nations governments constitute a unique or *sui generis* form of government in Canada.

The objective of the Siksika Nation's government initiatives is to enhance true self government. What it is attempting to structure are plenary, non delegated jurisdictions and powers that would ideally be entrenched in the Canadian Constitution. Within the context of the Canadian Constitution, the type of government envisaged entails powers and jurisdictions similar to those of a province. However, the form that such a government will take will be purely unique, as the cultural, social and political principles and values of the Siksika Nation would fine tune the exact form and mechanics of such a government

The government that Siksika Nation desires is a true state similar to a state government in the U.S.A. That is to say, its government would have legal status and capacities on par with the province or, in some circumstances, on par with the federal government.⁶⁹

Nevertheless, the Siksika Nation seems to accept the concept of shared jurisdiction with non-Aboriginal governments. For example, it anticipates that co-ordination with the

provincial government will be achieved through a protocol agreement. The agreement will set out principles for negotiation in relation to priority matters, such as the management of lands and resources; the environment; traffic and transportation; public works; health and justice; and secondary matters such as education and social services. The Siksika Nation emphasizes that it possesses inherent authority in these areas. The purpose of negotiations is to establish how provincial powers will be co-ordinated with those of the Siksika government in matters of concurrent interest.

Likewise, a case study at Kahnawake differentiates areas in which power might be exercised exclusively by the Mohawk government and areas in which power might be exercised on a shared basis with non-Mohawk governments.⁷⁰ It notes a preference for exclusive control of areas such as lands and resources, citizenship, education, infrastructure, justice, taxation and the environment. However, there is some support for sharing power in these areas, particularly through arrangements whereby other governments would assume certain responsibilities regarding the administration and delivery of services.

Aboriginal people also expressed concern about self-government arrangements in which federal or provincial governments delegate authority and retain certain veto rights over Aboriginal constitutions, legislation and policy. A case study of the general council of the Métis settlements in Alberta notes:

The jurisdiction which considers itself the delegator often requires reassurance that the power being delegated will be exercised only in certain ways. Absent such reassurance, it will not co-operate in the scheme. The presence of a ministerial veto power over General Council policies provides this assurance, although it is universally unpopular with settlement members. To date, this has not proven to be a practical problem, since ... the veto has never been exercised. However its presence is an obvious irritant, and one which the settlements will continue to attempt to have changed.⁷¹

Many First Nations communities told the Commission that their current land base is insufficient to generate the economic resources necessary for self-sufficiency under self-government.

It is foolish to pretend that self-government can be practised without a land base and resources to support the society and the administration of that society. Seventy-nine square miles will not provide the resources needed to support the people of the communities. Our people will require more land to move forward in areas of tourism, forestry, fisheries, mining and other economic development activities in which that First Nation wishes to pursue.

Frank McKay
Windigo First Nations
Sioux Lookout, Ontario, 1 December 1992

Some First Nations communities said that outstanding land issues would need to be resolved before jurisdictional issues could be dealt with in a satisfactory manner. These

communities want assurances that they will not find themselves with ample governmental powers but insufficient resources to exercise those powers effectively. As a case study of the Shubenacadie-Indian Brook First Nation noted:

All data on money, land ownership and the need for land gave support to settling land claims. It is reassuring to find that respondents believe that land is more important than money, that shared land is more important than individual ownership, that land is needed for the people to support themselves and, most important, that ownership must be settled before the band starts discussions on power and jurisdiction.⁷²

The importance of an adequate territorial base is felt even more acutely by Aboriginal peoples without lands. For example, the New Brunswick Aboriginal Peoples' Council, which represents off-reserve people in the province, sees an exclusive land base as a prerequisite to economic self-sufficiency and cultural healing. It proposes that the province transfer unspoiled Crown land, in areas such as the Christmas Mountains in northern New Brunswick, to governments and organizations representing Aboriginal people living off-reserve. The council also calls for the right to participate in decisions regarding the management and use of provincial lands and resources generally.

The Métis Nation in the west also views territory as central to economic self-sufficiency and the protection and enhancement of Métis culture. For example, in some parts of northern British Columbia, such as Kelly Lake, Métis people have called for the province to negotiate the provision of an exclusive land base. They seek arrangements similar to the Métis settlements of Alberta, except that they would own sub-surface resources on their lands and benefit fully from their development and use.

A Metis land base is seen as essential for the long-term survival and betterment of the Metis Nation. The absence of a land and resource base is the primary source of the poverty which exists amongst our people today. Total control over our own land and resource base will generate economic development and create employment.⁷³

These questions receive detailed discussion in Chapter 4, on lands and resources.

Authority over shared territories

The exclusive land bases held by Aboriginal peoples are, in most cases, only a small fraction of the much larger areas that constituted their original homelands. These traditional lands are now shared with other groups, both Aboriginal and non-Aboriginal. While Aboriginal people generally do not dispute the need to share these territories with others, they emphasize that they have strong ties to their original homelands that involve special rights and responsibilities.

Territory is a very important thing, it is the foundation of everything. Without territory, there is no autonomy, without territory, there is no home. The reserve is not our homeBefore the colonization of Abitibi, our ancestors always lived on the territory; my

grandfather, my grandparents and my father lived there. This is the territory that I am talking about. [translation]

Oscar Kistabish
Val d'Or, Quebec
30 November 1992

Many Aboriginal interveners called for greater participation in the government of shared traditional territories and the management of resources located there. They seek to realize these objectives in a variety of ways. Some emphasize the need to implement or renovate existing treaties in accordance with their true spirit and intent (see Chapter 2). Others look to the settling of comprehensive land claims. Some propose regimes involving co-jurisdiction and co-management. Still others regard regional public government as an effective means to the goal.

Many treaty First Nations maintain that their treaties with the Crown were essentially concerned with the sharing rather than the surrender of their traditional lands and resources.

By treaty the Bloods agreed to share their lands with the British Crown, except for specifically reserved areas for exclusive Blood use. The treaty created a unique relationship between the Bloods and the Crown, modifying only one aspect of our rights — the right to exclusive use of the land. We retain the same legal and political status as we did when we entered the treaties. Our Elders have stated that it is inconceivable that the Bloods could have alienated themselves from the land, from their sacred obligation as caretakers of the land.

Les Healy
Lethbridge, Alberta
25 May 1993

According to this view, the treaties not only assigned certain lands for the exclusive use of Aboriginal people, they also provided for continuing Aboriginal access to resources throughout the larger territory. In agreeing to share the land, treaty First Nations did not relinquish their jurisdiction and stewardship responsibilities. It is this basic principle, based on coexistence and co-jurisdiction, that treaty First Nations wish to see implemented.

In this spirit, the Nishnawbe-Aski Nation and its member First Nations communities in northern Ontario are seeking to implement their treaty relationships with respect to shared traditional territories, covered by Treaties 5 and 9.⁷⁴ In a “Framework Agreement on Land, Resources and the Environment”, drawn up in August 1992, the Nishnawbe-Aski Nation proposes a variety of institutions for land and resource management. Some of these would be exclusively Aboriginal in composition while others would involve sharing jurisdiction with Canada and the province of Ontario. The Nishnawbe-Aski Nation calls for prior consent by First Nations to development activities within traditional territories and the establishment of appropriate dispute-resolution mechanisms. It also envisages the

application of Nishnawbe-Aski principles and values in the stewardship and use of traditional lands and resources.

Other First Nations have developed similar proposals. For example, the Montagnais of Lac St. Jean, Quebec seek to implement a land and resource management regime through partnerships with the province and other parties holding interests in Montagnais traditional territories. In the meantime, they have established an institution called Services Territoriaux, designed to protect and promote Montagnais rights and interests within their traditional territories. This institution regulates the exercise of rights by individual Montagnais members and delivers trapper assistance, safety and communications programs. It also tries to establish co-operative working relationships with other governmental authorities and users, notably by participating in regional wildlife and environmental regulatory committees. Chief Rémi Kurtness provides a brief description:

These services cover several areas of activity relating to the development of the land, management of the natural and wildlife resources, and relations with other actors in the regionTo assist it in its responsibilities, the Montagnais Band Council has [developed] a process ... a general code of ethics, wildlife management and harvesting activities plans, and codes of practice for each traditional activitySome of the staff of the service, the lands officers, are responsible for applying these tools of management and regulationAll of our members, all of the Montagnais people, must follow those rules. If they do not follow those rules they are brought before the Court and we do not defend them if they do not follow the rules. On the other hand, if they are arrested and they have complied with our management plans we will defend them before the courts. [translation]

Chief Rémi Kurtness
Band Council of the Montagnais of Lac-Saint-Jean
Montreal, Quebec, 26 May 1993

The United Chiefs and Councils of Manitoulin has also drawn up plans to manage fish and wildlife in their traditional territories and regulate their people's activities there. These include draft regulations that set out principles to guide the use and management of resources, including safety and conservation measures, respect for fish and wildlife, and distribution and sharing among community members. The regulations establish harvesting seasons and lay down permissible methods of hunting, trapping and fishing.

One thing should be made clear at this point: we are not advocating the takeover of all fish and wildlife management, or exclusive use, in our territory. But we are asserting the right and the responsibility to regulate our own use and management of these resources in the areas where we have traditionally harvested, based on our needs. We are also prepared to challenge other governments when it appears to us that they are not managing their share of these resources responsibly. On our part there has always been a willingness to share the abundance of resources that reside in our territory, but at this stage we are not getting an equitable share, and we are not satisfied that the resources themselves are being managed properlyEventually we can see that there will be some

areas in which we have exclusive use and management responsibilities, and others where these responsibilities are shared with the Crown.⁷⁵

Aboriginal peoples who lack an exclusive land base have also proposed shared jurisdiction over traditional lands and resources. An example is the proposal for a Mi'kmaq Commonwealth, which includes a plan for co-management of the fisheries.⁷⁶ This proposal is modelled on a New Zealand arrangement whereby the Maori are entitled to a negotiated percentage of the commercial fishery, which they manage through their own laws. It is suggested that the Mi'kmaq Commonwealth might conclude similar agreements with relevant Atlantic provinces. These agreements would determine the First Nation's share of the resource, which would then be managed by the Mi'kmaq Commonwealth through its own or contracted enforcement mechanisms.

The proposals just described share the view that Aboriginal jurisdiction over traditional territories is inherent and exists independently of any recognition by the governments of Canada and the provinces. From this perspective, agreements regarding shared lands and resources should be based on the principle of co-jurisdiction. The co-jurisdiction model differs from certain co-management approaches currently proposed by provincial governments. The latter enable Aboriginal people to participate in the management of resources, but under legislative and policy regimes developed without the participation of Aboriginal people. In the eyes of many Aboriginal people, such arrangements are unsatisfactory because they do not acknowledge the autonomous authority of Aboriginal governments regarding their traditional lands and resources. By contrast, the type of regime favoured by many Aboriginal people would involve Aboriginal and non-Aboriginal governments exercising jurisdiction in a co-operative manner as equal parties.

Public governments

In areas where the public government option is attractive, a wide range of arrangements have been proposed by Aboriginal people. Inuit in particular have long been concerned about the social, economic and political implications of being confined to exclusive land bases.⁷⁷ Because Inuit constitute a majority of the population in their traditional territories, they are in a position to exercise effective control over local and regional governments elected by majority rule. In these circumstances, public government allows Inuit to maintain and strengthen their relationships with their traditional lands while avoiding the risks they associate with confinement to an exclusive land base.

Plans are now being drawn up to establish a public government for the new northern territory of Nunavut.⁷⁸ Under recent proposals (which are still fluid) the territory will be governed by a legislative assembly elected by popular vote, with the first election held in 1999. Consideration is being given to two-member constituencies, with one woman and one man elected in each constituency. The Nunavut government will be headed by a premier and a cabinet, with cabinet members holding responsibility for specific departments. Inuktitut will be the working language of government, along with English and French. The government will be as decentralized as possible without sacrificing effectiveness. To this end, core departments may be located in the capital, with some or

all of the program departments stationed in other communities. The authority of local community governments may also be enhanced. The public sector will employ Inuit in numbers commensurate with their share of the overall population, starting with at least 50 per cent Inuit representation.

Inuit of the Nunavik region in northern Quebec have proposed a regional public government featuring a legislative assembly with authority over a wide range of subjects currently within the purview of provincial and federal governments. These include lands, education, the environment, renewable and non-renewable resources, health and social services, employment and training, public works, justice, language, offshore areas and external relations.⁷⁹ While the government of Nunavik will be public in nature and thus open to all residents of the region, its proponents anticipate that it will reflect the distinct relationships Inuit have with their traditional lands. Under current proposals, such relationships will be protected through a Nunavik charter, which will recognize, for example, Inuit priority in harvesting wildlife, subject only to conservation needs.

Likewise, Inuvialuit of the western Arctic anticipate gradual devolution of powers from the federal or territorial government to a regional public government to be known as the Western Arctic District (or Regional) Government. The jurisdiction of the district government would encompass such matters as culture, economic development, education, land use planning and zoning, municipal services, local parks, housing, public safety, tourism, wildlife management and taxation. It is proposed that federal and territorial laws will continue to apply until displaced by laws enacted by the district government.⁸⁰ Inuvialuit emphasize the need for a genuine devolution of power and authority, as opposed to a mere delegation of administrative responsibilities.

Over the years, the Labrador Inuit Association has considered various models of public government.⁸¹ In 1987, the options under consideration included a regional government based on municipal units, a regional government based on federally established units, a system of issue-specific institutions, and a territorial government for northern Labrador.⁸² In 1993, the Labrador Inuit Association submitted a proposal for a comprehensive land claims agreement that included a plan for a public form of government. However, the respective merits of public and nation-based forms of government continue to be debated.

Métis communities in the northern sectors of some provinces have also shown some interest in regionally based governments with electorates composed predominantly of Métis people. As noted in a study of Métis self-government in Saskatchewan, these governments might have authority over land and resource management, fire control, highways, health, education, justice, economic development, and other areas.⁸³

In other cases, communities composed of both Aboriginal and non-Aboriginal people want decisions affecting the development and use of local resources to be localized. They also seek a share in the benefits derived from such activities. This situation is particularly prevalent in Labrador and other eastern coastal regions, as well as certain northern areas of the prairie provinces. Some of these communities have aspirations similar to those already described regarding authority over shared territories. Others, such as Métis

people of the south coast of Labrador, aspire simply to participate in decisions affecting matters such as the conservation of fish stocks or the harvesting of renewable resources.

At present, people in these regions seldom have control over the development of their lands and resources and derive few direct benefits. Proposals have been made in some regions for the delineation of community resource boundaries and local participation in decisions on matters such as the approval of Crown leases and land sales. Some have called for a portion of the proceeds from the use or sale of Crown lands and resources to be directed to local treasuries. These matters receive detailed consideration in the next chapter.

Communal jurisdiction

While territorial jurisdiction provides an important option for many Aboriginal people, for others it is less attractive or feasible. Large numbers of Aboriginal people do not live on exclusive territorial bases. Moreover, in the mixed areas where they reside, they are often significantly outnumbered by their non-Aboriginal neighbours. Aboriginal people in this situation are often acutely conscious of the need to maintain and strengthen their cultures and identities. For them, communal jurisdiction represents an appropriate way to fulfil this need. (For a full explanation of how governance questions relate to urban Aboriginal people, see Volume 4, Chapter 7.)

Communal jurisdiction comes in many forms, sometimes combined with territorial arrangements. The submissions, briefs and research studies suggest three main approaches to the subject:

- initiatives featuring territorially based governments exercising jurisdiction over citizens living off the territorial base (the extraterritorial approach);
- initiatives (mainly Métis) featuring multi-level governments with a mix of communal and territorial jurisdiction (the layered approach); and
- initiatives that form urban communities of interest composed of people from various Aboriginal nations (the community of interest approach).

We examine several proposals and initiatives that illustrate these three approaches. While most of the proposals relate to urban areas, some also apply or could be adapted to rural settings.

The extraterritorial approach

Many First Nations people living in urban areas maintain a strong sense of connection with their nations and communities of origin and would like to strengthen these ties. As a representative of the Saskatoon Urban Treaty Indians stated,

there has to be a process that respects the aspirations of urban treaty peoples in the full and free exercise of our inherent rights to representation regardless of residency. Urban groups such as ours need the flexibility to address concerns with all levels of government. Therefore, we seek to dialogue with our First Nation governments to forge a relationship that will mutually benefit our treaty peoples living in the urban centres.

Margaret King
Saskatoon, Saskatchewan
28 October 1992

According to many interveners, current legislation and governmental policies separate urban peoples from their nations of origin and fracture their sense of identity. As participants at the Commission's round table on urban issues indicated, rights under the current system are tied to the land:

People who move off a reserve land base are all of a sudden floating ... It is not a question of jurisdiction. It is a question of a vacuum. A participant said her identity changes if she moves, that it isn't tied to her, that it depends on where she lives.⁸⁴

For some, the solution is for First Nations governments to extend their jurisdiction beyond their territories to serve citizens living in urban and other off-reserve settings. The First Nation government could establish service agencies and other institutions to cater to these citizens and could establish structures for their representation and participation in the home government. This solution envisages a form of extraterritorial jurisdiction. Dave White offered an example:

My argument is not to diminish that power or authority [of First Nations on reserves], but to extend it beyond the borders of the reserves so that the people — the Native people in Sudbury and other urban centres — still have that sense of community, of power and responsibility that currently, under the *Indian Act*, only accrues to on-reserve situations.

Dave White
Sudbury, Ontario
1 June 1993

Advocates of this approach maintain that extraterritorial initiatives can help bridge the gap between Aboriginal people living on an exclusive land base and those living off this base. According to this view, such initiatives can also help maintain and revitalize the cultures and identities of Aboriginal people in urban areas. Some participants at the Commission's national round table on urban issues affirmed the link between their cultural identity and their communities:

[Our] cultural identities as First Nations people are tied to [our] communities, just as the identities of Métis flow from their settlements. The answer was for each group to extend jurisdiction from these home territories over the Aboriginal urban population.⁸⁵

An example of this approach is the *Act Respecting Self-Government for First Nations in the Yukon Territory*.⁸⁶ Under this act, a Yukon First Nation has certain powers to enact

laws and provide services for its citizens throughout the entire Yukon Territory, in addition to jurisdiction over its exclusive settlement area. These extraterritorial powers are optional and permit a First Nation to offer programs and services in a number of crucial areas: spiritual and cultural matters, Aboriginal languages, health care, social and welfare services, training programs, education, and dispute resolution outside the courts. First Nations governments also have extraterritorial powers regarding guardianship and custody of children, inheritance, wills and estates, determination of mental competency, solemnization of marriage, and granting of licences.

Another example of the extraterritorial approach is furnished by the Siksika Nation in Alberta, whose long-term plans for self-government consider the needs of its citizens living in urban areas. Under its present negotiations for self-government, the Siksika Nation proposes that its reserve-based government have jurisdiction over all Siksika citizens, both on and off the reserve, and that it take full responsibility for providing programs and services to them. As a step in this direction, the Siksika Nation has signed a protocol agreement with the Siksika Urban Association in Calgary, where a significant number of Siksika citizens live. This agreement affirms that all Siksika belong to the Siksika Nation, regardless of place of residence, and as such are entitled to representation by the Siksika Nation chief and council.⁸⁷

Extraterritorial initiatives in urban areas have been launched not only by local First Nation communities but also by tribal, regional and provincial organizations. For example, the Touchwood File Hills Qu'Appelle council, composed of sixteen First Nations communities near the city of Regina, provides numerous programs and services to its urban members.⁸⁸ Some provincial First Nations organizations have also begun to address the needs and concerns of urban peoples, although these initiatives are often still in their early stages.⁸⁹

The layered approach: Métis initiatives

The need for Métis-specific institutions of governance was a consistent theme in submissions to the Commission. Briefs and research studies from the Métis National Council, the Metis Society of Saskatchewan and the Manitoba Metis Federation all called for initiatives directed specifically to Métis populations in urban areas.⁹⁰ Marc LeClair states:

The Métis Nation feels strongly that institutions of Métis self-government should be established solely for Métis and categorically rejects approaches to urban self-government which lump Métis into institutions that serve both Indians and Métis.⁹¹

This position was echoed by Ernie Blais, then president of the Manitoba Metis Federation:

Programs and services for Metis in urban areas must be designed, developed and delivered by Metis government institutions for Metis people. This concept of Metis institutions of self-government has been developed provincially through the Tripartite

Negotiations and nationally through the Metis Nation Accord. In all instances, we intend that these Metis institutions will operate in both rural and urban areas and will be operated for the benefit of Metis.

Ernie Blais
Winnipeg, Manitoba, 2 June 1993

Métis people envisage a multi-layered system with local, regional, provincial and Canada-wide decision-making bodies. Urban areas would be represented in Métis governments as Métis locals, which would exercise authority delegated from Métis provincial governments. These locals would be structured to suit the needs and priorities of their particular constituencies. They would exist both on and off a land base and would have responsibility for such matters as education, training and employment, housing, social services, justice, health and economic development. In some cases, they would deliver programs and services developed at the provincial or regional level; in other cases, they would develop and deliver their own programs. Where urban areas have large Métis populations, several locals could be created in one area to ensure balanced provincial representation. The presidents of Métis locals would be members of provincial Métis legislatures, which in turn would provide direction to national organizations.

In Saskatchewan, the Metis Society has proposed that a Métis legislative assembly be created of local presidents, the provincial Métis council and representatives of the Metis Women of Saskatchewan. The legislative assembly would meet several times each year to fulfil its mandate as the governing authority of the Metis Nation of Saskatchewan. It would enact laws and regulations governing the internal affairs of the Métis Nation in that province. Members of the provincial Métis council would form the cabinet of the provincial Métis government, with responsibilities for various ministries or portfolios, such as education, health, housing, economic development.⁹²

Citizenship for purposes of Métis government would be voluntary, and individual participation would be based on the democratic principle of one person, one vote. In this way, it is anticipated that Métis locals would evolve into effective self-government vehicles for Métis people.⁹³

The community of interest approach

The extraterritorial and layered approaches to governance are designed for situations where there are strong continuing ties between urban Aboriginal people and their nations and communities of origin. However, these approaches do not meet the perceived needs of all urban peoples.

Some urban interveners, particularly women, stated that they had become estranged from their communities of origin. Others maintained that mainstream Aboriginal organizations did not adequately reflect the interests and needs of urban residents. As participants at the Commission's national round table on urban issues stated,

Aboriginal organizations claim to represent Aboriginal urban people but involve little accountability and almost no voice for Aboriginal urban people.⁹⁴

Other urban residents identify more strongly with the place where they live than with their community of origin. This tendency was particularly clear in submissions from Aboriginal youth living in cities. Other interveners suggested that distinctive local Aboriginal cultures have often emerged in urban areas. As Ruth Williams pointed out,

Each urban community has its own culture. There will not be two communities alike. Therefore, they must be able to have their own voice to ensure that community plans for social and economic development reflect the community's needs.

Ruth Williams
Executive Director, Interior Indian Friendship Society
Kamloops, British Columbia, 15 June 1993

Furthermore, it may not be possible for urban people to receive services from their community of origin, even if they retain strong links to that community.

The majority of bands, tribal councils and treaty areas do not have the capacity or infrastructure to address off-reserve Aboriginal issues and concerns Historically, off-reserve Aboriginal people have had to look after themselves individually, and then over a period of time organize into groups for mutual support.

Dan Smith
United Native Nations
Vancouver, British Columbia, 2 June 1993

For all these reasons, many Aboriginal people living in urban areas view communal institutions organized at the local level as best suited to their situation. The Assembly of Aboriginal Peoples of Saskatchewan reported that their members see autonomous self-governing institutions in urban areas as the most appropriate means to autonomy for urban people. Members of the Assembly expressed concerns

about entering into urban self-governing agreements with other off-reserve Indians who had ties back to their reserve homelands. They did not want to see their hopes, aims and aspirations drowned out by alliances with others who took their direction from chiefs and councils.⁹⁵

In its submission, the Native Council of Canada (NCC, now the Congress of Aboriginal Peoples) reported the results of a survey of more than 1,300 Aboriginal people living in six major metropolitan centres. The survey indicated that “virtually all Aboriginal respondents (92%) either strongly (66%) or somewhat strongly (26%) support this effort to have Aboriginal people in urban areas run their own affairs”.⁹⁶

The NCC submission discusses four basic models for urban self-government: urban reserves; Aboriginal neighbourhood communities; pan-Aboriginal governments; and sector-specific Aboriginal institutions.⁹⁷ The first model envisages establishing urban

reserves under the *Indian Act* or other federal legislation. A reserve could be either an autonomous entity or a satellite of an existing reserve or settlement. In the NCC's view, this model is not generally desirable, especially if it relies on the *Indian Act*, with its tainted legacy of fragmentation and exclusion. The NCC also points out that the satellite option may lead to undesirable situations in which the urban community becomes the effective colony of the home reserve or vice versa.

The second model for urban self-government contemplates a situation in which Aboriginal people form a majority of the residents in a relatively homogeneous urban neighbourhood. It envisages establishing an Aboriginal community government with its own institutions for education, health, housing, policing and other similar services. Unlike the first model, the community government would not be grounded in the *Indian Act*. Moreover, the neighbourhood would not be designated a reserve under federal authority. In the NCC's opinion, this model has advantages; however, given current demographics, there may be few instances in which it can be implemented.

The third model resembles the second but with a city-wide governmental body embracing all Aboriginal people within the urban area rather than a discrete neighbourhood institution. There would be no links with the *Indian Act* and no significant land base. The council views this option as workable and desirable in many contexts.

The fourth model involves single-sector institutions in areas such as education, housing and health. The institutions would be developed and run by Aboriginal people in a manner similar to denominational schools. Although some initiatives of this kind are emerging, the NCC considers that they may encounter significant jurisdictional and financing problems.

Overall, the NCC prefers Aboriginal community governments of the neighbourhood or city-wide varieties. Once these governments are established, they will be in a good position to create sector-specific institutions. The council also anticipates that Aboriginal community governments may find it useful to link together in larger structures embracing an entire region or even the whole country. Such structures might play a variety of roles, ranging from providing information to providing a further level of pan-Aboriginal governance.

Levels of governance

What is the most desirable level (or levels) for governmental functions? This basic question must be considered in relation to the many visions of governance presented to us. For example, with territorial approaches, should the main governmental unit be the local community, or should it be the larger nation or treaty group?

Distinctive approaches to this issue, reflecting their particular histories, traditions and contemporary circumstances, have been taken by First Nations, Métis people and Inuit. For convenience, we deal with each of these groups separately. However, many of the

approaches have possible application beyond the groups with which they are currently associated.

First Nations approaches

First Nations hold differing views regarding the most appropriate level for governmental institutions. These differences are reflected in the varying ways in which the term First Nation is used. Sometimes, it is used in a broad sense to indicate a body of Indian people whose members have a shared sense of national identity based on a common heritage, situation and outlook, including such elements as history, language, culture, spirituality, ancestry and homeland. Under this usage, a First Nation would

often be composed of a number of local communities living on distinct territorial bases. However, in other instances, the term First Nation is used in a narrow sense to identify a single local community of Indian people living on its own territorial base, often a reserve governed by the *Indian Act*.

While many interveners used the term First Nation in the narrower sense, others preferred the broader usage, which they considered more inclusive and consistent with Aboriginal traditions. The Ontario Native Women's Association expressed the following view:

It is recommended that the definition provided by our elders be utilized. When they speak of the First Nations in Ontario, they are speaking of the Algonquin, Cayuga, Cree, Delaware, Iroquois, Metis, Ojibway, Onondaga, Oneida, Seneca and Tuscarora Nations and all their peoples. They are not speaking about the reserves or of treaty organizations, or any other organization. Their definition is in fact independent of the Indian Act and is based on inclusion rather than exclusion.⁹⁸

The same broad usage was reflected in the accounts that Aboriginal people gave of their nation's history and identity. For example, Chief Gerald Antoine supplied the following description of Dene in his testimony to the Commission:

The Dene constitute a nation born of a common heritage within a distinct territorial land base ... and having a distinct culture, including laws, beliefs and languagesDene land use is based on tradition and the technologies and governed by Dene beliefs, customs and laws.

Chief Gerald Antoine
Fort Simpson, Northwest Territories
26 May 1992

The Commission uses the term First Nation in the broader sense. By contrast, we use the terms First Nation community or local community to refer to a single community forming part of a First Nation.

The basic issue is whether the principal unit of self-determination and self-government is the local First Nation community, the First Nation as a whole, or some wider grouping.

Many interveners maintained that the local community is the principal unit. The Chiefs of Ontario had this to say:

As an essential component of our relationships, we believe in the primacy of the individual community as an embodiment of all that which a nation stands for, that is, the implementation of its inherent right of self-government and jurisdiction within the context of original nationhood. To us, this is the principle of the primacy of the individual First Nation community.⁹⁹

Nevertheless, while many interveners maintained that in principle primary authority rests with the local community, they also recognized that in practice powers and responsibilities would often have to be exercised at higher levels, by governmental bodies representing the entire nation, treaty group, region or province. The result would be multi-level First Nation governments, in which authority spreads upward from the people. This approach is reflected in the following extracts from the hearings:

The United Indian Councils' model recognizes fully autonomous individual First Nations and we have nine First Nations that are involved in this model. Each one of them will be respected and independent of the others on a regular daily basis and we also have a regional government for strength, for economies of scale, for sharing, and for support.

Cynthia Wesley Esquimaux
Vice-Chief, United Indian Councils
Orillia, Ontario, 14 May 1993

What we have arrived at is that powers should remain with each of the band councils and everything that is common[F]or example, health, education, social services, environment and so on, that would be a government that would be called the Montagnais government. But that Montagnais government or that common government of the nine Montagnais communities is a government that would get its responsibilities from the band councils[W]e want power to stay as close as possible to the peopleThis is what we call self-government. [translation]

Chief Rémi Kurtness
Band Council of the Montagnais of Lac-Saint-Jean
Montreal, Quebec, 26 May 1993

For some First Nations, this division between local and national or regional governments takes a federal or quasi-federal form. For example, the council of the Attikamek Nation in Quebec is a regional organization comprising three distinct local communities, each with its own band council. The purpose of the Attikamek council is to pursue the common political, social and economic goals of the three local communities, arrange for shared services and mount joint projects. The Attikamek council offers services to its local communities in such areas as public administration, education, social services, community services, economic development and forestry. The Attikamek Nation expects that its governmental structures will continue to develop along federal lines. As Simon Awashish, president of the council of the Attikamek Nation, explained to the Commission,

The structure of the Attikamek government will be both national and local; that is to say that certain aspects of its authority will be exercised at the level of the nation and other aspects of its authority will emanate from each of the three communities. [translation]

Simon Awashish
President, Attikamek Nation Council
Manawan, Quebec, 3 December 1992

Some First Nations see their tribal or national organizations as a senior level of government, possessing primary authority to deal with other nations. Others envisage First Nations governments organized not only at the level of the community, nation, treaty or region but also Canada-wide. The Fort Albany First Nation community reported support among its members for an arrangement whereby First Nations communities would have primary authority in some areas but would conduct governmental activities in accordance with policies and guidelines developed by a Canada-wide government or organization such as the Assembly of First Nations.

Multi-level structures of governance are not new to First Nations. Many First Nations were traditionally organized in federations and confederacies. The Mi'kmaq Nation is an example of a federal-type association. According to the accounts of interveners, the most basic unit in the Mi'kmaq Nation was the family, which joined together with other families for economic purposes at the local or community level — the level of the extended family or clan — in Mi'kmaq, *wikamow*. At this level, decisions were made concerning internal relations, social and seasonal movements, and assignment of community tasks. Leadership was provided by an individual *sagamaw* who worked closely with a council of elders, generally composed of the heads of families.

The next tier of organization occurred at the district or regional level. The Mi'kmaq homeland of *Mi'kma'ki* comprised seven *sakamowti*, or districts, covering parts of present-day Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island, St. Pierre and Miquelon, the Gaspé peninsula and the Magdalen Islands. The political organization at this level, which included district chiefs, made decisions regarding war and peace and also assigned hunting territories to the various families living in the district. The highest level of organization was the Mi'kmaq Nation.

All of the *sakamowti* are represented on the Sant'Mawi'omi, and its leadership is made up of three positions: the Kjisakamow, the Grand Chief, who is the head of state; the Kjikep'tin, Grand Captain or War Chief, is the executive; and the Putu's is the keeper of the Constitution and the rememberer of our treaties. We had full control and jurisdiction over our internal affairs, as any national government would.

Alex Christmas
President, Union of Nova Scotia Indians
Eskasoni, Nova Scotia, 6 May 1992

This level of government focused on issues affecting the whole nation, including diplomacy and international relations:

The Grand Council provides an organized structure which maintains customs of land tenure, order between members and regulations between neighbouring nations and tribes.

Chief Geraldine Kelly
Miawpukek Band, Conne River
Gander, Newfoundland, 5 November 1992

Nevertheless, the authority of the higher levels of organization depended on the support they received from individual communities:

The authority of the district and national institutions is required from the communities which may be rescinded without notice. This structure certainly promoted accountability of those persons appointed as leaders of their communities, their districts and their Nation.

Brenda Gideon Miller
Listuguj Mi'gmaq First Nation
Restigouche, Quebec, 17 June 1993

Many other First Nations, such as the Haudenosaunee, the Wabanaki and the Siksika, were traditionally organized as confederacies rather than federations. The Haudenosaunee Confederacy, for example, incorporated five distinct but linguistically related nations: Mohawk, Onondaga, Oneida, Cayuga and Seneca. The covenant circle of wampum represented the fifty chiefs (*rotiianeson*) of the five nations. It also represented the peace, balance and security that was achieved through the confederacy:

Inside of the circle, the circle of fifty chiefs ... is our people, and our future generationsInside of the circle is our language and our culture, and clans and the ways we organize ourselves politically, and our ceremonies which reflect our spirituality of our cycle of life. A further meaning of the Covenant Circle is that if at any time one of our Chiefs or our people chooses to submit to the law of a foreign nation, he is no longer part of the Confederacy.

Elizabeth Beauvais
Kahnawake, Quebec
6 May 1993

Confederacies generally recognized the equality and autonomy of each member nation. As such, they constituted international organizations, which held shared economic, military and other policies. They were often involved in treaty-making processes with other nations, including European nations.

The Wabanaki Confederacy symbolizes the unity of First Nations. It was and continues to be an international forum for ... sharing information and creating alliances with other Nations. The Confederacy was brought together as an alliance during war as it was in times of peace.

Brenda Gideon Miller
Listuguj Mi'gmaq First Nation
Restigouche, Quebec, 17 June 1993

Métis Nation approaches

Multi-level governmental structures are a prominent feature of Métis Nation political organization. Four levels of political organization are recognized within the Métis Nation: local, regional, provincial and national. Although recently the main emphasis has been on the last two levels, Métis people also see the local and regional levels as necessary to future Métis governments.

Locally, Métis people envisage governmental institutions organized both on and off territorial bases. Territorial governments would exist mainly in the northern sectors of the western provinces. Off a land base, Métis locals would be the main form of self-governing institution. They would affect only those who chose to participate in them. Métis people in Saskatchewan have emphasized developing local government in their five-year restructuring process. This process is characterized by increased decentralization and accountability, with greater involvement of Métis locals in decision making. In Alberta, the Metis Nation plans to establish community constituencies as base organizations in a provincial Métis government.

Regionally, various forms of political structures are envisaged. The model provided by the Alberta Metis Settlements General Council is composed of the political leaders of all local settlement councils. The council considers itself an example of a successful multi-order political organization.

The Metis Settlements General Council offers one of the most highly developed examples in existence to-date of a *federation* of aboriginal governments. The General Council is a working model of a type of aboriginal federalism whose operation may provide some useful examples for other aboriginal jurisdictions which might be interested in adopting federative political arrangements.¹⁰⁰

Regional or zone councils are also part of the present and future structure of Métis government in Alberta. As currently envisaged, representation in provincial executive bodies, including a Métis cabinet, would be drawn from each of six regional zones.

In recent years, some Métis people have considered transforming their provincial associations into governmental bodies based on adapted parliamentary models. The following excerpt from the Manitoba Metis Federation's case study outlines one such approach:

Metis governance structures would promote Metis rights at the provincial and federal level while respecting the autonomy of the Metis at the community and regional levels. They could take the form of a provincial Metis legislative assembly mandated to enact legislation and administrative orders at periodic assemblies and be comprised of Local presidents. A provincial executive council or Cabinet elected on a province-wide basis would be empowered to implement the legislation through its various departments such as economic development, social services, housing, etc.¹⁰¹

Governmental structures are also anticipated for the entire Métis Nation. The Métis Nation sees itself as a unified political entity, both historically and today. The primary role of a Canada-wide Métis Nation government, acting through an institution such as a parliament, would be to represent all its citizens on issues affecting their collective welfare and to establish national institutions in areas such as culture and communications.

Inuit approaches

Inuit governmental initiatives feature multi-level structures. It is anticipated that the future territorial government of Nunavut will incorporate both community governments and advisory regional bodies.¹⁰² Similar arrangements are foreseeable in regions of the territorial and provincial north where a significant majority of inhabitants are Inuit, such as northern Quebec and the western Arctic.

Inuvialuit of the western Arctic anticipate creating a regional government, to be called the Western Arctic District (or Regional) Government, which would embrace a number of local community governments.¹⁰³ The government could comprise the four Inuvialuit communities of Holman Island, Paulatuk, Sachs Harbour and Tuktoyaktuk, the mixed Inuvialuit-Gwich'in communities of Aklavik and Inuvik on the Mackenzie Delta, and the predominantly Gwich'in communities of Arctic Red River and Fort McPherson. The inclusion of First Nations communities would create a unique pan-Aboriginal form of public government.

The Western Arctic District Government would have representatives from each local community, with a few other members elected at large. The district government's powers would be limited to those that the local communities, through their representatives in the regional assembly, confer on the government. The district government's main task would be to co-ordinate local government activities. It would increase efficiency and effectiveness by creating regional standards, and it would secure greater control for residents over lands, resources and the off-shore. Delivery of services would remain primarily the responsibility of local community governments. While this model shares jurisdiction between the local community and the district government, the proposed legislative authority could be exercised by the district only with the consent of the local communities. The district government is primarily a vehicle for empowering local communities. The proposals of many First Nations communities assign primacy to the governments that are closest to the people.

In summary, most Aboriginal peoples contemplate exercising their right of self-determination in ways that involve multi-level governments. At the same time, many Aboriginal people have concerns about the excessive concentration of authority in larger political structures, whether at the level of the nation, treaty group, region, province or country. There is a widespread conviction that locally important powers and responsibilities should rest with the local community, not with government one or more steps removed from the people to be served. This conviction raises important issues of principle and policy which we discuss in the next section.

2. Toward an Aboriginal Order of Government

2.1 An Overview

Can the various visions of governance held by Aboriginal peoples in Canada be realized today? In our view, the answer is a resounding yes. We believe that the right of self-determination and the constitutional right of self-government together provide a strong basis for realizing Aboriginal aspirations. In this section, we describe the basic principles that support and guide this important process. We also provide some suggestions for implementing self-government.

Attributes of good government

To be effective — to make things happen — any government must have three basic attributes: legitimacy, power and resources.¹⁰⁴ Legitimacy refers to public confidence in and support for the government. Legitimacy depends on factors such as the way the structure of government was created, the manner in which leaders are chosen, and the extent to which the government advances public welfare and honours basic human rights. When a government has little legitimacy, leaders have to work against public apathy or resistance and expend more power and resources to get things done.

Power is the acknowledged legal capacity to act. It includes legislative competence (the authority to make laws), executive capacity to execute the laws and carry on public administration, and judicial jurisdiction to resolve disputes. The power of a government may arise from long-standing custom and practice or from more formal sources such as a written constitution, national legislation and court decisions. Internal legal authority, however, is not always enough to make a government effective. Another important factor is the degree to which other powerful governments and institutions recognize and accept what is done by the government. Claims to sovereignty and other forms of legal authority may be of limited use if they are not respected by other governments holding greater power and resources.

Resources consist of the physical means of acting — not only financial, economic and natural resources for security and future growth, but information and technology as well as human resources in the form of skilled and healthy people. Resources are necessary to exercise governmental power and to satisfy the needs and expectations of citizens. Key resource issues include the nature of fiscal and trade relationships among governments, which affect the control and adequacy of resources.

A government lacking one or more of these attributes will be hampered in its operations. For example, a government that enjoys great legitimacy but has insufficient power or resources will be able to accomplish little and will remain largely symbolic — especially if it is competing with other political institutions that do wield substantial power and resources. By contrast, some governments have both power and resources but little legitimacy. To maintain themselves, they must rely on manipulation, intimidation and coercion. Where a government has some power but is lacking in both resources and

legitimacy, it is likely to become both oppressive and dependent. To maintain itself, the regime must seek resources from other governments. In return, these benefactors become the real decision makers, imposing conditions on continued financial support and investment. Such dependence makes governments more responsive to their external taskmasters than to their own citizens. This in turn erodes whatever legitimacy they originally possessed, accelerating the need for repressive domestic measures.

Aboriginal governments in Canada often lack all three attributes necessary to be effective. First, the legitimacy of some of these governments is weak because they evolved from federally imposed institutions and historically have been unable to satisfy many basic needs of their citizens, in part because of deficits in power and resources. Sometimes these governments have also failed to embody such basic Aboriginal values as consensus, harmony, respect for individuality and egalitarianism. Second, current Aboriginal governments have far less power than their provincial, territorial and federal counterparts. What power they possess is frequently insecure and depends mainly on federal legislation or even ministerial approval. Third, Aboriginal governments generally lack a sufficient tax and resource base and are highly dependent on federal funding for their basic operations. This funding has often been conditional, discretionary and unpredictable, fluctuating substantially over time.

What remedies do we see for these deficiencies? First, to put in place fully legitimate governments, Aboriginal peoples must have the freedom, time, encouragement and resources to design their own political institutions, through inclusive processes that involve consensus building at the grassroots level. Popular control of the process of constitution building is much more important than the technical virtuosity of the final product. In other words, Aboriginal peoples have the right of self-determination and now require the means to implement this right.

Second, to possess sufficient power, Aboriginal governments must have a secure place in the constitution of Canada, one that puts them on a par with the provincial and federal governments and does not depend on federal legislation or court decisions. The effectiveness of Aboriginal governments will depend on their ability to devote their energies to improving the welfare of their constituents rather than continuously asserting, defending and redefining their legal status. In other words, Aboriginal peoples' right of self-government must be recognized.

Finally, Aboriginal peoples must have adequate collective wealth of their own, in the form of land and access to natural resources, to minimize dependence on external funding and the political constraints that accompany it. No Aboriginal government, regardless of the quality and ideals of its personnel, can be fully accountable to its citizens if its basic operations are paid for by the federal government.

These three themes, among others, are discussed in the remainder of this chapter. First, we deal with the right of self-determination. Then, we consider the constitutional right of self-government under section 35 of the *Constitution Act, 1982*. Later in the chapter we discuss financial capacity. (Economic autonomy is discussed in Chapters 4 and 5.)

Self-determination and self-government: overview

In this section we discuss the relationship between the principles of self-determination and self-government and Aboriginal peoples, their governments and the evolution of Canada's constitution. The right of self-determination is vested in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis. It is founded in emerging norms of international law and basic principles of public morality. Self-determination entitles Aboriginal peoples to negotiate the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs.

Aboriginal peoples are not racial groups; they are organic political and cultural entities. Although contemporary Aboriginal peoples stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestries. As organic political entities, they have the capacity to evolve over time and change in their internal composition.

The Commission considers the right of self-determination to be vested in Aboriginal nations rather than small local communities. By Aboriginal nation, we mean a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories. There are 60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities.

Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. For an Aboriginal nation to exercise the right of self-determination, it does not have to be recognized as a nation by the federal government or by provincial governments. Nevertheless, unless other Canadian governments are prepared to acknowledge the existence of Aboriginal nations and to negotiate with them, such nations may find it difficult to exercise their rights effectively, so in practice there is a need for the federal and provincial governments actively to acknowledge the existence of the various Aboriginal nations in Canada and to negotiate with them to implement their right of self-determination.

Self-determination is the starting point for Aboriginal initiatives in governance but it is not the only possible basis for such initiatives. As a matter of Canadian constitutional law, Aboriginal peoples also have the inherent right of self-government within Canada. This right stems from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied. This status was recognized and recast in the numerous treaties, alliances and other relations maintained with the incoming French and British Crowns. This extensive practice gave rise to a body of intersocietal customary law that was common to the parties and eventually became part of the law of Canada.

In our view, the inherent right of Aboriginal self-government was recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty right. The inherent right is now entrenched in the Canadian constitution, therefore, and provides

a basis for Aboriginal governments to function as one of three distinct orders of government in Canada.

The constitutional right of self-government does not supersede the right of self-determination or take precedence over it. Rather, the constitutional right of self-government is available to Aboriginal peoples who wish to take advantage of it, in addition to their right of self-determination, treaty rights, and any other rights that they currently enjoy or negotiate in the future. The constitutional right of self-government is one of a range of voluntary options available to Aboriginal peoples.

Generally, the sphere of inherent Aboriginal jurisdiction under section 35(1) of the *Constitution Act, 1982* comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. This sphere of inherent jurisdiction is divided into two sectors: a core and a periphery.

In our opinion, the core of Aboriginal jurisdiction includes all matters that (1) are vital to the life and welfare of a particular Aboriginal people, its culture and identity; (2) do not have a major impact on adjacent jurisdictions; and (3) are not otherwise the object of transcendent federal or provincial concern. An Aboriginal group has the right to exercise authority and legislate at its own initiative, without the need to conclude self-government treaties or agreements with the Crown.

The periphery of Aboriginal jurisdiction comprises the remainder of the sphere of inherent Aboriginal jurisdiction. It includes matters that have a major impact on adjacent jurisdictions or that attract transcendent federal or provincial concern. Such matters require substantial co-ordination among Aboriginal, federal and provincial governments. In our view, an Aboriginal group cannot legislate at its own initiative in this area until a self-government treaty or agreement has been concluded with the Crown.

When an Aboriginal government passes legislation regarding a subject that falls within the core jurisdiction, any inconsistent federal or provincial legislation is automatically displaced. An Aboriginal government may thus expand, contract or vary its exclusive range of operations to match its needs and circumstances. Where there is no inconsistent Aboriginal legislation in a core area of jurisdiction, federal and provincial laws continue to apply within their respective areas of legislative jurisdiction.

When a federal law and an Aboriginal law conflict, sometimes the federal law may take precedence over the Aboriginal law. However, for this to happen, the federal law must meet the strict standard laid down by the Supreme Court of Canada in the *Sparrow* decision. Under this standard, the law must serve a compelling and substantial federal objective and be consistent with the Crown's basic fiduciary responsibilities to Aboriginal peoples.¹⁰⁵

In relation to matters on the periphery of Aboriginal jurisdiction, a self-government treaty or agreement is needed to settle the jurisdictional overlap between an Aboriginal government and the federal and provincial governments. This treaty must specify which

areas of jurisdiction are exclusive and which are concurrent; in the latter case, the treaty must specify which legislation will prevail if a conflict arises. Until such an agreement is concluded, Aboriginal jurisdiction on the periphery remains

in abeyance, and federal and provincial laws continue to apply within their respective areas of legislative jurisdiction. A treaty dealing with the inherent right of self-government gives rise to treaty rights under section 35(1) of the *Constitution Act, 1982* and thus becomes constitutionally entrenched. Even when a self-government agreement does not itself constitute a treaty, rights articulated in it may nevertheless become constitutionally entrenched.

In our view, the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and regulates relations with individuals within their jurisdiction. However, under section 25, the Charter must be interpreted flexibly to account for the distinctive philosophies, traditions and cultural practices of Aboriginal peoples. Moreover, under section 33, Aboriginal nations can pass notwithstanding clauses that suspend the operation of certain Charter sections for a period. At the same time, sections 28 and 35(4) of the *Constitution Act, 1982* ensure that Aboriginal women and men are in all cases guaranteed equal access to the inherent right of self-government and are entitled to equal treatment by their governments.

Only nations can exercise the full range of governmental powers available in the core areas of Aboriginal jurisdiction; nations alone have the power to conclude self-government treaties or agreements regarding matters falling within the periphery. The constitutional right of self-government is vested in the peoples who make up Aboriginal nations, not in local communities. Nevertheless, local communities of Aboriginal people, including communities in urban areas, have access to inherent governmental powers if they join together in their national units and draft a constitution allocating powers between the national and local levels.

Under section 35 of the *Constitution Act, 1982*, an Aboriginal nation has the right to determine which individuals belong to the nation. However, this right is subject to two limitations. First, it cannot be exercised in a manner that is discriminatory toward women or men. Second, it cannot specify a minimum 'blood quantum' as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.

Overall, the enactment of section 35 of the *Constitution Act, 1982* has had far-reaching significance. It confirms the status of Aboriginal peoples as equal partners in the complex federal arrangements that constitute Canada. It provides the basis for recognizing Aboriginal governments as constituting one of three orders of government in Canada: Aboriginal, provincial and federal. These governments are sovereign within their several spheres and hold their powers by virtue of their inherent status rather than by delegation. In other words, they share the sovereign powers of Canada, powers that represent a pooling of existing sovereignties.

Aboriginal peoples also have a special relationship with the Canadian Crown, which the courts have described as *sui generis* or one of a kind. This relationship traces its origins to the treaties and other links formed over the centuries and to the intersocietal law and custom that underpinned them. Because of this relationship, the Crown acts as the protector of the sovereignty of Aboriginal peoples within Canada and as guarantor of their Aboriginal and treaty rights. This fiduciary relationship is a fundamental feature of the constitution of Canada.

2.2 Self-Determination

International human rights law

In our view, the Aboriginal peoples of Canada possess the right of self-determination.¹⁰⁶ This right is grounded in emerging norms of international law and basic principles of public morality.

Canada has played an important role in articulating international human rights standards. It is a signatory to a number of international human rights instruments, including the Charter of the United Nations which includes the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights. Yet the historical process by which Canada was formed involved a denial of the right of its first peoples to self-determination. The process was tainted by widespread misrepresentation, fraud and outright coercion as well as by broken promises, dispossession and exclusion. There is now a basic and pressing need for Aboriginal peoples to be able to negotiate freely the terms of their continuing relationship with Canada and to establish governmental structures that are in keeping with their aspirations and traditions.

The problem with international law instruments is their implementation and enforcement within the states that become parties to them. Paul Sieghart explains:

Regrettably, states differ a great deal in the 'good faith' with which they perform their international legal obligations in the field of human rights. A few are excellent, and will not even ratify such a treaty until *after* they have passed all the necessary legislation, and made all the other necessary internal arrangements, to ensure that they will comply fully as soon as they become bound. At the opposite extreme, there are states which adhere to every treaty in sight, and then do nothing at all towards performing their legally binding promises.¹⁰⁷

Because of the fundamental proposition of law that a right without a remedy is meaningless, international human rights instruments generally have to be supported by domestic legislation in countries that sign them. If no such domestic legislation is passed, the fact that a particular country is a signatory does not, of itself, entitle a citizen to take action against the state in its domestic courts, even if the state has violated its undertakings in an international convention or covenant to which it is a party. This does not mean that international instruments are of no help to the citizen. They have

significant interpretive value in situations where a case against the state is founded on violation of domestic human rights legislation such as the *Canadian Charter of Rights and Freedoms*. Justice Linden made this point in relation to the International Covenant on Civil and Political Rights, which protects the right of all peoples to self-determination, including the right freely to determine their political status and to pursue their economic, social and cultural development.

On May 19, 1976 Canada acceded to the United Nations Covenant on Civil and Political Rights ... no Canadian legislation has been passed which expressly implements the covenant ... The covenant may, however, be used to assist a court to interpret ambiguous provisions of a domestic statute ... provided that the domestic statute does not contain express provisions contrary to or inconsistent with the covenantThis rule of construction is based on the presumption that Parliament does not intend to act in violation of Canada's international obligations.¹⁰⁸

Each state is expected, and in some cases obliged, to establish its own system for enforcing its international commitments in a manner compatible with its own constitution and legal system.

If the domestic law of the signatory state provides no enforcement system, there may be recourse to international law forums that entertain complaints from disaffected states and citizens, investigate them, and make reports and recommendations. This is all they can do, however; they have no enforcement powers within individual nation-states.

The International Covenant on Economic, Social and Cultural Rights, to which Canada is a signatory, affirms the right of all human beings to, among other things, gainful employment and an adequate standard of living, protection and support for the family, health and education, and the conservation and development of their cultures. However, the obligations of signatory states under the covenant are not absolute. They are relative and progressive. Article 2 reads:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁰⁹

The one requirement stated in Article 2 is that there be no discrimination by a state in the discharge of its obligations under the covenant; whatever it does, for example, in the field of health or education, it must do for the benefit of all its citizens, not just for some.

Preventing discrimination against Indigenous peoples became a focus of United Nations attention in the 1960s and 1970s following major studies in a number of countries. In 1982, the United Nations established the Working Group on Indigenous Populations under the aegis of the International Labour Organisation (ILO), the UN agency whose primary concern is social justice. Five non-governmental organizations participate in a

continuing forum at the annual meetings of the Working Group on Indigenous Populations. They are the World Council of Indigenous Peoples, the International Indian Treaty Council, the Indian Law Resource Centre, the Inuit Circumpolar Conference, and a recently formed body representing four First Nations groups in the United States and Canada, the Four Directions Council.

The working group has drawn up a Draft Declaration on the Rights of Indigenous Peoples, which recognizes the right of Indigenous peoples to self-determination. This draft declaration is now being considered by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.¹¹⁰ Its preamble affirms that Indigenous peoples are equal in dignity and rights to all other peoples. It notes that Indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting in colonization and the dispossession of their lands, territories and resources. The preamble recognizes that Indigenous peoples have the right freely to determine their relationships with states in a spirit of coexistence, mutual benefit and full respect. In light of these and other considerations, Article 3 of the draft declaration states:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The basis and scope of the indigenous right of self-determination are explained by Erica-Irene Daes, who chairs the Working Group on Indigenous Populations, in an explanatory note concerning the draft declaration.

With few exceptions, indigenous peoples were never a part of State-building. They did not have an opportunity to participate in designing the modern constitutions of the States in which they live, or to share, in any meaningful way, in national decision-making. In some countries they have been excluded by law or by force, but in many countries ... they have been separated by language, poverty, misery, and the prejudices of their non-indigenous neighbours. Whatever the reason, indigenous peoples in most countries have never been, and are not now, full partners in the political process and lack others' ability to use democratic means to defend their fundamental rights and freedoms.¹¹¹

How should the international community respond to this situation in which Indigenous peoples lack effective partnership in the governments of existing states? The most appropriate response, writes Daes, is to recognize that Indigenous peoples have the right of self-determination. This means, as she explains,

[T]he existing State has the duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically. It also means that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing State, and to exercise their right to self-determination by this means and other peaceful ways, to the extent possible.

In other words, the right of self-determination should ordinarily be interpreted as entitling Indigenous peoples to negotiate freely their status and mode of representation within existing states. It does not, in Daes' view, normally give rise to a right of secession.

Once an independent State has been established and recognized, its constituent peoples must try to express their aspirations through the national political system, and not through the creation of new States. This requirement continues unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be "representing the whole people".

The declaration on the rights of Indigenous peoples is still in draft form. It will probably undergo changes after further deliberation on its terms within the United Nations. Nevertheless, we consider that Article 3, understood in the light of Daes' remarks, expresses the basic sense of emerging international norms relating to Indigenous peoples.

The right of self-determination is held by all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis people. It gives Aboriginal peoples the right to opt for a large variety of governmental arrangements within Canada, including some that involve a high degree of sovereignty. However, it does not entitle Aboriginal peoples to secede or form independent states, except in the case of grave oppression or a total disintegration of the Canadian state.

The right of self-determination gives Aboriginal peoples the right to initiate changes in their governmental arrangements within Canada and to implement such reforms by negotiations and agreements with other Canadian governments, which have the duty to negotiate in good faith and in light of fiduciary obligations owed by the Crown to Aboriginal peoples. Any reforms must be approved by the Aboriginal people concerned through a democratic process, ordinarily involving a referendum. Where these reforms necessitate alterations in the Canadian constitution, they must be implemented through the normal amending procedures laid out in the *Constitution Act, 1982*.

Canada has not yet become a signatory to the International Labour Organisation Convention No. 169 on Indigenous Peoples, an important international agreement that came into force in 1991 and that eight states have already ratified. The convention deals with such sensitive subjects as the ownership of traditional Aboriginal lands, the ownership of reserve lands, customary penal justice issues, and the funding of Aboriginal educational institutions, subjects that fall within both federal and provincial jurisdiction. It also contains a general override clause stating that implementation measures must be determined "in a flexible manner having regard to the conditions characteristic of each country".¹¹²

The practice in Canada has been to sign such a convention only if all the provinces agree and undertake to implement the convention requirements pertaining to their respective jurisdictions. It will be necessary, therefore, for the federal government to consult with the provinces as well as with Aboriginal peoples before signing the convention. In our

view, however, Canada should proceed expeditiously to complete these consultations and sign the convention, particularly in light of the override clause.

There is no doubt that the international enforcement machinery of international human rights is extremely weak. Unless nation-states that have made a commitment to international human rights enact appropriate domestic legislation, they can ignore their commitment with impunity, at least regarding their own citizens. A strong argument can be made, however, that the fiduciary obligations owed by Canadian governments to protect the rights of the Aboriginal peoples of Canada requires the enactment of such domestic legislation. How can Canada undertake to achieve the full realization of Aboriginal peoples' rights under the economic, social and cultural rights covenant "by all appropriate means, including particularly the adoption of legislative measures" and then, as a fiduciary, fail to do the very thing required to give Aboriginal peoples recourse in its own courts?

Conclusions

1. The Commission thus concludes that the right of self-determination is vested in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis peoples. The right finds its foundation in emerging norms of international law and basic principles of public morality. By virtue of this right, Aboriginal peoples are entitled to negotiate freely the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs.

2. When exercised by Aboriginal peoples within the context of the Canadian federation, the right of self-determination does not ordinarily give rise to a right of secession, except in the case of grave oppression or disintegration of the Canadian state.

Recommendation

The Commission recommends that

2.3.1

The government of Canada take the following actions:

(a) enact legislation affirming the obligations it has assumed under international human rights instruments to which it is a signatory in so far as these obligations pertain to the Aboriginal peoples of Canada;

(b) recognize that its fiduciary relationship with Aboriginal peoples requires it to enact legislation to give Aboriginal peoples access to a remedy in Canadian courts for breach of Canada's international commitments to them;

(c) expressly provide in such legislation that resort may be had in Canada's courts to international human rights instruments as an aid to the interpretation of the Canadian *Charter of Rights and Freedoms* and other Canadian law affecting Aboriginal peoples;

(d) commence consultations with provincial governments with the objective of ratifying and implementing International Labour Organisation Convention No. 169 on Indigenous Peoples, which came into force in 1991;

(e) support the Draft Declaration of the Rights of Indigenous Peoples of 1993, as it is being considered by the United Nations;

(f) immediately initiate planning, with Aboriginal peoples, to celebrate the International Decade of Indigenous Peoples and, as part of the events, initiate a program for international exchanges between Indigenous peoples in Canada and elsewhere.

Self-determination and self-government

It is important to distinguish between self-determination and self-government. Although closely related, the two concepts are distinct and involve different practical consequences. Self-determination refers to the right of an Aboriginal nation to choose how it will be governed — whether, for example, it should adopt separate governmental institutions or join in public governments that embrace Aboriginal and non-Aboriginal people alike. Self-government, by contrast, is one natural outcome of the exercise of the right of self-determination and refers to the right of peoples to exercise political autonomy. Self-determination refers to the collective power of choice; self-government is one possible result of that choice.

Some examples may clarify the distinction. Perhaps the most likely situation will be where a single Aboriginal nation exercises its right of self-determination in favour of autonomous self-government within its own territory. It would create its own institutions of government, enact and administer its own laws, create its own policies, and provide programs and services to its own members. It would have exercised its right of self-determination in favour of autonomous Aboriginal nation government.

Other sorts of cases may arise where several distinct Aboriginal nations live alongside one another, each with the right of self-determination. At some point, these nations may decide to set up a confederal form of Aboriginal government. Each nation holds a referendum in which the proposed arrangements are approved by the voters. As a result, a new confederal government is created that embraces all the nations concerned and allows for powers to be exercised at a variety of levels, including the local community, the nation and the confederation as a whole. In this case, each participating nation exercised its right of self-determination in agreeing to the new confederal arrangements. Under these arrangements, the confederated group as a whole exercises a collective right of self-government on behalf of the several participating nations.

Consider another example. An Aboriginal nation forms the majority of inhabitants in a region with a population of both Aboriginal and non-Aboriginal people. The Aboriginal nation decides by way of referendum to support the creation of a new public government that embraces all the residents of the region. In making this decision, the Aboriginal nation exercises its right of self-determination. The new structures of public government are formed as a result of this decision, and they constitute the mode by which the Aboriginal nation has chosen to be governed.

The distinction between self-determination and self-government has an important practical consequence. In our view, an Aboriginal group's right of self-determination is not exhausted for all time when it agrees to a particular governmental structure. Circumstances can change in ways that affect the justness or viability of the original arrangement. The other parties to an agreement may fail to fulfil their side of the bargain in some fundamental way. In such a case, the group may be entitled to exercise its right of self-determination afresh and opt for governmental arrangements that better meet its needs and aspirations. Generally speaking, however, an exercise of the right of self-determination that has serious implications for other governments and people should not be retracted lightly.

For example, it could be argued that the Métis Nation of Red River exercised a right of self-determination when it participated in creating the province of Manitoba in 1870. It does not follow, however, that the Métis Nation's right of self-determination was exhausted by this action. In our view, the arrangement made in 1870 was gravely compromised by the subsequent process that effectively deprived Métis people of their land rights. Therefore, the right of self-determination continues to exist and may be exercised today in a manner that suits the changed circumstances of the Métis Nation.

Another example: Inuit of the eastern sector of the Northwest Territories have recently exercised their right of self-determination in deciding to establish a public government in the new territory of Nunavut. That decision was influenced in part by the fact that Inuit form a considerable majority of the area's residents and so are in a good position to protect their culture, language and communal interests through institutions of public government. However, should conditions in the territory change significantly (for example, a large influx of non-Aboriginal people), Inuit could review their earlier decision and negotiate alternative governmental arrangements.

Aboriginal peoples: political groups, not racial minorities

For purposes of self-determination, Aboriginal peoples should be seen as organic political and cultural entities, not groups of individuals united by racial characteristics.¹¹³

One of the greatest barriers standing in the way of creating new and legitimate institutions of self-government is the notion that Aboriginal people constitute a "disadvantaged racial minority" ... Only when Aboriginal peoples are viewed, not as "races" within the boundaries of a legitimate state, but as distinct political communities

with recognizable claims for collective rights, will there be a first and meaningful step towards responding to Aboriginal peoples' challenge to achieve self-government.¹¹⁴

As the Inuit Tapirisat of Canada observes,

It is not our race in the sense of our physical appearance that binds Inuit together, but rather our culture, our language, our homelands, our society, our laws and our values that make us a people. Our humanity has a collective expression, and to deny us that recognition as a people is to deny us recognition as equal members of the human family.¹¹⁵

Of course, not every group that proclaims itself Aboriginal automatically qualifies for that status. A group must have sufficient historical continuity with the peoples who originally inhabited the continent before extensive European settlement took place in the area. That continuity can be established in various ways. While the predominant ancestry of group members is clearly a relevant consideration, it must be weighed alongside other factors such as the group's traditions, political consciousness, laws, language, spirituality and ties to the land. No single factor is decisive; it is the overall pattern of characteristics that matters. In particular, for a group to qualify as Aboriginal, it does not have to be composed of individuals with a certain quantum of supposed Aboriginal blood.¹¹⁶ (This subject is discussed later, in relation to citizenship.)

A group has to show historical continuity with the peoples originally inhabiting a certain area only before extensive European settlement took place, not before European contact. This criterion recognizes the fact that, in some parts of Canada, relations existed between Indigenous peoples and newcomers for long periods before a substantial influx of settlers occurred. As a result, there was a blending of cultural and genetic heritages. In western Canada, for example, close ties developed between Indigenous peoples and Europeans in the course of the fur trade, ties that were consolidated during the seventeenth and eighteenth centuries, long before the advent of extensive settlement. These relations led to significant changes in the culture and make-up of many Aboriginal groups and their European partners. In particular, they gave rise to an entirely new Aboriginal people, the Métis Nation of Red River, who have played a prominent role in the history of western Canada and the evolution of the Canadian federation.

Conclusion

3. Aboriginal peoples are not racial groups; rather they are organic political and cultural entities. Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change in their internal composition.

The Aboriginal nation as the vehicle for self-determination

Which Aboriginal groups hold the right of self-determination? Is the right vested in small local communities of Aboriginal people, many numbering fewer than several hundred individuals? Were this the case, a village community would be entitled to opt for the status of an autonomous governmental unit on a par with large-scale Aboriginal groups and the federal and provincial governments. In our opinion, this would distort the right of self-determination, which as a matter of international law is vested in 'peoples'. Whatever the more general meaning of that term, we consider that it refers to what we will call 'Aboriginal nations'.

We use the term nations rather than peoples to avoid possible confusion. Section 35(2) of the *Constitution Act, 1982* speaks of the Aboriginal peoples of Canada as including three groups: "the Indian, Inuit and Métis peoples of Canada". While it is possible that all Inuit, for example, constitute an Aboriginal people of Canada with a right of self-determination, we also consider that certain Inuit sub-groups clearly qualify for that status as well. The same observation holds true of certain sub-groups within First Nations and Métis peoples. In other words, the three Aboriginal peoples identified in section 35(2) encompass nations that also hold the right of self-determination.

As understood here, an Aboriginal nation is a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories. There are three elements in this definition: collective sense of identity; size as a measure of capacity; and territorial predominance.

The first element, a collective sense of identity, can be based on a variety of factors. It is usually grounded in a common heritage, which comprises such elements as a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry, homeland or adherence to a particular treaty. Aboriginal groups sharing a common heritage constitute what can be described as historical nations, because the factors that unite them have deep roots in the past. Such groups as the Huron, the Mohawk, the Nisg_a'a, the Haida and the Métis of Red River, among others, are examples. However, historical nations are not the only groups capable of holding a right of self-determination. In other cases, a sense of national identity may flow less from a common heritage than from a shared contemporary situation and outlook, involving such factors as similar background and historical experience, geographical proximity and the resolve to pursue a common destiny through joint governmental arrangements. Because of these considerations, certain emerging nations may take their place alongside historical nations as holders of the right of self-determination.

Not all nations fall neatly into one category or the other. There are a number of intermediate cases. Many Aboriginal peoples that once constituted historical nations were fragmented and dispersed during the nineteenth century, under the impact of colonialism and governmental policies, so that their sense of common identity was weakened and their internal political ties impaired. In our view, there is a pressing need for nations of this kind to reconstitute themselves as modern political units. Only in this way can they act effectively to protect and develop their distinctive languages, cultures and traditions.

This process of reconstitution must be an open and inclusive one that does not shut out people by reference to overly restrictive or irrelevant criteria. An Aboriginal group that restricts its membership on an unprincipled or arbitrary basis cannot qualify for the right of self-determination. (Citizenship in Aboriginal nations is discussed later in this chapter.)

The second element in our definition relates to the size and overall capacity of a group. For a body of Aboriginal people to constitute a nation, it must be large enough to assume the powers and responsibilities that potentially flow from the right of self-determination. This right enables an Aboriginal people to opt to govern itself as an autonomous unit within the Canadian federation, with an extensive range of powers. Generally, the right cannot be vested in small local communities that are incapable of exercising the powers and fulfilling the responsibilities of an autonomous governmental unit. Ordinarily, an Aboriginal nation should comprise at least several thousand people, given the range of modern governmental responsibilities and the need to supply equivalent levels of services and to co-ordinate policies with other governments. Nevertheless, this criterion must be applied in a manner that takes account of the differing situations of Aboriginal peoples. For example, some Aboriginal nations, such as the Huron and the Sarcee, are centred in a single community or band and clearly do not have to join with other nations to exercise their right of self-determination. Other historical Aboriginal nations are dispersed over large areas, sometimes spanning several provinces, which makes reunification of the entire nation difficult, at least in the immediate future.

Local communities within an Aboriginal nation have to join together to exercise the right of self-determination. This process need not result in a melting pot. To the contrary, it would be natural for a reconstituted Aboriginal nation to adopt a federal style of constitution that ensures that a considerable measure of authority rests with local communities.

The third element in our definition relates to territorial predominance. Under this criterion, to hold a right of self-determination an Aboriginal group must constitute a majority of the permanent population in a certain territory or collection of territories. A group must have a geographical base. In using this term, we do not imply that the Aboriginal group must have exclusive or special land rights in the territory or territories in question; it is sufficient if the Aboriginal group constitutes a majority of the permanent population. The right of self-determination does not vest in a group whose entire membership is scattered as a minority throughout the general population and as such lacks any geographical base of its own. However, the fact that many or even most members of an Aboriginal nation are dispersed in urban settings does not mean that the nation as a whole lacks a right of self-determination. So long as the nation has a geographical base, it can exercise its right in a way that includes the entire membership of the nation. For example, the fact that many Métis people live in urban settings does not deprive the Métis Nation of its right of self-determination, because the nation has geographical bases where it is the predominant population.

By contrast, a group of Aboriginal people living dispersed in Toronto or Vancouver does not possess its own right of self-determination, because the group does not constitute the majority population there. Of course, many Aboriginal individuals living in urban settings are members of Aboriginal nations that have their own geographical bases and rights of self-determination. For example, many Aboriginal people living in Halifax belong to the Mi'kmaq Nation, which has a geographical base and qualifies for the right of self-determination. If those individuals are recognized members of the Mi'kmaq Nation, they can participate in the nation's exercise of its right of self-determination. Unaffiliated Aboriginal people living in Halifax, however, do not have a right of self-determination of their own.

It is not necessary for an Aboriginal nation to live on a single contiguous territory to qualify for the right of self-determination. A geographical base may consist of a number of distinct territories, in each of which the members of the Aboriginal nation form a majority of the population. In cases where an Aboriginal nation is composed of a number of local communities in separate locations, those communities normally have to join together to exercise their right of self-determination as a national unit.

Recommendation

The Commission recommends that

2.3.2

All governments in Canada recognize that Aboriginal peoples are nations vested with the right of self-determination.

Our definition of nation is a flexible one that can apply to a wide range of cases. These include

- a First Nation people with a common historical heritage living on a single territorial base;
- a First Nation people with a common historical heritage living on several distinct territories, whether within a single province or one of the northern territories or spread over several provinces or northern territories;
- a group composed of all or most First Nations communities in a single region, northern territory or province;
- a group comprising First Nations communities belonging to a particular treaty group;
- a group composed of all or most Inuit communities in a single region, northern territory or province;

- a group comprising all or most Métis communities in a single province or northern territory, or several provinces or northern territories.

This list does not, of course, represent all the possibilities. However, it indicates the large variety of groups that would be capable of constituting a nation for purposes of self-determination. It should also be remembered that a number of distinct Aboriginal nations may exercise their individual rights of self-determination by establishing a confederacy with common governmental institutions.

In practical terms, how many Aboriginal nations do we envisage? While the precise number will vary depending on how Aboriginal peoples decide to organize their affairs, we can establish some rough baselines. At the time of the first European contact, there were between 50 and 60 Aboriginal nations inhabiting the territories now making up Canada. Currently, the number of historically based nations is somewhat higher, perhaps as high as 80. The figure of 80 represents the likely upper limit for Aboriginal groups capable of exercising an autonomous right of self-determination. If Aboriginal peoples coalesce on regional, provincial or interprovincial lines, the number of self-determining entities will be somewhat less. These figures should be compared with the total number of local Aboriginal communities in Canada — approximately a thousand.

A further observation can be made. Although historical Aboriginal nations that span several provinces and territories may, over time, come together again as unified political entities, in the shorter term it seems likely that many nations will find it convenient to organize themselves within existing provincial and territorial boundaries. There are a number of practical reasons for doing this, such as the community of interest flowing from a common geo-political situation and the difficulty of conducting negotiations simultaneously with two or more provincial governments as well as with the federal government. Nevertheless, in principle there is no reason why provincial or territorial boundaries should hinder reunification of Aboriginal nations. Indeed, over time transprovincial linkages will be necessary if certain historical groups, such as the Mohawk Nation and the Mi'kmaq Nation, are to reconstitute themselves as contemporary governmental units.

In our view, an Aboriginal nation cannot be identified in a mechanical fashion by reference to a detailed set of objective criteria. The concept has a strong psycho-social component, which consists of a people's own sense of itself, its origins and future development. While historical and cultural factors, such as a common language, customs and political consciousness, will play a strong role in most cases, they will not necessarily take precedence over a people's sense of where their future lies and the advantages of joining with others in a common enterprise. Aboriginal nations, like other nations, have evolved and changed in the past; they will continue to evolve in the future.

Conclusions

4. The Commission concludes that the right of self-determination is vested in Aboriginal nations rather than small local communities. By Aboriginal nation we mean a sizeable

body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories. Currently, there are between 60 and 80 historically based nations in Canada, compared with a thousand or so local Aboriginal communities.

5. The more specific attributes of an Aboriginal nation are that

- the nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland;
- it is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and
- it constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.

Thus far, we have focused on the attributes an Aboriginal group must have to hold a right of self-determination. We turn now to a closely related matter: the process by which an Aboriginal group is identified for purposes of exercising that right.

Identifying Aboriginal nations

Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. Given the variety of ways in which Aboriginal nations may be configured and the strong subjective element, any self-identification initiative must necessarily come from the people actually concerned.

For a group to hold the right of self-determination, it is not necessary for it to be recognized by the federal or provincial governments. This conclusion flows from the basic rationale of self-determination, which relates to a nation's power to control its own political destiny and establish its own governmental arrangements. If, for example, an Aboriginal nation had to be recognized officially by the federal government in order to exercise the right of self-determination, the right could be frustrated simply by denying that recognition.

Nevertheless, this rationale needs to be tempered by certain practical considerations. Unless the federal and provincial governments are prepared to acknowledge the existence of a certain Aboriginal nation and to co-operate in establishing a process for implementing the nation's right of self-determination, it will be difficult for that nation to exercise its right in a full and effective manner. Any proper process for implementing the right of self-determination must strike a balance between recognition and the principles of self-determination.

In many cases, when a group identifies itself as an Aboriginal nation entitled to self-determination, this act of self-identification will correspond to widespread public

perceptions and existing government practice and the point will not be contested. However, in other instances, disputes will arise regarding whether the group's own determination is correct. Three types of disputes may arise: identity, representation and membership. In practice the distinctions between these types are often blurred, because many disputes have multiple aspects.

An identity dispute concerns whether a certain collection of people actually constitutes an Aboriginal nation vested with a right of self-determination. The point in dispute may be whether the group is actually Aboriginal or whether it satisfies the criteria of nationhood already described (sense of identity, size and territorial predominance).

By contrast, a representation dispute concerns which of two or more rival bodies or organizations is entitled to represent a certain Aboriginal nation (or one of its member communities) in processes implementing the right of self-determination. Representation disputes occur where a certain body within a group purports to speak for the entire group but this claim is disputed by another body, which either claims to be the group's true representative or questions the other body's capacity to speak for the whole group. Sometimes disputes of this kind involve the opposing claims of elected and traditional governing bodies; in other cases, they arise from familial or political splits within the group.

Finally, a membership dispute concerns whether a certain Aboriginal nation is properly configured to exercise the right of self-determination or whether its status is impaired by serious flaws in its membership rules and practices. A First Nation is composed of a number of local communities, whose membership is governed by rules laid down in the *Indian Act*. A large group of non-status individuals living in the vicinity might argue that they form part of the larger national unit even if they do not qualify under the local membership rules. They might claim that they have been unfairly excluded from the group exercising the right of self-determination. Since an Aboriginal nation must be constituted in an inclusive manner to qualify for the right of self-determination, a large-scale membership dispute of this kind could be very significant.

We consider it undesirable for the federal government to deal with these matters on an ad hoc basis, without full disclosure of the principles and policies applied, the factors taken into account, and the objectives sought. The existing process gives too much scope for political discretion and too little scope for the kind of principled consideration that should guide implementation of the right of self-determination.

Conclusion

6. The Commission concludes that Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. For an Aboriginal nation to hold the right of self-determination, it does not have to be recognized as such by the federal government or by provincial governments. Nevertheless, as a practical matter, unless other Canadian governments are prepared to acknowledge the existence of Aboriginal nations and to negotiate with them, such nations

may find it difficult to exercise their rights effectively. Therefore, in practice there is a need for the federal and provincial governments actively to acknowledge the existence of the various Aboriginal nations in Canada and to engage in serious negotiations designed to implement their rights of self-determination.

Recommendation

The Commission recommends that

2.3.3

The federal government put in place a neutral and transparent process for identifying Aboriginal groups entitled to exercise the right of self-determination as nations, a process that uses the following specific attributes of nationhood:

- (a) The nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland.
- (b) The nation is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner.
- (c) The nation constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, operates from a defined territorial base.

We discuss this recommendation in greater detail later in this chapter.

2.3 Self-Government

The right of self-determination is the basis in international law for Aboriginal initiatives in the area of governance. However, it is not the only possible basis for such initiatives. We consider that, as a matter of existing Canadian constitutional law, Aboriginal peoples in Canada have the inherent right to govern themselves. This legal right arises from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied. This status was recognized and given effect in the numerous treaties, alliances and other relations negotiated with the French and British Crowns. This extensive practice gave rise to a body of customary law that was common to the parties and eventually became part of the general law of Canada.

In 1982, the inherent right of Aboriginal self-government was recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty-protected right. As a result, it is now entrenched in the Canadian constitution. Aboriginal peoples exercising this right constitute one of three distinct orders of government in Canada: Aboriginal, federal and provincial. The sphere of inherent Aboriginal jurisdiction under section 35(1) comprises all matters relating to the good government and welfare of Aboriginal peoples

and their territories. This sphere of inherent jurisdiction includes both a core, where an Aboriginal nation may act at its own initiative, and a periphery, where action may be taken only after a treaty or agreement with the Crown has been concluded.

The constitutional right of self-government does not replace the right of self-determination or take precedence over it. Section 35(1) merely recognizes and affirms a pre-existing right. The constitutional right is available to any Aboriginal people who wish to take advantage of it, in addition to or in exercise of the right of self-determination. Moreover, as a matter of basic treaty understandings and broad political principle, the constitutional right does not affect the special relationship between treaty nations and the Crown. The constitutional right is simply an additional tool available to treaty nations that find it useful in advancing toward greater autonomy. It does not detract from other rights they hold on different grounds.

The following discussion examines

- the legal roots of the right of self-government in the doctrine of Aboriginal rights;
- the contributions of Aboriginal nations to the historical genesis of the Canadian constitution;
- the recognition of Aboriginal and treaty rights in the *Constitution Act, 1982*;
- the entrenchment of the right of self-government in the 1982 act;
- the scope of the constitutional right;
- the application of the *Canadian Charter of Rights and Freedoms*;
- the central role of the Aboriginal nation in implementing the right of self-government;
- the question of citizenship in Aboriginal nations; and
- the three orders of government in Canada.

This segment of our report draws upon the preliminary analysis presented in our discussion paper, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*, and in *The Right of Aboriginal Self-Government and the Constitution: A Commentary*.¹¹⁷ We have revised our discussion with the help of the many useful comments, suggestions and criticisms that followed publication of those documents.¹¹⁸ The following discussion is an expanded approach to the subject; in some respects, it follows the analysis developed in *Partners in Confederation*, but in other respects it represents a fresh treatment of the subject.

The common law doctrine of Aboriginal rights and the inherent right of self-government

In about 1802, a young Quebec lad by the name of William Connolly left his home near Montreal and went west to seek his fortune in the fur trade with the North-West Company.¹¹⁹ A year or so later, William married a young woman of the Cree Nation, Suzanne by name. Suzanne had an interesting background. She was born of a Cree mother and a French-Canadian father and was the stepdaughter of a Cree chief at Cumberland House, located west of Lake Winnipeg.¹²⁰ The union between William and Suzanne was formed under Cree law by mutual consent, with a gift probably given to Suzanne's stepfather. It was never solemnized by a priest or minister. Marriages of this kind were common in the fur trade during that era.

William and Suzanne lived happily together for nearly 30 years and had six children, one of whom later became Lady Amelia Douglas, the wife of the first governor of British Columbia. William Connolly prospered in the fur trade. He was described by a contemporary as "a veritable *bon garçon*, and an Emerald of the first order." When the North-West Company merged with the Hudson's Bay Company, he continued on as a chief trader and was later promoted to the position of chief factor.

In 1831, William left the western fur trade and returned to the Montreal area with Suzanne and several of their children. Not long after, however, William decided to treat his first marriage as invalid and he married his well-to-do second cousin, Julia Woolrich, in a Catholic ceremony. Suzanne eventually returned west with her younger children and spent her final years living in the Grey Nuns convent at St. Boniface, Manitoba, where she was supported by William and later by Julia. When William died in the late 1840s, he willed all his property to Julia and their two children, cutting Suzanne and her children out of the estate.

Several years after Suzanne's death in 1862, her eldest son, John Connolly, sued Julia Woolrich for a share of his father's estate. This famous case, *Connolly v. Woolrich*, was fought through the courts of Quebec and was eventually appealed to the privy council in Britain before being settled out of court.¹²¹ The judgement delivered in the case sheds a remarkable light on the constitutional status of Aboriginal nations and their relations with incoming French and English settlers.

In support of his claim, John Connolly argued that the marriage between his mother and William Connolly was valid under Cree law and that the couple had been in 'community of property', so that each partner to the marriage was entitled to one-half of their jointly owned property. When William died, only his half-share of the property could be left to Julia, with the other half passing automatically to Suzanne as his lawful wife. On Suzanne's death, her children would be entitled to inherit her share of the estate, now in the hands of Julia.

The initial question for the Quebec courts was whether the Cree marriage between Suzanne and William was valid. The lawyer for Julia Woolrich argued that it was not valid. He maintained that English common law was in force in the northwest in 1803 and that the union between Suzanne and William did not meet its requirements. Moreover, he said, in an argument that catered to the worst prejudices of the times, the marriage

customs of so-called uncivilized and pagan nations could not be recognized by the court as validating a marriage even between two Aboriginal people, much less between an Aboriginal and a non-Aboriginal person.

The Quebec Superior Court rejected Julia Woolrich's arguments. It held that the Cree marriage between Suzanne and William was valid and that their eldest son was entitled to his rightful share of the estate. This decision was maintained on appeal to the Quebec Court of Queen's Bench.

In his judgement, Justice Monk of the Superior Court stated that he was prepared to assume, for the sake of argument, that the first European traders to inhabit the northwest brought with them their own laws as their birthright.¹²² Nevertheless, the region was already occupied by "numerous and powerful tribes of Indians; by aboriginal nations, who had been in possession of these countries for ages". Assuming that French or English law had been introduced in the area at some point, "will it be contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were abrogated; that they ceased to exist, when these two European nations began to trade with the aboriginal occupants?" Answering his own question in the negative, Justice Monk wrote: "In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives."¹²³(

Justice Monk supported this conclusion by quoting at length from *Worcester v. Georgia*,¹²⁴ a landmark case decided in 1832 by the United States Supreme Court under Chief Justice Marshall. Justice Marshall, describing the policy of the British Crown in America before the American Revolution, states:

Certain it is, that our history furnishes no example, from the first settlement of our country, *of any attempt on the part of the Crown to interfere with the internal affairs of the Indians*, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. *He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.* [emphasis supplied by Justice Monk]¹²⁵

According to this passage, the British Crown did not interfere with the domestic affairs of its Indian allies and dependencies, so that they remained self-governing in internal matters. Adopting this outlook, Justice Monk concluded that he had no hesitation in holding that "the Indian political and territorial right, laws, and usages remained in full force" in the northwest at the relevant time.¹²⁶ This decision portrays Aboriginal peoples as autonomous nations living within the protection of the Crown but retaining their territorial rights, political organizations and common laws.

A number of lessons can be drawn from *Connolly v. Woolrich*. First, the sources of law and authority in Canada are more diverse than is sometimes assumed. They include the

common laws and political systems of Aboriginal nations in addition to the standard range of Euro-Canadian sources.

Second, in earlier times, the history of Canada often featured close and relatively harmonious relations between Aboriginal peoples and newcomers. The fur trade, which played an important role in the economy of early Canada, was based on long-standing alliances between European fur traders and Aboriginal hunters and traders. At the personal level, these alliances resulted in people of mixed origins, who sometimes were assimilated into existing groups but in other cases coalesced into distinct nations and communities, as with the Métis of Red River.

Connolly v. Woolrich demonstrates that newcomers have sometimes found it convenient to forget their early alliances and pacts with Aboriginal peoples and to construct communities that excluded them and suppressed any local roots. Despite these efforts, however, the courts have periodically upheld the original relationship between newcomers and Aboriginal peoples and enforced the rights it embraced. Among these was the right of Aboriginal peoples to conduct their affairs under their own laws, within a larger constitutional framework linking them with the Crown.¹²⁷

The decision in *Connolly v. Woolrich* stands in contrast, then, to the common impression that Aboriginal peoples do not have any general right to govern themselves. It is often thought that all governmental authority in Canada flows from the Crown to Parliament and the provincial legislatures, as provided in the constitution acts — the basic enactments that form the core of our written constitution. According to this view, since the constitution acts do not explicitly recognize the existence of Aboriginal governments, the only governmental powers held by Aboriginal peoples are those delegated to them by Parliament or the provincial legislatures, under such statutes as the *Indian Act*¹²⁸ and the *Alberta Metis Settlements Act*.¹²⁹

This outlook assumes that all law is found in statutes or other written legal instruments. Under this view, if a right has not been enshrined in such a document, it is not a legal right. At best, it is regarded as only a moral or political right, which does not have legal status and so cannot be enforced in the ordinary courts. Since the constitution acts do not explicitly acknowledge an Aboriginal right of self-government, such a right does not exist as a matter of Canadian law.

However, this view overlooks important features of our legal system. The laws of Canada spring from a great variety of sources, both written and unwritten, statutory and customary. It has long been recognized, for example, that the written constitution is based on fundamental unwritten principles, which govern its status and interpretation.¹³⁰ In Quebec, the general laws governing the private affairs of citizens trace their origins in large part to a body of French customary law, the *Coûtume de Paris*, which was imported to Canada in the 1600s and embodied in the *Civil Code of Lower Canada* in 1866.¹³¹ In the other provinces, the foundation of the general private law system is English common law, a body of unwritten law administered by the courts, with its roots in the Middle Ages.¹³² English common law has never been reduced to statutory form, except in partial

and fragmentary ways. Over the years, it has become a supple legal instrument, capable of being adapted by the courts to suit changing circumstances and social conditions.

Given the multiple sources of law and rights in Canada, it is no surprise that Canadian courts have recognized the existence of a special body of 'Aboriginal rights'. These are not based on written instruments such as statutes, but on unwritten sources such as long-standing custom and practice. In the *Sparrow* case, for example, the Supreme Court of Canada recognized the Aboriginal fishing rights of the Musqueam people on the basis of evidence "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."¹³³ The court went on to hold that government regulations governing the Aboriginal fishing right were incapable of delineating the content and scope of the right.¹³⁴

Aboriginal rights include rights to land, rights to hunt and fish, special linguistic, cultural and religious rights, and rights held under customary systems of Aboriginal law. Also included is the right of self-government. This broad viewpoint is reflected in the words of John Amagoalik, speaking for the Inuit Committee on National Issues in 1983:

Our position is that aboriginal rights, aboriginal title to land, water and sea ice flow from aboriginal rights; and all rights to practise our customs and traditions, to retain and develop our languages and cultures, and the rights to self-government, all these things flow from the fact that we have aboriginal rightsIn our view, aboriginal rights can also be seen as human rights, because these are the things that we need to continue to survive as distinct peoples in Canada.

This point was echoed by Clem Chartier, speaking on behalf of the Métis National Council:

What we feel is that aboriginal title or aboriginal right is the right to collective ownership of land, water, resources, both renewable and non-renewable. It is a right to self-government, a right to govern yourselves with your own institutions¹³⁵

A similar view underlies a resolution passed by the Quebec National Assembly in 1985. This recognizes the existing Aboriginal rights of the indigenous nations of Quebec. It also urges the government of Quebec to conclude agreements with indigenous nations guaranteeing them

- (a) the right to self-government within Quebec;
- (b) the right to their own language, culture and traditions;
- (c) the right to own and control land;
- (d) the right to hunt, fish, trap, harvest and participate in wildlife management; and

(e) the right to participate in, and benefit from, the economic development of Quebec ... [translation]¹³⁶

The doctrine of Aboriginal rights is not a modern innovation, invented by courts to remedy injustices perpetrated in the past. As seen in Volume 1 of this report, the doctrine was reflected in the numerous treaties of peace and friendship concluded in the seventeenth and eighteenth centuries between Aboriginal peoples and the French and British Crowns. Aboriginal rights are also apparent in the *Royal Proclamation of 1763* and other instruments of the same period, and in the treaties signed in Ontario, the west, and the northwest during the late nineteenth and early twentieth century. These rights are also considered in the many statutes dealing with Aboriginal matters from earliest times and in a series of judicial decisions extending over nearly two centuries. As such, the doctrine of Aboriginal rights is one of the most ancient and enduring doctrines of Canadian law.

The principles behind the decision in *Connolly v. Woolrich* form the core of the modern Canadian law of Aboriginal rights.¹³⁷ This body of law provides the basic constitutional context for relations between Aboriginal peoples and the Crown and oversees the interaction between general Canadian systems of law and government and Aboriginal laws, government institutions and territories.¹³⁸

In a series of landmark decisions delivered over the past several decades, the Supreme Court of Canada has upheld the view that Aboriginal rights exist under Canadian law and are entitled to judicial recognition throughout Canada (see Volume 1, Chapter 6).¹³⁹ As Justice Judson stated in the *Calder* case,

[The] fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means¹⁴⁰

Speaking for a unanimous Supreme Court bench in *Roberts v. Canada* (1989), Justice Bertha Wilson held that the law of Aboriginal title is federal common law, that is, a body of unwritten law operating within the federal constitutional sphere.¹⁴¹ This law is presumptively uniform across Canada. As such, it can be described as part of the common law of Canada.

In speaking of federal common law in this context, we are not referring to English common law as applied in various parts of Canada outside Quebec. Neither do we intend to draw a contrast with the civil law system of Quebec. Rather, the phrase ‘federal common law’ describes a body of basic unwritten law that is common to the whole of Canada and extends in principle to all jurisdictions, whether these are governed in other spheres by English common law, French civil law or Aboriginal customary law.

The doctrine of Aboriginal rights is common law in the sense that it is not the product of statutory or constitutional provisions and does not depend on such provisions for its legal force.¹⁴² Rather, it is based on the original rights of Aboriginal nations as these were

recognized in the custom generated by relations between these nations and incoming French and English settlers since the seventeenth century. This body of fundamental law provides a legal bridge between Aboriginal nations and the broader Canadian community. It oversees the interaction between their respective legal and governmental systems, permitting them to operate harmoniously, each within its proper sphere. In that sense it forms a body of inter-societal law. Moreover, the doctrine of Aboriginal rights is neither entirely Aboriginal nor entirely European in origin. It draws upon the practices and conceptions of all parties to the relationship as these were modified and adapted in the course of contact. The doctrine not only forms a bridge between different societies, it is a bridge constructed from both sides.

In recognizing the existence of a common law of Aboriginal rights, the contemporary Supreme Court of Canada has tacitly confirmed the views expressed in 1887 by Justice Strong of the Supreme Court in the *St. Catharines* case, where he stated:

It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of lawThen, if this is so as regards Indian lands in the United States ... how is it possible to suppose that the law can, or rather could have been, at the date of confederation, in a state any less favourable to the Indians whose lands were situated within the dominion of the British Crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the Crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such ... ¹⁴³

In our view, the common law doctrine of Aboriginal rights includes the right of Aboriginal peoples to govern themselves as autonomous nations within Canada. Although the Supreme Court of Canada has not yet ruled directly on the point, some indication of its thinking can be seen in *R. v. Sioui* (1990), where Justice Lamer delivered the unanimous judgement of a full bench of nine judges. Justice Lamer quoted a passage from *Worcester v. Georgia* (1832) in which the United States Supreme Court summarized British attitudes to Indigenous peoples of North America in the mid-1700s:

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; *she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.* [emphasis supplied by Justice Lamer]

Justice Lamer went on to comment that Great Britain maintained a similar policy after the fall of New France and the expansion of British territorial claims:

The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. *It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.* [emphasis added]¹⁴⁴

To summarize, under the common law doctrine of Aboriginal rights, Aboriginal peoples have an inherent right to govern themselves within Canada. This right is inherent in that it originates from the collective lives and traditions of these peoples themselves rather than from the Crown or Parliament.

Conclusion

7. The Commission thus concludes that the right of self-determination is the fundamental starting point for Aboriginal initiatives in the area of governance. However, it is not the only possible basis for such initiatives. In addition, Aboriginal peoples possess the inherent right of self-government within Canada as a matter of Canadian constitutional law. This right is inherent in the sense that it finds its ultimate origins in the collective lives and traditions of Aboriginal peoples themselves rather than the Crown or Parliament. More specifically, it stems from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied, as this status was recognized and given effect in the numerous treaties, alliances and other relations maintained with the incoming French and British Crowns. This extensive practice gave rise to a body of inter-societal customary law that was common to the parties and eventually became part of the law of Canada.

The process of constitution building

The constitution of Canada has a complex internal structure that bears the imprint of a wide range of historical processes and events. The process of building the Canadian federation was not restricted to the pact struck in the 1860s between the French-speaking and English-speaking representatives of Lower Canada, Upper Canada, Nova Scotia and New Brunswick and to the negotiations bringing in the other provinces at later stages. The Canadian federation also finds its roots in the ancient annals of treaties and alliances between the Aboriginal peoples of North America and the Crown.

The modern state of Canada emerged in part from a multi-faceted historical process involving extensive relations among various bodies of Aboriginal people and incoming French and British settlers. These relations were reflected in a wide variety of formal legal instruments, including treaties, statutes and Crown instruments such as the *Royal Proclamation of 1763*. The resulting body of practice eventually gave rise to a unique body of inter-societal common law that spanned the gap between the societies in question and provided the basic underpinning for ongoing relations between them.

Over time and by a variety of methods, Aboriginal peoples became part of the emerging federation of Canada while retaining their rights to their laws, lands, political structures and internal autonomy as a matter of Canadian common law.

As we saw in Volume 1, this process was not fully consensual (see Chapter 3 and Chapter 6). It was marred by elements of coercion, misrepresentation and outright fraud. It was often characterized by broken promises, widespread acts of dispossession and a blatant disregard for established rights. Nevertheless, it is also true that the current constitution of Canada has evolved in part from the original treaties and other relations that First Peoples held (and continue to hold) with the Crown and the rights that flow from those relations.

These treaties form a fundamental part of the constitution and for many Aboriginal peoples, play a role similar to that played by the *Constitution Act, 1867* (formerly the *British North American Act*) in relation to the provinces. The terms of the Canadian federation are found not only in formal constitutional documents governing relations between the federal and provincial governments but also in treaties and other instruments establishing the basic links between Aboriginal peoples and the Crown. In brief, ‘treaty federalism’ is an integral part of the Canadian constitution.

In interpreting those treaties, we should recall the classic observations of Lord Sankey on the nature of the 1867 act:

Inasmuch as the Act [of 1867] embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded¹⁴⁵

While these remarks are directed specifically at the position of the provinces on entering Confederation, they bear remembering when it comes to the case of First Nations.¹⁴⁶

A similar approach was taken by the influential Quebec jurist, Justice Thomas-Jean-Jacques Loranger, in 1883. He summed up the matter in a series of propositions, three of which are relevant here:

1. the confederation of the British Provinces was the result of a compact entered into by the provinces and the imperial Parliament, which, in enacting the British North America Act, simply ratified it;
2. the provinces entered into the federal union, with their corporate identity, former constitutions, and all their legislative powers, part of which they ceded to the federal Parliament, to exercise them in their common interest and for purposes of general utility, keeping the rest which they left to be exercised by their legislatures, acting in their provincial sphere, according to their former constitutions, under certain modifications of form, established by the federal compact;
3. far from having been conferred upon them by the federal government, the powers of the provinces not ceded to that government are the residue of their old powers, and far

from having been created by it, the federal government was the result of their association and of their compact, and was created by them. [translation]¹⁴⁷

Animating these propositions is a single more fundamental principle, which can be called the principle of continuity.¹⁴⁸ As formulated by Loranger, it states that “a right or a power can no more be taken away from a nation than an individual, except by a law which revokes it or by a voluntary abandonment.” [translation]¹⁴⁹

While Loranger has in mind the status and rights of the provinces uniting in 1867, the implications of the principle of continuity extend far beyond that context. In particular, the principle supports the view that Aboriginal nations did not lose their inherent rights when they entered into a confederal relationship with the Crown. They retained their ancient constitutions so far as these were consistent with the new relationship.

This broader understanding of the constitution raises a number of issues. First, the process of constitution building has taken place over a very long time. It has ranged from such ancient arrangements as the seventeenth-century Covenant Chain between the Five Nations and the French and British Crowns to the relatively recent entry of Newfoundland in 1949. The federal union in 1867, in which French- and English-speaking peoples joined to form the new country of Canada, was a significant landmark in the process. However, it was only one part of a protracted historical evolution that, in one way or another, had already been proceeding for some time and has continued to the present day.

Constitution building was a varied process. The terms and conditions governing relations between the Crown and the Mi'kmaq Nation or the Huron Nation were different from those applying to the provinces of Nova Scotia, British Columbia or Alberta. For example, under the Treaty of Annapolis Royal, concluded by the Mi'kmaq Nation with the British Crown in 1726, the Crown promised “all Marks of Favour, Protection & Friendship” to the Indians and undertook that they “shall not be Molested in their Person's, Hunting, Fishing and Shooting & Planting on their planting Ground nor in any other Lawfull Occasions, By his Majestys Subjects or their Dependants nor in the Exercise of their Religion”.¹⁵⁰ The links between the Mi'kmaq Nation and the Crown were reaffirmed in the Treaty of Governor's Farm in 1761, where the Crown's representative promised

The Laws will be like a great Hedge about your Rights and properties — if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their disobedience.¹⁵¹

During the same period, in 1760, the Huron Nation concluded a peace treaty with the British, which received them into the Crown's protection “upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English”.¹⁵² In the view of the Supreme Court, this broad provision remains in effect today and permits members of the Huron Nation to carry on certain customary activities free of unwarranted interference.¹⁵³

Recognition of national and regional rights has been a major structuring principle of the constitution from earliest times. This principle of continuity ensured that when a distinct national or regional group became part of Canada, it did not necessarily surrender its special character or lose its distinguishing features, whether these took the form of a distinct language, religion, legal system, culture, educational system or political system. In its most developed form, the principle has enabled certain national groups to determine the dominant legal, linguistic, cultural or political character of an entire territorial unit within Confederation, whether this be a province or an Aboriginal territory. In more modest form, it has preserved certain collective rights of national groups within these territorial units.

As we saw in Volume 1, the *Royal Proclamation of 1763* was the cornerstone of the principle of national continuity, in its recognition of the autonomous status of Indian nations within their territories. The preamble to the Indian provisions of the Proclamation provides as follows:

And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds ...¹⁵⁴

The *Quebec Act* of 1774 also recognized the principle of national continuity.¹⁵⁵ This act amended the provisions introducing English law into Quebec and restored French law in all matters of “Property and Civil Rights.”¹⁵⁶ In so doing, the *Quebec Act* confirmed that it was possible for many different legal systems to coexist within the territories under the protection of the British Crown. This principle would be applied extensively as British influence spread into Africa, India and Southeast Asia.¹⁵⁷

The recognition of French law in the *Quebec Act* did not impair the recognition of Aboriginal rights in the *Royal Proclamation of 1763*. The *Quebec Act* contained a saving provision ensuring that the restoration of French law would not have harmful effects on “any Right, Title, or Possession derived under any grant, Conveyance, or otherwise howsoever, of or to any Lands within the said Province”.¹⁵⁸ This provision preserved all existing rights to land, no matter how these rights were derived. The act restored to the inhabitants of Quebec their original laws and rights but did not give them priority over the laws and rights of Aboriginal groups.¹⁵⁹

In their various ways, then, the *Royal Proclamation of 1763* and the *Quebec Act* manifest the principle of continuity, which was further recognized and elaborated as federation continued into the next century. The distinct identity of Quebec was a cornerstone of the *Constitution Act, 1867*, which reversed the earlier attempt to unite Lower and Upper Canada into a single province. The phraseology of the *Quebec Act* was carried forward in a provision giving the provinces the exclusive right to make laws regarding “Property and Civil Rights in the Province”. The unique character of the Quebec civil law system was reflected in a clause that allowed the Parliament of Canada to provide uniform laws in all

the federating provinces except for Quebec, thus introducing an asymmetrical element into Confederation.¹⁶⁰

The principle of continuity is further reflected in the provisions in the *Manitoba Act, 1870* dealing with the 'Indian title' of the Métis people.¹⁶¹ Discussing these provisions, one commentator has concluded:

The contextual background of section 31 [of the *Manitoba Act, 1870*] reveals its true nature as one of the constitutional provisions that formed part of 'the basic compact of Confederation' and places it in the category of provisions that guaranteed rights to minorities in order to obtain consent for joining Confederation. For section 31, a land claims agreement was reached and was entrenched in a Confederation pact, and the rights embodied in it are affirmed by section 35 of the *Constitution Act, 1982* as one of the 'treaties' that formalized relations between the Crown and the inhabitants of the Crown lands when Canada assumed jurisdiction.¹⁶²

Our constitutional law shows diversity, not only in its origins and content but also in its legal character. At various times, it has included such items as treaties (both oral and written) with Aboriginal peoples, royal proclamations, governors' commissions and instructions, acts of the British Parliament, federal statutes and orders in council. In addition to such written sources, our constitutional law also incorporates unwritten principles and rules, which can be described as the common law of the constitution. Some of this law has long been entrenched, in that it could not be changed by an ordinary statute passed by Parliament or a provincial legislature, but only by a more complicated process which, before 1982, involved recourse to the British Parliament. Other important parts of the constitution, however, were not entrenched originally and could be altered by ordinary statute.

Before the enactment of section 35 of the *Constitution Act, 1982*, the courts took the view that Aboriginal treaties could be amended or overridden by federal statute, without the agreement of the Aboriginal parties. This view was consistent with certain British constitutional traditions, under which even such fundamental documents as *Magna Carta* could be repealed by a simple act of Parliament. However, it did not correspond to Aboriginal conceptions of the treaties, which were viewed as sacred pacts, not open to unilateral repeal. As Mis-tah-wah-sis, one of the leading chiefs, stated at the negotiation of Treaty 6 in 1876:

What we speak of and do now will last as long as the sun shines and the river runs, we are looking forward to our children's children, for we are old and have but few days to live.¹⁶³

This outlook was fostered by Crown negotiators, who often emphasized that the treaties were foundational agreements, establishing or confirming the basic and enduring terms of the relationship between Aboriginal peoples and the Crown. We see this in the observations made by Alexander Morris, Lieutenant Governor of the North West Territories, while negotiating the terms of Treaty 4 at Fort Qu'Appelle in 1874:

I told my friends yesterday that things changed here, that we are here to-day and that in a few years it may be we will not be here, but after us will come our children. The Queen thinks of the children yet unborn. I know that there are some red men as well as white men who think only of to-day and never think of to-morrow. The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.¹⁶⁴

Unfortunately, the Crown's memory proved more fragile than the memories of the Aboriginal parties. The treaties were honoured by Canadian governments as much in the breach as in the observance. Moreover, before 1982, Canadian courts upheld federal legislation imposing unilateral restrictions on treaty rights. At times, this judicial approach was tinged with misgiving. For example, in *Regina v. Sikyee* (1964), Justice Johnson of the Northwest Territories Court of Appeal commented ruefully:

It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations. How are we to explain this apparent breach of faith on the part of the Government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked — a case of the left hand having forgotten what the right hand had done.¹⁶⁵

Nevertheless, the judge felt bound to uphold the legislation because there was no law preventing Parliament from overriding treaty rights. As we will see, this situation changed dramatically with the reform of the constitution.

A Constitutional Watershed: the CONSTITUTION ACT, 1982

In 1982, the written constitution of Canada was revised to recognize explicitly the special status and rights of Aboriginal peoples. Section 35 of the *Constitution Act, 1982*, as amended in 1983, provides that existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed. The provision includes the First Nations, Inuit and Métis peoples and guarantees the rights equally to men and women. Section 35.1 commits the federal and provincial governments to convening a constitutional conference that includes representatives of the Aboriginal peoples of Canada before any amendment is made to a constitutional provision concerning them.

The complete text of these provisions follows:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the “*Constitution Act, 1867*”, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

The adoption of section 35(1) marked a watershed in relations between Aboriginal peoples and the Canadian state.¹⁶⁶ As the Supreme Court of Canada noted in its unanimous judgement in the leading case of *R. v. Sparrow*, decided in 1990,

S. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada’s aboriginal peoples made the adoption of s. 35(1) possible ...¹⁶⁷

The Supreme Court observed that the new provision provided a strong constitutional foundation for negotiations between Aboriginal peoples and Canadian governments. The section also protected Aboriginal peoples from certain kinds of legislation. Moreover, in the view of the court, the significance of section 35 extended beyond these fundamental effects. Quoting from an article by Noel Lyon, it adopted this view:

The context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.¹⁶⁸

The Supreme Court stated that, when the purposes of section 35 were taken into account, it was clear that a “generous, liberal interpretation of the words” was demanded.¹⁶⁹ In its view, there was one general guiding principle for understanding section 35:

The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.¹⁷⁰

Applying these considerations, the court held that the section gives constitutional protection to a range of special rights enjoyed by Aboriginal peoples, shielding these rights from the adverse effects of legislation and other governmental acts, except where a rigorous standard of justification can be met. There are two criteria that an asserted right must meet to gain the protection of section 35(1): first, it must qualify as an Aboriginal or treaty right within the meaning of the provision; and second, it must be an existing right, in that it must not have been extinguished before 1982, when section 35(1) took effect. In discussing these criteria, the court focused on the position of Aboriginal rights rather than treaty rights, which were not at issue in *Sparrow*.

Overall, the court took what might be called a ‘living heritage’ approach to section 35(1), one that endeavours to strike a balance between affirming the historical rights of Aboriginal peoples and providing a form of contemporary justice. This approach involves three interrelated doctrines: continuity; legislative extinguishment; and evolutionary adaptation.

A doctrine of continuity holds that a right originally held by an Aboriginal group as “an integral part of their distinctive culture”¹⁷¹ presumptively withstood the imposition of colonial rule and continued to exist in 1982, even though the factual evidence for its survival may be somewhat meagre.¹⁷² The court noted that the nature and scope of an Aboriginal right are not to be determined simply by reference to historical government policies or regulatory schemes, thus rejecting an approach that views the right exclusively through the lens of colonial law and policy.¹⁷³

Under a doctrine of legislative extinguishment, the court affirmed that in cases where an Aboriginal right had been extinguished by legislation before 1982, it would not qualify as an existing right under the section.¹⁷⁴ Nevertheless, the court placed two significant limitations on the operation of this doctrine. First, legislation must manifest a clear and plain intention to extinguish an Aboriginal right before it can have this effect.¹⁷⁵ The court adopted the ‘clear and plain’ standard as set out by Justice Hall in the *Calder* case rather than a ‘tacit extinguishment’ approach favoured in other quarters. In particular, the court distanced itself from the view expressed in the *Baker Lake* case that an Aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute.¹⁷⁶ It also set to one side the approach of Justice Judson in *Calder*, which viewed a series of statutes as manifesting “a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title.”

The court placed a second important limitation on the extinguishment doctrine. It held that legislation that merely regulated an Aboriginal right did not extinguish it, even if the regulations were very detailed and extensive and the right was reduced to a very narrow scope.¹⁷⁷ So long as the right survived in some form, however slight, it qualified as an existing right under section 35(1) and received constitutional protection. Moreover, the

section would not freeze an Aboriginal right in the regulated form it happened to hold in 1982.¹⁷⁸ Restrictions imposed by existing legislation would be open to challenge under section 35(1) as being inconsistent with the constitutional recognition extended by the provision.

Adopting a doctrine of evolutionary adaptation, the court held that the phrase ‘existing Aboriginal rights’ must be interpreted flexibly to permit rights to evolve and adapt over time. In particular, said the court, “the word ‘existing’ suggests that those rights are ‘affirmed in a contemporary form rather than in their primeval simplicity and vigour’”.¹⁷⁹ As applied to the case under consideration, for example, this doctrine means that the Aboriginal fishing rights of the Musqueam people “may be exercised in a contemporary manner”.¹⁸⁰ Further, any legislation limiting Aboriginal rights “must uphold the honour of the Crown and must be in keeping with the *unique contemporary relationship*, grounded in history and policy, between the Crown and Canada’s aboriginal peoples”.¹⁸¹

Overall, then, the Supreme Court held that section 35(1) recognizes Aboriginal rights as the *living heritage* of Aboriginal peoples rather than as strictly historical rights. This approach endeavours to pay due regard to history without being in thrall to it. It anchors itself in the contemporary world and takes as much account of current conditions as it does of past circumstances.

The inherent right of self-government is entrenched in the constitution

Given the approach identified in *Sparrow*, the basic argument in favour of a constitutional right of self-government is relatively straightforward.¹⁸² At the time of European contact, Aboriginal peoples were sovereign and independent peoples, possessing their own territories, political systems and customary laws. Although colonial rule modified this situation, it did not deprive Aboriginal peoples of their inherent right of self-government, which formed an integral part of their cultures. This right continued to exist, in the absence of clear and plain legislation to the contrary. Although in many cases the right was curtailed and tightly regulated, it was never completely extinguished. As a result, the inherent right of self-government was recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an existing Aboriginal or treaty-protected right. This constitutional right assumes a contemporary form, one that takes account of the changes that have occurred since contact, the modern needs of Aboriginal peoples, and the existence of a federal system in Canada.

The strength of this approach is that it follows closely the route identified in *Sparrow* and so benefits from the substantial authority this case carries in Canadian law. However, the approach also has some drawbacks. Taken in isolation, it could be viewed as conceding that the existence of the inherent right of self-government in Canada today depends simply on whether the right had been extinguished by Canadian or imperial legislation before 1982. The approach therefore tacitly accepts the possibility of unilateral extinguishment, a possibility that few Aboriginal peoples are prepared to contemplate. For them, the right of self-government is fundamental to their very existence as peoples and as such is inextinguishable without their free consent. From this perspective, the

approach represents the low road to a destination that would better be reached by the high road of principle and fundamental rights.

These considerations lead us to suggest an alternative approach to section 35(1), one that seems consistent with the spirit of the *Sparrow* decision even though it is not clearly articulated there.¹⁸³ This approach draws attention to the fact that some of the rights covered by section 35(1) are so closely connected with the basic identity and communal well-being of Aboriginal peoples that it is hard to imagine they could ever have been completely extinguished by unilateral Crown acts. For example, it is difficult to believe that legislation passed before 1982 could have terminated a people's right to speak their own language, to follow their basic way of life or to adhere to their spiritual traditions. In dealing with rights of this kind, our approach argues, we should set a very strict standard for extinguishing legislation, one that would be extremely difficult to satisfy, given the importance of the rights at stake.

In applying the word 'existing' in section 35(1), we should consider not only the terms of any legislation passed before 1982 but also the character and weight of the particular right in question, as a matter of basic human rights and international standards. The strictness of the extinguishment criterion will vary, depending on the gravity of the right at stake and its importance to the identity of the Aboriginal people in question. This last factor deserves particular emphasis. Aboriginal peoples are the descendants of the historical nations of Canada, the first to occupy the land as sovereign peoples and the original stewards of its resources. It is unimaginable that, in their own homelands, Aboriginal peoples should ever be denied Aboriginal and treaty rights that are central to their existence as peoples. This broader approach reinforces the conclusion that the inherent right of self-government still exists for all Aboriginal peoples in Canada and that this right exists notwithstanding the terms of legislation passed before 1982.

From the time that section 35(1) was first enacted, observers have noted that the right of Aboriginal peoples to govern themselves within Canada was potentially one of the rights recognized in the section. As early as 1983, the report of a special House of Commons committee on Indian self-government (the Penner report) observed that the inclusion of Aboriginal and treaty rights in the constitution may have altered the traditional understanding of governmental powers:

If, as many assert, the right to self-government exists as an aboriginal right, there could be a substantial re-ordering of powers. Indian governments may have implicit legislative powers that are now unrecognized.¹⁸⁴

The Penner report remarked that many Indian witnesses appearing before the committee affirmed that the Aboriginal right of self-government had an existing basis in Canadian law. For example, a representative of the Canadian Indian Lawyers' Association, Judy Sayers, invoked the *Royal Proclamation of 1763* and the *Constitution Act, 1982* and concluded that "there is in law and history a definite basis for self-determination and self-government."¹⁸⁵ Noting this possibility, the Penner committee recommended that the constitution be amended to recognize explicitly and entrench the right of self-

government. Indian governments would then, in the committee's view, clearly form a distinct order of government in Canada, with their jurisdiction defined.¹⁸⁶

During the following decade, further constitutional reform was actively pursued. Several intensive rounds of constitutional negotiations occurred between Aboriginal peoples and the federal and provincial governments.¹⁸⁷ One major aim was to secure explicit constitutional recognition of the right of self-government. These efforts culminated in the detailed Aboriginal amendments proposed in the Charlottetown Accord of 1992.¹⁸⁸ Despite the complexity of these provisions, one simple clause lay at their core. The draft legal text of 9 October 1992 included the following provision:

35.1 (1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.

As the wording indicates, this provision does not purport to create a right of self-government or to grant it to Aboriginal peoples. It simply affirms that Aboriginal peoples have this right, a right described as inherent. It seems fair to conclude that the draft provision assumes that the right of self-government was already in existence. The provision was intended merely to confirm the right and give it explicit constitutional status. Although the Charlottetown Accord was never implemented, it bears witness to one important point: all the parties to the accord were prepared to recognize that Aboriginal peoples already possessed the inherent right to govern themselves within Canada.

More recently, this view has been reaffirmed by the government of Canada on numerous occasions. On 4 November 1994 a political accord was signed between the minister of Indian affairs, Ronald A. Irwin, and the Mi'kmaq of Nova Scotia, in which the parties agreed to conduct further negotiations implementing the Mi'kmaqs' inherent right of self-government regarding education. The accord's preamble states:

WHEREAS Canada is prepared to act on the premise that the inherent right of self-government is an existing Aboriginal right within the meaning of section 35 of the Constitution Act of 1982;

AND WHEREAS Canada is engaging in a process of discussion with Aboriginal people of Canada on how best to implement the inherent right of self-government;

AND WHEREAS Canada is prepared to act on the premise that the inherent right of self-government includes jurisdiction in respect of education;

The following month, on 7 December 1994, a framework agreement was concluded between First Nations communities in Manitoba, represented by the Assembly of Manitoba Chiefs, and the Queen represented by the minister of Indian affairs. The thrust of the agreement is to dismantle the operations of the Department of Indian Affairs and Northern Development (DIAND) in Manitoba, restore jurisdiction to First Nations

peoples, and recognize First Nations governments. The agreement sets out a number of principles to guide this process, including the following:

5.2 The inherent right of self-government, First Nations' Treaty rights and Aboriginal rights will form the basis for the relationships which will be developed as a result of the process;

5.3 In this process, the Treaty rights of First Nations will be given an interpretation, to be agreed upon by Canada and First Nations, in contemporary terms while giving full recognition to their original spirit and intent;

5.4 First Nations governments in Manitoba and their powers will be consistent with Section 35 of the *Constitution Act, 1982*;

Finally, in August 1995, the federal government issued a policy guide entitled *Aboriginal Self-Government*, which sets out the government's approach to implementing the inherent right of self-government. The policy guide affirms:

The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.¹⁸⁹

The policy guide acknowledges that the inherent right of self-government may be enforceable in the courts. However, it affirms a strong preference for negotiation over litigation as the most practical method to implement the inherent right.

These documents show that the federal government recognizes that the inherent right of self-government is entrenched in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty-protected right. As seen earlier, this view is consistent with the unanimous decision of the Supreme Court of Canada in *Sioui*, which indicates that the right of self-government is an Aboriginal right under the common law of Canada.

Nevertheless, serious arguments have been advanced to the effect that the right of self-government was in fact extinguished before 1982 and as such cannot benefit from the constitutional guarantee in section 35(1). It is important to address these arguments, even if they involve somewhat technical matters that seem far removed from the broad approach recommended earlier.

Four main arguments need to be considered. The first three are comprehensive in nature: they apply to all Aboriginal peoples in Canada, including First Nations, Inuit and Métis peoples. The final argument is narrower and applies only to peoples covered by the

Indian Act. In the *Delgamuukw* case, a majority of the British Columbia Court of Appeal accepted the first three arguments and held that any inherent powers of Aboriginal governments in British Columbia were extinguished at the latest when the colony joined Confederation in 1871.¹⁹⁰ The case is now on further appeal to the Supreme Court of Canada and is being held in abeyance pending further negotiations between the parties.

Briefly, the first argument maintains that inherent Aboriginal governmental powers were automatically terminated as a matter of British law when the British Crown and Parliament assumed sovereignty over Canadian territory. The second argument is a variation on this view, holding that Aboriginal powers were extinguished when the Crown appointed a governor and set up a local law-making authority, such as an assembly or the governor in council. The third argument maintains that, in any case, Aboriginal powers came to an end when the *Constitution Act, 1867* became applicable to the territory in question. This result is said to flow from the act's comprehensive division of legislative powers between the federal and provincial governments and from the grant of exclusive jurisdiction over Indian affairs to Parliament. The fourth argument holds that federal Indian legislation passed after 1867 effectively wiped out any inherent jurisdiction held by Indian peoples and substituted a form of delegated jurisdiction.

The first two arguments are both ostensibly based on the British doctrine of the sovereignty of Parliament and so can be considered together. In his classic *Introduction to the Study of the Law of the Constitution*, Dicey summarizes this doctrine as follows:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

A law may, for our present purpose, be defined as "any rule which will be enforced by the courts." The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle, looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make laws which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.¹⁹¹

The argument then cites the view expressed by the Supreme Court of Canada in the *Sparrow* case:

[While] British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown ...¹⁹²

Taken in combination with the doctrine of parliamentary sovereignty, this view leads necessarily to the conclusion that the sovereignty of the British Parliament (and of local legislatures established under British authority) left no room whatever for Aboriginal jurisdiction, which was automatically extinguished.

In the Commission's view, this argument is not sound. Even if one accepts the premises given, they do not lead to the conclusion that Aboriginal jurisdiction was necessarily terminated. The doctrine of parliamentary sovereignty, as framed by Dicey, involves two related propositions. The first proposition affirms that "Parliament ... has, under the English constitution, the right to make or unmake any law whatever". As applied to Aboriginal peoples, this proposition means that once the Crown assumes authority over a certain territory, the British Parliament (or suitably empowered local legislatures) would have the power to repeal or modify indigenous laws and to curtail or abolish Aboriginal jurisdiction. However, it does not follow that Aboriginal laws and jurisdiction would be terminated automatically once the British Parliament assumes authority. It only means that, according to British law, both would now be subject to the paramount authority of the British Parliament. A clear and plain parliamentary act would be required to terminate them. To draw a parallel, under the doctrine of parliamentary sovereignty, the British Parliament has the power to confiscate all private lands in England without compensation. Nevertheless, the fact that Parliament has the power to do this does not mean that private property automatically ceases to exist. Very clear legislation would be needed to produce such a drastic result.

The second proposition framed by Dicey states that "no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament". This proposition means that under British law, once the Crown assumes authority over a certain Canadian territory, no Aboriginal institution would have the power to override a parliamentary statute applying in the territory (or a law passed by a suitably empowered local legislature). According to this doctrine, an Aboriginal body would not be able to enforce an indigenous law that was inconsistent with a British statute. However, as long as no such inconsistency existed, the indigenous law would remain in force. Furthermore, the capacity of the Aboriginal body to formulate or enforce the laws of the group would not be extinguished but would continue to exist, subject to the paramount power of Parliament.

To summarize, it is a mistake to think that under the doctrine of parliamentary sovereignty the power of an Aboriginal group to formulate and enforce its own laws is automatically terminated once the Crown assumes authority. The doctrine of parliamentary sovereignty maintains simply that the group and its laws are now subordinate to parliamentary power. If Parliament exercises this power to override or amend the indigenous laws in question or to abolish inherent Aboriginal jurisdiction, Crown courts will give effect to this act.¹⁹³ However, so long as Parliament does not act in this manner, Aboriginal laws and jurisdiction remain essentially intact.

For example, as seen in the case of *Connolly v. Woolrich*, the fact that the British Crown assumed sovereignty over a certain part of western Canada did not mean that the

marriage laws of Aboriginal peoples living there were automatically terminated or that Aboriginal jurisdiction to enforce these laws was superseded. To the contrary, indigenous laws and jurisdiction continued to exist, in the absence of British legislation repealing or modifying them.

So, the simple fact that the British Crown gained control over a certain Canadian territory and established a local legislature there did not mean that inherent Aboriginal jurisdiction was automatically superseded. In the absence of clear and plain legislation to the contrary, indigenous jurisdiction continued to exist under the Crown's protection. As seen earlier, this conclusion is consistent with the wording of the *Royal Proclamation of 1763*, which speaks of "the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection". It is also consistent with the unanimous decision of the Supreme Court of Canada in *Sioui*, which affirmed that the British Crown allowed Aboriginal peoples "autonomy in their internal affairs, intervening in this area as little as possible".

These reflections dispose of the first two arguments identified. However, they bring us directly to the third argument. This argument affirms that when the British Parliament passed the *Constitution Act, 1867*, it clearly expressed the intention to abolish any form of inherent Aboriginal jurisdiction in Canada. In other words, not only did Parliament have the power to abolish indigenous jurisdiction, it actually exercised this power in 1867. This argument is based on two related propositions.

The first proposition holds that the *Constitution Act, 1867* divided all governmental powers between the federal and provincial governments, except for a few matters expressly reserved. As the privy council remarked in the *Reference Appeal* (1912):

In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada.¹⁹⁴

According to this argument, the complete distribution of legislative and executive authority between the federal and provincial governments in 1867 did not leave any room for inherent Aboriginal jurisdiction, which was necessarily extinguished.

The second proposition invokes section 91 of the *Constitution Act, 1867*, which provides that Parliament has "exclusive Legislative Authority" over all the matters listed in the section, including "Indians, and Lands reserved for the Indians" (section 91(24)). According to this argument, the word 'exclusive' abolishes any Aboriginal jurisdiction. Section 91(24) indicates that Parliament is the sole governmental authority capable of dealing with Aboriginal peoples. It would be inconsistent with the section's wording, according to this view, if such an authority resided in both Parliament and Indigenous peoples.

In our opinion, these arguments are not persuasive. They fail to take account of the historical background to the *Constitution Act, 1867* and the purposes the act was designed to serve. The year 1867 was not, of course, the first occasion upon which Canadian governments had been granted comprehensive powers. From early times, local colonial governments had been empowered to legislate for the peace, welfare and good government of the colony (or some variation on this formula), and this grant was understood to confer comprehensive authority within the larger framework of imperial legislation, subject to any specific limitations.¹⁹⁵

For example, the Royal Commission to the Governor of Nova Scotia in 1749 authorized him to constitute a council and an assembly and together with them to legislate “for the Public peace, welfare & good government of our said province”.¹⁹⁶ The *Royal Proclamation of 1763* contained a similar provision for Quebec, empowering the governor, council and assembly to make laws “for the Publick Peace, Welfare, and Good Government” of the colony.¹⁹⁷ Likewise, the *Constitutional Act, 1791* gave the councils and assemblies of Upper and Lower Canada the power, together with the Crown, to make laws for the peace, welfare and good government of the provinces in question.¹⁹⁸ The same language is found in the *Union Act, 1840*.¹⁹⁹ These general grants of authority included the power to deal with Aboriginal peoples and their affairs, as is evinced by the many executive acts and statutes concerning Indians and Indian lands in the colonies before 1867.

The *Constitution Act, 1867* did not materially increase the power of Canadian governments to deal with Aboriginal peoples, nor did it alter the status of Aboriginal institutions of government. Its main effect was to transfer powers formerly held by the governments of the provinces to the new federal government, powers that were held to the exclusion of the provinces. This fact explains the wording of section 91, which gives Parliament an exclusive set of powers over a specific list of subject matters, including “Indians, and Lands reserved for the Indians”. By the same token, section 92 gives provincial legislatures the exclusive power to make laws regarding certain other matters. The wording of the two sections is reciprocal and designed to eliminate overlap between the federal and provincial authorities.

In our view, the term exclusive in section 91 means exclusive of the provincial legislatures. The term does not address the question of inherent Aboriginal jurisdiction and does not affect it. Before 1867, Aboriginal jurisdiction had coexisted with the old colonial constitutions in force in the provinces; it continued to exist in the new federation of Canada.

A parallel approach to the act of 1867 was taken by Lord Denning in *R. v. Secretary of State*:

Save for that reference in s. 91(24), the 1867 Act was silent on Indian affairs. Nothing was said about the title to property in the ‘lands reserved for the Indians’, nor to the revenues therefrom, nor to the rights and obligations of the Crown or the Indians thenceforward in regard thereto. But I have no doubt that all concerned regarded the royal

proclamation of 1763 as still of binding force. It was an unwritten provision which went without saying. It was binding on the legislatures of the Dominion and the provinces just as if there had been included in the statute a sentence: ‘The aboriginal peoples of Canada shall continue to have all their rights and freedoms as recognized by the royal proclamation of 1763’.²⁰⁰

The continued existence of Aboriginal political systems is borne out by legislation enacted both before and after the *Constitution Act, 1867*. Consider, for example, the *Indian Lands Act*, passed by the Province of Canada in 1860.²⁰¹ Section 4 provides that lands reserved for the use of any tribe or band of Indians cannot be surrendered except on this condition:

Such release or surrender shall be assented to by the Chief, or if more than one Chief, by a majority of the Chiefs of the tribe or band of Indians, assembled at a meeting or Council of the tribe or band summoned for that purpose *according to their rules*. [emphasis added]

This section apparently presupposes that each tribe or band of Indians retained its internal political structure as determined by the tribe’s own rules. The act superimposes a further layer of regulations on these structures but otherwise leaves them intact.

The *Constitution Act, 1867* did not change this position, as we see in the first federal Indian statute passed after Confederation. The *Indian Lands Act* of 1868 contains wording virtually identical to that found in the 1860 act.²⁰² Section 8 states that no surrender of lands reserved for the use of any tribe, band or body of Indians is valid unless assented to by the chief or chiefs of the group assembled “at a meeting or council of the tribe, band or body summoned for that purpose *according to their rules*”. [emphasis added] Similar wording appears in federal Indian legislation until 1951, when the provision changes.²⁰³ Nevertheless, section 2 of the *Indian Act* of 1951 continues to envisage bands with councils and chiefs chosen “according to the custom of the band”, and a similar provision appears in the current *Indian Act*. These provisions correctly assume that the internal constitutions of Aboriginal groups survived the passage of the *Constitution Act, 1867*.

Section 129 of the 1867 act gives added support to this conclusion. The section enunciates a broad principle of continuity whereby laws and powers existing before 1867 presumptively remained in force in the new federation. The text states that, except as provided elsewhere in the act, “all *Laws* in force in Canada, Nova Scotia, or New Brunswick at the Union, and all *Courts* of Civil and Criminal Jurisdiction, and all legal Commissions, *Powers, and Authorities*, and all Officers, Judicial, Administrative, and Ministerial” [emphasis added] shall continue to operate, subject nevertheless to be repealed, abolished or amended by Parliament or the provincial legislatures, according to their respective capacities. In our opinion, this language is sufficient to prevent Aboriginal governmental structures, powers and laws from being swept away by the division of powers accomplished by the 1867 act. It leaves these matters in the same state as before 1867, subject to any new legislation passed by Parliament.

Nevertheless, beginning in 1869, Parliament passed a series of measures defining the governmental powers of Indian chiefs and councils and subordinating them to the discretion of federal officials.²⁰⁴ This legislation provides the basis of the fourth extinguishment argument. This argument applies only to peoples covered by the Indian acts and does not affect the position of Inuit or Métis people. In brief, the argument maintains that federal Indian legislation wiped out any form of inherent jurisdiction in Aboriginal peoples and substituted a restricted form of delegated governmental authority.

We do not find this argument convincing. As discussed in Volume 1, Chapter 9, the basic pattern was established by the *Indian Enfranchisement and Management Act* of 1869, which provides in section 12:

The Chief or Chiefs of any Tribe in Council may frame, subject to confirmation by the Governor in Council, rules and regulations for the following subjects, viz:

1. The care of the public health.
2. The observance of order and decorum at assemblies of the people in General Council or on other occasions.
3. The repression of intemperance and profligacy.
4. The prevention of trespass by cattle.
5. The maintenance of roads, bridges, ditches and fences.
6. The construction of and maintaining in repair of school houses, council houses and other Indian public buildings.
7. The establishment of pounds and the appointment of pound-keepers.²⁰⁵

This provision, and others like it, clearly purported to alter the existing governmental structures of Aboriginal groups. It attributed legislative powers to individuals and entities that may not have possessed them previously and confined these powers to a narrow range of subjects. Nevertheless, these restrictive measures did not build upon completely new foundations. They took for granted the existence of Aboriginal groups as distinct political entities and introduced or authorized changes in their internal political structures.

We see an example of this approach in the second paragraph of the section just quoted, which authorizes chiefs in council to frame regulations dealing with order and decorum assemblies of the people in general council, which assumes the continuing existence of assemblies and councils constituted under Indian custom. Another provision in the same act authorizes the governor in council to order that chiefs be elected by the adult male members of the group and hold office for three years, unless dismissed by the governor for bad behaviour. However, this provision is left to be implemented at the governor's discretion. Otherwise, the group's traditional mode of selecting chiefs continues as

before. So, while it is true that federal Indian legislation severely disrupted and distorted the political structures of Aboriginal peoples, leaving them with limited powers, in our view the legislation did not evince a clear and plain intention to strip them of all governmental authority.

We conclude, then, that the inherent right of self-government of Aboriginal peoples was still in existence in 1982 when section 35(1) was enacted. As such, it qualifies as an existing right under the section. One great achievement of section 35(1) of the *Constitution Act, 1982* was to deal with the issue of the status of Aboriginal governments in a manner favourable to Aboriginal views. By entrenching Aboriginal and treaty rights in the constitution, section 35(1) ensured that the right of self-government would henceforth enjoy a substantial degree of immunity from federal and provincial legislation, except where the legislation could be justified under a strict constitutional standard.

Conclusions

8. The Commission concludes that the inherent right of Aboriginal self-government is recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty-protected right. The inherent right is thus entrenched in the Canadian constitution, providing a basis for Aboriginal governments to function as one of three distinct orders of government in Canada.

9. The constitutional right of self-government does not supersede the right of self-determination or take precedence over it. Rather, it is available to Aboriginal peoples who wish to take advantage of it, in addition to their right of self-determination, treaty rights and any other rights that they enjoy now or negotiate in the future. In other words, the constitutional right of self-government is one of a range of voluntary options available to Aboriginal peoples.

The scope of constitutional self-government

Let us turn now to the question of the precise nature and scope of the Aboriginal right of self-government under section 35. It should be emphasized once again that, in speaking of the right of self-government in this context, we have in mind the particular version of that right now recognized in Canadian constitutional law. We are not referring to the broad right of self-government that is asserted by many Aboriginal peoples on the basis of their treaties or on other historical and political grounds. The precise character of that broader right varies from people to people, as do its dimensions and overall significance. We think that this matter is better addressed by each Aboriginal people in negotiations with the Crown. Here we deal only with the right of self-government that, in our judgement, is recognized in section 35(1) of the *Constitution Act, 1982*.

It follows from what we have already said that the right of self-government is inherent in its source, in the sense that it finds its origins within Aboriginal peoples, as a contemporary manifestation of the powers they originally held as independent and sovereign nations. It does not stem from constitutional grant; that is, it is not a derivative

right. The distinction between an inherent and a derivative right is not merely symbolic. It addresses the basic issue of how Canada emerged and what it stands for. According to proponents of the view that the right is derivative, Aboriginal peoples have no rights of government other than those that the written constitution creates or that the federal and provincial governments choose to delegate. By contrast, our approach sees Aboriginal peoples as the bearers of ancient and enduring powers of government that they carried with them as they established relations with the Crown. Under the first theory, Aboriginal governments are newcomers on the constitutional scene, mere neophytes among governments in Canada. Under the second doctrine, Aboriginal governments give the constitution its deepest and most resilient roots in the Canadian soil.

The Aboriginal right of self-government is recognized by the Canadian legal system, under the constitutional common law of Canada and also under section 35(1). So, while the section 35(1) right is inherent in point of origin, as a matter of current status it is a right held in Canadian law. The implication is that, while Aboriginal peoples have the inherent legal right to govern themselves under section 35(1), this constitutional right is exercisable only within the framework of Canada. Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short, the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers.

Within their sphere of jurisdiction, however, the authority of Aboriginal governments is immune to indiscriminate federal or provincial interference. This conclusion flows from the *Sparrow* decision, where Aboriginal rights and treaty rights were treated as immune to legislative inroads, except where a high constitutional standard could be satisfied. According to this view, Aboriginal governments are not subordinate to the actions of other governments, but neither are they entirely supreme. They occupy an intermediate position. In cases where an Aboriginal law conflicts with a federal law, the Aboriginal law will prevail except where the federal law can be justified under the *Sparrow* standard. This view recognizes a large degree of Aboriginal sovereignty and yet allows for the paramount operation of federal laws in matters of overriding importance to the federal government.

How can the Aboriginal right of self-government in section 35(1) be implemented? Here it is helpful to distinguish between two opposing views. According to the first view, the right of self-government is merely a potential right, which needs to be particularized and adapted to the needs of each Aboriginal people before it can be implemented, a process that requires negotiation and agreement between an Aboriginal people and the Crown. So, under this view, the right cannot be implemented unilaterally by an Aboriginal group. By contrast, according to the second view, the right of self-government is actual rather than potential. As such, it can be implemented immediately to its fullest extent by self-starting Aboriginal initiatives, even in the absence of self-government treaties and agreements.

In our view, neither of these options is entirely satisfactory. To hold that the right of self-government cannot be exercised at all without the agreement of the Crown appears inconsistent with the fact that the right is inherent. To hold that Aboriginal peoples can implement the right to its fullest extent unilaterally reads too much into section 35(1), as seen in the broader context of the constitution as a whole.

We propose a middle path between these two extremes. In our approach, the right of self-government recognized in section 35(1) should be considered organic, in a sense similar to that explained in a First Nations constitutional report:

Self-government is not a machine to be turned on or off. It is an organic process, growing out of the people as a tree grows from the earth, shaped by their circumstances and responsive to their needs. Like a tree growing, it cannot be rushed or twisted to fit a particular mould.²⁰⁶

We might add that, like trees growing in a forest, Aboriginal governments coexist with other governments in a complex ecological system. So, while the ancient pine of Aboriginal governance is still rooted in the same soil, from which it derives stability and sustenance, it is now linked in various intricate ways with neighbouring governments.

According to the organic model, Aboriginal peoples constitute one of three orders of government in Canada: Aboriginal, federal and provincial. These exercise authority within distinct but overlapping spheres. The Aboriginal sphere of jurisdiction includes all matters relating to the good government and welfare of Aboriginal peoples and their territories. As noted earlier, this sphere consists of both a core and a periphery. In core areas of jurisdiction, an Aboriginal people is free to implement its inherent right of self-government by self-starting initiatives, without the need for agreements with the federal and provincial governments, although it would be highly advisable for Aboriginal people to negotiate such agreements in the interests of reciprocal recognition and the avoidance of litigation. However, in the periphery, the inherent right of self-government can be exercised only following the conclusion of agreements with the federal and provincial governments.

The core of Aboriginal jurisdiction includes all matters that

- are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity;
- do not have a major impact on adjacent jurisdictions; and
- are not otherwise the object of transcendent federal or provincial concern.

The periphery makes up the remainder of the sphere of inherent Aboriginal jurisdiction.

Under the organic model, the right of self-government is an inherent right in both the core and the periphery. In neither case is the right delegated. The effect of agreements with the

Crown is to particularize the inherent right, not to create it. So, for example, where an Aboriginal group concludes a self-government treaty with the Crown, the group's governmental authority is inherent throughout the full extent of its jurisdiction, in relation to matters in both the core and the periphery.

At this stage, two related questions arise. First, what are the potential outer limits of Aboriginal jurisdiction, including both the core and the periphery? Second, how does Aboriginal jurisdiction interact with the jurisdictions of the federal and provincial governments? These are complex and difficult matters.

In what follows, we focus on the case of an Aboriginal nation that exercises autonomous authority over an exclusive territory. (Urban and public governments are considered later, in our discussion of models of Aboriginal government.) We deal first with the interaction between federal and Aboriginal jurisdiction, then turn to the question of provincial jurisdiction.²⁰⁷

In our view, the relationship between federal and Aboriginal authority is governed by three guiding principles. First, the Aboriginal sphere of authority under section 35(1), including both core and periphery, has roughly the same maximum scope as the federal head of power with respect to 'Indians, and Lands reserved for the Indians' recognized in section 91(24) of the *Constitution Act, 1867*. This sphere includes all matters relating to the good government and welfare of Aboriginal peoples and their territories. This approach assumes that, in the interests of constitutional rationality and harmony, the word 'Indians' in section 91(24) carries the same meaning as the phrase 'aboriginal peoples' in section 35; that is, it extends not only to 'Indians' in the narrow sense of the word, but also to the Métis people and Inuit of Canada.²⁰⁸

Second, within this sphere, Aboriginal governments and the federal government generally have concurrent powers; that is, they have independent but overlapping authority. As one commentator has written, "There is no indication that section 35 was intended to supersede completely an established head of Federal power such as section 91(24). So, it follows that Aboriginal governments and the Federal Parliament must have concurrent authority over the matters specified in section 91(24)."²⁰⁹ Nevertheless, the exercise of federal authority is clearly subject to the terms of section 35(1), which protects Aboriginal and treaty rights, including the inherent right of self-government.

Third, where a conflict arises between an Aboriginal law and a federal law within this concurrent sphere, the Aboriginal law will take priority, except where the federal law satisfies the *Sparrow* standard. Under this standard, federal laws will prevail where the need for federal action can be shown to be compelling and substantial and the legislation is consistent with the Crown's basic trust responsibilities to Aboriginal peoples.²¹⁰

Let us now consider the position of the provincial governments in this scheme. In a broad way, we think that the interaction between Aboriginal and provincial jurisdiction is governed by rules similar to those regulating the interaction of federal and provincial

jurisdictions in this area. Under this approach, the matter is governed by four general principles.²¹¹

First, the provinces cannot single out for specific treatment subjects that fall within the concurrent sphere of Aboriginal and federal authority that results from the joint operation of section 35(1) of the *Constitution Act, 1982* and section 91(24) of the *Constitution Act, 1867*. So, for example, provincial legislation specifically regulating the education of Aboriginal children on Aboriginal territories would be invalid.

Second, provincial laws of general application that affect an integral part of a subject-matter falling within the concurrent Aboriginal-federal sphere are inapplicable within that sphere. For example, general provincial laws governing the use and disposition of property would not apply to lands located within Aboriginal territories, because such laws deal with a subject-matter that is integral to Aboriginal-federal jurisdiction.

Third, subject to these first two principles, provincial laws of general application apply to Aboriginal peoples and their territories in relation to subjects that fall within provincial jurisdiction. In particular, it seems unlikely that section 35(1) establishes Aboriginal enclaves within which general provincial laws have no application. Certain aspects of subject-matters that otherwise fall within the Aboriginal-federal sphere will be susceptible to general provincial laws. For example, general provincial labour laws may well apply to businesses and industries operating on Aboriginal territories; likewise, provincial laws governing the practice of professions such as law and medicine will probably extend to Aboriginal territories, as will provincial traffic laws.²¹²

Fourth, this last principle is subject to an important proviso. Where Aboriginal laws conflict with provincial laws of general application, the Aboriginal laws will take precedence. So, for example, Aboriginal labour laws will usually displace any conflicting provincial labour laws within Aboriginal territories, and Aboriginal traffic laws will ordinarily take precedence over conflicting provincial traffic laws.²¹³

Under this approach, then, Aboriginal peoples have a form of organic jurisdiction. Within core areas, an Aboriginal government is free to establish an exclusive sphere of operation by enacting legislation that is sufficient to displace federal and provincial laws. An Aboriginal government may proceed at its own pace, gradually occupying various areas within the core as need and circumstance dictate. Until an area is occupied by Aboriginal legislation, the area will continue to be governed by federal legislation and provincial laws of general application, under normal constitutional principles. By the same token, once an Aboriginal group vacates an area previously occupied, relevant federal and provincial laws will resume their application. The overall result is illustrated by Figure 3.1.

What is the concrete scope of the entire sphere of Aboriginal jurisdiction, including both the core and the periphery? We saw earlier that, in principle, the sphere comprises all matters relating to the good government and welfare of Aboriginal peoples and their

territories. In concrete terms, this probably includes (but is not necessarily limited to) the following subject-matters:

- constitution and governmental institutions
- citizenship and membership
- elections and referenda
- access to and residence in the territory
- lands, waters, sea-ice and natural resources
- preservation, protection and management of the environment, including wild animals and fish
- economic life, including commerce, labour, agriculture, grazing, hunting, trapping fishing, forestry, mining, and management of natural resources in general
- the operation of businesses, trades and professions
- transfer and management of public monies and other assets
- taxation
- family matters, including marriage, divorce, adoption and child custody
- property rights, including succession and estates
- education
- social services and welfare, including child welfare
- health
- language, culture, values and traditions
- criminal law and procedure
- the administration of justice, including the establishment of courts and tribunals with civil and criminal jurisdiction
- policing
- public works and housing

- local institutions.

Which powers fall within the core of Aboriginal jurisdiction, rather than the periphery? As indicated, the core includes all matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity; do not have a major impact on adjacent jurisdictions; and are not otherwise the object of transcendent federal or provincial concern. To give a partial list, it seems likely that an Aboriginal nation with an exclusive territory would be entitled as a matter of its core jurisdiction to draw up a constitution, set up basic governmental institutions, establish courts, lay down citizenship criteria and procedures, run its own schools, maintain its own health and social services, deal with family matters, regulate many economic activities, foster and protect its language, culture and identity, regulate the use of its lands, waters and resources, levy taxes, deal with aspects of criminal law and procedure, and generally maintain peace and security within the territory. In particular, the regulation of many substantive Aboriginal and treaty rights protected under section 35(1) would probably fall within the core of Aboriginal jurisdiction.

By contrast, to take only one example, an Aboriginal nation would not be entitled as part of its core powers to authorize activities on its territories that potentially pose risks to the health and welfare of people in adjacent jurisdictions, such as the storage of hazardous waste or the pollution of the environment. Such activities would potentially have a major impact on adjacent jurisdictions and so would require intergovernmental agreements.

In most cases, an Aboriginal nation would not be able to exercise its core governmental powers beyond its own territory without intergovernmental treaties or agreements. So, for example, where an Aboriginal government wishes to provide social services to its citizens living in urban centres located outside its territory, it will normally need to conclude treaties or agreements with the other governments concerned.

However, there may be exceptions to this territorial limitation. For example, where an Aboriginal nation holds section 35(1) fishing rights with respect to traditional waters located outside its exclusive territory, the nation is probably capable of regulating the fishing activities of its own citizens in those areas as part of its core powers because, according to the *Sparrow* decision, there are strict limitations on the ability of the federal government to do so under section 35(1).²¹⁴ Since the federal government cannot regulate the exercise of a nation's collective Aboriginal fishing rights without meeting a high standard of justification, a jurisdictional vacuum may result unless the nation itself has the capacity to regulate the fishing of its own citizens.

It is interesting to compare the jurisdictional approach outlined here with the draft text of the Charlottetown Accord.²¹⁵ The accord proposed inserting the following clauses in the *Constitution Act, 1982*:

35.1(1)The Aboriginal peoples of Canada have the inherent right of self-government within Canada.

(2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.

(3) The exercise of the right referred to in subsection (1) includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,

(a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and

(b) to develop, maintain and strengthen their relationship with their lands, waters and environment, so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.

This section was balanced by another, providing as follows:

35.4 (1) Except as otherwise provided by the Constitution of Canada, the laws of Canada and the laws of the provinces and territories continue to apply to the Aboriginal peoples of Canada, subject nevertheless to being displaced by laws enacted by legislative bodies of the Aboriginal peoples according to their authority.

(2) No aboriginal law or any other exercise of the inherent right of self-government under section 35.1 may be inconsistent with federal or provincial laws that are essential to the preservation of peace, order and good government in Canada.

(3) For greater certainty, nothing in this section extends the legislative authority of the Parliament of Canada or the legislatures of the provinces or territories.

Significantly, the Manitoba First Nations Government Framework Agreement, signed on 7 December 1994, follows closely the items listed in section 35.1(3) of the Charlottetown Accord. Article 5.11 of the agreement provides:

First Nations governments in Manitoba will be able to undertake legislative, executive, administrative and judicial functions, based on agreements which are consistent with the inherent right of self-government and, with that proviso, will include, but not be limited to, the protection and promotion of their cultures, identities, institutions, traditions, citizenship, lands, waters, economies and languages.²¹⁶

This list differs from the Charlottetown text in only two respects: the citizenship item is a new one, not found in the Charlottetown text and the environment item, mentioned in the Charlottetown agreement, is not mentioned in the Manitoba agreement. While these represent differences of emphasis, in both instances the missing topics are probably covered by other general headings.²¹⁷

More recently, in August 1995, the government of Canada issued a policy guide entitled *Aboriginal Self-Government*, which is designed to serve as a framework for the

negotiation of agreements implementing the inherent right of self-government.²¹⁸ In broad terms, the statement views the scope of Aboriginal jurisdiction as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution.

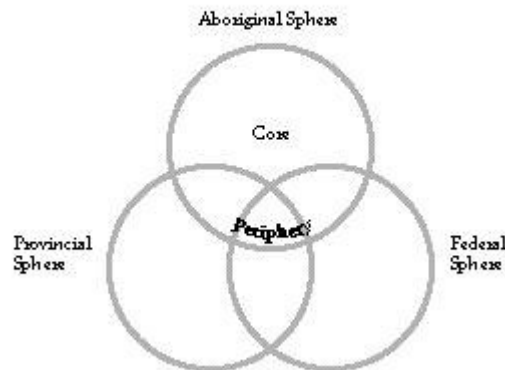
The guide goes on to flesh out this broad affirmation in substantial detail. It provides three lists of subject-matters. The first list comprises a range of matters that the federal government views as proper subjects for negotiation under the definition just quoted. These include

- the establishment of governing structures, internal constitutions, elections, and leadership selection processes
- membership
- marriage
- adoption and child welfare
- Aboriginal language, culture and religion
- education
- health
- social services
- administration and enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments
- policing
- property rights, including succession and estates
- land management, including zoning, service fees, land tenure and access, and expropriation of Aboriginal land
- natural resources management
- agriculture
- hunting, fishing and trapping on Aboriginal lands
- direct taxation and property taxation of members

- transfer and management of monies and group assets
- management of public works and infrastructure
- housing
- local transportation
- licensing and regulation of business

The second list includes areas that, in the federal government's view, go beyond matters that are integral to Aboriginal culture or that are strictly internal to an Aboriginal group. In these areas, the federal government declares its willingness to negotiate some measure of Aboriginal jurisdiction, while specifying that primary law-making authority would remain with the federal or provincial governments, whose laws would prevail in the case of conflict with Aboriginal laws.

FIGURE 3-1
Aboriginal, Federal and Provincial Spheres of Jurisdiction



Subject-matters in this category include the following:

- divorce
- labour and training
- administration of justice issues, including the administration of certain federal criminal laws
- penitentiaries and parole
- environmental protection
- fisheries co-management

- migratory birds co-management
- gaming
- emergency preparedness

The third list includes subject-areas where, in the federal government’s view, there are no compelling reasons for Aboriginal governments to exercise law-making authority and that cannot be characterized as either integral to Aboriginal cultures or internal to Aboriginal groups. These areas are grouped under two headings:

1. Powers related to Canadian sovereignty, defence and external relations, including

- international relations, diplomatic relations and foreign policy
- national defence and security
- security of national borders
- international treaty making
- immigration, naturalization and aliens
- international trade, including tariffs and import-export policy

2. Other national interest powers, including

- management and regulations of the national economy (including such matters as fiscal and monetary policy, the banking system, bankruptcy and currency)
- maintenance of national law and order (including substantive criminal law, emergencies, and matters of “peace, order and good government”)
- protection of the health and safety of all Canadians
- federal undertakings and powers (such as broadcasting and communications, aeronautics, navigation and shipping, and national transportation systems.)

While matters on the third list are excluded from self-government negotiations, the policy guide envisages the possibility of entering into “administrative arrangements” in these areas, where such arrangements are feasible and appropriate.

With respect to the implementation of self-government agreements, the federal government declares its willingness to ensure that the rights set out in such agreements receive constitutional protection as treaty rights within the scope of section 35 of the

Constitution Act, 1982. This protection may be secured by new treaties or comprehensive land claims agreements, or by additions to existing treaties.

The policy guide affirms that implementation of the inherent right of self-government will not lead to the automatic exclusion of federal and provincial laws, many of which will continue to apply to Aboriginal peoples or co-exist with Aboriginal laws. To minimize conflicts between Aboriginal laws and federal or provincial laws, the federal government proposes that all self-government agreements should establish rules of priority for resolving such conflicts. While these rules may provide for the paramountcy of Aboriginal laws, in the federal government's view, they may not deviate from the basic principle that "federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws".

Conclusions

10. The Commission concludes that, generally speaking, the sphere of inherent Aboriginal jurisdiction under section 35(1) comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. This sphere of inherent jurisdiction is divided into two sectors: a core and a periphery.

11. The core of Aboriginal jurisdiction includes all matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity; that do not have a major impact on adjacent jurisdictions; and that otherwise are not the object of transcendent federal or provincial concern. With respect to these matters, an Aboriginal group has the right to exercise authority and legislate at its own initiative, without the need to conclude federal and provincial agreements.

12. The periphery comprises the remainder of the sphere of inherent Aboriginal jurisdiction. It includes, among other things, subject-matters that have a major impact on adjacent jurisdictions or attract transcendent federal or provincial concern. Such matters require a substantial degree of co-ordination among Aboriginal, federal and provincial governments. In our view, an Aboriginal group cannot legislate at its own initiative in this area until agreements have been concluded with federal and provincial governments.

13. When an Aboriginal government passes legislation dealing with a subject-matter falling within the core, any inconsistent federal or provincial legislation is automatically displaced. An Aboriginal government can thus expand, contract or vary its exclusive range of operations in an organic manner, in keeping with its needs and circumstances. Where there is no inconsistent Aboriginal legislation occupying the field in a core area of jurisdiction, federal and provincial laws continue to apply in accordance with standard constitutional rules.

14. By way of exception, in certain cases a federal law may take precedence over an Aboriginal law where they conflict. However, for this to happen, the federal law has to meet the strict standard laid down by the Supreme Court of Canada in *Sparrow*. Under

this standard, the federal law has to serve a compelling and substantial need and be consistent with the Crown's basic fiduciary responsibilities to Aboriginal peoples.

15. In relation to matters in the periphery, a self-government treaty or agreement is needed to settle the jurisdictional overlap between an Aboriginal government and the federal and provincial governments. Among other things, a treaty will need to specify which areas of jurisdiction are exclusive and which are concurrent and, in the latter case, which legislation will prevail in case of conflict. Until such a treaty is concluded, Aboriginal jurisdiction in the periphery remains in abeyance, and federal and provincial laws continue to apply within their respective areas of legislative jurisdiction.

16. A treaty dealing with the inherent right of self-government gives rise to treaty rights under section 35(1) of the *Constitution Act, 1982* and thus becomes constitutionally entrenched. Even when a self-government agreement does not itself constitute a treaty, rights articulated in it may nevertheless become constitutionally entrenched.

Recommendations

The Commission recommends that

2.3.4

All governments in Canada recognize that the inherent right of Aboriginal self-government has the following characteristics:

- (a) It is an existing Aboriginal and treaty right that is recognized and affirmed in section 35(1) of the *Constitution Act, 1982*.
- (b) Its origins lie within Aboriginal peoples and nations as political and cultural entities.
- (c) It arises from the sovereign and independent status of Aboriginal peoples and nations before and at the time of European contact and from the fact that Aboriginal peoples were in possession of their own territories, political systems and customary laws at that time.
- (d) The inherent right of self-government has a substantial degree of immunity from federal and provincial legislative acts, except where, in the case of federal legislation, it can be justified under a strict constitutional standard.

2.3.5

All governments in Canada recognize that the sphere of the inherent right of Aboriginal self-government

- (a) encompasses all matters relating to the good government and welfare of Aboriginal peoples and their territories; and

(b) is divided into two areas:

- core areas of jurisdiction, which include all matters that are of vital concern for the life and welfare of a particular Aboriginal people, its culture and identity, do not have a major impact on adjacent jurisdictions, and are not otherwise the object of transcendent federal or provincial concern; and
- peripheral areas of jurisdiction, which make up the remainder.

2.3.6

All governments in Canada recognize that

(a) in the core areas of jurisdiction, as a matter of principle, Aboriginal peoples have the capacity to implement their inherent right of self-government by self-starting initiatives without the need for agreements with the federal and provincial governments, although it would be highly advisable that they negotiate agreements with other governments in the interests of reciprocal recognition and avoiding litigation; and

(b) in peripheral areas of jurisdiction, agreements should be negotiated with other governments to implement and particularize the inherent right as appropriate to the context and subject matter being negotiated.

The CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Does the *Canadian Charter of Rights and Freedoms* apply to Aboriginal governments exercising the inherent right of self-government, or are these governments exempt from Charter scrutiny in their dealings with people under their jurisdiction?

In posing this question, we have to remember that the Charter contains two types of provisions. Provisions of the first type are general in nature and restrain the activities of all governments to which the Charter applies. Section 2 of the Charter, for example, states that

Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

Provisions of this general type are designed largely to shield individuals from governmental actions restricting or suppressing their basic human rights and freedoms. They usually reflect accepted international standards as expressed, for example, in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Many of these general Charter provisions protect not only Canadian citizens but more generally any individuals located on Canadian soil, whether as permanent residents or temporary visitors.

By contrast, Charter provisions of the second type have a more limited scope and apply only to governmental institutions that are specifically identified. For example, section 17(2) states that

Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

This section applies only to the legislature of New Brunswick; it does not apply to the legislatures of other provinces. By the same token, it has no application to Aboriginal governments.

Therefore, even if we suppose that the Charter does apply to Aboriginal governments in a general way, it does not follow that each and every provision of the Charter relates to them. The application of a particular Charter provision depends on its specific wording and intent. When we ask whether the Charter applies to Aboriginal governments, we have in mind Charter provisions that are general in scope, not those with a restricted application.

Another preliminary point worth making is that Aboriginal individuals enjoy the protection of the Charter in their relations with the federal and provincial governments, as well as with all other governments that fall under federal and provincial authority, including Aboriginal governments that exercise delegated powers. The question that we wish to consider here is whether the same protection extends to individuals (both Aboriginal and non-Aboriginal) in their relations with Aboriginal governments exercising inherent powers under section 35(1) of the *Constitution Act, 1982*. This question concerns all people who fall within the jurisdiction of an Aboriginal government, including not only the citizens of an Aboriginal nation but also residents and visitors on Aboriginal territories. In considering this question, we will use the term 'Aboriginal governments' to refer exclusively to governments exercising inherent rather than delegated powers.

The question is governed largely by section 32(1) of the Charter, which deals with the Charter's application:

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

As can be seen, the section specifically mentions the federal and provincial governments. It also refers to the Yukon Territory and Northwest Territories, presumably to make it clear that the governments of those territories are bound by the Charter. However, the section does not specifically mention Aboriginal governments. What is the significance of this omission?

Two approaches

There are two main approaches to the matter. The first approach argues that, as a matter of basic constitutional principle, it would be highly anomalous if Canadian citizens enjoyed the protection of the Charter in their relations with every government in Canada except for Aboriginal governments. The general provisions of the Charter are designed to provide a uniform level of protection for individuals in exercising their basic rights and freedoms within Canada. So, for example, in exercising their freedom of expression under section 2(b) of the Charter, individuals should be able to speak freely anywhere in Canada without fear of unwarranted interference or sanctions from any governmental source. This freedom should exist whether a person is located in an Aboriginal territory, a province or a northern territory. It should hold good against all types and levels of governments, whether federal, Aboriginal, provincial or territorial.

According to the first approach, this is the meaning of the fundamental guarantee embodied in section 1 of the Charter:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This approach also reminds us of the fact that many of the general provisions of the Charter are modelled on international standards with universal application. For example, section 2(b) of the Charter, dealing with freedom of thought and expression, reflects the essence of Article 19 of the *Universal Declaration of Human Rights*, which states:

Everyone shall have the right to freedom of expression; this right shall include freedom to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers.²¹⁹

According to this approach, it is hard to imagine that Aboriginal governments are exempt (or would want to be exempt) from this fundamental guarantee, as enshrined in the *Canadian Charter of Rights and Freedoms*.

Viewed in this light, then, the main purpose of section 32(1) is to indicate that governments rather than private individuals are subject to the Charter in their actions. While the section identifies some of the main government bodies subject to the Charter, it

does not state that the Charter applies exclusively to those bodies or provide a complete list of government bodies affected. In effect, then, the section leaves open the possibility that there are other government bodies, not mentioned in the section, that are subject to the Charter's provisions. The tacit recognition of an Aboriginal order of government in section 35(1) fulfils that possibility.

The second approach to the question is quite different.²²⁰ It accepts that Aboriginal governments are subject to international human rights standards in their dealings with people under their jurisdiction. However, it argues that an Aboriginal government cannot be held accountable in Canadian courts for alleged violations of the *Canadian Charter of Rights and Freedoms* unless the Aboriginal nation in question has previously consented to the application of the Charter in a binding constitutional instrument, such as a self-government treaty with the Crown. This approach invokes in its favour the detailed terms of the Charter as well as certain broad considerations of policy.

The second approach begins by noting that section 35 of the *Constitution Act, 1982*, which recognizes the Aboriginal and treaty right of self-government, is located outside the Charter, which is found in Part I of the act. Section 35, by contrast, is found in Part II of the act, entitled "Rights of the Aboriginal Peoples of Canada". This arrangement arguably indicates that Aboriginal and treaty rights are not to be balanced against other rights within the context of the Charter but have an autonomous status equal to that of Charter provisions.

What is the relationship, then, between Part I and Part II of the *Constitution Act, 1982*? The answer is provided by section 25 of the Charter, which states as follows:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

As its wording indicates, section 25 lays down a fundamental rule for interpreting the Charter, stating that the Charter "shall not be construed so as to abrogate or derogate" from aboriginal and treaty rights. The section does not rule out the application of the Charter to aboriginal and treaty rights. Rather, it ensures that the Charter will receive an interpretation that is consistent with those rights in all their amplitude.

The inherent right of self-government is one of the Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada mentioned in section 25. The result, according to the second approach, is that the Charter cannot "abrogate or derogate from" the exercise of inherent powers of Aboriginal self-government. Since any

limitation on Aboriginal governmental powers would amount to such a derogation, section 25 effectively prevents Aboriginal governments from being held accountable for Charter violations.

This conclusion is reinforced by section 32(1) of the Charter. According to the second approach, not only does the section fail to mention Aboriginal governments specifically, its wording is not broad enough to cover them. Aboriginal governments are neither creatures of federal or provincial governments nor “matters within the authority” of those bodies. They constitute a distinct order of government whose authority is constitutionally guaranteed under section 35(1).

So, according to the second approach, the wording of section 32(1) supports the conclusion that Aboriginal governments exercising inherent powers are completely exempt from the Charter in their operations. If the drafters of the Charter had intended the Charter to apply to Aboriginal governments, they would surely have said so in explicit language, just as they did with the federal and provincial governments.

This interpretation of section 32(1) is bolstered by the fact that section 33 of the Charter, which allows for notwithstanding clauses suspending the operation of certain Charter provisions, does not specifically mention Aboriginal governments:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

The section goes on to specify that a notwithstanding clause expires automatically after five years but can be re-enacted.

So, although section 33 allows the federal and provincial governments to suspend the application of certain sections of the Charter, it does not specifically extend this right to Aboriginal governments. According to the second approach, this silence suggests once again that the Charter was not designed to apply to Aboriginal governments exercising inherent powers; otherwise, they would have been mentioned in the section.

These arguments can also be supported on broad policy grounds. One of the main purposes of section 25 is to ensure that Aboriginal peoples can exercise their distinctive rights in a manner consistent with their philosophical outlooks, cultures and traditions. According to the second approach, some Charter provisions reflect individualistic values that are antithetical to many Aboriginal cultures, which place greater emphasis on the responsibilities of individuals to their communities. In any case, interpretation of the Charter lies ultimately in the hands of judges who are often unfamiliar with Aboriginal ways and likely to prove unsympathetic to them when they depart from standard Canadian approaches. According to this view, then, if the Charter applied to Aboriginal governments, it could hamper and even stifle the efforts of Aboriginal nations to revive and strengthen their cultures and traditions. As such, the Charter might operate as the unwitting servant of the forces of assimilation and domination.

The Commission's view

Which of these two approaches should prevail? In our view, each approach has notable strengths and weaknesses, which tend to counterbalance one another. Rather than adopt one or the other, we think it preferable to take an intermediate approach that combines the strengths of both while avoiding the extremes they represent.

This intermediate solution embodies three basic principles. First, all people in Canada are entitled to enjoy the protection of the Charter's general provisions in their relations with governments in Canada, no matter where in Canada the people are located or which governments are involved. On this ground alone, the general provisions of the Charter apply to Aboriginal governments, and section 32(1) of the Charter should be read in this light. Second, Aboriginal governments occupy the same basic position relative to the Charter as the federal and provincial governments. Aboriginal governments should thus have recourse to notwithstanding clauses under section 33 to the same extent as the federal and provincial governments. Third, in its application to Aboriginal governments, the Charter should be interpreted in a manner that allows considerable scope for distinctive Aboriginal philosophical outlooks, cultures and traditions. This interpretive rule is found in section 25 of the Charter. It applies with particular force where distinctive Aboriginal perspectives on human rights have been consolidated in Aboriginal charters of rights and responsibilities.

Our overall approach is governed by one central consideration. The drafters of the *Constitution Act, 1982* did not provide in explicit language for Aboriginal governments or attempt to describe their exact position in the Canadian federation. They contented themselves with general references to Aboriginal and treaty rights in sections 35(1) and 25, references that, in our view, are broad enough to include the inherent right of self-government. If section 35(1) is interpreted as recognizing the inherent right, we think that section 32(1) of the Charter should be read in a way that takes account of this recognition. Otherwise, there would be a serious imbalance in the application of the Charter, one that should be avoided in the absence of explicit language to the contrary. In other words, the 'unpacking' of the rights referred to in section 35(1) should be achieved in a manner that takes account of the central position of the Charter in Canada's overall constitutional scheme.

We agree that the main purpose of section 32(1) is to indicate that governments rather than private individuals are subject to the Charter. The wording of the section is not exhaustive. It allows for the possibility that government bodies not specifically named in the section are subject to the Charter's provisions. The tacit recognition of an Aboriginal order of government in section 35(1) leads us to take a broad view of the terms of section 32(1).

This same approach applies, in our opinion, to section 33 of the Charter, the provision regarding notwithstanding clauses. As with section 32(1), the section does not mention Aboriginal legislatures. In interpreting section 33, we should remember that it operates in tandem with section 32(1) and moderates its impact. While section 32(1) makes the

Charter applicable to governments, section 33 gives those same governments a measure of latitude and allows them to shield themselves from certain Charter provisions for a period. The close connection between the two sections suggests that they should be interpreted in the same way. For this reason, we think that section 33 should be read as permitting governments of Aboriginal nations to pass notwithstanding clauses in the same manner as the federal and provincial governments.

This conclusion is tempered by a basic consideration. The power to pass notwithstanding clauses belongs only to an Aboriginal nation and, in the absence of self-government treaties, can be exercised only in relation to matters falling within the core areas of Aboriginal jurisdiction. This means that the governments of local Aboriginal communities do not have the power to pass notwithstanding clauses. It also means that for an Aboriginal nation to pass notwithstanding clauses in relation to matters falling within the periphery, the power to pass such clauses must be acknowledged specifically in self-government treaties or agreements with the Crown.

The application of the Charter to Aboriginal governments is moulded and tempered by the mandatory provisions of section 25. This section clearly rules out any interpretation of the Charter that would attack the existence of Aboriginal governments or undermine their basic powers. It also ensures that the Charter will receive a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices that animate the inherent right of self-government. Section 25 prevents distinctive Aboriginal understandings and approaches from being washed away in a flood of undifferentiated Charter interpretation.

The Charter is a flexible instrument, one that gives governments a significant measure of latitude in implementing its terms. In particular, section 1 enables governments to enact reasonable limits on Charter rights so long as these “can be demonstrably justified in a free and democratic society”. This section is, of course, available to Aboriginal governments. Section 25 gives an Aboriginal government an alternative way to justify its activities when these are challenged under the Charter. The section enables an Aboriginal government to argue that certain governmental rules or practices, which may seem unusual by general Canadian standards, are consistent with the particular culture, philosophical outlook and traditions of the Aboriginal nation, and as such are justified. This approach is consistent with the contextual approach that the Supreme Court of Canada has adopted more generally in applying the Charter.

In reaching this conclusion, we have been assisted by the analysis of Peter Hogg and Mary Ellen Turpel.²²¹ These authors suggest that, despite the silence of section 32 of the Charter with reference to Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the Charter.²²² This result would be especially likely in cases where self-government has been implemented with the support of federal or provincial legislation. However, even where an Aboriginal government exercises inherent powers at its own initiative, it is unlikely that a court would regard section 25 as providing blanket immunity from the Charter. The probable effect of section 25 will be to exempt certain actions of Aboriginal governments from Charter scrutiny and to ensure

that the Charter will be interpreted in a manner “deferential to and consistent with Aboriginal culture and traditions.”²²³

Regarding deference to Aboriginal cultures and traditions, Hogg and Turpel make a number of useful points:

Interpretations of the Charter that are consistent with Aboriginal cultures and traditions would probably be found when the court is faced with a situation where different

standards apply and the difference is integral to culturally-based policy within an Aboriginal community. For example, if an Aboriginal juvenile justice system were created in which legal counsel was not provided to an accused person, would this be considered unconstitutional as denying a legal right to an accused person? If the juvenile justice system reflected Aboriginal culture and traditions, section 25 would shield such practices from attack based on the values expressed in the legal rights provisions of the Charter. In other words, the legal rights provisions would be given a new interpretation in light of Aboriginal traditions.

The important point here is that the application of the Charter, when viewed with section 25, should not mean that Aboriginal governments must follow the policies and emulate the style of government of the federal and provincial governments. Section 25 allows an Aboriginal government to design programs and laws that are different, for legitimate cultural reasons, and have these reasons considered relevant should such differences invite judicial review under the Charter. Section 25 would allow Aboriginal governments to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices.²²⁴

In endorsing this approach, we wish to emphasize that section 35(4) of the *Constitution Act, 1982* lays down a broad and unqualified rule ensuring the equality of the sexes in the enjoyment of Aboriginal and treaty rights, including the inherent right of self-government. The section provides that

Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

This provision is reinforced by section 28 of the Charter, which states that

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Singly and in combination, these provisions constitute an unshakeable guarantee that Aboriginal women and men have equal access to the inherent right of self-government and that they are entitled to equal treatment by their governments. By their explicit terms, these provisions transcend any other provisions of the Charter, including section 33.²²⁵

Where an Aboriginal nation enacts its own charter of rights and responsibilities, private individuals will benefit from its provisions in addition to those of the Canadian Charter. An Aboriginal charter will supplement the Canadian Charter but not displace it. A person subject to the authority of the Aboriginal government will still have direct access to the Canadian Charter. However, in construing the Canadian Charter in the light of section 25, a court may well find the provisions of the Aboriginal charter a useful interpretive guide. For example, where an Aboriginal charter contains a series of provisions dealing with the treatment of accused persons in an Aboriginal justice system, a court should ordinarily take these provisions into serious account in determining the effect of the legal rights provisions of the Canadian Charter with respect to the Aboriginal government in question.²²⁶

In our view, the interpretive influence of an Aboriginal charter will likely be amplified if it forms part of a self-government treaty between an Aboriginal nation and the Crown, because section 25 specifically shields treaty rights from the impact of the Canadian Charter. Where a self-government treaty includes an Aboriginal charter among its provisions, it appears that courts would be bound to take the terms of this charter into serious account in interpreting any related provisions of the Canadian Charter.

Conclusion

17. The Commission concludes that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and regulates relations with individuals falling within their jurisdiction. However, under section 25, the Charter must be given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of Aboriginal peoples. Moreover, under section 33, Aboriginal nations can pass notwithstanding clauses that suspend the operation of certain Charter sections for a period. Nevertheless, by virtue of sections 28 and 35(4) of the *Constitution Act, 1982*, Aboriginal women and men are in all cases guaranteed equal access to the inherent right of self-government and are entitled to equal treatment by their governments.

The central role of the Aboriginal nation

Which bodies of Aboriginal people currently hold the inherent right of self-government recognized in section 35? Does the right vest in local communities, as these have been moulded historically? Or is the right held only by Aboriginal nations in the sense identified earlier in the chapter? (See our earlier discussion on self-determination.) While our response to this question is similar to that given in our discussion of self-determination, it also has some differences that reflect the distinctive character of the constitutional right of self-government.

In our view, the inherent right of self-government is vested in the entire people making up an Aboriginal nation and so is shared in an organic fashion by the various overlapping groups that make up the nation, from the local level upward. The inherent right does not vest in local communities as such, considered apart from the nations of which they are part. In effect, for an Aboriginal people to exercise the inherent governmental powers at

their disposal, they will have to draw up a national constitution that establishes an overall structure of government. In many cases this structure will include not only national but also local institutions. Within such multi-level structures, each level of government can be viewed as exercising its own powers, powers that are appropriate to its particular sphere of authority and that spring in each case from the people concerned.

For example, with respect to matters falling within the core jurisdiction, a national constitution might well provide that local communities have the power to establish their own primary schools and initiate certain training programs as part of their powers over education. However, in most cases only the national government will be able to put in place a full-fledged education system. Likewise, while a local community may take certain initiatives in the area of justice, establishing an Aboriginal court system will normally be the work of the nation.

Turning now to the periphery of Aboriginal jurisdiction, we recall that treaties or agreements with the Crown are necessary to activate inherent powers in these areas. In our view, only the people of the nation as a whole can negotiate and conclude treaties relating to inherent governmental powers. A local community does not have the capacity to negotiate a separate treaty for itself. Of course, a self-government treaty concluded by a nation may take a number of different forms. It may, for example, specify that ratification at the community level is necessary for the treaty to take effect. It may also provide that a substantial measure of power will be exercised by local governments, in both the core and the periphery. The distribution of powers among the various levels of government is a matter for the people of the nation as a whole to determine.

In our opinion, negotiations to implement the inherent right of self-government cannot bypass the nation and proceed on a community-by-community basis. Although it is possible for a local Aboriginal community to obtain delegated powers from the federal or provincial governments, the inherent jurisdiction of Aboriginal peoples can be exercised only through initiatives and treaties at the level of the nation. On this point, we share the view expressed by Sharon McIvor, speaking for the Native Women's Association of Canada:

Self-government should be granted to 'Nations', not to Band Councils ... Each band council does not represent a nation ... Any self-government agreement must be negotiated on a nation-to-nation basis. This being the case, discussion in the constitutional meetings must focus on the matter of determining what nations are, and what their governments will be.

Sharon McIvor
Native Women's Association of Canada
Toronto, Ontario, 26 June 1992

We recognize that there are obstacles to implementing this approach to self-government. In the case of First Nations, for example, one of the effects of the band orientation of the *Indian Act* has been to foster loyalties at the level of the local community, at the expense of broader national affinities arising from a common language, culture, spirituality and

historical experience. Moreover, as we saw earlier, many Aboriginal people appearing before the Commission emphasized the need for strong local input to decision making and affirmed the principle that leaders should be responsible to the people they represent.

We fully recognize the need for strong local input and political accountability, in keeping with the democratic traditions of many Aboriginal peoples. There is also a need for larger governmental structures, however, if the full range of powers and benefits associated with an Aboriginal order of government are to be realized. In striking the right balance, there are two major considerations. First, community-level governments will generally continue to be poor, weak and isolated unless they form part of larger governmental structures. Second, there is a danger that such larger structures may become bureaucratic and remote unless they remain in close touch with the communities they represent. These competing considerations point once again to the need for multi-level or federal constitutional structures as a basic mode of governmental organization within Aboriginal nations.

While we do not suggest that current initiatives to implement self-government at the local level should come to a complete halt, we do believe that such initiatives must be placed in the larger context of Aboriginal nations. It is necessary for local communities to join together in their nations to exercise the core powers at their disposal and to negotiate treaties or agreements regarding powers in the periphery. This nation-based approach does not, of course, rule out approaches that encompass two or several Aboriginal nations.

Conclusion

18. The Commission concludes that the constitutional right of self-government is vested in the people that make up Aboriginal nations, not in local communities as such. Only nations can exercise the range of governmental powers available in the core areas of Aboriginal jurisdiction, and nations alone have the power to conclude self-government treaties regarding matters falling within the periphery. Nevertheless, local communities of Aboriginal people have access to inherent governmental powers if they join together in their national units and agree to a constitution allocating powers between the national and local levels.

Recommendation

The Commission recommends that

2.3.7

All governments in Canada recognize that the right of self-government is vested in Aboriginal nations rather than small local communities.

Citizenship in Aboriginal nations

Aboriginal people are both Canadian citizens and citizens of their particular nations. Thus they hold a form of dual citizenship, which permits them to maintain loyalty to their nation and to Canada as a whole.²²⁷ Here we consider the rules governing individual citizenship or membership in Aboriginal nations. (For discussion of the position of non-citizen residents of Aboriginal territories, see section beginning on page 289 and Recommendation 2.3.22.)

In our view, the right of an Aboriginal nation to determine its own citizenship is an existing Aboriginal and treaty right within the meaning of section 35(1) of the *Constitution Act, 1982*. At the same time, any rules and processes governing citizenship must satisfy certain basic constitutional standards flowing from the terms of section 35 itself. The purpose of these standards is to prevent an Aboriginal group from unfairly excluding anyone from participating in the enjoyment of collective Aboriginal and treaty rights guaranteed by section 35(1), including the right of self-government. In other words, the guarantee of Aboriginal and treaty rights in section 35 could be frustrated if a nation were free to deny citizenship to individuals on an arbitrary basis and thus prevent them from sharing in the benefit of the collective rights recognized in section 35.

The most obvious of these constitutional standards is laid down in section 35(4), which states that Aboriginal and treaty rights are guaranteed equally to male and female persons. Since Aboriginal and treaty rights are generally collective rather than individual rights, an individual can have access to them only through membership in an Aboriginal group. It follows that the rules and processes governing membership cannot discriminate against individuals on grounds of sex, for to do so would violate the guarantee embodied in section 35(4).

Section 35 embodies a second basic standard. As we saw earlier, the Aboriginal peoples recognized in the section are political and cultural entities rather than racial groups. While it is true that a group must descend from the original peoples of North America to qualify as Aboriginal, that historical link can be established in a variety of ways. Modern Aboriginal nations, like other nations in the world today, usually represent a mixture of genetic backgrounds. The Aboriginal identity lies in people's collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.

In our view, this fundamental principle has implications at two levels. It not only governs recognition of Aboriginal groups as collective entities under section 35, it also lays down a basic standard governing individual membership in such groups. It prevents an Aboriginal group from specifying that a certain degree of Aboriginal blood (what is often called blood quantum) is a general prerequisite for citizenship. On this point, it is important to distinguish between rules that specify ancestry as one among several ways of establishing eligibility for membership and rules that specify ancestry as a general prerequisite. By general prerequisite, we mean a requirement that applies in all cases or that only allows for very limited exceptions. For example, a citizenship code that requires that a candidate must be at least 'half-blood', except in cases of marriage or adoption, would lay down a general prerequisite and as such, in our view, be unconstitutional. By contrast, it would be acceptable for a code to specify, for example, that someone with at

least one parent belonging to the group qualifies for citizenship, so long as this provision represents only one among several general ways for an individual to qualify for membership, including, for example, meeting such criteria as birth in the community, long-time residency, group acceptance and so on.

In offering this opinion, we recognize the sensitive nature of the subject and the existence of strongly held opposing views. We also acknowledge the legitimate concerns that underlie these views. After all, birth is the normal way to acquire citizenship, and descent is the normal way a nation's culture and identity are perpetuated. The citizenship codes of most countries, including Canada, reflect that reality. None of this leads us to believe, however, that a minimum blood quantum is an acceptable general prerequisite for membership in an Aboriginal group.

For example, suppose that the citizenship code of an Aboriginal nation states that individuals qualify for membership only if at least one of their grandparents was a full-blooded member of the nation, except in cases of adoption. On the surface, this might seem a reasonable minimum qualification. However, in our opinion, the rule places the emphasis in the wrong place and is liable to operate in an arbitrary and unjust fashion.

Consider the position of a child who is born into an Aboriginal community and raised as an ordinary member of the group, playing with the other children, attending the same school, speaking the same language and following the same overall pattern of life. The child's father, while born and raised in the community, is of mixed origins: the father's father, although also born and raised in the same community, is half-blood, while the father's mother is of Scottish stock. It also happens that the child's mother comes from another part of Canada and, although Aboriginal in ancestry, was born to parents belonging to another Aboriginal nation. According to the applicable rule, this child is not eligible for membership because none of the four grandparents was a full-blooded member of the nation: one was Scottish, another was half-blood and two belonged to another Aboriginal nation. This result is both illogical and unjust.

It should be remembered that, under the traditional practices of most Aboriginal groups, birthright was not the only method by which group membership could be acquired. Methods such as marriage, adoption, ritual affiliation, long-standing residence, cultural integration and group acceptance were also widely recognized. As Rene Lamothe has noted with respect to Dene:

In the traditions of the Dene elders, because The Land is the boss and will teach whoever She wants, they will accept as Dene anyone who comes to know and live as they know and live. At that time they will be only too eager to share their responsibility for jurisdiction and governance. This is not a note on racial relationships, it is a statement to the belief of the Dene that The Land is the boss of culture, that culture is inextricably tied to The Land, and that people are required to adapt their way of life to the teachings of The Land.²²⁸

In our view, any code that specifies a minimum blood quantum as a general prerequisite for citizenship is not only unconstitutional under section 35, it is also wrong in principle, inconsistent with the historical evolution and traditions of most Aboriginal peoples, and an impediment to their future development as autonomous political communities.

Conclusion

19. The Commission concludes that under section 35 of the *Constitution Act, 1982*, an Aboriginal nation has the right to determine which individuals belong to the nation as members and citizens. However, this right is subject to two basic limitations. First, it cannot be exercised in a manner that discriminates between men and women. Second, it cannot specify a minimum blood quantum as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race as such.

Recommendations

The Commission recommends that 2.3.8

The government of Canada recognize Aboriginal people in Canada as enjoying a unique form of dual citizenship, that is, as citizens of an Aboriginal nation and citizens of Canada.

2.3.9

The government of Canada take steps to ensure that the Canadian passports of Aboriginal citizens

- (a) explicitly recognize this dual citizenship; and
- (b) identify the Aboriginal nation citizenship of individual Aboriginal persons.

2.3.10

Aboriginal nations, in exercising the right to determine citizenship, and in establishing rules and processes for this purpose, adopt citizenship criteria that

- (a) are consistent with section 35(4) of the *Constitution Act, 1982*;
- (b) reflect Aboriginal nations as political and cultural entities rather than as racial groups, and therefore do not make blood quantum a general prerequisite for citizenship determination; and

(c) may include elements such as self-identification, community or nation acceptance, cultural and linguistic knowledge, marriage, adoption, residency, birthplace, descent and ancestry among the different ways to establish citizenship.

2.3.11

As part of their citizenship rules, Aboriginal nations establish mechanisms for resolving disputes concerning the nation's citizenship rules generally, or individual applications specifically. These mechanisms are to be

(a) characterized by fairness, openness and impartiality;

(b) structured at arm's length from the central decision-making bodies of the Aboriginal government; and

(c) operated in accordance with the *Canadian Charter of Rights and Freedoms* and with international norms and standards concerning human rights.

Three orders of government

The enactment of section 35 of the *Constitution Act, 1982* had far-reaching structural significance. It confirmed the status of Aboriginal peoples as partners in the complex federal arrangements that make up Canada. It provided the basis for recognizing Aboriginal governments as one of three distinct orders of government in Canada: Aboriginal, provincial and federal. The governments making up these three orders share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties.

Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.

The constitutional reforms of 1982 had another important effect. In completing the process by which Canada became independent of the United Kingdom, the constitution confirmed that the Canadian Crown is constitutionally distinct from the British Crown, even if for historical reasons the two offices continue to be occupied by the same person.²²⁹ The Canadian Crown is no longer the symbol of British imperial authority. It stands for all the people of Canada, regardless of origin, ethnicity, culture, religion or language.

The Canadian Crown also symbolizes the association of the various political units that make up the country. Canada is a federal state composed of a number of political units with diverse origins, bound together by a complex body of basic law making up the

constitution of Canada. The constitution governs how the cluster of rights and jurisdictions are shared by various governmental institutions and political entities, including the federal government, the provinces and Aboriginal nations.

The word ‘shared’ is used advisedly here, in preference to a term such as ‘distributed’ which would suggest a single, centralized source. As we have seen, many of the political units that make up Canada entered the federation bearing powers, rights and responsibilities that stemmed from historical roots deeply embedded in the communities in question. So, while the constitution of Canada recognized (and sometimes restructured) those powers and rights, it did not constitute their ultimate source.

The Crown of Canada is, in part, the symbol of the constitutional relationship among various autonomous political communities, each with its distinctive history and internal constitution; it also represents the federal institutions that give concrete expression to this relationship. Contrary to some imperial views, the Canadian Crown is not the notional fountain of all governmental power and jurisdiction; to the contrary, it represents a partial pooling of powers that flow from a variety of sources, Aboriginal and non-Aboriginal alike.

It would be wrong to say that the Crown has sovereignty over Aboriginal peoples, on a quasi-imperial model. Rather, it is the living symbol of a federal arrangement involving a partial merging of sovereignty and the guaranteed retention of certain sovereign powers by the various political units that make up Canada, including Aboriginal peoples.

Of course, Aboriginal peoples have a range of differing relations with the Crown, so their constitutional status within Canada varies, depending on their distinctive histories. Here we can give only a partial sketch of the subject.²³⁰ We will focus on the constitutional position of Aboriginal peoples that hold long-standing treaty or customary relations with the Crown, as this position was reflected in the *Royal Proclamation of 1763*. The proclamation speaks of “the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection” (See the discussion of the proclamation in Volume 1, Chapter 5). For convenience, we will speak of these peoples as having ‘proclamation-style’ governments, in contrast to more standard ‘Westminster-style’ governments.

A proclamation-style government has a distinctive relationship with the Crown of Canada. While the Crown is the head of the executive branches of the federal and provincial governments, the Crown does not constitute the executive head of an Aboriginal government, unless, of course, the people in question adopt Westminster-style arrangements. Strictly speaking, under the proclamation model, there is no Crown expressed through the Mi’kmaq Nation, comparable to the Crown expressed through the province of Nova Scotia.

This basic difference manifests itself in a number of ways. First, whereas federal and provincial bills technically need the assent of the Crown in order to take effect, laws enacted by proclamation-style governments do not need Crown assent. Even in the case

of federal and provincial statutes, the requirement is a purely formal one, because under Canadian constitutional convention the Crown cannot withhold assent. However, in the case of Aboriginal governments, this formal requirement does not exist.

Second, while the activities of the executive branches of the federal and provincial governments are carried on in the name of the Crown, this is not the case with a proclamation-style government. The executive branch of an Aboriginal government of this type acts directly in the name of the people as a whole or in some other capacity under the nation's laws and customs.

Finally, while Canadian courts dispense justice in the name of the reigning monarch, Aboriginal courts and other organs of justice in proclamation-style systems act in the name of the people as a whole or in some other capacity laid down by the nation's laws and customs.

These features point to the fact that, under the proclamation model, Aboriginal peoples and their governments have unique relationships with the Crown, that is, relationships distinctive to the particular peoples in question. The character of these relationships is not determined by the constitutional arrangements reached in 1867 between the French-speaking and English-speaking representatives of Lower and Upper Canada, Nova Scotia and New Brunswick, the four original parties to the *Constitution Act, 1867*. The relationship is governed primarily by the treaties and other historical relationships formed between Aboriginal nations and the Crown and by the inter-societal law and custom that underpinned them. At the core of these inter-societal links is a fiduciary relationship under which the Crown stands as the protector of the sovereignty of Aboriginal peoples within Canada and as guarantor of their Aboriginal and treaty rights. This fiduciary relationship is a fundamental feature of the constitution and more especially of section 35 of the *Constitution Act, 1982*. (See our discussion of the principles of a renewed relationship in Volume 1, Chapter 16.)

On this point, we draw inspiration from the ancient vision of the Great Tree of Peace, as expressed by the Peacemaker, the Huron prophet who inspired the formation of the Five Nations Confederacy. The Peacemaker envisioned a great white pine with four white roots that extended in the four directions of the earth. A snow-white mat of feathery thistledown spread out from under the tree, carpeting the surrounding countryside and protecting the peoples that embraced the three basic principles of peace, power and the good mind. The Peacemaker explained that the tree represented humanity living according to these principles. An eagle perched at the very summit of the tree was humanity's lookout against people who might disturb the peace. The Peacemaker's vision was thus potentially universal in its scope:

He postulated that the white carpet could cover the entire earth and provide a shelter of peace and brotherhood for all mankind. His vision was a message from the Creator, bringing harmony to human existence and uniting all peoples into a single family.²³¹

In some respects, this vision of a federation of peoples united in peace and fellowship resembles the one that we hold for Canada.

We acknowledge that the image of the Canadian federation presented here is not shared by all Aboriginal peoples and that a variety of differing views was expressed in Commission hearings and briefs. In particular, some Aboriginal nations consider that they are not part of the Canadian federation at all but are linked to the Crown by international treaties and other relations. These views are based on historical and political considerations that require thoughtful appraisal. Nevertheless, we consider that the issues they raise are better resolved in a context of political negotiations rather than by Canadian courts as a matter of existing constitutional law. (See the discussion of the legal context of treaties in Chapter 2 of this volume.)

It is important to recognize that whatever the formal legal position, in practice Canadian governments often have little political and moral legitimacy among Aboriginal peoples. This reality reflects the historical fact that Aboriginal peoples have been subjected to shockingly unjust and coercive governmental policies that have denied them their most basic rights, stripped them of their ancestral lands and attempted to suppress their very identities. In our view, there is a profound need for a process that will afford Aboriginal peoples the opportunity to restructure existing governmental institutions and participate as partners in the Canadian federation on terms they freely accept. The existing constitutional right of self-government under section 35 is no substitute for a just process that implements the basic right of self-determination by means of freely negotiated treaties between Aboriginal nations and the Crown.

Conclusions

20. The Commission concludes that, overall, the enactment of section 35 of the *Constitution Act, 1982* has had far-reaching significance. It serves to confirm the status of Aboriginal peoples as equal partners in the complex federal arrangements that make up Canada. It provides the basis for recognizing Aboriginal governments as one of three distinct orders of government in Canada: Aboriginal, provincial and federal. The governments making up these three orders are sovereign within their several spheres and hold their powers by virtue of their inherent or constitutional status rather than by delegation. They share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties.

21. Aboriginal peoples also have a special relationship with the Canadian Crown, which the courts have described as *sui generis* or one of a kind. This relationship traces its origins to the treaties and other links formed over the centuries and to the inter-societal law and custom that underpinned them. By virtue of this relationship, the Crown acts as the protector of the sovereignty of Aboriginal peoples within Canada and as guarantor of their Aboriginal and treaty rights. This fiduciary relationship is a fundamental feature of the constitution of Canada.

22. Nevertheless, there is a profound need for a process that will afford Aboriginal peoples the opportunity to restructure existing governmental institutions and participate as partners in the Canadian federation on terms they freely accept. The existing right of self-government under section 35 of the *Constitution Act, 1982* is no substitute for a just process that implements the basic right of self-determination by means of freely negotiated treaties between Aboriginal nations and the Crown.

Recommendation

The Commission recommends that

2.3.12

All governments in Canada recognize that

(a) section 35 of the *Constitution Act* provides the basis for an Aboriginal order of government that coexists within the framework of Canada along with the federal and provincial orders of government; and that

(b) each order of government operates within its own distinct sovereign sphere, as defined by the Canadian constitution, and exercises authority within spheres of jurisdiction having both overlapping and exclusive components.

3. Implementing an Aboriginal Order of Government

3.1 Models of Aboriginal Government: An Overview

The exercise of self-determination and self-government will assume many forms according to Aboriginal peoples' differing aspirations, circumstances and capacity for change. In practice, therefore, we anticipate that many variations will emerge in the implementation of the broad approaches outlined in this section.

Some Aboriginal peoples will implement forms of Aboriginal government organized around a substantially autonomous nation. For them, internal and intergovernmental relations will focus on a strong sense of nationhood as reflected, for example, in jurisdiction over territory and recognition of a distinct Aboriginal citizenship base. Other Aboriginal peoples, notably those in the northern parts of Canada, may exercise public leadership and control over the government of a territory, representing all residents, Aboriginal and non-Aboriginal alike. That may be the most practical and effective route to ensure that Aboriginal rights and traditions are sustained and protected and that resources are managed in an equitable way now and in the future. Validating nationhood through a form of government that involves responsibility for non-Aboriginal people is seen by some Aboriginal people as consistent with the goals of self-government and the traditional understanding of sharing and interdependency. Finally, some Aboriginal people, especially those living among non-Aboriginal people in an urban or rural setting,

will focus their aspirations on acquiring government powers and authority over education, health and social services.

Our approach in this chapter is to consider three primary models of Aboriginal government. These models represent hypothetical forms of government to the extent that they do not exist fully today, although many aspects of the models can be found in existing and traditional Aboriginal forms of government. They are not intended as ideals or prescriptions but rather as one source of guidance from which Aboriginal peoples will choose their direction. We hope that these models will also demonstrate to non-Aboriginal Canadians that Aboriginal self-government and self-determination are realistic and workable goals.

For purposes of our discussion, the three broad models of Aboriginal government are the nation government model, the public government model, and the community of interest government model. In briefly describing each approach, we consider the following general features:

- lands and territory
- citizenship
- jurisdiction and powers
- internal government organization
- urban extensions of Aboriginal nation government
- associated models of inter-Aboriginal government organization.

There is great variation in how Aboriginal people see themselves as peoples and as nations. The *Indian Act* and associated government policies have had a significant and, in our view, detrimental impact on their consciousness as nations. The act has caused the breakup of Indian nations and the diffusion of their power. Consequently, some people identify their *Indian Act* band as a nation and refer to them as First Nations or nations. Others identify the nation on the basis of a broader traditional affiliation, for example, Cree, Mohawk, Gitksan, Kwakwa ka'wakw and Dene. Some First Nations refer to themselves as treaty nations because they have made treaties with the Crown.

Inuit frequently associate their identity with self-determination, rather than nationhood, although clearly they have a national identity and consciousness. They have strong regional alliances and affiliations with Inuvialuit of the western Northwest Territories, Inuit of Nunavut, Nunavik and Quebec, and Labrador Inuit. These regional alliances have an impact on organization for the purposes of government.

A strong national identity has been articulated by the Métis people of western Canada and has guided the development of Métis Nation political organizations at the community,

provincial, territorial and national levels. Métis people in eastern Canada are organized less cohesively around the model of a single nation.

Among the Aboriginal nations of Canada, factors that will influence the organization of Aboriginal nation governments include

- historical treaty and other relations,
- cultural characteristics,
- social organization,
- economic situation,
- political culture, philosophy and traditions of political organization,
- geographic features,
- territorial size and existing land base,
- degree of contiguity in territory,
- population size and concentration or distribution of population, and
- existing provincial and territorial boundaries.

In testimony and submissions to the Commission some Aboriginal people indicated support for governance relationships that do not take as their starting point Aboriginal-only forms of government. For example, Inuit have actively pursued the public government model, a form of government in which all the residents of a particular region or territory would be represented. For these and other Aboriginal peoples, the most practical route to achieving greater autonomy and effective control over their lives is through leadership and authority in Aboriginal public governments that already exist or may be established within their traditional territory.²³²

Nationhood can be validated and Aboriginal rights and traditions protected through effective control over traditional lands and resources within a defined territory. At the same time, traditional understandings of interdependency and sharing can be realized through a public government's efforts to represent the interests of all residents. Within a defined geographic area, a public form of government can accommodate and contribute to the realization of Aboriginal objectives with respect to

- self-determination;
- increased Aboriginal control over decision making, management and use of traditional lands and resources; and

- governments that are responsive to the people served; have the legal authority and capacity to define and meet local and regional needs; and contribute to self-sufficiency through the development of local and regional lands, resources and economies.

The most apparent distinction between the public government model and other forms of Aboriginal government is the make-up of its citizenry. Aboriginal public governments would represent all residents within a defined territory, whether or not they are Aboriginal. Like other Canadian governments, Aboriginal public governments would be accountable to everyone who is subject to the exercise of their government authority. Aboriginal public governments would differ from non-Aboriginal Canadian governments in that they could accommodate and reflect Aboriginal cultures, traditions and values in all aspects of government. They could have powers that are different from those of comparable non-Aboriginal governments. For example, a regional Aboriginal public government within a province or territory could have jurisdiction in matters normally under the jurisdiction of a provincial government.

In practice, the nature of an Aboriginal government will be determined by, among other things,

- the size of the territory in which the Aboriginal majority exists;
- whether the majority includes one or more Aboriginal peoples or nations;
- whether the public government will be the only government in the territory or will co-exist with other Aboriginal governments instituted on the nation model; and
- the province or territory in which it will operate, which must pass enabling legislation.

We anticipate that Aboriginal public government might assume a variety of forms. Some of these are already emerging, including

- a public government of a northern territory: Nunavut in the eastern Arctic;
- a regional public government of a northern territory: the proposed western Arctic regional government in the Beaufort-Delta region;
- a regional public government in a province: Nunavik in northern Quebec; and
- a community or regional public government in part of a province: resulting from the merging of band and municipal governments or the enhancement of municipal governments serving predominantly Métis communities.

The community of interest model of Aboriginal government is based on the idea that Aboriginal people with ties to different nations, who share common needs and interests arising out of their aboriginality, may associate voluntarily for a limited set of governing purposes. Community of interest governments may evolve from existing institutions

currently providing services to non-land-based Aboriginal people, particularly in urban areas. They will differ from existing institutions, however, because of more secure forms of funding than the short-term, project-dependent funding of existing institutions. While services are an important component of the model, these governments and their associated structures and institutions also could assume gradually a broader range of government features and functions.

As with the other two models, several factors will shape the precise form of Aboriginal community of interest governments. These include

- the size of the Aboriginal population and whether the population is concentrated in a particular area,
- urban or rural location, and
- extent of government activities.

While we believe that this is a workable model, certain factors could constrain the viability of community of interest governments or favour alternative forms of government. These factors include

- the need for these governments to be empowered under authority of the federal or provincial governments or by an Aboriginal nation government;
- population thresholds;
- whether economies of scale can be realized in program and service delivery; and
- the presence of other Aboriginal, notably nation-based, governments and initiatives.

The community of interest model is potentially applicable in either an urban or a rural context. However, we believe that it is more likely to be implemented by urban Aboriginal communities of interest. (Details on the urban community of interest model are provided in Volume 4, Chapter 7.)

Two features — the nature of membership and the relationship to a land base — distinguish this model from other forms of Aboriginal government. First, community of interest governments would be formed by and for Aboriginal people from many nations, and membership would be based on individual choice. Aboriginal community of interest governments would be accountable to these members. Second, although access to and ownership of a land base is a possibility, it is not a distinguishing characteristic of the community of interest model. For example, an Aboriginal community of interest government may own a land base or have access to a land base for cultural purposes, but it will not be organized primarily for governance purposes on that land base, nor will its members be resident or be concentrated on that land base.

Aboriginal Nation Government

The nation government model is identified by the following key characteristics:

- an identifiable land and territorial base consisting of the nation's own lands and resources (Category I lands) as well as parts of its traditional, treaty and land-use areas (Category II lands), which may be shared with non-Aboriginal governments under co-jurisdiction or co-management arrangements;
- citizenship in the nation as a whole;
- the presence of non-Aboriginal residents on the nation's Category I lands and the protection of their rights;
- the exercise of government powers and authority (for example, law making, administration and interpretation) in a comprehensive range of jurisdictions and, depending on the internal structure of the nation government, possibly by units of government at community, regional or tribal levels;
- the possibility of one or more units of government within the nation, organized centrally or federally;
- internal government procedures that vary from one nation to another and that build upon a nation's traditions;
- the possibility of urban components or extensions of nation government, including extra-territorial jurisdiction and urban institutions; and
- the possibility of relationships with other Aboriginal governments through inter-nation associations such as confederacies, treaty associations and provincial or pan-provincial associations.

Aboriginal community of interest governments are also distinguished from other models in that they exercise a more limited range of powers. For example, Aboriginal people living in a city may come together strictly for the provision of primary or secondary education or other such services.

Treaty Nation Jurisdiction over Treaty Territory

The Nishnawbe-Aski Nation (NAN) and its member First Nations provide an example of how treaty relationships, as they affect traditional territories currently shared with non-Aboriginal governments and peoples, and regimes of co-jurisdiction and co-management, might be implemented.

NAN wants to engage in negotiations with Canada and the province of Ontario to

clarify how jurisdiction and legislative authority will be exercised regarding the traditional and customary lands and resources affected by Treaty 5 and Treaty 9. Through the draft “Framework Agreement on Land, Resources and the Environment” (August 1993) NAN has proposed establishing

- institutions for land and resource management (some would be exclusively First Nation, some might be created to facilitate sharing in the management of lands and resources with Ontario and Canada),
- Nishnawbe-Aski principles and values in the use and care of traditional lands and resources,
- First Nation consent to any development activities within their traditional territories, and
- dispute resolution mechanisms to regulate the exercise of authority by First Nations and other governments within the territory.

Source: Nishnawbe-Aski Nation, “Intervention Report to the Royal Commission on Aboriginal Peoples” (1993), Annex L, Draft Framework Agreement on Lands, Resources and the Environment.

Model 1: The nation model

The nation model of Aboriginal government includes aspects of lands and territory, citizenship, jurisdiction, forms of internal organization, and associated models of inter-Aboriginal government organization.

Lands and territory

In most cases an Aboriginal nation’s relationship with a land and resource base would originate from its concept of traditional territory. A nation would have an identifiable land base composed of the nation’s own Aboriginal lands and resources (Category I lands) and parts of the nation’s traditional territories.²³³

An Aboriginal nation’s own land and resource base would sustain full rights of ownership as well as beneficial use and enjoyment by its citizens. Aboriginal governments would exercise core jurisdiction in most matters affecting their lands, including resource management and allocation, and the lands would be administered in accord with a nation’s traditions of tenure and governance. Only an Aboriginal nation would be able to grant rights and interests in these lands and resources. Parts of a nation’s traditional territories (Category II lands) are shared with non-Aboriginal governments, and the relationship between Crown and Aboriginal rights and interests is negotiated and reflected in co-management, co-jurisdiction or similar arrangements.

Citizenship Rules Based on Nation Acceptance

The constitution proposed by the Native Council of Nova Scotia for the Mi'kmaq Commonwealth would establish a nation-type government for reserve and non-land-based Mi'kmaq peoples. It contains provisions relating to both citizenship and associated fundamental rights. While self-identification is an important criterion, the constitution also provides for developing a citizenship law incorporating other guiding criteria, including parentage, location of birth, residency, adoption, affiliation and community acceptance. Citizenship in other Indian nations must be relinquished if one is to become a citizen in the commonwealth, and the Grand Council of the Mi'kmaq would have authority to judge individual citizenship cases.

Source: Native Council of Nova Scotia, "Mawiwo'kutinej: Let's Talk Together (The Off-Reserve Aboriginal Peoples Perspective)", brief submitted to RCAP (1993).

Citizenship

Aboriginal people may enjoy a form of dual citizenship in their Aboriginal nation and Canada. Citizenship and eligibility for citizenship in a nation would be based on criteria set by the nation's constitution, citizenship law or code, cultural norms, unwritten customs or conventions. The criteria could be applied nation-wide or adapted at the community level or other levels. Persons could be considered eligible for citizenship on the basis of, among other things,

- community acceptance,
- self-identification,
- parentage or ancestry,
- birthplace,
- adoption,
- marriage to a citizen,
- cultural or linguistic affiliation, and
- residence.

Rights Protection Instruments

The Teslin Tlingit constitution provides that all citizens enjoy rights guaranteed in the Canadian constitution, the *Canadian Charter of Rights and Freedoms*, as well as other rights set out in the constitution, including the right to pursue a way of life that promotes Tlingit language, culture, heritage and material well-being. In exercising law-making powers, the Teslin Tlingit government must observe certain norms and

work within parameters designed to protect the individual and collective rights of the Teslin Tlingit Nation.

Source: Teslin Tlingit First Nation, "Aboriginal Self-Government and Judicial Systems", research study prepared for RCAP (1995).

As is the case elsewhere, citizens of an Aboriginal nation may also identify with social or political groups within the nation. This identification may be based on clan or family membership or residence in a community or urban area. Some of these other affiliations will have implications for governance and may be reflected in the nation's political structures. Likewise sub-groups, particularly communities within the nation, may have some role in citizenship determination.

The rules governing citizenship would likely incorporate provisions for eligibility, application, enrolment, local community input, and appeal procedures and related structures. The nation's constitution or citizenship law would most likely also identify the circumstances under which the nation would revoke citizenship, whether the nation would permit citizenship in another Aboriginal nation, and associated implications for access to rights and benefits.

In our analysis of citizenship we concluded that a nation's citizenship rules must not discriminate against individuals on the basis of sex, nor can they make ancestry (or blood quantum) a general prerequisite in assessing applications.

Citizenship confers rights, entitlements and benefits upon individuals as well as responsibilities. These rights include civil, democratic and political rights (for example, the right to participate in the selection of leaders), cultural and economic rights (such as the right to pursue traditional economic activities), and rights to social entitlements, such as those flowing from treaties and those in the areas of education, health care, and so on.

Different rights and responsibilities may apply to citizens and non-citizens on Aboriginal lands. For example, cultural rights, or rights to carry on certain economic activities on the nation's lands, may differ for citizens and non-Aboriginal residents on those lands. However, all residents, regardless of citizenship, should have some means of participating in the decision making of Aboriginal governments.

Aboriginal governments may establish charters or other instruments to protect individuals and individual rights from the abusive exercise of power by government. The nation's charter could be an important mechanism to protect, promote and guarantee the fundamental rights and values shared by the people.

The *Canadian Charter of Rights and Freedoms* would protect individual rights as well. However, it would be interpreted and applied flexibly to take into account the particular culture, values, traditions and philosophies of Aboriginal people. Nation governments would have the power to pass notwithstanding clauses under section 33 of the Charter, as explained earlier in this chapter.

Jurisdiction and powers

Aboriginal nation governments will exercise comprehensive government powers and authority in a variety of areas of jurisdiction. They will exercise these powers in respect of all persons resident on their territory. As discussed earlier in this chapter, in some instances these matters will fall within the core area of a nation's jurisdiction and in others within the periphery, thus requiring negotiation and agreement with other governments.

The nature of Aboriginal nation government jurisdiction and its applicability to territory and persons is properly the subject of discussion or negotiation in treaty processes. In general, Aboriginal nations can be expected to exercise jurisdiction of three types:

1. Aboriginal nations exercise paramount authority in core areas of jurisdiction on Category I lands. These matters

- are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity,
- do not have a major impact on adjacent jurisdictions, and
- are not otherwise the object of transcendent federal or provincial concern.

2. Aboriginal nations exercise negotiated jurisdiction in subject areas falling within the periphery of their jurisdiction on Category I lands, and negotiated authority in regard to Category II lands. In most instances, on Category II shared lands, nation government laws as they affect lands, resources and the nation's citizens would be determined by negotiated co-jurisdictional agreements. Short of an agreement, the rules governing paramountcy in cases of conflict would be guided by the test set out in the *Sparrow* decision.

3. Jurisdiction would be exercisable in a limited way with respect to citizens living outside Category I and Category II lands, including in urban areas. Again, the exercise of this authority in most instances would need to be negotiated and would be subject to voluntary acceptance by those affected. Ideally, negotiated agreements would clarify situations where power is exercised by both Aboriginal nation governments and non-Aboriginal governments, and normal rules of paramountcy would apply. Agreements would mitigate conflicts and uncertainty by setting out how federal and provincial laws will interact with the laws of an Aboriginal nation government in areas of co-jurisdiction. These agreements may take the form of treaties, co-jurisdictional or co-management agreements, protocols and other intergovernmental arrangements.

In each area of government responsibility, an Aboriginal nation would have powers and authorities in respect of law making (legislative); administration and policy making (executive); and interpretation, application and enforcement of law (judicial).

Law-making powers and authorities normally rest with legislative bodies. They include the development, passage, amendment and repeal of laws, regulations, standards and other legal instruments. These bodies may resemble historical structures, existing structures (a council) or government structures common to other Canadian governments (such as a legislative assembly). The authority to design and deliver programs and services and to establish agencies and other structures for government purposes will likely rest with institutions assigned to administer the day-to-day business of government. These could include executive offices held by individuals (for example, chiefs) or executive bodies (such as councils).

Judicial powers and authority associated with the interpretation, application and enforcement of law, including policing, sentencing, restitution and healing, will rest with the individuals and institutions that the nation entrusts with providing this counsel and wisdom. Elders and women are likely to play a key role in these areas.²³⁴

Core Jurisdiction

In most of the documentation it has produced since the 1970s, the Federation of Saskatchewan Indian Nations has focused on the powers and jurisdiction of First Nations governments. Exclusive authority in respect of First Nations lands and citizens is asserted in most jurisdictional areas, for example, administration of justice, education, trade and commerce, lands and resources, gaming, taxation, social development, culture and languages, housing, family services and child welfare, hunting, fishing and trapping, citizenship and property and civil rights.

Source: Federation of Saskatchewan Indian Nations, "First Nations Self-Government: A Special Research Report", research study prepared for RCAP (1995).

An RCAP case study involving Kahnawake revealed areas in which power would be exercised *exclusively* by Mohawk government and areas in which power might be exercised concurrently or on a shared basis with non-Mohawk governments. Specifically, there was a preference for *exclusive* control in areas such as lands and resources, citizenship, education, infrastructure, justice, taxation and environment, but also some support for power sharing in these areas with other governments (mainly involving administrative and service delivery by these other governments).

Source: Gerald R. Alfred, "The Meaning of Self-Government in Kahnawake", research study prepared for RCAP (1994).

Internal government organization

Units of government

Given their diversity, nation governments will differ significantly in terms of how they are organized internally for purposes of self-government. Within a nation there may be several units of government, which might include nation or sub-nation units, such as

tribes, regions, communities, families or clans. Nations with large and dispersed populations or large traditional territories may include all of these units of government. Smaller nations may operate with only one or two unit levels: community and nation. Aboriginal nations may organize their units of government on a centralized or federal basis.

Co-Jurisdiction

Most Aboriginal governments today embrace the concept of shared jurisdiction with non-Aboriginal governments, but call for agreements and protocols to set out clearly how the exercise of government powers within each government's respective sphere of jurisdiction will be co-ordinated.

The Siksika Nation anticipates concurrent jurisdiction with other governments. In respect of the province, the management and co-ordination of activities in areas of concurrent jurisdiction will be achieved through a negotiated protocol agreement. Areas where concurrent jurisdiction is to be negotiated include management of lands and resources, environment, traffic and transportation, public works, justice, education, health, and social services. The Siksika Nation emphasizes that it possesses inherent powers in these areas in respect of Siksika Nation lands and peoples. The purpose of negotiations pursuant to the protocol agreement is to establish how provincial powers in these jurisdiction areas are to be practically co-ordinated with Siksika government.

Source: Andrew Bear Robe, "The Historical, Legal and Current Basis for Siksika Nation Governance, Including Its Future Possibilities Within Canada", research study prepared for RCAP (1995).

Under a centralized form of organization, power and authority, including the power to establish community or local governments and assign responsibilities to them, would be concentrated in a single unit at the nation level. A centralized form of organization would likely be least appropriate for Aboriginal nations whose traditional form of political organization is decentralized and informal, or for nations having a widely dispersed and large population. However, it may be appropriate for nations with a concentrated population and land base and a tradition of strong centralized government institutions.

Nation Government Jurisdiction in Traditional Territories

The United Chiefs and Councils of Manitoulin view the regulation of fish and wildlife resource use by their own citizens within traditional harvesting areas as an exercise of governance responsibility and stewardship of the resources. They do not advocate exclusive use and management. Under their fish and wildlife initiative UCCM:

- has developed regulations that set out principles for responsible resource use as well as harvesting seasons, methods and procedures and harvester eligibility criteria,

- has established compliance procedures which emphasize prevention, responsibility and enforcement through community sanction, and
- plans to employ conservation officers and engage in conservation projects, monitoring and habitat management.

Source: United Chiefs and Councils of Manitoulin, "UCCM Fish and Wildlife Project", brief submitted to RCAP (1993).

A federal form of government organization would in most cases involve two or more units of government, a nation unit and either community, regional or tribal units. Power would be shared by the units of government. The flexibility of the federal form could accommodate the organizational and administrative needs of Aboriginal nations with large or small, dispersed or concentrated populations and land bases.

Aboriginal nations with large and widely dispersed populations or land bases, and clearly identifiable sub-nation political communities, may wish to adopt federal structures that include political units organized at the provincial or territorial level.

Metis Nation of Alberta Structures

As proposed by the Metis Nation of Alberta, Métis government would include several levels: community, regional/zone, and provincial. Community constituencies will elect representatives to a Métis provincial-level parliament or legislature.

A provincial-level treasury board composed of an equal number of trustees (who are also legislators) from each of the six regions or zones, appointed by constituency representatives from within that zone, will make budget decisions.

At the executive level a Metis Nation of Alberta president will be elected at large by all Métis people in the province, and will select cabinet members from among the trustees of the treasury board. These members will assume portfolio responsibilities for Metis Nation administrative departments and ministries.

A Métis senate, made up of Métis elders, will have advisory powers and will review all matters before parliament. The senate will resolve disputes between various government structures and officials (for example, between parliament and the president).

Source: Metis Nation of Alberta Association, "Metis Nation of Alberta Association Final Report", research study prepared for RCAP (1995).

Allocation of jurisdiction through the nation

Jurisdiction, or specific power to deal with certain matters, may be allocated to different levels of government within the nation. For example, the authority to deliver services and to enforce regulations or certain laws may appropriately be exercised by community-level

governments within the nation, while the passage and interpretation of laws for those same matters may be exercised more appropriately at the nation level. Some powers and authority may reside exclusively at the nation level, for example, the authority to conduct intergovernmental relations. Other areas, such as the allocation of interests in local lands and resources, may best be administered at the community level by the people who are most affected by decisions.

The allocation of jurisdictional responsibilities among community (including family/clan), regional, tribal and nation level units of government ideally would be reflected in a nation's constitution. The centralization or decentralization of power would depend on the traditions of the nation as well as the size and distribution of its population. The allocation of jurisdictional authority to government structures outside the nation (such as a confederacy) is discussed later in the chapter.

Administrative Boards

The Windigo Tribal Council proposes joint First Nation community action through a significantly empowered regional government (Windigo Executive Council) and the development of legislative, policy and administrative capacities on a sector-specific basis.

In order to achieve a separation between political and administrative levels, an executive council, composed of elected chiefs and councillors of individual First Nation communities and an administration and management board, would be established. This board, on a sector-specific basis, would negotiate the takeover or establishment of new programs and services. Within each sector, other management structures, including boards and technical committees, would be established at First Nation, tribal council, and inter-governmental levels with specific responsibility for the development, administration and management of sectoral activities.

Source: Windigo First Nations Council, "Proposal for Regional Governance in the Windigo First Nations Area", brief submitted to RCAP (1993).

Legislative, executive and judicial branches

Aboriginal nation governments will exercise legislative, executive and judicial powers and authority for the purpose of making, implementing, interpreting and enforcing laws. A nation government's constitution would establish institutions to carry out these activities. They may reflect the traditional forms of organization or contemporary adaptations. Examples of legislative structures include councils, assemblies, congresses, senates, elders councils and clan leaders. Examples of executive structures include chiefs, councils, chairpersons and presidents. Examples of judicial structures include justice circles, judicial councils, peacemaker courts, healers and tribunals.

Administration and delivery of programs and services

Nation governments will also establish administrative agencies and institutions. These may assume a variety of forms, including departments, ministries, boards, corporations, societies or associations, and would represent varying levels of autonomy and accountability.

On Category I lands, a nation, and in some instances community government structures, will deliver programs and services to its resident citizens and to residents who are non-citizens. Arrangements for the delivery of programs and services to non-Aboriginal residents on Aboriginal lands would follow from financial arrangements with non-Aboriginal governments.

Outside its Category I Aboriginal lands, where feasible, a nation may extend its programs and services to its citizens through extension programs, special agencies or institutions operating off the Aboriginal land base, or through co-management or co-jurisdiction arrangements negotiated with other governments.

Internal government procedures

Internal procedures of government include rules for leadership selection and representation in government agencies and boards, decision-making bodies and related administrative systems that enhance the accountability of institutions of government. There will be many ways for Aboriginal nations to conduct their internal affairs. In some instances these will draw upon a nation's traditions. In others they may synthesize traditional, non-traditional and non-Aboriginal government procedures. We suggest a few possibilities in the paragraphs that follow.

Leaders and officials may be selected according to a nation's traditions or by those traditions adapted to a contemporary context. Leaders may be elected or otherwise selected from the citizenship at large, or from groups of citizens such as clans, families or urban constituencies, each of which may have its own particular selection processes. Leaders may be selected by procedures that assign special roles to elders or women or according to hereditary systems. Others, like the Métis Nation, may adopt a ballot-box approach to leadership selection.

Alternatively, representation may be achieved through councils, boards and assemblies composed of representatives who hold public office in other units of government. For example, community chiefs may also sit as representatives at national or regional-level councils or assemblies.

Decision-making processes will likely differ among nations and among the various units of government within nations. Decision making at the community level may be structured to achieve the broad participation of all community members, including families, clans, elders, youth and women. Community decision-making processes may be vote-based or consensus-based, or may be rooted in a combination of traditional and non-traditional methods. Some decisions may be made by a community government structure, such as a council, while other decisions, especially in matters of broad community interest, or

affecting collective interests and well-being (such as those that affect a nation's lands and resources), may require the consideration of the whole community. On a day-to-day basis, decision making at regional, tribal and nation levels would likely be carried out directly by representative leaders and would be vote- or consensus-based.

Accountability of Aboriginal nation government will be determined primarily by processes rather than by structures and institutions. Such processes may mirror Aboriginal governing traditions. They may also replicate accountability measures common to Canadian governments. For example, these might include

- financial and operational reporting regimes (possibly based on statutes);
- clear and transparent administrative policies, procedures and operations (including administrative decision-making procedures);
- a code of ethics for public officials;
- conflict of interest laws or guidelines;
- access to information procedures;
- the development of communication systems to keep citizens informed; and
- the establishment of procedures to deal with individual or community grievances.

Constitution

The internal structure and authority of a nation government and its various units of government would be reflected in a constitution, charter, law(s) and in unwritten conventions that reflect the nation's cultural norms and social and traditional values. The elements of such constitutions could include

- a statement of values, beliefs, principles;
- a description of units or levels of government and associated legislative, executive and judicial structures, written procedures (for example, for selecting officials, leaders and representatives to decision-making bodies), and definitions of jurisdictions, powers and authority;
- criteria, and application and appeal procedures for citizenship;
- provisions regarding lands, resources and the environment;
- individual and collective rights protections; and
- procedures for amending the constitution.

Urban extensions of Aboriginal nation government

The authority of an Aboriginal nation government authority has both a territorial and a communal character (see the section on visions of governance earlier in the chapter for an elaboration of these terms). Its exercise can be in respect of a particular territory (for example, an Aboriginal land base) or in respect of persons (for example, citizens, whether or not they live on Aboriginal lands). Aboriginal nation governments may also extend their government activities and authority to their

Teslin Tlingit Government

The Teslin Tlingit Nation in Yukon is restoring its traditional system of government, particularly in the area of leadership and decision making, with some contemporary adaptations. Teslin Tlingit government is clan-based. The five Tlingit clans determine who is a member, select leaders and assume government-type responsibilities in respect of clan members.

The Teslin Tlingit are building upon the family at the level of the nation through the establishment of several branches of government, including a general council (legislative branch), executive council, an elders council and a justice council. While these councils are not exact duplicates of traditional Tlingit institutions, they do reflect structurally the tradition of maintaining balance within the community through the five clans. For example, the general council comprises five representatives from each clan. Decision making is by consensus, but requires a quorum including at least three members from each clan. Similarly, each clan leader has a seat on the executive council, and the justice council comprises the five clan leaders. Each clan has its own court structure called a “peacemaker court”.

Source: Teslin Tlingit First Nation, “Aboriginal Self-Government and Judicial Systems”, research study prepared for RCAP (1995).

citizens living in urban areas. In all cases, however, urban Aboriginal citizens’ participation in such governance initiatives will be voluntary, based on individual choice and consent. Urban extensions of an Aboriginal nation government might take the form of

- extra-territorial jurisdiction,
- host nation,
- treaty nation government in urban areas, or
- Métis Nation government in urban areas.

Each of these approaches is considered in greater detail in Volume 4, Chapter 7.

Accountability Processes

For Shubenacadie (Indian Brook), a First Nation community in Nova Scotia, the accountability of government institutions, leaders and officials is important. Accountability is defined in terms of council's responsiveness to and operation for the benefit of community members.

Suggestions for improving band council accountability made by community members are pragmatic. They suggest various measures to be taken by the community and its leadership through a process of community review and adjustment. For example, suggestions include open council meetings, improved systems for communicating community concerns and council decisions such as newsletters, home visits by political leaders, and increased involvement of members through committee structures.

Source: Jean Knockwood, "The Shubenacadie Band Council and the Indian Brook Band Case Study on Self Governance", research study prepared for RCAP (1993).

Extra-territorial jurisdiction

The extra-territorial jurisdiction approach will likely be of greatest interest to Aboriginal nation governments that wish to extend government activities to urban citizens living outside the nation's Category I lands. They might extend services through urban service delivery programs, agencies or institutions established and operated by the nation or by the nation's urban citizens under the nation government's authority. Another possibility is to establish separate urban political institutions (for example, urban councils) or to represent the urban constituency in the nation's main political structures (for example, through urban councillors).

Extra-Territorial Jurisdiction

Precedents for the exercise of extra-territorial jurisdiction exist in the Yukon. While not confined to urban areas, First Nations, pursuant to their individual self-government agreements, may enact laws in respect of their citizens for

- programs and services for spiritual and cultural beliefs and practices;
- provision of programs and services in Aboriginal languages;
- aspects of health care, social and welfare services;
- training programs;
- most aspects of care, custody, adoption and placement of the First Nation's children;

- marriage; and
- dispute resolution services.

See, for example, “First Nation of Nacho Nyak Dun Final Agreement between the Government of Canada, the First Nation of Nacho Nyak Dun and the Government of the Yukon”, 1992.

A nation could extend the application of the nation’s laws to urban residents who choose to be subject to them, in matters described in a treaty or self-government agreement (for example, child welfare, marriage, health, education, language and culture). Finally, a nation could contract with other urban service delivery agencies and institutions on behalf of urban citizens to have these agencies provide programs and services to the nation’s citizens.

Host nation

Acting as a host nation, Aboriginal nations would have rights and responsibilities having to do with citizens of other Aboriginal nations living in urban areas within the traditional territories of the nation who choose to participate in the host nation’s urban governance activities. In an urban area, an Aboriginal nation government would most likely confine its activities as host nation to program and service delivery.

Treaty nation government

Treaty nations may singly or jointly establish centres in urban areas to deliver services and treaty entitlements. The authority to deliver programs and services to treaty people in urban areas would be delegated by participating treaty nations to the centres. These institutions need not be empowered by a particular Aboriginal nation government but could be a common governance concern of several treaty nations — whether or not they are signatories of the same treaties.

Historical and Contemporary Confederacies

The Haudenosaunee Confederacy provides an example of a traditional confederacy. It incorporates five distinctive though linguistically related nations of people (the Mohawk, Onondaga, Oneida, Cayuga and Seneca nations). The Covenant Circle of wampum represents the 50 chiefs (*rotiianeson*) of the five nations and the peace, balance and security that are achieved for all through the mechanism of the confederacy.

The Nishnawbe Aski Nation (NAN) embodies a newer confederal arrangement. It involves the participation of Cree, Ojibwa and Oji-Cree First Nation communities in northern Ontario. NAN has developed an extensive infrastructure for program and service delivery in areas such as education, justice and health. It has also established political structures to oversee all activities jointly undertaken by the members.

Métis Nation government in urban areas

The Métis Nation has advocated the development and operation of urban institutions to serve urban Métis residents. Some Métis Nation government proposals anticipate a local or community level of Métis government integrated with provincial, regional and national Métis government bodies. This model of local government would include urban areas with Métis populations. Urban Métis locals, as governments, would have responsibilities in areas such as education, training, economic development, social services and housing. They would deliver programs and services organized at the provincial or national level of the Métis Nation or their own programs.

Aboriginal Public Government

The public government model expresses self-determination through an Aboriginal-controlled public government rather than an Aboriginal-exclusive form of self-government. It is identified by the following key characteristics:

- government over a geographic territory, coinciding with an existing or new government administrative jurisdiction, a treaty area or a comprehensive claims settlement area;
- a constituency of residents that includes Aboriginal persons possessing Aboriginal and treaty rights in Canada, as well as non-Aboriginal people;
- jurisdiction in areas considered important by residents and that may include a mix of comprehensive powers and authority;
- the establishment of legislative, executive and judicial structures of government and internal government procedures broadly similar to those of other Canadian governments, but that may be adapted to reflect Aboriginal customs, culture and traditions;
- the possibility of relationships with other units of government operating within a public government framework;
- the possibility of relationships with other Aboriginal governments; and
- the use of internal government procedures broadly similar to those of other Canadian governments, adapted to reflect Aboriginal traditions

Associated models of inter-Aboriginal government organization

Several nations may join together to establish a confederacy or similar type of political alliance or supra-nation government organization. These may reflect historical alliances (for example, the Haudenosaunee, Wabanaki or Blackfoot confederacies) or new

alliances that take into account relationships that have evolved between Aboriginal peoples in more recent years. Confederacies may be established to

- maintain treaty relations with federal and provincial governments;
- further political purposes, such as advocacy;
- carry out intergovernmental tasks such as regulating land and resource use in shared traditional territories (Category II lands); and
- carry out administrative tasks, such as program and service delivery.

Some nations may be too small to sustain a broad range of government activities, especially in program and service delivery. More effective service delivery may be achieved when several nations pool their resources through co-operative intergovernmental arrangements.

Administration of Lands and Resources

Inuit proposals for Nunavik, a regional public government in northern Quebec, would see the establishment of administrative departments (such as the department of environment, lands and resources proposed in the Nunavik constitution) to implement Nunavik government legislation and policy.

Government action would strongly reflect Inuit relationships with their traditional land and resource base, and Inuit rights would ultimately be protected through a Nunavik charter. For example, this charter would recognize Inuit priorities in harvesting wildlife subject only to principles of conservation.

Source: Marc Malone and Carole Lévesque, "Nunavik Government", research study prepared for RCAP (1994); see also Nunavik Constitutional Committee, "Constitution of Nunavik", 1991.

Structures

Nations with continuing associations may establish joint political and administrative structures, including councils, assemblies, administrative agencies, boards or institutions. For example, a group of nations, through a confederal organization, may set up a post-secondary education facility.

Jurisdiction

Based on our opinion that the right of self-determination and the right of self-government reside primarily with nations, we believe a confederacy would need to be empowered by participating Aboriginal nations. They would have to delegate or transfer to the confederacy and its political and administrative institutions jurisdiction and associated powers and authority. Jurisdiction and associated powers to be delegated to a confederacy

may be limited (for example, the administration of selected programs) or comprehensive (for example, making and enforcing laws in a range of subject matters including education, health, taxation, lands and resources).

Model 2: The public government model

The public government model of Aboriginal government includes aspects of lands and territory, citizenship, jurisdiction, forms of internal organization, and the relationship with other Aboriginal governments.

Lands and territory

Public governments exercise jurisdiction over a geographically defined territory. The territorial boundaries of the public government may coincide with or encompass

- an existing administrative territory such as a region or northern territory, a northern regional municipality, improvement or similar administrative district, a municipality, town, hamlet or village;
- a treaty area or comprehensive claims agreement settlement area; or
- the traditional territory of an Aboriginal nation.

Rights Protections in a Public Government Context

Reporting in 1993, the Northwest Territories Commission for Constitutional Development (the Bourque commission) proposed a constitution for a new western territory, Nunavut, incorporating public, Aboriginal and mixed governments. The commission recommended affirmation of the rights and freedoms set out in the *Canadian Charter of Rights and Freedoms*. It also recommended recognition and protection of the rights of First Peoples, including the inherent right of self-government; the status of Aboriginal languages as official languages; the right of Aboriginal First Nations to opt out of a new western territory and pursue direct relationships with the federal government; and affirmation, recognition and protection of treaty rights, Métis rights and the rights of First Nations that have already entered into modern land claims agreements.

Source: Linda Starke, Signs of Hope: Working Towards Our Common Future (Oxford: Oxford University Press, 1990).

Within the territorial boundaries of the public government, land is likely to be organized according to the three categories of land referred to earlier. (These categories are described further in Chapter 4.)

Category I lands are Aboriginal lands held and controlled by the Aboriginal nation or nations participating in the public government. Category II lands are shared lands encompassing parts of the traditional Aboriginal territories over which the Aboriginal

public government will exercise jurisdiction shared with other Canadian governments and possibly with other Aboriginal nation governments in accordance with negotiated arrangements. Category III lands are Crown lands and privately held lands.

Treaties to be made between the Aboriginal peoples who reside in the territory and Canadian governments will deal with self-government, lands and resources, and federal or provincial legislation required to establish a public government. They will determine what jurisdictional regimes apply to the three categories of land within the public government's territory.

Regional Public Government Jurisdiction

A research study on Métis self-government in Saskatchewan suggested that Métis communities in the northern parts of the province may be in a position to exercise a range of government powers through a Métis-controlled regional public government. As proposed, the authority of this government might encompass provincial-type responsibilities; for example, lands and resource management, fire control, highways, health, education, justice and economic development.

Source: Clement Chartier for the Metis Family and Community Justice Services Inc., "Governance Study: Metis Self-Government in Saskatchewan", research study prepared for RCAP (1995).

The draft constitution of Nunavik proposes authority in areas normally within the purview of federal and provincial governments, including lands, education, environment, health and social services, public works, justice, language, offshore areas and external relations.

Source: Nunavik Constitutional Committee, "Constitution of Nunavik", 1991.

Constituency of residents

A public government would be organized to serve a constituency of residents, including Aboriginal and non-Aboriginal people who live within a defined territory. The Aboriginal residents may be from different Aboriginal nations and backgrounds.

The Aboriginal public government model differs from non-Aboriginal public governments in that the rights of residents may be differentiated to allow the Aboriginal majority to retain constitutionally protected Aboriginal and treaty rights, including the right of self-government. Aboriginal residents may have certain exclusive economic rights, for example, in renewable resource harvesting activities. Aboriginal residents may have the right to own, use, regulate and enjoy specific cultural property, and to promote and protect Aboriginal heritage, culture, language and traditions. Both Aboriginal and non-Aboriginal persons may have to prove they are residents to establish their eligibility to stand for government office or leadership positions.

Aboriginal or treaty rights that limit a public government's power may be reflected in a treaty, a comprehensive claims settlement or a similar agreement. Both shared and differentiated rights of Aboriginal and non-Aboriginal citizens would be set out in a constitution or laws of the public government.

The *Canadian Charter of Rights and Freedoms* and provincial charters or human rights codes, where appropriate, would apply to Aboriginal public governments. Charters may be developed to reflect Aboriginal values and the Aboriginal realities of public government, and to protect and promote the specific rights and interests of the Aboriginal residents.

Jurisdiction, powers and authority

Powers and authority in a variety of areas will be variously recognized, transferred, devolved or delegated to Aboriginal public governments by other Canadian governments. The jurisdiction of Aboriginal public governments will almost certainly differ from that of comparable non-Aboriginal governments. For example, local Aboriginal governments in some areas might have enhanced municipal jurisdiction to deal with provincial areas of jurisdiction (for example, lands and resources, environment, education, social affairs, administration of justice). Even some federal areas of jurisdiction (for example, migratory birds) might logically be dealt with by local and regional governments.

The objective is to ensure that the public government is sufficiently empowered to support Aboriginal peoples' aspirations in economic, cultural, social and political spheres, and to protect all residents' civil and political rights. The section on self-government identifies core areas of regional jurisdiction, as well as matters that might be considered to fall within the periphery of Aboriginal nation government jurisdiction. The types of jurisdiction that might be exercised by a local or community form of public government would have to be negotiated, and would be delegated by another government (for example, the Aboriginal, provincial or federal government). Aboriginal-controlled local public governments might be permitted to exercise authority different from that normally assigned to comparable municipal governments. For example, they might receive delegated authority to regulate certain hunting, fishing and trapping activities, subjects normally within the purview of the province.

Like Aboriginal nation governments, Aboriginal public governments can be expected to exercise the law-making, judicial and executive powers of government. The way these powers are exercised, and the structures that administer them, can reflect Aboriginal traditions and cultures.

Internal government organization

Units of government

Aboriginal public governments may operate at community, regional or territorial levels. They may incorporate one or more units of government. The relationship between

regional or territorial units differs according to whether the units are organized centrally or federally.

Under a centralized form of government, powers and authority, including the power to establish, empower and legislate in respect of other orders of government, may be concentrated in one central unit of government. This is the case, for example, in the newly established territory of Nunavut.²³⁵ A centralized form can be implemented in a regional public government when there is a history of co-operative action among the communities and they decide to form a new government such as Nunavik in northern Quebec.

Federal Forms of Organization

The Bourque commission proposed a federal form of government organization for the western Northwest Territories. Two distinct levels of government, a district and central government, would coexist, each with its own constitutionally protected sphere of authority, law-making capacities and structures of government.

Source: Commission for Constitutional Development (the Bourque commission), "Phase I Report: Working Toward a Common Future" (Ottawa: Supply and Services, 1992).

Reflecting the principle of subsidiarity, proposals for a western Arctic district government encompassing Inuvialuit, Gwich'in and mixed Aboriginal/non-Aboriginal communities describe the relationship between regional and community levels of government as follows:

The proposed regional government will have no legislative powers in fact unless and until the communities, through representatives in the regional assembly, wish to confer a given power upon the regional government. The legislation creating the regional government ... is simply enabling legislation to empower the regional assembly ... to legislate. Thus, the proposed new regional government should properly be considered as empowering communities.

Source: Inuvialuit Regional Corporation, "Inuvialuit Self-Government", research study prepared for RCAP (1993).

Under a federal form of organization, two or more units of government, most likely regional and local governments, would coexist in the public government framework. Jurisdiction would be divided among them. Each level of government would be autonomous within its respective field of jurisdiction. This form of organization may be appropriate where communities want to exercise powers and authority in respect of specific matters, rather than have these rest with a regional or territorial government.

A public government may also be organized federally according to the principle of subsidiarity.²³⁶ Under this arrangement, a regional public government might be set up and controlled by other participating governments, including community and Aboriginal

nation governments. A regional government may have its own powers and authority, but for the most part it would exercise these at the discretion and according to the will of participating governments. Through the regional government, participating governments would pursue common interests and objectives, for example, in program and service delivery. Organization on the basis of subsidiarity works well where diverse communities benefit by participating in regional alliances for some but not all government purposes.

Allocation of jurisdiction among units of government

Like Aboriginal nation government, Aboriginal public governments may include more than one level of government. As with the Aboriginal nation government model, some authority may be exercised more appropriately at the community level (for example, program and service delivery), while others (such as program and service design, and law and policy making) may rest at regional or territorial levels of the public government.

Representation in the Western Arctic Regional Government

Proposals for this government anticipate a regional council composed of eleven councillors. One would be elected from each of the participating Inuvialuit and Gwich'in communities, two elected at large from each of the Beaufort and Delta areas, and a mayor would be elected at large from within the region.

Source: Western Arctic Regional Government, "Inuvialuit and Gwich'in Proposal for Reshaping Government in the Western Arctic", 1994.

Legislative, executive and judicial structures

Aboriginal public governments will include legislative, executive and judicial branches, although the form these take may be influenced by the traditions, values and cultures of the Aboriginal people who control the government. Public governments will also establish administrative agencies and institutions to carry out government business.

Internal government procedures

Internal procedures include rules for leadership selection, representation in government agencies and boards, decision making and other activities to enhance government accountability. Aboriginal public governments may wish to adopt the procedures of other Canadian public governments. They may also adapt procedures to reflect the culture, values and traditions of Aboriginal peoples participating in the public government.

Leaders most likely will be selected through electoral processes. Representatives to regional or territorial legislative bodies may be the leaders of community governments, or directly elected representatives. In some instances it may be desirable to have some combination of the two approaches. Members of executive bodies may be elected, for example, through at-large elections for specific offices, or selected from representatives to the legislative body.

Decision-making processes may reflect Aboriginal traditions of consensus or may be based on majority vote. Regional and territorial public governments may carry out government responsibilities and activities through sector-specific departments, ministries, public corporations and related government agencies. Internal government procedures, administrative systems and the corporate culture of government institutions may reflect Aboriginal traditions, values and ways. Many of these adaptations might not be readily apparent on the surface of the government's operations. Aboriginal public governments would be accountable to all residents. The form of accountability, like that of nation-based governments, in part reflects traditional Aboriginal customs and in part measures common to mainstream Canadian government.

Constitution

Various features of an Aboriginal public government may be formally described in instruments such as the constitution (where specifically created), or in agreements (treaties, comprehensive claims agreements). Characteristics of the government may also be formalized in the legislation of another Canadian government that recognizes or enables the public government. For example, the *Nunavut Act* was passed by Parliament permitting the establishment and implementation of the Nunavut government and legislative assembly. The elements that would be included in each of these instruments are similar to those described for Aboriginal nation government constitutions.

Relationships with other Aboriginal governments

An Aboriginal public government might establish formal and working relationships with other Aboriginal governments in two situations: when the boundaries of an Aboriginal nation and an Aboriginal-controlled public government are contiguous, and when Aboriginal communities of interest operate in urban areas located in its territory. In either case, intergovernmental arrangements, including co-jurisdiction and co-management, might be established to deal with lands and resources, environmental matters and program and service delivery (for example, in the areas of health, education, justice, public services and infrastructure).

Model 3: The community of interest model

The community of interest model of Aboriginal government deals with aspects of lands and territory, citizenship, jurisdiction, forms of internal organization, and the relationship with other Aboriginal governments.

Lands and territory

Community of interest governments are not land-based or territorial. The model is not based on exercising jurisdiction over an Aboriginal land base or territory. However, such governments may operate within a clearly defined geographic area. This area may be determined by the dispersion or concentration of the government's membership, or by its location in a rural or urban area. For example, governments may operate within the

boundaries of a city, town or municipality, while non-urban community of interest governments may operate province-wide or within a region defined by other means. The model is distinctive because it is not primarily land-based either in terms of the location of its membership or its jurisdiction. However, a community of interest government may own or hold land or be involved in land and resource co-management projects. (Co-management, as it pertains to urban communities of interest, is considered in Volume 4, Chapter 7.)

A land base or access to one may be acquired by a community of interest government for the following purposes:

- cultural, spiritual or educational
- institutions (including schools and offices)
- housing
- economic development and revenue generation.

Membership

Membership in the government is based on Aboriginal identity and voluntary affiliation. It consists of individuals (or families) of Aboriginal heritage, who may or may not have emotional, familial, cultural, political or other affiliations with a particular nation.

Such a government could have the authority to establish membership rules and to determine the criteria to assess a person's affiliation with an Aboriginal people. Individuals might be eligible for membership on the basis of

- self-identification as an Aboriginal person;
- claims of affiliation with, or citizenship in, an Aboriginal nation; or
- documented evidence of affiliation with an Aboriginal people or nation.

We believe that community of interest governments and nation governments should allow individuals to retain citizenship in an Aboriginal nation as well as being members of a community of interest government.

Depending on the structure and purpose of the government, membership rights and entitlements may be limited primarily to political rights (for example, the right to stand for executive office) and to social, economic and cultural rights (for example, entitlement to programs and services delivered by the government).

The *Canadian Charter of Rights and Freedoms* and provincial, territorial and appropriate Aboriginal charters would apply to community of interest governments.

Intergovernmental Arrangements

In a report to the Northwest Territories Constitutional Steering Committee in 1994, the Dogrib Treaty #11 Council described the type of arrangements that might exist between Dogrib and public government institutions. It suggested that such relations would take place in a framework of negotiated inter-governmental agreements, inter-delegation of powers and sharing of resources.

Source: Constitutional Development Steering Committee (N.w.T.), "Summaries of Member Group Research Reports" (Yellowknife, N.w.T.: Constitutional Development Steering Committee, 1994), p. 32.

Jurisdiction and powers

Unlike Aboriginal nation and public governments, a community of interest government would not exercise the right of self-government unless it is one of the communities of a specific Aboriginal nation, nor would it have comprehensive powers. Jurisdiction and authority will be limited and will be assigned, delegated or transferred by other Canadian and Aboriginal governments. Under such arrangements, authority may be transferred on a sector-specific basis.

Areas in which these governments are likely to be active include those with a human focus, for example,

- education, culture and language,
- social services,
- child welfare,
- housing, and
- economic development.

Areas in which they are likely to have less involvement include those with an infrastructure or land base focus, for example lands, resources, environment, aspects of the economy (for example, wildlife management), public infrastructure and services, and communications.

Aboriginal community of interest governments may exercise their jurisdiction exclusively for their members in accordance with arrangements that result from a delegation of power. Alternatively, they may exercise devolved or delegated jurisdiction on behalf of other governments (federal, provincial, other Aboriginal) in specific service delivery sectors (for example, education, health). These areas would likely involve negotiated co-management arrangements. They also may deliver the programs and services of other governments under service delivery agreements.

Community of interest governments will engage primarily in by-law, rule and policy making, and exercise administrative powers and authority. It is also possible that a government would administer justice services and enforce its own by-laws, as well as the laws of other authorities, according to agreement.²³⁷

Internal government organization

Given that they fulfil a limited set of functions, these governments will not have all the organizational features of other governments. In general, the size of the government and its associated organization would correspond to the range of activities being undertaken. The more limited and focused its functions and activities, the less political and administrative infrastructure will be required.

Units of government

Community of interest governments likely will be organized with only one level. This form of organization is most appropriate for urban or non-urban areas where the participating Aboriginal population is fairly concentrated.

An organization of more than one level would be less common but appropriate for non-urban Aboriginal communities where the population is dispersed but can be organized in local or regional associations or communities. As discussed previously, two or more levels of government can be organized according to centralized or federal principles.

Structures of government

Community of interest governments for the most part would not have a full set of government structures. Executive and legislative functions likely will be fused in one body (for example, an elected executive council). However, if the community of interest is large enough, and government responsibilities are comprehensive, a legislative body may be established with representation drawn from local or regional associations or participating institutions and agencies. The executive could be a subset of the members of the legislative council, or could be separately selected.

Most community of interest governments will carry out their government responsibilities and activities through sector-specific agencies and institutions. These institutions may be fairly autonomous, enjoying an arm's-length relationship with political bodies and having their own boards. Alternatively, the government may elect to establish tight control over them and make them administrative branches of the government.

Internal government procedures

Internal government procedures relating to the selection of leaders, decision making and accountability would be set out in the government's constituting document.

Leadership selection and decision-making procedures would be determined by several factors, including the homogeneity of the population and the functions served by the government. As a non-traditional form of Aboriginal government, involving individuals from diverse Aboriginal traditions, leadership selection is likely to be by election, although other methods should not be precluded. Decision making may be by majority vote or consensus. Accountability to the community served may be enhanced by procedures similar to those described for Aboriginal nation and public governments.

Constitution

The community that associates for purposes of pursuing this form of government will determine the scope, functions, structure, institutions and procedures of that government. These characteristics might be described in a constituting document, which would be recognized or given effect by another government's legislation, delegating powers to the community of interest government.

Aboriginal Community of Interest Government

The community of interest model of Aboriginal government is an Aboriginal-exclusive form of government of a group of Aboriginal people who associate voluntarily. It does not operate on the basis of the inherent right of self-government, but rather has self-governing authority delegated by an Aboriginal nation government or by federal or provincial governments. It has the following key characteristics:

- it operates within territorial limits but without jurisdiction over a territory or land base, although the acquisition of land is not precluded;
- its membership includes individuals of different Aboriginal heritage who choose to be members, and who may or may not pursue an affiliation with their home nations;
- its powers and authority have been delegated to it in a limited range of jurisdictions or matters concentrated on program and service delivery in areas of importance to its members;
- in most cases, it has a single level of government organization, with government operations conducted through institutions and agencies;
- it has some decision- or rule-making authority and a dispute-resolution mechanism; and
- it may act as a service delivery agency for other Aboriginal governments.

Relationships with other Aboriginal governments

Since Aboriginal community of interest governments will include individuals from different nations, relations with Aboriginal governments, especially nation governments, will be significant. Aspects of inter-Aboriginal government relations might include

- service delivery arrangements to provide services to citizens of the nation who reside in areas where the community of interest government operates;
- co-operation in program and service delivery in specific sectors (for example, post-secondary education, justice initiatives, and health facilities); and
- co-operation for the purpose of political advocacy and to pursue relations with Canadian governments at a municipal, provincial, territorial or national level.

Participation in Land and Resource Management

A community of interest government, in agreement with a provincial government, may have access to a specific area of unoccupied Crown land. It may operate educational and cultural centres or programs or manage resources on the land base (for example, forests). Access to the land and resource base would be permitted even if it is not being used primarily for residential purposes.

Community of interest governments will also enjoy significant relations with municipal governments, notably in urban areas. These will likely require establishing formal agreements for program and service delivery in certain sectors, and establishing associated structures (such as committees and councils) to facilitate communication and consultation. In Volume 4, Chapter 7, we explore some possibilities for reforming existing government authorities and structures in urban environments in consideration of Aboriginal perspectives and interests. Such reforms could also entail establishing joint structures to co-ordinate activities and agreements with urban Aboriginal community of interest governments.

Community of Interest Proposals

The Native Council of Prince Edward Island has proposed a non-urban variant of the community of interest model. Their draft recognition act provides for the registration of members in accordance with a by-law to be developed by the governing council. The by-law would require documented evidence of descent from one of the Aboriginal peoples of Canada defined in the *Constitution Act, 1982*. Associated “rights and obligations” of membership would be spelled out in a by-law.

Source: Native Council of Prince Edward Island, “Report on Self-Government Structures for Micmacs Living Off-Reserve in Prince Edward Island”, brief submitted to RCAP (1993).

The Aboriginal Council of Winnipeg proposes to extend membership to Aboriginal

people in the city of Winnipeg. As proposed in its draft constitution, an Aboriginal person is defined as “any person whose ancestral beginnings or roots can be traced, in full or in part, to the first inhabitants of North America”.

Source: Linda Clarkson, “A Case Study of the Aboriginal Council of Winnipeg as an Inclusive Status-Blind Urban Political Representative Organization”, research study prepared for RCAP (1994).

Conclusion

We have considered three models of Aboriginal governance that might be developed to meet the aspirations of Aboriginal peoples in Canada. These approaches do not exhaust the possibilities for Aboriginal self-government and self-determination.

The nation government model provides a largely autonomous form of governance for Aboriginal peoples who choose to exercise their collective self-determination around the principles of a nation with a defined citizenship base. However, nation government requires a certain amount of aggregation on the part of an Aboriginal people and associated communities, either to reinstate traditional nation affiliations and confederacies or to create new ones, and to sustain an adequate citizenship and resource base for the practical implementation of self-government.

Program and Service Delivery

Aboriginal peoples want more control over how programs and services are delivered to their citizens. Current co-management type regimes permit varying levels of Aboriginal involvement in design, development and delivery of programs and services. However, such involvement must occur within the parameters of provincial or federal government legislative or policy regimes.

In delivering programs to a mixed Aboriginal constituency, the New Brunswick Aboriginal Peoples Council envisions short-term co-management arrangements and the gradual assumption of greater government powers and self-sufficiency over the longer term.

As Aboriginal self-government becomes a reality, it will be the responsibility of the government to formulate, initiate and maintain programs and services for its constituency. The NBAPC, as such a government, would design programs to meet the needs of the membership and conduct objective research. Program design and delivery would involve contemporary management methods coupled with traditional techniques, which will be used as guidelines for all programs.

Source: New Brunswick Aboriginal Peoples Council, “Aboriginal Self Governance Within the Province of New Brunswick”, research study prepared for RCAP (1995).

For some Aboriginal peoples and nations, leadership and control over public governments in their traditional territories represent an effective route to self-

determination and provide a vehicle for protecting, promoting and exercising Aboriginal and treaty rights. This form of government may result in Aboriginal peoples or nations controlling territorial or regional public governments through law-making, executive and judicial powers in much the same way as nation governments do.

Nation Governments and Community of Interest Governments

The need for co-operation between nations of origin and urban communities of interest was noted by the Native Council of Canada. It suggested that urban governments representing Aboriginal people of different heritage

need [not] be at the expense of tribal or national distinctions, any more than it would to clan or other collective distinctions that cut across and link national and local identitiesRegimes for dual citizenship can be developed, as indeed they now exist internationally. Membership in an urban government need not and should not imply loss of citizenship in a nation, clan or family.

Source: Native Council of Canada, "The National Perspective", Book 1 in The First Peoples Urban Circle: Choices for Self-Determination (Ottawa: Native Council of Canada, 1993), p. 17.

Community of interest governments provide an inclusive and practical response to the needs of Aboriginal people who, while they may not share the same Aboriginal group origin, do have a shared sense of identity arising from their common experience in urban and other areas. Where nationhood is not an issue, these governments may provide a meaningful and effective way for individuals and groups to protect and preserve the essential elements of their aboriginality that might otherwise be threatened by time, distance and other circumstances. Affiliations with Aboriginal nation or public governments may provide opportunities for mutually beneficial arrangements, such as shared program delivery.

We emphasize again that these models of Aboriginal government should not be considered either exhaustive of the possibilities, mutually exclusive or static in time. We have presented them here as suggestions of possible forms of Aboriginal governments. Governance, like nationhood, has a dynamic character. Should Aboriginal peoples choose to follow one or another of these paths to Aboriginal government, depending on their geographic situation, we anticipate that the outcomes will be as richly diverse as the traditions, aspirations and experiences of Aboriginal peoples in Canada.

Recommendations

The Commission recommends that

2.3.13

All governments in Canada support Aboriginal peoples' desire to exercise both territorial and communal forms of jurisdiction, and co-operate with and assist them in achieving these objectives through negotiated self-government agreements.

2.3.14

In establishing and structuring their governments, Aboriginal peoples give consideration to three models of Aboriginal government — nation government, public government and community of interest government — while recognizing that changes to these models can be made to reflect particular aspirations, customs, culture, traditions and values.

2.3.15

When Aboriginal people establish governments that reflect either a nation or a public government approach, the laws of these governments be recognized as applicable to all residents within the territorial jurisdictions of the government unless otherwise provided by that government.

2.3.16

When Aboriginal people choose to establish nation governments,

- (a) The rights and interests of residents on the nation's territory who are not citizens or members of the nation be protected.
- (b) That such protection take the form of representation in the decision-making structures and processes of the nation.

3.2 Financing Aboriginal Government

Earlier in this chapter, we identified three attributes that any government must have to be effective: legitimacy, power and resources. A new relationship between Aboriginal and non-Aboriginal people must provide for all three elements if self-government is to become a reality for Canada's First Peoples. It is not enough to say that Aboriginal peoples, by virtue of recognition of their inherent rights, can establish (or re-establish) their own governments with varying degrees of independent and shared authority. Such governments would be relatively ineffective without sufficient resources and financial arrangements in place to enable the effective exercise of this governing authority.

Thus far, we have addressed two of the fundamental ingredients for Aboriginal self-government, legitimacy and power. We now shift our attention to the issue of financing, beginning with a focused treatment of the financial arrangements that will be required to support Aboriginal governments under the new relationship. Lands and resources and economic development are addressed further in Chapters 4 and 5 (in Part Two of this volume).

First, we outline the main objectives that should be pursued in financing Aboriginal governments. Second, we revisit the features of the new relationship in light of the particular circumstances of Aboriginal governments and communities, recommending principles to guide the development of new financial arrangements between the Aboriginal, federal and provincial orders of government. Third, we identify and comment upon the array of funding sources and instruments potentially available to Aboriginal governments under a new relationship. Fourth, we build upon the models of Aboriginal government elaborated in the previous section, proposing ‘packages’ of financial arrangements suited to the features and characteristics of each. Finally, we present an argument for a Canada-wide fiscal framework to govern the fiscal relationship among federal, provincial and Aboriginal governments.

True Aboriginal self-government will be elusive and illusionary unless Aboriginal people have the means by which to effect it ... The mistakes of the past must not be allowed to continue and we must jointly work together to break the current bondage of poverty that ... continues to marginalize Aboriginal people to the lowest end of the social economic ladder.

Gary Gould
Skigin Elnoog Housing Corporation
Moncton, New Brunswick, 15 June 1993

Again and again I hear, ‘To whom will Aboriginal governments be accountable and for what?’ Well, our answer [is that] Métis people will be accountable to Métis people.

Robert Doucette
Metis Society of Saskatchewan
Saskatoon, Saskatchewan, 27 October 1992

Objectives for financing Aboriginal governments

In addressing the challenge of financing Aboriginal governments under a new relationship, we need to ask ourselves, what are the fundamental goals or objectives for financial arrangements that will support Aboriginal peoples’ quest for effective and meaningful self-government? Establishing such objectives is important for several reasons. They are a starting point for the negotiations on funding arrangements that will ensue when Aboriginal peoples, acting as nations, choose to exercise their inherent right of self-government. The objectives themselves will be a subject of these negotiations and will influence the design of the financial framework for Aboriginal self-government that will be worked out among the confederation partners. These objectives will also allow for an evaluation of the implementation and continued operation of particular funding arrangements to determine whether they fulfil the purposes they were designed to achieve.

Self-reliance

First and foremost, effective government depends upon a sound economic base. Without an adequate land and resource base, and without flourishing economic activity, Aboriginal governments will have little access to independent sources of revenue. Aboriginal governments will need access to fiscal instruments such as taxation. Fiscal arrangements should be structured to provide for Aboriginal self-reliance to meet their governing responsibilities.

Equity

Financing arrangements must provide for an equitable distribution of resources — financial and otherwise — among and between governments, groups of people and individuals. In the design of new funding arrangements, we would emphasize the importance of (1) equity among the various Aboriginal governments that make up the third order of government in Canada, (2) equity between Aboriginal and non-Aboriginal people as a whole, and (3) equity between individuals.

It is not program monies [from DIAND] that are going to do things for us. They are not the solution. What ... it [the *Indian Act*] has done to us ... it has deprived us of our independence, our dignity, our respect and our responsibility.

June Delisle
Kanien'Kehaka Raotitiohkwa Cultural Centre
Kahnawake, Quebec, 6 May 1993

Efficiency

Efficiency dictates that a government should use limited resources in as effective a manner as possible, and in so doing promote sustainable development. This is not unlike the long-standing Aboriginal tradition of respect for the land and its uses. Financial arrangements for Aboriginal governments, and the processes employed to achieve them, should therefore be designed to be efficient.

Accountability

Governments with the authority and responsibility to spend public funds for particular purposes should be held accountable for such expenditures, primarily by their citizens and also by other governments from which they receive fiscal transfers. In the context of Aboriginal governments, it is our view that this accountability rests with the Aboriginal nation rather than with individual communities. Funding arrangements should reflect this basic objective, allowing for processes and systems of accountability that are both explicit and transparent.

Harmonization

Finally, financial arrangements should include mechanisms that provide for harmonization and co-operation with adjacent governing jurisdictions. This is to ensure that decisions made by individual Aboriginal governments take account of the effects of their policies on other governments. This consideration should include federal, provincial and municipal governments.

A principled basis for new financial arrangements

Building on the fundamental objectives for financing Aboriginal governments — self-reliance, equity, efficiency, accountability and harmonization — we now present a series of principles that should govern the design and development of funding arrangements for Aboriginal governments.²³⁸

The renewed relationship and financial arrangements for Aboriginal governments

The new relationship between Aboriginal and non-Aboriginal people that we have proposed consists of three key elements:

- Aboriginal self-government based on a recognition of the right of self-determination and the inherent right of self-government for Aboriginal peoples;
- a relationship between Aboriginal and non-Aboriginal people and their governments that takes the form of a nation-to-nation relationship;
- recognition of Aboriginal governments as one of three constitutionally recognized orders of government in Canada.

The nature of this new relationship gives rise to the following principles, which should shape the development of financial arrangements for Aboriginal governments.

First, a renewed relationship requires fundamentally new fiscal arrangements. It is our view that developing a system of finance for Aboriginal governments based on adapting or modifying existing financial arrangements with Indian bands would be ill-advised, because those arrangements are based on a radically different kind of governing relationship. *Indian Act* band governments, for example, are perceived as a form of self-government; but in fact they are a form of self-administration, not self-government. Band governments under the *Indian Act* do not have independent authority; they derive their powers from the federal government. Moreover, given the limited range of powers delegated to them, there is little opportunity for band governments to have access to independent sources of revenue. Consequently, the financial arrangements are characterized by dependency, by extensive accountability provisions, by elaborate administrative structures and by other features that reflect that type of governing relationship. The accountability procedures for Aboriginal nation governments should not be more onerous than those imposed on the federal and provincial governments. (A brief overview of existing financial arrangements for Aboriginal governments and regional and territorial governments is provided in Appendix 3A to this chapter.)

Second, the development of a Canada-wide framework to guide the fiscal relationship among the three orders of government should be a prerequisite for negotiations leading to the development of long-term financial arrangements for individual Aboriginal governments. A key feature of the new relationship we are recommending is that it provides an opportunity for Aboriginal peoples to aggregate their collective interests as self-governing nations. This is an important step toward restoring balance in a relationship between Aboriginal and non-Aboriginal people that all too often has been weighted unduly against the interests of Aboriginal peoples.

Likewise, Aboriginal nations collectively forming a third order of government should have an opportunity to aggregate their interests on fiscal matters. This would best be achieved through a Canada-wide fiscal framework negotiated by representatives of the federal and provincial governments and national Aboriginal peoples' organizations. The elements of such a framework, and its role in negotiations to develop financial arrangements for individual Aboriginal governments, are elaborated later in this chapter.

Third, financial arrangements should reflect the principle that for Aboriginal self-government to be meaningful, fiscal autonomy and political autonomy should grow together. This relationship should be reflected in the proportion of transfers to Aboriginal governments from the federal and provincial governments that are unconditional. A government cannot be truly autonomous if it depends on other governments for most of its financing. The nature of transfers from other governments, for example, should reflect this principle. We note that under existing financial arrangements, most of the funds Aboriginal governments receive from the federal government are of a highly conditional nature, with Aboriginal governments having to meet predetermined, detailed program criteria to continue receiving these funds.

Conditional transfers are legitimate fiscal instruments for certain purposes — for example, when the delivery of a program has an impact beyond a single community, or when country-wide standards in the delivery of certain public services are seen as desirable. As Aboriginal governments become more autonomous politically, however, the proportion of transfers from federal or provincial governments that is conditional should fall. This principle is reflected in federal-provincial fiscal relations and should also underlie fiscal relations with Aboriginal nation governments.

Fourth, financial arrangements should provide greater fiscal autonomy for Aboriginal governments by increasing access to independent revenue sources of their own. As we argue throughout this report, a critical element of fiscal autonomy is a fair and just redistribution of lands and resources for Aboriginal peoples. Without such a redistribution, Aboriginal governments, and the communities they govern, will continue to lack a viable and sustaining economic base, which is integral to self-government.

Aboriginal governments should be able to develop their own systems of taxation. While most Aboriginal people already pay taxes in Canada, the difference is that under a new relationship Aboriginal citizens would pay taxes mainly to their own governments. Accordingly, Aboriginal governments should have the tools to raise revenues from the

development of their lands and resources. This taxing authority, when recognized, will be an important step toward increased fiscal autonomy for Aboriginal governments and will also encourage greater fiscal accountability and citizen participation. If Aboriginal nations have the power to tax and have a tax base, non-Aboriginal governments will expect them to levy taxes. If no effort is made by Aboriginal governments to collect taxes, there will be a negative impact on their transfer payments from other governments.

Recommendation

The Commission recommends that

2.3.17

Aboriginal governments established under a renewed relationship have fundamentally new fiscal arrangements, not adaptation or modification of existing fiscal arrangements for *Indian Act* band governments.

Features distinguishing Aboriginal and non-Aboriginal governments: implications for financial arrangements

There is considerable diversity among Aboriginal nations and their communities. Many Aboriginal peoples do not possess a formally recognized land base, and among those who do, there are large differences in resource wealth and economic potential. The cost of delivering services to Aboriginal people who live in remote areas is very high. Compared to the non-Aboriginal population, more Aboriginal people live in small communities whose size limits the economies of scale that urban governments can achieve. The territories of an Aboriginal nation government may not be contiguous, which also affects the cost of delivering services.

Membership in Aboriginal nations is not necessarily defined by residency. For example, a member of a particular Aboriginal nation might make his or her home in a non-Aboriginal community (often an urban one). Likewise, non-Aboriginal persons might reside within an Aboriginal community or territory but not be citizens of that political constituency. This is an important issue, given that existing fiscal transfers for non-Aboriginal governments are based wholly on the principle of residency.²³⁹

In terms of the transition to self-government, it is likely that Aboriginal governments will assume varying degrees of jurisdictional authority, at least initially, because of political choices that nations or peoples make regarding their ability or preparedness to exercise the full powers of self-government. This is true of any new or developing system of government.

As a final example, the policy of taxation exemption as applied to ‘on-reserve Indians’ is unique to band governments under the existing *Indian Act* relationship. Under section 87 of the act, status Indians residing on-reserve and their property are exempt from certain kinds of taxation levied by non-Aboriginal governments. Under the new relationship, we

note that Aboriginal people will be subject to taxation levied by their own governments. Application of the section 87 exemption in the transition phase is a matter that must be considered in the treaty negotiations leading to self-government agreements for status Indians.

[To] receive funds which match neither community needs nor abilities is to invite failure. To receive no funds [at all] is to invite disaster.

Darryl Klassen
Mennonite Central Committee
Vancouver, British Columbia, 2 June 1993

All of the features distinguishing Aboriginal from non-Aboriginal governments, taken together, will necessarily have an impact on the effectiveness of financing arrangements that are developed for Aboriginal governments. Thus, we will suggest several considerations that should govern the design of financing mechanisms for Aboriginal governments under the new relationship.

The financing mechanisms employed in arrangements for individual Aboriginal governments should provide for considerable institutional flexibility, especially during the transition to self-government. Assuming that all Aboriginal nation governments will have the potential to exercise the same range of governing authorities, it is nonetheless evident that individual governments will proceed at varying speeds in assuming these responsibilities.

In this context, the financing mechanism should be designed so that it does not force Aboriginal governments to assume fewer areas of jurisdiction than they need. For example, if the financing mechanism for a program or policy sector requires a large bureaucratic structure to be effective, the associated costs of administration — in the face of scarce resources — may be so high that Aboriginal governments are unable to gain access to it. Similarly, it is important to ensure that the financing mechanism does not prevent an Aboriginal government from asking other governments to deliver public goods or services for which it is not yet ready to assume responsibility, or that it may never wish to deliver itself.

The financing mechanism should be designed to promote cost-effectiveness and the incentive to innovate. This is directly linked to our earlier arguments that Aboriginal people should be given the opportunity to reorganize or structure their governments in a manner that provides for greater economies of scale in delivering public services. If financing mechanisms are focused only on supporting public services in small individual communities, as under the existing DIAND-band government relationship, it is evident that some public functions will simply be too costly to administer and support. The financing mechanism should enable Aboriginal governments to realize greater economies of scale through co-operative service delivery arrangements with adjacent jurisdictions (including non-Aboriginal ones, depending on the nature of the activity).

It follows that as Aboriginal governments become more autonomous, a significant proportion of the transfers received from the other orders of government should be unconditional. This will enable Aboriginal governments to take into account the costs and benefits of providing public services and goods in various ways, and ensure that decisions regarding the necessary trade-offs among alternative means are sensitive to the needs and aspirations of the nation itself.

It is also important that financing agreements minimize administrative costs as much as possible. Keeping administrative costs as low as possible is particularly important for Aboriginal governments, given limited own-source revenues. Therefore, the vast majority of transfers received from the other two orders of government should be devoted as much as possible to supporting actual services, rather than to the high costs of constantly negotiating and renegotiating annual financial agreements. Formula funding such as that found in the fiscal arrangements for the territorial governments is based on a set of indicators and is usually reviewed every five years. This allows for better planning and greater predictability and autonomy.

The financing mechanism should also reflect the capacity of the Aboriginal government to raise own-source revenues and promote fiscal equity. The equalization principle is a cornerstone of federalism and is enshrined in section 36 of the *Constitution Act, 1982*.

36(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

We believe that this equalization principle should extend to the Aboriginal order of government as well.

For provincial governments, equalization is achieved through a system of payments that takes into account a government's revenue-raising capacity to determine eligibility for and the level of unconditional transfers. However, the capacity of Aboriginal governments to raise revenues through instruments such as taxation is considerably less than that of non-Aboriginal governments generally. Moreover, differences in the need for and cost of providing public services across Aboriginal communities are greater than for comparable non-Aboriginal communities. For example, a northern or isolation allowance similar to that of the government of the Northwest Territories will be required for many Aboriginal governments.

When the provinces entered Confederation, several received statutory subsidies, partly for surrendering their indirect taxes to the federal government and often to offset their debt.²⁴⁰ In 1907, at Canada's request, the British government passed *An Act to make further provision with respect to the sums to be paid by Canada to the several Provinces of the Dominion*, effectively amending section 118 of the *Constitution Act, 1867* and increasing the burden of the federal government's payments to the provinces. Later, special payments were made to the maritime provinces following the Royal Commission

on Maritime Claims (the Duncan commission report of 1926) and to both the prairie and maritime provinces during the 1930s, when several provinces were on the verge of bankruptcy.²⁴¹

Consideration of need is not new to fiscal arrangements in Canada. New Brunswick received a half-yearly grant for ten years following Confederation,²⁴² and British Columbia a railroad. Prince Edward Island was promised regular transportation to the mainland, which the federal government provided through a ferry service. Honouring this promise required a constitutional amendment in 1993 to replace the commitment to 'steam service' with one to 'a fixed crossing', and to prevent the imposition of tolls or the private operation of the crossing.²⁴³

Similar treatment should be considered now as we lay the groundwork for three orders of government in Canada and try to meet the particular needs of Aboriginal governments.

Recommendation

The Commission recommends that

2.3.18

The financing mechanism used for equalization purposes be based not only on revenue-raising capacity, but also take into account differences in the *expenditure needs* of the Aboriginal governments they are designed to support, as is done with the fiscal arrangements for the territorial governments, and that the tax effort that Aboriginal governments make be taken into consideration in the design of these fiscal arrangements.

Funding sources and instruments for Aboriginal governments

Governments rely on a variety of sources and related instruments for financing their public activities. Here we consider four categories relevant to the financing of Aboriginal governments in Canada:

- own-source funding;
- transfers from other governments;
- funding from treaties and land claims settlements; and
- borrowing authorities for capital expenditures.

In the old days we had a tradition of caring and sharing. If a person was sick or injured, the Chief would delegate others to hunt for him and provide fire wood. We redistributed our wealth for the good of all, and that is what any good system of taxation is supposed to do.

Elder Ernie Crowe from Piapot as retold by Chief Clarence T. Jules
Kamloops First Nation
Ottawa, Ontario, 5 November 1993

These will serve as the basis for the financial packages associated with particular models of government and will inform the negotiations leading to a proposed Canada-wide fiscal framework for financing Aboriginal governments.

Own-source funding

In theory, a broad array of instruments is available to governments for raising their own revenues. For Aboriginal governments these might include taxes; tax-sharing; resource rents and royalties; user fees, licences and fines; proceeds from gaming activities; and corporation revenues. In reviewing these sources, however, we should keep in mind that the potential for each instrument to raise revenues will, in practice, vary considerably.

Taxation

Here we consider four main kinds of taxation:

- (a) personal income tax, which in the case of Aboriginal governments could apply to Aboriginal citizens and to non-citizen residents within an Aboriginal-controlled territory;
- (b) corporate taxes on private business, both Aboriginal and non-Aboriginal;
- (c) sales or consumption taxes;

and (d) taxes or lease fees on land and property. The revenue-raising potential of these kinds of taxation depends directly on levels of income, the nature and degree of economic development and activity, and the degree of authority to use the various forms of taxation.

When governments share authority over a particular kind of taxation — for example, personal or corporate income tax — they can establish a common base and then negotiate the share of the revenues collected for each order of government. As part of the financial arrangements for Aboriginal governments, this kind of tax-sharing arrangement would depend naturally on the authority that Aboriginal governments have over certain kinds of taxation, their willingness to assert or exercise this authority, and the revenue-raising potential of any taxes to be levied.

We want control of our destiny and a peaceful co-existence with Canadian society. In order for this to happen, First Nations must have an equitable share of lands, resources and jurisdiction, and fiscal capability to fulfil their responsibilities as self-determining peoples.

As we have stated, attaining a significant measure of fiscal autonomy is a fundamental prerequisite for effective self-government. A people that does not possess the means to finance its own government will be dependent on the priorities of others. This can be mitigated by negotiating long-term arrangements that commit other governments to fiscal transfers. But ultimately, a government that must look to others for most of its financial requirements remains dependent. Hence the importance of own-source revenues and authority for Aboriginal nations to tax their own resources and citizens.

Given the many responsibilities of Aboriginal governments, and assuming that Aboriginal people will want to receive a wide range of high quality services, Aboriginal governments will need to collect significant amounts of revenue. Other governments that support Aboriginal governments through transfers will expect them to do so. Indeed, transfers are likely to depend on the revenue collection effort of the recipient government, as is common in fiscal arrangements between governments in Canada.

Aboriginal nation or public governments will find it necessary to tax economic activity on their territory. This will take the form of personal income tax on their residents, corporate tax on businesses operating on their territory and, most likely, some form of royalty tax on resources extracted from their lands and waters. Income tax will not be a suitable instrument for financing community of interest governments.

It can be expected that Aboriginal governments will tax the personal income of all residents on their territory, whether or not a resident is a citizen under the nation government model. Income tax will likely be levied regardless of whether a resident's income was earned on the territory or elsewhere. Citizens of an Aboriginal nation residing off the territory can expect to continue to pay personal income tax to the governments in whose jurisdiction they reside and from whom they receive services, that is, the federal and provincial governments. Residency as the determinant of tax status is the arrangement that applies in all jurisdictions across Canada today.

The Commission proposes that residents on an Aboriginal nation's territory would pay all income tax to the Aboriginal government and not, as is the case with other residents of a province, to the federal and provincial governments. Residents under the jurisdiction of an Aboriginal public government would continue to pay income tax to the public, federal and, where appropriate, provincial government. We argue in favour of this position for two reasons.

First, levels of economic activity and hence of personal income on the vast majority of existing Aboriginal lands are well below those in most neighbouring communities. Aboriginal governments will be hard-pressed, until significant additional lands and resources are transferred to them, to raise a major portion of the financial resources they will need from their own tax base. Even after the acquisition of an adequate land base,

economic development to raise personal income levels will be a long process in most communities. Aboriginal governments will need the full resources that the taxation capacity of their communities can generate for some time to come.

A second reason for advocating this arrangement relates to the controversy over tax exemption for Aboriginal people. A widely held perception among Canadians is that Aboriginal people enjoy generous tax exemptions. This is not the case.²⁴⁴ By the same token, many Aboriginal people believe that tax exemption is an Aboriginal or a treaty right that should benefit all Aboriginal people wherever they live.²⁴⁵

The current tax exemptions leave room for taxation that could be taken up readily by First Nations governments. Doing so would not be an infringement of Aboriginal rights, and the issue of compensation therefore does not arise. Some would argue further that the exemption is a reflection of the original autonomy of Aboriginal rights, and should be seen as being closely linked to the inherent right of self-government.

The Commission believes that the question of taxation needs to be addressed in the context of self-governing Aboriginal territories. If Aboriginal governments emerge with an adequate land and resource base to sustain self-reliance for their people, those governments will want to exercise control over their finances for reasons already discussed. We believe that responsible self-government is the most effective route for resolving the divisive debate over taxation. The severely limited fiscal capacity of most Aboriginal communities and the willingness of most Aboriginal people to support their own governments through appropriate taxation both argue that personal and corporate income taxes payable by residents and levied on economic activity should be paid to Aboriginal governments.

Circumstances might arise where residents on an Aboriginal nation's territory will attain a level of average income equivalent to that enjoyed by residents of the region surrounding them. By the same token, some Aboriginal governments will in time have fiscal capacity equal to that of neighbouring governments. These circumstances will affect the level of fiscal transfers Aboriginal governments receive, including, where the financial situation justifies, the elimination of such transfers.

Aboriginal nations will exercise taxation authority, including decisions on the level of taxation on their territory. Those governments may choose, as some provincial governments do now, to use lower levels of taxation to stimulate economic activity. In so doing, they will have to bear in mind the impact of such actions on the federal government's calculation of fiscal capacity in determining fiscal transfers.

If they establish tax rates significantly lower than neighbouring jurisdictions, Aboriginal governments may find their territories becoming tax havens for non-citizen residents. In such circumstances, the federal government can be expected to lower the level of fiscal transfers to reflect the taxation capacity not used. There is a fine line between differentiated tax rates for purposes of social and economic policy and the creation of artificial tax havens. In provinces that levy a lower rate, taxpayers must still pay a

common level of tax to the federal government. If the federal government agrees, as we propose, to see the revenues it would have raised go directly to the Aboriginal nation government, it can be expected to require arrangements that do not permit tax havens.

Where services continue to be provided by the province, we believe they should be paid for by a contractual arrangement between the governments involved, thus eliminating the rationale for provincial taxation.

Recommendations

The Commission recommends that

2.3.19

Financial arrangements provide greater fiscal autonomy for Aboriginal governments by increasing access to independent own-source revenues through a fair and just redistribution of lands and resources for Aboriginal peoples, and through the recognition of the right of Aboriginal governments to develop their own systems of taxation.

2.3.20

Aboriginal citizens living on their territory pay personal income tax to their Aboriginal governments; for Aboriginal citizens living off the territory, taxes continue to be paid to the federal and relevant provincial government; for non-Aboriginal residents on Aboriginal lands, several options exist:

- (a) all personal income taxes could be paid to the Aboriginal government, provided that the level of taxation applied does not create a tax haven for non-Aboriginal people;
- (b) all personal income taxes could be paid to the Aboriginal government, with any difference between the Aboriginal personal income tax and the combined federal and provincial personal income tax going to the federal government (in effect, providing tax abatements for taxes paid to Aboriginal governments); or
- (c) provincial personal income tax could go to the Aboriginal government and the federal personal income tax to the federal government in circumstances where the Aboriginal government decides to adopt the existing federal/provincial tax rate.

2.3.21

Aboriginal governments reimburse provincial governments for services the latter continue to provide, thereby forgoing the requirement for provincial taxes to be paid by their residents.

Measures will have to be taken to ensure that non-Aboriginal residents are represented in the decision-making processes of the Aboriginal nation government.²⁴⁶ In the case of the

Sechelt Indian band government in British Columbia, this was accomplished through provincial legislation, the *Sechelt Indian Government District Enabling Act*. Among other matters, the legislation provides for the creation of an advisory council, which is the primary mechanism for non-Aboriginal residents on Sechelt lands to participate directly in the affairs of the district.²⁴⁷

Recommendation

The Commission recommends that

2.3.22

Non-Aboriginal residents be represented effectively in the decision-making processes of Aboriginal nation governments.

Resource rents and royalties

Rents or royalties can be levied on the extraction and development of natural resources. For Aboriginal governments, they are another possible source of revenues whose potential depends on the existence of natural resources within a given territory, on the value of the resources and the cost of developing them, and on the degree of authority and control Aboriginal governments have over the development and taxation of such resources.

User fees, licences and fines

Governments can also charge user fees and licence fees — instruments targeted at individual users of particular government services. There has been a growing trend among governments everywhere in the last decade to make greater use of such levies. However, as with taxes, their potential for raising revenues is limited by the number and level of such fees that residents are willing to tolerate. Fines are raised from those breaking a law, and traffic violations can account for a significant revenue base.

Gaming

In the last decade or so, some Aboriginal governments in Canada and the United States have established gambling casinos on their territories, both to assert their self-governing authority and to develop a potentially lucrative revenue source in communities that are significantly disadvantaged economically. The feasibility of establishing gaming enterprises is highly dependent on the distribution of legislative authority, on the proximity of such establishments to densely populated centres, and on the willingness of these populations to engage in gaming activities. Given the uncertainty and controversy surrounding the issue, it would be better to negotiate gaming within the treaty processes.

Aboriginal and public corporation revenues

Own-source funding is also available in the form of revenues from Aboriginal government or public corporations. Such corporations, where Aboriginal ownership is collectively held, can be either single or joint ventures; and in the case of public government, potentially can include both public and Aboriginal corporations. Unlike royalties and resource rents, the potential for revenue from such corporations is not dependent on the level and nature of economic activity within a given territory, because these corporations may choose to invest outside of their Aboriginal nation's traditional territory.

Notwithstanding the apparent variety of sources potentially available to a government through these instruments, the reality is that own-source financing for Aboriginal governments is currently very limited and likely will remain so for some time. This brings us back to a key point about the financing of Aboriginal governments — the overwhelming importance of a sufficient land and resource base and of sustainable economic development to effective self-government. Without access to land and resources, it will be impossible to establish a viable and sustainable economic base upon which Aboriginal governments will be able to finance their activities. (See Chapters 4 and 5, in Part Two of this volume, for detailed coverage of these issues.)

Transfers from other governments

Transfers from other orders of government can be a key source of financing, especially in federal systems of government. Provincial governments, for example, receive a significant portion of their funding in the form of transfers from the federal government, as do municipal governments from the provinces.

The existing arrangements for financing *Indian Act* band governments are realized largely through fiscal transfers, although the nature of these transfers differs from the federal-provincial arrangements in several important ways. (See Appendix 3A for a brief overview of these arrangements.) Here we consider two types of intergovernmental transfers, conditional and unconditional.

Conditional transfers

Conditional transfers entail conditions established by the donor government to influence the behaviour of the recipient government. They are either spending-conditional or program-conditional.

Spending-conditional transfers require the recipient government to match a portion of the funds received from the donor with their own expenditures. The requirements are usually quite strict, leaving little autonomy to the recipient government. Matching transfers are usually employed when the services they are designed to finance have an impact beyond a particular community — what economists call 'externalities' — and when both donor and recipient governments have sufficient own-source revenues to draw upon.

An example drawn from the recent history of federal-provincial fiscal arrangements is the Canada Assistance Plan (CAP), under which the federal and provincial orders of government shared expenditures for basic welfare services, usually on a fifty-fifty basis.²⁴⁸ If this form of transfer were used to finance Aboriginal governments, special attention would need to be given to the capacity of Aboriginal governments to raise their own-source funding — that is, to their ability to match funds from a donor government — as well as to the degree of their jurisdictional authority. Matching need not occur only on a fifty-fifty basis, and such transfers could potentially be available from both federal and provincial governments.

Spending-conditional transfers can also be used for specific purposes that are narrower in scope. Such transfers are more incidental in nature, arising when the need for particular public goods or services is not anticipated by either the donor or the recipient government (for example, in case of flood or other natural disaster), or where such expenditures do not fit neatly with the distribution of jurisdictional authority.

Rather than being built into the basic intergovernmental fiscal framework, specific purposes transfers are usually developed through ad hoc arrangements based on consultation and co-operation among federal, provincial and municipal governments. This system was used to introduce a national infrastructure program in 1993 and to promote regional development across Canada through federal-provincial general development agreements and other instruments during the past 30 years. Other common examples are recreation facility capital grants that provincial governments provide for municipalities and the contribution agreements between DIAND and Indian bands for major capital projects (see Appendix 3A). Such transfers may be relevant particularly for Aboriginal governments in the transition phase to self-government because Aboriginal peoples or nations decide upon the range of governing jurisdiction they want to assume initially.

Conditional transfers may also be tied to specific types of expenditures for program areas. This provides the recipient government with more autonomy in designing programs and services to match regional conditions. If certain conditions or objectives — usually identified in legislation — are not met in the program area, the donor government may impose a penalty, often in the form of a reduced transfer to the recipient government.

A practical example of program-based conditional transfers is the federal funding the provinces have received for medical and hospital services. This funding is received by provincial governments on the condition that provinces adhere to the five basic objectives of the *Canada Health Act* — universality of coverage, comprehensiveness of insured services, accessibility, portability and public administration. If these objectives are not adhered to, the federal government may decide to withhold a percentage of the funds to discourage the deviant practice.

Conditional transfers might be available for financing Aboriginal governments when such governments decide that they do not want to assume full responsibility for particular

program areas, or where regional or Canada-wide standards or objectives in the delivery of certain public services are seen as desirable, such as in the field of health.

Unconditional transfers

The key characteristic of unconditional transfers is that funds, or sources of funds, are transferred unconditionally — with no strings attached — thus leaving the recipient government with the independent authority to spend such funds as it sees fit. Unconditional transfers also come in a variety of forms.

Cash transfers provide lump sums of money, usually determined according to an agreed formula, that are transferred from one level of government to another annually. This kind of transfer was reflected in part in the financial arrangements for health and post-secondary education shared by the federal and provincial governments under the former Established Programs Financing (EPF) program. The EPF arrangements involved a mix of instruments reflecting several of the transfer characteristics outlined in this section, one of which is a cash or lump sum grant. Since the EPF program was negotiated in 1977, provincial governments have been free to use these funds for any purpose, regardless of whether it related to post-secondary education or health. The new Canada health and social transfer is comparable in approach, although the cash portion of the transfer is expected to diminish over time.

Cash transfers would allow for considerable autonomy in the financial arrangements for Aboriginal governments, even if the initial arrangements are nominally based on the distribution of expenditures for general program areas, as they were in EPF.

In tax-sharing, revenues are either collected by two governments or they are returned to the jurisdiction where they originated by the government that collects the taxes. In *revenue-sharing*, one government (usually the federal or provincial) pools its revenues from various sources (such as resource royalties), then shares these revenues with provincial or municipal governments. As a source of financing for Aboriginal governments, this would be relevant in the case of co-management and co-jurisdiction of lands and resources, and would depend on the particular agreements reached with the other governing jurisdictions.

Equalization grants are an element of federal-provincial tax-sharing. They replaced the tax rental agreements instituted during the Second World War, in which the federal government rented exclusive control of personal and corporate income tax and succession duties. First formally introduced in 1957, equalization provides that the provinces will receive 10 per cent of the personal income taxes raised, 9 per cent of corporate profits and 50 per cent of federal succession duties. Of course, 10 per cent of income taxes generates more revenue in a wealthy province than in a poor one. To compensate, the governments agreed to bring all provinces' revenues up to a certain per capita standard. Under the current program, employing a more broadly representative tax base, a five-province standard is in effect. All provinces are guaranteed access to revenues equal to the per capita average from applying national-average tax rates to the representative tax

bases in the five designated provinces (Ontario, Quebec, British Columbia, Saskatchewan and Manitoba). All provinces receive equalization grants except British Columbia, Alberta and Ontario.²⁴⁹

The equalization principle was enshrined in section 36(2) of the *Constitution Act, 1982*, committing Parliament and the government of Canada to “making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation”.

If equalization were extended to Aboriginal governments, account would be taken of both the fiscal capacity and the fiscal need of the Aboriginal government — how much capacity they have to tax and how much revenue they need to provide required services. Likely it would be assumed, as it is for provincial and territorial governments, that Aboriginal governments tax at national-average rates. If Aboriginal governments chose not to tax, this would be reflected in reduced equalization payments — that is, if Aboriginal governments had the capacity to raise revenues, but chose not to do so. If Aboriginal governments kept all income and sales taxes, this too would be factored into the equalization formula, in effect reducing the transfer from other governments. If an Aboriginal nation government’s revenues are great enough that they no longer require equalization payments, consideration should be given to transferring some of their revenues to other Aboriginal nations — in effect, sharing the wealth through inter-Aboriginal nation equalization.

Aboriginal nation governments would enjoy intergovernmental immunity from taxation by the Crown, as the federal and provincial governments do. They would also be eligible for grants in lieu of taxes on federal and provincial property on Aboriginal lands, just as federal and provincial governments pay grants in lieu of taxes to municipalities to make up for the fact that municipal governments cannot tax federal or provincial property.

Finally, there may be very specific unconditional transfers, such as northern or isolation allowances to offset the higher cost of living in northern and remote communities.

Regardless of the type of fiscal transfer, the level or magnitude of such transfers may also depend upon certain characteristics of the recipient government. For example, amounts transferred can be based on the fiscal capacity of the recipient government, using measures such as the revenue potential of various tax bases under a given jurisdiction. The principle of fiscal capacity, for example, is at the core of the unconditional transfers paid to qualifying provinces under the current equalization program.

As well, the level of intergovernmental transfers can be related directly to the expenditure levels of a recipient government in providing particular services to its citizens.²⁵⁰ An example of this is the conditional matching or cost-shared transfers under the former Canada Assistance Plan, where the general level of expenditures is determined by the demand for welfare services in particular provinces.²⁵¹ The needs basis has also been used in the fiscal arrangements for the Yukon and Northwest Territories and in other federal systems as one of the factors determining the appropriate level of equalization payments

for the constituent governments of the federation. Consideration of both fiscal capacity and fiscal need in the design of fiscal arrangements for Aboriginal governments will be especially important, given the generally lower level of economic development in Aboriginal communities.

It is clear that transfers from other levels of government will be a prominent feature of financial arrangements for Aboriginal governments, now and in the future. This is because, first, Aboriginal peoples' right of self-government has not been fully recognized by the Canadian state, and Aboriginal governments accordingly have not had access to the instruments necessary for own-source financing. This is exacerbated by the continuing inequitable distribution of lands and resources between Aboriginal and non-Aboriginal people in this country, which leaves Aboriginal governments without a viable and sustainable economic base upon which to finance basic public services for their citizens. As these injustices are corrected over time, Aboriginal governments will gradually become less reliant on transfers from other governments.

Second, transfers from other orders of government will continue to be an integral part of financial arrangements for Aboriginal governments because of the nature of the federal system of government in Canada. Significant efficiency and equity benefits accrue from having the federal government assume a relatively stronger revenue-raising role in the federation, then distribute these revenues in the form of fiscal transfers to other governments so they can meet their expenditure responsibilities more effectively. Aboriginal governments, as one of three constitutionally recognized orders of government, will necessarily become a part of this intergovernmental fiscal framework and receive transfers from the federal government as the provinces do now.²⁵²

Entitlements from treaties and land claims

There is a third category of funding sources specific to the circumstances of Aboriginal governments in Canada, especially those established on the nation-based model. These are revenues arising from specific claims settlements and comprehensive land claims and treaty land entitlement settlements. Because of the unique nature of these arrangements, they deserve special treatment in terms of being considered as potential sources for the financing of Aboriginal governments.

Specific claims settlements

Specific claims settlements can sometimes be indirect sources of funding for Aboriginal nations, but only for some, since many do not have treaties with the Crown or may not be engaged in related specific claims processes.²⁵³

The Commission is of the view that revenues arising from specific claims settlements should not be considered a direct source of funding for Aboriginal governments, even if some governments choose to use some of these funds directly for government purposes. Often, the purpose of these settlements is to compensate for lands taken fraudulently or expropriated by the federal government; for example, for a military base, or for reserve

lands previously reduced, without compensation, for a railway right of way. These specific claims settlements are granted generally to right a wrong, not to provide for the financial support of Aboriginal governments. For the most part, Aboriginal people are seeking to replace the land they lost with other land. Payments for specific claims would likely produce temporarily increased economic activity in a local economy and provide only indirect funding to Aboriginal governments, for example, through taxation.²⁵⁴

Recommendation

The Commission recommends that

2.3.23

Revenues arising from specific claims settlements not be considered a direct source of funding for Aboriginal governments and therefore not be included as own-source funding for purposes of calculating fiscal transfers.

Comprehensive claims settlements and treaty land entitlements

Comprehensive claims settlements and treaty land entitlements are another potential source of funding, but again only for some Aboriginal governments and only in an indirect way. Resolution of comprehensive claims or treaty land entitlements can include a financial settlement as well as land as part of the compensation package for the Crown having denied Aboriginal peoples access to and control of their territories.²⁵⁵

In comprehensive land claims settlements, as in specific claims settlements, a payment of funds should not be considered a direct own-source of funding for Aboriginal governments. However, if an Aboriginal government decided to invest the monies from a financial settlement — perhaps through an investment corporation established for the purpose — it would be appropriate in certain circumstances to consider any resulting income as a continuing own-source of funds for that government. Under such circumstances, this kind of funding would also be compatible with the public model if an investment corporation were established under its authority.²⁵⁶

The earnings from the funds (the indirect income) may or may not be included in own-source revenues for purposes of calculating fiscal transfers. If they are used to make loan repayments for funds advanced to finance treaty negotiations, to offset the effects of inflation in order to preserve the value of the principle agreed to in the treaty (cash settlements are usually distributed over a long time — up to 20 years — thus discounting their value), or for charitable activities or community good works, they would not be included.

Interesting precedents in this regard are included in the Atlantic Accord and the Canada-Nova Scotia Offshore Petroleum Resources Accord. For example, the Atlantic Accord addresses, among other matters, revenue-sharing between Canada and Newfoundland with respect to offshore oil and gas and how this revenue would affect the equalization

payments Newfoundland now receives. Article 39 of the accord states, in part, that the two governments recognize that there should not be a dollar for dollar loss of equalization payments as a result of offshore revenues flowing to the Province. To achieve this, the Government of Canada shall establish equalization offset payments.²⁵⁷

Progressive First Nations realize that public financing is required by Native government in order to build the sorts of community Native peoples want. For instance, Westbank wants to use its property tax revenues to arrange financing to build a new community hall to replace the existing small one. There is no structure, however, which allows First Nations to borrow as governments. The absence of an ability to borrow as governments has exacerbated the program of underdevelopment on reserves.

Larry Derrickson
Councillor, Westbank Indian Band Kelowna, British Columbia, 16 June 1993

Two types of offset payments are foreseen, both adjusting for the loss in equalization payments that would result if Newfoundland's own-source revenues increase. The first type provides for a 12 year phase-out of equalization entitlements from the commencement of production (assuming that resource revenues make Newfoundland a 'have' province). The second type provides for federal government payments equivalent to 90 per cent of any decrease in equalization payments compared to the previous year. In the fifth year of offshore production, this offset rate is to be reduced by 10 per cent, then by 10 per cent in each subsequent year.

Recommendations

The Commission recommends that

2.3.24

Financial settlements arising from comprehensive land claims and treaty land entitlements not be considered a direct source of funding for Aboriginal governments.

2.3.25

Investment income arising from Aboriginal government decisions to invest monies associated with a financial settlement — either directly or through a corporation established for this purpose — be treated as own-source revenue for purposes of calculating intergovernmental fiscal transfers unless it is used to repay loans advanced to finance the negotiations, to offset the effect of inflation on the original financial settlements, thereby preserving the value of the principal, or to finance charitable activities or community works.

Borrowing authority

The funding sources and instruments we have identified have focused principally on the operating costs of government. Another important component of financial arrangements is the financing of capital expenditures by means of borrowing money through public offerings and loans from financial institutions.

This is a critical issue for Aboriginal peoples because many of their communities lack basic infrastructure, including schools, good roads and sewage systems. Throughout our public hearings, we heard Aboriginal people deplore the fact that when DIAND devolves responsibility for certain programs or services, the associated funding arrangements are often designed to meet only normal operating costs and not to provide the means to maintain or replace existing infrastructure as it declines in value or utility over time. Moreover, existing financial arrangements under the *Indian Act* severely limit the ability of band governments to pursue independent sources of financing for such capital expenditures because of their lack of corporate capacity and the uncertain legal status of reserve lands. Accordingly, band governments pay very high interest rates on loans.

If Aboriginal peoples decide to exercise self-government at the level of nation or public government, borrowing authority will be an important component of financial arrangements that are designed to support the full range of public expenditures, both operating and capital. The constitutional and legal status of Aboriginal governments under the new relationship would provide the necessary basis to establish these borrowing authorities.

Our preference is really ... to be financially independent from the government. I don't want to have to depend, and my children, on the [federal] government's whim of the day, if they want to send the money that day or not, if the Minister of Finance says, 'We can't afford it', so Indians will become a social program and we can be cut, as they are doing already. That's not the objective ... All we want is recognition of the tools that are required to sustain ourselves economically.

John 'Bud' Morris
Executive Director, Mohawk Council of Kahnawake
Kahnawake, Quebec, 6 May 1993

Financial arrangements for models of Aboriginal government

Earlier in this chapter we elaborated three models of government: nation, public and community of interest. In part, this was to help answer the question, "What might Aboriginal government look like under a new relationship?" The value of these models is to demonstrate, in a practical and understandable way, some of the opportunities and constraints that exist for Aboriginal self-government, as well as the diversity possible within these models.

Funding instruments and sources: compatibility with the models and feasibility

We now examine the funding instruments and sources introduced earlier to show how they fit with each of the models.²⁵⁸ Our focus will be on the extent to which the four

primary sources — own-source revenues, transfers from other governments, funding from treaties and land claims settlements, and borrowing authorities — are practical and feasible for each of these models. Mindful of the principles that should inform the design of financial arrangements for Aboriginal governments, we also indicate whether a particular source of funding is compatible with the operation of a given model.²⁵⁹

Own-source funding

Own-source revenues are a critical component of any self-government arrangement because they provide for a sufficient level of fiscal independence and autonomy to support the effective exercise of governing jurisdiction and authority implicit in such an arrangement. The existence of own-source revenues also allows for important accountability links between governments and the citizens they serve.

All of the own-source funding instruments are compatible with both the nation and the public model of government. This reflects their status as full-fledged governments capable of exercising a broad range of authority over an explicitly defined territory. The practicality or feasibility of these sources for use by either type of government depends on a number of factors, however, including

- the level of income among the citizens or residents within a governing jurisdiction;
- the level of economic activity within these jurisdictions;
- the presence of, and control (either solely or shared) over, certain types of land or natural resources; and
- the level of administrative capacity.

These factors need to be considered on a case-by-case basis for each funding instrument.

The community of interest model is not compatible with many of the own-source revenues. One reason is that many of these funding instruments — for example, personal and corporate taxation, and resource royalties — will simply not be available to community of interest governments, which would have no jurisdiction in these fields. There are exceptions. A portion of municipal taxes, such as those currently available in some provinces for separate schools, would be available. In that case, individuals elect to identify themselves or their property with a particular agency, and the taxes collected flow to that agency. User fees for the delivery of particular services could be a further revenue source.

Examining these sources in detail, we see that personal and corporate income taxation, while compatible with the nation-based and public models, nonetheless poses certain problems in terms of cost-effective administration. These types of taxation are costly to administer and require a large volume of revenues in order to take advantage of economies of scale in collection. It is because of these efficiency considerations that the

federal government collects personal income taxes on behalf of all provincial governments (except Quebec), at no cost to the provinces and remits these revenues to the provinces.²⁶⁰ These arrangements are formally recognized in tax collection agreements negotiated between the federal and provincial governments.

Even a Canada-wide Aboriginal system of income tax collection would be prohibitively expensive. Average collection costs would be high compared to the small volume of revenues to be collected and the fact that the Aboriginal population is widely scattered across the country. This is a reflection of the small population base and the fact that Aboriginal people, as a group, have significantly lower levels of income than other Canadians. A more realistic possibility would see the federal government collect all income taxes and then return the revenues designated for an Aboriginal government back to that government.

Other forms of taxation are available only to the two territorially-based models of Aboriginal government. The feasibility of sales taxes, for example, as revenue source would necessarily depend on the level and nature of economic activity within a particular jurisdiction. Tax collection agreements would also be required for cost-effective administration, although in this case such agreements would likely be negotiated with provincial governments.

Taxes or lease fees on land and property are another likely source of revenue that is considerably easier and less costly to administer than other taxes. Its revenue-producing capacity would depend on the number of private leases and the extent of commercial property in an Aboriginal-controlled territory.

Resource rents and royalties are compatible with both the nation and the public model. Their efficacy as own-source revenue depends, in part, on the nature of tax arrangements (especially where management and control over lands and resources is shared with other governing jurisdictions), as well as on the existence of commercially desirable natural resources in an Aboriginal government's territory.

User fees, licences and fines are compatible with all three models and are likely to be one of the more important sources of revenue for community of interest governments. Their efficacy as a revenue producer is subject to the level of fees that citizens seeking these services are willing to pay. This is less true of fines, unless they are regarded as unfairly high and simply a covert form of taxation.

Proceeds from gaming activities are compatible with all the models. However, this source would not be available to all Aboriginal governments as revenues would depend on the establishment of profitable gambling casinos or large-scale bingo operations in or near densely populated urban centres. However, given the uncertainty and controversy surrounding the issue, it would be better for Aboriginal governments to reach agreements through the treaty processes.

Finally, corporate revenues generated by collectively owned Aboriginal corporations are potentially available to the nation and public models of Aboriginal government. Revenue-raising capacity will depend on the level and nature of economic activity in a particular jurisdiction.

Transfers from other governments

Transfers from other governments are another important source of financing to be considered in the design of financial arrangements for Aboriginal governments. Our focus here is on transfers from the federal and provincial governments. Municipal governments may also be involved in intergovernmental fiscal arrangements, but their relationship with Aboriginal governments is more likely to occur on an ad hoc, contract basis focused on the delivery of particular services.

At the outset, several general observations can be made. All forms of transfers are compatible with territory models. At the same time, however, the mix of transfers available to nation and public governments should be predominantly unconditional in nature. This is consistent with the independent decision-making authority implied by constitutionally recognized self-government. Territory-based governments, when fully developed, are capable of exercising jurisdiction and governing functions over a defined territory, and unconditional transfers will allow for the planning, autonomy and flexibility required to make self-government real. At the same time, such transfers assume an increased administrative capacity on the part of Aboriginal governments.

Governments based on the community of interest model will find unconditional transfers generally incompatible with their governing arrangement. Their jurisdiction is limited by the lack of a defined land and resource base, and by the weakness of authority for the exercise of that jurisdiction, which is likely to be delegated from other governments, either Aboriginal or non-Aboriginal.

Instead, community of interest governments are likely to function more as urban-based institutions delivering programs in the areas of education and social services. Services delivered by municipal and community of interest governments in an urban setting will necessarily have effects beyond their individual jurisdictions, given that all residents — Aboriginal and non-Aboriginal — share the same territory. To account for these potential external circumstances, funding involving conditional transfers would ensure that a basic level of compatibility with services being offered in an urban area is met, while at the same time allowing community of interest governments to control the delivery of these services to reflect the special needs of Aboriginal people. Thus, the intergovernmental fiscal transfers received by community of interest governments would be primarily conditional.

Exploring all these transfers in more detail, we see that those of an unconditional cash nature would need to allow for adjustments to account for both the fiscal capacity and the actual cost of delivering public services. There is also the possibility that unconditional cash transfers could form a component of the finances available to a community of

interest government, perhaps to cover overhead costs of administration. Other unconditional transfers, such as revenue-sharing, grants in lieu of taxes, and northern and isolation allowances, are compatible with the nation and public models. (The rationale for this expenditure needs component, which is a feature of federal-territorial transfers but not a feature of current federal-provincial transfers, was discussed earlier.)

As for conditional transfers, both types — program-conditional and spending-conditional — are available to Aboriginal government of any type. As a general rule, conditional transfers are compatible when the programs or activities they are designed to fund have effects beyond the jurisdiction of the recipient government, or when they are directed at financing large capital projects. In the case of the community of interest model, especially when operating as a single-function government on the basis of delegated authority, conditional transfers are likely to be a primary source of funding.

Entitlements from treaties and land claims settlements

This third funding source is unique to Aboriginal governments and arises from specific claims settlements, comprehensive land claims settlements and treaty land entitlement. These sources of funding are available almost exclusively to nation governments — to nations that have treaties with the Crown, to those engaged in specific-claims processes, and to those that have not yet made treaties. In terms of specific claims, feasibility will depend on whether any monies are owed as part of the treaty obligations or claims settlement. However, as we argued earlier, such funds should not be considered a direct source of funding for these Aboriginal governments.

Nor should any treaty entitlements, such as education entitlements, affect the calculation of the Aboriginal government's fiscal capacity. Moneys flowing from these sources would likely provide only indirect funding for Aboriginal governments. These distinctions would need to be accounted for in determining own-source revenues for purposes of calculating fiscal transfers from other governments. In the case of comprehensive land claims settlements, for example, a payment of funds associated with the settlement should not be considered a direct, own-source of funding for Aboriginal governments.

Borrowing authority

Finally, borrowing to finance capital expenditures, through public offerings or loans from financial institutions, is a funding instrument that is compatible with both the nation and the public model of government. The ability of these governments to use borrowing instruments will depend on their asset base, the stability of their political and fiscal arrangements, and their continued ability to raise own-sources of revenue.

Aboriginal governments based on the community of interest model, in the absence of a defined land base and a consolidated government structure, are more restricted in their ability to use borrowing instruments. We expect that other governments, notably those

based on the nation model, will play an instrumental role in meeting the capital expenditure needs of this form of Aboriginal government.

Toward a Canada-wide framework for fiscal relations among the three orders of government

Financial arrangements to support the functioning of a system of government are rarely the product of a single grand design drawn up at a particular time. The number and variety of factors to consider in such arrangements are so broad and diverse that it would be impossible, in theory or in practice, to design a ‘once-and-for-all’ fiscal master plan that would meet the needs of all citizens and adapt to changing circumstances over time. On the contrary, financial arrangements are inevitably the product of extensive and continuing discussions and negotiations among the officials and elected representatives of the affected governments, who are in the best position to understand the needs of their citizens and to determine what workable arrangements will best equip governments to deal with these demands and responsibilities.

In terms of financing Aboriginal governments under the new relationship, negotiations to develop particular arrangements will occur in two stages. The first step will be the negotiating process discussed here, aimed at establishing a Canada-wide framework to set up the general fiscal relationship among the three orders of government — Aboriginal, federal and provincial. While these negotiations are going on, interim financial arrangements should be made for recognized nations to exercise their core powers. In the second step, building on the Canada-wide framework, negotiations will proceed at the level of individual Aboriginal nations through treaty processes (outlined in Chapter 2) to work out the fiscal arrangements particular to their circumstances and in accordance with the form of government through which they choose to exercise their inherent right of self-government.

Although First Nation people have been invited to partnership we still do not have the resources to implement our traditional ways.

Norma Sorty
Kwanlin dun First Nation
Whitehorse, Yukon, 18 November 1992

Having considered the design of financial arrangements that would be appropriate for individual Aboriginal governments — as they are realized through nation, public or community of interest models of governance — we turn now to the broader fiscal relationship that these governments, collectively, will share with other governments in Canada.

In federal systems, individual constituent governments are rarely completely self-financed. Many areas of responsibility are shared by two orders of government and therefore require joint financing arrangements. As well, there is often a gap between the fiscal needs of governments and their fiscal capacity, requiring a system of intergovernmental subsidies and grants. In Canada, these kinds of fiscal relations,

involving both federal and provincial governments, are currently realized through an umbrella framework called the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act*.²⁶¹ We will now identify some of the key elements that should govern the design and operation of a fiscal framework for Aboriginal governments.

Objectives of a framework agreement for financing Aboriginal governments

The framework should be prefaced by a statement of fundamental objectives for making Aboriginal self-government operational and for the financing of Aboriginal governments. This statement, in turn, should be reflected in the design of fiscal arrangements. In this regard, we offer the objectives of self-reliance, equity, efficiency, accountability and harmonization as a starting point for these negotiations. Moreover, this statement should specify the various commitments of the Aboriginal, federal and provincial governments in fulfilling these objectives.

Transfer regime

At the core of the framework is the development of a regime to govern how fiscal transfers are effected between and among the three orders of government. This regime could comprise the following elements: purpose, nature of receipt, form and basis of calculation.

The transfer regime should specify the purposes to which particular transfers should be directed:

- financial assistance for Aboriginal governments in terms of the general operations of government, infrastructure and so on;
- financial assistance in specific policy or program areas, for transition purposes and/or on a continuing basis;
- availability of financial resources to meet the equity principles articulated in section 36 of the *Constitution Act, 1982*;
- availability of financial resources to meet the regional development principles articulated in section 36 (“furthering economic development to reduce disparity in opportunities”); and
- the application of tax immunity to Aboriginal governments, so that they cannot be taxed by the federal and provincial governments; or
- the eligibility of Aboriginal governments for grants in lieu of taxes from the federal and provincial governments (for example, for highway maintenance, federal and provincial property).

The transfer regime should identify the nature of receipt (conditional or unconditional) for transfers directed to Aboriginal governments. There should be explicit criteria to determine when conditional transfers are appropriate, the manner in which conditions will be identified and how they will be enforced. The nature of receipt should include the principle that as the political and jurisdictional autonomy of an Aboriginal government increases, the proportion of transfers that are conditional in nature should fall.

The regime should also determine the forms in which fiscal transfers will be realized: cash payments, revenue-sharing, grants in lieu of taxes, and northern or isolation allowances.

Finally, the transfer regime should develop a formula to calculate the magnitude of transfers received by particular Aboriginal governments. In addition to the relevant factors considered in typical federal-provincial fiscal transfer formulas, consideration should be given to

- transition and start-up costs for Aboriginal governments established under the renewed relationship;
- the range of own-source revenues particular to the Aboriginal governments to be included;
- the costs borne by Aboriginal governments in the delivery of programs and services (that is, the needs-basis);
- catch-up (equalization) grants and subsidies; and
- equalization offset payments.

Co-ordination mechanisms and agreements

In addition to the development of a transfer regime, the framework should allow for the harmonization and co-ordination of other shared fiscal arrangements through various mechanisms and agreements. A key issue is the negotiation of tax-sharing agreements to co-ordinate the taxing activities of the Aboriginal, federal and provincial orders of government where they share a common tax base and to allow for the collection of certain Aboriginal government taxes (for example, personal income and corporate taxes) by other orders of government when efficiencies can be realized through greater economies of scale.

Implementing the framework

The framework, once negotiated by representatives of federal and provincial governments and national Aboriginal peoples' organizations, should be recognized in a political accord signed by all parties.

Recommendation

The Commission recommends that

2.3.26

Federal and provincial governments and national Aboriginal organizations negotiate

(a) a Canada-wide framework to guide the fiscal relationship among the three orders of government; and

(b) interim fiscal arrangements for those Aboriginal nations that achieve recognition and begin to govern in their core areas of jurisdiction on existing Aboriginal lands.

4. Transition

So far, we have focused our discussion of governance on what must be done to establish a renewed and constructive relationship between Aboriginal peoples, their governments and the other orders of government in Canada. It is important to consider how the transition to this renewed federalism can be made. We conclude the chapter by dealing with transition and capacity-building issues — the ‘how’ questions.

We consider these from the perspective of Aboriginal peoples, as they realize their nationhood, and that of Canadian governments. First, we develop recommendations concerning how to launch the restructured relationship between Aboriginal peoples and Canada and what transitional steps should be taken on the road to self-government. Next, we discuss strategies for Aboriginal people to rebuild their communities and nations and to ensure that their governments have the capacity to be good governments. Third, we recommend changes in the structure of the government of Canada necessary to launch and sustain the renewed governing relationship. Finally, we address the issue of the Aboriginal peoples’ representation in the institutions of the Canadian federation.

4.1 Transitional Measures on the Road to Self-Government

How might we begin to clear a path for Aboriginal peoples to set about the enormous undertaking before them? We see the task in the area of governance as building or rebuilding Aboriginal nations, including financial and administrative support, until they are able to become more economically self-sufficient and administratively autonomous; creating a jurisdictional space within which they can start to act as one of three orders of government instead of as the delegates of the existing orders; and assuring them an adequate land and resource base upon which economic self-reliance and local autonomy can be based.

Each of these actions, which must result from the initiative of Aboriginal peoples themselves, will obviously require the assistance of the other orders of government. Those orders have been the beneficiaries of the lapse in Aboriginal government over the

past century and a half and now purport to occupy all the law-making space and to control the vast majority of the land and resources in Canada. There may also be a legal requirement, in the form of the Crown's fiduciary obligation, for the federal and provincial governments to assist in repairing the damage caused to Aboriginal nations.

In short, the question arises as to how Canada might assure Aboriginal peoples the assistance they want in a way that does not impede or overly restrict Aboriginal peoples in the exercise of their rights. This section sets out our ideas about how this might occur. We foresee a process comprising four distinct but related elements that will clear the path for Aboriginal self-governance:

1. the promulgation by the Parliament of Canada of a royal proclamation and companion legislation to implement those aspects of the renewed relationship that fall within federal authority;
2. activity to rebuild Aboriginal nations and develop their constitutions and citizenship codes, leading to their recognition through a proposed new law, the Aboriginal Nations Recognition and Government Act;
3. negotiations to establish a Canada-wide framework agreement to set the stage for the emergence of an Aboriginal order of government in the Canadian federation; and
4. the negotiation of new or renewed treaties between recognized Aboriginal nations and other Canadian governments.

A royal proclamation and companion legislation

As the first step, the Crown would issue a royal proclamation declaring in unequivocal terms the fundamental principles that will guide the Crown in its future relations with the Aboriginal peoples and nations of Canada. The new royal proclamation would elaborate on and supplement the original principles set out in the landmark *Royal Proclamation of 1763*. It would acknowledge the errors and injustices of the past, recognize Aboriginal nations as possessing the right of self-determination in the form of the inherent right of self-government within the Canadian federation, affirm a continuing commitment to the historical and modern treaties and to the treaty process, and outline a contemporary legislative program to restore the relationship between Aboriginal peoples and the Crown on a foundation of mutual respect. The proclamation would follow upon extensive consultations with Aboriginal peoples and provincial and territorial governments. We described this proclamation in some detail in Chapter 2 and recommended its adoption by the Parliament of Canada. We return to the subject in Volume 5, where we propose a strategy for implementing this report.

Our proposed approach also involves enacting federal companion legislation to commit government to assist new or restored Aboriginal nations to emerge from their present state of fragmentation. This legislation would include the following:

- an Aboriginal Treaty Implementation Act to commit the federal Crown to the treaty renewal and treaty-making processes, to enable its participation in the treaty commissions that would facilitate and oversee the treaty negotiations, and to establish general guidelines for the ensuing negotiations on the reallocation of lands and resources to Aboriginal nations. We discuss these approaches in Chapters 2 and 4 of this volume;
- an Aboriginal Lands and Treaties Tribunal Act to establish and empower a tribunal to deal with specific claims and assist the treaty process. We discuss these measures in detail in Chapter 4;
- an Aboriginal Relations Department Act and an Indian and Inuit Services Department Act to create new federal departments to discharge federal Crown obligations to recognized Aboriginal nations and replace the existing Department of Indian Affairs and Northern Development;
- an Aboriginal Parliament Act to establish a new federal Aboriginal institution;
- amendments to the *Canadian Human Rights Act* to create mechanisms to inquire into harms to Aboriginal peoples and communities as a result of relocations; this recommendation was developed in Volume 1, Chapter 11; and
- an Aboriginal Nations Recognition and Government Act to provide a means for Aboriginal people and communities to come together and obtain federal recognition as nations. This act would amend the *Indian Act* to exclude these nations from provisions that no longer apply as they gain access to their self-government powers, and to provide access to the financial resources recognized Aboriginal governments will need to begin building their government infrastructure before exercising their full self-government powers as a result of the treaty processes.

We discuss most of these proposals elsewhere in this volume. What follows is confined to the proposed Aboriginal Nations Recognition and Government Act. This federal legislation will formally acknowledge the existence of Aboriginal nations and establish the criteria and process for recognition. Some fundamental principles are associated with this proposal, which are based on our conception of Aboriginal nations:

- A broad and flexible standard of Aboriginal nationhood should be embraced, emphasizing the collective sense of Aboriginal identity, shared by a sizeable body of Aboriginal people, and grounded in a common heritage.
- Aboriginal groups might assert their modern nationhood in a variety of ways, incorporating, among other things, modern political affiliations.
- Nationhood is linked to the principle of territoriality. This principle does not require exclusive territorial rights and jurisdiction for an Aboriginal nation and its government to exercise the inherent right of self-governance.

- Except for rare exceptions, Aboriginal nations are not synonymous with *Indian Act* bands or small communities.
- One formula for self-government cannot be expected to satisfy the interests and needs of every Aboriginal nation or meet the requirements for its relations with the other two orders of government.

The proposed recognition and government act would prescribe how the government of Canada would give formal recognition to Aboriginal nations and make explicit what is implicit in section 35 of the *Constitution Act, 1982*, namely that those nations have an inherent right of self-government. The legislation would provide that Aboriginal nations, once recognized, may exercise on their existing territories the law-making capacity they deem necessary in the transition period in core areas of jurisdiction vital to the life and welfare of their people and to their culture and identity. Under this legislation, the federal government would vacate its relevant legislative authority under section 91(24) in such core areas. Further, the act would identify which federal areas of jurisdiction the Parliament of Canada is prepared to acknowledge as being core. The federal government would make a commitment to provide recognized Aboriginal nations with financing commensurate with the scope of the jurisdiction in core areas that they propose to exercise and to help them prepare for renewed treaty negotiations.

To promote greater co-operation and certainty, the government of Canada would negotiate with the provinces and Aboriginal representatives, in the context of the Canada-wide framework agreement, an interim agreement on the core powers that Canadian governments are prepared to acknowledge that Aboriginal nations could exercise once they are recognized. This would reduce the risk of legal conflict. Short of an agreement with all the provinces, the government of Canada would proceed with those provinces that were ready to act.

The full extent of these law-making powers and their application to expanded Aboriginal territory in both core and periphery areas would ultimately be negotiated with the federal and provincial governments in the context of the Canada-wide framework agreement and in the subsequent treaty negotiation.

Although we are proposing *recognition* legislation, Aboriginal nations do not require federal (or provincial) legislation to have the constitutional authority to function as governments. That authority, it will be recalled, has its source outside the Canadian constitution, although it is recognized and affirmed in it. What we are proposing, therefore, is simply legislation to make this explicit and to offer guidance to Aboriginal nations and to Canadian governments on how to facilitate the re-emergence of self-governing Aboriginal nations. To make the context of this legislation clear, it would be useful to have a provision that any law-making powers assumed by recognized Aboriginal nations are not to be construed as contingent, delegated or limited, unless limitations are agreed to through negotiations with the other two orders of government.

The Aboriginal Nations Recognition and Government Act would also clarify other important matters. Among them, federal, provincial and territorial laws would continue to apply to Aboriginal people unless and until displaced by a law passed by a recognized Aboriginal nation acting within its proper sphere of inherent law-making authority. It might also be useful to add a non-derogation provision. This would assure Aboriginal people that recognition will have no impact on existing Aboriginal or treaty rights except to the extent agreed upon through subsequent negotiations.

The most important function of the recognition legislation would be to establish the criteria for formal recognition of Aboriginal nations and the process by which this would take place.

Rebuilding and recognizing Aboriginal nations

As a second element of the transition, we see the process for seeking recognition under the Aboriginal Nations Recognition and Government Act unfolding in three broad stages: (1) a preliminary organizational stage; (2) the stage of preparing an Aboriginal nation's constitution and seeking the endorsement of its citizens; and (3) the stage of seeking recognition under the proposed legislation.

Stage 1: Organizing for recognition

Preliminary consultations with each community could be undertaken by local communities themselves or by larger organizations representing more than one community, a regional or even a national population of Aboriginal people. Tribal councils, provincial associations of *Indian Act* bands and self-governing groups under delegated authority (such as the James Bay Cree and Naskapi), treaty nations, Inuit regional governments or the provincial Métis associations come to mind. Regardless of who begins it, the process of grouping and regrouping scattered elements to rebuild a nation will have to begin from within. The recognition process we foresee is primarily self-directed.

A preliminary step would be for local communities to hold referendums or some other mechanism of community approval to authorize representatives to take the first steps in organizing the nation's institutions, with a view to being recognized. At this first stage, eligibility to vote would, of necessity, be restricted to current members of the community. Thus, in the case of *Indian Act* bands, those eligible to vote would be all band members, including off-reserve members. Where a band operates according to the *Indian Act*, which restricts voting to on-reserve members, it should use custom to enlarge its list of eligible voters for this initial vote to include all members, regardless of residency. In the case of non-status Indian communities, such as the Mi'kmaq in the province of Newfoundland, and Inuit and Métis communities, the list of eligible voters should include everyone considered to be a community member, regardless of where such persons reside.

When a referendum is used rather than a consensus-building approach, we recommend that at least one-third of eligible voters must vote for the referendum to be valid; then, a simple majority of 50 per cent plus one of those actually voting would be sufficient to carry the referendum.

Having received a mandate to pursue recognized nation status, the initiating communities or organization would be in a position to seek funding and other governmental assistance. Funding should be based on a readily understood formula and be used to enable the elements of the Aboriginal nation, be they representatives of communities or of other organizations, to come together to discuss the many items that will have to be resolved; to enumerate all potential citizens of the Aboriginal nation and to inform them how to apply for citizenship; to engage technical and other assistance where required to begin the process of developing a constitution and a citizenship code; to lay out the possible structures of the nation and its government; and to facilitate the internal healing necessary for the successful completion of these preliminary tasks. An important part of this stage will be to begin the healing process in Aboriginal communities where political cohesion has been fragmented.

One of the most important tasks at this stage will be enumerating the nation's potential citizens. For those directly affected by the *Indian Act*, this poses a particular challenge. As discussed in Volume 1, Chapter 9 and Volume 4, Chapter 2, membership has been and remains a contentious issue in many reserve communities. There were real problems with both the substance of Bill C-31 and its implementation. Unfortunately, it appears from the evidence presented to the Commission that sexual discrimination and fundamental unfairness continue to be problems in the status and membership provisions of the *Indian Act* and in their application, despite the 1985 amendments.

Self-government within section 35 of the *Constitution Act, 1982* is subject to the requirement in subsection (4) of equality between the sexes. Ultimately, the artificial and unfair distinctions between status and non-status Indians under the *Indian Act* should be eliminated once Aboriginal nations are properly constituted with all their eligible members. Funding arrangements for Aboriginal nations will no longer be based on such distinctions or on the formulas now used by federal officials that discourage Indian communities from including a broader range of persons in their membership.

Thus, in this first stage in the recognition process, the errors and injustices of past federal Indian policy should be corrected by identifying candidates for citizenship in the Aboriginal nation that include not only those who are currently members of the communities concerned, but also those who desire to be members of the nation and can trace their descent from or otherwise show a current or historical social, political or family connection to a particular community or nation. From this enlarged pool of potential citizens of the Aboriginal nation, an appropriate citizenship code could make rational and defensible distinctions based on the principles contained in the *Constitution Act, 1982*, subsection 35(4), the *Canadian Charter of Rights and Freedoms*, and international human rights instruments.

This task in some cases will undoubtedly give rise to controversy. Potential citizens should be informed as early as possible of the process under way. All those seeking citizenship will be required to indicate the circumstances that give rise to their claim. The requirement to offer evidence of descent or connection to the emergent nation should be reasonable, bearing in mind that written records or other documentary forms of evidence are often not available.

Stage 2: Preparing the nation's constitution and seeking its endorsement

We see the constitution of a recognized Aboriginal nation containing several elements: a citizenship code; an outline of the nation's governing structures and procedures; guarantees of rights and freedoms; and a mechanism for constitutional amendment.

A draft constitution should incorporate a citizenship code that is fair and in harmony with Canadian and international standards (this will have been determined earlier in the nation-rebuilding process). Although domestic and international law in this area is still in its formative stage, there is a small body of case law as well as many statements of principle that together would provide guidance in drafting citizenship codes. Care must be taken to abide by the spirit and intent of domestic and international law and principle, rather than relying on narrow interpretations, for example, to suit the views of a small minority that may now be enjoying the advantages of recognized membership under the *Indian Act*. If a citizenship code is overly exclusive, this could be grounds for a recognition panel, established under the provisions of the proposed Aboriginal Lands and Treaties Tribunal (see Chapter 4), to recommend against recognition and propose steps to make the code more inclusive.

Aboriginal people with a rational connection to a particular community or nation, whatever their current residence or circumstances, should be given a fair opportunity to acquire citizenship, should they so desire, according to fair standards fairly applied. A nation's code would be applied by an impartial body or bodies selected by the membership of the initiating communities or organization. The task of applying the code justly will be an onerous one, and we urge selection of persons with broad vision and the greatest integrity. It will also be crucial to develop an appeal mechanism to ensure that citizenship decisions are subject to a second impartial review. Indeed, the existence of an appeal process should be a condition of recognition in the recognition act. The appeal mechanism should be at the nation level rather than the community level. A nation-level appeal mechanism will ensure consistency of decisions between and across communities.

In the second stage, developing the citizenship code and the bodies to apply it will be one of the first tasks in moving toward recognition. Those deemed to be citizens through these processes will participate in drafting and ratifying a nation's fundamental laws or constitution. The structure of government and how it will function may also be set out clearly in the draft constitution. The paramount consideration will be the presence of internal checks and balances to ensure the smooth running of the proposed government. Many traditional governance systems contain just such mechanisms, and we will not make specific recommendations in this regard. Obviously, one of the challenges facing

modern Aboriginal nations will be adapting traditional mechanisms to modern conditions.

In any event, the constitution should contain an outline of the governing structures and their rules and procedures. It should also provide for a system of impartial and independent review of the executive or administrative decisions of the government and public officials. The grounds for review should include alleged illegalities under the constitution and applicable laws, and unreasonableness or lack of fairness in substance or procedure. Citizens need to have a way of challenging government actions without resorting to civil disobedience or other socially disruptive forms of protest. In this regard, the draft constitution could also contain mechanisms for removing elected and appointed officials from office and identify the grounds for their removal.²⁶²

Although the *Canadian Charter of Rights and Freedoms* will protect the individual rights of citizens, if Aboriginal nations develop their own charters or recognize conventions or traditional practices that would offer interpretive assistance in applying Canadian Charter protections, these should also be set out in a nation's constitution. Finally, a constitution should contain a provision describing how it can be amended as well as a description of the territory over which the Aboriginal nation will exercise governance.

At all stages of development of a draft constitution, the process must be an open one to ensure that all views are canvassed. Persons who have become citizens at this stage of the process should have an opportunity to take part in discussions on preparing a draft constitution. A number of approaches could encourage broad participation: questionnaires could seek the views of all concerned; the draft constitution could be circulated to all citizens; discussion of the draft constitution could occur through community- and nation-based media; and a variety of ratification procedures could be used to address the circumstances of different groups. For example, provisions could be made for mail-in voting, and voting facilities could be established in urban centres.

A draft constitution should be subject to a 'double majority' standard of ratification before it is adopted. The draft constitution would be presented for approval in a referendum to all individuals who are citizens. Given the historical policies that led to the forced removal or emigration of community members from their home communities, it is likely that the citizenry accepted under the citizenship code will be larger than the total membership of the individual communities that have come together to seek recognition.

Given the importance of the matters being voted on, we recommend that at least 40 per cent of eligible voters vote before a referendum is considered valid and that 50 per cent plus one be needed to achieve the first of the double majority requirements.

As a second requirement of the double majority ratification process, we propose that acceptance of a draft constitution require the approval of a majority in each of the communities that have come together to seek recognition. The objective of this requirement is to preserve the primacy of established communities in the important decisions that will have to be made on the road to recognition.

In our view, a majority of those voting in a community would have to approve the constitution for that community to participate in the new nation government, and a strong majority of communities, say 75 per cent, would be required to ratify the package before the double majority could be said to have been met. Communities that do not decide to join an Aboriginal nation will remain under current *Indian Act* arrangements but will be entitled to join the nation at any time in the future.

To sum up, a draft constitution would be considered adopted as drafted if 40 per cent of the eligible voters participated in the referendum; if the constitution was approved by 50 per cent plus one of those eligible voters across the nation as a whole (the first majority); and if a simple majority of those voting in each community approved the constitution in 75 per cent of the communities (the second majority).

It may also be advisable, given the extreme importance of the ratification stage, that the entire double majority voting process be monitored by outside observers. In this regard, observers from other Aboriginal nations or Elections Canada officials could assist. The important thing will be to ensure due process.

Stage 3: Getting recognition

Assuming that a nation's constitution is approved and the decision to seek recognition under the Aboriginal Nations Recognition and Government Act is endorsed, the third stage would be an application for recognition. In our view, application for recognition should be made to a neutral body, a recognition panel appointed by, and operating under, the proposed lands and treaties tribunal. The panel would consist of a minimum of three persons, the majority of whom would be Aboriginal. It would have broad investigative powers to ensure that the criteria for recognition established in the Aboriginal Nations Recognition and Government Act had been met and that fundamental fairness had been observed in the processes leading to the application.

The authorized representatives of an Aboriginal nation would submit to the recognition panel a draft of their proposed constitution along with evidence that the referendum had been held and that citizens had given their consent. The recognition panel would make a recommendation to the governor in council (the cabinet) once it had reviewed the application against established criteria. If, for any reason, the panel recommended against recognition, the panel would provide reasons for its recommendation and guidance on how its concerns might be addressed. Although the government would not be obliged to accept the panel's recommendation, it would have to have compelling reasons not to do so and should be required to state those reasons publicly. Recognition would be accomplished by an order in council published in the *Canada Gazette*.

The Aboriginal Nations Recognition and Government Act should amend the *Indian Act* to clarify that the provisions of the *Indian Act* would apply to a recognized Aboriginal nation exercising powers under section 35 of the *Constitution Act, 1982*, but only to the extent the nation wishes.

We make no particular recommendation regarding the amendment or repeal of the *Indian Act*. The future of this act, and particularly the issue of lands, resources and the fiduciary obligation that attaches to reserve lands under the *Indian Act*, are matters that should be subject to negotiations. As a practical matter, withdrawal from the *Indian Act* regime should be phased to provide an appropriate transition period for bands that become part of recognized Aboriginal nations under the proposed recognition and government act. Once recognized, a nation government should receive enhanced funding to exercise expanded powers for its increased population base. In the longer term, the exercise of powers by Aboriginal nations and their governments will be dealt with through the comprehensive treaties that we see as the end products of negotiations between the federal and provincial governments and recognized Aboriginal nations. These agreements will be ratified by Parliament and the relevant provincial legislatures, so as to be binding on Canada and the provinces, and, as treaties, will have constitutional protection.

Recommendation

The Commission recommends that

2.3.27

The Parliament of Canada enact an Aboriginal Nations Recognition and Government Act to

- (a) establish the process whereby the government of Canada can recognize the accession of an Aboriginal group or groups to nation status and its assumption of authority as an Aboriginal government to exercise its inherent self-governing jurisdiction;
- (b) establish criteria for the recognition of Aboriginal nations, including
 - (i) evidence among the communities concerned of common ties of language, history, culture and of willingness to associate, coupled with sufficient size to support the exercise of a broad, self-governing mandate;
 - (ii) evidence of a fair and open process for obtaining the agreement of its citizens and member communities to embark on a nation recognition process;
 - (iii) completion of a citizenship code that is consistent with international norms of human rights and with the *Canadian Charter of Rights and Freedoms*;
 - (iv) evidence that an impartial appeal process had been established by the nation to hear disputes about individuals' eligibility for citizenship;
 - (v) evidence that a fundamental law or constitution has been drawn up through wide consultation with its citizens; and

- (vi) evidence that all citizens of the nation were permitted, through a fair means of expressing their opinion, to ratify the proposed constitution;
- (c) authorize the creation of recognition panels under the aegis of the proposed Aboriginal Lands and Treaties Tribunal to advise the government of Canada on whether a group meets recognition criteria;
- (d) enable the federal government to vacate its legislative authority under section 91(24) of the *Constitution Act, 1867* with respect to core powers deemed needed by Aboriginal nations and to specify which additional areas of federal jurisdiction the Parliament of Canada is prepared to acknowledge as being core powers to be exercised by Aboriginal governments; and
- (e) provide enhanced financial resources to enable recognized Aboriginal nations to exercise expanded governing powers for an increased population base in the period between recognition and the conclusion or reaffirmation of comprehensive treaties.

A Canada-wide framework agreement

The third element necessary to establish Aboriginal nations as one of three orders of government is a Canada-wide framework agreement to guide the development of subsequent treaties and self-government agreements between recognized Aboriginal nations and the federal and provincial governments.

The development of this framework agreement would involve broad and sustained consultations between the federal and provincial governments and the representatives of Aboriginal peoples. This process should begin within six months after the publication of this report and should be a prominent feature of a special first ministers conference we believe should be called early in 1997 to consider implementation of this report. A final, Canada-wide framework agreement should be in place no later than the year 2000 if positive momentum is to be maintained and if federal and provincial good faith toward Aboriginal peoples is to be demonstrated.

It will be vital that adequate financing be made available to the national Aboriginal organizations to enable them to consult properly with and adequately represent their member populations and communities during the process of developing the framework agreement. These funds should be provided according to a reasonable and generally agreed basis of calculation. The willingness of the existing two orders of government to provide financial assistance at this early stage will be a barometer of the commitment of Canadians to the process.

The framework discussions should have three primary purposes: to achieve agreement on the areas of Aboriginal self-governing jurisdiction; to provide a policy framework for fiscal arrangements to support the exercise of such jurisdiction; and to establish principles to govern negotiations on lands and resources and on agreements for interim relief with respect to lands subject to claims, to take effect before the negotiation of treaties.

Concerning the first purpose, what are the potential areas of Aboriginal jurisdiction that would be listed in the Canada-wide framework agreement? The following is a tentative list of the areas of self-government that we see accruing to recognized Aboriginal nations, pursuant to their inherent right. This list includes examples of the core and peripheral jurisdiction discussed earlier in this chapter. It was derived from the scope of section 91(24) and the implied principles reflected in section 35 of the *Constitution Act, 1982* as refined by the *Sparrow* test. It is evident that not every Aboriginal government will wish to have access to all these areas of jurisdiction. Some may choose to exercise them later. This list is a suggested starting point for the negotiations that must occur if the framework agreement is to encompass the extent of Aboriginal nations' law-making powers:

- constitution and governmental structures
- citizenship
- elections and referendums
- access to and residence in the territory
- lands, waters, sea-ice and natural resources
- preservation, protection and management of the environment, including wild animals and fish
- economic life, including commerce, labour, agriculture, grazing, hunting, trapping, fishing, forestry, mining, and management of natural resources in general
- operation of businesses, trades and professions
- transfer and management of public monies and other assets
- taxation
- family matters, including marriage, divorce, adoption and child custody
- property rights, including succession and estates
- education
- social services and welfare, including child welfare
- health
- language, culture, values and traditions

- criminal law and procedure
- the administration of justice, including the establishment of courts and tribunals with civil and criminal jurisdiction
- policing
- public works and housing
- local institutions

The second purpose of the Canada-wide framework agreement will be to establish a policy framework for fiscal arrangements to support the exercise of those powers once the treaty process has been completed. The policy framework must flow from and reflect the principles we suggest for new financial arrangements:

- A renewed relationship requires fundamentally new fiscal arrangements in which the accountability procedures for Aboriginal nations are not more onerous than those imposed on the federal and provincial governments.
- The fiscal and political autonomy of Aboriginal nations should grow together, so that as they become more politically and administratively autonomous, the share of federal and provincial transfer payments that is conditional diminishes.
- Financial arrangements should provide greater fiscal autonomy for Aboriginal governments by increasing their access to independent own-source revenues founded on the fair and just distribution of lands and resources to Aboriginal nations and enhanced economic development and the development of their own systems of taxation.

The third purpose of the agreement should be to establish the principles on which a fair and just distribution of lands and resources to Aboriginal nations can be accomplished. Negotiations concerning lands and resources must accompany self-government and fiscal negotiations if they are to be accomplished within a reasonable time and produce acceptable results for Aboriginal nations that will give them the measure of autonomy due to them in a renewed federation. In the next chapter we outline the principles that must guide these negotiations — principles that should be reflected in the framework agreement:

- Aboriginal title is a real interest in land that contemplates a range of rights with respect to lands and resources and is recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.
- The Crown has a special fiduciary duty to protect the interests of Aboriginal peoples, including Aboriginal title, requiring it to protect the Aboriginal land and resource rights fundamental to Aboriginal economies and to the cultural and spiritual life of Aboriginal peoples.

- Blanket extinguishment of Aboriginal land rights will not be required in exchange for rights or other benefits contained in an agreement, and partial extinguishment of Aboriginal land rights will not be made a precondition for negotiating agreements but will be considered only after careful and exhaustive analysis of alternatives.
- All agreements regarding lands and resources will be subject to periodic review and renewal.
- Agreements regarding lands and resources will contain dispute resolution mechanisms tailored to the circumstances of the parties.

For additional clarity, and to allay any possible suspicions regarding the intent of the federal and provincial governments, the Canada-wide framework agreement should also contain a clear statement to the effect that the requirement to negotiate the extent of Aboriginal nation law-making powers is in no way to be construed as considering them contingent powers dependent on the delegation of federal, provincial or territorial law-making authority.

Transition from Aboriginal dependency on federal and provincial governments to greater political autonomy will be neither swift nor without obstacles and problems. Accordingly, it might also be useful for the framework agreement to provide for interim arrangements that would be without prejudice to the long-term negotiations. Existing jurisdictional arrangements could be preserved, or Aboriginal nation self-government powers could be implemented in stages. There are many precedents for such arrangements in recently concluded self-government agreements, such as those in the Yukon and Northwest Territories.

The advantage of a framework agreement is that it will provide guidance to the parties in the subsequent treaty negotiations, saving time, effort and expense. It will also encourage greater fairness across Aboriginal nations in treaty negotiations, because nations with less bargaining power can take advantage of provisions negotiated by Aboriginal organizations or nations bargaining from a position of greater strength.

Subsequent negotiations between individual recognized Aboriginal nations and the federal and provincial governments will build on the framework agreement negotiated by the national Aboriginal organizations. For Aboriginal nations that already have treaties, these subsequent agreements may amount to new treaties, implementation and renewal of their original treaties, or protocols regarding interpretation of the original treaties.

Recommendation

The Commission recommends that

2.3.28

The government of Canada convene a meeting of premiers, territorial leaders and national Aboriginal leaders to create a forum charged with drawing up a Canada-wide framework agreement. The purpose of this agreement would be to establish common principles and directions to guide the negotiation of treaties with recognized Aboriginal nations. This forum should have a mandate to conclude agreements on

(a) the areas of jurisdiction to be exercisable by Aboriginal nations and the application of the doctrine of paramountcy in the case of concurrent jurisdiction;

(b) fiscal arrangements to finance the operations of Aboriginal governments and the provision of services to their citizens;

(c) principles to govern the allocation of lands and resources to Aboriginal nations and for the exercise of co-jurisdiction on lands shared with other governments;

(d) principles to guide the negotiation of agreements for interim relief to govern the development of territories subject to claims, before the conclusion of treaties; and

(e) an interim agreement to set out the core powers that Canadian governments are prepared to acknowledge Aboriginal nations can exercise once they are recognized but before the renegotiation of treaties.

Negotiation of new or renewed treaties

As a fourth step in the transition leading to full self-government, Aboriginal nations recognized under the Aboriginal Nations Recognition and Government Act may proceed to enter into treaty negotiations with the federal and provincial governments for a new or renewed treaty relationship. These negotiations, described in Chapter 2 of this volume, would include expanding lands and resources over which an Aboriginal nation would have sole control and jurisdiction, and identifying a further area of its traditional territory in which it would have shared jurisdiction with other governments.

Having passed through the recognition process, Aboriginal nations would also be able to negotiate directly with the federal and provincial governments in political and constitutional forums for redress of their historical grievances without arousing concerns about representation and membership issues that were evident during the constitutional discussions in the 1980s or that have reached the courts more recently. For example, a single Métis nation or several Métis nations might emerge from this process. Métis people would no longer have to justify their collective presence and explain what they believe their self-government rights to be. They would be able to move directly into power- and resource-sharing negotiations with federal and provincial governments.

At this stage, Aboriginal nations would be entitled to enter into fiscal transfer arrangements as negotiated under the framework agreement with the federal and provincial governments. The scale of funding will be related to the scope of powers to be

exercised by an Aboriginal nation and the corresponding services to be delivered within the limits negotiated in the Canada-wide framework agreement.

Although jurisdiction over core areas would accrue to Aboriginal nations upon their recognition, no sovereignty is absolute or exclusive in any federation; nor are the law-making powers associated with that sovereignty. For example, the law-making powers of Parliament and the provincial legislatures have undergone a process of harmonization that continues to this day as the Canadian federation evolves and adapts to new challenges and changing economic circumstances. In the same way, the law-making powers of Aboriginal nations will need to be harmonized with those of the federal and provincial governments if the federation is to move forward in a renewed relationship on the basis of consensus and mutual respect.

Following recognition of an Aboriginal nation, there will be great pressure on the federal and provincial governments to arrive at workable arrangements that will satisfy the needs and aspirations of Aboriginal nations, and preserve a strong measure of predictability and co-operation between neighbouring jurisdictions. In the same way, given their need to build a government infrastructure, acquire stable sources of funding, and draw the population together into cohesive and functioning societies, newly recognized Aboriginal nations will be highly motivated to arrive at practical arrangements to make this possible.

The more difficult issues can and should be left for the negotiation process, seen as taking place within the context of the Canada-wide framework agreement, and the subsequent individual treaty negotiations. These include the full scope of potential Aboriginal jurisdiction; the paramountcy to be accorded to Aboriginal or to federal and provincial laws in cases of shared jurisdiction; the exact nature of the long-term system of fiscal transfers; the size and nature of land allocations; and many related issues. These negotiations will culminate in treaties within the meaning of section 35 of the *Constitution Act, 1982*.

In the final analysis, resolving all the issues raised in this chapter will be for the parties — the new partners in Confederation — to achieve. The process described here is intended only as illustration. By definition, a federation is a flexible and evolving entity, and the shape and direction it takes must likewise be somewhat flexible and capable of responding to change. If there is one quality that Aboriginal and non-Aboriginal Canadians have shared historically and continue to share, it is the ability to be flexible, to respond to change, and to look to the future with hope and confidence. It is in this spirit that we offer these suggestions for transition.

4.2 Capacity Building: Aboriginal Strategies for the Transition to Self-Government

The Commission's vision of Aboriginal governance is one in which Aboriginal peoples are free to determine the form of political organization and government that is appropriate for them. To assume their rightful place in this vision, Aboriginal peoples need to have at their disposal tools to ensure their success in reclaiming nationhood, in

constituting effective governments, and in negotiating new relationships with the other partners in the Canadian federation.

Earlier in this chapter we identified three basic attributes of effective government: power, legitimacy and resources. We are concerned with the legitimacy of Aboriginal governments, the confidence and support they enjoy, and the resources needed to support them throughout the transition process. Legitimacy will be determined by the way Aboriginal governments are created and structured, the way leaders are selected and held accountable by the people, and the extent to which basic human rights are respected. The capacities of government, especially the people who will propel and steer Aboriginal government, are equally important.

Our discussion of these issues is organized around the capacities and strategies that will be required to effect the transition to a future in which Aboriginal governments are fully functional as one of three orders of government. Throughout the transition process, Aboriginal people will need capacities and strategies that allow them to

- rebuild Aboriginal nations and reclaim nationhood;
- set up Aboriginal governments;
- negotiate new relationships and intergovernmental arrangements with the other two orders of government;
- exercise Aboriginal governmental powers over the longer term; and
- support the building of all these capacities.

Capacity to rebuild Aboriginal nations and reclaim nationhood

The colonial experience and its legacy have touched all Aboriginal people in Canada in some way. The effects of colonialism have been felt not only by individuals, families and communities but also in political structures and activities. This legacy has disrupted many of the institutions essential to Aboriginal governance.

The reclaiming of Aboriginal nationhood is an aspiration actively sought by Aboriginal peoples. It is a key to unlocking Aboriginal autonomy and creates the tools that can be used to reduce dependency, disparity and marginalization and to ensure cultural and political survival.

In practical terms, organizing beyond the community level in the larger political unit of the nation will enable Aboriginal peoples to develop their own laws, institutions and services through governments that command greater power and influence than current community-level arrangements. The aggregated wealth and assets of a nation can be administered for the benefit of the nation as a whole. Duplication of key services, in

health and education, for example, can be eliminated and improvements in the quality of those services realized when they are redesigned to serve the nation.

Rebuilding and reclaiming nationhood will be a daunting challenge for some Aboriginal peoples but one that we believe can be met through strategies of healing and reconciliation. These strategies must be designed and directed by Aboriginal people themselves, drawing upon their initiative, imagination and energy. While the main responsibility for rebuilding Aboriginal nations rests with Aboriginal people, given the central role played by the Crown in colonizing Aboriginal nations, processes to rebuild them should receive the full support of Canadian governments.

What then can be done by Aboriginal peoples to rebuild their nations and reclaim nationhood? What can Canadian governments do to aid this process? We believe that developing the capacity of Aboriginal peoples to rebuild their nations has to take place at both the community and the nation level and involves two primary but interrelated dimensions: cultural revitalization and healing, and political processes for consensus building.

Cultural revitalization and healing

Cultural education and awareness will be vital to the rediscovery and revitalization of an Aboriginal nation. The objective of these activities and processes is to build strength and self-esteem in nations and to build nation identity. Cultural revitalization might include the gathering and sharing of knowledge about history, languages, traditions, customs and values. These activities can involve all members of an Aboriginal community but would likely require the special participation of elders, teachers and traditionalists.

Such activities might include organizing research and cultural circles; establishing history and language projects; developing profiles of role models; holding meetings with elders; and offering discussion groups for all ages aimed at restoring self-confidence, pride and self-esteem. These activities might be designed for various social groups, such as families, educators, and political leaders, and could be undertaken by single communities or co-operatively by a number of communities that share cultural ties.

Cultural healing and revitalization aimed at reclaiming nationhood will require capacities in research and education, the preparation of teaching materials, and public communication efforts at the community level and beyond. Resources will have to be organized in support of these activities. These processes might dovetail with the implementation of recommendations in other parts of our report — those concerned with education and health and healing in particular. We see a strong link between cultural healing as part of nation building and the recommendations for healing made in Volume 3 of this report, particularly in Chapter 5 on cultural institutions, where we recommend community-level strategies to counter language shift and further erosion of Aboriginal culture and knowledge.

Political processes for consensus building

The types of cultural healing and revitalization activities we describe are central to reclaiming nationhood. But these need to be complemented by a process to develop consensus around re-empowering nations for political and governmental action.

The transition process we proposed assumes the development of consensus, first within the community — because it is at this level that most Aboriginal peoples are organized today — and then at the nation level. All members of Aboriginal communities, including women, elders, elected representatives, teachers, healers, artists and others must be involved in reclaiming their culture and identity and reaching consensus about their political future. Initially, this might involve the sparking of public discussion by groups representing a cross-section of the community or particular segments of the community. Alternatively, individuals from within the community might be appointed or come forward voluntarily to act as facilitators in consensus building and as catalysts in starting the process of public discussion.

These individuals or groups would be responsible for collecting and disseminating information on the nation-building process, determining levels of community interest, identifying concerns about or opposition to the focus on nationhood, and generally facilitating the exchange of views and information.

Special consideration will need to be given to establishing links with community members who live away from the community, who have been excluded from participating in community political and social life because of non-residence, or because of loss of Indian status or their own alienation and distrust of community leaders and political processes.

Efforts should be made to ensure that consensus-building activities are co-ordinated with cultural healing and revitalization projects and other social healing processes.

Informal processes of information gathering and sharing and consensus building should eventually give way to more formal processes, culminating in confirmation by the community, through a referendum or other ratification process, of the community's desire to participate in further nation-building exercises organized at the nation level and to establish nation-level organizations and leaders to represent their interests.

Preliminary nation-building activities and processes involving communities that share a nation affiliation should be organized on a broader basis, concurrently with those taking place at the community level. These preliminary forums for nation building should be concerned, initially, with planning and organizing nation-level political organizations and structures and with establishing protocols and agreements on Aboriginal nationhood and processes by which communities can join together under the umbrella of an Aboriginal nation.

Recommendation

The Commission recommends that

2.3.29

Aboriginal peoples develop and implement their own strategies for rebuilding Aboriginal nations and reclaiming Aboriginal nationhood. These strategies may

- (a) include cultural revitalization and healing processes;
- (b) include political processes for building consensus on the basic composition of the Aboriginal nation and its political structures; and
- (c) be undertaken by individual communities and by groups of communities that may share Aboriginal nationhood.

Aboriginal communities and nations should have access to financial and other assistance to aid in developing and implementing these processes. Of critical importance to nation rebuilding is the willingness of other governments, notably the government of Canada, to support and assist in a neutral and non-interfering manner in the preliminary and subsequent phases of the transition to Aboriginal self-government.

The Commission proposes the establishment of a national centre to co-ordinate and oversee the provision of assistance and support to Aboriginal nations in capacity building through all stages of the transition process, from reclaiming Aboriginal nationhood to implementing Aboriginal governments. We believe that this centre will have a significant role to play in supporting preliminary, pre-nation organizational activities at the community level, including cultural revitalization and healing and political consensus-building processes, as well as the emergence of nation-level political structures. While this centre would have a catalytic role in supporting the transition to Aboriginal self-government, we foresee both mainstream and Aboriginal-controlled educational institutions and organizations centrally involved in delivering support services, programs and projects to Aboriginal peoples and governments.

Recommendations

The Commission recommends that

2.3.30

The federal government, in co-operation with national Aboriginal organizations, establish an Aboriginal government transition centre with a mandate to

- (a) research, develop and co-ordinate, with other institutions, initiatives and studies to assist Aboriginal peoples throughout the transition to Aboriginal self-government on topics such as citizenship codes, constitutions and institutions of government, as well as processes for nation rebuilding and citizen participation;

(b) develop and deliver, through appropriate means, training and skills development programs for community leaders, community facilitators and field workers, as well as community groups that have assumed responsibility for animating processes to rebuild Aboriginal nations; and

(c) facilitate information sharing and exchange among community facilitators, leaders and others involved in nation rebuilding processes.

2.3.31

The federal government provide the centre with operational funding as well as financial resources to undertake research and design and implement programs to assist transition to self-government, with a financial commitment for five years, renewable for a further five years.

2.3.32

The centre be governed by a predominantly Aboriginal board, with seats assigned to organizations representing Aboriginal peoples and governments, the federal government, and associated institutions and organizations.

2.3.33

In all regions of Canada, universities and other post-secondary education facilities, research institutes, and other organizations, in association with the proposed centre, initiate programs, projects and other activities to assist Aboriginal peoples throughout the transition to Aboriginal self-government.

Capacity to set up governments

Once consensus on the composition of an Aboriginal nation and its political structures has been reached by participating Aboriginal communities, Aboriginal peoples will have to engage in a formal process of setting up their governments. This is the second stage of our proposed process for rebuilding and recognizing Aboriginal nations; it precedes formal recognition under the proposed recognition and government act, but culminates in a mandate to seek formal recognition.

Activities at the nation level will be focused on preparing for recognition. At this stage, development activities and associated capacity requirements will be concerned with

- designing and planning distinctive Aboriginal nation governments and reflecting these in the constitutions and laws of the nations; and
- developing education and communication strategies to ensure community input into constitution development processes and, ultimately, in preparation for ratification of the draft constitution before recognition is sought.

At this stage, Aboriginal people require the capacity to determine the form, key features and dimensions of their governments; to plan and design structures, institutions and procedures; to determine the scope of government operations and how Aboriginal government authority is to be exercised and distributed among different components of the nation; and to define the extent to which traditional forms of political organization will be incorporated or adapted in new or restored Aboriginal governments.

As noted by the Kwakiutl district chiefs, people must be adequately prepared to plan, manage and support such processes.

Community members are their own experts on defining the scope/goals of a treaty and their needs with the process. However, leaders, staff and others engaged in the land and sea question require support in information and skill development to facilitate this definition and planning process. 'How do we get started'; 'What kind of research is necessary' are questions which illustrate expressed concern at community levels.²⁶³

The planning, design and development of Aboriginal governments will require the capacity to identify and consider options and make informed decisions with confidence; it will also require access to the necessary technical expertise.

Recommendation

The Commission recommends that

2.3.34

The Aboriginal government transition centre support Aboriginal nations in creating their constitutions by promoting, co-ordinating and funding, as appropriate, associated institutions and organizations for initiatives that

(a) provide professional, technical and advisory support services in key areas of Aboriginal constitutional development, such as

- citizenship and membership;
- political institutions and leadership;
- decision-making processes; and
- identification of territory;

(b) provide training programs to the leaders and staff of Aboriginal nation political structures who are centrally involved in organizing, co-ordinating, managing and facilitating constitution-building processes;

(c) provide assistance to Aboriginal nations in designing and implementing community education and consultation strategies;

(d) assist Aboriginal nations in preparing for, organizing and carrying out nation-wide referenda on Aboriginal nation constitutions; and

(e) facilitate information sharing among Aboriginal nations on constitutional development processes and experiences.

Capacity to negotiate new intergovernmental arrangements

Assuming that Aboriginal nations receive recognition under the proposed recognition and government act, they will move to the negotiation phase of the transition to Aboriginal government. They will have been recognized as the political unit capable of exercising the inherent right of self-government.

Nations will undertake two main types of transition activities:

- implementation of Aboriginal nation government, with government activities focused on core areas of jurisdiction and, where appropriate, on retained areas of *Indian Act* governance, on an interim and transitional basis; and
- preparation for the negotiation and subsequent ratification of treaties, including lands and resources agreements, agreements regarding the scope of Aboriginal legislative jurisdiction, in relation to both core and periphery areas, and financial arrangements.

Our focus here is on measures and special initiatives to support negotiation activities. Aboriginal nations will require strategies and capacities for negotiating new relationships and renewing existing relationships with other governments in Canada. This will require the ability to develop consensus around the nature of the relationship to be negotiated or renewed, and to undertake technical negotiations with other governments. We have noted that Aboriginal people and governments already have extensive experience in negotiations and negotiating skills in a broad range of areas. However, we anticipate that this skills base will have to be expanded.

Currently there are few, if any, organized programs for developing negotiating skills. The pool of candidates who can assume positions as negotiators for Aboriginal governments or organizations is accordingly limited. We think that the proposed new national centre and its associated institutions and organizations would have a role to play in this area.

We also believe that the period of negotiation will place special demands on the leaders of Aboriginal nation governments to approve negotiation mandates, support negotiators, and establish and participate in processes to inform their members of developments during negotiations.

Recommendation

The Commission recommends that

2.3.35

The Aboriginal government transition centre promote, co-ordinate and fund, as appropriate, in collaboration with associated institutions and organizations, the following types of initiatives:

(a) special training programs for Aboriginal negotiators to increase their negotiating skills and their knowledge of issues that will be addressed through negotiations; and

(b) training programs of short duration for Aboriginal government leaders

- to enhance Aboriginal leadership capacities in negotiation; and
- to increase the capacity of Aboriginal leaders to support and mandate negotiators and negotiation activities, as well as nation-level education, consultation and communication strategies.

Capacity to exercise governmental powers over the long term

Immediately following recognition, Aboriginal governments will be in a position to act in what they see as core areas of jurisdiction. However, we anticipate that community-level administrative systems and structures, such as those associated with the *Indian Act*, may remain operative for a period of time, working in parallel and co-operatively with emergent nation governments. They may also be adapting and restructuring themselves to assume new government functions and responsibilities within the framework of nation government. Thus, community government structures, such as band and tribal councils and associated administrative organizations, could retain their role in the short and medium term following recognition.

Certain strategies and capacities are needed to sustain Aboriginal government operations. Our recommendations address the following:

- human resource capacity generally, particularly in fields not covered in other areas of the report (for example, management and administration, leadership);
- accountability capacities; and
- statistical and data collection capacities.

We also recommend a special program of partnerships between Aboriginal governments and Canadian governments of similar size and scope of operations.

Current Aboriginal human resource base

One of the most significant challenges confronting Aboriginal governments will be to bring together and maintain a trained, professional Aboriginal public service to carry out the many functions of Aboriginal government. As noted in Volume 3, Chapter 5 (especially the section on education for self-government), the pool of trained Aboriginal people has grown steadily over the past two decades, encompassing a wider range of skills and professions. Aboriginal people now operate governments and single- and multi-function organizations and institutions of diverse sizes and degrees of complexity. They deliver myriad programs and services and manage budgets and staff. Notwithstanding dramatic growth in their administrative and service delivery capacity over the last two decades, Aboriginal governments face a shortage of skilled human resources drawn from their own ranks to fill the wide range of jobs that will accompany Aboriginal self-government. (A more detailed analysis of the current Aboriginal human resource base and its capacity to meet the demands of Aboriginal self-government is reviewed in Volume 3, Chapter 5.)

While it is difficult to estimate the exact requirements of Aboriginal governments, we anticipate that, at a minimum, people with the following experience and skills will be needed:

- negotiators
- leaders
- program managers and evaluators
- social animators
- engineers
- storytellers
- traditionalists
- cultural experts
- judges and lawyers
- elders
- artists
- administrators
- human resource managers
- economists

- communicators
- linguists
- financial administrators and managers
- accountants
- healers
- scientists

This list is not exhaustive; there will be a large demand for specialized technical and related skills in key service sectors, including housing, economic development, health and healing, justice and education. Other parts of our report are concerned more specifically with developing government institutional and human resource capacities in key service delivery areas (see, for example, Volume 3, Chapters 2 to 5).

Data from the 1991 Aboriginal peoples survey and the 1991 census suggest that the range of skills and professional qualifications held by Aboriginal people will need to be broadened to meet the demands of an emergent Aboriginal public service. Although some of the human resource needs of Aboriginal governance can be met from the current pool of skilled people, in many areas the demand for qualified Aboriginal people will outstrip the supply of candidates for some years to come.

Aboriginal governments currently contract with Aboriginal and non-Aboriginal consultants and professionals to provide a variety of services to Aboriginal communities. While Aboriginal governments in the future will not be able to meet all their human resource capacity needs with local expertise, the widespread use of non-Aboriginal professionals and consultants in areas central to the operation of government (such as law, program development and evaluation, accounting and auditing) suggests the need for special measures to meet the demand for more qualified Aboriginal people with these skills.

Human resource capacity has in fact been growing in areas where special initiatives have been established, notably in law, elementary education, social work, management and some areas of community health. In the area of public administration and management, some post-secondary institutions have begun to offer programs and courses geared to the needs of Aboriginal governments. For example, the University of Victoria's school of public administration offers a part-time university credit program leading to a certificate in the administration of Aboriginal governments. Courses focus on communication, organization and management in Aboriginal government contexts as well as on legal, political, economic and policy dimensions. (Other programs are reviewed in Volume 3, Chapter 5.)

Ensuring that they have the human resource capacity to conduct their public affairs was a concern noted by participants in the community consultation component of the Commission's research studies on Aboriginal government. For example, a study of Siksika Nation governance, observed that

On the basis of the 1986 Census and interviews with senior management in the Siksika administration, it is abundantly clear that there must be a large scale fiscal resourcing of human resources development and training if Siksika self-government is to be successful. Due to high drop-out/push-out rates, the pool of skilled human resources on-reserve is relatively shallow even in some of the most basic occupations such as mechanics, accountants and carpenters. During community consultations, many respondents stated that the Siksika Nation does not have the skilled management and expertise to undertake self-government. It is a genuine community concern which should not be treated lightly.²⁶⁴

In another case, a majority of respondents to a community survey felt that the Indian Brook Band, near Shubenacadie, Nova Scotia, had the human resource capacity to run its government, but those interviewed emphasized the need for training, especially in the areas of basic literacy, legal issues, business management, financial administration, and social policy development.²⁶⁵

A submission by the Kwakiutl District Council stated that

In almost all cases, the lack of human resources was identified as a major barrier to preparing for negotiations in our community survey on our land and sea questionSerious negotiation preparation will require significant finances to increase basic human resource capabilities.²⁶⁶

The Commission does not believe that the shortage of administrative, management, professional, technical and other skills and expertise should be an impediment to implementing of Aboriginal government. Broadening the human resource base available to Aboriginal governments will, however, require major efforts in training and education. We explore elsewhere in our report the shortcomings of existing education and training opportunities for Aboriginal people and recommend improvements to meet the needs of Aboriginal people and communities and the demands of Aboriginal self-government in the future. Here we consider some specific strategies for human resource development in the field of Aboriginal government management and administration, particularly as they concern senior managers and Aboriginal leadership.

Professionalization

Professionalization can be a source of significant tension in Aboriginal governments today; it can be both a critical element in effective governance and a major source of division between the Aboriginal people served and the government employees serving them. The tension arises from the need for employees to fulfil their responsibilities in an objective and professional manner, while at the same time retaining the confidence and

trust of the community and its individual members. As described in a research study prepared for the Commission by Leslie Brown, 'being professional' often involves adopting certain behaviours, language and values as well as attaining a level of formal education. These requirements may set professional Aboriginal people apart from their fellow community members and introduce mistrust in both professional and personal relationships.

First Nations bureaucrats face a bifurcated reality. They are expected to be 'Aboriginal', to be community members, to be culturally aware and thereby retain close communication and relations with the community. At the same time, they are expected to be 'professional', to behave in a way that is credible to federal, provincial and territorial governments and agencies. The two are not always compatible.²⁶⁷

Professionalization also has implications for the systems used to structure and control the work of government organizations. Sophisticated Aboriginal bureaucracies have developed around formalized administrative systems, largely as a consequence of Aboriginal governments having to structure themselves administratively to respond to the demands of external governments. While these forms of administrative organization have their advantages, they can also alienate community members, especially when they reflect values and practices that are foreign and in many cases inappropriate to Aboriginal cultures. In the absence of clear administrative systems and procedures, however, officials may be rendered ineffective as a consequence of uncertainty about their roles and responsibilities. Further, they may act in ways that contribute to administrative inefficiency or leave them unaccountable for their actions. This phenomenon was noted in a case study involving the Indian Brook Band in Nova Scotia.

Staff members, when asked about the study findings, indicated that structure was the key element in correcting the community's outlook on job accessibility and availability. They felt that structure needs to be imposed so that staff will fully understand the band's mandate. They felt that it can be confusing at times for them, when government policies state that they are unable to provide certain services but they are expected by the community to do so. It places them in a moral dilemma: whether to give services that will not be reimbursed and eventually cause a deficit, or release the funds and hope that it will be overlooked by the auditors.²⁶⁸

Another dimension of professionalization stems from the presence and influence of non-Aboriginal consultants and professionals in Aboriginal government environments. In the absence of a broadly skilled human resource base, Aboriginal governments frequently contract with or directly employ non-Aboriginal people to fill certain roles and perform certain functions. While outside professionals may have a certain objectivity as a consequence of disengagement from community social and political structures, they may also, unwittingly, bring their own cultural baggage to their tasks, with a consequent impact on the Aboriginal government, its administrative culture and, in the domain of accountability, its legitimacy in the eyes of the Aboriginal people served.

Commenting on a case study of a Dene community's experience with non-Aboriginal people, Brown observed:

The study revealed how Eurocanadians were constructing subtle, as well as more tangible, barriers to the creation of a post-colonial society during a struggle for decolonization. [The author] felt that the Eurocanadians involved in constructing such barriers, while seemingly concerned with the implementation of self-government, were not yet ready to give up their image as humanitarian benefactors or their positions as persons with power and authority ... Sabotaging community processes for gathering input, reinforcing federal and provincial guidelines and authority, and manipulating conflict within the Dene community were among the ways the Eurocanadians involved in the process attempted to prevent effective and autonomous First Nations governance.²⁶⁹

We conclude that many of the tensions associated with professionalization will dissipate with increased Aboriginal autonomy and the emergence of Aboriginal-controlled governments and public service. Aboriginal assumption of control over the education and training facilities where Aboriginal people receive their professional qualifications will also have an impact by re-orienting the language, values and objectives of Aboriginal professionals and by adapting professional qualifications and standards to meet Aboriginal needs and priorities.

Tensions may also recede as accountability regimes shift responsibility and reporting relationships toward the people served and away from remote, non-Aboriginal governments. Also, under Aboriginal government, administrative and management practices can be scrutinized more easily by Aboriginal governments and harmonized with the cultural practices and values of the people. Finally, community education that includes information sharing about the activities and administrative practices of government will help to bridge the gap between Aboriginal people and the personnel of Aboriginal governments.

Leadership

The nature and quality of leadership is an important determinant of effective government. As discussed earlier in the chapter, Aboriginal people have particularly strong traditions in the area of leadership that are a source of pride and inspiration for many. Ensuring that these traditions of leadership are carried into the future and, where these skills have been lost, rediscovered and restored, will be vital to capacity-building strategies.

A useful reminder of the nature of traditional leadership was recorded in a booklet published by the James Bay Cree Cultural Education Centre in Chisasibi. For Cree people, being a man and a good hunter are related.

A good hunter

- does not boast about his successes or kills,

- never causes embarrassment to less successful hunters,
- never (or seldom) talks about how he killed an animal,
- conducts himself with dignity and with restraint,
- reveals the information about his catch slowly and quietly, often by non-verbal means,
- shows modesty, does not make an exhibition of himself,
- shares, is generous, and
- even when game is scarce, often manages to catch something.

A good leader

- is a good hunter in the first place,
- teaches by example,
- consults others and values their opinions,
- exercises leadership subtly, he is not pushy, and
- obtains consensus among his hunters when making decisions; he seeks agreement.²⁷⁰

Forging new leadership styles and improving the practice of leadership should be deliberate and permanent goals of Aboriginal government capacity building. Any distance between the people and their leaders must be bridged, and gulfs that may have formed as a consequence of the imposition of colonial institutions must be narrowed. The challenge will be to restore Aboriginal government leadership traditions and learn new leadership styles that draw on Aboriginal customs, values and traditions in a way that builds on the respect for leadership and knowledge of modern circumstances.

Once again, the current challenge for Aboriginal peoples is to build on the relevant and positive traditions of leadership, to recall these practices, to measure current practices against these norms and to create healthy models for the future.

Strategies supporting capacity building

We have concluded that, in view of current realities and the many challenges posed in establishing Aboriginal governments as an order of government in Canada, strategies need to be implemented to develop Aboriginal governing capacities. We suggest that such strategies encompass training and human resource development as well as the establishment of formalized systems for Aboriginal government accountability and responsibility. In addition to these strategies, components of which can be implemented

at the level of individual Aboriginal governments as well as through Canada-wide measures, we propose changes to the existing system of statistical data collection at the Canada-wide level and information management systems for individual Aboriginal governments. Finally, we recommend a strategy for partnerships or ‘twinning’ Aboriginal and non-Aboriginal governments to establish forums for information exchange and to enhance understanding among governments in Canada.

Training and human resource development

Developing human resource capacity may mean the difference between success and failure in implementing and sustaining effective Aboriginal government over time. Immediate as well as long-term needs for administrative and management training and education must be recognized as a priority in the transitional phase toward establishing and operating Aboriginal government.

In Volume 3, Chapter 5, we make specific recommendations for education and training strategies to support the development of human resource capacities for Aboriginal government. (See also Volume 3, Chapter 3 on health and healing, and Volume 2, Chapter 5 on economic development.) These recommendations focus on two strategic points of intervention: increasing institutional capacity and increasing support for students. Our recommendations include the following:

- establishing an education for self-government fund to support partnership initiatives at the post-secondary level;
- introducing student bonuses and incentives to reward completion of programs in fields related to self-government;
- increasing co-operative work placements, internships and executive exchanges for Aboriginal people through partnerships with the private and public sector;
- instituting a Canada-wide campaign to increase youth awareness of opportunities in Aboriginal government;
- involving professional associations in the co-operative development of opportunities for Aboriginal professional training; and
- establishing distance education models for professional training.

Each Aboriginal government will have its own particular human resource needs, determined by the scope of its government operations. These needs will be defined according to short-, medium- and long-term planning and priorities and the progressive emergence of Aboriginal governments. In this regard human resource development transcends and overarches all phases in the transition process.

Human resource strategies should encompass the preparation of inventories and assessment of existing skills available to an Aboriginal government, as well as the identification of human resource needs that can be anticipated throughout transition and implementation. Strategies will also involve establishing personnel policies to attract qualified Aboriginal people and to retain them in the Aboriginal public service. These activities might be undertaken as part of the general planning for Aboriginal government, in constitution-building phases, and in preparation for treaty and self-government negotiations.

Recommendation

The Commission recommends that

2.3.36

Early in the process of planning for self-government agreements, whether in treaties or other agreements, provisions be drafted to

(a) recognize education and training as a vital component in the transition to Aboriginal government and implement these activities well before self-government takes effect; and

(b) include provisions for the transfer of resources to support the design, development and implementation of education and training strategies. We also suggest that human resource development strategies for Aboriginal government be based on the following principles:

- a broad rather than a narrow focus; opportunities should be made available for training and education in a broad range of subject matters, skills areas and professions;
- objectives complementary to self-determination, rather than the administrative objectives of non-Aboriginal governments;
- sufficient flexibility to accommodate the different needs and objectives of Aboriginal governments, whether nation governments, public governments or Aboriginal community of interest governments;
- strategies that are culturally based and relevant to the nation or community served; and
- structures that take advantage of education and training programs offered by Aboriginal-controlled educational institutions, including distance education components, and that place a priority on creating a supportive environment for Aboriginal students.

In addition to our recommendations for human resource development to support self-government contained in chapters dealing with sector-specific matters (for example, education, health, economic development), we make a few additional observations and

recommendations on training and education for Aboriginal people working in the administration and management of Aboriginal government, especially those with leadership and senior management and administrative responsibilities.

At present, training opportunities for Aboriginal people in administration and management tend to focus on developing skills for administrative support and middle management. Aboriginal people are being trained to implement the decisions of other governments and decision makers outside the Aboriginal community. We see training for administrative and support positions as a valuable component of Aboriginal government human resource strategies. We draw particular attention, however, to the urgent need to train Aboriginal people to assume senior management and administrative positions in Aboriginal governments. Senior managers will need to be trained in such areas as finance, policy and program design, planning and management. They will also need the capacity to provide objective and sound advice to Aboriginal leaders on these matters and on the law- and policy-making activities of government.

We believe special initiatives should be established immediately to increase the number of persons qualified to assume senior management positions in Aboriginal governments. Opportunities for training and education should be created encompassing innovative education and accreditation techniques, including distance education, on-the-job training, and co-operative and internship arrangements.

Consideration should be given to locating these initiatives in Aboriginal or mainstream post-secondary education institutions. These initiatives and programs should offer opportunities for distance education and accreditation and include periodic updating to support and refresh the skills of senior managers in Aboriginal government.

We conclude that training opportunities of short duration should be made available to Aboriginal leaders through education facilities controlled by Aboriginal people. Leadership training and education initiatives should be concerned with enhancing the interpretive, analytic and decision-making skills of leaders, for example, in the areas of financial and personnel management, in policy formulation and assessment, and in law making. They should be extended to Aboriginal leaders in a way that ensures minimal disruption in the exercise of leadership responsibilities. Initiatives to enhance leadership skills might be offered through distance education technologies, through periodic short sessions at designated educational institutions, or through on-site workshops in Aboriginal communities on a contract basis with education facilities. In accordance with our observations on the development of leadership capacities that are culturally appropriate, these programs and initiatives should reflect Aboriginal peoples' customs and traditions of leadership and be responsive to the unique demands and expectations placed on individual leaders.

Recommendation

The Commission recommends that

2.3.37

To assist Aboriginal nations in developing their governance capacities, the Aboriginal government transition centre promote, co-ordinate and fund, as appropriate, in collaboration with associated education institutions initiatives that

- promote and support excellence in Aboriginal management;
- reflect Aboriginal traditions; and
- enhance management skills in areas central to Aboriginal government activities and responsibilities.

Partnerships between Aboriginal and Canadian governments

In Volume 3, Chapter 5 we recommend, as part of an overall human resource development strategy for self-government, that corporations and governments extend to Aboriginal people opportunities for internships, co-operative work placements and executive exchanges. Among other benefits, these initiatives will contribute to the development of management and administrative expertise and skills, applicable in the private and public sectors, through on-the-job training. In addition we see considerable merit in formalizing a program to facilitate co-operation and greater understanding among Aboriginal and non-Aboriginal governments in Canada, at the same time contributing to the development of the skills and capacities of Aboriginal government employees.

We commend the government of Canada for its initiative to begin such a program in collaboration with the Assembly of Manitoba Chiefs. Under this arrangement a number of Aboriginal administrators are being seconded for training to federal departments, including central agencies, in Winnipeg and Ottawa.

Recommendation

The Commission recommends that

2.3.38

A partnership program be established to twin Aboriginal governments with Canadian governments of similar size and scope of operations. Under this program, twinned Aboriginal and Canadian governments would share information on management, administration, programs and other government activities, enter into economic and other partnerships, and conduct personnel and executive exchanges. The overall objective of the program would be to establish a climate of mutual understanding and dialogue, and to give partners the opportunity to learn from each other's experience.

Establishing accountability systems for Aboriginal government

As described by many interveners at our public hearings, in briefs presented to us and in our research, Aboriginal people have recognized that establishing mechanisms for government accountability and responsibility must go hand-in-hand with the autonomy that these governments will enjoy under self-government and associated fiscal arrangements. Aboriginal governments must be able to demonstrate to their citizens that they are exercising authority and managing the collective wealth and assets of the nation and administrative structures in a responsible and open manner.

Currently, Aboriginal governments and organizations are accountable mainly to non-Aboriginal governments and agencies, such as the Department of Indian Affairs and Northern Development (DIAND), that provide funding for their activities. There is a widespread perception in some communities that their leaders rule rather than lead their people, and that corruption and nepotism are prevalent. Increasingly, Aboriginal people are challenging their leaders through a variety of means, including legal suits brought against leaders by individual members for alleged breaches of public duty. For First Nations people, this situation is traced to the *Indian Act* system of governance and associated administrative policies. Over the past 100 years the act has effectively displaced, obscured or forced underground the traditional political structures and associated checks and balances that Aboriginal peoples developed over centuries to suit their societies and circumstances.²⁷¹

At the level of administration, reporting systems and lines of accountability to external agents such as DIAND are time-consuming and complex and divert the energies of Aboriginal service providers away from delivery responsibilities. These arrangements have created a situation where Aboriginal governments are more responsive to external agencies than to community members. Further, the development of the capacity for political accountability has been stymied by the fact that key policy and program decisions are made by non-Aboriginal officials and political leaders.

Dislodging administrative and related practices associated with the *Indian Act* and similar forms of delegated governance will be an important element of healing and capacity building for self-government. The transformation of administrative regimes may be difficult, in part because many of the current practices are familiar and have become ingrained in existing administrations. In many cases, however, First Nations people have already begun to adapt *Indian Act* practices to suit their unique circumstances, needs and preferences.²⁷²

Interveners before the Commission recognized that systems for accountable and responsible government must be deeply embedded in the fundamental structures of Aboriginal governments and must be consonant with the cultural norms of the people. As stated in one brief:

Accountability must be carefully considered and assessed. Traditionally, there were checks and balances that were functional and appropriate for the Anishinabek. The leaders were servants to the people and upheld the values that were inherent in the community. Accountability was not a goal or aim of the system, rather it was embedded

in the very make-up of the system. Traditionally there existed an authentic consensual holistic approach to governing. Consensus as a practical option for decision-making must be re-instated by the Anishinabek.²⁷³

Checks and balances to promote accountability in government are present in Aboriginal cultures and political traditions. Aboriginal peoples and cultures have a rich tradition and a tremendous variety of practices and customs to draw upon. In general, interveners expressed a desire to see their traditions at the centre of responsible Aboriginal government. Given the significant and new challenges facing contemporary Aboriginal governments, however, Aboriginal peoples may wish to consider the inclusion of formalized accountability mechanisms, including codified standards concerning ethical conduct and conflict of interest.

Developing the internal capacities of their governments for political, financial and administrative accountability should be an element in the constitution-building activities of Aboriginal nations and in the implementation of their governments. The essence of accountability is the responsibility of government officials and government employees for their conduct while in public office or otherwise in a position of authority. Citizens must be assured that government is conducted by individuals who are beyond reproach and that public administration is carried out by competent public servants.

Accountability falls into three broad categories: for political decisions, for the administration of public affairs, and for the use of public funds. Elected and appointed officials are formally responsible through clearly defined rules and mechanisms. Accountability means that those dealing with or receiving services from governments will be treated impartially, fairly and on the basis of equality; that government decisions will not be influenced by private considerations and will be carried out efficiently and economically; and that public officials will not use public office for private gain. In short, the constituency of people served rather than the office holder should benefit from the discharge of public functions.

Accountability mechanisms normally include reporting requirements regarding how government spends public funds, a code of ethics for public officials, and conflict of interest guidelines and enforcement mechanisms. The goal of such mechanisms, and of accountability regimes generally, is to maintain public confidence in the integrity of government, to uphold high standards in public service and to encourage the best people in the community to present themselves for public office. In this sense, accountability is integrally linked with other elements of governance, including leadership selection and decision-making processes.

Accountability strategies for Aboriginal government may include both informal and formal mechanisms. In terms of formal accountability, a variety of mechanisms could be reflected in Aboriginal constitutions, laws and other public authorities. With respect to accountability for the use and expenditure of public funds, public authorities, including laws and administrative procedures that govern financial management and reporting, can be developed by Aboriginal governments. These may include structures and procedures

for the independent review and evaluation of all government activities, including the expenditure and management of public finances.

There is wide experience in Canada with public accountability mechanisms that Aboriginal peoples may wish to draw upon. For example, all jurisdictions in Canada have legislation, policies or guidelines to ensure that the private and personal interests of public officials are not inconsistent with the fulfilment of public duties. These specify the types of behaviours or activities considered unacceptable for a public official: among others, selling or purchasing of a public office, influencing appointments, receiving compensation for services rendered in respect of laws or contracts, disobeying laws, obstructing justice, engaging in businesses or political activity that might conflict with official duties, and failure to disclose information about a public official's financial interests. These laws also specify penalties, ranging from imprisonment, fines and reprimands to suspension or removal of the official from public office.²⁷⁴

Tribal governments in the United States enjoy a high degree of internal sovereignty in political affairs. Their experience may also be of interest and relevance to Aboriginal peoples in Canada designing and implementing their own systems for accountable and responsible government. For example, the Navajo Nation has had an *Ethics in Government Act* since 1984, outlining acceptable standards of conduct and restricted activities for public officials and employees, as well as sanctions and penalties. The act requires public officials annually to complete a form disclosing their financial and other interests. Such disclosures, and the overall promotion and supervision of ethical conduct within Navajo Nation government, are the responsibility of the ethics and rules committee of the Navajo tribal council. This body enjoys quasi-judicial powers in monitoring public officials and investigating and conducting hearings on alleged contraventions of Navajo Nation ethics law.²⁷⁵

More informal mechanisms of accountability, involving direct interaction among government leaders, officials and citizens, might also be instituted to ensure that Aboriginal governments, particularly nation-level structures, remain connected with the people served.

Informal accountability strategies with a community education orientation could encompass the following:

- regular public meetings and consultation processes on public matters;
- communication through newsletters, radio, television and cable broadcasting;
- regular community surveys and assessments to provide feedback on government activities, priorities, initiatives, and so on;
- establishment of citizen advisory bodies for elders, youth and women, and in key areas of government activity (for example, finance, employee selection and review); and

- opportunities for direct interaction involving individual citizens, leaders and officials, such as citizens' question periods.

Recommendations

The Commission recommends that

2.3.39

Aboriginal governments develop and institute strategies for accountability and responsibility in government to maintain integrity in government and public confidence in Aboriginal government leaders, officials and administrations.

2.3.40

Aboriginal governments take the following steps to address accountability:

- (a) Formalize codes of conduct for public officials.
- (b) Establish conflict of interest laws, policies or guidelines.
- (c) Establish independent structures or agencies responsible for upholding and promoting the public interest and the integrity of Aboriginal governments.
- (d) Establish informal accountability mechanisms to ensure widespread and continuing understanding of Aboriginal government goals, priorities, procedures and activities, administrative decision making and reporting systems.

2.3.41

To the extent deemed appropriate by the Aboriginal people concerned, strategies for accountability and responsibility in Aboriginal government reflect and build upon Aboriginal peoples' own customs, traditions and values.

Data collection and information management

Improvements and adjustments will need to be made to Canada-wide statistical and data-gathering systems to respond to and support emerging and new forms of Aboriginal government. Ultimately, improvements in the structure and activities of Statistics Canada, as they relate to Aboriginal people, and the census, post-census and other surveys on Aboriginal people will be beneficial to Aboriginal government planning activities as well as to the determination of fiscal transfers to Aboriginal governments.

For Aboriginal people, knowing how political, demographic, social and economic changes will affect their nations and having in place data collection vehicles that provide a community and nation level aggregate picture will be essential to Aboriginal

government implementation and planning processes. Having a reliable, valid and continuous statistical system, however, will require the participation of all Aboriginal people and nations if the system is to have the utility and credibility that users need.

Because of the evolving nature of Aboriginal societies, their government structures, economies and social conditions, we believe that it is essential to have a flexible survey vehicle or instrument to measure changing conditions over time. A post-census survey provides the opportunity to reach a large sample of the Aboriginal population, especially those living off-reserve in rural and urban areas, and enables the type of in-depth analysis required for policy development and for planning and evaluation of programs and services affecting Aboriginal people — activities that increasingly will be the responsibility of Aboriginal governments in the future. Statistics Canada might wish to consult with national Aboriginal organizations on the range of off-reserve communities to be included in a post-census survey.

With respect to the content of survey instruments, there is evidence that Aboriginal people are increasingly describing themselves according to their nation or tribal affiliation, instead of accepting the terms supplied in the survey instrument. Although there has always been the opportunity for respondents to write in an ethnic group not covered in the list of responses, an Aboriginal person would have to write in his or her tribal or nation affiliation in the ‘other ethnic group’ space, which is usually at the end of the ethnic group list. This may discourage Aboriginal people from responding to the ethnic/cultural question, since they are not an ‘ethnic group’. Other problems are posed for the selection of sample populations for the post-census survey.

It has come to our attention that changes may be required in the geographic coding system used by Statistics Canada in census and other survey instruments to account for the establishment of new jurisdictions in which Aboriginal governments operate, or areas in which these may emerge in public or other government form. These areas include the Metis Settlements of Alberta, mid-north communities with significant Aboriginal populations, and Nunavut. The changes we recommend may assist Aboriginal people and local groups in acquiring data from Statistics Canada more easily and at reduced cost.

Recommendation

The Commission recommends that

2.3.42

Statistics Canada take the following steps to improve its data collection:

- (a) continue its efforts to consult Aboriginal governments and organizations to improve understanding of their data requirements;
- (b) establish an external Aboriginal advisory committee, with adequate representation from national Aboriginal organizations and other relevant Aboriginal experts, to discuss

- Aboriginal statistical data requirements; and
 - the design and implementation of surveys to gather data on Aboriginal people;
- (c) continue the post-census survey on Aboriginal people and ensure that it becomes a regular data-collection vehicle maintained by Statistics Canada;
- (d) include appropriate questions in all future censuses to enable a post-census survey of Aboriginal people to be conducted;
- (e) in view of the large numbers of Aboriginal people living in non-reserve urban and rural areas, extend sampling sizes off-reserve to permit the statistical profiling of a larger number of communities than was possible in 1991;
- (f) test questions that are acceptable to Aboriginal people and are more appropriate to obtaining information relevant to the needs of emerging forms of Aboriginal government;
- (g) test a representative sample of Aboriginal people in post-census surveys;
- (h) include the Metis Settlements of Alberta in standard geographic coding and give each community the status of a census subdivision;
- (i) review other communities in the mid-north, which are not Indian reserves or Crown land settlements, to see whether they should have a special area flag on the census database; and
- (j) consider applying a specific nation identifier to Indian reserves and settlements on the geographic files to allow data for these communities to be aggregated by nation affiliation as well as allowing individuals to identify with their nation affiliation.

We commend the federal government on its efforts to involve Aboriginal people in conducting the 1991 census and post-census Aboriginal peoples survey. Statistics Canada broke new ground in terms of its extensive consultation efforts with Aboriginal groups. It established a number of agreements with First Nations organizations in several provinces, resulting in Aboriginal people assuming a meaningful role in conducting and supervising data-collection operations. In those regions where such agreements were in place the data collection phase proceeded smoothly.

Recommendation

The Commission recommends that

2.3.43

The federal government take the following action with respect to future censuses:

(a) continue its policy of establishing bilateral agreements with representative Aboriginal governments and their communities, as appropriate, for future census and post-census survey operations;

(b) in light of the issues raised in this report and the need for detailed and accurate information on Aboriginal peoples, the decision not to engage in a post-census survey, in conjunction with the 1996 census, be reversed; and

(c) make special efforts to establish such agreements in those regions of Canada where participation was low in the 1991 census.

The capacity of Aboriginal government to design, plan and manage a broad range of government functions and operations in the future will be improved if Aboriginal people have adequate information management skills and access to appropriate technologies within their own government organizations. Information management systems currently in place in Aboriginal communities may be sufficient for administering limited local government responsibilities, small service delivery institutions, societies and non-profit associations. However, as Aboriginal governments assume significantly increased authority and responsibility in areas such as citizenship, financial planning and management, and new services sectors, the demand for data management systems and related capacities will increase.

Aboriginal governments must have at their disposal the human resource skills, technologies and equipment to assist them in meeting the challenges of managing information in an Aboriginal government with confidence. Information management systems in support of self-government should allow for controlled access to confidential information, collection and analysis of information within and across communities in a nation, pooling of information among multiple Aboriginal nations, and maximum compatibility with Canada-wide statistics gathered by Statistics Canada. A recommendation for an Aboriginal statistics clearing house to serve these ends appears in Volume 3, Chapter 5.

Recommendation

The Commission recommends that

2.3.44

Governments provide for the implementation of information management systems in support of self-government, which include

(a) financial support of technologies and equipment proportional to the scope of an Aboriginal government's operations; and

(b) training and skills development, including apprenticeships and executive exchanges with Statistics Canada, to facilitate compatibility between Aboriginal government systems and Statistics Canada.

4.3 The Structure of the Government of Canada for the Conduct of Aboriginal Affairs

Implementation of our recommendations will require changes in the organization of the government of Canada for the conduct of its responsibilities related to Aboriginal affairs. Without seeking to

predetermine choices about implementation that will best be made by the political leaders and officials directly involved, it is part of our responsibility to consider the changes needed in the structure of the government of Canada as a result of our recommendations. We propose what we believe to be the best organization for the development and implementation of Aboriginal policy through the cabinet system. By implication, we consider the future of the Department of Indian Affairs and Northern Development.

An essential condition for change is the establishment of effective agencies through which the federal government can fulfil the commitments called for in our recommendations. If the last several decades have revealed anything about federal administration in Aboriginal affairs, it is that no real change will occur without agencies structured in such a way as to facilitate change, staffed by committed people who can work unencumbered by conflicting policy instructions.

We have already established that there are deep structural reasons for failures in federal management of Aboriginal affairs. We addressed these at length in Volume 1, and our recommendations relating to restructuring the relationship and improving the social and economic circumstances of Aboriginal peoples reflect our assessment of how to remedy the failure. The specific institutional changes discussed here are necessary companions to our other recommendations.

We begin our analysis with a review of the history of federal organization for the conduct of Aboriginal affairs. An understanding of this history is important because, despite many reorganizations and changes in philosophical direction, other characteristics of the federal approach to managing Aboriginal affairs have proven resistant to change over many decades. Some of these more intransigent characteristics have prompted what are now conventional critiques of DIAND and, more generally, the federal government's performance.

Our proposals and recommendations are not based solely on the lessons of history, however. There are a number of contemporary challenges associated with reform of the status quo. To a considerable extent, these are shaped by the current social and economic environment and by the realities of organizational life within the government of Canada. We also develop our recommendations on the basis of important principles for federal institutions, such as the goal of transparency — public policies that are readily

understood by Aboriginal people and other segments of the attentive public, as well as within the government of Canada. In summary, the approach we recommend to reshape the federal government takes into account the lessons learned from the past and the current environment, as well as the Commission's recommended direction for Aboriginal policy.

Lessons from history

The current state of federal organization for the development and implementation of Aboriginal policy reflects historical conflicts and strains in political and bureaucratic philosophy about Aboriginal issues. It also reflects the fact that federal policy making has rarely taken a comprehensive approach to Aboriginal affairs. Instead, the various departments with responsibilities for matters of interest to Aboriginal peoples have developed policies and programs independently of each other, and frequently only for specific groups of Aboriginal people.²⁷⁶

Historically and today, the federal approach reveals an interplay among ideas of federal custodianship, an emphasis on infrastructure development born of a desire both to improve the objective conditions of Aboriginal people and to permit the opening of lands and other developments in their traditional territories; and an emphasis on micro-scale and 'holistic' community development. More recently, we see an emphasis on political and administrative devolution. This emerged first as an aspect of northern development policy, beginning in the late 1960s; but it also underlies the various federal self-government initiatives of recent years. Unfortunately, the different organizing principles and philosophies for the conduct of Aboriginal affairs have often competed with one another, both within DIAND and in the federal government as a whole.

Reviews of DIAND and its predecessors reveal almost constant organizational and policy flux. Until recently, critiques by Aboriginal people and others have, however, been remarkably consistent.²⁷⁷ The conventional criticisms are as follows.

DIAND operates under a legacy of colonialism and paternalism and is resistant to change.

As the department charged with implementing the *Indian Act*, DIAND could hardly have escaped this criticism. For at least 30 years, successive ministers of Indian affairs have announced their intention to change the department's orientation and to create a new role for the department in promoting and enabling the economic and political development of Aboriginal communities. Whatever successes there have been in this area have come more slowly than predicted and with less than wholehearted support from the department.²⁷⁸

DIAND's performance in the federal policy arena is inadequate.

Departments with more focused functional responsibilities and budgets are seen as being able to 'walk over' DIAND, at least in its policy role. Critical departments include

defence, health, natural resources (and its various predecessors) and fisheries. In addition, over the years DIAND has been seen as having insufficient capacity to bring its own policy initiatives to fruition through the cabinet decision process.

The relative weakness of DIAND may seem odd, considering its large budget and the minister's ability to lever supplementary funds from the expenditure budget.²⁷⁹ It is likely a result of the contradictory mandate, which has made the department prone to protracted internal policy debates and has made it difficult for the department to benefit from the efforts of its politically active and effective constituency.²⁸⁰ That constituency is extremely diverse, including at various times resource developers, status Indians, Inuit, and northern political leaders with aspirations to provincehood, among others. At different times virtually all members of this constituency have tried to circumvent DIAND to make claims more directly on other ministers or on cabinet.

DIAND is evasive or negligent on the matter of meeting federal treaty and claims obligations.

Federal policy on Aboriginal rights and title, as well as that with respect to treaties and comprehensive claims, has been extremely inconsistent over time.²⁸¹ And if policy directions have vacillated dramatically, it is plain that federal *behaviour* has been relatively consistent: the federal role has been to deny the original spirit and intent of the treaties and to attempt to restrain any expansion of federal responsibilities to all Aboriginal peoples in Canada. The absence of any effective oversight mechanism, aside from the courts, has been a matter of concern.²⁸²

The organizational challenge

Linking these perceptions and lessons from history with current reality, the Commission faced three important challenges in developing a vision of federal executive organization for Aboriginal affairs:

- Policy capacity: How can organizational capacity within the federal government be enhanced to ensure that it will be possible to develop policy to implement a restructured relationship?
- Implementation: What institutional arrangements will make it most likely that major reforms will be implemented once policy has been developed?
- Current trends in government organization: How can these wide-ranging proposals for structural and program reform be explained and defended in the real world of government in the 1990s?

Policy capacity

Our recommendations related to the policy capacity of the federal government suggest a number of imperatives.

First, there is a need to identify the policy initiatives that will start the process of implementing the new relationship, in contrast to those that will sustain it.

Several of the Commission's major recommendations are in the first category — measures that will launch the process of developing a new relationship between Aboriginal peoples and other Canadians. These include, for example, the proposal for a royal proclamation to establish an appropriate context for negotiations; the Aboriginal Nations Recognition and Government Act; the decision to establish and support treaty commissions; and, for the prime minister, the decision to reorganize the government to reflect the new relationship and agenda for change, as recommended by the Commission.

For such initiatives, the leadership of the prime minister and the support of the government — as well as the sustained effort of the prime minister's office and the Privy Council Office — will be required.

Second, recommendations must deal with the establishment of a federal policy capacity related to the full range of its responsibilities for Aboriginal peoples.

The Commission has recommendations covering many functions, such as health, education and economic development. The DIAND experience indicates that a multi-functional unit faces major obstacles to effectiveness across the full range of responsibilities. When many functions must be served by a single department, it is difficult to develop sufficient depth of expertise in all areas. Compounding this problem is the capacity of departments and agencies of government that carry the lead responsibility for a particular function (for example, human resources development or natural resources) to dominate policy debates within government related to Aboriginal-focused initiatives or to influence the situation of Aboriginal people, through their action or inaction.

Third, both the reputation and the reality of past federal practice suggests the need for recommendation(s) for policy oversight and guidance other than through the courts.

Implementation issues

Regardless of the substance of future federal policy, there are fundamental organizational issues related to policy and program implementation.

What will the operational relationship be between Aboriginal governments and the federal government?

This question may be particularly critical during the transition to self-government. The federal government will still have responsibility for assisting Aboriginal governments to build suitable capacity to manage their affairs. Over the longer term, relations will continue, at the administrative level, between Aboriginal governments and the federal government on matters such as policy and program co-ordination and funding.

It is likely that both symbolic and practical considerations will induce Aboriginal governments to seek a federal/Aboriginal government relationship that will be in some respects analogous to that of federal and provincial governments. This implies diffuse access to the various departments and agencies of the federal government.²⁸³

For treaty nations and those with comprehensive claims, can organizational improvements be made that will result in the more timely and effective implementation of federal obligations?

Is an organization like DIAND the best means for fulfilling federal fiduciary and operational obligations related to the *Indian Act*? This question becomes particularly important when we recognize that some Aboriginal communities may not want to depart from the act in the near future.

Current trends in government organization

The question of how best to organize for effective Aboriginal policy development and implementation should be addressed in light of recent experience and the current direction of reform in the machinery of government.

Two previous experiments with federal cabinet reorganization are worth noting, both of which were ultimately abandoned. The first was the creation of a new ministry of state, a potentially tempting device for reorganizing federal policy responsibilities in Aboriginal affairs.²⁸⁴ A ministry of state unencumbered by operational responsibilities may seem an appropriate instrument to usher in a new era in which Aboriginal governments themselves control much of the public expenditure in their own territories. Assessments of such ministries, such as the former ministry of state for urban affairs and the ministry of state for science and technology, suggest, however, that they have had very little claim on the attention of departments with operating responsibilities and significant budgets, or on cabinet.²⁸⁵ Some means of increasing a policy ministry's clout under these circumstances would seem advisable.

A second institutional approach to policy development emphasized cabinet committees and the clustering of ministries into envelopes or other groupings. This instrument, used on its own, is not promising. Bruce Doern's work suggests that the envelope system of the 1970s failed to capture the breadth of the Aboriginal policy field, instead channelling all Aboriginal policy into the social policy area.²⁸⁶

Establishing an Indian affairs department devoted to policy concerns and reforming the expenditure process play a role in our recommendations, but neither step is adequate on its own.

In considering institutional options, we have also taken into account more recent trends in federal government organization, sparked to a considerable degree by the imperatives of expenditure reduction, in particular,

- The creation of large, multifunctional departments, such as human resources development, public works and government services, and Canadian heritage. These very large departments were intended to enhance policy and program co-ordination within the federal government by creating departments with interconnected responsibilities, as well as to facilitate the process of reducing the number of employees in the federal public service by combining similar functions and responsibilities.
- A preoccupation with creating partnerships between the federal government and other governments, non-governmental organizations and the private sector. Partnerships are often seen to facilitate program delivery and to provide a means for renewing the federal policy capacity. In popular terms, the federal government would prefer to emphasize steering, not rowing.²⁸⁷
- Retention of some of the ‘businesslike’ functions of government but housing them in more independent special operating agencies.
- An overwhelming preoccupation with reducing the apparent overall size of the federal government.

In making our recommendations, we have not followed any one or all of these trends blindly. It

is our best judgement, however, that our proposals for institutional reform tread a reasonable if assertive middle path: they make sense in the existing climate without necessarily following the loudest drummer. Most important, they provide a sound organizational basis for moving ahead to implement the new relationship and sustain federal momentum for developing the many policy and program initiatives we recommend.

Finally, there are two important realities about the way government bureaucracies operate that form the permanent backdrop for any of the Commission’s institutional recommendations:

- Existing central agencies have persistent and strong interests in Aboriginal policy. The departments of finance, justice and treasury board are particularly important, as is the Privy Council Office.
- The Commission hopes to stimulate a lasting impetus for change, but must recognize that this impetus will be met by significant natural ‘drags’ that will slow or curtail implementation of the key recommendations.

Such countervailing forces include the absence of institutional capacity to do everything at once or to do some things at all; preoccupation by the government with other policy agendas; and conflicts among the different institutional arms of the federal government about what should be given priority. The last two factors indicate a need for a strong and focused capacity to develop policy on Aboriginal affairs, as well as clearly assigned

responsibility for co-ordinating the different parts of the federal government that may be charged with implementing the new relationship.

All of the considerations just reviewed argue for a careful and fundamental reconsideration of the federal institutions through which the new relationship could be realized. The organizational complexities, as well as the volatility of Aboriginal affairs and the many costly episodes of confrontation and stalemate, suggest that developing new institutions appropriate to bringing about fundamental change is not a simple matter. When thinking about the various possibilities for reform, we were guided by a number of principles that speak to the public interest and to organizational needs.

Proposed principles

The following principles underlie our recommendations concerning federal government organization. These are not intended as evaluation criteria; the fact that some of them are seemingly contradictory would bedevil an effort to use them in this way. They are complementary to the preceding analysis, to serve as *inuksuit*, to assist in navigation.

- **Simplicity:** Organizational changes should be as straightforward as possible; all other things being equal, where there is a choice of format or mechanism, preference should be given to the simpler form.
- **Transparency:** The reasons for and content of recommendations must be capable of being readily understood within the government of Canada, by Aboriginal peoples and by other segments of the attentive Canadian public.
- **Link between policy development and implementation:** Experience suggests that initiatives in which the ultimate doers create the policy and in which the idea people share responsibility for implementation are most likely to be successful. This principle implies rejection of ministry of state approaches, as they have been conceived in the past, but requires consideration of how to enhance policy development and implementation.
- **Oversight:** The general perception of unmet federal commitments requires specific attention to oversight other than through the courts.
- **Respect for difference:** Policies and institutional arrangements must reflect fundamental differences among Aboriginal peoples. This may imply differentiation within a single federal organization or policy regime, or different organizations or regimes.

Implications for the federal role

Our recommendations fall into three broad categories.

First are recommendations fundamental to restructuring the relationship between the government of Canada and Aboriginal peoples. Two examples of this type are the recommendation to form the foundation of the new relationship through a royal

proclamation and companion legislation; and the development of new institutions through which better policies will be developed and sustained, as in the restructuring of the federal government and the establishment of the treaty commissions and the Aboriginal Lands and Treaties Tribunal.

These initiatives will be necessary to launch the process of building the new relationship. They will require prime ministerial leadership, the full commitment of the cabinet, and sustained and ingenious support from the key central agencies of the cabinet, the Privy Council Office and the prime minister's office.

Second, several key recommendations will require federal executive attention over a longer period. These recommendations are essential to complete implementation of the new relationship but are not symbolically or legally essential to the launching of a new relationship. They imply the need for a federal capacity for

- sectoral policy reviews, in such areas as education, health and healing, and housing; and
- reviews of the federal fiscal framework as it relates to fiscal arrangements between Canada and Aboriginal governments and funding levels for continuing federal programs and new institutions and arrangements.²⁸⁸

Finally, there is an important third category of recommendations that support or improve measures already mandated by legislation (most often, the *Indian Act*). These activities are

- implementation — the conclusion of new comprehensive claims and self-government arrangements under the approaches recommended by the Commission, together with the requirement that the federal government live up to the terms of existing agreements and initiatives (recent examples of which are the agreement to establish Nunavut and the Nunavut land claim agreement, as well as the Manitoba initiative and the 1995 federal policy guide on Aboriginal self-government), suggests a need for enhanced capacity within the federal government to implement such agreements; and
- reformed servicing — for communities that decide that, for the immediate future, they want to retain a relationship with the federal government under the *Indian Act* and established administrative practices for governance and community servicing. The Commission's recommendations on remedial reform, perhaps most particularly in Volume 3, point to improvements in federal practice that should be made, even in the *Indian Act* context.

These activities suggest that the federal government needs the following institutional capabilities:

- a capability to negotiate new treaty arrangements, self-government accords and claims agreements;

- a capacity to develop and review policy;
- a capacity to service and deliver programs to communities operating under the terms of the *Indian Act*;
- a capacity to facilitate and implement new policies and relationships. This implies specialized expertise, in areas such as education, health, and economic development, to implement policy and program changes resulting from federal policy reviews and new agreements with Aboriginal peoples and their governments. It also includes the capacity to get funds and other forms of support out to Aboriginal governments, Aboriginal agencies and organizations established jointly by Canada and Aboriginal peoples (and perhaps provinces), consistent with any federal commitments for such support;
- a capacity to develop and establish alternative dispute resolution mechanisms, such as the lands and treaties tribunal; and
- a centralized executive oversight capability, within the cabinet structure, to ensure that the practices of departments and agencies throughout the federal government conform to federal policy.

The proposed organizational structure

Lessons from the past, the current context and the challenges posed by the Commission's recommendations require a federal government with the capacity to develop and implement the new relationship while continuing to meet federal obligations. The federal organizational structure must also have the capacity to conduct intergovernmental relations with provincial and territorial governments, encouraging co-ordinated and constructive initiatives at all levels of government. The federal government's organization must have these capabilities while avoiding some of the institutional conflicts of interest and other difficulties associated with past arrangements.

The key elements of this new approach are reflected in our recommendations on

- the leadership initiative of the prime minister;
- the overall structure of the federal cabinet;
- the role of the Privy Council Office;
- the establishment of a new department of Aboriginal relations, under a minister of Aboriginal relations; and
- the establishment of a new Indian and Inuit services department to meet continuing federal obligations to Indian communities and Inuit, until transition to self-government.

The cabinet structure

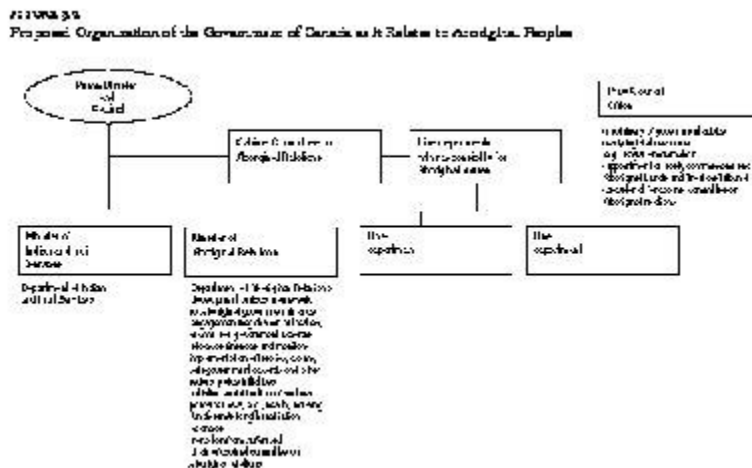
The proposed cabinet structure reflects the important lessons from past government organizations, the different requirements for centralized and more decentralized executive action, and the realities of the operational milieu for implementing the Commission's recommendations. Figure 3.2 indicates five central elements of our proposed approach.

1. Responsibility for beginning and sustaining renewal in the conduct of Aboriginal affairs lies with the prime minister.

The prime minister would, as a matter of course, carry out this role in consultation with cabinet and supported by the branch of the Privy Council Office (PCO) that deals with machinery of government. This latter group will have responsibility for guiding the federal role in relation to any independent tribunals and bipartite or tripartite organizations that might be established. For example, appointments to the Aboriginal Lands and Treaties Tribunal would be made through the PCO by cabinet.

More generally, as discussed later, PCO will support the prime minister and cabinet as a new cabinet committee on Aboriginal relations conducts its work.

The pivotal role of the prime minister is not restricted to initiating institutional reform or launching federal support for independent tribunals and bipartite and tripartite organizations. At the most fundamental level, it falls to the prime minister to launch and nurture the renewed Aboriginal/Crown relationship, through a vehicle such as a royal proclamation and its companion legislation. We discussed our recommendation for a royal proclamation in Chapter 2 of this volume.



2. A new senior ministerial portfolio, the minister of Aboriginal relations, and a new department of Aboriginal relations are established.

Created to guide all federal actions associated with developing and implementing the new federal/Aboriginal relationship, this new department would combine policy and intergovernmental responsibilities with responsibility for the overall fiscal framework and federal spending related to Aboriginal affairs. We have tried to build on the

experience of the federal government with other attempts at institutional change. Specifically, we have concluded that there is a need for a minister with real power to oversee policy development throughout the federal government, to lead the federal intergovernmental relationship with Aboriginal governments and with provinces and territories on Aboriginal affairs, and to make sure that federal policies and other commitments reflecting the new relationship between Canada and Aboriginal peoples are implemented by federal departments and agencies.

Previous efforts have failed, both in the conduct of Aboriginal affairs and in federal efforts to co-ordinate initiatives related to such diverse fields as urban affairs and science and technology policy. In the latter instance, ministries of state lacked the real policy levers, most importantly the financial levers, to do their job. From the mid-1970s until its abandonment in 1984, the envelope system attempted to link policy development and spending decisions across policy fields. It failed, however, to provide adequate emphasis on Aboriginal matters or to reflect the breadth of Aboriginal issues. Aboriginal issues were collapsed under the rubric of social policy, both at the department level (through the ministry of state for social development) and in its mirror cabinet committee on social development. We also reviewed the history of the administration of the *Indian Act* and concluded that DIAND does not provide the appropriate structure or environment for the task ahead.

Conventional criticisms of DIAND support this conclusion.²⁸⁹ One may take issue with these criticisms. The fact remains, however, that the perceptions are widely shared, and the criticisms are supported by the Commission's own research. We believe the legacy of DIAND's corporate history since its establishment has contributed to two somewhat contradictory tendencies: internal resistance to change and a reluctance to 'expose' the department as it relates to obligations under historical treaties or more contemporary claims agreements and, in the most recent period, a tendency to move relatively quickly on policy initiatives without adequate consultation with those affected, raising questions about whether adequate attention has been paid to their implications. We do not think either tendency will contribute to the development of a sound foundation within the government of Canada for the new relationship we envision.

The practical effect of the proposed innovation would be that the new minister would oversee Aboriginal policy and program development across the departments and agencies of the federal government. The minister would have the authority to ensure that new initiatives and continuing activities reflect the spirit and intent of the new relationship. To a significant degree, this would occur by virtue of the minister's authority to allocate funds from the federal government's expenditures on Aboriginal issues and operations across the government. The minister would also have the authority, by virtue of a monitoring role, to withdraw or withhold funds should federal commitments be unmet by other federal departments and agencies or by initiatives contrary to the spirit and intent of the new relationship being proposed.

It is important to note that the minister of Aboriginal relations would carry out fiscal responsibilities within the overall federal fiscal framework established by the minister of

finance. We expect, however, that the minister of Aboriginal relations would engage with the minister of finance in vigorous negotiations about the overall fiscal framework. As Figure 3.2 indicates, within the context of the fiscal framework of the federal budget, the minister of Aboriginal relations would have the lead

responsibility for managing the fiscal envelope related to Aboriginal affairs. This includes negotiating and concluding financial arrangements associated with comprehensive and specific claims, treaties and self-government accords; developing the foundational federal/Aboriginal relationship related to Aboriginal government finance; allocating funding to other federal departments with line responsibility for meeting federal obligations and implementing initiatives; and funding the various arm's-length agencies the Commission recommends to facilitate the new relationship.

One of the principal responsibilities of the minister would be the conduct of the recognition and self-government process under the Aboriginal Nations Recognition and Government Act and the negotiation of renewed and new treaties with Aboriginal nations, to be undertaken through the Crown treaty office in the department of Aboriginal relations. Of equal importance will be a capacity to monitor the Crown's implementation of its treaty and other undertakings as well as its fiduciary obligations to Aboriginal nations. This responsibility should be discharged by a Crown implementation office within the department.

This new senior minister would not have direct responsibility for service delivery. Our next two recommendations address the principles and practicalities related to service delivery and implementation of new federal commitments.

3. Responsibility for direct implementation of new federal initiatives relating to Aboriginal people should be assigned to the relevant line departments and agencies of the federal government.

In every instance, the work of the line departments would be subject to monitoring by the minister for Aboriginal relations. As appropriate, line departments and agencies would also be involved in functional policy reviews (with respect to housing or economic development, for example) as recommended by the Commission. This is consistent with the government's current effort to enhance the co-ordination of initiatives by establishing ministries that work across broad policy fields. It is also consistent with the characteristics of a real government-to-government relationship between Aboriginal governments and the federal government. As already indicated, the minister of Aboriginal relations would have the lead role in co-ordinating policy reviews, overseeing implementation through its funding responsibilities, and broadly monitoring implementation. This arrangement speaks to our principle of linking policy development to implementation.

4. Another minister, the minister for Indian and Inuit services, would head a new Indian and Inuit services department and be responsible for delivery of the government's

remaining obligations to status Indians, Inuit and reserve communities under the Indian Act.

In keeping with the increasing self-reliance of all Aboriginal peoples and communities, we see the role of this minister and department as secondary to that of the minister of Aboriginal relations. There are two important manifestations of this. First, the minister for Indian and Inuit services would probably combine this responsibility with another portfolio. Second, the principle that the minister of Aboriginal relations controls the purse strings for federal activities related to Aboriginal peoples and is responsible for monitoring would apply to the relationship with the minister of Indian and Inuit services, in the same manner as with other ministers overseeing departments with line responsibilities for particular Aboriginal issues.

The Department of Indian and Inuit Services would have no policy role in the transition to self-government. Its establishment is intended to reflect the fact that many First Nations and Inuit communities will choose to live under existing legislation while reconstructing their nations.²⁹⁰ In some cases, the federal government, through this department, will be involved with such communities in overseeing the construction of housing and other forms of infrastructure. For Inuit, who are rapidly developing public government institutions that will eventually be capable of assuming all governmental responsibilities, there may still be some federal obligation — such as in the area of post-secondary education — that would be administered by the Indian and Inuit services department, at least in the interim. For Métis people, federal initiatives of an interim nature, such as the administration of scholarship funds, would also, prior to the negotiation of a full treaty relationship, be administered by this department.

The needs of nations, bands and communities for effective support and service delivery should not be overshadowed by the important initiatives we foresee in terms of fundamental policy. Although the Inuit and Indian services department would have no policy role, it would be expected to develop and implement the best practices possible for the support of Indian peoples and Inuit and of communities using its services. It should not just be a bastion of the past.

Establishing this department alongside the department of Aboriginal relations is intended to differentiate the context in which the remnants of the old relationship are administered from the fundamentally new relationship associated with the Commission's recommendations. As peoples and communities move to embrace the new relationship, their connection with this department will wither away, to the point where it will be redundant.

5. There should be a permanent cabinet committee on Aboriginal relations, chaired by the minister of Aboriginal relations.

We have already emphasized the central role of cabinet in supporting the prime minister's role in renewing the fundamentals of the relationship between Canada and Aboriginal peoples. We believe there are two continuing aspects of the collective

responsibility of cabinet that suggest the need for a permanent cabinet committee dedicated specifically to Aboriginal relations.

First, cabinet will have to approve many new policy initiatives. These are of several types, including new mandates for the renewal and negotiation of treaties, claims and self-government accords; policy recommendations regarding transition from the *Indian Act*; and policy recommendations resulting from the various sectoral reviews we have recommended. The importance and volume of this work suggests the need for a cabinet committee to provide knowledgeable guidance to the full cabinet.

Second, cabinet colleagues will have to support the minister of Aboriginal relations as he or she initiates the various reviews and reforms that require interdepartmental/agency co-ordination. There will be a natural tendency for competing agendas to erode the momentum of Aboriginal policy development. Establishment of a focal point for collective responsibility and leadership within cabinet should help sustain co-operation, while it will also signal this purpose to federal officials, Aboriginal peoples and the attentive public.

Membership on the committee should reflect the fact that the federal/Aboriginal relationship is diverse and that this committee is not simply dealing with a particular aspect of social policy. We have seen the pitfalls of this latter approach in our review of the past.

It is important that the minister of Aboriginal relations chair the committee. There are a number of reasons for this. First, holding the chair will reinforce the new minister's senior status within cabinet and should provide extra leverage in obtaining the support of colleagues. Second, chairing this committee will create strong links between the minister of Aboriginal relations and the Privy Council Office. In addition to overseeing the structure of government, PCO also performs the crucial function of supporting the work of cabinet and its committees. Each cabinet committee has a dedicated secretariat within PCO, which provides guidance to the process of moving business through cabinet. In the thick of cabinet agenda making, it is not uncommon for PCO to exert a strong influence as gatekeeper, controlling what does and does not move forward. As the chair of the cabinet committee on Aboriginal relations, the new minister would be informed promptly and first hand, from a central-agency perspective, on how Aboriginal matters were progressing. This would increase the minister's ability to move issues through cabinet.

Finally, we foresee that there will be occasions when Aboriginal nations or peoples will meet with cabinet as the collective representative of the Crown. In the period before full treaty/nation government, these meetings would be with existing national Aboriginal organizations. These would not be cabinet meetings in the legal sense. Neither, however, would they be 'cap in hand' sessions, held so that Aboriginal peoples can make requests of cabinet. Instead, we see these meetings as a manifestation of the principle that Aboriginal governments and the government of Canada have common needs and interests that require joint planning and initiatives at the highest level.²⁹¹ Again, the practicalities of government business suggest that such meetings will be held in a more timely fashion if

there are designated representatives of cabinet who generally attend. Chairing this group would confirm the stature of the minister as the senior cabinet member dedicated to Aboriginal issues. Existence of the committee itself would mean that such meetings could involve knowledgeable substantive discussions, as well as have a ceremonial and symbolic character.

Portfolio of the minister of Aboriginal relations

Figure 3.3 illustrates a proposed structure for the ministry of Aboriginal relations. It is intended to highlight the responsibilities assigned to the portfolio and to avoid the conflict of interest problem associated with combining negotiation and implementation responsibilities within the same departmental structure, as has been the case mostly recently with DIAND. The ministerial structure sketched in Figure 3.3 reflects the concept that a single minister is crucial to knit all the pieces of the new relationship together, while being able to provide specific and clear direction to officials responsible for policy, negotiation and implementation.

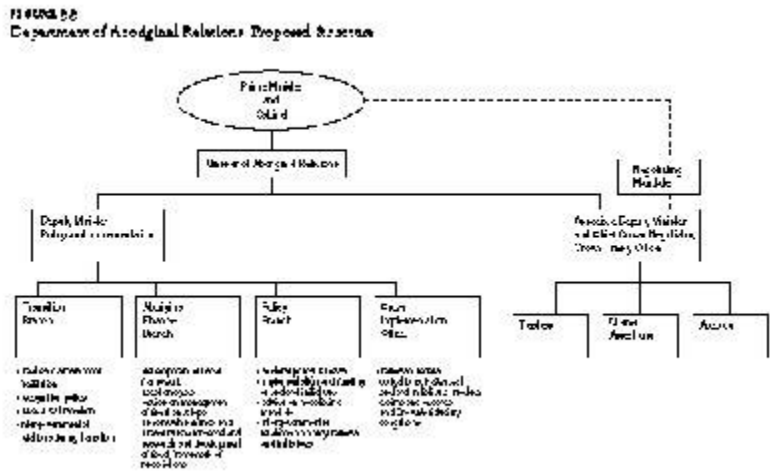
Initially, there are two main functions associated with fulfilling the minister's responsibilities: development of new federal policies associated with Aboriginal affairs and negotiation/engagement related to treaties, Aboriginal claims and self-government accords. Results of the sectoral and fiscal policy reviews recommended by the Commission should feed into discussions of treaties, claims and self-government accords. The need for a good link between the two suggests the wisdom of combining them in a single ministry.

Nonetheless, distinctions between the roles of policy development and negotiation are very real. The former implies the need for consultation with Aboriginal peoples, within the federal government and with provincial/territorial governments. These consultations will be oriented to developing federal policies that reflect the spirit of the new relationship and what the federal government thinks it can realistically accomplish, given fiscal and other constraints. The negotiation role involves continuous and intense engagement with Aboriginal nations and their governments. Although the negotiating atmosphere may be constructive, there will almost inevitably be differences in perspective that will cause the relationship to have its ups and downs. We think it is necessary to achieve the appropriate connections and distinctions between the policy and negotiation roles within the ministry itself. Specifically, we suggest that responsibility for the policy component of the ministry's role be vested in the deputy minister. This will be carried out through the work of three branches of the department: the policy branch, the Aboriginal finance branch and the transition branch. The specific functions of each of these are as follows.

Policy branch

- conducting sectoral policy reviews
- implementing and funding sectoral initiatives

- providing advice on the negotiating mandate
- overseeing intergovernmental relations with respect to policy review and initiatives
Aboriginal finance branch
- developing a fiscal framework
- continuing fiscal analysis
- providing advice on managing the fiscal envelope
- liaison with department of finance and treasury board secretariat
- conducting research and development on the fiscal framework of negotiations
Transition branch
- facilitating treaties/claims/accords
- implementing recognition policy
- overseeing *Indian Act* transition
- managing intergovernmental relations regarding transition



Responsibility for actual negotiations would be vested in another senior official holding associate deputy minister rank. This person's title would be Chief Crown Negotiator, Crown Treaty Office; as head of the Crown Treaty office the official would be responsible for negotiation of treaties, claims and self-government accords.

The chief Crown negotiator would be expected to work closely with the deputy and take direction from specific negotiation mandates given by cabinet and resulting from the work of the transition, Aboriginal finance, and policy branches of the department.

Both the deputy minister and the associate deputy minister would have significant contact with the minister of Aboriginal relations, as befits their important roles and the need for the minister to ensure that the policy development and negotiation functions are moving in concert.

The minister of Aboriginal relations would also be responsible for overseeing implementation of federal obligations under treaties, claims and self-government accords; for overseeing the actual transition from the *Indian Act*; and for supervising the implementation of new federal policies and programs in specific sectors, such as housing and health, that result from the various policy reviews we have recommended. This is the crucial oversight function associated with the new ministerial mandate. We foresee this occurring in two ways.

First, the minister's control of the fiscal envelope will result in effective leverage to induce action by other federal departments and agencies. We have already discussed the innovative and important nature of this aspect of our proposal.

In addition, we propose that the new department contain a distinct Crown implementation office. It would be responsible for oversight review of federal obligations relating to treaties, claims and self-government accords, the *Indian Act* transition, sectoral initiatives and the Crown's fiduciary obligations to Aboriginal nations. This office would perform comprehensive assessments of federal activities and prepare timely reports for the minister, cabinet and Parliament (perhaps through a standing parliamentary committee). In part, its role would be similar to that of a comprehensive auditor. We have chosen, however, not to isolate this office from the new ministry structure, as is frequently the case with such functions. Instead, we suggest that it be included in the responsibilities of the deputy minister to make maximum use of its potential to provide early warning signals to the department's other branches and to the minister.

Our proposals and the North

We have not referred extensively to the implications of our executive proposals for the northern mandate now associated with DIAND. This is because we see that mandate, as it relates to the North, being assumed by the territorial governments as they evolve. The varying approaches to self-government envisioned by Aboriginal peoples in the North, including nation-based government and public government, can be further developed and accommodated through the executive structure we propose.

Conclusion

No institutional change will sustain the long-term fundamental political objective of reforming the relationship between the Aboriginal peoples of Canada and their fellow

citizens, or even between Aboriginal nations and the Canadian political system. The institutional changes are necessary, but not sufficient in themselves. Also required is the sustained effort of individuals in many key positions of power and influence, and their ability to keep their attention on these longer-term goals.

We have highlighted the responsibility of the prime minister and cabinet to provide leadership, creativity and practical direction. We have lodged considerable responsibility for breaking new ground in our proposal for an unusually powerful federal minister of Aboriginal relations. The new minister's authority would come from the power of the purse, from the formal responsibility to oversee the entire range of federal behaviour with respect to Aboriginal peoples, and from the freedom from dealing directly with service delivery issues. This minister will be charged with making the ideals of the royal proclamation, the treaties and the other political accords a reality.

An essential complement to executive leadership will be the commitment of public servants charged with realizing the new relationship and the new agenda. With fresh institutions and a new mandate to work toward a more just relationship, we hope that appropriate attention will be paid to having the right skills and the right people in place within the new departments of Aboriginal relations and Indian and Inuit services. For example, we think that negotiators in the office of chief negotiator should be senior officials with excellent negotiating skills and a demonstrated capacity to arrive at successful outcomes despite difficult circumstances, rather than people with a long history in the Department of Indian Affairs and Northern Development. Negotiators will also need a detailed mandate with sufficient breadth and authority to provide a real chance of attaining far-reaching agreements. The chief negotiator will need direct access to the minister, and through the minister to cabinet, to enable speedy decisions when required. We see the changes we propose as providing an opportunity for retaining the services of a significant number of Aboriginal people.

There is also a need to sensitize people through the federal government to the essence of the new relationship and to promote genuine commitment to the work ahead. To a considerable degree, we see this happening through leadership by example on the part of the political executive. This would involve an early announcement of the royal proclamation and a legislative agenda. We think that the new executive structure we propose will promote this.

Development and implementation of the new executive structure and fulfilment of the mandate we propose will occur over time. For example, development of new negotiating mandates related to treaties, claims and self-government accords should logically precede full staffing of the office of the chief negotiator and the commencement of full-scale negotiations. We sincerely hope, however, that unnecessary delays in implementation will be avoided. We think that our proposals related to the executive structure and to implementation of the new relationship are sufficiently consistent with trends in government organization that they can move ahead. For example, our proposals for the executive structure do not increase the total number of federal ministers. They are also

consistent with the evolving government-to-government relationship between Aboriginal and territorial governments and Canada.

Finally, we think that these proposals can be implemented expeditiously. Precedent indicates that decisions about the structure of cabinet are initiated at the sole discretion of the prime minister. The mandate and organization of the Department of Aboriginal Relations and the Department of Indian and Inuit Services can be implemented initially by order in council.

The policy work that we foresee for the minister of Aboriginal relations and other federal departments and agencies need not derive its authority from any specific legislation, such as the *Indian Act*. Indeed, current government initiatives related to Aboriginal self-government are based on the federal government's broad constitutional responsibilities, not on the specific provisions of the *Indian Act*.

Ultimately, there will be a need for legislative change. This can be done retroactive to establishment of the new structure, as was the case with the major reorganization of the federal government undertaken in 1993. There is also a long list of federal legislation, on matters ranging from natural resources to health to employment, that may require modification in light of the new government organization and future policies related to Aboriginal peoples. This will be increasingly so as the new relationship takes hold. These legislative changes are no different in content or complexity from those in other federal policy fields undertaken in the past.

Recommendations

The Commission recommends that

2.3.45

The government of Canada present legislation to abolish the Department of Indian Affairs and Northern Development and to replace it by two new departments: a Department of Aboriginal Relations and a Department of Indian and Inuit Services.

2.3.46

The prime minister appoint in a new senior cabinet position a minister of Aboriginal relations, to be responsible for

- guiding all federal actions associated with fully developing and implementing the new federal/Aboriginal relationship, which forms the core of this Commission's recommendations;
- allocating funds from the federal government's total Aboriginal expenditures across the government; and

- the activity of the chief Crown negotiator responsible for the negotiation of treaties, claims and self-government accords.

2.3.47

The prime minister appoint a new minister of Indian and Inuit services to

- act under the fiscal and policy guidance of the minister of Aboriginal relations; and
- be responsible for delivery of the government's remaining obligations to status Indians and reserve communities under the *Indian Act* as well as to Inuit.

2.3.48

The prime minister establish a new permanent cabinet committee on Aboriginal relations that

- is chaired by the minister of Aboriginal relations;
- is cabinet's working forum to deliberate on its collective responsibilities for Aboriginal matters; and
- takes the lead for cabinet in joint planning initiatives with Aboriginal nations and their governments.

2.3.49

The government of Canada make a major effort to hire qualified Aboriginal staff to play central roles in

- the two new departments;
- other federal departments with specific policy or program responsibilities affecting Aboriginal people; and
- the central agencies of government.

2.3.50

The government of Canada implement these changes within a year of the publication of this report. Complying with this deadline sends a clear signal that the government of Canada not only intends to reform its fundamental relationship with Aboriginal peoples but is taking the first practical steps to do so.

4.4 Representation in the Institutions of Canadian Federalism

We have focused our attention so far on implementing Aboriginal self-government as one of three orders of government. As we suggested, this is the area of governance in which the Commission can make the greatest contribution. We recognize that federalism has two main pillars: self-rule and shared rule. Much of what we have written has been on the topic of Aboriginal self-rule. We turn now to the second component — how Aboriginal people can share in the governing of Canada.

A key component in the design of federal systems is how people are represented in federal institutions and processes. People can be represented directly in institutions and processes through elected or appointed representatives (as people are represented indirectly in the House of Commons and the Senate), or people can be represented indirectly through their governments, be they federal, provincial, territorial or Aboriginal (which we refer to as intergovernmental relations). What concerns us is how Aboriginal people can participate directly and more fully in the decision-making processes of Canadian institutions of government.

We wish to make two initial points. First, Canadian political institutions often lack legitimacy in the eyes of Aboriginal people. Many have noted that Aboriginal peoples were not involved in designing the Canadian state or in fashioning its institutions and processes. Second, there are good reasons to question the capacity of Canadian political institutions to represent Aboriginal people. Until recently, Aboriginal people were systematically denied participation in the Canadian electoral process, and only a handful of Aboriginal people have sat in Parliament since Confederation.

Representation in Parliament

To date, Aboriginal people have been prevented from playing an active role in sharing the governing of Canada; they have not been adequately represented in the federal structures of government. The Royal Commission on Electoral Reform and Party Financing, in its 1991 report, explored the reasons for this sorry state of affairs in some detail.²⁹² In the period before Confederation it was widely assumed that Aboriginal people were simply inferior or were to be excluded on grounds of their lack of ‘civilization’ and that they had to become assimilated before they could enjoy the benefits of citizenship.

Before the movement to universal suffrage, most Aboriginal people failed to meet the property ownership qualifications for voting. Although only men were eligible to vote at that time, these qualifications were made legally inapplicable to reserve-based Indian men. Then, from 1920 to 1960, the ground for exclusion appeared to reflect the belief that Indian people enjoying certain types of tax exemption should have no representation in the House of Commons.

With a few exceptions, everyone covered by the *Indian Act* was technically denied the franchise until 1920, and then very few could vote until 1960, when the franchise was extended to all Indian persons. Inuit were legislatively barred from voting from 1934 to 1950 and rarely enumerated for federal elections until the early 1960s. Inuit and the Innu of Labrador, like other citizens, received the right to vote in 1949 when Newfoundland

joined Confederation. Métis and Indian people of the north-west faced criminal charges under the *Indian Act* if they met in public assembly in the decade following the Riel rebellion, effectively curtailing their political right of association. Although Métis people have been entitled to vote since Confederation on the basis that they are provincial residents, they have also faced problems of enumeration and had limited opportunities for exercising their franchise.²⁹³

Finally, Aboriginal people themselves have resisted participating in Canadian institutions of government. Since Aboriginal people played no role in the design of Canadian government institutions or the Confederation agreement, many see these as ‘settler’ institutions. In some cases, treaty nations view their relationship with Canada as one of nation-to-nation only, and they want their relationship mediated by their own governments and leaders through their treaties — not by another institution. In other cases, Aboriginal people think that they should have their own distinct institutions, leaving Parliament to non-Aboriginal people. This lack of participation by Aboriginal people in Canadian institutions has been a growing problem in Canadian federalism and undermines the legitimacy of our system of government.

The extent of under-representation of Aboriginal people in Canadian governing institutions is startling. Since Confederation, almost 11,000 members of Parliament have been elected to the House of Commons. Of these, only 13 members have self-identified as Aboriginal people.²⁹⁴ The record for the Senate is not much better, at one per cent of all senators appointed since Confederation. This is far from proportional to the Aboriginal population of Canada.

Two major initiatives in recent years have addressed the issue of Aboriginal representation in Canadian governing institutions — the report of the Royal Commission on Electoral Reform and Party Financing, and the Charlottetown Accord. In its final report, the Royal Commission on Electoral Reform and Party Financing advocated an innovative model that would see the creation of up to eight Aboriginal electoral districts in the House of Commons.²⁹⁵ These districts would be created only if a sufficient number of Aboriginal people registered to vote in the designated district. The proposal guarantees a process for establishing these electoral districts rather than simply guaranteeing seats for Aboriginal people. The decision about whether they wish to have this type of representation would then rest with Aboriginal people.

The approach taken was limited by a decision not to make a recommendation that would trigger the general amending formula of the constitution, as a proposal for proportional representation by province and territory would do. The Aboriginal electoral districts proposal would simply require the consent of the House of Commons and the Senate.

A special enumeration of potential Aboriginal electors would be conducted, with a test for ‘aboriginality’ and a related dispute resolution procedure. An Aboriginal person would choose to vote in either the general electoral district or the Aboriginal one. A variant of this approach has been in use in New Zealand since 1867, with four seats set aside in the Parliament for Maori, the Indigenous people of New Zealand.²⁹⁶

The Charlottetown Accord of 1992 dealt only briefly with the representation of Aboriginal peoples in the House of Commons, proposing that the matter should be pursued by Parliament, in consultation with representatives of the Aboriginal peoples of Canada, after it received the final report of the House of Commons committee studying the recommendations of the Royal Commission on Electoral Reform and Party Financing.²⁹⁷ The accord had much more to say about the representation of Aboriginal people in the Senate. It proposed guaranteed representation in the Senate for Aboriginal peoples. Aboriginal Senate seats would be additional to provincial and territorial seats, rather than drawing away from current allocations. The accord suggested that Aboriginal senators would have the same roles and powers as other senators, as well as the possibility that a double majority would be required to approve certain matters affecting Aboriginal people. These issues and other details relating to the number of Aboriginal senators, the distribution of Senate seats, and the method of selecting Aboriginal senators were to be the subject of further discussion.²⁹⁸

It is clearly in the interests of all Canadians that Aboriginal peoples be represented more adequately and participate more fully in the institutions of Canadian federalism. This will help to build the moral and political legitimacy of such institutions in the eyes of Aboriginal people.

However, we are concerned that efforts to reform the Senate and the House of Commons may not be compatible with the foundations for a renewed relationship built upon the inherent right of Aboriginal self-government and nation-to-nation governmental relations. Three orders of government imply the existence of representative institutions that provide for some degree of majority control, not minority or supplementary status.

An Aboriginal parliament as a first step toward a House of First Peoples

A third chamber of Parliament would be a logical extension of three orders of government. A separate chamber, the Senate, was designed to represent the interests of Canada's regions and provinces (although in practice it has been less than successful). It follows that Aboriginal nations should also have distinct representation in Parliament, which could take the form of a third chamber established alongside the existing House of Commons and Senate. This third house would provide a means for the Aboriginal peoples of Canada to share in governing the country, while at the same time acknowledging the distinct interests, cultures and values of Aboriginal peoples. It would give Aboriginal people a permanent voice in processes of national decision making, in what might be called 'shared-rule decisions'. The idea of a third chamber is a relatively new one, first proposed during the Canada round of constitutional negotiations that led to the Charlottetown Accord. See Appendix 3B for a summary of the proposal by the Native Council of Canada (now the Congress of Aboriginal Peoples) for a House of First Peoples.

A third chamber representing Aboriginal nations would address a number of problems. It would provide an institutional link whereby Aboriginal peoples' concerns could be voiced in a formal and organized way in the decision-making process of the Parliament of

Canada. The third chamber approach would also avoid conflict with provincial and territorial governments, all of which — in the Charlottetown Accord — saw the Senate as representing primarily regional and provincial interests. A third chamber would be freed from accommodating the regional and provincial interests of the Senate.

If a third chamber is to be established, it should have real power. By this, we mean the power to initiate legislation and to require a majority vote on matters crucial to the lives of Aboriginal peoples. This legislation would be referred to the House of Commons for mandatory debate and voting. We recognize that, to accomplish this objective, the constitution would have to be amended. To move immediately in this area, we suggest a staged approach, which would not require a constitutional amendment initially. While full implementation will await a constitutional amendment and the rebuilding of Aboriginal nations, the government of Canada can act now, in terms of public policy and legislation, by enacting an Aboriginal Parliament Act.

Although the idea of an Aboriginal parliament is new to Canada, such institutions do exist in other countries. The first Aboriginal parliaments were established in northern Europe. There is much to be learned from the experience of the Saami parliaments of Scandinavia.²⁹⁹ The Saami (or Lapps) are the indigenous people of what was formerly called Lapland (now Saamiland), whose traditional territories are now divided among Sweden, Norway, Finland and Russia. There are approximately 75,000 Saami dispersed across these countries.³⁰⁰ The *Saami Codicil of 1751*, an addendum to a treaty between Sweden and what was then Denmark-Norway, recognized some of the Aboriginal rights of the Saami, including the customary law of the Saami (with exclusive jurisdiction of Saami courts over Saami disputes), the acknowledgement of a Saami Nation, and the free movement of Saami reindeer herders.

The Saami parliament in Norway — the *Saømediggi* — was created following the passage of the *Saami Act* by the Norwegian assembly in 1987. The legislation also recognized the Saami as a distinct people entitled to particular rights in such fields as culture, language and social life. There are 13 Saami constituencies, each of which returns three members. Eligible voters are enrolled on a Saami electoral register. To be eligible, voters must identify as a Saami and declare Saami as their mother tongue or have a parent or grandparent who does. The powers of the *Saømediggi* are very limited, however. It is to be consulted on appropriate matters, and it is to bring matters before public authorities and private institutions.

The Finnish Saami parliament, established in the early 1970s and officially called the Delegation for Saami Affairs, has 20 elected members. Of these, 12 are elected from four Saami constituencies, and two each from four Saami locals. Neither the Norwegian nor the Finnish Saami institutions have legislative functions. In this sense, the use of the term ‘parliaments’ is misleading.

Simply put, the Saami parliaments lack clout. Nor were the Saami people adequately involved in the design of these institutions. These are not inherent flaws in the concept of an Aboriginal parliament, however. Aboriginal parliaments can have real power, and

Aboriginal peoples can be fully involved, if not primarily responsible, for the structure and processes of such institutions.

Several other problems of adaptation present themselves. For example, unlike Finland and Norway, Canada has a federal system of government. Also, unlike the Saami, who are a relatively homogeneous people, Aboriginal peoples in Canada — Indian, Inuit and Métis — are diverse in language, culture and geography.

Recommendations

The Commission recommends that

2.3.51

The federal government, following extensive consultations with Aboriginal peoples, establish an Aboriginal parliament whose main function is to provide advice to the House of Commons and the Senate on legislation and constitutional matters relating to Aboriginal peoples.

2.3.52

The Aboriginal parliament be developed in the following manner:

- (a) the federal government, in partnership with representatives of national Aboriginal peoples' organizations, first establish a consultation process to develop an Aboriginal parliament; major decisions respecting the design, structure and functions of the Aboriginal parliament would rest with the Aboriginal peoples' representatives; and
- (b) following agreement among the parties, legislation be introduced in the Parliament of Canada before the next federal election, pursuant to section 91(24) of the *Constitution Act, 1867*, to create an Aboriginal parliament.

Although we do not wish to circumscribe the role of an Aboriginal parliament, we suggest that it should provide advice to the House of Commons and the Senate in the following matters:

Legislation

- legislation relating to matters pertaining to section 91(24) of the constitution (“Indians, and Lands reserved for the Indians”);
- legislation relating to Aboriginal self-government, treaties and lands;
- legislation of general application, but whose subject matter would directly affect Aboriginal peoples in relation to their identity, language, tradition, culture, land, water and environment; and

- legislation flowing from the recommendations of this Commission.

Constitutional matters relating to Aboriginal peoples

- Sections 25 and 35 of the constitution (shielding certain Aboriginal and treaty rights from a construction of the *Canadian Charter of Rights and Freedoms* that would abrogate or derogate from them and recognizing and affirming Aboriginal and treaty rights, including, we believe, the inherent right of Aboriginal self-government);
- other rights and freedoms that pertain to the Aboriginal peoples of Canada.

Review and oversight

- reports from treaty commissions;
- the proposed royal proclamation, the proposed ministry of Aboriginal relations, and the proposed Aboriginal Lands and Treaties Tribunal;
- Aboriginal self-government and land claims agreements; and
- monitoring of the implementation of Aboriginal self-government.

Fact finding and investigation

- Aboriginal parliamentarians could sit on joint committees of the House of Commons and the Senate on specific issues, such as justice and solicitor general and the standing committee on Aboriginal affairs.
- An Aboriginal parliament could receive references from the House of Commons or the Senate for investigation and have the power to hold hearings. This would enable an Aboriginal perspective to be brought to bear on possible legislative initiatives while they are still at an early stage. A similar role has been played in the past with respect to law reform commissions. For this reason, we think that the Aboriginal parliament should have a research branch to assist its members to fulfil this and other functions.

As the preceding list implies, an Aboriginal parliament should have the option of reviewing all legislation coming before the Parliament of Canada. This would permit a careful clause-by-clause assessment of proposed legislation from the perspective of Aboriginal peoples' representatives. It would also be helpful for the Aboriginal parliament to meet with the minister of Aboriginal relations on a regular basis, and at least twice per year.

This brings us to the question of how Aboriginal peoples are to be represented in an Aboriginal parliament. Here, we find the proposal of the Congress of Aboriginal Peoples instructive: base the representation on the nation or peoples. Each nation or people would have its own representative, yielding an Aboriginal parliament of between 75 and 100

seats, according to the proposal. Larger Aboriginal nations or peoples, such as the Cree, Ojibwa, Mi'kmaq, Dene, Inuit, and Métis — or confederacies of nations such as the Iroquois Confederacy and the Blackfoot Confederacy — might have more than one representative. Addressing representation in this way would have the added advantage of reinforcing what we consider to be a fundamental value of the new relationship between Aboriginal and non-Aboriginal people — that it is a nation-to-nation relationship within Canada. The issue of what constitutes an Aboriginal nation would be resolved by applying the proposed recognition policy.

While the fully developed and constitutionally entrenched House of First Peoples would eventually have representatives of up to 60 to 80 Aboriginal nations, we suggest that it would be wise to start with a smaller number of representatives for the Aboriginal parliament. Based on the work of the Royal Commission on Electoral Reform and Party Financing, it might be appropriate to begin, as an interim step, by allocating seats by province and territory. The Aboriginal parliament could begin with two Aboriginal constituencies per province and territory, with more populous regions receiving additional seats. For example, for each 50,000 people who identify as Aboriginal persons, an additional seat could be added. Roughly speaking, this would give Ontario three additional seats; British Columbia, Alberta, Manitoba and Saskatchewan two additional seats; and Quebec one additional seat, for a total of 36 seats in the initial Aboriginal parliament. As nations rebuild themselves, representation in the Aboriginal parliament would shift from representation by province to representation by nation.

Recommendation

The Commission recommends that

2.3.53

- (a) Aboriginal parliamentarians be elected by their nations or peoples; and
- (b) elections for the Aboriginal parliament take place at the same time as federal government elections to encourage Aboriginal people to participate and to add legitimacy to the process.

Several reasons led us to this recommendation. The first is that an appointed parliament, like the present Senate, lacks legitimacy in the eyes of many Canadians. Second, it would be more difficult to claim that an Aboriginal parliament did not truly represent the Aboriginal peoples of Canada if its members were elected. Aboriginal parliamentarians would serve the same terms, typically from four to five years, as federal members of Parliament.

It would be necessary to have a roll or list of voters, and this would entail the enumeration of Aboriginal Canadians. An enumeration of Aboriginal voters would help to ensure that the process is fair and that the parliamentarians are representative.

Recommendation

The Commission recommends that

2.3.54

The enumeration of Aboriginal voters take place during the general enumeration for the next federal election.

Conclusion

The creation of an Aboriginal parliament would not be a substitute for self-government by Aboriginal nations. Rather, it is an additional institution for enhancing the representation of Aboriginal peoples within Canadian federalism. The design of the institution, however, must provide for more than symbolic representation. At the centre of our proposal for an Aboriginal parliament is the principle that the renewed relationship between Canada and Aboriginal peoples is a nation-to-nation relationship that supports the inherent right of Aboriginal self-government. The proposed powers and responsibilities of an Aboriginal parliament reflect this principle and provide the basis for an effective role for Aboriginal nations in the decision-making processes of the Parliament of Canada.

Notes:

* Because of its length, Volume 2 is published in two parts, the first containing chapters 1 to 3 and the second chapters 4 to 6.

* Transcripts of the Commission's hearings are cited with the speaker's name and affiliation, if any, and the location and date of the hearing. See *A Note About Sources* at the beginning of this volume for information about transcripts and other Commission publications.

1 Chiefs of the Shuswap, Okanagan and Couteau (Thompson) Tribes of British Columbia to Prime Minister Sir Wilfrid Laurier, as quoted in Kamloops *News*, 25 August 1910.

2 Chief James Montour of Kanesatake (Oka), appearing before the Joint Committee of the Senate and the House of Commons on Indian Affairs, as quoted in John Thompson, "A History of the Mohawks at Kanesatake and the Land Dispute to 1961", in *Materials Relating to the History of the Land Dispute at Kanesatake*, report prepared for the Department of Indian Affairs and Northern Development (DIAND), revised edition (1993), p. 42.

3 This figure includes reserves, Indian settlements and Métis settlements in Alberta. Reserves south of the sixtieth parallel amount to approximately 26,600 square kilometres.

See DIAND, *Schedules of Indian Bands, Reserves and Settlements Including Membership and Population Location and Area in Hectares* (Ottawa: Government Services Canada, 1992).

4 In 1990, there were 1,878,285 Native Americans in the lower 48 states or .008 per cent of the total U.S. population of 248,709,873: *1990 Census of Population: General population characteristics, United States* (Washington, D.C.: U.S. Department of Commerce, 1992). There are 64,647,429 acres (261,822 square kilometres) of Indian lands in the lower 48 states: Bureau of Indian Affairs, "Acreage of Indian Lands by State", 1992 (unofficial figures). In Australia, Aborigines make up 1.2 per cent of the total population and hold title to 10.3 per cent of the land mass: Robert White-Harvey, "Reservation Geography and the Restoration of Native Self-Government" (1994) 17 *Dalhousie L.J.* 587 at 588.

5 See Royal Commission on Aboriginal Peoples [RCAP], *Focusing the Dialogue: Discussion Paper 2* (Ottawa: Supply and Services, 1993).

6 Rudy Platiel, "Coping with a land claim", *Globe and Mail* (1 October 1994), pp. A1 and A9; Diane Forrest, "Our Home and Native Land", *Cottage Life*, November/December 1994, pp. 30-39. See also Appendices 4A and 4B to this chapter.

7 RCAP, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995).

8 These three categories are discussed at some length in *Treaty Making in the Spirit of Co-existence*.

9 Patrick Moore and Angela Wheelock, eds., and Dene Wodih Society, comp., *Wolverine Myths and Visions: Dene Traditions from Northern Alberta* (Edmonton: University of Alberta Press, 1990), pp. xxi-xxv, 59-70, 84-86.

10 One of these parcels, Moose Prairie Indian Reserve #208, was surrendered to the Crown in 1954.

11 Moore and Wheelock, *Wolverine Myths and Visions* (cited in note 9), pp. xii-xiii; Dennis Madill, *Treaty Research Report: Treaty Eight* (Ottawa: Indian Affairs and Northern Development, 1986), pp. 85, 135-142, 149.

12 Moore and Wheelock, *Wolverine Myths and Visions*, pp. 72-76.

13 See Volume 4, Chapter 6.

14 For this and the following discussion, see generally, Peter J. Usher, Frank J. Tough and Robert M. Galois, "Reclaiming the land: aboriginal title, treaty rights and land claims in Canada", *Applied Geography* 12/2 (1992), pp. 109-132.

- 15** Eleanor B. Leacock, “Les relations de production parmi les peuples chasseurs et trappeurs des régions subarctiques du Canada”, *Recherches amérindiennes au Québec* 10/1-2 (1980), pp. 79-80.
- 16** Olive Patricia Dickason, “For Every Plant There is a Use: The Botanical World of Mexica and Iroquoians”, in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, ed. Kerry Abel and Jean Friesen (Manitoba: University of Manitoba Press, 1991), p. 23.
- 17** J.A. Cuoq, *Lexique de la langue algonquine* (Montréal: J. Chapleau et Fils, 1886), p. 296.
- 18** John Joe Sark, transcripts of the hearings of the Royal Commission on Aboriginal Peoples [hereafter RCAP transcripts], Charlottetown, Prince Edward Island, 5 May 1992.
- 19** National Archives of Canada (NAC), Record Group (RG) 10, volume 266, p. 163126, report of Commissioners Alexander Vidal and T.G. Anderson, 1849. See also James Morrison, “The Robinson Treaties of 1850: A Case Study”, research study prepared for RCAP (1993). For information about research studies prepared for RCAP, see *A Note About Sources* at the beginning of this volume.
- 20** See also Morrison, “The Robinson Treaties of 1850”.
- 21** An elder quoted in Anastasia M. Shkilnyk, *A Poison Stronger than Love: The Destruction of an Ojibwa Community* (New Haven, Conn.: Yale University Press, 1985), p. 66.
- 22** Shkilnyk, *A Poison Stronger than Love*, pp. 71-72.
- 23** F.G. Speck, *Family Hunting Territories and Social Life of Various Algonkian Bands of the Ottawa Valley: Memoir 70, No. 8, Anthropological Series* (Ottawa: Government Printing Bureau, 1915), p. 21. Aboriginal people are generally reluctant to discuss spiritual sanctions to cause misfortune, as the potential consequences of doing so are understood as being just as harmful. Others, however, have documented instances where its use, or threat of use, has been a means of punishing or resolving conflicts (including those related to resource access and allocation) among clans or between nations. See, for example, Shkilnyk, *A Poison Stronger than Love* (cited in note 21) and Edward S. Rogers, *The Round Lake Ojibwa*, Occasional Paper 5 (Toronto: Royal Ontario Museum, 1962).
- 24** See Peter Usher, “Contemporary Aboriginal Lands, Resources, and Environment Regimes æ Origins, Problems, and Prospects”, research study prepared for RCAP (1993); Adrian Tanner, “Existe-t-il des territoires de chasse?”, *Recherches amérindiennes au Québec* 1 (1971), pp. 69-83; José Mailhot, “La mobilité territoriale chez les Montagnais-Naskapis du Labrador”, *Recherches amérindiennes au Québec* 15/3 (1985), pp. 3-12; Jean-Guy Deschênes, “La contribution de Frank G. Speck à l’anthropologie des

Amérindiens du Québec”, *Recherches amérindiennes au Québec* 11/3 (1981), pp. 205-221.

25 Speck, *Family Hunting Territories* (cited in note 23), p. 17.

26 Quoted in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which they were based, and other information relating thereto* (Toronto: Belfords, Clarke & Co., Publishers, 1880; Saskatoon: Fifth House Publishers, 1991), p. 59.

27 World Wildlife Fund Canada, “Protected Areas and Aboriginal Interests in Canada”, brief submitted to RCAP (1993). For information about briefs submitted to RCAP, see *A Note About Sources* at the beginning of this volume.

28 William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983).

29 Henry T. Lewis, “A Time for Burning”, Occasional Publication Number 17 (Edmonton: Boreal Institute for Northern Studies, University of Alberta, 1982), p. 25.

30 On this general topic, see the collected papers in Nancy M. Williams and Eugene S. Hunn, eds., *Resource Managers: North American and Australian Hunter-Gatherers* (Canberra: Australian Institute of Aboriginal Studies, 1986).

31 Andrew Chapeskie, “Land, Landscape, Culturescape: Aboriginal Relationships to Land and the Co-management of Natural Resources”, research study prepared for RCAP (1995).

32 Chapeskie, “Land, Landscape, Culturescape”.

33 Chapeskie, “Land, Landscape, Culturescape”.

34 Canadian Arctic Resources Committee, “Aboriginal Peoples, Comprehensive Land Claims, and Sustainable Development in the Territorial North”, brief submitted to RCAP (1993), Appendix F; see also The Inuit Circumpolar Conference, “The Participation of Indigenous Peoples and the Application of their Environmental and Ecological Knowledge in the Arctic Environmental Protection Strategy: A Report on Findings”, report prepared for DIAND (1993).

35 Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992* (Vancouver: Douglas and McIntyre, 1991), pp. 126-139.

36 Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada’s Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993).

37 See Victor P. Lytwyn, "Ojibwa and Ottawa Fisheries around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Fishing Rights", *Native Studies Review* 6/1 (1990), pp. 1-30; John J. Van West, "Ojibwa Fisheries, Commercial Fisheries Development and Fisheries Administration, 1873-1915: An Examination of Conflicting Interest and the Collapse of the Sturgeon Fisheries of the Lake of the Woods", *Native Studies Review* 6/1 (1990), pp. 31-65; and Tim E. Holtzkamm, Victor P. Lytwyn and Leo G. Waisberg, "Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy", *The Canadian Geographer* 32/3 (1988), pp. 194-205.

38 The discussion that follows is taken from Peter Usher, "Lands, Resources and Environment Regimes Research Project: Summary of Case Study Findings and Recommendations", research study prepared for RCAP (1994).

39 See, for example, Fikret Berkes, "Native Subsistence Fisheries: A Synthesis of Harvest Studies in Canada", *Arctic* 43/1 (1990), pp. 35-42.

40 See Elizabeth Robinson, "The Health of the James Bay Cree", *Canadian Family Physician* 34 (July 1988), pp. 1606-1613.

41 Even in the early 1970s, it was still unusual for graduate students in English Canada (though not in Quebec) to consider writing a thesis dealing with an Aboriginal issue. On the general topic of the treatment of Aboriginal people in educational materials, see Donald B. Smith, "A Look Backwards: Canada in 1892, 1927 and 1967", *ASC [Association for Canadian Studies] Newsletter* 14/3 (Fall 1992), pp. 10-15; and Sylvie Vincent and Bernard Arcand, *L'Image de l'Amérindien dans les manuels scolaires du Québec* (Montreal: Hurtubise HMH, 1979).

42 See Jacques Rousseau, "The Northern Québec Eskimo Problem and the Ottawa-Québec Struggle", *Anthropological Journal of Canada* 7/2 (1969), pp. 2-15; Barnett Richling, "Diamond Jenness and 'useful anthropology' in Canada", *Stout Centre Review* 2/1 (1991), pp. 5-9; and T.F. McIlwraith, "'At Home with the Bella Coola Indians'", *B.C. Studies* 75 (Autumn 1987), pp. 43-60.

43 See Jean-Paul Bernard, "L'historiographie canadienne récente (1964-94) et l'histoire des peuples du Canada", *The Canadian Historical Review* 76/3 (September 1995), pp. 330-332, 348-350; Harold Franklin McGee, Jr., "No Longer Neglected: A Decade of Writing Concerning the Native Peoples of the Maritimes", *Acadiensis* 10 (Autumn 1980), pp. 135-142; James W. St. G. Walker, "The Indian in Canadian Historical Writing, 1971-1981", in *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, Nakoda Institute Occasional Paper No. 1, ed. Ian A.L. Getty and Antoine S. Lussier (Vancouver: University of British Columbia Press, 1983), pp. 340-357; and Bruce G. Trigger, *Natives and Newcomers: Canada's 'Heroic Age' Reconsidered* (Kingston and Montreal: McGill-Queen's University Press, 1985), pp. 3-49.

44 Claims of territorial sovereignty by European nation-states were bolstered by indefensible assertions of religious, ethnic, cultural and political superiority. As described by Chief Justice John Marshall of the United States Supreme Court, in *Johnson v. M'Intosh*, 5 U.S. (8 Wheaton) 543 at 573 (1823):

The character and religion of [North America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.

See also William Edward Hall, *A Treatise on International Law*, 8th ed. (London: Oxford University Press, 1924), p. 47 (international law only governs states that are "inheritors of that civilization"); Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Volume 1 (Boston: Little, Brown, and Company, 1922) p. 164 ("native inhabitants possessed no rights of territorial control which the European explorer or his monarch was bound to respect"); and John Westlake, *Chapters on the Principles of International Law* (Cambridge: University Press, 1894), pp. 136-138, 141-143 (a distinction is drawn between "civilization and want of it").

45 See generally, Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1996) Osgoode Hall L.J. (forthcoming).

46 See RCAP, *Treaty Making in the Spirit of Co-existence* (cited in note 7) and RCAP, *Partners in Confederation: Aboriginal*

Peoples, Self-Government, and the Constitution (Ottawa: Supply and Services, 1993), pp. 5-27. See also J.C. Smith, "The Concept of Native Title" (1974) 24 U.T.L.J. 1 at 9 (the origin of the law of Aboriginal title lies in institutions that give recognition to the near-universal principle that land belongs to those who have used it from time immemorial).

47 See *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313; see also *Mabo v. Queensland* (1992), 107 A.L.R. 1; *Worcester v. Georgia* (1832), 8 U.S. 6 Peters 515.

48 For the view that extinguishment did occur, see Henri Brun, "Les droits des Indiens sur le territoire du Québec", in *Le territoire du Québec: Six études juridiques* (Quebec City: Presses de l'Université Laval, 1974), pp. 49-51; and G.F.G. Stanley, "The First Indian 'Reserves' in Canada", *Revue d'histoire de l'Amérique française* 4/2 (1950).

For the pluralist perspective, see Denys Delâge, "L'alliance franco-amérindienne 1660-1701", *Recherches amérindiennes au Québec* 19/1 (1989), pp. 3-15; Gilles Havard, *La grande paix de Montréal de 1701: Les voies de la diplomatie franco-amérindienne* (Montreal: Recherches amérindiennes au Québec, 1992); Brian Slattery, "Did France Claim Canada Upon 'Discovery'?", in *Interpreting Canada's Past*, ed. J.M. Bumsted, Volume I (Toronto: Oxford University Press, 1986), pp. 2-26; and Brian Slattery, "The

Land Rights of Indigenous Canadian Peoples”, PH.D. dissertation, Oxford University, 1979, pp. 70-94.

49 See Andrée Lajoie, “Synthèse introductive”, research study prepared for RCAP, in A. Lajoie, J.-M. Brisson, S. Normand and A. Bissonnette, *Le statut juridique des autochtones au Québec et le pluralisme* (Cowansville, Quebec: Les Éditions Yvon Blais, 1996).

50 *Connolly v. Woolrich* (1867), 17 Rapport judiciaires révisés de la Province de Québec. 75 at 82 (Sup. C.).

51 The Proclamation provides:

In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively, within which they shall lie; and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose. The complete text of the Royal Proclamation is reproduced in Volume 1, Appendix D.

52 *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3, s. 91(24) (assigning exclusive legislative authority over “Indians, and Lands reserved for the Indians” to the Parliament of Canada); *Rupert’s Land and North-Western Territory Order, 1870* (U.K.), reprinted in R.S.C. 1985, App. II, No. 9 (admission of northern territory to Canada conditional on “adequate provision for the protection of Indian tribes whose interests and well-being are involved in the transfer”); *Adjacent Territories Order, 1880* (U.K.), reprinted in R.S.C. 1985, App. II, No. 14; *Manitoba Act, 1870* (U.K.) 33 Vict., c. 3, 5.31, reprinted in R.S.C. 1985, App. II, No. 8 (providing for land allotment to Métis people); and *British Columbia Terms of Union, 1871* (U.K.), reprinted in R.S.C. 1985, App. II, No. 10 (“the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government”). Natural resource agreements were entered into between Canada and the three prairie provinces and were given constitutional effect by the *Constitution Act, 1930*, 20-21 George V, c. 26 (U.K.), reprinted in R.S.C. 1985, App. II, No. 26. The natural resource agreements guarantee Indians the right to take game and fish “for food” at all seasons of the year on specified territory. *Constitution Act, 1982*, s. 35(1) (recognizing and affirming “existing aboriginal and treaty rights of the aboriginal peoples of Canada”).

53 *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1052-53.

54 See *Indian Treaties and Surrenders from 1680 to 1890*, Volume I (Ottawa: King's Printer, 1905).

55 On this general subject, see Morrison, "The Robinson Treaties" (cited in note 19).

56 NAC RG10, volume 5, pp. 2082-2084, statement of the Mississauga Indians, 3 April 1829. See also Donald B. Smith, *Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) & the Mississauga Indians* (Toronto: University of Toronto Press, 1987).

57 NAC RG10, volume 27, p. 420, speech of Chief Quinepenon, 6 September 1806. See also Smith, *Sacred Feathers*.

58 See J.E. Chamberlin, *The Harrowing of Eden: White Attitudes Toward North American Natives* (Toronto: Fitzhenry & Whiteside, 1975).

59 See, for example, Eugene C. Hargrove, "Anglo-American Land Use Attitudes", *Environmental Ethics* 2/2 (1980).

60 *Indian Treaties and Surrenders* (cited in note 54), p. 112.

61 See Paul Tennant, "The Place of *Delgamuukw* in British Columbia History and Politics æ And Vice Versa", in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, ed. Frank Cassidy (Montreal: Institute for Research in Public Policy, 1992).

62 See Denys Delâge, "Le Français, l'Anglais et l'Indien allaient être égaux: Autochtones du Québec dans l'histoire", research study prepared for RCAP (1995); Marc Jetten, "Recognition and Acquisition of Aboriginal Property in North America (from the 17th to the 18th Centuries): The Case of the Nations Domiciled in Canada", in Denys Delage et al., "Cultural Exchanges within the Franco-Amerindian Alliance, 1600-1760", research study prepared for RCAP (1995) [translation]; Sylvio Normand, "Les droits des Amérindiens sur le territoire sous le Régime français", in Lajoie et al., *Le statut juridique des autochtones* (cited in note 49); and Alain Beaulieu, "Réduire et instruire: Deux aspects de la politique missionnaire des Jésuites face aux Amérindiens nomades (1632-1642)", *Recherches amérindiennes au Québec* 17/1-2 (1987), pp. 139-154.

63 Thompson, "A History of the Mohawks" (cited in note 2), p. 17. See also our discussion of this topic in Volume 1, Chapter 6, and "Documents relatifs aux Droits du Séminaire et aux Prétentions des Indiens sur la Seigneurie des Deux Montagnes", *Recherches amérindiennes au Québec* 21/1-2 (1991), pp. 93-94.

64 *Indian Treaties and Surrenders* (cited in note 54); Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991); Morrison, "The Robinson Treaties" (cited in note 19).

65 John F. Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a corporate memory for the Indian department* (Ottawa: Indian Affairs and Northern Development, 1985).

66 The example of the Mohawk sachem Thayandanega (Joseph Brant) æ who lived among his people on the Six Nations Reserve on the Grand River and also owned land on Burlington Bay in his private capacity æ had clearly been forgotten.

67 Amendments made to the *Indian Act* purposively excluded treaty Indians from acquiring a homestead unless they became enfranchised, while European immigrants were offered free land holdings. See *An Act to amend and consolidate laws respecting Indians*, S.C. 1876, c. 18, s. 70.

68 Note that this section deals primarily with the experience of treaty and non-treaty Indian peoples, as Inuit remained relatively isolated until the mid-20th century, and Métis people were left to their own resources. See Volume 4, Chapters 5 and 6.

69 Although RCMP officers were generally uncomfortable with the pass system (believing it to be illegal), whenever they stopped enforcing it æ as in 1893 in southern Alberta æ they received angry criticism from the local settler population. There is at least some evidence that the pass system was still in use in the areas covered by Treaties 4, 6 and 7 as late as the mid-1930s. See Brian Bennett, “Study of Passes for Indians to Leave their Reserves” (Indian and Northern Affairs, 1974); and Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen’s University Press, 1990).

70 See also J.R. Miller, “Owen Glendower, Hotspur, and Canadian Indian Policy”, *Ethnohistory* 37/4 (1990); Carter, *Lost Harvests*; and John L. Tobias, “Canada’s Subjugation of the Plains Cree, 1879-1885”, in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991).

71 Stewart Raby, “Indian Land Surrenders in Southern Saskatchewan”, *The Canadian Geographer* 17/1 (1973).

72 See J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, rev. ed. (Toronto: University of Toronto Press, 1989).

73 See D.N. Sprague, “The Manitoba Land Question 1870-1882”, *Journal of Canadian Studies* 15/3 (1980); and Paul L.A.H. Chartrand, “The Obligation to Set Aside and Secure Lands for the ‘Half-Breed’ Population Pursuant to Section 31 of the *Manitoba Act, 1870*”, LL.M. thesis, University of Saskatchewan, 1988.

74 DIAND, *Specific Claim Settlement Agreement between Her Majesty the Queen, in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development and the Keeseekoowenin Indian Band, as represented by its Chief and Councillors* (Ottawa: 16 March 1994).

75 George Stewart, Jr., *Canada Under the Administration of the Earl of Dufferin* (Toronto: Rose-Belford Publishing Company, 1878), pp. 492-493.

76 *British Columbia Terms of Union* (cited in note 52). The following discussion is based on a number of sources. See especially Louise Mandell and Leslie Pinder, "B.C. Issues", research study prepared for RCAP (1993); Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990); Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977); Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: University of British Columbia Press, 1974); Dennis Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa: Indian and Northern Affairs, 1981); and Duane Thomson, "The Response of Okanagan Indians to European Settlement", *B.C. Studies* 101 (Spring 1994).

77 NAC, Manuscript Group (MG) 26A, Sir John A. Macdonald Papers, pp. 127650-127651, Trutch to Macdonald, 14 October 1872. See Robin Fisher, "Joseph Trutch and Indian Land Policy", *BC Studies* 12 (1971-72).

78 The historical population data in the 1931 census put the Indian population at 29,275 in 1871. See John Lutz, "The White Problem æ State Racism and the Decline of Aboriginal Employment in 20th Century British Columbia", paper presented to the 1994 Canadian Historical Association Meeting, p. 7; and Robert Galois and Cole Harris, "Recalibrating Society: The Population Geography of British Columbia in 1881", *The Canadian Geographer* 38/1 (1994), pp. 37-53. See also Plate 36 (by the latter two authors) in *Historical Atlas of Canada, Volume II: The Land Transformed, 1801-1891* (Toronto: University of Toronto Press, 1993).

79 S.B.C. 35 Vict. cap. 37 s. 13 (1872). Since women could not vote either, the electorate consisted entirely of men who met the property qualification æ in effect, only a few hundred people.

80 *An Ordinance to amend and consolidate the Laws affecting the Crown Lands in British Columbia*, 1 June 1870. Article III gave males age 18 and over the right to pre-empt up to 320 acres of land north and east of the Cascade mountains and 160 acres elsewhere, with the proviso that "such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor's special permission in writing to that effect". See Cail, *Land, Man and the Law* (cited in note 76).

81 An 1864 colonial ordinance had limited reserves made thereafter to 10 acres per head; the effective average at that time was between one and three acres per person. When the federal government in 1873 instead proposed a formula of 80 acres, the provincial government offered 20 acres per head. See Cail, *Land, Man and the Law*.

82 See Tennant, *Aboriginal Peoples and Politics* (cited in note 76).

- 83** *An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia*, S.B.C. (1874), No. 2.
- 84** NAC MG11 CO42/735, folios (ff.) 99-120v, dispatch of Governor-General Lord Dufferin to the Colonial Secretary, 26 January 1875, enclosing Minute of the Canadian Privy Council (23 January 1875) with Opinion of the Minister of Justice (19 January). The opinion itself is at ff. 99-115v.
- 85** Madill, *British Columbia Indian Treaties* (cited in note 76).
- 86** Usher et al., “Reclaiming the Land” (cited in note 14).
- 87** See Tennant, *Aboriginal Peoples and Politics*, pp. 92-93; and Cail, *Land, Man and the Law* (both cited in note 76).
- 88** “Report of Commissioners for Treaty No. 8”, in *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen’s Printer, 1966).
- 89** See generally Morris Zaslow, *The Opening of the Canadian North 1870-1914* (Toronto: McClelland and Stewart, 1971).
- 90** See Gérard L. Fortin and Jacques Frenette, “L’Acte de 1851 et la création de nouvelles réserves indiennes au Bas-Canada en 1853”, *Recherches amérindiennes au Québec* 19/1 (1989), pp. 31-37.
- 91** *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 14 & 15 Vict. 106, S.C. 1851. See also Lajoie et al., “The French Regime” (cited in note 49).
- 92** Greg Sarazin, “Les Algonquins de l’Ontario”, in *Minuit moins cinq sur les réserves*, ed. Boyce Richardson, trans. Jacques B. Gélinas (Montréal: Libre Expression, 1992), pp. 134-168.
- 93** See Larry Villeneuve, “The Historical Background of Indian Reserves and Settlements in the Province of Quebec”, rev. Daniel Francis (Ottawa: Indian Affairs and Northern Development, 1984); Jacques Frenette, “Kitigan Zibi Anishnabeg: Le territoire et les activités économiques des Algonquins de la Rivière Désert (Maniwaki), 1850-1950”, *Recherches amérindiennes au Québec* 23/2-3 (1993).
- 94** For a detailed examination of the background and content of those agreements see Morrison, “The Robinson Treaties” (cited in note 19).
- 95** Quoted in Morrison, “The Robinson Treaties”.
- 96** *The James Bay Treaty: Treaty No. 9 (made in 1905 and 1906), and Adhesions made in 1929 and 1930* (Ottawa: Queen’s Printer, 1964), p. 5; Pierre Trudel, “Comparaison entre

le Traité de la Baie James et la Convention de la Baie James”, *Recherches amérindiennes au Québec* 9/3 (1979).

97 See *Re Paulette and Registrar of Land Titles* (1973), 42 D.L.R. (3d) 8.

98 Rémi Savard and Jean-René Proulx, *Canada: Derrière l'épopée, les autochtones* (Montreal: L'hexagone, 1982).

99 House of Commons, “Report from Inspector for Treaty No. 8”, in Sessional Papers No. 27 (1904) at 235. See Madill, *Treaty Research Report: Treaty Eight* (cited in note 11).

100 See *Lubicon Settlement Commission of Review Final Report*, March 1993.

101 *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.) at 54. For more discussion of this case, see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

102 *In re Southern Rhodesia* (1918), [1919] A.C. 211 (P.C.). But see *Amodu Tijani v. The Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 407 (P.C.) (“a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners”). For discussion of this case, see McNeil, *Common Law Aboriginal Title* (cited in note 101). See also *Calder v. A.G.B.C.* 1970, 13 D.L.R. (3d) 64 at 66 (B.C.C.A.) per Davey C.J.B.C. at 66 (“I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation”). For discussion of the Court of Appeal's decision in *Calder*, see Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), pp. 47-49.

103 Special Joint Committee of the Senate and the House of Commons to Inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their Petition submitted to Parliament in June 1926, *Proceedings, Reports and the Evidence* (Ottawa: King's Printer, 1927), p. 187.

104 See, for example, *R. v. Syliboy*, [1929] 1 D.L.R. 307 at 313, (N.S. Co. Ct.) in which the Mi'kmaq nation is said to be an “uncivilized people” and its 1752 treaty “at best a mere agreement made by the Governor and council with a handful of Indians”; and *Pawis v. The Queen*, [1980] 2 F.C. 18 (F.C.T.D.) at 25 where the Robinson-Huron treaty is said to be “tantamount to a contract”. For more discussion of these and related cases, see Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991) 36 McGill L.J. 382.

105 Department of Indian and Northern Affairs, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969), p. 11 (the ‘white paper’). For more discussion of the white paper in the context of lands and resources, see RCAP, *Treaty Making in the Spirit of Co-existence* (cited in note 7), pp. 33-34. See, generally,

Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).

106 Quoted in Edwin May, "The Nishga Land Claim, 1873-1973", M.A. thesis, Simon Fraser University, 1979.

107 *An Act to amend the Indian Act*, S.C. 1927, c. 32, s. 6.

108 See John Giokas, "The Indian Act: Evolution, Overview and Options for Amendment and Transition", research study prepared for RCAP (1995).

109 *Copy of the Robinson-Huron Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron, Conveying Certain Lands to the Crown* (Ottawa: Queen's Printer, 1964), p. 4.

110 The texts of the first seven numbered treaties are in Morris, *The Treaties of Canada* (cited in note 26). For the texts of Treaties 8 through 11, see Madill, *Treaty Research Report: Treaty Eight* (cited in note 11); James Morrison, *Treaty Research Report: Treaty Nine (1905-06), The James Bay Treaty*, report prepared for DIAND (1986); Kenneth S. Coates and William R. Morrison, *Treaty Research Report: Treaty Ten (1906)*, report prepared for DIAND (1986); and Kenneth S. Coates and William R. Morrison, *Treaty Research Report: Treaty Eleven (1921)*, report prepared for DIAND (1986). See also Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992).

111 Neal Ferris, "Continuity within Change: Settlement-Subsistence Strategies and Artifact Patterns of the Southwestern Ontario Ojibwa A.D. 1780-1861", M.A. thesis, York University, 1989; see also Edward S. Rogers and Flora Tobobondung, "Parry Island Farmers: A Period of Change in the Way of Life of the Algonkians of Southern Ontario", in *Canadian Ethnology Service Paper No. 31, Contributions to Canadian Ethnology, 1975*, ed. David Brez Carlisle (Ottawa: National Museums of Canada, 1975).

112 Leo G. Waisberg and Tim E. Holzkamm, "'A Tendency to Discourage Them from Cultivating': Ojibwa Agriculture and Indian Affairs Administration in Northwestern Ontario", *Ethnohistory* 40/2 (1993), pp. 175-211.

113 George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Don Mills, Ont.: Collier-Macmillan Canada, Ltd., 1974), pp. 33-34.

114 On the subject of federal Indian agricultural policy generally, see Buckley, *From Wooden Ploughs to Welfare* (cited in note 110) and Carter, *Lost Harvests* (cited in note 69). For a parallel study of Indian agriculture in the United States in the last half of the nineteenth century, see Leonard A. Carlson, *Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming* (Westport, Conn.: Greenwood Press, 1981).

115 Waisberg and Holzkamm, “A Tendency to Discourage them from Cultivating” (cited in note 112).

116 NAC RG10, volume 10,872, file 901/20-10, part 2, Indian Agent E. McLeod, Lytton, to Chairman of Game Conservation Board of British Columbia, 20 May 1925; Indian Agent H.E. Taylor, Williams Lake, to Assistant Indian Commissioner for British Columbia, 24 January 1936.

117 NAC RG10, volume 3661, file 9755-6, W.E. Ditchburn to D. Pattullo, 28 August 1923. See Thomson, “The Response of Okanagan Indians” (cited in note 76).

118 British Columbia Archives and Records Service (BCARS), GR 1995, file: micro B 1454, McKenna-McBride Commission Testimony, 10 June 1913, p. 279. See Lutz, “The White Problem” (cited in note 78).

119 *Indian Conditions: A Survey*, cat. no. R32-45/1980E (Ottawa: Department of Indian Affairs and Northern Development, 1980).

120 Archives of Ontario (AO), MU 1514, Irving Papers 75/16, p. 261, Order in Council, 8 July 1874. See S. Barry Cottam, “Federal/Provincial Disputes, Natural Resources and the Treaty #3 Ojibway, 1867-1924”, PH.D. dissertation, University of Ottawa, 1994, p. 263.

121 The Agreement of 16 April 1894 was made pursuant to *An Act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian Lands*, S.C. 1891, 54-55 Vict., c. 5. See Cottam, “Federal/Provincial Disputes” (cited in note 120), p. 211.

122 Morrison, *Treaty Research Report: Treaty Nine* (cited in note 110).

123 Madill, *Treaty Research Report: Treaty Eight* (cited in note 11).

124 See Richard H. Bartlett, “Indian and Native Rights in Uranium Development in Northern Saskatchewan” (1980-81) 45 Saskatchewan L.Rev. 13 at 24-26.

125 *Montreal Gazette*, 7 July 1849, p. 2.

126 See Pierre Berton, *Klondike: The Last Great Gold Rush 1896-1899* (Toronto: McClelland and Stewart, 1972).

127 See Julie Cruikshank, “Images of Society in Klondike Gold Rush Narratives: Skookum Jim and the Discovery of Gold”, *Ethnohistory* 39/1 (1992), pp. 20-41.

128 Vernon Dufresne and Dave Ohring, “Early History of the Larder Lake Gold Camp”, *Proceedings of the Local History Workshop, 29 April 1995* (Temiskaming-Abitibi Heritage Association, 1995).

129 NAC RG10, volume 3109, file 315,190. See Bruce W. Hodgins and James Morrison, “Tonene (c.1841-1916)”, *Dictionary of Canadian Biography*

130 . *St. Catherine’s Milling* at 54, and McNeil, *Common Law* (both cited in note 101).

131 *Quebec (A.G.) v. Canada (A.G.)* (1921), A.C. 401.

132 *Ontario Mining Company v. Seybold* (1900), 31 O.R. 386; *Ontario Mining Company v. Seybold* (1901), 31 S.C.R. 125. For a detailed discussion of the background to this case, see Cottam, “Federal/Provincial Disputes” (cited in note 120).

133 Morris, *The Treaties of Canada* (cited in note 26). See also Morrison, “The Robinson Treaties” (cited in note 19). Morris went on to say that that right would not apply on off-reserve lands; however, “as regards other discoveries, of course, the Indian is like any other man. He can sell his information if he can find a purchaser”.

134 *Indian Act, 1876*, S.C. 1876 c. 18, s. 3(6).

135 *An Act for the Settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Land*, S.C. 1924, 14-15 Geo. V, c. 48.

136 See *An Act to confirm and give effect to certain agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan respectively* (U.K.) 20-21 Geo. V, c. 26

137 . *The British Columbia Indian Reserves Mineral Resources Act*, S.C. 1944, c. 19.

138 NAC RG10, Red Series, volume 2217, file 43168-71, Thomas Walton to Superintendent-General of Indian Affairs, 21 August 1893.

139 See James T. Angus, “How the Dokis Indians Protected their Timber”, *Ontario History* 81/3 (1989); and Ian Radforth, *Bushworkers and Bosses: Logging in Northern Ontario, 1900-1980* (Toronto: University of Toronto Press, 1987).

140 See John Charles Pritchard, “Economic Development and Disintegration of Traditional Culture Among the Haisla”, PH.D. dissertation, University of British Columbia, 1977, p. 147.

141 BCARS, GR1995, file: micro B 1454, McKenna-McBride Commissions Transcripts, examination of William Robertson, 10 June 1913. See Lutz, “The White Problem” (cited in note 78).

142 Ontario Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario* (Toronto, 20 April 1994); National Aboriginal

Forestry Association, "Forest Lands and Resources for Aboriginal People", brief submitted to RCAP (1993), p. 10.

143 NAC RG10, volume 6743, file 420-8, volume 2, F.R. Latchford to Attorney General J.J. Foy, 31 October 1914; Latchford to D.C. Scott, Deputy Superintendent General of Indian Affairs, 13 November 1914. Justice Latchford had considerable experience in fish and wildlife matters. A prominent amateur zoologist, he had been the first commissioner (in 1898) of the provincial fisheries branch.

144 NAC RG10, volume 6743, file 420-8, volume 2, Mulligan to Department of Indian Affairs, 29 March 1915. See generally, Frank Tough, "Ontario's Appropriation of Indian Hunting: Provincial Conservation Policies vs. Aboriginal and Treaty Rights, ca. 1892-1930", paper prepared for Ontario Native Affairs Secretariat (1991); and Morrison, "The Robinson Treaties" (cited in note 19).

145 The English common law relating to fishing was that in navigable (tidal) waters, the right was vested in the public as a whole, while in non-navigable (non-tidal) waters, the right was vested in the Crown or its grantees. Private fishing clubs in Quebec and New Brunswick owed their existence to the latter. See Roland Wright, "The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada", *Ontario History* 86/4 (1994). In Quebec, under the Civil Code, there has been a long controversy over the ownership of fishing rights, but the provincial legislature has granted and regulated fishing rights.

146 On the lands of the Cree, Assiniboine and Métis in what are now southern Manitoba and southern Saskatchewan, the great herds had largely vanished by the early 1870s, although in the Blackfoot country of the western plains, buffalo were still hunted throughout the rest of the decade. See John S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988).

147 Robert G. McCandless, *Yukon Wildlife: A Social History* (Edmonton: University of Alberta Press, 1985).

148 Wright, "The Public Right of Fishing" (cited in note 145).

149 *The Fishery Act*, S. Prov. C., 20 Vict., c. 21.

150 See Wright, "The Public Right of Fishing" (cited in note 145).

151 Lytwyn, "Ojibwa and Ottawa Fisheries" (cited in note 37).

152 Van West, "Ojibwa Fisheries"; and Holtzkamm et al., "Rainy River Sturgeon" (both cited in note 37).

153 For a discussion of eastern Canada and the salmon fishery, see Anne-Marie Panasuk and Jean-René Proulx, “Les rivières à saumon de la Côte-Nord ou ‘Défense de pêcher æ Cette rivière est la propriété de---’”, *Recherches amérindiennes au Québec* 9/3 (1979), pp. 203-219.

154 Lutz, “The White Problem” (cited in note 78).

155 R. Alan Douglas, ed., *John Prince, 1796-1870: A Collection of Documents* (Toronto: The Champlain Society, 1980), p. 155.

156 See United Chiefs and Councils Manitoulin, “UCCM Fish & Wildlife Project”, brief submitted to RCAP (1993).

157 U.S. Department of the Interior, “Casting Light Upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territories” (1991).

158 Morrison, “The Robinson Treaties” (cited in note 19).

159 *An Act to amend the Act for the Protection of Game and Fur-bearing Animals*, S.O. 1892, 55 Vict., c. 58; *An Act to amend and consolidate the Laws for the Protection of Game and Fur-bearing Animals*, S.O. 1893, 56 Vict., c. 49; *An Act to amend and consolidate the Acts for the Protection of certain Animals, Birds, and Fishes*, S.B.C. 1895, 58 Vict., c. 23; and *An Act respecting Game in the Northwest Territories of Canada*, S.C. 1917, 7-8 Geo. V, c.36.

160 McCandless, *Yukon Wildlife* (cited in note 147). Toby Morantz, “Provincial Game Laws at the Turn of the Century Protective or Punitive Measures for the Native Peoples of Quebec: A Case Study”, paper presented at the annual Algonkian meetings, October 1994.

161 *An Act respecting a certain Convention between His Majesty and The United States of America for the Protection of Migratory Birds in Canada and the United States*, S.C. 1917, c. 18 and *An Act respecting the transfer of the Natural Resources of Alberta*, S.C. 1930, c. 3.

162 See Farley Mowat, *Sea of Slaughter* (Toronto: McClelland and Stewart, 1984).

163 Wright, “The Public Right of Fishing” (cited in note 145). Whitcher ended his professional career as the first superintendent of Banff National Park.

164 NAC RG10, volume 2064, file 10,009 1/2, W.F. Whitcher to L[awrence] Vankoughnet, Deputy Superintendent General of Indian Affairs, 15 September 1878.

165 NAC RG10, volume 2064, file 10,009 1/2, Charles Skene to L[awrence] Vankoughnet, 24 October 1878.

- 166** Wright, “The Public Right of Fishing” (cited in note 145).
- 167** Van West, “Ojibwa Fisheries”; and Holtzkamm et al., “Rainy River Sturgeon” (both cited in note 37).
- 168** *An Act to amend the Act for the Protection of Game and Fur-bearing Animals*, S. O. 1892, 55 Vict., c. 58, s. 12.
- 169** See *An Act to amend and consolidate the Acts for the Protection of certain Animals, Birds and Fishes*, R.S.B.C. 1897, c. 88.
- 170** See, for example, E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Markham, Ont.: Penguin Books Canada Ltd., 1975); Douglas Hay, “Poaching and the Game Laws on Cannock Chase”, in *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay et al. (Markham, Ont.: Penguin Books Canada, Ltd., 1975).
- 171** NAC RG10, volume 6746, file 420-8X, part 3, D.J. Taylor to T.R.L. MacInnes, 15 January 1936.
- 172** See the detailed exchange of correspondence on this topic in NAC RG10, volume 6742, file 420-6, volumes 1-3.
- 173** NAC RG10, volume 8863, file 1/18-11-8, part 1, J.P.B. Ostrander to F. Matters, 17 September 1954.
- 174** NAC RG10, volume 8862, file 1/18-11-5, George Mitton to Superintendent General, 26 October 1925; J.D. McLean to Mitton, 2 November 1925.
- 175** *Syliboy* (cited in note 104).
- 176** *Simon v. The Queen*, [1985] 2 S.C.R. 387.
- 177** NAC RG10, volume 8862, file 1/18-11-5, Mrs. Peter Wm. Narvie to Department, 9 April 1929.
- 178** NAC RG10, volume 8862, file 1/18-11-5, Indian Agent Charles Hudson to Department, 16 April 1929; Department to J. Thomas Troy, 12 July 1929.
- 179** Ontario Federation of Anglers and Hunters, “Position Paper on Comanagement of Crown Lands and Resources in Ontario” (1993), p. 3 [emphasis in original].
- 180** NAC RG10, volume 8862, file 1/18-11-5, Petition of Chief and Members of the Restigouche Band, 10 April 1899; Department of Indian Affairs to Attorney General New Brunswick, 5 May 1899; Attorney General to Department, 25 May 1899

181 . For a detailed treatment of the issues discussed in this section, see generally Arthur J. Ray, *The Canadian Fur Trade in the Industrial Age* (Toronto: University of Toronto Press, 1990).

182 NAC RG10, volume 6750, file 420-10; see Morantz, “Provincial Game Laws” (cited in note 160).

183 NAC RG10, volume 6750, file 420-10, Armand Tessier, “Les Lois de chasse et les sauvages”, *Action sociale* (January 1913).

184 Hudson’s Bay Company Archives (HBCA), series II, A12/FT 319/1 (a), C.C. Chipman to William Ware, 1 March 1910; NAC RG10, volume 6743, file 420-8 1, McCarthy, Osler, Hoskin and Harcourt to Deputy Superintendent General of Indian Affairs, 17 March 1910

185 . HBCA, series II, A12/FT 319/1 (a) ff. 57-62, C.C. Chipman to William Ware, 8 April 1910; series II, A12/FT 319/1 (b) ff. 1-3, McCarthy, Osler, Hoskin and Harcourt to Premier J.P. Whitney, 20 January 1913; NAC RG10, volume 6743, file 420-8 1, McCarthy, Osler, Hoskin and Harcourt to Deputy Superintendent General of Indian Affairs, 23 August 1912.

186 HBCA, series II, A12/FT 319/1 (b) ff. 30-32, A.M. Nanton to F.C. Ingrams, 25 June 1914; AO RG4, series C-3, file 441, McCarthy, Osler, Hoskin and Harcourt to J.J. Foy, 14 January 1914; NAC RG10, volume 6743, file 420-8X 1, M.V. Ludwig, K.C., to Secretary of Indian Affairs, 15 October 1930.

187 NAC RG10, volume 6743, file 420-8X 1, J.D. McLean to D.F. McDonald, 11 March 1929.

188 NAC RG10, volume 6743, file 420-8X 1, typescript copy of *Rex v. Joe Padjena and Paul Quesawa*, unreported, Fourth Division Court of the District of Thunder Bay, 10 April 1930.

189 NAC RG10, volume 6743, file 420-8X 2, Department to Charles McCrea, 16 May 1930.

190 NAC RG10, volume 6743, file 420-8X 2, Ludwig, Schuyler and Fisher to Department, 13 December 1930.

191 NAC RG10, volume 6743, file 420-8X 2, M.H. Ludwig to D.C. Scott, 16 June 1929.

192 NAC RG10, volume 6743, file 420-8X 2, D.C. Scott to Ralph Parsons, Hudson’s Bay Company, 28 November 1931; T.R.L MacInnes to Boulton Steward Marshall, 2 June 1939; M.P. for Algoma to Deputy Superintendent General, 14 January 1931; volume 6743, file 420-8X 3, Memorandum of Hugh R. Conn, 19 April 1944.

193 Philip H. Godsell, *Arctic Trader: The Account of Twenty Years With the Hudson's Bay Company* (New York: G.P. Putnam's Sons, 1932), pp. 196-197. See also Kerry Abel, *Drum Songs: Glimpses of Dene History* (Montreal and Kingston: McGill-Queen's University Press, 1993).

194 NAC RG10, volume 10-872, file 901/20, part 1, George Pragnell to Provincial Game Board, 21 August 1924.

195 P.C. 1862, 22 September 1923.

196 Regulation respecting beaver reserves, R.R.Q., c. C-61, r. 31. See Commission des droits de la personne du Québec, *La controverse des droits de chasse, de pêche et de piégeage des autochtones au Québec*, a report prepared for the Quebec Human Rights Commission by Marc Voinson (1980).

197 Morantz, "Provincial Game Laws" (cited in note 160).

198 Ontario had begun the process in 1935 (though registration did not reach the more northern parts of the province until after the Second World War), followed by Alberta (1937), Manitoba (1940), Quebec (1945), Saskatchewan (1946), the Northwest Territories (1949) and the Yukon (1950).

199 NAC RG10, volume 8862, file 1/18-11-5, part 1, Indian Agent A. Lee Fraser, Hexton, N.B., to Branch, 4 August 1945; DIAND file 373/30-22-0, volume 1, D.J. Allan to Hugh Conn, 24 August 1945.

200 NAC RG10, volume 6748, file 420-8-2 1, H.R. Conn to Dr. W.J.K. Harkness, Chief, Fish and Wildlife Division, Dept. of Lands and Forests, 29 October 1947. See also Volume 1, Chapter 12.

201 NAC RG10, volume 6748, file 420-8-2 1, Dr. W.J.K. Harkness to Hugh Conn, 4 November 1947.

202 See Lutz, "The White Problem" (cited in note 78).

203 NAC RG10, volume 8865, file 1/18-11-13, part 1, Frank Edwards to General Superintendent of Indian Agencies, 15 April 1939. This quotation is cited in the 1994 Ontario Environmental Assessment Board ruling on the province's timber management plans, Chapter 10, page EA-87-02.

204 See, for example, Ken Coates and W.R. Morrison, "The Federal Government and Urban Development in Northern Canada after World War II: Whitehorse and Dawson City, Yukon Territory", *BC Studies* 104 (Winter 1994-95).

205 Paul Charest, “Les barrages hydro-électriques en territoire montagnais et leurs effets sur les communautés amérindiennes”, *Recherches amérindiennes au Québec* 9/4 (1980), pp. 323-338.

206 Thalassa Research, “Nation to Nation: Indian Nation-Crown Relations in Canada”, research study prepared for RCAP (1994). Indeed, a variation of this theme was used in a recent Supreme Court of Canada decision (albeit with reference to “subsistence” harvesting) with respect to treaty harvesting rights and the killing in self-defence of a bear whose hide was later sold under licence (see *Horseman v. The Queen*, [1990] 1 S.C.R. 901; dissenting judgement by Madam Justice Wilson).

207 NAC RG10, volume 6748, file 420-8-2 1, F.A. Matters to Dept. of Game and Fisheries, 19 November 1945.

208 NAC RG10, volume 7051, file 486/20-7-4-69 1, Fred Matters to Department, 21 July 1958.

209 Manitoba, Committee on Manitoba’s Economic Future, *Manitoba, 1962-1975, A Report to the Government of Manitoba*, as quoted in Buckley, *From Wooden Ploughs to Welfare* (cited in note 110), p. 74.

210 Canadian Labour Congress, “Aboriginal Rights and the Labour Movement”, brief submitted to RCAP (1993). See also Canadian Labour Congress, RCAP transcripts, Ottawa, 15 November 1993.

211 For this and the following discussion see generally Daniel W. Bromley, *Environment and Economy: Private Rights and Public Policy* (Oxford: Basil Blackwell, 1991).

212 Daniel W. Bromley, “Property Rights as Authority Systems: The Role of Rules in Resource Management”, in *Emerging Issues in Forest Policy*, ed. Peter N. Nemetz (Vancouver: UBC Press, 1992).

213 British Columbia, *Timber Rights and Forest Policy in British Columbia*, Volumes 1 and 2, Report of the Royal Commission on Forest Resources (Victoria: Queen’s Printer, 1976); British Columbia, report of the Forest Resources Commission *The Future of Our Forests* (Victoria: 1991).

214 L. Anders Sandberg, ed., *Trouble in the Woods: Forest Policy and Social Conflict in Nova Scotia and New Brunswick* (Fredericton: Acadiensis Press, 1992).

215 See McCandless, *Yukon Wildlife* (cited in note 147).

216 On the importance of forests in the European imagination, see Simon Schama, *Landscape and Memory* (Toronto: Random House of Canada, 1995).

217 Wright, “The Public Right of Fishing” (cited in note 145).

- 218** John W. Bruce and Louise Fortmann, "Property and Forestry", in *Emerging Issues* (cited in note 212).
- 219** F. Murindagomo, "Wildlife management in Zimbabwe: the CAMPFIRE programme", *Unasylva* 43/168 (1992); D.M. Lewis, A. Mwenya and G.B. Kaweche, "African solutions to wildlife problems in Africa: insights from a community-based project in Zambia", *Unasylva* 41/161 (1990).
- 220** See Lawrence Berg, Terry Fenge and Philip Dearden, "The Role of Aboriginal Peoples in National Park Designation, Planning and Management in Canada", in *Parks and Protected Areas in Canada: Planning and Management*, ed. Philip Dearden and Rick Rollins (Toronto: Oxford University Press, 1993).
- 221** Ontario Federation of Anglers and Hunters, "Self-Government and Comanagement in Ontario," brief submitted to RCAP (1993), p. 17.
- 222** Lorne Schollar, Northwest Territories Wildlife Federation, RCAP transcripts, Yellowknife, Northwest Territories, 9 December 1992.
- 223** G. Hardin, "The Tragedy of the Commons", *Science* 162/3859 (1968).
- 224** Neil S. Forkey, "Maintaining a Great Lakes Fishery: The State, Science, and the Case of Ontario's Bay of Quinte, 1870-1920", *Ontario History* 87/1 (1995), pp. 45-64.
- 225** Bromley, "Property Rights" (cited in note 212).
- 226** Chapeskie, "Land, Landscape, Culturescape" (cited in note 31).
- 227** North Shore Tribal Council, "North Shore First Nations Government", brief submitted to RCAP (1993).
- 228** Quoted in Barry May, "Newfoundland and Labrador: A Special Place", in *Endangered Spaces: The Future for Canada's Wilderness*, ed. Monte Hummel (Toronto: Key Porter Books, 1989), p. 128.
- 229** Bruce and Fortmann, "Property and Forestry", in *Emerging Issues* (cited in note 212).
- 230** World Wildlife Fund Canada, "Protected Areas and Aboriginal Interests in Canada", brief submitted to RCAP (1993).
- 231** Patrick Madahbee, speech to Robinson-Huron Treaty Commemoration, Garden River First Nation Territory, 9 September 1995.

232 Lloyd I. Barber, “Indian Land Claims and Rights”, in *The Patterns of “Amerindian Identity”: Symposium, Montmorency, October 1974*, ed. Marc-Adélarde Tremblay (Quebec City: Les Presses de l’Université Laval, 1976), pp. 73-74.

233 On these legal instruments generally, see Volume 1; on Jay’s Treaty, signed by Britain and the United States in 1794, see Rémi Savard, “Un projet d’État indépendant à la fin du XVIIIe siècle et le Traité de Jay”, *Recherches amérindiennes au Québec* 24/4 (1994), pp. 57-69.

234 Special Joint Committee of the Senate and the House of Commons appointed to examine and consider the *Indian Act*, *Minutes of Proceedings and Evidence*, 1946, 1947, 1948. See John Leslie, “A Historical Survey of Indian-Government Relations, 1940-1970”, paper prepared for DIAND (1993), pp. 6-8.

235 Joey Thompson, “Dancing Between Two Worlds”, *National* [Canadian Bar Association] 2/2 (1993).

236 Richard C. Daniel, “A History of Native Claims Processes in Canada, 1867-1979”, report prepared for DIAND (1980).

237 See *An Act to amend the Indian Act* (cited in note 107). This remained in force until the *Indian Act* was extensively amended in 1951.

238 Hugh L. Keenleyside, *Memoirs of Hugh L. Keenleyside: On the Bridge of Time*, Volume 2 (Toronto: McClelland and Stewart, 1982).

239 *An Act to create an Indian Claims Commission, to provide for the powers, duties and functions thereof, and for other purposes.* (U.S.) Pub. L. No. 79-726 (13 August 1946).

240 During House of Commons debates in 1950 on amendments to the *Indian Act*, John Diefenbaker argued publicly for an independent commission similar to the American body. See Indian Claims Commission, *Indian Claims Commission Proceedings [ICCP]*, Volume 2, Special Issue on Land Claims Reform (Ottawa: Supply and Services, 1995), p. 30.

241 In January 1950, the Indian affairs branch was transferred from the department of mines and resources to the newly created department of citizenship and immigration, with Walter Harris as minister.

242 Leslie, “A Historical Survey” (cited in note 234), pp. 14-15.

243 Leslie, “A Historical Survey”, pp. 33-34.

244 Letter from Prime Minister John Diefenbaker to Senator James Gladstone, 11 March 1963. See Hugh A. Dempsey, *The Gentle Persuader: A Biography of James Gladstone*,

Indian Senator (Saskatoon: Western Producer Prairie Books, 1986), p. 188.

245 This and the following discussion are based on Daniel, “A History of Native Claims Processes” (cited in note 236). See also Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240).

246 Daniel, “A History of Native Claims Processes”, pp. 149-153.

247 Daniel, “A History of Native Claims Processes”, pp. 152-153.

248 William B. Henderson and Derek T. Ground, “Survey of Aboriginal Land Claims” (1994) 26 *Ottawa L. Rev.* 187 at 197-198.

249 Indian Commission of Ontario, *An Introduction to the Indian Commission of Ontario and the Tripartite Process, 1990-1991* (Toronto: Indian Commission of Ontario, 1992).

250R. *v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103-1105.

251 In April-May 1995, B.C.’s ministry of Aboriginal affairs prepared a document entitled “British Columbia’s Approach to Treaty Settlements”. The document has not been officially published, but it is on the Internet and is considered public. Copy provided to RCAP by Nerys Poole, Executive Director, Treaty Mandates Branch, B.C. Ministry of Aboriginal Affairs.

252 DIAND, *In All Fairness: A Native Claims Policy æ Comprehensive Claims* (Ottawa: 1981; amended 1986).

253 DIAND, *Outstanding Business: A Native Claims Policy* (Ottawa: 1982).

254 DIAND, *Federal Policy for the Settlement of Native Claims* (Ottawa: 1993).

255 The following documents contain critiques of land claims policy: Indian Commission of Ontario, “Discussion Paper Regarding First Nation Land Claims” (Toronto: 1990), reprinted in Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240), p. 177; Chiefs Committee on Claims/First Nations Submission on Claims (Ottawa: 14 December 1990), reprinted in *ICCP*, Volume 1 (1994), p. 187; Canadian Human Rights Commission, *Annual Report 1990; Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: 1988); D.M. Johnston, “A Theory of Crown Trust Towards Aboriginal Peoples”, 18 *Ottawa L. Rev.* 307; D. Knoll, “Unfinished Business: Treaty Land Entitlement and Surrender Claims in Saskatchewan” (unpublished, 1986); Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements æ Report of the Task Force* (the Coolican report) (Ottawa: DIAND, 1985); Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (the Penner report) (Ottawa: House of Commons, 1983); B.W. Morse, ed., *Indian Land Claims in Canada*

(Wallaceburg: A.I.A.I. et al., 1981); and Eric Colvin, *Legal Process and the Resolution of Indian Claims* (Saskatoon: University of Saskatchewan Native Law Centre, 1981).

For more recent comment, see S.M. Weaver, "After Oka: 'The Native Agenda' and Specific Land Claims Policy in Canada" (University of Waterloo, April 1992); Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); Assembly of First Nations, "Background and Approach to Changing the Federal Claims Process" (unpublished draft, 19 May 1994); John A. Olthius and H.W. Roger Townshend, "Is Canada's Thumb on the Scales? An Analysis of Canada's Comprehensive and Specific Claims Policies and Suggested Alternatives", research study prepared for RCAP (1995); Henderson and Ground, "Survey of Aboriginal Land Claims" (cited in note 248), p. 187; Indian Commission of Ontario, "Indian Negotiations in Ontario: Making the Process Work" (Toronto: 1994); Indian Claims Commission, *ICCP*, Volume 2; A.C. Hamilton, *Canada and Aboriginal Peoples: A New Partnership* (Ottawa: DIAND, 1995).

256 Indian Commission of Ontario, "Discussion Paper" (cited in note 255).

257 DIAND does have a test case funding program, but it has no mandate to fund litigation at the trial level. While this frustrates most claimants, government did find significant funds for trial of the *Delgamuukw* case [*Delgamuukw v. British Columbia* (A.G.) (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), Lambert J.A.], underscoring for others the arbitrary nature of claims policies.

258 For a discussion of government's response to some claims as technical breaches not remediable under the claims policies, see Indian Commission of Ontario, "Discussion Paper" (cited in note 255), pp. 45-46. The Indian Commission of Ontario suggests that such glosses on the policies are calculated to frustrate the negotiation and settlement of claims.

259 Indian Commission of Ontario, "Discussion Paper", p. 27.

260 Georges Erasmus, "Vingt ans d'espairs déçus" and "Les solutions que nous préconisons", *Recherches amérindiennes au Québec* 21/1-2 (1991), pp. 7, 25.

261 DIAND, *Comprehensive Land Claims Policy* (Ottawa: Supply and Services, 1987), p. 23.

262 *Baker Lake v. Minister of Indian Affairs and Northern Development* (1979), 107 D.L.R. (3d) at 513 (F.C.T.D.).

263 DIAND, *Federal Policy* (cited in note 254), pp. 5-6.

264 Indian Claims Commission, "Interim Ruling: Athabasca Denesuline Treaty Harvesting Rights Inquiry" (May 1993), *ICCP*, Volume 1 (cited in note 255), pp. 159-168.

265 Ross Howard, “A terrible territorial tangle”, *Globe and Mail* (29 May 1995), p. A13; Melvin H. Smith, *Our Home or Native Land? What Governments’ Aboriginal Policy Is Doing to Canada* (Victoria: Crown Western, 1995), p. 97. The misperception appears to have arisen from a response to a question on a government form asking a claimant to identify its traditional territory. In that particular case it included territory jointly claimed by others. History is replete with examples of joint use of territory by neighbouring Aboriginal peoples, and all modern treaties have had to deal with questions of overlapping territory.

266 DIAND, *Comprehensive Land Claims Policy* (cited in note 261), p. 12.

267 Michael Jackson, “A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements”, research study prepared for RCAP (1994).

268 DIAND, *Comprehensive Land Claims Policy* (cited in note 261), pp. 12-15 and 17-18.

269 DIAND, *Aboriginal Self-Government: The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995).

270 DIAND, *Comprehensive Land Claims Policy* (cited in note 261), p. 18; and *Federal Policy* (cited in note 254), p. 9.

271 DIAND, *Comprehensive Land Claims Policy*, p. 14.

272 DIAND, *Comprehensive Land Claims Policy*, p. 14.

273 *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570.

274 See John Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre 1991).

275 Task Force to Review Comprehensive Claims Policy, *Living Treaties* (cited in note 255), p. 30.

276 DIAND, *Comprehensive Land Claims Policy* (cited in note 261).

277 RCAP, *Treaty Making* (cited in note 7).

278 The Gwich’in and the Sahtu Dene and Métis agreements have yet to receive royal assent.

279 Olthius and Townshend, “Is Canada’s Thumb on the Scales?” (cited in note 255).

280 Agreement between the First Nations Summit, Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of the Province of British Columbia, 21 September 1992. See *British Columbia Treaty Commission Act*, S.C. 1995, C. 45.

281 Task Force to Review Comprehensive Claims Policy, *Living Treaties* (cited in note 255), pp. 79-82.

282 Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 114.

283 Hamilton, *Canada and Aboriginal Peoples*, p. 71.

284 RCAP, *Treaty Making* (cited in note 7), pp. 59-60.

285 Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 88.

286 While this was a significant change to those affected by the exclusion, it was a relatively minor one in terms of the overall policy. Yet it remains the only official change to that policy since 1982.

287 G.V. La Forest, “Report on Administrative Processes for the Resolution of Specific Indian Claims” (DIAND, 1979, unpublished), p. 14.

288 The policy directs that neither is to be considered. Since the department of justice’s legal opinion is not disclosed, however, it is not possible to know what actual weight, if any, is given to these factors. Before the Indian Claims Commission, for example, government has argued that evidence of preliminary negotiations of treaties is barred by the parole evidence rule, a technical rule of evidence, even though the policy states that “All relevant historical evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law”.

289 See Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255), p. 179. The policy also includes examples described as “Beyond Lawful Obligation” to accept claims for the taking of reserve lands without compensation and claims based on fraud by government agents. The first set was clearly intended to incorporate B.C. ‘cut-off lands’ claims relating to the reduction of certain reserves on the advice of the McKenna-McBride Commission early in this century. See our discussion earlier in this chapter on how losses occurred.

290 When this argument was made before the Indian Claims Commission, it was found to be “an overly narrow interpretation of the Policy”: Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255), p. 82.

291 Manitoba Treaty Land Entitlement Commission, “Report of the Treaty Land Entitlement Commission” (1983), pp. 69-71.

292 *Guerin v. The Queen*, [1984] 2 S.C.R. 335, a landmark decision awarding compensation in respect of the Crown's breach of fiduciary duty and equitable fraud in leasing Indian land. The enlargement of the fiduciary concept to the constitutional level in *Sparrow* (cited in note 250) has also failed, as yet, to have any impact upon claims policy.

293 This doctrine is particularly appropriate in the case of the historical treaties because, although the formal treaty documents are written in English, they were negotiated in Aboriginal languages through interpreters. This is the basis for the rule, advanced by the Supreme Court in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, *Simon* (cited in note 176), and *Sioui* (cited in note 53), that treaties must be construed "in the sense in which they would naturally be understood by the Indians".

294 *Guerin* (cited in note 292) at 354.

295 Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255).

296 Increased funding for claims settlements was one of the initiatives taken by the federal government in the wake of the 1990 Oka crisis.

297 Coopers & Lybrand Consulting Group, "Draft Report on the Evaluation of the Specific Claims Negotiation and Settlement Process" (unpublished, 1994).

298 Russel Lawrence Barsh, "Indian Land Claims Policy in the United States" (1982) 58 *North Dakota Law Review* 7 at 22-23; 76-77. As in Canada, Native American tribes generally lack investment opportunities or sources of goods and services on their reservations. A cash settlement therefore amounts to a substantial indirect transfer payment to regional non-tribal businesses but results in relatively little reservation capital formation. See also Chapter 5 of this volume.

299 Coopers & Lybrand, "Draft Report" (cited in note 297).

300 See generally Weaver, "After Oka" (cited in note 255).

301 This document and subsequent correspondence are reprinted in Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255).

302 Order in Council P.C. 1992-1730, amending P.C. 1991-1329.

303 *Indian Claims Commission Annual Report, 1991-1992 to 1993-1994* (Ottawa: Supply and Services, 1993). The commission did not indicate whether it was prepared to assume the backlog of several hundred claims already submitted but unresolved.

304 Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240), p. 23.

305 Indian Claims Commission, *ICCP*, Volume 2.

- 306** Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993), p. 103.
- 307** *Indian Claims Commission Annual Report* (cited in note 303).
- 308** Manuel and Posluns, *The Fourth World* (cited in note 113), pp. 163-165.
- 309** Quoted in Leslie, “A Historical Survey” (cited in note 234), p. 16.
- 310** The following discussion is based on Leslie, *Commissions of Inquiry* (cited in note 65); Leslie, “A Historical Survey” (cited in note 234); and J.S. Milloy, “A Historical Overview of Indian-Government Relations, 1755-1940”, paper prepared for DIAND (1992).
- 311** Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (cited in note 255), pp. 12-14.
- 312** For example, a recent book by a former official of the B.C. government begins with a laudatory account of the white paper policy. See Smith, *Our Home or Native Land?* (cited in note 265).
- 313** In 1992, the Roman Catholic Church formally committed itself to “effectively block or eliminate assimilationist policies of forced integration which cause autochthonous cultures to disappear, as well as the obverse policies which seek to keep native people isolated on the periphery of national life” (John Paul II, Santo Domingo Document No. 251, 1992, as quoted in Peter-Hans Kolvenbach, “Living People, Living Gospel”, *Mission* 1/2 (1994), p. 325).
- 314** RCAP, *Treaty-Making* (cited in note 7).
- 315** DIAND and Department of Justice, “Background Paper: Achieving Certainty in Comprehensive Land Claims Settlements” (Ottawa: 1995).
- 316** Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 84.
- 317** L.I. Barber, “Indian Claims Mechanisms” (1973-1974) 38 Sask. L. Rev. 11 at 15.
- 318** See also *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34.
- 319** Robert Mainville, “Visions divergentes sur la compréhension de la Convention de la Baie James et du Nord québécois”, *Recherches amérindiennes au Québec* 23/1 (1993), pp. 69-80.
- 320** Treaty 9 was negotiated in 1905-1906, with adhesions in 1908 and 1929-1930.

321 John S. Long, “Treaty Making, 1930: Who got what at Winisk?”, *The Beaver* 75/1 (February/March 1995).

322 See Volume 4, Chapter 6 of this report for a description of this program; see also Ignatius E. La Rusic, “Subsidies for Subsistence: The place of income security programs in supporting hunting, fishing and trapping as a way of life in subarctic communities”, research study prepared for RCAP (1993).

323 *Calder* (cited in note 47). Six members of the court held Aboriginal title to be recognized by Canadian law. Three members of the Court (Judson, Martland and Ritchie JJ. concurring) were of the view that Aboriginal title had been extinguished by Crown and legislative action; three members of the court (Hall, Laskin and Spence JJ. concurring) were of the view that Nisg_a’a title had not been extinguished; the remaining member (Pigeon J.) held that judicial determination of the case required a fiat from the lieutenant governor of the province.

324 *Guerin* (cited in note 292).

325 *Simon* (cited in note 176) at 402 quoting *Jones v. Meehan* 175 U.S. 1 (1899); see also *Nowegijick* (cited in note 293) at 36 (“statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians”).

326 *Sparrow* (cited in note 250) at 1108. For an analysis of this case as it relates to the inherent right of self-government, see Chapter 3 and RCAP, *Partners in Confederation*, (cited in note 46). For a discussion of this case in light of federal extinguishment policy, see RCAP, *Treaty Making* (cited in note 7). For academic commentary on *Sparrow*, see W.I.C. Binnie, “The Sparrow Doctrine: Beginning of the End or End of the Beginning?” (1990) 15 Queen’s L.J. 217; Michael Asch and Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991) 29 Alta. L. Rev. 498.

327 *Kruger et al. v. The Queen*, [1978] 1 S.C.R. 104 at 109.

328 *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at 678. See also *Sparrow* (cited in note 250) at 1112 (“[c]ourts must be careful---to avoid the application of traditional common law concepts of property as they develop their understanding of---the *sui generis* nature of aboriginal rights”).

329 *Baker Lake* (cited in note 262). See also *Bear Island Foundation* (cited in note 273) (requiring “sufficient” occupation).

330 See, for example, *Calder* (cited in note 47); *Baker Lake*; and *Mabo* (cited in note 47).

331 *Sparrow* (cited in note 250). See also *Twinn v. Canada*, [1987] 2 F.C. 450 at 462 (F.C.T.D.) (“aboriginal rights are communal rights”).

332 RCAP, *Treaty Making* (cited in note 7), p. 50; see also *Sparrow* at 1093 (“an approach---which would incorporate ‘frozen rights’ must be rejected”).

333 For a discussion of Métis rights, see Volume 4, Chapter 5. For discussion of the impact of the fur trade and Christianity on Ojibwa identity, see John J. Borrows, “A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government” (1992) 30 *Osgoode Hall L.J.* 291.

334 *Johnson v. M’Intosh* (cited in note 44) at 574 (“They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion”); see also Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 *Can. Bar Rev.* 728 at 746 (“The doctrine of aboriginal title attributes to a native group a sphere of autonomy, whereby it can determine freely how to use its lands”).

335 *Sparrow* (cited in note 250).

336 See, for example, *Canadian Pacific Ltd.* (cited in note 328) at 677 (Aboriginal title cannot “be transferred, sold or surrendered to anyone other than the Crown”).

337 *Guerin* (cited in note 292) at 382. (Aboriginal title “gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians”); see also *Sparrow* at 1108 (“the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples”).

338 *Sparrow* at 1110.

339 Canadian Bar Association [CBA], *Report of the Canadian Bar Association Task Force on Alternative Dispute Resolution: A Canadian Perspective* (Ottawa: 1989), p. 23. See also *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 *W.W.R.* 577 (B.C.C.A.) at 607, Macfarlane J.A. (a judicial proceeding is “but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations”); *Pacific Fishermen’s Defence Alliance v. Canada*, [1987] 3 *F.C.* 272 (T.D.) at 284 (“Because of their socio-economic and political nature, it is indeed much preferable to settle aboriginal rights by way of negotiations than through the Courts”).

340 See Owen M. Fiss, “Against Settlement” (1984) 93 *Yale L.J.* 1073.

341 See Melvin Aron Eisenberg, “Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking” (1976) 89 *Harv. L. Rev.* 637.

342 For more discussion of the relationship between participation and legitimacy, see “Opening the Door” in Volume 1 of this report. For an assessment of the relationship between participation and legitimacy in the context of negotiated settlements, see Carrie

Menkel-Meadow, “For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference” (1985) 33 U.C.L.A. L. Rev. 485.

343 See Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1995), p. 15-3 (“negotiation---has historical origins in the treaty-making process”).

344 See Robert L. Hale, “Coercion and Distribution in a Supposedly Non-Coercive State” *Political Science Quarterly* 38 (1923), p. 470 (bargaining power constituted in part by background distribution of property rights).

345 CBA, *Alternative Dispute Resolution* (cited in note 339), pp. 85-86. See also Roach, *Constitutional Remedies in Canada* (cited in note 343); Abram Chayes, “The Role of the Judge in Public Law Litigation” (1976) 89 Harv. L. Rev. 1281 at 1302 (a fundamental feature of public law litigation is that “the remedy is not imposed but negotiated”).

346 Alberta Law Reform Institute, “Towards a New Alberta Land Titles Act” (Report for Discussion No. 8), Edmonton, 1990, p. 72.

347 *Paulette v. R.*, [1977] 2 S.C.R. 628.

348 *Uukw v. B.C. Govt.* (1987), 16 B.C.L.R. (2d) 145 (B.C.C.A.); *Lac La Ronge Indian Band v. Beckman*, [1990] 4 W.W.R. 211 (Sask. C.A.); *James Smith Indian Band v. Saskatchewan (Master of Titles)*, [1994] 2 C.N.L.R. 72 (Sask. Q.B.); but see *Ontario (A.G.) v. Bear Island Foundation* (cited in note 273).

349 See, generally, Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book Limited, 1983), ch. 2.

350 See *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.); and *Manitoba (A.G.) v. Metropolitan (MTS) Stores Ltd.*, [1987] 1 S.C.R. 110.

351 See, generally, Kent Roach, “Remedies for Violations of Aboriginal Rights” (1992) 21 Man. L.J. 498; Roger Townshend, “Interlocutory Injunctions in Aboriginal Rights Cases”, [1991] 3 C.N.L.R. 1.

352 *Société de Développement de la Baie James v. Kanatewat*, [1975] C.A. 166, rev’g [1974] R.P. 38, leave to appeal to S.C.C. dismissed [1975] 1 S.C.R. 48; see also *Ominayak v. Norcen*, [1985] 3 W.W.R. 193 (Alta. C.A.).

353 *MacMillan Bloedel* (cited in note 339); *Westar Timber Ltd. v. Ryan* (1989), 60 D.L.R. (4th) 453 (B.C.C.A.); *Touchwood File Hills v. Davis* (1985), 41 Sask. R. 263 (Q.B.); and *Mohawk Bands of Kahnawake v. Glenbow-Alberta Institute*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.).

354 See, for example, *Vieweger Construction Co. Ltd v. Rush & Tompkins Construction Ltd.* (1964), [1965] S.C.R. 195; see, generally, Sharpe, *Injunctions and Specific Performance* (cited in note 349).

355 Roach, *Constitutional Remedies* (cited in note 343), p. 15-3.

356 *R. v. Agawa* (1988), 28 O.A.C. 201 at 216; *R. v. Sparrow* (cited in note 250). See also Slattery, “Understanding Aboriginal Rights” (cited in note 334), 727 at 753 (governments ought to protect Aboriginal people “in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands”).

357 *Sparrow* at 1077.

358 *Guerin* (cited in note 292).

359 *Delgamuukw* (cited in note 257). See also Leonard I. Rotman, “Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility” (1994) 32 *Osgoode Hall L.J.* 735. Reference should also be made to the landmark decision by the High Court of Australia in *Mabo* (cited in note 47), in which six members of a seven-member panel agreed that Australian common law recognizes a form of Aboriginal title that, in cases where it has not been extinguished, protects Aboriginal use and enjoyment of ancestral land. Justice Toohey would have gone further to recognize a general fiduciary obligation on the part of the Crown that exists independently of any “obligation arising as a result of particular action or promises by the Crown” (at 204). Extinguishment or impairment of Aboriginal rights to land “would not be a source of the Crown’s obligation, but a breach of it” (at 205). Justice Brennan, Chief Justice Mason and Justice McHugh concurring, together with Justice Dawson dissenting on other grounds, did not agree with this approach, holding that the Crown is not in breach of any duty when it exercises sovereign authority and extinguishes Aboriginal rights. For commentary on *Mabo*, see Jeremy Webber, “The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*” (1995) 17 *Sydney L. Rev.* 5. For a collection of essays on Australia’s legislative response to *Mabo*, see M.A. Stephenson, ed., *Mabo: The Native Title Legislation æ A Legislative Response to the High Court’s Decision* (St. Lucia: University of Queensland Press, 1995).

360 *Sparrow* (cited in note 250) at 1108.

361 See Henderson and Ground, “Survey of Aboriginal Land Claims” (cited in note 248), p. 225 (“The concept of the fiduciary relationship between the Crown and Aboriginal peoples must be at the heart of any claims process”).

362 *Sparrow* (cited in note 250) at 1113 (“We find the ‘public interest’ justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights”).

363 *Pacific Fishermen's Defence Alliance* (cited in note 339) at 280-281. See also Mary Ellen Turpel, "A Fair, Expeditious, and Fully Accountable Land Claims Process", in Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240), p. 61; Wilson A. McTavish, "Fiduciary Duties of the Crown in the Right of Ontario" (1991) 25 *Law Soc. Gaz.* 181.

364 "Draft Declaration on the Rights of Indigenous Peoples" (as agreed to by the members of the working group at its eleventh session), U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (20 April 1994), Article 3.

365 S. James Anaya, "Canada's Fiduciary Obligation Toward Indigenous Peoples in Quebec under International Law in General", in S. James Anaya, Richard Falk and Donat Pharand, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, *International Dimensions* (Ottawa: RCAP, 1995), p. 24.

366 "The Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries", in International Labour Organisation, *Conventions and Recommendations Adopted by the International Labour Conference, 1919-1966* (Geneva: International Labour Office, 1966), pp. 1026-1042. Canada is not a party to the Convention. For an assessment of the ILO convention, see Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991), pp. 334-368. See also Martinez-Cobo, *Analytical Compilation of Existing Legal Instruments and Proposed Draft Standards Relating to Indigenous Rights*, U.N. Doc. M/HR/86/36, Annex V, for a summary of submissions by indigenous organizations sharply criticizing the convention on a number of grounds.

367 *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, in Centre for Human Rights, *Human Rights: A Compilation of International Instruments*, Volume 1 (second part), Universal Instruments (New York: United Nations, 1994), p. 475. The convention was adopted 27 June 1989 by the general conference of the International Labour Organisation and entered into force 5 September 1991.

368 Anaya, "Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec", Volume 1, *International Dimensions*" (cited in note 365); and Donat Pharand, "The International Labour Organisation Convention on Indigenous Peoples (1989): Canada's Concerns", in Anaya et al., *Canada's Fiduciary Obligation* (cited in note 365), Annex 3; Lee Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989" (1990) 15 *Okla. City University L. Rev.* 677. See also Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government", in *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: RCAP, 1995), pp. 1-54.

369 Anaya, "Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec", Volume 1, *International Dimensions*", p. 20.

370 *Manitoba Act, 1870*, 33 Vict., c. 3 (Canada) reprinted in R.S.C. 1985, App. II, No. 8. See, generally, Volume 4, Chapter 5 on Métis perspectives.

371 This figure is based on the B.C. government's policy position that settlement land would be proportional to the percentage of First Nations people in the total provincial population æ that is, approximately three to five per cent (information furnished by Nerys Poole, Executive Director, Treaty Mandates Branch, B.C. Ministry of Aboriginal Affairs).

372 To the extent that Aboriginal title is inalienable except to the Crown, treaty recognition of Aboriginal title alone may not establish Aboriginal authority to grant interests to third parties. However, we are of the view that an Aboriginal party can be vested with such authority by treaty.

373 Labrador Inuit Association, "Submission to the Royal Commission on Aboriginal Peoples" (1992), p. 28. See also Task Force to Review Comprehensive Claims Policy, "*Living Treaties*" (cited in note 255).

374 See, for example, "Submission of the Inuit Tapirisat of Canada", brief submitted to RCAP (1994); and Draft Conference Proceedings, "ITC Inuit Round-Tables on Economic Development, Negotiation and Implementation, and Self-Government", Pangnirtung, Northwest Territories, 26-28 July 1993.

375 See, generally, Rotman, "Provincial Fiduciary Obligations" (cited in note 359).

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