

Report of the Royal Commission on Aboriginal Peoples



1996

Volume 2 – Restructuring the Relationship

E-Book edition 2013

Preface to this e-book edition

The Report of Royal Commission on Aboriginal Peoples represents a tremendous effort in characterizing the historic and contemporary relationship between the aboriginal peoples of Canada and North America with the (mostly European) settlers, their descendants and their governments. It also represents a widely accepted vision on how these communities can build a sustainable relationship and live together in peace. Unfortunately this work has gotten out of print and is now only available as rare-book print or as an archived fragmented html collection on the [web page of the Libraries and Archives Canada](#), which is the source for this document.

I came across this report as part of the Massively Open Online Course “Aboriginal Worldview and Education” held by Prof. Jean-Paul Restoule on the Coursera platform. Not being familiar with the subject matter and following the discussions during this course, I have come to the conclusion that this report has not done its work yet. In the spirit of the open society, I have decided to attempt to transfer the work into a portable, searchable, usable format, exploiting the non-commercial reproduction license given by the Canadian government and reproduced below. This work is contributed freely and presented to the nations of Canada with the hope of lasting understanding and peace between its inhabitants. The copyright provisions below for this work still apply.

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PART ONE

A Note About Sources

Among the sources referred to in this report, readers will find mention of testimony given at the Commission's public hearings; briefs and submissions to the Commission; submissions from groups and organizations funded through the Intervener Participation Program; research studies conducted under the auspices of the Commission's research program; reports on the national round tables on Aboriginal issues organized by the Commission; and commentaries, special reports and research studies published by the Commission during its mandate. After the Commission completes its work, this information will be available in various forms from a number of sources.

This report, the published commentaries and special reports, published research studies, round table reports, and other publications released during the Commission's mandate will be available in Canada through local booksellers or by mail from

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A CD-ROM will be published following this report. It will contain the report, transcripts of the Commission's hearings and round tables, overviews of the four rounds of hearings, research studies, the round table reports, and the Commission's special reports and commentaries, together with a resource guide for educators. The CD-ROM will be available in libraries across the country through the government's depository services program and for purchase from

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Briefs and submissions to the Commission, as well as research studies not published in book or CD-ROM form, will be housed in the National Archives of Canada after the Commission completes its work.

A Note About Terminology

The Commission uses the term *Aboriginal people* to refer to the indigenous inhabitants of Canada when we want to refer in a general manner to Inuit and to First Nations and Métis people, without regard to their separate origins and identities.

The term *Aboriginal peoples* refers to organic political and cultural entities that stem historically from the original peoples of North America, not to collections of individuals united by so-called 'racial' characteristics. The term includes the Indian, Inuit and Métis peoples of Canada (see section 35(2) of the *Constitution Act, 1982*).

Aboriginal people (in the singular) means the individuals belonging to the political and cultural entities known as Aboriginal peoples.

The term *Aboriginal nations* overlaps with the term Aboriginal peoples but also has a more specific usage. The Commission's use of the term nation is discussed in some detail in Volume 2, Chapter 3, where it is defined as 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.

The Commission distinguishes between local communities and nations. We use terms such as a *First Nation community* and a *Métis community* to refer to a relatively small group of Aboriginal people residing in a single locality and forming part of a larger Aboriginal nation or people. Despite the name, a First Nation community would not normally constitute an Aboriginal nation in the sense just defined. Rather, most (but not all) Aboriginal nations are composed of a number of communities.

Our use of the term *Métis* is consistent with our conception of Aboriginal peoples as described above. We refer to Métis as distinct Aboriginal peoples whose early ancestors were of mixed heritage (First Nations, or Inuit in the case of the Labrador Métis, and European) and who associate themselves with a culture that is distinctly Métis. The more specific term Métis Nation is used to refer to Métis people who identify themselves as a nation with historical roots in the Canadian west. Our use of the terms Métis and Métis Nation is discussed in some detail in Volume 4, Chapter 5.

Following accepted practice and as a general rule, the term *Inuit* replaces the term *Eskimo*. As well, the term *First Nation* replaces the term *Indian*. However, where the subject under discussion is a specific historical or contemporary nation, we use the name of that nation (e.g., Mi'kmaq, Dene, Mohawk). Often more than one spelling is considered acceptable for these nations. We try to use the name preferred by particular nations or communities, many of which now use their traditional names. Where necessary, we add the more familiar or generic name in parentheses — for example, Siksika (Blackfoot).

Terms such as Eskimo and Indian continue to be used in at least three contexts:

1. where such terms are used in quotations from other sources;
2. where Indian or Eskimo is the term used in legislation or policy and hence in discussions concerning such legislation or policy (e.g., the *Indian Act*, the Eskimo Loan Fund); and
3. where the term continues to be used to describe different categories of persons in statistical tables and related discussions, usually involving data from Statistics Canada or the Department of Indian Affairs and Northern Development (e.g., status Indians, registered Indians).

1 - Introduction

IN VOLUME 1 OF OUR REPORT, we presented an historical overview of the relationship that has developed over the last 400 years between Aboriginal and non-Aboriginal people in Canada. We have seen that it was built on a foundation of false premises — that Canada was for all intents and purposes an unoccupied land when the newcomers arrived from Europe; that the inhabitants were a wild, untutored and ignorant people given to strange customs and ungodly practices; that they would in time, through precept and example, come to appreciate the superior wisdom of the strangers and adopt their ways; or, alternatively, that they would be left behind in the march of progress and survive only as an anthropological footnote.

It was not to be. A country cannot be built on a living lie. We know now, if the original settlers did not, that this country was not terra nullius at the time of contact and that the newcomers did not ‘discover’ it in any meaningful sense. We know also that the peoples who lived here had their own systems of law and governance, their own customs, languages and cultures. They were not untutored and ignorant; they were simply cast by the Creator in a different mould, one beyond the experience and comprehension of the new arrivals. They had a different view of the world and their place in it and a different set of norms and values to live by.

Many non-Aboriginal Canadians recognize this today and would like to start afresh. They find it quite understandable that settlers in the early days had difficulty relating to Indigenous peoples — and indeed Indigenous peoples had a similar difficulty relating to them — but they find it impossible to justify the sad history of colonialism that followed. The time has come, they told the Commission in briefs and oral presentations, to put the relationship between Aboriginal and non-Aboriginal peoples on a more secure foundation of mutual recognition and respect and to plan together a better future for our children and our children’s children.

This theme was echoed by many of the Aboriginal people who came to our hearings. Many, it is true, remain bitter and find it hard to put the past behind them. Memories of relocation, residential schools, discrimination and racism keep coming to the surface, causing them to lose heart and wonder whether things will ever change. But Commissioners were left in no doubt that deep down the spirit is still there, along with Aboriginal people’s determination to assume their rightful place in a new Canadian society where diversity is not just accepted but welcomed and encouraged, and where Aboriginal peoples are recognized not just as one of the founding peoples but as Canada’s First Peoples.

Most Aboriginal people can rise above their circumstances, believing firmly that their destiny is to remain here on the land the Creator set aside for them to care for and protect. Commissioners are persuaded that Aboriginal peoples’ deep-seated spirituality explains the miracle of their survival through centuries of adversity and pain. They will assuredly live to see a new day for their children, and they are anxious and impatient to start putting in place the foundations of the new relationship.

In this volume, the Commission addresses what we see as the four basic pillars of the new relationship:

- treaties
- governance
- lands and resources

- economic development

1. Treaties

For a great many people, the centre-piece of any new relationship between Aboriginal and non-Aboriginal people is the inherent right of Aboriginal peoples to self-government. Why then would Commissioners begin with treaties? The explanation is simple. The treaty was the mechanism by which both the French and the British Crown in the early days of contact committed themselves to relationships of peaceful coexistence and non-interference with the Aboriginal nations then in sole occupation of the land. The treaties were entered into on a nation-to-nation basis; that is, in entering into the pre-Confederation treaties, the French and British Crowns recognized the Aboriginal nations as self-governing entities with their own systems of law and governance and agreed to respect them as such. For several centuries, treaties continued to be the traditional method of defining intergovernmental relations between Aboriginal and non-Aboriginal people living side by side on the same land. It continues to be the mechanism preferred by most Aboriginal people today.

Accordingly, in analyzing treaties in Chapter 2 of this volume, we consider them from two different perspectives. We examine the treaties already in existence to see how successful the treaty mechanism has been in creating and maintaining a smooth and mutually satisfying relationship between the parties over time. But we also examine the treaty concept itself to see whether it offers the best way to establish new agreements involving the settlement of land claims and self-government structures. Obviously, these two purposes are related. If Aboriginal peoples did not see merit in the treaty mechanism, they clearly would not wish to adopt it as the basis for their future relations with non-Aboriginal governments.

It will be apparent in Chapter 2 that treaties have had some disadvantages, most arising out of issues of interpretation. Governments have insisted on the written document as embodying the entire agreement between the parties; Aboriginal parties have considered the oral arrangement, whether reflected in the written document or not, as reflecting the true consensus reached by the parties. The courts have favoured the Aboriginal position and have established, through a series of important decisions, the fundamental principles of interpretation that should apply to historical treaties. If these principles were applied to new treaties, having regard to the context of treaty negotiations, Aboriginal people would have good reason to put their faith in the treaty process.

It is indisputable, however, that existing treaties have been honoured by governments more in the breach than in the observance, and this might give Aboriginal parties reason to pause and reconsider the wisdom of using this process. Several recent changes in the Canadian constitution provide some reassurance, however, especially sections 35 and 25 of the *Constitution Act, 1982*, which recognize and affirm existing Aboriginal and treaty rights and protect them against erosion. Rights conferred on Aboriginal parties in new or renewed treaties entered into after 1982 would enjoy the protection of these provisions.

The courts have also enunciated new principles in recent years that Aboriginal parties to treaties can use to their advantage, such as the fiduciary obligations owed by federal and provincial governments to Aboriginal peoples and the fact that any violation of treaty promises would be seen by the courts as calling into question the honour and integrity of the Crown. By and large, therefore, Aboriginal people see more advantages than disadvantages in the treaty process and have told us that this is their preferred way to handle future negotiated settlements.

In effect, what is contemplated in some cases is a renewal of the old treaties to make them meaningful in today's context — not to change their spirit and intent, but to interpret them in a reasonable way in terms of today's realities. In other cases, new treaties will be required to reflect the new relationship between governments and Aboriginal people as a result of modern land claims settlements and negotiated arrangements for Aboriginal self-government, the two being inextricably intertwined in the view of many Aboriginal people. In either case, the aim will be to establish through negotiation the basis for a new relationship between Aboriginal and non-Aboriginal people based on the principles set out in Volume 1 of our report: mutual recognition, mutual respect, sharing and mutual responsibility.

2. Governance

For roughly 400 years, Aboriginal people in Canada have been ruled by foreign powers, first by the French and the British and later by Canadians. In the eyes of Aboriginal people, none of these governments had any legitimate authority over them. Why do they say this? They point out that under international law, which is embodied in a series of conventions and covenants to which Canada is a signatory, all peoples have the right of self-determination, and this right includes the right to decide how they will be governed. No government can be imposed upon a people without their consent; this would be a denial of their right of self-determination.

Aboriginal people in Canada say that they never consented to be governed by the French or the British or the government of Canada. Indeed, they were never consulted and had no say in the matter. Nor, they allege, did European powers assert authority over them on any valid grounds. Canada was not uninhabited when the Europeans came, nor was it 'discovered' by them. It has been the homeland of Canada's First Peoples for millennia.

Nor could the newcomers claim title to the land by conquest, for there was no conquest. Early in the contact period the relationship was one of peaceful coexistence and non-interference. It was mainly after Confederation that Canada began to appropriate large tracts of land to house the ever-increasing influx of settlers and that the process of colonization and domination of the Aboriginal population began. No one asked them whether they wanted to be British subjects or Canadian citizens. They were simply herded into small reserves to make way for development and at Confederation were assigned to the exclusive jurisdiction of the Parliament of Canada. It apparently struck no one as strange, and possibly even improper, to hand over control of a whole people to a branch of the new federal government. Such is the perception of Aboriginal people, and in Volume 1 we documented some of the worst features of colonization that ensued.

It is not surprising, therefore, that Aboriginal people are calling for a complete change in their relationship with federal and provincial governments to one that recognizes their inherent right of self-government as distinct peoples and as Canada's First Peoples. The time seems opportune; indeed, the cracks in the existing relationship are coming starkly to the fore all across the country, and it should be apparent by now that trying to preserve the status quo is futile.

It is clear to the Commission that if Aboriginal peoples are to exercise their self-governing powers within the context of Canada's federal system, then federal and provincial governments must make room for this to happen. Instead of being divided between two orders of government, government powers will have to be divided among three orders. This is a major change, and one that will require goodwill, flexibility, co-operation, imagination and courage on the part of all concerned.

Aboriginal people are not a homogeneous group, and it seems unlikely that any one model of self-government will fit all First Nations, Métis people and Inuit. The basic principles, however, should be settled by negotiation; the flexibility should be in their application.

In Chapter 3, the Commission considers a variety of governance models, including models for the increasing number of Aboriginal people living in urban centres. We hope that these models will be helpful in stimulating serious discussion on this very challenging subject.

3. Lands and Resources

Chapter 4, in Part Two of this volume, is devoted to lands and resources. This is probably one of the most sensitive aspects of the current dialogue, but it is one that must be addressed without equivocation. As interveners told us many times at our public hearings, self-government without the capacity for a broad measure of self-reliance is a recipe for disaster. How true this is. Governments need money to carry out their responsibilities, but Aboriginal nations have limited resources. Their lands and resources were taken from them by the settler society and became the basis for the high standard of living enjoyed by other Canadians over the years. Only a small proportion of Canada's resource income has come back to Aboriginal people, most in the form of transfer payments such as social assistance. This has never been, and is not now, the choice of Aboriginal people. They want to free themselves from the destructive burden of welfare and dependency. But to do this they need to have back some of what was taken away. They need land and they need resources. How are they to get them in a country where almost every acre is spoken for? Most non-Aboriginal Canadians are probably unaware that even the amount of land initially set aside as reserves for Indian peoples has been reduced over the years to the point where just a third of the original remains. The Métis people, with few exceptions, have no land base at all.

One way for Aboriginal peoples to acquire more land and resources is through the land claims process, but in most cases such negotiations have been hamstrung by lack of goodwill, if not lack of good faith, on the part of governments. Claims have dragged on for years, and it is clear that the processes in place are not effective. The Commission has studied these processes and has recommendations to change this situation. One positive step would be to establish an independent tribunal to monitor both the specific and the comprehensive land claims process.

A tribunal would ensure, among other things, that claims were being dealt with in a timely fashion, that the parties were negotiating in good faith, and that the disputed resources were not being depleted pending the disposition of the claim. The goal would be to ensure that the process was not being abused, that delays were kept to a minimum, and that principles of fundamental justice and fairness were being respected. The Commission is persuaded that without such a supervisory body, land claims negotiations will continue to drag on, to the detriment of only one of the negotiating parties — Aboriginal claimants.

Not all Aboriginal peoples have a land claim, however, and even for those who have, the settlement may fall far short of what is required for self-government. The Commission therefore approached the subject of land from a much broader perspective. Why do Aboriginal peoples want land? What do they need it for? They need lands and resources for self-government, but also for more than that. They need a land base for their people. In Chapter 3, we suggest that the nation, rather than the local community, is the preferred unit of self-government. Each Aboriginal nation would govern its own people and require enough land to accommodate them. Although all members of the nation may not want to live on the nation's land base — where Aboriginal laws, customs, language, identity and

culture would prevail under self-government — many will want to do so. There is already a movement afoot among Aboriginal people to recapture their identity and culture, and Aboriginal self-government might be expected to provide further impetus in this direction. Aboriginal nations will need land, in some rough proportion to their numbers (which are on the increase, if current demographic trends persist), on which they are a majority and can maintain and promote their language, identity and culture and live their own way of life. In Chapter 4, we discuss some of the criteria for determining how much land and resources would be required realistically to support Aboriginal self-government in both its aspects — as a cultural homeland and as a viable economic base.

The Commission recognizes, of course, that lands and resources alone will not provide self-sufficiency for Aboriginal governments. We therefore had to consider the potential for economic development.

4. Economic Development

In Chapter 5, the Commission looks at the immensely difficult problem of how to build a viable economic base in Aboriginal nations and their communities to support self-government. Certainly, a share in the resources of an adequate land base would help, and this has to be part of any treaty renewal process or comprehensive land claims agreement. But by itself it is not enough.

During our public hearings, we visited a cross-section of First Nations, Inuit and Métis communities and saw at first hand the terrible poverty in which many Aboriginal families are living. How could this happen in an affluent country like Canada? We saw also the psychological impact of years of grinding poverty — the sense of helplessness and hopelessness, the low morale, the lack of self-esteem. As one hunter and trapper, who had seen the wildlife habitat destroyed in the name of development, said to us, “How can I hold my head up high when I can’t put bread on the table to feed my family?” How does one respond to a question like that? How will Canada respond?

It is clear that the traditional economies of Aboriginal peoples must be strengthened. Tremendous hardship was inflicted on thousands of Aboriginal families by the anti-fur campaign of the animal rights lobby. Serious threats to traditional economies have also resulted from resource development projects — loss of habitat, mercury pollution, acid rain, and resource depletion through overfishing and clear cutting. The Commission believes that co-jurisdiction and co-management arrangements, where governments and Aboriginal people share responsibility for resource development, would result in less environmental damage and therefore less damage to the traditional economies of Aboriginal peoples.

Thriving, economically viable communities are not going to be created overnight. Aboriginal people recognize that a renewed focus on education and training is of vital importance. The inertia that paralyzes many communities has had a particularly deep impact on young Aboriginal people, causing them to drop out of school at alarming rates and abandon all prospects for a meaningful future. Yet this is the generation that must start to get ready for self-government: they must be the political leaders, the business entrepreneurs, the institution builders, the policy makers, the scientists, technicians and educators. It cannot happen without a massive investment in education and in imaginative and widely implemented approaches to help people acquire job experience. In the Commission’s view, this is part of the mutual and shared responsibility of which we spoke in Volume 1 and a vital aspect of the new relationship.

A significant step in the right direction would be for the federal government to fulfil its treaty promises. Its failure in this regard is a national disgrace. Another step would be for all governments to comply with the equality provisions of the *Canadian Charter of Rights and Freedoms*. We heard a lot about restorative and corrective justice during our mandate but saw very little evidence of it in practice.

Finding employment is often problematic for Aboriginal people. Few job opportunities are available in Aboriginal communities, and in urban centres Aboriginal applicants often face discrimination and racism. Employment equity and affirmative action are positive steps, but they can never completely solve such a large-scale problem. Some 300,000 additional jobs for Aboriginal people need to be created in the next 20 years if Aboriginal people are to attain the same level of employment as other Canadians enjoy.

Governments are not likely to be able to create these jobs. Creating an environment in which small businesses and an appropriate mix of private and public enterprises can emerge and grow in Aboriginal communities would seem to be a more appropriate role. Aboriginal business development was a recurrent theme during our hearings. At our round table on economic development we heard some remarkable success stories, but we also heard about barriers to success, the main one being difficulty gaining access to capital. In Chapter 5, we review institutional lending policies and suggest how financial institutions might play a greater role in furthering Aboriginal economic self-sufficiency. We also see a role for Aboriginal lending institutions; land claims settlements could provide a funding base for such institutions. Aboriginal people are fully aware that, in addition to supporting traditional economies, new forms of economic activity are required for the future, including resource-based industries, manufacturing and services, if self-sufficiency and self-government are to become a reality.

The messages of Volume 2 of our report are clear:

- The treaty process is the most appropriate vehicle for embodying the new relationship between Aboriginal and non-Aboriginal people in Canada.
- The time is right for Canadians and their governments to recognize the inherent right of Aboriginal peoples to self-government and to make room in the Canadian federation for its exercise.
- A more equitable and just allocation of lands and resources to Aboriginal peoples is a fundamental prerequisite for preserving Aboriginal culture and identity and for the effective operation of Aboriginal self-government.
- An adequate land and resource base by itself is not enough to support self-government: the challenge of Aboriginal economic development must also be met through the combined efforts of Aboriginal and non-Aboriginal people, governments and institutions.

2 - Treaties

When our peoples entered into treaties, there were nations of peoples. And, people always wonder why, what is a nation? Because only nations can enter into treaties. Our peoples, prior to the arrival of the non-indigenous peoples, were under a single political society. They had their own languages. They had their own spiritual beliefs. They had their own political institutions. They had the land base, and they possessed historic continuity on this land base.

Within these structures, they were able to enter into treaties amongst themselves as different tribes, as different nations on this land. In that capacity they entered into treaty with the British people. So, these treaties were entered into on a nation-to-nation basis. That treaty set out for us what our relationship will be with the British Crown and her successive governments.

Regena Crowchild
President, Indian Association of Alberta
Edmonton, Alberta, 11 June 1992⁷

THE COMMISSION'S TERMS OF REFERENCE required us to investigate and make concrete recommendations concerning

5. The legal status, implementation and future evolution of aboriginal treaties, including modern-day agreements.

An investigation of the historic practices of treaty-making may be undertaken by the Commission, as well as an analysis of treaty implementation and interpretation. The Commission may also want to consider mechanisms to ensure that all treaties are honoured in the future.

We were also directed to propose specific solutions, rooted in domestic and international experience.

This part of our mandate is in a sense the most simple to grasp. The treaties constitute promises, and the importance of keeping promises is deeply ingrained in all of us and indeed is common to all cultures and legal systems. Thus our task is, first, to identify the promises contained in the treaties. Then we must make recommendations for fulfilling any treaty promises that remain unfulfilled. This task, though simple to describe, takes us to the heart of our mandate and to the core elements of the relationship between Aboriginal and non-Aboriginal people in Canada.

We begin this volume, which concerns the restructuring of the relationship between Aboriginal and non-Aboriginal people, with an examination of the treaties because it has been through treaty making that relationships between Aboriginal and non-Aboriginal people have traditionally been formalized. In our view, treaties are the key to the future of these relationships as well. In this volume we address substantive issues such as governance, lands and resources, and economic development. Just as those issues were addressed traditionally in the nation-to-nation context of treaties, it is in the making of new treaties and implementation of the existing treaties that these issues can be addressed in a contemporary context.

In Volume 1, we discussed the history of treaty making; now we draw the lessons to be learned from that history. We will also see how the policies of the government of Canada, over time, ignored and marginalized the treaties, despite the continued insistence of treaty nations that the treaties are the key to all aspects of the relationship.* Finally, we will examine the central role of the treaties and treaty processes in fashioning a just and honourable future for Aboriginal peoples within Canada and an equitable reconciliation of the rights and interests of Aboriginal and non-Aboriginal people.

At the same time we must acknowledge that not all the substantive issues in our mandate can be addressed through the making, implementation or renewal of treaties. Treaties, as we will see, are by their nature agreements made by nations. Where there are groups of Aboriginal people who may not meet the criteria for nationhood, some other instrument must be used. The primary theme of this volume nonetheless remains the revitalization of Aboriginal nationhood, a theme discussed in greater detail in Chapter 3.

Earlier in our report, we identified four key principles of a renewed relationship: mutual recognition, mutual respect, sharing and mutual responsibility (see Volume 1, Chapter 16). These principles have been present in varying degrees throughout the treaty relationship. Some treaty relationships are very old: they go back to the earliest times of contact between the Aboriginal peoples of the Americas and the first Europeans to arrive here. Some relationships have yet to be formalized by treaty. The four principles provide a framework for understanding and fulfilling the treaties of the past and for making new treaties.

The story of the treaties is, sadly, replete with examples of failed communications, as peoples with vastly different views of the world attempted to make agreements. Those differences denied them a true consensus on many points, leading to frustration and animosity. In Volume 1, we saw that treaty making took place on a common ground of symbolism and ceremony, but contrasting world views led the treaty parties to divergent beliefs about the particulars of the treaties they made.

At the same time we must keep in mind that the very act of entering into treaties — even if the resulting agreements were flawed or incomplete — represented a profound commitment by both parties to the idea of peaceful relations between peoples. The act embodies the principles of respect and sharing that we identified in Volume 1. Just as these principles motivated the participation of the parties to some degree at the time of treaty, so they should now guide the actions of both treaty parties as they seek to establish consensus on the matters that divide them. The treaty mechanism itself provides a sound and appropriate framework for the task ahead. Once made, treaties need to be kept alive, honoured and adapted to changing circumstances.

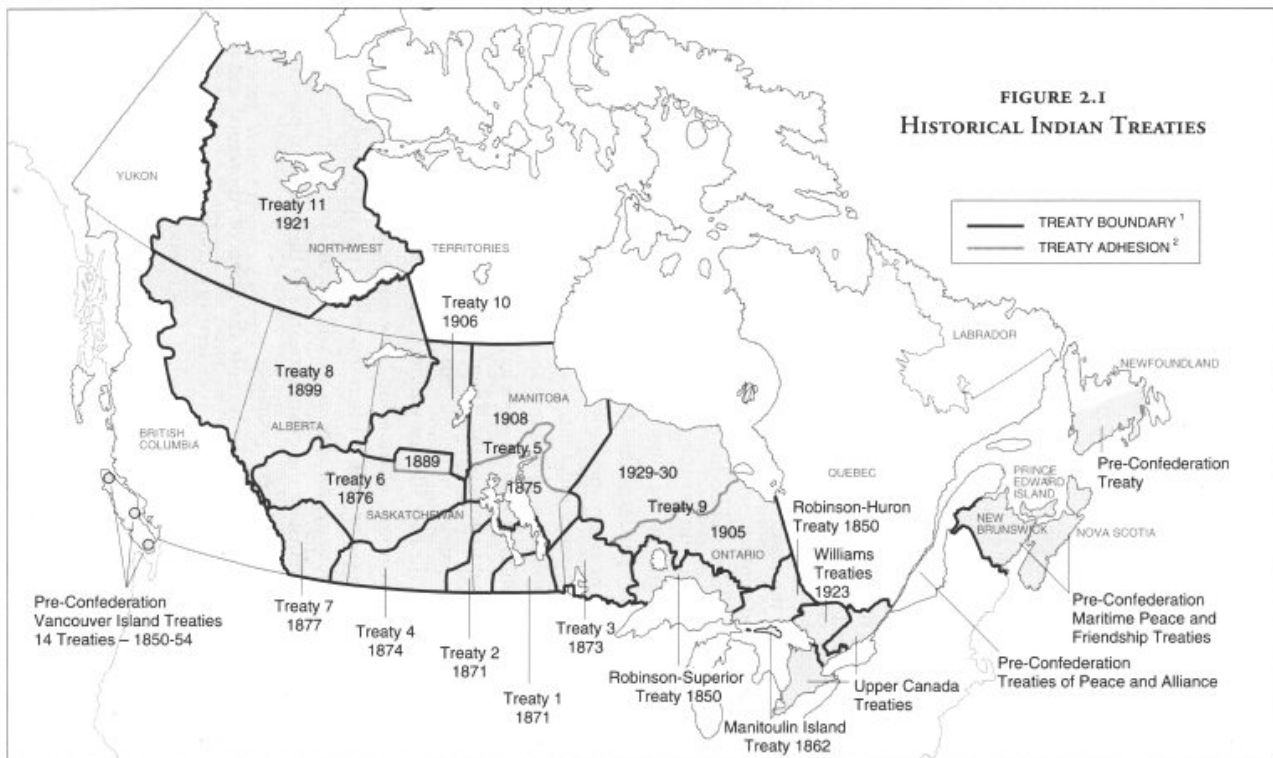
As we saw in Volume 1, there was a long and rich history of treaty making among the Aboriginal nations of the Americas before the arrival of Europeans. This tradition was expanded to include European powers. The treaties made in the Americas during the past 500 years address matters of

* **Notes:**

- Tables of contents in the volumes themselves may be slightly different, as a result of final editing.
- 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 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.
- In this chapter we use the term 'treaty nations' to refer to the Aboriginal parties to treaties with the Crown. We use the term 'Aboriginal nations' to refer to nations of Aboriginal people that have not yet made a treaty with the Crown that addresses their Aboriginal rights and title. We refer to these nations collectively as 'Aboriginal and treaty nations'.

governance, lands and resources, and the economic relationship between the parties (see Figure 2.1). The original meaning — or as it is often described, the spirit and intent — of treaties has become obscure, for reasons we will discuss. In this chapter we will propose processes to reinstate the existing treaties to their rightful prominence in defining relationships between peoples.

Treaties were made in the past because the rights of Aboriginal and non-Aboriginal people occupying a common territory could come into conflict unless some means of reconciliation was found. Contemporary Canadian law recognizes Aboriginal rights as being based on practices that are “an integral part of their distinctive culture”.¹ The unique nature of Aboriginal rights, as understood in Canadian law, makes it difficult to fit them into the context of rights and obligations our courts are accustomed to addressing. By entering into treaties, the parties can clarify how these rights should interact with one another.



Notes: 1. Treaty boundary lines are approximate.

2. Extension of a treaty boundary as a result of later signatories who adhered to the terms of the original treaty.

Source: Information taken from the National Atlas Information Services map sheet number MCR4162 © 1991. Her Majesty the Queen in Right of Canada with permission of Natural Resources Canada.

Treaty making can enable the deepest differences to be set aside in favour of a consensual and peaceful relationship. The parties to a treaty need not surrender their fundamental cultural precepts in order to make an agreement to coexist. They need only communicate their joint desire to live together in peace, to embody in their own laws and institutions respect for each other, and to fulfil their mutual promises.

1 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099

1. A Need For Public Education

We have an agreement as treaty Indians and we believe that these treaties cannot be broken or changed or negotiated because a sacred pipe was used when the treaties were signed and sealed.

Nancy Louis
Samson Cree Nation
Hobbema, Alberta, 10 June 1992

Prejudice has prevented non-Aboriginal society from recognizing the depth, sophistication and beauty of our culture ... But this must change, or there will be immense suffering in the future in this beautiful land which the Creator has bestowed upon us.

Chief Eli Mandamin
Kenora, Ontario, 28 October 1992

In Volume 5, Chapter 4 we discuss in detail a program of public education on Aboriginal issues. Here we focus on the state of public knowledge about the treaties, which, unfortunately, are poorly understood by most Canadians. We begin by describing two images, both familiar, and both distortions of the meaning of the treaties. The first image is described in the accompanying box.

The Indians arrived in canoes, the chiefs noble and wise and the warriors strong of limb, and they came to the meeting place where officials in black felt hats and black suits and red-coated Mounties were already waiting. The chiefs passed a pipe around, and the officials took it awkwardly as the Mounties and the warriors watched, displaying no emotion. After much talk a paper was brought out, and the noble chiefs and the men in hats made their marks upon it with a formal flourish. The photograph was taken at this moment, and the treaty became an artifact of our history. The black-hatted men and the chiefs had just pledged their undying loyalty to one another under the watchful and sceptical eyes of the red-coated Mounties and the strong-limbed warriors.

As a caption for this image, we offer a quotation from a speech by Prime Minister Trudeau in 1969, commenting on his government's recently announced white paper on Indian policy:

We will recognize treaty rights. We will recognize forms of contract which have been made with the Indian people by the Crown and we will try to bring justice in that area and this will mean that perhaps the treaties shouldn't go on forever. It's inconceivable, I think, that in a given society one section of the society have a treaty with the other section of society. We must all be equal under the laws and we must not sign treaties amongst ourselves.²

Prime Minister Trudeau's idea of the treaties, as expressed in the 1969 speech, was that they conferred rights to things such as "so much twine or so much gunpowder", making it easy for him to dismiss them as trivial relics.

The faded photograph of a treaty council is part of our common past as Canadians. It is one of a small number of images in our mental history books, along with the bearded man in a top hat driving in the last spike, the red-coated British soldiers scaling the cliffs before the battle of the Plains of Abraham, and the buckskinned *coureurs de bois* paddling laden canoes through a land of lakes and forests.

2 Peter Cumming and Neil Mickenberg, *Native Rights in Canada* (Toronto: General Publishing, 1972), p. 331.

The photograph of the black-hatted officials, the noble chiefs and warriors, and the red-coated watchers has acquired a sepia tone, turning brown with age, and the corners are tattered. The men in the photograph are dead, their living words of mutual loyalty dispersed in the air like the smoke from their pipe, and the promises they made have been superseded by history.

The paper they signed has become their treaty, and the words on the paper speak of the circumstances of a dead past. The words on the paper survive, and it is easy to interpret them narrowly, legalistically, in a manner far removed from the spirit of coexistence prevailing when the treaties were made. In this way treaties can be made to appear trivial, indeed irrelevant, and to the extent that any honour is involved in fulfilling them, token payments of money, twine or gunpowder will suffice.

A second image comes to mind (see accompanying box). The caption for this second image could be the words of Justice Reed of the Supreme Court of the United States, in a decision rendered in 1955:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.³

Were the treaties elaborate deceptions perpetrated by a sophisticated civilization upon unsophisticated and unwary Aboriginal peoples? Were the treaties fraudulent, designed to provide a thin veneer of respectability for transactions that were actually acts of conquest? Were the men in black hats and red coats engaged in an elaborate show? Were their promises of enduring loyalty at best evasions and at worst outright lies?

This image is a caricature, and the Indians are drawn comically, in cartoon style. Their noses are exaggeratedly large and their skin is bright red. The chief's eyes bulge as he ogles the mound of beads and other trinkets that spill out of a chest the man in the black top hat has brought. The top-hatted man holds a deed to Manhattan. Clearly, both the chief and the top-hatted man think the other is crazy.

In this view of history, the chiefs and warriors did not know that they were already a conquered people whose consent to a treaty was a mere formality. They were duped into peace by words of loyalty and trust and refrained from exercising their considerable military power as a result. In this view, the treaty might as well have been an ambush; its effect was the same. In this view, therefore, to continue to respect the treaties is to perpetuate a cruel hoax. Surely it would be preferable to end the pretext that there were ever meaningful treaties and to get on with the job of integrating Indian people into society on the basis of equality and sameness.

The Commission undertook historical and legal research on the treaties on a scale unprecedented in our country's history.⁴ We heard at length from First Nations leaders and elders in all parts of the country about the treaties that were made. We heard from Inuit about their land claims agreements, which are modern-day treaties. We heard from the Métis Nation about their hope for a new accord or compact to formalize their relationship with Canada. We heard from leaders and elders of other nations, which were denied the opportunity to make a treaty with the Crown, that they want to do so now, if it can be done upon a proper foundation of mutual respect.

³ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 at 289-90 (1954), Reed J.

The Canada that takes a proud place among the family of nations was made possible by the treaties. Our defining national characteristics are tolerance, pluralism and democracy. Had it not been for the treaties, these defining myths might well not have taken hold here.⁵ Had it not been for the treaties, wars might well have replaced the treaty council. Or the territory might have been absorbed by the union to the south. Canada would have been a very different place if treaty making with the Indian nations had been replaced by the waging of war.

Each of the European nations that came to America to plant a flag and assert imperial pretensions had a particular approach to the people of the continent. The French settled in the St. Lawrence Valley and made such short-term military alliances as were necessary to secure peace and trade. The British brought the common law, reinvented the Indian treaty on the basis of that law, and used it as their primary tool for relating to the Indian nations. This led to what might be termed a friendlier form of expropriation. Certainly the British honed the process of treaty making for purposes of land cession to a fine art.

4 The following studies were conducted as part of the research program of the Royal Commission on Aboriginal Peoples [RCAP]: Stephen Aronson and Ronald C. Maguire, “Federal Treaty Policy Study” (1994); Russel Lawrence Barsh and James Youngblood Henderson, “International Context of Crown-Aboriginal Treaties in Canada” (1995); Harold Cardinal, “Treaty 8 æ A Case Study” (1994); Denys Delâge et al., “Les autochtones de la Nouvelle France et du Québec : XVIe XXe siècles” (1995), which includes the following studies: Denys Delâge, “Les échanges culturels dans l’alliance franco-amérindienne, 1600-1760” (1995), Marc Jetten, “La reconnaissance et l’acquisition de la propriété autochtone en Amérique du Nord (du XVIIe et XIXe siècles) : Le cas des nations domiciliées du Canada” (1993), Jean-Pierre Sawaya, “Les sept nations du Canada : traditions d’alliance dans le nord-est, XVIIIe et XIXe siècles” (1994), and Régent Sioui, “Les enjeux contemporains au Québec” (1994); Peter W. Hutchins and Anjali Choksi, “Renouncing the Old Rules of the Game: Crown Conduct in the Context of Litigation Involving Aboriginal Peoples” (1994); Peter Russell and Roger Jones, “Aboriginal Peoples and Constitutional Reform” (1995); Andrée Lajoie et al., *Le statut juridique des autochtones au Québec et le pluralisme* (Cowansville, Quebec: Éditions Yvon Blais, 1996), which includes the following studies: Andrée Lajoie, “Synthèse introductive”, Jean-Maurice Brisson, “L’appropriation du Canada par la France de 1534 à 1760 ou les rivages inconnus du droit”, Sylvio Normand, “Les droits des Amérindiens sur le territoire sous le Régime français”, Andrée Lajoie and Pierre Verville, “Les traités d’alliance entre les Français et les Premières Nations sous le Régime français”, and Alain Bissonnette, “L’influence du Régime français sur le statut et les droits des peuples autochtones du Canada : relecture critique de la jurisprudence”; Rene M.J. Lamothe, “‘It Was Only a Treaty’: A Historical View of Treaty 11 According to the Dene of the Mackenzie Valley” (1993); Yngve Georg Lithman, “The Feathers of a Bird and the Frosts of Winter: Portability of Treaty Rights in an Era of Restraint and Off-Loading” (1994); Joseph Eliot Magnet, “Métis Land Rights in Canada” (1993); Louise Mandell and E. Ann Gilmour, “Land Rights of the Métis” (1994); James Morrison, “The Robinson Treaties of 1850: A Case Study” (1994); John Olthuis 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” (1995); Delia Opekokew, “The Inherent Right of Self-Government as an Aboriginal and Treaty Right” (1994); Louise Mandell, “B.C. Issues” (1993); Alan Pratt, “Discussion Paper Regarding the Natural Resources Transfer Agreements of the Prairie Provinces” (1994); Alan Pratt, “The Numbered Treaties and Extinguishment: A Legal Analysis” (1995); D.N. Sprague, “Administrative History of Métis Claims” (1994); Thalassa Research, “Nation to Nation: Indian Nation-Crown Relations in Canada” (1994); Frank Tough and Leah Dorion, “‘The claims of the half-breeds---have been finally closed’: A Study of Treaty Ten and Treaty Five Adhesion Scrip” (1993); Sharon H. Venne, “Final Report on Treaty 6 Case Study” (1994); Bill Wicken, “An Overview of the 18th Century Treaties Signed Between the Mi’kmaq and Wuastukwiuk Peoples and the English Crown, 1725-1928” (1993); Paul Williams and Curtis Nelson, “Kaswentha” (1995); and James Youngblood Henderson, “Land in British Legal Thought” (1994). For information about research studies prepared for RCAP, see *A Note About Sources* at the beginning of this volume.

5 We use the term ‘myth’ here in the sense used by Douglas Sanders in *Aboriginal Self-Government in the United States* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1985), p. 2. A major myth in United States Indian law is the concept that elements of inherent tribal sovereignty have continued from the point of first contact with Europeans. I call it a myth, for it is difficult to see how the concept was respected in the periods of removal, allotment and termination. It is a myth in the most positive sense of being a concept designed to instruct and give meaning to people and institutions. The myth has allowed the transformation of institutions.

In the treaties, the British Crown and the Indian nations pledged undying loyalty to one another. The Crown's honour was pledged to fulfilling solemnly made treaty promises. When these promises were dishonoured, the results were shameful. As Alexis de Tocqueville wrote in 1840, "the conduct of the United States Americans towards the natives was inspired by the most chaste affection for legal formalities ... It is impossible to destroy men with more respect to the laws of humanity."⁶ Substitute 'British' or 'Canadians' for 'United States Americans' and the statement remains as valid and as provocative.

Indian treaties bear the strong imprint of the British legal system. Treaties are of course universal means of arranging alliances, enabling disparate peoples to keep the peace, and establishing mutually beneficial arrangements. What the British did uniquely was to establish unilaterally, in the *Royal Proclamation of 1763*, a set of rules to govern treaty making with the Aboriginal peoples of North America. These rules, as Canadian courts have since declared, gave rise to a unique trust-like relationship, which continues to have legal and political effect today.

The British legal system regarded the creation of these rules as an assertion of British sovereignty and dominion over the land occupied by the Aboriginal nations. Courts in Canada have accepted that it is not their role to question the legality of this assertion of authority. Within the boundaries of our mandate, however, the Commission can and does challenge the legitimacy of certain conclusions based on the Crown's assertions, particularly when they call into question the Crown's declared policies of honourable dealing and its legal duty so to deal (see our recommendations in Volume 1, Chapter 16). It is the Commission's duty to examine the Crown's role in making and fulfilling treaties with First Nations and to make recommendations to the Crown in relation to these historical actions.

The view described earlier — that treaties are no more than outdated scraps of paper — has led many Canadians to consider that the specific obligations described in the treaty documents are trivial and can therefore be easily discharged. In this view, treaties are ancient and anachronistic documents with no relevance today. Like Prime Minister Trudeau in 1969, many Canadians still do not understand how, in a modern democratic society, treaties can continue to exist between different parts of society.

The other view — that treaties were weapons in a war fought not by combat but by deception and the systematic dishonouring of the sovereign's solemn pledges — leaves many Canadians puzzled, even appalled, by the prospect of giving renewed effect to treaties made in the distant (or even the recent) past. They react even more strongly to the prospect of making new treaties. There remains a view among Canadians that old treaty obligations might have to be fulfilled — grudgingly — but that the making of new ones is anathema to a vital and modern nation.

Canadian law and public policy have moved well ahead of these widely shared opinions about treaties. A mere twelve years after his 1969 speech, Prime Minister Trudeau agreed to a constitutional amendment that gave constitutional protection to "existing aboriginal and treaty rights".⁷ By that time the courts had given strong indications that these rights had considerable legal significance. A year after the patriation of the constitution, Prime Minister Trudeau endorsed a further constitutional amendment that recognized the contemporary land claims process as the making of new treaties.⁸

6 Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J.P. Mayer, Volume 1 (New York: Harper & Row, Publishers, 1988), p. 339.

7 *Constitution Act, 1982*, s. 35(1).

8 *Constitution Amendment Proclamation, 1983*, s. 35(3).

Canadians' knowledge and understanding of treaties have not kept pace with these changes. Canadians are not taught that Canada was built on the formal treaty alliances that European explorers, military commanders and later civil authorities were able to forge with the nations they encountered on this continent. Today, with increasing awareness of Aboriginal issues, young Canadians may learn more about the treaties than their parents did, but there is still little in the way of teaching material and curriculum development to dispel this ignorance.⁹ It is especially unfortunate that the younger members of the treaty nations may be losing a sense of their own history. If, as Justice Reed said, "every schoolboy knows" that the treaties were a sham used to disguise the expropriation of land, then this is the direct result of schoolboys having been misled or at least deprived of the truth about the treaties and about the peoples that made them.

Our discussion of the historical treaties will of necessity be dominated by a discussion of First Nations. Treaties were not generally made with Métis people or Inuit. As a result, this chapter may appear to focus on only one of the three Aboriginal peoples of Canada. Nevertheless the making of treaties in the future can and should be open to all Aboriginal nations that choose a treaty approach. Many of the future treaties may well be termed accords or compacts or simply land claims agreements. But the Commission believes that treaties, by any name, are a key to Canada's future. We will propose processes to implement and renew the historical treaties, which will involve an examination of the spirit and intent of those treaties. We will also make recommendations to revitalize treaty making for Aboriginal nations that have not yet entered into treaties with the Crown.

We will propose a rethinking of the treaties as a means to secure justice for Aboriginal nations and a reconciliation of their rights with the rights of all Canadians. The result could be a new, satisfying and enduring relationship between the Aboriginal and treaty nations and other Canadians. It is within the treaty processes we propose that our substantive recommendations on matters such as governance, lands and resources, and economic issues will ultimately be addressed.

Treaties need to become a central part of our national identity and mythology. Treaties have the following attributes:

- They were made between the Crown and nations of Aboriginal people, nations that continue to exist and are entitled to respect.
- They were entered into at sacred ceremonies and were intended to be enduring.
- They are fundamental components of the constitution of Canada, analogous to the terms of union under which provinces joined Confederation.
- The fulfilment of the spirit and intent of the treaties is a fundamental test of the honour of the Crown and of Canada.
- Their non-fulfilment casts a shadow over Canada's place of respect in the family of nations.

1.1 Treaties are Nation-to-Nation

The treaties created enduring relationships between nations. In Volume 1 (particularly chapters 3 and 5) we discussed the concept of nations of Aboriginal people. As discussed further in Chapter 3 of this volume, the original nations have evolved over time, and barriers to their exercise of

⁹ A notable and valuable exception is the high school text by Richard Price, *Legacy: Indian Treaty Relationships* (Edmonton: Plains Publishing Inc., 1991).

nationhood have arisen, but this has not changed their relationship to the Crown.¹⁰ The parties to the treaties must be recognized as nations, not merely as “sections of society”.

In entering into treaties with Indian nations in the past, the Crown recognized the nationhood of its treaty partners. Treaty making (whether by means of a treaty, an accord or other kinds of agreements) represents an exercise of the governing and diplomatic powers of the nations involved to recognize and respect one another and to make commitments to a joint future. It does not imply that one nation is being made subject to the other.

As discussed in Volume 1, the nation-to-nation relationship became unbalanced when alliances with Aboriginal nations were no longer needed, the non-Aboriginal population became numerically dominant, and non-Aboriginal governments abandoned the cardinal principles of non-interference and respectful coexistence in favour of policies of confinement and assimilation — in short, when the relationship became a colonial one.

1.2 Treaties are Sacred and Enduring

Much was said at our public hearings about the sacred nature of the treaties and their embodiment of spiritual values. As Nancy Louis of the Samson Cree Nation said in the passage quoted earlier in this chapter, the treaty nations regard as sacred compacts the agreements that Prime Minister Trudeau described as “forms of contract”. The contrast between these perspectives could not be sharper.

Regardless of how the treaties are perceived, one thing is clear: the parties agreed that they were to be enduring. They were to last “so long as the sun rises and the river flows.”¹¹ These are solemn words. They are words with which the Crown pledged its honour. In this chapter we explore the prevalent amnesia about the treaties and why their spirit and intent need to be rediscovered and fulfilled.

Why are treaties with Indian nations different from ordinary contracts or international treaties? Some argue that they are not different. Some maintain that they are fully international in nature while others argue that they are simple contracts. The courts of Canada have described them as neither international nor contractual but as constituting in Canadian law a unique category of agreement or, in the terminology used by the courts, *sui generis*.¹²

Regardless of the legal character of the treaties, the Commission has concluded that the treaties are unique in part because their central feature makes them irrevocable. The central feature of almost all the treaties is to provide for the orderly and peaceful sharing of a land and the establishment of relations of peace and even kinship. Once this has been acted upon, it cannot be reversed. Parties that have made such promises cannot go back to the beginning and annul the agreement, because the treaty has made them interdependent in a way that precludes starting over again as strangers.

Commercial contracts are easily made, then frequently changed or broken. Parties to contracts can resort to the courts, or they can simply change their minds about the contractual relationship. They can pay a penalty or damages, then go their separate ways.

10 See also RCAP, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993).

11 *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] 2 All E.R. 118 at 124, Lord Denning MR. Lord Denning quotes from a 1794 New Brunswick treaty with the Mi'kmaq.

12 *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 404.

In the realm of international law, treaties are less readily made, but they too are sometimes changed or broken. Nation-states that break off a treaty relationship may continue to have enduring links, but they do not usually find themselves in a state of continuing interdependence as a result of sharing a territory. Except in the rarest of cases, they do not make treaties that obliterate their separate identities and legal personalities or prejudice their exclusive dominion over their territories.

As discussed later in this chapter, the parties to the treaties now have a different perspective on their relationship. The treaty nations maintain that their national identities, their sovereignty and their title were recognized and affirmed by their making of treaties with the Crown. However, they did give up exclusive dominion over their territories by consenting to some form of sharing of their territory.

The Crown has traditionally contended that treaty nations, by the act of treaty making, implicitly or explicitly accepted the extinguishment of residual Aboriginal rights and acknowledged the sovereignty and ultimate authority of the Crown, in exchange for the specific rights and benefits recorded in the treaty documents.

Although it can be argued that some treaties, or key parts of them, are void for lack of consensus, they cannot be voided, because the parties to the treaties are now intertwined and interdependent. For this reason, the treaties must be respected and implemented, however difficult this may prove. As a result, areas of consensus must be built upon, and areas where no consensus was reached at the time the treaty was signed must now become the subject of a process to achieve consensus.

1.3 Treaties are Part of the Canadian Constitution

The Commission is of the view that the treaties are constitutional documents, designed to embody the enduring features of the law of the country.

In extensive presentations to the Commission, treaty nation leaders said their nations were sovereign at the time of contact and continue to be so. Such positions are often perceived as a threat to Canada as we know it. The Commission has considered the various views of sovereignty expressed to us and has found no rational way to bridge the gap between those who assert and those who deny the continuing sovereignty of Aboriginal nations (see Chapter 3).

The Commission concludes that any detailed examination of sovereignty is ultimately a distraction from the issues our mandate requires us to address. Differences in deep political beliefs are best dealt with by fashioning a mutually satisfactory and peaceful coexistence rather than attempting to persuade the adherents of opposing positions that their beliefs are misguided.

Treaty making does not require the parties to surrender their deepest beliefs and rights as a precondition for practical arrangements for coexistence. In the international arena, treaties are made by nation-states reflecting the cultural and political diversity of all humanity. The treaties between the treaty nations and the Crown were based on their mutual consent and did not require either nation to surrender its identity and culture. The alternative to treaties was to take the treaty nations' territory by force, an option that was certainly used elsewhere in the Americas.¹³ The avoidance of war between Aboriginal nations and the French and British in what is now Canada was a direct consequence of the treaties and the relationships created by them.

13 For a harrowing account of genocide in the Americas see David E. Stannard, *American Holocaust: Columbus and the Conquest of the New World* (New York: Oxford University Press, 1992).

The network of treaties between the Crown and treaty nations is described by some as confederal in nature.¹⁴ Treaty rights are now recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. The Commission considers that the treaties do indeed form part of the constitution of Canada. When properly understood, the treaties set out the terms under which the treaty nations agreed to align themselves with the Crown. Most treaty nation members who appeared before the Commission denied that their nations became mere subjects as a result of their treaties, but made it clear that a political and a spiritual relationship of enduring significance was created.

The Commission concludes that the treaties describe social contracts that have enduring significance and that as a result form part of the fundamental law of the land. In this sense they are like the terms of union whereby former British colonies entered Confederation as provinces.

1.4 Fulfilment of the Treaties is Fundamental to Canada's Honour

Canada holds a unique place among the nations of the world, considered a model of democratic ideals, pluralism, and respect for individual and group rights, which coexist in a rare and precious balance. The weak spot in Canada's international reputation, however, is that we have not honoured our obligations to Aboriginal peoples, a situation that has often been the subject of critical comment from international human rights bodies.¹⁵

Canadians also recognize that Aboriginal peoples have been treated unjustly; many have a sense of unease about this part of Canada's history. Unfortunately, many Canadians believe that it is too late to remedy these injustices. There is a genuine fear that the cost of justice might be too high.

The Commission believes, however, that a just and fair fulfilment of the treaties is fundamental to preserving Canada's honour in the eyes of the world and in the eyes of Canadians themselves.

We want to engage Canadians in a vision of treaty fulfilment that has three elements. First, we need to achieve *justice* within the separate treaty relationships by implementing those provisions of the treaties that are set out clearly in legal documents. Second, *reconciliation* must be achieved between the spirit and intent of the treaties and the rights of Canadians as a whole. Oral representations and assurances that preceded treaty signings cannot be ignored or divorced from the written text. They are part of the spirit and intent of the treaties. We believe that the purpose of the treaties was to achieve a *modus vivendi*, a working arrangement that would enable peoples who started out as strangers to live together as neighbours. The third element is to *extend* the treaty relationship to all Aboriginal nations in Canada.

Before we can discuss justice in a meaningful way, however, we must overcome ignorance about the treaties. Attitudes arising from ignorance need to be altered through public education. We must engage in an open examination of the costs that drain the public purse and the public spirit alike, and against this we must begin to measure the gains offered by a new relationship.

A program of public education about the spirit and intent of the treaties should include the development of curriculum and teaching materials. It should also include films, plays, and novels to tell the stories of the treaties.

14 See Russel Lawrence Barsh and James Youngblood Henderson, "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'", *Journal of Canadian Studies* 17/2 (1982), pp. 55-81.

15 A notable example is the case of *Sandra Lovelace v. Canada*, a 1981 decision of the United Nations Human Rights Committee under Article 5(4) of the *Optional Protocol to the International Covenant on Civil and Political Rights*. The decision is reproduced at [1982] 1 C.N.L.R. and concluded that section 12(1)(b) of the *Indian Act* was in violation of several articles of the covenant. Bill C-31 repealed that provision in 1985.

The three main audiences for a program of education are the Canadian public at large, the youth of the Aboriginal and treaty nations, and the public servants responsible for implementing the Crown's treaty obligations.

Recommendation

The Commission recommends that

2.2.1

Federal, provincial and territorial governments provide programs of public education about the treaties to promote public understanding of the following concepts:

- (a) Treaties were made, and continue to be made, by Aboriginal nations on a nation-to-nation basis, and those nations continue to exist and deserve respect as nations.
- (b) Historical treaties were meant by all parties to be sacred and enduring and to be spiritual as well as legal undertakings.
- (c) Treaties with Aboriginal nations are fundamental components of the constitution of Canada, analogous to the terms of union whereby provinces joined Confederation.
- (d) Fulfilment of the treaties, including the spirit and intent of the historical treaties, is a test of Canada's honour and of its place of respect in the family of nations.
- (e) Treaties embody the principles of the relationship between the Crown and the Aboriginal nations that made them or that will make them in the future.

2. Legal Context of the Treaty Relationship

The non-Indian governments began to say, "What treaties? You have no treaties." They did not terminate the treaties. They did not restrict the treaties. They just forgot about the treaties and our claim to the land, our land. This is our land as promised by your law. Treaties are the law. They are even in Canada's highest law, the constitution.

Chief Albert Levi
Migmag First Nation at Big Cove
Big Cove, New Brunswick, 20 May 1992

For many decades, Canadian courts struggled with the legal character of treaties with Aboriginal nations. Were they contracts? If so, they were certainly very different from ordinary commercial contracts in their subject matter, parties and open-endedness.¹⁶ Were they treaties as understood in international law? If so, how did they acquire any legal force in Canadian law in the absence of implementing legislation, as is required to give force to international treaties?¹⁷ These questions became the subject of numerous court cases, particularly in the 1980s, that helped to shape the legal context for treaties today.

In 1985, the Supreme Court of Canada concluded in *Simon v. The Queen* that treaties were neither contracts nor international instruments. In Canadian law, they were now to be regarded as agreements sui generis. Mr. Simon was a Mi'kmaq who defended himself against a charge of

¹⁶ See *Pawis v. The Queen*, [1980] 2 F.C. 18 (1979) 102 D.L.R. (3d) 602 (F. C. T. D.).

¹⁷ See *Francis v. The Queen*, [1956] S.C.R. 618.

unlawful possession of a rifle and ammunition by referring to hunting rights secured by a 1752 treaty between the Crown and the Mi'kmaq. The Crown, in prosecuting the case, relied on international law on treaty termination to argue that hostilities subsequent to the treaty had terminated it. The Supreme Court of Canada, which eventually heard the case, reached this conclusion:

While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement sui generis which is neither created nor terminated according to the rules of international law.¹⁸

In adopting this as our starting point, we do not intend to diminish the views of those who see the nature of the treaties differently. We acknowledge the view of many members of treaty nations that the treaties are international in nature. The Supreme Court has stated that, under the laws of Canada, the principles of international law can be helpful, at least by way of analogy, in interpreting the treaties.

The international law of treaties was codified in the 1969 *Vienna Convention on the Law of Treaties*.¹⁹ As the decision in *Simon* suggests, the principles of this body of law can be used by analogy, although no court (other than the Supreme Court of Canada in *Horse*, discussed later in this chapter) appears to have resorted to international law to interpret a treaty since then. In *Simon* the international law relating to the termination of peace treaties was held not to apply. This result was to the benefit of the treaty nations, which sought to rely on the continued existence of the 1752 treaty with respect to hunting rights.

By the time of the *Simon* decision in 1985, section 35(1) of the *Constitution Act, 1982* had come into force and had given a new legal stature to existing treaty rights. Recent cases had affirmed that a generous and liberal approach to interpreting treaties is required. The classic statement is found in the following passage from the 1983 decision in *Nowegijick*:

It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.²⁰

The 1990 *Sioui* decision provided the following succinct description of a treaty:

What characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.²¹

The *Sioui* case involved a safe conduct document, issued in 1760, which the courts held to be a treaty between the Huron nation and the Crown. The Supreme Court made it clear that the relationship between the Huron and the Crown at that time was at least partly nation-to-nation:

18 *Simon* (cited in note 12) at 404.

19 *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF.39/27 (1969).

20 *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36, Dickson J.

21 *R. v. Sioui*, [1990] 1 S.C.R. at 1044.

*At the time with which we are concerned relations with Indian tribes fell somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.*²²

In 1991, the Supreme Court observed in the *Bear Island Foundation* case that the fulfilment of treaty rights involved the fiduciary duty of the Crown.²³ The landmark decision in *Sparrow* elaborated further on the nature of the relationship between Aboriginal peoples and the Crown, although it did not involve treaties directly.²⁴ In *Sparrow*, the context was the effect of section 35(1) of the *Constitution Act, 1982* on an Aboriginal right to fish. A unanimous Supreme Court, interpreting the section for the first time, found that its words “incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power.”²⁵

The court quoted with approval the Ontario Court of Appeal decision in *R. v. Taylor and Williams*:

*In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of ‘sharp dealing’ should be sanctioned.*²⁶

Based in part on this conclusion, the court described a general guiding principle for section 35(1) and generally for the future relationship between the Crown and Aboriginal peoples:

*That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. 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.*²⁷

In other words, the government cannot treat Aboriginal people as if they were adversaries. On the contrary, it must be mindful of the trust-like relationship with them and recognize and protect their Aboriginal rights as a trustee would protect them.

Canadian law thus provides a workable framework within which to begin to assess the status of the treaties and the special relationship they create. One of the problems to which the treaties give rise, however, is interpretation. Canadian law contains complex evidentiary rules developed to address the interpretation of contracts between parties with equal bargaining power (and presumably sharing a common culture, language, laws and means of recording promises).

In considering the interpretation of treaties, Associate Chief Justice MacKinnon of the Ontario Court of Appeal had this to say in *Taylor and Williams*:

22 *Sioui* at 1038.

23 *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 at 575.

24 *Sparrow* (cited in note 1) at 1075.

25 *Sparrow* at 1109.

26 *R. v. Taylor and Williams* (1982), 34 O.R. (2d) 360 at 367, MacKinnon A.C.J.O.

27 *Sparrow* (cited in note 1) at 1108.

*Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect. Although it is not possible to remedy all of what we now perceive as past wrongs in view of the passage of time, nevertheless it is essential and in keeping with established and accepted principles that the courts not create, by a remote, isolated current view of past events, new grievances.*²⁸

The judge went on to set out a number of factors to guide the interpretation of treaties, which were subsequently approved by the Supreme Court of Canada in *Sioui*. Justice Lamer said in *Sioui*, without purporting to be definitive on the subject, that these factors were “just as useful in determining the existence of a treaty as in interpreting it”.

In particular, they assist in determining the intent of the parties to enter into a treaty. Among those factors are:

- 1. continuous exercise of a right in the past and at present;*
- 2. the reasons why the Crown made a commitment;*
- 3. the situation prevailing at the time the document was signed;*
- 4. evidence of relations of mutual respect and esteem between the negotiators; and*
- 5. the subsequent conduct of the parties.*²⁹

Justice Lamer added that “once a valid treaty is found to exist, that treaty must in turn be given a just, broad and liberal construction”. He noted that U.S. law on treaties is just as relevant in considering treaty interpretation in Canada and that this principle “for which there is ample precedent was recently reaffirmed in *Simon*”. He then adopted the 1899 U.S. Supreme Court decision in *Jones v. Meehan*:³⁰

It must always ... be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Justice Lamer went on to say:

28 *Taylor* (cited in note 26) at 364.

29 *Sioui* (cited in note 21) at 1045.

30 *Jones v. Meehan*, 175 U.S. 49 (1899).

*The Indian people are today much better versed in the art of negotiation with public authorities than they were when the United States Supreme Court handed down its decision in Jones. As the document in question was signed over a hundred years before that decision, these considerations argue all the more strongly for the courts to adopt a generous and liberal approach.*³¹

The *Jones* case uses some of the pejorative language of another era, and most Aboriginal people would reject the description of their ancestors as “weak and dependent” when the treaties were negotiated.³²

Recent cases have turned the *Sioui* decision around, concluding that signatories of more recent treaties should not benefit from special rules of interpretation because of their growing sophistication in matters of negotiation. In *R. v. Howard*, involving a treaty that ceded Aboriginal title to parts of southern Ontario, the Supreme Court of Canada held as follows:

*The 1923 Treaty does not raise the same concerns as treaties signed in the more distant past or in more remote territories where one can legitimately question the understanding of the Indian parties. The 1923 Treaty concerned lands in close proximity to the urbanized Ontario of the day. The Hiawatha signatories were businessmen, a civil servant and all were literate. In short, they were active participants in the economy and society of their province. The terms of the Treaty and specifically the basket clause are entirely clear and would have been understood by the seven signatories.*³³

In *Eastmain Band v. Canada*, the Federal Court of Appeal took a similar approach to interpreting the 1975 James Bay and Northern Quebec Agreement. The court said that

*while the interpretation of agreements entered into with the Aboriginals in circumstances such as those which prevailed in 1975 must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all the parties who signed it and take into account the historical and legal context out of which it developed.*³⁴

The courts continue to grapple with the interpretive difficulties of the treaties. The facts of each case must govern their approach, but the evolving law on the special fiduciary relationship between the

31 *Sioui* (cited in note 21) at 1036.

32 The Supreme Court of Canada has indicated that this language can no longer be accepted. See *Simon* (cited in note 12) at 400.

33 *R. v. Howard*, [1994] 2 S.C.R. 299 at 306-307 [references omitted]. *Howard* involved the question of whether a treaty made in 1923 had extinguished a pre-existing treaty right to fish. The circumstances surrounding the 1923 treaty negotiations are troubling, in part because the treaty commissioners rejected a request by legal counsel for the Aboriginal parties to be heard during the public hearings. Furthermore, there is no evidence that the legal implications of the treaty were explained to the Aboriginal signatories, by the treaty commissioners or anyone else, when the treaty was signed.

34 *Eastmain Band v. Canada*, [1993] 1 F.C. 501 at 518 (F.C.A.). Leave to appeal to Supreme Court of Canada denied, [1993] 3 S.C.R. vi. Sébastien Grammond, in “Aboriginal Treaties and Canadian Law” (1994) 20 Queen’s L.J. 57 at 74-75, has criticized the decision because it ignores the fact that the Crees were essentially compelled to negotiate because the Quebec Court of Appeal had, in *Société de développement de la Baie James v. Kanatewat*, [1975] C.A. 166, dissolved the injunction granted by Justice Malouf of the Superior Court ([1974] Que. P.R.) and because the decision does not refer to the fiduciary duty of the Crown that may have been created by the extinguishment of Aboriginal rights by the Agreement. See also Sébastien Grammond, *Les traités entre l’État canadien et les peuples autochtones* (Cowansville, Que.: Les Éditions Yvon Blais Inc., 1995), p. 129.

Crown and Aboriginal peoples will also continue to guide the courts. Each treaty is unique in time and circumstances. No single formula can be expected to settle the interpretation of such a diverse group of agreements.

To bring some clarity to our analysis of the jurisprudence, we refer to treaties that should benefit fully from the interpretive approach described in the *Sioui* case as historical treaties. Treaties to which these interpretive principles may not apply, such as the *Howard* and *Eastmain* cases, we refer to as modern treaties.

We do not suggest that there is a sharp dividing line between these classes of agreements. The historical context of the relationship between Aboriginal and non-Aboriginal people is relevant to all treaties, as is the general fiduciary relationship between Aboriginal peoples and the Crown described in *Sparrow*. The treaties made before the twentieth century are clearly historical, as are the numbered treaties made in relatively remote parts of Canada early in this century (Treaties 8, 9, 10 and 11). Treaties made in 1975 and later can be characterized as modern. However, each treaty is unique, and as the courts have said, the factual context of each treaty must be considered when approaching issues of interpretation.

Indeed, if the logic of the court decisions is accepted, it might be said that the written text of an historical treaty is but one piece of evidence to be considered with others in determining its true meaning and effect. It seems illogical to recognize the two-sided nature of treaty negotiations but to conclude that the one-sided technical language recorded by the Crown is the whole treaty.

On the other hand, such an approach may be difficult to follow in light of the 1988 decision in *R. v. Horse*, in which the Supreme Court considered the admissibility of a transcript of the treaty negotiations to support an argument that the treaty was intended to guarantee the Indians a right of access to occupied private lands surrendered under the treaty. Justice Estey said:

I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement.

The court went on to quote a classic statement of the parol (or oral) evidence rule:

Extrinsic evidence is generally inadmissible when it would, if accepted, have the effect of adding to, varying or contradicting the terms of a judicial record, a transaction required by law to be in writing, or a document constituting a valid and effective contract or other transaction. Most judicial statements of the rule are concerned with its application to contracts, and one of the best known is that of Lord Morris who regarded it to be indisputable that:

Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which the parties have deliberately agreed to record any part of their contract. [Bank of Australasia v. Palmer, [1897] A.C. 540, at 545]³⁵

Justice Estey noted that the parol evidence rule he relied on had its analogy in the approaches to the construction of Indian treaties. He quoted the *Nowegijick* case as well as *Jones v. Meehan*. Justice Estey nevertheless held that there was “no ambiguity which would bring in extraneous interpretive material.”³⁶

But what if the written version of the treaty was inaccurate or did not capture the understanding of the Indian parties? In *Sioui*, Justice Lamer referred to what Justice Bisson of the Quebec Court of Appeal had concluded, based on the opening words of the document in question (which was not signed by the Hurons): “the Hurons did not know how to write and the choice of words only makes it clear that the document of September 5, 1760 recorded an oral treaty.”³⁷ It is well known that the numbered treaties were ‘signed’ by chiefs who did not read or write and were asked to make their marks or to touch a pen. Without question, the chiefs saw this as a formality that was of great significance to the Crown. But can this formality make the Crown’s memorandum of the oral agreement the exclusive evidence of its content?

In an influential article (referred to in *Sparrow*), Brian Slattery encapsulated the basic problem:

*The written texts of these treaties must be read with a critical eye. Usually, they were accompanied by extensive oral exchanges, which may have constituted the true agreement. The written version was translated orally to the Indian in a process that allowed ample opportunity for misunderstanding and distortion.*³⁸

Looked at from a purely common-sense perspective, for the Indian parties who did not have the ability to read and write, the real treaty was very likely the oral agreement. The paper document may have been perceived as having the same importance to the Crown’s representatives as the ceremonial exchanges of wampum and the smoking of tobacco (to signify the solemnity and finality of the agreement) had to the Indian parties; but the legal document could not have been considered the agreement itself.

The *Horse* case might now be reassessed in light of the principles of *Sparrow*. In particular, courts faced with interpreting treaties in the post-*Sparrow* era might consider what effect the *sui generis* nature of the relationship created by the treaties has on the evidentiary rules applicable to their interpretation. In *Sparrow* the court said that the relationship is trust-like and non-adversarial. Does

35 *R. v. Horse*, [1988] 1 S.C.R. 187 at 201-202.

36 *Horse* at 203.

37 *Sioui* (cited in note 21) at 1046. The judgment of Bisson J.A. is reported at [1987] R.J.Q. 1722 at 1729.

38 Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 734-735.

this preclude the Crown from asserting that the written text is the whole treaty and that no oral evidence should be admitted to show otherwise?

The law of contracts does not appear to be bound as rigidly to the written word as the authorities discussed in *Horse* might suggest. In his leading text on the law of contracts, Waddams discusses the difficulty of applying the parol evidence rule to a world in which standard wording and pre-printed contracts are widely used:

If in all cases where documents were signed the signer had read and fully understood and intended to assent to the contents, the parol evidence rule would be widely applicable. In modern times, however, the growth in the use of standard form printed documents has greatly increased the number of cases where documents are signed without being understood or even read. Everyone knows this — even the judges now openly say it. Clearly then the party seeking to rely on the document can often be held to know that it was unread. And if that party knows or has reason to know that it does not represent the intention of the signer the document should not be enforced.

There is nothing very radical in this proposition. It springs naturally from the notion that the law of contracts exists to protect reasonable expectations.³⁹

It may appear somewhat farfetched to apply a comment about contemporary pre-printed business forms to the negotiation of treaties in the 1800s. The common issue in both situations, however, is whether the parties had reasonable expectations that a written document expressed their mutual intentions. In both cases, there can be considerable doubt, and in both cases, if it can be shown that the written document does not embody a true consensus on its terms, it should not be treated as the exclusive record of the agreement. The hard work of ascertaining whether a true consensus was reached must then be undertaken. In some cases, as we will discuss, the parties may not in fact have reached consensus on some important points.

In the 1984 case *R. v. Bartleman*, Justice Lambert of the British Columbia Court of Appeal wrote:

*There are many common law rules about the importance that is to be attached to the text of an agreement that has been reduced to writing. But where the text of the agreement was created by one party long after the agreement was made, and where the text is written in a language that only one party can understand, I do not think that any of those rules relating to textual interpretation can have any application.*⁴⁰

In that case, the treaty text was produced well after the meeting and the ‘signatures’ of the chiefs were “crosses on the document [that] were not put there by the Indians.”⁴¹

As the *Bartleman* decision suggests, it does not appear necessary to reject all common law rules applicable to written contracts to achieve a fair approach to interpretation, once it is recognized that most treaties, like many pre-printed contractual forms today, were contracts of adhesion. An adhesion contract is defined by *Black’s Law Dictionary* as follows:

39 S.M. Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Canada Law Book Inc., 1993), pp. 217-18 [emphasis added].

40 *R. v. Bartleman* (1984), 55 B.C.L.R. 78 at 92 (C.A.).

41 *Bartleman* at 88.

Standardized contract form offered to consumers of goods and services on essentially “take it or leave it” basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in contract. Recognizing that these contracts are not the result of traditionally “bargained” contracts, the trend is to relieve parties from onerous conditions imposed by such contracts. However, not every such contract is unconscionable.⁴²

In other words, they are ‘agreements’ recorded by one party that do not necessarily reflect the real consent of the other. The law’s traditional respect for the written word must give way to the reality of the situation and an honest assessment of the historical context. The cross-cultural process of treaty making makes these concerns much greater in the case of Indian treaties than in the world of contemporary commerce, where most participants are literate.

In the Commission’s view, to ignore these factors is to deny the treaties their sui generis character in Canadian law and indeed to deny the very reasons that they are sui generis. In *Horseman v. The Queen*, Justice Wilson wrote:

The interpretive principles developed in Nowegijick and Simon recognize that Indian treaties are sui generisThese treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party’s understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.

Later in the judgement, this conclusion is reached:

In other words, to put it simply, Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with today’s formal requirements. Nor should they be undermined by the application of the interpretive rules we apply today to contracts entered into by parties of equal bargaining power.⁴³

The law of Canada, in summary, has strained to acknowledge the unique character of the treaties. It has recognized the uniqueness of the relationship between the parties to the treaties, and it has acknowledged the unique nature of Aboriginal title. But by nature the law is an inconsistent and politically inappropriate vehicle for resolving the deepest issues of treaty fulfilment.

Not surprisingly, the Canadian law applied to treaties is suffused with the values and assumptions of imperial treaty makers. The written text of the treaty document, for example, is given precedence over oral traditions (although there is somewhat grudging acknowledgement of the oral tradition). In *Horse*, the Supreme Court of Canada said that unless there is ambiguity in the text drafted by the Crown’s draftsman, the courts cannot go outside the document for additional evidence about the true intentions of the parties. The courts have sometimes tried to avoid the rigours of this rule, but the rule remains in place, reflecting a highly literal approach to treaty interpretation.

⁴² *Black’s Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990), p. 40.

⁴³ *Horseman v. The Queen*, [1990] 1 S.C.R. 901 at 907.

Treaties are often up for interpretation in court cases, but usually in a narrow and ultimately frustrating context. Often the question at issue is whether an Indian person whose First Nation is party to a treaty has a defence to a charge of hunting or fishing out of season. The variations on the facts are endless, but the pattern is common. Treaties often do provide for such a defence. However, the context does not invite a broad look at what the treaty was all about from the perspective of the First Nation party. The court is asked to decide the very narrow question of whether the accused has a treaty right to hunt or fish. The courts seldom have an opportunity to address more fundamental but controversial treaty questions such as whether the treaty nation's Aboriginal title to its traditional territories was effectively extinguished.

This is one of the central issues raised by treaties. What if the two parties had completely different concepts of the agreement each believed had been reached? What if there never was agreement at all? The normal law of contracts specifies that a valid contract requires two elements: the first is the required formality, in the form of a seal or consideration passing between the parties (consideration meaning simply the exchange of something of value). The second element is *consensus ad idem*. This means that the parties must actually have reached a meeting of the minds, that is, an agreement.

In commercial contracts, it can seldom be said that the parties did not have a meeting of minds about a sale of land, a car, shares or commodities. Usually, one party is purchasing something from the other for a price; both sides know what is being purchased and at what price.

Many of the treaties with which we are concerned were made with one of the parties (the Crown) believing that the central feature of the treaty was the purchase or extinguishment of the other party's Aboriginal title, while the very idea of selling or extinguishing their land rights was beyond the contemplation of the Aboriginal party, because of the nature of their relationship to the land. To date, *Paulette* has been the only case in which a direct discussion of this issue was even approached.

At least one court has expressed the view that if a treaty were approached from the perspective of contract law, it might be found invalid. In *R. v. Batisse*, the court said, in relation to the negotiation of Treaty 9 in 1905-1906:

As a result, approximately 90,000 square miles of resource-rich land was acquired by the Crown, free of any beneficial Indian interest, for an absurdly low consideration (even for that time). It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements. If the former, then the very validity of this treaty might very well be questioned on the basis of undue influence as well as other grounds.⁴⁴

Other courts have drawn a similar link between treaties and contracts. For example, in *R. v. Tennisco*, the Ontario Supreme Court observed about the formation of an Indian treaty:

44 *R. v. Batisse* (1978), 19 O.R. (2d) 145 at 151 (Dist. Ct.).

*In its simplest form the treaty must of necessity consist of an agreement or settlement arrived at between two or more parties with all of the elements of a valid contract. To be a treaty, the provisions of the agreement or settlement, at the very least, must be capable of enforcement during the life of the instrument at the instance of both parties.*⁴⁵

If the Indian treaties were contracts, conventional legal analysis might indicate that many of them are void because of the absence of *consensus ad idem*. The law of contracts then suggests that the parties would return to their original positions, as if the contract had not been made. The problem is apparent. After 100 years of relying on a treaty that has been assumed to be about extinguishment, the parties cannot turn back the clock and begin again.

The legal characterization of the treaties as *sui generis* is a powerful conclusion with powerful implications in law. On one hand, terming the treaties *sui generis* is legally liberating. It means that special rules of law can be developed to address the unique nature of the treaties. On the other hand, though, it might be interpreted to mean that some of the basic protections of contract law do not apply if they would otherwise challenge the extinguishment of Aboriginal title.

Courts have been eager to find that Indian treaties are valid, although they are also willing to find that they have been breached. In *Simon*, the possible application of fundamental breach to the treaties was referred to by Chief Justice Dickson:

*It may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions. It is not necessary to decide this issue in the case at bar since the evidentiary requirements for proving such a termination have not been met.*⁴⁶

Similarly, article 60 (1) of the Vienna Convention entitles a party to a treaty to terminate it or suspend its operation in whole or part where the other party is in “material breach.”⁴⁷

When applied to the treaties, the doctrine of fundamental breach appears tailor-made for numerous situations. A recent example is the Supreme Court of Canada decision in *Bear Island*.⁴⁸ This case involved an assertion by the Teme-Augama Anishinabai (Deep Water People, in Ojibwa) that they had Aboriginal title to some 4,000 square miles of land in the Temagami area in northeastern Ontario, an area of exceptional beauty, dotted by clear-cut logging and tourist businesses in an uneasy balance. The litigation began in the early 1970s and ended with a judgement of the Supreme Court of Canada in the summer of 1991.

The *Bear Island* case is worthy of special study on many levels. It is a saga of nearly 20 years of argument before the courts. It is an object lesson to many Aboriginal leaders who want to place their people’s most important rights before a court. The judgement of the trial court, released in late 1984, found that there were no Aboriginal rights at all. It discussed the evidence of individual families and their trapping areas in great detail. There was a treaty, but the case was not framed so as to require the court to address any entitlement under the treaty.

45 *R. v. Tennisco* (1981), 131 D.L.R. (3d) 96 at 105 (Ont. S.C.).

46 *Simon* (cited in note 12) at 404.

47 See D.J. Harris, *Cases and Materials on International Law*, 3rd ed. (London: Sweet & Maxwell, 1983), p. 608. Material breach is defined in Article 60 (3) as

(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

48 *Bear Island Foundation* (cited in note 23) at 570.

By the time the Supreme Court released its decision, it was 1991, nearly seven years later. The court concluded that the trial judge was wrong and added that, on the basis of the facts as the trial judge found them, there had been “an aboriginal right” but that some “arrangements” made sometime after the treaty amounted to an adhesion to the treaty. This extinguished the Aboriginal rights of the Teme-Augama Anishinabai. The Supreme Court remarked that there was agreement that some of the treaty rights had not been fulfilled. The fulfilment of these rights, the court indicated, involved the fiduciary obligations of the Crown.

The Ontario Court of Appeal had even gone so far as to conclude that the Robinson-Huron Treaty had the effect of unilaterally extinguishing the Aboriginal title of the Teme-Augama Anishinabai because the Crown had formed the intention to extinguish that title, and the ratification of what was in form an agreement was equally capable of being a unilateral act of extinguishment by the sovereign.⁴⁹

If the facts of the treaty adhesion found to have occurred were looked at from the perspective of ordinary contract law, another legal doctrine would certainly have raised its head — that of fundamental breach. The Teme-Augama Anishinabai were said to have exchanged their Aboriginal rights for two main rights: the right to annuities and the right to a reserve of reasonable size. A major component of the treaty — and probably the most fundamental one — remained unfulfilled. A small reserve was created in the late 1940s, 60 years after the adhesion. The balance of the land entitlement remains unfulfilled, however, more than 100 years after the adhesion.

Bear Island suggests that the validity of a treaty purporting to extinguish Aboriginal rights will seldom be questioned. It may be that the treaty rights of the First Nation have not been recognized or implemented, but this cannot call into question the cession of land. In the eyes of the law, the Crown can be compelled to live up to commitments under the treaties, but the extinguishment has validity no matter how poorly the Crown subsequently fulfilled its obligations.

The Commission believes that cases such as *Bear Island* place an inappropriate burden on the courts. It is beyond the normal duty of the courts to rule on the validity of instruments that have been relied upon for generations, even centuries. It is natural for a court to leave such instruments intact, rather than set them aside, and simply provide for compensation if the Crown has breached its duty. The Supreme Court has never been asked to rule on the validity of a treaty when there is compelling evidence that the written text deviated from the treaty nation’s understanding.

Indian treaties now have the following attributes in Canadian law:

- They are agreements sui generis, neither mere contracts nor treaties in international law.
- They were entered into by one party — the Crown — that owed a fiduciary duty to the other party — the treaty nation.
- The honour of the Crown is always involved in treaties’ formation and fulfilment.
- Historical treaties are to be given a large and liberal interpretation in light of the understanding of the Aboriginal party at the time of entering into the treaty.
- While modern treaties may not benefit from the same rules of interpretation as apply to the historical treaties, the courts have not yet explored the impact of the Sparrow decision on their interpretation, particularly their sui generis nature and the Crown’s fiduciary duty.

49 *Ontario (A.G.) v. Bear Island Foundation* (1989), 68 O.R. (2d) 394 at 419 (Ont. C.A.).

The Commission believes that the unique nature of the historical treaties requires special rules to give effect to the treaty nations' understanding of the treaties. Such an approach to the content of the treaties would require, as a first step, the rejection of the idea that the written text is the exclusive record of the treaty.

The basic question we posed earlier still lingers: what if there was no agreement at all? One party thought it was purchasing land; the other thought it was agreeing to share its territory. This goes beyond the limits of legal analysis and into the grey area of contact between two alien societies entering treaty, signifying something very important to both of them, but perhaps something very different to each of them. Questions of Aboriginal and treaty rights are different in many ways from the issues courts normally decide, and one might wonder whether they are inherently unsuitable for disposition by the courts ('non-justiciable').

The Supreme Court of Canada has consistently reaffirmed, however, in every important decision on Aboriginal or treaty rights since at least 1973, that these are in fact justiciable issues. In *Calder*, *Guerin*, *Simon*, *Sioui* and other cases, arguments have been made that the issues before the court could not or should not be addressed by judges. Until the 1984 *Guerin* case, the Crown's fiduciary responsibilities were described as a non-justiciable "political trust". Aboriginal and treaty rights were described as having been "superseded by law". Until *Sparrow*, the regulation of Aboriginal rights to fish was said to have extinguished those rights.

The Supreme Court of Canada, for the most part consistently, has made it clear that Aboriginal and treaty rights are part of the legal regime that defines the rule of law in Canada. These court decisions have come slowly, erratically, and at great cost to Aboriginal people. They are also built on a jurisprudential foundation that did not have the benefit of the Aboriginal perspective on key issues.⁵⁰ Whatever the shortcomings of the legal system that considered these rights, they are clearly not historical anomalies; nor are they mere constructs of policy. They are part of the bedrock of our law, and they paved the way for our pluralistic society.

They have also contributed, however, to an increase in tensions between the treaty parties. Court proceedings simply do not foster reconciliation. They create winners and losers. Those who lose an argument in court do not always accept it, particularly if they regard the process or the result as illegitimate. This applies equally to treaty nations people and to segments of the non-Aboriginal population. For this reason, we see a need for treaty nations, the institutions of the Crown and the Canadian public to engage in a process of mutual understanding and respect that is not driven by successes or failures in court.

When the courts arrive at the limits of legal analysis and the law as legitimate tools for determining rights, they will be compelled to recommend a negotiated political settlement based on such rights as they have found to exist. Courts can describe rights. They cannot make a relationship based on those rights work. At some point we may have to stop looking to the courts for assistance. An eloquent plea to this effect is found in the judgement of Justice Lambert of the British Columbia Court of Appeal in the *Delgamuukw* case:

50 Leading cases such as *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 Appeal Cases 46 (Judicial Committee of the Privy Council) were decided without any participation by the Aboriginal peoples whose rights were under discussion. In addition, from 1927 to 1951, the *Indian Act* made it an offence for band funds to be used for litigation. See the *Indian Act*, R.S.C. 1927, chapter 98, section 141, and Volume 1, Chapter 9 of this report.

So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. The legal rights of the Gitksan and Wet'suwet'en peoples, to which this lawsuit is confined, and which allow no room for any approach other than the application of the law itself, and the legal rights of all Aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years ahead. In my view, the failure to recognize the true legal scope of Aboriginal rights at common law, and under the Constitution, will only perpetuate the problems connected with finding the honourable place for the Indian peoples within the British Columbian and Canadian communities to which their legal rights and their ancient cultures entitle them.⁵¹

3. Historical Treaties: The Need for Justice and Reconciliation

Our people have always understood that we must be able to continue to live our lives in accordance with our culture and spirituality. Our elders have taught us that this spirit and intent of our treaty relationship must last as long as the rivers flow and the sun shines. We must wait however long it takes for non-Aboriginal people to understand and respect our way of life. This will be the respect that the treaty relationship between us calls for.

Josephine Sandy
Ojibwa Tribal Family Services
Kenora, Ontario, 28 October 1992

By virtue of section 35 of the *Constitution Act, 1982*, existing treaty rights are protected by the constitution. Thus, the treaties are now in a sense part of the constitution, including the unique relationships they create among nations or peoples. Despite section 35, however, the institutions of government have been slow to reflect the treaties in their laws, policies and practices. All too often, treaty rights are disputed in the courts.

As we have seen, the law of Canada has developed certain rules that pay respect to the unique nature of the treaties. But treaties are also circumscribed by the nature of the law the courts are called upon to apply. The courts have brought to bear a legalistic focus on the written text of treaties. The Commission has concluded that further court decisions may well deepen the gulf between the treaty parties, regardless of who wins and who loses future court battles.

Even when a treaty right prevails in court, there is reluctance to implement that right. Frequently, treaty rights come to courts in connection with criminal prosecutions. There is no readily available mechanism to implement in positive terms a right that has been given judicial recognition as a defence to a charge of unlawful hunting or fishing. Similarly, disputes about reserve land or other important treaty rights are often delayed and frustrated by inappropriate processes for fulfilment, thus perpetuating injustice (see Chapter 4 in Part Two of this volume).

51 *Delgamuukw v. British Columbia* (A.G.), [1993] 5 C.N.L.R. 1 at 254-55, Lambert J.A.

3.1 The Need for Justice

The Commission sees the first objective in fulfilling the treaties as the achievement of justice. Treaty rights already identified by the courts should be given force and effect. Our recommendations to achieve justice in this narrow but important sense are set out at the end of this chapter and in other chapters in this volume (see in particular Chapter 4).

Treaty promises were part of the foundation of Canada, and keeping those promises is a challenge to the honour and legitimacy of Canada. The fulfilment of treaty rights already recognized by the courts will bring important benefits to treaty nations people. In particular, the full implementation of hunting, fishing and trapping rights can assist in the revitalization of traditional economies. The fulfilment of treaty land entitlements and the resolution of land claims will provide important resources for creating new economic opportunities.

The implementation of legally recognized rights under the treaties will also demonstrate that the Crown's honour is reflected in the Crown's actions. Until the rights already recognized in Canadian law as being in the treaties are respected, treaty nations cannot be expected to embark on further discussions aimed at deeper reconciliation with other Canadians. It is not enough for governments to say, "Trust us."

The first stage of treaty implementation therefore is to find ways to give effect to treaty rights already acknowledged by the Canadian legal system. Our specific recommendations for short-term implementation are set out later in this chapter and in Chapter 4.

3.2 The Need for Reconciliation

By reconciliation we mean more than just giving effect to a treaty hunting right or securing the restoration of reserve land taken unfairly or illegally in the past. We mean embracing the spirit and intent of the treaty relationship itself, a relationship of mutual trust and loyalty, as the framework for a vibrant and respectful new relationship between peoples.

New attitudes must be fostered to bring about this new relationship. A consensus will have to evolve that the treaty relationship continues to be of mutual benefit. New institutions must be created to bring this relationship into being. At present, the relationship between the treaty parties is mired in ignorance, mistrust and prejudice. Indeed, this has been the case for generations.

We embark on this discussion with a full appreciation that Canada is in a fiscal crisis. In our view, however, the cost of the present unreconciled relationship far outweighs the cost of achieving the proper balance in the relationship, particularly when human costs are included. We examined the cost of the present regime and its consequences in terms of poverty, despair and premature death (see Volume 5, Chapter 2). A new relationship built on honouring the treaties will lead to self-reliance, empowerment and the restoration of resources to the treaty nations. It will lead away from the crippling dependence on government that has been engendered in treaty nations communities.

The Commission has identified major issues requiring analysis, reconciliation and redress. They stem from profound differences in the beliefs of the Crown and the treaty nations with respect to the nature and content of the treaties. Before exploring these differences, it is important to lay a foundation for reconciliation by setting out the areas where consensus has been achieved by the treaties.

3.3 Common Ground in the Treaties

The courts have sometimes mistakenly regarded the written text as an accurate and complete record of the treaty agreement. There are dangers in going to the other extreme and concluding that the treaties are so completely devoid of consensus that the written records should be discarded. This view would result in a complete rejection of the treaties as representing any kind of agreement whatsoever.

In fact, there is considerable common ground between the Crown and treaty nations concerning the treaties. Both parties perceived the treaties as providing for a shared future. The treaties were to define relationships between governments. They guaranteed a sharing of the economic bounty of the land. They guaranteed peace and prevented war. They involved a mutual respect that was to be enduring. There is common ground in the understanding that once the treaty was made, it would define and shape the future relationship between the parties in a definitive way.

There is common ground in the fact that each party brought to the treaty ceremony its most sacred and enduring symbols. The Crown formalized the treaties using its most formal instrument: a written document under seal. Clergy were often asked to attend treaty councils to provide advice and spiritual guidance to the parties. Representatives of the Crown pledged the word of the sovereign. In the Anglo-Canadian legal tradition, making the treaty agreement under seal gave it force in law, as expressed by Lord Denning of the English Court of Appeal in 1982:

They [the Indian peoples] will be able to say that their rights and freedoms have been guaranteed to them by the Crown, originally by the Crown in respect of the United Kingdom, now by the Crown in respect of Canada, but, in any case, by the Crown. No parliament should do anything to lessen the worth of these guarantees. They should be honoured by the Crown in respect of Canada 'so long as the sun rises and river flows'. That promise must never be broken.⁵²

Similarly, the treaty nations drew upon solemn practices from their own laws and traditions: the pipestem, wampum, tobacco and oratory. For the Indian nations of the plains, the sacred pipe sealed the agreements:

The concept of treaty, inaistisinni, is not new to the Blood Tribe. Inaistisinni is an ancient principle of law invoked many times by the Bloods to settle conflict, make peace, establish alliances or trade relations with other nations such as the Crow, the Gros Ventre, the Sioux and, more recently, the Americans in 1855 and the British in 1877. Inaistisinni is a key aspect of immemorial law, which served to forge relationships with other nations. Inaistisinni is a sacred covenant, a solemn agreement, that is truly the highest form of agreement, binding for the lifetime of the parties. So solemn is a treaty that it centres around one of our most sacred ceremonies and symbols, the Pipe.

Les Healy
Lethbridge, Alberta
25 May 1993

In each case, treaty making was solemnized with the formality appropriate to commitments intended to endure as long as the sun rises and the rivers flow.

52 *Secretary of State for Foreign and Commonwealth Affairs* (cited in note 11) at 129-30.

3.4 Lack of Common Ground

In Volume 1, we showed that the Indian nations and the Crown had divergent views about the fundamental assumptions on which the treaties were based. The Crown's objective was to achieve the extinguishment of Aboriginal title and the subjection of treaty nations to the Crown's authority. The British Crown, like all European powers that came to the Americas, adhered to the doctrine of discovery. Chief Justice Marshall of the U.S. Supreme Court described this doctrine in a 1823 decision, *Johnson v. M'Intosh*:

This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assentedWhile the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.⁵³

This principle explains the British Crown's purposes in treaty negotiations, at least after the *Royal Proclamation of 1763*. The Crown thought it had dominion over Indian lands, even in the absence of a treaty. Indian title was seen as a possessory right, a cloud upon the Crown's title that could be purchased to perfect that title. Acquisition of that title was a one-time purchase.

The treaty nations regarded the treaties, in terms of their spirit and intent, as a set of solemn, oral and mutual promises to coexist in peace and for mutual benefit. The treaty was to be renewed regularly, to be kept fresh and living. In this view, the piece of paper produced by the Crown was no more the treaty than was the pipestem, the wampum or the tobacco that symbolized the solemnity of the promises.

Each treaty is a unique compact, but there is remarkable consistency in the principles of the treaties as expressed by the treaty nations themselves. They maintain with virtual unanimity that they did not give up either their relationship to the land (or as Europeans called it, their title) or their sovereignty as nations by entering into treaties with the Crown. Indeed, they regard the act of treaty making as an affirmation of those fundamental rights.

Indian treaty nations naturally approached the treaties they made with Europeans on the same basis as the treaties they made with each other. As we saw in Volume 1, indigenous treaty practice was to reinforce the autonomy of nations and to establish relations of kinship among them. To the treaty nations, the making of a treaty affirmed their nationhood and their rights to territory. They created sacred relations of kinship and trust.

53 *Johnson v. M'Intosh*, 5 U.S. (8 Wheaton) 543 at 573-74, Marshall C.J. (1823). For further discussion of these issues see Robert A. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

3.5 The Vulnerability of Treaties

The treaties have been affirmed by both parties, and nullification is not an option for either party.⁵⁴ The treaty nations affirm, virtually without exception, that they have valid treaties with the Crown and do not seek to void them. This is key to understanding the position they asserted to this Commission and elsewhere. They take issue not with the existence or essential validity of the treaties but with the Crown's interpretation of the content of the treaties.

In Canadian law, as we have seen, the conduct of the parties after the treaty is relevant to the continuing validity of a treaty.⁵⁵ International law, by analogy, provides for limited circumstances under which a party may suspend specific treaty terms when a dispute arises, as opposed to withdrawing from or nullifying the treaty as a whole.⁵⁶

The Commission believes that if the treaty nations were to choose to use all legal means at their disposal to challenge the orthodox legal interpretation of the written text of their treaties, some key provisions of the treaties might well be vulnerable in light of legal doctrines such as duress, *non est factum*, fundamental breach, and breach of the Crown's fiduciary duty.⁵⁷ Such proceedings might result in grave legal and financial uncertainty across Canada as long-held rights were called into question.

It is also quite possible that this would not occur. If faced with the argument that the treaties did not, for example, extinguish Aboriginal title, at least some courts might narrow and confine the results of some of the cases of the past 30 years, which have generally been favourable to Aboriginal peoples' interpretation. In this situation, Aboriginal people might become frustrated by the lack of respect for their aspirations, and renewed violence could occur, both within and outside treaty nation communities.

We must emphasize that challenging the legal texts of the historical treaties does not reflect the position of the treaty nations. They have waited steadfastly for implementation of their treaty rights as they understand them. It is the Crown that has marginalized the treaties to the point where questioning their validity — clearly as a last resort — might become an option.

The present tension between the competing visions of what the treaties were intended to accomplish compels the parties to make a choice between two starkly opposed options:

54 In the case of the Crown, we regard the recognition and affirmation of existing treaty rights in section 35(1) of the *Constitution Act, 1982* as conclusive of the Crown's affirmation.

55 *Sioui* (cited in note 21) at 1045.

56 Article 44(3) of the Vienna Convention (cited in note 19) provides that a party may as a general rule only invalidate, terminate, withdraw from or suspend the operation of a treaty as a whole, and may only do so in relation to particular clauses if

(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

Article 45 of the Vienna Convention provides that a state may not invalidate, terminate or withdraw from a treaty if, after becoming aware of the certain facts that might justify those actions:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

57 See Alan Pratt, "The Numbered Treaties and Extinguishment: A Legal Analysis", research study prepared for RCAP (1995).

- renegotiating the historical treaties from scratch, or
- identifying and implementing the spirit and intent of these treaties.

3.6 Implementing the Spirit and Intent of Treaties

The Commission uses the term ‘spirit and intent’ to mean the intentions the treaty parties voiced during treaty negotiations as the underlying rationale for entering into a treaty and its expected outcome: sharing, coexistence and mutual benefit. The term transcends the purely legal nature of treaties and includes their constitutional and spiritual components. It requires the treaties be approached in a liberal and flexible way.

The Commission believes that the spirit and intent of the historical treaties need to be re-discovered and restored as the basis for treaty implementation. We have concluded that the cross-cultural context of treaty making probably resulted in a lack of consent on many vital points in the historical treaties. As the courts have indicated, modern treaties do not give rise to the same difficulties of understanding, but they do pose interpretive problems of their own, as well as, in many cases, stopping short of the comprehensive measures needed to restructure the relationship. We believe that honouring the spirit and intent of the historical treaties requires two distinct approaches:

- a broad and liberal interpretation of the treaty promises and agreements as understood by *both* treaty parties, using all available information regarding the treaty negotiations, including secondary and oral evidence, without giving undue weight to the treaty text; and
- a negotiated compromise on issues on which a thorough examination of the evidence leads to the conclusion that the treaty parties themselves failed to reach consensus.

The key to implementing the spirit and intent of the treaties is the open acknowledgement that the treaty parties may have failed to reach agreement on issues such as Aboriginal title because of the difficulty of translating the central concepts. In this light, it would be unconscionable for the Crown to insist on extinguishment of rights through the treaties because of factors that vitiated the free and informed consent of treaty nations.⁵⁸

It is the Commission’s view that Canada should indicate its willingness to assume and implement the obligations of the Crown as these become apparent in light of the spirit and intent of the treaties. This will, of necessity, involve a commitment to decolonize treaty nations.

3.7 The Fiduciary Relationship: Restoring the Treaty Partnership

Elsewhere in our report we address the nature of the fiduciary relationship between the Crown and Aboriginal peoples (see Volume 1, chapters 5 and 7; Volume 2, chapters 3 and 4). The nation-to-nation relationship embodied in the practice of treaty making implies a set of *mutual* fiduciary obligations between the nations that were parties to treaties. This relationship arises from the mutual agreement of the treaty parties to share a territory and its benefits and thereby to establish a continuing and irrevocable relationship of coexistence. This can best be understood as a partnership, an idea we had in mind in choosing a title for our special report, *Partners in Confederation*.

Fiduciary principles provide guidance in cases where a relationship has become unbalanced and one party, for one reason or another, becomes vulnerable to the power of the other. Regardless of the

58 See Pratt, “The Numbered Treaties”.

partnership relationship that the treaties created or should have created, treaty nations have been deprived of many basic civil and economic rights and as a result have been placed in a state of vulnerability to federal and provincial government power.

The relationship between Aboriginal peoples and the Crown reflects the classic fiduciary paradigm of one party's vulnerability to another's power and discretion. The law imposes clear duties on the 'dominant' party within such a relationship.

In the Commission's view, the Crown is under a fiduciary obligation to implement such measures as are required to reverse this colonial imbalance and help restore its relationship with treaty nations to a true partnership. This will require the Crown to take positive steps toward this end as well as to refrain from taking actions that will frustrate it.

The New Zealand courts have discussed this notion of partnership in connection with the Treaty of Waitangi of 1840. In the 1987 case, *New Zealand Maori Council v. A.-G.*, President Cooke of New Zealand's highest court wrote:

The Treaty [of Waitangi] signified a partnership between races, and it is in this concept that the answer to the present case has to be foundIn this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty.

It should be added ... that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.⁵⁹

Justice Richardson put it this way:

In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both partners that obligation to deal with each other and with their treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions.⁶⁰

Justice Casey wrote that there was a concept of 'ongoing partnership' in the treaty:

Implicit in that relationship is the expectation of good faith by each side in their dealings with the other, and in the way that the Crown exercises the rights of government ceded to it. To say this is to do no more than assert the maintenance of the "honour of the Crown" underlying all its treaty relationships.⁶¹

The key principles in such a treaty partnership are those we identified in Volume 1 as the keys to a renewed relationship: mutual recognition, mutual respect, sharing and mutual responsibility.

59 *New Zealand Maori Council v. Attorney-General* (1987), 1 N.Z.L.R. 641 at 664 (C.A.) [emphasis added].

60 *New Zealand Maori Council* at 682.

61 *New Zealand Maori Council* at 703.

The treaty partnership must be a goal for the future, since the past has been characterized by a lack of good faith on the part of the Crown, the sometimes arbitrary exercise of power contrary to the interests of Aboriginal peoples, and the imposition of policies of marginalization.

As the relationship between Canada and Aboriginal and treaty nations is gradually restored to one of partnership rather than domination, through the revitalization of existing treaties and the making of new ones, the duty of care may well become more equal and reciprocal in practical terms. As Aboriginal and treaty nations regain their dignity and rights, they will enjoy greater opportunities to interact with Canadian society as a whole and will be honour-bound, by treaty, to act with the same degree of good faith that they quite properly demand of Canada today.

The renewed treaty partnership also disposes of any notion that treaty nations can enjoy rights without corresponding obligations. Indeed, the numbered treaties expressly required treaty nations to keep the peace and enforce the laws. This is one of the bases of a right to establish treaty nation justice systems.⁶² Treaties were clearly intended to include mutuality of rights and obligations.

The condition of dependence and underdevelopment among treaty nations is the legacy of disregard for the real nature of the treaty relationship. A fiduciary obligation exists on the part of all Crown institutions to reverse this condition and to foster self-reliance and self-sufficiency among the treaty nations.

3.8 Aboriginal Rights and Title: Sharing, Not Extinguishment

As we wrote in *Treaty Making in the Spirit of Co-existence*, nothing is more important to treaty nations than their connection with their traditional lands and territories; nothing is more fundamental to their cultures, their identities and their economies.⁶³ We were told by many witnesses at our hearings that extinguishment is literally inconceivable in treaty nations cultures. For example, Chief François Paulette testified:

In my language, there is no word for 'surrender'. There is no word for 'surrender'. I cannot describe 'surrender' to you in my language. So how do you expect my people to put their X on 'surrender'?

Chief François Paulette
Yellowknife, Northwest Territories
9 December 1992

The treaty nations maintain with virtual unanimity that they did not agree to extinguish their rights to their traditional lands and territories but agreed instead to share them in some equitable fashion with the newcomers. The presentation of Chief George Fern of Fond du Lac First Nation community is representative:

62 See RCAP, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996).

63 RCAP, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services, 1995).

We believe the principle of sharing of our homeland and its natural resources is the basis of the treaty arrangements, not surrender or extinguishment. Accordingly, the concepts of resource co-management and revenue sharing from the Crown lands and resources are the proper forms of treaty implementation. Such arrangements would provide a significant economic basis for self-government, and would provide First Nations with the ability to protect and benefit from Mother Earth.

Chief George Fern
Prince Albert Tribal Council
La Ronge, Saskatchewan, 28 May 1992

The written text of many treaties provides for the extinguishment of traditional Aboriginal land rights, in exchange for specified contractual rights, pursuant to the Crown's policy of using the treaty process to extinguish Aboriginal title. The Treaty 7 First Nations recently conducted a treaty review process with respect to their treaty and came to this conclusion:

In 1877, the Blackfoot Confederacy, Tsuu T'ina, and the Stoneys entered into an agreement to share the land with the European settlers, resources were never surrendered, the land was never surrendered. These nations were to be taken care of and provided for in perpetuity by the government.

It is now more apparent than ever that there were two understandings at the conclusion of the Treaty at Blackfoot Crossing in 1877. One is the obvious belief by the government that the essence of the Treaty was a land surrender. It must be stressed that according to the Indian Agent Reports, that by the time Treaty 7 was made, treaty making was only a formal exercise to extinguish Indian title to land.

What we believed to be the agreement reached by the Treaty 7 First Nations was an agreement to share the land to the depth of a plow in return for certain concessions.⁶⁴

Insistence by Crown agencies that Aboriginal title was largely extinguished by the treaties has the potential to be highly destructive to the process of reconciliation. The text of the post-1850 treaties clearly provides for the extinguishment of Aboriginal title. But the people of the treaty nations reject that outcome. It is unlikely that any court decision could ever change their minds on this central issue. For this reason, the Commission proposes that the question of lands and resources be addressed on the basis that the continuing relationship between the parties requires both to accept a reasonable sharing of lands and resources as implicit in the treaty (see Chapter 4). For a range of reasons developed more fully in the next two chapters, we believe that any interpretation of the spirit and intent of the historical treaties that is to endure as the basis of a new relationship must be, and must be seen to be, fair to the First Nations parties in terms of their ownership of, use of and access to their traditional lands and resources.

The implications of a lack of consensus on the issue of title to land are enormous. There is a deep dispute between the treaty parties with respect to the extent of historical treaty agreements, particularly in regard to treaties whose written texts contain extinguishment provisions.

In *Treaty Making in the Spirit of Co-existence*, we wrote of the extinguishment clauses of past treaties:

⁶⁴ Elders of Treaty 7: Walter Hildebrandt, Dorothy First Rider, and Sarah Carter, *The Spirit and Intent of Treaty 7* (Treaty 7 Tribal Council, Tsuu T'ina, Alberta, 1993), p. 6.

*In light of divergent understandings of extinguishment clauses and the jurisprudence on treaty interpretation ... it cannot always be said with certainty that the written terms of an extinguishment clause will determine the clause's legal effect.*⁶⁵

We went on to say:

*Extinguishment policy during the era of the numbered treaties was designed to clear Aboriginal title for the sake of non-Aboriginal settlement and Aboriginal assimilation. In combination, these purposes do not merely ignore the interests served by Aboriginal title, they negate them. They amount to a justification of extinguishment for extinguishment's sake. These objectives, in our view, do not merit serious consideration in a constitutional regime committed to fundamental principles of equality and respect for Aboriginal difference.*⁶⁶

Thus, notwithstanding clear words calling for extinguishment in many historical treaties, it is highly probable that no consent was ever given by Aboriginal parties to that result. Aboriginal people, who believe that the Creator set them on their traditional territories and gave them the responsibility of stewardship of the land and of everything on it, are not likely to have surrendered that land knowingly and willingly to strangers. By the same token it would be entirely consistent with their world view and ethical norms for them to share the land with newcomers.

The legal character of Aboriginal title (see Chapter 4), the source and nature of the Crown's fiduciary duties to Aboriginal peoples (see Volume 1, Chapters 5 and 7 and Chapters 3 and 4 in this volume), and the fundamental contractual nature of the treaties raise a serious question about whether the treaties that purport to extinguish Aboriginal title over large tracts of land actually achieved this end.⁶⁷ The treaties did, however, include an agreement to share territory between treaty nations and the newcomers as represented by the Crown.

Thus, it is possible that Aboriginal title continues to coexist with the Crown's rights throughout the areas covered by treaties, despite the Crown's intention to include a cession of Aboriginal title. It is also possible, however, that the courts could continue to give effect to the written text of a treaty, however illegitimate this may be from the treaty nation's perspective.

The treaty relationship requires that the parties meet in a spirit of partnership to complete their incomplete agreement. Since neither party has expressed a wish to nullify the treaties, we must consider how the parties should deal with the issues arising from lack of consensus.

During the negotiations required to complete the treaties, it stands to reason that the Crown should not assert that the Aboriginal title of the treaty nations has been extinguished unless there was clear consent. On the other hand, the treaty nations, having undertaken an obligation of sharing in good faith, must not take any steps that contradict the spirit and intent of a partnership predicated on those principles. Both parties are therefore under constraints, stemming from their treaty obligations, in negotiating the completion of the treaties.

It should be implicit in these negotiations that the principle of sharing, which was central to the treaty nations' purposes in making their treaties, entitles them to an adequate land base to satisfy their contemporary cultural and economic requirements and to support their governments.

65 RCAP, *Treaty Making in the Spirit of Co-existence* (cited in note 63), p. 17.

66 RCAP, *Treaty Making in the Spirit of Co-existence*, p. 57.

67 See Pratt, "The Numbered Treaties" (cited in note 57).

3.9 Sovereignty and Governance

Sovereignty, like extinguishment, is a concept that does not have a ready analogue in Aboriginal languages and world views (see Chapter 3). Treaty nations uniformly consider that in formalizing treaty relations with the Crown, they were acting as nations. When the treaties accorded mutual recognition and described specific and mutual rights and obligations, the treaty nations were not intending to cede their sovereignty, but to exercise it.

In the 1832 case *Worcester v. State of Georgia*, Chief Justice John Marshall of the United States Supreme Court wrote:

The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

... These articles [of treaties between Indian nations and both Great Britain and the United States] are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is that a weaker power does not surrender its independence — its right to self-government, by associating with a stronger and taking its protection.⁶⁸

In his concurring opinion in the same case, Justice McLean asked:

What is a treaty? The answer is, it is a compact formed between two nations or communities, having the right of self-government.

Is it essential that each party shall possess the same attributes of sovereignty to give force to the treaty? This will not be pretended; for, on this ground, very few valid treaties could be formed. The only requisite is, that each of the contracting parties shall possess the right of self-government, and the power to perform the stipulations of the treaty.⁶⁹

We do not quote these words in support of any theory that the Crown and the treaty nations had or have the same or different attributes of sovereignty but to confirm the essential link between the right and power of a people to govern themselves and the act of treaty making.

The Commission believes that the spirit and intent of the treaties requires the Crown to respect the inherent right of the treaty nations to govern their own affairs and territories. Implicit in this principle, of course, is the right of treaty nations to enter into intergovernmental relations with the Crown, to acquire the benefits of such agreements, and to incur their burdens voluntarily.

In this connection, there will have to be an examination of how these rights are to be exercised. The Aboriginal people who can assert and exercise such a right are members of the nations that entered into treaties with the Crown. In entering into nation-to-nation treaties with them, the Crown has already acknowledged their self-governing nation status. Other Aboriginal nations have not yet entered into treaties with the Crown. As we discuss in Chapter 3, they have a right to negotiate and enter into treaties that will set out their powers of governance.

⁶⁸ *Worcester v. State of Georgia*, 8 U.S. (6 Peters) 515 at 559-561 (1832).

⁶⁹ *Worcester v. State of Georgia* at 581.

3.10 Observations Regarding Fulfilment of the Historical Treaties

The historical treaties (including the written and oral versions) cover a wide range of topics. The Commission does not intend to catalogue the particular rights and obligations in these treaties, but we want to caution against ignoring the unwritten assumptions about the treaties that have contributed to so much misunderstanding.

We make the following observations regarding the historical treaties:

- Specific rights of the treaty nations under the treaties have not been recognized or implemented in many, and possibly most, cases.
- The implicit treaty right of governance has not been recognized.
- In many, if not most cases, implementation of treaties has resulted in an imbalance in the benefits and the burdens of the treaty relationship in favour of the Crown and against the interests of the treaty nations.
- Canadian law has tended to give force to the treaty texts that purport to extinguish the rights and title of treaty nations, while not giving effect to aspects of the treaties that require the Crown to fulfil its fiduciary duties to implement the treaties fully and fairly.

If the validity of the historical treaties — or certain key components of them, including the extinguishment clauses — were placed before the courts, key aspects of many portions of the written texts might be set aside on the following bases:

- In some cases, treaty nations may not have given informed consent to the extinguishment of their rights and title.⁷⁰
- In some cases, important components of the treaties may not have been included in the written text drafted by the Crown.⁷¹
- In some cases the letter of the treaty text may have been fulfilled, but the spirit and intent, which require a broader interpretation of the text, may have been breached.⁷²
- In some cases, the failure of the Crown to provide some treaty entitlements may constitute fundamental breach.⁷³
- In some cases, treaties might be found unconscionable, or agreement might be found to have been induced by fraud, undue influence or duress.⁷⁴

70 See *Re Paulette and Registrar of Land Titles No. 2* (1973), 42 D.L.R. (3d) 8 at 40: “That notwithstanding the language of the two treaties there is sufficient doubt on the facts that aboriginal title was extinguished that such claim for title should be permitted to be put forward by the Caveators.” This decision was subsequently overturned on technical grounds (related to the availability of the caveat) that do not affect the point here.

71 Many examples can be given here. In *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen’s Printer, 1966), the treaty commissioners for Treaty 8 recorded a promise that no taxation would be permitted, but this was not included in the treaty text. The report on the negotiations leading to Treaty 3, *Treaty No. 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions* (Ottawa: Queen’s Printer, 1966), included mention that the wild rice harvest was to be protected, but again this was not included in the treaty text.

72 Few if any treaties made in Canada explicitly address the rights of the treaty nations to govern themselves. Implicitly, however, the power to fulfil the treaty promises requires that the treaty nations be self-governing.

73 *Bear Island Foundation* (cited in note 23) might be such a case.

- In some cases, implementation of the treaties might be found to fall short of the standards required of a fiduciary.

Finally, the written texts of the historical treaties do not set out treaty nations' inherent right of self-government in explicit terms. This has led to doubt on the part of non-Aboriginal governments and courts about whether governance is a treaty right.

These observations lead us to conclude that, if no alternative to the courts can be found, historical treaties in many, if not most, parts of Canada may well be the subject of renewed court challenges.

A better process must be found.

Recommendation

The Commission recommends that

2.2.2

The parties implement the historical treaties from the perspective of both justice and reconciliation:

(a) Justice requires the fulfilment of the agreed terms of the treaties, as recorded in the treaty text and supplemented by oral evidence.

(b) Reconciliation requires the establishment of proper principles to govern the continuing treaty relationship and to complete treaties that are incomplete because of the absence of consensus.

4. Treaty Implementation and Renewal Processes

The approach we prefer at the present time is to proceed on the basis of the treaty relationship. We hope that with the new government we can enter into some kind of a national process, a bilateral process, so that we can begin to look at how we are in fact going to implement not only the treaties but the inherent right to self-government as well.

National Chief Ovide Mercredi
Assembly of First Nations
Ottawa, Ontario, 5 November 1993

The sources of the under-development, poverty, disease and dependence within our First Nations can be found in the disregard and violation of our treaties and of Canada's own constitution. Likewise, the seeds of the solutions to the fundamental problems and contradictions can be found in the honouring and faithful implementation of these sacred treaty rights and obligations.

Vice-Chief John McDonald
Prince Albert Tribal Council and Denesuliné First Nations
La Ronge, Saskatchewan, 28 May 1992

74 See *R. v. Batisse* (quoted earlier in the chapter and cited in note 44) in relation to *The James Bay Treaty: Treaty No. 9 (made in 1905 and 1906), and Adhesions made in 1929 and 1930* (Ottawa: Queen's Printer, 1964).

If the Royal Commission is truly interested in furthering resolution of the injustices committed against our nations in the name of the Crown, then you must join us in calling upon the Crown in right of Canada to return to the relationship between our peoples as intended by the treaty and enter into a comprehensive bilateral process of treaty review with each First Nation on a nation-to-nation basis. Only this type of bilateral nation-to-nation dialogue will be capable of resolving our differences and restoring the honour of the Crown.

Chief Johnson Sewepegaham
Little Red River Cree Nation/The Tall Cree First Nation
High Level, Alberta, 29 October 1992

During our hearings, leaders and members of treaty nations without exception called for the establishment of a treaty implementation and renewal process. The Commission agrees. This is not the creation of a new process but the renewal of a very old one.

In the opinion of Commissioners, a treaty implementation and renewal process is the appropriate way to address issues of relevance to the treaty relationship. If the process is renewed in a fashion that properly respects the treaties and the beliefs and diversity of the treaty nations, it will usher in a new era in the life of Aboriginal peoples and Canadians.

This section focuses on the historical treaties. These agreements were made before the general availability of legal representation to Aboriginal people. The modern treaties are lengthy, detailed and the product of extensive negotiation. They may not, however, address all the dimensions of an agreement that meets the standards of fairness and completeness we are seeking to establish through this report. We address the special challenges of the modern treaties later in this chapter.

Presenters testified variously to the need for a “bilateral treaty process”, a “treaty implementation process”, “treaty renovation”, “treaty review” or simply a “treaty process.” Their terminology varied, but all agreed that the existing treaties need to be revisited and revitalized.

Many emphasized the bilateral nature of the proposed treaty process.⁷⁵ We refer to ‘treaty implementation and renewal processes’ without always prefacing the term with ‘bilateral’. The treaties are correctly perceived by treaty nations as being bilateral in nature: the treaty nations are one party, and the Crown is the other.⁷⁶ Treaty nations, in many cases, regard their relationship under treaty as one made between sovereigns. Certainly, they all regard their relationship as being between nations or peoples. Each of the treaties represents the coming together of two separate cultures, political systems, legal systems and systems of land tenure. The treaties are therefore, in this sense, fundamentally bilateral.

Each side of the treaty implementation relationship, however, can be politically complex. Treaty nations, for example, can be made up of different clans, tribes or villages, recognized by their own laws and customs. In addition, in some places, traditional treaty nation political structures have been superseded by the establishment of band councils elected under the *Indian Act*, as well as by other

75 For example, see transcripts of the hearings of the Royal Commission on Aboriginal Peoples [hereafter RCAP transcripts] for the following: Brian Lee, Hobbema, Alberta, 10 June 1992; Chief Lindsay Cyr and Felix Musqua, Saskatoon, Saskatchewan, 28 October 1992; Johnson Sewepegaham, Chief Bernie Meneen and Harold Cardinal, High Level, Alberta, 29 October 1992; François Paulette, Yellowknife, Northwest Territories, 9 December 1992; and Gregg Smith and Dorothy First Rider, Lethbridge, Alberta, 25 May 1993, among others.

76 In our view this remains true even in cases where the government of a province has signed a treaty. See in this context *R. v. Batisse* (cited in note 44) at 148-49 in relation to Treaty 9 and *R. v. Howard* (cited in note 33) in relation to the 1923 Williams treaties.

entities, such as tribal councils and provincial, regional and national political associations, to represent some treaty nations for some purposes.

Similarly, while ‘the Crown’ is in a very real sense a single party to a bilateral treaty relationship, Her Majesty the Queen is advised by many ministers of many governments and has no real authority independent of them. In Canada, Parliament has the primary legislative authority and the federal government executive responsibility for fulfilling the treaties, but many treaty issues involve matters within provincial jurisdiction and ownership, particularly lands and natural resources.

The Crown in Canada today is a concept that both constrains governments from wrongful actions and acts more positively as an affirmative and honourable force that is required to uphold treaty relationships and treaty promises made on behalf of society as a whole.

Some treaty nations continue to regard the Crown in right of the United Kingdom as having continuing relevance to their treaty relationships. Their views on this matter are strongly held and worthy of respect.

While the treaty relationship is bilateral in nature, issues of representation of the two treaty parties will be important to the success of a bilateral treaty process. Many treaty implementation discussions may involve more than one government on both sides. On one side will be the federal and provincial governments. In time, treaty nations will have governments that are in effect ‘federal’, with individual band governments or their successors retaining certain local autonomy within a broader treaty nation government structure. The result of a successful treaty process will determine how the governments of treaty nations will function as one of three orders of government within the Canadian federation. The essential bilateral nature of the relationship will be preserved, but the discussions may involve more than a single government entity on each side of the table.

We refer to a process of implementation and renewal of the historical treaties. The treaty nations do not want to start afresh and create a new relationship between the parties. They want the treaties to be implemented in the context of the traditional relationship but in a way that the parties can agree effects a just and reasonable resolution of areas in dispute. They see the treaties as sacred compacts between peoples, not as relics of the past, and they want them renewed in that spirit. We use the term ‘implementation’ because treaties already deal at least implicitly with the issues raised by treaty nations. We use the term renewal to emphasize the need to revitalize, in contemporary form, the treaty relationships established so long ago.

The treaty process will involve the negotiation of gaps in the record of the original treaty as recorded by the Crown. As we have concluded, the treaty nations see the written text of the historical treaties as incomplete and misleading. Negotiation of these gaps does not imply renegotiation of the entire treaty. The proposed treaty process is *not* a renegotiation of the existing historical treaties. The treaty nations did not ask the Commission to recommend renegotiation of their treaties, or nullification, amendment or reopening of them. In light of the history of many of the treaties, particularly the consistent implementation of only one view of the treaty relationship, at the expense of the other, this is perhaps surprising.

According to the approach of Canadian law to date, many of the treaties resulted in the extinguishment of the most fundamental rights any people can possess. Against this backdrop, it is remarkable that a repudiation of the treaties has not been asserted with greater vigour. On the contrary, the treaty nations that testified before the Commission asserted that all the terms of the treaties — including matters that were not recorded by the Crown — continue to exist and require only identification and implementation. They do not regard the written texts of treaties as

authoritative; but neither do they repudiate or seek to nullify their treaties. The point the treaty nations make, however, is that the original treaty, however ambiguous, one-sided or deficient, created a relationship between the parties that continues today; what is required is a process undertaken in the context of that relationship and consistent with the spirit that generated it.

The consistent message emerging from the testimony of treaty nations is that the treaties are sacred and spiritual covenants that cannot be repudiated, any more than the cultures and identities of treaty nations can be repudiated. In entering into treaties, treaty nations maintain that they made an irreversible and spiritual alliance with the Crown that cannot be broken.

The treaty nations believe that their fundamental relationship with the Crown has been made and solemnified: what is required is a continuing process occurring in the context of that relationship.

The federal government has regarded outstanding treaty issues as claims or grievances, so it has established a claims procedure that seeks finality and certainty in one-time settlements, arrived at through negotiation. While the treaty process will involve negotiations to give effect to the spirit and intent of treaties, it will be shaped by the pre-existing relationship of partnership.

With remarkable uniformity, the treaty nations consider that their treaties with the Crown already contain commitments to maintain that partnership and to review it periodically. Many early treaties contain explicit commitments to renew and continue to renew the treaty relationship. The distribution of annuities on annual treaty days under many treaties is regarded as much more than the payment of rent. It is regarded as a formal opportunity to discuss and renew the relationship each year.

We quote the words of Lord Sankey, of the Judicial Committee of the Privy Council, who described the *British North America Act* as “a living tree capable of growth and expansion within its natural limits.”⁷⁷ Just as a country’s constitution is organic, being shaped and reshaped continually by the evolving circumstances of human society, the principles of treaties made between nations must also be interpreted as the relationship evolves. In this light, the treaties must also be flexible enough to include new matters that might not have been raised at the time of the original treaty discussion. Treaty relationships, once established or re-established, must be flexible enough to address new items of concern.

The treaty process will thus emphasize the treaty as a set of mutual rights and mutual fiduciary obligations appropriate to the continuing relationship between treaty partners, rather than as a set of claims and grievances. In this process, there will be a mutual endeavour to achieve clarity, precision and certainty with respect to the content of treaty rights and obligations on both sides.

Canada is fortunate to have a living tradition of treaty making that can now be revitalized. In some countries, notably Australia, no treaty process with Indigenous peoples was ever commenced, and the struggle to begin reconciliation between Indigenous and non-Indigenous peoples is now under way after 200 years of denial of Aboriginal rights.⁷⁸

In other countries, such as the United States, the government terminated the treaty process unilaterally in the last century,⁷⁹ creating severe anomalies among the Native American peoples and withdrawing from them the principal and constitutionally recognized means of establishing and

⁷⁷ *Edwards v. Canada (A.G.)* (1929), [1930] A.C. 124 at 136.

⁷⁸ This is the direct result of the landmark decision of the High Court of Australia in *Mabo v. Queensland* (1992), 107 A.L.R. 1.

maintaining their relationship with the United States.⁸⁰ It is significant that in New Zealand, where a form of treaty process exists, important advances in Maori rights have been achieved.

In Canada, the constitutional recognition of rights under land claims agreements as treaty rights is symbolic of the continued vitality of the treaty process, regardless of the difficulties inherent in contemporary claims policies. As a result, Canada could set a precedent among the nations of the world in using or reviving the treaty as the primary means of legitimizing relations with indigenous nations.

Making a treaty does not require the parties to put aside all their political and legal differences, much less adopt each other's world view. A treaty is a mutual recognition of a common set of interests by nations that regard themselves as separate in some fundamental way. Treaty relationships will evolve organically, but there must be no expectation that one world view will disappear in the process. On the contrary, treaty making legitimizes and celebrates the distinctiveness of the parties while establishing their bonds of honour and trust.

In Canada, the establishment of formal processes to address treaty issues has been suggested in the past. Perhaps most notably, in 1985 and 1986 discussions took place between some of the First Nations that are party to Treaty 8 and David Crombie, then minister of Indian affairs, with the objective of renovating that treaty. Crombie described the proposed initiative in a letter to Treaty 8 head negotiator Harold Cardinal on 11 March 1985. His words eloquently express our own view of the treaty implementation process:

79 As provided in *The Appropriations Act*, 25 U.S.C. § 71 (1871): "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." See Felix S. Cohen, *Handbook of Federal Indian Law* (Charlottetown, Virginia: Michie, Bobbs-Merrill, 1982), p. 107.

80 The U.S. Constitution, Article II, section 2(2) provides that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." This has always been held to include treaties with Indian tribes; see, for example, *Fellows v. Blacksmith*, 60 U.S. (19 Howard) 366 at 372 (1856).

As you know, I have appointed Mr. Frank Oberle, M.P. to explore ways in which problems or grievances in regard to the current treaty can be remedied, unfulfilled portions of the treaty can be fulfilled, and the spirit and intent of the treaty can be utilized as the basis for an agreement upon which we can move into the future. Where my current mandate is not sufficient to accommodate the needs of this process, I am willing to proceed to Cabinet with a request that Cabinet issue appropriate authority. I agree that where appropriate, the federal government could introduce legislation to implement or reaffirm the agreement. I reiterate your own statement that such discussions and agreement would not be a repudiation nor a renegotiation of the treaty but would be an affirmation and clarification of its true terms. In addition to matters dealt with under the treaty, additional agreements might be contemplated by both parties.

While I am willing to consider the articles of the treaty, the report of the treaty commissioners and other written contemporary report, and the Indian understanding of the treaty including written and oral history, I do not believe that we need to be limited in this fashion and that it is much more important that we recognize that the treaty is the expression of a special relationship, which itself needs to be renewed and restored. It is in the spirit and intent of this, rather than a legalistic requirement that you produce evidence, that we should proceedThe exercise, in my view, offers an opportunity to redesign and reconceptualize your relationship with the federal government in a way which reinforces your historical and constitutional rights as Indian First Nations, while at the same time, restoring to you the means to manage your own affairs.

The process was endorsed by Prime Minister Mulroney during the first ministers conference of April 1985.⁸¹

The ministerial appointee, Frank Oberle, prepared a discussion paper on the scope and issues of the renovation initiative, which was sent to Mr. Crombie on 31 January 1986 and set out a detailed program for a step-by-step renovation of the issues arising from Treaty 8.⁸² But the proposed process faltered because of a lack of formal cabinet authorization.⁸³ This experiment illustrates the need for formal government commitment. The presentations of Treaty 8 leaders showed that they continue to strive for a treaty review process, despite the setbacks of the past.⁸⁴

Proposals for a treaty process led to the inclusion of several provisions in the 1992 Charlottetown Accord:

81 First Ministers Conference: The Rights of Aboriginal Peoples, Ottawa, April 2-3, 1985, "Notes for an Opening Statement by the Right Honourable Brian Mulroney, Prime Minister of Canada", at 7-8.

82 Frank Oberle, P.C., M.P., "Treaty 8 Renovation æ Discussion Paper," January 31, 1986. This paper has never been formally published, yet with the consent of the minister was widely circulated for discussion purposes in March 1986.

83 See Harold Cardinal, RCAP transcripts, High Level, Alberta, 29 October 1992.

84 See the RCAP transcripts for the following: Tribal Council of High Level, Alberta, 29 October 1992; Treaty 7 Tribal Council, Lethbridge, Alberta, 25 May 1993; and Federation of Saskatchewan Indian Nations, Saskatoon, Saskatchewan, 28 October 1992.

(2) The government of Canada is committed to establishing treaty processes to clarify or implement treaty rights and, where the parties agree, to rectify the terms of the treaties, and is committed, where requested by the Aboriginal peoples of Canada concerned, to participating in good faith in the process that relates to them.

(3) The governments of the provinces and territories are committed, to the extent that they have jurisdiction, to participating in good faith in the processes referred to in subsection (2), where jointly invited by the government of Canada and the Aboriginal peoples of Canada concerned or where it is specified that they will do so under the terms of the treaty concerned.

(4) The participants in the processes referred to in subsection (2) shall have regard to, among other things and where appropriate, the spirit and intent of the treaties, as understood by the Aboriginal peoples concerned.

(5) For greater certainty, all those Aboriginal peoples of Canada who have treaty rights shall have equitable access to the processes referred to in this section.

(6) Nothing in this section abrogates or derogates from any rights of the Aboriginal peoples of Canada who are not parties to a particular treaty.⁸⁵

These provisions died with the accord, but they demonstrate that, quite recently, this idea had broad acceptability among federal, provincial and territorial governments, as well as the leadership of the national Aboriginal organizations.

In 1993, the electoral platform of the Liberal Party of Canada, which now forms the government, expressed support for the idea of a treaty process.⁸⁶ Since taking office, the government has indeed begun to address the need for treaty processes. The Manitoba Framework Agreement, dated 7 December 1994, between the minister of Indian affairs and 60 First Nations communities in Manitoba, provides as one of its principles:

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.⁸⁷

The Mohawk/Canada Roundtable is another process whereby the government of Canada and the Mohawk communities of Akwesasne, Kahnawake and Kanasatake have begun discussions “to

85 Meeting of the First Ministers and Aboriginal and Territorial Leaders, “Charlottetown Accord & Draft Legal Text, October 9, 1992”, s. 35.6(2)-(6). This text did not receive formal approval from governments before the referendum vote in October 1992.

86 See *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993), p. 98: A Liberal government will seek the advice of treaty First Nations on how to achieve a mutually acceptable process to interpret the treaties in contemporary terms, while giving full recognition to their original spirit and intent. In a news release on 8 October 1993, the Liberal Party of Canada called for the creation of a land claims commission with the following functions: To report regularly to Parliament; to facilitate claims negotiations; to establish time frames; to develop criteria for validating claims; *to inquire into the need to clarify or renovate treaties to make their express terms consistent with their spirit and intent; and to have an ongoing role in the implementation of claims agreements.* [emphasis added]

87 *The Dismantling of the Department of Indian Affairs and Northern Development, the Restoration of Jurisdictions to First Nations Peoples in Manitoba and Recognition of First Nations Governments in Manitoba & Framework Agreement*, 7 December 1994, s. 5(5.3).

promote harmony and peaceful coexistence among the Mohawks and Canada through cooperation and non-confrontational negotiations.”⁸⁸ These Mohawk communities have tabled a joint statement on the inherent right of self-determination that asks Parliament to pass legislation to “empower the process of negotiating treaties and other arrangement[s] between Mohawk governments and Canada.”⁸⁹

In addition, Ron Irwin, minister of Indian affairs, and the Confederacy of Treaty 6 First Nations signed a declaration of intent on 16 March 1995 containing an agreement to “develop a protocol for bilateral Treaty discussions respecting Treaty Six”.⁹⁰

On 10 August 1995, the government of Canada announced new policy proposals for the negotiation of self-government in which it envisaged self-government agreements being constitutionally protected as treaty rights.

The government of Canada is prepared, where the other parties agree, constitutionally to protect rights set out in negotiated self-government agreements as treaty rights within the meaning of section 35 of the *Constitution Act, 1982*. Implementation of the inherent right in this fashion would be a continuation of the historical relationship between Aboriginal peoples and the Crown. Self-government rights could be protected under section 35

- in new treaties;
- as part of comprehensive land claims agreements; or
- as additions to existing treaties.

Treaties create mutually binding obligations and commitments that are constitutionally protected. Recognizing the solemn and enduring nature of treaty rights, the government believes that the primary criterion for determining whether a matter should receive constitutional protection is whether it is a fundamental element of self-government that should bind future generations. Under this approach, suitable matters for constitutional protection would include

- a listing of jurisdictions or authorities by subject matter and related arrangements;
- the relationship of Aboriginal laws to federal and provincial laws;
- the geographic area within which the Aboriginal government or institution will exercise its jurisdiction or authority, and the people to be affected by it; and
- matters relating to the accountability of the Aboriginal government to its members, in order to establish its legitimacy and the legitimacy of its laws within the constitution of Canada.⁹¹

These initiatives, particularly the last one, are generally consistent with the Commission’s recommendations for new treaty implementation and renewal and treaty-making processes. However, as we explain later in this chapter and in the next chapter, the Commission is of the view that these treaty processes should be centred around Aboriginal nations and treaty nations rather than individual communities.

88 Mohawk Councils of Akwesasne, Kahnawake and Kanesatake, letter to RCAP, 27 January 1995.

89 Mohawk Councils of Akwesasne, Kahnawake and Kanesatake, “A Joint Statement on the Inherent Right of Self-Determination and the Exercise of that Right by Akwesasne, Kahnawake and Kanesatake”, (1995).

90 *Declaration of Intent*, 16 March 1995.

91 *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), p. 8.

Our observations about the nature of the treaties and the relationships established by them apply to the modern as well as the historical treaties. The circumstances under which the modern treaties were negotiated dictate a different focus for implementation and renewal, but in principle the goal of renewing and revitalizing the relationship is the same.

Recommendations

The Commission recommends that

2.2.3

The federal government establish a continuing bilateral process to implement and renew the Crown's relationship with and obligations to the treaty nations under the historical treaties, in accordance with the treaties' spirit and intent.

2.2.4

The spirit and intent of the historical treaties be implemented in accordance with the following fundamental principles:

- (a) The specific content of the rights and obligations of the parties to the treaties is determined for all purposes in a just and liberal way, by reference to oral as well as written sources.
- (b) The Crown is in a trust-like and non-adversarial fiduciary relationship with the treaty nations.
- (c) The Crown's conflicting duties to the treaty nations and to Canadians generally is reconciled in the spirit of the treaty partnership.
- (d) There is a presumption in respect of the historical treaties that
 - treaty nations did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by entering into the treaty relationship;
 - treaty nations intended to share the territory and jurisdiction and management over it, as opposed to ceding the territory, even where the text of an historical treaty makes reference to a blanket extinguishment of land rights; and
 - treaty nations did not intend to give up their inherent right of governance by entering into a treaty relationship, and the act of treaty making is regarded as an affirmation rather than a denial of that right.

2.2.5

Once the spirit and intent of specific treaties have been recognized and incorporated into the agreed understanding of the treaty, all laws, policies and practices that have a bearing on the terms of the treaty be made to reflect this understanding.

5. Treaty-Making Processes

It is self-defeating to pursue a policy that supposes that the terms of a land claims agreement can be fixed for all time. There can be no acceptable final definition of the compromises that must be made between societies over succeeding generations. The conclusion of a modern land claims agreement must be seen as a beginning, not as an end.

The emphasis on finality in the current federal land claims policy is at odds with the federal government's expressed support for Aboriginal self-government. In the event that comprehensive land claims agreements are to serve as a central reference point in the balancing of the distinctiveness of Aboriginal societies and the demands of a common Canadian citizenship, then the agreements must be open to periodic review, renegotiation and amendment. It is ambitious enough for the representatives of the Crown and an Aboriginal people to achieve a mutually beneficial agreement for the foreseeable future; it is ludicrous to try to anticipate with precision the circumstances and needs of all future generations.

Bernadette Makpah
Nunavut Tunngavik Inc.
Montreal, Quebec, 29 November 1993

Much of what we have written about implementing and renewing existing treaties can be applied, with modifications, to making new treaties. At present, the comprehensive claims policy is the only vehicle for negotiations between Aboriginal nations and the Crown on questions of fundamental rights and relationships. As discussed in our report, *Treaty Making in the Spirit of Co-existence An Alternative to Extinguishment*, the comprehensive claims policy continues to contemplate blanket extinguishment as a possible option in settlement agreements. We discussed alternatives to this approach in that report and direct the reader to it. Later in this volume, we address in greater detail the shortcomings of the comprehensive claims policy as a basis for making treaties (see Chapter 4 in Part Two of this volume).

Under section 35(3) of the *Constitution Act, 1982*, rights under land claims agreements, including comprehensive claims agreements, are deemed to be existing treaty rights for constitutional purposes. In our view, however, this does not make the process of achieving these agreements a complete treaty process; because of the limitations of the existing process, it does not necessarily result in a satisfactory treaty relationship either. Present federal policy does not permit the negotiation of governance rights as an integral component of a comprehensive claims agreement. Delegated self-government arrangements can be negotiated and are being negotiated in tandem with comprehensive claims, but federal policy denies the possibility of those arrangements acquiring the status of treaty rights under section 35 of the *Constitution Act, 1982*.⁹²

The comprehensive claims process aims to achieve an exchange of Aboriginal rights to land for rights derived exclusively from a claims agreement. In this process, all residual Aboriginal rights to land, other than lands in “specified or reserved areas”, are to be extinguished.⁹³ In our view, the making of new treaties should occur on the basis of mutual recognition as a means to just and fair

92 See *Yukon First Nations Self-Government Act*, S.C. 1994, c. 35; see also Department of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Supply and Services, 1986), p. 18: “As a matter of policy, most aspects of [negotiated self-government] arrangements will not receive constitutional protection unless a constitutional amendment to this effect is in force”.

93 DIAND, *Comprehensive Land Claims Policy*, p. 12.

coexistence of Aboriginal and non-Aboriginal people. Blanket extinguishment of Aboriginal rights and title does not foster this result. Similarly, as discussed in the next chapter, we regard every Aboriginal and treaty nation as having an inherent right of self-government, which includes the right to enter into a treaty with the Crown that explicitly addresses self-government.

The present comprehensive claims policy has three main deficiencies:

- First, it does not acknowledge the inherent right of self-government as giving rise to treaty rights of governance under section 35 of the Constitution Act, 1982.
- Second, it continues to contemplate blanket extinguishment of Aboriginal rights and title as an option.
- Third, it excludes Métis people and certain First Nations claimant groups.

5.1 Implementation of Modern Treaties

Our essential conclusions about the historical treaties are equally applicable to treaties that will be made in the future. We regard the treaty-making process as a continuing and vital part of Canadian life. We do not regard modern treaties as any less binding or enduring than earlier ones. We agree that treaties made in the future, like those made in the recent past, will be made largely on the basis of a common language and greater sensitivity on both sides to the matters that can produce difficulties of interpretation. Having said this, modern treaties and future treaties alike will benefit from the perspective that they are, above all, embodiments of a nation-to-nation partnership.

Our assessment of the comprehensive claims policy leads us to conclude that implementation of modern treaties made under that policy should involve two main themes. First, they should be reopened to permit the addition of constitutionally entrenched rights of self-government. The full implications of this conclusion will be fleshed out in the next chapter. Second, where a modern treaty contains a provision for the blanket extinguishment of the Aboriginal party's land rights, that party might elect to have the treaty reopened for renegotiation.

Renegotiation would require *both* parties to begin again at the starting point of those treaties. Logically, this would require the revival of Aboriginal rights to land that were extinguished in blanket fashion. However, it would also require the Aboriginal party to account for all benefits received in exchange for extinguishment. It is quite possible that the federal, provincial or territorial governments involved in the renegotiation would be unwilling to pay as much as was provided in the original agreements, given their view that renegotiation could diminish the degree of certainty and finality involved.

We must also emphasize that renegotiating modern treaties would require untangling the complex arrangements that have grown up around them. Unlike historical treaties, modern treaties call explicitly for frequent renegotiation of particular issues and contain dispute-resolution mechanisms negotiated by the parties and tailor-made for the circumstances of the original agreement. In this sense, they are 'living' agreements to a greater extent than the historical treaties. We would therefore urge the parties to modern treaties to exercise caution in discussing implementation and renewal of these treaties. Nevertheless, to the extent that these treaties do not meet the requirements of a modern relationship as outlined in this chapter, they warrant modification.

It may well be that the treaty principles we have identified can be implemented without wholesale renegotiation. It may also be possible for the negotiations we envisage to take place within the

framework of the modern treaties. We encourage the parties to explore all their options and the implications of their treaty partnership before concluding that wholesale renegotiation must occur.

5.2 The Peace and Friendship Treaties

At the other historical extreme from the modern treaties are the historical treaties known as the peace and friendship treaties. Many treaties were made with Indian nations before 1763, when the Crown began to use the treaty process to acquire territory and extinguish Aboriginal title. The rights in these peace and friendship treaties continue to have force and constitutional protection.⁹⁴ They do not, however, purport to codify the entire relationship between the parties. In particular, they do not address title to the ancestral lands of the treaty nations. It is clear that these treaties were the beginning of a process that remains unfinished.

The *Mi'kmaq Treaty Handbook*, published in 1987 by the Grand Council of Micmacs, the Union of Nova Scotia Indians and the Native Council of Nova Scotia, states:

The surviving documents are often incomplete summaries of meetings that typically required many days and were repeated every few years as necessary. By themselves, the documents are fragments; considered together, they constitute a great chain of agreement. In other words, the treaty documents ... should be seen not as distinct treaties but as stages and renewals of a larger agreement or pact that developed during the 1700s between the Mi'kmaq and the British.

By entering into treaty, Britain joined our circle of brother nations, the Wabanaki Confederacy, and we joined its circle of nations known as the British Commonwealth

We have fulfilled our only agreement to date: to remain friends and allies of the British Crown and to live in peace with all of his or her subjects

Now, if our conditions are to be improved and our differences reconciled it must be by an arrangement that takes the past into account. What is required is policy and action that acknowledge the treaty relationship we developed with the British Crown.⁹⁵

Whether the land issue is the proper subject for a new treaty or the continuation of an existing treaty or series of treaties is a matter for the treaty parties to decide. The same is true for the negotiation of treaties that address the jurisdiction of treaty nation governments for the first time.

For many years, the nations that are parties to early peace and friendship treaties were denied access to the comprehensive claims process because it was assumed that their land rights had been superseded by law (see Chapter 4). The Commission does not regard this conclusion, whether legally sound or not, as a legitimate reason to deny access to the treaty-making process. Denial of access to the treaty-making process cannot be justified by any non-consensual appropriation of Aboriginal rights to land.

94 The *Simon* (cited in note 12) and *Sioui* (cited in note 21) decisions involved such treaties, in the context of section 88 of the *Indian Act*. While the Supreme Court of Canada has yet to hold specifically that a treaty of peace and friendship gives rise to constitutionally protected rights, there is no reason to think that the court will depart from its earlier findings.

95 The Grand Council of Micmacs, the Union of Nova Scotia Indians and the Native Council of Nova Scotia, *The Mi'kmaq Treaty Handbook* (Sydney, N.S.: Native Communications Society of Nova Scotia, 1987), p. i.

5.3 Making New Treaties and Equivalent Agreements

The Commission does caution that not all groups of Aboriginal people will be eligible for treaty nation standing. The basic unit of Aboriginal self-determination and self-governance is the nation (see Chapter 3), and in our view only nations can have treaty relations with the Crown. There must be some objective criteria that define a nation, and we discuss what these might be in the next chapter.

First Nations, Inuit and Métis presenters at our hearings pointed out that their peoples are distinct from each other, with different political and cultural traditions, including their traditions of forming relationships with the Crown and with other peoples. Treaty making has been the traditional method whereby First Nations and the Crown have made compacts for coexistence. To avoid misunderstanding, we emphasize that we are not advocating the adoption of First Nations traditions by Inuit and Métis groups.

Our focus is the formalization of new relationships. Internationally, the treaty is used to achieve this between nation-states. In Canada, although treaties have been used to fashion *sui generis* relationships with Aboriginal peoples, the term has been used primarily in connection with First Nations. The agreements made in the future between the Crown and Aboriginal nations might well be called accords, compacts, land claims agreements, settlement agreements or other appropriate terms. They would reflect different world views and priorities. Indeed, if they are true treaties, they would necessarily give expression to the unique rights and cultures of the Aboriginal nations signing them. Our point is that treaty relationships and access to treaty institutions should be extended to all nations of Aboriginal people that want to have them.

We must also caution that we regard treaty making as the exclusive preserve of nations. In the case of the treaty implementation and renewal process described earlier in this chapter, the nation status of the treaty nations was determined by the original act of treaty making. In the case of Aboriginal nations seeking to enter the treaty process today, their status as nations will have to be established.

To open the treaty-making process to Aboriginal groups that do not meet the criteria of a nation would detract from the fundamental nature of treaties and the integrity and status of the nations that make them. This does not preclude a variety of other initiatives to give effect to the rights and aspirations of groups that do not qualify as nations. It simply preserves the essential nation-to-nation nature of the treaties.

Inuit land claims agreements

The Inuit experience with treaties has been restricted to the modern comprehensive land claims process,⁹⁶ beginning in 1975 with the James Bay and Northern Quebec Agreement and continuing with the Inuvialuit Final Agreement in 1984 and the signing of the Nunavut Land Claims Agreement on 25 May 1993.⁹⁷ These agreements are often termed modern treaties. Negotiations on the Labrador Inuit claims continue. The Inuit leadership, like that of First Nations that have signed comprehensive claims agreements, has questioned the legitimacy of the extinguishment clauses in those agreements.⁹⁸

96 See Wendy Moss, "Inuit Perspectives on Treaty Rights and Governance Issues", in RCAP, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Supply and Services, 1995), p. 95.

97 *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29, brought into force 10 June 1993. This agreement not only settled the comprehensive land claim to the eastern Arctic but enabled the establishment of the new territory of Nunavut as well. See *Nunavut Act*, S.C. 1993, c. 28.

98 Inuit Tapirisat of Canada, RCAP transcripts, Ottawa, 3 November 1993.

The Inuit leadership has sought constitutional recognition of Inuit Aboriginal rights, including the right of self-government, and has generally striven for forms of public government. Inuit refer to themselves as a people rather than as a nation or nations. This terminology does not alter the fact that many Inuit groups would likely meet the criteria of nationhood and would be eligible to establish a treaty process if they wanted to do so.

Again, we emphasize that there is no reason why treaties with Inuit have to resemble those with other Aboriginal peoples. As Inuit land claims agreements show, the negotiation of a modern treaty can result in public government and include many other elements tailored to the circumstances of Inuit.

Métis treaties

Some persons regarded as Métis were included as ‘Indians’ in some of the historical treaties, but Métis people generally have been excluded from treaty making. More recently the Métis Association of the Northwest Territories signed the 1990 final agreement on the Dene/Métis claim in the Northwest Territories. That agreement has not been ratified, however, because of objections to its reference to blanket extinguishment of Aboriginal rights to land. The Sahtu Métis (along with the Sahtu Dene) have since signed a comprehensive claims agreement.⁹⁹

The Commission regards Métis people as eligible to negotiate a treaty relationship with Canada subject to the criteria defining ‘nation’ or ‘people’.

The western Métis Nation has pursued negotiations for a Métis Nation accord, but the latest attempt was thwarted by the failure of the Charlottetown Accord in 1992. In our view, such an accord, being based on nation-to-nation dealings, would be a treaty. The Métis Nation must have full access to all processes and institutions to assist in the negotiation of a satisfactory treaty or accord. The unique situation of Métis people may of course give rise to agreements that have little resemblance to treaties made by First Nations.

Recommendation

The Commission recommends that

2.2.6

The federal government establish a process for making new treaties to replace the existing comprehensive claims policy, based on the following principles:

- (a) The blanket extinguishment of Aboriginal land rights is not an option.
- (b) Recognition of rights of governance is an integral component of new treaty relationships.
- (c) The treaty-making process is available to all Aboriginal nations, including Indian, Inuit and Métis nations.
- (d) Treaty nations that are parties to peace and friendship treaties that did not purport to address land and resource issues have access to the treaty-making process to complete their treaty relationships with the Crown.

⁹⁹ *Sahtu Dene and Métis Comprehensive Land Claim Agreement* (Ottawa: Public Works and Government Services, 1993).

6. Establishment of Treaty Processes

Regarding those parts of Canada which have not yet been covered by land claims settlements, we believe the government should now, belatedly, endorse the principle underlying the Royal Proclamation of 1763. Following the consolidation of British North America, this proclamation enunciated the principle of leaving Aboriginal people in possession of all the lands outside the settled colonies of the time and forbidding European settlement of these Aboriginal-held lands until agreements had been reached between the Aboriginal peoples of each region and the Crown. While the terms of the Royal Proclamation were never carried out, this policy still makes admirable sense.

Modern Aboriginal policy, particularly with regard to those groups in the undeveloped or partially developed frontier regions not yet ceded to Canada by Aboriginal people, including much of the interior and some of the coast of Newfoundland and Labrador, needs a 1990s version of the Royal Proclamation, that is, a renewed commitment by Canada to bring about, with utmost urgency, freely-negotiated agreements which will create a new set of partnerships within Confederation with Aboriginal nations and, to a large extent, retroactively legitimate the process of development and non-Aboriginal settlement.

Dr. Adrian Tanner
Native Peoples' Support Group of Newfoundland and Labrador
St. John's, Newfoundland, 22 May 1992

The Commission believes that treaty processes should be established pursuant to a formal declaration of the Crown and have an explicit statutory foundation. We also propose the creation of new institutions to facilitate these processes.

6.1 A Royal Proclamation

A treaty is an exercise of the prerogative powers of the Crown. A declaration of the Crown's commitment to the treaties is, in our view, properly made by a royal proclamation.

The *Royal Proclamation of 1763* was the most significant landmark in the Crown's history of treaty making with Aboriginal peoples. While not a treaty, the Proclamation did establish fundamental principles to guide the Crown in making treaties, particularly with regard to the lands of Indian nations.

The Proclamation also stands as an important recognition of the rights of Aboriginal peoples and their status as nations. It has been called the Indian Bill of Rights, and it continues to have the force of law in Canada. It is at least quasi-constitutional in nature, if not a fundamental component of the constitutional law of Canada.¹⁰⁰

In keeping with its high symbolic importance, and to lend substantive legitimacy to the new approach to treaty relations that we recommend, it would be appropriate for the Crown, in the person of the reigning monarch, to announce the establishment of a new era of respect for the

100 Among the many references to the Royal Proclamation in the leading court cases, see *The King v. Lady McMaster*, [1926] Ex. C. R. 68 at 72-74; *Easterbrook v. The King*, [1931] S.C.R. 210 at 214-15 and 217-18; *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 394-401, Hall J.; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 383, Dickson J.; *Sioui* (cited in note 21) at 1063-64; and *R. v. Secretary of State for Foreign and Commonwealth Affairs* (cited in note 11).

treaties. We therefore conclude that formal renewal of treaty processes should be initiated by a royal proclamation to supplement the *Royal Proclamation of 1763*.

The new proclamation should have the same standing in Canadian law and policy as the *Royal Proclamation of 1763*. It should affirm the nature of existing treaty relationships as well as the continuity of the treaty process. It should embody the living commitment of the Crown to fulfilling its relationship with treaty nations.

We see a new royal proclamation as the symbolic turning point in the relationship between Aboriginal peoples and other Canadians. The proclamation would

- reaffirm and endorse the basic principles of the *Royal Proclamation of 1763*;
- acknowledge the injuries of the past, when Aboriginal rights were ignored, treaties were undermined and the *Indian Act* was imposed, and express Canadians' regret for policies that deprived Aboriginal peoples of their lands and often interfered with their family relationships, spiritual practices, structures of authority and relationship with the land;
- express the will of the government of Canada to achieve reconciliation so that Aboriginal people can embrace their Aboriginal and Canadian citizenship without reservation;
- commit the Crown to implementing and renewing existing treaties and making new treaties;
- recognize that Métis people, as one of the Aboriginal peoples recognized in section 35 of the *Constitution Act, 1982*, are included in the federal responsibilities set out in section 91(24) of the *Constitution Act, 1867*;
- commit the Crown to recognizing the inherent right of governance of Aboriginal nations and the jurisdiction of Aboriginal governments as one of three orders of government in Canada and to implementing a process for this recognition;
- commit governments and institutions that act in the name of the Crown to honour Aboriginal and treaty rights;
- recognize fundamental principles defining the nature of Aboriginal title (see Chapter 4); and
- commit the Crown to honourable redress for breaches of its honour in its past dealings with Aboriginal peoples in Canada.

We emphasize the importance of the intervention of the reigning monarch to give weight to these undertakings. For many treaty nations, the relationship with the monarch is real, personal and enduring. The Crown symbolizes this relationship in the same way as the Pipe and the Two Row Wampum.

The royal proclamation must represent the commitment of Canada as a whole. The proclamation must transcend partisan politics and regional differences, so there must be a serious attempt to secure the support of provincial and territorial governments. The success of treaty implementation and renewal and of treaty making will require the involvement of the provinces. There must also be wide consultation with the treaty nations and other Aboriginal peoples to ensure that the proclamation is not seen in any way as a pre-emptive measure or a measure that might derogate from any Aboriginal or treaty right.

6.2 Companion Legislation

We are aware of the potential for empty symbolism. Without companion legislation, a royal proclamation would change nothing. We also recognize that such a proclamation alone would have no legal effect, regardless of its moral authority. The proposed royal proclamation must therefore be accompanied by appropriate legislation. We propose that the government of Canada recommend that the House of Commons and the Senate, by joint resolution, request Her Majesty to issue the royal proclamation. The companion legislation would then be introduced in Parliament as draft legislation to give substantive symbolic force to the commitments contained in the Proclamation, as well as giving it legal force. It is obvious that the proclamation should be issued as early as possible to demonstrate the government's clear intentions and that it be accompanied by draft legislation. Here we outline the elements that should be contained in the treaty legislation; other elements of the companion legislation are set out later in this volume and in Volume 5, Chapter 1.

The treaty legislation would set out the guiding principles of the treaty processes and provide for the establishment of the institutions required to implement them. It should also introduce certain reforms of the law in relation to the judicial interpretation of treaties.

The proposed treaty legislation should achieve the following objectives:

- It should provide for the implementation of existing treaty rights, including the rights to hunt, fish and trap.
- It should affirm liberal rules of interpretation of treaties, having regard to the context of treaty negotiations, the spirit and intent of each treaty, and the special relationship between the treaty parties, and acknowledge the admissibility of oral and secondary evidence in the courts to make determinations with respect to treaty rights.
- It should declare the commitment of Parliament and government of Canada to the implementation and renewal of each treaty on the basis of the spirit and intent of the treaty and the relationship embodied in it.
- It should commit the government of Canada to treaty processes to clarify, implement and, where the parties agree, amend the terms of treaties so as to give effect to the spirit and intent of each treaty and the relationship embodied in it.
- It should commit the government of Canada to a process of treaty making with Aboriginal nations that do not yet have a treaty with the Crown and with treaty nations whose treaty does not purport to address land and resource issues.
- It should clarify that defining the scope of governance for Aboriginal and treaty nations is a vital part of the treaties.
- It should authorize establishment of the institutions necessary to fulfil the treaty processes in consultation with treaty nations, as discussed in greater detail later in this chapter and in Chapter 4.

It is vital that these unilateral acts of the Crown not be perceived by Aboriginal peoples as a breach of the treaty relationship. It is therefore essential that the proposed proclamation and its companion legislation be the subject of thorough discussion and consultation with Aboriginal peoples and provincial and territorial governments before they are introduced.

The royal proclamation would supplement the written text of the constitution and would form part of the constitution as the *Royal Proclamation of 1763* does now.

Thus far, we have addressed only federal legislation. However, without complementary provincial legislation and territorial ordinances authorizing those governments to participate in treaty processes, it will be impossible to achieve their objectives, particularly with respect to lands and resources. There is a particular obligation on the part of provinces to participate, as they have benefited directly from past breaches of the treaties. In addition, the *Constitution Act, 1867* and the transfer of lands and resources to the western provinces by the government of Canada in the 1930s may have made land available to the provinces that ought to have remained with Aboriginal peoples. Treaties are instruments of reconciliation; it is therefore in the interests of all parties for provincial and territorial governments to participate in these historic processes.

The Commission also respects the views of many treaty nations that continue to look to the international arena for fulfilment of their treaties. In proposing Canadian treaty processes, in no way is the Commission attempting to exclude continuing dialogue and activity in international bodies concerning Indigenous peoples' rights.

Recommendations

The Commission recommends that

2.2.7

The federal government prepare a royal proclamation for the consideration of Her Majesty the Queen that would

- (a) supplement the *Royal Proclamation of 1763*; and
- (b) set out, for the consideration of all Aboriginal and treaty nations in Canada, the fundamental principles of
 - (i) the bilateral nation-to-nation relationship;
 - (ii) the treaty implementation and renewal processes; and
 - (iii) the treaty-making processes.

2.2.8

The federal government introduce companion treaty legislation in Parliament that

- (a) provides for the implementation of existing treaty rights, including the treaty rights to hunt, fish and trap;
- (b) affirms liberal rules of interpretation for historical treaties, having regard to
 - (i) the context of treaty negotiations;
 - (ii) the spirit and intent of each treaty; and
 - (iii) the special relationship between the treaty parties;

- (c) makes oral and secondary evidence admissible in the courts when they are making determinations with respect to historical treaty rights;
- (d) recognizes and affirms the land rights and jurisdiction of Aboriginal nations as essential components of treaty processes;
- (e) declares the commitment of the Parliament and government of Canada to the implementation and renewal of each treaty in accordance with the spirit and intent of the treaty and the relationship embodied in it;
- (f) commits the government of Canada to treaty processes that clarify, implement and, where the parties agree, amend the terms of treaties to give effect to the spirit and intent of each treaty and the relationship embodied in it;
- (g) commits the government of Canada to a process of treaty making with
 - (i) Aboriginal nations that do not yet have a treaty with the Crown; and
 - (ii) treaty nations whose treaty does not purport to address issues of lands and resources;
- (h) commits the government of Canada to treaty processes based on and guided by the nation-to-nation structure of the new relationship, implying:
 - (i) all parties demonstrating a spirit of openness, a clear political will and a commitment to fair, balanced and equitable negotiations; and
 - (ii) no party controlling the access to, the scope of, or the funding for the negotiating processes; and
- (i) authorizes the establishment, in consultation with treaty nations, of the institutions this Commission recommends as necessary to fulfil the treaty processes.

2.2.9

The governments of the provinces and territories introduce legislation, parallel to the federal companion legislation, that

- (a) enables them to meet their treaty obligations;
- (b) enables them to participate in treaty implementation and renewal processes and treaty-making processes; and
- (c) establishes the institutions required to participate in those treaty processes, to the extent of their jurisdiction.

7. Content of Treaty Processes

We agreed to maintain peace and friendship among ourselves and with the Crown. Peace and friendship can only be nurtured through processes which allow treaty partners to talk and resolve any differences through negotiations and goodwill.

The unique and special relationship which is evidenced by the existence of our treaty places upon both partners a duty to take whatever steps are necessary toward creating mechanisms or processes for resolving difficulties and differences which from time to time will arise in the course of such a relationship

We seek urgent action aimed at commencing the task of addressing and resolving the many outstanding issues which have arisen in our treaty relationship. We want to make clear our position that treaty framework is a framework we wish to utilize for redressing the many inequities which presently exist. We want the results of that process recognized, affirmed and protected by the Canadian constitution.

Chief Bernie Meneen
High Level Tribal Council
High Level, Alberta, 29 October 1992

Treaty parties will devise the appropriate process for reviewing, implementing and renewing the treaty relationship or for making new treaties. In this section, we provide some guidance on the possible content of treaty processes and the results they may be designed to achieve.

The treaty-making process we envisage represents an evolution from the present comprehensive claims process toward a process that is less exclusionary with respect to the parties and the subject matter of agreements and predicated on the affirmation rather than the extinguishment of Aboriginal title (see Chapter 4).¹⁰¹

The Crown saw the historical treaties, as the federal government has seen modern treaties, as one-time final transactions. This perspective must be overcome. The treaties must be acknowledged as living instruments, capable of evolution over time and meaningful and relevant to the continuum of past, present and future. They should not be frozen as of the day they are signed.

7.1 Entry to be Voluntary

No treaty nation can or should be compelled to enter a new process. If a treaty nation wishes to leave its treaty relationship as it is, the nation's right to remain apart from a process that in its view might derogate from its treaty should be respected.

Commissioners heard many treaty nation leaders, elders and members tell us not to tamper with their sacred treaties. Commissioners respect that view. No aspect of any treaty should be discussed, let alone redefined or amended, without the consent of the treaty parties.

It is the Commission's view, however, that what is sacred about the treaties is not the specific provisions, which we believe the parties can agree to change, but rather the continuing relationship to which both the Crown and the treaty nations brought their most binding formalities. The relationship is sacred, but the details of the relationship are subject to definition. Indeed,

101 See also RCAP, *Treaty Making* (cited in note 63).

representatives of treaty nations have been consistent in asserting that the treaties were to be renewed regularly and revisited in the light of changing circumstances.

In recommending a process to reconcile the differing understandings of treaties and to engage in a constructive dialogue on issues where agreement was reached, Commissioners do not regard this as tampering with the treaty but rather as giving it life and meaning for today and for the future.

The Commission does not propose renegotiation of the treaties but rather implementation of the spirit and intent of the treaties, including completing them where appropriate or amending the treaty text where the parties acknowledge that it does not embody their true agreement. This respects the rights of the treaty nations to enter into protocols to give greater definition to their rights and obligations under the treaty and to resolve different views the treaty parties may have with respect to those specific rights and obligations.

7.2 Timing to be Realistic

Many treaty relationships have fallen into serious disrepair over a period of generations and even centuries. Reversing this trend through renewal of treaty relationships will take considerable time. A generation may well have passed before both treaty parties feel that the true principles of their treaty have been restored. The parties should be realistic about the size of the task ahead and the time needed to complete it.

It is important that the proposed royal proclamation contain a clear acknowledgement of the continuing nature of the process and the magnitude of the task. For this reason, the royal proclamation should also commit the agencies of government to short- and medium- term initiatives to give effect to the treaties and to recognize the desirability of providing interim relief in appropriate circumstances.

We also recognize that negotiations may have to take place in stages to accommodate the capacity of governments to address the issues raised. This should be done by agreement, with certain negotiations being identified, with the concurrence of all parties, as ‘lead’ negotiations.

7.3 Long-Term Resources to be Available

Adequate resources for treaty-making and treaty implementation and renewal processes should be made available to treaty nations, with sufficient long-term predictability to permit their relationship with the Crown to be repaired and restored gradually. The treaty legislation should address the question of resources, to provide a legislative foundation for funding. Treaty nations must, of course, be accountable for their expenditure of these public funds.

Recommendation

The Commission recommends that

2.2.10

The royal proclamation and companion legislation in relation to treaties accomplish the following:

(a) declare that entry into treaty-making and treaty implementation and renewal processes by Aboriginal and treaty nations is voluntary;

- (b) use clear, non-derogation language to ensure that the royal proclamation and legislation do not derogate from existing Aboriginal and treaty rights;
- (c) provide for short- and medium-term initiatives to support treaty implementation and renewal and treaty making, since those processes will take time to complete; and
- (d) provide adequate long-term resources so that treaty-making and treaty implementation and renewal processes can achieve their objectives.

7.4 Nature and Scope of Items for Discussion

It would be entirely inappropriate for the Commission to specify the substantive content of treaty processes, but we would like to provide guidance on some of the issues they should attempt to address.

Some treaty nations have declared that every point of contact between them and the non-Aboriginal people and institutions of Canada is affected in one way or another by the relationships established by their treaties.¹⁰² Certain apparently unimposing items referred to in treaty texts may be emblematic of larger issues that define important components of the treaty relationship. Other issues may be implicit and not mentioned at all in treaty texts. Still other matters, particularly governance and Aboriginal title, are generally regarded by Aboriginal and treaty nations as fundamental rights not ceded in treaties.

The issues under discussion in treaty-making and treaty implementation and renewal processes could include

- the fundamental purposes, character and scope of the treaty relationship;
- the parties, successors and beneficiaries of the treaties;
- the effect of a treaty, if any, on the Aboriginal right and title to land;
- the adequacy of the land and resource base secured by the treaty;
- economic rights, including treaty annuities and hunting, fishing and trapping rights;
- the rights and obligations of the parties arising from a treaty relationship in a modern context;
- education, health and taxation issues;
- governance and justice issues;
- a determination of the extent to which federal and provincial legislation has extinguished, diminished or infringed upon Aboriginal and treaty rights; and
- disputes based on breaches of legal or fiduciary obligations arising in relation to the Crown's past, present and future administration of Indian lands and assets.

¹⁰² This is generally true of the treaty nations that are party to the numbered treaties. Having said this, it must be recognized that the treaty nations that are parties to early peace and friendship treaties do not regard their treaties as having attempted to define a comprehensive relationship with the Crown.

In this volume, we address the basic elements of the new relationships to be forged with all Aboriginal nations in the context of governance (Chapter 3), lands and resources (Chapter 4), and economic issues (Chapter 5). Here we provide a brief explanation of the relevance of these elements to treaty processes. In each case, more complete discussion and substantive recommendations are set out in the relevant chapters.

Governance

Whether or not the written text of the treaties refers expressly to rights of governance, we can say with certainty that all treaty nations regard themselves as self-governing. Without exception, the treaty nations that testified before the Commission expressed the view — which we accept — that the Crown entered into treaties with treaty nations on the basis that they were self-governing nations with the ability to discharge the treaty obligations they undertook. Thus, treaties acknowledged their jurisdiction over treaty subject matters and by necessary implication over other matters not addressed specifically in a treaty.

In this regard, we will not repeat our earlier comments about governance.¹⁰³ We agree with the treaty nations that governance issues are implicit in any treaty relationship. We find that the right of treaty nations to govern themselves was acknowledged implicitly by the Crown. The medals and uniforms provided to chiefs and headmen under many treaties affirm their legitimacy as the government of the treaty nations. The treaty nations undertook to maintain peaceful relations with settlers. How could they do this without the power to govern themselves?

As discussed fully in the next chapter, the new relationships we foresee are based on the inherent right of Aboriginal nations to act as one of three orders of government in Canada. It is vital that the link between governance and treaties be re-established, including the right to institute Aboriginal justice systems.¹⁰⁴ Thus, it is crucial that existing treaties that are to be implemented and renewed, as well as new treaties yet to be made, address governance powers in explicit terms.

Lands and resources

In most cases, the treaty nations dispute the written provisions in their treaties that provide for the extinguishment or cession of their Aboriginal rights and title to lands. In the treaties predating 1763, often described as treaties of peace and friendship, land rights are not mentioned, and the treaty nations maintain that their land rights have survived the making of these treaties. For example, Alex Christmas, president of the Union of Nova Scotia Indians, said this during our hearings:

103 See Chapter 3 of this volume and RCAP, *Partners in Confederation* (cited in note 10), pp. 11-14, 16-19.

104 See RCAP, *Bridging the Cultural Divide* (cited in note 62).

Although we have many treaties, none of them dealt with the surrender of lands and title
...

The matter of our traditional lands and resources must be addressed in a manner consistent with the principles underlined in the 1752 treaty and the standards of the treaty-making process laid out in the Royal Proclamation. Canada's current comprehensive claims policy calls for the extinguishment of Aboriginal and treaty rights in return for specific rights granted by the federal settlement legislation. In our view, if future agreements are to provide for coming generations and reflect our unique constitutional relationship with the Crown, they must be based on the recognition of our Aboriginal and treaty rights, not on their extinguishment. We require an adequate land base and equitable access to natural resources if we are to truly join the circle of Confederation.

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

In the case of treaties that the Crown regards as having extinguished Aboriginal land rights and title, there is a treaty nation tradition that the treaty was intended to ensure an equitable sharing of lands and resources. How otherwise could Aboriginal people and settlers live peacefully side by side? The words of Chief George Fern are representative:

We believe the principle of sharing of our homeland [and] its natural resources is the basis of the treaty arrangements, not surrender or extinguishment. Accordingly, the concepts of resource co-management and revenue sharing from the Crown lands and resources are the proper forms of treaty implementation. Such arrangements would provide a significant economic basis for self-government, and would provide First Nations with the ability to protect and benefit from Mother Earth.

Chief George Fern
Prince Albert Tribal Council
La Ronge, Saskatchewan, 28 May 1992

As we have seen, the cross-cultural nature of treaty negotiations almost certainly gave rise to a lack of consensus on this vital issue in many instances.¹⁰⁵ It appears that many of the historical treaties did not secure the voluntary cession of Aboriginal title, even though the Crown intended this result and even though the legal language of the written treaty texts recorded a cession.

We reached some key conclusions with respect to the historical treaties that contain blanket extinguishment provisions. We do not suggest that these conclusions apply in precise fashion to every treaty. Rather, we set them out as emerging from the overall pattern of treaty making in Canada.

First, the historical treaties are agreements and as such are subject to the basic principles of contract law, with additional guidance being derived from the international law principles governing treaties. Even a cursory survey of the treaties reveals numerous ways that contract law could be invoked to call into question the extinguishment of Aboriginal land rights. The common law of contracts already recognizes certain categories of contracts — unconscionable contracts, contracts made in writing but that do not embody one party's consent, contracts made under duress, and contracts that have been fundamentally breached — all of which attract specific, well-established doctrines of

105 See Pratt, "The Numbered Treaties" (cited in note 57) and Volume 1, Chapters 4 and 5.

invalidation. In our view, these doctrines are applicable to many of the treaties. They are also flexible enough to be adapted to the sui generis aspects of the treaties that make them different from other agreements.

Second, the historical treaties were made in the context of what is now seen as a fiduciary relationship between the parties, and where they involve a cession of Aboriginal title they must bear particular scrutiny. As a fiduciary, the Crown must account for any unfair or improper benefit derived from appropriating Aboriginal title without clear consent or without making sure that the treaty nations were fully informed. The Crown owed conflicting duties to the treaty nations and to Canadians generally and must bear an onus of clear and plain proof that the extinguishment of Aboriginal land rights occurred properly, that is, that there was not only free but also informed consent to the extinguishment on the part of the Aboriginal parties.

Third, throughout the period when historical treaties that purport to extinguish Aboriginal title were being made, the Crown had the power to extinguish Aboriginal title without the consent of Aboriginal people, but this would have required a clear and plain legislative intention to do so. There was no such legislative authority for what was done.

Fourth, the historical treaties were meant to be enduring. Both parties have formally affirmed that they rely upon them. As we have discussed, the unique nature of the treaties implies a relationship of partnership, including mutual obligations to deal with each other in good faith. These obligations do not permit either party to draw back from the treaty relationship or from the duties that flow from it. The clarification of these rights and duties must therefore be the subject of good faith negotiations so that consensus can be reached on the respective rights and obligations of the parties.

If it flows from these four conclusions that in many instances the historical treaties did not result in the voluntary cession of Aboriginal title, that title may well continue to exist over the large portion of the Canadian land mass dealt with in the numbered treaties. This result, already contemplated by the trial decision in *Paulette*, would place the land regime in the parts of Canada covered by the treaties of cession in the same position as most of British Columbia, the Atlantic provinces, certain parts of the Northwest Territories and Quebec, as well as other areas where the Crown never attempted to obtain a cession of Aboriginal title.¹⁰⁶

The parties to the historical treaties already have a treaty relationship that prohibits them from engaging in certain conduct and requires them to deal with one another honourably and in good faith. The treaty relationship establishes affirmative obligations on the parties to complete the treaties and at the same time restrains them from conduct that is inconsistent with treaty principles. Treaties provide a framework for the peaceful resolution of disputes.

In Chapter 4, we set out our detailed recommendations for a more equitable sharing of lands and resources through treaty processes. An adequate land base is essential to the economic and cultural health of Aboriginal peoples and to the viability of Aboriginal governments. It is the Commission's view that the treaty nations intended to enter into treaties that would provide for this result, and only such an outcome would meet the standards of fairness imposed by the relationship we envisage.

106 In British Columbia, until recently (the Nisg_a'a agreement being the most noteworthy example), there has been no attempt to obtain a cession of Aboriginal title, and a treaty-making process has been established. In the Atlantic provinces, there are numerous treaties of peace and friendship that do not purport to affect Aboriginal title. In the Northwest Territories some comprehensive claims have been settled and others have been in negotiation for many years. In Quebec some comprehensive claims have been settled and others are in negotiation.

Economic rights

In addition to providing for sharing lands and natural resources, the treaty nations regard the historical treaties as creating an economic relationship between themselves and the Crown. As with the political components of the treaty relationship, the economic aspects will evolve with time and with changing circumstances. These are also matters for treaty implementation and renewal processes (see Chapter 5).

Similarly, new treaties will be deeply concerned with economic issues. Not only will lands and natural resources be an issue, but other provisions to enable Aboriginal nations to benefit from economic opportunities will have to be addressed as well.

Treaty annuities

One example of economic rights in the historical treaties is the practice of paying annuities. The Robinson treaties of 1850 and the numbered treaties made after 1870 provide for annual annuities to be paid to each member of a treaty nation. Today, many treaty nation members travel great distances to collect their treaty annuity on treaty day because of the symbolic value of meeting with the Crown's representatives to renew the treaty and affirm the continuing nature of the treaty relationship.

With the passage of time, the value of these annuities, typically \$4 or \$5 per year, has been severely eroded. The dollar amount specified in the original treaty is still distributed annually. The annuities established by the Robinson treaties, for example, represented between one-half and one-third of the annual wage of an unskilled labourer.¹⁰⁷ Annuities could also increase if revenues derived from the territory affected by the treaty rose. Treaty 1 provided for the annuity to be “made in such articles as the Indians shall require of blankets, clothing, prints (assorted colours), twine, or traps, at the current cost price in Montreal, or otherwise, if Her Majesty shall deem the same desirable in the interests of Her Indian people, in cash”.¹⁰⁸

The growth of the modern social safety net eventually brought larger infusions of resources. The treaty nations insist that all transfers of resources to them are in fact being made pursuant to treaty. We agree that the treaty promises of wealth transfer should be reconsidered in treaty implementation and renewal processes.

Hunting, fishing and trapping

Similarly, the Robinson treaties and the numbered treaties contain assurances that the traditional economic activities of hunting, fishing and trapping would be preserved. The words used to record these rights in the treaties varied, however, and extensive litigation has subsequently produced many anomalies in interpretation.

In addition, in some cases these rights have been abrogated unilaterally by the Crown or affected by regulations that breach the letter and spirit of the treaty promises. In the prairie provinces, for example, the Natural Resources Transfer Agreements of the 1930s altered treaty rights to hunt, fish and trap, and recent cases indicate that these treaty rights may indeed have been extinguished without the consent of treaty nations and replaced with a more limited set of rights.¹⁰⁹ Provincial game and fish laws and regulations have been applied to treaty nations people without regard for

107 See James Morrison, “Robinson Treaties of 1850: A Case Study”, research study prepared for RCAP (1993)

108 *Treaties 1 and 2 between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba and Country Adjacent with Adhesions* (Ottawa: Queen's Printer, 1957).

their treaty rights, and for decades federal laws such as the *Fisheries Act* and *Migratory Birds Convention Act* have criminalized essential harvesting activities guaranteed by treaty (see Chapter 4).¹¹⁰ These issues are overdue for consideration in treaty implementation and renewal processes, particularly given their central importance to the economic well-being and cultural integrity of treaty nations.

Other economic issues

The Crown's other promises of economic assistance were often expressed in the treaties by reference to the provision of fish hooks and nets, ammunition, or agricultural equipment and seeds. These items, humble as they may seem, represent the undertaking of an economic relationship. They represent the Crown offering economic development aid in exchange for peaceful coexistence and the sharing of territory.

In Chapter 5, we address the economic issues facing treaty nations and other Aboriginal peoples today and suggest some ways for the Crown to provide assistance in a modern context.

Other treaty issues

Individual treaties raise other issues that might be the subject of treaty processes. Just as ordinary items such as fish hooks and twine represent continuing commitments of economic aid, other references to apparently simple matters may signify important commitments in the treaty relationship.

Each of the numbered treaties, for example, provides specifically for rights to education. These are sometimes expressed in the form of a simple requirement to provide a school or a teacher, but when taken together with the oral record and understanding of the treaty nation, they entitle treaty nations people to be educated so that they can earn a living in today's world (see Volume 3, Chapter 5).

Education was regarded as vital to give children the means to maintain and develop their culture and identity while at the same time acquiring the skills necessary to survive and flourish in the context of the new settler society. The treaty right cannot, therefore, be seen as limited to the salary of a teacher, the construction of a school building, or the purchase of a few books. We regard education as a proper subject for treaty processes.

The text of Treaty 6 provides for a "medicine chest".¹¹¹ Treaty nations of Treaty 6 have maintained consistently that the medicine chest provision means that full medical care was to be provided under their treaty. Other treaty peoples regard full medical care as implicit in their treaty relationship, having been discussed at the time of treaty.

109 See Alan Pratt, "Discussion Paper Regarding the Natural Resources Transfer Agreements of the Prairie Provinces", research study prepared for RCAP (1994).

110 The *Migratory Birds Convention Act* was repealed and replaced in 1994 by the *Migratory Birds Convention Act, 1994*, S.C. 1994, chapter 22 to address this difficulty. It now includes a 'non-derogation' clause to protect Aboriginal and treaty rights from its provisions. Amendments to the international agreement in question, the Migratory Birds Convention, are currently under negotiation by the states party to the convention to address this concern.

111 *Copy of Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen's Printer, 1964).

The people of Treaty 8 were concerned that the treaty would lead to an enforced change in their way of life because of the imposition of taxes. They were assured by the treaty commission that this would not occur, but this assurance was not properly recorded in the written version of the treaty.¹¹²

Many treaty nations regard their immunity from taxation by the governments of Canada and the provinces as an implicit treaty right. They refer to section 90 (1) (b) of the *Indian Act*, which deems personal property “given to Indians or to a band under a treaty or agreement between a band and Her Majesty” to be “situated on reserve”, thus exempting it from taxation by virtue of section 87 of the act. A revised assessment of the scope of treaty rights and obligations will conceivably have an impact on the extent of the exemption of treaty nations from taxation.

First Nations that do not have reserve land, as well as Métis people and Inuit, do not benefit from this limited exemption from tax. The present legislative exemption applies only to status Indians who can demonstrate close links between personal property (including income) and a reserve.¹¹³ Despite section 87, virtually all Aboriginal adults in Canada pay some taxes to all levels of government, and the overwhelming majority cannot take advantage of the tax exemption described in the *Indian Act*.

The legislation also draws a sharp distinction between economic activity on- and off- reserve. The Commission believes that taxation issues, like governance, must be clarified and formalized to permit a clear and predictable regime for intergovernmental relations in the future. We believe that Aboriginal governments should benefit from the immunity from taxation now enjoyed by federal and provincial government property, as guaranteed by section 125 of the *Constitution Act, 1867*.

We believe that explicit treaty-based taxation regimes should combine intergovernmental exemptions from taxation with new and enhanced powers of Aboriginal governments to tax people living on their territory, including their own members, and economic activity taking place on their territories (see Chapters 3 and 5). For these reasons, we regard taxation as an appropriate subject for treaty processes.

We believe that all discretionary payments, transfer payments and program funding should be examined in the context of the treaty discussions. Whether these payments are made now pursuant to an explicit treaty right, legislation or discretionary policy, they should come under close scrutiny in light of the treaty relationship. Many government programs now administered on the basis of need may in fact be a matter of treaty entitlement. There is a difference between collecting welfare and receiving dividends from investments. New treaties and renewed treaties should make these distinctions explicit.

Through treaty processes, and over time, treaty nations can begin to realize a real transfer of power and resources in their favour in fulfilment of the treaty relationship.

Our report contains many recommendations that could be implemented through treaty implementation and renewal processes. In making new treaties, the parties are free to fashion any arrangements they wish. No issue should be left off the negotiating table arbitrarily.

Recommendation

The Commission recommends that

112 See “Report of Commissioners for Treaty No. 8” [22 September 1899], in *Treaty No. 8* (cited in note 71), p. 6.

113 See *Williams v. Canada*, [1992] 1 S.C.R. 877.

2.2.11

The following matters be open for discussion in treaty implementation and renewal and treaty-making processes:

- governance, including justice systems, long-term financial arrangements, including fiscal transfers, and other intergovernmental arrangements;
- lands and resources;
- economic rights, including treaty annuities and hunting, fishing and trapping rights;
- issues included in specific treaties (for example, education, health and taxation); and
- other issues relevant to treaty relationships identified by either treaty party.

7.5 Outcomes of Treaty Processes

Section 35(1) of the *Constitution Act, 1982* states that the “existing ... treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”. In other words, it gives constitutional protection to treaty rights, although it is not their source. Their source is the treaties themselves. Section 35 (3) was added by a constitutional amendment in 1983. It extends the definition as follows:

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

This amendment makes it clear that the existing treaty rights referred to in section 35(1) include rights contained in past treaties as well as rights contained in treaties yet to be made. It also makes it clear that land claims agreements past and future are a form of treaty.

Parties to a treaty should be free to modify or supplement it. In theory they can even renegotiate the treaty if they come to the conclusion that the current treaty inadequately describes their relationship.¹¹⁴ In virtually every case, however, we believe that treaty nations will not wish to renegotiate their historical treaties but will want to achieve an understanding of the real terms of those treaties and then to implement that understanding. The treaty nations that have entered into modern treaties may be more likely to ask for renegotiation, but as we discussed earlier, they may also risk more than the other parties if that occurs.

114 See Bill Nothing, RCAP transcripts, Sioux Lookout, Ontario, 1 December 1992, regarding the position of the Nishnawbe-Aski Nation with respect to the issue of renegotiating Treaty 9: In the past they have talked about renegotiating or renovating the treaty. However, when the draft Memorandum of Understanding was presented to the chiefs in 1985, all reference to the treaty was removed at the request of the chiefs. The MOU [memorandum of understanding] process is not a treaty-based initiative.

Despite the written text of the treaty, First Nations did not agree to surrender land. One judge, who is involved in the RCNE [Royal Commission on the Northern Environment] litigation case stated that we had a claim which may not yet have been legally recognized to the ownership of a vast area of land.

The treaty will remain intact and all options for dealing with the treaty are still open to NAN [Nishnawbe-Aski Nation]. Work on legal challenges for the treaty, treaty implementation or treaty interpretation, can and should continue.

Commissioners strongly recommend to treaty parties that they put their agreements in writing and that they include in them dispute resolution mechanisms that can be invoked by either or both treaty parties.

It is important to set out clearly the relationship between the original treaty and any treaty implementation and renewal agreement to define or supplement the rights contained in the original treaty. It might be argued that the existing treaty rights are constitutionally entrenched and thus immutable. But such an approach would distort the essential nature of treaties, which is that they create continuing relationships capable of growth, amendment and clarification as the parties desire.

Protocol agreement

The most common outcome of treaty implementation and renewal will be a formal protocol agreement that defines specific treaty rights and obligations, perhaps for specified periods of time, with clearly defined mechanisms for review and renegotiation of the elements covered by the agreement.

Such a protocol could state specifically that it is not a treaty but simply an intergovernmental agreement of a lesser nature that governs and, for certain purposes, defines rights and obligations derived from a treaty. It could also describe rights that are nonetheless treaty rights within the meaning of section 35(1). This is consistent with section 35(3) of the *Constitution Act, 1982*, which enables a land claims agreement to result in constitutionally protected treaty rights.

Such protocol agreements should be ratified legislatively to remove any doubt with regard to their legal status. This was done, for example, with the James Bay and Northern Quebec Agreement, although now the treaty nation government, as well as Parliament and, if necessary, the relevant provincial legislature, would be expected to pass legislation.¹¹⁵

Supplementary treaty

Alternatively, treaty implementation agreements could be given the status of supplementary treaties that leave the original treaties intact and add to them. From what we have heard, this approach would not likely be the preferred one for many of the treaty nations.

It is possible that implementation and renewal of existing treaties could be achieved in part through a modern interpretation of the original historical agreement. Items not originally dealt with, or dealt with unsatisfactorily, could be handled in a supplementary treaty.

On the other hand, treaty nations such as the Mi'kmaq and the Haudenosaunee have made a series of separate treaties with the Crown and have expressed a wish to continue the treaty-making process. Any supplementary treaty would coexist with earlier treaties.

Replacement treaty

A treaty implementation and renewal agreement could consist of a new treaty that terminates and replaces the original treaty. Renegotiation or replacement should be an option for treaty nations that regard their original treaties as fundamentally flawed. This alternative is extremely unlikely to be

¹¹⁵ For a discussion of the status of the James Bay and Northern Quebec Agreement in light of the federal and provincial legislation that ratified and incorporated the agreement, see the article and book by Sébastien Grammond (cited in note 34). See also *Nunavut Land Claims Agreement Act* (cited in note 97), s. 4.

the choice of many of the treaty nations, however, which have strongly advocated implementation of existing treaties.

We caution that there should be no requirement or expectation that the treaty implementation and renewal process will produce yet another treaty within the meaning of section 35. Since treaty nations believe strongly that their treaties already exist and are complete, it is to be expected that many — and even most — treaty nations will choose to establish implementation protocols.

Regardless of the type of agreement reached, legislation and regulations will likely have to be enacted by the treaty parties to formalize the renewed treaty and to provide for implementation, review and dispute resolution.

Recommendation

The Commission recommends that

2.2.12

The royal proclamation and companion legislation in relation to treaties provide for one or more of the following outcomes:

- (a) protocol agreements between treaty nations and the Crown that provide for the implementation and renewal of existing treaties, but do not themselves have the status of a treaty;
- (b) supplementary treaties that coexist with existing treaties;
- (c) replacement treaties;
- (d) new treaties; and
- (e) other instruments to implement treaties, including legislation and regulations of the treaty parties.

7.6 Reorganization in Preparation for Treaty Processes

Later in this volume we make a series of major recommendations for restructuring federal government institutions related to Aboriginal affairs (see Chapter 3). Here we deal only with the establishment of government agencies to address treaty processes.

The government of Canada has begun to dismantle the department of Indian affairs, the first step being the signing on 7 December 1994 of a framework agreement between the minister of Indian affairs and northern development and 60 First Nations communities represented by the Assembly of Manitoba Chiefs.¹¹⁶

The agreement makes it clear that the dismantling process should restore to First Nations jurisdiction now exercised by other federal departments. Dismantling of the department has been a constant demand from treaty nations for many years. The question that arises is which agencies of the federal Crown will negotiate or maintain liaison with treaty nations in the future. In preparation for treaty renewal, thought must be given to how Crown commitments can be met in the context of a Canada that is not only a constitutional monarchy but a federation.

116 See *The Dismantling of the Department of Indian Affairs* (cited in note 87).

The Commission uses the term ‘the Crown’ to mean the repository of the constitutional values of our society that transcend ordinary political arrangements. The Crown is no longer a simple monolithic entity, if indeed it ever was. The Crown represents the Canadian people as well as their governments. It epitomizes the rights and obligations of the Canadian people as a collective whole.

In the present context, the Crown is party to all treaties with treaty nations. These obligations have been assumed by the Crown, and they are now implicit in section 35(1) of the *Constitution Act, 1982*. This is true whether the treaty in question was made by the French Crown, the British Crown, the Crown in right of Canada, or the Crown in right of a province. It is even true, in our view, of treaties made by the Hudson’s Bay Company under the Crown’s authority, as with the Douglas treaties on Vancouver Island.

The contemporary relationship between the Crown in this sense and the treaty nations is the theme of this chapter. Our use of the term ‘the Crown’ embodies values, rights and obligations that would survive even the end of the monarchy in Canada, although they are symbolized by the monarchy at present.

The gradual dispersal of Crown obligations

The Crown has not implemented the spirit and intent of the treaties for many reasons. In part, it was because of different understandings on the part of the Crown’s representatives and the treaty nations with respect to the treaties. The dramatic extent of cross-cultural misunderstandings was analyzed earlier.

Increasingly, however, continual reorganizations in government have resulted in trivialization of the treaties because of deliberate policies inimical to the treaties or sheer ignorance and neglect of the treaties as the source of rights and obligations.

The division of jurisdiction between the federal and provincial orders of government has also resulted in a division of the Crown’s duty under the treaties. Indeed, court decisions conclude that these responsibilities belong to different entities entirely. In 1910, Lord Loreburn of the judicial committee of the privy council described the contemporary judicial view of the two separate roles of the federal and provincial Crowns in *Canada v. Ontario*:

*The Crown acts on the advice of ministers in making treaties, and in owning public lands holds them for the good of the community. When differences arise between the two Governments in regard to what is due to the Crown as maker of treaties from the Crown as owner of public lands they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively.*¹¹⁷

The Commission is of the view that both federal and provincial governments are required by the honour of the Crown to participate in treaty processes and to give effect to treaty rights and promises. The fulfilment of the Crown’s duty is their joint responsibility.

Remarkably, there has never been a department or agency of the government of Canada devoted to the fulfilment of treaties. The mandate of the Department of Indian Affairs and Northern Development (DIAND) is to implement the *Indian Act*. Over time, the federal government’s point of contact with treaty nations has been dispersed to a host of departments and agencies, all of which

117 *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637 at 645.

apply federal legislation and policies but none of which has a mandate to address the whole array of issues arising from treaties. The rights that flow from the Indian Act have been accorded greater prominence than Aboriginal or treaty rights.

The result is that the original nation-to-nation treaty relationship has dissolved into a complex relationship between the governments of treaty nations (more accurately, individual band councils) and a host of federal and provincial government entities. In the process, the treaty relationship has been lost sight of.

A Crown treaty office

The organization required to enable the government of Canada to fulfil its obligations under the treaties is an important matter. In our view, DIAND cannot legitimately serve this role. The legacy remaining from the flawed relationship of the past makes the department largely incapable of implementing a new relationship. The creation of a Crown Treaty Office within a new Department of Aboriginal Relations will ensure that a department of the government of Canada has, for the first time, an unambiguous mandate to identify and implement treaty rights and obligations and to make new treaties. This will reverse the trend that has diminished the relevance of the treaties. In Chapter 3, we discuss in detail the structure and mandate of the proposed Department of Aboriginal Relations and the place of the Crown Treaty Office within it.

A Crown Treaty Office would assume the responsibilities of the Crown in right of Canada in implementing and renewing and making treaties and would co-ordinate the Crown's participation in treaty implementation and renewal. The role of the Crown Treaty Office should be mentioned in the royal proclamation and its functions set out in the companion legislation. It must have a clear and prominent place in the federal government.

For the reasons discussed later in this volume, the Crown Treaty Office should be insulated from the program delivery responsibilities now exercised by DIAND. The implementation of treaty terms, which often involve multiple federal entities, should be overseen, directed and managed by the Crown Treaty Office. Its senior official, the chief Crown negotiator, will take direction from specific negotiation mandates given by cabinet to the minister of Aboriginal relations and from the work of other branches of the new Department of Aboriginal Relations.

Recommendation

The Commission recommends that

2.2.13

The royal proclamation and companion legislation in relation to treaties:

- (a) establish a Crown Treaty Office within a new Department of Aboriginal Relations; and
- (b) direct that Office to be the lead Crown agency participating in nation-to-nation treaty processes.

The role of provincial governments

The terms of Confederation complicated the task of identifying the Crown as a party to treaties. Under the constitution, and subject to the *Canadian Charter of Rights and Freedoms* and the

constitutionally protected rights of Aboriginal peoples, the provinces are sovereign within their spheres of jurisdiction.

The rights and obligations described in the treaties have implications for the provinces, and it is clear that treaty implementation and treaty making will engage many areas of provincial legislative competence and proprietary rights. Treaty processes will require provincial Crown lands and resources to be made available to provide for a reasonable sharing of the natural resource wealth of the country. Provincial laws that now apply to Aboriginal and treaty nations people and lands will have to be modified to make room for Aboriginal governance. As a result, successful treaty processes will require the active co-operation and participation of provincial governments as an integral component of the Crown. This is why we recommended that the provinces introduce legislation to enable them to meet their treaty obligations and participate in treaty processes (see Recommendation 2.2.9 earlier in this chapter).

Some treaties that were made between treaty nations and the undivided Crown must now be implemented by a Crown that acts through two constitutional orders of government. In addition, under the constitution, Parliament has legislative authority and the government of Canada has executive responsibility for the treaty relationship. As many treaty nations people describe it, the relationship between treaty nations and the provinces is government-to-government, while the relationship between treaty nations and the Crown in right of Canada is nation-to-nation.

Federal and provincial responsibility to meet treaty obligations must be clarified and implemented to eliminate federal/provincial disputes over cost sharing. To achieve this, some overall federal/provincial cost-sharing arrangements will have to be made (see Volume 4, Chapter 7). Recent experience suggests that these arrangements can in fact be achieved. Two examples are the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement and the financial components of the British Columbia treaty process.¹¹⁸

The Commission proposes that provincial governments organize themselves, possibly through legislation parallel to the federal treaty legislation, in a way similar to the proposed Crown Treaty Office, with provincial offices being established as negotiating agencies responsible to provincial governments and legislatures.

In many provinces, agencies dedicated to Aboriginal relations already exist.¹¹⁹ In no case has a provincial government established an agency with a mandate to implement the provincial government's responsibilities with regard to the treaties or enter into new treaties. Existing provincial agencies tend to be small policy development and co-ordination offices or branches of larger ministries. Substantive responsibility (and consequent authority) for lands, resources and myriad other matters continues to be vested in line ministries.

There is good reason to think that provincial governments are subject in law to the Crown's fiduciary duties to Aboriginal and treaty nations.¹²⁰ They are obliged to respect Aboriginal rights and are subject to the burdens of treaty rights. In addition, in many cases provincial governments have been enriched by the federal government's breaches of treaty obligations, particularly in relation to land or the failure of the Crown to enter into a treaty relationship with Aboriginal nations. As a

118 See *Saskatchewan Treaty Land Entitlement Framework Agreement between the Government of Canada, the Entitlement Bands and the Province of Saskatchewan*, 22 September 1992, E98 C6 C2 (Sask.); and *Memorandum of Understanding between Canada and British Columbia Respecting the Sharing of Pre-Treaty Costs, Settlement Costs, Implementation Costs and the Costs of Self-Government* (Vancouver: Ministry of Aboriginal Affairs, 21 June 1993).

matter of equity and honour, provincial governments should feel a particular responsibility to ensure that Aboriginal people secure a fully adequate land base.

Recommendation

The Commission recommends that

2.2.14

Each province establish a Crown Treaty Office to enable it to participate in treaty processes.

7.7 Reorganization of Aboriginal and Treaty Nations

In Chapter 3 of this volume we discuss the major issues of governance for Aboriginal peoples. We describe the harm that has been done to traditional Aboriginal governing structures, and we recognize the need for new governing bodies. These themes are of particular importance in the context of treaty processes.

This Commission cannot determine which entities can legitimately represent treaty nations in treaty processes. In many cases, treaty nation representation may not be an issue. In other cases, there may be competing entities that claim standing to represent Aboriginal and treaty nations. In Chapter 3, we discuss the need for a federal policy on recognition of Aboriginal nations.

This crucial issue has the potential to paralyze treaty processes at the outset. Many of these issues stem from Canada's legislative creation, through the Indian Act, of band council governments exercising delegated power, as opposed to Aboriginal and treaty nation governments. The government of Canada thus created much of the problem and should assume some role in its solution.

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- 119 See the following domestic governance case studies commissioned by the RCAP research program: Peter Aucoin and Violet Paul, "Canadian Governments and Aboriginal Peoples Project: Province of Nova Scotia" (1995); Kathy Brock, "Relations with Canadian Domestic Governments: Manitoba" (1995); David Cameron and Jill Wherrett, "New Relationship, New Challenges: Aboriginal Peoples and the Province of Ontario" (1995); Ken Coates, "First Nations and the Yukon Territorial Government: Toward a New Relationship" (1993); John Crossley, "Relations Between the Province and Aboriginal Peoples in Prince Edward Island" (1995); Gurston Dacks, "Canadian Governments and Aboriginal Peoples: The Northwest Territories" (1995); G. Bruce Doern, "The Politics of Slow Progress: Federal Aboriginal Policy Processes" (1994); Paul J. Dudgeon and Thomas Dore, "Domestic Governance Project: Regina Government Study" (1993); Renée Dupuis, "The Government of Quebec and Aboriginal Self-Government" (1995) [translation]; Roger Gibbons, Sonia Arrison and Jennifer Stewart, "Domestic Governments and Aboriginal Peoples: The Alberta Case" (1995); Robert Gravel, "Relations entre les gouvernements municipaux de la région de Québec et le village des Hurons-Wendat" (1995); David Milne, "The Case of New Brunswick-Aboriginal Relations" (1995); Darcy A. Mitchell and Paul Tennant, "Government to Government: Aboriginal Peoples and British Columbia" (1994); Ken Rasmussen, "Canadian Governments and Aboriginal Peoples: The Case of Saskatchewan/Aboriginal Relations" (1995); and Adrian Tanner et al., "Aboriginal Peoples and Governance in Newfoundland and Labrador" (1994).
- 120 See the following research studies prepared for RCAP: 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*, and Renée Dupuis and Kent McNeil, Volume 2, *Domestic Dimensions* (Ottawa: Supply and Services, 1995); and Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government", in *Aboriginal Self-Government* (cited in note 96).

What is an Aboriginal or treaty nation?

Authentic renewal of treaty relationships will require realignment not only on the part of the Crown but also on the part of Aboriginal and treaty nations. Each Aboriginal and treaty nation must ultimately determine for itself the route that it will take to a reconstituted nation government, but we feel obliged to make some observations and identify potential pathways to renewal. Later in this volume, we address the rebuilding of Aboriginal nations in more detailed terms (see Chapter 3). Here we address in a preliminary fashion the link between nationhood and treaties.

The *Royal Proclamation of 1763* refers, significantly, to “Nations or Tribes of Indians”. Consistent with this designation, the vast majority of historical treaties — in their written versions — refer to particular nations or tribes. These terms are a reflection of historical fact and British imperial practice. As we saw in our review of history, both the British and the French conducted Indian policy on the assumption that their Aboriginal counterparts possessed the political, territorial and economic characteristics of nationhood.

An Aboriginal or treaty nation is an indigenous society, possessing its own political organization, economy, culture, language and territory. The Supreme Court of the United States identified some of these characteristics of nationhood in *Cherokee Nation v. State of Georgia*:

*The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war; of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community.*¹²¹

More than 140 years after this judgement, the International Court of Justice attacked the concept of *terra nullius* in its advisory opinion on the Western Sahara, noting that “at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.”¹²²

We have already referred to recognition by Chief Justice Marshall and Justice McLean of the U.S. Supreme Court that the terms ‘treaty’ and ‘nation’ were European in origin and that the only prerequisite to a valid treaty is that both parties be self-governing and capable of carrying out the treaty’s stipulations.

Displacement and deconstruction of the Indian nations as policy

Britain acknowledged the nationhood of the Indian nations at an early stage and made undertakings of non-interference with internal matters. At the same time, this recognition was often undermined by the imperatives of political and economic expediency. Intertribal and intratribal rifts were often encouraged or exacerbated by Crown agents to advance imperial or local policy objectives. As a result, the treaty-making process, which began on an explicitly nation-to-nation basis, became more ambiguous in time as the government of Canada undermined the integrity of the Aboriginal nations with which it had treaty relations.

Interference with Aboriginal political structures entered a new and more formalized stage with the federal government’s adoption of the consolidated *Indian Act* in 1876. Despite the fact that the Crown was still engaged in treaty making on the basis of nationhood or at least tribal organization,

121 *Cherokee Nation v. State of Georgia*, 5 Peters (1831) at 1-2.

122 *Western Sahara Advisory Opinion*, [1975] I.C.J. Reports at 39.

the act identified bands as the legal embodiment of Indian political structure.¹²³ Moreover, bands and their membership were defined by the act, which gave the responsible minister authority to recognize and even to create bands and to divide their membership and assets. The act not only provided a legislative basis for the denial of Indian nationhood, but also recast the relationship between Indian people and the Crown in administrative instead of political terms.

As discussed in Volume 1, the Indian Act was intended to hasten the assimilation, civilization and eventual annihilation of Indian nations as distinct political, social and economic entities. It was not intended as a mechanism for embracing the Indian nations as partners in Confederation or for fulfilling the responsibilities of the treaty relationship. Rather, it focused on containment and disempowerment — not by accident or by ignorance, but as a matter of conscious and explicit policy. The breaking up of Aboriginal and treaty nations into smaller and smaller units was a deliberate step toward assimilation of Aboriginal individuals into the larger society.

After almost 120 years, the Indian Act has taken its toll — not only in the quality and the basis of the relationship between Indian nations and the Crown, but also with respect to the internal organization of the Indian and treaty nations. In the next chapter, we examine in detail the approaches Aboriginal nations may choose to pursue to reclaim and reconstruct their nationhood.

8. Institutions for Treaty Processes

There should be an independent body to oversee violations of the treaties. This body could be formed by Indigenous peoples and the Crown, and have the authority to approve fines and penalties against the treaty violator. The violators could be individuals, corporations or governments. All would be subject to the jurisdiction of this body.

There has never been any independent body in Canada to oversee the implementation of the treaties. In other Commonwealth countries that have treaties with the indigenous peoples, the state governments have tried to unilaterally implement their own form of treaty resolution. One which immediately comes to mind is the New Zealand model known as the Waitangi Tribunal. We have our own version in Canada known as the Office of the Treaty Commissioner. Each of these bodies was modelled after the American Indian Claims Commission. In the United States and in New Zealand these bodies have serviced their political masters and not the Indigenous peoples. We must strive for something which serves us.

Regena Crowchild
President, Indian Association of Alberta
Edmonton, Alberta, 11 June 1992

123 For example, Treaty No. 6 (cited in note 111) of 1876 was made with the ‘Plain and Wood Cree Indians’.

What may be required is an institution that would ensure the Crown's full compliance with its responsibilities and obligations. This could take a number of forms, but a key would be to place treaty implementation and treaty making outside the realm of partisan politics, with an institution whose mandate would be to uphold the honour of the Crown, not to cater to the whims of political expediency.

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

The restoration of the treaty relationship through the making of new treaties and the implementation and renewal of existing ones will require the establishment of at least two types of independent and neutral institutions: treaty commissions and a specialized Aboriginal Lands and Treaties Tribunal. Their functions would be quite distinct, but both will be vital to the success of the proposed treaty processes.

To be legitimate in the eyes of treaty nations, these institutions must be established through consultation and negotiation with the Aboriginal and treaty nations. They must also be genuinely independent of federal and provincial governments. Finally, they can have no authority to affect any rights of Aboriginal and treaty nations that have not given their clear consent to the creation of these institutions or accepted their roles.

As a result, although this chapter has concerned steps the Crown should take to meet its unfulfilled obligations, the present discussion must be more general, in that the treaty parties must consult and agree on the institutions required to move the relationship forward.

8.1 Treaty Commissions

Throughout the history of Canada, commissions have been established to negotiate treaties with Aboriginal nations. The term commission has been used from time to time to refer to the negotiating teams appointed by the Crown and, more recently, to bodies established to facilitate treaty discussions and negotiations. It is the latter meaning we use here.

Treaty commissions should be established by the government of Canada, the appropriate provinces and territories, and Aboriginal and treaty nations. These commissions would be permanent, independent and neutral forums where negotiations as part of treaty processes can take place. They should be established on a regional basis as required, the most obvious and useful structure being along provincial or territorial lines, although the possibility of using treaty boundaries should also be explored.¹²⁴

A number of such entities now exist, including the B.C. Treaty Commission and the Saskatchewan Office of the Treaty Commission. The commissions would assist the treaty parties to resolve political and other disputes arising in treaty processes. Their mandate would be to eliminate both substantive and procedural obstacles within treaty processes.

Treaty commissions must not be simply administrative structures. What is required is the creation of an *environment* that will promote and permit treaty processes to succeed. Treaty commissions would provide the entire range of services necessary to foster and facilitate the success of talks.

¹²⁴ This is the suggestion made by the Assembly of First Nations in "Reclaiming Our Nationhood, Strengthening Our Heritage", a brief submitted to RCAP in 1993. For information about briefs submitted to RCAP, see *A Note About Sources* at the beginning of this volume.

Eighteenth-Century Treaty Commissions: The Council Houses

In the summer of 1764, Sir William Johnson held a great congress with 24 Indian nations at Niagara. When a peace was made, Sir William extended the Covenant Chain to the nations of the Western Confederacy. His home at Fort Johnson on the Mohawk River, in what is now New York state, became the first permanent imperial council house, permanently stocked with provisions. Its outbuildings were sleeping quarters and meeting places. The shady area in front of the house was ideal for open-air councils. The home of Johnson the individual became inseparable from the council house of Johnson the representative of the Crown.

After the Revolutionary War, Lieutenant Governor John Graves Simcoe of Upper Canada envisioned a permanent council house in his capital city of London, on the Thames River. On September 1, 1794, he wrote to Lord Dorchester:

That as soon as conveniently it can be executed, a Council House should be erected for this purpose at the proposed seat of Government, London, particularly adapted as central to the Indian Nations; that there the Indian [peoples] should be assembled to receive their regular presents, with all due form and solemnity under His Majesty's Picture or Statue; that they may be taught to repose in security on their Great Father, consider him and not his Officers or Agents as their benevolent benefactor — That to this fire-place, a deputation of all their Chiefs should be annually invited to resort, to reconcile their respective differences, to receive advice, and to renew their friendship with the King's People, which they are sufficiently acquainted is indispensable for their common protection.

Simcoe's council house would have served as a place of safety and neutrality and, more important, as a concrete symbol of the relationship between the Treaty nations and the Crown. Unfortunately, it did not come into being.

Source: Paul Williams and Curtis Nelson, "Kaswentha", research study prepared for RCAP (1994), quoting from *The Correspondence of Lieut. Governor John Graves Simcoe*, ed. E.A. Cruikshank (Toronto: Ontario Historical Society, 1925).

Recommendations

The Commission recommends that

2.2.15

The governments of Canada, relevant provinces and territories, and Aboriginal and treaty nations establish treaty commissions as permanent, independent and neutral bodies to facilitate and oversee negotiations in treaty processes.

2.2.16

The following be the essential features of treaty commissions:

- Commissioners to be appointed in equal numbers from lists prepared by the parties, with an independent chair being selected by those appointees.
- Commissions to have permanent administrative and research staff, with full independence from government and from Aboriginal and treaty nations.
- Staff of the commissions to act as a secretariat for treaty processes.
- Services of the commissions to go beyond simple facilitation. Where the parties require specialized fact finding of a technical nature, commissions to have the power to hire the necessary experts.
- Commissions to monitor and guide the conduct of the parties in the treaty process to ensure that fair and proper standards of conduct and negotiation are maintained.

- Commissions to conduct inquiries and provide research, analysis and recommendations on issues in dispute in relation to historical and future treaties, as requested jointly by the parties.
- Commissions to supervise and facilitate cost sharing by the parties.
- Commissions to provide mediation services to the parties as jointly requested.
- Commissions to provide remedies for abuses of process.
- Commissions to provide binding or non-binding arbitration of particular matters and other dispute resolution services, at the request of the parties, consistent with the political nature of the treaty process.

Above all, treaty commissions must respect the political and even diplomatic nature of treaty processes. They must be and be seen to be independent of the parties. They cannot legitimately have any authority to resolve disputes unless such authority is conferred on them by both parties.

Treaty commissions will serve as the guardians or keepers of treaty processes. To give them the best chance of achieving this status, there must be full and open consultations with Aboriginal and treaty nations before the Crown brings them into being. Corresponding laws or resolutions of Aboriginal and treaty nations would then be required before treaty commissions could be considered a legitimate part of individual treaty negotiations.

8.2 An Aboriginal Lands and Treaties Tribunal

There will be a need to resolve disputes within treaty processes. As we have shown, a treaty process is political by nature. In Chapter 4 we recommend establishment of an Aboriginal Lands and Treaties Tribunal. We have considered carefully the relationship between the tribunal, which would be a court-like and adjudicative body, and the institutions necessary to ensure success in a political process. Our concern is the relationship between the tribunal, which would have a broad mandate to hear and decide disputes, and the profoundly political nature of a treaty process.

Many treaty nations' representatives have expressed concern about the present role of the courts in adjudicating treaty issues. The courts are seen as a product of the Crown's legal and political system and as such are perceived as lacking legitimacy to address questions arising from a nation-to-nation political relationship. Others, however, have asked us to respond to the shortcomings of the court system by recommending establishment of a judicial body with binding authority but one that would be more detached from the Crown's legal and political traditions.

We recommend that the tribunal play a supporting role in treaty processes, with three main elements in its mandate. First, the tribunal should have jurisdiction over process-related matters such as ensuring that the parties negotiate in good faith. Second, the tribunal should have the power to make orders for interim relief. Third, the tribunal should have jurisdiction to hear appeals on funding issues.¹²⁵

¹²⁵ A major part of the tribunal's role would be resolving disputes of a specific claims nature that, for whatever reason, the Aboriginal parties choose to have settled outside the broader treaty implementation and renewal or treaty-making processes. A detailed description of this aspect of the tribunal's proposed responsibilities is set out in Chapter 4.

The tribunal would be a forum of last resort in treaty processes, and every attempt should be made to provide for the negotiated, mediated or arbitrated resolution of treaty disputes with the assistance of treaty commissions, which would have primary responsibility for ensuring that treaty processes are kept moving and on track.

The existence of the tribunal should not shape treaty processes. Its jurisdiction over treaty processes should be limited to deciding particular matters that might otherwise have been litigated in court and to acting as an appellate body in relation to certain functions of the treaty commissions. Most important, in the treaty processes the tribunal must be only one of an array of dispute-resolution mechanisms available to the treaty parties.

Recommendation

The Commission recommends that

2.2.17

The Aboriginal Lands and Treaties Tribunal recommended by this Commission (see Volume 2, Chapter 4) play a supporting role in treaty processes, particularly in relation to

- (a) issues of process (for example, ensuring good-faith negotiations);
- (b) the ordering of interim relief; and
- (c) appeals from the treaty commissions regarding funding of treaty processes.

3 - 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

¹ Based on a story by Phil Lane, Jr., Four Worlds Development, University of Lethbridge, Lethbridge, Alberta, as retold by Richard Wagamese.

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.

² See the *Constitution Act, 1982*, s. 35(2).

- *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

René Tenasco, Councillor
Kitigan Zibi Anishinabeg Council
Maniwaki, Quebec, 2 December 1992

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

* 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.

restriction. In a study prepared for the Commission, the Métis 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:

- 3 Clement Chartier for Métis Family and Community Justice Services Inc., “Governance Study: Métis Self-Government in Saskatchewan”, research study prepared for the Royal Commission on Aboriginal Peoples [RCAP] (1995). For information about research studies prepared for RCAP, see *A Note About Sources* at the beginning of this volume.
- 4 Chiefs of Ontario, “Submission to the Royal Commission on Aboriginal Peoples” (1993), p. 19. For information about briefs submitted to RCAP, see *A Note About Sources* at the beginning of this volume.

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 Kanesatake:

5 Gerald R. Alfred for Mohawk Council of Kahnawake, "The Meaning of Self-Government in Kahnawake", research study prepared for RCAP (1994). Difficulties with the use of the term are also noted in the testimony of Oren Lyons, Akwesasne, 3 May 1993 and Leonard Nelson, Roseau River, Manitoba, 8 December 1992.

6 Federation of Saskatchewan Indian Nations, "First Nations Self-Government: A Special Research Report", research study prepared for RCAP (1995).

7 Alfred, "The Meaning of Self-Government" (cited in note 5).

*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-

8 Mohawk Councils of Akwesasne, Kahnawake and Kanesatake, “A Joint Statement on the Inherent Right of Self-Determination and the Exercise of that Right by Akwesasne, Kahnawake and Kanesatake” (1995), p. 2.

9 Inuit Tapirisat of Canada, “Preliminary Submission to the Royal Commission on Aboriginal Peoples” (1993), p. 16.

10 Rosemarie Kuptana, as quoted in Wendy Moss, “Inuit Perspectives on Treaty Rights and Governance Issues”, in RCAP, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Supply and Services, 1995), p. 84 [note omitted].

11 Métis National Council, “The State of Research and Opinion on the Métis Nation of Canada”, Intervener Participation Program [IPP] brief submitted to RCAP (1993), pp. 1 and 129.

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 Métis Society of Saskatchewan:

At the outset, it is important to note that our self-determination objectives, through self-government, are not new. Métis 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 Métis and the European settlers culminated in the well known Métis 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 Métis economic, social and cultural values and goals has persisted.

This enduring theme in our Métis 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

12 See Chartier, “Governance Study” (cited in note 3).

13 See, for example, Métis Nation of Quebec, RCAP transcripts, Montreal, Quebec, 28 May 1993.

14 Métis National Council, “The State of Research” (cited in note 11), p. 130.

15 Métis National Council, “The State of Research”, pp. 23-24.

16 Manitoba Métis Federation, “A Report on Métis Self-Governance in Urban Manitoba”, research study prepared for RCAP (1995).

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 sovereigntyThat 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 development ... Knowledge 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 context ... As 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

¹⁷ Union of Ontario Indians, "Anishinabek Traditional Governing, A New Era for the Anishinabek: Understanding the Past for the Challenges of Tomorrow", brief submitted to RCAP (1993), pp. 4-5.

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.

18 Nancy Wachowich, “Women’s Traditional Governance Research Project: Pond Inlet Inuit Contribution”, research study prepared for RCAP (1994).

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.

19 Union of Ontario Indians, "Anishinabek Traditional Governing" (cited in note 17), p. 18.

20 Rene M.J. Lamothe, "'It Was Only a Treaty': A Historical View of Treaty 11 According to the Dene of the Mackenzie Valley", research study prepared for RCAP (1993).

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.

21 Pauktuutit (Inuit Women's Association), *The Inuit Way: A Guide to Inuit Culture* (Ottawa: n.d.), pp. 15-16.

22 Lamothe, "A Historical View of Treaty 11" (cited in note 20).

23 Deh Cho Tribal Council, "Dene Decision Making", brief submitted to RCAP (1993), p. 23, quoting George Barnaby of Fort Good Hope, Vice-President of the Indian Brotherhood of the Northwest Territories, speaking to the Berger inquiry (1977).

24 Chiefs of Ontario, "Submission to the Royal Commission" (cited in note 4), p. 13.

*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

25 Chiefs of Ontario, "Submission to the Royal Commission", p. 7.

26 Paul Williams and Curtis Nelson, "Kaswentha", research study prepared for RCAP (1995).

27 Métis National Council, "The State of Research" (cited in note 11), p. 124.

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.

28 Métis National Council, “The State of Research”, pp. 124-126.

29 Pauktuutit, *The Inuit Way* (cited in note 21), p. 6.

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:

30 Keith T. Carlson for the Stó:lo Tribal Council, "Leadership Review: The Indian Act Election System, Traditional Stó:lo Socio-political Structures, and Recommendations for Change", brief submitted to RCAP (1993), pp. 30-32 [note omitted].

31 Aboriginal Women's Council of British Columbia, "Traditional Self-Government, Economic Development and Aboriginal Women", brief submitted to RCAP (1992), p. 7

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 cultureWomen 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

32 Wachowich, "Women's Traditional Governance" (cited in note 18).

33 Wachowich, "Women's Traditional Governance".

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

34 Women of the Métis Nation, "Women Who Own Themselves: The Final Report on the Conference on Métis Women and Governance", brief submitted to RCAP (1993), pp. 25-27.

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.

35 Ontario Native Women's Association, "A Preliminary Study: Anishnabequek and their Families in Ontario", IPP brief submitted to RCAP (1993), p. ii.

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.

36 Marc G. Stevenson, "Traditional Inuit Decision-Making Structures and the Administration of Nunavut", research study prepared for RCAP (1993).

37 Council of Elders, "A Negotiations Process for Off-Reserve Aboriginal Peoples in Ontario", brief submitted to RCAP (1993), p. 6.

38 Stevenson, "Traditional Inuit Decision-Making Structures" (cited in note 36).

39 Chief Peter Quaw, RCAP transcripts, Stoney Creek, British Columbia, 18 June 1992.

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

40 Council of Elders, "A Negotiations Process" (cited in note 37).

41 Williams and Nelson, "Kaswentha" (cited in note 26).

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:

42 Pauktuutit (Inuit Women’s Association), “Pauktuutit Submission to the Royal Commission on Aboriginal Peoples” (1993).

43 Carlson, “Leadership Review” (cited in note 30), pp. 17-18 [note omitted].

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:

44 Union of Ontario Indians, "Anishinabek Traditional Governing" (cited in note 17), p. 39.

45 Union of Ontario Indians, "Anishinabek Traditional Governing".

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

46 Lamothe, "A Historical View of Treaty 11" (cited in note 20).

47 Williams and Nelson, "Kaswentha" (cited in note 26). See also Kenneth Deer, RCAP transcripts, Kahnawake, Quebec, 6 May 1993.

48 Williams and Nelson, "Kaswentha". See also Deer, RCAP transcripts.

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-

49 Stevenson, "Traditional Inuit Decision-Making Structures" (cited in note 36).

50 Stevenson, "Traditional Inuit Decision-Making Structures".

51 Stevenson, "Traditional Inuit Decision-Making Structures".

52 Stevenson, "Traditional Inuit Decision-Making Structures".

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.

53 Union of Ontario Indians, "Anishinabek Traditional Governing" (cited in note 17), p. 13.

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

54 Council of Elders, “A Negotiations Process” (cited in note 37), p. 5.

55 Deh Cho Tribal Council, “Dene Decision Making” (cited in note 23), p. 21.

56 B.C. Native Women’s Society, “Self-Government: The Quest for Self-Determination and Self-Reliance of Aboriginal Peoples”, brief submitted to RCAP (1993), p. 11.

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.

57 Williams and Nelson, “Kaswentha” (cited in note 26).

58 Deh Cho Tribal Council, “Dene Decision Making” (cited in note 23).

59 Carlson, “Leadership Review” (cited in note 30), p. 15.

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.

60 Union of Ontario Indians, "Anishinabek Traditional Governing" (cited in note 17), p. 39.

61 Assembly of First Nations, "Reclaiming our Nationhood: Strengthening our Nation", brief submitted to RCAP (1993), p. 16.

62 See for example Teslin Tlingit First Nation, "Aboriginal Self-Government and Judicial Systems", research study prepared for RCAP (1995); Carlson, "Leadership Review" (cited in note 30).

63 See Council of Elders, "A Negotiations Process" (cited in note 37); Women of the Métis Nation, "Women Who Own Themselves" (cited in note 34), pp. 25-27; Marilyn Fontaine, RCAP transcripts, Winnipeg, Manitoba, 23 April 1992.

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 Métis 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

64 Teslin Tlingit, "Aboriginal Self-Government" (cited in note 62).

65 See Robert Pasco, Chief of the Oregon Jack Creek Indian Band, for the Nlaks'pamux Nation, RCAP transcripts, Merritt, British Columbia, 5 November 1992.

66 Métis Nation of Alberta, "Submission to the Royal Commission on Aboriginal Peoples" (1993), p. 59.

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

67 RCAP transcripts, Moose Factory, Ontario, 9 June 1992.

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.

68 Federation of Saskatchewan Indian Nations, "First Nations Self-Government" (cited in note 6), pp. 17-18.

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.

69 Andrew Bear Robe for the Siksika Nation, "The Historical, Legal and Current Basis for Siksika Nation Governance, Including its Future Possibilities Within Canada", research study prepared for RCAP (1994).

70 Alfred, "Meaning of Self-Government" (cited in note 5).

71 Métis Settlements General Council, "Aboriginal Governance Project", research study prepared for RCAP (1994).

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 Métis land base is seen as essential for the long-term survival and betterment of the Métis 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.

72 Jean A. Knockwood, "The Shubenacadie Band Council and the Indian Brook Band Case Study on Self Governance", research study prepared for RCAP (1993).

73 The Pacific Métis Federation, "Report to the Royal Commission on Aboriginal Peoples", brief submitted to RCAP (1993), p. 12.

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

74 Nishnawbe-Aski Nation, “Intervention Report: Royal Commission on Aboriginal Peoples”, brief submitted to RCAP (1993).

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.

75 United Chiefs and Councils of Manitoulin, "UCCM Fish and Wildlife Project", brief submitted to RCAP (1993), p. 45.

76 Dwight Dorey, "Aboriginal Self Government for the Mi'kmaq People of Nova Scotia: Essential Features of a Workable Model", M.A. thesis, Carleton University, Ottawa, 1993.

77 See, for example, Moss, "Inuit Perspectives" (cited in note 10).

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.

78 See the *Nunavut Act*, S.C. 1993, c. 28, and “Information Sheet: Design of the Nunavut Government”, document issued for the Nunavut Conference, Iqaluit: 22-23 February 1995.

79 Nunavik Constitutional Committee, “Draft Constitution of Nunavik” (28 January 1991), part IV, reproduced in Marc Malone and Carole Lévesque, “Nunavik Government”, research study prepared for RCAP (1994).

80 Inuvialuit Regional Corporation, “Inuvialuit Self-Government” in “Political Developments in the Inuvialuit Settlement Region”, research study prepared for RCAP (1993). Recent proposals have envisaged the establishment of a Western Arctic Regional Government involving Inuvialuit and Gwich’in communities. See, for example, Constitutional Development Steering Committee, Western Northwest Territories, *Summaries of Member Group Research Reports* (Yellowknife, N.w.T.: 1994), pp. 5-8.

81 See Moss, “Inuit Perspectives” (cited in note 10).

82 Inuit Committee on National Issues, *Completing Canada: Inuit Approaches to Self-Government* (Kingston: Institute of Intergovernmental Affairs, Queen’s University, 1987), p. 24.

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.

83 Chartier, "Governance Study" (cited in note 3).

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:

84 RCAP, *Aboriginal Peoples in Urban Centres*, Report of the National Round Table on Aboriginal Urban Issues (Ottawa: Supply and Services, 1993), p. 55.

*[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 Métis Society of Saskatchewan and the Manitoba Métis Federation all called for initiatives directed specifically to Métis populations in urban areas.⁹⁰ Marc LeClair states:

85 RCAP, *Aboriginal Peoples in Urban Centres*, pp. 18-19.

86 S.C. 1994, c. 35, s. 11(1)(b) and schedule III, part II. See also *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (Ottawa: Supply and Services, 1993); and Peter W. Hogg and Mary Ellen Turpel, "Implementing Aboriginal Self Government: Constitutional and Jurisdictional Issues", in RCAP, *Aboriginal Self-Government* (cited in note 10), and 74 Can. Bar Rev. 1995, p. 187.

87 Bear Robe, "Basis for Siksika Nation Governance" (cited in note 69).

88 See Del C. Anaquod, "Urban Institutional Development Case Study æ Regina", research study prepared for RCAP (1993).

89 See Assembly of Manitoba Chiefs, "Planning Change", brief submitted to RCAP (1993), p. 11; Federation of Saskatchewan Indian Nations, "First Nations Self-Government" (cited in note 6); and Anaquod, "Urban Institutional Development".

90 Métis National Council, "The State of Research" (cited in note 11); Chartier, "Governance Study" (cited in note 3); Manitoba Metis Federation, "Metis Self-Governance" (cited in note 16).

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 Métis Federation:

Programs and services for Métis in urban areas must be designed, developed and delivered by Métis government institutions for Métis people. This concept of Métis institutions of self-government has been developed provincially through the Tripartite Negotiations and nationally through the Métis Nation Accord. In all instances, we intend that these Métis institutions will operate in both rural and urban areas and will be operated for the benefit of Métis.

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 Métis Society has proposed that a Métis legislative assembly be created of local presidents, the provincial Métis council and representatives of the Métis Women of Saskatchewan. The legislative assembly would meet several times each year to fulfil its mandate as the governing authority of the Métis 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.

91 Marc LeClair, "Métis Self-Government Origins and Urban Institutions", brief submitted to RCAP (1993), p. 1.

92 Chartier, "Governance Study" (cited in note 3).

93 Métis National Council, "The State of Research" (cited in note 11).

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

94 RCAP, "Aboriginal Peoples in Urban Centres" (cited in note 84), p. 57.

95 The Assembly of Aboriginal Peoples of Saskatchewan Inc., "Report to the Royal Commission on Aboriginal Peoples", brief submitted to RCAP (1993) pp. 7-8. The Assembly was incorporated in 1988 to represent people affected by Bill C-31 and those seeking reinstatement.

96 Native Council of Canada [Congress of Aboriginal Peoples], *The First Peoples Urban Circle: Choices for Self-Determination. The National Perspective*, Book 1 (Ottawa: Native Council of Canada, 1993), pp. 43-44.

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.

97 An overview of these models is provided in Native Council of Canada, "Summary of IPP Submission, Royal Commission on Aboriginal Peoples" (1993).

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, Métis, 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 languages Dene 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:

98 Ontario Native Women's Association, "A Preliminary Study" (cited in note 35), p. 2.

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

99 Chiefs of Ontario, "Submission to the Royal Commission" (cited in note 4), p. 2.

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 Métis 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 Métis 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 Métis 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 Métis Federation's case study outlines one such approach:

*Métis governance structures would promote Métis rights at the provincial and federal level while respecting the autonomy of the Métis at the community and regional levels. They could take the form of a provincial Métis 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

100 Metis Settlements General Council, "Metis Settlements Governance Legislation: Community Perspectives", brief submitted to RCAP (1993).

101 Manitoba Metis Federation, "Metis Self-Governance" (cited in note 16), pp. 14-15.

102 "Information Sheet: Design of the Nunavut Government" (cited in note 78).

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.

103 See Inuvialuit Regional Council, "Inuvialuit Self-Government" (cited in note 80); Constitutional Development Steering Committee, Summaries of Member Group Research Reports (cited in note 80).

104 See Russel Lawrence Barsh, "Aboriginal Self-Government in the United States: A Qualitative Political Analysis", research study prepared for RCAP (1993).

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

105 *R. v. Sparrow*, [1990] 1 S.C.R. 1075. It has yet to be decided whether this exception, recognized in the *Sparrow* case, would apply not only to federal laws but also to provincial laws. For discussion, see Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261 at 282-87.

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:

106 Among extensive writings on self-determination, see especially S. James Anaya, "A Contemporary Definition of the International Norm of Self-Determination" (1993) 3 *Transnational Law & Contemporary Problems* 131; S. James Anaya, "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims" (1990) 75 *Iowa Law Review* 837; Alain Bissonnette, "Le droit à l'autonomie gouvernementale des peuples autochtones: un phénix qui renaîtra de ses cendres" (1993) 24 R.G.D. 5; Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 I.C.L.Q. 241; Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government", in RCAP, *Aboriginal Self-Government: Legal and Constitutional Issues* (cited in note 10), p. 1; Avishai Margalit and Joseph Raz, "National Self-Determination"; *Journal of Philosophy* 87 (1990), p. 439; Brian Slattery, "The Paradoxes of National Self-Determination" (1994) 32 Osgoode Hall L. J. 703; Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell Int'l L. J. 579.

*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 covenant ... This 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:

107 Paul Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (Oxford: Oxford University Press, 1985).

108 *Re Mitchell and the Queen* (1983), 42 O.R. (2nd) 481 at 492. See also Dickson C.J.C. (dissenting) in *Re Public Service Employee Relations Act (Alta.)* [1987], 1 S.C.R. 313 at 348-349: "Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation."

*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.

109 United Nations, *Resolutions Adopted by the General Council During Its Twenty-First Session* (New York: United Nations, 1967), p. 165.

110 See “Draft Declaration as Agreed upon by the Members of the Working Group at Its Eleventh Session”, United Nations, Economic and Social Council, E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994. See also “Draft Declaration on the Rights of Indigenous Peoples” (1994) 1 C.N.L.R. 40.

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

111 Erica-Irene A. Daes, "Discrimination Against Indigenous Peoples: Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples", United Nations, Economic and Social Council, E/CN.4/Sub.2/1993/26/Add.1, 19 July 1993. This note refers to an earlier draft of the Declaration, dated 8 June 1993, in which Article 3 took a different form than that found in the current draft. Nevertheless, in our opinion, the background analysis supplied by Daes is equally helpful for understanding Article 3 in its current form. See also Erica-Irene A. Daes, "Some Considerations on the Rights of Indigenous Peoples to Self-Determination" (1993) 3 *Transnational Law & Contemporary Problems* 1.

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

112 See Donat Pharand, “The International Labour Organisation Convention on Indigenous Peoples (1989): Canada’s Concerns”, in RCAP, *Canada’s Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, International Dimensions (Ottawa: Supply and Services, 1995), p. 132.

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

113 See Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992* (Vancouver: Douglas and McIntyre Ltd., 1991); Menno Boldt and J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms", in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, ed. Menno Boldt and J. Anthony Long (Toronto: University of Toronto Press, 1985), pp. 174-175; Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1993) 45 *Stanford Law Review* 1311 at 1324-1327; and Slattery, "First Nations and the Constitution" (cited in note 105) 261 at 273-274.

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.

114 Paul L.A.H. Chartrand, "Aboriginal Self-Government: The Two Sides of Legitimacy", in Susan D. Phillips, ed., *How Ottawa Spends: A More Democratic Canada---? 1993-1994* (Ottawa: Carleton University Press, 1993), pp. 234, 236.

115 Inuit Tapirisat of Canada, "Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples" (1994), p. 38 [note omitted].

116 By contrast, some of the early legislation included the test of 'Indian blood' among the criteria governing membership; see, for example, *An Act Providing--for the Management of Indian and Ordnance Lands*, S.C. 1868, c. 42, s. 15, discussed in Sharon H. Venne, ed., *Indian Acts and Amendments, 1868-1975: An Indexed Collection* (Saskatoon: University of Saskatchewan Native Law Centre, 1981), p. 3. It seems very doubtful that racial criteria as such had much basis in the laws and practices of Aboriginal nations.

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

117 RCAP, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993); RCAP, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: 13 February 1992).

118 See Catherine Bell, “Comment on Partners in Confederation: A Report on Self-Government by the Royal Commission on Aboriginal Peoples” (1993) 27 U.B.C.L. Rev. 361; Canadian Bar Association, “Aboriginal Civil Jurisdiction in Canada”, brief submitted to RCAP (1993); Bob Freedman, “The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*” (1994) 28 U.B.C.L. Rev. 49; Sylvain Lussier, “Réflexions sur ‘Partenaires au sein de la Confédération’ et le droit ‘inhérent’ à l’autonomie gouvernementale”, in *The Inherent Right of Aboriginal Self-Government*, Volume 1 (Toronto: Canadian Bar Association Continuing Legal Education Program, 1994); Kenneth J. Tyler, “Another Opinion: A Critique of the Paper Prepared by the Royal Commission on Aboriginal Peoples Entitled: ‘Partners in Confederation’”, in *The Inherent Right of Aboriginal Self-Government*, Volume 2 (Toronto: Canadian Bar Association Continuing Legal Education Program, 1994).

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 Emeralder 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

119 This account is based largely on the following sources, which differ somewhat in their details: *Connolly v. Woolrich* (1867), 17 *Rapports judiciaires révisés de la Province de Québec* 75 (Sup.C.) (for other sources of this case, see note 121); and *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1966), Volume 7, pp. 204-206 ("Connolly, William"), Volume 9, pp. 149-150 ("Connolly, Suzanne").

120 National Archives of Canada, Manuscript Group 29, B15, Robert Bell Papers, "Reminiscences of Henry Connolly"; information kindly supplied by James Morrison, Legal and Historical Research, Haileybury, Ontario.

121 *Connolly v. Woolrich* (1867) (cited in note 119); see also 11 *Lower Canada Jurist* 197 and Brian Slattery, ed., *Canadian Native Law Cases* (Saskatoon: University of Saskatchewan Native Law Centre, 1980), Volume 1, 70. The decision on appeal is reported under the name *Johnstone v. Connolly* (1869), 17 *Rapports judiciaires révisés de la Province de Québec* 266 (Quebec Queen's Bench); it is also reported in 1 *Revue légale* (Old Series) 253 and Brian Slattery, ed., *Canadian Native Law Cases*, Volume 1, 151. The case was settled out of court before the Privy Council dealt with it.

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.

122 This account is based on *Connolly v. Woolrich* at 83-87.

123 *Connolly v. Woolrich* at 83-84.

124 8 U.S. (6 Peters) 515 (1832).

125 The original passage is found in *Worcester v. Georgia* at 547; it is quoted in *Connolly v. Woolrich* (cited in note 119) at 86.

126 *Connolly v. Woolrich* at 82.

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

127 For other cases dealing with the issue of Aboriginal customary law, see *R. v. Nan-e-quis-a Ka* (1889), 1 Territories Law Reports 211 (N.W.T. S.C.); *R. v. “Bear’s Shin Bone”* (1899), 3 C.C.C. 329 (N.W.T. S.C.); *Re Noah Estate* (1961), 32 D.L.R. (2d) 185 (N.W.T. Terr. Ct.); *Re Adoption of Katie* (1961), 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.); *Re Beaulieu’s Adoption Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T. Terr. Ct.); *Re Kitchoolik and Tucktoo* (also reported as *Re Deborah*) (1972), 28 D.L.R. (3d) 483 (N.W.T. C.A.), upholding the decision of the Northwest Territories Territorial Court reported at (1972), 27 D.L.R. (3d) 225; *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743 (N.W.T. S.C.); *Re Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T. S.C.); *Michell v. Dennis and Dennis*, [1984] 2 C.N.L.R. 93 (B.C. S.C.); *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22 (B.C. C.A.), [1992] 1 C.N.L.R. 84 (B.C. S.C.); *Delgamuukw v. British Columbia* (1993), 5 C.N.L.R. (B.C. C.A.). For discussion, see Norman K. Zlotkin, “Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases” (1984) 4 C.N.L.R. 1; and Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 738-39.

128 R.S.C. 1985, c. I-5.

129 S.A. 1990, c. M-14.3.

130 In *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 750-752, the Supreme Court of Canada held unanimously that the rule of law was a fundamental postulate of the Canadian constitutional structure, even though it was not explicitly set out in any operative provision. The Court went on to conclude, at p. 752: “In other words, in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the *Patriation Reference*—this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law.”

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 institutions*¹³⁵

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

131 See Jean-Gabriel Castel, *The Civil Law System of the Province of Quebec* (Toronto: Butterworths, 1962). See also the Royal Edict of 1663 creating the Conseil Souverain of New France; text in Jacques-Yvan Morin and José Woehrling, *Les Constitutions du Canada et du Québec* (Montreal: Les Éditions Thémis, 1992), p. 592.

132 See W.R. Jackett, “Foundations of Canadian Law in History and Theory”, in Otto E. Lang, ed., *Contemporary Problems of Public Law in Canada* (Toronto: University of Toronto Press, 1968); J.E. Cote, “The Reception of English Law” (1977), 15 *Alta. L. Rev.* 29; and Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992), pp. 27-44.

133 *R. v. Sparrow* (cited in note 105) at 1094.

134 *R. v. Sparrow* at 1101.

135 Amagoalik and Chartier quoted in Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), p. 27, citing *First Ministers’ Conference on Aboriginal Constitutional Matters; Unofficial and Unverified Verbatim Transcript*, 15 March 1983, Volume 1, pp. 130 and 134 respectively (with minor corrections in first quotation approved by Amagoalik).

- (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

136 Resolution of the Quebec National Assembly, 20 March 1985. The English text is reproduced in Secrétariat aux affaires autochtones, *The Basis of the Québec Government's Policy on Aboriginal Peoples* (Quebec City: 1988). The original French text is found in Secrétariat aux affaires autochtones, *Les fondements de la politique du Gouvernement du Québec en matière autochtone* (Quebec City: 1988), pp. 5-6.

137 The evolution of modern legal thinking on the subject can be traced in the following commentaries: Gerard V. La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), pp. 108-133; Douglas Sanders et al., *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1970); Peter A. Cumming and Neil H. Mickenberg, ed., *Native Rights in Canada*, 2nd ed. (Toronto: Indian-Eskimo Association of Canada and General Publishing, 1972); Kenneth Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973) 51 Can. Bar Rev. 450; Douglas Sanders, "The Nishga Case" (1973) B.C. Studies (no. 19) 3; J.C. Smith, "The Concept of Native Title" (1974) 24 U.T.L.J. 1; 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), p. 33; Brian Slattery, "The Land Rights of Indigenous Canadian Peoples", doctoral dissertation, Oxford University, 1979, reprinted by the University of Saskatchewan Native Law Centre, 1979; Geoffrey S. Lester, "The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument", doctoral dissertation, Osgoode Hall Law School, York University, 1981; Leroy Littlebear, "A Concept of Native Title" (1982) 5 Can. Legal Aid Bul. (Nos. 2 & 3) 99; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983); Boldt and Long, ed., "The Quest for Justice" (cited in note 113); René Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed. (Toronto: Carswell, 1988), Vol. II, pp. 68-84; Slattery, "Understanding Aboriginal Rights" (cited in note 127); Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); Kent McNeil, "The Temagami Indian Land Claim: Loosening the Judicial Strait-jacket", in Matt Bray and Ashley Thomson, ed., *Temagami: A Debate on Wilderness* (Toronto: Dundurn Press, 1990), p. 185; Slattery, "First Nations and the Constitution" (cited in note 105); Hogg, *Constitutional Law* (cited in note 132), pp. 679-682; Jack Woodward, *Native Law* (Toronto: Carswell, 1994); and Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government" (cited in note 106).

138 See Slattery, "Understanding Aboriginal Rights" (cited in note 127), pp. 732, 744-745.

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 means ...*¹⁴⁰

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

139 The following Supreme Court decisions contain important discussions of Aboriginal rights and their relation to treaty rights: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Guerin v. R.*, [1984] 2 S.C.R. 335; *Simon v. R.*, [1985] 2 S.C.R. 387; *Roberts v. Canada*, [1989] 1 S.C.R. 322; *R. v. Sparrow* (cited in note 105); *R. v. Sioui*, [1990] 1 S.C.R. 1025. The modern Supreme Court has in effect confirmed a view expressed in the nineteenth century by a majority of Supreme Court justices in *St. Catharines Milling and Lumber Company v. R.* (1887), 13 S.C.R. 577, a view that was overshadowed at the time by the ambiguous views of the British Privy Council on further appeal, as reported in (1888), 14 Appeal Cases 46. In *St. Catharines* (1887), the Supreme Court was split four-two on the question of which government, federal or provincial, took the benefit of a cession of Indian lands, with the majority (Ritchie C.J., Fournier, Henry and Taschereau JJ.) favouring the provincial government and a minority (Strong and Gwynne JJ.) supporting the federal government. However, on the question of the existence of Aboriginal title, the Court split in a different manner, with four judges (Ritchie, C.J., Fournier, Strong and Gwynne JJ.) supporting the view that Aboriginal land rights existed in one form or another under Canadian law, and two judges (Henry and Taschereau JJ.) apparently denying this; see especially at 599-600, 608-616, 638, 639, 643-645, 663-664. For recent judicial treatments of the doctrine of Aboriginal rights, see the judgement of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia* (cited in note 127), and the judgement of the High Court of Australia in *Mabo v. Queensland* (1992), 107 Australian Law Reports 1.

140 *Calder v. Attorney-General of British Columbia*, at p. 328.

141 See *Roberts v. Canada* (cited in note 139) at 340, where Justice Wilson identified the precise question to be resolved in the case as “whether the law of aboriginal title is federal common law”. To this question she responded: “I believe that it is. In *Calder v. Attorney-General of British Columbia*, this Court recognized aboriginal title as a legal right derived from the Indians’ historic occupation and possession of their tribal lands. As Dickson J---pointed out in *Guerin*, aboriginal title pre-dated colonization by the British and survived British claims of sovereignty.” For discussion of this holding, see John M. Evans and Brian Slattery on *Roberts v. Canada* in “Notes of Cases” (1989) 68 Can. Bar Rev. 817 at 829-832. See also *Bisailon v. Keable*, [1983] 2 S.C.R. 60, where the Supreme Court of Canada held that common law rules that fall within the jurisdiction of the federal Parliament are paramount to provincial laws. Justice Beetz stated for the Court at 108: “I do not see why the federal Parliament is under an obligation to codify legal rules if it wishes to ensure that they have paramountcy over provincial laws, at least when some of those legal rules fall under its exclusive jurisdiction”.

142 On this broad usage, see *Black’s Law Dictionary*, 5th ed. (St. Paul, Minn.: West Publishing Co., 1979), pp. 250-251.

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:

143 *St. Catharines Milling and Lumber Company* (cited in note 139) at 612-613. See also his statement at pp. 615-616: “To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the Crown, were considered to possess a certain proprietary interest in the unsundered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations”.

*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

144 *R. v. Sioui* (cited in note 139) at 1054-1055.

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 founded ...*¹⁴⁵

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:

145 *Re The Regulation and Control of Aeronautics in Canada*, [1932] Appeal Cases 54 at 70 (Privy Council), rev’g [1930] S.C.R. 663.

146 These remarks are sometimes associated with various ‘compact theories’ of Confederation. For discussion of compact theories, see, for example, Morin and Woehrling, *Les Constitutions du Canada et du Québec* (cited in note 131), pp. 153-164; and G.F.G. Stanley, “Act or Pact? Another Look at Confederation”, in Ramsay Cook, Craig Brown and Carl Berger, ed., *Canadian Historical Readings* (Toronto: University of Toronto Press, 1967), pp. 94-118. For the application of a compact theory to Aboriginal peoples, see J.E. Foster, “Indian-White Relations in the Prairie West during the Fur Trade Period æ A Compact?”, in Richard Price, ed., *The Spirit of the Alberta Indian Treaties* (Montreal: Institute for Research on Public Policy, 1979), pp. 181-200, and the wide-ranging discussion in James Tully, “Multirow Federalism and the Charter”, in Philip Bryden, Steven Davis, and John Russell, ed., *Protecting Rights and Freedoms: Essays on the Charter’s Place in Canada’s Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 1994).

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

147 Thomas-Jean-Jacques Loranger, *Lettres sur l'interprétation de la constitution fédérale; première lettre* (Quebec City: Imprimerie A. Côté et Cie., 1883), pp. 59-60; translated as *Letters upon the Interpretation of the Federal Constitution; First Letter* (Quebec: Morning Chronicle Office, 1884), pp. 61-62. For Loranger's influence, see “Loranger, Thomas-Jean-Jacques” in *Dictionary of Canadian Biography* (cited in note 119), Volume 11, pp. 529-531.

148 For the application of this principle in the context of indigenous property rights, see *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 Appeal Cases 399 (Privy Council) at 407-410; *Oyekan v. Adele*, [1957] 2 All England Law Reports 785 (Privy Council) at 788; *Calder v. Attorney-General of British Columbia* (cited in note 139) at 401-406; *Guerin v. R.* (cited in note 139) at 376-379; Slattery, *Land Rights* (cited in note 137), pp. 49-62; Slattery, *Ancestral Lands* (cited in note 137); and McNeil, *Common Law Aboriginal Title* (cited in note 137), especially pp. 161-192. For contrasting viewpoints on the doctrine of continuity, see *Delgamuukw v. British Columbia* (cited in note 127) at 98-99 and at 165-168.

149 *Letters upon the Interpretation of the Federal Constitution* (cited in note 147), pp. 14-15.

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

150 The full reciprocal texts of the treaty, which are found in the British Public Record Office, are reproduced in the documentary submissions made by the defendants in the *Nova Scotia Micmac Moose Harvest Cases*, Document Books, Volume 1; for the outcome of the cases, see [1990] 3 C.N.L.R. 87. For discussion of the status of the eighteenth-century Maritime treaties, see the decision of the Supreme Court of Canada in *Simon v. R.* (cited in note 139).

151 Treaty of Peace signed on 25 June 1761, reproduced in the *Moose Harvest Cases*, Volume 3, pp. 553-618; the passage quoted is on p. 573.

152 *R. v. Sioui* (cited in note 139) at 1034.

153 *R. v. Sioui* at 1071-1073.

154 For a full discussion of the Proclamation see Volume 1, Chapter 5. For the complete text of the Royal Proclamation see Volume 1, Appendix D.

155 Statutes at Large (U.K.) 8, 7 George III to 18 George III, c. 83.

“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

156 Statutes at Large, s. 8: “All His Majesty’s Canadian Subjects within the Province of Quebec---may also hold and enjoy their Property and Possessions, together with all Customs and Usages relative thereto, and all other their Civil Rights, in as large, ample, and beneficial Manner, as if the said Proclamation, Commissions, Ordinances, and other Acts and Instruments had not been made---and that in all Matters of Controversy, relative to Property and Civil Rights, Resort shall be had to the Laws of Canada, as the Rule for the Decision of the same”.

157 See M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Oxford University Press, 1975); and Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (New York: Frederick A. Praeger, Inc., 1966).

158 Section 3 of the *Quebec Act* states in full: “Provided always, and be it enacted, That nothing in this Act contained shall extend, or be construed to extend, to make void, or to vary or alter any Right, Title, or Possession, derived under any Grant, Conveyance, or otherwise howsoever, of or to any Lands within the said Province, or the Provinces thereto adjoining; but that the same shall remain and be in force, and have Effect, as if this Act had never been made.”

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

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- 159 To this effect, see *St. Catharines Milling and Lumber Company v. R.* (cited in note 139) at 629-635 and at 648. Justice Strong stated at 631-632: “The words ‘right’, ‘title’ and ‘possession’ [in section 3 of the *Quebec Act*] are all applicable to the rights which the Crown had conceded to the Indians by the proclamation [of 1763], and, without absolutely disregarding this 3rd section, it would be impossible to hold that these vested rights of property or possession had all been abolished and swept away by the statute. I must therefore hold, that the Quebec act had no more effect in revoking the five concluding paragraphs of the proclamation of 1763 which relate to the Indians and their rights to possess and enjoy their lands until they voluntarily surrendered or ceded them to the Crown, than it had in repealing it as a royal ordinance for the government of the Floridas and Granada” at pp. 631-652. Justice Taschereau stated at 648: “From this result of my interpretation of it [the *Royal Proclamation of 1763*] it is unnecessary, for my determination of this case, to consider how far the sections of the proclamation to which I have alluded, have been affected by the act of 1774. I may, nevertheless, remark, that any right the Indians might have previously had could not, it seems, have been affected by this act, as by its 3rd section it is specially provided and enacted that ‘nothing in this act contained shall extend, or be construed to extend, to make void, or to vary, or alter, any right, title, or possession derived under any grant, conveyance, or otherwise howsoever, of or to any lands within the said Province, or the Provinces thereto adjoining’ [note omitted]”. This viewpoint was adopted by the Privy Council on further appeal, see *St. Catherine’s Milling and Lumber Company v. R.* (cited in note 139), where Lord Watson recited the main provisions of the *Royal Proclamation of 1763* and concluded at 54: “The territory in dispute had been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the *British North America Act, 1867*), by the Government of the Dominion---. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.” See also *R. v. Lady McMaster* [1926] Ex. C.R. 68 at 73-74, where Justice Maclean, after summarizing Lord Watson’s opinion on this point in the *St. Catherine’s* case, stated: “I am unable also to concur in the defendant’s contention that the *Quebec Act*, which enlarged the limits of the province of Quebec, destroyed the rights of the Indians in the lands reserved under the proclamation. This I think has been authoritatively settled.” In *Ontario (A.G.) v. Bear Island Foundation*, [1989] 2 C.N.L.R. 73 at p. 85, the Ontario Court of Appeal held that Aboriginal land rights held under the *Royal Proclamation of 1763* were not affected by the *Quebec Act* but that the Proclamation’s procedural requirements governing Indian land cessions were repealed by the act. For discussion, see Slattery, *Land Rights* (cited in note 137), p. 334; and Cumming and Mickenberg, *Native Rights in Canada* (cited in note 137), pp. 71-72, 88-89, 107.
- 160 *Constitution Act, 1867*, s. 94. The section states that any federal provision for uniformity of laws shall take effect in a province only upon being adopted by the province’s legislature.
- 161 S.C., 1870, c. 3. Section 31 provides in part: “And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada.”
- 162 Paul L.A.H. Chartrand, *Manitoba’s Métis Settlement Scheme of 1870* (Saskatoon: University of Saskatchewan Native Law Centre, 1991), p. 5 [notes omitted]; see also the detailed analysis at pp. 13-14 and 110-137.

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. Sikyea* (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.

163 Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880), p. 213. See discussion in Foster, "Indian-White Relations" (cited in note 146).

164 Morris, *Treaties of Canada*, p. 96.

165 43 D.L.R. (2d) 150 (Northwest Territories Court of Appeal). The Court's decision was upheld on further appeal to the Supreme Court of Canada: see *Sikyea v. R.* (1964), 50 D.L.R. (2d) 80 at 158.

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,

166 For commentary on section 35 (and the companion section 25), see W.I.C. Binie, “The Sparrow Doctrine: Beginning of the End or End of the Beginning?” (1990) 15 Queen’s L.J. 217; Dussault and Borgeat, *Administrative Law: A Treatise*, 2nd ed., (cited in note 137), Volume 2, pp. 72-73; Georges Emery, “Réflexions sur le sens et la portée au Québec des articles 25, 35, et 37 de la Loi constitutionnelle de 1982” (1984) 25 C. de D. 145; Hogg, *Constitutional Law of Canada*, 3rd ed. (cited in note 132), pp. 679-695; Lyon, “An Essay on Constitutional Interpretation” (cited in note 168); Kenneth Lysyk, “The Rights and Freedoms of the Aboriginal Peoples of Canada”, in Walter S. Tarnopolsky and Gérald-A. Beaudoin, ed., *The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1982); Kent McNeil, “The Constitutional Rights of the Aboriginal Peoples of Canada” (1982) 4 Supreme Court L.R. 255; Kent McNeil, “The Constitution Act, 1982, Sections 25 and 35” (1988) 1 C.N.L.R. 1; James O’Reilly, “La Loi constitutionnelle de 1982, droit des autochtones” (1984) 25 C. de D. 125; William Pentney, “The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982. Parts I and II” (1988) 22 U.B.C. L. Rev. 21, 207; Douglas Sanders, “The Rights of Aboriginal Peoples of Canada” (1983) 61 Can. Bar Rev. 314; Douglas Sanders, “Pre-Existing Rights: The Aboriginal Peoples of Canada (Sections 25 and 35)”, in Gérald-A. Beaudoin and Edward Ratushny, ed., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989), 707; Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986); Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1982-83) 8 Queen’s L.J. 232; Brian Slattery, “The Hidden Constitution: Aboriginal Rights in Canada” (1984) 32 Am. J. Comp. L. 361; Slattery, “Understanding Aboriginal Rights” (cited in note 127); Brian Slattery, “Aboriginal Language Rights”, in David Schneiderman, ed., *Language and the State* (Cowansville, Quebec: Les Éditions Yvon Blais Inc., 1991), 369; Slattery, “First Nations and the Constitution”, (cited in note 105); and Bruce H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988).

*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

167 *R. v. Sparrow* (cited in note 105) at 1105. The unanimous judgement was written jointly by Chief Justice Dickson and Justice La Forest.

168 *Sparrow* at 1106. The passage quoted is found in Noel Lyon, “An Essay on Constitutional Interpretation” (1988) 26 *Osgoode Hall L.J.* 95 at 100.

169 *Sparrow* at 1106.

170 *Sparrow* at 1108.

171 *Sparrow* at 1099.

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

172 As the Court remarked in *Sparrow* at 1095: “It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal’s finding, and we would not disturb it.”

173 The Court stated in *Sparrow* at 1101: “Government regulations governing the exercise of the Musqueam right to fish--have only recognized the right to fish for food for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is--incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right.”

174 The Court held in *Sparrow* at 1091: “The word ‘existing’ makes it clear that the rights to which section 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*.”

175 *Sparrow* at 1099.

176 *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (Trial Division) at 568.

177 The Court stated at 1097-1098: “At bottom, the respondent’s argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.” It went on to conclude at p. 1099: “There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.”

178 In *R. v. Sparrow* (cited in note 105) the Court observed at 1091: “An existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations.”

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

179 *R. v. Sparrow* at 1093, quoting Slattery, “Understanding Aboriginal Rights” (cited in note 127), p. 782.

180 *Sparrow* at 1099.

181 *Sparrow* at 1110 [emphasis added].

182 [footnote missing in original text]

183 See Brian Slattery, “Aboriginal Peoples and the Crown”, research study prepared for RCAP (1993).

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

184 Special Committee on Indian Self-Government, *Indian Self-Government in Canada: [Second] Report of the Special Committee*, presented to the House of Commons, 12 and 20 October 1983, p. 43.

185 *Indian Self-Government*, p. 44.

186 *Indian Self-Government*, p. 44.

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:

187 For discussion of these negotiations, see Asch, *Home and Native Land* (cited in note 135); William Calder, "The Provinces and Indian Self-Government in the Constitutional Forum", in J. Anthony Long and Menno Boldt, ed. *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988), pp. 72-82; J. Edward Chamberlain, "Aboriginal Rights and the Meech Lake Accord", in Katherine E. Swinton and Carol J. Rogerson, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988), pp. 11-19; Georges Erasmus, "Twenty Years of Disappointed Hopes", in Boyce Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press Ltd., 1990), pp. 1-42; R.E. Gaffney, G.P. Gould, and A.J. Semple, *Broken Promises: The Aboriginal Constitutional Conferences* (Fredericton: New Brunswick Association of Metis and Non-Status Indians, 1984); David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989); McNeil, "The Decolonization of Canada" (cited in note 137); Schwartz, *First Principles, Second Thoughts* (cited in note 166); and Norman K. Zlotkin, "The 1983 and 1984 Constitutional Conferences: Only the Beginning" (1984) 3 C.N.L.R. 3-29.

188 See First Ministers Meeting on the Constitution, *Consensus Report on the Constitution*, Charlottetown, P.E.I., 28 August 1992, and *Draft Legal Text*, 9 October 1992.

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.

¹⁸⁹ Minister of Indian Affairs and Northern Development, *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), p. 3.

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 Crown¹⁹²

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

190 See *Delgamuukw v. British Columbia* (cited in note 127) per Macfarlane J. and Wallace J., with dissenting opinions per Lambert J. and Hutcheon J. See also *Casimel v. Insurance Corporation of British Columbia* (cited in note 127); and *R. v. Pamajewon and Jones*, [1995] 2 C.N.L.R. 188 (Ont. C.A.). For commentary, see Freedman, "The Space for Aboriginal Self-Government" (cited in note 118); and Hutchins, "The Aboriginal Right to Self-Government" (cited in note 182).

191 Dicey, *Law of the Constitution* (London: MacMillan & Co., 1959), pp. 39-40 [note omitted], as quoted in *Delgamuukw v. British Columbia* at 120.

192 *R. v. Sparrow* (cited in note 105) at 1103.

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

¹⁹³ We are speaking here of the situation existing before the enactment of section 35 of the *Constitution Act, 1982*, which curtailed the powers of Parliament.

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

194 *Province of Ontario v. Dominion of Canada*, [1912] A.C. 571, at 581. The judgement of the Court was delivered by Earl Loreburn.

195 See discussion and references in Roberts-Wray, *Commonwealth and Colonial Law* (cited in note 157).

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:

196 See W.P.M. Kennedy, *Statutes, Treaties and Documents of the Canadian Constitution, 1713-1929*, 2nd ed. (Toronto: Oxford University Press, 1930), p. 7.

197 See the text of the Royal Proclamation in Volume 1, Appendix D, and our discussion in Volume 1, Chapter 3.

198 *Constitutional Act, 1791* (U.K.) 31 Geo. III, c. 31, s. 2; text in Kennedy, *Statutes, Treaties and Documents* (cited in note 196).

199 *Union Act, 1840* (U.K.) 3 & 4 Vict., c. 35, s. 3; text in Kennedy, *Statutes, Treaties and Documents*, pp. 433-434.

200 *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] 2 All Eng. L. R. 118 at 125.

201 *An Act Respecting the Management of the Indian Lands and Property*, S. Prov. C., 1860, c. 151.

*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:

202 *An Act Providing for the Organisation of the Department of the Secretary of State of Canada, and for the Management of Indian and Ordinance Lands*, S.C. 1868, 31 Vict., c. 42.

203 Compare section 51 of the *Indian Act*, R.S.C. 1927, c. 98, with section 39 of the *Indian Act*, S.C. 1951, c. 29.

204 For discussion, see Richard H. Bartlett, *The Indian Act of Canada*, 2nd ed. (Saskatoon: University of Saskatchewan Native Law Centre, 1988).

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.

²⁰⁵ *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act, 31st Victoria, Chapter 42, S.C. 1869, 32-33 Vict., c. 6.* See also John Giokas, "The Indian Act: Evolution, Overview and Options for Amendment and Transition", research study prepared for RCAP (1995).

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

206 Rosie Mosquito and Konrad Sioui, *To the Source: First Nations Circle on the Constitution. Commissioners' Report* (Ottawa: Assembly of First Nations, 1992), p. 21.

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.

207 For a parallel approach, see Slattery, "First Nations and the Constitution" (cited in note 105) at pp. 282-287. For a different view, see Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95.

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

208 In *Re Term "Indians"*, [1939] S.C.R. 104, the Supreme Court of Canada ruled that section 91(24) applied to the Inuit (or "Eskimo") peoples. The Supreme Court has not yet decided whether the section also covers Métis people. A leading constitutional authority, Peter Hogg, offers the view that Métis people are probably included within the section; see Hogg, *Constitutional Law of Canada*, 3rd ed. (cited in note 132). For background and discussion, see Catherine Bell, "Who Are The Metis People in Section 35(2)?" (1991) 29 Alta. L. Rev.; Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the B.N.A. Act" (1978-79) 43 Sask. Law Rev.; Paul L.A.H. Chartrand, "Aboriginal Rights: The Dispossession of the Métis" (1991) 29 Osgoode Hall L.J. 457; Chartrand, *Manitoba's Métis Settlement Scheme* (cited in note 162); Richard I. Hardy, "Metis Rights in the Mackenzie River District of the Northwest Territories" (1980) 1 C.N.L.R. 1; Cumming and Mickenberg, *Native Rights in Canada* (cited in note 137), pp. 6-9, 200-204; William F. Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982* (Saskatoon: University of Saskatchewan Native Law Centre, 1987), chapter 4; Schwartz, *First Principles, Second Thoughts* (cited in note 166) pp. 213-247; and Woodward, *Native Law* (cited in note 137), pp. 53-59.

209 Slattery, "First Nations and the Constitution" (cited in note 105), p. 282, quoting *R. v. Sparrow* (cited in note 105), p. 1109, where the Supreme Court stated: "We find that the words 'recognition and affirmation' [in s. 35(1)] incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1)."

210 See *Sparrow* at 1113-1114. The Supreme Court held that the alternative proposed justifications of reasonableness and "in the public interest" were not sufficiently stringent; see pp. 1113, 1118-1119.

211 For discussion of these principles, see, for example, Hogg, *Constitutional Law of Canada* (cited in note 132), and Slattery, "Understanding Aboriginal Rights" (cited in note 127).

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

212 See, respectively, *Four B Manufacturing Limited v. United Garment Workers*, [1980] 1 R.C.S. 1031; *R. v. Hill* (1907), 15 O.L.R. 406 (Ont. C.A.); and *R. v. Francis*, [1988] 1 S.C.R. 1025.

213 As discussed earlier (see note 105), it has not yet been decided whether the *Sparrow* exception applies to provincial laws.

- 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

²¹⁴ Parliament holds the general power to regulate both coastal and inland fisheries under section 91(12), Constitution Act, 1867. For discussion, see Hogg, *Constitutional Law of Canada* (cited in note 132), pp. 723-727.

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:

215 *Draft Legal Text* (cited in note 188), 9 October 1992, s. 29.

*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

216 *The Dismantling of the Department of Indian Affairs and Northern Development, the Restoration of Jurisdictions to First Nations Peoples in Manitoba and Recognition of First Nations Governments in Manitoba, Framework Agreement*, 7 December 1994.

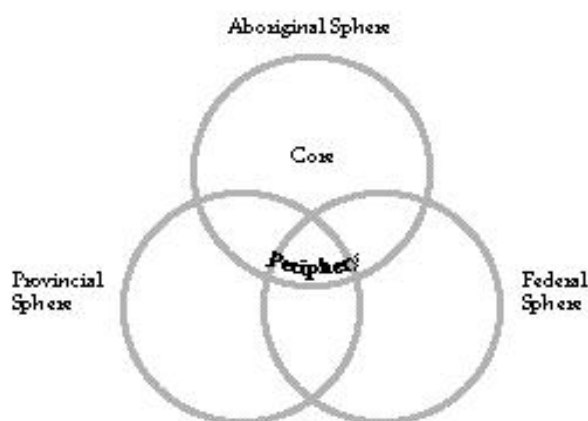
217 Thus, the Manitoba heading 'citizenship' is implicit in the Charlottetown heading 'identities', and the Charlottetown heading 'environment' seems to be covered by the Manitoba heading 'lands, waters'.

218 Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government* (Ottawa: Public Works and Government Services Canada, 1995).

- 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

219 *International Bill of Human Rights* (Universal Declaration of Human Rights) (New York: United Nations, 1978; reprinted Ottawa: Supply and Services, 1980), Article 19.

220 See, generally, Kent McNeil, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms: A Legal Perspective", research study prepared for RCAP (1994).

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:

221 Hogg and Turpel, “Implementing Aboriginal Self-Government” (cited in note 86).

222 See also Slattery, “First Nations and the Constitution” (cited in note 105).

223 Hogg and Turpel, “Implementing Aboriginal Self-Government”, (cited in note 86), p. 418.

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

224 Hogg and Turpel, pp. 418-419.

225 In any case, under section 33(1), notwithstanding clauses may only be passed with respect to section 2 and sections 7 to 15 of the Charter.

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.

226 See Hogg and Turpel, "Implementing Aboriginal Self-Government" (cited in note 86), p. 414 and following.

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).

²²⁷ For a critique of dual citizenship, see the report of the House of Commons Standing Committee on Citizenship and Immigration, "Canadian Citizenship: A Sense of Belonging", Issue No. 23, June 1994

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

²²⁸ Lamothe, "A Historical View of Treaty 11" (cited in note 20), pp. 58-59.

(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

²²⁹ See *R. v. Secretary of State* (cited in note 200).

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.

230 For a discussion, see Thomas Isaac, “The Concept of the Crown and Aboriginal Self-Government” (1994) 14 *Canadian Journal of Native Studies* 221.

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

231 Donald A. Grinde Jr. and Bruce E. Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (Los Angeles: University of California American Indian Studies Center, 1991), p. 29. Grinde and Johansen describe the three basic principles as follows: "The first law of nature was that a stable mind and healthy body must be in balance so that peace between individuals and groups could occur. Secondly, ---humane conduct, thought, and speech were requirements for equity and justice among peoples. Finally, he divined a society in which physical strength and civil authority would reinforce the power of the clan system" (pp. 28-29). See also Paul A.W. Wallace, *The Iroquois Book of Life: White Roots of Peace* (Philadelphia: University of Pennsylvania Press, 1946; Santa Fe, New Mexico: Clear Light Publishers, 1994), pp. 7-8, 30-31, 41.

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

232 We use the term 'Aboriginal public government' to mean leadership and control of a government by Aboriginal people in regions or territories where they constitute a majority of residents. An Aboriginal-controlled government will have many features not found in governments controlled by non-Aboriginal people

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,

233 A more detailed discussion of the Commission's proposed land regime as it pertains to categories of land is found in Chapter 4 (in Part Two of this volume). Three categories of land are identified and discussed. Category I lands are subject to full Aboriginal ownership and sole Aboriginal stewardship. Category II lands encompass parts of the nation's traditional territories and are subject to Aboriginal and Crown rights to be specified in agreements. Governance and jurisdiction on Category II lands would be shared by the agreement partners. Category III lands include Crown and private lands that sustain a complete set of Crown rights in land and governance, although some Aboriginal rights may be recognized, especially concerning spiritual and historical relationships with the land.

- 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.

²³⁴ Judicial structures and processes in matters of criminal law are the subject of more detailed investigation and recommendations in RCAP, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services, 1996).
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).

235 The *Nunavut Act* (cited in note 78) assigns the Nunavut government legislative authority for municipal and local institutions in Nunavut.

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.

236 An example of government based on subsidiarity is the European Union.

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

²³⁷ See RCAP, *Bridging the Cultural Divide* (cited in note 234), especially the discussion of Aboriginal Legal Services of Toronto in Chapter 3.

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 itThe 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 Raotiohkwa 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

238 These principles are drawn, in part, from the general academic literature on public finance and fiscal federalism. See Vicky Barham and Robin Boadway, “Financing Aboriginal Self-Government”, research study prepared for RCAP (1995).

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

239 The exception is property taxes for separate schools in Ontario and in certain areas of Quebec which are levied on the basis of residency and religion

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

240 The subsidies contained an element of equalization, in that they were per capita grants up to a maximum population. For an overview of equalization in Canada, see Thomas J. Courchene, "Equalization Payments and the Division of Powers", in Thomas J. Courchene, *Economic Management and the Division of Powers*, Volume 67 of *The Collected Research Studies (Royal Commission on the Economic Union and Development Prospects for Canada)* (Toronto: University of Toronto Press, 1986).

241 *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, Volume 3 (Ottawa: Supply and Services, 1985).

242 Section 119 of the *Constitution Act, 1867*.

243 *Constitution Amendment Proclamation, 1993 (Prince Edward Island)*.

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.

Chief Clarence T. Jules
Kamloops First Nation
Ottawa, Ontario, 5 November 1993

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

244 Status Indian people living on-reserve and whose income is earned from activity on-reserve are the only individuals whose personal income is sheltered from taxation. All other Aboriginal people pay personal income taxes in the same manner as other Canadians. Purchases made by status Indian people on-reserve are free of federal and provincial sales tax. In some provinces, purchases made off-reserve are free of provincial sales tax with proof that the buyer is a status Indian person. Federal sales tax on goods purchased off-reserve is waived for status Indian people when the goods purchased are to be delivered to the reserve.

245 Tax exemption is referred to in the text of at least one of the historical treaties and was the subject of oral exchanges during the negotiation of others. In Chapter 2 of this volume we propose that issues of taxation be clarified in the treaty renewal and treaty-making processes.

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.

246 This point was made forcefully presented to the Commission during its public hearings in Merritt, B.C. on 5 November 1992. The brief of the Musqueam/Salish Parks Residents' Association, submitted to RCAP on 5 October 1992 in Vancouver, states on p. 7:

The non-native leaseholders on Reserve land have been disenfranchised. We are taxed without representation! Needless to say, we do not elect members of the Band Council nor can we be elected to the Band Council. We believe that the principle of no taxation without representation is fundamental in a democratic system of government. [emphasis in original]

247 *Sechelt Indian Government District Enabling Act*, S.B.C. 1987, c. 16; see also John P. Taylor and Gary Paget, "Federal/Provincial Responsibility and the Sechelt", in David C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989).

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,

248 Established Programs Financing and the Canada Assistance Plan have been replaced by a single, unconditional block-funding arrangement called the Canada Health and Social Transfer (CHST). See the *Budget Implementation Act*, S.C. 1995, chapter 17, section V.

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

249 For further information, see *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, Volume 3 (cited in note 241).

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

250 The recommendations of the Rowell-Sirois Commission first proposed that a series of national adjustment grants be instituted, incorporating the expenditure or fiscal needs of the provinces. See *Royal Commission on Dominion-Provincial Relations, Report of the Royal Commission on Dominion-Provincial Relations, Book II: Recommendations* (Ottawa: Queen’s Printer, 1940), pp. 125-130.

251 However, the federal government’s payments under the Canada Assistance Plan were later capped for the ‘have’ provinces: Ontario, British Columbia and Alberta.

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

252 The proportion of total revenues that takes the form of federal government grants varies considerably from province to province. British Columbia receives only about 11 per cent of its revenues in this form, as compared with 44 per cent received by Newfoundland (1992-1993 data). These data are found in Robin Boadway and Frank Flatters, "Fiscal Federalism: Is the System in Crisis?", in Keith G. Banting, Douglas M. Brown and Thomas J. Courchene, ed., *The Future of Fiscal Federalism* (Kingston: Queen's University School of Policy Studies, 1994).

253 In specific claims settlements, compensation or restitution is given as a result of the Crown's failure to honour, in whole or in part, the terms of an original agreement, often a treaty, or as a result of wrongdoing (as in fraud or expropriation without adequate compensation) that has occurred in the intervening period. This includes lands expropriated for rail and highway rights of way, military bases and weapons ranges, or other public purposes.

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

254 This distinction between direct and indirect sources of funding is significant in the treatment of transfers from other orders of government. When transfers include formulas for calculating the fiscal capacity of a recipient government, only direct sources of funding would be considered as a potential own-source.

255 The comprehensive claims process was first instituted in the 1970s and relates to land claims made by Aboriginal peoples on the basis of unextinguished Aboriginal title, rather than specific treaty agreements. Treaty land entitlements refer to lands promised to First Nations at the time of treaty, but to which the full entitlement was never granted. See Chapter 4 (in Part Two of this volume) for a fuller treatment of these processes.

256 Perhaps the most well-developed and comprehensive fiscal arrangement for Aboriginal government to date is that contained in the Quebec government's December 1994 offer for the comprehensive land claims of the Atikamekw and Montagnais Nation. Title V on financial provisions contains chapter 14 on funding autonomous governments, and chapter 15 on compensation, covering articles 89 to 103 of the offer. It addresses the underlying principles of taxation within the Aboriginal territories; shared resource management and resource revenues (including guaranteed revenue-sharing payments); transfer income and compensation.

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,

²⁵⁷ The Atlantic Accord, memorandum of agreement between the Government of Canada and the Government of Newfoundland and Labrador on offshore oil and gas resource management and revenue sharing, 11 February 1985.

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

258 This analysis is drawn from Carolyn Dittburner and Allan M. Maslove, "Making Finance Fit: Funding Arrangements for Aboriginal Governments", research study prepared for RCAP (1994).

259 For an elaboration of the challenges faced by Aboriginal governments seeking to implement such approaches to self-government, see Alexandra Macqueen, "Current Practice in Financing Aboriginal Governments: An Overview of Three Case Studies", research study prepared for RCAP (1995).

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.

²⁶⁰ Corporate income tax, too, is collected largely by the federal government. Only three of the larger provinces are in a position to realize economies of scale æ Ontario, Quebec and Alberta æ and have established their own collection systems for corporate taxes.

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.

²⁶¹ R.S.C. 1985, c. F-8. The framework is being replaced by the Canada Health and Social Transfer, the elements of which are set out in the *Budget Implementation Act* (cited in note 248).

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

262 Mary Ellen Turpel, "Enhancing Integrity in Aboriginal Government: Ethics and Accountability for Good Governance", research study prepared for RCAP (1995).

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:

263 Kwakiutl District Council æ Musgamagw Tsawataineuk Tribal Council, "Kwakiutl Governance: Negotiating Mutual Beneficial Accommodations Through a Treaty Process", brief submitted to RCAP (1993).

- 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

264 Bear Robe, "Basis for Siksika Nation Governance" (cited in note 69), pp. 39-40.

265 Knockwood, "Case Study on Self-Governance" (cited in note 72).

266 Kwakiutl District Council, "Kwakiutl Governance" (cited in note 263), p. 22.

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 authoritySabotaging community processes for gathering

267 Leslie A. Brown, “Community and the Administration of Aboriginal Governments”, research study prepared for RCAP (1994).

268 Knockwood, “Case Study on Self-Governance” (cited in note 72).

*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.

269 Brown, "Community and the Administration of Aboriginal Governments" (cited in note 267). The study Brown refers to is David M. Smith, "The Dynamics of a Dene Struggle for Self-Determination", *Anthropologica* 34/1 (1992), pp. 21-49.

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.

270 Cree Trappers Association's Committee of Chisasibi, *Cree Trappers Speak* (Chisasibi, Quebec: James Bay Cree Cultural Education Centre, 1989), p. 14.

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

271 For a review of the effects of *Indian Act* governance on First Nations accountability systems and the emergent case law on duties and responsibilities of chiefs and councillors, see Turpel, "Enhancing Integrity in Aboriginal Government" (cited in note 262).

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

272 See, for example, Alfred, "The Meaning of Self-Government in Kahnawake" (cited in note 5); also, Brown, "Community and the Administration of Aboriginal Governments" (cited in note 267).

273 Union of Ontario Indians, "Anishinabek Traditional Governing" (cited in note 17), p. 39

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.

274 Turpel, "Enhancing Integrity in Aboriginal Government" (cited in note 262).

275 A copy of this law is included in Turpel, "Enhancing Integrity", Appendix A: Navajo Nation Ethics in Government Law.

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 Métis 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

276 See G. Bruce Doern, “The Politics of Slow Progress: Federal Aboriginal Policy Processes”, research study prepared for RCAP (1994); Edgar J. Dosman, *The National Interest: The Politics of Northern Development 1968-75* (Toronto: McClelland and Stewart, 1975); Gordon Robertson, “Administration for Development in Northern Canada: The Growth and Evolution of Government”, *Canadian Public Administration* 3/4 (1960), pp. 354-362; Augie Fleras and Jean Leonard Elliott, *The ‘Nations Within’: Aboriginal-State Relations in Canada, the United States and New Zealand* (Toronto: Oxford University Press, 1992); Frances Abele and E. J. Dosman, “Interdepartmental Coordination and Northern Development”, *Canadian Public Administration* 24/3 (1981), pp. 428-451; Katherine Graham, “Indian Policy and the Tories: Cleaning Up After the Buffalo Jump”, in Michael J. Prince, ed., *How Ottawa Spends 1987-88: Restraining the State* (Toronto: Methuen, 1987); Frances Abele and Katherine A. Graham, “Plus Que Ça Change---Northern and Native Policy”, in Katherine A. Graham, ed., *How Ottawa Spends 1988-89: The Conservatives Heading Into the Stretch* (Ottawa: Carleton University Press, 1988), pp. 113-138; and Richard Paton, “New Policies and Old Organizations: Can Indian Affairs Change?”, Centre for Policy and Program Assessment, Carleton University, 1982.

277 Harold Cardinal, *The Rebirth of Canada’s Indians* (Edmonton: Hurtig, 1977); Harold Cardinal, “Canadian Indians and the Federal Government”, *The Western Canadian Journal of Anthropology* 1/1 (1969), p. 90; George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Toronto: Collier-MacMillan, 1974); J. Rick Ponting, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986); and Cassidy and Bish, *Indian Government: Its Meaning in Practice* (cited in note 182).

278 Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-70* (Toronto: University of Toronto Press, 1981).

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?

279 Graham, "Indian Policy and the Tories" (cited in note 276).

280 An illustrative contrast is the way environmental activism by citizens whether middle of the road or extra-parliamentary and public opinion data highlighting Canadians' views about the importance of environmental protection have strengthened the hand of several ministers of the environment. In contrast, DIAND has been buffeted by dramatic reversals in federal policy signals, usually responding to rather than initiating these changes. To cite just one example, in 1966, the department released the Hawthorn report, the results of an independent study and Canada-wide consultation, which recommended recognition that treaty Indians had all citizen rights and an additional set of rights arising from the treaties. Just three years later, in 1969, the federal cabinet released a white paper that appeared to relegate treaty rights to the dustbin of history in favour of a campaign of aggressively promoting the full assimilation of Aboriginal people into the mainstream of Canadian society. The subsequent uproar and the Supreme Court decision in *Calder* led to the complete reversal of this approach just four years later, when the federal cabinet announced its willingness to negotiate 'modern treaties' with nations that had not yet negotiated treaties.

281 John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy", *Western Canadian Journal of Anthropology* 6/2 (1976), pp. 13-30. See also Chapter 2 in this volume.

282 In the context of these criticisms, current DIAND initiatives can perhaps be seen more positively. Such initiatives include the Manitoba initiative, an effort to develop a federal policy on the inherent right of self-government, and overtures to First Nations chiefs concerning revisions to the *Indian Act*. From the standpoint of the Commission's deliberations, however, the jury is still out on these initiatives.

- 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.

283 The practices of the maturing territorial governments and national Aboriginal organizations, as analyzed in Doern, "The Politics of Slow Progress" (cited in note 276), are instructive on this point.

284 It is important to distinguish between a ministry of state and a minister of state. Ministries of state are administrative organizations, generally without significant operational or spending powers. There are no ministries of state in the current organization of the government of Canada. Ministers of state, technically referred to as secretaries of state, are assigned specific responsibilities to support ministers in cabinet. Secretaries of state are not cabinet members. There are currently nine secretaries of state: Multiculturalism; Status of Women; Parliamentary Affairs; Training and Youth; Veterans; Latin America and Africa; Asia-Pacific; Science, Research and Development; and International Financial Institutions.

285 Lionel D. Feldman and Katherine A. Graham, *Bargaining for Cities: Municipalities and Intergovernmental Relations An Assessment* (Montreal: Institute for Research on Public Policy, 1979), Chapter 3.

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

286 Doern (cited in note 276) indicates that consideration was given in 1989 and 1992 to turning Industry Canada’s Aboriginal business branch into a special operating agency. During the 1993 reorganization, some within government proposed separating the policy and service delivery responsibilities of the department. The idea was rejected in 1993 because of the extreme sensitivity of any changes in this policy field and the recognition that changes could no longer be made unilaterally.

287 David Osbourne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Reading, Mass.: Addison-Wesley, 1992); and Susan D. Phillips, “How Ottawa Blends: Shifting Government Relationships with Interest Groups”, in Frances Abele, ed., *How Ottawa Spends: The Politics of Fragmentation 1991-92* (Ottawa: Carleton University Press, 1991).

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;

²⁸⁸ The Commission's fundamental recommendations regarding Aboriginal governance require a shift in federal perspective away from highly conditional funding arrangements to a much more varied fiscal framework. The Commission itself will have provided a major conceptual foundation for this review through the work of Dittburner and Maslove, "Making Finance Fit" (cited in note 258), and Douglas Brown and Jonathan Rose, "Exercising Aboriginal Self-Government: The Intergovernmental Transition", research study prepared for RCAP (1995). A major task remains, however. The federal government must refine the Commission's conceptualization of the government-to-government fiscal relationship, partly on the basis of more sophisticated data on federal spending related to Aboriginal people than the Commission was able to obtain.

In addition, the Commission's recommendations imply a need for the federal government to assess the full level of funding related to Aboriginal affairs and to evaluate the allocation of funds among its various responsibilities and initiatives. Consideration of the level of federal support for initiatives such as the proposed treaty commissions and the centre for research and policy on Aboriginal economic development would fall into this category

- 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

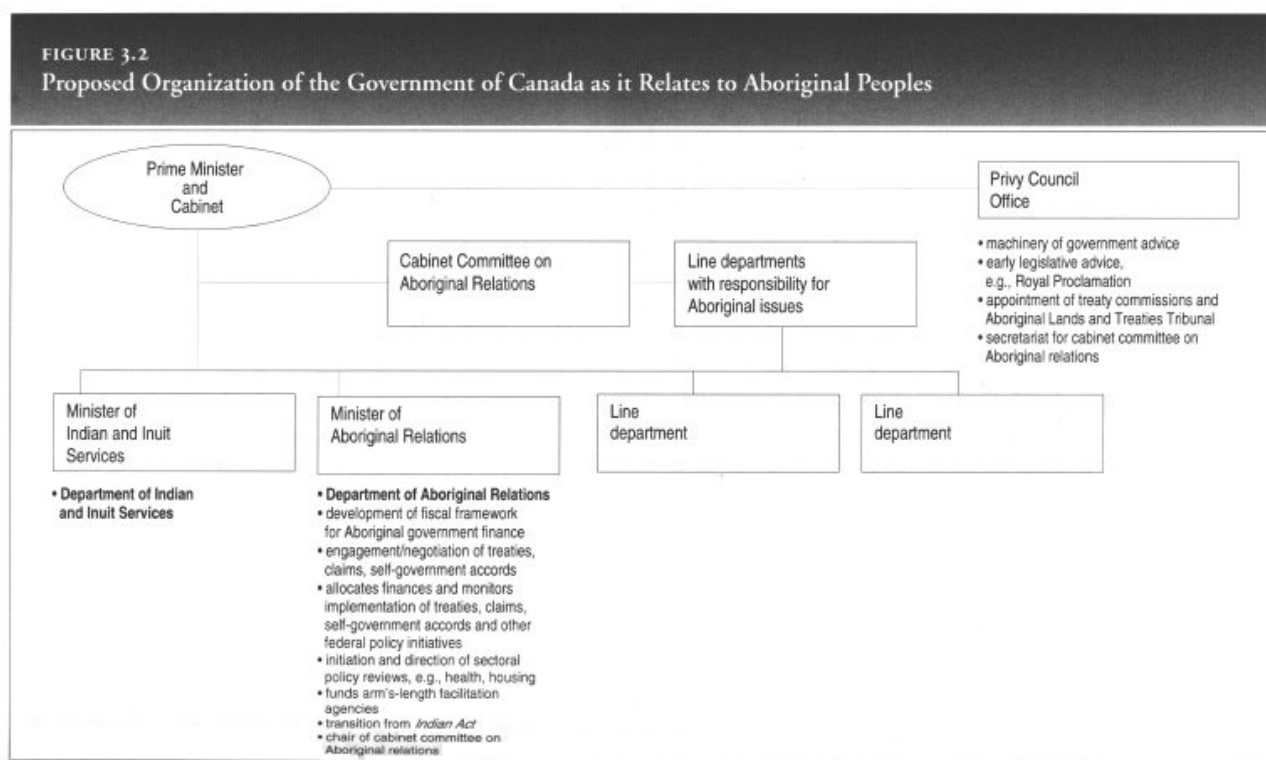
The proposed cabinet structure reflects the important lessons from past government organizations, the different requirements for centralized and more decentralized executive action, and the realities of the operational milieu for implementing the Commission's recommendations. Figure 3.2 indicates five 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 coordinate 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.

289 For further discussion of past policy and the corporate culture of DIAND, see Doern, "The Politics of Slow Progress"; Abele and Graham, "Plus Que Ça Change"; and Paton, "New Policies and Old Organizations" (all cited in note 276).

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

290 See, for example, Knockwood, "Case Study on Self-Governance" (cited in note 72).

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

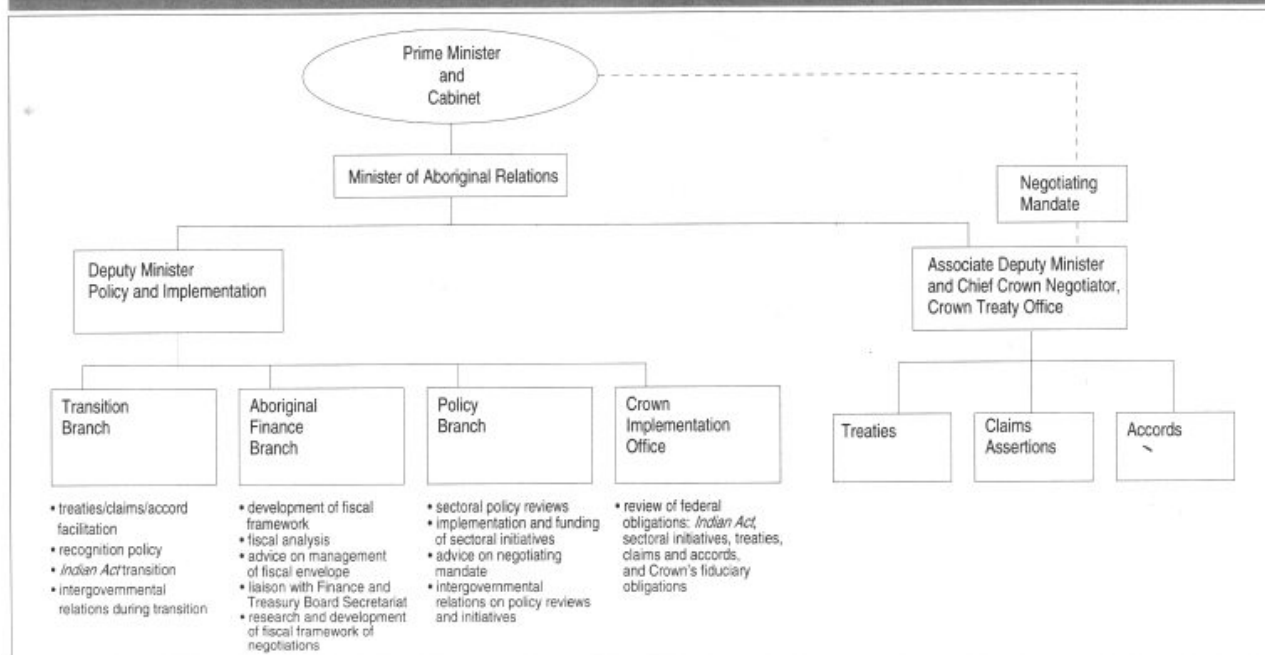
291 Aboriginal people have long seen the need for this. Commentaries on the history of Aboriginal/Canada relations since the early 1960s have shown, however, that occasions that Aboriginal people thought were for joint planning were viewed by government officials as lobbying sessions. This inconsistency in expectations contributed to Aboriginal peoples' distrust of Canadian governments and to a souring of relations. See, for example, Weaver, *Making Canadian Indian Policy* (cited in note 278); and Katherine A. Graham, Carolyn Dittburner and Frances Abele, *Soliloquy and Dialogue: The Evaluation of Public Policy Discourse on Aboriginal Issues Since the Hawthorn Report*, volume 1 of RCAP, *Public Policy and Aboriginal Peoples, 1965-1992* (Ottawa: Supply and Services, forthcoming).

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

FIGURE 3.3
Department of Aboriginal Relations: Proposed Structure



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

292 Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, Volume 2 (Ottawa: Supply and Services, 1991). See, in particular, the report to the Royal Commission on Electoral Reform and Party Financing by the Committee for Aboriginal Electoral Reform, “The Path to Electoral Equality”, 1991. All five members of the committee were Aboriginal persons and either sitting or former members of Parliament.

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

293 For a general review, see Robert A. Milen, “Aboriginal Constitutional and Electoral Reform”, in Robert A. Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada*, Volume 9 of the Research Studies of the Royal Commission on Electoral Reform and Party Financing (Toronto: Dundurn Press, 1991).

294 Based on data in Robert A. Milen, “Canadian Representation and Aboriginal Peoples: A Survey of the Issues”, research study prepared for RCAP (1994).

295 See Chapter 5 on implementing Aboriginal constituencies in Volume 2 of *Reforming Electoral Democracy* (cited in note 292).

296 Augie Fleras, “Aboriginal Electoral Districts for Canada: Lessons from New Zealand”, in Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada* (cited in note 293).

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

297 First Ministers Meeting on the Constitution, *Consensus Report on the Constitution* (cited in note 188), section 22, p. 8.

298 First Ministers Meeting on the Constitution, *Consensus Report on the Constitution*, section 9, p. 4.

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

299 For a fuller description of the Saami parliaments, see David C. Hawkes and Bradford W. Morse, “Alternative Methods for Aboriginal Participation in Processes of Constitutional Reform”, in Ronald L. Watts and Douglas M. Brown, ed., *Options for a New Canada* (Toronto: University of Toronto Press, 1991).

300 Peter Jull, “A Thousand Years: Indigenous Peoples and Northern Europeans”, research study prepared for RCAP (1994).

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.

Appendix 3A: Existing Financial Arrangements for Aboriginal Governments and Regional and Territorial Governments

Indian Band Government

Until at least the 1950s, the federal government, through the department of Indian affairs (DIAND), was directly responsible for providing the vast majority of services to on-reserve Indians. Since that time, band governments have come to assume more and more responsibility for delivering and administering these services themselves. The financial arrangements currently in place to support these activities fall into three programs of transfers from DIAND: contribution arrangements, comprehensive funding arrangements, and alternative funding arrangements.

Contribution Arrangements

Contribution arrangements are used to fund programs or projects requiring significant interaction between DIAND and the recipient government, such as major capital projects. Contributions involve substantial terms and conditions that stipulate matters such as the service to be provided, to whom, and what expenses are eligible for reimbursement. Any amount left unspent is to be returned to the federal government.

Comprehensive Funding Arrangements

Sixty-five per cent of all funds currently transferred by the department to Indian Act governments are realized through the comprehensive funding arrangements (CFA) program, a mix of contributions, lump sum grant funding, and flexible transfer payments.¹

Contributions

Contributions are open-ended financing arrangements in which DIAND undertakes to finance all eligible expenditures associated with the provision of particular services to band members. For these designated services, DIAND retains all control over program design and the allocation of funds, while band governments are responsible for administering the services and reporting regularly to the federal government. Before the establishment of the broader CFA program (which includes a mix of transfers), contribution agreements were the primary instrument for financing band government activities. Now, as part of the CFA program, contribution agreements fund only those services involving a high level of technical complexity or a high level of risk, such as in the case of social assistance programs. In this case, a manual specifies eligibility requirements and benefit schedules that must be complied with in order for payments made by the Indian band to be eligible for reimbursement.

1 Department of Indian Affairs and Northern Development, “DIAND’s Evolution from Direct Service Delivery to a Funding Agency”, background paper prepared for RCAP (1993), p. 13. Note that an additional 13 per cent of funding for band governments is realized through contribution agreements that have been established outside the CFA framework.

Grants

The grant portion of the CFA program is specifically earmarked for financing the institutions of band government and their administration. This is an unconditional grant, with no specific terms or conditions attached to it.

Flexible transfer payments

Flexible transfer payments (FTP) are special transfer payments that were introduced as an alternative to contribution agreements, providing for increased flexibility in the form of more autonomy for band governments to determine the means of delivering specified services. When any savings are realized through these alternative means, band governments are free to spend the surpluses generated in any manner they see fit. This limited autonomy allowed under FTP, however, is traded off against more onerous reporting requirements compared to contribution agreements.

Alternative Funding Arrangements

A lot of times our funds are earmarked already. We are told, 'This is for child initiatives; this is for this; this is for that.' In our community we know our needs are a lot different from what has been told to us. We need to be able to have a say, as a community, where we want to have those dollars go.

Chief Agnes Snow
Canoe Creek Indian Band
Kamloops, British Columbia, 15 June 1993

The most recent approach to financing *Indian Act* governments is the alternative funding arrangements (AFA) program. It was established in 1986 as an alternative to the CFA program and now accounts for 20 per cent of all funding transferred to band governments from DIAND.² Similar in nature to the FTP scheme, but generally on a multi-year basis, the AFA program provides for more autonomy for band governments regarding the allocation of funds for different uses. In practice, a band government will negotiate with the department what is essentially a conditional grant for the provision of particular services. Once those funds are transferred, however, band governments have the authority to redesign programs and to reallocate funds between various programs and projects.

Sechelt Indian Band Self-Government

The legal framework for the fiscal arrangements for the Sechelt band is provided by federal legislation (the *Sechelt Indian Band Self-Government Act*) and provincial law (the *Sechelt Indian Government District Enabling Act*). The latter gives Sechelt, and the 33 reserves it contains, legal status as a municipality.

The federal legislation effectively replaced most of the elements of the *Indian Act* for the Sechelt band. The Sechelt band, as a legal entity, can thus enter into contracts, acquire property and borrow funds and has been given fee simple title to all its reserve lands. It is responsible for providing public services in the areas of education, health, testate or intestate succession, public order and safety, and social and welfare services.

2 DIAND, "DIAND's Evolution".

Perhaps the most important point concerning the fiscal arrangements is the power given to the Sechelt band in the federal law for “taxation, for local purposes, of interests in Sechelt lands, and of occupants and tenants of Sechelt lands in respect of their interests in those lands”. Thus the Sechelt band has taxation authority over both Aboriginal and non-Aboriginal residents. This is significant, because roughly 50 per cent of the residents on Sechelt lands are non-Aboriginal.

Section 32 of the federal legislation also allows for moneys held by the government of Canada for the Sechelt band (as the band existed under the *Indian Act*) to be transferred to the band. Five-year agreements establish a base level of funding that is indexed to the Consumer Price Index and to growth in the on-reserve status population and is conditional upon providing existing standards of specified public services. These services include the operation of band-owned schools and the provision of education support services, social services such as shelters and special needs, job creation and economic development. Capital expenditures include transfers to the Sechelt Indian Band Housing Program, construction and improvement of roads and bridges, purchase of machinery, equipment and lands for use by the Sechelt band, and payments to local school districts for Sechelt’s negotiated share of capital construction.

DIAND expenditures in 1984-1985 for the Sechelt band served as the initial basis for the transfer payments to the band under the original five-year funding agreement (1986-1991). A new funding agreement was signed in 1991 covering the next five-year period. This new agreement gives the band a single lump-sum grant at the beginning of the fiscal year, with annual adjustments made to reflect the rate of inflation and changes in the band’s population. The funding now allows the range of services to be extended to include the provision of nursing services, health and medical supplies, and it includes the funds that had been allocated to the band under the Canadian Aboriginal Economic Development Strategy. The arrangement eliminates the need for separate contribution agreements to be reached between the band and the various departments of the federal government that would normally provide services to Sechelt residents.

Regional Governments

Kativik Regional Government

The Kativik Regional Government (KRG) is recognized as a municipal corporation by the *Act Concerning Northern Villages and the Kativik Regional Government*, which also provides the legal framework for the fiscal arrangements between Kativik and the Quebec government. Although KRG has the legal authority to levy taxes within its territory, and has entered into tax-sharing agreements with Canada and Quebec, KRG leaves many of the tax fields open entirely for the 14 municipalities that make up the region. Quebec’s Bill 23 (1978) gives municipalities within the Nunavik region the power to levy municipal-type taxes (a portion of which is paid to KRG), as well as raising revenues through issuing licences or permits and charging fees for services and rentals. Each municipality, however, must submit its budget proposals to KRG, which, in turn, must have its global budget approved by the Quebec department of municipal affairs. KRG also has a resource revenue sharing agreement and has the authority to borrow funds.

The bulk of the funding for KRG comes in the form of conditional grants from a large number of federal and provincial government departments. The amount of these grants must be negotiated each year with each department that has entered into a contractual agreement with KRG. These contracts are usually for periods of three years. For example, the recent contract signed between the Quebec department of public security and KRG for locally controlled police services is for a

duration of three years, but the annual transfer amounts from the department to KRG to finance these services must be renegotiated each year. Therefore, KRG is subject to the funds made available to the department by the Quebec cabinet. This approach is time-consuming and expensive.

Cree-Naskapi

The *Cree-Naskapi (of Quebec) Act* applies to the Naskapi band of Quebec and eight Quebec Cree bands. This act gives the bands local by-law powers that translate into authority to levy taxes (other than income taxes) and to charge fees for licences or services. The bands control their own capital and revenue funds, although the minister of Indian affairs is entitled to inspect all band accounts, financial records and auditor's reports. The bands may also borrow moneys through a by-law that specifies the amount to be borrowed, its purpose, and the manner and terms of repayment.

The fiscal arrangement between the federal government and the Cree-Naskapi takes the form of cash grants with few conditions attached. Annual funding is determined by adjustments to the DIAND funding base for the 1984-1985 fiscal year, with subsequent adjustments made for changes in population, inflation, uncontrollable major cost components in northern isolated communities (for example, fuel, transportation and utility costs), additions to housing and local infrastructure, reinstatements of band members, as well as any special needs that may arise from time to time. Funds are allocated to the individual bands based on proportional distribution and subject to a few negotiated factors. Seventy-five per cent of the grant is paid at the beginning of the fiscal year, with the remainder paid once certain conditions regarding accountability have been met.

Territorial Government

Yukon Territorial Government

A similar model is found in the *Yukon Territorial Government Formula Financing Agreement*. This model is an alternative to the formula used to calculate equalization payments from the federal government to the provinces, but is based on the equalization principles set out in section 36 of the *Constitution Act, 1982*. It is based on historical estimates of spending for the provision of "reasonably comparable levels of public services" to those in other provinces and territories of Canada. This base, referred to as the gross expenditure base (GEB) is then adjusted to reflect population and inflation changes.

GEB is calculated on a per capita basis which, for 1991, was estimated at approximately \$13,000. This represents the maximum transfer, or ceiling, available from the federal government. However, all other revenues available to the Yukon government are deducted from GEB. These revenues include payments under various shared-cost programs, such as the former Established Programs Financing and the Canada Assistance Plan; and recoveries from various programs and agreements such as DIAND's family and children's services and hospital and medical care programs, the economic development agreement, and the Inuvialuit Final Agreement, for example. Also deducted from the expenditure base are the own-source revenues available to the Yukon government, such as tax revenues (for example, income tax, school and property tax, as well as taxes on fuel oil, tobacco, liquor and insurance premiums), investment income, licences, fees and permits, and fines. The difference between GEB and the revenues available to the government is the amount of the formula financing transfer payment.

The main advantage of this approach is its flexibility, which would make it attractive to Aboriginal nation governments that do not yet enjoy a level of economic development that would allow for a significant tax base, as well as those that require a period to catch up. The tax effort of the Aboriginal government would have to be factored into the formula, as is the case for the method of calculating equalization for provinces. This would likely be done by assuming that the Aboriginal government is levying taxes, where it has authority to do so, at the national average rate.³ Without such a factor, a decision by a government not to tax in an area in which it has authority to do so would result in an increased transfer from the federal government. To be consistent with the broad principles of equalization, and to prevent the creation of tax havens, it should be the Aboriginal government that bears the fiscal consequences of such a decision.

Analysis

By far the most serious critique of financial arrangements associated with the *Indian Act*-style governing relationship is the excessive costs of negotiation and administration associated with such a relationship. DIAND, for example, expends a portion of its budget advising on and monitoring services that are devolved to band governments, in addition to its responsibilities for managing program design and providing funding for the services themselves. Band governments, for their part, are subject to excessive and complex accountability requirements, which draw significantly on the time and other resources available for actually delivering the services. We should note that many improvements have been made in the past decade regarding these accountability requirements, notably with the introduction of the AFA program. However, these accountability provisions, and the related costs of administration, typically still exceed those associated with transfers received by provincial and even municipal governments.

A related and equally important critique of the DIAND band government relationship stems from the fact that the size of transfers under either CFA or AFA is determined in separate negotiations between the federal government and individual band governments, rather than through formula-based financing mechanisms that would apply to *all* band governments. This has two important implications, one related to the process of negotiation and the other to equity considerations.

To begin with, each band must allocate scarce resources to a continuing and regularized negotiation process. These negotiations often occur on an annual or ad hoc basis, in contrast to federal/provincial fiscal arrangements, which are renewed regularly every five years. More fundamentally, the prospect of a fair and balanced negotiation process is nearly impossible given the overwhelming imbalance of the parties at the table — small band governments, often representing communities of fewer than a thousand people, with limited own-source revenues and institutional capacity, versus federal negotiators who not only have the administrative resources of an entire federal department to draw upon, but are also the gatekeepers of the federal government's fiscal largesse.

As well, negotiations for transfer levels conducted on a community-by-community basis are not designed to take sufficient account of (1) the resources available to different bands; (2) the varying abilities of band governments in terms of institutions and personnel to administer or deliver programs; or (3) the differences in the costs of service delivery borne by different band governments in providing the same services. By contrast, when the level of fiscal transfers is determined on the basis of a funding formula (or formulae), and these broader arrangements are

3 For a fuller description, see Thomas J. Courchene and Lisa M. Powell, *A First Nations Province* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1992).

negotiated simultaneously by Aboriginal, federal, provincial and territorial governments, the negotiation process is simplified, more cost-effective, and more likely to produce equitable results across Aboriginal nations.

Finally, it should be noted that CFA and AFA programs apply only to service delivery for band members residing on-reserve, as determined by the federal government. In some *Indian Act* communities, this can mean that up to 50 per cent of a nation's members are not properly or adequately funded.

Appendix 3B: A Summary of the Proposal by the Native Council of Canada for a House of the First Peoples

The Native Council of Canada (now the Congress of Aboriginal Peoples) has proposed its vision of a more powerful and constitutionally entrenched House of the First Peoples, which would be a third chamber of Parliament and as such require a constitutional amendment. The proposal, developed in 1992 during the Canada round of constitutional negotiations, described a body of between 75 and 100 representatives.¹ Each nation or people would choose representatives, with adjustments made to acknowledge the influence of provincial and territorial boundaries. The primary function of the House of the First Peoples would be in relation to federal legislation, since it is assumed that Parliament will continue to legislate for Aboriginal peoples, as Aboriginal peoples, under section 91(24) of the Constitution Act, 1867 (“Indians, and Lands reserved for the Indians”), as well as in other areas that will affect them, such as spending power, the environment, and the offshore. This assumption underlies all proposals for a third chamber or an Aboriginal parliament.

The Native Council proposed that the House of First Peoples have the power to veto certain legislation put before it, or that passing such legislation require a double majority of the House of Commons and the House of First Peoples, or that the House of Commons might refer certain legislation to the House of First Peoples for review. The House of First Peoples would be permitted to review or override Parliament initiatives concerning matters that “directly affect areas of exclusive Aboriginal jurisdiction ... or where there is a substantial impact of a particular law on Aboriginal peoples”.²

The Native Council of Canada also saw a role for a third chamber in ratifying constitutional amendments, particularly those affecting the rights and interests of Aboriginal peoples, although it did not see the House of the First Peoples becoming involved in constitutional negotiations and intergovernmental relations.

A number of options were proposed for selection of representatives to the House of the First Peoples:

1. by electoral districts representing all Aboriginal peoples within that district;
2. by electoral districts representing each Aboriginal people (that is, separate representation for First Nations, Inuit and Métis people);
3. through appointment by Aboriginal organizations or Aboriginal governments;
4. through indirect elections in which Aboriginal associations or Aboriginal governments represent each Aboriginal people; or
5. through indirect elections in which an electoral college mechanism is established composed of delegates of each Aboriginal people.

1 Native Council of Canada [Congress of Aboriginal Peoples], “House of the First Peoples”, paper tabled in Working Group II of the Continuing Committee on the Constitution, 31 March-2 April 1992, Canadian Intergovernmental Conference Secretariat document 840-614/015.

2 “House of the First Peoples”, p. 3.

As the proposal noted, the method of selection would have to reflect Aboriginal principles of democracy within their own institutional framework. In many instances representatives would be elected directly, but in a number of nations indirect representation might reflect more accurately traditional Aboriginal ways, in which consensus decision making is favoured over the more adversarial approach of non-Aboriginal Canadian politics.

PART TWO *

A Note About Sources

Among the sources referred to in this report, readers will find mention of testimony given at the Commission's public hearings; briefs and submissions to the Commission; submissions from groups and organizations funded through the Intervener Participation Program; research studies conducted under the auspices of the Commission's research program; reports on the national round tables on Aboriginal issues organized by the Commission; and commentaries, special reports and research studies published by the Commission during its mandate. After the Commission completes its work, this information will be available in various forms from a number of sources.

This report, the published commentaries and special reports, published research studies, round table reports, and other publications released during the Commission's mandate will be available in Canada through local booksellers or by mail from

Canada Communication Group — Publishing

Ottawa, Ontario

K1A 0S9

A CD-ROM will be published following this report. It will contain the report, transcripts of the Commission's hearings and round tables, overviews of the four rounds of hearings, research studies, the round table reports, and the Commission's special reports and commentaries, together with a resource guide for educators. The CD-ROM will be available in libraries across the country through the government's depository services program and for purchase from

Canada Communication Group — Publishing

Ottawa, Ontario

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Briefs and submissions to the Commission, as well as research studies not published in book or CD-ROM form, will be housed in the National Archives of Canada after the Commission completes its work.

A Note About Terminology

The Commission uses the term *Aboriginal people* to refer to the indigenous inhabitants of Canada when we want to refer in a general manner to Inuit and to First Nations and Métis people, without regard to their separate origins and identities.

The term *Aboriginal peoples* refers to organic political and cultural entities that stem historically from the original peoples of North America, not to collections of individuals united by so-called

* 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.

‘racial’ characteristics. The term includes the Indian, Inuit and Métis peoples of Canada (see section 35(2) of the *Constitution Act, 1982*).

Aboriginal people (in the singular) means the individuals belonging to the political and cultural entities known as Aboriginal peoples.

The term *Aboriginal nations* overlaps with the term Aboriginal peoples but also has a more specific usage. The Commission’s use of the term nation is discussed in some detail in Volume 2, Chapter 3, where it is defined as 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.

The Commission distinguishes between local communities and nations. We use terms such as a *First Nation community* and a *Métis community* to refer to a relatively small group of Aboriginal people residing in a single locality and forming part of a larger Aboriginal nation or people. Despite the name, a First Nation community would not normally constitute an Aboriginal nation in the sense just defined. Rather, most (but not all) Aboriginal nations are composed of a number of communities.

Our use of the term *Métis* is consistent with our conception of Aboriginal peoples as described above. We refer to Métis as distinct Aboriginal peoples whose early ancestors were of mixed heritage (First Nations, or Inuit in the case of the Labrador Métis, and European) and who associate themselves with a culture that is distinctly Métis. The more specific term *Métis Nation* is used to refer to Métis people who identify themselves as a nation with historical roots in the Canadian west. Our use of the terms Métis and Métis Nation is discussed in some detail in Volume 4, Chapter 5.

Following accepted practice and as a general rule, the term *Inuit* replaces the term *Eskimo*. As well, the term *First Nation* replaces the term *Indian*. However, where the subject under discussion is a specific historical or contemporary nation, we use the name of that nation (e.g., Mi’kmaq, Dene, Mohawk). Often more than one spelling is considered acceptable for these nations. We try to use the name preferred by particular nations or communities, many of which now use their traditional names. Where necessary, we add the more familiar or generic name in parentheses — for example, Siksika (Blackfoot).

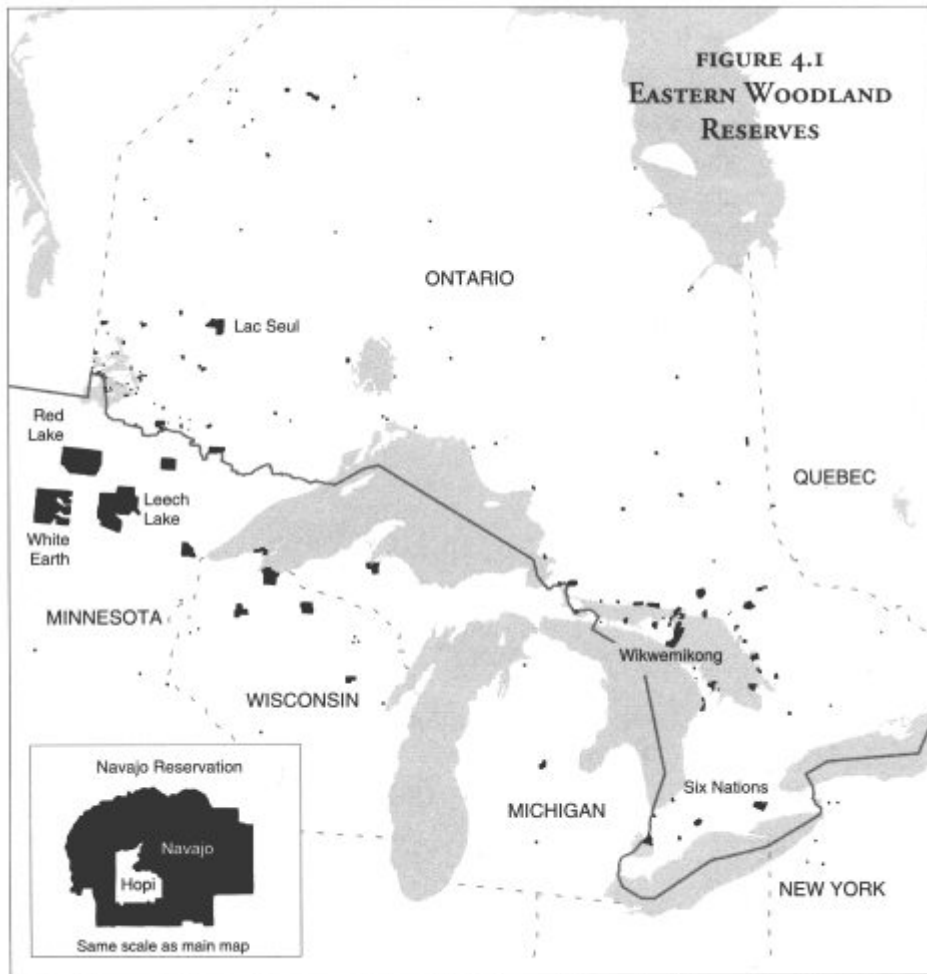
Terms such as Eskimo and Indian continue to be used in at least three contexts:

1. where such terms are used in quotations from other sources;
2. where Indian or Eskimo is the term used in legislation or policy and hence in discussions concerning such legislation or policy (e.g., the Indian Act; the Eskimo Loan Fund); and
3. where the term continues to be used to describe different categories of persons in statistical tables and related discussions, usually involving data from Statistics Canada or the Department of Indian Affairs and Northern Development (e.g., status Indians, registered Indians).

4 - Lands and Resources

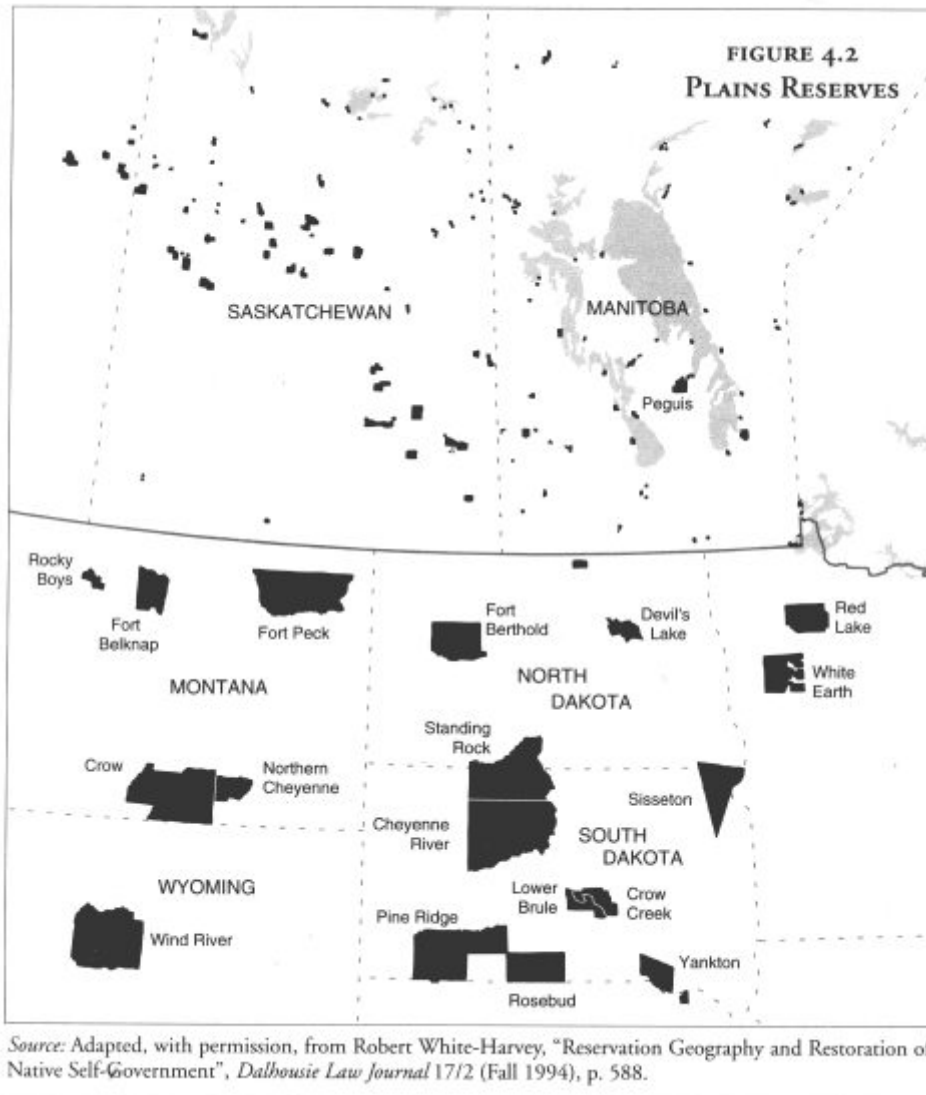
We find ourselves without any real home in this our own country ... owing to the inadequacy of most of our reservations, some having hardly any good land, others no irrigation water etc., our limitations re pasture lands for stock owing to fencing of so-called government lands by whites ... the depletion of salmon by overfishing of the whitesIn many places we are debarred from camping, travelling, gathering roots and obtaining wood and water as heretofore. Our people are fined and imprisoned for breaking the game and fish laws and using the same game and fish which we were told would always be ours for food. Gradually we are becoming regarded as trespassers over a large portion of this our countryWe have no grudge against the white race as a whole nor against the settlers, but we want to have an equal chance with them of making a livingIt is their government which is to blame by heaping up injustice on us. But it is also their duty to see their government does right by us, and gives us a square deal. We condemn the whole policy of the B.C. government towards the Indian tribes of this country as utterly unjust, shameful and blundering in every way.¹

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.



Source: Adapted, with permission, from Robert White-Harvey, "Reservation Geography and Restoration of Native Self-Government", *Dalhousie Law Journal* 17/2 (Fall 1994), p. 588.

*We hold this piece of land as our own home. When our great grandfathers came to that piece of land they said they would never move from it and that it was going to be their permanent home. We are still in occupation of it and we ask that the Indian Affairs Branch produce whatever documents they have dealing with this land so that everything may be settled, once and for all.*²

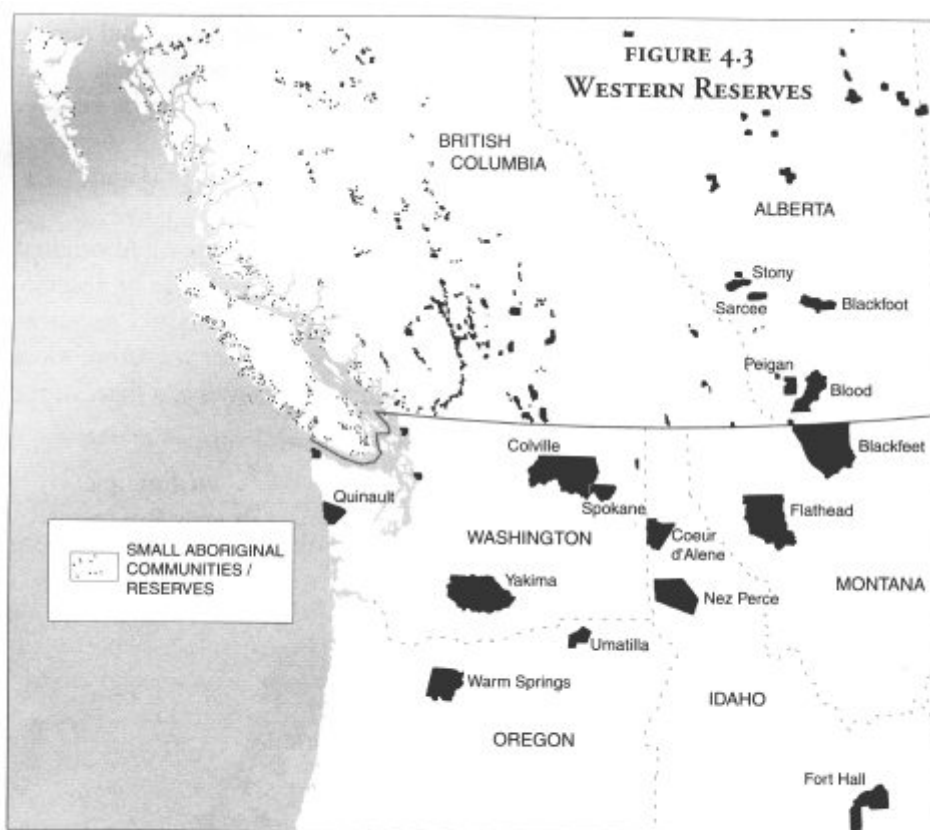


THE COMMISSION WAS ASKED TO INVESTIGATE and make concrete recommendations on “the land base for Aboriginal peoples, including the process for resolving comprehensive and specific claims, whether rooted in Canadian constitutional instruments, treaties or in Aboriginal title”. In Chapter 3, we discussed the recognition of Aboriginal peoples as self-governing political entities within Canada. Governance is inseparable from lands and resources. If self-government is to be a reality, then Aboriginal people need substantially more lands and resources than they have

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.

now. While these alone cannot guarantee self-reliance, Aboriginal peoples will be unable to build their societies and economies without an adequate land base.

Except in the far north (including northern Quebec), where comprehensive claims settlements since 1975 have improved the situation, the present land base of Aboriginal communities is inadequate. Lands acknowledged as Aboriginal south of the sixtieth parallel (mainly reserves) make up less than one-half of one per cent of the Canadian land mass.³ Much of this land is of marginal value. In the United States (excluding Alaska) — where Aboriginal people are a much smaller percentage of the total population — the comparable figure is three per cent. In fact, as Robert White-Harvey points out, “all of the reserves in every province of Canada combined would not cover one-half of the reservation held by Arizona’s Navajo Nation”.⁴ The accompanying maps (Figures 4.1, 4.2 and 4.3) graphically illustrate these differences.



Source: Adapted, with permission, from Robert White-Harvey, “Reservation Geography and Restoration of Native Self-Government”, *Dalhousie Law Journal* 17/2 (Fall 1994), p. 588.

- 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.

We have therefore concluded that the current land base of Aboriginal peoples should be expanded significantly. In addition, there should be a significant improvement in Aboriginal access to or control over lands and resources outside the boundaries of this expanded land base. Put another way, Aboriginal people must have self-governing powers over their lands, as well as a share in the jurisdiction over some other lands and resources to which they have a right of access. This is both a matter of justice — of redressing past wrongs — and a fundamental principle of the new relationship with Aboriginal people that we are proposing throughout this report. How we reach that goal, while overcoming the many problems that stand in the way, is the subject of this chapter.

1. The Case for a New Deal

As the two quotations at the beginning of the chapter make clear, Aboriginal peoples have had great difficulty preserving a home in what has always been their country. Throughout our hearings, Aboriginal people told us about the past loss of their reserve or community lands and their inability to secure additional lands for a growing population. They also spoke eloquently about the difficulties they have experienced in participating in the resource economy; about the impact of what they see as uncontrolled development or environmental degradation of their traditional territories; and about the lack of recognition of their treaty and Aboriginal harvesting rights. Throughout this chapter, we use the terms ‘traditional territory’ and ‘traditional land-use area’ synonymously.

Land is absolutely fundamental to Aboriginal identity. We examine how land is reflected in the language, culture and spiritual values of all Aboriginal peoples. Aboriginal concepts of territory, property and tenure, of resource management and ecological knowledge may differ profoundly from those of other Canadians, but they are no less entitled to respect. Unfortunately, those concepts have not been honoured in the past, and Aboriginal peoples have had great difficulty maintaining their lands and livelihoods in the face of massive encroachment.

This encroachment is not ancient history. In addition to the devastating impact of settlement and development on traditional land-use areas, the actual reserve or community land base of Aboriginal people has shrunk by almost two-thirds since Confederation, and on-reserve resources have largely vanished. The history of these losses includes the abject failure of the Indian affairs department’s stewardship of reserves and other Aboriginal assets. As a result, Aboriginal people have been impoverished, deprived of the tools necessary for self-sufficiency and self-reliance.

Aboriginal peoples have not been simply the passive victims of this process. They have used any means at their disposal to halt the relentless shrinkage of their land base. From an Aboriginal perspective, treaties were one means to that end. But Aboriginal people insist that the Crown has failed to uphold those agreements and has generally broken faith with them. And since the nineteenth century, they have continuously protested — to government officials, to parliamentary inquiries, and in the courts — what they see as the resulting inequity in the distribution of lands and resources in this country.

There is a strong moral case, then, for improving Aboriginal access to lands and resources. But there are also many pragmatic reasons. One is the sheer cost of the present system of programs and services for First Nations, Inuit and, to a lesser extent, Métis people. Improved access to lands, resources and resource revenues will finance at least some of the costs of self-government.

An equally important reason is that conflict over lands and resources remains the principal source of friction in relations between Aboriginal and other Canadians. If that friction is not resolved, the situation can only get worse, as events between the summers of 1990 and 1995 have already shown.

The confrontation at Kanesatake (Oka) was much more than a trivial dispute over the location of a golf course. Like most Aboriginal communities, the Mohawk people of Kanesatake were seeking to secure their land base. In this particular instance, the interests of the neighbouring municipality of Oka became caught up in a three-way dispute between the Kanesatake community, Canada and Quebec over title to land. That dispute, which dates to the early eighteenth century (see Volume 1, Chapter 7), remains unresolved.

This was not an isolated incident. Also during the summer of 1990, a group from the Blackfoot Confederacy called the Loners tried to halt construction of an irrigation dam on the Oldman River in southern Alberta, citing potential environmental damage to their communities and loss of traditional livelihood. This provoked an immediate reaction from the provincial government and area farmers, who expected to benefit from the regulation of water flow on the river. In northern Ontario, members of three Ojibwa bands blocked railway lines in support of their claims to a greater share in the allocation of local lands and resources. At Ontario's Ipperwash Provincial Park, members of the Kettle and Stoney Point First Nations communities, claiming the park contained burial sites, clashed with provincial police in the fall of 1995, resulting in the death of one of the protesters.

Since 1973, when members of the Ojibwa Warrior Society occupied Anishinabe Park in the northwestern Ontario town of Kenora, there has been a marked increase in this kind of Aboriginal protest and accompanying counter-reaction. The Cree people of Lubicon Lake in northern Alberta have attempted to halt oil and gas exploration in their traditional territories in support of their claim to land, angering industry and the provincial government. The Innu people in Labrador have occupied the airport runway at Happy Valley-Goose Bay to protest low-level training flights over their hunting grounds, antagonizing the military and other residents of the region. Mi'kmaq people in Quebec and New Brunswick have been involved in armed confrontations with provincial game wardens and police officers, as well as federal fisheries officials, over fishing rights in the Restigouche and Miramichi rivers.

In the Temagami region of Ontario and in various parts of British Columbia, Aboriginal people (often in association with environmentalists) have blockaded access roads to protest timber harvesting practices on traditional lands and, in the process, they have attracted counter-protests from residents of rural and remote logging communities. New allocations of fishing rights to Aboriginal people in British Columbia and Ontario also have attracted public protest.

Aboriginal actions over the past two decades have not been limited to high-profile blockades and other forms of direct action. Some groups — such as the Nisg_a'a and the Gitksan and Wet'suwet'en in British Columbia — have tried to have their Aboriginal title recognized in Canadian courts. Others have been able to persuade courts to acknowledge their treaty or Aboriginal rights as a shield against prosecution for violation of provincial and federal fish and wildlife legislation. Still other Aboriginal groups have taken part in long (and costly) hearings about the potentially adverse effects of development, such as the Berger inquiry of the mid-1970s.

Many representations were made on these matters at the Commission's hearings. While these suggested a general commitment to sharing and reconciliation, we recognize that solutions based on

those principles will not be easy.⁵ Any redistribution of lands and resources must be just and equitable to all concerned. Aboriginal people should not be surprised if, when rights and property are at stake, other Canadians react with surprise, concern or indignation at the assertion of their rights.

In Ontario, for example, the Algonquin people of Golden Lake have laid claim to much of Algonquin Provincial Park, attracting vocal opposition from parks and wilderness advocates as well as from local citizens. In the nearby Muskoka district, property owners on Gibson Lake — most of them urban dwellers from Toronto and other parts of the province — are concerned that their Mohawk neighbours from the Wahta Reserve might gain control of Crown land surrounding their cottages, as well as access routes to them.⁶ The Commission has heard from many groups, including municipalities, western ranchers, and recreational hunters and anglers, who express similar concerns about the potential impact of any expansion in the reserve land base or an increase in Aboriginal control over off-reserve lands and resources.

It is nevertheless essential for Canadians to understand that these are not new problems. The basic difficulty — given the change in power relationships between Aboriginal people and other Canadians over the past century or more — has been that, until very recently, governments have either ignored or failed to address the basic issues. Now the time of reckoning has arrived.

The Commission believes strongly that negotiations provide the best hope for a solution to these issues. Further confrontation will not bring social peace; continued resort to the courts is not only expensive, it risks outcomes (because of the all-or-nothing nature of the process) that may be unacceptable to all sides. But before there can be real negotiations, the power imbalance between Aboriginal governments and federal and provincial governments must be addressed.

One important step will be to alter the process for resolving what are referred to by governments as land claims. Although there have been some improvements in the two decades since federal claims policies were first introduced, opinion is virtually unanimous that the present system does not work. The system is generally inequitable, inefficient, time consuming and far too expensive. And it places the department of Indian affairs in a clear conflict of interest as funding agent, defence counsel, judge and jury.

But if Aboriginal people are to obtain a greater share of lands and resources in this country, existing claims processes are not the sole obstacle. A fundamental difficulty, and one that has had a major influence on government claims policy, is how governments and the courts have interpreted the law of Aboriginal title. In our report on federal extinguishment policy, we concluded that blanket or partial extinguishment should not be a requirement of future claims settlements.⁷ The Commission believes strongly that doctrines such as extinguishment and frozen rights — not to mention the very exacting tests that Aboriginal people are being asked to meet to prove their title — are an embarrassment. It should be distasteful for Canadians to rely on inappropriate nineteenth-century (or earlier) attitudes to Aboriginal peoples. But so long as Canadian governments continue to argue some or all of these doctrines, there can be no just resolution of Aboriginal claims.

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).

Effecting a new and equitable distribution of lands and resources will require more than new claims processes or legal arrangements, for there are many other blockages to be overcome. The state of the law has influenced how constitutional powers have been distributed, leaving little room for Aboriginal title and jurisdiction. The mandate and operating styles — in short, the institutional interests — of both provincial and federal resource management agencies and the department of Indian affairs often make it difficult to implement treaty provisions and claims settlements. Resource policies, which are based on state management and open access, have seldom respected treaty and Aboriginal rights, and they continue to result in Aboriginal exclusion from traditional territories. These policies generally reflect the views of the dominant society on matters of property or resource rights, views that have often conflicted with those of Aboriginal people. As an example, the Commission heard from many non-Aboriginal Canadians who see fish, wildlife, and parks as common property resources to which Aboriginal people should have no special rights.

What these various blockages really represent is a clash between two fundamental visions of the relationship between Aboriginal and other Canadians. What Aboriginal people see as their traditional territories are treated by governments and society as ordinary Crown or public lands. The philosophy that prevailed for more than a century and that shaped the present situation (especially south of the sixtieth parallel) supported confining Aboriginal people to reserves and assuming control of the rest of the land. Under the *Constitution Act, 1867*, the provinces were the chief beneficiaries of this approach to the division of lands.

This approach has not worked and cannot work. The Aboriginal principles of sharing and coexistence offer us the chance for a fresh start. Canadians have an opportunity to address the land question in the spirit of these principles.

In this chapter we outline our proposals to implement the Aboriginal concept of sharing on a reasonable and equitable basis and thereby improve their access to lands and resources. The spur to action is provided by legal developments over the past several years, which are already improving the standing of Aboriginal people in negotiations. Recent Supreme Court decisions such as *Simon* and *Sparrow*, for example, have acknowledged that Aboriginal title is a unique or *sui generis* interest in land. Accordingly, Aboriginal people have now an opportunity to explain to other Canadians their understanding of the nature of their title and the sources of its uniqueness.

The other major legal development, emanating from the Supreme Court judgements in *Guerin* and *Bear Island*, is the concept of the Crown's fiduciary or trustee obligations to Aboriginal peoples. What Aboriginal people see as a breach of faith — already the subject of most specific land claims — can also be viewed as a breach of the Crown's fiduciary duties. The concept of fiduciary duty has other important implications as well, since section 35 of the constitution gives protection to "existing treaty and Aboriginal rights". It is the Commission's view that Aboriginal people now have the standing to challenge past and present Crown conduct with respect to their rights.

The Crown's fiduciary duty also means that Parliament has a positive obligation to enact a fair and effective process to facilitate negotiated solutions concerning the recognition and protection of Aboriginal rights to lands and resources. The new approach to treaty implementation and renewal and treaty making, proposed in Chapter 2, would replace the current land claims processes. The new approach would be based on respect for the treaty relationship and would remove the department of Indian affairs from its present controlling and conflicting role. As part of that solution, we recommend the creation of a new Aboriginal Lands and Treaties Tribunal, which would have binding powers over an enlarged category of specific claims and would play a facilitating role with respect to the treaty processes set out Chapter 2.

Treaty making — in areas where no treaties exist at present — and implementing and renewing existing historical treaties is the proper way to negotiate an expanded land and resource base for Aboriginal peoples. The Commission believes that the same general goals should apply to both categories of treaty. It would be inequitable if Aboriginal people who signed earlier treaties were prejudiced as far as the applicable principles are concerned in comparison with those taking part in modern agreements.

For that reason, we outline a model land regime, involving the recognition of three different categories of land (Aboriginal land, shared land and Crown land) in which the respective rights of Aboriginal people and other Canadians would be clearly identified and balanced differently than under the present system.⁸ On lands in the first category (which would include those lands now called Indian reserves), full rights of beneficial ownership and primary, if not exclusive, jurisdiction in relation to lands and resources would belong to the Aboriginal party in accordance with the traditions of land tenure and governance of the people in question. Aboriginal understandings of their title with respect to such lands could be recognized more or less in their entirety, leaving the people free to structure their relationship with the lands in accordance with their own world view.

On lands in the second category, which would comprise a portion of the Aboriginal party's traditional lands, a number of Aboriginal and Crown rights with respect to land would be recognized by the agreement, and rights of governance and jurisdiction would be shared among the parties. Co-jurisdiction or co-management bodies, which could be based on the principle of parity of representation among parties to the treaty, could be empowered to manage the lands and direct and control development and land use.

On lands in the third category, a complete set of Crown rights with respect to land and governance would be recognized by agreement. Even on lands in this category, however, some Aboriginal rights could be recognized, to acknowledge that Aboriginal peoples enjoy historical and spiritual relationships with such lands. For example, Aboriginal people, as a matter of protocol, could serve as diplomatic hosts at significant events of a civic, national or international nature that take place on their territory.

This new approach must, of course, take into consideration the existing rights of the public and of third parties with property interests. The Commission has listened carefully to the concerns expressed by many Canadians about the practical cost of implementing treaty rights and land claims, and we have heard the voices of non-Aboriginal residents in rural and remote parts of Canada who feel excluded by their governments from negotiations with Aboriginal people that might affect them. We therefore outline the principles we believe should govern the selection of lands and resources in treaty negotiations and offer some suggestions for how to accommodate existing rights in new agreements. Fundamentally, however, we believe that a co-operative approach to land and resource management in shared areas can lead to solutions that increase equity, efficiency and sustainability for all Canadians, not just for Aboriginal people.

Several examples of co-operative land and resource management already exist in Canada. We discuss these examples later in this chapter in the context of interim measures to be implemented while the proposed treaty processes are going on. These would go a long way toward expanding the Aboriginal land base and improving access to natural resources. Commissioners realize that it will take time to make the fundamental changes to law and process that we are recommending. In some jurisdictions, governments and Aboriginal peoples have already worked out some innovative new approaches to lands and resources. These deserve to be highlighted.

⁸ These three categories are discussed at some length in *Treaty Making in the Spirit of Co-existence*.

Expanding the Aboriginal land and resource base is not just about honouring past obligations or paying a moral debt to Aboriginal people. It is about laying a firm consensual foundation for a new relationship between Aboriginal and non-Aboriginal Canadians, one of fair sharing of Canada's enormous land mass, of mutual reconciliation and of peaceful co-existence. Without it there can be no workable system of Aboriginal self-government. There can only be a continuing clash of cultures and interests. The Commission believes it is time to put this behind us — it has gone on far too long already — to sit down at the negotiating table, and to work out our differences in a spirit of co-operation and good faith.

We trust, however, that these negotiations will be guided by one of the fundamental insights from our hearings: that is, to Aboriginal peoples, land is not just a commodity; it is an inextricable part of Aboriginal identity, deeply rooted in moral and spiritual values.

2. A Story

In Dene Th'a (Slavey) communities of northwestern Alberta, religious leaders still sing Nóggha's Song (see box), accompanying themselves on the traditional skin drum. The words belonged to Nóggha (wolverine), a Dene prophet from the Bistcho Lake region who died in the mid-1930s. The song expresses the sadness the singer feels for his departed parents and is also a prayer for the land itself, which the singer recognizes as a gift from the Creator.

Nóggha's Song

Hee di d'geh elin. Hey, this is the land.

Hee hee hi-a hi-a. He hey hia hia. Ndahetǰ d'geh elin. It is God's land. Hee hee hi-a hi-a. Hey hey hia hia. Ane la hia hi-a hi-a. Mother! la hia hia hia.

Setǰ la d'geh elin. It is my father's land.

Ane la d'geh elin. It is my mother's land.

Hee hee hi-a hi-a. Hey hey hia hia. Setǰ d'geh elin-a. It is my father's land.

Ha ha hi-a hi-a. Ha ha hia hia Hee hee hee. Hey hey hey.

Setǰ la d'geh elin. My father is the land.

Heya haa hia hia. Hia haa hia hia. Ane la d'geh elin. My mother is the land.

Hee hi-a. Hey hia Hee hee hee. Hey hey hey.

Source: 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. 71 and 217.

For the prophets, who are called *ndatin* (dreamers), traditional stories of animal people and culture heroes furnish the landscape for their dreams and visions. *Shin* (songs) provide the trail through that landscape. Unlike the modern western tradition that divides music into sacred and secular forms, all Dene Th'a songs are prayers, which are most often directed at the spirits of natural forces, of animals or of people who have died.

Aspiring religious leaders learn to sing the songs of Nóggha and the other prophets who have come before them. This allows them both to acquire their own songs and to develop their special ability to direct dreams. Like other Aboriginal societies in Canada and throughout the world, Dene Th'a hold that powerful individuals can pass at will between the material and spiritual worlds, travelling long

distances as they sleep. The most skilled prophets, they say, can locate moose in the bush by dreaming, and the prophecies they bring back from the spirit world are invariably proven true.

The prophet Nóggha is especially well remembered for the accuracy of his dreams and predictions. Though at the time of his death Dene Th'a were still living for most of the year in small encampments out on the land, Nóggha had already witnessed the influence of Canadian frontier society on areas immediately to the north and south. He urged his people to protect their culture by keeping their games, their stories and their songs. According to his spiritual heirs and descendants, he also foresaw the day when they would end up confined to small parcels of land. Don't live on those reserves, he warned them, "because people will be roaming about like packs of dogs". Nóggha, they say, also warned of the impact of alcohol on communities and predicted that the payment of money or other forms of government assistance would be a mixed blessing for his people. One of Nóggha's last prophecies was that the traditional territories of Dene Th'a would one day be covered with *satsóné* (metal) — which they interpret as a reference to the pipes, seismic lines, and other modern installations of the oil and gas companies.⁹

When Dene Th'a elders speak of the land, therefore, it is with a sense of loss. Within two decades of Nóggha's death their lives had changed a great deal. Instead of dwelling in their small bush encampments, most Dene Th'a now live year-round in the communities of Bushie River, Assumption and Meander River. These are three of the eight small parcels of reserve land (see Figure 4.4) that the department of Indian affairs began surveying in 1946 for the Slavey people of the upper Hay River, as the federal government then called Dene Th'a.¹⁰ Although they had been formally recognized as far back as 1900, when Nóggha and others took part in an adhesion to Treaty 8 signed at Fort Vermilion, no reserves had ever been set apart for their benefit. Post-war governments wanted to persuade northern Aboriginal people like Dene Th'a to form more concentrated settlements so that they could be more easily assimilated into mainstream society. This process, which was encouraged by the Catholic missionaries who built a mission and residential school at Assumption in 1951, spurred the growth of the three modern communities.¹¹

To Dene Th'a, this community land base is far from adequate. Over the last 50 years, their numbers have expanded to more than a thousand people. For that reason, they are in the process of challenging the federal government that their total entitlement to reserve land under the treaty has not been fulfilled. The department of Indian affairs refers to this sort of grievance as a *specific land claim* and has developed policy criteria for dealing with such issues. Even if Dene Th'a are successful, however, their room for community expansion may still be limited. Assumption itself is in the middle of a large oil field, and the province of Alberta, which has constitutional jurisdiction over public lands and resources, has granted various kinds of development rights to other parties on the lands that surround the three reserve communities. Current federal policy requires that such rights be respected in land claims settlements.

As matters now stand, Dene Th'a have no say in the awarding of development rights on their traditional territories, nor do they receive guarantees of employment benefits. They do not share in resource revenues or receive compensation for disruption of their lifestyle, and they are not represented in the municipal government structures that cover their traditional lands. Canada and

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.

Alberta take the position that any rights Dene Th'a may have had to lands outside their reserves were extinguished absolutely — according to the text of the document — by Treaty 8.

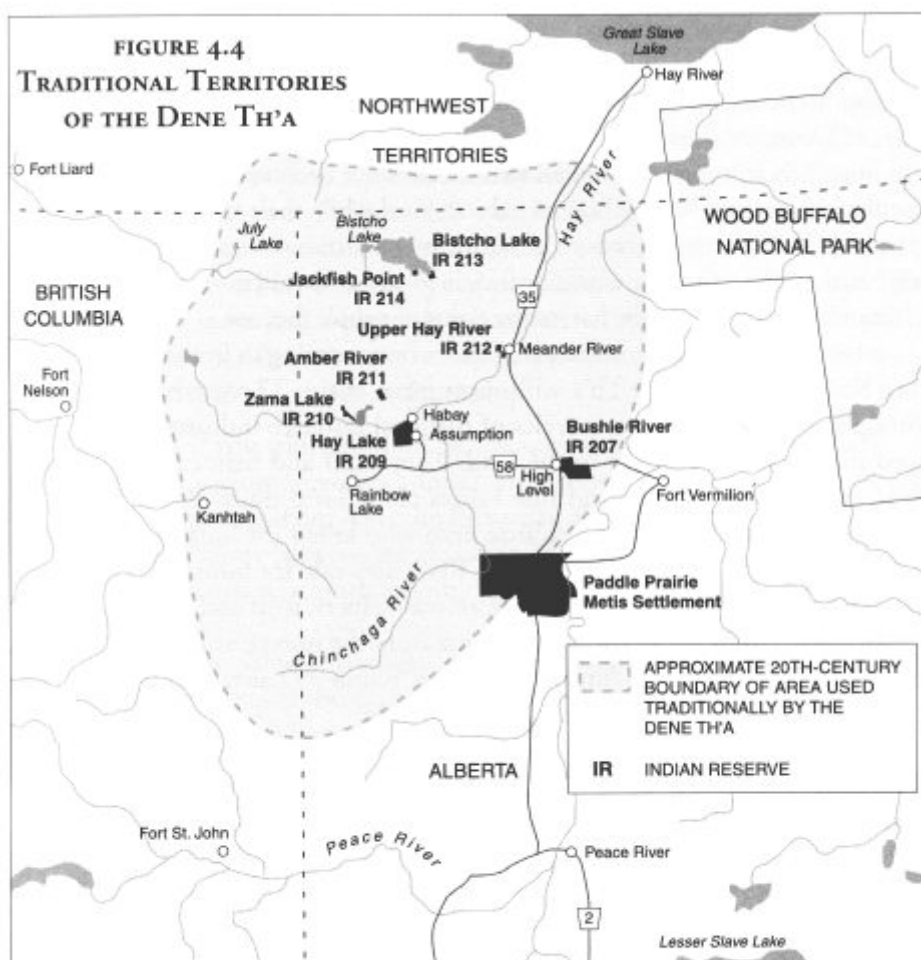
Both governments do acknowledge that Dene Th'a have treaty hunting, fishing and trapping rights on unoccupied Crown lands and waters — but for subsistence purposes only, as defined by government. Dene Th'a have no priority allocation or special rights to fish and game within their traditional territories, which are open to licensed recreational hunters and anglers from Alberta and elsewhere. Nor are Dene involved in the management of game, fish and fur-bearing animals — although their hunters complain that moose have declined in number with the opening of access roads and loss of habitat. And while their traditional territories span (like Treaty 8 itself) portions of northeastern British Columbia and the southern Northwest Territories, wildlife officials in those jurisdictions have often been reluctant to acknowledge the harvesting rights of people they see as 'Alberta Indians'.

For many years now, other people have been coming to live along the upper Hay River, though Dene Th'a still outnumber them. Those who have stayed throughout the up and down cycles of the local resource industries have developed their own attachment to the land. They hunt and fish, canoe the rivers, build cabins in the woods and ride horses along local trails. But few of them know about Yamahndeya, the culture hero who killed the animal monsters in ancient times and made the upper Hay River area safe for human life; nor have they heard Dene Th'a stories about the animal helpers, wolf and wolverine. They do not know that some of their neighbours from the reserve at Assumption were born at Bistcho Lake or at Amber River or at Rainbow Lake, nor do they know the meaning of the Dene names for those places.

When Nóggha's nephew, Alexis Seniantha, who succeeded him as the head prophet at Assumption, regularly crossed the British Columbia boundary to trap, he would head for July Lake, as it is now called. He knew this lake as Ts'u K'edhe (Girls' Place), so called because a very long time ago, two teenaged girls lived there alone all winter. He learned this from his father, Ahkimnatchie, who also told him that an earlier prophet named Gochee (brother) was buried near that same lake.

In 1979, Alexis Seniantha gave an account of Nóggha's prophecies to an assembly at Assumption of Aboriginal elders from across North America:

‘Nothing will happen to this land,’ Nógħa said, ‘because the earth is tremendous. Anything can happen on the surface of the earth. There may be bad things happening, but if you yourself are a good person, you shouldn’t worry about these things,’ he often told us. ‘Sometimes far off there may be a huge wind,’ he said, ‘but it avoids us as long as even one person prays.’ He prayed for us, for the future, I think.¹²



Source: Adapted from James Morrison, "The Robinson Treaties of 1850: A Case Study", research study prepared for RCAP (1993), based on Patrick Moore and Angela Wheelock, ed., *Wolverine Myths and Visions: Dene Traditions from Northern Alberta* (Edmonton: University of Alberta Press, 1990).

3. Lands and Resources: Background

3.1 Lessons from the Hearings

The themes of Nógħa’s songs and prophecies — nurturing communities, making a living, caring for the land — recurred throughout the Commission’s public hearings. We have no hesitation in saying that these themes unite all Canadians. In a country that still derives much of its culture and wealth from the land and its natural resources, this should not be surprising. Over the course of our travels and meetings, the individuals and organizations that spoke to us about such issues, whether

12 Moore and Wheelock, *Wolverine Myths and Visions*, pp. 72-76.

Aboriginal or non-Aboriginal, showed a common concern for social and economic well-being, for finding ways to provide for their children and future generations.

But while there are definite similarities, we also learned that there are profound differences between Aboriginal people and other Canadians over fundamental issues associated with lands and resources. As Chief Tony Mercredi of Fort Chipewyan in Alberta reminded us, much of the problem stems from the power imbalance in the current relationship:

Envision, if you will, a circle. The Creator occupies the centre of the circle and society ... revolves around the Creator.

This system is not based on hierarchy. Rather, it is based on harmony. Harmony between the elements, between and within ourselves and within our relationship with the Creator. In this circle there are only equals.

Now, envision a triangle. This triangle represents the fundamental elements of the Euro-Canadian society. Authority emanates from the top and filters down to the bottom. Those at the bottom are accountable to those at the top, that is control. Control in this society is not self-imposed, but rather exercised by those at the top upon those beneath them.

In this system the place of the First Nations peoples is at the bottom. This is alien to the fundamental elements of our society, where we are accountable only to the Creator, our own consciences and to the maintenance of harmony.

By having the institutions and regulations of the Euro-Canadian society imposed upon us, our sense of balance is lost.

Chief Tony Mercredi
Athabasca Chipewyan First Nation Community
Fort Chipewyan, Alberta, 18 June 1992^{*}

The songs of the prophet Nógha convey this idea of harmony in the relationship between the earth and all those who inhabit the lands and waters. This fundamental tenet of Aboriginal spirituality was repeated to us many times during the hearings by individuals like Elder Alex Skead in Winnipeg:

We are so close to the land. This is my body when you see this mother earth, because I live by it. Without that water, we dry up, we die. Without food from the animals, we die, because we got to live on that. That's why I call that spirit, and that's why we communicate with spirits. We thank them every day that we are alive ...

Elder Alex Skead
Winnipeg, Manitoba
22 April 1992

Some Canadians told us that they find resonance in such insights, because they provide a kind of spiritual content that is often missing from public discourse on land and resource issues. Mavis Gillie of Project North, an inter-church coalition in support of Aboriginal peoples, made this point in her appearance before the Commission:

* 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.

The chief lesson I think I have learned all these years is that there is a moral and spiritual dimension to the right of Aboriginal peoples to be distinct peoples, their right to an adequate land base and the right to self-government.

I believe that the reason Canada has failed so miserably in the past in its relationship with First Peoples is that it failed to take into account the impact of this moral and spiritual dimension, and we had better not make the same mistake this time around.

Mavis M. Gillie
Project North
Victoria, British Columbia
22 May 1992

At the core of Aboriginal peoples' world view is a belief that lands and resources are living things that both deserve and require respect and protection. Grand Chief Harold Turner of the Swampy Cree Tribal Council stressed that his people were "placed on Mother Earth to take care of the land and to live in harmony with nature":

The Creator gave us life, inherent rights and laws which governed our relationship with nations and all peoples in the spirit of coexistence. This continues to this day.

We as original caretakers, not owners of this great country now called Canada, never gave up our rights to govern ourselves and thus are sovereign nations. We, as sovereign nations and caretakers of Mother Earth, have a special relationship with the land.

Our responsibilities to Mother Earth are the foundation of our spirituality, culture and traditions ... Our ancestors did not sign a real estate deal, as you cannot give away something you do not own.

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

Aboriginal peoples believe, therefore, that lands and resources are their common property, not commodities to be bought and sold. Chief George Desjarlais of the West Moberly community in British Columbia told us that the principle of sharing formed the basis of arrangements made between his people and the Crown:

We are treaty people. Our nations entered into a treaty relationship with your Crown, with your sovereign. We agreed to share our lands and territories with the Crown. We did not sell or give up our rights to our land and territories. We agreed to share our custodial responsibility for the land with the Crown. We did not abdicate it to the Crown. We agreed to maintain peace and friendship among ourselves and with the Crown.

Chief George Desjarlais
West Moberly First Nation
Fort St. John, British Columbia, 20 November 1992

Aboriginal people also understand the treaties as instruments through which land-based livelihood and future self-sufficiency for themselves and the newcomers were secured. The late John McDonald, then Vice-Chief of the Prince Albert Tribal Council, stated emphatically that Aboriginal peoples never gave up their right to take part in the governance and management of lands and resources:

If the wealth of our homelands was equitably shared with us and if there is no forced interference in our way of life, we could fully regain and exercise our traditional capacity to govern, develop and care for ourselves from our natural resources. This is what was intended by the Creator, this is what our elders believe to be the true significance of our treaties. First Nations agreed to share the wealth of their homelands with the Crown, the Crown agreed to protect the First Nations and their homelands from forced interference into their way of life, i.e., culture, economy, social relations, and provide development and material assistance.

Vice-Chief John McDonald
Prince Albert Tribal Council
La Ronge, Saskatchewan, 28 May 1992

Many of the Aboriginal people who appeared before us expressed bitterness at the way they had been treated by society. Elder Moses Smith of the Nuu-chah-nulth Nation on Vancouver Island particularly objected to the assumption that Aboriginal people had not been making proper use of their lands and resources before the settlers arrived:

We got absolutely the short end of the stick. And to quote what was said, what was said of us, we, as Nuu-chah-nulth people, “These people, they don’t need the land. They make their livelihood from the sea.” ... So, here we have just mere little rock piles on the west coast of Vancouver Island, the territory of the Nuu-chah-nulth Nation. Rock piles! Rock piles!

Moses Smith
Nuu-chah-nulth Nation
Port Alberni, British Columbia, 20 May 1992

Many non-Aboriginal Canadians, however, interpret the treaty relationship differently. To Andy Von Busse of the Alberta Fish and Game Association, a modern society calls for modern rules and relationships:

We respectfully suggest that traditions are something that changes in all societies. As an example, Treaty 6 and Treaty 7 Indians in Alberta traditionally subsisted through the hunting of buffalo and, of course, that tradition is not something that could be carried out today because of other changing circumstances.

We feel that the principle of wildlife conservation must override that of treaty rights. Subsistence hunting and fishing should only be allowed in those areas where access to other food sources is limited. Today’s realities are that most Canadians, whether status or otherwise, live within a reasonable driving distance of grocery stores. The reality is today, again the use of high-powered rifles, night lighting, four-by-four vehicles allow access and success that could not have been foreseen at the time that the treaties were signed.

Andy Von Busse
Alberta Fish and Game Association
Edmonton, Alberta, 11 June 1992

A basic consequence of such differences of opinion about the treaty relationship is that what Aboriginal people see as traditional land use areas, society considers to be lands and resources under public government. Public servants base their actions on the assumption that the Crown ultimately holds title to and hence jurisdiction over lands and resources, even those included within claims settlement agreements:

By encouraging the involvement of residents in renewable resource management, the Department has not compromised its mandate of managing resourcesEven within land claim agreements, the Minister of Renewable Resources retains the final say in accepting management decisions.

Joe Hanly
Deputy Minister of Renewable Resources
Yellowknife, Northwest Territories, 9 December 1992

Implicit in this perspective is the idea that lands and resources can be separated into distinct units of specific rights of ownership and use by governments, private individuals and corporations. Glen Pinnell of Abitibi-Price Ltd. stressed the importance of the existing arrangements for resource industries and for their employees and their communities:

With the resource, it is important to all the communities. It is important to the livelihood of the mill. If the resource is not there, then there is no possibility for investing in the mill. In order to have the mill, there has to be the right or the commitment to have that resource.

Glen Pinnell
Abitibi-Price Ltd.
Fort Alexander, Manitoba, 30 October 1992

Many Canadians, then, regard access to Crown lands and to the resources on them as common property rights. In its brief to the Commission in September 1993, the Ontario Federation of Anglers and Hunters argued very forcefully that treaty and Aboriginal rights do not give Aboriginal people any exclusive privileges with regard to Crown lands and resources and that ultimately public government must retain the responsibility to manage and conserve those resources on behalf of all citizens:

*Crown lands, and the indigenous natural resources they harbor, are held in trust by the Crown for the continued economic benefits, and social and cultural well being of all the people of Ontario (i.e., society as a whole). Thus, together they are **public common property resources**. Concerning freelifing fish and wildlife, the protection against proprietary, possessionary claims extends even onto patented lands. **No one person or group owns them!** In effect, no individual, group of individuals, enterprise, or political entity can claim proprietary rights over them. Possessory rights to Crown lands are usually conveyed through tenure agreements and licences at fair market value, issued by the Crown for payment of fees/royalties. [emphasis in original]*

Ontario Federation of Anglers and Hunters
Toronto, Ontario
3 May 1993

Some recreational hunters and anglers argue that Aboriginal and treaty rights in effect discriminate against poorer residents of rural and northern areas, who may have subsistence needs of their own. Lorne Schollar of the Northwest Territories Wildlife Federation urged that this “imbalance” be addressed, so as to foster better relationships between northern residents of all backgrounds:

We recognize and support the need for true subsistence hunting by Native people. There should, however, be a clear distinction made between actual subsistence hunting and perceived rights. Exclusive Aboriginal rights to hunt at any time of year and without restrictions can hardly be justified as subsistence when an individual is permanently employed.

On the other hand, a non-Aboriginal person, making the same or less money, is subject to strict harvest regulations. Licensing and reporting procedures that apply to all resource users alike are deemed essential components for effective wildlife conservation and management.

Lorne Schollar
Northwest Territories Wildlife Federation
Yellowknife, Northwest Territories
9 December 1992

The Commission was reminded throughout the hearings that non-Aboriginal Canadians have developed their own identity, history, sense of community, and ties to lands and resources. Don McKinnon, a prospector from Timmins, Ontario, spoke about the lives and livelihood of residents of rural and northern Canada:

Most people work in the north, and especially northern Ontario, because they like it. They work in resource industries and they enjoy the outdoors, for recreation such as skiing, snowmobiling, fishing and hunting. They also like the clean air and fresh water.

They are just as concerned as the Aboriginal about environmental issues and preserving the land and its wildlife. Forestry and mining depend on secure long-term access to Canada's land baseI love the fresh water and stately trees and clean air and fruitful land. I want my children and my grandchildren to develop the same strong feelings for the land. More than that, I pledge that there will be a place for them in Northern Ontario.

Don McKinnon
Timmins, Ontario 5 November 1992

Many Canadians are seeking a sense of certainty, as Cor Vandermeulen of the British Columbia Federation of Agriculture put it, for rights of settlement and development in the face of Aboriginal claims to lands and resources:

Uncertainty comes when we hear statements from the Aboriginal leaders such as, “There will be a complete change in the power structure,” or “These lands that you are on belong to us.” Uncertainty comes when it seems that the indecisiveness of governments leads to higher and higher expectation from the Aboriginal community. Uncertainty comes when we hear that some Native nations want to return to a system of government that will give hereditary chiefs a major role in making decisions

I think, as far as the land question is concerned, we do need a high degree of certainty and finality, but we must proceed cautiously so that the final outcome will be fair and equitable for all partiesWe understand that the Aboriginal people have their aspirations as well and are entitled to seek redress for past injustices. In addressing these past injustices, we have to be careful that a whole new set of injustices is not created.

Cor Vandermeulen
British Columbia Federation of Agriculture
Kelowna, British Columbia
17 June 1993

This perspective is understood by Aboriginal people, who are attempting to address issues of land and resource development within their own communities. Gilbert Cheechoo, a Cree from Moose Factory on James Bay, pointed out the error of assuming that Aboriginal people are automatically opposed to development:

So a lot of people get mixed up ... when we talk about resource development: the Indians want to keep their culture, the Indians want to trap on that land when they are sitting on a million dollars worth of gold. That is not the only thing we are talking about.

There are debates going on in our reserves right now, our communities, about resource development. But a lot of non-Native people don't know that because they don't take the initiative to find out if our people are talking about these things. They assume that everybody is against them saying, “They want to take our land. They want to take our rights to explore and to take resource development out ... ”.

Resource development is a big issue that they talk about in our communities. What are we going to do? Some people say, “Well, we should go and negotiate and try to get a deal.” Some people say “no.”

Gilbert Cheechoo
Timmins, Ontario 6 November 1992

There are, however, many reasons why Aboriginal people express concerns about resource development. We were reminded by Chief Allan Happyjack of Waswanipi, Quebec, that his people have borne most of the costs, while reaping few of the benefits, of past development activities:

Our trees are gone. When the trees are gone, the animals are gone and all the land is destroyed. They all came from the outside, from non-native economic development. That is where we have our problems, with our hunting and fishing, our traditional way of life has been affected and these developments cause other problems from alcohol and drug abuse, but you have also heard about the dams and the flooding on the territory. You heard about forestry and those people that are leaders of Quebec and Canada, they are the ones that are letting the developers come into our territory to do what nobody has asked us, asked for our consent or to talk about it. Nobody asked us for our consent, if we approve or are in favour of these projects.

Chief Allan Happyjack
Cree First Nation of Waswanipi
Waswanipi, Quebec, 9 June 1992

We were told of similar kinds of pressure in other parts of Canada. Adrian Tanner of Memorial University in St. John's, Newfoundland, pointed to the rapidity and scale of resource development in his own province:

There is now an increasing pace of large-scale development of the interior of the province. Much of this new activity is incompatible with Aboriginal patterns of land use and with how Aboriginal people envision their own futures. Labrador, in particular, is at a development threshold with actual and planned projects which include the expansion of military training activities, a highway which will, for the first time, open up large areas to contact through Baie Comeau with the rest of Canada, the proposed development of the Lower Churchill and other rivers for hydro-electricity, new mines and new forestry ventures.

The Mi'kmaq on the island of Newfoundland have already experienced the same kinds of intrusions, with the Upper Salmon hydro-electric project, extensive pulpwood cutting and mines, such as the one at Hope Brook.

Little has been done to protect Aboriginal interests in their unsundered traditional lands

Adrian Tanner
Native Peoples' Support Group of
Newfoundland and Labrador
St. John's, Newfoundland, 22 May 1992

As Max Morin of the Metis Society of Saskatchewan explained, these continuing, unresolved situations have fostered an increased and compounded sense of frustration, bitterness and resentment on the part of Aboriginal people across Canada and have led at times to conflict between Aboriginal communities:

One of the things I am really concerned about when we talk about self-government and Aboriginal rights is this land has always been ours ... I believe that and I continue to believe that, but all of a sudden the government in 1930, the federal government, transferred it to the provincial government without consulting the people in northern Saskatchewan, especially the Aboriginal people.

Weyerhaeuser Canada, which is a pulp company operating out of Prince Albert, Saskatchewan; and Millar Western, which is a company operating out of Meadow Lake, Saskatchewan, have more rights to this land than we do. They have forest management lease agreements. They are clear cutting our livelihood, our traditional traplines and hunting areas. They are clear cutting right to the lakes, to the rivers. Our rivers are drying up. Our fish are dying out and yet as Aboriginal people when we make a stand and ask for our rights, the general public in Canada, the general public in Saskatchewan say we are a bunch of radicals.

Max Morin
Metis Society of Saskatchewan
La Ronge, Saskatchewan, 28 May 1992

However, in seeking redress for past wrongs as well as an expanded land and resource base, Aboriginal people told us that they are not advocating taking away the rights of others:

But in suggesting that we need a land base, we have to be very careful and we have to be honest in saying it's not our ambition to build boats or to buy boats from the Gander Bay Indian Band Council and take all of the white people that live within our community or our surrounding community and put them in and send them off to drift. That's not our ambition. We want to manage for us and for them also.

Calvin White
Flat Bay Indian Band
Gander, Newfoundland, 5 November 1992

When claims come to the table for our people we don't want society as a whole to be scared of what might come down because we are not looking at making changes that are going to be severely adverse to non-Aboriginal people. We are not looking at chasing them out of this land. We're prepared to sit and talk to them and negotiate and point out and work with them as to how we can both co-operate together.

Hereditary Chief Gerald Wesley
Kitsumkalum Band
Terrace, British Columbia, 25 May 1993

As Chief David Walkem from the Cooks' Ferry community (Nlaks'Pamux Nation) in British Columbia made clear, many Aboriginal groups are willing to implement the notion of shared jurisdiction over territories, as embodied in their understanding of the treaties:

The first principle that has to be incorporated is an increased access to land and natural resources over and above the existing reservations we have been placed upon.

The second one is a shared management and control of all natural resources within our traditional territories, or the development of, for want of a better term, 'interim partnership agreements', with the specifics to be subject to negotiation.

Chief David Walkem
Council of the Nlaks'Pamux Nation
Merritt, British Columbia, 5 November 1992

Commissioners found that many Canadians would support measures that would constitute a significant break with the failed solutions of the past. Gordon Wilson, then opposition leader in British Columbia, and Denis Perron, a member of the Quebec National Assembly, emphasized the potential of new land and resource arrangements:

It is widely recognized that the legal and political structures which currently govern every aspect of the lives of Aboriginal people have been a complete failure. And the attempt at eradication of First Nations culture has left a legacy of poverty and injustice to Aboriginal people across Canada.

Accordingly, we believe that it is time to acknowledge the principle that Aboriginal people have with respect to their inherent right to govern themselves, a right which flows from their long-term occupation and use of the land, and a right which also flows from their long history of self-government, prior to European colonization.

Gordon F.D. Wilson, MLA
Leader of the Official Opposition
Esquimalt, British Columbia, 21 May 1992

Through agreements, it is possible to define the territory within which each Aboriginal nation will have the right to pursue its traditional activities. At the same time, these agreements could set up joint development and management mechanisms for these territories to allow for both traditional Aboriginal activities and sustainable natural resource development. Within the context of these agreements, an Aboriginal government could receive part of the income or royalties that the government of Quebec earns from exploiting resources within that territory. [translation]

Denis Perron, MNA
Opposition Spokesperson on Aboriginal Affairs
Mani-Utenam, Quebec, 20 November 1992

However, a fundamental issue is how non-Aboriginal Canadians are to be involved in resolving these issues. Commissioners recognize the frustration expressed by many participants in the hearings, including municipal representatives like Barrie Conkin, the mayor of North Battleford, Saskatchewan:

Thus far, federal and provincial governments have done all the negotiating of the framework agreements for treaty land entitlements and land claims. Municipal governments have not had input. The federal and provincial governments have made promises the ordinary citizen at the grassroots level does not understand and does not feel part of. This is true, as well, of local government. In other words, the federal and provincial government can put a cheque in the mail but it is at the local level that natives and non-natives will have to implement and live with the actual changes. And profound changes there will be. To avoid the clash of anger and frustration on the native side with fear and uncertainty on the non-native side, it is imperative that people at this level, both native and non-native, be included in the process.

Barrie Conkin
North Battleford, Saskatchewan
29 October 1992

Similar concerns were expressed by Richard Martin of the Canadian Labour Congress:

We believe that labour should be treated as a stakeholder in third-party consultations anywhere in Canada, whether they involve treaty and land settlements, interim measures or co-management agreements with Aboriginal communities.

Governments have taken the position that third-party property rights that are diminished or taken away by Aboriginal land or treaty settlements should be protected or compensated. We believe that this principle should also apply to workers who are substantially affected by land and treaty settlements or other decisions involving Aboriginal groups.

Richard Martin
Canadian Labour Congress
Ottawa, Ontario, 15 November 1993

At an individual level, many residents of rural and northern Canada pride themselves on their pioneer ethos of self-sufficiency and self-reliance. As Don McKinnon put it, they are distrustful of government, which they see as dominated by urban concerns, and they too feel excluded from the negotiation of land claims agreements or other new arrangements with Aboriginal people:

We would like to suggest that the proper way to address the legitimate concerns of the Aboriginal peoples is one step at a time. Much as we recognize their frustration at the slowness of change and their desire to control their own affairs on their land, we feel two wrongs can never make a right ...

Natives cannot build a secure future on the wreckage of the lives of their non-Aboriginal neighbours. There has been too little consultation with the non-Aboriginal residents of northern Canada by the negotiating teams of Aboriginal and faceless bureaucrats ...

No elected or appointed body has the moral right to give away my heritage. No politician or bureaucrat with the wave of a pen will make me disappear. I am prepared to share with others, but I will not be pushed off my land or out of the north.

Don McKinnon
Timmins, Ontario 5 November 1992

On the other hand, Aboriginal people told us that their relationship with other Canadians, including the negotiation of land claims agreements, must be conducted on a government-to-government basis. Chief Peter Quaw of Stoney Creek, British Columbia, rejected any notion that Aboriginal people are simply one among many groups of stakeholders who have interests in Crown lands and resources:

We are not just another 'interest' group within the province. We are a people with an inherent right to govern ourselves and control our own resources and economies. We are willing and interested in sharing with the non-Aboriginal peoples and governments, but it must be a joint sharing through joint ventures based on equality, not subordination.

Chief Peter Quaw
Lheit-Lit'en Nation
Stoney Creek, British Columbia, 18 June 1992

Although the views expressed by Aboriginal and non-Aboriginal people are often divergent, Commissioners believe that the concepts of coexistence and shared jurisdiction over lands and resources may provide a unique window for reconciliation. It was encouraging for us to hear the optimism of Canadians like Clifford Branchflower, mayor of Kamloops, British Columbia:

I emphasize that whatever process takes place it is important that we do try to meet with and understand one anotherIt is important that real effort be made to raise the level of person-to-person and family-to-family understanding among our peoples.

I am convinced, being an optimist, that we can live together as neighbours in peace and harmony and that we can enrich one another's lives by our interactionsI don't believe we can afford not to make the effort to do so.

Clifford G. Branchflower
Kamloops, British Columbia
15 June 1993

According to environmental activist Henri Jacob, differences in views about Aboriginal and treaty rights to lands and resources cannot be resolved without addressing the relationship between diverse cultures. He also argued that reconciling these differing perspectives on land would create opportunities and benefits for all Canadians:

Because of different mentalities and different origins ... there were always compromises to be made, in order to reach agreementThere is also the question of consensus. We were used to voting when there was disagreement. Most Canadian environmental groups have now adopted the consensus approach to settling problems and various demands.

When we worked with Aboriginal people, the consensus mentality taught us the meaning of the word 'respect'. I am talking here not only about respect for individuals, but respect for all parts of every ecosystem, considering ourselves as part of an ecosystem. This gave us a different view of the world in general. [translation]

Henri Jacob
Le regroupement écologiste
Val d'Or et environs
Val d'Or, Quebec, 30 November 1992

The fundamental concern of Aboriginal people, as expressed throughout the hearings, was that the resolution of land and resource concerns — including the recognition, accommodation and implementation of Aboriginal rights to and jurisdiction over lands and resources — is absolutely critical to their goals of self-sufficiency and self-reliance. Cliff Calliou of the Kelly Lake community in northeastern British Columbia made this linkage explicit in his testimony:

A land and resource base must also be provided. A land base is seen as essential for the long-term survival and betterment of our nation. The absence of a land and resource base is the source of poverty which exists amongst our people today. Total control of our own land and resources will generate economic development to create employmentThe Kelly Lake community is located within Treaty 8 territory. It is time that negotiations proceed. This community is ready to pave the way for other communities similar to ours to follow.

Cliff Calliou
Kelly Lake Community
Fort St. John, British Columbia
19 November 1992

To set the stage for discussing the kinds of changes that would make such goals a reality, we need to examine in more detail the background of the land and resource issues raised at the hearings. These issues did not arise in a vacuum but are the product of the complex interplay of culture, politics and the law in the almost five centuries since first contact between Europeans and the Indigenous peoples of North America.

3.2 Significance of Lands and Resources to Aboriginal Peoples

We lived a nomadic lifestyle, following the vegetation and hunting cycles throughout our territory for over 10,000 years. We lived in harmony with the earth, obtaining all our food, medicines and materials for shelter and clothing from nature. We are the protectors of our territory, a responsibility handed to us from the Creator. Our existence continues to centre on this responsibility.

Denise Birdstone
St. Mary's Indian Band
Cranbrook, British Columbia, 3 November 1992

Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies.

Many Aboriginal languages have a term that can be translated as 'land'. Thus, the Cree, the Innu and the Montagnais say *aski*; Dene, *digeh*; the Ojibwa and Odawa, *aki*. To Aboriginal peoples, land has a broad meaning, covering the environment, or what ecologists know as the biosphere, the earth's life-support system. Land means not just the surface of the land, but the subsurface, as well as the rivers, lakes (and in winter, ice), shorelines, the marine environment and the air. To Aboriginal people, land is not simply the basis of livelihood but of life and must be treated as such.

The way people have related to and lived on the land (and in many cases continue to) also forms the basis of society, nationhood, governance and community. Land touches every aspect of life: conceptual and spiritual views; securing food, shelter and clothing; cycles of economic activities including the division of labour; forms of social organization such as recreational and ceremonial events; and systems of governance and management.

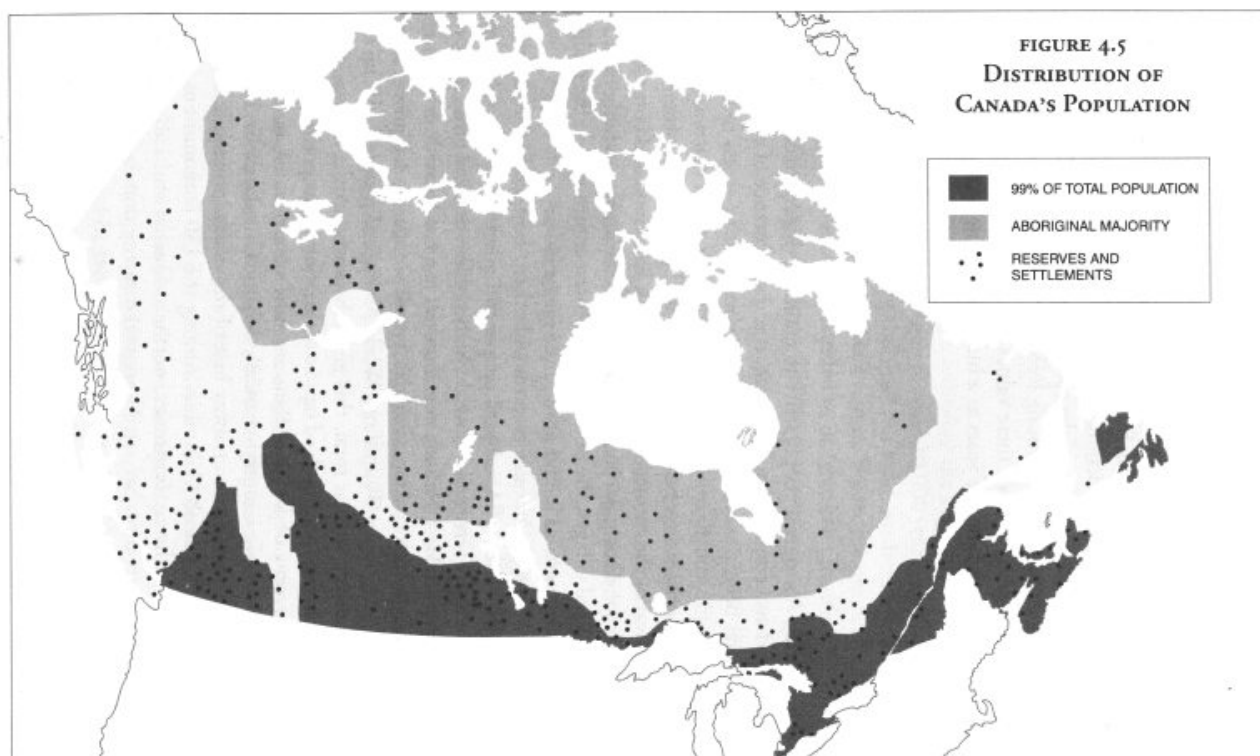
To survive and prosper as communities, as well as fulfil the role of steward assigned to them by the Creator, Aboriginal societies needed laws and rules that could be known and enforced by their citizens and institutions of governance. This involved appropriate standards of behaviour (law) governing individuals and the collective, as well as territorial rights of possession, use and jurisdiction that — although foreign to and different from the European and subsequent Canadian systems of law and governance — were valid in their own right and continue to be worthy of respect.

Our survival depended on our wise use of game and the protection of the environment. Hunting for pleasure was looked upon as wasteful and all hunters were encouraged to share food and skins. Sharing and caring for all members of the society, especially the old, the disabled, the widows, and the young were the important values of the Mi'kmaq people. Without these values, my people would not have survived for thousands of years as a hunting, fishing and gathering culture.

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

Even today, Aboriginal people strive to maintain this connection between land, livelihood and community. For some, it is the substance of everyday life; for others, it has been weakened as lands have been lost or access to resources disrupted. For some, the meaning of that relationship is much as it was for generations past; for others, it is being rediscovered and reshaped. Yet the maintenance and renewal of the connection between land, livelihood and community remain priorities for Aboriginal peoples everywhere in Canada — whether in the far north, the coastal villages, the isolated boreal forest communities, the prairie reserves and settlements, or in and around the major cities.

Figure 4.5 shows present-day reserves and other Aboriginal communities, as well as the distribution of Aboriginal people and other Canadians. In many parts of the Northwest Territories, central Quebec, Labrador and other parts of eastern Canada, some First Nations communities are not located on reserves. Since the early nineteenth century, Canada's overall population has grown from less than 200,000 to almost 30 million. While Aboriginal people make up no more than 2.5 per cent of that total, this general statistic masks the way their numbers are distributed. As a result of rapid urbanization in the post-war period, more than 90 per cent of all Canadians are now concentrated in the most southerly 10 per cent of the country — basically Atlantic Canada, the St. Lawrence River-Great Lakes waterway, the railway belt of the prairie provinces, and the southernmost parts of British Columbia. Among the 139 communities in the far north (Yukon, Northwest Territories, northern Quebec and Labrador), 96 communities, or 69 per cent, have an Aboriginal majority population. Of communities in the mid-north, 216 of 624 communities (34 per cent) have an Aboriginal majority. However, in the mid-north zones of Manitoba, Saskatchewan and British Columbia, more than half the communities have a majority Aboriginal population.



Source: Adapted from Russel Lawrence Barsh, "Canada's Aboriginal Peoples: Social Integration or Disintegration?", *Canadian Journal of Native Studies* 14/1 (1994), and used with the permission of Brandon University, Brandon, Manitoba.

Like Canadian society in general, a steadily increasing number of Aboriginal people live in cities and towns. This migration (discussed in Volume 4, Chapter 7 and in Chapter 5 of this volume) is relatively recent and often tends not to be by choice. While many Canadians have been moving from rural to urban areas in order to find employment, better living conditions, or education opportunities not available in their home communities, Aboriginal people have in addition felt particular pressure from government assimilation policies and other actions designed to move them away from their reserves and settlements.

Nonetheless, Aboriginal communities continue to survive and even grow, and Aboriginal people regard these places as the heartland of their culture. For most, living off the reserve or settlement and in the towns and cities is like being in a diaspora. Mohawk steelworkers who spend much of the year in New York or other urban areas still consider Kahnawake or Akwesasne home. This desire to return is deeply rooted. Alphonse Shawana, an Odawa from the Wikwemikong Unceded Reserve on Manitoulin Island, spent his professional life working in the oil and gas industry in Alberta, Venezuela and Scotland; in the late 1980s, he returned to his home community in Ontario and has since served as chief and councillor.

Among the Crees of Waswanipi, Quebec, as Chief Allan Happyjack explained to us, the urge to centre economic life in their communities and indeed to maintain the link between land, livelihood and community is strong:

Today we are working and we want to go back and take care of the land and clean up the damage that was done. We also want to go back to our traditional territory because that is where our tradition came from ... Our elders have told us the strengths from our past and we are listening to them and they told us about what happened in the past. We still want to look toward the future with a strong past.

Chief Allan Happyjack
Cree First Nation of Waswanipi
Waswanipi, Quebec, 9 June 1992

Figure 4.5 shows reserves as well as Aboriginal settlements. Fewer than half the reserves are inhabited; many are small, scattered pieces of land. Most of the Aboriginal people of the north reside in about 480 scattered villages ranging in population from less than a hundred to a few thousand persons.¹³ In the far north, outside of the few mining communities, at least 80 per cent of village residents are Aboriginal. In the mid-north and in the southern portion of the provinces (apart from urban areas), many of the villages are located on Indian reserves or settlements or are Métis communities and are predominantly Aboriginal. While land and resource activities are a mainstay of the Aboriginal economy in the north, even in more southerly regions, the economy of many Aboriginal communities continues to be based on activities such as commercial fishing or, to a lesser degree, farming. Many Aboriginal people living in urban centres have retained a connection to the land through ties to home communities or participation in ceremonial and cultural events (which include feasting, harvesting, fishing and hunting).

For thousands of years Aboriginal people have practised many forms of self-government. These forms are diverse and incorporate many unique methods of jurisdictional control. Traditional Aboriginal government, culture, spirituality and history are tied to the land and the sea. Our history is passed onto the present and future generations through an old tradition in such forms as songs, dances, legends, ceremonies and kinship relations. Our grandparents believe our old traditions top and strengthen the laws and practices necessary to uphold harmony between people and the world we live in.

Robert Mitchell
University of Victoria Aboriginal Government Program
Victoria, British Columbia, 22 May 1992

Aboriginal territories, use and occupancy

In natural resource law, the state assumes that it owns the resources and that only it can effectively regulate the exploitation by individuals and corporations of the natural resources. The purpose of the state in the area of natural resources law is to balance competing uses between the individuals who live in the state. As in criminal law, those who offend are charged, tried and punished.

13 See Volume 4, Chapter 6.

Where are we in the scheme of things? We are not the Canadian state. Neither are we simply Canadian individuals. Our communities are not made up of a state and individuals ... We operate almost as a family where we all have obligations and rights. We do not have crimes so much as we have inappropriate behaviour. We do not punish; rather we seek to heal. Sharing is the basis of our land and resource use. [translation]

Garnet H. Angeconeb
Independent First Nations Alliance
Big Trout Lake, Ontario, 3 December 1992

Before the arrival of Europeans, virtually all of Canada was inhabited and used by Aboriginal peoples. Whether they were comparatively settled fishers and horticulturalists or wide-ranging hunters, each people occupied specific territories and had systems of tenure, access and resource conservation that amounted to ownership and governance — although those systems were not readily understood by Europeans, in part because of language and cultural differences.

Aboriginal societies in Canada were generally either foraging societies — such as those based around seasonal hunting, fishing and gathering — or settled, resource-based communities — such as those based on agriculture. In either case, kinship was the organizing institutional basis of production and consumption. The household was the basic unit of production, several of which constituted a camp or village. The band, tribe or nation (the latter a culturally and linguistically homogeneous entity consisting of several of these groups) numbered from fewer than a hundred to several thousand persons.¹⁴

Each of the extended families of Dene people have their own traditional land base and, within that land base, they have jurisdiction over all matters pertaining to human life in relationship with the animals and the land and the Creator.

Rene Lamothe
Deh Cho Regional Council
Fort Simpson, Northwest Territories, 26 May 1992

Each nation's system of territoriality, governance and occupancy was intimately linked to its particular relationship to lands and resources. Northern and western nations, including Dene and Cree, had very large territories, shaping their system of governance to make it easier for them to move in harmony with seasonal activities such as hunting, fishing and harvesting.¹⁵ By contrast, Pacific coast nations such as the Haida and the Tsimshian, whose sustenance and activities were tied to the sea and its resources, resided in settled villages with an elaborate system of governance. As for the east, there are many historical references to established agrarian communities at the time of contact:

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

When sixteenth-century Europeans encountered Iroquoians, first in the Gaspé and St. Lawrence Valley, and later in their homelands in the Great Lakes region and to the south, they also found gardens, although on a very modest scale in comparison with the Mexica [of Central America], and none was strictly for pleasure. Rather it was the Iroquoian cornfields that immediately attracted European attention: in 1535 Cartier was impressed with Hochelaga's "large fields covered with the corn of the country," which he thought resembled Brazilian millet. Nearly a century later, Recollet Friar Gabriel Sagard, visiting Huronia in 1623-24, reported that it was easier to lose his way in the cornfields than in the forest.¹⁶

Regardless of the actual pattern of land and resource-based activity, some social and political principles were common to all Aboriginal nations. These included stewardship of the earth and a set of responsibilities and obligations governing individuals, the family or clan, and the collective. These rules guided behaviour with respect to resource access and use and governed, managed and regulated territorial boundaries and resources.

Certain obligations and responsibilities for the larger collective — such as presiding at councils or conducting warfare — were undertaken by designated leadership. In Anishnabe-speaking nations (Ojibwa, Mississauga, Algonquin, Potawatomi and Odawa), these individuals were known as okima — a term that Europeans first translated as 'captain', and then as 'chief'.¹⁷ Depending on the nation, leaders were chosen through the male or female line of descent of certain key families, or as a result of demonstrated ability in certain areas. Decisions about allocation, access to and use of lands and resources occurred mostly at this broader level.

The relationship to land was also reflected in jurisdictional issues relating to lands and resources. Tribal or band territories — often thousands of square kilometres — were communal property to which every member had unquestioned rights of access. As John Joe Sark, Kep'tin of the Micmac Grand Council, explained during the hearings, the Grand Council "traditionally divided hunting grounds so that all bands within the Mi'kmaq Nation would have adequate resources for their needs".¹⁸

A similar system existed among the Ojibwa people of northern lakes Huron and Superior, according to the report of two commissioners appointed by the province of Canada in 1849 to investigate Aboriginal grievances on the upper lakes:

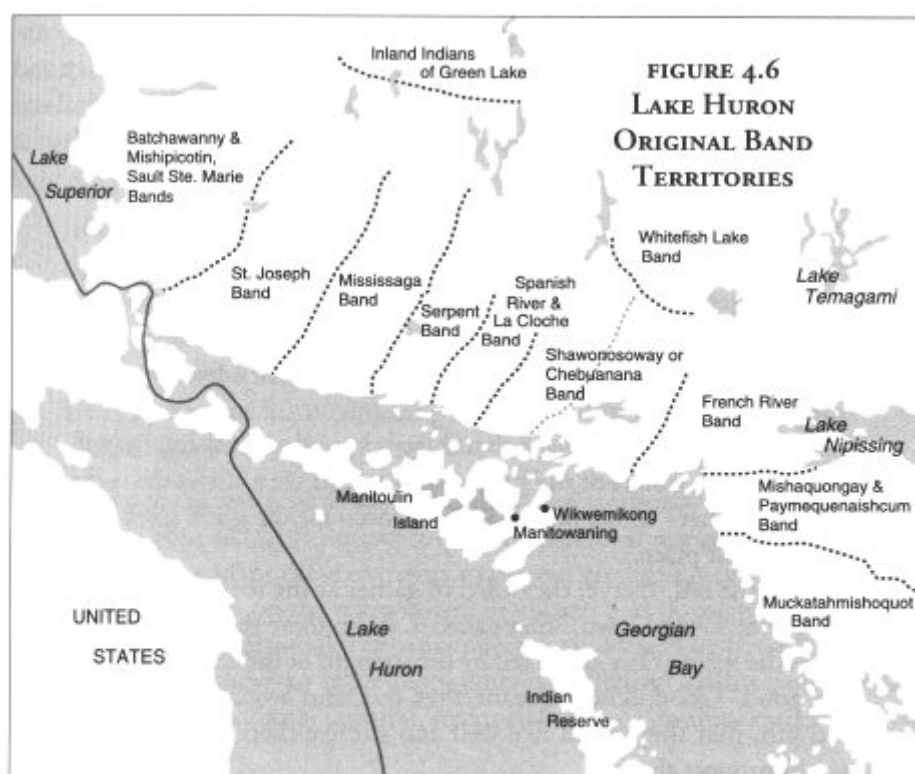
16 Olive Patricia Dickason, "For Every Plant There is a Use: The Botanical World of Mexica and Iroquoians", in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, ed. Kerry Abel and Jean Friesen (Manitoba: University of Manitoba Press, 1991), p. 23.

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.

Long established custom, which among these uncivilized tribes is as binding in its obligations as Law in a more civilized nation, has divided this territory among several bands each independent of the others; and having its own Chief or Chiefs and possessing an exclusive right to and control over its own hunting grounds; — the limits of these grounds especially their frontages on the Lake are generally well known and acknowledged by neighbouring bands; in two or three instances only, is there any difficulty in determining the precise boundary between adjoining tracts, there being in these cases a small portion of disputed territory to which two parties advance a claim.¹⁹

The map of Lake Huron that commissioners Alexander Vidal and T.G. Anderson enclosed with their report is shown in Figure 4.6. Although the division lines marking each territory appear as straight lines, most follow major river systems flowing into the lake. Each of these band territories included such resources as lakeshore fisheries, sugar bushes and gardens, as well as interior fisheries and hunting grounds.²⁰



Source: Adapted from James Morrison, "The Robinson Treaties of 1850: A Case Study", research study prepared for RCAP (1993), based on maps in National Archives of Canada, Record Group 10 (Indian Affairs), volume 266, pp. 163121-163155, report of treaty commissioners Alexander Vidal and T. G. Anderson, 1849.

Within these band or tribal territories, however, family units or clans retained their autonomy. Day-to-day decision making about production and consumption occurred mostly at the household level,

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".

and the families or clans generally returned every year to the same specific areas. In later years, many Ojibwa communities attempted to adapt this traditional pattern of organization and territoriality when they were settled on reserves. This was true, for example, along the English River between what is now Manitoba and northwestern Ontario:

On the old reserve, every family lived together. We weren't all bunched up and mixed together like we are today

On the old reserve, the families were far apart from each other. We lived beside the Fobisters, about a half mile apart; in between us were the Lands. John Loon and his family lived on that island, up the English River. The Assins were more on the Wabigoon side of the river. The Hyacinthes all lived together on one shore ... the next point belonged to the Ashopenaces ... then the Fishers, then the NecanapenacesThe Taypaywaykejicks had a different spot too. It was traditional for all the clans to live separately from each other. That's the way they have always lived. It was much better that way.²¹

The geographic extent of territorial rights was based on systematic jurisdiction, use and occupancy, although among the Pacific coast tribes, more formal property rights based on lineage and descent existed. However, the connection between the land and the group lay not simply in use, occupancy, and governance, but in knowledge, naming and stories. These were the cultural and symbolic expression of travel, harvesting, habitation and one's sense of place in the scheme of the universe:

Our people used to believe there is a spirit that dwells in those cliffs over there. Whenever the Indians thought something like that, they put a marker. And you can still see these markers on the old reserve. Sometimes, you see paintings on rocks. These mean something; they were put there for a purpose. You can still see a rock painting when you go up to Indian Lake

The rock paintings mean that there is a good spirit there that will help us on the waters of the English River. You see a cut in the rocks over there; that's where people leave tobacco for the good spirit that inhabits that place.

On the old reserve, they used to gather at the rock formation — “Little Boy Lying Down,” they called it. From there they sent an echo across the space. They could tell by the strength of the echo if the land was good. Good echoes meant that the land would give people strength, that they could live well and survive there, that the land would support them.

Another way to tell whether the land was good to live on was by the light that comes off the land. The old people used to be able to see this light. The place where the new reserve is, it is not a good place. It is not a place for life.²²

One criticism that Aboriginal people make of the current comprehensive claims process is that federal policy reduces the geographic basis for claims to evidence of economic use, without

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.

adequate recognition of the more fundamental connection with sites and areas of cultural, spiritual and community significance.

Boundary maintenance

The maintenance of territorial integrity (or, more specifically, access to resources) was effected through defence of social boundaries and of the territorial perimeter itself. The key to survival was access to and control of resources rather than land per se. Territorial boundaries could be variable or somewhat flexible according to social and political rules, such as alliances with other nations. Nonetheless, the limits were known to the members of the territorial group and to their neighbours and were defended accordingly. Unauthorized presence in the territory of another group would lead to disputes and was in most cases regarded as punishable trespass; people governed their behaviour accordingly.

In this respect, individual nations or tribes formed alliances or arrangements as required to address their respective rights of access or land use. In extreme instances, they resorted to war or to spiritual sanctions. In 1913, anthropologist Frank Speck learned about such duties of chieftainship among the Algonquin and Ojibwa peoples of western Quebec and northeastern Ontario:

*In time of war, it is remembered, the chief was the head. He decided the fighting policy of the band, where to camp, where to move, when to retreat, when to advance, and the like. Or, if unable to go himself, he would apportion so many men to another responsible leader, whom he might appoint as his proxy. The chief seems to have been expected to learn conjuring in order to send his *ma'nitu* spirit to fight against enemies or rivals.²³*

Although the patterns of social, political and territorial organization have been largely disrupted, it is noteworthy that, in certain respects, communities have attempted to adapt these elements to present circumstances both in terms of settlement patterns on the reserves and in villages and through the demarcation and survey of traditional territories or land use areas. The latter has generally been done in order to meet requirements of federal claims policy or to rediscover or affirm internal cultural, territorial and community integrity.

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).

Property and tenure

You must recognize that although we exercised dominion over these lands prior to the coming of the foreigners, our values and beliefs emphasized stewardship, sharing and conservation of resources, as opposed to the foreign values of ownership, exclusion and domination over nature. Proprietorship over use of resources within a traditional land base was a well-established concept that influenced our relations among ourselves as a people, and with other people who entered our lands from time to time.

Chief George Desjarlais
West Moberly First Nation
Fort St. John, British Columbia
20 November 1992

Aboriginal property systems can best be thought of as communal because they resemble neither individualized private property systems, nor the system of state management, coupled with open access, that currently prevails on public lands in Canada. Even where family and tribal territories existed, these systems combined principles of universal access and benefit within the group, universal involvement and consensus in management, and territorial boundaries that were flexible according to social rules.²⁴

Specific property arrangements have varied widely among Aboriginal nations, but some basic principles are common to all. In no case were lands or resources considered a commodity that could be alienated to exclusive private possession. All Aboriginal peoples had systems of land tenure that involved allocation within the group, rules for conveyance of primary rights (and obligations) between individuals, and the prerogative to grant or deny access to non-members, but not outright alienation.

The land belongs exclusively to the Atikamekw people. There is currently a territorial organization whose division is based on the principle of family clans. At its head is a principal guardian and his role is to manage the clan lands. Generally, the principal guardian is the patriarch of the clan. The clan lands are then divided among the families of the same clan. This land structure is comparable to the Regional Municipal Council and to the administrative divisions of a province. [translation]

Simon Awashish
Conseil de la Nation Atikamekw
Manouane, Quebec
3 December 1992

Formal arrangements could be made between groups, based on mutual recognition of each other's needs and surpluses, but these required adherence to rules of conservation as well as norms respecting harvesting, exchange, sharing and consumption. Members of the group either had equal access to the communal lands or were assigned places within them on an ordered basis. In 1913, one of Frank Speck's Ojibwa informants described how this process worked:

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.

One time I went to visit Chief Michel Batiste ... at Matachewan post near Elk lake. He gave me three miles on a river in his hunting territory and told me I could hunt beaver there. I was allowed to kill any young beaver, and one big one, from each colony. He told me not to go far down the river because another man's territory began there. Said he, "Don't go down to where you see a tract of big cedars." And I did not go there. This grove of cedars was the measure of his boundary. Later he gave me another lake where I could hunt marten.²⁵

As can be seen from this example, Aboriginal tenure systems generally incorporate two seemingly conflicting principles: permission must be sought to use another's territory, but no one can be denied the means of sustenance. The key is the acceptance of the obligations that go with the right. In general the bundle of rights included use by the group itself, the right to include or exclude others (by determining membership), and the right to permit others to use lands and resources. Excluded was the right to alienate or sell land to outsiders, to destroy or diminish lands or resources, or to appropriate lands or resources for private gain without regard to reciprocal obligations.

Available records of early treaty making confirm that Aboriginal systems allowed for a conception of land that included the notion of property. This can be seen from the report of a speech by Chief Ma-we-do-pe-nais, chief of the Saulteaux of Fort Frances in northwestern Ontario, to Commissioner Alexander Morris during the negotiations of Treaty 3 in 1873:

*What we have heard yesterday, and as you represented yourself, you said the Queen sent you here, the way we understand you as a representative of the Queen. **All this is our property where you have come.** We have understood you yesterday that Her Majesty has given you the same power and authority as she has, to act in this business; you said the Queen gave you her goodness, her charitableness in your hands. **This is what we think, that the Great Spirit has planted us on this ground where we are, as you were where you came from.** We think where we are is our property. I will tell you what he said to us when he planted us here; the rules that we should follow — us Indians — He has given us rules that we should follow to govern us rightly. [emphasis added]²⁶*

Management

It is commonly assumed that when Europeans first arrived in North America, they found a vast wilderness dotted with occasional Aboriginal settlements. Even today, many people think of wilderness parks or similar protected areas as regions "untrammelled by man".²⁷ But while many parts of North America were certainly more heavily forested in 1500 than they are now, Aboriginal people have lived on this continent for tens of thousands of years, and during that long period, they have intensively modified the landscape in a variety of ways.

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.

One important tool was fire. Environmental historians have shown, for example, that in the mixed deciduous forest areas of what are now New England, Nova Scotia, New Brunswick and southern Quebec, Aboriginal people not only cleared land for their corn fields and gardens, they burned forests at least once a year to keep them open and parklike.²⁸ In northern Alberta during this century, Dene and Cree were still using fire as a management tool for increasing the abundance of crops and the diversity of animal species in certain locations. As one of ecologist Henry Lewis's informants explained:

*In the spring when there is still some snow in the bush that's the only time most people could burn the open places. It is then that people think that it is best to start the burning. There are a lot of places they don't burn; they don't burn all over. But there are many places people know to burn. In time many animals go there; some like the beaver, about four to five years after. Especially the bear because of the new bushes of berries growing in the burned places.*²⁹

Aboriginal management systems rested on their communal property arrangements, in which the local harvesting group was responsible for management by consensus. Management and production were not separate functions, although leadership and authority within the group were based on knowledge, experience and their effective use. For example, those individuals and families that possessed and demonstrated extensive knowledge, experience and ability regarding traditional medicines, including tending, harvesting, use and application, became the acknowledged community experts in that sphere of land and resource management.³⁰

Traditional ecological knowledge

Management data included not only immediate observations of variation and theories of cause and effect, but also the accumulated knowledge of countless generations of harvesters. Various tools and techniques are still employed to modify the land and its resources, both to encourage an abundant harvest and, in fulfilment of their roles of stewards and brethren to the earth's creatures, to conserve the ecosystem and its inhabitants. In a case study prepared for the Commission, Andrew Chapeskie describes his experiences working with Aboriginal communities in northwestern Ontario:

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).

One Anishinaabe “trapper” ... I work with, for example, told me in the spring of 1993 about his feeding of fish to certain species of the furbearers that he customarily harvests. When I asked why, he responded with the following explanation. By feeding these animals at certain times of the year they can be attracted to specific locations. This makes it easier to catch them. A trapper like himself will want to do this so that a certain amount of carnivorous furbearers can be caught to maintain balanced levels of other furbearers that they prey upon, but which at the same time are important to his livelihood.

As well, since the collapse of the market for furs, his livelihood rationale to trap has diminished. The consequence is that populations of predator species such as mink have risen sharply since the customary balance between the furbearer species mosaic and himself as a trapper is no longer maintained. If he did not feed them they would not only disturb this optimal species balance with prey species such as muskrats, but they would also turn to cannibalism. He felt obligated to assume some sort of responsibility to ameliorate this situation to the extent that his time permitted.³¹

Oral culture, in the form of stories and myths, was coded and organized by knowledge systems for interpreting information and guiding action. Spiritual beliefs, ceremonial activities, and practices of sharing and mutual aid also helped to define appropriate and necessary modes of behaviour in harvesting and utilizing resources. These techniques thus had a dual purpose: to manage lands and resources, and to affirm and reinforce one's relationship to the earth and its inhabitants. Andrew Chapeskie describes the behaviour of another Anishnabe trapper from the Kenora region of northwestern Ontario:

She would open up beaver lodges at certain times of the year to see where the various ‘bedrooms’ and other rooms were located and to visit with the beaver in them. This work was also part of a broader spectrum of ‘census-taking’ activities designed to maximize the efficacy of her trapping work.³²

Although these practices did not operate in the manner of western ‘scientific’ management, they regulated access to and use of resources. It was these cultural constraints on behaviour with respect to communal property, rather than ‘natural’ predator-prey relationships, that normally guarded against resource depletion.

When the people came and started hunting at hunting time, maybe we picked on one area too much. The elders used to get together and say, “That land is going to rest. There is to be no more hunting. There will be no deer hunting for two, three, four years.” But the system as it is now, the white man goes and gives a hunting permit, a hunting licence to everyone to shoot everything they see in sight and we have so much respect amongst our people we don't even go to other tribes' territory to hunt moose or deer or bear. We stay out of there unless we are invited by that tribe.

John Prince
Stoney Creek, British Columbia,
18 June 1992

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”.

We use the term ‘management’ for these practices and beliefs as an analogy, rather than a description. Aboriginal languages did not have such a term, and many Aboriginal people today do not feel comfortable applying that term to their own ways of doing things.³³ However, social scientists have termed the content and use of such knowledge ‘traditional ecological knowledge’ or simply, traditional knowledge. The term itself is somewhat ambiguous, as it applies to a host of cultural concepts, understandings, tools and techniques from nations as diverse as the Wuastukwiuk (Maliseet) and the Shuswap. Given its cultural (and oral) context and the inherent difficulty of relating the underlying concepts, references to traditional knowledge tend to be general statements of principle. This lack of precision has led to misunderstandings and sometimes outright rejection of its value by western scientific practitioners and administrators.³⁴

We also have a considerable amount of information within our communities. There is a lot of wisdom there; there is a lot of experience there; there is a lot of knowledge. It is going to take time, it is going to take people and it is going to take resources to access that. We have research we have to undertake. We have to be able to collect that information, store it and retrieve it

When we sit down with the Ministry of Forests or Energy, Mines and Resources or any particular area, we find that we have to rely on their information. The things we know and believe, we often have a difficult time proving because we simply don't have the detailed technical information at our fingertips.

Bruce Mack
Cariboo Tribal Council
Kamloops, British Columbia, 14 June 1993

Subsistence

The word subsistence is a western concept, which carries with it the negative connotation of a hand-to-mouth existence. According to former British Columbia Supreme Court Justice Thomas Berger, who learned first-hand about the northern economy when he headed the Mackenzie Valley Pipeline Inquiry of the 1970s, many people down the centuries have tended to dismiss Aboriginal economies as “unspecialized, inefficient and unproductive”.³⁵ But while Aboriginal people have lived more “lightly on the land” than most of those who have come to join them, many of the resources they used were extraordinarily productive, even by modern standards.

A classic example, though far from the only one, is fisheries. On the east and west coasts of Canada, Aboriginal people harvested enormous quantities of fish and shellfish both for personal consumption and for exchange. Historian Dianne Newell has shown that, at the time of extensive non-Aboriginal settlement in British Columbia in the last quarter of the nineteenth century, the annual salmon catch of the Stó:lo and other tribes from the waters of the Fraser River and the coast was already close to modern levels for all fishers.³⁶

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.

The same was true of inland fisheries. In the mid-nineteenth century on lakes Huron and Superior and in the later nineteenth century in the Rainy River-Lake of the Woods area of northwestern Ontario and southeastern Manitoba, Ojibwa and Odawa fishers were running the equivalent of full-fledged commercial operations for sturgeon, trout and other species. Historical and archaeological evidence suggests that such fisheries had been managed on a maximum sustained yield basis for centuries.³⁷

Even today, many Aboriginal communities — particularly in the far and mid-north — have mixed, subsistence-based economies, meaning that people continue to make their living by combining subsistence harvesting with wage labour, government transfer payments and commodity production.³⁸ In particular, hunting, fishing and trapping continue to be central economic activities, and, in a larger sense, subsistence has remained very much a part of the way of life (see Chapter 5 of this volume and Volume 4, Chapter 6).

Subsistence activities are economically productive as a source of income in kind, and they provide nutritious and highly valued food such as fish and wild meat, for which there is often no import replacement. Social scientists have estimated that Aboriginal people continue to eat about seven times as much fish as the average Canadian, and their relative consumption of wild game is even greater.³⁹ There is a strong link between the consumption of such country food and lower instances of lifestyle diseases such as obesity and diabetes.⁴⁰

Without this subsistence base, the informal sector of the mixed, subsistence-based economy that typifies many communities becomes largely non-viable. Subsistence, in its broadest sense, is also a key means of reaffirming Aboriginal identity and of intergenerational transmission of skills and values. Subsistence is also valued as a sphere of Aboriginal autonomy; it provides for the retention of traditional and fundamental ties to the earth and is thus the aspect of life where control by federal or provincial management agencies is least appropriate. Gerry Martin, an Ojibwa from the Matagami First Nation community, explained to us that this close connection is not only economic, but also cultural, social and spiritual:

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.

Most Indians ... will say, "If you take that money out in the bush it is worth nothing to you, but what you have in your mind, in experience, with how you know how to live with the land and what it offers you — that is worth something." Money can't buy that and the only way you are going to learn that is to listen to your elders and the teachings and take the time to learn those lessons — by being out on the land.

Gerry Martin
Timmins, Ontario
6 November 1992

Thus, subsistence is part of a social and cultural system. Family ties form the basis of its social organization; kinship is in turn reinforced by hunting, fishing, harvesting and sharing. While some Canadians — residents of Newfoundland outposts, for example — will recognize this kind of system, it is unknown to most non-Aboriginal systems of governance. Yet extended families and the many kinds of land-based activities they practised continue to be an integral part of Aboriginal nationhood and governance.

What Aboriginal peoples do on the land (and on the rivers, lakes and oceans) has certainly evolved over time, as has the way they do it. But it remains just as important to them as a means of securing the future as well as affirming their connection to the past.

To live on our land for periods of time throughout the year continues to be of central importance to maintaining our culture. We are a hunting people. Life in the country, away from the villages, is not sufficient for us. It is what is at the heart of who we are as a people. In the country, we have the skills passed to us from our mothers and fathers. In the country, we are the teachers, passing on Innu skills to our children. It will be a major role of the Innu government to do whatever is necessary to ensure that our rights to use and occupy our lands are protected.

All of these are examples of what Innu government means. I think it is obvious how recognition of Innu government and the Innu rights will lead to political and economic self-sufficiency. Recognition of our rights means recognition of our nationhood, and recognition of our nationhood brings all we need to be politically and economically self-sufficient.

George Rich
Innu Nation
Davis Inlet, Newfoundland and Labrador
1 December 1992

To the Innu people of northern Labrador, as to other Aboriginal peoples in Canada, the link between self-sufficiency and self-government is an obvious one. But that link has been far from obvious to the broader society. Indeed, most of the land use rights and practices referred to in this section have survived with the greatest difficulty, for only in the past two decades have Aboriginal property rights begun to be reconsidered in the law and on the facts, after more than a century of atrophy. This is the subject to which we now turn.

4. How Losses Occurred

As we saw earlier in this chapter, Dene Th'a prophet Nógħa warned his people that they would end up confined to small parcels of land. How Nógħa's prophecy became a reality is a tragic story of forgotten promises and abandoned responsibilities — and this story is not unique to Dene. Although the law of Aboriginal title initially promised respect for Aboriginal relationships with lands and

resources, Aboriginal peoples increasingly were separated from their traditional territories and shunted to the margins of Canadian society. While they continued to occupy large regions of the country, their recognized land holdings — their reserves and settlements — had been reduced during the years between Confederation and the end of the Second World War to a series of small plots of land with few natural resources. The process of settlement and economic development had devastating effects on their traditional land use areas.

Aboriginal peoples were also ignored in the collective memory of Canadian society. Their history since Confederation was not taught in schools or recognized as integral to the founding of Canada.⁴¹ Government policy makers had little consciousness of Aboriginal issues. Some academics, mainly anthropologists like Diamond Jenness, Jacques Rousseau and Thomas McIlwraith, had developed close relations with Aboriginal people, but their publications did not reach a wide audience.⁴²

In recent years, there has been an explosion in historical, social, scientific and popular writing by and about Aboriginal people and their concerns. Some of it has been spurred by research into land claims and related issues, but much of it is the result of Aboriginal issues being recognized as legitimate areas of academic study. Various publications are bringing about a reassessment of the history of the past century or more.⁴³ We are only beginning to understand the myriad factors that made Nógha's prophecy concerning Aboriginal lands and resources a reality. In the rest of this section we describe in some detail how, despite the law's initial promise, these losses occurred. As our hearings showed, Aboriginal people have always known what happened to them, but many Canadians still do not.

4.1 The Law's Initial Promise

Our songs, our spirits, and our identities are written on this land, and the future of our peoples is tied to it. It is not a possession or a commodity for us. It is the heart of our nations. In our traditional spirituality it is our mother.

Grand Chief Anthony Mercredi
Assembly of First Nations
Ottawa, Ontario, 5 November 1993

Despite claims of territorial sovereignty over North America by European nation-states at the time of contact, Aboriginal relationships to land and its resources were initially respected by imperial and

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.

colonial authorities.⁴⁴ Indeed, the law of Aboriginal title, as initially expressed in British colonial law, emerged out of the very process of colonization and settlement, through practices of Aboriginal people and colonial officials in their attempt to maintain peace and co-operation with each other. The law of Aboriginal title initially took the form of consistent norms of good practice necessary for initiation and expansion of the trade in fish and fur, but grew quickly to reflect intersocietal norms that enabled the coexistence of colonists and Aboriginal peoples on the North American continent.⁴⁵

This body of law prescribes stable ways of handling disputes between Aboriginal and non-Aboriginal people, especially disputes over land. It recognizes Aboriginal title, namely, occupation and use of ancestral lands, including territory where Aboriginal people hunted, fished, trapped and gathered food, not just territory where there were Aboriginal village sites or cultivated fields. It restricts non-Aboriginal settlement on Aboriginal territory until there is a treaty with the Crown. It prohibits the transfer of Aboriginal land to non-Aboriginal people without the approval and participation by Crown authorities. And in its most developed form, it prescribes safeguards for the manner in which such treaties can occur and imposes strict fiduciary obligations on the Crown with respect to Aboriginal lands and resources.⁴⁶

That these norms are stable, consistent and intersocietal does not mean that they were always scrupulously observed by colonial authorities. Settlement frequently outran governmental authority and often was ratified retroactively by governments. Agents of government, attracted by the potential for profit in land speculation, occasionally connived in the evasion of the standards contemplated by the law. Aboriginal interests in land and resources were increasingly ignored in the formulation of public policy designed to open up the continent for non-Aboriginal settlement and exploitation.

But the initial story of colonial encounters with Aboriginal relationships with land and resources is one of respect and recognition, reflected in the law of Aboriginal title (see Volume 1, Chapter 5, and Chapter 3 of this volume). Although the existence of Aboriginal nations on the continent did not preclude European powers from asserting territorial sovereignty over North America, Aboriginal

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).

title survived such assertions and protected Aboriginal lands and resources from non-Aboriginal settlement.⁴⁷

Whether Aboriginal title was extinguished by the French regime before 1760 is a matter of some scholarly controversy. The older view is that extinguishment did occur, but more recent scholarship working from a pluralist perspective, which we find persuasive, reaches a different conclusion.⁴⁸ In the words of Andrée Lajoie, “the French cohabited with their Aboriginal allies in North America in ambiguity, without acquiring territory or subjugating any population other than, perhaps, certain individuals who had settled in villages”.⁴⁹ In 1867, Justice Monk of the Quebec Superior Court described these initial relations between French settlers and trading companies and Aboriginal nations in the following terms:

*The enterprise and trading operations of these companies and the French colonists generally extended over vast regions of the northern and western portions of this continent. They entered into treaties with the Indian tribes and nations, and carried on a lucrative and extensive fur trade with the natives. Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and, then only by persuasion.*⁵⁰

Respect for and recognition of Aboriginal title is apparent in the *Royal Proclamation of 1763*, which codified British colonial practice with respect to Aboriginal lands and resources. The Proclamation forbids the purchase of Aboriginal territory by entities other than the Crown and provides rules governing the voluntary cession of Aboriginal territory to the Crown.⁵¹

Recognition of the importance of land and resources to Aboriginal people is also reflected in a number of other constitutional instruments, including the *Constitution Act, 1867*, the *Rupert's Land and North-Western Territory Order and the Adjacent Territories Order*, the *Manitoba Act*, the *British Columbia Terms of Union*, the *Natural Resources Transfer Agreements* and, of course, the *Constitution Act, 1982*.⁵²

Norms of conduct recognizing the importance of Aboriginal relationships with lands and resources and enabling Aboriginal and non-Aboriginal people to live alongside each other are also embodied in countless treaties entered into by Aboriginal nations and government authorities. As Justice Lamer of the Supreme Court of Canada said in *Sioui*:

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.).

Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.⁵³

Respect for Aboriginal relationships with lands and resources is apparent not only in early treaties of alliance, but also in more contemporary agreements that authorize the sharing of territory by Aboriginal nations and the Crown (discussed at greater length in Volume 1, Chapter 5, in Chapter 2 of this volume, and in Appendix 4B to this chapter).

4.2 Losing the Land

Although the law recognizes Aboriginal title in terms of a range of inherent rights with respect to lands and resources, Crown respect for the existence of Aboriginal title, as we will see shortly, was most consistent during the eighteenth and early nineteenth centuries, when settlers and colonial officials still needed or valued Aboriginal people as friends and military allies. This respect was eroded by the decline of the fur trade and the concomitant decline of Aboriginal and non-Aboriginal economic interdependence. Increased demands on Aboriginal territory occasioned by population growth and westward expansion, followed by a period of paternalistic administration marked by involuntary relocations and resettlement, only exacerbated the erosion of respect. The treaty-making

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, s. 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.

process fell into disuse, and treaties that had been concluded were often vulnerable to manipulation and misinterpretation by government officials.

The Loyalist settlers who fled to Canada at the close of the American Revolution brought with them the treaty-making practice that had been enshrined in the *Royal Proclamation of 1763*, and various agreements with Aboriginal nations cover southern Ontario and portions of southern Quebec.⁵⁴ If the dates of first surveys in various parts of southern Ontario are compared with the dates of the creation of the first farms, it can be seen that (unlike the United States) Crown survey invariably preceded settlement. This was because, in accordance with the rules set down in the Royal Proclamation and subsequent regulations, lands did not become waste lands of the Crown — that is, lands available for disposition to settlers (now known as public lands) — until after a treaty with their Aboriginal inhabitants.⁵⁵ In 1794, the commander in chief in British North America, Lord Dorchester, had enshrined such rules for all of His Majesty’s surviving colonies on that continent (including Upper and Lower Canada, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland).

While the language of the Dorchester regulations is that of a real estate transaction, this was not how the subsequent agreements were perceived by the Aboriginal participants. The *Royal Proclamation of 1763* had stated that treaties would be made only if the Indian Nations were “inclined” to part with their lands. In effect, however, what had been designed originally as measures for the protection of Aboriginal people contributed to their dispossession. With large-scale immigration to Canada, particularly in the period after the War of 1812, the understanding that Aboriginal people had of the treaty relationship — that they would continue to have access to their traditional lands and that the Crown was to function as the referee between their interests and those of the settlers — was, in their view, violated. In 1829, the chiefs of the Mississauga Nation of the Credit River, whose lands included what is now the greater Toronto area, expressed to Lieutenant Governor John Colborne their disappointment with the Crown’s interpretation of a treaty they had made in 1820:

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).

Several years ago we owned land on the Twelve mile [Bronte] creek, the Sixteen [Oakville] and the Credit. On these we had good hunting and fishing, and we did not mean to sell our land but keep it for our Children for ever. Our Great Father sent to us by Col[onel] Claus and said. The White people are getting thick around you and we are afraid they, or the yankees will cheat you out of your land, you had better put it into the hands of your very Great Father the King to keep for you till you want to settle. And he will appropriate it for your good and he will take good care of it; and will take you under his wing, and keep you under his arm, & give you schools, and build houses for you when you want to settle.

Some of these words we thought good; but we did not like to give up all our lands, as some were afraid that our great father would keep our land. But our Great Father had always been very good to us, and we believed all his words and always had great confidence in him, so we said “yes”, keep our land for us. Our great father then thinking it would be best for us sold all our land on the Twelve the Sixteen and the upper part of the Credit to some white men. This made us very sorry for we did not wish to sell it.⁵⁶

What the Aboriginal nations were not aware of was that, in the Crown’s view, once a particular treaty had been concluded, the lands covered by the agreement could be turned into private property. By the turn of the nineteenth century, Aboriginal people in southwestern Ontario were complaining that farmers were setting their dogs on them if they tried to cross an open field to get to a hunting or fishing site. And there were other consequences. In 1806, the same Mississauga people were protesting to Deputy Superintendent General William Claus that the waters of the Credit River at its entrance into Lake Ontario “are so filthy and disturbed by washing with soap and other dirt that the fish refuse coming into the River as usual, by which our families are in great distress for want of food”. They asked that the settlers be moved away from the river.⁵⁷

In our area, Aboriginal people are denied access to most Crown lands because we have to cross private property to get to the land. As an example there is one person in our area who owns almost 1,000 acres and he has signs posted saying private property on his own property but he retains a hunt camp on Crown land. In order for us to get to that Crown land we have to cross his property but we can’t cross it.

On one piece of land where I hunted and fished for years, MNR [ministry of natural resources] changed it to a designated park and we were charged that fall for hunting there.

Paul Day
Toronto, Ontario
4 June 1993

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*.

The Dorchester Regulations of 1794

To Sir John Johnson, Baronet, Superintendent General and Inspector General of Indian Affairs, or, in his absence to the Deputy Superintendent General.

Art. 1st. It having been thought advisable for the King's Interest that the system of Indian Affairs should be managed by Superintendents under the direction of the Commander in Chief of His Majesty's Forces in North America; no Lands, therefore, are to be purchased of the Indians but by the Superintendent General and Inspector General of Indian Affairs, or in his absence the Deputy Superintendent General or a Person specially commissioned for that purpose by the Commander in Chief.

2d. When Indian Territory shall be wanted by any of the King's Provinces, the Governor or Person administering the Government of the respective Province will make his Requisition to the Commander in Chief, and also to the Superintendent General of Indian Affairs, or in his absence the Deputy Superintendent General, accompanied with a sketch of the Tract required, who will endeavour to find out the probable price to be paid therefor, in Goods the Manufacture of Great Britain, and Report the same to the Commander in Chief, that measures may be taken to get them out from England by the first opportunity. Presents sent to the Upper Posts for the ordinary purposes of the Indians inhabiting the Neighbourhood of, or visiting the said Posts, are not to be appropriated to the purchase of Indian Lands without the express Order of the Commander in Chief.

3d. All Purchases are to be made in public Council with great Solemnity and Ceremony according to the Antient Usages and Customs of the Indians, the Principal Chiefs and leading Men of the Nation or Nations to whom the lands belong being first assembled.

4th. The Governor or Person administering the Government of the Province in which the Lands lie, or two Persons duly commissioned by him, are to be present on behalf of the said Province.

5th. The Superintendent General or in his absence the Deputy Superintendent General negotiating the purchase shall be accompanied by two other Persons belonging to the Indian Department together with one, two, three or more Military Officers (according to the Strength) from the Garrison or Post nearest to the place where the Conference shall be held.

6th. The Superintendent General or Deputy Superintendent General negotiating the Purchase will employ for the purpose such Interpreters as best understand the Language of the Nation or Nations treated with, and during the time of the Treaty every means are to be taken to prevent the pernicious practice of introducing strong Liquors among the Indians, and every endeavour exerted to keep them perfectly sober.

7th. After explaining to the Indians the Nature and extent of the Bargain, the situation and bounds of the Lands and the price to be paid, regular Deeds of conveyance (Original, Duplicate and Triplicate) are to be executed in Public Council by the Principal Indian Chiefs and Leading Men on the one part, and the Superintendent General, or in his absence the Deputy Superintendent General or Person appointed by the Commander in Chief on His Majesty's behalf on the other part, and attested by the Governor or Person administering the Government in which the ceded Lands lie, or the Person commissioned by him and by the Officers and others attending the Council. Descriptive Plans signed and witnessed in the same manner are to be attached to the Deeds of Conveyance, one of which is to be transmitted to the Office of the Superintendent General to be there entered and remain on Record, a second to be given to the Governor or Person administering the Government of the Province in which the lands fall or the Person appointed by him, and the third is to be delivered to the Indians, who by that means will always be able to ascertain what they have sold and future Uneasiness and Discontents be thereby avoided.

8th. All other matters being settled, Indian Goods to the amount agreed upon are to be given in payment of the Territory ceded, the said Goods to be delivered in Public Council with the greatest possible Notoriety and the Delivery certified and witnessed in the same manner as the Deeds of Conveyance.

9th. When the Council is finished the Proceedings are by the first convenient Opportunity to be transmitted to the Office of the Superintendent General for the information of the Commander in Chief.

Guy Carleton, Lord Dorchester

Source: Lord Dorchester, "Additional Instructions, Indian Department", letter to Sir John Johnson, superintendent general and inspector general of Indian affairs, 26 December 1794, in *The Correspondence of Lieut. Governor John Graves Simcoe, with Allied Documents relating to His Administration of the Government of Upper Canada*, ed. Brigadier General E.A. Cruikshank, Volume III (Toronto: Ontario Historical Society 1925), pp. 241-242.

The settlers believed that they had acquired a valid title to land, a fact acknowledged by Crown officials, and they were generally mystified by the Aboriginal response. They had their own cultural reasons for acquiring land. Except on the east coast, the vast majority of North American settlers until the mid-nineteenth century had arrived in search of land; many of them believed that they were fulfilling a biblical injunction to subdue the earth.⁵⁸ Particularly for agricultural colonists from England, where much of the forest cover had disappeared by Norman times (though not France, where large tracts of woodland remained) — forested lands were considered wild and unproductive.⁵⁹ This meant that Aboriginal people were not making proper use of them. Lieutenant Governor Francis Bond Head of Upper Canada summed up the prevailing attitudes in a speech to Aboriginal nations assembled on northern Lake Huron in the summer of 1836:

In all parts of the world farmers seek for uncultivated land as eagerly as you, my red children, hunt in your forest for game. If you would cultivate your land it would then be considered your own property, in the same way your dogs are considered among yourselves to belong to those who have reared them; but uncultivated land is like wild animals, and your Great Father, who has hitherto protected you, has now great difficulty in securing it for you from the whites, who are hunting to cultivate it.⁶⁰

Even today, such sentiments have resonance, even though only a small percentage of Canadians remain on the farm. Government programs for farmers have until recently been regarded with greater favour than those for fishers or resource workers. Attitudes about “uncultivated land” also have had a subtle and lingering influence, leading to the view that what Aboriginal people did (or still do) on the land has been neither efficient nor productive enough to be considered real economic activity.⁶¹

The first reserves

As early as the beginning of the seventeenth century in New France and Acadia, lands were being set aside for missionary orders to concentrate Indian people in a single location and instruct them in the Christian religion. These ‘reductions’, as they were termed, were modelled on earlier Jesuit missions to the Indigenous peoples of Central and South America. For example, the present lands of the Mohawk people at Kahnawake (Sault Saint Louis) and Kanasatake (Lake of Two Mountains) had been part of Christian missions run by the Jesuits and the Sulpicians, respectively, in the late seventeenth and early eighteenth centuries.⁶² The Mohawk people, however, regarded the lands as theirs, not the missionaries’; both during the French regime and with the arrival of the British, they continually pressed for recognition of their own titles. “It is our earnest prayer”, Agneetha, the chief

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.

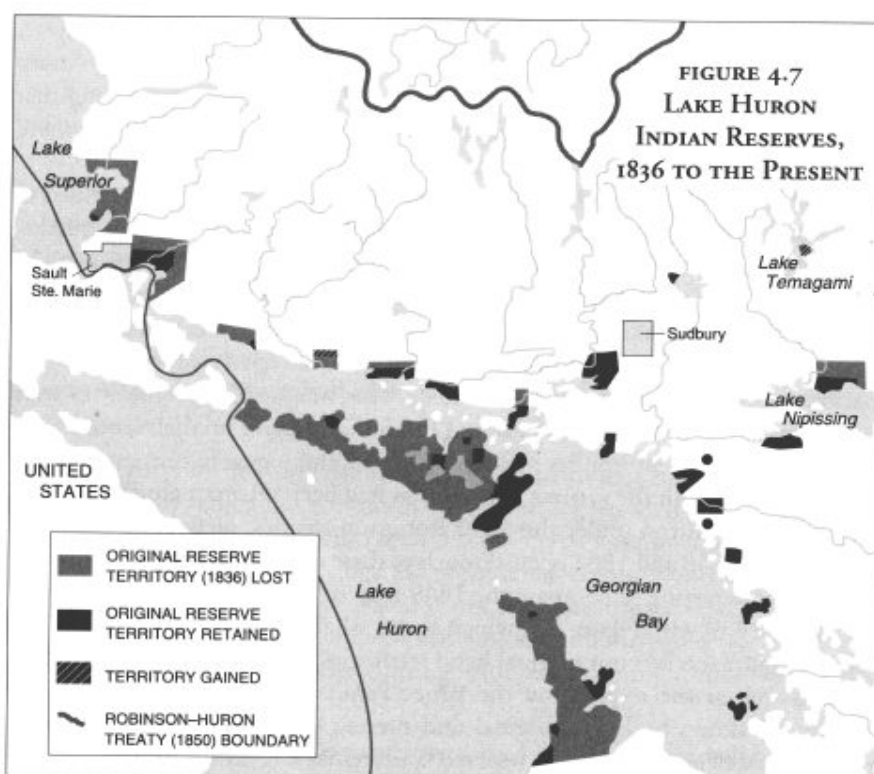
61 See Paul Tennant, “The Place of *Delgamuukw* in British Columbia History and Politics æ And Vice Versa”, in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, ed. Frank Cassidy (Montreal: Institute for Research in Public Policy, 1992).

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.

at Kanesatake, told Superintendent General Sir John Johnson in 1788, “that a new Deed for the Lands we live on be made out for us, and that we may hold them on the same tenure that the Mohawks at Grand River and Bay de Quinte hold theirs”.⁶³

Throughout the first half of the nineteenth century, reserves continued to be set aside in the Maritimes, Quebec and Ontario, sometimes as part of treaties, sometimes not. Yet even these reserves were a target for settlement pressure. The purpose of Lieutenant Governor Bond Head’s trip to the upper lakes in 1836 was to persuade the nations of that region to allow the Bruce Peninsula and the Manitoulin chain of islands in Lake Huron to be set apart as reserves for any nations that might choose to locate there. This was so that people who were occupying smaller reserves in southern Ontario would give up their lands to settlers. As the settlement frontier moved northward, these areas in turn came under pressure, along with the various reserves that had been set apart along Georgian Bay and Lake Huron under the 1850 Robinson treaties. New land treaties in 1854, 1857, 1858 and 1862 opened much of these reserved areas to settlement.⁶⁴

It is interesting to compare the 1849 map of Lake Huron referred to earlier (Figure 4.6) with Figure 4.7, which shows what happened to reserves in the region. Figure 4.6 lays out original band territories along the north shore of the lake, as well as the reserves on the Bruce Peninsula and Manitoulin Island. Figure 4.7 shows both the original and present size of the Robinson treaty reserves, as well as the size of the reserved lands remaining on the Bruce Peninsula and Manitoulin islands. The two current reserves at Sault Ste. Marie (Garden River and Batchewana) have lost almost four-fifths of their territory since the 1850 treaty, and the Saugeen (Bruce) reserve is now represented on the map by a few tiny dots. Indeed, the Indian people of this region have been doubly dispossessed.



63 Thompson *Source: Adapted from James Morrison, "The Robinson Treaties of 1850: A Case Study", research study prepared for RCAP (1993).*

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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).

Reserves were regarded for much of the nineteenth century as places for people to be confined until they became ‘civilized’. Once they had learned ‘proper habits’ of industry and thrift, they could then be released (enfranchised, in the language of Indian legislation from this period) into the general society as full citizens with equal rights and responsibilities, taking with them a proportional share of reserve assets.⁶⁵ An Indian person could not be both Aboriginal and a citizen of Canada; to own property, one would have to leave the reserve.⁶⁶

The prairie west

The treaty-making process that had its origins in central Canada was continued in northwestern Ontario and the prairie west after Confederation. The Cree, Assiniboine, Saulteaux and Siksika nations saw that life would change with the arrival of so many newcomers, and they tried to secure both an economic base and a promise of continued government support. Part of that economic base would be the various reserves set apart under the so-called numbered treaties.

The prairie treaty nations were not told that, with the treaties, they would be made subject to existing policies and legislation, particularly the Indian Act. In addition to its extensive list of measures governing the everyday lives of Indian people, the 1876 act specifically prohibited Indians from acquiring a homestead in Manitoba, the Northwest Territories, and the territory of Keewatin — unless they were enfranchised.⁶⁷ Until that time, they were to remain on their reserves. Métis people, who had formerly used the open spaces of the west, along with their Indian brethren, were reduced to seeking a living on the margins of Crown land.⁶⁸

In 1885, the Indian department brought in a pass system, requiring Indian people to get signed permission from the Indian agent before they could leave their reserves. The system, which was used for about two decades, had been designed in part to prevent the movement of Indian leaders in the aftermath of the Riel rebellion.⁶⁹ Once the military threat had diminished, however, both the settler population and government officials came up with other motives for keeping it. The settlers, who often complained that Indian people were killing their cattle, saw the pass system as a way of keeping Indians from loitering about their towns — and of preventing them from competing for game and fish. To government officials, the system was intended to discourage participation in ceremonies such as the sundance or thirst dance, to prevent nations such as the Plains Cree from

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).

asking for larger reservations, and to establish reserve agriculture by preventing Indians from travelling when there was work to be done in the fields (see Volume 1, Chapter 9).⁷⁰

Despite the latter goal, some prairie treaty nations never received their full entitlement of reserve lands and therefore never even had the opportunity to try farming. Moreover, in the land rush that accompanied the building of the Canadian Pacific Railway, many First Nations lost parts of their reserves. In southern Saskatchewan alone, close to a quarter-million acres of reserve land had been sold by 1914. In very few instances were First Nations willing vendors; usually they were subject to relentless pressure from government officials and local settlers to part with their land.⁷¹ Sometimes reserve lands were expropriated for railway easements or the needs of neighbouring municipalities. In other cases, reserve lands were lost through questionable transactions involving government officials and land speculators. In a famous case, documented in the 1970s by the Federation of Saskatchewan Indian Nations, forensic evidence established that fraudulent deeds for lands belonging to the White Bear First Nation community had been typed up in the office of the local Indian superintendent.⁷²

Whether or not outright corruption was involved in the transfer of reserve land, the reluctance of the new residents of western Canada — whether government officials, settlers, or elected politicians — to accept the continuing existence of reserves had a number of fundamental causes. One was the prevailing view that there ought to be a free market in land. No land would then remain ‘idle’ (as defined by the general society), and the most profitable use would prevail. The behaviour of government officials therefore had a certain logic. By engineering the surrender and sale of reserve lands, they were ensuring that the broader public interest (as they interpreted it) would prevail over the Aboriginal interest in maintaining a land base.⁷³

The federal government, which retained control of lands and resources in the prairie provinces until 1930, also took reserve lands for other reasons that it considered to be in the broad public interest. In 1896, for example, the department of Indian affairs set aside 728 acres on Clear Lake in southwestern Manitoba as a fishing reserve for the Keeseekoowenin Band of Saulteaux. Some 30 years later, the federal government declared the enabling order in council inoperative and included the fishing reserve in the new Riding Mountain National Park, established in 1933. Keeseekoowenin Band members were evicted and their houses burned down. In 1994, the department of Indian affairs finally settled a specific land claim based on its actions; by order in council, the disputed portion of the national park was returned to the Keeseekoowenin Saulteaux.⁷⁴

British Columbia

At this very moment the Lieutenant-Governor of Manitoba has gone on a distant expedition in order to make a treaty with the tribes to the northward of the Saskatchewan. Last year he made two

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).

treaties with the Chippewas and Crees; next year it has been arranged that he should make a treaty with the Blackfeet, and when this is done the British Crown will have acquired a title to every acre that lies between Lake Superior and the top of the Rocky Mountains.

But in British Columbia — except in a few cases where under the jurisdiction of the Hudson Bay Company or under the auspices of Sir James Douglas, a similar practice has been adopted — the Provincial Government has always assumed that the fee simple in, as well as the sovereignty over the land, resided in the Queen. Acting upon this principle, they have granted extensive grazing leases, and otherwise so dealt with various sections of the country as greatly to restrict or interfere with the prescriptive rights of the Queen’s Indian subjects. As a consequence there has come to exist an unsatisfactory feeling amongst the Indian population.⁷⁵

Frank Oliver and the Michel Band

A prominent journalist and pioneer settler in Edmonton, Alberta, Frank Oliver (1853-1933) was one of the most powerful politicians in the history of western Canada. As minister of the interior and superintendent general of Indian affairs from 1905 to 1911 in Sir Wilfrid Laurier’s government, Oliver did his utmost to obtain surrenders of the various Indian reserves in and around his home city.

One of these reserves, located in what is now northwestern Edmonton, belonged to the Michel Band (of Iroquois, Cree and Métis ancestry) under Treaty 6. In 1906, after considerable pressure from Frank Oliver and officials of the Indian department (and the promise of horses and farm implements), the band agreed to part with some of its reserve lands. At the auction sale in December of that year (supervised personally by Oliver), 8,200 acres of Michel land sold in four hours at a price of \$9.00 an acre. Three-quarters of the land went to two speculators, Frederick Grant and Christopher Fahrni, who were both political allies of Oliver and the Laurier government.

By 1910, neither speculator had yet paid a cent of the purchase price. Under the Indian Act, the sales ought to have been cancelled immediately for non-payment. In the case of the Grant lands, the sales were not cancelled until 1927, after continuing futile attempts to secure payment. Indian affairs had cancelled the Fahrni sale in 1910 — only to withdraw the cancellation a few days later without explanation. Shortly thereafter, the Fahrni lands were sold to Edmonton bank manager J.J. Anderson at a quarter of their original purchase price. In 1914, Anderson transferred title to these lands to his father-in-law — none other than Frank Oliver.

Source: See Bennett McCardle, *The Michel Band: A Short History* (Indian Association of Alberta, 1981). See also Tyler and Wright Research Consultants Limited, “The Alienation of Indian Reserve Lands During the Administration of Sir Wilfrid Laurier, 1896-1911: Michel Reserve #132”, report prepared for the Federation of Saskatchewan Indians (1978).

As the governor general noted in his official dispatch to the colonial secretary, treaties were being made in the prairie west but not in mainland British Columbia. The Earl of Dufferin had in fact been trying for more than a year to persuade the government of Canada to force British Columbia to follow the treaty-making policy stipulated in the 1871 act admitting that province to Confederation.⁷⁶ The settlers, however, held firm views on the subject. “If you now commence to buy out Indian title to the lands of British Columbia”, Lieutenant Governor Joseph Trutch told Sir John A. Macdonald in 1872, “you would go back on all that has been done here for 30 years past

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).

and would be equitably bound to compensate the tribes who inhabited the district now settled and farmed by white people equally with those in the more remote and uncultivated portions”. With respect to the Indian nations, the most the provincial government was prepared to do was reserve from time to time “tracts of sufficient extent to fulfil all their reasonable requirements for cultivation and grazing”.⁷⁷

Like Manitoba in 1870, British Columbia actually had an overwhelming Aboriginal majority (at least 70 per cent) when it entered Confederation. The federal census for 1871 put the total population at 36,247 — of which 25,661 were Indian and another 1,000 Chinese — although other estimates place the Aboriginal population considerably higher.⁷⁸ An 1872 provincial act had removed the right of both groups to vote in provincial and federal elections, however, so that all political decisions in the province were being made by the tiny settler minority.⁷⁹

It was therefore the settler minority that determined what the “reasonable requirements” of the Indian nations actually were. Crown land ordinances both before and after Confederation prevented Indian people from pre-empting land without the written permission of the governor, which was almost never given.⁸⁰ Reserves in the colony/province were limited, on average, to less than 10 acres per family, compared to between 160 and 640 acres per family of five allocated under the prairie treaties.⁸¹ By Confederation, this had effectively transferred most of the land owned and used by Indian nations in southern and central British Columbia to non-Aboriginal farmers and ranchers.⁸²

In 1875, the federal cabinet approved a legal opinion from the minister of justice that urged the Crown to disallow British Columbia’s first public lands act on the grounds that it did not make adequate provision for Aboriginal interests in land.⁸³ In addition to citing the *Royal Proclamation of 1763*, the opinion argued that Aboriginal title constituted an interest other than that of British Columbia in the lands within its boundaries by virtue of section 109 of the *British North America Act*.⁸⁴ Instead of proceeding with disallowance, however, the federal government proposed negotiations to the province, which agreed. In 1876 the governments set up a joint commission to investigate the Indian land question. Provincial commissioner G.M. Sproat suggested that the

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.

commission be instructed on the principle of Indian title in order to permit them to make treaties, but this was never done. During its five- year existence, the commission allotted several reserves for treaty Indians on Vancouver Island, but never completed its work on the mainland.⁸⁵

By national standards, reserves in British Columbia remained small, and they were to get even smaller. Another joint federal-provincial royal commission (McKenna-McBride), appointed in 1912 to deal with the long-standing Indian land question, recommended that 19,000 hectares, including areas long coveted by settlers, be eliminated from existing Indian reserves and communities in the province as surplus to their requirements.⁸⁶

From the time of the failure of the first joint commission in 1875-1880, Indian nations in British Columbia pressed the Crown for recognition of their land rights as well as compensation for lands taken from them. In 1913, for example, the Nisg_a'a people of the Nass valley presented a petition to the imperial privy council asking for recognition of their Aboriginal title; the petition was referred to the Canadian government. The federal government bowed to provincial pressure, however, and did not proceed with a case by reference to the Exchequer Court of Canada with a right of appeal to the judicial committee of the privy council — then the country's highest court.⁸⁷ The failure of such attempts to settle their grievances eventually led the Nisg_a'a to take both governments to court, an action that led to the 1973 Supreme Court decision in *Calder* and to a new era in federal land claims policy. The recent creation of the British Columbia Treaty Commission, then, is but the latest in a long series of attempts to deal with unresolved issues dating back to before the province's entry into Confederation.

The North

The Indians were generally averse to being placed on reserves. It would have been impossible to have made a treaty if we had not assured them that there was no intention of confining them to reserves. We had to very clearly explain to them that the provision for reserves and allotments of land were made for their protection, and to secure to them in perpetuity a fair portion of the land ceded, in the event of settlement advancing.⁸⁸

While the policy goal of turning Aboriginal people into farmers prevailed in much of Canada, even Indian department officials realized that such programs would be difficult, if not impossible, in more northerly regions of the country where agricultural land was either scarce or non-existent. By the turn of the twentieth century, the resource development frontier extended from the north shores of lakes Huron and Superior, where minerals had been discovered in the mid-1840s, to the boreal forest and Arctic regions of Canada. The development of these resources went in step with, but was independent of, the colonization of fertile lands.⁸⁹

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).

Indian Reserves in the Okanagan

James Douglas proclaimed colonial government on the mainland in 1858, but civil authority was not established in the southern interior until Governor Douglas himself visited the middle Fraser, Similkameen, and Okanagan valleys in the spring of 1860. Indian concurrence was necessary before settlement could proceed, so Douglas sought public agreement to a proposal....[Under the agreement,] the Okanagan and other interior Indians retained the right to hunt and fish on unoccupied Crown lands....The agreement which secured Okanagan Indian acquiescence in the settlement of their territory [also] included the maintenance of exclusive Indian rights to resources on reserves of land of whatever size and location they demanded. The Okanagan people...in 1861....chose most of the good bottom land at the Head of the Lake and at Penticton. They retained their village sites, their fishery locations and garden plots, and a good base for winter-ranging their livestock. However, both reserves were reduced to a small fraction of their previous size in 1865 after J.C. Haynes, the local Justice of the Peace, argued that the reserve awards were excessive and beyond the requirements of semi-nomadic Indians....Land on both the Head of the Lake and the Penticton reserves was reduced from approximately 200 to about twenty-five acres of land per household, of which perhaps ten acres was arable....With Indian holdings thus reduced, white stock holders moved to acquire the newly available bottom land as the nucleus of their livestock operations....

When the restricted size of the Haynes reserves began to hamper Native agricultural production and the implications of the English concept of private property began to be felt by the presence of fences and trespass laws, the Okanagan and neighbouring Indians became agitated and threatened war. In an attempt to assuage Indian discontent, the federal and provincial governments established the Indian Reserve Commission (irc) and dispatched it to the Shuswap and Okanagan in 1877. The irc scrutinized each reserve with a view to determining and meeting minimal Indian demands, and then recommended enlarged reserves (which were not formally granted until the early 1890s), based on a ratio of twenty-four acres per head of livestock then held. The new Nkamaplix (Head of Lake) Reserve, for example, with over 25,000 acres, plus a 25,000-acre grazing Commonage, was estimated to include 1,200 acres of arable land, or nineteen acres per male adult....However, in 1880 the settler-dominated government categorically denied Indians the right to purchase land off the reserve, and in 1893, the Indian Reserve Commissioner, Peter O'Reilly, was instructed to "cut off" the Commonages attached to the Nkamaplix, Penticton, and Douglas Lake reserves. The Indian land base was eroded again in the 1890s when the government allowed white settlers to purchase land immediately adjacent to various reserves, thereby eliminating Indian access to Crown lands lying beyond. Further reductions were recommended by the McKenna-McBride Commission of 1912-1916, resulting in the Penticton, Westbank, and Spallumcheen reserves being reduced by 14,060, 1,764, and 1,831 acres respectively, and the Nkamaplix Reserve by the loss of various small outlying reserves.

Source: Duane Thomson, "The Response of Okanagan Indians to European Settlement", B.C. Studies 101 (Spring 1994), pp. 101-104.

There had been earlier attempts to deal with Aboriginal people living in resource-rich sections of the country. In 1851, the province of Lower Canada appropriated some 250,000 acres of land for Indian peoples resident in that province. The three largest reserves — established at Maniwaki, at the head of Lake Timiskaming, and at Manicouagan (Betsiamites) on the north shore of the St. Lawrence — were intended (mainly as a result of representations by Oblate missionaries) to protect the Attikamek, Algonquin and Montagnais peoples from the depredations of lumbermen and settlers in the upper valleys of the St. Lawrence, St. Maurice and Ottawa rivers, where the forest industry had been making serious inroads since the 1820s.⁹⁰ In contrast to previous practice in Upper Canada, these reserves were not the result of treaties, nor did the enabling 1851 legislation refer to the cession or extinguishment of Aboriginal title.⁹¹ However, some of the Aboriginal nations in question — particularly the Algonquin and closely related Nipissing who maintained summer villages at Oka and Trois Rivières — had been protesting to the Crown since the late eighteenth century that settler governments had permitted settlement and development on their hunting grounds in the Ottawa and St. Maurice river valleys before any treaties had been made with them. Those unresolved grievances lie behind the current claims of the Algonquin people of Golden Lake

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).

in Ontario and the various Algonquin nations in Quebec (see Appendix 4B).⁹² The present claim negotiations with the Attikamek-Montagnais people are also based on the fact that their Aboriginal title previously had not been dealt with.⁹³

At the same time as lands were being set apart in the eastern half of the Province of Canada, Aboriginal protests in the western half (now Ontario) did result in the making of treaties. From the time that the first exploration parties arrived in 1845, the Ojibwa and Métis peoples of lakes Huron and Superior had taken strong exception to the use of natural resources without their consent. In the fall of 1849, a war party led by the elderly chief Shinguacšuse actually took possession of an operating mine at Mica Bay, just up the shoreline from Sault Ste. Marie. The government sent troops, and the perpetrators were arrested, but at the same time, Governor General Lord Elgin ordered the province to make a treaty. A prominent politician, William Benjamin Robinson, was commissioned to undertake the task and in September 1850 made the two agreements that bear his name with the Ojibwa people of the upper lakes.⁹⁴

The Robinson treaties provided for the recognition of various reservations, mostly along the lakeshore. Commissioner Robinson knew the resources of the region first-hand, however, (he had been a fur trader and had managed one of the mining operations) and insisted that the Ojibwa people were not being required to give up all connection to their traditional lands. He reported to the superintendent general of Indian affairs:

*I explained to the chiefs in council the difference between the lands ceded heretofore in this Province, and those then under consideration: they were of good quality and sold readily at prices which enabled the Government to be more liberal, they were also occupied by the whites in such a manner as to preclude the possibility of the Indian hunting over or having access to them: **whereas the lands now ceded are notoriously barren and sterile, and will in all probability never be settled except in a few localities by mining companies**, whose establishments among the Indians, instead of being prejudicial, would prove of great benefit as they would afford a market for any things they may have to sell, and bring provisions and stores of all kinds among them at reasonable prices. [emphasis added]⁹⁵*

The later-numbered treaties (8 through 11, plus adhesions to treaties 5 and 6) made in the period 1898-1930 (see Figure 4.8) can also be considered resource development treaties in whole or in part. While reserves were set apart out of the territories covered by agreement — often in a formula of 640 acres per family of five, rather than the 160 acres that had prevailed on the prairies — the nations that participated, like those on lakes Huron and Superior, were constantly reassured that they would not be forced to reside on those lands, nor would their traditional economies be interfered with. Thus, the commissioners for Treaty 9 noted the reaction of the chief of the Osnaburgh Band, from the Albany River region between northern Ontario and the Northwest Territories, in 1905:

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”.

*Missabay, the recognized chief of the band, then spoke, expressing the fears of the Indians that, if they signed the treaty, they would be compelled to reside upon the reserve to be set apart for them, and would be deprived of the fishing and hunting privileges which they now enjoy. On being informed that their fears in regard to both these matters were groundless, as their present manner of making their livelihood would in no way be interfered with ... the Indians signified that ... they were prepared to sign, as they believed that nothing but good was intended.*⁹⁶

While many of the reserves stipulated in these treaties were in fact surveyed and established, others were not. This was particularly true of treaties 8, 10 and 11, which cover much of northern Alberta, Saskatchewan, northeastern British Columbia and the Northwest Territories. Many Treaty 8 reserves in northern Alberta and British Columbia were not created until the 1950s, for example, and Treaty 10 reserves in northern Saskatchewan did not come into existence until the 1970s. The lack of reserve creation in the Northwest Territories was one of the reasons that led Justice Morrow of the Supreme Court of the Northwest Territories to conclude that there had been no valid extinguishment of Aboriginal title under Treaties 8 and 11.⁹⁷ This court decision was a major precipitating factor behind comprehensive claims negotiations with Dene and Métis peoples of the Northwest Territories.

The idea of Aboriginal intent is essential to understanding the treaty relationship. In the case of the northern treaties, for example, there is considerable evidence that various groups were unaware of the actual content of the treaty document or were reluctant to take part.⁹⁸ In 1903, agent H.A. Conroy explained to the department of Indian affairs about his difficulties with the Beaver Indians of the Fort St. John region:

*The Indians at this place are very independent and cannot be persuaded to take treaty. Only a few families joined. The Indians there said they did not want to take treaty, as they had no trouble in making their own living. One very intelligent Indian told me that when he was old and could not work he would then ask the government for assistance, but till then he thought it was wrong for him to take assistance when he did not really require it.*⁹⁹

Some groups never did take treaty, even though their traditional areas were included in the metes and bounds descriptions in particular treaty texts. A prominent example is the Cree people of the Whitefish, Little Buffalo and Lubicon lakes area of northern Alberta, who are considered to be covered by the terms of Treaty 8. For many years, the Lubicon Cree have disputed government claims that they are part of that treaty, and they have been asserting their Aboriginal title in a variety of forums.¹⁰⁰

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.

Forgotten promises

The difficulties Aboriginal people experienced in securing or retaining a land base in the period between Confederation and the Second World War were intimately linked to the overall decline in the Crown's respect for their rights to lands and resources. By the late nineteenth century, in all parts of the British Empire, the law was reflecting official doubts about the existence and nature of Aboriginal title. In 1888, the judicial committee of the privy council (JCPC) intimated that Aboriginal rights with respect to lands and resources did not predate but were created by the Royal Proclamation and, as such, were "dependent upon the good will of the Sovereign".¹⁰¹ In 1919, in a case arising in Southern Rhodesia, the JCPC stated that some "aboriginal tribes ... are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society" and that, as a result, their Aboriginal title should not be recognized by colonial law.¹⁰² These kinds of views both reflected and were adopted by members of society. Thus, W.E. Ditchburn, federal Indian commissioner for British Columbia, described Aboriginal title in 1927 as "a canker in the minds of the Indians".¹⁰³

Courts began to view treaties between Aboriginal nations and the Crown as at best private contracts, ignoring their historical and fundamental character.¹⁰⁴ As late as 1969, the federal government could describe claims of Aboriginal title as "so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy" that included the termination of all distinct Aboriginal rights other than temporary benefits and rights to reserve land.¹⁰⁵

Official resistance to the existence of Aboriginal title did not occur without Aboriginal protests. As we will see in our discussion of claims policy, Aboriginal peoples made consistent demands for recognition of their rights to lands and resources and sought to enter into treaties that would protect their systems of land tenure and governance from encroachment and erosion. In 1913, for example, the Nisg_a'a Nation sent a petition to authorities in London seeking the protection of Nisg_a'a title:

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).

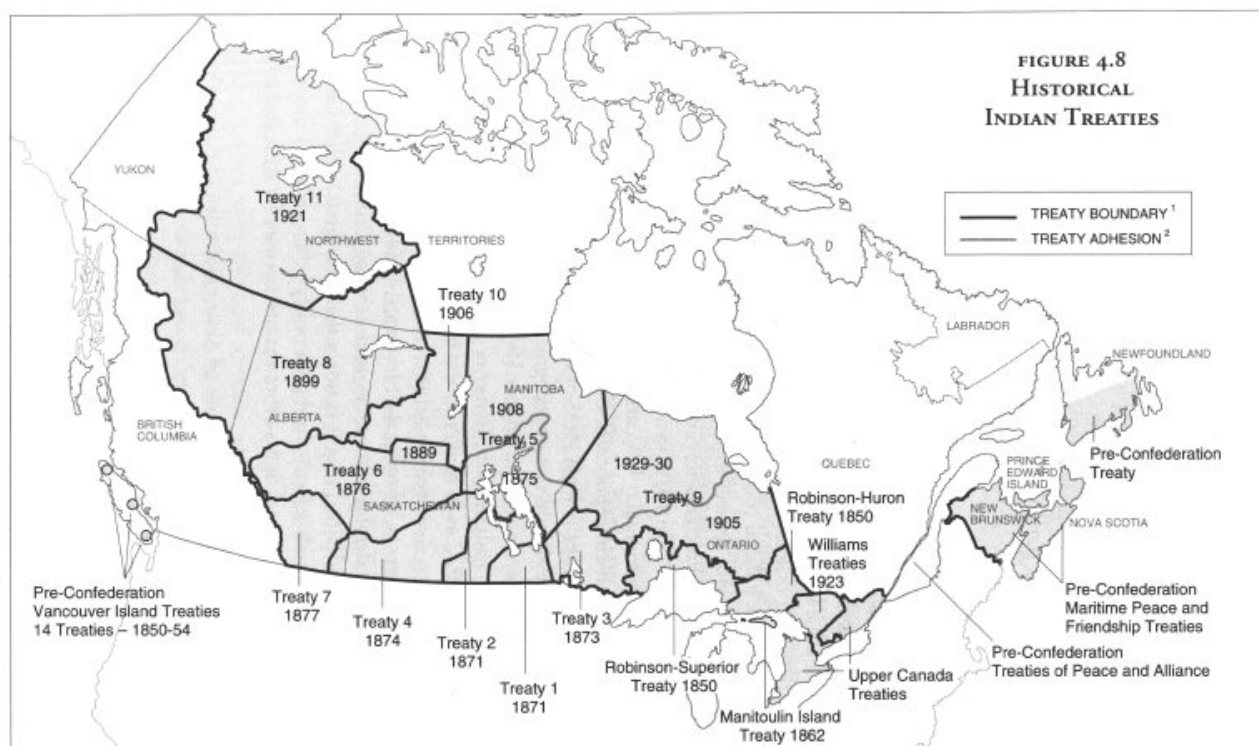
102 *In re Southern Rhodesia* (1918), [1919] A.C. 211 (P.C.). But see *Amodu Tijani v. The Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 407 (P.C.) ("a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners"). For discussion of this case, see McNeil, *Common 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).

*We are not opposed to the coming of the white man into our territory, provided this be carried out justly and in accordance with the British principle embodied in the Royal Proclamation. If, therefore, as we expect, the aboriginal rights which we claim should be established ... we would be prepared to take a moderate and reasonable position. In that event, while claiming the right to decide for ourselves the terms upon which we would deal with our territory, we would be willing that all matters outstanding between the Province and ourselves should be finally adjusted by some equitable method to be agreed upon ...*¹⁰⁶



Note: 1. Treaty boundary lines are approximate.
2. Extension of a treaty boundary as a result of later signatories who adhered to the terms of the original treaty.

Source: Information taken from the National Atlas Information Services map sheet number MCR4162 © 1991. Her Majesty the Queen in Right of Canada with permission of Natural Resources Canada.

But, as the remainder of this section will outline, these demands were all too often ignored. When Aboriginal peoples sought judicial assistance, they frequently found obstacles placed in their paths. Some of these obstacles were the result of legislative action. In 1927, for example, Parliament amended the *Indian Act* to require anyone soliciting funds for Indian legal claims to obtain a licence from federal authorities,¹⁰⁷ impeding Aboriginal people from seeking to enforce their claims of Aboriginal title in court.¹⁰⁸ And, as already mentioned, other obstacles were the product of judicial interpretation. As a result, Aboriginal peoples' experience with the law of Aboriginal title was, until relatively recently, one of continuing frustration.

106 Quoted in Edwin May, "The Nishga Land Claim, 1873-1973", M.A. thesis, Simon Fraser University, 1979.

107 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).

4.3 Failure of Alternative Economic Options

If we return to the map at the beginning of this chapter showing the present distribution of the Canadian population (Figure 4.5) and compare it with the treaties map (Figure 4.8), we can see that the boundaries of the northern resource development treaties generally cover areas where Aboriginal people still make up either an absolute majority or a sizeable minority of the population (though some of the majority areas, such as northern Quebec and the eastern Arctic, would wait until the modern era of comprehensive claims settlements for their agreements). In this sense, Robinson's prediction, made in 1850 to the Ojibwa people of the upper Great Lakes — that these regions would probably never be settled except by mining or other resource industries — has proved substantially accurate.

Robinson also predicted, however, that Aboriginal people would benefit from their contact with the new arrivals, who would provide them with a market for their products (fish, meat, fur, maple sugar and other fruits of the harvest). He even wrote into the text of the Lake Huron treaty a clause guaranteeing the Ojibwa people an increased share in government revenues if the value of the resources extracted went up:

Should the Territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial Currency in any one year; or such further sum as Her Majesty may be graciously pleased to order.¹⁰⁹

Robinson cannot be blamed for failing to predict the scale of resource development that eventually took place across the north and the west or the fact that the Ojibwa and other Aboriginal peoples would never get a share of the benefits. In 1850, railways were only beginning to be built in eastern Canada; lumbering had just reached the upper lakes and still had not seen the boreal forest; and no one had discovered yet that water could be used to produce hydroelectricity. Gauging the impact of these kinds of developments on Aboriginal people would have to wait until the new century.

For their part, neither did First Nations or Métis peoples foresee the scale and speed of agricultural settlement and industrial development after Confederation — or the arrival of so many immigrants to take up lands and jobs in frontier regions. But they did acknowledge that life would change. The treaties and scrip entitlements were intended, from their perspective, not only to protect the basis of their self-governance and economy but also to secure access to new economic endeavours. Many of the numbered treaties, for example, contain provisions for the supply of seed, cattle and agricultural implements, because the Cree, Dakota and Ojibwa nations had expressed an interest in expanding their economies to include farming. Other treaties provided for the distribution of fishing nets, net twine, guns and ammunition so that First Nations could blend their subsistence activities with participation in the new economy.¹¹⁰

Had those policies worked, there is no doubt that Aboriginal people would now be better off. But they did not and they are not. Nominally, at least, Canada's policies at the time of Confederation

109 United Nations, *Resolutions Adopted by the General Council During Its Twenty-First Session* (New York: United Nations, 1967), p. 165.

110 See "Draft Declaration as Agreed upon by the Members of the Working Group at Its Eleventh Session", United Nations, Economic and Social Council, E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994. See also "Draft Declaration on the Rights of Indigenous Peoples" (1994) 1 C.N.L.R. 40.

were designed to integrate Aboriginal people into the national economy. In practice, however, federal legislation (most notably the *Indian Act*), coupled with federal and provincial policy and actions, made it more, not less, difficult for Aboriginal people to pursue other economic options. As a consequence, change was abrupt and sudden and by no means based on reciprocity.

As we will see, in all parts of Canada and in every major sector — land, timber, minerals, fisheries, fur and game — First Nations and Métis peoples (and somewhat later, Inuit) not only lost control of resources on what are now considered public lands, but were denied even the same terms of access as non-Aboriginal people. In the process, governments unwittingly — and, in some important instances, consciously — violated treaty and Aboriginal rights. The net effect was to force increasing numbers of Aboriginal people onto government relief or other forms of public assistance.

As for what were supposed to be their own lands — the reserves — Indian people found themselves under the control of government officials rather than their own leadership. Not only did the Indian department's stewardship of reserve lands and resources turn out to be abysmal, but the employment policies that were to be based on those lands and resources were mostly a failure (see Volume 1, Chapter 9). By the time these policies began to be reversed (by federal-provincial economic development agreements beginning in the mid-1960s, as well as by court- or claims-imposed allocation freezes), Indian participation in trapping, logging, fresh-water commercial fishing and farming had already declined drastically and, in many cases, ceased altogether, and Indian people had been largely excluded from the mining and forest industries. We begin with the instructive case of federal Indian agricultural policy.

Agriculture

Several nations in eastern Canada — the Huron-Wendat, members of the Iroquois Confederacy, and some Ojibwa nations — were already raising crops at the time of contact, and many took easily to the introduction of European farming methods. Recent research has shown, for example, that many Iroquois and Chippewa (Ojibwa) farmers in southwestern Ontario were as productive as their non-Aboriginal neighbours in the nineteenth century.¹¹¹ Other nations, such as the Saulteaux (Ojibwa) of northwestern Ontario and northeastern Manitoba, took up farming in the eighteenth century for the purpose of commercial sales to fur traders.¹¹² In principle, many western peoples welcomed the introduction of agriculture at a time of social and economic change. As the late George Manuel, a distinguished leader from the Shuswap Nation, put it in 1974:

The people of the plateau saw farming differently; it was an addition to the existing economy and not a second-rate substitute. It did not bring down our whole social order.

111 Erica-Irene A. Daes, "Discrimination Against Indigenous Peoples: Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples", United Nations, Economic and Social Council, E/CN.4/Sub.2/1993/26/Add.1, 19 July 1993. This note refers to an earlier draft of the Declaration, dated 8 June 1993, in which Article 3 took a different form than that found in the current draft. Nevertheless, in our opinion, the background analysis supplied by Daes is equally helpful for understanding Article 3 in its current form. See also Erica-Irene A. Daes, "Some Considerations on the Rights of Indigenous Peoples to Self-Determination" (1993) 3 *Transnational Law & Contemporary Problems* 1.

112 See Donat Pharand, "The International Labour Organisation Convention on Indigenous Peoples (1989): Canada's Concerns", in RCAP, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, International Dimensions (Ottawa: Supply and Services, 1995), p. 132.

*It did not take children away from the family circle. It did not take men away from jobs at which they were skilled to do menial work for strange men far away. Farming, for us, was a change in land use that did not require a complete renunciation of the relationship between the land and the men who lived on it.*¹¹³

But federal laws and policies after 1881 placed restrictions on commercial agriculture carried out by First Nations members. As the example of the Dakota people shows (see accompanying box), the department developed a policy of non-mechanized peasant agriculture that required the use of hand tools on small plots.¹¹⁴

Dakota Farming in Western Manitoba: 1880-1900

The Dakota communities of Oak River, Birdtail and Oak Lake in southwestern Manitoba adapted easily to commercial-based agriculture by the mid-1880s. They had acquired a variety of livestock and were the first to plant test crops successfully, including Red Fife wheat, clover and alfalfa.

However, the orientation of federal Indian agricultural policy was not commercial in nature. Rather, the department of Indian affairs sought to create a form of ‘peasantry’ farming with a dual purpose: to ‘civilize’ the Indians and to prevent their direct competition with settler farmers.

The relative isolation of the Dakota had previously served them well. It prevented both the intrusion of Indian agents and competition for land and resources from settlers. This was to be short-lived. When the Dakota appealed to Indian affairs for more and better seed, implements and farming instruction, the department insisted that control over agriculture planning and practices be vested in Indian agent(s) and/or farm instructors. By the end of the nineteenth century, Indian agents or their designates (the reserve farm instructors) had control over every aspect of Dakota farming: seeding, deployment of labour, the division of reserve lands into individual plots, harvesting, marketing and the revenue gained, etc. In effect, the Dakota lost all political autonomy, and their social fabric was severely damaged. Previously, Dakota communities farmed on a communal basis, which enabled them to shift labour easily from farming to hunting and fishing, without disrupting either endeavour. The policy changes had the further effect of hastening soil depletion and erosion, and the practice of cattle farming soon declined, owing to the lack of communal land for grazing.

Dakota communities attempted to compensate for the changes by purchasing more efficient technology through private means. The Indian commissioner, however, was strongly opposed to Indian people using labour-saving devices. What proved to be fatal, however, was the Department’s introduction of the permit and ‘chit’ system in the 1890s. The former meant that Indian farmers had to obtain a permit to sell grain and other produce, or to buy stock and implements. The latter meant that all cash transactions became illegal; instead Indian farmers were to be paid in chits that could be exchanged at stores. The policy regulations were condemned by both Indian and non-Indian farmers: “They farm their own land, work hard all summer, and through the obnoxious order are not allowed the full benefit of the fruit of their own labour. They are thus placed at a disadvantage in competition with their white and more highly civilized neighbours.”

Although the federal government received numerous complaints and petitions, the department pressed ahead and began to charge Dakota who defied the policy, threatening non-Indian businesses with the same treatment should they buy grain or sell implements without a permit. Eventually, Dakota farmers became completely frustrated and stopped complaining, as those who did were frequently refused permits. By the turn of the century, most Dakota had abandoned farming altogether. By this time, it appears that the federal government became equally frustrated, since the department turned its attention away from agricultural policy to social matters such as the residential school

113 See Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992* (Vancouver: Douglas and McIntyre Ltd., 1991); Menno Boldt and J. Anthony Long, “Tribal Philosophies and the Canadian Charter of Rights and Freedoms”, in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, ed. Menno Boldt and J. Anthony Long (Toronto: University of Toronto Press, 1985), pp. 174-175; Patrick Macklem, “Distributing Sovereignty: Indian Nations and Equality of Peoples” (1993) 45 *Stanford Law Review* 1311 at 1324-1327; and Slattery, “First Nations and the Constitution” (cited in note 105) 261 at 273-274.

114 Paul L.A.H. Chartrand, “Aboriginal Self-Government: The Two Sides of Legitimacy”, in Susan D. Phillips, ed., *How Ottawa Spends: A More Democratic Canada---? 1993-1994* (Ottawa: Carleton University Press, 1993), pp. 234, 236.

In northwestern Ontario, after a promising start, Ojibwa people also abandoned farming because of the same federal policies; as a result, agriculture had virtually ceased in the area by the 1890s. By 1905, the Ontario minister of lands, forests and mines was noting complaints from settlers in the Rainy River district about “the large areas of agricultural land that are locked up by Indian reserves”. The minister wanted the department of Indian affairs to engineer surrenders of the reserves, “as the Indians are few in number and will never cultivate the land to any extent”.

By 1915, despite Ojibwa protests, the department had enforced the sale of over 43,000 acres of the best farming land in northwestern Ontario to local settlers.¹¹⁵

In British Columbia, it was provincial control of pre-emptions and of grazing and water rights, even more than federal policies, that made it difficult for Aboriginal people to take up commercial agriculture. In most areas of the province, arable land was scarce, and for reasons discussed earlier, reserves had ended up too small to be adequate for farms. When Aboriginal people looked elsewhere for land, they found themselves shut out. As late as the 1920s and ‘30s, federal officials in the Lytton and Williams Lake regions were complaining that “provincial authorities will not sell or lease lands to Indians”, were denying them water rights, and were “chasing the Indians’ horses off the Crown Ranges”.¹¹⁶

The lack of guaranteed access to water was particularly important in the Okanagan region, where fruit farming is almost impossible without irrigation. The provincial government consistently denied water licences (known in B.C. as water records) to Indian people because they were not the owners of lands in fee simple. In 1911, for example, Paul Terrabasket applied for a licence to irrigate 50 acres of land, including an orchard, on Reserve No. 6 in the Lower Similkameen, which his family had been cultivating for decades. The board of investigation refused Mr. Terrabasket’s application and instead confirmed the licence held by the Similkameen Fruitlands Company, successor in title to the water record once owned by a local pioneer rancher. The company’s title, however, was conditional on its making beneficial use of the water by 1916, which it failed to do, although in 1921 it was able to secure an extension until November 1922. When the company finally began using the irrigation ditch, after decades of non-use, it tried to prevent Paul Terrabasket from using the water upon which his orchard depended. The company obtained a restraining order from the British Columbia Supreme Court, and when Mr. Terrabasket ignored the order in an attempt to save his crops, he was jailed.¹¹⁷

One of the major problems for policy makers was that the government’s Indian agriculture programs (and, indeed, all economic programs for Aboriginal people) were perceived by non-Aboriginal people as creating unfair competition. This may have been the way it looked to struggling pioneer farmers, but in fact Indian people were not eligible for the information and assistance that settlers themselves received from federal and provincial departments of agriculture. In the Cowichan area of British Columbia, for example, the only assistance available to Indian farmers was a single inspector whose job was to make sure that their orchards were sprayed with

115 Inuit Tapirisat of Canada, “Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples” (1994), p. 38 [note omitted].

116 By contrast, some of the early legislation included the test of ‘Indian blood’ among the criteria governing membership; see, for example, *An Act Providing--for the Management of Indian and Ordnance Lands*, S.C. 1868, c. 42, s. 15, discussed in Sharon H. Venne, ed., *Indian Acts and Amendments, 1868-1975: An Indexed Collection* (Saskatoon: University of Saskatchewan Native Law Centre, 1981), p. 3. It seems very doubtful that racial criteria as such had much basis in the laws and practices of Aboriginal nations.

117 RCAP, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Supply and Services, 1993); RCAP, *The Right of Aboriginal Self-Government and the Constitution: A Commentary* (Ottawa: 13 February 1992).

pesticides — not to improve their crop, but to prevent pests from spreading to adjacent non-Aboriginal orchards.¹¹⁸

Minerals, oil and natural gas

At present, mineral revenues from reserve lands are a significant source of wealth for some Indian people, although revenues have fallen drastically since the boom years of the late 1970s and early 1980s, when they amounted to as much as \$200 million annually.¹¹⁹ Almost all the revenues derive from oil and natural gas on certain reserves in Alberta. While many Aboriginal people in other parts of the country live in regions rich in minerals, they derive far fewer benefits from those resources.

One important reason is that, in the parts of western and northern Canada covered by the numbered treaties, the federal government tried to ensure that the reserves selected contained no valuable minerals. In 1874, for example, the federal cabinet directed the officials in charge of locating reserves under Treaty 3 to ensure that they did not include “any land known ... to be mineral lands” or any lands for which patents had been sought by either the Ontario or the dominion government.¹²⁰ In fact, because of what would become a long-standing federal-provincial dispute over the boundaries of those reserves and resource rights within them, an 1894 agreement between Canada and Ontario stipulated that any future treaties with the Indians of Ontario would “require the concurrence of the government of Ontario”.¹²¹ The province used this veto power during the negotiation of Treaty 9 in 1905-1906 to ensure that no water power sites or known mineral deposits were included within reserve boundaries along the Albany River.¹²²

Further to the northwest, one of the government’s principal motives for making Treaty 8 in 1899 was to prepare the way for resource development. The Yukon gold rush was already under way, and there was extensive exploration for gold and other minerals in the basins of the Peace and Athabasca rivers. But while officials hoped to protect the Aboriginal population from the worst effects of contact with the miners, they had no intention of including existing mining claims within the reserves set apart by treaty.¹²³ At the time, however, few people suspected the existence of oil

118 See Catherine Bell, “Comment on Partners in Confederation: A Report on Self-Government by the Royal Commission on Aboriginal Peoples” (1993) 27 U.B.C.L. Rev. 361; Canadian Bar Association, “Aboriginal Civil Jurisdiction in Canada”, brief submitted to RCAP (1993); Bob Freedman, “The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*” (1994) 28 U.B.C.L. Rev. 49; Sylvain Lussier, “Réflexions sur ‘Partenaires au sein de la Confédération’ et le droit ‘inhérent’ à l’autonomie gouvernementale”, in *The Inherent Right of Aboriginal Self-Government*, Volume 1 (Toronto: Canadian Bar Association Continuing Legal Education Program, 1994); Kenneth J. Tyler, “Another Opinion: A Critique of the Paper Prepared by the Royal Commission on Aboriginal Peoples Entitled: ‘Partners in Confederation’”, in *The Inherent Right of Aboriginal Self-Government*, Volume 2 (Toronto: Canadian Bar Association Continuing Legal Education Program, 1994).

119 This account is based largely on the following sources, which differ somewhat in their details: *Connolly v. Woolrich* (1867), 17 *Rapports judiciaires révisés de la Province de Québec* 75 (Sup.C.) (for other sources of this case, see note 121); and *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1966), Volume 7, pp. 204-206 (“Connolly, William”), Volume 9, pp. 149-150 (“Connolly, Suzanne”).

120 National Archives of Canada, Manuscript Group 29, B15, Robert Bell Papers, “Reminiscences of Henry Connolly”; information kindly supplied by James Morrison, Legal and Historical Research, Haileybury, Ontario.

121 *Connolly v. Woolrich* (1867) (cited in note 119); see also 11 *Lower Canada Jurist* 197 and Brian Slattery, ed., *Canadian Native Law Cases* (Saskatoon: University of Saskatchewan Native Law Centre, 1980), Volume 1, 70. The decision on appeal is reported under the name *Johnstone v. Connolly* (1869), 17 *Rapports judiciaires révisés de la Province de Québec* 266 (Quebec Queen’s Bench); it is also reported in 1 *Revue légale* (Old Series) 253 and Brian Slattery, ed., *Canadian Native Law Cases*, Volume 1, 151. The case was settled out of court before the Privy Council dealt with it.

122 This account is based on *Connolly v. Woolrich* at 83-87.

123 *Connolly v. Woolrich* at 83-84.

and natural gas, nor were those resources being actively sought. Like the province as a whole, therefore, the resource-rich Alberta bands are the accidental beneficiaries of the discovery of oil at Leduc in the late 1940s.

Had oil and gas been discovered in the 1920s and 1930s, the latter bands might not have been as lucky. In the northern parts of the prairie provinces, there was a long interval between reserve selection and survey, and many reserves were not even selected until many years after treaty. Here too there was considerable pressure to ensure that valuable minerals were not included within reserve boundaries. In a 1925 letter to the federal minister of the interior, Premier Dunning of Saskatchewan urged the minister not to allow the Lac La Ronge band to select the 30 or so square miles of treaty land entitlement in areas with mineral potential. “If mineralized sections are kept out of Indian Reserves,” wrote the premier, “there is a chance for their development in the future. The placing of them within the borders of the Reserves would hamper development very materially.” Band members, he said, were aware of the activity of prospectors in the area and wanted to prevent further development by having the territory in the vicinity made into reserve land.¹²⁴

The premier was expressing a general societal belief that Aboriginal people were either uninterested in, or incapable of, taking part in resource industries. But Aboriginal opposition to resource development was not uniform, and some of the opposition was based on fears of being excluded from its benefits. During the copper boom of the 1840s on Lake Superior, Ojibwa chiefs from the Sault Ste. Marie area had protested to the governor general that prospectors were staking mining claims without their consent. The Great Spirit, said the chiefs, had originally stocked their lands with animals for clothing and food, but now these were gone; however, the Great Spirit had foreseen that this would happen and had “placed these mines in our lands, so that the coming generations of His Red Children might find thereby the means of sustenance”.¹²⁵ In fact, most of the major deposits of copper (a mineral that had been used by Aboriginal people for centuries) had been found not by exploration, but after Aboriginal people told prospectors where to look.

In many parts of Canada, such as northern British Columbia, the Yukon and the Northwest Territories, and the mineral belt that straddles northwestern Quebec and northeastern Ontario, Aboriginal people not only guided geological surveyors and mining exploration parties, but they also staked claims themselves. Popular narratives of the Yukon gold rush tell colourful stories about the Tagish people: Skookum Jim (his actual name was Keish), his sister Kate (Shaw Tlaa) and his brother Tagish Charley (Kaa Goox) who, along with Kate’s non-Aboriginal husband George Carmack, triggered the rush with their strike along the Yukon River in 1896, then headed off to Seattle to spend their new-found wealth.¹²⁶ Though Keish never made another major find, he continued to prospect along the Teslin, Pelly, Stewart and upper Liard rivers until his death in 1916.¹²⁷

Though some Aboriginal people did explore for minerals themselves, they were more likely than other small prospectors to suffer discrimination in registering their claims. An Ojibwa named Tonene, a former chief of the Teme-Augama Anishinabai, took up prospecting during the Cobalt silver rush that began in 1903. He is credited with discovering the ore body near the Quebec border that led to the famous Kerr-Addison mine — at one time the largest single producer of gold in the western world.¹²⁸ Unfortunately for the chief, his claim was jumped. “Damn the Indian who moves my posts” the other prospector had written on Tonene’s own claim markers, after the chief had

124 8 U.S. (6 Peters) 515 (1832).

125 The original passage is found in *Worcester v. Georgia* at 547; it is quoted in *Connolly v. Woolrich* (cited in note 119) at 86.

126 *Connolly v. Woolrich* at 82.

replanted them. The local mining recorder refused to recognize the chief's grievance, and the department of Indian affairs was unable to secure him redress.¹²⁹

With respect to the mineral rights of Aboriginal peoples, especially the status of minerals on reserve lands, the state of the law has played a particularly important role. We referred earlier to the overall decline in official respect for Aboriginal title during the late nineteenth century. In the most important judgement of that period, the judicial committee of the privy council characterized Aboriginal rights with respect to lands and resources in 1888 as "personal and usufructuary".¹³⁰ The provinces argued that this meant that the usufruct (a Roman law concept meaning 'use') of reserve lands, not being true ownership, did not extend to minerals, which therefore was vested in the provinces by virtue of section 109 of the Constitution Act, 1867. In 1921, the privy council ruled that this was indeed the case with respect to the minerals on reserves set apart in Quebec before Confederation.¹³¹

Other provinces (especially Ontario) also claimed rights to gold and silver on reserve lands, on the grounds that such "royal mines" had always been regarded as belonging to the Crown (not the landowner) by virtue of the royal prerogative. In 1900, in *Ontario Mining Company v. Seybold*, Chancellor Boyd agreed with this argument, ruling that the precious metals on reserves set apart under Treaty 3 of 1873 had already passed to Ontario under section 109; that decision was upheld by the Supreme Court of Canada a year later.¹³²

First Nations people maintained that the provincial position violated their treaties, which in their view guaranteed them full rights to the minerals on their reserves. That understanding is reflected, for example, in the wording of the 1850 Robinson treaties, which refer to the rights of the "said Chiefs and their Tribes ... to dispose of any mineral or other productions upon the said

127 For other cases dealing with the issue of Aboriginal customary law, see *R. v. Nan-e-quis-a Ka* (1889), 1 Territories Law Reports 211 (N.W.T. S.C.); *R. v. "Bear's Shin Bone"* (1899), 3 C.C.C. 329 (N.W.T. S.C.); *Re Noah Estate* (1961), 32 D.L.R. (2d) 185 (N.W.T. Terr. Ct.); *Re Adoption of Katie* (1961), 32 D.L.R. (2d) 686 (N.W.T. Terr. Ct.); *Re Beaulieu's Adoption Petition* (1969), 3 D.L.R. (3d) 479 (N.W.T. Terr. Ct.); *Re Kitchoalik and Tucktoo* (also reported as *Re Deborah*) (1972), 28 D.L.R. (3d) 483 (N.W.T. C.A.), upholding the decision of the Northwest Territories Territorial Court reported at (1972), 27 D.L.R. (3d) 225; *Re Wah-Shee* (1975), 57 D.L.R. (3d) 743 (N.W.T. S.C.); *Re Tagornak Adoption Petition*, [1984] 1 C.N.L.R. 185 (N.W.T. S.C.); *Michell v. Dennis and Dennis*, [1984] 2 C.N.L.R. 93 (B.C. S.C.); *Casimel v. Insurance Corporation of British Columbia*, [1994] 2 C.N.L.R. 22 (B.C. C.A.), [1992] 1 C.N.L.R. 84 (B.C. S.C.); *Delgamuikw v. British Columbia* (1993), 5 C.N.L.R. (B.C. C.A.). For discussion, see Norman K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases" (1984) 4 C.N.L.R. 1; and Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 738-39.

128 R.S.C. 1985, c. I-5.

129 S.A. 1990, c. M-14.3.

130 In *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 750-752, the Supreme Court of Canada held unanimously that the rule of law was a fundamental postulate of the Canadian constitutional structure, even though it was not explicitly set out in any operative provision. The Court went on to conclude, at p. 752: "In other words, in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the Patriation Reference---this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law."

131 See Jean-Gabriel Castel, *The Civil Law System of the Province of Quebec* (Toronto: Butterworths, 1962). See also the *Royal Edict of 1663* creating the Conseil Souverain of New France; text in Jacques-Yvan Morin and José Woehrling, *Les Constitutions du Canada et du Québec* (Montreal: Les Éditions Thémis, 1992), p. 592.

132 See W.R. Jackett, "Foundations of Canadian Law in History and Theory", in Otto E. Lang, ed., *Contemporary Problems of Public Law in Canada* (Toronto: University of Toronto Press, 1968); J.E. Cote, "The Reception of English Law" (1977), 15 Alta. L. Rev. 29; and Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992), pp. 27-44.

reservations”.¹³³ During the negotiation of Treaty 3 in 1873, Commissioner Alexander Morris had assured the chiefs that “if any important minerals are discovered on any of their reserves the minerals will be sold for their benefit with their consent ... ”.

While federal officials had tried their best to exclude mineral lands from subsequent reserve selection, in 1876 the *Indian Act* basically reflected the Indian understanding, in that it defined reserves as including the “stone, minerals, metals and other valuables thereon or therein”.¹³⁴ But the provincial position, buttressed by court decisions, made it virtually impossible to develop mineral resources on reserves. Once a band had surrendered mineral rights for the purposes of development (a requirement of the *Indian Act*), the beneficial interest automatically flowed to the province, not the band.

As a result, Canada entered into a series of federal-provincial statutory agreements that gave many of the provinces a measure of control over reserve lands, as well as a share in resource revenues.

Under the terms of the 1924 Indian lands agreement with Ontario, for example, the province obtained 50 per cent of the revenues from mineral development on reserves.¹³⁵ An identical provision was included in the 1930 natural resource transfer agreements, under which Canada transferred ownership and jurisdiction of Crown lands and resources to Manitoba, Saskatchewan and Alberta, although it was not to apply to reserves set aside before 1930.¹³⁶ In 1943, Canada reached a similar agreement with British Columbia, recognizing the province’s right to 50 per cent of mineral revenues from reserve lands.¹³⁷

133 *R. v. Sparrow* (cited in note 105) at 1094.

134 *R. v. Sparrow* at 1101.

135 Amagoalik and Chartier quoted in Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), p. 27, citing *First Ministers’ Conference on Aboriginal Constitutional Matters; Unofficial and Unverified Verbatim Transcript*, 15 March 1983, Volume 1, pp. 130 and 134 respectively (with minor corrections in first quotation approved by Amagoalik).

136 Resolution of the Quebec National Assembly, 20 March 1985. The English text is reproduced in Secrétariat aux affaires autochtones, *The Basis of the Québec Government’s Policy on Aboriginal Peoples* (Quebec City: 1988). The original French text is found in Secrétariat aux affaires autochtones, *Les fondements de la politique du Gouvernement du Québec en matière autochtone* (Quebec City: 1988), pp. 5-6.

137 The evolution of modern legal thinking on the subject can be traced in the following commentaries: Gerard V. La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), pp. 108-133; Douglas Sanders et al., *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1970); Peter A. Cumming and Neil H. Mickenberg, ed., *Native Rights in Canada*, 2nd ed. (Toronto: Indian-Eskimo Association of Canada and General Publishing, 1972); Kenneth Lysyk, “The Indian Title Question in Canada: An Appraisal in the Light of Calder” (1973) 51 *Can. Bar Rev.* 450; Douglas Sanders, “The Nishga Case” (1973) *B.C. Studies* (no. 19) 3; J.C. Smith, “The Concept of Native Title” (1974) 24 *U.T.L.J.* 1; 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), p. 33; Brian Slattery, “The Land Rights of Indigenous Canadian Peoples”, doctoral dissertation, Oxford University, 1979, reprinted by the University of Saskatchewan Native Law Centre, 1979; Geoffrey S. Lester, “The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument”, doctoral dissertation, Osgoode Hall Law School, York University, 1981; Leroy Littlebear, “A Concept of Native Title” (1982) 5 *Can. Legal Aid Bul.* (Nos. 2 & 3) 99; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983); Boldt and Long, ed., *The Quest for Justice*” (cited in note 113); René Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed. (Toronto: Carswell, 1988), Vol. II, pp. 68-84; Slattery, “Understanding Aboriginal Rights” (cited in note 127); Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); Kent McNeil, “The Temagami Indian Land Claim: Loosening the Judicial Strait-jacket”, in Matt Bray and Ashley Thomson, ed., *Temagami: A Debate on Wilderness* (Toronto: Dundurn Press, 1990), p. 185; Slattery, “First Nations and the Constitution” (cited in note 105); Hogg, *Constitutional Law* (cited in note 132), pp. 679-682; Jack Woodward, *Native Law* (Toronto: Carswell, 1994); and Macklem, “Normative Dimensions of the Right of Aboriginal Self-Government” (cited in note 106).

Forestry

The action of the Band in this matter exemplifies in a marked degree the incapacity of the Indians to manage their own affairs. Because of the stubborn waywardness of one old man, their Chief, they refuse to execute an act that would place all in the most comfortable circumstances ... In view of the incapacity of the Dokis Band to exercise any judgement in the matter of the surrender of their timber, the Department should seek or take the exceptional authority to dispose of their Timber without their consent or without previously having obtained from them the surrender of same.¹³⁸

What one elderly chief from a reserve on the French River in northern Ontario had done was very unusual in the late nineteenth century. He and his band had refused to allow their white pine timber to be cut down. Many other reserves east of the Great Lakes were not so lucky; most had already been stripped of their valuable trees. In the department of Indian affairs' defence, the pressures on them were enormous — lumbermen from Canada and the United States were after what remained of the virgin white pine stands that had once covered much of eastern Canada. By 1900, all that was left were small pockets on eastern Georgian Bay and a narrow strip along the north shore of Lake Huron; by 1920, these stands, including the pine on the various reserves along the shore, were gone as well. The scale of forest operations had been prodigious, with sawmills along Georgian Bay and Lake Huron producing hundreds of millions of board feet every year, but once the trees had been cut down, most of the sawmills closed and the lumbermen moved on.¹³⁹

In addition to the revenues they received from the surrender of their reserve timber, some Indian people worked in the sawmills or on river drives. But if they sought cutting rights themselves on the reserve, they were almost invariably advised that logging was better left to the large companies; if they sought timber rights off-reserve, the Crown timber office told them that those rights had already been allocated, or that only the most uneconomic areas were available.

In their recent report respecting timber management on Crown lands, the Ontario environmental assessment board criticized the provincial government for pursuing policies over the past century that have denied Aboriginal people access to forest resources and a share of their social and economic benefits. But blame was also placed squarely on the federal government for allowing First Nations to be deprived of their reserve timber resources. The example the board used was the fate of timber in northwestern Ontario (see accompanying box).

In British Columbia, which was as heavily forested as eastern Canada, Aboriginal people were at first able to benefit from the logging economy. As settlements expanded in the immediate pre- and

138 See Slattery, "Understanding Aboriginal Rights" (cited in note 127), pp. 732, 744-745.

139 The following Supreme Court decisions contain important discussions of Aboriginal rights and their relation to treaty rights: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Guerin v. R.*, [1984] 2 S.C.R. 335; *Simon v. R.*, [1985] 2 S.C.R. 387; *Roberts v. Canada*, [1989] 1 S.C.R. 322; *R. v. Sparrow* (cited in note 105); *R. v. Sioui*, [1990] 1 S.C.R. 1025. The modern Supreme Court has in effect confirmed a view expressed in the nineteenth century by a majority of Supreme Court justices in *St. Catharines Milling and Lumber Company v. R.* (1887), 13 S.C.R. 577, a view that was overshadowed at the time by the ambiguous views of the British Privy Council on further appeal, as reported in (1888), 14 Appeal Cases 46. In *St. Catharines* (1887), the Supreme Court was split four-two on the question of which government, federal or provincial, took the benefit of a cession of Indian lands, with the majority (Ritchie C.J., Fournier, Henry and Taschereau JJ.) favouring the provincial government and a minority (Strong and Gwynne JJ.) supporting the federal government. However, on the question of the existence of Aboriginal title, the Court split in a different manner, with four judges (Ritchie, C.J., Fournier, Strong and Gwynne JJ.) supporting the view that Aboriginal land rights existed in one form or another under Canadian law, and two judges (Henry and Taschereau JJ.) apparently denying this; see especially at 599-600, 608-616, 638, 639, 643-645, 663-664. For recent judicial treatments of the doctrine of Aboriginal rights, see the judgement of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia* (cited in note 127), and the judgement of the High Court of Australia in *Mabo v. Queensland* (1992), 107 Australian Law Reports 1.

post-Confederation period, so did the demand for lumber. While colonial ordinances had declared timber a Crown resource, Aboriginal men were nonetheless able to cut trees on their ancestral lands and sell them to sawmills without being harassed by government officials. In 1888, however, the province of British Columbia changed the law to require a handlogger's licence for cutting timber anywhere in the province not already licensed or leased to larger companies. Because of this regulation, many coastal Aboriginal people acquired licences.

By the turn of the century, handlogging was a major source of income for the Kwakwa ka'wakw, Haisla, Tsimshian, Sechelt and other coastal peoples. But between 1904 and 1907, a great timber rush alienated more than 11.4 million acres of the best forest land. Not only did Aboriginal people find their access limited, but the government also stopped issuing licences for handlogging in 1907. Though some Aboriginal men subsequently found work as wage labourers and some bought the equipment necessary to bid on smaller timber sales, they found other obstacles, including general stereotypes about Aboriginal people. "There is a good body of timber in here," one assistant district forester wrote in 1924 on the rejected application of a Haisla logger, "and we do not want it alienated by any Indian reserve applications."¹⁴⁰

Treaty No. 3 First Nations Forestry Experience

During the mid-1880s, Ojibwa nations in the Treaty 3 area of northwestern Ontario sold or traded cord wood to road contractors and steam barges operating along the Dawson Road (near Kenora). During treaty discussions, the Ojibwa negotiated unsuccessfully for compensation for resources, including timber, that they argue were not surrendered to the Crown. Subsequent to the Ojibwa peoples' relocation to reserves, large-scale non-Aboriginal logging occurred in the area.

Initially, Ojibwa people were employed by logging companies; however, employment declined steadily as settlers took over cutting jobs. Denied employment off-reserve, by the early 1900s, most Ojibwa had returned to their communities and attempted to cut timber on reserves. However, attempts at establishing viable commercial operations were often frustrated by the department of Indian affairs, which would frequently give permits for dead and downed timber to Indian bands while pressuring communities to surrender more valuable timber to the department for sale to non-Aboriginal companies at auction. Monies from such auctions, as well as stumpage fees for cutting reserve timber, were not paid directly to the band(s) but held in trust and controlled by Indian affairs.

By the time the federal department began undertaking surveys of timber resources on each reserve (1920s), the resource had been severely depleted as a result of external contractors, trespass and theft. Further, there are few records of any regeneration efforts. Indeed, a 1983 study by Indian Affairs and Northern Development indicated that forest inventories conducted between 1947 and 1960 showed that most of the good wood had been cut and that major reforestation was needed. This did not occur. At present, reserve timber resources consist primarily of immature stands or rehabilitation efforts.

Source: Based on 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), pp. 353-354.

With access to Crown forests becoming more restricted, Indian people found, as in eastern Canada, that federal government regulations prevented them from harvesting their own reserve timber. Indian agents would permit their charges to cut timber for bona fide land clearing purposes, but they were not allowed to log for the purpose of sale. In the words of the McKenna-McBride commissioners, who seemed astounded to discover this during their 1913 tour of investigation, Indian people were "not allowed to do what a white man could do on his own land"¹⁴¹.

140 *Calder v. Attorney-General of British Columbia*, at p. 328.

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).

Provincial policy throughout Canada continues to restrict Indian access to off-reserve forest resources for commercial purposes. British Columbia remains the sole provincial jurisdiction that has made specific legislative provision for Indian access to Crown timber — although the Ontario environment assessment board ruling requires the ministry of natural resources to find allocations, if at all possible, for First Nations.¹⁴²

The way Aboriginal people were treated in the immediate aftermath of Confederation can be attributed in large part to misunderstandings, to the division of constitutional responsibilities between federal and provincial governments, or to differing priorities with regard to lands and resources. But in one area — wildlife harvesting — the agents of the Crown consciously and openly violated Aboriginal and treaty rights.

Wildlife harvesting

In October of 1914, two Ojibwa men from the Nipissing Band in northern Ontario — Moses Commanda and his son Barney — appeared before High Court Justice Frank Latchford at the Sudbury Criminal Assizes. One had been charged with wounding a police officer and the other with wounding with intent. In the spring, provincial game wardens came onto their reserve, found a beaver and some beaver skins, and charged the two men with taking animals in the closed season, contrary to provincial law.

Justice Latchford was astounded to find out that, in June, the local magistrate had sentenced the two men to a year in jail for possession of the beaver skins and had also bound them over for trial on the criminal charges. On the facts adduced before him, the judge held that the shooting had been started by one of the game wardens, “and the only wounding that took place resulted from the fact that when one of the wardens had his revolver pointed at the younger Commanda, the father struck down the revolver with a birch stick, slightly injuring the game warden’s hand”.

Though the two men were acquitted by the jury, they were immediately returned to jail on the previous conviction. Justice Latchford appealed to the attorney general of Ontario to have them released and wrote to the superintendent general of Indian affairs to protest the “gross injustice” that had been done. He suggested that the department should consider entering a claim for compensation on the Commandas’ behalf against the government that had wrongfully imprisoned them.

Under the Robinson-Huron Treaty which should be as sacred as any treaty, Shabokishick and his band to which the Commandas belonged — and other Indians inhabiting French River and Lake Nipissing — were accorded the full and free privilege to hunt over the territory which they ceded, in the same manner that they had heretofore been in the habit of doing. There seems to be no possible doubt as to the meaning of the Treaty in regard to the district in which the Commandas were hunting; and yet I find that the representatives of His Majesty, in violation of the Treaty made with His Majesty’s predecessor, Queen Victoria, have interfered with the rights guaranteed by that Treaty and incarcerated the Indians for doing what they were given the right to do.¹⁴³

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.

The following spring, the Sudbury lawyer who had defended the Commandas free of charge chastised the department of Indian affairs for “assuming your own wards to be guilty without hearing anything from them”. J.A. Mulligan argued that the department had a duty to provide for their defence. “If you listen only to the side of the prosecution for information,” he argued, “you will not often be called upon to spend money in the defence of your wards.” The Commandas were eventually released by provincial order in council, though not before they had served well over two-thirds of their sentence.¹⁴⁴

It may seem astonishing that, apart from any arguments about treaty and Aboriginal rights, an individual could be jailed for trapping a beaver out of season. But since Confederation, and particularly since the First World War, countless Aboriginal people, in all regions of the country, have been arrested and punished for violations of federal, provincial and territorial fish and wildlife legislation. They have had their guns, nets, fishing boats and motor vehicles seized. They have paid sizeable fines. And, like the Commandas, some individuals have gone to jail, often because of their inability to pay fines. This is a particularly unfortunate and relatively unknown chapter in Canadian history, and one that is far from being over.

While some of the Crown’s agents may have acted out of malice, what Aboriginal people really are experiencing is the logic of state management of lands and resources, particularly as it applies to fish and wildlife. Aboriginal peoples that signed treaties in the nineteenth and twentieth centuries may have believed that their rights with respect to harvesting — their customary laws and practices — were to be protected. What they did not know, nor could they have anticipated, was that the treaty commissioners had brought with them a whole complex of societal attitudes toward fish and wildlife and how those resources were to be managed.

A number of legal and policy developments had produced the situation in which the Commandas and other Aboriginal people now found themselves. While there had been laws governing the taking of fish and game in both New France and the Anglo-American colonies, these laws were not applied to Aboriginal people, who, for reasons set out earlier, were generally treated by colonial officials as independent nations with their own usages and customs. By the mid-nineteenth century in Canada and the United States, however, two related trends were taking hold. East coast fisheries were beginning to be regulated by the colonies, and some politicians and members of colonial society had come to believe that the inland fisheries were also a matter of public right — even if that supposition was not legally correct — and that they should therefore be regulated by the state in the public interest.¹⁴⁵ The second phenomenon, which gathered momentum toward the end of the century, was the rise of the scientific conservation movement.

Concern for vanishing wildlife was a continent-wide phenomenon, which had been particularly influenced by the disappearance of the buffalo.¹⁴⁶ In the United States, conservation developed a high profile when prominent sportsmen like Teddy Roosevelt took up the cause. Sport hunting had

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.

become a mass movement by the 1870s, and over the following decades, popular magazines like *Rod and Gun in Canada* mobilized their readers for preservation of game and fish.¹⁴⁷

In the fur trade economy, Aboriginal people had harvested the furs, fish, meat, wild rice, maple sugar and other goods for trade and provisioning. Ojibwa and Algonquin people built the great bark canoes that travelled the inland waterways of central Canada; Métis boat builders constructed the flat-bottomed vessels that plied the Hudson Bay drainage and the Mackenzie River system. Aboriginal people also worked as boat men, packers and guides along the transportation network. In the new industrial and agricultural economy, settlers took over much of this work, and governments regulated access to key resources on their behalf. Aboriginal people therefore experienced progressive encroachment and restriction, both as direct competition for fish and fur and through legislated restrictions on their harvest.

Fishing

One of the very first targets in the nineteenth century was commercial fishing. There is no question that fisheries required regulation on the Great Lakes and in northwestern Ontario, where the situation was becoming a free-for-all, particularly as Americans entered Canadian waters.¹⁴⁸ But the effect of regulation was to eliminate or severely reduce existing Aboriginal commercial fisheries.

The first fisheries legislation in the Province of Canada (1857-58) gave the commissioner of Crown lands the power to lease fishing stations on all “vacant public lands still belonging to the Crown”.¹⁴⁹ Because of the potential conflict with treaty fishing rights, the superintendent general of Indian affairs reached an agreement with the commissioner of Crown lands that would recognize an Aboriginal right of first refusal on fishing leases located in front of “inhabited Indian lands”. In one sense, this agreement can be considered an early precursor to the kind of priority allocation for Aboriginal people enjoined by the 1990 *Sparrow* decision of the Supreme Court of Canada.¹⁵⁰

As implemented by government officials, however, the policy had the opposite effect, because most existing Aboriginal fishing grounds were thereby opened to commercial lease. Of the 97 leases issued on Lake Huron during the first regulatory season in 1859, 71 went to non-Aboriginal ‘practical fishermen’, 14 to the Hudson’s Bay Company and only 12 to ‘Indian Bands’. Over the following four years, the number of Aboriginal leases dwindled to almost none.¹⁵¹

In the case of the sturgeon fishery, government regulations not only favoured non-Aboriginal commercial operations, they effectively destroyed the fishery itself. Until the turn of the century, sturgeon was an enormously abundant resource and the basis of many Ojibwa and Cree economies. For generations, sturgeon had been taken for both subsistence and commerce, but not overfished. In the great inland sturgeon lakes — Lake Nipissing, Lake Huron, Lake of the Woods, Lake Winnipeg — the settler commercial sturgeon fishery, newly established in the 1870s and 1880s to supply distant markets, proved completely unsustainable, and catch levels plummeted to a small fraction of

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).

peak levels within a decade or two. Repeated pleas to federal authorities by First Nations to save the fishery and their livelihoods failed to reduce the magnitude of mismanagement.¹⁵²

A similar situation prevailed on the west coast, where the federal government took over regulation of the fishery after 1871 and explicitly regulated the Aboriginal fishery from 1888.¹⁵³ There, the “white preference” in the licensing system was an explicit, rather than implicit, goal of government regulation.¹⁵⁴ Nevertheless, Aboriginal people did play an important role in the British Columbia canning industry.

Subsistence hunting and fishing

But it wasn't just the Aboriginal commercial fishery that was affected by government regulations and policies. Many techniques of the Aboriginal food fishery — including the use of spears and gill-nets, as well as night fishing by torchlight — were offensive to sports anglers, as were certain hunting activities. During the legislative debate on the 1857 *Fishing Act* of the Province of Canada, M.L.A. John Prince attacked the use of spears and other Aboriginal techniques:

*There was no skill requisite to use the spear; it was a dastardly and mean thing to hold a torch at the surface of the water, waiting until the fish came up, and then to stick it with a fork. It was as bad to do this as to follow the practice of some individuals who go out into the woods with hounds, and hunt the poor deer into the lake, and then take a canoe, paddle over to the poor animal, and shoot it. No sportsman would follow such discreditable sport. He himself would rather take deer on the bound, or cast a fly at the fish he wished to capture.*¹⁵⁵

Such techniques were not offensive to rural settlers, who learned how to spear and net from their Aboriginal neighbours.¹⁵⁶ In fact, spearing can be much more efficient than angling as a means of selecting fish by size and age class.¹⁵⁷ What John Prince's comments indicate is a continuing conflict between the goals of those who take fish and game for food and those who do so for sport. Prince was an affluent English emigrant steeped in the literary lore of the rod and the chase. As the first judge in northern Ontario (in the 1860s), he tried to persuade the Indian department to ban Aboriginal hunting and fishing altogether on the grounds that such activities were better left to sportsmen like himself.¹⁵⁸ This tension between sport and support characterized much of the game and fish legislation in the first century after Confederation. Laws passed in Ontario (1892-1893), Quebec (1894), British Columbia (1895) and for the Northwest Territories (1897), as well as their many later amendments, were uniformly based on recommendations from recreational hunters and anglers and strongly influenced by the scientific conservation movement. They closed seasons for many species, limited take, and banned certain techniques of harvesting — including the use of spears and gill-nets and hunting with dogs.

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).

All of these laws placed a ban on so-called market hunting — that is, the sale of wild meat.¹⁵⁹ The latter was a traditional activity not just of Aboriginal people but of settlers in remote regions. Supplying wild game to urban or rural markets, or to logging, mining and survey camps became a penal offence. Since fresh domestic meat was scarce or nonexistent in frontier areas, the latter prohibition was often honoured in the breach (and not just by Aboriginal people).¹⁶⁰ Later legislation limiting the Aboriginal harvest included acts that prohibited the spring hunt for waterfowl in the far north and gave the prairie provinces certain regulatory powers over Indian hunting and fishing.¹⁶¹

Aboriginal Participation in the British Columbia Salmon Fishery

The early history of the British Columbia salmon fishery was characterized primarily by rapid and significant expansion of fishing and cannery operations into the interior and northern British Columbia. From 1871 to 1966, when the last cannery was built, more than 220 individual cannery sites were established, with over half of them by 1905. It was not until the 1960s that the federal government first began to introduce licence limitations in the commercial salmon fishery, at about the same time that the provincial government began to promote fish farming and the sport fishery.

Many of the prime fishing and cannery sites were on the traditional and reserve lands of Aboriginal peoples, since their primary source of food and livelihood centred on the sea and its resources. As salmon is a perishable good, the canneries had to be built close to fishing grounds. As a consequence, the fishery's development is marked by exploitation of Indian land, resources and labour. In 1902, writes historian Dianne Newell, Henry Doyle, the general manager of the newly formed British Columbia Packers Association “casually staked claims for cannery locations even where he suspected that they were located on Indian reserves. In at least one case, he negotiated with the Indians concerned for a lease on their land and a guarantee of employment for local Indian fishers and shoreworkers should a cannery ever be built there”.

Until the First World War, Indians dominated the labour market, given the industry's reliance on transient labour that could quickly respond to a ‘run’ lasting two to three weeks. But then the situation began to change. With the onset of the war, the demand for canned food escalated sharply, prompting heavy overfishing and the licensing of new cannery operations. In 1919, the federal government lifted a pre-war policy of limited entry in fishing and canning in order to accommodate the needs of returning war veterans. Fishing licences specifically excluded Japanese fishers; and while licensing included Aboriginal people, in practice, according to Dianne Newell, it had the opposite effect:

Indians were not treated on equal terms with whites. Indian fishing licences were concentrated in the north. As numbers of licences issued to Japanese declined, only the number of licences issued to whites increased, while those to Indians remained roughly the same. In order to keep up the number of Indian cannery workers it became customary in the major district for cannery operators to use only those Indian fishers who had female relatives who could work at the cannery. Even then the Indian fishers reported they often received insufficient and sub-standard gear.

This licensing policy has had a lasting impact on the relative distribution of Aboriginal people within the commercial fishing industry. Not only did the absolute number of Aboriginal licence holders continue to drop, but the proportion of Aboriginal people involved in canning continued to outnumber those engaged as employees in the fishery itself. At present, for example, the United Fishermen and Allied Workers' Union estimates that about 40 per cent of the shoreworkers in its membership are Aboriginal, while about 10 per cent of those working in fishing vessels are union members.

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 the Act for the Protection of Game and Fur-bearing Animals*, S.O. 1893, 56 Vict., c. 23; *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.

The Commission would not want to suggest that there were no valid conservation objectives behind such legislation. The assault on North American wildlife in the late nineteenth century is a fact.¹⁶² But even at the time, there were differing views about the primary causes of species depletion. Some individuals, including Nova Scotia-born William Whitcher, federal deputy minister of fisheries in the 1870s, assigned Aboriginal people a considerable portion of the blame. A hero of the early Canadian conservation movement, Whitcher was an avid fly fisherman and had worked as a fisheries overseer on the Restigouche River and then on Lake Huron in the 1850s and '60s.¹⁶³ Replying in 1878 to a letter from his counterpart at Indian affairs, who had complained that the fisheries department's new regulations were interfering with the rights and livelihoods of Indian people in the maritime provinces, Ontario and the lower St. Lawrence River region of Quebec, Whitcher asserted the necessity of federal control as well as the paramountcy of statute law over any treaty rights:

The protection of certain kinds of fish during their breeding time has proved a great public benefit to the whole country, as well as to the Indians themselves, the fish having again become plenty in districts where they had formerly been netted and speared unrestrictedly and were nearly exterminated. The rapid disappearance of game which is stated in the same letter to be a cause of destitution amongst the Indians is due almost entirely to unrestricted hunting, pursued also by Indians; and a similar condition of things would inevitably result to the inland fisheries were the habit of indiscriminate fishing to be restored, thus imposing still further deprivation on whites and Indians alike.

On referring to the treaties mentioned, it does not appear that any unrestricted fishing or hunting was guaranteed; but, on the contrary, the Statutes then in existence specified restrictions applicable to the whole community, but which were until lately inefficiently enforced ... It is well known that much of the laxity which prevailed in former times, and the prevalence of destructive practices of fishing, particularly by Indians, were due to false sympathy with the pretended sufferings which it was alleged they must sustain if prevented from indulging their habitual preference for spearing fish on their spawning beds

The question would undoubtedly be asked — What claims are possible and sufficient in favor of Indians to injure and destroy a valuable public property that are paramount to the rights and interests of a great majority of the inhabitants to preserve and increase it for the benefit of the trade and industry of the whole country? Besides, it is well known that, as a matter of fact, the Indians are themselves benefitted through the operation of the present system.¹⁶⁴

By contrast, at least some Indian department officials felt that treaty rights were entitled to respect. The Indian agent for Georgian Bay, Ontario, Charles Skene, agreed with William Whitcher that some sort of restriction on the times and seasons for fishing and hunting was necessary. But as he told his departmental superiors, environmental damage, along with pressure from the general

162 See Farley Mowat, *Sea of Slaughter* (Toronto: McClelland and Stewart, 1984).

163 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.

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.

society (and American fishermen), were largely responsible for the precipitous decline in fish and game populations:

I am at the same time of opinion that the scarcity of game and fish has been caused more by the pollution of the rivers & spawning Beds by throwing in Saw Dust and other Mill refuse and by the great quantities of fish and Game of all kinds killed by the white men for the purpose of sale than by the Indians spearing on the Shoals and Banks. As far as my experience goes all that the Indians killed by spearing or with the small nets or other limited means was not of much consequence — and certainly so long as only the Indians fished & hunted no one heard of the great scarcity of Game & fish that now prevails

With regard to the Salmon and Trout I entirely agree with Mr. Whitcher that interfering with the Spawning beds should be entirely put a stop to but I think that the greater evil of casting in Saw dust should also be entirely put an end to. And the rivers being entirely within the Dominion this could be done effectually. As to the Spawning Beds in the Large Lakes — where the Lake Salmon and the White Fish spawn — of course it is in the power of the Government to stop spearing etc on them within the Line between the Dominion and the United States — but I much question the United States aiding the Dominion by a like prohibition on their side — yet I think something should be done in the way of Restriction.

But any such law will come hard upon the Indians who depend so much upon the fishing — the fish they kill in the Fall forming a principal part of their support during the winter and for this they depend so much upon spearing — as they are unable to procure the large number of nets required and with their small boats and canoes they would be unable to set them if they had them. And as for their small nets the fishing along the Shore where they used to set them has been so destroyed by the Saw Dust and mill refuse that they are of little or no use

Mr. Whitcher says ‘On referring to the treaties mentioned it does not appear that unrestricted fishing or hunting was guaranteed’. Now I differ from him there as I think that the Robinson Treaty does guarantee this in as much as when that Treaty was made and the Indians ceded their Territory no restriction was known by the Indians but they hunted and fished as best suited them and a clause in the Robinson Treaty says ‘And further to allow the said chiefs and their tribes the full and free privilege to hunt over the Territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the Provincial Government’.

I consider this clause very distinct and explicit and that unless it can be proved that the Indians did not at that time spear fish the right to do so cannot be taken from them without breaking faith with them.¹⁶⁵

The preceding correspondence has a very modern ring to it. Different views about what, if anything, constitutes a justifiable infringement of Aboriginal rights are still at the heart of the conflict between

165 NAC RG10, volume 2064, file 10,009 1/2, Charles Skene to L[awrence] Vankoughnet, 24 October 1878.

government regulators and Aboriginal people. For more than a century, this conflict has pitted the rights of all members of society to harvest fish and wildlife for sport or commerce (under state regulation) against the rights of Aboriginal people (often enshrined in treaty) to take fish and wildlife for their own purposes — even according to their own rules.¹⁶⁶

The agent's observations about pollution from the sawmills of Lake Huron and Georgian Bay were repeated by agents in northwestern Ontario and British Columbia, who were receiving complaints from First Nations about the impact of sawdust on the rivers and streams of their traditional territories.¹⁶⁷ It is also interesting to note that, despite agent Skene's concern for his charges, neither department believed that Aboriginal people themselves should have any role in the management or regulation of game and fish.

For a time, provincial and territorial laws did recognize the subsistence needs of settlers and Indian peoples in certain remote regions. For example, section 12 of Ontario's game protection act of 1892 provided that game laws would “not apply to Indians or to settlers in the unorganized districts of this Province with regard to any game killed for their own immediate use for food only and for the reasonable necessities of the person killing the same, and his family, and not for the purposes of sale and traffic”.¹⁶⁸ Similar clauses appeared in British Columbia and Northwest Territories legislation.¹⁶⁹ The frontier ideal of a free man with deer or moose in his larder still has currency in many parts of Canada. Settlers — farmers, woodworkers, and prospectors — hunted and fished for their own subsistence. Many immigrants from Great Britain, where in the eighteenth and nineteenth centuries rural folk who hunted for sustenance on private land — that is, most of the country — could be jailed, exiled or sentenced to hang, valued highly their new freedom in North America.¹⁷⁰

The provision of a subsistence harvest for non-Aboriginal people was particularly useful for Métis people, since provincial, federal and territorial regulators did not think that Métis people had any special rights to take game and fish. But by the 1920s, such clauses had also been dropped from legislation. The laws, then, were as much about allocation as they were about conservation — about who was entitled to take what, and for what purpose. By the 1930s, recreational hunting and angling had triumphed. As David Taylor, Ontario deputy minister of game and fisheries, explained to the department of Indian affairs in 1936, the fish and game resources of the province were far too important to be left to Aboriginal people or settlers:

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).

I think you will appreciate where we have a natural resource by way of game and fish that is instrumental in attracting to this Province annually Tourist trade valued at from \$50,000,000 to \$80,000,000, that the Province would be much better off annually to keep these Indians in more or less luxurious fashion than to allow them to slaughter, particularly for dog feed, the game and fish of this Province ...

I presume your Department will be only too anxious to cooperate with us in this respect to the extent of having your local Indian Agents cease informing the Indians that they have privileges beyond what the laws of the Province permit, as this has from time to time a tendency to give us considerable trouble.¹⁷¹

The privileges to which the deputy minister referred were those set out in agreements such as the Robinson treaties of 1850, Treaty 3 (1873) and Treaty 9 (1905-1906; 1929-1930), entitling Indian people to hunt, fish and trap on unoccupied Crown land. In the prairie west and north, wildlife officials took the same position on the treaties that applied to their areas. In the 1930s and '40s, employees of the Northwest Territories commission — one arm of the federal department of mines — explicitly rejected statements from the Indian affairs branch — another arm of the department — that treaty Indians had any specific harvesting rights on public lands.¹⁷² In 1954, the superintendent of welfare for the Indian affairs branch advised one of his officers, with respect to an individual who had been charged with a hunting offence, that “it is not the desire of the [Indian Affairs branch] to inform Indians fully concerning their Treaty rights because conservation and management could be defeated by so doing”.¹⁷³ Ontario was still prosecuting treaty Indians for hunting on unoccupied Crown lands as late as the 1970s.

In the maritime provinces, neither the federal nor the provincial governments conceded that there were treaty harvesting rights at all. In 1925, Indian affairs official J.D. McLean told Moncton, New Brunswick, lawyer George Mitton, who had been retained by Chief Dan Paul of the Eel Ground Reserve near Newcastle, that Canada did not recognize a 1752 treaty that the chief was insisting had acknowledged Aboriginal rights to hunt and fish. “This department,” McLean added, “has recognized the exclusive right of the provinces to legislate with respect to hunting and fishing and has advised the Indians that they must obey the laws of the provinces with respect thereto.”¹⁷⁴ On the rare occasions when Aboriginal people used a treaty defence in court, they usually lost — as in the 1928 Syliboy case, when a member of the Mi’kmaq people from Cape Breton Island was convicted of illegal hunting. The Nova Scotia County Court dismissed the effect of the 1752 treaty with the Mi’kmaq on a number of grounds, among them that the treaty applied only to a small band living near the Shubenacadie River in Nova Scotia.¹⁷⁵

In the 1985 *Simon* case, the Supreme Court of Canada upheld the validity of the 1752 treaty, but this was half a century too late for Syliboy and the many other Indian people from the Maritimes who paid the price for violating provincial game and fish laws.¹⁷⁶ The wife of Peter William Narvie of the Eel River Reserve in New Brunswick wrote the Indian department in April 1929 that “my husband is in jail for having venison in his possession”. He had believed, she said, in the treaties which said that “the Indians could fish and hunt any time of the year for their own use”:

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.

*Dear Sir my husband and three other Indians went by those Treatys and went in the forest to get enough meat for a few meals because we were almost starving and couldn't get help from our Agent neither could the men get work of any kind around here to make a living and we were very hungry. And he was arrested for that and put in jail to serve fifteen days sentence or thirty one dollars fine. Now while he is in jail my two babies and I are going from one house to another begging our meals. While my husband was out on bail in between the trials he found a job for all summer and just because of this case, he is going to lose his job, and God knows when he will be able to find another because the jobs are not plentiful for the Indians especially.*¹⁷⁷

Most Aboriginal defendants could not afford lawyers. In this particular instance, however, Narvie and the other defendants had hired a lawyer from Dalhousie, New Brunswick to defend them, believing that they could pay him out of band funds. But the department refused to honour the account because, by virtue of amendments to the 1927 *Indian Act*, the lawyer's services had not been engaged by proper authority. Moreover, as officials in Ottawa explained to the angry barrister, "it is not the policy of the Department to provide a defense for Indians in cases of this kind".¹⁷⁸

A century of effective prohibition of activities that treaty beneficiaries believed had been guaranteed to them by treaty has had a major impact on government and on society generally. Part of the corporate memory of provincial resource management agencies is that Aboriginal and treaty rights do not exist. It is no accident that groups such as the Ontario Federation of Anglers and Hunters continue to maintain that "Treaty Indians do not possess any *exclusive* claims to Crown land or resources within the geographic boundaries of Ontario, with the exception of their reserves".¹⁷⁹

Tourism

In some parts of Canada, Aboriginal people worked in the early tourism industry, which began to flourish in the late nineteenth century as steamboats and railways opened previously inaccessible regions to recreational travel. Aboriginal people served as guides, packers and cooks for parties of hunters or fishermen in frontier regions. In the lake districts of southern Ontario and Quebec, they were employed by the growing numbers of tourist lodges and youth camps. But as the example of commercial guiding in the Yukon shows (see box), with increasing competition from non-Aboriginal people and increasing government regulation, Aboriginal people found themselves gradually excluded from this industry as well.

In some cases, the effect of government regulation on Aboriginal livelihoods was unintentional but just as severe. Legislation passed in New Brunswick in 1897 and 1898, for example, required persons not "resident and domiciled" in that province to obtain a licence if they wished to act as a guide or camp help. Such activities had been a significant source of income for Mi'kmaq people living on the Restigouche Reserve just across the provincial boundary in Quebec, the Restigouche being a popular destination for tourists from the eastern seaboard of the United States. But although they protested to the department of Indian affairs that they could not afford the non-resident licence

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].

fee of \$20 (10 times the resident rate, and equivalent to more than a month's wages), New Brunswick would not make any exception for those they referred to as "Quebec Indians".¹⁸⁰

Trapping

One industry in which Aboriginal people were the exclusive primary producers during much of the nineteenth century was the fur trade. As with hunting and fishing, however, the imperatives of provincial and territorial regulation ran head-on into the assumption by Aboriginal people that the treaties protected their rights to trap.¹⁸¹ Earlier in the chapter we described the case of the Commandas, jailed in Ontario in 1914 for trapping a beaver contrary to provincial regulations. The same collision occurred in all regions of the country. In March 1915, a Mohawk trapper from Kanasatake, Andrew La Fleche, was arrested by two Quebec game constables for attempting to sell 101 muskrat skins to a trader in Montreal. In his defence, Mr. La Fleche cited the *Royal Proclamation of 1763* and a proclamation of Quebec Governor James Murray in 1762 as support for his contention that he had a treaty right to hunt and trade fur. His furs were confiscated, he was fined and the department of Indian affairs, to which he had appealed for assistance, advised him that the proclamations to which he referred were "repealed many years ago and the Game Act is now in force".¹⁸²

It is not difficult to see why Quebec officials, like those in other jurisdictions, thought Aboriginal people should be treated no different than the non-Aboriginal population when it came to hunting and fishing regulations. The provinces were not accountable for Indian people and Inuit, who were considered wards of the federal government. Armand Tessier, the Indian agent at Pointe Bleue, who tried for many years to have Aboriginal rights recognized, explained his problem in a 1913 article in the newspaper *L'Action sociale*:

I understand that the provincial government is not responsible for these people, who are under the guardianship of the federal government, and that, if injustices are done to their detriment by the imposition of laws, it is due simply to the fact that not having direct relationship with them, the government forgets them or does not think about them. [translation]¹⁸³

In asserting their trapping rights, however, Aboriginal peoples had one powerful and influential ally: the Hudson's Bay Company. Before the First World War and between the two world wars, the company took legal action against provincial game officials who confiscated furs from Aboriginal people, arguing that such behaviour violated treaty rights. If Aboriginal people had a right to trap, they said, then necessarily they had a right to sell. The precipitating factor had been the arrest and conviction in 1910 of one of the company's northern Ontario managers for illegal possession of furs. George Train had been given a penalty of \$6,150 or, in default of payment, imprisonment for 20 years, six months.¹⁸⁴ Company lawyer Leighton McCarthy had intended to appeal the conviction to the privy council, if necessary. Although both sides agreed to put the points of law — including the treaty rights of the people from whom George Train had purchased the pelts — directly to the

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).

Ontario Court of Appeal, Ontario managed to delay the appeal hearing until 1913.¹⁸⁵ A year later, Chief Justice William Meredith informed the parties that he considered it best not to render a decision and urged Ontario and the company to negotiate. The only official rationale the chief justice gave was that a judgement might affect the “real interests of the Indians”; the company’s lawyer claimed to the department of Indian affairs that the real reason for the non-judgement was that the court did not want to find that treaty harvesting rights prevailed over Ontario’s game laws.¹⁸⁶

Aboriginal Guiding in the Yukon

Until 1920, guides for big game hunting in the Yukon did not require a licence, and the industry as a whole was unregulated by the territorial council. Aboriginal and non-Aboriginal guides maintained an equal footing within the community and in commerce. Many Aboriginal people in the Yukon worked as guides because they had intimate knowledge of the terrain and habitat, and because guiding complemented their overall lifestyle. Indeed, the success of the industry depended largely on Aboriginal people for the same reasons.

However, as overkill provoked concern from the fledgling conservationist movement, and as revenue generated from the industry grew, big game hunting came under increasing territorial regulation, to the distinct disadvantage of Yukon Aboriginal people. First, overkill was blamed largely on Indian guides, rather than on overall hunting pressure and habitat disturbance. “Of late years”, stated the 1916 official Yukon Guidebook, “game of all kinds has been very scarce in some localities....The Indians, having lately acquired high-powered magazine guns are responsible for a great deal of the slaughter as the average Indian who gets into a band of big game shoots as long as his cartridges hold out, whether he can use the meat or not.”

Big game hunters became a major source of income for individuals and businesses involved in the industry and for the territorial council, which received fees for permits and licences. In 1923, the territorial council amended the game ordinance specifically to bar Indian people from becoming chief guides, although they were not prevented from applying to be guides, assistant guides and helpers. In other words, Indian people could be employees but not employers soliciting their own business. The attitude of the Whitehorse government agent responsible for issuing licences is instructive: “It really means the taking away of the livelihood of guiding from the white man if any more Indians are granted the privilege of acting as Chief Guides”.

As a direct result, many guides gave up their Indian status and attendant rights in order to start or maintain a business. However, many who chose to become enfranchised were still blocked in their attempts to obtain a chief guide’s licence through bureaucratic delays or unreasonable terms. For example, after waiting a year, George Johnson, a Teslin Lake Indian, was turned down in 1934 for a chief’s licence because he had no horses, even though, as he reasoned, there was no point in purchasing horses on speculation.

Source: Robert McCandless, *Yukon Wildlife: A Social History* (Edmonton: University of Alberta Press, 1985), pp. 53, 58, 60.

The same issue came before the court of appeal almost two decades later in the case of *R. v. Padgena and Quesawa*. The defendants, who were Robinson treaty beneficiaries from Pic River on Lake Superior, had been convicted by a magistrate in 1929 of illegal possession of beaver pelts and fined \$600. The Indian affairs branch (by now part of the department of mines) had instructed the Indian agent for Port Arthur to attend the trial and ask for leniency but specifically directed him not to raise any question of treaty rights. (He managed to get the fine reduced to \$200.) With the

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.

support of the local Hudson's Bay Company manager, however, the two defendants hired a lawyer and appealed.¹⁸⁷ In April 1930, district court judge J.J. McKay overturned the convictions, finding that provincial regulations should not annul the defendants' rights under treaty.¹⁸⁸ Ontario appealed, and the Indian affairs branch found that it now had no choice but to act for the two individuals. In a letter to the Ontario minister of mines, the minister responsible for Indian affairs explained that the federal government did so reluctantly, "not in any hostile spirit but simply as a natural obligation that devolves upon the department in its capacity as guardian of the Indian interest":

*The Indians in question have no funds to defend this appeal and have asked the department to employ counsel for them. In the circumstances I think you will agree that it is scarcely possible for the department to refuse to comply with their requestIn view of the constitutional question involved, it would seem desirable that the case should be fully expounded pro and con by eminent counsel inasmuch as the subject has become a source of perennial dispute between the Indians and Game Wardens, and a source of embarrassment to both our departments.*¹⁸⁹

Indian affairs retained a Toronto law firm to act in the appeal, which was set to take place in December 1930. As with the earlier *Train* case, however, Ontario was granted a delay of proceedings until October 1931. In the meantime, the province continued to prosecute trappers in the region, despite Justice McKay's decision.¹⁹⁰ Ontario, in fact, wanted a negotiated settlement that would preserve their right of regulation, as, apparently, did the court of appeal. Lawyer M.H. Ludwig advised Indian affairs that Chief Justice Mulock "does not want to hear the case for the reason that his view is in favour of upholding the treaty obligation".¹⁹¹ In late 1931, Canada and Ontario agreed to halt the legal proceedings on a promise from the province to negotiate an accommodation. But those negotiations never took place, and Ontario continued to enforce its regulations. As for Joe Padgena and Paul Quesawa, the Indian defendants from Pic River, they never got back the \$200 they paid in fines, despite the fact that their convictions had been overturned.¹⁹²

With the building of railways in eastern and western Canada, Aboriginal people came to face another severe problem, namely, competition from non-Aboriginal trappers. Particularly in the aftermath of the First World War, when fur prices skyrocketed, droves of trappers and traders entered previously remote regions of the country in search of pelts. Many were young, single men who intended to make as much money as possible and then leave. To that end, some of them used poisoned bait, much to the revulsion of Aboriginal communities. Hudson's Bay Company official Philip Godsell, then working in the Northwest Territories, described the stark contrast between the trapping methods of these new arrivals and those of Dene with whom he regularly traded:

The professional trapper does not make an occasional short trapping journey as does the Indian, then forget about his trapline for a while, neither does he "farm" his territory as was done by Indians until just a few years ago. Instead he brings in a

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.

*complete grub-stake from the “outside” in the fallFrom the first snowfall until the ice breaks up he is tirelessly on the go, and in the course of a single season will accumulate three or four times as much fur as an entire Indian family has been in the habit of taking out of the same territory over a period of years.*¹⁹³

The department of Indian affairs did attempt to secure the co-operation of provincial and territorial officials in protecting Aboriginal trapping. But most jurisdictions rejected the department's preferred approach, which was either to ban non-Aboriginal trappers from the industry entirely or to set aside areas where only Aboriginal people could trap. In the Yukon, the territorial council sided with non-Aboriginal trappers, arguing that it would be impossible to exclude them. In Ontario, the province allowed non-Aboriginal trappers to follow the Temiskaming and Northern Ontario Railway north of Cochrane, despite urging from the Indian affairs branch that the Moose River basin area be zoned exclusively for Aboriginal people. In British Columbia, the province assumed the right to allocate traplines in 1921, and many traplines were given to the new arrivals. George Pragnell, inspector of British Columbia Indian agencies, reported in 1924 that the “almost universal complaint by the Indian is that their lines are seized by white men under cover of the law”. The inspector pointed out that virtually every area of the province was already allocated to traplines according to Aboriginal custom.¹⁹⁴

Only in the Northwest Territories and Quebec did a different system prevail. In the N.W.T., a 1923 federal order in council set up four large zones — the Yellowknife preserve, the Thelon preserve, the Peel River preserve and the Slave River preserve — where only Aboriginal people could hunt and trap.¹⁹⁵ Between the 1920s and the 1940s, Quebec co-operated with the Indian affairs branch in establishing a series of beaver preserves throughout the north, where only Aboriginal people could trap, and banning non-Aboriginal people from trapping north of the Canadian National Railway line.¹⁹⁶ Quebec's regulations are also interesting because they did not discriminate against Métis people, simply assigning the trapping rights to all those of Aboriginal ancestry. Within the beaver preserves, Aboriginal people were paid as “tallymen”, to count the number of live beaver each year.¹⁹⁷ This kind of work-substitution program accorded well with the traditional economy and can be considered a forerunner of the income support programs introduced by the James Bay and Northern Quebec Agreement. (See our discussion of income support programs for harvesters in Volume 4, Chapter 6.)

The climax in the trend of provincial control came in the 1940s. By then, most provinces and territories had introduced systems requiring everyone, Aboriginal people included, to apply for and register their traplines.¹⁹⁸ Because of the importance of existing systems of animal harvesting among the treaty nations, this system proved deeply controversial and was one of the precipitating factors in the rise of organizations such as the North American Indian Brotherhood, headed by Chief

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).

Andrew Paull of British Columbia and Henry Jackson of Ontario, and the North American Indian Nation, headed by Jules Sioui of Village Huron. These men urged Aboriginal trappers not to take out licences or registrations on the grounds that they violated treaty and Aboriginal rights, statements for which they were soundly denounced by the Indian affairs branch.¹⁹⁹

Particularly galling to Indian rights associations was the treatment of Aboriginal veterans of the Second World War, many of whom returned from their years overseas to find that provincial governments were already awarding their traplines to non-Aboriginal people. On the eastern side of Ontario's Algonquin Park, for example, none of the members of the Golden Lake First Nation who applied for registration of their existing traplines were successful. "Military service is apparently not taken into consideration", complained Hugh Conn, fur supervisor for the Indian affairs branch, in a 1947 letter to the head of Ontario's fish and wildlife branch, "as we find approved applications of men without military service in preference to Indians with four years' overseas service". Conn pointed out that the Golden Lake people had already lost most of their traditional trapping territories in the 1890s "without compensation" when Algonquin Park was created and hunting and trapping banned within its boundaries.²⁰⁰

Despite these protests, Aboriginal people lost out to non-Aboriginal trappers in all but the most remote areas. In part the motive was financial. In British Columbia, for example, the province earned fees from the trapline registrations of non-Aboriginal people, but not from Indians. Aboriginal people were also accused of not being efficient enough in trapping fur. Thus, replying to Hugh Conn's 1947 inquiry about why so many existing traplines in Ontario were being given to non-Aboriginal people, the head of the fish and wildlife branch, W.J.K. Harkness, replied that it was "because the standard of trapping practice on which the priorities were decided favoured the white trapper over the Indian trapper, and not because the Indian trapper was discriminated against because he was an Indian".²⁰¹

The consequences for the Aboriginal economy of the loss of traplines were devastating in many regions of the mid-north. By 1956, according to the game commissioner for British Columbia, only 10 per cent of the province's traplines were being operated by Aboriginal people.²⁰²

There is a direct link, therefore, between government regulations and policies that favoured non-Aboriginal trappers, commercial fishers, and recreational hunters and anglers and the decline in Aboriginal self-sufficiency. In the spring of 1939, Kenora Indian agent Frank Edwards reported to his superiors in Ottawa that he had asked Ontario game and fisheries deputy minister David Taylor the previous summer "how the Indians were going to make a living". According to Edwards, Taylor had replied that "it was nothing to do with him ... It was our department's baby, not his, and the Indians were not going to live on the province's moose, deer, fish, etc. and some other way of their making a living should be devised by us".²⁰³ The problem for the department was that there were few other sources of livelihood. In many cases, the only real alternative was government assistance.

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.

Disrupting the harvest: 1950-1970

As we have just seen, for more than a century, progressive encroachment and restriction of their land-based activities have been the common experience of Aboriginal people living in the rural and near-northern areas of Canada. There has been substantial variation in the intensity of the disruption, even north of settled agricultural lands. Up to about 1950, the effects of settlement and resource development were probably greatest in the railway belts of northern Ontario and Manitoba, perhaps least in northern Quebec and the Labrador interior. They were hardly experienced at all in the Arctic before that time.

The Second World War and the development boom that followed it in the 1950s and '60s transformed the north. First there was the rapid construction of military bases, airfields and radar stations; then there was a significant northward advance of all major resource activities. These included chiefly hydroelectric development (often involving large-scale impoundment, diversion, and regulation of waterways); mining and forestry in the boreal region; and oil and gas exploration and mining in the Arctic. In the mid-north, these were often accompanied by an infrastructure of roads, railways and new towns, many of which constituted major projects themselves. These developments were accompanied by newly expanded and activist government administrations. They also enabled much readier access to the north by a newly prosperous and mobile southern population.²⁰⁴

These developments intensified — and geographically extended — familiar forms of encroachment and restriction, such as regulation and enforcement of subsistence harvesting and competition from non-Aboriginal people for subsistence resources. They also introduced new and previously unimagined threats to the viability and autonomy of Aboriginal ways of life. These included the seizure of lands for industry, transport and settlement; disruption of waterways for hydroelectric development and water storage; alteration, destruction or pollution of habitat, whether by design or accident; a growing network of roads and trails giving transients and tourists easy access to traditional harvesting areas; increased stress on animals because of noise, harassment, obstructions or other consequences of human activity that result in death, ill health or dispersal; and contamination of fish and other wildlife (by heavy metals such as mercury or by organochlorines or radionuclides, for example) making the wildlife unfit for human consumption. These changes, caused relatively recently by development, concerned many of the Aboriginal witnesses at our hearings, as we saw earlier in this chapter. The adverse effects of forestry and hydroelectric development, for example, are keenly experienced by Aboriginal people in small communities especially.

Highly mechanized logging (mostly for pulp) is a relatively new phenomenon, one that has been on the upswing since the early 1960s. Because it involves clear cutting of very large areas, important wildlife habitat (and thus valued hunting and trapping land) is suddenly and completely denuded. Other adverse effects of clear cutting include stream degradation, road construction and, in rugged terrain, slope destabilization and erosion. Contamination also occurs, primarily in association with pulp mills. The northward extension of mechanized pulp cutting into slower-growth forests, particularly in Quebec, Ontario, Manitoba and Alberta, has exacerbated this trend.

For Aboriginal people, one of the most significant adverse consequences of the pulp and paper industry's practice has been the building of an extensive network of forest access roads that sport anglers and hunters can use. As we saw earlier in this chapter, Dene Th'a and other Aboriginal

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).

people have been protesting the impact on their traditional economy of the resulting increase in competition for fish and other wildlife, particularly big game species like moose, caribou and elk. During the fall hunting season, many northern Aboriginal residents stay out of the bush altogether.

Since the turn of this century, there has also been massive hydroelectric development across the mid-north, most notably in Labrador, Quebec, Ontario, Manitoba and British Columbia.²⁰⁵ As the example of Manitoba Hydro's Nelson-Churchill River project shows (see box, overleaf), such development has generally resulted in the flooding of large areas, seasonal reversal of flow, reservoir draw-down, and sometimes river diversion and dewatering. These physical effects, which occur in varying combinations upstream and downstream of major installations, are normally associated with reduced biological productivity in littoral zones, the elimination of rapids and hence spawning areas for certain fish, the disruption of productivity in large lakes, and the creation of unpredictable and often unsafe travel conditions, especially on river ice. As well, large developments have resulted in methyl mercury contamination, leading to commercial fishery closures and threats to domestic fishing, which is often the most important local food source. These effects are very long lasting, if not permanent, and can be exacerbated by changing operating regimes. Harvest disruption and community relocation are common consequences (see Volume 1, Chapter 11).

As in the period before 1950, whenever fish, fur and wildlife resources were depleted or perceived by management agencies to be in danger of depletion, Aboriginal use was a prime target for control. Wherever they were perceived as abundant, Aboriginal people were regarded as not using them to maximum efficiency, and others were given priority access. Moreover, treaty and Aboriginal rights continued to be interpreted as providing for food and family use only. This interpretation is noteworthy in light of the structure of Aboriginal traditional economies. While distinct from market-based economies, Aboriginal economies were by no means limited to subsistence. Instead, if Aboriginal economies are understood in relation to the broader structure of Aboriginal societies, 'commerce' was and remains an integral part:

*The survival — and prosperity — of the Indian nations has always flowed from their ability to choose freely how they would use their land and resources for collective benefit. If Indigenous peoples' economic activities and land use patterns — and their rights and interests — are seen in this context, then the conventional 'hunter-gatherer'-'frozen rights' analysis begins to wear thin ... This means that the arbitrary line between subsistence use and commercial use of resources no longer exists. Resources within the territory were there to be used for the benefit of the people first and foremost. This could mean taking for personal use, for distribution within the community, or for commerce with other communities and peoples. In this sense the result was the primary objective, not the destination of the product.*²⁰⁶

Protection of Aboriginal access to resources, though in diminished form, served the state only in so far as it kept Aboriginal people at a distance from the expanding settler economy and from dependence on the public purse. Some jurisdictions took this view to the extreme, believing that

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).

treaty Indians who were gainfully employed should, in turn, lose their treaty harvesting rights. In 1945, for example, the Ontario department of game and fisheries refused to issue trapping licences to Indian people working on the railway or in lumber camps.²⁰⁷

It is not surprising, given the barriers continually thrown up, that Aboriginal communities have consistently expressed frustration at their inability to develop healthy, self-sufficient economies. Not only did communities lose access to lands and resources in exchange for a limited land base (and, for many, no land base at all), but the guarantees provided in the treaties with respect to harvesting and access to new forms of economic enterprise were slowly eroded or completely denied. Moreover, when Aboriginal people sought wage labour outside their own communities, many were refused employment. Union practices, for example, did little to ameliorate the situation during this period.

In June 1958, for example, two organizers from the lumber and sawmill workers union visited the New Post Reserve north of Cochrane, Ontario, where 34 Indian men were cutting under a subcontract to Kimberley-Clark, and explained that those who did not join the union would have to leave immediately. As a result of this threat, 28 of the 34 men paid \$29 each and \$4 for monthly dues, while the remaining six returned to their homes at James Bay. It turned out that there was no clause in the original timber licence for the New Post Reserve specifying that Indian people would have to be hired, nor had any previous arrangement been made for an exemption to the union agreement, although the subcontractor had agreed orally with the department of Indian affairs to hire Indian labour. On the basis of a discussion with the Indian foreman, the department tried to secure a refund of the money collected, arguing that the organizers had used intimidation. As regional supervisor Fred Matters explained, the “wood belongs to the Indians and is on their own reserve”, and the primary purpose of the licence was to provide them with employment. He also pointed out that, because the men in question only worked seasonally, they would be compelled to rejoin the union every year for only a few weeks’ work. Apparently none of the men had understood what they were signing; as far as they were concerned, they had simply been exploited by white men.²⁰⁸

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.

Hydroelectric Development of the Nelson and Churchill Rivers

While the enormous potential of Manitoba's northern water resources for hydroelectric development has been recognized since the early part of this century, it was not until the late 1950s that hydroelectric development was seriously considered. Subsequent to numerous joint studies undertaken by the federal and provincial governments, Manitoba Hydro (the provincial utility) developed the Kettle project, in the mid-1960s, at Kettle Rapids in northern Manitoba, in anticipation of gaining approval for the much larger high level diversion of the Churchill River to the (Lower) Nelson River, with storage at Lake Winnipeg, Reindeer Lake and Southern Indian Lake on the Churchill River.

This diversion scheme met with serious opposition, however, focused on the concerns of the local Aboriginal community at Southern Indian Lake, which would have to be relocated, and on the environmental impact of flooding. Following the election of a new provincial government under the leadership of Ed Schreyer, Manitoba Hydro gained approval for a lower level Churchill River Diversion scheme. The South Indian Lake community, which was opposed to any flooding, failed to block the development, despite attempts to gain an injunction and appeals to the federal government.

The Churchill River Diversion has subsequently become well known for its massive scale and detrimental effects on the northern Manitoba environment and the Aboriginal peoples who live there. Although the project directly affected the lands and livelihood of five treaty communities (York Factory, Nelson House, Norway House, Cross Lake and Split Lake) and one non-treaty community (South Indian Lake), they were not consulted, nor did they give approval for the undertaking.

Reserve and community lands were either flooded or affected by dramatic changes to levels in surrounding lakes and rivers, and traditional land use areas were damaged or rendered inaccessible.

In return, community leaders and members assert, they have gained little benefit, in the form of employment, business-related activity or a share of revenues from the project, and have instead been mired in a continuous negotiation and litigation process to obtain compensation for the damages.

The controversies surrounding the development did succeed, however, in raising public awareness of northern Aboriginal communities and concerns and about the detrimental effects of such development. The Northern Flood Committee was formed in 1975 to negotiate a compensation settlement for the affected First Nations communities and resulted in the Northern Flood Agreement (nfa), which was signed in 1977 between the treaty nations, Canada, Manitoba and Manitoba Hydro.

The nfa itself has been the subject of much controversy (in many respects the agreement has become the model of how not to reach resolution), as its history has been marked by little or no action in implementation of nfa obligations and a long, drawn-out (and continuing) process of arbitration to force governments to implement their obligations. In 1988, the parties attempted to reach a global settlement of virtually all outstanding elements; however, agreement was never reached. Currently, two communities have reached a settlement outside of this process, with the balance still attempting to do so.

Source: See Patricia M. Larcombe Cobb, "Northern Flood Agreement — Case Study in a Treaty Area", research study prepared for RCAP (1995); James B. Waldram, "Native Employment and Hydroelectric Development in Northern Manitoba", *Journal of Canadian Studies* 22/3 (1987); and James B. Waldram, *As Long as the Rivers Run: Hydroelectric Development and Native Communities in Western Canada* (Winnipeg: University of Manitoba Press, 1988).

Related to such practices was the general attitude that northern resource-related jobs, such as those in hydroelectric development and mining, were for southern non-Aboriginal workers. As a report submitted to the provincial government in 1963 by the committee on Manitoba's economic future explained:

*Industrial concerns in this area should not be expected to employ native labour which is not as productive as white labour ... It is difficult enough to persuade large investors to put money in resource development in the north without expecting them to assume the added cost of solving the welfare problems of the native population.*²⁰⁹

More recently, the organized labour movement has been trying to rectify past problems. In its written submission to the Commission, the Canadian Labour Congress (CLC) acknowledged that Aboriginal peoples have a right of self-government and a concurrent requirement for more lands and resources. As part of the latter goal, the congress is encouraging union initiatives that would remove current obstacles to the hiring of Aboriginal workers. At the same time, however, CLC is concerned about the impact of the implementation of Aboriginal rights on union members in the resource industries, particularly forestry and commercial fishing, as well as on union members in non-Aboriginal organizations that deliver public services to Aboriginal people.²¹⁰

For the CLC and many Canadians, the interests of Aboriginal peoples must be balanced against the broader public interest. The difficulty for Aboriginal peoples, as we have seen throughout this section, is that any invocation of the common good has tended to leave them disadvantaged. The historical record shows that while Aboriginal communities contributed capital in the form of lands and resources to the accumulated wealth of Canada, they derived little benefit in return. Instead, Aboriginal communities have borne the brunt of the social, economic and environmental costs of development. Thus, not only did government policies and practices impede alternative economic pursuits, they generated and subsequently perpetuated dependence.

Many of the current conflicts over Aboriginal issues are an enduring reflection of the fundamental and forced separation of Aboriginal societies from the land. Land acquisition through treaties and other arrangements and subsequent resource allocations to other interests have meant that Aboriginal people have been dispossessed not just of their lands. All the elements that encompass their relationship with the land have been expropriated as well: nationhood, governance, and territoriality; customary forms of social and community organization; and conceptual and spiritual views.

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
Treaty 8 First Nation
Fort St. John, British Columbia, 20 November 1992

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.

4.4 The Impact of Crown Land Management Systems

In the majority of the land, we are the sole users and occupiers. The government, with its various ministries, has studied and prepared management plans in which we have had no input. The majority of the management plans are not geared to meeting the First Nations' needs or priorities. They have forced us to be reactive instead of proactive.

Steven Jakesta
Manager, Dease River Band Council
Watson Lake, Yukon, 28 May 1992

As we have seen, the way lands and resources are controlled and allocated presents significant difficulties for Aboriginal peoples, who, with relatively few exceptions, do not have a share in jurisdiction or management. Our goal is to reconcile the interests of Aboriginal peoples with those of society generally. To begin, we examine Canada's system for managing lands and resources in an international context and identify the institutional constraints that need to be overcome.

Crown lands and resources are managed by provincial and territorial government agencies, acting on the Crown's behalf. These agencies contribute to the development of legislation and regulations, make land and resource use policies and issue guidelines. They grant the leases, licences and other forms of tenure agreements that permit private corporations, groups and individuals to use resources such as trees, water power, oil and natural gas, or to graze their livestock on public lands. They also monitor the subsequent operations. These same agencies control access to and use of parks, forest reserves and other protected areas. Access to Crown lands is permitted for many purposes, including hunting, fishing, trapping, boating and recreational snowmobiling, but government agencies set and enforce policies and regulations for all such activities.²¹¹

State management and open access

Canada's system of state property and open access is similar to that of, among others, the United States (at least in federal lands west of the Mississippi) and Australia. But no other jurisdiction has such a large percentage of lands and resources under state control. More than 80 per cent of our country — millions of square kilometres — remains Crown land. Because of this geographic reality, Canadians have developed unique expertise in this kind of property regime.

The prevailing Canadian system is not the only possible resource regime, although it is generally considered to be the most appropriate. In Argentina, which has many similarities to Canada in terms of size and resources, most land is private property. Cattle ranches are enormous even by North American standards, and what would be grazing rights on public lands in Alberta or British Columbia are private rights in Argentina. Forested lands, although not nearly as extensive as in Canada, are also under private ownership. In the former Soviet Union and East Bloc countries, by contrast, all lands and resources belonged to the state, all resource users worked as state employees and there were few rights of open access.²¹²

Our state property system is not without its critics, who suggest that it is simply a private property regime under a different guise. Important resources such as forests, they argue, are effectively controlled by private interests under long-term tenures, and those interests are becoming increasingly concentrated. In British Columbia, according to the 1976 Royal Commission on Forest

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).

Resources, 10 companies held 59 per cent of all harvesting rights on Crown lands. By 1990, that share had increased to 69 per cent.²¹³ In Nova Scotia and New Brunswick, vast tracts of forest land have been held under virtually perpetual concessions since the last quarter of the nineteenth century.²¹⁴ The effects of concentration have been criticized by groups as diverse as small sawmill owners and independent loggers, mill workers, environmentalists, and Aboriginal people. The critics do not always (or even often) agree among themselves. But they do argue that it has been consistently difficult for small producers to gain access to the woodlands and that forest conservation has suffered badly in the process.

Conflict between the state and local communities over the control of forests is a worldwide phenomenon, one with a very long history. In the European countries from which settlers came, the term ‘forests’ meant both designated areas of forested land and open waste lands that were not suited to agriculture. Such areas were originally administered through complex laws and customs (which in England were independent of the common law) governing the rights of monarchs, lords, churches and communities to hunt and fish, to graze livestock, to cut timber or firewood, and to make charcoal.²¹⁵

By their nature, forests were also a zone of freedom; think of Robin Hood and Sherwood Forest.²¹⁶ In that sense, they were the only genuinely public lands, that is, lands to which there were public rights more or less autonomous from those of the state (represented by the Crown). As medieval monarchs sought to assert control over forests in order to extract more revenue, their subjects fought back. This was one of the concerns at issue in Magna Carta; thus, in 1215, King John’s barons forced him to assent to a forest charter that would uphold customary laws. (Another clause in Magna Carta prevented the monarch from establishing new private fisheries in public rivers.²¹⁷)

Although the terms ‘Crown lands’ and ‘public lands’ are now used synonymously, such was not always the case. Crown lands were state lands, meaning not only the estates of the feudal monarch, but all lands over which the monarch claimed paramountcy and the right to derive revenue. Monarchs (but not always their subjects) considered forests to be “waste or ungranted lands of the Crown”. The trees and other resources could be privatized as a source of revenue for the state (originally the monarch), and such lands could also be privatized by being granted, cleared of their forest cover and turned into farms. This is what the Crown meant by public lands.

This second sense of the term is the one that became common in the Anglo-American colonies such as New York and that has come to predominate in Canada. It is not hard to see why. In contrast to Europe, all of eastern North America was forested land when the colonists arrived. The amount of “waste and ungranted land” was vast. While the forests were clearly to be a source of revenue and of supplies to the Crown (white and red pine timber in both the French and Anglo-American colonies was reserved as masts for the royal navy), the forests, at least in the Anglo-American colonies, at first existed as an enormous reservoir of lands to be granted for agriculture.

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).

Excluding customary uses

This approach had significant consequences for Aboriginal people and their customary laws — their rights to use the forest and forest clearings. While Aboriginal rights were generally respected until treaties were made (although not, as we have seen, in areas like British Columbia where there were no treaties), once lands had entered the category of “waste lands of the Crown”, those customary rights were drastically diminished. Not only did Aboriginal people lose access to agricultural lands; the farming that took place promoted deforestation, which in turn drastically affected wildlife habitat. Deer and moose, for example, were gone from most of the eastern seaboard by the end of the seventeenth century.

The rise of industrial-scale forestry in the nineteenth and twentieth centuries was an entirely new phenomenon, one unknown to medieval Europe and colonial North America. It too has greatly diminished the ability of Aboriginal people to follow their customary laws and to use the resources of the forest. The role of the state management system is to make decisions about allocation, and in making those decisions, Crown agencies have consistently ranked Aboriginal interests at the very bottom. In this respect, state management has meant that forests have become resources to be protected against their former users.

This is a controversial subject in other parts of the post-colonial world, where new states are also banning or limiting customary uses of the forest in the interests of large-scale forestry. In fact, it has been argued that foresters and other resource professionals are bringing with them to their consulting work overseas a strong predilection for comprehensive government resource management on the North American model, one that trivializes customary law.²¹⁸

In Canada, as in the developing world, a policy to protect resources against their former users dictates both how resource rights are allocated and how certain kinds of development are disallowed. Until very recently in Canada, for example, Aboriginal customary uses were consciously excluded by regulation and policy from parks and protected areas established on Crown lands. As a result, parks have been extremely unpopular among Aboriginal people not only in Canada but also in Africa, for example, where they are seen as private preserves for the rich. In Zambia and Zimbabwe, recent government programs have tried, with considerable success, to reconcile park management with the economic needs of local residents.²¹⁹

The Yellowstone model for designating and managing park lands is a significant part of the corporate memory of land and resource management agencies in Canada, one that until very recently has made it difficult to bring Aboriginal people into management decisions, as it is based on professional management. In British Columbia, the 17,683-hectare Anhluut’ukwsim Laxmihl Angwinga’asanskwhl Nisg_a’a (Nisg_a’a Memorial Lava Bed Provincial Park) was set apart in 1991 in the Nass valley, north of Terrace. The Nisg_a’a Tribal Council approached the provincial government to create the park, and it is being managed jointly. The national parks set apart as a result of recent land claims agreements in the Yukon and the Northwest Territories are also improving relations between park staff and Aboriginal people who will be sharing in their management.²²⁰

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).

Although parks have very high levels of support in urban areas for both conservation and recreational reasons, they have been deeply unpopular with many residents of rural and remote parts of Canada who, like Aboriginal people, have felt that their customary uses of particular areas were being eliminated. State management of natural resources and concomitant disputes over issues such as industrial forestry and park creation have thus revived a centuries-old conflict over customary rights. This debate pits public lands in the Crown definition — in this case, the right of the state effectively to privatize the forest by granting long-term tenures or setting aside large areas in the public interest (but to which public access is strictly controlled) — against public lands in an older sense — the sense in which communities and individuals have customary rights of access to the forests and resource use is subject to community, not state, control. Much of the current discussion of decentralizing forest management in British Columbia and other regions of Canada, to which governments have been responding in a variety of ways, flows from this tension.

Differing views of common property

As communities worldwide debate who should benefit from resources and resource access, differing views of common property have become apparent. Many Canadians, and not just Aboriginal people, now consider trees and other natural assets common property resources. In its brief to the Commission, the Ontario Federation of Anglers and Hunters classified fish and other wildlife as “common property resources” since, in our legal system, they cannot be “owned” by any one individual or group. The federation went on to elaborate its belief that wildlife should therefore be managed by the state on behalf of all members of the public.²²¹ This is somewhat different from the views of supporters of community forest initiatives, who give greater primacy to local, rather than state control. Others who appeared before the Commission, such as Lorne Schollar of the Northwest Territories Wildlife Federation, implied that the state system, when coupled with Aboriginal rights, effectively discriminates against the rights of local non-Aboriginal people to harvest fish and other wildlife.²²²

The classic critique of common property systems is an influential 1968 article entitled “The Tragedy of the Commons” by Garrett Hardin, then a professor of human ecology at the University of California.²²³ Hardin argued that in a system supporting a publicly owned resource — a commons — the pursuit of private interests leads automatically to resource depletion. He used the example of herdsmen on a common pasture, each of whose rational pursuit of his own best interests would lead him to increase the size of his herd, thus resulting in the ruin of the commons for all. Hardin cited overgrazing on public lands in the western United States and overfishing in the oceans as examples.

The examples have particular resonance for Canadians in light of recent troubles in the Atlantic fishery. The historical examples cited earlier in the chapter — the decline of the sturgeon fisheries in various inland lakes — also appear to bear out Hardin’s thesis. Another example from the recent historical literature concerns the Bay of Quinte in Ontario. At the turn of the century, fishers there were anxious to preserve the viability of their industry but were unable to practise conservation on an individual level because of the need to cover operating costs and turn a profit. If they conserved fish stocks, their competitors simply reaped the benefit by landing more fish.²²⁴

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.

The Bay of Quinte fishery was originally not managed at all and was therefore not common property, but rather a resource to which there was completely open access. This is an important distinction. Common property is actually private property for the group, since it means that the group controls the resource and excludes all non-members from use and decision making.²²⁵ In the case of the Bay of Quinte, the department of fisheries ended uncontrolled access by bringing in conservation and restocking measures, and the fishery partially rebounded. There is considerable historical justification, then, for federal and provincial decisions to manage access to these kinds of resources in order to counteract species depletion.

As we saw earlier, however, control of open access has had major implications for the Wabanaki, the Haisla, Dene and all other Aboriginal peoples, who had existing common property systems that functioned under their customary laws. Swept up in the movement to control open access, they were severely penalized by the state. As with the forests and other resources, when management agencies subsequently made decisions about the allocation of wildlife, all other users were given higher priority, whether they were commercial fishers or trappers, tourist operators or recreational hunters and anglers. It is only with the Sparrow decision that this order of priorities is being re-examined.

The purpose of Aboriginal management systems, based on traditional ecological knowledge, was to counteract resource depletion and ensure the survival of the group. Aboriginal people have not abandoned their traditional tenure and management systems, either in concept or practice. These systems exist today (where the means and the access to exercise them still survive), although often in semi-covert fashion and in the context of a mixed economy. In various parts of the country, such as northwestern Ontario and southeastern Manitoba, where Ojibwa people continue their traditional practice of planting, tending, harvesting and cultivating wild rice, Aboriginal peoples still manage their common property by employing “a complex set of customary arrangements”.²²⁶

If we look again at the maps of the Lake Huron region presented earlier in the chapter (Figures 4.6 and 4.7), we can see that traditional land use areas — the band territories marked on the 1849 map (Figure 4.6) — surround the reserves along the northern and eastern shores of the lake. They are also adjacent to modern cities and towns like Sudbury and Blind River. These boundaries do not appear on any government maps, but it is within them that First Nations people hunt, fish, trap, gather, cut firewood and perform cultural ceremonies, and it is from these traditional territories that First Nations people want to derive the resources to build their reserve-based economies. The present state management system does not recognize traditional land use areas, and resource allocation decisions are made within that system based on other criteria.²²⁷

The theory and practice of land and resource management

While many employees of resource management agencies know that Aboriginal people living on reserves continue to harvest on Crown lands, they are generally unaware that most do so in accordance with their own rules of common property. Nor are they aware that Aboriginal people generally consider state rules an unfortunate imposition. In part, this is a reflection of the way those agencies are structured. Authority is centralized and flows from the top down, and the environment is reduced to conceptually discrete components, such as forests, parks, fish and wildlife, that have traditionally been managed independently (although less so as governments commit to principles of sustainable development or holistic management).

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).

This arrangement reflects long-standing government policy and practice as well as the way resource managers are trained as foresters, biologists, planners and technicians. Managers bring to their jobs the systems of knowledge and understanding that prevail in those disciplines, and those systems have become part and parcel of the corporate memory and institutional interests of resource management agencies.

These disciplines share certain common objectives, which are traceable to theories of scientific management that date from the ‘progressive era’ of the late nineteenth century. As summed up by Robert McCabe, former chair of the department of wildlife ecology at the University of Wisconsin, an influential training ground for many Canadian biologists, “the basic responsibility of professionals is to the resources, not to resource users. If professionals exercise that responsibility, the resource user is automatically served”.²²⁸

This focus on resources has had many positive benefits, but one result was that for a long time managers favoured efficiency in resource use above other considerations, and based on their professional training, managers defined what efficiency is. We have seen, for example, how Aboriginal people lost traplines to ‘more efficient’ non-Aboriginal trappers. Even now, government licensing systems favour economies of scale. ‘Use it or lose it’ has been the consistent message from resource managers to Aboriginal people and indeed all small commercial producers in rural and northern regions, including wild rice harvesters, logging contractors and tourist operators. Questions of resource allocation continue to be influenced, then, by the doctrine of efficiency.

Another essential feature of modern management systems is the fundamental divide between managers and users. Managers in effect become the owners (or at least custodians) of resources on public lands, while those who actually use resources — hunters, fishers, recreational boaters, trappers, loggers — become their clients. As we saw with parks (and forest and game reserves), the guiding principle is that the best way for state managers to protect resources is to control or exclude users.²²⁹ This principle, which assumes that only managers have knowledge (which is scientifically based), gives little weight to the experience and customs of all people (not just Aboriginal people) who harvest resources.

The effect on Aboriginal governance

When users have constitutionally protected rights to harvest resources, as Aboriginal people do, conflict is guaranteed. In its brief to the Commission, World Wildlife Fund Canada pointed out that when resource managers discuss biologically sustainable and culturally desirable levels of harvest with Aboriginal groups, “It is important that the idea of a quota which is enforced by a ‘policeman’ who distrusts the harvester, be avoided as much as possible. The result is often resentment and non-compliance.”²³⁰

Like the control of reserve lands, which has been exercised by the department of Indian affairs, state management of natural resources has had a negative impact on Aboriginal systems of governance. The Commission acknowledges that conservation of resources has been an important goal. Nor would we deny that individual Aboriginal people have occasionally been involved in the abuse of resources. As Patrick Madahbee, former grand chief of the Robinson-Huron Treaty First Nations,

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).

reminded a recent treaty gathering in Sault Ste. Marie, Ontario, Aboriginal people have an obligation to exercise their harvesting rights in a responsible manner.²³¹ But because government resource managers have been unaware of (or have discounted) surviving Aboriginal common property institutions on public lands, Aboriginal people have had no reason to respect the state system. This in turn has made it difficult for Aboriginal governments to maintain or enforce their own rules among their own membership. The result, in some cases, has been the worst of all possible worlds.

4.5 Conclusion

The distinctive relationship between Aboriginal people and the land — where they live, what they do there, and the connection between land, livelihood and community — has been problematic for Canadian society since the days of the early settlers. In the final sections of this chapter, we propose an approach to resolving the issues for the long term. We recommend changes to the current system of Crown land administration and jurisdiction, in the context of a new approach to treaty making and to the implementation and renewal of historical treaties. These changes make sense not just for Aboriginal peoples, but for all Canadians. Many individuals and groups expressed concerns about the present system at our own hearings. Canadians may differ about the exact nature of the changes needed to address these concerns, but the outlines are clear. They want a great deal more control over broad policy decisions about the zoning and allocation of resources on Crown lands, and particularly at the local level, they want a great deal more involvement in land and resource management in general.

Aboriginal peoples have been leading this movement for structural change, as they seek to build their own communities and economies in a sustainable manner. Experiments in regional public government, shared jurisdiction and shared management — now being introduced as part of land claims agreements in the north or developed in partnership with some provincial governments — are largely the result of pressure from Aboriginal peoples. These experiments are a positive model for us all, but structural change is not occurring nearly quickly enough. While the legal, political and institutional constraints discussed here continue to play a major role in hampering substantive change, current federal government policies for dealing with Aboriginal claims, coupled with the institutional interests of the Department of Indian Affairs and Northern Development, present a much more fundamental obstacle. In the next section, we examine how resistance by Aboriginal peoples to the loss of their lands and resources led eventually to modern claims policies, and why those initiatives remain inadequate.

5. The Inadequacy of Federal Claims Processes

Indian grievances are not new to Indians nor are they new to the Department of Indian Affairs. The rest of us, however, have not known much about them and the Indians have never been in a position to put their claims forward in a clear and forceful way which would make them fully understandable to us ... Over the years, the relationships between Indians and the government have been such that strong feelings of distrust have developed. This distrust goes far beyond distrust of government to the entire society which has tried, since day one, to assimilate Indian people. Indian people, who once dwelt proud and sovereign in all of Canada, have resisted with stubborn tenacity all efforts to make them just like everybody else They have given up much in this country, and they feel that

231 Patrick Madahbee, speech to Robinson-Huron Treaty Commemoration, Garden River First Nation Territory, 9 September 1995.

the assistance they receive from government must be seen as a right in recognition of this loss and not merely as a handout because they are destitute. In short, the grievances are real, the claims arising from them are genuine, and redress must be provided if our native peoples are to find their rightful place in this countryRecent experiences in Kenora, Cache Creek and Ottawa must have made even the most indifferent Canadian aware that native frustration is building up and that we cannot expect that native people will much longer confine their misery to their own communities as they have in the past.²³²

5.1 A Background of Aboriginal Protest

In 1947, leaders from major Indian rights associations and the Iroquois Confederacy travelled to Ottawa to appear before a special joint committee of the Senate and the House of Commons struck the previous year to consider amendments to the *Indian Act*. These leaders presented oral and written briefs on a host of topics, including the resolution of grievances dealing with treaties, lands and resources. Their submissions focused on the following issues:

1. resolution of the British Columbia Indian land title question;
2. resolution of the land ownership dispute at Kanesatake (Oka);
3. Iroquois Confederacy claims to sovereign nation status as British allies based on various wampum belt treaties, the *Royal Proclamation of 1763*, the Haldimand Grant (1784) and Simcoe Patent (1763), Jay's Treaty (1794) and other legal instruments;²³³
4. government's failure to fulfil specific treaty obligations;
5. complaints concerning improper government management of reserve land transactions and band trust funds;²³⁴ and
6. complaints about government discrimination against Indian war veterans, who were not considered eligible for veteran land grants (see Volume 1, Chapter 12).

Thus, Aboriginal claims are far from a recent phenomenon. Fifty years later, these issues, as well as many others involving lands and resources, remain unresolved. How did this happen? Why have so many attempts to deal with the problem failed?

Aboriginal peoples have consistently protested their exclusion from their traditional territories, the continuing alienation of reserve lands and resources, and governments' failure to honour the terms of treaties. Aboriginal peoples have also protested the characterization of these disputes as 'claims', since this suggests that it is the undisputed rights of others that are being challenged, whereas it is the established rights of Aboriginal peoples that are being asserted. Chief Joe Mathias of the

232 Lloyd I. Barber, "Indian Land Claims and Rights", in *The Patterns of "Amerindian Identity": Symposium, Montmorency*, October 1974, ed. Marc-Adélar 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.

Squamish Nation in British Columbia made the point in this way: “We’re not talking about being granted our rights — they are our rights!”²³⁵

Aboriginal peoples have used petitions, protests and direct action in their continuing attempts to secure a just resolution of their grievances. But apart from intermittent and ad hoc attempts to deal with individual issues, Canada paid scant attention to Aboriginal claims until after the Second World War.²³⁶ In fact, strong measures were taken at times to suppress any assertion of Aboriginal rights and title. In the 1920s, for example, when Iroquois representatives were having some success in promoting their cause at the League of Nations, the council house at the Grand River was invaded by the RCMP and the traditional longhouse chiefs replaced by an elected council. Shortly afterward, the *Indian Act* was amended to make raising funds to advance an Indian claim or retain a lawyer for that purpose an offence.²³⁷

Following the 1946-1948 hearings, the federal government made serious and laudable attempts to streamline the administration of Indian affairs and to better the condition of reserve residents through improvements in education and social services. But at the same time, senior officials of the Indian affairs branch did their best to forestall any attempts to deal with broader land and resource issues. Deputy minister Hugh Keenleyside found the 1947 parliamentary hearings particularly unsatisfactory because they were a national platform for “venal” and “self-serving” Indian politicians to sound off on issues that he considered to be unimportant.²³⁸

The special committee recommended the creation of an independent administrative body to deal with Indian grievances, to be modelled on the U.S. Indian Claims Commission, which had begun operations in 1946.²³⁹ The creation of such a body enjoyed multi-party support in the House of Commons, with prominent opposition members (such as John Diefenbaker) speaking in its favour along with Liberal members of Parliament from the special committee.²⁴⁰ The Indian affairs branch did conduct an internal investigation into the types of matters that might be brought before such a commission; that investigation actually foreshadowed modern claims categories by distinguishing, for the first time, between specific grievances relating to treaties and reserve lands and resources and larger claims dealing with issues of Aboriginal title. But the claims commission idea was rejected at senior levels of the department, a decision announced by Walter Harris, minister responsible for Indian affairs.²⁴¹ Harris and his officials expected that Indian people would instead pursue treaty and land claims cases in the Exchequer (now Federal) Court of Canada. This became possible, at least theoretically, in 1951, when the notorious section prohibiting the use of band funds to advance claims was dropped from the newly revised *Indian Act*.²⁴²

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.

The repeal of that section, however, was the only real concession to protests about land and resource issues. During formal consultations between 1948 and 1951 on *Indian Act* revisions, the Indian affairs branch tried to discourage participation by the Indian rights associations — a hostile attitude that continued over the following decade. Thus, at a series of regional Indian conferences held across Canada in 1955-1956, officials set the agenda items in advance, and questions relating to treaties, land claims or special rights were avoided or deflected. When the Indian leadership finally gained another chance to appear before Parliament — during the joint Senate-House of Commons hearings of 1959-1961, co-chaired by member of Parliament Noël Dorion and Senator James Gladstone (a Treaty 7 beneficiary from the Blood reserve in southern Alberta and the first member of a Treaty First Nation appointed to the Senate) — virtually all of their submissions reiterated long-standing concerns about land claims, violations of treaties and unresolved Aboriginal title issues. Chief James Montour of Kanesatake spoke in Mohawk about the land dispute at Oka, introducing in evidence the same historical documents that had been filed at the 1947 parliamentary hearings. Spokesmen for the British Columbia allied tribes once again raised the Indian land question in that province, and the Six Nations Confederacy reiterated its assertions of sovereign nation status and border-crossing privileges.²⁴³

Finally, the federal government began to take these specific grievances seriously. Some of the credit belongs to James Gladstone, who used his position on the committee — and his influence with certain ministers of the Conservative government that had appointed him — to lobby for substantive change.²⁴⁴ In accordance with the committee's recommendations, draft legislation prepared in 1962 would have created a three-member administrative tribunal, the Indian Claims Commission. The proposed commission (of which one member was to be Indian) would have been empowered to hear a broad range of grievances, with no restriction on claims arising from before Confederation. As a concession to Aboriginal oral traditions, strict evidentiary rules would not be followed, and the commission would be allowed to develop its own procedures. However, it was not clear that broader issues of Aboriginal title (as in British Columbia) could be dealt with, and there was to be no renegotiation of existing treaties. Also, claimants were to be limited to Indian people as defined by the Indian Act, thus excluding Métis people. Internal policy debate centred on whether the commission (like its American counterpart) should have binding decision-making powers. Although initial proposals had favoured such powers, the draft legislation was altered so that the commission would simply make recommendations to Parliament concerning decisions and awards.²⁴⁵

The Diefenbaker government fell before the legislation could be introduced, but the new Liberal government of Lester B. Pearson brought forward similar legislation, Bill C-130, in December 1963. The proposed Indian claims commission — now expanded to five members — was to have jurisdiction over claims concerning unextinguished Indian title, the expropriation of reserve lands without compensation or consideration of Indian interests, the failure to discharge the obligations of treaties or other agreements, the improper use of trust funds, and the general failure of the Crown to act fairly and honourably with the Indian people. As before, however, these categories excluded the renegotiation of existing treaties, and claims could be brought by *Indian Act* bands only, not by national or regional organizations. Bands were to be given two years to bring forward their claims.

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).

The Pearson government's bill differed in two important respects from the Conservative's proposal. One was that the commission was to have binding decision-making powers. The second was a proposed appeals process. Either side could appeal jurisdictional questions to the Exchequer Court and the Supreme Court of Canada. Appeals concerning the unreasonableness of an award, or the failure to grant an award, could be taken to a new Indian claims appeal court to be composed of judges of the Exchequer Court, to be created along with the claims commission.

Following first reading, there was an 18-month delay as copies of Bill C-130 were sent to all Indian bands and organizations (as well as other interested bodies) for comment. The legislation was reintroduced to Parliament in June 1965 as Bill C-123. Several amendments had been made in response to criticism, including an extension to three years of the time limit for filing claims, as well as provisions that one of the five commissioners be Indian and that financial assistance be provided to help claimants document their grievances. However, this bill died on the order paper when the Liberal government went to the electorate in the fall of 1965.

The re-elected Pearson government remained committed to the idea of establishing an Indian claims commission over the next two years, but the continuing pressures of minority government left the issue relatively low on the parliamentary agenda. In addition, the British Columbia Native Brotherhood had asked the government to delay submitting the necessary legislation. Because the proposed commission would not have jurisdiction over claims against the provinces, and because it was not clear whether their claim was against British Columbia or Canada, many Indian leaders there believed the title issue in that province should be settled by negotiation before the claims commission bill became law. However, negotiations never got off the ground, in part because of the federal government's insistence that at least 75 per cent of B.C. Indian people be represented in negotiations by a single organization, a requirement that proved to be an insurmountable problem.²⁴⁶

Two subsequent events caused change, though for widely different reasons. These were the Trudeau government's white paper on Indian policy in June 1969 and the Calder decision in 1973. The white paper proposed the termination of Indian status under Canadian law and a complete overhaul of the relationship between Indian people and Canadian society based on liberal ideals of equality (see Volume 1, Chapter 9 and Chapter 2 in this volume). Developed by the government as a whole, not just the department of Indian affairs, the white paper, which was totally and angrily rejected, denied the existence of Indian title and considered other claims to be of only limited significance. As a result, efforts within the Indian affairs department to bring forward an Indian claims commission bill, under way since 1961, were suspended during the winter of 1968-1969.²⁴⁷

Although the white paper policy did call for the appointment of a claims commissioner, there was little similarity between this and earlier legislative proposals. The commissioner, Lloyd Barber of the University of Saskatchewan, appointed by order in council in December 1969, was given a mandate to receive and study *specific* grievances (but not those involving Indian title) and to recommend alternative measures to provide for the resolution of claims. The Barber commission continued until 1977, though the fact that it was an exploratory and advisory commission only, rather than one with explicit adjudicatory powers, was strongly criticized by Indian leaders. Most Indian organizations were unwilling to proceed with negotiations of claims in the absence of a more concrete mechanism for resolving them.²⁴⁸ In one area of Canada, however, a successor to the Barber commission has remained in operation. The Indian Commission of Ontario was created in

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.

1978 as a tripartite council of representatives of First Nations, Ontario and Canada. Its powers remain confined to facilitating and assisting in negotiations.²⁴⁹

The federal government was forced to reconsider at least some elements of its policy on land claims because of *Calder*, a decision that confirmed that Indian title is a valid right in common law. In 1990, the Supreme Court of Canada summarized the effect of these events on the development of claims policy:

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).

*For many years, the rights of the Indians to their aboriginal lands — certainly as legal rights — were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For 50 years after the publication of Clement's **The Law of the Canadian Constitution**, 3rd ed. (1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the **Statement of the Government of Canada on Indian Policy** (1969), although well meaning, contained the assertion (p. 11) that 'aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community'. In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument: see the **Quebec Boundary Extension Act**, 1912, S.C. 1912, c. 45. It took a number of judicial decisions and notably the Calder case in this court (1973) to prompt a reassessment of the position being taken by government.*

*In the light of its reassessment of Indian claims following Calder, the federal government on August 8, 1973, issued 'a statement of policy' regarding Indian lands. By it, it sought to 'signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians', which it regarded 'as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country'See **Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People**, August 8, 1973. The remarks about these lands were intended 'as an expression of acknowledged responsibility'. But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. 'The Government', it stated, 'is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest.'*

*It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position: see also Canada, Department of Indian Affairs and Northern Development, **In All Fairness: A Native Claims Policy — Comprehensive Claims** (1981), pp. 11- 2; Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 726 at p. 730. As recently as **Guerin v. The Queen** (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, the federal government argued in this court that any federal obligation was of a political character [i.e., not enforceable in the courts].²⁵⁰*

250 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103-1105.

5.2 Three Existing Claims Policies

There are now three published federal policies relating to Aboriginal claims. Provinces also participate, to varying degrees, in claims negotiations — as in the British Columbia Treaty Commission — but there are as yet no published provincial policies.²⁵¹ The following three federal policies flow from the government's original statement of claims policy in 1973:

*1. The comprehensive claims policy is intended to deal with claims based upon unextinguished Aboriginal title. As will be seen, these are effectively claims to negotiate a treaty with the Crown. First Nations and Inuit may advance a comprehensive claim.*²⁵²

*2. The specific claims policy is intended to cover claims based upon failure to discharge treaty obligations, improper alienation of reserve lands or assets, and other claims based upon breach of "lawful obligation" by the federal government. Such claims can be advanced by First Nations only.*²⁵³

*3. Claims of a third kind were formally acknowledged in 1993. They are amorphous in nature, described as providing "administrative solutions or remedies to grievances that are not suitable for resolution, or cannot be resolved, through the Specific Claims process". While they lack both definition and process, it is clear that such claims can be advanced only by First Nations.*²⁵⁴

Notable procedural features are common to all three policies:

- The burden of proving a claim is on the Aboriginal claimants.
- Government determines the validity of the claim (without prejudice to any position that it might subsequently advance in court proceedings).
- Government can accept a claim for negotiation as an alternative to litigation; litigation takes claims outside the scope of the policies.
- Government determines the parameters of what can be negotiated.
- Existing treaties will not be renegotiated.
- Government determines the basis for compensation.
- Negotiation funding can be provided to claimants in the form of loans.
- Third-party interests are not to be affected by a claims settlement.

Over the years since their inception, these claims policies and processes have been much and justly criticized, but they have shown themselves particularly resistant to change.²⁵⁵ As the Indian Commission of Ontario noted in 1990, "What all the intervening review, comment and

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).

recommendations [about claims policy] have most in common is the fact that they have all been ignored”.²⁵⁶

A quick review of the three policies illustrates their deficiencies. Many claims can be abandoned at the discretion of the government. This is almost always the case with specific claims, where the parties might grapple for years with the compensation guidelines, only to have these jettisoned if the government determines to settle a claim and make a lump-sum offer. The significant role of the department of justice in advising on the validity of claims and appropriate compensation is seen by claimants as a clear conflict of interest, especially given the lack of funding available to them for litigation.²⁵⁷

In addition, it will be seen readily that there is no federal process to deal with Métis claims, although there are claims that need to be addressed (see Volume 4, Chapter 5). This supports the complaint advanced by all Aboriginal groups that federal policies are exclusionary in nature by virtue of the categories government has established unilaterally. Where the policies do not explicitly exclude certain groups or certain types of claims, subsequent interpretation of the policies by the departments of Indian affairs and justice has resulted in *de facto* exclusions, such as the government’s refusal to deal with treaty harvesting rights as claims.²⁵⁸ Part of the solution would be more general processes, accessible to all Aboriginal groups, in respect of their Aboriginal, treaty and other rights.

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 a 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.

These factors have combined, over the years, to make the claims process a dilatory and frustrating one for all concerned. Although there have been settlements, and while the rate of settlements has increased in recent years, there has not been any significant policy change, and the outlook remains bleak. In central and eastern Canada alone, for example, the Indian Commission of Ontario notes that only 13 of 215 specific claims submitted have reached settlement. “This equates to less than one settlement per year, an alarming figure considering that 124 claims remain under review or negotiation.”²⁵⁹

The delays that plague claims resolution are notorious among those involved with the process.²⁶⁰ They are not so well known to the public, except when tensions reach the breaking point. There have already been tragic consequences, as with the shooting deaths of a Quebec police officer at Kanasatake in 1990 and an Aboriginal protestor at Ipperwash Provincial Park in Ontario in 1995. Even the extensive press coverage of the Oka crisis was not successful in communicating the fact that the issue was a land claim the Mohawk Nation had been advancing for nearly two centuries. The claim did not fit into any of the policy pigeon holes, however, and repeated intrusions into their territory brought some Mohawk people to the point where armed resistance seemed valid. In the case of Ipperwash, the federal government’s unconscionable delay in fulfilling its promise to return reserve lands, originally expropriated by the military in 1942, to the Kettle and Stoney Point First Nation contributed to the decision by some of its members to occupy the adjacent provincial park. The Commission rejects violence as a tactic for redress of grievances. But it is essential that Canada adopt policies and procedures to usher in an era of true coexistence. Processes must be established immediately to address all Aboriginal rights and title issues. These processes will require independent supervision, adjudication, funding and non-adversarial dispute resolution.

The comprehensive claims process

As originally defined by government and set out in the 1981 publication, *In All Fairness*, a comprehensive claim is one based on unextinguished Aboriginal title and is, in effect, a request for the negotiation of a treaty. This is reinforced by subsection 35(3) of the *Constitution Act*, 1982, which recognizes and affirms existing Aboriginal and treaty rights: “‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired”.

The comprehensive claims policy has three elements:

1. the criteria for acceptance under the policy;
2. the rights the Aboriginal group in question is asked to relinquish; and
3. the type and quantity of benefits the federal government will consider providing the Aboriginal group in exchange for the relinquishment of the group’s rights.

Criteria for acceptance of claims

Under the comprehensive claims policy (as amended in 1986), the minister of Indian affairs will determine whether to accept a claim on advice from the minister of justice about its acceptability according to legal criteria. An Aboriginal group is therefore expected to submit a statement of claim that complies with the following requirements:

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.

- the claimant has not previously adhered to treaty;
- the claimant group has traditionally used and occupied the territory in question, and this use and occupation continue;
- a description of the extent and location of such land use and occupancy together with a map outlining approximate boundaries; and
- identification of the claimant group, including the names of the bands, tribes or communities on whose behalf the claim is being made, as well as linguistic and cultural affiliation and approximate population figures.²⁶¹

This list might suggest relatively liberal criteria for accepting claims, but in practice the criteria used by the department of justice to assess validity are more rigorous, set out in the 1979 Federal Court decision in *Baker Lake*.²⁶² Under this decision, as elaborated by the federal government, an Aboriginal group must demonstrate all of the following:

- It is, and was, an organized society.
- It has occupied the specific territory over which it asserts Aboriginal title from time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations.
- The occupation of the territory is largely to the exclusion of other organized societies.
- There is continuing use and occupancy of the land for traditional purposes.
- Aboriginal title and rights to use of resources have not been dealt with by treaty.
- Aboriginal title has not been extinguished by other lawful means.²⁶³

The last part of this test appears to have been somewhat altered by the 1990 *Sparrow* decision, which held that if the federal government's position is that Aboriginal title has been eliminated by "other lawful means", then its intention to extinguish Aboriginal title must have been "clear and plain". Federal policy continues to reflect other parts of the *Baker Lake* decision, however, despite Supreme Court decisions like *Simon* and *Bear Island* that implicitly reject evidentiary tests for Aboriginal claims that are impossible to meet in the absence of written evidence.

In practice, the federal government has applied the policy with varying degrees of stringency, depending on its broader political agenda. For example, it has negotiated and settled the Tungavut Federation of Nunavut claim in the eastern Arctic on the basis that Inuit had historically used and occupied all the lands now included in the new territory of Nunavut. In fact, as the Indian Specific Claims Commission has pointed out, the southwestern portion of the territory just north of the sixtieth parallel continues to be traditionally used and occupied by Athabasca Denesuline (Dene) and Sayisi Dene, whose communities are in northern Saskatchewan and Manitoba. The government has thus far refused to acknowledge that Denesuline have any treaty or Aboriginal rights within the territory in question.²⁶⁴

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.

As well, the geographic criteria for claims validation have had a negative impact on the public perception of Aboriginal issues. A popular misconception in British Columbia, for example, is that Aboriginal people are claiming 110 per cent of the province.²⁶⁵

What Aboriginal people must relinquish

As discussed in our special report, *Treaty Making in the Spirit of Co-existence*, the Crown's interpretation of the treaty relationship was, historically, that Aboriginal nations had received specified benefits in exchange for a blanket extinguishment of their title or rights. In keeping with this practice, the original comprehensive claims policy specified that an Aboriginal group must surrender all Aboriginal rights in return for a grant of rights specified in a settlement agreement. The government has moved very little from this position. In response to widespread objections by Aboriginal people and the Coolican report in 1985, the amended federal policy allows for an "alternative" to the surrender of all Aboriginal rights — "the cession and surrender of Aboriginal title in non-reserved areas", while "allowing any Aboriginal title that exists to continue in specified reserved areas, granting to beneficiaries defined rights applicable to the entire settlement area".²⁶⁶ The policy also notes that the only Aboriginal rights to be relinquished are those related to the use of and title to lands and resources. In practice, however, only one of the recent settlements, the Yukon Umbrella Final Agreement, comes under this "alternative". In that agreement the only Aboriginal rights that are not surrendered are surface interests in the lands that are retained as Indian lands.²⁶⁷ Thus, it would appear that the current policy allows for only a minimal divergence from the basic position of requiring a total surrender of all Aboriginal rights.

Scope of the benefits Aboriginal groups can negotiate

Federal policy sets out a number of areas where benefits can be negotiated, including lands (including offshore lands), wildlife harvesting rights, subsurface rights, natural resources revenue sharing, environmental management, local self-government and financial compensation.²⁶⁸ Certain limitations on each of these areas are especially noteworthy.

First, until the recent federal announcement on self-government,²⁶⁹ these issues were based on delegated authority, not the inherent right, and were the subject of separate negotiations governed by the federal policy on community self-government negotiations. Under the comprehensive claims policy, issues of self-government will be contained in separate agreements and separate enacting legislation. They will not receive constitutional protection unless there is a general constitutional amendment to this effect.²⁷⁰

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.

Second, natural resources revenue-sharing provisions will be subject to limitations, which might include an absolute dollar amount, the duration of the revenue-sharing provisions or a reduction of the percentage of royalties generated.²⁷¹ Thus, natural resources revenue-sharing arrangements are seen more correctly as a way of spreading cash compensation over a longer period of time, rather than securing a significant continuing source of revenue for Aboriginal claimants.

Third, on the issue of Aboriginal participation in managing lands and resources, the policy requires that any arrangements recognize the overriding powers of non-Aboriginal governments.²⁷² While numerous management boards and committees have been set up under the various comprehensive land claims agreements (see Appendix 4B), these bodies remain advisory, although some have found innovative ways to prevent their recommendations from being ignored. Nonetheless, non-Aboriginal governments retain full jurisdiction and final decision-making authority.

The lack of interim measures

One of the most significant weaknesses of comprehensive land claims policy is the lack of any provision for interim measures before submission of a comprehensive claim and during negotiations. Governments are free to create new third-party interests on the traditional lands of Aboriginal claimants right up until the moment a claims agreement is signed.

The continuation of activities such as logging, mining and hydroelectric development before and during negotiations has, as we have seen in this chapter, provoked confrontation with Aboriginal people. Virtually all the co-management regimes established to date, including the Barriere Lake Trilateral Agreement in Quebec and the Clayoquot Sound Agreement in British Columbia, were created because of Aboriginal protest over resource development. It should not be necessary for Aboriginal people to mount blockades to obtain interim measures while their assertions of title are being dealt with.

The incentive to negotiate

Developing parallel to federal claims policy is the underlying law of Aboriginal title. Continuing uncertainty about legal recognition of Aboriginal title and the rights that adhere to such a title, as well as the absence to date of any truly effective judicial remedy, give Aboriginal and government parties sufficient reason to enter into treaty negotiations. Yet this incentive is offset by the fact that the federal government continues to contemplate blanket extinguishment of Aboriginal title as a possible option.

In addition, Aboriginal parties asserting an unextinguished Aboriginal title often find themselves involved in a constitutional dispute. Their assertions are typically opposed, primarily by a province protecting its jurisdiction over lands and resources, and frequently by Canada as well. This was the situation in *Calder* and subsequently in *Delgamuukw*, both cases relating to the assertion of Aboriginal title in British Columbia. In other provinces, Aboriginal groups have found themselves subject to a further gloss on existing policy. In *Bear Island*, an Ontario case, the federal government communicated its position that there could be no subsisting Aboriginal title in treaty areas even if the Aboriginal party had not actually joined in the treaty.²⁷³ This was the situation of the Lubicon

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.

Cree as well.²⁷⁴ Moreover, as previously noted, Métis people are excluded from asserting Aboriginal title under the policy.

The Coolican report and revisions to policy

There has been one searching examination of existing policy. The task force to review comprehensive claims policy, which released its findings in 1985 (commonly known as the Coolican report), noted a fundamental difference in the aims of the parties to an Aboriginal title claim:

*The federal government has sought to extinguish rights and to achieve a once-and-for-all settlement of historical claims. The aboriginal peoples, on the other hand, have sought to affirm the aboriginal rights and to guarantee their unique place in Canadian society for generations to come.*²⁷⁵

The report recommended a policy and process that would

- be open to all Aboriginal peoples using and occupying traditional lands whose title has not been subject to a treaty or to explicit legislation;
- recognize and affirm Aboriginal rights;
- allow for variation based on historical, political, economic and cultural differences among Aboriginal peoples and their circumstances;
- focus on negotiated settlements;
- be fair and expeditious;
- encourage the participation of provincial and territorial governments;
- allow for the negotiation of Aboriginal self-government;
- enable Aboriginal peoples and government to share responsibility for the management of lands and resources and to share the benefits of their use;
- deal with third-party interests in an equitable manner;
- be monitored for fairness and progress by an authority independent of the parties; and
- provide for effective implementation of negotiated agreements.

Government responded to these recommendations the following year in a publication entitled *Comprehensive Land Claims Policy*.²⁷⁶ To the disappointment of Aboriginal groups and others who supported the Coolican report, the federal response offered an alternative to extinguishment of rights that was more illusory than real: self-government negotiations, if they resulted in an agreement, would receive no constitutional protection or independent monitoring authority. By and large, this remains the federal position with respect to comprehensive claims.²⁷⁷

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).

Existing claims settlements

There have been eight major settlements of Aboriginal title claims affecting huge segments of northern Canada, the last six of which were concluded under the federal comprehensive claims policy:

- The James Bay and Northern Quebec Agreement, 1975
- The Northeastern Quebec Agreement, 1978
- The Inuvialuit Final Agreement, 1984
- The Gwich'in Comprehensive Land Claim Agreement, 1992²⁷⁸
- The Nunavut Final Agreement, 1993
- The Sahtu Dene and Métis Comprehensive Land Claim Agreement, 1993
- The Yukon Umbrella Final Agreement, 1994, consisting of four final agreements signed with the Vuntut Gwich'in First Nation, the First Nation of Na-cho Ny'a'k Dun, the Teslin Tlingit Council, and the Champagne and Aishihik First Nations
- the Nisg_a'a agreement in principle, 1996.

The main provisions of these settlements are set out in Appendix 4A, along with the Quebec government's 1994 offer of settlement to the Atikamekw-Montagnais people, whose Aboriginal title claim covers a large area of north-central Quebec. This example is included for comparative purposes only, since the offer has been rejected by the claimants, although technical discussions continue. Similar claims are expected from the 10 Algonquin First Nation communities that border the Atikamekw to the west. The Algonquin community of Kitigan Zibi (River Desert), the easternmost of these 10 communities, formally submitted its comprehensive claim to the federal government in 1994. It is currently being assessed by the department of justice. In the province of Newfoundland and Labrador, the Innu and Inuit of Labrador have asserted title claims. As well, the British Columbia Treaty Commission is now undertaking the negotiation of nearly 50 claims in that province.

The majority of modern treaties relating to Aboriginal title have been reached in the territories, where Canada has exclusive jurisdiction over lands and resources. The two modern treaties concluded in a province are the 1975 James Bay and Northern Quebec Agreement and the related 1978 Northeastern Quebec Agreement from (see Appendix 4A) and the recent Nisg_a'a agreement in principle in British Columbia. In the first case, Quebec's desire to develop hydroelectric resources motivated its participation in the settlement. There have been problems with the implementation of that settlement and others.²⁷⁹ The Commission therefore repeats, with emphasis, the Coolican recommendation that an appropriate policy, and indeed the treaties themselves, must include appropriate provisions for implementation. An independent monitoring authority would help to ensure that result.

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).

The British Columbia Treaty Commission

In British Columbia the process for negotiating comprehensive claims settlements has been somewhat modified by the presence of the British Columbia Treaty Commission, created jointly by the First Nations Summit, Canada, and British Columbia in 1992.²⁸⁰

The establishment of an independent body to monitor the negotiation process was also a recommendation of the Coolican report, one intended to redress the massive imbalance of bargaining power between federal and provincial governments on one hand and Aboriginal parties on the other.²⁸¹

In that regard, the method of appointment of the commissioners is certainly promising. Canada and British Columbia each nominate one commissioner and the First Nations Summit nominates two; the chief commissioner is nominated jointly by the parties. However, the commission remains purely facilitative. While the involvement in negotiations of an outside party is certainly a step in the right direction, its true effectiveness remains to be assessed. Continued arguments between Canada and British Columbia, for example, have contributed to a delay in the commission's operations. Moreover, the fact that a number of First Nation communities in British Columbia have refused to join the First Nations Summit means that the Aboriginal side is not fully representative.

We note particularly that federal negotiators do not have the authority to depart from existing comprehensive claims policy. Without significant policy changes, therefore, extinguishment of Aboriginal title will remain one of the criteria for any new treaties in British Columbia.

The 1995 fact finder's report on surrender and certainty

In December 1994, the minister of Indian affairs appointed Alvin C. Hamilton, a former associate chief justice of the Manitoba Court of Queen's Bench, as an independent fact finder to explore and report on existing federal claims policies and other potential models for achieving certainty of rights to lands and resources through land claims agreements. The appointment was made in response to a June 1994 report of the House of Commons standing committee on Aboriginal affairs that asked the minister to "consider the feasibility of not requiring blanket extinguishment". The fact finder's report, entitled *Canada and Aboriginal Peoples: A New Partnership*, was released in September 1995.

In his report, Mr. Hamilton explicitly rejected the current federal policy requiring extinguishment or surrender of some or all Aboriginal rights to lands and resources in exchange for rights and benefits set out in an agreement or modern treaty. He offers an alternative to eliminate the need for a surrender clause while achieving the necessary level of certainty. This alternative has six essential and interconnected elements:

1. recognition in the preamble that the Aboriginal party to the treaty has Aboriginal rights in the treaty area;
2. as much detail as possible concerning the rights to lands and resources of each of the parties to the treaty and of others affected by it;

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.

3. mutual assurance clauses in which the treaty parties agree that they will abide by the treaty and exercise rights only as set out in the treaty;
4. mutual statements that the treaty satisfies the claims of all parties to the lands and resources covered by the treaty and that no future claims will be made with respect to those lands and resources except as they may arise under the treaty;
5. a dispute resolution process with broad powers, including binding arbitration and judicial review, to ensure that treaty obligations are met and disagreements about the treaty are addressed; and
6. a workable amendment process whereby the parties can, if they agree, amend certain provisions of the treaty to respond to changing circumstances.²⁸²

We are pleased to observe that the fact finder's recommendations are similar to the alternative presented in our special report on extinguishment, *Treaty Making in the Spirit of Co-existence*, as well as to recommendations later in this chapter dealing with the content and scope of new or renewed treaties.

The fact finder was asked by the minister to consider our special report when conducting his deliberations. Mr. Hamilton did express some disagreement with our second recommendation, which he sees as endorsing partial extinguishment in certain circumstances. He does not believe that "there are any circumstances that warrant even a partial extinguishment or surrender of Aboriginal rights whether one is dealing with Aboriginal rights in general or more specific Aboriginal rights with respect to lands and resources".²⁸³ In our view, his disagreement is one of degree more than of kind, particularly if our recommendation is read in light of our discussion in the special report:

Requiring partial extinguishment as a precondition of negotiations is also an inappropriate means of achieving co-existence. Partial extinguishment often results in the extinguishment of rights to far more territory than the term 'partial' perhaps implies. Because of its permanent effects, any decision to agree to partial extinguishment of Aboriginal title should be made after a careful and exhaustive analysis of alternative options. We do not wish to suggest in this report that an Aboriginal nation should never be entitled to exchange some of its territory for certain treaty-based benefits. Nor do we wish to foreclose the availability of bargaining solutions that rely in part on partial extinguishment techniques. Nevertheless, we hope that the approach we propose will prove more attractive in most instances.²⁸⁴

The Commission cannot support the extinguishment of Aboriginal rights, either blanket or partial. It seems to us completely incompatible with the relationship between Aboriginal peoples and the land. This relationship is fundamental to the Aboriginal world view and sense of identity; to abdicate the responsibilities associated with it would have deep spiritual and cultural implications. However, we recognize that there will be circumstances where the Aboriginal party to a treaty may agree to a partial extinguishment of rights in return for other advantages offered in treaty negotiations. We would urge, however, that this course of action be taken only after all other options have been considered carefully.

Mr. Hamilton had a number of useful suggestions to improve treaty documents. He was critical, for example, of the language of the recent Yukon Umbrella Final Agreement:

I attempted to read the Umbrella Final Agreement, Council for Yukon Indians. While

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.

*I have some years of experience as a practising lawyer and as a judge, I must say that I found the document convoluted and very difficult to follow. I understood what a presenter meant when he said one would need to be a lawyer or a negotiator who has been involved in the negotiation of a treaty to be able to understand it.*²⁸⁵

Mr. Hamilton's opinion, which we share, is that the language used in treaty documents should be clear, plain and understandable to everyone, not just to those involved in preparing the draft.

Mr. Hamilton also believes that the certainty desired by all parties can be provided by clearer, more concise treaties than those of recent years. Concerning land regimes, he suggests that the treaty simply state at the outset the nature of each type of land within the treaty area and then give a general outline of the rights of each party with respect to each category. This is an excellent suggestion. Our point of disagreement is that Mr. Hamilton proposes only two categories — settlement land (that portion owned by the Aboriginal party) and non-settlement land (the rest of the land within the treaty area that is owned by the government or is privately owned and to which the Aboriginal party has special rights). We envision instead a tripartite land scheme involving settlement land, shared land (land under joint jurisdiction and management by the Crown and Aboriginal parties) and non-settlement land. We believe this land regime would provide greater self-sufficiency for Aboriginal peoples than the bipartite scheme favoured by current claims policy.

We share Mr. Hamilton's view that the federal government's present approach to the treaty process is inappropriate. We also agree with his comments on the lack of government response to the many criticisms of claims policy made over the years.

The specific claims process

As defined by government and set out in the 1982 publication, *Outstanding Business*, a specific claim is one based upon a "lawful obligation" of Canada to Indians. Claims based on unextinguished Aboriginal title are expressly excluded, as were pre-Confederation claims until 1991.²⁸⁶ A specific claim, from the government's point of view, is little more than a claim for compensation.

Although the term 'specific claim' was derived from earlier departmental policy discussions and the 1969 white paper, which stated that Canada would continue to honour its "lawful obligations" in respect of claims "capable of specific relief", the concept of lawful obligation remains at the centre of specific claims policy, although there is no agreement upon what facts or relationships might constitute such an obligation. In a paper prepared for the department of Indian affairs before publication of the policy, G.V. La Forest suggested that "we are not so much concerned with a legal obligation in the sense of enforceable in the courts as with a government obligation of fair treatment if a lawful obligation is established to its satisfaction". [emphasis added]²⁸⁷ He made a distinction between claims that might be enforceable in the courts, under court procedures, and obligations that could be upheld under a lower administrative standard. The department of justice, however, assesses the validity of claims in terms of their chances of success in court and applies technical rules of evidence.²⁸⁸ Thus, legal validity informs the government's assessment of whether a claim properly

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.

falls within the scope of federal policy. This assessment is further informed, if not defined, by the examples of lawful obligations set out in the policy itself:

A lawful obligation may arise in any of the following circumstances:

- 1. The non-fulfilment of a treaty or agreement between Indians and the Crown.*
- 2. A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.*
- 3. A breach of an obligation arising out of government administration of Indian funds or other assets.*
- 4. An illegal disposition of Indian land.²⁸⁹*

The more restrictive view of lawful obligation is that a claim must fall within one of these examples in order to come within the policy. The most restrictive view is that a claim must fall within one of the examples and also within the compensation guidelines; that is, compensation in the form of money or land must be possible.²⁹⁰

A narrow and restrictive reading of the policy leads to the exclusion of many claims based on non-fulfilment of treaty obligations. Assertions of the right to exercise hunting and fishing rights, for example, or of rights to education, health and other benefits, are not seen by government as coming within the policy even though they are justiciable rights. Even seemingly uncontroversial obligations, such as the provision of land under the terms of treaties, have been subject to the same narrow reading. This was the 1983 conclusion of a commission appointed by the Manitoba government to make recommendations about treaty land entitlement:

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.

*One may be compelled to conclude that the Office of Native Claims' interpretation of Canada's 'lawful obligation' is unfair and unreasonable ... The Office of Native Claims, by its words and conduct, is acting actively against the interests of the Indians to arrive at a mutually acceptable agreement. The Office of Native Claims is acting inconsistent with the Canadian Government policy and the expressed position of its present Minister and the Ministers who preceded ... This is a harsh comment, but the facts presented to this Commission do not permit any other conclusion.*²⁹¹

It is the great irony of the policy, and the most common complaint against it, that it was intended to broaden the concept of negotiable claims beyond those that might be proven strictly in court. In fact, it does precisely the opposite. Nowhere is this more evident than in the failure to incorporate, as a basis of claim, breach of fiduciary obligation, which was established as actionable in 1984 by the Supreme Court of Canada.²⁹²

In addition, the government's determination of validity involves a clear conflict of interest. The department of justice faces a conundrum, because the policy directs it to ignore technical rules of evidence and the issue of justiciability. Yet how can it advise government that a treaty includes one set of terms, with one meaning for purposes of claims policy, but another set of terms, with a different meaning, for purposes of litigation? It is not clear how these conflicting demands can ever be reconciled in the absence of significant institutional reform, but it is not at all difficult to identify the ensuing tensions and inconsistencies.

As a result, the department of justice advises on treaties in the same way that it litigates them. In many ways, stances taken by the department in litigation portray treaties as contracts and downplay the fact that they reflect and are the product of a fiduciary relationship between the Aboriginal nation and the Crown. At issue in a fiduciary relationship is conduct, not contract. The law of fiduciary obligations holds the Crown to its substantive promises, regardless of the language used in formal agreements.²⁹³ As Justice Wilson wrote in the *Guerin* decision, "Equity will not permit the Crown to hide behind the language of its own document".²⁹⁴

The policy interpretations and practices noted here create the perception, if not the reality, of a policy that is arbitrary, self-serving and operating without due regard to established law. If negotiated settlements are meant to be achieved according to a broader range of rights and obligations than those otherwise enforceable in a court of law, then federal policy must set a clear standard by which their validity can be determined. If the department of justice cannot advise on such a standard in a manner consistent with its other responsibilities to the Crown, then the advice must come from elsewhere. At a minimum, Canada cannot continue to articulate standards that exclude justiciable claims from its policy for negotiated settlements.

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.

The specific claims policy also contains restrictions on compensation, in the form of guidelines, which ensure much delay and confrontation in negotiations. The policy's first rule is that compensation will be based on "legal principles", but nine other guidelines qualify it. Of particular concern is guideline number 10:

*The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered.*²⁹⁵

In practice, guideline number 10 means that the federal government may, at any stage, reduce the amount of compensation being offered by 25 per cent, 50 per cent or 75 per cent. The perception is widespread that such determinations are made arbitrarily, or with a view to the budget rather than the facts. In many cases, contract not conduct has determined the degree of doubt, leaving the Aboriginal party wondering whether it still has a valid claim.

More generally, the compensation guidelines do not reflect the reality of claims negotiation. When the federal government determines that it wishes to settle a specific claim, it offers a lump sum payment unrelated to the compensation criteria and settles without further reference to them. Years can be wasted negotiating on the guidelines, only to have the government abandon them in a final offer. Such guidelines are, in our view, unnecessary and provocative.

Of an estimated 600 specific claims in Canada as a whole, approximately 100 have been settled under the specific claims policy. As is often the case, however, these statistics do not reveal the full story. Most of the specific claims settlements have been made during the past five or six years, when increased funding has been available.²⁹⁶ The majority of claims had been in the process for as many as 15 years or more. For example, a recent settlement with the Nipissing First Nation community in Ontario resolved a claim that had first been submitted in 1973. There are also regional variations that further skew the numbers due to 'batch' settlements like those relating to cut-off lands in British Columbia or treaty land entitlement in Saskatchewan. As noted by the Indian Commission of Ontario, about one settlement a year is made in central and eastern Canada; several hundred claims remain to be dealt with across the country.

Government and the public may take some satisfaction in the number of settlements that have been achieved, frequently despite the obstacles created by federal specific claims policy. However, a study of 17 settlements, prepared for the department of Indian affairs in 1994, disclosed that only two of those communities were satisfied with the result.²⁹⁷ The others felt that the claims process had diverted them from the original grievance in favour of financial compensation. Where, for example, the communities wanted reserve land in return for loss of territory, they received cash. This continuing sense of grievance calls into question whether current federal policy can ever lead to durable settlements.

Where a specific claim is based on the misappropriation or loss of trust funds, financial compensation is clearly appropriate. But where the claim is for loss of land, provision for land must

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).

be a major component of the settlement. For a number of reasons discussed later in this chapter, Commissioners believe that the transfer of Crown land (or private land, where there is a willing seller) is both less costly and more effective than cash payments for resolving specific claims. A recent review of Indian land claims policy in the United States, for example, has shown that those who benefit from cash settlements are most often lawyers and the economies of surrounding non-Aboriginal communities.²⁹⁸

Federal policy is not solely to blame, however, for the failure to include land in claims settlements. Because of the existing division of constitutional powers, any transfer of Crown lands or resources necessarily involves negotiations with the provinces. In some instances, either the federal government has not invited provinces to take part in negotiations, or provinces have refused to put any land on the table. In cases where Aboriginal territory has become provincial Crown land as the result of a breach of Crown duty, provincial governments must make Crown land available to an Aboriginal nation as a replacement. In our view, the provision of land in such circumstances is not only just, it is a matter of fiduciary obligation.

The 1994 study noted other perceptions about the federal specific claims policy and process that have been advanced consistently on behalf of Aboriginal groups over the years:

- *Government is seen as having a conflict of interest (acting as both judge and jury).*
- *The policies incorporate restrictive criteria that lead to confrontation and inhibit flexible and creative solutions.*
- *The process is too time-consuming and too confrontational.*
- *It is not directed at ameliorating the original grievance.*
- *Government negotiates on a 'take it or leave it' basis.*
- *Settlements do not have a long-lasting or positive effect on communities.*²⁹⁹

Notably, the study disclosed that both government and Aboriginal parties saw claims negotiation as a “trying” process that did not work for them. The truth of these observations is sadly borne out by the confrontation at Ipperwash in the fall of 1995. A cash payment to the Kettle and Stoney Point First Nation in 1992, as compensation for the 1942 military expropriation of the Stoney Point Reserve, did little to resolve the underlying grievance, which was the federal government’s failure to return the expropriated lands in a timely fashion. Even with the return of the land, we believe that the federal government should give serious consideration to reinstating the Stoney Point community.

While it is possible to reach a negotiated claims settlement within the policies, it is far from clear that these settlements will deal ultimately with the underlying causes of grievance or implement any significant change over the long term. The Commission believes the number of settlements does not

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).

vindicate the specific claims policy or rebut the criticisms levelled against it. Our review of the specific claims policy and process shows that major change is needed.

Claims of a third kind

Claims of a third kind, acknowledged since 1993, are really a subset of specific claims. Such claims are intended to attract “administrative solutions or remedies to grievances that are not suitable for resolution, or cannot be resolved, through the Specific Claims process”. The policy provides no definition of what kinds of claims might fall into this category. The only example given is the Kanesatake claim, which has lingered in this category without resolution for the past five years. Many other claims previously rejected by the departments of Indian affairs and justice because of their failure to fit within existing claims policy, such as those of the Mi’kmaq Nation and the Lubicon Cree, have not yet been considered as candidates for this category.

If the Kanesatake claim is an appropriate example, then such claims can be negotiated, but no indication is given of the purpose of negotiation or the potential results. Quite simply, the problem with claims of a third kind is that there is no purpose, no definition, no process, no conclusion and no review.

An appropriate claims process would not require an unarticulated catch-all category like claims of a third kind. Such a policy would include these claims as part of the overall objective of achieving reconciliation and coexistence.

5.3 Specific Claims Initiatives: 1990-1995

In the fall of 1990, prompted by that summer’s events at Kanesatake, government took several steps in relation to specific claims: the budget for claims settlements was increased, a ‘fast-track’ process was implemented for claims of relatively small value, and the bar on claims originating before 1867 was to be removed. Also an independent review body was promised in tandem with an overall review of claims policies.³⁰⁰

The chiefs’ committee on claims was formed as an ad hoc group of interested parties to advise on the policy review. Co-chaired by Chief Manny Jules of Kamloops and Harry LaForme, then Indian commissioner of Ontario, and with the administrative support of the Assembly of First Nations (AFN), the committee produced a position paper on claims that was forwarded to the minister of Indian affairs in December 1990.³⁰¹

As a result of subsequent discussions, it was agreed in 1991 that government would enter into a policy review protocol with a joint government-AFN working group on claims policy. At the same time, and as an interim measure while this policy review was under way, the federal government undertook to establish an Indian specific claims commission.

Indian Claims Commission

The Indian Specific Claims Commission was established in July 1991 and came to be known as the Indian Claims Commission. It had powers under the *Inquiries Act* to review certain ministerial decisions under the specific claims policy and advise government about them. There was, however,

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).

an immediate dispute between AFN and government over the wording of the order in council creating the commission, which was seen as tying it too closely to the policy to make recommendations of any value. This dispute simmered for nearly a year until a revised mandate was issued in July 1992 and a full complement of commissioners was appointed.³⁰²

Under its revised mandate, the commission is directed to inquire into and report upon the following ministerial decisions under the specific claims policy:

1. whether a claimant has a valid claim for negotiation under the policy where that claim has already been rejected by the minister; and
2. which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the minister's determination of the applicable criteria.

The commission is also authorized to provide mediation services for specific claims issues at the parties' request.

By March 1995, the Indian Claims Commission had filed seven reports with the parties to particular claims. The reception to these reports has been mixed, especially in government. The commission has had some success with its mediation efforts, despite the federal government's earlier refusal to participate in mediation. To date, it seems too closely linked to the existing specific claims policy to work effectively, and the entire process needs to be improved. In 1994, the commission expressed frustration at the time lag in government response to its reports and envisioned a role of facilitating claims through alternative dispute resolution techniques. It suggested that claims might be submitted to the commission before going to the departments of Indian affairs and justice.³⁰³

In its early reports, the commission has not addressed difficult issues of law, although legal issues are crucial to a policy ostensibly based on lawful obligation. Such issues cannot be avoided if the commission, or some version of it, is to have the power to make binding decisions. There are lessons to be learned from its experience. Since the commission is only in a position to make recommendations, it has favoured the role of an informed but objective entity that can help the parties refrain from becoming too adversarial. A different balance must be struck if an effective, independent tribunal is to be established.

Recently, the Indian Claims Commission published a special volume of its proceedings intended to serve as a discussion document for land claims reform. It suggests that where it sees broad consensus, the following steps should be taken immediately:

- create an independent claims body (ICB);
- validate claims by some other body (such as ICB) to remove the conflict of interest that exists for the federal government in the present system;
- facilitate claims negotiations by ICB (or some other body) to ensure fairness in the process; and

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.

- recognize the need for ICB (or some other body) to possess the authority to break impasses in negotiations regarding compensation.³⁰⁴

We support these measures, as far as they go, and see them as consistent with the recommendations later in this chapter.

The joint government/First Nations working group on claims policy

The second initiative was a joint working group to conduct an overall review of claims policy. This group did not finalize its operating mandate until the spring of 1992. Unfortunately, that mandate required consensus among government and First Nations representatives on major recommendations, and that consensus proved elusive. A mediation expert retained by the joint working group produced a neutral draft, signalling points of agreement and disagreement, shortly before the group's mandate expired in July 1993.³⁰⁵ It wound down without achieving its purpose or even agreement on what constitutes a claim. We have incorporated some elements of the neutral draft in the interim specific claims protocol recommended later in this chapter.

The AFN chiefs' committee on claims

The chiefs' committee continues, although a lack of funding has prevented it from undertaking any major work. In August 1994, the committee produced a summary report on the reform of federal land claims policies. It pointed to 32 concerns about the current policies and recommended the following:

- an independent body, involved in facilitating claims throughout the entire process, from the research, development and submission of claims, through negotiations and on to the implementation of settlements;
- a fair and equitable process with the power to bind government;
- an appeal mechanism; and
- independent funding.

The chiefs' committee also emphasized the importance of linking claims and treaties in an appropriate manner. There has been no formal response from government to this report.

Public awareness

Canadians generally expect that Aboriginal claims will be resolved fairly and expeditiously. Public expectations are easily identified. There is a general desire that government discharge this task at minimal cost and without serious disruption to the established order of things. Specifically, Canadians do not want the resolution of Aboriginal claims to intrude upon private rights or private claims on public resources. They do not seem inclined to explore the dilemma this creates when constitutional rights and government's historical fiduciary obligations to Aboriginal peoples are at stake.

The fact remains that most Canadians are generally aware of and to some degree intimidated by Aboriginal claims but have little knowledge of the facts or circumstances of these claims. While

304 Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240), p. 23.

305 Indian Claims Commission, *ICCP*, Volume 2.

aware of settlements as they are concluded and announced, people are not aware of the investment of time, energy and money or the many delays and frustrations involved in achieving those settlements.

Our review of these issues makes it clear that major change in federal claims policies is long overdue. This is an urgent issue. We note that before the 1993 federal election, the Liberal Party of Canada announced its intention to overhaul claims policy and expressed a commitment to an independent process and a tribunal.³⁰⁶ To date, the government has taken no action to implement those commitments.

We believe a major reason for the delay is the central role played by the department of Indian affairs in the development and implementation of federal policy on Aboriginal issues. As we will see, the department's role generally has been more harmful than helpful.

5.4 The Institutional Interests of the Federal Government

In 1994, the Indian Claims Commission criticized the department of Indian affairs for its consistent failure to produce documents quickly, attend meetings, consider mediation and respond to the commission's recommendations in a timely manner.³⁰⁷ Although intended to help speed the resolution of claims, in practice the commission has been unable to exercise this part of its mandate because the department appears to treat its operations as an interference with the normal workings of claims policy. Such behaviour is symptomatic of the department's adversarial attitude toward First Nations.

This is far from a new phenomenon. The late George Manuel experienced it when serving as co-chair of the National Indian Advisory Council, appointed by the Pearson government in 1964:

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).

[The] National Indian Advisory Council ... was to be the first time that Indian people would actually participate in an official inquiry into Indian matters. There was finally to be a distinction made within government between the way Indian Affairs related to Indian people and the way Transport related to trains, planes and ships

[T]he Indian affairs people who sat with us in those conferences tended to blame the [Indian] Act itself for the lack of development on reserves and for the control it held over Indian lives. The Indian consensus went very much the other wayThere was a common belief among us that the primary problems lay with Indian Affairs, and the relations the bureaucracy maintained with our people. None of that is prescribed in the Act. The source of the problem lies mostly in the attitude that no legislation can change so long as the present staff continues in the traditional structure, so long as the traditional structure of civil service roles is passed on from one generation to another, like an hereditary title, and the relationship between bureaucrat and Indian never becomes a relationship between man and man.

There was never a point in all those discussions when the Indian delegates recommended that the Indian Act be repealed.³⁰⁸

All institutions, if they are in existence long enough, develop a corporate memory. Policies may change over time, but as Manuel pointed out, practices — the mix of training and inherited ways of doing things that govern how employees work — do not change nearly so quickly. Government institutions are not simply neutral bodies carrying out policies in a balanced fashion on behalf of the public; they have interests of their own. We have seen how lands and resources management agencies have tended to limit Aboriginal participation. The observation is even more applicable to the department of Indian affairs, which can claim legitimately to be the oldest federal department, tracing its origins to Sir William Johnson's northern Indian superintendency in the 1750s. But the department's real corporate memory dates from the century after Confederation, when it held virtually total sway over the lives of Aboriginal people.

Government employees are also members of the general public. As we learned during our hearings, many people have deeply held beliefs about property rights and resources that often conflict with those of Aboriginal people. At least some of this conflict stems from the negative ways Canadians have been conditioned to see Aboriginal people, particularly during the past century. These conditioning factors need to be understood if there is ever to be a new relationship.

Assimilation policies

In a speech to the House of Commons in 1950, the minister responsible for Indian affairs, Walter Harris, summarized the long-time aims of Indian affairs policy:

308 Manuel and Posluns, *The Fourth World* (cited in note 113), pp. 163-165.

The underlying principles of Indian legislation through the years have been protection and advancement of the Indian population. In the earlier period the main emphasis was on protection. But as the Indians become more self-reliant and capable of successfully adapting themselves to modern conditions, more emphasis is being laid on greater participation and responsibility by Indians in the conduct of their own affairs. Indeed, it may be said that ever since Confederation the underlying purpose of Indian administration has been to prepare the Indians for full citizenship with the same rights and responsibilities as enjoyed and accepted by other members of the community

The ultimate goal of our Indian policy is the integration of the Indians into the general life and economy of the country. It is recognized, however, that during a temporary transition period of varying length, depending upon the circumstances and stage of development of different bands, special treatment and legislation are necessary.³⁰⁹

These goals would remain basically unchanged — though constantly challenged — until the 1969 white paper on Indian policy.³¹⁰ The policy of assimilation had its roots in the nineteenth century, when governments in Canada and the United States — motivated by both philanthropic ideals and notions of European cultural and racial superiority — tried, through civilization and enfranchisement legislation, to eliminate distinct Indian status and to blend Indian lands into the general system. Thus, imprinted on the corporate memory of the Indian affairs department well into this century was the attitude that Indian people required protection because they were inferior — although with proper education and religious instruction, they could be turned into productive members of society.

Such views became deeply rooted in Canadian society as a whole. As the Penner committee on Indian self-government observed in its 1983 report to Parliament, it is only since the mid-1970s that public perceptions about Aboriginal problems have started to shift.³¹¹ Even today, many Canadians subscribe to the goals elaborated by Walter Harris; they do not understand why one sector of Canadian society should have treaties with another. They continue to believe that the solution to land claims and other issues lies in Aboriginal peoples' integration and assimilation into mainstream society.³¹² Such views are being rejected explicitly, however, in emerging international legal principles, and assimilation policies have been criticized by major religious institutions.³¹³

Most Canadians are unaware that Indian people refused all along to accept assimilation (or enfranchisement, to use the words of the Indian Act). Between 1857 and 1940, fewer than 500 people chose voluntarily — even under intense pressure from the department — to give up their Indian status in exchange for social and political rights. Unfortunately, this determined adherence to religion, language and customs, including traditional land-use practices, only reinforced the prevailing impression of Indian inferiority. To the department, it meant simply that Indian people

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).

would require the guiding hand of government — and a controlled reserve land base — for that much longer.

Federal policy on Aboriginal lands and resources

The federal assimilation policy also explains, at least in part, the extraordinary pressures placed on Indian nations over the past century to surrender or sell their reserve lands and resources. If reserves were simply a temporary expedient — a way station en route to assimilation — then there was no particular reason to treat their natural assets with respect. At the same time, the departmental focus on reserves, even in a negative sense, had profound consequences for all Aboriginal peoples. First Nations have had every aspect of daily life regulated while Métis people and non-status Indians have been neglected completely.

The department of Indian affairs has continuously downplayed the Crown's obligations under the historical treaties. Faced with provincial and territorial policies, which have limited Aboriginal access to lands and resources off-reserve, Indian affairs officials — particularly those at the highest levels — generally did not champion Aboriginal people, as when they failed to defend harvesting rights explicitly spelled out in treaties.

This aspect of the department's behaviour also had links to the policy of assimilation. Most galling to federal officials were the many individuals who learned English or French, became Christians, found jobs in the mainstream economy, and still refused to surrender their identity. At least in Ottawa, department personnel were unfamiliar with the kinship ties and customary laws that characterized traditional harvesting, and this easily led to the conclusion that, if someone had secured employment, he or she was no longer Indian. Provincial and territorial wildlife officials also subscribed to this view, and it continues to be held by some Canadians.

In and of itself, as we have seen throughout this chapter, the department's behaviour has contributed greatly to the backlog of Aboriginal grievances. From Confederation until the early 1960s, Indian affairs officials refused to take land claims seriously and tried to prevent Aboriginal people from bringing them to the attention of Parliament and the public. Even today, despite the exponential growth over the past 20 years of policies and programs to deal with land claims and claims-related issues, the tradition that Indian people do not have land or resource rights outside their reserves is a strong component of the corporate memory of the department of Indian affairs. It is reflected in the department's preference for extinguishment as a valid option in comprehensive claims settlements.³¹⁴ It is reinforced by interpretations of Aboriginal and treaty rights that continue to be advanced by lawyers working in the departments of justice and Indian affairs. And it is reflected in the way the department classifies claims — downgrading matters of treaty interpretation and consistently limiting the discussion of Aboriginal grievances to matters connected with the past treatment of reserve lands and assets.

Adversarial attitudes are hindering the creation of policy measures that can genuinely fulfil the federal government's fiduciary duty to Aboriginal peoples. In his report on extinguishment, for example, A.C. Hamilton expresses dissatisfaction with a background paper prepared for his inquiry by officials of the departments of Indian affairs and justice. That paper outlined the present requirements of federal comprehensive claims policy and put forward seven alternative models for discussion.³¹⁵ Mr. Hamilton found the paper, and all but two of the models, distinctly unhelpful. He

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).

characterized the fears expressed in the paper about the continuation of “undefined Aboriginal rights” as a defence of existing policy:

The statement appears to reflect the extent to which current departmental thinking is influenced by the existing policy, even though the paper purports to advance alternatives to it. I believe this statement represents a belief by some departmental officials that the present policy and its wordings are quite appropriate and are merely misunderstood. If so, that attitude fails to appreciate the strength of the Aboriginal opposition to giving up, surrendering or exchanging Aboriginal rights, even for the limited purpose the present practice requires.³¹⁶

We, too, have been struck by the resistance of the department of Indian affairs in maintaining its claims policies and practices in the face of cogent and well-documented criticism over a period of nearly two decades. We have noted, however, that without formal changes in these policies, the department has created a large number of exceptions and has dealt with similar matters in inconsistent ways. Many justiciable rights have been excluded, as have some Aboriginal groups. For substantive change to occur, we have recommended that the department of Indian affairs be disbanded and replaced by two new departments (see Chapter 3).

5.5 Conclusion: The Need for Structural Change

Since the early 1970s, a virtual claims industry has developed; federal claims policies continue to perpetuate procedures that are dilatory, adversarial and unsatisfactory to all concerned. Claims negotiations have managed to take on a life of their own, leading to settlements that do not address the original grievance or vindicate the original assertions. Federal policies have consistently ignored what should be the fundamental goal of a just settlement of Aboriginal claims, a goal expressed by Indian claims commissioner Lloyd Barber in 1973:

In the final analysis it must be realized that the process of ... claims settlement involves not just the resolution of a simple contractual dispute, but rather the very lives and being of the people involved. Desire for settlement does not concern only the righting of past wrongs but as well the establishment of a reasonable basis for the future of a peopleAfter all, much of our current difficulty stems from the rigidity and inflexibility of positions established ages ago.³¹⁷

The current situation cannot endure. Fundamental change is urgent. But change requires mutual respect and reconciliation between Aboriginal peoples and other Canadians, not a return to failed policies of assimilation based on the surrender or extinguishment of Aboriginal title. In the next section, we develop the outline of a new deal for Aboriginal nations, one that will structure all claims issues within the context of the treaty relationship. Our proposal also includes the creation of a federal tribunal, one that would assist treaty processes and have binding decision-making powers over an enlarged category of specific claims. That such a tribunal was first proposed well over 30 years ago is in itself sad testimony to the continuing need for change.

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.

6. A New Deal for Aboriginal Nations

6.1 Redressing the Consequences of Territorial Dispossession

As we learned from the song of Dene Th'a prophet Nógħa, land is at the core of Aboriginal identity, a source of profound spiritual and moral values. Dene Th'a and other Aboriginal peoples require greater physical space than non-Aboriginal people to maintain their cultures and to protect their quiet and symbolic places — places of autonomy where they can reassert authority over their economic, social and political futures. For the same reason, Aboriginal peoples also require a greater share in decision making about activities occurring on the parts of their traditional territories currently treated as ordinary Crown land.

A rapidly growing population is straining the resources of reserves and Aboriginal communities. In almost all cases, reserves are too small even to support existing numbers. In addition, most Aboriginal peoples in Canada have neither effective control over their existing lands nor sufficient access to lands and resources outside their reserves or communities.

Aboriginal peoples have tried for more than a century to maintain their own land base and derive a decent living from the natural resources and revenues of their traditional territories but these aspirations have been frustrated. Reserves and community lands have shrunk drastically in size over the past century and have been stripped of their most valuable resources. Moreover, as governments allocated resources and economic opportunities on traditional territories, Aboriginal peoples found themselves either excluded or positioned at the back of the line.

It is not difficult to identify the solution. Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.

This is as true for nations that have yet to enter into treaty with the Crown as it is for those that are party to historical treaties. There must be a presumption that Aboriginal signatories did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by agreeing to a treaty relationship. Where the text of an historical treaty makes reference to a blanket or wholesale cession of lands, the treaty relationship mandates sharing of both the territory and the right to govern and manage it, as opposed to a cession of the territory to the Crown.

Despite difficulties with current claims policies, especially the continuing requirement for some form of extinguishment of Aboriginal title, the Commission does not want to suggest that the consequences of these policies have been uniformly negative. Recent agreements are proof that more territory and jurisdictional authority will have a dramatic effect on Aboriginal nations' ability to achieve economic, cultural and political self-sufficiency. In Appendix 4A, we outline the land provisions of the modern treaties and comprehensive agreements and, in Appendix 4B, the provisions of land and environment regimes established under these agreements. For Inuvialuit of the western Arctic, for example, fee simple or community lands amount to about 30 per cent of territory covered by the land claims settlement. In addition, Inuvialuit have achieved a share in the management of resources on Crown lands throughout the entire settlement region. Other recent

agreements in the North have similar provisions. As a result of the Yukon final agreement, the First Nations there will have an expanded base of exclusive Aboriginal lands (in their case, some eight per cent of the settlement area) and a share in the management of additional lands and resources.³¹⁸ Through their agreement, Inuit of the eastern Arctic will have both extensive community lands and access to resources. Through the new government of Nunavut, they will also have significant authority over all Crown lands and resources.

Inuit of northern Quebec have an agreement with Quebec and Canada; the neighbouring Inuit of Labrador do not. While there have been complaints relating to the implementation of the James Bay and Northern Quebec Agreement,³¹⁹ there can be no question that Quebec Inuit are more self-sufficient than their neighbours. Labrador Inuit have no formally recognized lands of their own, no guaranteed rights to resources outside their communities and no share in the governance of their traditional land-use areas.

The same conclusion can be drawn if we compare the Crees of eastern James Bay, who signed the 1975 James Bay and Northern Quebec Agreement, with the Cree of western James Bay in Ontario, who took part in Treaty 9.³²⁰ By any measurable standard, the eastern Crees are in a better situation, with more economic tools at their disposal to improve the lot of their communities. They have more land, more rights to resources and more capital than their neighbours (although they have continuing disputes with the government of Quebec about resources development and the respective powers of the parties on the various land categories described in their agreement.) Ontario does not acknowledge that the western Cree have rights to Crown land outside their reserves other than limited hunting, fishing and trapping rights. Inhabitants of Peawanuck (Winisk) on the western James Bay coast, which is located within a provincial park, require a work permit from an Ontario ministry of natural resources office several hundred kilometres away if they want to cut down trees to build a trapper's cabin on their traditional lands.³²¹ Through their agreement, the eastern Crees negotiated an income security program for traditional harvesters that is the envy of harvesters throughout northern Canada.³²² The Mushkegowuk Tribal Council, which represents First Nations on western James Bay, has tried to negotiate a similar program for its member communities, thus far without success.

The problem and the solution are easy to identify, but providing Aboriginal nations with enough territory to facilitate economic, cultural and political self-sufficiency will be difficult. Nonetheless, the Commission believes that the law of Aboriginal title provides guidance. After more than a century of relative legal inaction on the rights of Aboriginal peoples to lands and resources, the law is finally beginning to recognize that they have a strong moral case for redress; they also have enforceable rights to an expanded base of lands and resources and to a share in jurisdiction over traditional territories that now fall within the category of Crown or public lands. The law of Aboriginal title, outlined in the next section, imposes extensive obligations on the Crown to protect Aboriginal lands and resources.

However, courts alone cannot provide everything required to achieve economic and cultural self-reliance and political autonomy. We propose that Parliament and the provinces introduce a range of

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).

reforms to facilitate negotiated solutions concerning the recognition and protection of Aboriginal rights to lands and resources. We also propose the establishment of an Aboriginal Lands and Treaties Tribunal to assist in redressing the consequences of territorial dispossession. As well, we propose a number of interim measures to protect Aboriginal title pending introduction of these institutional reforms and to improve Aboriginal access to lands and resources.

6.2 The Contemporary Law of Aboriginal Title as a Basis for Action

Aboriginal peoples' experience with the law of Aboriginal title has been one of promise and frustration. The law of Aboriginal rights, including rights associated with Aboriginal title, provides a bridge between Aboriginal nations and the broader Canadian community. It draws on the practices and conceptions of all parties to the relationship, as these were modified and adapted in the course of contact (see Chapter 3). Canadian law recognizes and affirms Aboriginal relationships with the land and its resources. Indeed, recognition of Aboriginal title fundamentally structured the relationship between Aboriginal and non-Aboriginal people during much of the history of non-Aboriginal settlement and colonization of eastern and central North America. Recognition formed the basis of a pattern of contact that held real value for Aboriginal and non-Aboriginal people alike. Beginning in the second half of the nineteenth century, however, Aboriginal peoples encountered more and more difficulty securing recognition of their rights, despite persistent efforts.

The courts have begun to develop the law of Aboriginal title along its original path of respect and coexistence. In a landmark 1973 decision, the Supreme Court of Canada affirmed that Canadian law recognizes Aboriginal title as encompassing a range of rights of enjoyment and use of ancestral land that stem not from any legal enactment, such as the Royal Proclamation, but from the fact of Aboriginal occupancy.³²³ The court has also held that the Crown owes a fiduciary duty to Aboriginal peoples in its dealings with Aboriginal lands and resources.³²⁴

In another case, the court ruled that treaties between the Crown and Aboriginal nations ought to be construed in light of their historical character, “not according to the technical meaning of [their] words but in the sense that they would naturally be understood by the Indians”.³²⁵ In 1990, in light of constitutional recognition and affirmation of existing Aboriginal and treaty rights by section 35(1) of the *Constitution Act, 1982*, the court ruled that “[t]he 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”.³²⁶

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 Nisg̱a'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.

Courts have been careful to acknowledge that “[c]laims to aboriginal title are woven with history, legend, politics and moral obligations”.³²⁷ They emphasize the unique nature of Aboriginal title and tend not to subsume it under traditional common or civil law categories, referring to Aboriginal title as protecting an “Indian interest in land [that] is truly *sui generis*”.³²⁸

With respect to claims of Aboriginal title to unceded ancestral lands advanced in the courts, claimants typically are required to prove that they and their ancestors have been members of an organized society that has occupied the territory in question since the assertion of British sovereignty.³²⁹ Earlier intimations that some Aboriginal peoples were “so low in the scale of social organization” as to warrant no recognition of their title have since been roundly rejected by the judiciary as disreputable and discriminatory.³³⁰

With respect to claims of Aboriginal rights to engage in particular practices and activities associated with lands and resources, the courts have noted that such rights are collective and protect integral aspects of Aboriginal identity.³³¹ Like the communities in which they are exercised, Aboriginal rights are not frozen in time, but instead evolve with the changing needs, customs and lifestyles of Aboriginal peoples.³³²

The law of Aboriginal title thus acknowledges that societies and cultures evolve and transform over time and that legal recognition of Aboriginal rights is premised on continuity, not conformity, with the past. Given the dramatic transformations that accompanied contact, settlement and colonization, this acknowledgement is especially critical if the law of Aboriginal title is to reflect respect for Aboriginal relationships with lands and resources. In response to a host of complex factors, including historical patterns of non-Aboriginal settlement, economic development, intercolonial conflict and the intermingling of cultures, new Aboriginal collectivities, such as the Métis Nation, have emerged in North America. They have incorporated aspects of non-Aboriginal life into their cultures to produce unique new forms of Aboriginal identity, but they are self-governing, distinct societies that retain powerful relations with the land based on principles of stewardship and responsibility.³³³

This judicial reawakening holds real promise for the future. In particular, the law of Aboriginal title provides a strong foundation for contemporary protection of Aboriginal lands and resources. The law recognizes that Aboriginal peoples have collective rights to occupy and use ancestral lands “according to their own discretion,”³³⁴ and it protects practices — traditional and modern — that are

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”).

integral to Aboriginal identity.³³⁵ The law also seeks to restrict non-Aboriginal settlement on Aboriginal territory until a treaty has been reached with the Crown.³³⁶ As well, it imposes strict fiduciary obligations on the Crown with respect to Aboriginal lands and resources.³³⁷

These ways of regulating relations between Aboriginal and non-Aboriginal people have existed since contact but have begun to be reconstructed by the courts only recently, after years of neglect. Constitutional recognition and affirmation of existing Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982* have provided additional support in reconstructing rights associated with Aboriginal lands and resources. In the words of the Supreme Court, “By giving aboriginal rights constitutional status and priority, Parliament and the Provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected”.³³⁸

Although true to the original purposes of the law of Aboriginal title, current jurisprudence cannot and does not accomplish all that is required to protect Aboriginal lands and resources. When an Aboriginal community asserts a particular right associated with its title to engage in a relatively discrete course of action, such as fishing, a ruling that defines the respective rights of the parties might be an effective means of resolving the issue. However, when an Aboriginal nation asserts a wide range of rights with respect to lands and resources associated with its title, the courtroom is not always the most effective forum to settle the dispute. Available remedies are often too blunt and reactive to reflect the detailed and complex political, economic, jurisdictional, and remedial determinations necessary to resolve the claim to the satisfaction of all interested parties.

The courts can be only one part of a larger political process of negotiation and reconciliation. As noted in a recent report by a task force of the Canadian Bar Association, “While the courts may be useful to decide some native issues or to bring pressure on the parties to settle by some other means, it appears clear that judicial adjudication will not provide all of the answers to the issues surrounding native claims”.³³⁹ Similarly, Chief Edward John of the First Nations Summit of British Columbia stated at our hearings:

It has never been the role of the Courts to define the detailed terms of the accommodation between the Crown and the First Nations. We have gone to the Courts in our own defence. We view them as a source of guidance for government, as to the rights of Aboriginal peoples and the resulting duties of government.

Chief Edward John
First Nations Summit of British Columbia
Prince George, British Columbia, 1 June 1993

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”).

Negotiations are clearly preferable to court-imposed solutions.³⁴⁰ Litigation is expensive and time-consuming. Negotiation permits parties to address each other's real needs and make complex and mutually agreeable trade-offs.³⁴¹ A negotiated agreement is more likely to achieve legitimacy than a court-ordered solution, if only because the parties participate more directly and constructively in its creation.³⁴² Negotiation also mirrors the nation-to-nation relationship that underpins the law of Aboriginal title and structures relations between Aboriginal nations and the Crown.³⁴³

Thus, the law of Aboriginal title serves as a backdrop to complex nation-to-nation negotiations concerning ownership, jurisdiction and co-management. By recognizing Aboriginal title, the law serves as an instrument for the enforcement of Aboriginal rights and provides Aboriginal nations with a measure of bargaining power during negotiations.³⁴⁴ The Canadian Bar Association has noted that to have courts decide basic legal issues and then to rely on negotiations in the "shadow of the court" to resolve complex details is a promising development with respect to the protection of Aboriginal lands and resources.³⁴⁵

Governments must assist in achieving lasting reconciliation with Aboriginal nations concerning lands and resources. Indeed, the law requires the Crown to take active steps to protect Aboriginal lands and resources. The failure of current federal claims policy forces Aboriginal nations to seek redress through the courts, which, understandably, are reluctant to provide the continuing supervision necessary to enforce decisions concerning lands and resources. Aboriginal peoples face formidable hurdles in obtaining even interim relief pending final resolution of their claims. In light of the Crown's historical duty of protection, Parliament should enact legislation providing for substantial protection of Aboriginal lands and resources. In addition to creating opportunities for lasting agreements, the policy should seek to ease the remedial burden on the courts by providing an alternative and more flexible and effective form of interim relief tailored to the particular needs and interests of all parties.

Next we describe current law governing interim relief. Then we explain why the law of Aboriginal title imposes on the Crown a positive obligation to protect Aboriginal lands and resources. Finally, we propose ways for Parliament to begin to fulfil the Crown's historical duty of protection and achieve reconciliation with Aboriginal peoples concerning lands and resources.

Interim relief

When an Aboriginal nation seeks to assert its title in a court of law, usually it seeks to prevent activity adverse to its interests from occurring on the disputed territory pending final resolution.

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").

Generally speaking, the law offers two types of interim relief in such circumstances. The first is to file a notice of pending litigation or of right less than ownership (a caveat, *lis pendens*, or caution) against the land in question in the appropriate land titles office, indicating the existence of an outstanding claim. Available in the four western provinces, the territories, and parts of Ontario, this type of notice works as a temporary measure, designed to “freeze the title situation on the register until a claimant of an interest in land could take legal steps to protect the claim”.³⁴⁶

Aboriginal parties have encountered difficulty securing this form of protection. A notice of *lis pendens* is permitted only after a claimant has begun an action to secure the claim. Caveats can be challenged immediately in court. As a result, this protection is available only when an Aboriginal nation is ready to begin or defend a legal action. Moreover, and partly as a result of differences in statutory wording, the right to register a caveat or *lis pendens* varies from jurisdiction to jurisdiction. In 1977, the Supreme Court held that a caveat could be registered in the Northwest Territories by an Aboriginal nation only on lands for which a certificate of title had been issued, not on unpatented Crown land. Accordingly, a caveat could be registered only on lands already in the hands of third parties.³⁴⁷ Other decisions provide that Aboriginal title and treaty rights do not constitute interests in land sufficient to support the registration of a caveat or certificate of *lis pendens*.³⁴⁸ *Perhaps most important, the caveat and lis pendens are blunt forms of interim relief, in that they tend to prevent a wide range of activity on lands to which they apply, and they do not allow for tailored relief. Their blunt nature can contribute to judicial reluctance to see Aboriginal and treaty rights as registrable interests. As a result of all of these factors, caveats and lis pendens are of limited use to an Aboriginal nation seeking protection of its title pending the outcome of litigation.*

A second type of relief is the interlocutory injunction.³⁴⁹ Available in all jurisdictions, an interlocutory injunction is an order restraining certain persons from engaging in certain activity pending trial or other disposition of an action. The court typically will examine a number of factors to determine whether an interlocutory injunction is appropriate in the circumstances, including the strength of the plaintiff’s case, whether the plaintiff or defendant would suffer irreparable harm, the balance of convenience, and the effect of an interlocutory injunction on the status quo.³⁵⁰ The interlocutory injunction is much more flexible than a caveat or *lis pendens*, as the courts are better able to tailor relief to the particular facts of the case.

The interlocutory injunction, therefore, is a more promising means of obtaining interim relief in cases involving claims of Aboriginal title.³⁵¹ In 1973, for example, the James Bay Crees obtained from the Quebec Superior Court an interlocutory injunction stopping the James Bay I hydroelectric development. Although the injunction was suspended a week later by the court of appeal pending a full appeal, the action did bring parties to the bargaining table.³⁵² However, it is not the ideal form of interim relief in all cases. Aboriginal nations have had greater success obtaining an interlocutory

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.

injunction where the territory at issue is a relatively small tract of land and where there are significant and special cultural and spiritual values at stake.³⁵³ Moreover, as a condition of obtaining this injunction, the plaintiff generally must give an undertaking to pay to the defendant any damages that the defendant sustains by reason of the injunction, should the plaintiff fail in the final result.³⁵⁴ This requirement, if insisted on by the courts, would make the interlocutory injunction an illusory form of interim relief for many Aboriginal nations seeking to uphold their title.

The availability of interim relief is closely related to the broader process of nation-to-nation negotiation. Interim relief against Crown and third-party activity on disputed territory is bound to serve as an incentive for the Crown to reach an agreement concerning lands and resources. Because negotiation is preferable to litigation as a means of resolving disputes between the Crown and Aboriginal nations, “courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests”.³⁵⁵ Aboriginal peoples will secure substantive gains in negotiations only if courts order remedies that give Aboriginal parties more bargaining power than they have under Canadian law at present.

Judicial caution in this area is fuelled in no small measure by the same factors that make negotiation preferable to litigation. Although interlocutory injunctions are flexible interim measures, the courts are not the most appropriate institutions to rule on the complex political, economic, jurisdictional and remedial issues raised by cases involving Aboriginal title. Interim relief may adversely affect existing third-party interests and severely disrupt resource-based communities in the area, as well as introduce significant uncertainty about the future. We urge the courts to make creative use of the interlocutory injunction as a means of facilitating negotiations, but we recognize the difficulties associated with interim relief in the absence of a fair and effective claims policy. For this reason, we believe that reform should provide a quick and reliable means of obtaining interim relief to protect Aboriginal lands and resources from further encroachment during negotiations. We propose that the parties reach interim relief agreements before final agreement. Pending these developments, however, Aboriginal parties require remedies from the courts that both increase their bargaining power and facilitate negotiations with the Crown. The institutional constraints on the courts do not outweigh the pressing need to protect rights associated with Aboriginal title from further erosion.

A duty to protect Aboriginal lands and resources

The law of Aboriginal title requires governments to take active steps to protect Aboriginal lands and resources. This positive dimension of the law emerges from the text, structure and jurisprudence of section 35 of the *Constitution Act, 1982*, which together suggest that government action, in the form of negotiations, is central to the constitutional recognition and affirmation of Aboriginal and treaty rights. It is reflected also in case law addressing the Crown’s fiduciary relationship with Aboriginal peoples, which “emphasize[s] the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation”.³⁵⁶ It is supported as well by emerging international legal norms, which impose extensive positive

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.

obligations on governments to recognize and protect a wide array of rights with respect to lands and resources.

With respect to the *Constitution Act, 1982*, section 35 recognizes and affirms existing Aboriginal rights and requires the courts to assess the constitutional validity of laws that impair existing Aboriginal rights. As we have seen, effective recognition of Aboriginal rights is the product of negotiation at least as much as judicial fiat. Indeed, section 35(3) of the *Constitution Act, 1982* reflects this unique mix of negotiation and adjudication by recognizing and affirming “rights that now exist by way of land claims agreements or may be so acquired”. Equally, section 35.1 commits the federal and provincial governments to inviting Aboriginal participation in discussions of proposed constitutional amendments affecting Aboriginal rights. These aspects of section 35 underscore the fact that government as well as Aboriginal action — in the form of nation-to-nation negotiations — is central to the constitutional recognition and affirmation of Aboriginal rights. As stated by the Supreme Court, section 35 “provides a solid constitutional base upon which subsequent negotiations can take place”.³⁵⁷

The Crown’s fiduciary relationship with Aboriginal peoples also reflects its historical obligation to protect Aboriginal lands and resources. Duties with respect to Aboriginal peoples have been recognized in at least three different contexts. First, it is well settled that the federal Crown is under fiduciary obligation to act in the interests of an Indian band when the band surrenders land to the Crown for third-party use.³⁵⁸ Second, in some contexts at least, the provincial Crown may owe fiduciary obligations to Aboriginal peoples upon the unilateral extinguishment of Aboriginal rights with respect to land.³⁵⁹ Third, jurisprudence under section 35(1) of the *Constitution Act, 1982* suggests that government action that interferes with the exercise of Aboriginal rights recognized and affirmed by section 35(1) creates fiduciary duties on the government responsible for the interference in question. More generally, the Supreme Court of Canada stated in *Sparrow* that

[T]he sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, Guerin, together with R. v. Taylor and Williams (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the

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 as A Legislative Response to the High Court’s Decision* (St. Lucia: University of Queensland Press, 1995).

*responsibility to act in a fiduciary capacity with respect to aboriginal peoples. 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.*³⁶⁰

The fact that the relationship between the government and Aboriginal peoples is trust-like, rather than adversarial has important implications for the role of government with respect to Aboriginal lands and resources.³⁶¹ It requires institutional arrangements to protect them, and it requires government not to rely simply on the ‘public interest’ as justification for limiting the exercise of Aboriginal rights with respect to them.³⁶² Moreover, it requires government to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources. In the words of Justice Dubé of the Federal Court of Canada,

*it is ... the duty of the federal government to negotiate with Indians in an attempt to settle ... rightsThe government’s task is to determine, define, recognize and affirm whatever aboriginal rights existed.*³⁶³

Emerging international legal principles also specify that governments are under extensive obligations to protect Aboriginal lands and resources. The Draft Declaration on the Rights of Indigenous Peoples, prepared by a sub-commission of the United Nations Commission on Human Rights, proposes to recognize that “indigenous peoples have the right to self-determination” and that “[b]y virtue of that right they freely determine their political status and freely pursue their economic social and cultural development”.³⁶⁴ Accordingly, the draft declaration proposes to recognize, among others, indigenous rights of autonomy and self-government, the right to record, practise and teach spiritual and religious traditions, rights of territory, education, language and cultural property, and the right to maintain and develop indigenous economic and social systems.

The terms of the draft declaration support the view that government ought to provide for a fair and effective claims process, one that imposes positive obligations on government to reach agreements protecting Aboriginal rights with respect to lands and resources. Indeed, article 37 of the draft declaration provides that states shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 26 provides:

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, Expedient, 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.

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

James Anaya describes the draft declaration as “an authoritative statement of norms concerning Indigenous peoples on the basis of generally applicable human rights principles”, and notes that it also “manifests a corresponding consensus on the subject among relevant actors”.³⁶⁵

In addition, convention 107 of the International Labour Organisation, adopted in 1957, while advocating the “integration” of indigenous populations into national communities, also calls upon governments to develop co-ordinated and systematic action to protect indigenous populations and to promote their social, economic and cultural development.³⁶⁶ The International Labour Organisation revised convention 107 in its convention 169 of 1989.³⁶⁷ It recognizes “the aspirations of these indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live”. It then lists a wide array of rights that attach to Indigenous peoples and numerous responsibilities that attach to governments, including obligations to protect indigenous lands and resources.³⁶⁸ Canada is not yet a party to the convention, but, again according to James Anaya, the convention “represents a core of expectations that are widely shared internationally and, accordingly, it reflects emergent customary international law generally binding upon the constituent units of international community”.³⁶⁹

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.

We agree that both the draft declaration and convention 169 are authoritative statements of norms concerning Indigenous peoples, and we urge the government of Canada to protect Aboriginal lands and resources in accordance with those norms.

Summary

The law of Aboriginal title provides a firm foundation for contemporary protection of Aboriginal lands and resources. It imposes extensive obligations on the Crown to protect them. These duties of the Crown oblige Parliament to enact fair and effective institutional processes to facilitate negotiated solutions. The law requires government not to rely simply on the public interest as justification for limiting the exercise of Aboriginal rights but to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources. Moreover, because the courts cannot easily make the detailed judgements necessary to address all the concerns of all the parties in a dispute involving Aboriginal title, any new claims processes should provide for effective means of obtaining interim relief.

6.3 A New Approach to Lands and Resources

The many criticisms of existing land claims policies are cogent. Government's failure to heed the volume and quality of criticism has fostered the perception that existing policies serve the needs of the broader public at the expense of Aboriginal peoples' rights. Courts alone cannot provide the detailed and complex determinations necessary to provide lasting solutions to all interested stakeholders. A new approach is urgently needed. Federal and provincial governments must take seriously their legal and constitutional obligations. They must accept that the Crown is under a positive obligation to protect Aboriginal lands and resources. They must enact and participate in institutional processes that result in the definition, recognition and protection of the rights of Aboriginal peoples to lands and resources. They must give Aboriginal nations much greater control over and access to their traditional territories. The treaty making and treaty implementation and renewal processes described earlier in this volume (see Chapter 2), together with related reforms, can accomplish these objectives.

New terms and new processes

The term 'land claims policy' suggests that the burden of proof regarding lands and resources lies with Aboriginal parties. Long-held and totally misconceived ideas about the doctrines of discovery and *terra nullius* underpin the concept that Aboriginal title is a mere cloud or burden upon the Crown's underlying title (see Volume 1, Chapter 2). The rights of Aboriginal peoples to lands and resources are perceived as somewhat nebulous claims against the real rights of the Crown. The purpose of a land claims agreement has been to dispose of the claim by extinguishing Aboriginal title and perfecting the 'real' Crown title in exchange for a set of contractual rights and benefits. By contrast, Aboriginal groups say that it is government that should bear the burden of establishing the validity of its claim to the unfettered administration and control of Aboriginal lands, and that the Crown, as a fiduciary obliged to protect the interests of Aboriginal people, should act with propriety.

Moreover, under current policies, claims based on non-fulfilment of a treaty promise or other legal obligation are seen as claims against the dominant system of vested rights and the orderly conduct of business and, therefore, as annoyances that must be put to an end. This fosters the view that Aboriginal claims should be settled, if at all, on the basis of a cash payment in exchange for a

release, often accompanied by a purported extinguishment of land rights. In addition, existing categories of specific, comprehensive, and other claims are defined arbitrarily, containing limitations not in keeping with the Crown's fiduciary obligations and too often plagued by conflicts of interest on the part of government.

Finally, as policy, land claims determination is subject to government control of substance and procedure. Land claims policies define what types of claims governments will recognize and those to which they will respond. These policies are created unilaterally by government, interpreted unilaterally by government, and amended unilaterally by government, with a minimum of outside scrutiny. They are not entrenched in law or subject to judicial review.

These assumptions gravely misrepresent the nature of Aboriginal rights and make federal policy part of the problem instead of part of the solution. First, Aboriginal claims are not entreaties against the Crown's superior underlying title. Aboriginal claims are assertions of Aboriginal *rights* — rights that inhere in Aboriginal nations because of time-honoured relationships with the land, which predate European contact. Aboriginal rights do not exist by virtue of Crown title; they exist notwithstanding Crown title. They are recognized by section 35(1) of the *Constitution Act, 1982*, and they protect matters integral to Aboriginal identity and culture, including systems of government, territory and access to resources. Any remaining authority the Crown may enjoy is constrained by the fact that it is required by law to act in the interests of Aboriginal peoples. Instead of readily invoking the public interest to oppose Aboriginal interests, the Crown should uphold Aboriginal interests.

Second, the extinguishment of Aboriginal title in exchange for a cash payment is at odds with constitutional recognition and affirmation of Aboriginal rights. Extinguishment is also out of step with the Crown's fiduciary relationship with Aboriginal peoples. A fiduciary should not attempt to destroy what it is required to protect. The Crown should not seek the extinguishment of Aboriginal title; it should seek the recognition of Aboriginal title. Treaties should serve as solemn acts of mutual recognition of Aboriginal and Canadian ways of structuring relationships with the land. They should enable the coexistence of otherwise competing systems of land tenure and governance.

Third, the rights of Aboriginal peoples to lands and resources should not be subject to the shifting sands of policy initiatives developed unilaterally by governments. The protection and enforcement of Aboriginal rights require independent, legislated processes that allow for extensive Aboriginal participation and nation-to-nation negotiations. These new processes must address the fact that Aboriginal territories have been reduced by settlement, dislocation and development to such an extent that the very identities of Aboriginal nations are seriously threatened. Federal, provincial, territorial and Aboriginal governments must work together to establish processes that enable a significant expansion of Aboriginal territories. These processes should not interfere with third-party interests, but they must provide Aboriginal nations with sufficient lands and resources to reverse the devastating effects of dispossession and allow for the possibility of Aboriginal self-sufficiency.

Under the approach we propose, instead of being guided by a policy developed unilaterally by federal authorities, which establishes preconditions for negotiations and constrains possible outcomes based on the preferences of the Crown, disputes over lands and resources should be resolved through legitimate processes of consultation and negotiation enshrined in legislation. Negotiation is the best and most appropriate way to address these issues, and land claims policies should be replaced by treaty processes, primarily under the auspices of regional treaty commissions, with the Aboriginal Lands and Treaties Tribunal performing supplementary functions.

Integrating treaty processes with lands and resources

Current federal policy categorizes Aboriginal claims as comprehensive claims, specific claims, or claims of a third kind. We have struggled to find a more appropriate vocabulary to describe the range of unresolved lands and resources issues — one that embodies the four principles of the new relationship: mutual recognition, mutual respect, sharing and mutual responsibility (see Volume 1, Chapter 16). We have found it in the language of relationships, rights and reconciliation. As we have emphasized throughout our report, the relationship between Aboriginal peoples and other Canadians must be renewed in an honourable way. Aboriginal and treaty rights to lands and resources, along with other Aboriginal rights, must be taken seriously. They must be acknowledged, protected and given effect by institutions of government. And the rights of other Canadians must be reconciled with them.

When seen in this light, the separate categories of claims simply vanish. They become part of a broader process of reconciliation based on real and enforceable rights. Treaty-making processes will supersede the comprehensive claims process of the recent past. They will enable Aboriginal nations to enter new treaty relationships to define their rights to lands and resources, governance and many other matters. Treaty-making processes must be open to all Aboriginal groups that can meet the criteria set out in the proposed recognition act (see Chapter 3).

Treaty implementation and renewal processes will address the spirit, intent and legal effect of existing treaties, including those pre-Confederation and numbered treaties that the Crown has interpreted as treaties of extinguishment. As a result, many specific claims and claims of a third kind will become particular items for discussion in broader implementation and renewal negotiations. There must be a presumption in such negotiations that Aboriginal signatories did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by agreeing to a treaty relationship. Where the text of an historical treaty makes reference to a blanket or wholesale cession of lands, the treaty relationship mandates the sharing of both the territory and the right to govern and manage it, as opposed to a cession of the territory to the Crown. Implementation and renewal processes thus will attempt to determine the true spirit and intent of existing treaty relationships and bring them up to date with renewed vigour and relevance.

In time, treaty processes will make specific claims policy obsolete. Future treaties and their associated implementation agreements will contain dispute-resolution mechanisms to address past breaches of the Crown's duty as well as new disputes that arise from time to time. Likewise, existing treaties will be supplemented by agreements to address past and future breaches of duty and other disputes that arise within the treaty relationship. Most disputes currently understood as specific claims will be settled through broader treaty implementation and renewal processes. As a result, the relationship between Aboriginal peoples and other Canadians will be renewed in an honourable way. Aboriginal and treaty rights to lands and resources, along with other Aboriginal rights, will be taken seriously, and they will be reconciled with the rights of other Canadians.

However, Aboriginal people should not have to wait for resolution of a specific claim through this broader treaty implementation and renewal process. They should be free to seek its speedy resolution through negotiations outside the broader process in ways that do not replicate defects in current policy. When all other means of reconciliation fail, they should be able to place particular issues concerning the legal rights of parties to an existing treaty before an independent tribunal for binding decisions and appropriate relief. We propose that the Aboriginal Lands and Treaties Tribunal be authorized to hear and make binding decisions concerning specific claims in such circumstances. In addition, we propose that the tribunal's jurisdiction be sufficiently flexible to

permit it to resolve claims of a third kind, as well as other claims that do not fit within the categories of current policy.

The treaty-making and treaty implementation and renewal processes will share important structural similarities. Both processes will ensure that government negotiates in good faith and with Aboriginal interests in mind. Both processes will be predicated on the existence of Aboriginal rights concerning lands and resources. Both will aim to facilitate the negotiation of agreements that recognize those rights and reconcile them with the rights of other Canadians. Finally, both will ensure that Aboriginal nations are provided with enough territory to foster economic self-reliance and cultural and political autonomy. Together, these processes will foster a new relationship between Aboriginal nations and the Crown — a relationship based on recognition, respect, sharing and responsibility.

Principles to guide federal policy and treaty processes

We have proposed the preparation of a royal proclamation to set out the fundamental principles of the bilateral nation-to-nation relationship and the treaty-making and treaty implementation and renewal processes. We have proposed that the government of Canada introduce companion legislation to accomplish a number of objectives, among them the establishment of institutions to fulfil treaty processes, including an Aboriginal Lands and Treaties Tribunal. In addition, we recommend the development of a Canada-wide framework agreement, entered into by the federal, provincial and territorial governments and Aboriginal nations, to establish the scope of treaty making and treaty implementation and renewal negotiations and a fiscal formula for the financing of the Aboriginal order of government.

Several key principles relating to lands and resources must inform federal policy both before and during negotiations. In our special report, *Treaty Making in the Spirit of Co-existence*, which addressed federal policy as it relates to Aboriginal nations that have yet to enter into treaty with the Crown, we presented some of these principles as recommendations for reform of federal treaty-making policy. However, these principles must inform both treaty making and treaty implementation and renewal. The federal government should seek to ensure that these principles find expression in a Canada-wide framework agreement. However, the government should not wait for consensus on the framework agreement to amend its current claims policies, because some Aboriginal nations may be ready to enter into negotiations before consensus is reached.

Recommendation

The Commission recommends that

2.4.1

Federal policy and all treaty-related processes (treaty making, implementation and renewal) conform to these general principles:

- (a) Aboriginal title is a real interest in land that contemplates a range of rights with respect to lands and resources.
- (b) Aboriginal title is recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.

- (c) The Crown has a special fiduciary obligation to protect the interests of Aboriginal people, including Aboriginal title.
- (d) The Crown has an obligation to protect rights concerning lands and resources that underlie Aboriginal economies and the cultural and spiritual life of Aboriginal peoples.
- (e) The Crown has an obligation to reconcile the interests of the public with Aboriginal title.
- (f) Lands and resources issues will be included in negotiations for self-government.
- (g) Aboriginal rights, including rights of self-government, recognized by an agreement are ‘treaty rights’ within the meaning of section 35(1) of the *Constitution Act, 1982*.
- (h) Negotiations between the parties are premised on reaching agreements that recognize an inherent right of self-government.
- (i) Blanket extinguishment of Aboriginal land rights will not be sought in exchange for other rights or benefits contained in an agreement.
- (j) Partial extinguishment of Aboriginal land rights will not be a precondition for negotiations and will be agreed to by the parties only after a careful and exhaustive analysis of other options and the existence of clear, unpressured consent by the Aboriginal party.
- (k) Agreements will be subject to periodic review and renewal.
- (l) Agreements will contain dispute resolution mechanisms tailored to the circumstances of the parties.
- (m) Agreements will provide for intergovernmental agreements to harmonize the powers of federal, provincial, territorial and Aboriginal governments without unduly limiting any.

Federal policy and treaty processes must conform to a number of specific principles relating to lands and resources: Aboriginal nations must be provided with sufficient territory to foster economic self reliance and cultural and political autonomy; traditional Aboriginal territories should be defined as falling into one of several categories of jurisdiction to foster mutual coexistence; third-party interests must receive protection in negotiations; and parties must reach interim relief agreements that protect Aboriginal lands and resources during negotiations.

Providing sufficient territory to foster economic self-reliance and cultural and political autonomy

A major objective of treaty making and treaty implementation and renewal is to facilitate Aboriginal economic self-reliance, cultural autonomy and self-government. To accomplish this, Aboriginal nations must have more territory and rights of access to resources than they do now under Canadian law. Without adequate lands and resources, Aboriginal nations will be pushed to the edge of economic, cultural and political extinction. This is as true for nations that have yet to enter into treaty with the Crown as it is for those that are party to historical treaties.

Recommendations

The Commission recommends that

2.4.2

Federal, provincial and territorial governments, through negotiation, provide Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy.

2.4.3

The goal of negotiations be to ensure that Aboriginal nations, within their traditional territories, have

- (a) exclusive or preferential access to certain renewable and non-renewable resources, including water, or to a guaranteed share of them;
- (b) a guaranteed share of the revenues flowing from resources development; and
- (c) specified preferential guarantees or priorities to the economic benefits and opportunities flowing from development projects (for example, negotiated community benefits packages and rights of first refusal).

2.4.4

Aboriginal nations, through negotiation, receive, in addition to land, financial transfers, calculated on the basis of two criteria:

- (a) *developmental needs* (capital to help the nation meet its future needs, especially relating to community and economic development); and
- (b) *compensation* (partial restitution for past and present exploitation of the nation's traditional territory, including removal of resources as well as disruption of Aboriginal livelihood).

An Aboriginal nation engaged in treaty making or treaty renewal with the Crown will see the provision of more territory and access to resources as critical components of the negotiation process. The amount of land necessary to meet present and future economic and cultural needs will occasion extensive discussions. Some of the historical treaties established the amount of reserve land by a predetermined formula (for example, in the western half of the province of Canada, it was 640 acres per family of five). The *Manitoba Act, 1870* provides for the appropriation of ungranted Crown lands, "to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents".³⁷⁰ There have also been more recent attempts to define specific amounts. In the spring of 1995, for example, the government of British Columbia proposed that the amount of settlement land (including existing reserves) to be set apart as a result of the British Columbia Treaty Commission process be less than five per cent of the province's total land base.³⁷¹

If parties to negotiations wish to establish a per capita formula or a ceiling as part of a framework agreement, that is certainly their prerogative. Governments should not impose such a formula or

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).

ceiling as a precondition for negotiations. This is unnecessary, because the amount of land available for selection will vary by region and local circumstances. Where the territory is extensively populated, for example, it may be appropriate for the Crown to provide a limited amount of land plus sufficient funds to enable the Aboriginal party to purchase additional land from willing third parties.

Recommendation

The Commission recommends that

2.4.5

Negotiations on the amount and quality of additional lands, and access to resources, be guided by the

- (a) size of the territory that the Aboriginal nation traditionally occupied, controlled, enjoyed, and used;
- (b) nature and type of renewable and non-renewable resources, including water, that the Aboriginal nation traditionally had access to and used;
- (c) current and projected Aboriginal population;
- (d) current and projected economic needs of that population;
- (e) current and projected cultural needs of that population;
- (f) amount of reserve or settlement land now held by the Aboriginal nation;
- (g) productivity and value of the lands and resources and the likely level of return from exploitation for a given purpose;
- (h) amount of Crown land available in the treaty area; and
- (i) nature and extent of third-party interests.

Aboriginal nations require not only more territory, but also territory of value. In the past, governments often tried to limit the lands available for reserve selection to those that were of least value to other interested parties.

Recommendation

The Commission recommends that

2.4.6

In land selection negotiations, federal, provincial and territorial governments follow these principles:

- (a) No unnecessary or arbitrary limits should be placed on lands for selection, such as
 - (i) the exclusion of coastlines, shorelines, beds of water (including marine areas), potential hydroelectric power sites, or resource-rich areas;

- (ii) arbitrary limits on size, shape or contiguity of lands; or
- (iii) arbitrary limits on the ability of the Aboriginal nation to purchase land in order to expand its territory.

(b) Additional lands to be provided from existing Crown lands within the territory in question.

(c) Where parties are seeking to renew an historical treaty, land selection not be limited by existing treaty boundaries (for example, the metes and bounds descriptions contained in the post-Confederation numbered treaties).

(d) Provincial or territorial borders not constrain selection negotiations unduly.

(e) Where Crown lands are not available in sufficient quantity, financial resources be provided to enable land to be purchased from willing third parties.

In relation to points (c) and (d), for example, Dene Th'a, whose existing reserve lands are located in northern Alberta, are party to Treaty 8, but their traditional territory also covers portions of British Columbia and the Northwest Territories (see Figure 4.4). Treaty 5, which covers well over half of Manitoba, as well as small portions of Ontario and Saskatchewan, provides another example. The Cree, Oji-Cree, Ojibwa and Dene nations of Treaty 5 may seek to enter into the treaty renewal process together, although they would probably choose to negotiate separately under that umbrella and negotiate the selection of lands based on their traditional territories.

The Commission believes that the principles outlined in recommendations 2.4.1 to 2.4.6 must be given a status that gives all parties the expectation of stability, continuity and accountability. We are acutely aware that negotiating appropriate reallocation of lands and resources and land-sharing agreements will be the work of a generation. If the required trust is to be generated and sustained over this process, stability and accountability are essential.

Guiding principles for negotiations with respect to lands and resources must move from the realm of policy, where they can be altered any time a minister persuades cabinet that change is opportune, to the more stable realm of legislation. Equally, officials charged with implementing policy need the firmer discipline of being accountable to legislative requirements rather than policy guidelines. Where negotiations are involved, flexibility is important, but the promise of stability and legal accountability is even more crucial if trust is to be established and maintained.

It would be advisable for the federal government to legislate these principles with full consultation between provincial governments and representatives of Aboriginal peoples. The principles should be adopted immediately by the federal government as policy guiding negotiations with Aboriginal nations, but they should also be the subject of full discussion during the development of the Canada-wide framework agreement and revised appropriately as a result. Only then should the federal government move to incorporate the revised principles into legislation.

Recommendation

The Commission therefore recommends that

2.4.7

The government of Canada adopt the principles outlined in recommendations 2.4.1 to

2.4.6 as policy to guide its interaction with Aboriginal peoples on matters of lands and resources allocation with respect to current and future negotiations and litigation.

2.4.8

The government of Canada propose these principles for adoption by provincial and territorial governments as well as national Aboriginal organizations during the development of the Canada-wide framework agreement.

2.4.9

Following such consultations, the government of Canada propose to Parliament that these principles, appropriately revised as a result of the consultations, be incorporated in an amendment to the legislation establishing the treaty processes.

Categorizing traditional territories to foster coexistence

We propose that negotiations aim to categorize traditional territories in three ways to identify, as exhaustively and precisely as possible, the rights of each party with respect to lands, resources and governance.

On lands in a first category (Category I lands), full rights of ownership and primary jurisdiction over lands and renewable and non-renewable resources, including water, would belong to the Aboriginal nation in accordance with the traditions of land tenure and governance of the nation in question. Category I lands would comprise any reserve and settlement lands currently held by the nation and, selected in accordance with the factors listed in recommendation 2.4.5, any additional lands necessary to foster economic self-reliance and cultural and political autonomy. On such lands, Aboriginal relationships with the land could be recognized and systems of land tenure and governance implemented more or less in their entirety. For example, Aboriginal people commonly regard their lands and resources as a collective heritage or property. Tenure can be on the basis of an extended family, community or nation, and there might be customary limits and controls on the use, transfer, and alienation of lands and resources. An Aboriginal nation would be free to structure its relationship with Category I lands in accordance with its world view, perhaps by building in legal obligations to serve as stewards for future generations. It could opt for provisions enabling it to grant future interests to third parties in the form of conventional resource leases or permits.³⁷²

On lands in a second category (Category II lands), a number of Aboriginal and Crown rights concerning lands and resources would be recognized by the agreement, and governance and jurisdiction would be shared among the parties. Category II lands would form a portion of the traditional territory of the Aboriginal nation, determined by the degree to which Category I lands fostered self-reliance.

For example, if lands allocated in Category I were insufficient to provide the means for substantial self-reliance for the Aboriginal nation and its citizens, that nation would obtain a larger share of the revenues generated by taxation or royalties from economic activity on Category II lands. Co-jurisdictional and co-management bodies could be empowered to manage the lands and direct and control development and land use. Rights to traplines and fishing sites could be recognized in

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.

accordance with Aboriginal tenure systems and could coexist with Crown rights of mineral exploration, in accordance with provincial or territorial law. Co-jurisdiction refers to an institutional arrangement that allows for representation on a nation-to-nation basis, whereas co-management refers to an institutional arrangement that is more local in nature, allowing for representation of local Aboriginal and non-Aboriginal communities. Both types of regime should be based on the principle of parity of representation among parties to the treaty. Mutual recognition would allow for revenue sharing based on identified benefits flowing from Aboriginal and Crown rights recognized and affirmed by the agreement. In terms of existing uses, Category II lands are already shared lands. Agreements negotiated according to the principles proposed here would give legal force and effect to these uses, in a way that reflects the fundamental rights — and not necessarily the economic and demographic power — of each party.

On lands in a third category (Category III lands), a complete set of Crown rights with respect to lands and governance would be recognized by the agreement, subject to residual Aboriginal rights of access to historical and sacred sites and hunting, fishing and trapping grounds, Aboriginal participation in national and civic ceremonies and events, and symbolic representation in certain institutions. These lands would likely constitute the largest of the three categories and consist of the majority of Crown lands in the area covered by the treaty, all municipal lands, and most other organized local jurisdictions such as townships or local improvement districts (especially where these consist of settled agricultural or industrial lands). Even on lands in this category, however, some Aboriginal rights could be recognized to acknowledge Aboriginal peoples' historical and spiritual relationships with such lands. For example, Aboriginal people, as a matter of protocol, could serve as diplomatic hosts at significant events of a civic, national or international nature that take place on their territory.

Category I lands will provide the maximum degree of autonomy for Aboriginal people. They will provide for coexistence rather than sharing and minimize the need for harmonization and co-operation. Category II lands will require shared jurisdiction and management. As a general rule, both the expansion of the Aboriginal land base through Category I selections, and security of access to resources on public lands and joint management of these resources on Category II lands, will be necessary to achieve self-reliance and self-government. Although the appropriate mix in any particular situation should be determined by the parties, selection negotiations should seek to maximize the amount of Category I lands available to the Aboriginal nation, and the amount selected should result in a significant increase of territory under Aboriginal control.

As can be seen in Appendix 4A, versions of this categorization scheme already exist in the land provisions of the comprehensive claims agreements negotiated since 1975. Quebec's offer to the Attikamek-Montagnais people, also described in Appendix 4A, relies on a version of this scheme. This tripartite classification is in marked contrast to the post-Confederation treaty model, whereby the written text provided that Aboriginal peoples were to receive very small allocations of reserve land, with their rights to resources off-reserve generally confined to limited harvesting (hunting, fishing and trapping) privileges.

This tripartite categorization of land should not be insisted on at the expense of reaching agreement on ownership, use, and access rights concerning features of the environment and common resources not separable by land categories, (for example, flowing waters, fish, some migratory species, and animals with large ranges, such as caribou). In respect of these, the appropriate approach would be to negotiate institutional mechanisms to allow for resource sharing, regardless of location. Concerning fish specifically, an arrangement respecting shared allocation and governance should be negotiated, independent of riparian, coastline, or water bed ownership. Major fisheries, such as the

salmon fisheries on the Fraser and Skeena rivers in British Columbia, would be shared and co-managed as a whole, without regard to land categories. Existing caribou management boards (see Appendix 4B) provide a model of how this might be done. Similarly, some water rights might be allocated through a co-management regime that includes all categories of land.

This tripartite categorization of lands should be employed in a manner consistent with the models of governance discussed in Chapter 3. In particular, and along the lines suggested by the nation-based model of government, we propose that an Aboriginal nation exercise primary and paramount legislative authority on Category I lands, shared legislative authority on Category II lands, and limited, negotiated authority on Category III lands.

Recommendations

The Commission recommends that

2.4.10

Negotiations aim to describe the territory in question in terms of three categories of land. Using these three categories will help to identify, as thoroughly and precisely as possible, the rights of each of the parties with respect to lands, resources and governance.

2.4.11

With respect to Category I lands,

(a) The Aboriginal nation has full rights of ownership and primary jurisdiction in relation to lands and renewable and non-renewable resources, including water, in accordance with the traditions of land tenure and governance of the nation in question.

(b) Category I lands comprise any existing reserve and settlement lands currently held by the Aboriginal nation, as well as additional lands necessary to foster economic and cultural self-reliance and political autonomy selected in accordance with the factors listed in recommendation 2.4.5.

2.4.12

With respect to Category II lands,

(a) Category II lands would form a portion of the traditional territory of the Aboriginal nation, that portion being determined by the degree to which Category I lands foster Aboriginal self-reliance.

(b) A number of Aboriginal and Crown rights with respect to lands and resources would be recognized by the agreement, and rights of governance and jurisdiction could be shared among the parties.

2.4.13

With respect to Category III lands, a complete set of Crown rights with respect to lands and governance would be recognized by the agreement, subject to residual Aboriginal rights of access to historical and sacred sites and hunting, fishing and trapping grounds, participation in national and civic ceremonies and events, and symbolic representation in certain institutions.

2.4.14

Aboriginal nations exercise legislative authority as follows:

- (a) primary and paramount legislative authority on Category I lands;
- (b) shared legislative authority on Category II lands; and
- (c) limited, negotiated authority exercisable in respect of citizens of the nation living on Category III lands and elsewhere and in respect of access to historical and sacred sites, participation in national and civic ceremonies and events, and symbolic representation in certain institutions.

Protecting third-party rights and interests

The objective of providing adequate territory to facilitate self-sufficiency and self-government must be balanced with the need to protect third-party rights and interests. In common law, these would include rights of fee simple and lesser legal interests, as well as general rights to use Crown lands. In Quebec these would include the right of ownership, dismemberments of ownership (real rights of enjoyment), and personal rights of enjoyment in connection with land, as well as general rights to use Crown lands. Accordingly, the Commission believes that parties to treaty processes should adhere to certain principles when negotiating the selection and categorization of territory.

Common law fee simple interests and civil law rights of ownership

The need to provide land and access to resources should not be met at the expense of the rights and interests of those who currently own property in fee simple at common law or who are titularies of a right of ownership in civil law. Except where there are willing sellers, or in exceptional circumstances outlined below, agreements should not modify, limit or extinguish common law fee simple interests or civil law rights of ownership. However, parties to the treaty process should be free to include land held at common law in fee simple or land owned in Quebec within Category II lands. The inclusion of such lands in Category II lands would not change the legal nature of the common law right of fee simple or the civil law right of ownership, but would subject activity occurring on such land to the regulatory authority of co-jurisdictional and co-management bodies empowered to manage Category II lands and direct and control development and land use. An example of this arrangement is the

Wendaban Stewardship Authority, which has exercised jurisdiction over roughly 400 square kilometres of land northwest of Temagami, Ontario, within the traditional territory of the Tem-Augama Anishinabai. The stewardship authority is responsible for monitoring, regulating and planning all uses and activities ranging from recreation and tourism, fish and other wildlife to land development and cultural heritage, including such uses and activities on private land within the territory in question (see Appendix 4B). In Category III lands, common law fee simple interests and civil law rights of ownership would continue to be subject to federal, provincial or territorial laws.

Recommendations

The Commission recommends that

2.4.15

As a general principle, lands currently held at common law in fee simple or that in Quebec are owned not be converted into Category I lands, unless purchased from willing sellers.

2.4.16

In exceptional cases where the Aboriginal nation's interests clearly outweigh the third party's rights and interests in a specific parcel, the Crown expropriate the land at fair market value on behalf of the Aboriginal party to convert it into Category I lands. This would be justified, for example, where

(a) a successful claim for the land might have been made under the existing specific claims policy based on the fact that reserve lands were unlawfully or fraudulently surrendered in the past; or

(b) the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance).

2.4.17

Lands that at common law are held in fee simple or that in Quebec are owned can be included within Category II lands.

Lesser interests on Crown lands

At common law, in addition to fee-simple interests, lesser interests can be grouped into two basic categories:

- exclusive tenures, such as cottage or other recreational property leases, which are akin to fee simple interests, in that the holders can exclude access, use or occupation by another party, but apply for only a limited period; and
- non-exclusive tenures, such as forest licences. These provide defined rights of use and benefit, but do not necessarily exclude other interests. Several such tenures, such as a mining claim, forest licence or grazing licence, can apply simultaneously to the same piece of land.

Under the civil law, in addition to the right of ownership, other real rights of enjoyment can be claimed in land, and other personal rights of enjoyment can be claimed in respect of land. For present purposes, these rights can be considered to be of two main types:

- Rights of exclusive enjoyment. These include major dismemberments of ownership, such as the right of emphyteusis or usufruct, which are akin to ownership in that the titular can exclude access, use or occupation by another party, but exist for only a limited period. Also of this kind are certain personal rights, such as those under a lease, which provide for exclusive rights of enjoyment of an immovable but are also of limited duration.
- Non-exclusive rights of enjoyment. These include rights such as those granted under forest permits, which may be either lesser dismemberments of ownership or personal rights of enjoyment, but do not necessarily preclude the existence of other similar rights. Several lesser dismemberments and personal rights of enjoyment, such as a mining claim, a forest permit or a grazing permit, can apply simultaneously to the same piece of land.

Parties must be able to select lands subject at common law to third-party interests less than fee simple, or under the civil law to third-party rights of enjoyment other than ownership, for conversion into Category I lands, but if such lands are selected, the treaty should provide that the Aboriginal nation respect the original terms of all common law tenures and the original terms by which all dismemberments of ownership and personal rights of enjoyment in the civil law were created. Thus, at common law, there would be a change of landlord, in that the Aboriginal nation would replace the Crown as the beneficial owner and receive rentals or other revenues. The existing lease, however, would continue to structure relations between the new lessor and lessee. Under the civil law, there would also be a change of owner, and the Aboriginal nation would replace the Crown as the owner entitled to receive rents or other revenues. The existing contractual agreement, however, would continue to structure relations between the new owner and the titulary of the dismemberment of ownership or the personal right of enjoyment.

As in the case of common law fee-simple interests or civil law rights of ownership, we propose that in exceptional circumstances, where Aboriginal interests significantly outweigh third-party rights and interests, the Crown should revoke the common law tenure or the civil law dismemberment of ownership or personal right of enjoyment, at fair market value, on behalf of the Aboriginal party to convert it into Category I lands. This would occur where the land in question might otherwise have been the subject of a successful claim under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past), or where the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance).

In addition, parties must be free to include within Category II lands lands that are held in less than fee simple at common law and lands held by virtue of a dismemberment of ownership or a personal right of enjoyment under the civil law. If lands held under such lesser common law interests or by virtue of such civil law rights are included in Category II lands, they would fall under the authority of the co-jurisdictional and co-management bodies empowered to manage the lands and direct and control development and use. In Category III lands, common law interests less than fee simple and civil law rights of enjoyment other than ownership would continue to be subject to federal, provincial or territorial laws.

Recommendations

The Commission recommends that

Lands affected at common law by third-party interests less than fee simple or under the civil law by third-party rights of enjoyment other than ownership may be selected as Category I lands. If such lands are selected, the Aboriginal nation is to respect the original terms of all common law tenures and all civil law dismemberments of ownership and personal rights of enjoyment.

2.4.19

In exceptional circumstances, where Aboriginal interests significantly outweigh third-party rights and interests, the Crown revoke the common law tenure or the civil law dismemberment of ownership or personal right of enjoyment at fair market value on behalf of the Aboriginal party to convert it into Category I lands. Examples of when this would be justified are where

(a) a successful claim for the land might have been made under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past); or

(b) the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance).

2.4.20

Lands affected at common law by interests less than fee simple or under the civil law by rights of enjoyment other than ownership can be selected as Category II lands.

Parks and protected areas

There are many parks and protected areas within the traditional territories of Aboriginal nations. For example, Canada has recently returned to the Keeseekoowenin Ojibway Nation in Manitoba a small portion of Riding Mountain National Park that was wrongfully taken from them in the 1930s. In the Yukon and Nunavut agreements, several new national parks have been created with the full consent, and indeed at the insistence, of the Aboriginal parties. These new parks will be subject to shared management. Moreover, some Aboriginal nations might wish to establish their own tribal parks — as the Haida people of British Columbia did with Gwaii Haanas (South Moresby) — and most will want to share in the management of existing and future parks and protected areas. Nonetheless, existing parks and protected areas should be interfered with as little as possible in the land selection process.

Recommendations

The Commission recommends that

2.4.21

Existing parks and protected areas not be selected as Category I lands, except in exceptional cases where the Aboriginal nation's interests clearly outweigh the Crown's interests in a specific parcel. Examples of when this would be justified are where

- (a) a successful claim for all or part of the park or protected area might have been made under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past);
- (b) all or part of the park or protected area is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site); or
- (c) a park occupies a substantial portion of a nation's territory.

2.4.22

Existing parks and protected areas, as well as lands being considered for protected area or park status, may be selected as Category II lands.

Public interests on Crown land

Members of the public use Crown lands and waters for a variety of purposes, including recreation, and hunting and fishing. Parties to the treaty process must be free to categorize Crown lands to which the public has access as Category I or II lands. Some Crown lands used for these purposes

undoubtedly will be selected in the course of treaty negotiations and converted into Category I lands. Aboriginal governments may choose to allow continued public access to these lands, but they will have legislative authority to regulate such activities subject to any terms in the agreement to the contrary. In many cases, such activities will be of economic benefit to Aboriginal communities. In the case of sacred sites or places of traditional significance, however, Aboriginal governments may wish to exclude members of the general society. If parties categorize such lands as Category II lands, public rights of access will be determined by the co-jurisdictional and co-management bodies empowered to manage the lands and direct and control development and use. In Category III lands, rights of access will continue to be determined by the federal, provincial, territorial or municipal government with jurisdiction over the lands in question.

Recommendation

The Commission recommends that

2.4.23

Crown lands to which the public has access be available for selection as Category I or II lands.

Interim relief agreements

Treaty negotiations based on mutual recognition, mutual respect, sharing and mutual responsibility will take time. In the past, it has taken a decade or more to conclude a comprehensive claims agreement. We have every reason to think that the time involved may be reduced by the greater and more formal government commitment in the proposed royal proclamation as well as the clearer direction and greater consensus on the purposes of treaty negotiations. Nonetheless, time will be required to complete large-scale negotiations on a new relationship, whether it is the making of a new treaty or the renewal and implementation of an historical one. For this reason, the Commission considers it vital that realistic and effective interim relief be agreed upon as a first step in treaty negotiations to protect Aboriginal rights concerning lands and resources. Forms of relief should be contained in interim agreements between federal, provincial, territorial and Aboriginal governments. These should provide an effective means of interim protection from development and the creation of new legal third-party interests by subjecting them to a set of controls and exclusions. Relief should apply for a specified period until agreement on a formal treaty is reached or until joint management structures are put in place after the ratification of a treaty.

As the brief from the Labrador Inuit Association points out, the existence of interim relief agreements can have powerful implications for the process of claim negotiations:

- they increase the pressure on non-Aboriginal governments to negotiate in good faith and expeditiously;
- they help equalize the bargaining power of the Aboriginal claimant group;
- they give the Aboriginal group a say in managing lands and resources in their traditional territory during negotiations; and

- they free up time and resources, which the Aboriginal group might otherwise have devoted to dealing with resource developments on their lands.³⁷³

As other presenters pointed out, the chief problem in the absence of an agreement on interim relief is that as the negotiations proceed, new third-party rights and interests are granted and even promoted by one party to the negotiations, to the detriment of the negotiating position, and indeed the substance of the interest, of the other party.³⁷⁴ Moreover, as we have seen, the courts are reluctant to order interim relief to protect Aboriginal title pending final judgement.

We propose that federal policy and the Canada-wide framework agreement recognize, as a matter of principle, that nation-to-nation negotiations must begin with efforts to reach an agreement that includes interim relief of the following nature:

- Interim relief agreements should provide for land withdrawals to halt the further disposition of rights on specified lands for the duration of the agreement. Land withdrawals should apply to those areas most likely to be selected by the Aboriginal party and that might affect the disposition of all or a significant portion of existing or future rights concerning lands and resources.
- Aboriginal participation and consent should be required for the creation of new third-party interests or Crown development of lands or resources on withdrawn lands. An interim relief agreement should also guarantee Aboriginal participation in the joint management of lands and resources in the traditional territory, for the duration of the agreement. This involvement could take various forms, ranging from consultation to consent to all surface and subsurface rights issuance.
- Interim relief agreements should provide that revenue to governments, such as taxes and royalties from any new resources development on the traditional territory, should be held in trust pending final resolution of the claim. While such revenues would be payable by the developer, governments would not receive them pending expiry of the interim relief agreement.

Given that one of the purposes of an interim relief agreement is to protect the rights of Aboriginal peoples to lands and resources, undue delay in negotiating such an agreement could be highly detrimental. Companion legislation to a royal proclamation should state that the parties to negotiation have a duty to bargain in good faith and make reasonable efforts to reach an agreement. We propose that the Aboriginal Lands and Treaties Tribunal be given jurisdiction over the negotiation, implementation and conclusion of interim relief agreements to ensure good faith negotiations, and in the event of failure, be empowered to impose an agreement in order to prevent the erosion of Aboriginal title. These recommendations require provincial participation in negotiations and in the design of the tribunal and its mandate.

Recommendations

The Commission recommends that

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.

2.4.24

Federal and provincial governments recognize, in the Canada-wide framework agreement, the critical role of interim relief agreements and agree on principles and procedures to govern these agreements, providing for

- (a) the partial withdrawal of lands that are the subject of claims in a specific claims treaty process;
- (b) Aboriginal participation and consent in the use or development of withdrawn lands; and
- (c) revenues from royalties or taxation of resource developments on the withdrawn lands to be held in trust pending the outcome of the negotiation.

2.4.25

In relation to treaties, the companion legislation to the proposed royal proclamation state that the parties have a duty to make reasonable efforts to reach an interim relief agreement.

Rights concerning lands and resources and the role of provincial governments

Although Parliament has exclusive legislative authority to enact laws in relation to “Indians, and Lands reserved for the Indians”, provincial interests in lands and resources figure prominently in our proposals. Undoubtedly, provincial Crown lands and resources will be a matter of discussion in any negotiations. Many specific claims about the loss of land guaranteed to an Aboriginal nation by treaty implicate provincial interests, for the land in question is often provincial Crown land. Many times the federal government offers only cash in compensation for land claims, while the lands remain with the province. There must be a presumption in respect of historical treaties that Aboriginal signatories did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by agreeing to a treaty relationship. It must be presumed also that where the text of an historical treaty makes reference to a blanket or wholesale cession of lands, the treaty relationship mandates a sharing of both the territory and the right to govern and manage it, as opposed to a cession of the territory to the Crown.

It is critical that provincial governments establish policies parallel to the processes and reforms that we are proposing, and that provincial governments participate fully in negotiations on interim relief agreements and in the treaty-making and treaty implementation and renewal processes. In addition, to provide Aboriginal nations with sufficient land to foster economic self-reliance and cultural and political autonomy, provincial governments must make Crown land available to an Aboriginal nation in cases where traditional territory has become provincial Crown land as the result of a breach of Crown duty. The provision of land in such circumstances is a matter of simple justice and likely is required by principles of fiduciary law.³⁷⁵ Where traditional territory has become private land as a result of Crown conduct (such as the improper sale or surrender of reserve land), the federal government can be called upon to compensate the province for the market value of Crown lands provided to Aboriginal nations in substitution, but such issues should be resolved between the governments and should not delay the resolution of claims.

In the wake of extensive litigation between Canada and provincial governments between the 1880s and the early 1920s, various federal-provincial statutory agreements were entered into that had the effect of giving provincial governments a measure of control over reserve lands and certain resources revenues from such lands. In the short term, these arrangements must be renegotiated by

³⁷⁵ See, generally, Rotman, “Provincial Fiduciary Obligations” (cited in note 359).

the federal and provincial governments to restore the control and benefits of reserve lands to Aboriginal nations. In the longer term, they should be repealed and replaced with appropriate statutory agreements that formalize the obligations of the federal and provincial governments in the fulfilment of treaty provisions.

Recommendations

The Commission recommends that

2.4.26

Provincial governments establish policies parallel to the processes and reforms proposed in recommendations 2.4.1 to 2.4.22.

2.4.27

Provincial governments participate fully in the treaty-making and treaty implementation and renewal processes and in negotiations on interim relief agreements.

2.4.28

In addition to provisions made available under recommendations 2.4.2 to 2.4.5, provincial governments make Crown land available to an Aboriginal nation where traditional Aboriginal territory became provincial Crown land as the result of a breach of Crown duty.

6.4 An Aboriginal Lands and Treaties Tribunal

Our principles for a renewed relationship between Aboriginal and non-Aboriginal peoples are not self-implementing. If these principles are to retain their credibility and vitality, they must be translated expeditiously into solid achievements. To prevent the erosion of confidence in the foundations of the new relationship, and to build their own legitimacy, institutional arrangements must satisfy four principles.

First, the tasks must be appropriate for the body to which they are assigned. This is the principle of institutional competence. It means, for example, that multi-dimensional and complex public policy decisions of wide-ranging importance should be made through a political process by persons accountable to those they represent, not by an adjudicative body independent of the parties. On the other hand, the resolution of disputes with less sweeping ramifications, depending more on judgements about the specifics of particular issues, can appropriately be entrusted to a body that is, and is seen to be, informed, open, impartial and independent.

Second, before the body is established, its design, jurisdiction, procedures and powers must have been the subject of wide consultation and broad agreement. Its composition must be representative of those most affected by the issues to be decided. This is the principle of inclusiveness.

Third, the powers and procedures of the body must be compatible with a process that is participatory, informal and inexpensive. This is the principle of accessibility. An adversarial model dominated by lawyers, in which the decision-making body plays an essentially passive role, is unlikely to meet these objectives. For these reasons, the body must have the capacity to deal

comprehensively with the issues before it, and its decisions should be final, subject only to limited rights of reconsideration and judicial review.

Fourth, any body entrusted with responsibilities related to implementing the Commission's recommendations for a renewed relationship between Aboriginal and non-Aboriginal people must have available the ingredients for fully informed, thoughtful and wise decisions. These can be supplied through representations made at public hearings, the expertise and knowledge of its members, staff and consultants, and the results of research. This is the principle of responsive deliberation.

With these principles in mind, we propose that federal companion legislation to the royal proclamation provide for the establishment of an independent administrative tribunal, the Aboriginal Lands and Treaties Tribunal. One of its principal roles will be to ensure a just resolution of existing specific claims, relating mostly, but not exclusively, to lands and resources. The tribunal will have responsibility not only for monitoring the fairness of the bargaining process by which most specific claims should be settled, but also, where no agreement is reached, for adjudicating outstanding substantive issues and making final and binding decisions on the merits of these claims.

In addition, the tribunal may be of assistance in treaty-making, implementation and renewal processes. However, because of the highly political nature of these negotiations, the tribunal's role will be much more modest and confined almost exclusively to process issues and matters pertaining to interim relief. The tribunal would also be assigned responsibility for the creation and supervision of recognition panels to advise the government on the eligibility of an Aboriginal nation's application for recognition (outlined in Chapter 3).

Recommendation

The Commission recommends that

2.4.29

Federal companion legislation to the royal proclamation provide for the establishment of an independent administrative tribunal, to be called the Aboriginal Lands and Treaties Tribunal.

Rationale for a tribunal

Experience clearly indicates that without an enforcement mechanism, it is all too likely that disputes will continue to be protracted as a result of the reluctance of the federal or provincial governments to come to the bargaining table or, when there, to attempt in good faith to reach a speedy and just resolution of the issues. It seems equally clear that a body with the power only to make recommendations is of limited value in effecting settlements.

While Aboriginal people have undoubtedly achieved some important victories in the recognition of Aboriginal title and other rights through the courts, litigation is a very slow and expensive process for resolving the large number of outstanding claims, let alone the disputes that may arise from implementation of the Commission's recommendations. Although satisfying the criterion of independence, judges lack the necessary expertise in these areas. In addition, the adversarial and formal procedures of courts of law are all too likely to be damaging to the relationship of the parties, and their domination by lawyers tends to exclude the active participation of the parties

themselves. Moreover, court procedures and rules of evidence can often be quite inappropriate for achieving a just and fully informed resolution of the issues.

Independent administrative agencies are perhaps the most characteristic public institutions of the late twentieth century. They have several features in common: procedural openness, specialization of functions, and a degree of independence from the executive branch of government. In other respects, they are notable for the variety of their structures, powers, procedures and composition. It is, of course, this very flexibility that has made them so attractive in many different government contexts: within broad parameters, the institutional design and legal powers of these agencies can be tailored to the exigencies of the task at hand.

Thus, the composition of a tribunal is not limited to lawyers but can include persons with a range of experience, knowledge and skills. Specialization ensures that, in addition to their previous knowledge, its members will acquire new expertise and understanding as a result of repeated exposure to related issues. It is also possible to ensure that tribunal members and staff are representative of those they serve.

Tribunals do not have to use formal, adversarial procedures. For example, many tribunals have a research capacity independent of the parties that enables them to play an active role in defining and resolving the issues. They are not restricted by technical rules of evidence either. At the same time, the openness and independence inherent in administrative tribunals provide essential supports for the legitimacy that is crucial for successful decision making in sensitive and complex areas of public policy.

These features make an independent administrative tribunal the most suitable institutional form through which to exercise whatever coercive powers of a broadly judicial type are needed to implement the Commission's recommendations.

Jurisdiction of the tribunal

Our proposals for the tribunal's jurisdiction should be considered with three points in mind. First, since constitutional competence for "Indians, and Lands reserved for the Indians" is vested in Parliament, the tribunal should be established by federal legislation. The jurisdiction proposed for the tribunal with respect to specific claims can be conferred by federal legislation. Whether they arise from a treaty, the common law of Aboriginal title or some other liability of the federal Crown, specific claims can be settled by a body operating under federal statute.

Nonetheless, provinces will be directly interested in the resolution of many of these claims, especially when they relate to land to which underlying title is held by the Crown in right of a province. It is highly desirable, therefore, that provinces become involved in the design of the tribunal. In addition, it would enhance the tribunal's constitutional ability to deal effectively with issues relating to land and self-governance if provincial legislatures were to delegate to the tribunal jurisdiction over matters that relate essentially to property and civil rights in the province. The constitutional dimensions of the tribunal's jurisdiction are discussed in more detail below.

Second, at this stage it is neither realistic nor desirable to provide more than a tentative sketch of the institutional design and operation of the tribunal. If the tribunal is to be broadly accepted and effective, Aboriginal people and federal and provincial governments must be actively involved in its design. Moreover, given the complexity and variety of the issues that are likely to arise, it would be unwise to attempt to settle the details of the tribunal's operations so precisely as to preclude the possibility of readily making adjustments in the light of experience.

Third, negotiation is the best way for Aboriginal nations and the other two orders of government to resolve their differences. This will be especially true concerning the treaty-making, implementation and renewal processes as they relate to claims for lands and resources and the right of self-governance. However, it is hoped that conferring jurisdiction on the tribunal to adjudicate specific claims will provide an important incentive for the parties to negotiate. Despite its adjudicative powers over specific claims, the tribunal's roles are best regarded as an aid, not a substitute, for negotiation.

Recommendations

The Commission recommends that

2.4.30

Parliament, and provincial legislatures when they are ready, confer on the tribunal the necessary authority to enable it to discharge its statutory mandate pertaining to both federal and provincial spheres of jurisdiction.

2.4.31

Even without provincial delegation of powers to the tribunal, Parliament confer on the tribunal jurisdiction to the full extent of federal constitutional competence in respect of “Indians, and Lands reserved for the Indians”, including the power to issue orders binding provincial governments and others, when they relate essentially to this head of federal competence.

Specific claims

The creation of an administrative body with binding decision-making powers over specific claims was first proposed by the federal government more than three decades ago but never implemented. The subsequent failure of the federal government to settle specific land claims, partly because of the lack of an independent body, resulted in Aboriginal people feeling a sense of grievous injustice.

In defining the jurisdiction of the tribunal we have adopted an understanding of specific claims considerably broader than that currently accepted by government policy. For one thing, the jurisdiction proposed for the tribunal extends to specific claims made by any of the Aboriginal peoples covered by section 91(24) of the *Constitution Act, 1867*: Indian, Inuit or Métis. This is consistent with the position taken by the Commission that section 91(24) includes Métis people and their lands (see Volume 4, Chapter 5).

Specific claims relating to land may arise from several legal sources. Some claims will be based on allegations of failure by the Crown to honour an existing treaty obligation. Others might involve disputes about lands reserved by the Crown; for example, part of the reserve might have been improperly expropriated, or there might be disagreement about the precise boundaries of the reserve. Still others might depend on unextinguished Aboriginal title to particular land or the Crown's breach of the *Indian Act* or a fiduciary duty. An example of a Métis specific claim is the allegation by the western Métis Nation that the Crown is in breach of its fiduciary duty in failing to prevent the perpetration of fraud and other forms of dishonesty by third parties and government officials with respect to land title.

Specific claims might pertain also to natural resources, such as mineral rights and hunting, fishing and trapping rights on particular land. Nor should the specific claims within the tribunal's jurisdiction be limited to lands and resources — they might also include specific provisions in a treaty relating to the payment of an annuity by the Crown, education, health or taxation, for example.

Current federal policy on specific claims adopts a much narrower definition of a specific claim than that just indicated. Nonetheless, even narrowly understood, more than 500 of the specific claims already submitted remain unresolved and are being settled at the rate of a mere five or six each year. Moreover, the process now in place gives the appearance of injustice. In particular, since claims are currently referred to the Indian Claims Commission only after they have been screened by officials in the department of justice, and since the claims commission has the power to make recommendations but not final decisions, the federal government appears to be in the position of both judge and adversary.

We attach utmost importance to the just and expeditious settlement of specific claims, more broadly conceived, and we see some of the tribunal's most important functions being in this area. We recommend that the tribunal replace the claims commission, although the experience gained by members of the commission concerning specific claims should be made available to the tribunal by, for example, the appointment to the tribunal of former members of the commission.

The tribunal and the negotiating process

Regardless of their particular subject matter, negotiations are likely to produce timely, just and durable agreements only if the negotiating process is not allowed to stall and is regarded by the participants as fair. Complaints about the unwillingness of governments to bargain in good faith and the disparity of resources available to the parties are long-standing.

We proposed the creation of treaty commissions to facilitate negotiations including mediation when required. Most of the commissions' efforts will focus on the bilateral process for negotiating new or renewed treaties, which may include claims arising from existing treaties, comprehensive land claims and self-governance.

It will be an important function of the Aboriginal Lands and Treaties Tribunal to ensure that any negotiations on specific claims outside bilateral treaty processes are conducted in good faith and without undue delay and that the integrity of the process is otherwise maintained. Rather like a labour relations board, the tribunal will police the bargaining process, and, unlike the treaties commissions, it will have the power to make binding orders on those in breach.

In addition, when it proves impossible through good faith negotiations with the federal government for Aboriginal people to secure adequate funding to enable them to participate effectively in the process for resolving a particular claim, it should be within the jurisdiction of the tribunal to review the adequacy of the amount of funding provided by the federal government.

There is, of course, a danger that disappointment with funding decisions, even if made by members who do not participate in subsequent proceedings arising from the same negotiations, may undermine the credibility and perceived impartiality of the tribunal to determine the other issues. Indeed, we invited a person who was independent of our Commission to chair the Intervener Participation Program through which funds were distributed to Aboriginal groups to enable them to participate in the Commission's work by preparing research papers, briefs and oral presentations.

On the other hand, the joint boards established under land use, municipal and environmental legislation, to which Ontario's *Intervenor Funding Project Act* applies, seem not to have been impaired by their power to award funding before hearings commence.³⁷⁶ Some of the criteria contained in the Ontario statute to guide the boards' discretionary award of funding might be relevant to decisions the tribunal will make in exercising its funding review powers.

Perhaps the most salutary warning to emerge from Ontario's experience with intervenor funding is the propensity of lawyers to turn the hearings process into something resembling complex, multi-party litigation in the courts. However, the active role recommended for the tribunal in the exercise of its adjudicative powers should provide an effective countervail.

Substantive questions

Here we sketch the tribunal's decision-making powers in respect of specific claims that the parties have been unable to resolve in negotiations outside the treaty processes, even with the benefit of mediation and other assistance provided by treaty commissions. We anticipate that most claims will be settled informally by negotiation. Indeed, the existence of the tribunal, as a last resort when good-faith attempts to resolve differences have failed, will tend to encourage the parties to reach an agreement.

Given the relatively limited scope of most specific claims arising from the failure of the Crown to implement the rights and obligations in existing treaties, or derogations of reserved land, for example, it would be appropriate for Parliament to confer on the tribunal jurisdiction to adjudicate disputes that the parties cannot resolve by negotiation. The tribunal may be asked to adjudicate the claim as a whole, or any part of it. In addition, the statute should confer wide remedial powers on the tribunal, making it clear that the transfer of land, as opposed to compensation, is the preferred remedy.

Because these claims are based on breaches of obligation by the federal Crown, it is within Parliament's constitutional competence for "Indians, and Lands reserved for the Indians" to confer on the tribunal statutory jurisdiction to determine whether a breach has occurred and, if so, to provide an appropriate remedy. Federal law creating the tribunal might authorize the making of an order, even though it affects the proprietary rights of the Crown in right of a province, if the law in question relates in pith and substance to "Indians, and Lands reserved for the Indians". However, legitimate provincial interests will have to be recognized. After the tribunal has been created and principles for the selection of land determined, parallel negotiations are likely to take place between the province affected and the federal government on issues such as the selection of the land to be transferred and the compensation to be paid for the transfer.

Aboriginal nations should not have to wait for resolution of these pressing specific claims by the treaty renewal processes. It is a widespread and strongly held view among Aboriginal people that, as a matter of the most elementary justice, the Crown's non-fulfilment of existing treaty and other obligations with respect to specific claims should be remedied without further delay. The tribunal's decision on any specific claim will be final. However, an Aboriginal nation, or other claimants, should be free to refer a specific claim instead to the longer and broader treaty-making or renewal processes.

³⁷⁶ *Intervenor Funding Project Act*, R.S.O. 1990, c. I.13. Enacted in 1988 and renewed for five years in 1991, the act was allowed to lapse at the end of March 1996.

Because there is no bright conceptual line dividing specific claims from comprehensive claims, legislation will need to define with care the term ‘specific claim’. This definition should include all disputes categorized by current federal policy as either specific claims or claims of a third kind. In general, the definition should embrace claims relating to treaty rights and obligations, as well as claims based on breach of statutory, fiduciary or other legal obligations of the Crown. It should seek to be inclusive, not exclusive, of the range of disputes that typically arise between the Crown and Aboriginal parties to treaties. In any event, the definition of a specific claim should certainly include any issue relating to treaties that is currently justiciable in the courts. It will be for the tribunal to decide, subject to the possibility of judicial review, whether a claim referred to it falls within its jurisdiction as defined in its enabling statute.

The enabling legislation must also provide that, when deciding specific claims derived from treaties or issues relating to treaty making or implementation, the tribunal should adopt a broad and progressive interpretation of the treaties and not limit itself to technical rules of evidence (including the parol evidence rule) by which the courts are bound. In particular, the enabling legislation must ensure that when interpreting disputed terms and fashioning appropriate relief for breach, the tribunal takes into account the fiduciary obligations of the Crown, Aboriginal customary law and perspectives, and the relevant history of the parties’ conduct and relations. Moreover, the statute should remind the tribunal of the importance of rendering its decisions promptly. Aboriginal peoples have good reason already to appreciate the truth of the maxim that justice delayed is justice denied.

Clearing the current substantial backlog of specific claims referred to the tribunal will require a time limit. In contrast, the longer-term processes of treaty making and renewal, tackling the more deep-seated problems, will be of indefinite duration. Given its role in the longer-term treaty processes, the tribunal will remain in existence for that time.

An important policy question is whether claims should be made to the tribunal solely at the instance of the Aboriginal claimants, or whether the consent of the Crown should be required, including the Crown in right of the province, when the dispute involves land to which it has the underlying title. On balance, we recommend that the Crown not be given the power to veto the right of claimants to refer such questions to binding decisions by the tribunal. To make the tribunal’s jurisdiction contingent on the consent of all parties would provide a major disincentive for government to settle these claims, many of which have been outstanding for a very long time.

When claimants refer a claim to the tribunal for settlement, the tribunal could grant standing to any third party whose interests are directly affected by the decision. We have in mind those on whom the claim, if successful, would have a direct impact: local landowners, including municipalities, and local fishers, for example.

Finally, when a specific claim arises under a treaty that contains its own mechanism for resolving disputes about non-implementation, the claim should be handled through the agreed process. However, if a claim raises issues of general significance, extending beyond the immediate dispute, the Aboriginal nation should be able to ask the tribunal to resolve it. If the non-Aboriginal party objects to the tribunal’s jurisdiction over a claim, on the ground that it should have been referred to the treaty mechanism, the tribunal will have to decide whether, given the circumstances, there is good reason for bypassing the primary forum. Conversely, those responsible under the treaty for resolving disputes may, in exceptional circumstances, decide that the claim is better taken to the tribunal. Once either the tribunal or the decision-making body created by the treaty has decided to deal with the claim, the other should defer to it and refuse to entertain the claim.

The general thrust of the legislative scheme we propose for the tribunal is to expand the choices available to Aboriginal people for achieving justice. Potential inconsistencies between specific dispute resolution mechanisms in particular treaties and the tribunal's design are a price worth paying to maintain this principle.

Treaty-making, implementation and renewal processes

In describing the jurisdiction that should be conferred on the tribunal with respect to comprehensive claims, we deal separately with land claims and self-governance, although often the issues will be inextricably linked.

Land claims

The tribunal should not exercise a significant role on non-process issues that might arise in the course of treaty-making and treaty implementation and renewal negotiations between the Crown and Aboriginal nations, including Métis people and Inuit. For the most part, issues arising out of these processes will be unsuitable for adjudication. They will usually involve the reallocation of lands, resources and jurisdictional authority and can be addressed satisfactorily only as an integral part of the whole relationship established (or to be established) by the treaty.

The tribunal would be available to review the adequacy of funding made available by government to Aboriginal parties. It would also ensure that negotiations were conducted in good faith. However, in the absence of provincial legislation delegating powers to the tribunal in respect of matters that relate essentially to property and civil rights, it is unlikely that the tribunal could rely on jurisdiction conferred solely by federal legislation to order a province to the bargaining table. The courts might conclude that Parliament's constitutional competence with regard to Indian peoples and their lands does not extend to aspects of the bilateral treaty process involving land to which a province has underlying title and on which there may be no existing Aboriginal title. However, it might concur with our view, set out in Chapter 2, that the assumed extinguishment of Aboriginal title as a result of the historical treaties may not in fact have occurred and that Aboriginal title can continue to exist alongside provincial Crown title.

In addition, the parties mutually should be able to refer to the tribunal any issue on which they cannot agree. Arbitration might enable them to obtain a ruling on an issue that is impeding resolution of the central questions they are negotiating. Party autonomy should be the governing principle: that is, generally they are in the best position to know when the assistance of the tribunal on a matter that is not just one of process would be beneficial. The tribunal should have the power to make a final adjudication and to issue orders that are legally binding on the parties.

However, the tribunal should have discretion not to exercise its jurisdiction as well. For example, if it regards a question referred to it as one better resolved by the parties themselves, it could send it back for further negotiation, perhaps with some suggestions for a way forward. It might regard a question as premature, and again might send it back to the parties, with or without suggestions.

Finally, in some circumstances the parties might leave a question of principle about the interpretation of existing treaty rights or unextinguished Aboriginal title unresolved, while they negotiate other issues. In these situations, which we anticipate will be few, we propose that if the government refuses to submit a particular matter to the tribunal for arbitration, the Aboriginal party should be able to refer it for binding adjudication on its own initiative. We want to emphasize that

this jurisdiction would extend only to issues of Aboriginal rights or treaty that would be justiciable in a court of law, if the claimants had chosen that route.

Implementing the right of self-government

It is unlikely that substantive issues surrounding negotiations on the implementation of self-governance will be suitable for adjudication by the tribunal. Negotiating the recognition of constitutional powers among the federal, provincial and Aboriginal orders of government, together with the transfer of a land and resource base sufficient to sustain Aboriginal self-governance, involves political questions of the highest order. However, subject to any constitutional limits when a province has not delegated powers to the tribunal, its jurisdiction to monitor the negotiating process should be applicable here, as should its authority to arbitrate an issue referred to it by the parties.

Nonetheless, in addition to its roles as monitor of the negotiation process and consensual arbitrator, the tribunal appropriately can assume jurisdiction for resolving disputes about whether an Aboriginal group should be recognized as an Aboriginal nation possessing the right of self-government. The Commission has recommended that criteria of recognition, including culture and language, be included in the legislation. Panels organized by the tribunal specifically for this purpose should be empowered to recommend whether a group claiming nationhood status should be recognized as such by the federal government. In the event that a panel's recommendation for recognition is rejected by the federal government on the grounds that a particular group's inherent right of self-government had been extinguished or had never existed, the Aboriginal party could refer the matter to the tribunal proper for adjudication.

Compliance

Parties to a new treaty or agreement could empower the tribunal to resolve disputes about compliance in an area within the tribunal's jurisdiction. Parties to existing treaties may also decide to include a similar provision in respect of disputes not already covered by the tribunal's general statutory jurisdiction. Accordingly, a party alleging that an agreement is not being implemented in accordance with its intent should be able to invoke the tribunal's assistance. The tribunal would be given the statutory powers necessary to investigate a complaint of non-compliance, adjudicate the dispute and award an appropriate remedy.

Parties to a new treaty would be able to devise their own dispute resolution mechanism; however, the existence of the tribunal, with a developed structure, expertise and statutory powers, may provide an attractive and convenient alternative.

Interim relief

To maintain the fairness and efficacy of the processes for resolving disputes concerning lands and resources, it is crucial to ensure that their subject matter is not lost or irretrievably diminished before negotiations are complete or disputes resolved by adjudication. We proposed that parties be under an obligation to bargain in good faith and make every reasonable effort to reach interim relief agreements to halt or regulate the development of lands and resources and to provide for their continuing management. The tribunal should have jurisdiction to supervise the negotiation, implementation and conclusion of interim relief agreements to ensure good faith treaty-making and treaty implementation and renewal negotiations; also, it should be empowered to impose an interim

relief agreement in the event of a breach of the duty to bargain, as well as to order other forms of interim relief where necessary.

The tribunal would be a suitable body to make orders granting interim relief with respect to lands and resources that are the subject of negotiation, once it was satisfied that the claimants had demonstrated an arguable claim. The availability of effective relief of this nature should remove a powerful incentive for governments to procrastinate in the conduct of negotiations and delay the just settlement of claims.

However, to bind the provinces to an interim relief order, it is likely that the tribunal will require provincial legislatures to delegate powers to supplement its own. This is because, when the relief proposed by the tribunal concerns land owned by the Crown in right of the province that is not necessarily subject to existing Aboriginal title, the essence of the order may well be regarded by the courts as pertaining to property and civil rights within the province rather than to Aboriginal peoples and their lands.

Because of the generally circumscribed scope of specific land claims, there will be fewer occasions on which it will be appropriate for the tribunal to exercise its power to order interim relief. However, when the nature of the claim is such that its substratum may disappear, the tribunal should be empowered to award interim relief here as well.

Recommendations

The Commission recommends that

2.4.32

The tribunal be established by federal statute operative in two areas:

- (a) settlement of specific claims, including those removed by the Aboriginal party from the broader treaty-making, implementation and renewal processes; and
- (b) treaty-making, implementation and renewal processes.

2.4.33

In respect of specific claims, the tribunal's jurisdiction include

- (a) reviewing the adequacy of federal funding provided to claimants;
- (b) monitoring the good faith of the bargaining process and making binding orders on those in breach; and
- (c) adjudicating claims, or parts of claims, referred to it by Aboriginal claimants and providing an appropriate remedy where called for.

2.4.34

In respect of the longer-term treaty-making, implementation and renewal processes, the tribunal's jurisdiction include

- (a) reviewing the adequacy of federal funding to Aboriginal parties;

- (b) supervising the negotiation, implementation, and conclusion of interim relief agreements, imposing interim relief agreements in the event of a breach of the duty to bargain in good faith, and granting interim relief pending successful negotiations of a new or renewed treaty, with respect to federal lands and on provincial lands where provincial powers have been so delegated;
- (c) arbitrating any issues referred to it by the parties by mutual consent;
- (d) monitoring the good faith of the bargaining process;
- (e) adjudicating, on request of an Aboriginal party, questions of any Aboriginal or treaty rights that are related to the negotiations and justiciable in a court of law;
- (f) investigating a complaint of non-compliance with a treaty undertaking, adjudicating the dispute and awarding an appropriate remedy when so empowered by the treaty parties; and
- (g) recommending to the federal government, through panels established for the purpose, whether a group asserting the right of self-governance should be recognized as an Aboriginal nation.

2.4.35

The enabling legislation direct the tribunal to adopt a broad and progressive interpretation of the treaties, not limiting itself to technical rules of evidence, and to take into account the fiduciary obligations of the Crown, Aboriginal customary and property law, and the relevant history of the parties' relations.

2.4.36

Constitutional foundations

A tribunal that is to make binding determinations of rights and duties and issue orders backed by the authority of the state requires statutory authority. In a federal system, it is important to establish which order of government has the constitutional authority to give the tribunal a legislative mandate.

The Commission's strong preference is that the provinces co-operate actively with the federal government and Aboriginal people in working to ensure the success of the tribunal as an instrument of justice. In particular, we would hope that the provinces are willing to delegate to the tribunal the powers necessary to enable it to grant interim relief and monitor negotiations effectively. However, the legislative powers of Parliament are sufficient to enable the tribunal to deal effectively with one important part of its mandate, the resolution of specific claims, especially those relating to land.

A federal tribunal with additional powers delegated by the provinces

The tribunal's principal work will be in connection with the settlement of specific claims based on existing treaties that have not been honoured or on other legal sources, such as the Crown's reserve of land for Aboriginal people. We regard specific claims against the Crown, whatever their origin, as falling squarely within the exclusive federal legislative competence for "Indians, and Lands reserved for the Indians", even when they relate to land to which a province holds the underlying title. In view of the constitutional authority vested in Parliament, it is appropriate that, after extensive consultations with Aboriginal people and the provinces, the tribunal should be established

by federal statute. This would have the advantage of minimizing the risk of a successful challenge to the tribunal under section 96 of the *Constitution Act, 1867*.

It is clear, however, that the provinces will have a direct interest in the settlement of many of the issues outstanding between Aboriginal people and the Crown. The successful conclusion of the larger treaty-making, renewal and implementation processes is likely to require the provinces to delegate the necessary powers to the tribunal to enable it to support negotiations and grant interim relief.

In addition, provinces must confirm the legislative powers needed by the third order of government to implement Aboriginal self-governance. Even when provincial co-operation in the resolution of a dispute is not required as a matter of constitutional law (as in the settlement of specific land claims, for example), the outcome may be of concern to a province. In short, the provinces are crucially important actors in the process of renewing the relationship between Aboriginal peoples and Canada.

Active participation by the provinces in implementing the Commission's recommendations would recognize their stake in the success of the enterprise. A constructive step in this direction would be for the provinces to delegate to the tribunal the power to deal with any matters within its mandate that fall outside exclusive federal legislative competence. This would maximize the tribunal's capacity to deal with issues comprehensively and conclusively. That the constitution permits the inter-delegation of power by the legislature of one order of government to an administrative agency created by the other order of government has been made clear by the Supreme Court in *P.E.I. Potato Marketing Board v. Willis*.³⁷⁷

Once the tribunal has been created by Parliament, provinces could 'sign on' individually and at different times by enacting legislation to delegate to the tribunal the power it would need to perform its functions effectively. Provinces that signed on would become active participants in the process of renewing the relationship between Aboriginal people and other residents within their boundaries. For example, they would be included in consultations about the development and operation of the tribunal and would be invited to nominate members to the tribunal.

A federal tribunal with exclusively federal powers

It is clearly preferable for the tribunal to operate with the benefit of co-operation between governments. However, Parliament has the constitutional capacity to confer on the tribunal the statutory authority necessary to enable it to discharge the most important parts of the mandate we have recommended be entrusted to it. In this section, we indicate the breadth of Parliament's authority to legislate in this area.

The authority conferred by section 91(24) of the *Constitution Act, 1867* enables Parliament to enact legislation establishing a tribunal with jurisdiction over a range of issues arising from Aboriginal treaties, land claims and self-governance. A tribunal could be given statutory decision-making powers on any matters falling within section 91(24). In addition, the law relating to the liability of the Crown in right of Canada is federal, whether or not it has been put into statutory form, as is the common law relating to Aboriginal title.

³⁷⁷ *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392. See also *British Columbia (Milk Board) v. Grisnich*, [1995] 2 S.C.R. 895.

Section 101 of the *Constitution Act, 1867* provides another possible source of authority. It authorizes Parliament to establish “additional courts for the better administration of the laws of Canada”. Under this provision, Parliament can create a court to decide disputes governed by federal legislation, as well as by federal common law relating to Aboriginal title and the liability of the federal Crown.

Despite Parliament’s broad powers under these provisions, the Crown in right of the provinces holds the underlying title to much of the land that is subject to claims of unextinguished Aboriginal title and to specific claims under existing treaties. Three provisions of the *Constitution Act, 1867* give provincial legislatures exclusive authority to legislate with respect to such land. Section 92(5) confers legislative competence over the sale and management of public lands belonging to the province, while section 92(13) assigns to provincial jurisdiction property and civil rights within the province. A third important source of provincial authority is section 92A of the *Constitution Act, 1867*, which gives provinces exclusive legislative authority over non-renewable resources, forestry resources and electrical energy.

A tribunal with powers conferred solely by federal law could not exercise jurisdiction in matters that, in pith and substance, fall within one of these provincial heads of power rather than within the federal sphere of “Indians, and Lands reserved for the Indians”. When the first provinces entered Confederation, however, the land that passed to them then was “subject to any Trusts existing in respect thereof, and to any interest other than that of the province in the same”. Similar provisions apply to provinces admitted to Confederation later.

Despite the limitations on federal legislative competence that preclude Parliament from conferring plenary powers on the tribunal in every aspect of its statutory mandate, it is equally important to note the substantial scope of the jurisdiction that federal statute can confer. By virtue of the paramountcy doctrine, federal legislation relating in pith and substance to “Indians, and Lands reserved for the Indians” prevails over any inconsistent provincial statutes or common law. In addition, a federal law that in other respects falls within the constitutional authority of Parliament can be made to apply to the Crown in right of the provinces, if clearly it so provides. Canada’s constitutional law contains no general doctrine of intergovernmental immunity.

Thus, the extent to which a federal tribunal could be empowered by federal legislation to make decisions binding on the Crown in right of a province depends entirely on the reach that the courts are prepared to give to the federal law of Aboriginal title, the fiduciary duties of the Crown, and Parliament’s legislative authority under section 91(24). Despite the uncertainties that inevitably surround the courts’ future interpretations of the constitution, we note that in the past the courts have generally taken a broad view of the scope of section 91(24). We regard the following observation made by Peter Hogg as eminently plausible:

It seems likely, therefore, that the courts would uphold laws which could be rationally related to intelligible Indian policies, even if the laws would ordinarily be outside federal competence.³⁷⁸

A federal tribunal and the constitutionally guaranteed jurisdiction of provincial superior courts

A problem of a somewhat different kind is posed by the judicature provisions of the *Constitution Act, 1867*, sections 96 to 100. These provide for the federal appointment of judges to the superior, district and county courts of the provinces; specify that the judges are to be selected from members

378 Peter W. Hogg, *Constitutional Law of Canada*, third ed. (Toronto: Carswell, 1992), 27.1 (c). See also Volume 4, Chapter 5, where we discuss Métis people and the constitution.

of the bar of the province in which they sit; and underpin judges' independence by guaranteeing security of tenure until the prescribed age of retirement and the provision by law of salaries, allowances and pensions.

These sections have been held to prevent legislatures (both federal and provincial) from conferring on provincially created tribunals powers of a judicial nature that are identical or analogous to a jurisdiction historically exercised exclusively by superior, district or county courts. In addition, since it is an inherent part of the jurisdiction of a section 96 court to determine whether inferior tribunals have acted in breach of the duty of fairness or otherwise exceeded their legal authority, provincial legislation cannot remove the power of the superior courts of the provinces to exercise jurisdictional control over them.³⁷⁹

For the following reasons, these provisions do not present a serious constitutional impediment to the creation of an Aboriginal Lands and Treaties Tribunal. First, whether or not its jurisdiction is supplied in part by provincial legislation, the tribunal will be established by federal statute, and the orthodox view is that Parliament's power to create administrative tribunals in the federal sphere is not subject to the same limitations as those restricting provincial competence. Sections 96-100 seem directed at the appointment and terms of office of judges of the superior courts in the provinces.

Second, even if the judicature sections of the *Constitution Act, 1867* were held to apply to federally created tribunals, a challenge to the constitutionality of the legislation would succeed only if it were established that the Aboriginal Lands and Treaties Tribunal had been given jurisdiction over matters that were at least analogous to those exclusively within the jurisdiction historically exercised by superior, district or county courts. While determinations of rights by reference to the federal common law of Aboriginal title or the Crown's fiduciary duties to Aboriginal peoples, for example, might be regarded as such a matter, many others would not.

For example, the superior courts historically have not had exclusive jurisdiction over the determination of questions of constitutional law: lower courts can be required to determine the constitutionality of the conduct of a police officer, and administrative tribunals may be empowered to decide constitutional challenges to the validity of their enabling legislation. Thus, there could be no objection to the tribunal's jurisdiction to interpret section 35 of the *Constitution Act, 1982* or the scope of Parliament's legislative authority under section 91(24) of the *Constitution Act, 1867* in the course of deciding a dispute. Since there is no aspect of the superior courts' jurisdiction that is analogous to the role proposed for the tribunal as monitor of the bargaining process between Aboriginal peoples and the Crown, section 96 could not be used to impugn this aspect of the tribunal's jurisdiction.

Third, the Supreme Court has upheld legislation conferring powers on provincial tribunals that were, considered in isolation, analogous to those of section 96 court judges but, when viewed in their wider context, formed part of an administrative scheme.³⁸⁰ To the extent that the proposed tribunal is seen as an integral and ancillary part of the non-judicial process of resolving multi-faceted disputes by negotiation, it is likely to come within this exception. This view is strengthened by the importance to the tribunal of having non-lawyer and Aboriginal members, an independent research capacity and informal procedures.

Fourth, Parliament could resort to section 101 of the *Constitution Act, 1867* to create a federal tribunal. This expressly empowers Parliament to create additional courts for the better

379 *Crevier v. Quebec (A.G.)*, [1981] 2 S.C.R. 220.

380 See, for example, *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238.

administration of the laws of Canada, “notwithstanding any other provision in this Act”. It is a requirement of this section, however, that the rights and obligations determined by this court must be based on federal law, which includes the law that the tribunal is most likely to administer — federal legislation, Aboriginal title, and the liability of the Crown in right of Canada. Because the tribunal’s success depends on the diversity of background, perspectives and expertise of its members and the flexibility of its procedures, we do not recommend the creation of a body that is likely to be regarded as a court for purposes of section 101.

It is clear, however, that constitutional law imposes at least two limitations on the jurisdiction of the tribunal. First, on application for judicial review, a court could set aside a decision of the tribunal on the ground that Parliament lacked the constitutional authority to establish it.

Second, by express word or implication, legislatures can authorize tribunals to determine questions of constitutional law that arise in the course of their proceedings. However, when conferred, this jurisdiction cannot exclude the superior courts’ inherent authority to determine the constitutionality of federal or provincial legislation on either division of powers or Charter grounds, or under section 35 of the *Constitution Act, 1982*. Nonetheless, it is within the discretion of the superior courts to decide in any given case whether to exercise their jurisdiction over constitutional challenges to the validity of legislation. The existence of an independent, specialized administrative agency with the capacity to decide questions of constitutional law, along with other matters that are squarely within its expertise, might satisfy a court that it should not make a ruling until the tribunal has rendered its decision.

If Parliament can entrust a tribunal with jurisdiction to decide a matter, it can make that jurisdiction exclusive of the superior courts of the provinces, except on questions of constitutional law. It would be tidy to sweep into the tribunal, the body designed specifically for resolving disputes of this kind, exclusive jurisdiction over matters within its statutory mandate. It would ensure that decisions made by the tribunal were informed by its expertise and would minimize inconsistencies and avoid ‘forum shopping’.

Nonetheless, we propose that where a claim is justiciable, Aboriginal claimants should remain free to pursue it through the courts, rather than be forced to take it to the tribunal. It would be inappropriate to recommend legislation to remove an avenue of legal redress that Aboriginal peoples have sometimes found valuable. Moreover, to the extent that these claims fall within section 35 of the *Constitution Act, 1982*, the jurisdiction of the superior courts of the provinces cannot be removed. However, if the tribunal operates as we anticipate, claimants should find it at least as satisfactory a forum as the courts.

Recommendation

The Commission recommends that

2.4.37

The tribunal’s jurisdiction to determine specific claims be concurrent with the jurisdiction of the superior courts of the provinces.

Structure

The range of issues that could be assigned to the tribunal is large, geographically diverse, and of fundamental importance to a large number of Aboriginal nations and groups with distinctive histories, traditions and cultures. Some aspects of the tribunal's jurisdiction are likely to be needed for a finite period of time, while others may endure indefinitely. The composition of the tribunal will need to reflect the knowledge required for the resolution of particular issues. The procedures it adopts might need to vary according to the nature of the dispute before it. Also, its structure should reflect fully the very significant interest of the provinces in aspects of its operation.

In light of this diversity, should there be a single tribunal to exercise jurisdiction over all issues, regardless of where they arise or the Aboriginal peoples they involve? Or should there be several tribunals, perhaps based on geography, subject matter (self-governance or specific claims, for example), or the degree to which the dispute involves lands or resources to which the Crown in right of a province holds the underlying title?

The selected structure should seek to combine the organizational advantages of a centralized agency with the responsiveness that could be achieved through a series of more specialized tribunals. Perhaps this balance can be struck through a tribunal that is established on a Canada-wide basis but operates through panels appointed in connection with particular matters. A single tribunal, with internal devolution, has the great virtue of avoiding uncertainties and wrangles about which tribunal has jurisdiction over any given matter. It is also important that Aboriginal peoples not have to divide up their grievances to fit different institutional mechanisms but instead have them considered as a whole.

The tribunal could also provide a registry, with offices located across the country, for filing documents and performing other related functions for matters referred to the tribunal. The tribunal could maintain a library containing, among other things, a record of the research conducted for the panels, together with their decisions. Although not legally binding, the results of research and reasoned decisions in other cases would provide invaluable assistance to subsequent claimants and panels and introduce into the process a welcome level of consistency, expertise and efficiency.

Senior permanent members of the tribunal would constitute its executive, which would have regional representatives. The role of the executive would include overseeing, co-ordinating and being publicly accountable for the tribunal's operations and budget. It might be efficient as well for the tribunal to provide central legal services and a small research staff, on which panels could call as required.

Apart from the permanent full-time members of the tribunal with executive responsibilities, others would be appointed on a provincial or regional basis. They would be assigned to particular disputes on the basis of their knowledge and experience with the issues. Members of a panel could be selected by the claimants and the federal and provincial governments, with a mutually agreed chair. If the parties could not agree on a chair, the selection could be made by the tribunal.

It can sometimes be difficult to know when the local and specialized knowledge that is desirable in tribunal members threatens the appearance of impartiality and independence. This issue is important in the context of the Supreme Court's recent decision in *Canadian Pacific Ltd. v. Matsqui Indian Band*.³⁸¹ Some members of the court expressed the view that the tax appeal committee established by the band council was not sufficiently independent of the council to provide an adequate alternative to judicial review. However, as experience with tripartite labour arbitration boards

381 *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3.

indicates, courts are liable to take a contextual approach to standards of independence and impartiality when the composition of an agency is designed to reflect the general perspectives of each of the parties. Nonetheless, attention will need to be given to avoiding potential conflicts of interest when panel members are selected.

As the *Matsqui Indian Band* decision reminds us, the terms of appointment of members of a tribunal have an important bearing on the independence of the tribunal and the degree of public confidence that it attracts. We propose that for the duration of their appointments, members be dismissable only for cause. Other aspects of appointment that should be considered from this perspective include duration, reappointment, remuneration, and disciplinary authority and process.

To ensure that members are widely representative of Aboriginal peoples and have a broad range of knowledge, most tribunal members would serve part-time, as is commonly the case with members of human rights tribunals and labour arbitrators, for example.

The appointment of members

The credibility and legitimacy of the tribunal will depend on its composition and the process for appointing members. Three points of principle stand out.

First, Aboriginal nominees, both men and women, must be fully represented at all levels of the tribunal. Half the members of decision-making panels should be Aboriginal members of the tribunal, or as close to half as may be permitted by an uneven number. The tribunal should also have Aboriginal and non-Aboriginal nominees as co-chairs. This principle can be implemented by giving Aboriginal groups the right to nominate candidates for half the positions on the tribunal, including one of the co-chairs, and by providing that half the members appointed to the tribunal at all levels by the federal government be nominated by Aboriginal groups.

Second, the membership of the tribunal should be representative of all regions of Canada, and provinces that delegate legislative power to the tribunal should have the right to nominate full-time members, as well as half the non-Aboriginal part-time members who will decide disputes that arise within their boundaries.

Third, the process of appointing members must meet growing public demands for openness, equity and accountability. For example, all nominations for membership should be subject to approval by a screening committee that is broadly representative of the principal stakeholders. The government, on the joint recommendation of the minister of justice and the proposed minister of Aboriginal relations, could appoint from among nominees approved by the committee.

Recommendations

The Commission recommends that

2.4.38

The membership and staff of the tribunal

(a) reflect parity between Aboriginal and non-Aboriginal nominees and staff at every level, including the co-chairs of the tribunal; and

(b) be representative of the provinces and regions.

2.4.39

The process for appointing full-time and part-time members to the tribunal be as follows:

- (a) the appointment process be open;
- (b) nomination be by Aboriginal people, nations, or organizations, the federal government, and provinces that delegate powers to the tribunal;
- (c) nominees approved by a screening committee be qualified and fit to serve on the tribunal;
- (d) members be appointed by the federal government on the joint recommendation of the minister of justice and the proposed minister of Aboriginal relations; and
- (e) the terms of appointment of the co-chairs and members provide that, during their period of office, they be dismissable only for cause.

Procedure

It would not be useful at this stage to prescribe codes of procedure for the tribunal and its panels. There ought to be room for experimentation and variation, based on the type of claim and proceeding being heard and the preferences of the parties. Whatever procedures are adopted should help, not hinder, the ability of the panel to reach timely and fully informed decisions; they should provide an adequate opportunity for the parties to participate in the decision-making process in a constructive manner and minimize the need for professional representation; they should respect oral traditions of Aboriginal peoples; and they should be the product of prior consultation, Aboriginal world views, values and experience.

It will be important to free the panels' proceedings from undue constraints imposed by rules of evidence developed in the very different context of adversarial courts. There should be little place for the parole evidence rule, for example, which restricts the introduction of evidence other than the written text of an agreement in order to determine its terms. Aided by researchers, panel members should assume an active role in identifying the issues, the research agenda and methodology, and potential witnesses and evidence. The procedure should more closely resemble an inquiry than the adversarial model.

Recommendation

The Commission recommends that

2.4.40

The tribunal operate as follows:

- (a) emphasize informal procedures, respect the oral and cultural traditions of Aboriginal nations, and encourage direct participation by the parties;
- (b) take an active role in ensuring the just and prompt resolution of disputes;
- (c) maintain a small central research and legal staff and provide a registry for disputes; and
- (d) hold hearings as close as is convenient to the site of the dispute, with panels comprising members from the region or province in question.

Judicial review

Should tribunal decisions be subject to review by the courts? As a federally created agency, it might not be subject to the rule established in *Crevier v. Attorney General of Quebec*, where the Supreme Court held that the constitution makes provincially created tribunals subject to review by the superior courts for jurisdictional error.

Nevertheless, it is clear that the decisions of all tribunals are subject to review on questions of constitutional law. In addition, legislation cannot oust the jurisdiction of superior courts to determine at first instance the extent of a person's constitutionally entrenched rights and whether they have been breached by statute or otherwise; however, given the existence of a more appropriate forum, a court may resolve in its discretion not to decide the issue until the completion of the tribunal proceedings in which the issue has arisen or is likely to arise. Even if *Crevier* were held not to apply to federal tribunals, a legislative attempt to insulate the tribunal from judicial review on non-constitutional issues would be liable to attract to the legislation, and to the tribunal in particular, unhelpful and unnecessary controversy.

On the other hand, to afford unrestricted access to the courts would increase the cost of reconciliation and delay its progress. An appropriate balance would be to subject the tribunal, like other major federal administrative agencies, to review in the Federal Court of Appeal. However, given the importance of avoiding delays in resolving questions before the tribunal, minimizing the cost of judicial review, and respecting the expertise of the tribunal and its representative composition, the grounds for review should be restricted to questions of constitutional law, jurisdiction and procedural fairness. Similar restrictions, and for some of the same reasons, already attach to the review of decisions by administrative agencies operating in the area of labour law, including the Canada Labour Relations Board.

Recommendation

The Commission recommends that

2.4.41

Decisions of the tribunal be final and binding and not subject to review by the courts, except on constitutional grounds and for jurisdictional error or breach of the duty of fairness under paragraphs 18.1(4)(a) and (b) of the *Federal Court Act*.

6.5 The Need for Public Education

We have emphasized the need for public education about the role treaties played in the creation of Canada and about the rights and obligations they conferred on all peoples who share this land. The treaty processes and other measures recommended in this chapter will require not only the energetic participation of government but also, to be successful, understanding and acceptance by the general public and Aboriginal people. This may not be easy to achieve. Public opinion polls in the past few years have consistently shown broad sympathy for Aboriginal issues and concerns, but that support is not very deep. More recent events have brought about a hardening of attitudes toward Aboriginal issues in many parts of the country. This is true especially in rural areas, the northern parts of some provinces and urban areas that border some of the large southern reserves. This growing hostility can be traced in large part to recent negative publicity over land claims, Aboriginal hunting and fishing rights, and issues of taxation.

The current economic situation has also had an impact on public attitudes. Greater competition for government program funds has meant that moneys earmarked for land claims settlements or other measures to increase the Aboriginal land and resource base are seen increasingly in zero-sum terms — as Aboriginal people win, the general society loses. The range of such opinions and the force with which they are expressed were evident in our hearings and in submissions made to us.

In response to such concerns, non-Aboriginal governments have been devoting more attention to consultations with the public on Aboriginal issues. In the case of the B.C. treaty process, for example, the parties have established a series of ‘side tables’ for municipalities and advocacy groups, which insist that their interests or those of the broader citizenry are not being represented. Government negotiators believe that active public involvement will speed resolution of the particular land claim or other issue by promoting the crucial ‘buy-in’ from the non-Aboriginal population. Commissioners certainly agree that for the long-term success of such initiatives, personal and community-level co-operation is essential. Mayor Barrie Conkin of North Battleford, Saskatchewan, expressed the frustration of many participants in our hearings when he noted that, with respect to land claims settlements and other Aboriginal issues, “federal and provincial governments have made promises the ordinary citizen at the grassroots level does not understand and does not feel part of”.³⁸² As we will see, similar complaints are being made by members of Aboriginal communities.

Public consultation, then, is an absolute necessity for the success of the measures we recommend in this section. Such consultation needs to be carried out very carefully, however. In fact, unless it is coupled with a serious program of public education, it may actually slow down the resolution of Aboriginal grievances. Moreover, it could worsen, rather than improve, relations between Aboriginal and non-Aboriginal people. As we have seen throughout this chapter, a significant minority of Canadians — including many government officials — do not accept even the basic premises of current negotiations. On many issues, it is clear from the hearings and submissions that Aboriginal people and the general public do not share even common definitions — of conservation, for example. Moreover, it is apparent that many Canadians still subscribe to the views set out in the federal government’s 1969 white paper on Indian policy, which recommended the termination of treaties and the elimination of distinct legal status for Aboriginal peoples.

Throughout our report, we have rejected the premises on which the white paper was based and recommended a new relationship with Aboriginal peoples based on principles of mutual recognition, respect, sharing and responsibility. Nevertheless, these attitudes must be discussed openly as part of a public education process dealing with lands and resources issues. In particular, that discussion must highlight the fundamental relationship that Aboriginal people maintain with the land. We note, for example, that in light of recent confrontations in Ontario and British Columbia, the member of Parliament for Churchill, Elijah Harper, has convened a circle of Aboriginal and non-Aboriginal spiritual leaders to seek new ways of healing disputes over matters of lands and resources. It is our view that this kind of intercultural initiative helps restore an important spiritual dimension to a dialogue that, if it has existed at all, has been overly materialistic.

The role of non-Aboriginal governments

In general, non-Aboriginal governments have an obligation to develop and support policies of public education and discussion in connection with the treaty processes. Not only do Aboriginal governments currently lack the resources to do so, they would argue that federal, provincial and

382 Barrie Conkin, RCAP transcripts, North Battleford, Saskatchewan, 29 October 1992.

territorial governments bear full responsibility for the fact that so many citizens do not understand Aboriginal issues. However, provinces can argue that the federal government — given its constitutional responsibilities — should bear the cost of public education programs connected with land claims or other such negotiations. There is no reason that these programs should be treated differently from other public consultation exercises currently under way across the country. They are funded, depending on circumstance, by either or both orders of government.

Governments have a particular responsibility to educate their own employees about Aboriginal lands and resources issues. It should not be limited to explaining the implications for provincial or federal legislation of court decisions on Aboriginal rights. In many jurisdictions, police officers, court workers and other officials who deal regularly with Aboriginal people already receive cross-cultural awareness training. The same has not been true for government employees involved in areas of public lands and resources management — forestry, parks, fisheries and wildlife — where they interact regularly with Aboriginal people, often in an enforcement role.

Cross-cultural education and training is also important to the success of claims settlements or analogous agreements. It is one thing for government negotiators or other senior officials to bring back agreements for implementation. Government personnel responsible for implementing the provisions of the agreement also need to understand the concepts behind the agreements and to buy in to the resulting process. If not, shared management schemes that rely on such officials for technical and other support will fail.

Aboriginal governments

The issue of buy-in is also a concern for Aboriginal governments. In many instances, there has been a lack of awareness among community members with respect to the overall intent and provisions of lands and resources agreements negotiated with non-Aboriginal governments — something that on occasion has promoted community backlash. This makes the agreements themselves vulnerable at the ratification stage. The Dene-Métis land claims agreement, for example, was rejected in 1990 by Dene and Métis general assemblies. The first two agreements negotiated by the Council for Yukon Indians met the same fate. In southwestern Ontario, at the Chippewa Thames reserve, ballot boxes were stolen and destroyed to annul a vote on a specific land claims settlement. In northeastern Ontario, in 1994, the Temagami First Nation — an *Indian Act* band — rejected an agreement in principle with the provincial government that had been negotiated by the Teme-Augama Anishinabai, which represents status and non-status people.

This issue has also arisen during the development and negotiation stages of agreements. For instance, tribal councils and other political organizations involved in negotiations on community-based self-government, land claims and other matters have often found that, despite their best efforts, community understanding is largely absent. The result, in some cases at least, is that individual First Nations have withdrawn from involvement. The basic problem is that the negotiators sometimes get ahead of the community and there is slippage, resulting in further delays, ambivalence or schism. At the level of the nation, general awareness and co-ordination may be lacking in terms of concrete action or the ability to deliver. As we concluded in Chapter 3, Aboriginal governments require the opportunity and capacity to educate their citizens and renew their institutions.

The issue of community acceptance or buy-in applies to both sides of the treaty negotiation process. Whether treaties are to be made, implemented or renewed, there must be mutual respect for the terms of the agreement. Negotiators need to pay equal attention to the internal renewal that must

take place within and among Aboriginal communities as well as to accountability and public education.

The language of agreements

One immediate and concrete step that can be taken toward public education is to improve the language of treaty documents and other such agreements. As we saw earlier in this chapter, treaty documents are overly legalistic, filled with minutiae and virtually incomprehensible to the lay reader — not to mention inaccessible to the many Aboriginal people whose principal language of communication is an Aboriginal one. We endorse the statement of Alvin C. Hamilton in his recent fact finder's report to the minister of Indian affairs: "Future treaties must be able to provide certainty for the parties, and for those affected by them, and to do so they must be understandable".³⁸³ We encourage the drafters of agreements to think of their eventual audience and to bring in professional writers, if necessary, to aid in the production of clear, comprehensible documents.

Aboriginal outreach

While Aboriginal people individually are not responsible for public misunderstanding of lands and resources issues, they can still play a role in educating their neighbours. This involvement can take many forms. Already a number of Aboriginal organizations have outreach activities aimed at reaching local and regional communities, particularly in British Columbia, Quebec and other provinces. Many Aboriginal organizations provide speakers on Aboriginal issues to schools, service clubs, chambers of commerce and other community organizations.

Across the country, schools, libraries and local historical societies are searching for materials on Aboriginal history and culture. What they find is most often too general or largely inaccurate. What they want is material that relates to Aboriginal people in their own area. Many Canadians do not know whether where they live is covered by treaty, or if they do, they have no real idea of the treaty's contents or why it was made.

Many First Nations, tribal councils, and provincial and national Aboriginal organizations have reports and other material, much of it unpublished, bearing on tribal and local history and culture. A great deal of it is the product of land claims research over the past 20 years. While sensitive information could be protected, an outreach program to disseminate this information, particularly in local and regional schools and libraries, could have a long-term impact on public opinion.

If nothing else, this material would help dispel the misconception in many parts of Canada that land claims are a new phenomenon, and it would provide a partial rejoinder to the argument that historical wrongs are not the responsibility of present generations. Non-Aboriginal people should know that, in many cases, it was their own parents and grandparents — not distant government officials — who benefited directly from the wrongful alienation of Aboriginal lands and resources.

Government accountability

Public education is not a top-down exercise. If the constitutional talks of the 1980s proved nothing else, they proved that Canadians are increasingly suspicious of their governments. This view was stated emphatically at our hearings. Indeed, far from regarding government negotiators as their

383 Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 91.

representatives, many residents of rural and northern Canada see government — along with environmentalists and other ‘outsiders’ — as a disruptive influence on their long-standing relations with local Aboriginal people. Aboriginal people do not share wholeheartedly in this rosy view of a common past, but they can find themselves the victims of a government’s urge to do the right thing. Long after the negotiators have left, it is they who must continue to live with their non-Aboriginal neighbours.

If public education is to be an important part of treaty processes, there are advantages to having that function performed by someone other than the immediate parties to negotiations. This need not jeopardize the principle of government-to-government negotiations. Outside facilitators have been employed already in a number of claims negotiations, and local communities include many respected individuals capable of playing a similar role. Such people could be responsible for disseminating information about the specific issues involved in negotiations — including any research — and for generating discussion of the broader principles of treaty and Aboriginal rights.

It is important that public information be shared and that it be perceived as coming from a neutral source. Ironically, government-commissioned research is often treated with suspicion by Aboriginal and non-Aboriginal people alike. For example, the ad hoc committee for the defence of Algonquin Park, which is opposing current negotiations with the Algonquin of Golden Lake, has been refused access to provincial and some federal research reports on the claim and related matters. As a result, the committee has been carrying out its own research and publicizing the results in a series of newsletters.

For genuine healing and reconciliation between Aboriginal and non-Aboriginal people, therefore, treaty processes must encourage dialogue, and the contents of negotiations must be explained comprehensively and clearly.

Recommendation

The Commission recommends that

2.4.42

Public education be a major part of treaty processes and of the mandates of the treaty commissions and Aboriginal Lands and Treaties Tribunal, in keeping with the following principles:

- (a) federal and provincial governments keep the public fully informed about the nature and scope of negotiations with Aboriginal peoples and not unduly restrict the release of internal reports and other research material;
- (b) Aboriginal parties participate in educating the general public and ensure that their members fully understand the nature and scope of their negotiations with provincial and federal governments;
- (c) the federal government ensure that negotiation processes have sufficient funding for public education; and
- (d) treaties and similar documents be written in clear and understandable language.

7. Securing an Adequate Land and Resource Base for Aboriginal Nations

Only substantive change, represented by the new treaty processes and the Aboriginal Lands and Treaties Tribunal, can fully resolve outstanding issues and provide the land and resource base that Aboriginal nations require for self-government and self-reliance. At the same time, we recognize the difference between long-term and short-term solutions. Some of the measures we have recommended, especially those requiring new or amended legislation, will take time. In the interim, there are many things that non-Aboriginal governments can do — and are already beginning to do — within the existing legal and policy framework that would provide a better situation for Aboriginal people. In this section, we outline a number of such transitional measures, with recommendations on their implementation.

First, we discuss broad questions of land reform, principally for First Nations. We begin with the urgent need for an interim specific claims protocol, which will last until the Aboriginal Lands and Treaties Tribunal is established. Next, we suggest improvements to several of the existing related processes by which First Nations can add to their land base. Because of the division of constitutional powers, the federal government will have primary responsibility in this area, although it will necessarily involve negotiations with provincial, territorial and, in some cases, municipal governments where their interests are involved.

Second, we cover general issues of improved access to natural resources on public lands for all Aboriginal peoples, as well as tenure arrangements that would allow more space for Aboriginal title and jurisdiction on-reserve (in the case of First Nations) and on Crown lands.

Third, we examine co-jurisdiction and co-management arrangements, in the overall context of provincial land and resource management policies. While all questions involving natural resources will require the consent and active involvement of provincial and territorial governments, we recommend a much greater level of active participation on the part of the federal government.

The word ‘interim’, as we use it throughout this section, does not always mean temporary. Some of the measures we recommend, such as an interim specific claims protocol, are clearly transitional, and many short-term changes to provincial land and resource management policies and regulations will undoubtedly be embodied in future agreements with Aboriginal nations. However, other measures, particularly those touching on questions of natural resource allocation, are immediate and can be implemented regardless of whether they eventually form part of the negotiation process for new or renewed treaties.

We have been critical of past action (or in some cases, inaction) on the part of all levels of government. But we also wish to recognize instances where there has been significant progress, whether in Aboriginal access to resources, in self-regulation or in co-management ventures. Much of this movement has come from the provinces and territories, often with little or no co-operation from the federal government and at times in the face of vigorous opposition. Such achievements reinforce our hope and expectation of energetic involvement on the part of all governments.

7.1 Interim Steps: Expanding the First Nations Land Base

The linked processes of treaty making and treaty implementation and renewal provide the best route to securing an adequate land base for all Aboriginal peoples. For First Nations people, however, there are already several means by which they can add to their existing land base. These include the

settlement of specific claims or past grievances and unfulfilled land entitlement under previous treaties or agreements; compensatory land provisions (such as the Manitoba Northern Flood Agreement); and the purchase of land on the open market. Other measures would also assist in providing more land for Aboriginal people, such as the return of unsold surrendered lands and of lands expropriated previously.

These are all practical means of providing an expanded land base for First Nations communities. Moreover, they can all be implemented without prejudice to future treaty negotiations. The needs are immediate, and Commissioners believe that they deserve to be pursued. However, in each case, practical problems make it difficult to reach or implement agreements. These problems are set out below.

An interim specific-claims protocol

Only an independent body with a legislative basis, such as the Aboriginal Lands and Treaties Tribunal, can remove the current conflict of interest created when the federal government serves as funding agent, defence counsel, judge and jury in matters involving its own past conduct. Until the tribunal has been established, however, the current specific claims policy must be amended to introduce more fairness in its operations and to speed up claims resolution. Our discussion follows the lines suggested by the proceedings of the joint AFN-federal government working group on claims and the neutral draft of recommendations.³⁸⁴

With respect to criteria, the current specific claims policy states that the federal government will consider claims based on non-fulfilment of treaty terms. In practice, however, the government does not accept grievances relating to the interpretation of treaties. Harvesting rights are a prominent example — as in the government's recent refusal to consider claims of the Athabasca Denesuline to Aboriginal or treaty harvesting rights north of the 60th parallel.³⁸⁵ We believe that the current policy must be open to treaty-based claims.

With respect to compensation, we draw two conclusions. We observed that the guidelines that federal negotiators apply in settling claims are inconsistent, arbitrary and not in keeping with the fiduciary principles set out in *Guerin* and other Supreme Court decisions. The main purpose of these guidelines is apparently to limit the financial obligations of the federal government. In effect, claimants are being offered compensation far less than the courts would likely award, with the result that the policy is no longer a viable alternative to litigation. The specific claims policy itself does not need to be revised to eliminate this inequity; but the compensation guidelines should be amended or interpreted to permit the application of fiduciary principles of legal obligation and compensation.

In almost all instances, the federal government also offers only cash compensation to settle claims. For the reasons set out in this chapter, we believe the primary purpose of claims resolution should be to provide Aboriginal nations with greater access to and control over their traditional territories. Cash compensation should be paid only if full restitution is impossible or impracticable or not desired by the nation in question.

The federal government should respond promptly to the recommendations of the Indian Claims Commission, which currently serves as a forum for bringing forward rejected claims. We agree with

384 Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255), pp. 169-205; and *ICCP*, Volume 2 (cited in note 240).

385 Indian Claims Commission, *ICCP*, Volume 1, pp. 159-168.

the claims commission that government delays and inaction are unconscionable; they are slowing the process of claims resolution and undermining the commission's effectiveness.³⁸⁶ We also believe that the federal government should improve access to the claims commission and to the expertise the commission has developed in cross-cultural mediation and negotiation.

Recommendation

The Commission recommends that

2.4.43

The federal government enter into an interim specific claims protocol with the Assembly of First Nations embodying, at a minimum, the following changes to current policy:

- (a) the scope of the specific claims policy be expanded to include treaty-based claims;
- (b) the definition of 'lawful obligation' and the compensation guidelines contained in the policy embody fiduciary principles, in keeping with Supreme Court decisions on government's obligations to Aboriginal peoples;
- (c) where a claim involves the loss of land, the government of Canada use all efforts to provide equivalent land in compensation; only if restitution is impossible, or not desired by the First Nation, should claims be settled in cash;
- (d) to expedite claims, the government of Canada provide significant additional resources for funding, negotiation and resolution of claims;
- (e) the government of Canada improve access to the Indian Claims Commission and other dispute resolution mechanisms as a means of addressing interpretations of the specific claims policy, including submission to mediation and arbitration if requested by claimants; and
- (f) the government of Canada respond to recommendations of the Indian Claims Commission within 90 days of receipt, and where it disagrees with such a recommendation, give specific written reasons.

Fulfilment of treaty land entitlements

The general question of unfulfilled entitlement to reserve lands will most properly be dealt with under the new treaty implementation and renewal process, with the Aboriginal Lands and Treaties Tribunal serving as the forum for unresolved issues. But many First Nations (as in Saskatchewan) are already involved in processes dealing with treaty land entitlement. The parties may wish to continue with those processes while the Commission's general recommendations are being implemented.

Many treaties negotiated with Aboriginal people provided for the selection of reserve lands. Until Confederation, these lands were simply exempted from the general description of lands covered by treaty; later, they were set apart for Aboriginal beneficiaries out of the totality of lands covered by the treaties.

386 Indian Claims Commission, *ICCP*, Volume 2, p. 55.

The post-Confederation numbered treaties — covering much of western and northwestern Canada (see Figure 4.8) — provided specific formulae for calculating the quantum of reserve lands. Depending on the treaty, the signatory tribes or bands were to choose reserve lands of between 160 and 640 acres per family of five.

As several of the treaty case studies conducted for the Commission showed, not all of the contemplated reserves were actually created. Of those that were created, many First Nations communities argue that the population of signatory bands was calculated incorrectly, so that the reserves were not the proper size. These issues currently form the subject of specific land claims in various parts of northern and western Canada.

Parallel to the specific claims process, and in most instances tied directly to it, there have been various attempts to resolve questions of outstanding treaty land entitlement. After a failed attempt, in the 1970s, to resolve outstanding issues of entitlement in Saskatchewan, a treaty commission was established in 1989 to advise the department of Indian affairs and the Saskatchewan Indian Federation on outstanding treaty issues. The commission turned its attention to the entitlement issue and issued a report in 1990. In 1982, the government of Manitoba had created its own treaty land entitlement commission to address — from a provincial perspective — the claims of 27 Indian bands that signed various of the numbered treaties.³⁸⁷

The findings of the two commissions were quite similar, dealing with the interests of third parties, loss of municipal tax assessment, and the categories of land that should be available for selection. Although subsequent negotiations have encountered many difficulties, some agreements have now been reached in Saskatchewan (though not in Manitoba, where negotiations were inconclusive) that will see money handed over to Aboriginal people for the purchase of land on the open market. That process will be under way for many years.

One general problem affecting all unfulfilled land entitlement discussions is the issue of the appropriate amount of acreage to be set aside on a per capita basis for First Nations people under treaty terms. The written texts of the numbered treaties are silent regarding the date at which the base population is to be enumerated for the purposes of determining reserve land quantum. Canada has generally interpreted the ambiguity to mean that lands were to be selected based on total membership at the time of treaty, or at the time of survey following reserve selection.

For their part, First Nations people disagree passionately with the specific land quantum set out in the treaty texts, insisting that this was not their understanding of the treaty negotiations. Reserves, they say, were intended to provide a basis for their self-sufficiency in the future. As a result, they have consistently argued that modern land entitlement should be calculated on the basis of current population figures. The so-called ‘Saskatchewan formula’, which was to have applied in both

Saskatchewan and Manitoba, represented a compromise between these two positions. Land quantum was to be divided up according to treaty band populations as of 31 December 1976. Canada has since backed away from this formula (as has Manitoba), arguing once again that its ‘lawful obligation’ is confined to population at the date of first survey. To do otherwise, say federal officials, would be unfair to bands that received their entitlements long ago.

Federal policy on land entitlement has never been consistent. New reserves have been set apart on many occasions since the 1930s with, in several instances, the quantum of reserve land being calculated on the basis of contemporary population figures, not those at the time of the treaty or first

387 Leon Mitchell, Q.C., “Report of The Treaty Land Entitlement Commission” (Winnipeg: 1983).

survey. This makes it difficult for Canada to argue that the strict wording of the treaty texts prevents the same being done again.

First Nations and their political organizations point to the rate of natural increase in on-reserve population as a significant reason for using modern population figures in calculating quantum. They also argue that Bill C-31 registrants have enlarged many band populations since the 1976 formula was established. We believe the Aboriginal position makes good sense. It acknowledges the current needs of First Nations communities and avoids the expense and associated delay that results from arguing over historical population figures.

It is extremely difficult to establish historical population figures. Except in rare cases, there are no accurate government census records for communities in the period before treaty, and the registers of Indian missions, while informative, are based on religious affiliation, not group identity. Moreover, the penetration of Christianity among northern and western First Nations was far from comprehensive before the early twentieth century.

The department of Indian affairs bases its calculations for entitlement purposes on treaty pay lists. But those pay lists, particularly in the early years after treaty, are difficult to interpret. Because most Indian agents did not speak the languages of their clients, they had trouble rendering Aboriginal names into English. Especially in northern regions, some treaty beneficiaries either refused to take payment or did not show up for annuities until many years later. Agents also complained of what they saw as frequent inter-band movement, with members of the same family showing up on different pay lists in the same or subsequent years. In fact, what this showed was that treaty pay lists did not necessarily represent actual group identity.³⁸⁸

Federal calculations also ignore the impact of the Indian Act on band membership lists. It is well known that the act excluded women who married non-Indians, along with their descendants. In addition, if the date of first survey, rather than of treaty signing, is used, band numbers in some instances show a decline. Numbers could also drop because of the effects of epidemic diseases such as measles and influenza before 1920.

There are also broader issues involved in any discussion of treaty land entitlement. The case studies conducted for the Commission demonstrated that the treaty texts are open to interpretation on more than just the issue of the date at which land quantum was to be calculated. For example, while the reserves on Lake Huron and Lake Superior under the Robinson treaties of 1850 are defined in terms of miles, the Ojibwa participants believed that they were reserving lands on the basis of French leagues (one league equals approximately 2.5 miles), the only European unit of measure with which they were familiar.³⁸⁹

It should not be assumed, therefore, that those who participated in later agreements, such as the northern Cree and Dene who took part in Treaty 10, even understood the meaning of units of measure such as an acre or a square mile. Indeed, in most of the northern treaties, reserves were not surveyed and set apart until many years after the agreements were signed, if at all. Many of the Treaty 8 reserves in northern Saskatchewan, Alberta and British Columbia, for example, were not created until the 1950s and '60s, more than half a century after the treaty was signed.

388 For a brief discussion of some of the problems inherent in using government documents to research historical Aboriginal populations, see Bennett Ellen McCardle, *Indian History and Claims: A Research Handbook*, Volume 1 (Ottawa: Indian and Northern Affairs, 1982), pp. 130-139.

389 Morrison, "The Robinson Treaties" (cited in note 19).

However, the Aboriginal position on treaty entitlement leaves one important issue unaddressed. As the Federation of Saskatchewan Municipalities points out, almost two-thirds of Saskatchewan First Nations people, including long-time band members and Bill C-31 registrants, now live in urban areas. Should urban band members be part of the calculation of treaty land entitlement, particularly when it is unlikely that they will ever return to live on-reserve? It could be argued that it may be more appropriate to use their numbers when calculating new treaty land entitlement in urban areas.

Canada, as well as some of the provinces, regards the entitlement process as a particular kind of specific claim that will provide a final solution to the treaty issue. But First Nations object that government is once again trying to impose its own agenda. They believe that treaty land entitlement is simply throwing money at a deeper problem. Unless the true spirit and intent of the treaties are recognized and implemented, it is clear that many of them will not accept the process as resolving the issue. This is an excellent example of why a long-term process of treaty implementation and renewal is preferable to any short-term solution on treaty land entitlement.

Nation building must occur before nations enter into the revised treaty process. Treaty entitlement will be an important part of that process, which should be as inclusive as possible.

Recommendation

The Commission recommends that

2.4.44

The treaty land entitlement process be conducted as follows:

- (a) the amount of land owing under treaty be calculated on the basis of population figures as of the date new negotiations begin;
- (b) those population figures include urban residents, Bill C-31 beneficiaries and non-status Indians; and
- (c) the federal government negotiate agreements with the provinces stipulating that a full range of land (including lands of value) be available for treaty land entitlement selection.

Purchase of land

Many First Nations communities, particularly those in heavily populated regions of the country, have been attempting to increase their reserve land base by purchasing property on the open market. Since most Canadians broadly support private property rights, one would expect little opposition to such a practice. The Commission heard, for example, from Chief Gerald Beaucage of the Nipissing First Nation near North Bay, Ontario, that his community has been using a variety of revenue sources, including the proceeds of specific land claims settlements, to buy bush lots and farm land in the townships surrounding their reserve.³⁹⁰ These townships were originally part of their reserve, having been surrendered in the early part of this century.

In this particular case, there has been little or no controversy. Much of the land is of marginal value to the seller, and the properties are being acquired at fair market value. Thus, the principle of

390 Chief Gerald Beaucage, Nipissing Band of Ojibways, RCAP transcripts, North Bay, Ontario, 10 May 1993.

‘willing seller, willing buyer’ can be seen to apply. Nevertheless, in many other localities, such purchases of private land have sparked protests.

In October 1993, the Township of Onondaga, which borders the large Six Nations reserve in southern Ontario, passed a resolution protesting any First Nation purchases of land outside reserve boundaries. While recognizing the right of all Canadians to buy and own land, the resolution opposes the right of Aboriginal people to purchase private property and have it become part of a reserve. The stated reason is the potential loss of municipal tax assessment and the effect of such loss on school funding and the provision of municipal services. The township resolution demands that the federal government compensate municipalities for the loss of tax base and directly fund the continued provision of services to the reserve. It petitions the government to defer all decisions regarding land claims and the addition of what it calls “non-native lands” to reserves until federal policy on such matters has been reviewed by all Canadians.³⁹¹

Having circulated the resolution to other municipalities in Ontario, the township attracted widespread support, particularly from municipalities affected by actual or potential land claims. The controversy could therefore have an impact on current land negotiations, not only with First Nations in Ontario, but elsewhere across Canada. According to a brief to the Commission from the union of Quebec municipalities, 80 municipalities in Quebec either border on or are close to an Aboriginal community.³⁹² The number of municipalities potentially affected in provinces such as Saskatchewan and British Columbia is even larger.

Ironically, the apparent source of the Onondaga township grievance is not reserve status itself, but a section of the Ontario Assessment Act that exempts First Nations property from municipal taxes. The province of Ontario argues that the federal government should invoke the provisions of its 1991 Additions to Reserve policy whenever a First Nation purchases the land, not just when it first applies for reserve status.

According to that policy, Canada will not normally grant reserve status to lands within municipal boundaries until the First Nation and the affected municipality have reached a formal agreement on areas of concern. These areas include loss of tax assessment; provision of and payment for municipal services; the application, enforcement or harmonization of by-laws; and land-use planning.³⁹³

We certainly favour negotiations between Aboriginal people and other interested parties. In their submission, the Federation of Canadian Municipalities recommended that joint committees be formed with representation from municipalities and neighbouring Aboriginal governments to deal with issues of common concern.³⁹⁴ This is an excellent suggestion, which we fully support.

While it is essential that municipal interests be considered in issues of reserve expansion, it was surely not the intent of the federal policy to give municipalities a veto over reserve creation. This would prevent a First Nation from obtaining reserve status for any newly acquired lands.

It is also important to point out that Aboriginal people have been purchasing land for purposes other than reserve land expansion. Inuvialuit, for example, have been using the money from their land

391 Township of Onondaga, Resolution 12, 12 October 1993.

392 Union des municipalités du Québec, “Mémoire de l’Union des Municipalités du Québec présenté à la Commission royale sur les peuples Autochtones”, brief to RCAP (1993).

393 DIAND, “Additions to Reserves”, in *Land Management Policies and Procedures Manual* (November 1991).

394 The Federation of Canadian Municipalities in co-operation with the Canadian Association of Municipal Administration, “Municipalities and Aboriginal Peoples in Canada”, submission to RCAP (1993).

claims settlement to buy property in urban areas as an investment. In that sense, they are no different from any other institutional investor. The additions to reserve policy has no relevance to this type of activity.

Recommendation

The Commission recommends that

2.4.45

Land purchases be conducted as follows:

- (a) the federal government set up a land acquisition fund to enable all Aboriginal peoples (First Nations, Inuit and Métis) to purchase land on the open market;
- (b) the basic principles of ‘willing seller, willing buyer’ apply to all land purchases;
- (c) joint committees, with representatives from municipalities and neighbouring Aboriginal governments, be formed to deal with issues of common concern;
- (d) the federal government do its utmost to encourage the creation of such committees;
- (e) the federal government clarify the 1991 additions to reserves policy to ensure that the process of consultation with municipalities does not give them a veto over whether purchased lands are given reserve status; and
- (f) the federal government compensate municipalities for the loss of tax assessment for a fixed sum or specific term (not an indefinite period), if the municipality can show that such loss would result from the transfer of the purchased lands to reserve status.

Unsold surrendered lands

Since the mid-nineteenth century, First Nations in many parts of Canada have surrendered lands conditionally to the federal Crown (often under protest) so that such lands could be sold for their benefit. A surprising quantity of those lands were never sold, and they continue to occupy a curious limbo in the federal land registry system. Though they are no longer reserve lands, they remain ‘Indian lands’ as defined in the *Indian Act*, and their disposal is handled by the department of Indian affairs. The department does not actively manage them, however. While they are not provincial Crown lands, local non-Aboriginal residents generally treat them as such — and have been known to raise objections when the issue of returning such lands to First Nations control is broached.

The map of present and past reserves on Lake Huron is a good illustration of unsold surrendered lands (see Figure 4.7). At Sault Ste. Marie, Garden River and Thessalon, for example, the original reserve area is outlined in grey around the much smaller contemporary reserves. Though these lands were surrendered long ago, half the grey area or more remains unsold to this day.

The return of such lands would be an excellent way to provide for community expansion, particularly since these lands have remained legally under federal jurisdiction and control. Considerable progress is now being made in some regions. Figure 4.7 shows a large area of surrendered land around the present reserve on Lake Nipissing. On 30 March 1995 the governments of Canada and Ontario signed an agreement with the Nipissing First Nation community to return 13,300 hectares of unsold land in Beauceage and Commanda townships (the residue of 22,840

hectares originally surrendered for sale in 1904 and 1907) to community control. The agreement maintains easements for transportation and utility purposes and protects the access rights of private landowners, as well as the continued public use of waterways that pass through the lands in question.³⁹⁵

Such protection for existing third-party interests is clearly an important consideration in the return of unsold surrendered lands. The terms of the Nipissing agreement conform to the general principles for the treatment of such interests. We note, however, that the Nipissing First Nation community first approached the federal government in 1973 about securing the return of these unsold surrendered reserve lands.³⁹⁶ Sadly, such delays have plagued the claims resolution process.

Recommendation

The Commission recommends that

2.4.46

Unsold surrendered lands be dealt with as follows:

- (a) the Department of Indian Affairs and Northern Development compile an inventory of all remaining unsold surrendered lands in the departmental land registry;
- (b) unsold surrendered lands be returned to the community that originally surrendered them;
- (c) First Nations have the option of accepting alternative lands or financial compensation instead of the lands originally surrendered but not be compelled to accept either; and
- (d) governments negotiate protection of third-party interests affected by the return of unsold surrendered lands, such as continued use of waterways and rights of access to private lands.

Return of expropriated lands

Portions of reserves have been surrendered for a variety of private or public purposes, including fur trade posts, Christian missions, police stations and utility operations. Reserves have also, like private lands, been subject to expropriation. During the railway boom of the past century, many reserves were bisected by railway rights-of-way, and the lands for these were expropriated by the Crown (despite protests from First Nations). Another example — one that attracted significant notice in 1995 — involved the expropriation in 1942, under the *War Measures Act*, of the Stoney Point reserve on Lake Huron for a military base and weapons range.³⁹⁷

In other instances, it was not reserve lands themselves, but lands that Aboriginal peoples occupied and used for traditional harvesting that were expropriated. Thus, in the early 1950s, an area of 11,630 square kilometres, straddling the Alberta-Saskatchewan border, was set apart by federal/provincial agreement as the Primrose Lake Air Weapons Range. First Nations and Métis people were forbidden to carry on traditional activities (such as hunting, fishing and trapping) within the range. Although some First Nations people did receive payment for loss of traplines, the

395 Ontario, Nipissing Band of Ojibways and Canada, “13,300 Hectares Transferred to First Nation Under Tripartite Nipissing Specific Agreement”, joint press release No. 95nr-002 (30 March 1995).

396 Ontario, Nipissing Band of Ojibways and Canada, “Nipissing Reserve of Ojibways: Unsold Land”, backgrounder (March 1995).

397 Chippewas of Kettle and Stoney Point, “Information Sheet” (1994).

Indian Claims Commission (ICC) recently concluded that payments were completely inadequate to compensate for the loss of livelihood. The ICC found that the most productive harvesting lands of the Canoe Lake and Cold Lake First Nation communities had been taken up by the Primrose Lake range, with devastating consequences for their traditional economy.³⁹⁸

There are obvious policy implications when the original purpose for which lands were taken no longer exists. For example, CP and CN rail have stated their intention to abandon considerable amounts of track in eastern Canada — some of which runs through reserves.

In principle, the Commission believes that Aboriginal people should benefit from any disposal of rights to such land. In the case of the Stoney Point weapons range, which is no longer in use, the departments of national defence and Indian affairs did reach a tentative agreement with the nearby Kettle Point First Nation community, which had absorbed the former Stoney Point band following the original expropriation. That agreement was subsequently rejected, in part because of the perceived inadequacy of the financial settlement (as well as the fact that it did not provide for return of the land) and in part because descendants of the Stoney Point people argued that they alone should have been the beneficiaries of the agreement.

The difficulties surrounding the Stoney Point weapons range illustrate some of the problems with claims policy discussed earlier in this chapter. We believe that it is inappropriate for the owner — the federal Crown — unilaterally to establish the value of previously expropriated lands or the conditions of their return. At the very least, such matters should be resolved by negotiation. If the parties are unable to reach agreement, the Aboriginal Lands and Treaties Tribunal would be an ideal body to make such a determination.

There are other difficulties involved in the return of previously expropriated lands, such as clean-up and environmental monitoring and the associated costs. These should not be borne by the Aboriginal community affected. They can, however, represent an opportunity. In the case of a former weapons dump on the Sarcee reserve in Alberta, for example, Tsuut'ina Nation members have been trained in ordnance clean-up by retired defence department personnel, and they have been able to market this expertise elsewhere through a company, Wolf Floats, established for the purpose.

Recommendation

The Commission recommends that

2.4.47

If reserve or community lands were expropriated by or surrendered to the Crown for a public purpose and the original purpose no longer exists, the lands be dealt with as follows:

- (a) the land revert to the First Nations communities in question;
- (b) if the expropriation was for the benefit of a third party (for example, a railway), the First Nations communities have the right of first refusal on such lands;
- (c) any costs of acquisition of these lands be negotiated between the Crown and the First Nation, depending on the compensation given the First Nation community when the land was first acquired;

398 Indian Claims Commission, "Primrose Lake Air Weapons Range Report", *ICCP*, Volume 1 (cited in note 255), pp. 3-158.

- (d) if the land was held by the Crown, the costs associated with clean-up and environmental monitoring be borne by the government department or agency that controlled the lands;
- (e) if the land was held by a third party, the costs associated with clean-up and environmental monitoring be borne jointly by the Crown and the third party;
- (f) if an Aboriginal community does not wish the return of expropriated lands because of environmental damage or other reasons, they receive other lands in compensation or financial compensation equivalent to fair market value; and
- (g) the content of such compensation package be determined by negotiation or, failing that, by the Aboriginal Lands and Treaties Tribunal.

7.2 Interim Steps: Improving Access to Natural Resources

The ability of First Nations people to derive a living from natural resources on their reserves has been hampered by federal policies. Provincial and territorial laws and policies have made it difficult for First Nations and Métis (and, in some regions, Inuit) to secure allocations of natural resources outside their reserves or community lands. In numerous instances — such as the Ojibwa commercial sturgeon fishery on Lake of the Woods — resources once used by Aboriginal communities were in effect confiscated by government and awarded to non-Aboriginal people.

Increasing the Aboriginal share of natural resources will therefore require direct action by governments at all levels. Spelling out Aboriginal resource rights in the context of treaties will obviously provide the best long-term solution. But until that process is completed, governments should take interim steps to redress the balance. Some jurisdictions (such as British Columbia and Saskatchewan) are already improving First Nations' access to natural resources, and their approach could provide a model for other regions of the country.

Commissioners believe that it is in the federal government's interest to assist in the economic and cultural development of First Nations through opportunities in the natural resources sector. As a general principle, therefore, we encourage governments to rethink their overall allocation policies and licensing systems. As noted earlier, natural resource regulation regimes have historically favoured the maximization of production, which is a major reason that Aboriginal peoples were excluded from so many resource sectors. Even today, licensing systems continue to be based on economies of scale, on the assumption that the largest producers (whether in forestry, fisheries or other resource sectors) are the most efficient. But a new understanding of the concept of resource depletion, coupled with broad acceptance of the principles of sustainable development, means that old assumptions about efficiency may no longer be valid. The collapse of the Atlantic fishery is an excellent case in point. Changing the system of resource allocation to benefit Aboriginal harvesters (as well as other small producers in all regions of Canada) is not only a just solution, but also one that can make long-term environmental and economic sense.

We also believe that, as part of the law of fiduciary duty, Canada has an obligation to protect the exercise of traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands. There is a strong link, for example, between resource activities such as industrial forestry and negative effects on traditional activities. While some First Nations have treaties that guarantee certain harvesting rights, many do not — and all First Nations have had difficulty securing recognition of their broader Aboriginal rights. As for Métis people, and Inuit in Labrador, there has been no recognition of their right to pursue traditional harvesting activities at

all. Similar standards that apply across the country would remove such inequities as well as provide greater certainty for provincial and territorial governments until the new treaty processes have been implemented.

We therefore urge the federal government to seek the agreement of the provinces and territories in enacting a national code to permit traditional Aboriginal activities on Crown lands, which the provinces and territories would enact as part of their land and resource management law. Such a code and its contents could be an agenda item for an early meeting of federal and provincial ministers responsible for natural resources and public lands, following publication of this report.

Next, we examine other measures to increase Aboriginal access to and control over resources and help them gain a proper share in resource revenues. Future treaty negotiations will likely supplant or incorporate many of our recommendations. In some instances, however, we offer general observations to serve as a guide for negotiations.

Recommendation

The Commission recommends that

2.4.48

With respect to the general issue of improving Aboriginal access to natural resources on Crown land:

- (a) the federal government seek the co-operation of provincial and territorial governments in drafting a national code of principles to recognize and affirm the continued exercise of traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands; and
- (b) the provinces and territories amend relevant legislation to incorporate such a code.

Forest resources

In the mid-north, as well as in pockets of southern Canada, participation in the forest industry shows great potential for increasing Aboriginal self-sufficiency. Most reserves outside the prairie belt and the far north have at least some forest cover, and in the mid-north, reserves and settlements are surrounded by forested Crown land. But improving the Aboriginal share of forest resources will require better care of forests on reserves as well as changes in tenure systems for Crown forests.

Reserve forests

For much of the past century, the fate of renewable resources on reserve lands has been a dismal one. Most reserves in eastern Canada were stripped of their timber for the sake of short-term employment or a modest increase in band funds. Farsighted leaders such as Chief Dokis, of the French River area in Ontario, were subjected to continuous pressure from timber interests and government officials if they tried to slow down exploitation and conserve valuable resources on reserves.

Until quite recently, little forest management expertise was available to First Nations through the department of Indian affairs. There were few attempts at artificial regeneration and, on most

reserves, natural regeneration has been only partially successful. Forested lands on reserves continue to require major restoration efforts. According to a 1994 federal report on reserve forests in Nova Scotia, woodlots are in poor condition in places where the stands are reasonably accessible.³⁹⁹

Only in the past decade has there been any real change. A number of First Nations have participated in the Indian forest lands program, a component of federal/provincial forest resource development agreements (FRDA). Unfortunately, there have been no similar programs for Métis people. The program has provided for some forest inventories, management plans and reforestation of reserve forests, as well as limited training and practical work opportunities for First Nations workers in the forest industry. In Nova Scotia, about \$200,000 was being provided annually to the Confederacy of Mainland Micmacs to encourage forest management on reserves owned by 12 Nova Scotia First Nations.⁴⁰⁰ Under the Indian forestry development program in northwestern Ontario, for example, 1050 hectares of reserve land had been planted and tended by 1990, 10 management plans prepared and almost 50 person-years of employment created for community members. The program was directed by representatives of three tribal councils in the area served by the Grand Council, Treaty 3.⁴⁰¹

Although there has been general satisfaction with the Indian forest lands program, some Aboriginal groups, notably the National Aboriginal Forestry Association in its submission to the Commission, have criticized the program's focus on timber production. It should be modified, they state, to reflect and integrate the traditional ecological knowledge and resource values of Aboriginal communities.⁴⁰²

In his November 1992 report to Parliament, Auditor General Denis Desautels noted that overall federal support, even with FRDA, has been inadequate to meet the reforestation requirements of Indian reserves or generally accepted standards of forest management. He also pointed out that the regulations governing forestry activities on Indian lands had not been changed in 50 years.⁴⁰³ Yet the need for proper forest management on reserves has never been greater. As provinces respond to public criticism of forest management practices by tightening up their legislation (as in Ontario's new *Crown Forest Sustainability Act*⁴⁰⁴), the overall supply of wood fibre from Crown lands is diminishing. Particularly in British Columbia and Ontario (where the laws are toughest), mills have been actively seeking alternative sources of wood from adjacent provinces and private lands. In Ontario alone, the price paid for wood from private land has quadrupled since the new act was passed and could go much higher.

To the forest industry, reserves are, in effect, private lands; they have therefore been subject to the same kinds of development pressure. In Alberta, in a well-publicized incident in the spring of 1995, the Nakoda (Stoney) First Nation at Morley sold much of its reserve timber to a mill in neighbouring British Columbia.⁴⁰⁵ Their chief was unapologetic. His people, he said, felt they had no alternative; the price was right, and the reserve had no other resources of value.

399 Consulting and Audit Canada, "Study of Forestry Sector Opportunities for Aboriginal Economic Program Initiatives, Province of Nova Scotia" (Halifax: 1994). See also Dean Beeby, "Natives miss out in forestry boom", *Halifax Chronicle-Herald* (3 July 1995), p. A3.

400 Consulting and Audit Canada, "Study of Forestry Sector Opportunities"; and Beeby, "Natives miss out".

401 Ontario Environmental Assessment Board, *Decision: Class Environmental Assessment* (cited in note 142), c. 10, pp. 354-355.

402 National Aboriginal Forestry Association, "Forest Lands and Resources" (cited in note 142).

403 Auditor General of Canada, "Report of the Auditor General of Canada to the House of Commons", cat. no. FA1-1992E (Ottawa: Supply and Services, 1992).

404 *An Act to revise the Crown Timber Act to provide for the sustainability of Crown Forests in Ontario*, S.O. 1994, c. 25, s. 86.

In early 1993, the federal government announced that as a cost-saving measure, it would no longer participate in federal/provincial forest resource development agreements. As those agreements expire — as the Canada-Nova Scotia agreement did on 31 March 1995 — they are not being renewed, which means that the Indian forest lands programs are disappearing along with them. Commissioners remind the department of Indian affairs and the department of natural resources that Canada has a fiduciary obligation to see that Indian lands are managed for the benefit of First Nations. That obligation includes stewardship of reserve forests.

Recommendation

The Commission recommends that

2.4.49

With respect to forest resources on reserves, the federal government take the following steps:

- (a) immediately provide adequate funding to complete forest inventories, management plans and reforestation of Indian lands;
- (b) ensure that adequate forest management expertise is available to First Nations;
- (c) consult with Aboriginal governments to develop a joint policy statement delineating their respective responsibilities in relation to Indian reserve forests;
- (d) develop an operating plan to implement its own responsibilities as defined through the joint policy development process;
- (e) continue the Indian forest lands program, but modify its objectives to reflect and integrate traditional knowledge and the resource values of First Nations communities with objectives of timber production; and
- (f) in keeping with the goal of Aboriginal nation building, provide for the delivery of the Indian forest lands program by First Nations organizations (as has been the case with the Treaty 3 region of northwestern Ontario).

Crown forests

Figures from the Canadian Council of Forest Ministers show that 80 per cent of all inventoried productive forests are on provincial Crown land, and 85 per cent of all forest harvesting occurs on provincial Crown land.⁴⁰⁶ Hence, any plan to increase Aboriginal access to forest resources will have to address the current system of provincial ownership and management.

In Canada, 42 major tenure systems are used to grant property rights to forestry companies, ranging from comprehensive freehold to non-exclusive common property rights.⁴⁰⁷ The three broad categories of tenure are forest management agreements, forest licences, and timber permits.

405 Vicki Barnett, "Logging chaos curbed", *Calgary Herald* (8 February 1995), p. A1. See also "Indian activist questions logging critics", *Edmonton Journal* (27 February 1995), p. C8.

406 Canadian Council of Forest Ministers, "Compendium of Canadian Forestry Statistics 1992: National Forestry Database" (Ottawa: 1993), p. 58, Figure 15

407 Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada* (North York: Captus Press Inc., 1994).

Forest management agreements called tree farm licences usually carry a 20-year term rolled over every five years and are area-based rather than volume-based. These agreements are the most significant form of tenure and are designed for companies that operate pulp and paper mills and/or major sawmills. Under these agreements, a wood processing facility is required because a major capital investment ensures that the company has both a vested interest in the licence area and enough capital to pay the costs of fulfilling the required forest management responsibilities; and the facility generates employment. In most cases, the company has exclusive harvesting rights within the area. Companies are required to submit annual harvesting plans and five-year management plans to the provincial forest ministry.

Until recently, these agreements focused almost exclusively on timber production, with the associated requirements that a company manage the forest for harvesting, silviculture, planting, road building and tending to the free-to-grow stage. In many jurisdictions now (such as Ontario and British Columbia) the scope of management is being broadened by requiring companies to manage the forest for other uses such as recreation and grazing. Nevertheless, timber production remains the primary economic focus. Most agreements stipulate that the company must consult with the public and other stakeholders. In some cases the provinces allocate third-party harvesting rights, while in others the company grants these rights.

Forest licences can be issued for periods of between ten and 20 years and are renewable for up to 20 years. Awarded through a competitive bidding process, licences tend to be restricted to operators of sawmills or manufacturing facilities where the company makes a smaller investment and has fewer property rights, while the province retains most of the forest management responsibilities.

Timber permits (called district cutting licences in some areas) are usually from one to five years in length, granting only site-specific property rights, while the province retains all management responsibility. The permits are designed to fulfil domestic and other small timber needs such as fuel wood, poles and building materials.

Historically, Aboriginal people have not participated in forest management agreements or forest licences. They have been confined to the much more limited category of timber permits or district cutting licences and even then have suffered discrimination compared to other resource users. In its 1994 decision on provincial timber management planning, the Ontario environmental assessment board noted that Aboriginal people frequently complained that the district cutting licences they were receiving from the ministry of natural resources were for areas where the best timber had already been removed. They also objected that allocations were far too small to support employment or income within their communities. In northwestern Ontario, for example, 30 loggers on the Eagle Lake reserve were required to share 5,500 cords of wood, while a single non-Aboriginal contractor in nearby Dryden was given a quota of 15,000 cords.⁴⁰⁸

The ninth priority of the 1992 national forestry strategy for Canada focuses on Aboriginal peoples in a framework for action designed “to increase the involvement of Aboriginal people in forest land management ... to ensure the recognition of Aboriginal and treaty rights in forest management ... and to increase forest-based economic opportunities for Aboriginal people”.⁴⁰⁹ Commissioners support these goals, but to reach them, a number of major barriers must be overcome. Fortunately, a great deal of progress is already being made in some regions.

408 Ontario Environmental Assessment Board, *Decision: Class Environmental Assessment* (cited in note 142), c. 10, p. 361.

409 Garry Merkel, Frank Osendarp, and Peggy Smith, “Sectoral Study: Forestry æ The Forest Industry’s Relationship with Aboriginal Peoples”, research study prepared for RCAP (1994).

One of the major impediments is that almost all of the most economically accessible forested lands are under long-term renewable licence or similar forms of tenure to large forest companies. The fact that such licences are renewable makes it difficult for provinces to provide timber allocations to Aboriginal firms. Related to this issue is the fact that forest management agreements in most provinces are tied to wood processing facilities. This acts as a barrier to Aboriginal people's attempts to enter the forest industry. Recently, however, provinces such as British Columbia are showing flexibility by altering some of the conditions of their tree farm licences (for example, the requirement for a wood-processing facility). We encourage other provinces to follow this example.

Partnerships or joint ventures between Aboriginal forest operating companies and other firms that already own wood processing facilities — or have the finances to create one — are another promising model. In northern Quebec, Domtar and the Cree of Waswanipi plan to build a sawmill on that First Nation's reserve, with the province agreeing to furnish an allocation of wood to the Cree-owned forest operating company, Nabakatuk.⁴¹⁰ In Saskatchewan, the Meadow Lake Tribal Council is generating employment and income from a once-failing sawmill purchased in a joint venture, which included an existing forest management agreement.

There are additional steps provinces could take to improve Aboriginal access to forest resources. The National Aboriginal Forestry Association has recommended that provinces amend their legislation to establish a special forest tenure category for holistic resource management by Aboriginal communities in their traditional territories or land use areas. This recommendation, which we support, would do a great deal to rectify the historical inequity in timber allocations to Aboriginal people. British Columbia, for example, already makes specific legislative provision for access to smaller amounts of Crown timber by First Nations. The B.C. Forest Act provides for woodlot licences of up to 400 hectares of Crown land for terms of up to 15 years. Several First Nations and communities have already taken advantage of this provision, combining the forested portion of their reserves with the leased Crown land.⁴¹¹

Tanizul Timber Limited

In 1981, the Tl'azt'en Nation (formerly known as the Stuart-Trembleur Band) in the Fort St. James area of central British Columbia bid for and received a tree farm licence (tfl) from the British Columbia Ministry of Forests. The licence itself is held by six members of the nation in trust for the entire community.

To obtain its licence, the Tl'azt'en combined some 2,500 acres of its reserve lands with 49,000 hectares of provincial Crown lands. To complete that commitment, special federal regulations under the Indian Act were prepared to allow for management of the Indian reserve portion of the tree farm licence under the terms of the b.c. Forest Act and regulations. A second unusual characteristic of this tfl was that it excluded the operation of a wood-processing facility, because b.c. officials believed that there was already enough milling capacity in the region. As a consequence, Tanizul Timber has been selling its logs on the open market. However, Tanizul Timber is now completing a sawmill so that it can profit from value-added manufacturing.

The two principal logging contractors employed by Tanizul are owned by community members, and more than half the 80 jobs in logging, road construction and reforestation are filled by band members or other Aboriginal people.

Source: National Aboriginal Forestry Association, "Forest Lands and Resources for Aboriginal People: An Intervention Submitted to RCAP" (August 1993).

410 *Agreement relative to the Waswanipi Wood Transportation Centre between Domtar Inc. and Waswanipi Mishtuk Corporation*, signed on 17 March 1995.

411 *Forest Act*, R.S.B.C. 1979, c. 140. See also National Aboriginal Forestry Association, "Forest Lands and Resources" (cited in note 142)

The diminishing quantity of unallocated forest land in most jurisdictions makes it more difficult to be innovative. In Ontario, for example, much of the Crown land is already tied up under long-term licence. In Nova Scotia, there is little Crown forest at all — about 72 per cent of forested lands are under private tenure, compared with the Canadian average of 10 per cent.⁴¹² Nevertheless, there are still things that can be done. One is priority of allocation. Where unalienated Crown timber exists close to reserves or Aboriginal communities, provinces could award those timber licences to Aboriginal people. The Ontario environmental assessment board, as part of its April 1994 decision on Crown timber management, has ordered the ministry of natural resources to implement just such a practice.⁴¹³

However, it will not be enough simply to incorporate Aboriginal people into existing systems of forest tenure and management. It is important to give proper consideration to Aboriginal values. In both the Tanizul Timber and NorSask ventures, local Aboriginal people, while appreciating the employment opportunities, have expressed concerns about the overall impact of forest operations. Tanizul Timber is obliged to operate according to British Columbia ministry of forest regulations that enshrine established industrial forestry practices — including clearcutting and extensive road construction. Some members of the community object that these practices emphasize timber production at the expense of their traditional activities and the holistic management philosophies of community elders. Moreover, logging roads have also made the area more accessible, increasing hunting competition from recreational hunters from outside the community.⁴¹⁴

NorSask Forest Products Limited

In 1988, the Meadow Lake Tribal Council, acting on behalf of nine First Nation communities in northern Saskatchewan, took advantage of the receivership of a local sawmill to join forces with the mill's employees and purchase the mill. They also assumed the former company's forest management licence agreement. The new company, NorSask Forest Products, which uses only softwoods in its sawmill, has joined forces with a pulp manufacturing firm interested in establishing a mill that would use hardwoods. In 1990, NorSask Forest Products and Millar Western Pulpmill Limited became partners. A new firm, Mystic Management Ltd., owned jointly by NorSask and Millar Western, with the Meadow Lake Chiefs District Investment Company and employees of the local sawmill as majority shareholders, was set up to operate the timber limits.

At present, Mystic Management relies on a non-Aboriginal forestry and technical staff, but already some 20 per cent of the logging is by the Meadow Lake Tribal Council Logging Company, and this proportion is expected to increase.

Source: National Aboriginal Forestry Association, "Forest Lands and Resources for Aboriginal People: An Intervention Submitted to RCAP" (August 1993), p. 21.

In Saskatchewan, there have been similar conflicts between the logging practices of Mystic Management — which are based on provincial management regulations and policies — and Métis and First Nations people concerned about maintaining traditional employment in hunting, trapping and fishing. Max Morin of the Metis Society of Saskatchewan raised this issue in his appearance before us. As a result of the protests, four forestry advisory boards have been set up with representation from the company, local First Nations communities and the provincial forestry administration to deal with problems between timber harvesting plans and trapping and hunting

412 Consulting and Audit Canada, "Study of Forestry Sector Opportunities"; and Beeby, "Natives miss out" (both cited in note 399).

413 Ontario Environmental Assessment Board, *Decision: Class Environmental Assessment* (cited in note 142), c. 10, p. 374.

414 National Aboriginal Forestry Association, "Forest Lands and Resources" (cited in note 142).

interests. The boards may place restrictions on forest management plans, although the province retains final decision-making power.⁴¹⁵

Commissioners encourage the provinces to show greater flexibility in their timber management policies and guidelines. Some jurisdictions are already reducing their annual allowable cut requirements and the size of clearcut areas. Continued experimentation with lower harvesting rates, smaller logging areas, and longer maintenance of areas left unlogged would allow greater harmonization with generally less intensive Aboriginal forest management practices and traditional Aboriginal activities.

In May 1995, a scientific panel appointed by the British Columbia government — which included Aboriginal representatives — released its final report on forestry practices in the Clayoquot Sound area of Vancouver Island. This and the panel's other reports are particularly critical of clearcutting, the dominant harvesting method in British Columbia and elsewhere in Canada. As currently practised, clearcutting “removes all trees in a given area in one cutting, after which an even-aged stand is established by planting or natural regeneration ... most of the opening is not shaded or sheltered by the surrounding forest”. This lack of shelter has major consequences for the viability and diversity of forest life. The panel's reports stress the need to maintain forest integrity, recommending that at least 15 per cent of trees be retained in all cutting areas and 70 per cent be kept where there are “significant values for resources other than timber”. The panel also recommends that forest structures and habitat elements such as large old trees, snags and downed wood — which are important for regeneration and as insect and wildlife habitat — be retained.⁴¹⁶

The panel concluded that existing provincial planning procedures were inadequate for sustainable ecosystem management. Forest companies and the provincial forests ministry, it said, had failed to take adequate account of the physical and ecological connections among land-based, freshwater and marine ecosystems and had failed to incorporate First Nations' values and perspectives:

415 National Aboriginal Forestry Association, “Forest Lands and Resources”, p. 21.

416 Clayoquot Sound Scientific Panel, “Sustainable Ecosystem Management in Clayoquot Sound: Planning and Practices, Report 5” (Victoria: Cortex Consultants Inc., 1995), pp. 46, 83, 85.

*Human activities must respect the land, the sea and all the life and life systems they support ... Long-term ecological and economic sustainability are essential to long-term harmony ... The cultural, spiritual, social and economic well-being of indigenous people is a necessary part of that harmony.*⁴¹⁷

*We believe that the conclusions of the Clayoquot Sound panel — particularly those concerning Aboriginal peoples — are valid for all forested regions of Canada and should be incorporated in planning processes. We urge the provinces to allow Aboriginal people to review forest management and operating plans within their traditional land-use areas. This would be parallel to — but separate from — other public consultation processes regarding such plans. This is already happening in Ontario where, in 1990, the province agreed to give the Teme-Augama Anishinabai an advisory role in timber management planning within the ministry's Temagami District (see Appendix 4B). More recently, under the terms of its April 1994 decision, the Ontario environmental assessment board ordered the ministry of natural resources to implement a special Aboriginal consultation process in all timber management planning throughout the province.*⁴¹⁸

Consultation is only part of the answer, however, because it leaves Aboriginal people in the position of responding to plans that have already been drafted. Far better to involve Aboriginal people in planning from the beginning. In Quebec, the Barriere Lake Trilateral Agreement, which was renewed in 1995 for another year, enables the local Algonquin community to participate in preparing a draft integrated management plan for renewable resources within the 10,000 square kilometre area of their traditional lands (see Appendix 4B). In keeping with the concept of sustainable development, environmental assessments are already part of the forest management planning process. In some jurisdictions, such as Ontario, proposed new timber management planning guidelines may also require heritage assessments. Given the importance of Aboriginal land use in so many areas of the country, such guidelines should address Aboriginal issues and concerns specifically. The Commission urges the provinces, therefore, to make Aboriginal land-use studies — developed in collaboration with Aboriginal peoples — a requirement of all forest management plans.

Finally, we turn to the question of federal involvement. We are encouraged by the fact that the federal department of natural resources has been actively promoting First Nations involvement in resource planning and research outside their reserve lands. In Saskatchewan, the Prince Albert model forest, partly funded by the federal forest service, recognizes Aboriginal people as an integral component of the forest ecosystem. The Prince Albert Tribal Council, the Montreal Lake Indian band, the Lac La Ronge Indian band, and the Federation of Saskatchewan Indian Nations are full partners in the program, along with Weyerhaeuser Canada Ltd., Prince Albert National Park of the Canadian parks service, and the Saskatchewan department of environment and resource management. Three of the seven directors on the board of the model forest partnership are First Nations representatives.⁴¹⁹ Similarly, the Abitibi model forest project in northeastern Ontario — also funded in part by the federal forest service — has the Wagoshig First Nation as a full partner along with Abitibi-Price Ltd. and the Ontario ministry of natural resources. Significantly, a part of that

417 Clayoquot Sound Scientific Panel, "Sustainable Ecosystem Management".

418 Ontario Environmental Assessment Board, *Decision: Class Environmental Assessment* (cited in note 142), c. 10, p. 374.

419 Prince Albert Model Forest Association Inc., Certificate of Incorporation (Saskatchewan Department of Justice, 8 January 1993).

project is the identification of Aboriginal sacred sites and other heritage sites and the documentation of past and present Aboriginal land use.

In keeping with its fiduciary obligation to protect traditional Aboriginal activities on provincial Crown lands, the federal government should actively promote Aboriginal involvement in provincial forest management and planning. As with the model forest program, this would include bearing part of the costs.

Recommendation

The Commission recommends that

2.4.50

The following steps be taken with respect to Aboriginal access to forest resources on Crown lands:

- (a) the federal government work with the provinces, the territories and Aboriginal communities to improve Aboriginal access to forest resources on Crown lands;
- (b) the federal government, as part of its obligation to protect traditional Aboriginal activities on provincial Crown lands, actively promote Aboriginal involvement in provincial forest management and planning; as with the model forest program, this would include bearing part of the costs;
- (c) the federal government, in keeping with the goal of Aboriginal nation building, give continuing financial and logistical support to Aboriginal peoples' regional and national forest resources associations;
- (d) the provinces encourage their large timber licensees to provide for forest management partnerships with Aboriginal firms within the traditional territories of Aboriginal communities;
- (e) the provinces encourage partnerships or joint ventures between Aboriginal forest operating companies and other firms that already have wood processing facilities;
- (f) the provinces give Aboriginal people the right of first refusal on unallocated Crown timber close to reserves or Aboriginal communities;
- (g) the provinces, to promote greater harmony with generally less intensive Aboriginal forest management practices and traditional land-use activities, show greater flexibility in their timber management policies and guidelines; this might include reducing annual allowable cut requirements and experimenting with lower harvesting rates, smaller logging areas and longer maintenance of areas left unlogged;
- (h) provincial and territorial governments make provision for a special role for Aboriginal governments in reviewing forest management and operating plans within their traditional territories; and
- (i) provincial and territorial governments make Aboriginal land-use studies a requirement of all forest management plans.

Mining, oil and natural gas

Resource development, including mining activity and oil and gas exploration, has often been problematic for Aboriginal people. With the exception of oil and natural gas in Alberta, First Nations have not generally benefited from the presence of minerals on reserve lands. Aboriginal peoples generally have not been consulted about development activities; usually they have not been guaranteed, nor have they obtained, specific economic benefits from such activities on their traditional lands; and they have had difficulty protecting their traditional use areas from the effects of development. This has been the case, for example, with Dene Th'a in northwestern Alberta.

Mineral, oil and natural gas resources on reserves

Where First Nations were able to retain ownership of some subsurface deposits on their reserves, as in the case of oil and gas resources in Alberta, the department of Indian affairs maintained control over all aspects of commercial development. This practice continues today. Consequently, many First Nations have not developed management experience or benefited from employment or the transfer of industry knowledge and expertise.⁴²⁰ Departmental regulations are also inconsistent in the requirements they impose on industry. For example, while the Indian oil and gas regulations require companies operating on reserves to employ First Nations residents, the Indian mining regulations do not.⁴²¹

Most First Nations have derived minimal benefit from mineral resources on their reserves. Federal/provincial agreements may have satisfied the provinces, which gained half the potential revenue from future mineral development, but, in the words of a recent text on Canadian mining law, those agreements appear to have been concluded “more for administrative expedience than for legal clarification”. The resulting combination of complexity, contested legal entitlement and inadequate returns for First Nations has had a “dampening effect on mineral exploration on reserves”.⁴²² Renegotiation of those agreements should be an urgent priority for the federal government.

Recommendations

The Commission recommends that

2.4.51

In keeping with its fiduciary obligation to Aboriginal peoples, the federal government renegotiate existing agreements with the provinces (for example, the 1924 agreement with Ontario and the 1930 natural resource transfer agreements in the prairie provinces) to ensure that First Nations obtain the full beneficial interest in minerals, oil and natural gas located on reserves.

2.4.52

The federal government amend the Indian mining regulations to conform to the Indian oil and gas regulations and require companies operating on reserves to employ First Nations residents.

420 Tribal Chiefs Association of Northeastern Alberta, brief submitted to RCAP (1993).

421 R.S.C. 1985, c. I-7 and C.R.C. 1978, c. 956.

422 Barry J. Barton, *Canadian Law of Mining* (Calgary: Canadian Institute of Resources Law, 1993), p. 99.

2.4.53

The federal government work with First Nations and the mining industry (and if necessary amend the Indian mining regulations and the Indian oil and gas regulations) to ensure the development of management experience among Aboriginal people and the transfer to them of industry knowledge and expertise.

Mineral resources on Crown lands

Before turning to our specific policy recommendations, we make some general observations about the process of mineral development. A mine involves three phases: exploration and development, mining and reclamation. The industry includes companies involved in mineral exploration, mining or extraction of ore, milling or concentrating, smelting and refining, processing of industrial minerals and environmental reclamation services (a newcomer to the industry) that return the land to an environmentally acceptable state. Smaller firms tend to concentrate on exploration, while larger companies are involved in all phases. The current trend is for larger companies to contract out field work, such as exploration and related services, because many companies have no field workers, tradespeople, or technicians on permanent staff. Exploration continues, as the deposit is mined, in order to extend the life of the mine.⁴²³

Consultation

In the Northwest Territories and Yukon it has become standard practice for the territorial government to advise Aboriginal communities of the zones within their traditional land use areas for which mineral or oil and gas exploration permits have been let, along with the name of the company and a contact person. In British Columbia, a 1995 Crown land activities and Aboriginal rights policy framework requires provincial officials to give similar notice to First Nations communities.⁴²⁴ Commissioners urge all provinces to adopt the same practice.

The provinces should also require exploration companies to contact Aboriginal communities in the area. (The provincial department responsible should provide the names of communities and contact persons.) The Commission urges provinces and companies to develop consultation mechanisms that encourage Aboriginal communities to participate in initial exploration, development and mining plans and provide non-technical information to the communities, so that they can fully appreciate the implications and play a real role in the planning process.

Socio-economic benefits

Aboriginal involvement in the mining industry would include socio-economic agreements with Aboriginal communities affected by development. As with the forest industry, Commissioners believe that Canada and the provinces should encourage partnerships or joint ventures between Aboriginal companies and firms involved in mining or oil and gas exploration and development. Provinces could give preference in awarding licences to natural resource companies that pursue joint ventures, make special training and employment commitments or commit to major contract work with an Aboriginal community or business.

423 Price Waterhouse, "Aboriginal Participation in the Minerals Industry", research study prepared for RCAP (1994).

424 British Columbia, "Crown Land Activities and Aboriginal Rights Policy Framework" (Ministry of Aboriginal Affairs, 25 January 1995).

Protection of traditional activities

Commissioners believe that the federal government has an obligation to protect existing Aboriginal activities on Crown land. In the Northwest Territories and the Yukon, where the Crown in right of Canada retains ultimate title and jurisdiction over lands and resources, recent comprehensive claims settlements provide for a wide range of Aboriginal benefits from resource development outside their community lands, as well as guaranteed roles for Aboriginal governments in planning and managing Crown land activities (see Appendices 4A and 4B).

Once new treaties are made (as in British Columbia) or old ones renewed, the same kinds of measures will apply within the provinces. However, even where such agreements have not yet been made, the federal government still has an obligation to maximize net benefits to Aboriginal people in areas adjacent to new mineral and petroleum ventures.

Recommendations

The Commission recommends that

2.4.54

The provinces require companies, as part of their operating licence, to develop Aboriginal land use plans to

- (a) protect traditional harvesting and other areas (for example, sacred sites); and
- (b) compensate those adversely affected by mining or drilling (for example, Aboriginal hunters, trappers and fishers).

2.4.55

Land use plans be developed in consultation with affected Aboriginal communities as follows:

- (a) Aboriginal communities receive intervener funding to carry out the consultation process;
- (b) intervener funding be delivered through a body at arm's length from the company and the respective provincial ministry responsible for the respective natural resource; and
- (c) funding for this body come from licence fees and from provincial or federal government departments responsible for the environment.

2.4.56

The provinces require that a compensation fund be set up and that contributions to it be part of licence fees. Alternatively, governments could consider this an allowable operating expense for corporate tax purposes.

2.4.57

The federal government work with the provinces and with Aboriginal communities to ensure that the steps we recommend are carried out. Federal participation could include cost-sharing arrangements with the provinces.

Cultural heritage

Recognition of Aboriginal ownership of sacred and secular heritage sites on Crown land would give Aboriginal people a powerful tool to monitor activities carried out on their traditional land-use areas. Such recognition would also enable Aboriginal people, should they so wish, to derive important economic benefits from tourism and related activities. Lack of certainty about the status of Aboriginal cultural sites continues to create problems for Aboriginal peoples, for state management agencies, and for third parties. For example, the occupation of Ontario's Ipperwash Provincial Park on Labour Day, 1995, was premised in part on assertions that the park contains sites sacred to local Ojibwa.

In the case of Aboriginal heritage sites already located on-reserve, it is clearly easier to institute protection policies. Dreamers' Rock, for example, is a votive site on the north shore of Lake Huron that is sacred to the nearby Whitefish River First Nation community and other Ojibwa. Although a provincial highway that is a popular tourist route runs through the reserve, provincial heritage policy requires tourists to obtain permission from the Whitefish River band office before visiting the site. As yet, however, the Whitefish River people do not follow the example of tribes in the American southwest, which charge fees for site visits and photography permits.

Internationally, Aboriginal title and jurisdiction over sacred and secular sites have been dealt with in various ways. In the United States, sacred sites on federal lands are protected through the *American Indian Religious Freedom Act* of 1978, which guarantees the right to "believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiian". The statute instructs federal agencies to inventory all sacred places on federal lands and draw up management policies to preserve the traditional religious practices and values associated with them.⁴²⁵ However, the law does not have an enforcement mechanism, and in most instances of conflict between sacred sites and development activities, tribes have been unsuccessful in attempts to invoke the statute. The Hopi and Navajo people, for example, were unsuccessful in blocking development of a ski resort at San Francisco Peaks, Arizona.⁴²⁶

In Australia, Aboriginal people are the legal owners of the Kakadu and Uluru-Kata Tjuta national parks in the Northern Territory. The latter park includes the internationally renowned Aboriginal sacred site, Ayers Rock. The parks are leased back to the Australian federal government and managed jointly by Aboriginal people and the Australian national parks and wildlife service. What made recognition of Aboriginal ownership possible was the Commonwealth government's decision in 1978 to amend the law to allow the Crown to lease parklands, rather than continue to own them outright.⁴²⁷

There have also been recent examples of Aboriginal involvement in heritage sites on Crown land. One of the most prominent is Head-Smashed-In Buffalo Jump in the Porcupine Hills of

425 Pub. L. No. 95-341, Senate Joint Resolution 102, 42 U.S.C. par.1996, 11 August 1978.

426 J. Donald Hughes and Jim Swan, "How Much of the Earth is Sacred Space?", *Environmental Review* 10/4 (1986), pp. 247-259.

427 J. Birckhead, T. De Lacy, and L. Smith, eds., *Aboriginal Involvement in Parks and Protected Areas*, Australian Institute of Aboriginal and Torres Strait Islander Studies Report Series (Canberra: Aboriginal Studies Press, 1992).

southwestern Alberta, where the government of Alberta constructed and operates an interpretive centre with the active participation of members of the nearby Blood and Peigan nations, part of the Blackfoot Confederacy. Now a UNESCO World Heritage Site, it was used by Aboriginal people for thousands of years. Although there were a number of controversies during development of the project in the early 1980s (involving such important matters as the proper display of medicine bundles and other sacred artifacts), the result has been a significant degree of Aboriginal involvement. Since the opening of the interpretive centre, all guides and supervisors have been Blackfoot people. Moreover, the centre has become a focus of Aboriginal culture, with Blackfoot weddings, funerals and other ceremonies being held there along with an annual pow-wow. Despite these good relations, the Peigan and Blood nations continue to have concerns about the fact that the province, not the Blackfoot Confederacy, retains ownership of the site.⁴²⁸

The Yukon Umbrella Final Agreement includes a number of specific measures to protect Aboriginal sacred and secular sites on Crown land. So do most of the recent comprehensive claims settlements. The Yukon agreement calls for the creation of a Yukon heritage resources board, with equal representation from the Council for Yukon Indians and government appointees, to advise on the management of movable heritage resources and heritage sites throughout the Yukon. Furthermore, each Yukon First Nation will own heritage resources on its settlement lands and within its traditional land-use area.⁴²⁹

These modern treaties in the North also provide for setting apart new national and territorial parks, to which Aboriginal people will have guaranteed rights of access, along with economic benefits and a role in management. Aboriginal people will not be the recognized owners of these new parks. The only instance to date in which Canada has agreed to discuss issues of park ownership is in British Columbia, where the federal government and the Haida are sharing jurisdiction over the Gwaii Haanas/South Moresby National Park reserve. The parties have, in effect, agreed to disagree about title in order to allow the park to be set aside as a protected area.

Claims settlements and recent heritage legislation in many jurisdictions, therefore, are making it somewhat easier for Aboriginal people to protect their sacred and secular sites on Crown land. Such protection is in keeping with guidelines issued by the international committee on monuments and sites, which place a priority on recognizing Aboriginal interests. Aboriginal heritage resources can be grouped into three broad categories, which have varying degrees of protection in current policies and legislation:

- immovable heritage such as burial sites, village sites or campsites, sacred landscapes or ritual and ceremonial sites;
- movable heritage such as archaeological artifacts, video, film, photographs, sound recordings and field notes; and
- intangible heritage such as oral history and legends, toponymy (place names), personal or spiritual relationship with the land and sites.

We are concerned mainly with the first category, which involves the physical location of Aboriginal sites on Crown land — although the third is also relevant to the protection of Aboriginal sites.

428 Jack Brink, “Aboriginal People & the Development of Head-Smashed-In Buffalo Jump”, paper presented at Focusing Our Resources, a national forum on resource development and management on the traditional First Nations territories (Calgary, 23-26 April 1995).

429 *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (Ottawa: Supply and Services, 1993).

Issues of archaeological, ethnological, ethnographic or cultural research — and the ownership of the resulting research materials — are sensitive matters to Aboriginal peoples and the academic community and must be dealt with appropriately. At the beginning of the Commission's mandate, we developed our own ethical guidelines for research, which we offer as a potential model for drafting future policy and legislation (see Volume 5, Appendix C).

Recommendations

The Commission recommends that

2.4.58

Federal, provincial and territorial governments enact legislation to establish a process aimed at recognizing

- (a) Aboriginal peoples as the owners of cultural sites, archaeological resources, religious and spiritual objects, and sacred and burial sites located within their traditional territories;
- (b) Aboriginal people as having sole jurisdiction over sacred, ceremonial, spiritual and burial sites within their traditional territories, whether these sites are located on unoccupied Crown land or on occupied Crown lands (such as on lands under forest tenure or parks);
- (c) Aboriginal people as having at least shared jurisdiction over all other sites (such as historical camps or villages, fur trade posts or fishing stations); and
- (d) Aboriginal people as being entitled to issue permits and levy (or share in) the fees charged for access to, or use of, such sites.

2.4.59

In the case of heritage sites located on private land, the federal government negotiate with landowners to acknowledge Aboriginal jurisdiction and rights of access or to purchase these sites if there is a willing seller, so that they can be turned over to the appropriate Aboriginal government.

2.4.60

The federal government amend the *National Parks Act* to permit traditional Aboriginal activity in national parks and, where appropriate, Aboriginal ownership of national parks, on the Australian model. Parks could then be leased back to the Crown and managed jointly by federal and Aboriginal governments.

2.4.61

Federal, provincial and territorial governments develop legislation and policies to protect and manage Aboriginal heritage resources in accordance with criteria set by negotiation with Aboriginal governments. These might include

- (a) detailed heritage impact assessment and protection guidelines for operations involving such activities as forestry, mining, aggregate extraction, road building, tourism and recreation;

(b) funding and undertaking heritage resource inventories, documentation and related research, and archaeological and other scientific survey, in partnership with Aboriginal governments; and

(c) carrying out salvage excavation or mitigative measures at sites threatened by development, looting, resource extraction or natural causes such as erosion, and providing for Aboriginal monitoring of archaeological excavations.

Fish and wildlife

Treaty and Aboriginal hunting, fishing and trapping rights are constitutionally entrenched. Moreover, the courts now recognize that Aboriginal people are entitled to priority of access to fish and wildlife on unoccupied Crown lands and waters for domestic consumption and ceremonial use. However, Aboriginal rights to commercial harvesting have not been recognized, even though Aboriginal harvesters traditionally predominated in some sectors (such as wild rice). Indeed, for much of the past century, Aboriginal people have had difficulty gaining access to the tourism sector and to the economic benefits associated with fish and wildlife harvesting.

Governments have honoured Aboriginal harvesting rights most often in the breach. It is clear from our hearings that the continued exercise of those rights remains deeply controversial in certain sectors of society, such as recreational hunters and anglers and commercial fishers. At the moment, Aboriginal people continue to end up in court because governments continue to lay charges against them for violations of provincial or federal regulations. The *Sparrow* and *Simon* decisions had their origins in such charges.

The trend continues. As of 1995, there were 12 cases involving Aboriginal people before the Supreme Court of Canada; eight of these involved issues related to the exercise of treaty and Aboriginal harvesting rights.⁴³⁰ Although Aboriginal people are acquitted more often now than was once the case, there is as yet no body with the clear authority to declare the scope and incidence of their rights to harvest.

Over the past two decades, some provinces have attempted to acknowledge Aboriginal concerns. In 1979, for example, Ontario introduced a leniency policy to guide its conservation officers in enforcing fish and wildlife laws; for the first time in almost a century, the province stopped prosecuting status Indian people for hunting and fishing on unoccupied Crown lands. In 1991, as a reflection of the *Sparrow* decision, that policy was replaced by interim enforcement guidelines, which made Aboriginal priority rights explicit. The guidelines required that potential charges against Aboriginal people be prescreened by senior officials of the ministry of natural resources. Similar guidelines were put in place at the federal level and in some other provinces.⁴³¹

While these kinds of measures are a worthwhile innovation, they are not based on negotiations with Aboriginal peoples. Provincial officials develop policy and interpret the guidelines based on their own (or legal counsel's) understanding of treaty and Aboriginal rights. If individual harvesters are considered to be in violation, they continue to be charged. Since *Sparrow*, many charges have tended to fall within what enforcement officers consider grey areas — such as hunting or fishing in a different treaty area, fishing during spawning periods, or selling some of the catch.

430 Eugene Meehan and Elizabeth Stewart, "Aboriginal Law in the Supreme Court of Canada æ 'The Year of the Indian'", paper presented to the Canadian Bar Association, Aboriginal Law Section, 29 November 1994.

431 See, for example, "Interim Guidelines on Aboriginal Use of Fish and Wildlife", discussion paper, Native Affairs Branch, B.C. Ministry of Environment, Lands and Parks (March 1993).

In most instances, the continuing prosecution of Aboriginal harvesters is not only socially harmful but costly to the justice system. At the same time, these prosecutions are not resolving the profound differences between Aboriginal peoples on the one hand and governments and the public on the other, over the content of treaty and Aboriginal rights and over general issues of fish and wildlife management and harvesting. These issues are, in effect, another category of land claims.

We recommended that unresolved harvesting issues be matters for negotiation under the new processes of treaty making, implementation and renewal. But there is also an immediate need for better guidelines on Aboriginal harvesting, ones that are developed co-operatively rather than imposed unilaterally.

General regulatory issues

Some of the difficulties between Aboriginal people and members of the public — including officials of resource management agencies — relate to cultural misunderstanding about matters such as harvesting practices. Aboriginal fishers, for example, were using fish traps, weirs, night lights and spears long before the arrival of Europeans on this continent. If the primary goal is to obtain food with the least amount of effort, then these are all sensible practices — though they remain offensive to recreational anglers for whom the thrill of the catch is part of the sport. There have been various attempts to reconcile these views. In Ontario, for example, Aboriginal communities and political organizations have been providing cultural awareness instruction for government officials responsible for fish and wildlife management. In other jurisdictions, including the Northwest Territories, governments are attempting to incorporate traditional ecological knowledge into their management systems.⁴³²

These cultural differences are coupled with another difficulty: the long-standing ethos in resource management that perpetuates distinctions between users and managers. These distinctions become particularly problematic when the users are Aboriginal and the managers predominantly non-Aboriginal. The frequent result is a system of wildlife ‘police’ who distrust the harvesters they are regulating. One solution is to increase the number of Aboriginal managers, either by incorporating Aboriginal people into general government regimes for fish and wildlife management, or by establishing co-management regimes. In areas where Aboriginal people form a majority of the population (Manitoba and Saskatchewan north of the 55th parallel, Ontario north of 50) or are a sizeable minority (northwestern British Columbia), there is no reason that many (even most) resource managers should not be Aboriginal. Since Canada already exercises jurisdiction over migratory birds and fisheries (with inland fisheries being administered by the provinces under federal law), the federal government has a direct role in facilitating greater Aboriginal involvement in fish and wildlife management.

The *Sparrow* decision established an order of priority for harvesting allocations: once the interests of conservation are satisfied, Aboriginal subsistence needs have first priority. In 1991, the federal minister of fisheries advised his provincial and territorial counterparts that their regulations should be changed to reflect the *Sparrow* principles.⁴³³ To date, not all jurisdictions have done so.

432 Aalice Legat, ed., “Report of the Traditional Knowledge Working Group” (Yellowknife: Northwest Territories Department of Culture and Communications, 1991).

433 See, for example, letter from John C. Crosbie, federal minister of fisheries and oceans, 7 October 1991, to C.J. Wildman, Ontario minister of natural resources, and letters to other provinces (Ottawa: Department of Fisheries and Oceans, Native Affairs Division).

Until the 1920s, in Ontario and other provinces, Aboriginal people and settlers in remote districts were exempted from normal legislative provisions if they were hunting and fishing for food, an acknowledgement that wild game and fish formed an important part of their diet. Because of protests from recreational hunters and anglers, however, this privilege was subsequently removed from legislation. In their appearance before us, the Canadian Wildlife Federation recommended that the subsistence needs of non-Aboriginal people living in remote regions of Canada, such as Newfoundland outports and the northern interior of British Columbia, should be acknowledged in the Sparrow order of priorities.⁴³⁴ Commissioners believe that this kind of acknowledgement would promote social harmony.

Recommendation

The Commission recommends that

2.4.62

The principles enunciated in the *Sparrow* decision of the Supreme Court of Canada be implemented as follows:

- (a) provincial and territorial governments ensure that their regulatory and management regimes acknowledge the priority of Aboriginal subsistence harvesting;
- (b) for the purposes of the *Sparrow* priorities, the definition of ‘conservation’ not be established by government officials, but be negotiated with Aboriginal governments and incorporate respect for traditional ecological knowledge and Aboriginal principles of resource management; and
- (c) the subsistence needs of non-Aboriginal people living in remote regions of Canada (that is, long-standing residents of remote areas, not transients) be ranked next in the *Sparrow* order of priority after those of Aboriginal people and ahead of all commercial or recreational fish and wildlife harvesting.

Commercial fishing

Since 1994, there have been a number of incidents pitting angry commercial or recreational fishers against Aboriginal harvesters in such areas as the Fraser River of British Columbia and Ontario’s Bruce Peninsula. Government regulators are in a difficult situation because growing public consciousness of fisheries as a declining resource is putting pressure on them to limit all harvesters in the interests of conservation. These disputes are as much about allocation as they are about conservation, with each industry sector arguing for limits on another. In the British Columbia salmon fishery, for example, the federal department of fisheries is attempting to balance the interests of the commercial salmon industry, tourist outfitters and sports anglers with the priority of access for Aboriginal harvesters enjoined by the Sparrow decision.

The *Sparrow* decision is silent on whether the Aboriginal priority of access applies to commercial fishing, although lower court decisions have upheld an Aboriginal commercial right.⁴³⁵ Given the historical importance of fisheries to Aboriginal economies, the Commission believes that Aboriginal

434 Canadian Wildlife Federation, “Aboriginal Use and Cooperative Management of Wildlife in Canada”, brief submitted to RCAP (1993).

435 See *R. v. Agawa*, [1988] 65 O.R. (2d) 505, 3 C.N.L.R. 73 (Ont. C.A.); and *R. v. Bombay*, [1993] 1 C.N.L.R. 92, 61 B.A.C. 312 (Ont. C.A.).

peoples are entitled to a reasonable share of commercial fishing allocations. This would constitute at least partial restitution for the historical inequity in such allocations. The exact size of fishing quotas should be negotiated, rather than imposed unilaterally by government, and they should be based on measurable criteria, including the current and future economic needs of Aboriginal communities. The *Sparrow* decision provides a useful model for establishing the relative order of priority in allocation. The Commission encourages other provinces to follow the example set by Ontario and British Columbia in purchasing commercial fishing quotas and turning them over to Aboriginal people.

Aboriginal people should also play an active role in fisheries jurisdiction and management. Under the 1985 Pacific Salmon Treaty between Canada and the United States, for example, the countries established a joint Pacific Salmon Commission to monitor and enforce the treaty. But the two countries' representation on the commission is structured differently. The U.S. part of the commission has four members — one representative each for the United States, the state of Alaska, the states of Washington and Oregon, and the Indian tribes in Washington, Oregon and Idaho who have treaty fishing rights. Canada's side has four full members and four alternates (who come from the federal department of fisheries and various commercial and recreational fishing interests), including one Aboriginal member.⁴³⁶ Unlike the Canadian part of the commission, the American side has to achieve consensus among its four commissioners before reaching any agreements with Canadian commissioners. The U.S. Aboriginal commissioner, like his American colleagues, therefore, has a de facto veto and thus more influence than the Canadian Aboriginal commissioner. Given that the fishing rights of the British Columbia First Nations are constitutionally guaranteed, the federal government should at least ensure guaranteed and effective Aboriginal representation on Canada's side of the commission.

One of the difficulties in determining quotas for each sector of the fishing industry is the difficulty of establishing adequate baseline data. The Commission believes that Canada and the provinces should improve their method of keeping statistics on the non-Aboriginal harvest — particularly recreational angling. Sports fishing is clearly a growing sector of the industry; moreover, it is being actively encouraged by many jurisdictions. As a consequence of their rising membership, many sports fishing organizations have been calling for major cutbacks in commercial fishing and the Aboriginal harvest. Yet there is still no clear idea of the relative impact of sports angling — including the effect of popular catch and release programs — on overall fish populations, compared with the impact of commercial and Aboriginal fishing. Some scientists have suggested that catch and release programs are stressful to fish and interfere with their reproduction.

We also encourage federal and provincial governments to carry out joint studies with Aboriginal people to determine the actual size of the Aboriginal harvest and the relative impact of Aboriginal harvesting methods (such as the use of spears or gill nets) on stocks. Joint data collection and interpretation with respect to stock assessments and harvest data are essential to the co-operative approach, which is the precursor to sound co-management.

Public education should also form a major component of any new fisheries strategy. Joint strategies to inform the public about Aboriginal perspectives on fishing might help to resolve differences and overcome fears that Aboriginal entry into the fishery will result in overfishing, loss of control or loss of property. One useful model is that of the Shuswap Nation in the Kamloops region of British Columbia, which has sought local non-Aboriginal involvement in fisheries management issues and

436 Department of Fisheries and Oceans Canada, *Treaty between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon* (Ottawa: 28 January 1985).

created much common ground in the process. In a study of the Shusway example undertaken for the Commission, the author points to these efforts as a key ingredient in success:

The band's experience with work parties in 1988 and 1989, when both local and Kamloops-based non-natives turned out to spend a day working alongside band members on habitat restoration projects, made it easier to reach out to local residents with some confidence in the response. Especially important was the positive energy generated by the delight in discovering at the work parties that people shared a strong common interest in restoring the fish, and in minimizing impacts on fish of other activities.⁴³⁷

Recommendations

The Commission recommends that

2.4.63

All provinces follow the example set by Canada and certain provinces (for example, Ontario and British Columbia) in buying up and turning over commercial fishing quotas to Aboriginal people. This would constitute partial restitution for historical inequities in commercial allocations.

2.4.64

The size of Aboriginal commercial fishing allocations be based on measurable criteria that

- (a) are developed by negotiation rather than developed and imposed unilaterally by government;
- (b) are not based, for example, on a community's aggregate subsistence needs alone; and
- (c) recognize the fact that resources are essential for building Aboriginal economies and that Aboriginal people must be able to make a profit from their commercial fisheries.

2.4.65

Canada and the provinces apply the priorities set out in the Sparrow decision to Aboriginal commercial fisheries so that these fisheries in times of scarcity

- (a) have greater priority than non-Aboriginal commercial interests and sport fishing; and
- (b) remain ranked below conservation and Aboriginal (and, in remote areas, non-Aboriginal) domestic food fishing.

2.4.66

The federal government ensure effective Aboriginal representation on the Canadian commission set up under the 1985 Pacific Salmon Treaty with the United States.

437 Evelyn Pinkerton, Fred Fortier, and Dave Moore, "A Model for First Nation Leadership in Multi-Party Stewardship of Watersheds and their Fisheries", research study prepared for RCAP (1993).

2.4.67

To establish adequate baseline data for assessing the relative impact of the Aboriginal and non-Aboriginal harvest, and to assist in determining quotas to be allocated in accordance with the principles set out in the Sparrow decision, federal and provincial governments improve their data gathering on the non-Aboriginal harvest of fish and wildlife.

2.4.68

Federal and provincial governments carry out joint studies with Aboriginal people to determine the size of the Aboriginal harvest and the respective effects of Aboriginal and non-Aboriginal harvesting methods on stocks.

2.4.69

Public education form a major component of government fisheries policy. This will require joint strategies to inform the public about Aboriginal perspectives on fishing, to resolve differences and to overcome fears that Aboriginal entry into fisheries will mean overfishing, loss of control, or loss of property.

Hunting

As we have seen, many Aboriginal people continue to be prosecuted for violating provincial and territorial fish and game laws. An increasingly common practice in recent years has been to charge Aboriginal people with hunting (or fishing) outside their own treaty area — or outside their province or territory of residence. The practice varies by region. For example, Quebec, New Brunswick and Nova Scotia will prosecute non-resident Mi'kmaq or Maliseet harvesters found on the wrong side of an interprovincial boundary. Ontario will prosecute Aboriginal people from Quebec or Manitoba who cross the provincial boundary to hunt unless they have a treaty right to do so. Within the province, Ontario will charge a Treaty 3 or Robinson treaty beneficiary who hunts in Treaty 9 territory, and vice versa.

In the west, by contrast, the natural resource transfer agreements state that treaty beneficiaries resident in each of the prairie provinces can hunt anywhere in their own province regardless of their treaty.⁴³⁸ Thus, a Treaty 4 beneficiary from southern Saskatchewan will not be prosecuted for hunting in Treaty 10 territory in the northern part of that province. However, this provision is not interpreted as applying across provincial or territorial boundaries.

Several interrelated issues are involved. One is the poor fit between the boundaries of treaties and provinces. Most of the numbered treaties were signed before current provincial and territorial boundaries in the west and north were set. Another important issue is the extent of the territory traditionally used and occupied by Aboriginal nations, which can easily span several provincial boundaries. As can be seen in Figure 4.4, for example, the traditional territories of Dene Th'a, who reside mostly in northwestern Alberta, cover portions of British Columbia and the Northwest Territories as well. Moreover, the boundaries of traditional territories do not always conform to those of treaties. This is because the federal government, not Aboriginal people, drew up the metes and bounds descriptions contained in the treaty texts. As a prominent example, most of the lands traditionally used and occupied by the Cold Lake Cree, whose reserves in northeastern Alberta were

438 *An Act respecting the transfer of the Natural Resources of Alberta, 1930* (Dominion of Canada), S.C. 1930, 20 & 21 Geo. V, c. 3.

set apart under the terms of Treaty 6, are actually within the metes and bounds of Treaties 8 and 10 (as defined in the treaty texts). Moreover, a portion of their traditional area lies in the province of Saskatchewan.⁴³⁹

In general, provincial regulatory agencies assume that provincial boundaries prevail over treaty boundaries and that the latter prevail over the boundaries of traditional territories (if boundaries of traditional territories are acknowledged at all). For Aboriginal people, this order of priorities is the reverse of what it should be. Treaty nations believe that the treaties established a relationship with the Crown that was to apply throughout their traditional lands, not some arbitrarily demarcated portion, and they argue that the treaties were intended to guarantee their harvesting rights, not to limit them geographically. Relations within and between Aboriginal communities are founded on kinship; these family ties are reinforced in turn by activities such as hunting, fishing and sharing. This means that Aboriginal harvesters will range throughout the traditional territories of their own nations and, depending on their family connections, across the territories of other nations as well. But because they continue to face prosecution for crossing treaty or provincial boundaries, there is no certainty about the geographic extent of treaty and Aboriginal harvesting rights.

One important consequence of identifying the nation as the proper vehicle for Aboriginal self-determination is that treaty and Aboriginal harvesting rights become collective, not individual. We believe, therefore, that individual harvesters must exercise their treaty and Aboriginal rights with the knowledge and consent of their own nation, or of the nation whose traditional territories they are on.

We expect that the processes of treaty making and treaty implementation and renewal will resolve such differences and provide the necessary level of certainty for Aboriginal people and government regulators alike. But until such processes are complete, we encourage provincial and territorial governments to make every effort to recognize Aboriginal harvesting rights throughout the full extent of traditional territories.

The increasing frequency of charges against Aboriginal people for crossing provincial and treaty boundaries appears to be linked to a general rise in recreational hunting. Many areas of the provinces, particularly those in range of major urban centres like Montreal, Toronto, Winnipeg and Edmonton, are under considerable hunting pressure — although this is truer of big game species than it is of small game or waterfowl. For example, while many jurisdictions have been increasing their quota for deer (whose populations are exploding in some rural areas), a steady rise in demand is forcing governments to limit licences for moose, caribou and elk as a conservation measure. In Ontario and Quebec, the most populous provinces, moose tags are now issued by lottery. In Ontario, for instance, hunters must buy a \$31 moose licence to enter the tag lottery, and there is no refund for the losers. In 1995, a record 106,018 hunters applied for 24,322 available tags, which meant that three out of four hunters were unsuccessful.⁴⁴⁰

Because the Ontario and Quebec lottery systems are open to all provincial residents, someone from the heavily populated south who wants to hunt in prime moose country has as good a chance of securing a tag as any local resident. This not only increases the likelihood of illegal hunting but also fosters resentment toward local Aboriginal people, whose hunting rights are perceived as giving them an unfair advantage.⁴⁴¹

439 Indian Claims Commission, “Cold Lake and Canoe Lake Inquiries”, *ICCP*, Volume 1 (cited in note 255), pp. 13-15.

440 Statistics provided by the Ontario Ministry of Natural Resources, Sault Ste Marie.

In areas under significant hunting pressure, there must be more appropriate systems of allocation. As with fishing, we encourage the provinces and territories to improve their overall compilation of hunting statistics and to carry out joint studies with Aboriginal governments to determine the actual size of the Aboriginal harvest. This would provide a solid basis for negotiations to establish an appropriate Aboriginal allocation, one that is based on the *Sparrow* principle of Aboriginal priority for subsistence purposes.

In addition, we urge the provinces and territories to favour non-Aboriginal hunters living in rural and northern areas in any revised allocation systems. This might include such measures as opening the big game season a week earlier for local residents or, in the case of Ontario, establishing a special tag lottery for bona fide northern residents. We note that in district 76 in northern Saskatchewan the provincial government has already established a separate hunting season for local non-Aboriginal residents.

Recommendation

The Commission recommends that

2.4.70

Provincial and territorial governments take the following action with respect to hunting:

- (a) acknowledge that treaty harvesting rights apply throughout the entire area covered by treaty, even if that area includes more than one province or territory;
- (b) leave it to Aboriginal governments to work out the kinds of reciprocal arrangements necessary for Aboriginal harvesting across treaty boundaries; and
- (c) introduce specific big game quotas or seasons for local non-Aboriginal residents in the mid- and far north.

Tourism

Particularly in the mid- and far north, opportunities in the tourism sector show great potential for increasing Aboriginal self-sufficiency. But, as with the other resource sectors, any improvement in Aboriginal participation in the tourist industry will also require changes in government allocation policies.

This is especially the case with the awarding of tourist outfitting licences and leases. There are a number of ways to redress the balance in favour of greater Aboriginal participation. Some of the comprehensive claims agreements (such as the James Bay and Northern Quebec Agreement) give Aboriginal people the right of first refusal on existing tourist outfitting leases or licences that are being given up, as well as priority access to new areas. Exclusive allocations are another possibility. For a number of years, the Ontario government has zoned the area north of the 7th and 11th baselines (the provincial far north) for Aboriginal operations only. We encourage other provinces to consider such arrangements.

441 In the context of negotiations concerning the application of the Murray Treaty, the government of Quebec and the Huron-Wendat Nation signed a specific agreement, on 21 February 1995, concerning moose hunting by members of the Huron-Wendat Nation during the 1995 hunting season. The agreement allowed nation members and their families to hunt moose during the week before the season opened to the general public in a territory made up of 48 controlled hunting zones in the Laurentian wildlife preserve.

We acknowledge that attempts over the past 25 years to involve Aboriginal people in outfitting opportunities have not always been successful. This was the case, for example, with certain fishing and goose-hunting camps on the west coast of James Bay. This reflects a need for training and management programs. We encourage provincial and territorial governments to facilitate joint management or other transitional agreements between Aboriginal entrepreneurs or Aboriginal governments and non-Aboriginal outfitters who wish to sell their facilities.

The failure of some attempts to involve Aboriginal people in the tourism sector may also reflect a clash of cultural values. There has been a tendency for governments (and industry associations) to promote a single model in the outfitting sector, namely fly-in hunting and fishing camps or lodges. While these have enjoyed great success, the rise of ecotourism and other forms of wilderness adventure are changing the nature of back-country tourism. Commissioners believe that governments should encourage Aboriginal people to develop their own kinds of tourism ventures that reflect who they are and where they live.

Recommendation

The Commission recommends that

2.4.71

Provincial and territorial governments take the following action with respect to outfitting:

- (a) increase their allocation of tourist outfitters' licences or leases to Aboriginal people, for example,
 - (i) by including exclusive allocations in certain geographical areas, as Ontario now does north of the 50th parallel;
 - (ii) by giving priority of access for a defined period to all new licences; and
 - (iii) by giving Aboriginal people the right of first refusal on licences or leases that are being given up.
- (b) not impose one particular style of outfitting business (lodge-based fly-in hunting and fishing) as the only model; and
- (c) encourage Aboriginal people to develop outfitting businesses based on their own cultural values.

Trapping

Until the First World War, Aboriginal people were the principal trappers of wild fur in Canada. But a rapid influx of non-Aboriginal trappers in the immediate post-war years, coupled with increasing provincial and territorial regulation of all harvesting activities over the following decades, eventually forced many Aboriginal people out of trapping altogether, particularly in rural southern areas of the provinces and in the mid-north. By the mid-1960s, in the Chapleau district of northern Ontario, for example, the provincial government was bringing in Cree trappers from eastern James Bay to deal with an over-population of beaver and other furbearers because local Ojibwa no longer trapped.

In recent years, Aboriginal people who still trap have faced new threats from animal rights activists. The campaign against the seal hunt had a devastating impact on the economy of many Inuit

communities (as well as on rural Newfoundlanders),⁴⁴² and activists have maintained their lobbying efforts in Europe and elsewhere to ban the importation or wearing of wild fur. Nevertheless, new markets have emerged in Asia, fur prices have risen, and the trapping industry is likely to survive for the foreseeable future, continuing to provide an important part of the livelihood of Aboriginal communities.

In northern Quebec, the beaver preserves created in the 1920s and '30s — where only Aboriginal people can trap — continue to exist. During our hearings, the Quebec trappers' federation urged that the preserves in more southerly areas (such as La Vérendrye) be opened to non-Aboriginal trappers, on the grounds that many Aboriginal people in such areas no longer trap wild fur.⁴⁴³ Rather than opening the preserves to others — particularly given the history of Aboriginal exclusion from traplines in so many of them — we believe that it would make more sense to work with Aboriginal governments in encouraging a return to land-based activities such as trapping. Communities such as Waswanipi in northern Quebec are already attempting to do so. In many Aboriginal communities, there is still a sufficient reservoir of people with trapping skills who can assist in culturally appropriate training for younger people.

While the Quebec preserves are zoned exclusively for Aboriginal people, the people themselves do not develop trapping regulations and policies. That remains the prerogative of provincial wildlife officials. Indeed, this is true for all parts of Canada — except those covered by co-management agreements under recent comprehensive claims settlements. The common experience for many Aboriginal trappers, even today, is that the rules governing trapping areas, seasons and quotas are developed without their input and explained to them by non-Aboriginal government employees.

Commissioners believe that provincial and territorial governments should involve Aboriginal people and Aboriginal governments in the development and implementation of trapline regulations. As well, where Aboriginal governments are able and willing to take over trapline regulation and management within their traditional territories, we urge the provinces and territories to assist them in doing so. This would include adequate levels of funding.

Recommendation

The Commission recommends that

2.4.72

By agreement, and subject to local capacity, provincial and territorial governments devolve trapline management to Aboriginal governments.

2.4.73

In Quebec, where exclusive Aboriginal trapping preserves have existed for many decades, the provincial government devolve trapline management of these territories to Aboriginal governments and share overall management responsibilities with them.

442 George Wenzel, *Animal Rights, Human Rights: Ecology, Economy and Ideology in the Canadian Arctic* (Toronto: University of Toronto Press, 1991).

443 Rivard Larouche, RCAP transcripts, Montreal, 26 May 1993.

Water resources

Aboriginal people have been seeking to protect themselves from actual or potential adverse effects of hydroelectricity generation on their traditional territories, but Aboriginal interests in water resources are much broader. They include domestic use and water-related activities such as fishing, trapping, wild rice harvesting and farming. We noted, for example, how provincial control over water privileges severely limited Aboriginal participation in the British Columbia fruit growing industry.

As a consequence, Aboriginal people have expressed considerable interest in participating in the management and protection of watersheds with provincial or federal governments and in exercising their riparian rights — including the power to restrain upstream activities that will adversely affect the quality or quantity of water flows. They have also sought to receive benefits from the development of water resources, such as a share of water use rents, royalties and taxes paid by utilities to provincial governments from existing and proposed hydroelectric developments.

We heard from a number of Aboriginal organizations and, on one occasion, a former vice-president of a Crown utility (Ontario Hydro) who argued in favour of the last point:

But it also seems that Aboriginal people should have some equitable share of the benefits from the development of these watersheds. There are two sub-issues: one is, what is an equitable share; and the other is, how should it be distributed among First Nations along the watershed.

Currently, Ontario Hydro pays the Ontario government a tax on water use, water use royalties, which exceeds \$100 million annually, and none of this goes directly to First Nations who are impacted by those developments, and they have been asking for a share in the benefits.

Sam Horton
Toronto, Ontario
3 June 1993

Among the barriers to be overcome is that water rights in many jurisdictions are already tied up in long-term leases to public utilities or private individuals and corporations. Nevertheless, there have been some interesting developments in jurisdictions across the country, and these form the basis for our recommendations.

Royalties

In a recent agreement between Ontario Hydro and Wabaseemoong Independent Nations in northwestern Ontario, the parties agreed that Ontario Hydro will provide Wabaseemoong with an annual payment, pending the completion of an agreement to share the benefits of the hydroelectric developments in Wabaseemoong's traditional territory that have had negative effects on the community. Once an agreement is in effect, it will replace the annual payment. By extension, the agreement will require Ontario Hydro to undertake discussions with the provincial government to redirect rents normally paid to the government to Wabaseemoong.

Non-utility generation

In recent years, a number of provincial Crown hydroelectric utilities (Ontario, British Columbia, Manitoba, Quebec) have actively encouraged non-utility generation within their jurisdictions.⁴⁴⁴ Under these arrangements, private hydroelectric companies acquire the water rights to develop a site and, subsequent to the development, sell all or a portion of the hydroelectricity back to the Crown utility for distribution on the grid.

These projects generally involve sites of less than 25 megawatts. Such small-scale developments do not usually require the reservoirs and impoundment necessary for larger projects and therefore do not have devastating effects of the kind that have sparked Aboriginal protests in northern Manitoba and Quebec. Smaller projects therefore offer great potential for Aboriginal economic development, particularly in northern areas. In northeastern Ontario, for example, a private developer has recently reached an agreement with the Constance Lake First Nation community that would see it participate in the development of a small-scale hydro project on the nearby Nagagami and Shekak Rivers. The agreement includes a share in royalties, participation in construction, and training and management programs for First Nation members.

Shared management

Of all the natural resources, water is perhaps the best suited to shared management because, even under western property law, no one can ‘own’ water. Instead, people and jurisdictions have specific rights of use.⁴⁴⁵ The management and administration of water resources falls under provincial jurisdiction with respect to domestic and industrial water supply, pollution abatement, power development, irrigation, reclamation and recreational uses. However, water matters of national concern, such as navigation, fisheries, agriculture, international waters and the administration of waters on Aboriginal lands and in national parks, are within federal jurisdiction. Where water bodies, rivers and waterways flow through a number of jurisdictions, joint regulation and administration are required by federal and provincial government arrangements, and in the case of water resources crossing the international border, through such arrangements as the International Joint Commission.

There are some precedents for joint water management arrangements between Aboriginal and non-Aboriginal governments. One is provided by the Fort Peck tribe in Montana (see box). The most recent example is the Nunavut Water Board, created in 1993 under the terms of the agreement between Canada and the Inuit of Nunavut.

The board has responsibilities and powers over the regulation, use and management of water in the Nunavut settlement area, “on a basis at least equivalent to the powers and responsibilities currently held by the Northwest Territories Water Board under the *Northern Inland Waters Act*”. The board is to be made up of an equal number of representatives from the territorial government, the federal government and the designated Inuit organization, with the chairperson appointed by the federal government based on consultation with the other members. All water applications will be approved through the board. In addition to water management duties, the board will play a role in the development and regulation of land use plans and environmental assessment pertaining to water. It is also expected that where a drainage basin is shared by the settlement area and another

444 In June 1995, Hydro Quebec put a moratorium on all such contracts.

445 Note that Article 913 of the new Civil Code of Quebec maintains this general principle, but creates an exception in its second paragraph, which reads as follows: “However, water and air not intended for public utility may be appropriated if collected and placed in receptacles”.

jurisdiction, agreements pertaining to the use and management of such drainage basins will be negotiated.

The Nunavut Water Board is perhaps the most important management model to date. Inuit rights to water use, management and administration are now recognized and have been integrated into the joint management regimes. The board also contemplates a cohesive and co-ordinated approach to water management and administration in the settlement area by way of the interface between the board and land use planning and environmental assessment provisions. The Nunavut model could be adopted elsewhere in Canada.

Joint Water Management in Montana

Because of continuing litigation over water rights between non-Aboriginal and Aboriginal users, the state of Montana established the Reserved Water Rights Compact Commission in 1979 in an attempt to deal with such disputes in a comprehensive manner. The commission was empowered to negotiate with Indian tribes. In 1985, an agreement was reached with the Assiniboine and Sioux tribes of the Fort Peck Indian Reservation that quantified the tribal water right for the reservation. The tribal water right is administered by the tribes, and the state administers all rights to water that are not part of the tribal water right.

To adjudicate disputes arising out of the dual administration, a joint water board — the Fort Peck-Montana Compact Board — was set up. Its mandate is to resolve controversies between the state and the tribes (and those claiming through them) regarding the use of water on the reservation. The board consists of a representative of the state, a representative of the tribes and a third member appointed by agreement or, failing agreement, by the chief judge of the United States District Court for Montana.

Recommendations

The Commission recommends that

2.4.74

Unless already dealt with in a comprehensive land claims agreement, revenues from commercial water developments (hydroelectric dams and commercial irrigation projects) that already exist and operate within the traditional land use areas of Aboriginal communities be directed to the communities affected as follows:

- (a) they receive a continuous portion of the revenues derived from the development for the life of the project; and
- (b) the amount of revenues be the subject of negotiations between the Aboriginal community(ies) and either the hydroelectric utility or the province.

2.4.75

If potential hydroelectric development sites exist within the traditional territory(ies) of the Aboriginal community(ies), the community have the right of first refusal to acquire the water rights for hydro development.

2.4.76

If a Crown utility or non-utility company already has the right to develop a hydro site within the traditional territory of an Aboriginal community, the provinces require these companies to develop

socio-economic agreements (training, employment, business contracts, joint venture, equity partnerships) with the affected Aboriginal community as part of their operating licence or procedures.

2.4.77

Federal and provincial governments revise their water management policy and legislation to accommodate Aboriginal participation in existing management processes as follows:

(a) the federal government amend the *Canada Water Act* to provide for guaranteed Aboriginal representation on existing interjurisdictional management boards (for example, the Lake of the Woods Control Board) and establish federal/provincial/Aboriginal arrangements where none currently exist; and

(b) provincial governments amend their water resource legislation to provide for Aboriginal participation in water resource planning and for the establishment of co-management boards on their traditional lands.

7.3 Co-management

The objective of co-management is to bring together the traditional Inuit system of knowledge and management with that of Canada's. We knew we could manage our resources in our own tradition, but we also recognized that the government's management system had something to offer. Our definition of co-management is the blending of these two systems of management in such a way that the advantages of both are optimized, and the domination of one over the other is avoided.⁴⁴⁶

Formal legal recognition of Aboriginal title and jurisdiction on Category II lands, along with delineation of the specific content of each party's rights and responsibilities, will be one important result of treaty processes. At the same time, there has been already a great deal of practical movement in this direction, chiefly under the rubric of co-management. Sometimes referred to as joint or shared stewardship, joint management, or partnerships, co-management has come to mean institutional arrangements whereby governments and Aboriginal entities (and sometimes other parties) enter into formal agreements specifying their respective rights, powers and obligations with reference to the management and allocation of resources in a particular area of Crown lands and waters.

Several current examples of co-management are described in Appendix 4B. Here we examine the strengths and weaknesses of these models, in the context of a tripartite land scheme. Because of the important lessons they offer for future treaty negotiations, we believe that further experiments of this type should be encouraged.

The origins of co-management

The term co-management has been used loosely to describe a variety of institutional arrangements encompassing consultation with members of the public on matters of land and resource allocation and management; the devolution of administrative, if not legislative, authority; and multi-party decision making. Co-management is thus essentially a form of power sharing, although the relative balance among parties, and the specifics of the implementing structures, can vary a great deal. As

446 Inuit Tapirisat of Canada, "Co-management in Inuit Comprehensive Claims Agreements", presentation to Standing Committee on Aboriginal Affairs and Northern Development (6 December 1994).

can be seen from Appendix 4B, most examples of co-management to date involve Aboriginal parties in a central role, either sharing power with governments exclusively or in conjunction with other interested parties. However, almost all arrangements envisage provincial, territorial or federal governments having the final say on matters of central concern.

What exists today, therefore, represents a compromise between the Aboriginal objective of self-determination and governments' objective of retaining management authority. This compromise is not one between parties of equal power, however, and Aboriginal peoples certainly regard co-management as an evolving institution.

Only 20 years ago, Canadian governments considered their authority in respect of lands and resources as unlimited, except by signed Indian treaties, and then only in the most minimal way. The origins of co-management, therefore, were in crisis and struggle. Governments at all levels have been forced to deal with Aboriginal land claims as well as with the adverse effects of resource development and the need to mitigate them. This was the case with the James Bay and Northern Quebec Agreement (and the related Northeastern Quebec Agreement), which came about because of Cree protests against the province's plans for large-scale hydroelectric development. Many people — not only Aboriginal people — have been raising concerns about real or perceived resource depletion and are demanding a share in management decisions. The result has been a partial convergence of goals between Aboriginal peoples and other Canadians, although governments have responded in several ways, depending on the array of interests ranged against them.

Co-management arrangements can be grouped into three broad categories:

- *claims-based co-management*, consisting of the land and environment regimes established under comprehensive claims agreements;
- *crisis-based co-management*, which is an ad hoc, and possibly temporary, policy response to crisis.

These two include the oldest and most widely known co-management arrangements, such as the Beverly-Qaminirjuak caribou management board, established in 1982, as well as more recent arrangements in political hotspots like Temagami (Ontario) and Clayoquot Sound.

- *community-based resource management*, which has the least Aboriginal involvement. It consists of government initiatives (such as Ontario's community forest program) to involve the inhabitants of resource-based communities in resource management planning.

See Appendix 4B for more details concerning these categories. These distinctions are artificial, and there is considerable overlap among them. For example, comprehensive claims negotiations — such as those leading to the James Bay and Northern Quebec Agreement — were themselves a response to crisis. Moreover, earlier crisis arrangements like the Beverly-Qaminirjuak board and 'pre-implementation' boards like the Denendeh conservation board set some important precedents and models for the claims-based regimes in the north as well as the ad hoc arrangements south of the 60th parallel. Nevertheless, the distinctions can serve as a valuable organizing tool because they highlight a number of different issues of title and jurisdiction.

Claims-based co-management

Comprehensive claims agreements are the products of negotiation between Aboriginal peoples and the government of Canada (and, in the case of Quebec, the province). Once enacted, they are

constitutionally protected. As can be seen in Appendix 4B, co-management under comprehensive claims agreements covers a broad range of land and resource matters. These include power sharing and co-operation as concerns fish and wildlife harvesting, the management of parks and conservation areas, environmental screening and review procedures, land use planning and water. We noted, for example, the usefulness of the Nunavut water management board as a precedent for Aboriginal involvement in other regions of Canada.

All the agreements in the territorial north provide for co-management of wildlife and fisheries. The James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement provide for consultative committees. In each case, a new structure is created: a board whose members are usually appointed in equal numbers by government and beneficiaries. The responsibilities and powers of the boards fall into two main spheres: allocation, in which they have actual decision-making power; and management, in which they have advisory roles. The general pattern is that allocation and licensing are delegated to the boards and the local harvester organizations, while management for conservation remains the prerogative of governments. There is substantial variation with respect to the latter, however. In the James Bay and Northern Quebec Agreement, the roles of the Cree and Inuit are more limited than under the Inuvialuit Final Agreement, where the co-management bodies are the effective determinants of conservation (although, as noted earlier, the harvester support program under the James Bay agreement is the envy of other northern harvesters).⁴⁴⁷

In the case of the Yukon Umbrella Final Agreement and the Nunavut Final Agreement, the management board may approve, among other things, management plans, the establishment of conservation areas and management zones, and the designation of rare, threatened, and endangered species. It may provide advice to management and other agencies with respect to wildlife and fisheries management and research, mitigation and compensation resulting from damage to wildlife habitat, and wildlife education.

In all co-management regimes under claims agreements, ultimate authority remains with the government. In the case of fish and wildlife matters, that authority resides with the federal departments of fisheries and oceans (for fisheries and marine mammals) and environment (for migratory birds), and the provincial and territorial wildlife management agencies (for terrestrial mammals). The respective ministers can adopt, reject or vary the recommendations of the boards, as well as appoint the government representatives on these boards. In practice, however, board decisions are seldom overridden if boards establish their competency, credibility and effectiveness among the parties.

One interesting feature of agreements in the territorial north is that the extent of co-management is the same as the settlement region itself. In the Inuvialuit and Nunavut final agreements, for example, the co-management regimes apply to both public and Inuit lands and operate quite apart from whatever protection Inuit as landowners wish to provide on their own lands. The co-management regimes are therefore instruments of regional or territorial government that apply to all persons, all tenure and permit holders, and all developers within the territory. The intent is that everything concerning fisheries, wildlife, land use and the environment be reviewed and consented to by the co-management bodies and, for this reason, by Inuit. The effect is that while Inuit have

447 See, for example, the following research studies prepared for RCAP: A. Penn, "The James Bay and Northern Quebec Agreement: Natural Resources, Public Lands, and the Implementation of a Native Land Claim Settlement" (1995); L. Brooke, "The James Bay and Northern Quebec Agreement: Experiences of the Nunavik Inuit with Wildlife Management" (1995); and Lindsay Staples, "The Inuvialuit Final Agreement: Implementing its Land, Resource and Environmental Regimes" (1995).

less than full control over these matters on their own lands, they retain some measure of control on all remaining public lands. Co-management differs in this respect from self-government, because the emphasis is on power *sharing*.

Category II (or shared) lands will be very large. Such an arrangement will undoubtedly work well in the new territory of Nunavut and in the residue of the Northwest Territories, where Aboriginal people will have a major (and in the case of Nunavut, dominating) role in public government. If regional public governments were established in the northern areas of provinces where Aboriginal peoples are a majority or significant minority of the population (as in Labrador and northwestern British Columbia), this kind of regime could be equally effective. But in more southerly areas, where Aboriginal people continue to be heavily outnumbered, Aboriginal parties to treaty negotiations are likely to resist limitations on their self-governing powers on their own settlement or Category I lands, in exchange for a greater share in power over non-settlement lands (Category II and Category III lands). Moreover, many non-Aboriginal people would object to the shared lands (Category II) being that large.

Nevertheless, some sign of the kinds of co-management arrangements that might be included in new or renewed treaties are apparent from the several models discussed in the next section.

Crisis-based co-management

In many cases, the most important models of co-management have come about as a result of crisis. This is not surprising. As we saw earlier, it is difficult to change established ways of doing things. It often takes the eruption of a major problem for governmental institutions to consider surrendering power. Many institutions of crisis-based co-management have been created over the past 15 years.

The Beverly-Qaminirjuaq caribou management board (see Appendix 4B) was created jointly by federal, provincial and territorial governments in response to a perceived crisis in caribou populations. Instead of stepping up enforcement against Aboriginal harvesters — which would have been the earlier response — the government brought the harvesters into the decision-making process. In addition to being species-specific, this board co-manages among three jurisdictions (though Aboriginal governments are not represented) and between users and managers. With the addition of Aboriginal governments, the caribou board would become a model of a special interjurisdictional co-management arrangement.

In essence, most of the other examples in Appendix 4B represent interim measures in advance of treaty negotiations. The Auyuittuq National Park reserve on Baffin Island was established originally in 1976. Because of opposition to its creation from two Inuit communities — in part because of their unresolved comprehensive claim — Inuit were given a role in management decisions, and the resulting committee has since evolved into a true co-management body. The park reserve was established without prejudice to the claim and, under the terms of the Tungavik Federation of Nunavut Agreement, will become a national park. But Inuit have secured continuing harvesting rights within its boundaries and guarantees of employment and other economic benefits.

A somewhat similar situation arose with Gwaii Haanas/South Moresby National Park reserve in British Columbia. Although the federal government accepted a Haida comprehensive claim in 1983, there were no interim measures to protect Haida lands during negotiations. Because of continued logging, the Haida decided to take matters into their own hands and created their own tribal park, designating Gwaii Haanas and Graham Island as protected areas. The ensuing publicity, along with protests from environmentalists, led the federal government to create the South Moresby park

reserve, with the consent of the province. While there is a shared management structure for the park, its exact legal status awaits the outcome of treaty negotiations. The Haida have stated that they will not surrender their jurisdiction as part of any eventual settlement.

This same combination — protests from Aboriginal people and environmentalists — led the Ontario government to create the Wendaban Stewardship Authority in 1990-91. In this case, the dispute was over logging of old growth pine and the unresolved claim of the Teme-Augama Anishinabai. As part of treaty negotiations, the authority was given full management responsibility for a 400 square kilometre area of northeastern Ontario, including much of the pine and a controversial forest access road. Ontario and the Teme-Augama Anishinabai each appointed six members of the board and agreed on a non-voting chair. In a neighbouring area of Quebec, the Barriere Lake Trilateral Agreement — which covers a much larger area of 10,000 square kilometres — came into existence at about the same time because of similar protests over logging and its impact on the local Algonquin community at Rapid Lake. Unlike the Wendaban authority, the Barriere Lake agreement includes the federal government as well as the province. While the agreement is not based on recognition of Algonquin title within the region, and is not tied directly to treaty negotiations, the Algonquins of Barriere Lake see it very much as an interim measure that will help protect their rights to lands and resources in advance of their eventual comprehensive claim.

The title of the 1994 Interim Measures Agreement Between British Columbia and the First Nations of Clayoquot Sound is self-explanatory. The result of an intense and highly public period of protest over clearcut logging in the Clayoquot Sound watershed of Vancouver Island, the agreement is tied specifically to the B.C. treaty process and is without prejudice to the eventual resolution of the claim of the Hawiik of the Tla-o-qui-aht First Nation community and the Ahousaht, Hesquiaht, Toquaht and Ucluelet First Nation peoples. Like the Wendaban authority on which it was modelled, the Clayoquot Sound agreement establishes a joint land and resource management process with equal representation from each side.

The Interim Hunting Agreement Between the Algonquins of Golden Lake First Nation and the Government of Ontario establishes the right of Golden Lake people to hunt within Algonquin Provincial Park, pending completion of tripartite negotiations over the Algonquin claim — which the federal government treats as a claim of a third kind. As noted in the introduction to this chapter, widespread protests from local non-Aboriginal people and urban park users over Algonquin hunting led to the agreement.

Finally, the Whitedog Area Resources Committee, set up in 1993 under the terms of a 1991 memorandum of understanding between Wabaseemoong Independent Nations (formerly Islington First Nation) and the government of Ontario, is technically not an interim measure, but it does represent another step in a long process of resolving problems created in the 1950s and '60s by hydroelectric dams and pulp mill pollution. A 1983 agreement between the parties provided for consultation, but not co-management. Formally established in 1993, with a four-year mandate and equal representation from Ontario and the First Nation, the committee is charged with developing and designing a co-management arrangement to govern all proposed activities by any parties in Wabaseemoong's traditional land use area.

While some of these boards are concerned with only a single animal species (such as caribou), a single activity (such as hunting), or a single designated area (such as a park), others generally adopt a holistic and ecosystem approach to land and resource management, whatever the geographic size of their mandate. This is in contrast to the claims-based co-management agreements, which have multiple boards for different mandates. These ad hoc arrangements also come much closer to true

co-jurisdiction than any of the claims-based agreements. The Wendaban authority, for example, whose management area was removed from the control of the local ministry of natural resources office, was also intended to be a shared jurisdiction body — with the board reporting to the government of Ontario and the Teme-Augama Anishinabai, rather than to a provincial government minister alone.

The areas covered by the Clayoquot Sound agreement, Gwaii Haanas/South Moresby park, the Barriere Lake agreement, the Wendaban authority and the Whitedog committee are all situated in the mid-north, where Aboriginal people share the land with many small non-Aboriginal communities and other interested parties such as forest companies. These interim arrangements clearly represent the kinds of lands that might be included as shared or Category II lands in new or renewed treaties. Because they already feature provincial involvement, they offer more appropriate — and in some cases more innovative — models of land and resource management than those in the existing comprehensive claims agreements. They can also be contrasted in several ways with arrangements in the next category, which also involves areas of the mid-north.

Community-based resource management

Across Canada, provincial and territorial governments have been adopting a number of strategies to increase community involvement in land and resource management decisions. They have been doing so for two principal reasons. First, some residents of rural and remote communities have come to resent centralized planning and control, which they feel does not adequately reflect local concerns about employment or access to resources. Other provincial and territorial residents have argued that policies should give greater weight to non-extractive uses of natural resources. The second reason is financial. Governments have an increasing incentive to devolve power in a period of fiscal restraint.

Ontario's community forestry initiative, which consists of four pilot projects, is one kind of provincial response. Another is the system of controlled exploitation zones for fish and wildlife in Quebec. A third involves recent proposals for multi-party stewardship of the Bras d'Or Watershed on Cape Breton Island in Nova Scotia. (See Appendix 4B for more details concerning these projects.)

If Ontario's experience is a guide, these projects will be extremely popular among non-Aboriginal residents of rural and remote Canada. The Elk Lake community forest project in northeastern Ontario, for example, has generated wide public support, and its board members lobbied the government successfully to have its mandate and funding extended beyond the 1995 termination date. Like many northern communities, the principal economic base of Elk Lake is a small sawmill. Community members feel that for the first time, they have obtained some power over resource management decisions that affect their lives and livelihoods, in contrast to a system where most major decisions are made elsewhere and reflect broader provincial interests.

Technical staff for the community forest projects is provided by the ministry of natural resources, and there is a close working relationship between the ministry and the project board. The structure of these community forest initiatives bears some resemblance to the caribou management board, in that government managers have retained ultimate responsibility for planning decisions. In fact, by comparison with most of the co-management boards already discussed, the community forest boards have very little power at this stage in their evolution.

Quebec's controlled exploitation zones (ZECs) are specific areas in the mid-north of the province in which development, harvesting and conservation of wildlife are managed by local non-profit organizations. They were created in the 1970s as a means of dismantling private hunting and fishing reserves where public and Aboriginal hunting, fishing and trapping were previously prohibited. The 80 ZECs are divided into three major categories: wildlife ZECs, waterfowl ZECs and salmon ZECs. Like Ontario's community forest initiatives, the ZECs are very popular with non-Aboriginal residents of rural and remote communities, who have come to treat them as a form of common property.

These volunteer organizations are not co-management bodies in the sense that the government and a community undertake to manage an area or species jointly, but rather another form of delegated community-based resource management. All decisions must conform to provincial regulations, and the applicable minister retains ultimate authority.

Apart from having relatively less power, the other major difference between these arrangements and those just discussed concerns the involvement of Aboriginal people. In Quebec, Aboriginal people can participate as individuals on the local association, but the ZEC enabling legislation does not provide for guaranteed Aboriginal involvement in management, nor does the act recognize Aboriginal rights to resource use within the zones. This can lead to conflict — one of the cases currently before the Supreme Court of Canada involves charges against Aboriginal people for fishing in a ZEC without a licence.⁴⁴⁸ However, some individual ZECs, such as the one dealing with Atlantic salmon, have tried to ensure more equal representation between Aboriginal and non-Aboriginal people. It is our view that these kinds of arrangements should be encouraged.

In the case of Ontario's community forest projects, one is entirely Aboriginal (covering Wikwemikong unceded reserve on Manitoulin Island). However, the initiative is generally aimed at the non-Aboriginal population of the provincial north. While the Elk Lake project reserves one of 15 seats on its board for an Aboriginal representative (with an alternate), the remaining two projects (Geraldton and Kapuskasing) include no Aboriginal representatives at all, even though they fall within the traditional territories of the Long Lake and Moose Factory First Nation communities respectively. In general, the plans being developed by community forest partnerships are required to respect provincial regulations and procedures but are not required to pay similar attention (with the exception of Wikwemikong) to treaty and Aboriginal rights or to other Aboriginal issues and concerns.

In fact, Ontario currently applies the term co-management to a wide variety of stakeholder boards or committees — many of which include few or no Aboriginal members. When Aboriginal people do agree to participate in such activities, they can find themselves out-voted. Thus, in May 1994, a majority of the members of the Sturgeon Lake co-management committee in northwestern Ontario voted to create a total sanctuary on all walleye spawning grounds within the management area — at the same time accusing Aboriginal people of damaging fish stocks and habitat. The committee, which included tourist outfitters and local hunters and anglers among its members, also voted to review the legal status of all Aboriginal fishing in sanctuaries. Representatives from the local Saugeen First Nation resigned from the committee in protest.⁴⁴⁹

448 *R. v. Côté*, [1993] 5 R.J.Q. 1350, 107 D.L.R. (4th) 28 (c.h.).

449 Letter from Chief Ed Machimity to Howard Hampton, minister of natural resources, 2 June 1994, on Co-Management Decision-Making and the Saugeen Nation Band (copy provided to RCAP through World Wildlife Fund Canada).

Such disputes are indicative of the lack of agreement over definitions of conservation. They also reflect the tendency of resource managers and local citizens to treat Aboriginal people as just one among many stakeholder groups with interests in lands and resources. Of the three kinds of co-management regimes we have outlined, Aboriginal people clearly prefer the first two — since they are the only structures that offer them some rough equality in membership and decision making.

Community-based resource management boards are a very suitable model for Category III lands — that is, those over which the Crown will retain full management rights. In many areas of the mid-north, this is likely to be the largest category under treaty. For boards that deal with resource management, such as the Elk Lake community forest initiative, one Aboriginal board member out of 15 may be entirely appropriate. But harvesting rights are among the more limited Aboriginal board rights that would continue to apply throughout Category III lands. It is important, therefore, that community boards with wildlife management responsibilities, such as the ZECs, acknowledge that Aboriginal people are the only stakeholders whose harvesting rights are constitutionally protected. Here, the approach of the Atlantic salmon ZEC is a much more appropriate model.

It is also possible, however, that community-based resource management boards could evolve into true co-management boards that would combine elements of Category II and Category III lands. This is the case, for example, with a recent proposal for a stewardship body for the Bras d'Or watershed on Cape Breton Island in Nova Scotia. At the moment, responsibility for developing and protecting land and water resources within the watershed rests with 20 different government agencies at the federal, provincial and municipal levels. This fragmentation has made it difficult to develop plans for sustainable development. The Bras d'Or Lakes working group, made up of a variety of stakeholder interests such as tourist outfitters and local municipalities, government departments, and local Mi'kmaq, with the assistance of the University College of Cape Breton, spent 12 months developing organizational plans for a new streamlined single-window agency. This proposal was presented to the provincial and federal governments in April 1995.

The report calls for the creation of a Bras d'Or Stewardship commission by November 1996. It would be a community-based organization with a mandate for resource planning and management for the entire watershed area. Responsibility for stewardship would be shared between the Mi'kmaq and non-Aboriginal residents of the watershed. There would be five voting Mi'kmaq members and seven voting members representing other local interests; the board would be filled out with six non-voting members, four appointed by local municipalities, one by the federal government and one by the province of Nova Scotia.

Improving co-management regimes

Lessons learned

As these examples have shown, Aboriginal peoples have been quite successful at bringing governments to the negotiating table in circumstances of political crisis. Governments and the public may be sending the wrong message — that direct, obstructive action produces positive results for Aboriginal communities. As interim measures, the ad hoc or crisis-based co-management regimes have created several important precedents. But they lack the certainty and staying power of regimes created by new treaties (comprehensive claims settlements). As soon as the precipitating crisis drops from the headlines, governments can lose interest or turn to more pressing matters, forgetting the obligations assumed in the agreement that ended the crisis.

In addition, responding only to crisis results in random patterns of management arrangements. The Algonquin of Barriere Lake, for example, have a trilateral agreement, but the neighbouring Algonquin of Grand Lac, who face much the same circumstances, do not. The difference is that the Barriere Lake Algonquin took action against government, blockading forest access roads and seeking a court injunction against logging. Because ad hoc arrangements usually cover relatively small areas, this raises the prospect of a patchwork approach to environmental planning and management, with associated problems of cost and harmonization.

In most comprehensive claims negotiations, by contrast, individual First Nation communities or traditional territories are consolidated for purposes of title and management. For example, while there are about 30 communities in Nunavut, each with a traditional land-use area represented by a designated organization, the agreement there calls for only one co-management board for the entire settlement area. While this kind of arrangement may be inappropriate in the mid-north or more southerly areas, it has many advantages in the far north. It represents not only a considerable saving but also the consolidation of individual territories, which, for land and resource management purposes, is more in keeping with the broader governance models we recommended in Chapter 3.

Operations

How boards or committees operate may be as important as their powers. For example, the language of operation, the role of traditional knowledge, the location of meetings, provisions for training and employment, access to independent expertise, and adequate funding are important factors affecting successful operation. There is also a need for flexibility and adaptability. There is a danger that operating mandates and techniques can become so fixed in stone that they tend to obstruct rather than assist in implementing the spirit of agreements.

Communication is also an important function of co-management. A good board with low member turnover and regular attendance can develop as a team; mutual respect and understanding can help overcome long-standing differences at the board level. But this can have only limited impact if the wider public — both Aboriginal and non-Aboriginal — does not understand and agree with the board's decisions. Effective communication is crucial, because traditions of decision making and implementation can vary substantially between government agencies, non-Aboriginal board members and Aboriginal communities. Many of the claims-based co-management boards have tended to operate more in the government than in the Aboriginal style, though some of the crisis-based organizations — such as the Wendaban Stewardship Authority — have tried to operate by consensus and adopt other cross-cultural methods.

Representation on co-management boards

The contrast between claims-based and crisis-based co-management also extends to representation. Because most comprehensive claims settlements have been in the far north, where there are few other interested parties, boards have generally consisted of equal numbers of Aboriginal representatives and public servants. At provincial or territorial levels, however, government appointments to boards generally consist of stakeholders rather than government employees. Indeed, the need to build communication, trust and confidence at the local level was borne out in presentations to the Commission, as non-Aboriginal Canadians and groups such as the Yukon Fish and Wildlife Association argued that they should participate directly in co-management arrangements with Aboriginal communities and Canadian governments or be assured access to some forum through which to be heard.

Where resolving conflicting management objectives is a central task of the co-management board, the way stakeholders are identified and represented in the management system is obviously crucial. The negotiation of Aboriginal claims sets a certain pattern that will not necessarily apply to others. While insistence on participating in co-management arrangements can be attributed to the reluctance of non-Aboriginal Canadians to see the management of resources turned over to Aboriginal governments, it also reflects a broader trend in Canadian society: Canadians have consistently and increasingly demanded more of a say in public decision-making processes, particularly with respect to conservation and environmental protection. Therefore, while the role of public representation on co-management boards is largely a subject for negotiation between Aboriginal and non-Aboriginal governments, it is clear that these agreements will not enjoy a large measure of success over the long term without some forum for interested people and organizations in the broader community.

The notion that government representatives also represent major non-Aboriginal stakeholders is not well accepted. For example, in their submission to the Commission, the Ontario Federation of Anglers and Hunters argued that the appointment of provincial natural resources employees to co-management boards is inappropriate because they cannot, as Crown employees, fairly represent the interests of non-Aboriginal citizens.⁴⁵⁰

The Commission believes that public servants can serve most appropriately as technical advisers to boards. If they are actually members, they should be non-voting rather than voting members. This is particularly true if the mandate of the co-management body is based on power sharing.

Technical advice

At best, co-management boards supplement but do not replace existing resource management agencies. Most have either no secretariats or purely administrative ones. This means that they get technical advice for planning and decision making primarily from resource management agency scientists. Aboriginal people generally argue that this is not neutral information. Some advocate that Aboriginal or 'user' members of boards obtain independent technical advice, but whether they can actually do so will depend on funding levels and operating procedures. Only some of the claims-based boards have been successful in doing this, with the most outstanding examples being the co-management boards established in the western Arctic as a result of the Inuvialuit Final Agreement. Indeed, the creation of separate secretariats to support co-management arrangements may be easier to achieve north of the 60th parallel, where these agreements tend to cover an enormous geographic area.

South of the 60th parallel, it may be too unwieldy and expensive to create separate secretariats to support individual co-management areas, which conceivably could be quite numerous in any given region. It may be worthwhile, therefore, to consider enhancing the capacity of existing secretariats at the community, tribal or regional level, such as the natural resources secretariat of Manitoba Keewatinowi Okimakanak, which already provides support services to its member communities. Another option would be to create one regional secretariat or research institute to assist all management regimes within an entire region.

At the very least, co-management has resulted in open discussion of research and management techniques that formerly occurred behind closed doors. Although research and management do not always incorporate Aboriginal knowledge and concepts, managers do have to justify and explain

450 Ontario Federation of Anglers and Hunters, "Self-Government and Comanagement" (cited in note 221).

what they are doing and in some cases will not undertake programs that Aboriginal harvesters clearly object to.

The research and information requirements of planning and management boards can be substantial, especially for major regional regimes. Questions arise about the knowledge system in which management occurs, the actual requirements and tests for documentation, control of intellectual property, and access to and control over data. For local co-management initiatives, the costs and availability of expertise may be beyond their capacity. This emphasizes the need for better and cheaper ways of disseminating knowledge and experience and for training Aboriginal people in relevant disciplines. One option is to rely on existing secretariats to provide the necessary support. This is being pursued by the Union of Ontario Indians, further to their memorandum of understanding with Ontario respecting the negotiation of sole and shared management of fisheries with member First Nations communities. The parties agree to establish a joint fisheries resource centre to act as a central and independent source of information on technical conservation and management issues. The creation of these centres would go a long way to alleviating conflicts between government and Aboriginal parties on matters such as the accuracy of data and access to and control over information.⁴⁵¹

Recognizing and incorporating traditional knowledge

Aboriginal self-management systems are based on what is often referred to as traditional knowledge, which in turn is incorporated into language. The experience of co-management systems in accounting for and incorporating traditional knowledge has varied widely. It is not always recognized that many key terms used in the technical idiom of biology and resource management, such as ‘wildlife’ and ‘conservation’ — have no direct equivalent in Aboriginal languages. The way Aboriginal harvesters define scarcity and abundance may differ substantially from the way resource managers define matters such as surplus and sustainable yield. The language of resource management, therefore, is far from unambiguous, especially from a cross-cultural perspective.

The real issue is how the parties reconcile such differences. It is sometimes hard for Aboriginal representatives to formulate or articulate their contributions, particularly if they are intimidated by the dominant resource management ethos. This may make it hard to move beyond platitudes, reinforcing resource managers’ scepticism that there is really anything important to be gained from traditional knowledge. Cross-cultural education is therefore crucial to the success of co-management.

Encouraging co-management

Despite these caveats, an incremental approach to co-management does offer a number of benefits. In the absence of fundamental changes in the law recognizing Aboriginal title and jurisdiction outside Aboriginal lands, co-management arrangements are a valuable option in the short term for dealing with competing interests, so that day-to-day issues and activities can be managed in a manner that incorporates the concerns and interests of Aboriginal communities.

More important, although existing arrangements do not formally recognize Aboriginal jurisdiction over land and resource management, co-management enables Aboriginal communities to gain greater control in practice. Aboriginal control and involvement in management can be entrenched

451 *Anishinabek Conservation and Fishing Agreement between Anishinabek Nation and Her Majesty the Queen in Right of Ontario* (8 June 1993).

on an incremental basis as the new way of doing things becomes familiar and palatable to government agencies and other interested parties. The goal is to entrench and gain support at the local level so that government cannot unilaterally and suddenly dismantle the regime without provoking a reaction.

Moreover, this kind of arrangement enables the Aboriginal community to acquire management expertise, experience and authority at a comfortable pace. Commission research indicates that building trust and capacity at the local level is essential for mutually acceptable and successful implementation.⁴⁵²

Models for effective co-management already exist — as in the western Arctic, where Inuvialuit have had nearly ten years of experience in implementing their agreement. Inuvialuit are committed to their co-management regimes because their title and rights give them a certain standing in dealing with their government counterparts, with whom they have good relations and achieve effective results. The Wendapan Stewardship Authority in Ontario and the Barriere Lake Trilateral Agreement in Quebec are other important examples. But to be truly effective, these models need time to develop and mature. This requires stable funding levels and the co-operation of all parties.

With their constitutional responsibilities for lands and resources, provincial and territorial governments will bear the main burden of ensuring the effectiveness of co-management and co-jurisdiction regimes and play a central role in land selection processes. Most provinces are already sharing management with Aboriginal and other local communities and addressing the concerns of non-Aboriginal resource users, and we applaud these initiatives. We believe, moreover, that it is reasonable to count on these governments to accelerate their efforts, in partnership with the federal government and Aboriginal governments, and to build on the successes already achieved.

Recommendation

The Commission recommends that

2.4.78

The following action be taken with respect to co-management and co-jurisdiction:

- (a) the federal government work with provincial and territorial governments and Aboriginal governments in creating co-management or co-jurisdiction arrangements for the traditional territories of Aboriginal nations;
- (b) such co-management arrangements serve as interim measures until the conclusion of treaty negotiations with the Aboriginal party concerned;
- (c) co-management bodies be based on relative parity of membership between Aboriginal nations and government representatives;
- (d) co-management bodies respect and incorporate the traditional knowledge of Aboriginal people; and
- (e) provincial and territorial governments provide secure long-term funding for co-management bodies to ensure stability and enable them to build the necessary management skills and expertise (which would involve cost sharing on the part of the federal government).

452 Pinkerton et al., “A Model for First Nation Leadership” (cited in note 437).

8. Conclusions

As with our development activities, Inuvialuit have reached beyond the Settlement Region to build partnerships and achieve agreements that will ensure our future well-being and that of our land and resources. The Settlement Region is neither an economic enclave, nor a protectorate under the watchful eye of government. Like our business activities and development initiatives, our land and wildlife are affected by decisions and events external to where we live and hunt and fish. Here as well, we have sought to exert our influence beyond the specific provisions of the [Inuvialuit Final Agreement] and the boundaries of the Settlement Region.⁴⁵³

We believe that the principle of sharing of our homeland, its natural resources, is the basis of the treaty arrangements, not surrender or extinguishment. Accordingly, the concepts of resource co-management and revenue sharing from the Crown lands and resources are the proper forms of treaty implementation.

Chief George Fern
Prince Albert Tribal Council
La Ronge, Saskatchewan, 28 May 1992

Inuvialuit of the western Arctic now have a land settlement with Canada that is enabling them to build their communities and economy. While the Inuvialuit Final Agreement does state that their Aboriginal title to lands and resources has been extinguished (a requirement that we recommend should no longer be imposed on Aboriginal people), Inuvialuit have secured a sizeable land base that they — not the department of Indian affairs — control. Moreover, Inuvialuit have also obtained a share in the management of resources on Crown lands throughout the entire region covered by the agreement.

These are important accomplishments. They are also among the stated goals of Aboriginal peoples throughout Canada, whether they live in or near urban centres or in rural and remote regions, and whether they now have treaties or seek to enter into a treaty relationship. Aboriginal peoples want to control and expand their land base and, as Chief George Fern of the Prince Albert Tribal Council stated, to share in the natural resources and revenues of their traditional lands. This, he says, is the proper form of treaty implementation.

Inuvialuit have already experienced the effects on well-being of adequate lands, resources and political powers. They are building their own communities and expanding their economic interests beyond the region and settlement area — using funds from the settlement to invest, for example, in enterprises in Edmonton, Vancouver and other urban centres.

Claims settlements are not the only means of expanding Aboriginal access to lands and resources. According to a 1994 auditor's report, the Meadow Lake Tribal Council in northern Saskatchewan is making a profit and paying millions in corporate taxes on revenues generated by the sawmill the council bought in 1988 in a joint venture with the mill's employees. Under the associated forest management licence, the tribal council now employs many of its own members in woods operations in parts of northern Saskatchewan. Chief Raymond Gladue has been happy to publicize the company's success because, he says, it is important that Aboriginal people be seen as contributors to Canada's economic prosperity, not a drain on it.⁴⁵⁴

453 Roger T. Gruben, Chairman, Inuvialuit Regional Corporation, "The Land and the Resource Base", discussion paper prepared for the National Round Table on Aboriginal Economic Development and Resources and published in RCAP, *Sharing the Harvest: The Road to Self-Reliance* (Ottawa: Supply and Services, 1993), p. 57.

454 Meadow Lake Tribal Council, Forest Operations Study, prepared by Price Waterhouse, Saskatchewan (1994); Rudy Platiel, "Federal loan to natives reaps richer tax return", *Globe and Mail* (30 November 1994), p. A3.

The Meadow Lake example is significant for several reasons. The nine First Nations communities participating in the project through the tribal council have been able to purchase lands and assets outside their reserves, as well as gain access to resources on provincial Crown land, despite the fact that their treaties (Treaty 8 and Treaty 10) purport to extinguish Aboriginal title.⁴⁵⁵ Changes in forest tenure systems and regulations are one of the many ways federal, provincial and territorial governments can alter the legal and policy framework to improve Aboriginal access to lands and resources. These alterations do not have to await the broad changes in laws, regulations and policies that we recommend.

The Meadow Lake case is also significant because it shows that gains for Aboriginal people do not automatically mean losses for other Canadians. The mill and the woods operations of the Meadow Lake Tribal Council are providing jobs for Aboriginal and non-Aboriginal people alike. This kind of positive example can help to allay the fears about the expected impact of claims settlements on the rights of landowners, resource industries, municipalities, anglers and hunters, and other interested parties.

We discuss these topics again in Chapter 5, but for now our point is clear: Given the right circumstances, Aboriginal people are more than capable of building a viable economy. The question is, will they have that chance? As we have shown in this chapter, Aboriginal peoples consistently have been put on the defensive, compelled to react in the face of intrusive development instead of participating actively in development planning that is compatible with their rights, values and cultures.

Contemporary events offer both a lesson and a warning. In the Northwest Territories, a diamond rush is in progress. Diamond formations have also been found recently along the Attawapiskat River, in a remote corner of northeastern Ontario. At Voisey's Bay in Labrador, a junior resources company searching for diamonds has instead found a huge deposit of base minerals, one of which has already attracted a multi-million dollar investment from Teck Corporation and the direct involvement of the giant nickel producer, INCO.

Staking fever, at least in Labrador and the Northwest Territories, is reminiscent of mining booms earlier in this century. Hundreds of prospectors and geologists have staked every inch of ground in the affected areas, swamping regional airlines, hotels and restaurants. Businesses have welcomed the unexpected stimulus to the regional economy and look forward to the development of viable mines.

If we return to the map of population distribution (see Figure 4.5), we can see that all this activity is taking place in areas where Aboriginal people form a majority of the population. But despite their majority status, Dene and Métis of the Northwest Territories, the Cree of northeastern Ontario, and Inuit and Innu of Labrador all find themselves in the same uncertain situation. Will they have any say in decisions about how, when — and even if — the projects go ahead? Will they have a guaranteed share in the employment opportunities and other economic spinoffs of mineral development, if those projects prove viable and are approved? Or, as we saw earlier, will they instead bear most of the social and economic costs of resource development, with few of the benefits?

The mining industry is simply following the rules of the game as laid out by governments. For a number of years, the industry has been increasingly solicitous of Aboriginal interests and if government and industry adopt the measures set out in our recommendations, there will be many

455 National Aboriginal Forestry Association, "Forest Lands and Resources for Aboriginal People" (cited in note 142).

potential benefits for Aboriginal people from these recent developments. At Voisey's Bay, for example, Archaean Resources is already employing 15 Inuit and four Innu on its survey crews, and there is the prospect of more employment during the exploration phase.⁴⁵⁶

Our concerns are more fundamental: they relate to the treaty relationship, or lack of it. The Cree of northeastern Ontario have a treaty with the Crown (Treaty 9), but neither the federal nor the provincial government considers that the treaty guarantees the Cree employment benefits or a share in the revenue from resource development, much less entitles them to oppose projects or control their implementation. Inuit and Innu of Labrador do not have a treaty, although Inuit had been negotiating with the provincial and federal governments until intergovernmental disputes over cost sharing ended the discussions. In the Northwest Territories, while the Gwich'in Dene and the Dene-Métis of Sahtu have now concluded land claims agreements with the Crown, the remaining Dene and Métis people have been negotiating a new arrangement with the federal government for much of the past 20 years. But governments do not consider that assertions of Aboriginal title trump the rights of the Crown or industry.

In short, there is no certainty for Aboriginal people in the current relationship. They are forced to rely on the grace and favour of government and industry for development benefits, and governments can create new third-party interests both before and during negotiations. This is a fundamental weakness of the comprehensive claims process, one that many groups commented on in their submissions to the Commission. We urge government to provide interim protection, including land withdrawals and shared management, to limit the ability to create new interests until negotiations are concluded.

Inuit and Innu of Labrador are speaking from personal experience. The creation of new interests is already apparent from the pace of development at Voisey's Bay. The main mineral discovery lies about 35 kilometres southwest of the Inuit community of Nain and some 60 kilometres north of the Innu community of Davis Inlet. But exploration companies have now staked virtually all the islands and mainland within a 100-kilometre radius of Nain, and exploration is proceeding outward at an exponential rate. The staked lands include not only the immediate vicinity of Nain, but campsites, harvesting areas and other areas traditionally used by Inuit and Innu. The exploration zone thus contains areas that Aboriginal people would presumably wish to keep for themselves or to protect from development, or from which they would wish to derive revenue benefits under any new treaty.

In almost every instance to date, resource development has forced Aboriginal communities into a reactive position. As we saw earlier in this chapter, during the copper boom of the 1840s on Lake Superior, an Ojibwa and Métis war party occupied one of the mines to protest the fact that the provincial government had authorized mining development before making a treaty with them. In this century, Aboriginal communities have gone to court or used direct action — blockades, boycotts and adverse publicity — to gain the attention of government. The institutions of crisis-based shared management are the direct result of Aboriginal reaction to resource development.

Courts are a blunt instrument. The process is costly, the outcome is never certain, and the all-or-nothing nature of the process can lead to results that satisfy no one. Legal processes and direct action can also delay projects, leading to accusations that Aboriginal people are obstructionist, that they are harming the country's economic interests. But if Aboriginal people feel they have no alternative to equalize their bargaining power with government, the choice between doing nothing and direct action is an easy one.

456 Vivian Danielson, "Voisey Bay deposit shows potential to become low-cost nickel producer", *The Northern Miner* 81/11(15 May 1995).

Many Canadians have expressed concern about the cost of settling Aboriginal grievances. But can we afford not to deal with them? In other parts of our report we have talked about the cost of doing nothing — about the health and social welfare expenditures, the overburdened justice system, the toll in suicide and lost opportunities (See, for example, Volume 5, Chapter 2, Volume 3, Chapter 3, and *Bridging the Cultural Divide*, our special report on the justice system.) Unresolved land and resource issues, while not entirely responsible, lie behind many of these problems. In the case of Voisey's Bay and similar developments, it is not difficult to see the potential problems. The cost of doing nothing, or of doing too little, could far outweigh the benefits of proceeding with development before issues of Aboriginal title are responsibly addressed.

Labrador Inuit are negotiating with government once again. The Innu of Davis Inlet have suspended their protest against drilling efforts — but not their assertion of Aboriginal title to their traditional lands. They are seeking negotiations as well. A major development like Voisey's Bay represents both a challenge and an opportunity. It can lead to years of protests, court cases and general social conflict. Or it can lead to a fruitful new relationship between Aboriginal peoples and other Canadians. In the next chapter, we outline the many ways Aboriginal peoples could benefit from resource development. First, however, they need a land base, guaranteed access to resources, and powers of governance — as Inuvialuit of the western Arctic and other nations with modern treaties already have.

Our recommendations in this chapter would require Parliament to protect Aboriginal lands and resources. The changes we are recommending in federal claims policies, and the establishment of interim measures while treaties are being negotiated, would make a significant difference to all Aboriginal people who seek to make new treaties or to renew and implement old ones. It is the treaty relationship that will establish a genuine reconciliation between Aboriginal peoples and other Canadians, based on the principles of mutual respect and sharing.

Appendix 4A: Land Provisions of Modern Treaties

1. James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement⁴⁵⁷

While the James Bay and Northern Quebec Agreement (JBNQA) and subsequent Northeastern Quebec Agreement (NEQA) were essentially out-of-court settlements designed to resolve conflicts over construction of the James Bay hydroelectric development project (announced in 1971), they are regarded as Canada's first modern treaties. Signed in 1975 and 1978 respectively, these agreements have also come to be viewed as the benchmark for subsequent comprehensive claims agreements. Signatories to JBNQA were the Grand Council of the Crees of Quebec (representing eight Cree communities), the Northern Quebec Inuit Association, the government of Canada, the government of Quebec, the Quebec Hydro-Electric Commission (Hydro Quebec), the James Bay Energy Corporation, and the James Bay Development Corporation. NEQA was entered into between the same non-Aboriginal parties and the Naskapi Band of Quebec (Kobac Naskapi-Aeyouch), amending JBNQA.

The territory covered by JBNQA and NEQA is a vast area of northern Quebec amounting to roughly 410,000 square miles (1,061,900 square kilometres). The James Bay Crees and Inuit of Nunavik (northern Quebec) are allocated an area of 'primary interest' (basically their traditional land use areas or traditional territories) and an area of 'common interest' (overlapping land use area). With respect to the James Bay Crees, their area of primary interest amounts to some 13,510 square miles (35,000 square kilometres) south of the 55th parallel. Land administration is the responsibility of two public institutions: the James Bay Regional Council (JBRC) and the James Bay Development Corporation (JBDC). JBRC, made up of equal representation from the Crees, Naskapi and province of Quebec, has a legislative mandate from the province for purposes of municipal administration on Category II lands. The development corporation was created by Quebec to promote, plan and co-ordinate development in the territory. The Cree regional authority, composed of all corporations with jurisdiction over Category I lands, was also established. The authority represents Cree interests, and co-ordinates and administers all programs and services on Category I lands, if the communities so delegate.

The portion north of the 55th parallel, known as the Inuit area of primary interest, amounts to approximately 21,616 square miles (56,000 square kilometres). Administration of this region is undertaken by a public body, the Kativik regional government, and is thus referred to as the Kativik region. The Kativik regional government is responsible for land use planning, the environmental assessment procedures pursuant to the agreement, and the provision of public services.

Under JBNQA and NEQA, each Aboriginal party received specific rights to and interests in lands and resources within their primary interest area, which was divided into Category I (divided into IA and IB lands in the Cree region), II and III lands. Category I lands are for the exclusive use and benefit of the Aboriginal signatories. Each James Bay Cree community received approximately 2,158 square miles (approximately 5,589 square kilometres) of lands surrounding or adjacent to the community. Each Inuit community received title to an area of 3,130 square miles (approximately

⁴⁵⁷ This summary is based on the terms of the two agreements and on René Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed., Volume 1, trans. Murray Rankin (Toronto: Carswell, 1985).

8,106 square kilometres) allocated in a similar fashion. Although Quebec retained mineral rights, the Aboriginal beneficiaries were granted exclusive use of forest resources and harvesting.

Within the Cree region, title to Category IA lands is held by the Crown for Quebec. But in all other respects such lands are subject to the jurisdiction of the federal government, which is constitutionally responsible for their administration. Category IA lands are subject to the regime established under the *Cree-Naskapi (of Quebec) Act*. Category IB lands are fully transferred to the Aboriginal community landholding corporation and are not subject to federal authority. The *Cree Villages and the Naskapi Village Act* makes Category IB land into village municipalities and established the Aboriginal municipal corporations whose make-up is identical to the landholding community corporations referred to above. Within the Inuit or Kativik region, Category I lands are not subdivided into IA or IB. The *Act respecting Northern Villages and the Kativik Regional Government* provides for local and regional organizational structures. Northern municipalities are established in Category I lands. Each municipal council is also responsible for administration of Category II lands.

With respect to the James Bay Crees, Category II lands comprise 25,130 square miles (approximately 65,086 square kilometres) south of the 55th parallel of latitude. Of this amount, Inuit have rights to 231 square miles (some 598.29 square kilometres). Category II lands for Inuit communities amount to 35,000 square miles (approximately 90,650 square kilometres) north of the 55th parallel and include a small allocation for the Whapmagoostui Crees. Within the Inuit allocation, 1,600 square miles (approximately 4,144 square kilometres) was later provided for the Naskapi band pursuant to NEQA. The Aboriginal parties have exclusive hunting, fishing and trapping rights, but Category II lands are also accessible by others for development purposes. In the event that development takes precedence over Aboriginal harvesting, the lands are to be replaced. Quebec retained title to and jurisdiction over these lands, although the Aboriginal communities share in land and resource management for hunting, fishing and trapping; tourism development; and forestry.

Category III lands, which make up the balance of land within the territory, are a unique type of provincial public lands. Both Aboriginal and non-Aboriginal people may hunt and fish on these lands, although the Aboriginal beneficiaries have exclusive rights to certain species (except migratory birds and marine animals). The Aboriginal parties also participate in land administration and development. The province, the James Bay Energy Corporation, Hydro Quebec, and the James Bay Development Corporation have specific rights to develop resources on Category III lands. However, depending on the jurisdictional nature of the project, either the federal or the provincial government must undertake an environmental impact assessment. (The exact meaning of this last provision has been, and continues to be, extremely contentious given Quebec's hydro development plans.)

With respect to Category I lands, title is owned collectively by the appropriate Aboriginal government authority. The Cree and Naskapi governments exercise full authority with respect to local government, and the administration and management of lands, pursuant to the *James Bay and Northern Quebec Native Claims Settlement Act* and the *Cree-Naskapi (of Quebec) Act*. Local and regional administrative structures governing James Bay are parallel to municipalities in southern Quebec in terms of powers and authority. The powers of local government with respect to Category I lands include land and resource use and zoning; preparing land use plans; setting rules governing the use of lands and resources; regulating the construction and use of buildings; environmental protection; and hunting, fishing and trapping. However, with respect to the latter, wildlife harvesting by-laws must be submitted to the co-ordinating committee established pursuant

to JBNQA, and the responsible minister can disallow them. (See the JBNQA wildlife regime, set out in Appendix 4B, for details.) No Category I lands can be sold or otherwise ceded except to the province.

The Aboriginal parties to the agreements also obtained the right of first refusal for outfitting within Category III lands for a period of 30 years from the execution of the agreements. However, the Aboriginal parties were not able to exercise this right in at least three non-Aboriginal applications out of every 10. The hunting, fishing and trapping co-ordinating committee established following the agreement is charged with overseeing this provision. (For details of the committee, see Appendix 4B.) In addition to compensation paid by Canada and Quebec, the beneficiaries were also entitled to a 25 per cent royalty share in provincial duties flowing from other forms of development, for example, mining and forestry, although this was later converted to a cash payment.

In addition to the types of access noted above, access is granted to Aboriginal lands and waters for public purposes. Government agents are authorized to enter Category I lands for the purpose of delivering public programs or services, and constructing or operating a public work or utility.

2. Inuvialuit Final Agreement

The 1984 comprehensive claims agreement between the Committee for Original Peoples' Entitlement (representing Inuvialuit of the western Arctic) and Canada transferred title to about 91,000 square kilometres to Inuvialuit. Of that amount, referred to as the Inuvialuit settlement region (ISR), Inuvialuit hold full surface and subsurface rights to approximately 12,800 square kilometres (Category A) and the surface rights to sand and gravel over another 78,200 square kilometres (Category B). Category A lands were distributed in blocks of approximately 1,700 square kilometres more or less near each of the six communities within the ISR. Fee simple absolute title includes the beds of all lakes, rivers and other water bodies found in Inuvialuit lands, although the Crown retains ownership of all waters in the ISR. Finally, a single block of approximately 2,000 square kilometres of fee simple absolute title in Cape Bathurst was conveyed. Title is collectively owned and managed through the Inuvialuit Land Corporation, a division of the Inuvialuit Regional Corporation.

The agreement also creates a special conservation regime governing the area between Alaska, the Yukon, and the Northwest Territories (known as the "Yukon North Slope"), including a new national park covering the western portion, as well as the creation of a territorial park (Herschel Island Park). Inuvialuit enjoy harvesting rights within both areas and participate in management activities. The balance of Inuvialuit harvesting and management rights with respect to lands and resources throughout ISR are set out in Appendix 4B.

Public right of access is subject to conditions that protect the area from damage, mischief and interference. The public has access to Inuvialuit lands without prior notice in case of emergency or to reach adjacent lands. The public may also enter Inuvialuit lands for recreation purposes if they receive the consent of Inuvialuit. Specifically, Inuvialuit agreed to allow the public to fish commercially or for sport on lands that do not surround the six communities, provided that individuals are registered with the appropriate authority (hunters and trappers committee or government agency). Government agents can enter Inuvialuit lands and use natural resources incidental to such access when delivering and managing programs and projects. Similarly, the government retained the right to manage fisheries on Category B lands. Further, the department of

national defence has access for military exercises but must first negotiate an arrangement, including compensation.

Private access to Inuvialuit lands was granted so that non-Inuvialuit lands could be reached. As well, those holding resource rights on Inuvialuit lands are entitled to exercise such rights without alteration or interruption until such licences or permits terminate. In return, Canada remits to Inuvialuit any rents, fees or other payments from such third-party resource rights. With respect to future development, if such access requires a permanent right of way, developers are required to deal directly with the Inuvialuit administration commission and negotiate participation agreements, including rents for surface use, compensation and other benefits. With respect to sand and gravel on Inuvialuit lands, Inuvialuit agreed to reserve supplies to meet public community needs, direct private needs and, as a third priority, government projects. Removal of such materials requires a licence from or concessions to the Inuvialuit land administration.

Inuvialuit lands can be expropriated only by a federal cabinet order, subject to their receiving suitable alternative lands and cash compensation for loss of use and actual harvesting loss. Any disagreement concerning expropriated lands can be referred to arbitration (set out in the agreement). Similarly, Inuvialuit agreed to enter into negotiations in the event that any level of government requires Inuvialuit lands to meet public needs.

3. Nunavut Final Agreement

The 1993 comprehensive claims agreement between Inuit of the Nunavut settlement area (as represented by the Tungavik Federation of Nunavut) and Canada is the first to create a new territory within Canada (Nunavut), which will be publicly governed with its own legislative assembly separate from the remainder of the Northwest Territories. Article 3 of the agreement sets out the boundaries of the new territory. Area A is a portion of the Arctic islands and the mainland of the eastern Arctic (including adjacent marine areas). Area B includes the Belcher Islands and associated islands, and adjacent marine areas in Hudson Bay. In addition, the area includes separate zones of waters and land-fast ice. Zone I comprises the waters north of the 61st parallel, subject to Canadian jurisdiction, seaward of the territorial sea boundary, and Zone II refers to those waters of James Bay, Hudson Bay and Hudson Strait that are not part of another land claim settlement or government jurisdiction. The outer land-fast ice zone is also defined in the agreement.

Article 19 of the agreement lays out Inuit rights to land within the new public territory (which is also divided into regional land use areas). ‘Inuit-owned lands’ are intended to provide Inuit with rights that promote economic self-sufficiency consistent with Inuit social and cultural needs and aspirations. Lands will therefore be selected near communities, include significant sites, and incorporate land use activities and patterns. Inuit-owned lands will take one of two forms: fee simple including surface and subsurface rights, and fee simple excluding surface and subsurface rights. Generally, Inuit title includes water except where water forms a boundary or is transboundary. There will be no Inuit lands in marine areas. Title will be owned collectively and vested in a designated Inuit organization (DIO), which is either Tungavik or a designated regional Inuit organization. Inuit title can be transferred only to another DIO, or in the case of land within a municipality, to Canada, the territorial government or a municipal corporation. The agreement also makes provisions for the future granting of certain Inuit lands to government for the purposes of public easements and the north warning system.

Quantum is as follows:

- North Baffin land use region: 86,060 square kilometres, consisting of at least 6,010 square kilometres in fee simple including surface and subsurface rights (first form), and approximately 80,050 square kilometres in fee simple excluding rights to surface and subsurface resources (second form);
- South Baffin Island land use region: 64,745 square kilometres, consisting of at least 4,480 square kilometres in the first form, and approximately 60,265 square kilometres in the second form of title;
- Keewatin Island land use region: 95,540 square kilometres, consisting of at least 12,845 square kilometres in the first form, and approximately 82,695 square kilometres in the second form;
- Kitikmeot East land use region: 36,970 square kilometres, consisting of at least 1,500 square kilometres in the first form, and approximately 35,470 square kilometres in the second form;
- Kitikmeot West land use region: at least 66,390 square kilometres, consisting of at least 9,645 square kilometres in the first form, and approximately 56,745 square kilometres in the second form;
- Sanikiluaq land use region: at least 2,486 square kilometres in the second form.

The agreement also establishes the following parks: Auyuittuq National Park (from a park reserve), Ellesmere Island National Park, a national park on north Baffin, and a national park on Wager Bay (the last is subject to the exchange of Inuit-owned lands). Establishment of territorial parks also will be considered. Inuit will be involved in the planning and management of parks through the negotiation of Inuit impact and benefits agreements (IIBA). (See discussion of Auyuittuq National Park Reserve, Baffin Island, in Appendix 4B, for discussion of IIBA.)

Inuit will have free and unrestricted access to harvest within the entire settlement area, including Category I and II lands, Crown lands, parks and conservation areas. As well, subject to Canada's rights and jurisdiction, Inuit will have the right to continue to use and harvest for domestic consumption in open waters in the outer land-fast ice zone. (See Appendix 4B for details of harvesting rights and management processes.) This right is subject to safety, conservation principles, bilateral agreements and land use activity. The last two conditions are rather expansive, as they refer to lands that are dedicated to military activity, owned in fee simple, granted in fee simple following ratification (if less than one square mile or 2.6 square kilometres) subject to an agreement for sale, or subject to a surface lease. However, renewal of surface leases is subject to Inuit rights. Pre-existing commercial rights to minerals on Inuit-owned lands continue following ratification of the agreement.

Designated Inuit organizations will have the right of first refusal throughout Nunavut to the following ventures: new lodges (sports or naturalist); wildlife propagation, cultivation or husbandry enterprises; and marketing wildlife (including parts and products). However, in all cases, if a DIO exercises this right and fails to establish an enterprise without just cause, the right may be declared by government as having lapsed.

Article 21 of the agreement outlines access rights to Inuit-owned lands within the Nunavut settlement area. Generally, non-Inuit may enter, cross or remain on Inuit-owned lands only with the consent of the appropriate DIO. All entry and access is subject to conditions to protect against damage, mischief and significant interference. The public may enter lands for emergency purposes,

travel and recreation (including harvesting subject to the laws of general application). Public harvesting rights, however, can be removed where the DIO requires exclusive possession. Government agents can enter Inuit-owned lands to carry out public services, wildlife management and research (subject to the appropriate management board's approval), and the department of national defence can enter Inuit lands only after conclusion of an agreement with the DIO. In addition to the conditions stated earlier, third parties can enter Inuit lands for mineral exploration and/or development only with the consent of the DIO. Such consent may involve compensation.

Authorized agencies can expropriate Inuit-owned lands. However, there must first be an attempt to negotiate an agreement for the use or transfer of the land, and, failing that, public hearings must be held. Approval must be obtained from either the federal cabinet or territorial government, and compensation must be paid (as determined by the surface rights board created pursuant to the agreement).

4. Umbrella Final Agreement between Council for Yukon Indians, the Government of Canada and the Government of the Yukon

The 1993 umbrella agreement between the Council for Yukon Indians (now the Council for Yukon First Nations) and the federal and territorial governments sets out the substantive benefits and processes that are to form the basis for individually negotiated First Nation claims agreements.⁴⁵⁸ Four individual First Nation agreements were signed in 1994 with the Vuntut Gwich'in First Nation; the First Nation of Na-cho Ny'a'k Dun; the Teslin Tlingit Council; and the Champagne and Aishihik First Nations. Chapters 4, 5, 6 and 9 of the umbrella agreement contain the settlement lands provisions entailing quantum, how lands will be owned and managed by the communities, and the conditions for access to settlement lands.

Three different categories of lands are detailed — Category A, Category B and fee simple. Waters and water beds within the boundaries of a parcel form part of the settlement land. For Category A lands, Yukon First Nations will have rights equivalent to fee simple title to the surface of the land and full fee simple title to the subsurface. For Category B lands, First Nations will have rights equivalent to fee simple surface title only. Fee simple settlement lands will be the same as fee simple title as it is held by individuals. Note that the wording “equivalent to fee simple” for Category A and B lands was used intentionally in an attempt to avoid extinguishing any Aboriginal rights the First Nations may have. (In the preamble to the agreement, the parties acknowledge explicitly that First Nations wish to retain Aboriginal rights and titles with respect to settlement lands.) However, title to Category A and B lands is subject to pre-existing rights (less than fee simple); interests for the use of land or resources, and any renewals or replacements; and any right of way or easement contained in individual First Nation agreements. In return, any rents received by government are payable to the First Nation. Further, the First Nations are free to divest, reacquire, or deregister Category A and B lands. In doing so, the ceding, release and surrender of any Aboriginal claims or title or interest in the land is not affected.

458 The communities that are party to the agreement are Carcross/Tagish First Nation, Champagne and Aishihik First Nations, Dawson First Nation, Kluane First Nation, Kwanlin Dunn First Nation, Liard First Nation, Little Salmon/Carmacks First Nation, First Nation of Na-cho Ny'a'k Dun, Ross River Dena Council, Selkirk First Nation, Ta'an Kwach'an Council, Teslin Tlingit Council, Vuntut Gwich'in First Nation, and White River First Nation.

The total amount of land for the requirements of all Yukon First Nations shall not exceed 16,000 square miles (41, 439.81 square kilometres). That amount shall not contain more than 10,000 square miles (25,899.88 square kilometres) of Category A settlement land. Each First Nation agreement will set out whether existing reserves are to retain that status or to be selected as settlement land, thereby ceasing to be a reserve. As well, Yukon First Nations can convert land previously set aside into settlement land.⁴⁵⁹ If the total amount of reserves and land set aside retained as settlement land by all the Yukon First Nations is less than 60 square miles (approximately 163 square kilometres), they will be able to select an additional amount of settlement land up to 60 square miles in total (see Table 4A.1).

TABLE 4a.1 Allocation of Settlement Land Amount

	Category A		Fee Simple and Category B		Total		Allocation under 4.3.4	
	1	2	1	2	1	2	1	2
Carcross/Tagish First Nation	400	1,036	200	518	600	1,554	2.90	8
Champagne and Aishihik First Nations	475	1,230	450	1,165	925	2,396	12.17	32
Dawson First Nation	600	1,554	400	1,036	1,000	2,590	3.29	9
Kluane First Nation	250	648	100	259	350	907	2.63	7
Kwalin Dun First Nation	250	648	150	389	400	1,036	2.62	7
Liard First Nation	930	2,409	900	2,331	1,830	4,740	2.63	7
Little Salmon/Carmacks First Nations	600	1,555	400	1,036	1,000	2,590	3.27	8
Nacho Nyak Dun First Nation	930	2,409	900	2,331	1,830	4,740	3.58	9
Dené Council of Ross River	920	2,383	900	2,331	1,820	4,714	2.75	7
Selkirk First Nation	930	2,409	900	2,331	1,830	4,740	2.62	7
Ta'an Kwach'an Council	150	389	150	389	300	777	3.21	8
Tlingits de Teslin Council	475	1,230	450	1,165	925	2,396	12.88	33
Gwich'ins Vuntut First Nation	2,990	7,744	—	—	2,990	7,744	2.74	7
White River First Nation	100	259	100	259	200	518	2.72	7

459 In addition to existing reserves, other land had been set aside over the years throughout the Yukon for Indian use for housing, buildings and other purposes.

	Category A		Fee Simple and Category B		Total		Allocation under 4.3.4	
	1	2	1	2	1	2	1	2
Total	10,000	25,900	6,000	15,540	16,000	41,440	60	155

Note:

1= square miles.

2= approximate square kilometers (converted from square miles and rounded).

Source: Department of Indian Affairs and Northern Development, Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon (1993), Chapter 9, Schedule a, P. 85.

Chapter 10 of the agreement provides for the establishment of an additional category of lands ‘special management areas’, which are for conservation purposes. Agreements outlining the rights and benefits of affected First Nations within such areas (that is, harvesting, participation in economic opportunities) are to be established.

First Nations will have the power to enact by-laws for use and occupancy, including setting rents or fees for third-party land use, land management, and establishing and keeping land records. Similarly, Yukon First Nations will have the authority to manage, administer, allocate and regulate the harvesting rights of Yukon Indians on settlement lands. (Refer to Yukon Umbrella Final Agreement, Appendix 4B, for details.)

In selecting lands, several restrictions apply. Privately owned land, or land that is subject to an agreement for sale or a lease, is not available, unless the owner consents. Likewise, leased land, land occupied or transferred to a federal, territorial or municipal government, is not available. Finally, land with public highways or rights of way or that forms a jurisdictional border is not available for selection.

Public right of access is subject to conditions to prevent damage, mischief and interference. Anyone has the right to enter settlement land in case of emergency. Anyone has the right to enter settlement land without the consent of the First Nation to reach adjacent non-settlement land for commercial or recreational purposes. Those holding licences can enter settlement land to exercise rights granted by such permits. Government agents can enter settlement land and use natural resources incidental to such access in order to deliver and manage programs and projects. Government will also retain fisheries management on Category B lands. Further, the department of national defence has the right of access to undeveloped settlement land for military manoeuvres with the consent of the First Nation or, failing that, an order from the surface rights board established pursuant to the agreement.

On Category A lands, the public will need permission to hunt, except on defined waterfront rights of way. Similarly, those seeking to conduct mineral exploration will need the permission of the First Nation to look for minerals and will be required to negotiate in order to develop any mines. On Category B lands, public access for non-commercial hunting will be permitted. Access to the subsurface for mining exploration and development will generally require the developer to negotiate an agreement outlining terms and conditions (with the First Nation or the surface rights board).

Although the parties recognize that settlement land is fundamental to the Yukon First Nations and therefore agree that expropriation should be avoided, authorized agencies can in fact expropriate settlement land. However, first there must be an attempt to negotiate an agreement for the use or

transfer of the land, and failing that, public hearings must be held. Approval must be obtained from either the federal cabinet or territorial government, and compensation must be paid (as determined by the surface rights board).

5. The Sahtu Dene and Métis Comprehensive Land Claim Agreement and the Gwich'in Comprehensive Land Claim Agreement

In August 1993 Canada signed a comprehensive claims agreement with the Sahtu (Slavey, Hare and Mountain Dene) and the Métis of the Sahtu region of the Northwest Territories. A separate comprehensive claims agreement was signed with the Gwich'in Tribal Council on behalf of the Gwich'in (also known as the Loucheaux) of the Northwest Territories and the Yukon in April 1992. Although the Sahtu Dene and the Gwich'in are signatories of Treaty 11, and Métis people of the region received cash grants in return for surrendering their claims, the federal government agreed to enter into comprehensive claims negotiations with these nations because of unresolved differences with respect to the interpretation of their Aboriginal and treaty rights. The land provisions (Chapter 19 of the Sahtu Dene and Métis agreement and Chapter 18 of the Gwich'in agreement) are presented together here, as they are essentially identical.

The Gwich'in are to receive 16,264 square kilometres of lands in fee simple, except for subsurface and surface mines and mineral deposits and the right to develop those deposits. The Gwich'in are to obtain fee simple title, including subsurface and surface rights, to an additional 4,299 square kilometres; another 1,755 square kilometres of lands in fee simple, including mines and minerals; and a final 93 square kilometre block with title only to the subsurface mines and minerals, subject to existing rights and interests (the last parcel is known as “the Aklavik Lands”). The Sahtu Dene and Métis people are to receive title collectively to 39,624 square kilometres of lands in fee simple, without subsurface and surface rights to mines and mineral deposits. An additional 1,813 square kilometres in fee simple land, including subsurface and surface rights to minerals and mines, is to be transferred.

Both Gwich'in and Sahtu title will include ownership of those portions of the beds of inland waters contained within land boundaries, but will exclude boundary waters. The total quantum includes a category referred to as ‘municipal lands’, which are to provide the communities with local government boundaries for residential, commercial, industrial and traditional purposes. These lands may be conveyed to any person and if done, cease to be settlement lands. Such lands may also be made available for public purposes, such as road corridors, in return for compensation. With the exception of municipal lands, which are subject to real property taxation, no other settlement lands are subject to federal, territorial or municipal taxation.

The selection processes contained in the agreements outline the various criteria guiding the actual selection of lands. Noteworthy among them are the following: unless otherwise agreed, land subject to a fee simple interest, an agreement for sale, or a lease may not be selected; land that is administered or reserved by government (federal, territorial or municipal) may not be selected; and a sufficient amount of reasonably accessible Crown land is to be left for public purposes, including recreation and wildlife harvesting. As well, settlement lands may be expropriated by government for compensation (that is, sufficient alternative lands to restore total quantum).

Lands are to be owned collectively, and title cannot be conveyed to anyone except the Crown or a designated Aboriginal organization. In turn, the designated organization(s) will manage and control land use, and may charge rents or fees for use and occupancy. However, the Aboriginal organizations are expected to provide (and be compensated for) supplies of construction materials (sand, gravel, clay and others) and permit access to them if no alternative source is available.

The harvesting rights of the claims beneficiaries are similar to those outlined in other comprehensive claims agreements in which the Aboriginal parties possess exclusive and preferential harvesting rights on settlement lands as well as in protected areas and parks. Various bodies are established to oversee the management and regulation of wildlife, fisheries, land use and environmental screening of proposed development projects. Each body includes representation from the Aboriginal party, but the relevant minister retains ultimate decision-making authority.

Generally, only beneficiaries of the agreements are allowed access to settlement land. There are numerous exceptions. Access by any non-Aboriginal person is subject to conditions to prevent damage, mischief, alteration and interference. Further, permanent or seasonal camps are not allowed. Any person may enter land, and waters lying over such lands, in case of emergency. Members of the public have the right to use inland waters for travel or for recreation, but may harvest wildlife only for recreation (fish and migratory birds) in certain waters specified in schedules to the agreements. Government agencies or departments have the right to enter, cross and stay on settlement land to deliver programs and services or establish navigational aids. Further, if government, including the department of national defence, requires continuous use or occupancy of settlement land, it must negotiate an agreement with the Aboriginal parties.

As alluded to in the land provisions, parties with existing rights to use or operate on settlement land for commercial purposes shall continue to enjoy such rights, including associated benefits. Further, such rights are eligible for renewal, replacement and/or transfer. Commercial travel on waters and waterfront lands is allowed in the course of conducting commercial activity, although the most direct route must be taken with minimal use, and the Aboriginal party must be given prior notification. As well, access across lands and waters is allowed in order to reach adjacent lands for commercial purposes. Commercial fishing operations have the right of access to waterfront lands and waters.

Individuals and governments possessing mineral rights on settlement land are granted access for exploring, developing, producing or transporting minerals, provided that they have the agreement of the appropriate Aboriginal party or the surface rights boards created after each agreement. Further, those with mineral prospecting rights do not require a land use permit to exercise such rights, and are granted access to settlement land provided that notice is given to the appropriate Aboriginal party. Any party wishing to undertake oil and gas or mineral exploration on settlement land must first consult with the relevant Aboriginal party via the appropriate government agency. Consultations are to include such matters as the impact on the environment and wildlife, Aboriginal employment, and business opportunities and training. In turn, proposed developments may be subject to review by claims-based bodies that make recommendations, including conditions for mitigation, to the appropriate minister.

The Gwich'in agreement also contains the Yukon Transboundary Agreement between the Crown and the Gwich'in Tribal Council (Appendix C to the agreement). This agreement has to do with the rights of the Tetlit Gwich'in in the Fort McPherson group trapping area as well as in an adjacent area, which both fall under the auspices of the Yukon Umbrella Final Agreement. Specifically, the Tetlit Gwich'in and the Vuntut Gwich'in First Nation, the Dawson First Nation and the First Nation

of Na-cho Ny'a'k Dun entered into an agreement in 1990 dealing with the interests of the Tetlit Gwich'in in an area included in the umbrella agreement. Essentially, the companion agreement sets out the provisions relating to those lands in the Yukon to which the Tetlit Gwich'in will receive title. It deals with the representation of both Aboriginal parties on the relevant interjurisdictional land and resource management bodies, and Tetlit Gwich'in harvesting rights in areas of overlapping traditional use. The rights and benefits set out in the companion agreement are the same as those outlined earlier.

6. Quebec's Offer to the Atikamekw and Montagnais Nations

In 1980 Quebec agreed to participate with Canada in negotiations with the Atikamekw Nation and the Montagnais Nation (represented by the Conseil Attikamek-Montagnais, or CAM) toward the settlement of their comprehensive claim, which covers much of northeastern Quebec and the southern half of Labrador. The government of Newfoundland did not participate in the negotiations since it considers the nations represented by CAM to be non-resident. In 1988, an agreement in principle was reached which, among other things, established interim measures for most of the claimed territory within Quebec. In December 1994 Quebec tabled an offer in an attempt to accelerate discussions so as to conclude the agreement by the end of 1995. The proposal, which does not constitute a final offer on the province's part, is an amalgamation of the acceptable positions of the three parties and is only for their consideration.⁴⁶⁰

Title II of the offer sets out the territorial provisions proposed by the Quebec government. Three basic types of land are contemplated: 'domains',⁴⁶¹ 'shared management areas' and 'traditional activity areas', and public lands. Domains would be lands that make up existing reserves, plus new land transferred to the communities from the province. The individual Atikamekw and Montagnais communities⁴⁶² would own this land, the mineral rights and all other real property rights, but not the beds and shorelines of waterways, including hydro reservoirs. Once transferred, these lands would cease to be reserves, but Aboriginal right to these lands would be protected under the *Constitution Act, 1982*. The total proposed amount, which is to satisfy the requirements of all 12 member communities, is 4,000 square kilometres. Domains are intended for the sole benefit of individual Atikamekw and Montagnais communities and would form the territory over which individual community governments (autonomous governments) govern. Jurisdiction would include matters relating to land-use planning, granting interests and rights in land and natural resources, and managing forestry, wildlife and mineral resources.

Traditional activity areas amounting to 40,000 square kilometres, which are also to be designated as shared management areas, are to be established for the Atikamekw and the Montagnais. Quebec would retain ownership of these areas and rights to use and occupancy. However, the Montagnais

460 "Comprehensive Land Claims of the Atikamekw and Montagnais Nations: Offer of the Québec Government" (December 1994); and "Summary of the Comprehensive Offer of the Québec Government to the Atikamekw and Montagnais Nations" (December 1994). See also Renée Dupuis, "Historique de la Négociation sur les revendications territoriales du conseil des Atikamekw et des Montagnais (1978-1992)", *Recherches Amérindiennes au Québec* XXIII/1 (1993), pp. 35-48.

461 The term 'fee simple lands' employed by the June 1993 negotiators' summary report was replaced by the expression 'domains'.

462 There are three Atikamekw communities (Manawan, Obedjiwan and Weymontachie), all in the Haute-Mauricie forest area, and nine Montagnais communities. Seven of the latter are spread over 900 kilometres of the Côte-Nord region along the north shore of the St. Lawrence River (Les Escoumins, Betsiamites, Sept-êles or Uashat-Malioenam, Mingan, Natashquan, La Romaine, and Saint-Augustin or Pakuashipi); of the remaining two, one (Pointe-Bleue or Mashteviatsh) is in the Lac Saint-Jean region and the other (Matimekossh) is near Schefferville.

and Atikamekw would enjoy exclusive rights to subsistence trapping, hunting, fishing and food gathering (harvesting). To harmonize mutual rights, the province proposed that each party draw up a code governing their respective activities, which would be consolidated and administered by a co-management committee. Such a committee would include equal representation from regional public authorities. Although these areas would be subject to provincial statutes, Quebec proposed a number of economic development initiatives. These include Aboriginal rights of first refusal for the establishment of outfitting operations, and a share of provincial land and resource revenues.

Protected sites may be established under the sole or joint management of the relevant autonomous government. Ten thousand square kilometres of public land would be designated as conservation sites on which there would be no resource development except recreation, tourism and wildlife activities, and which would be subject to joint management (between Quebec and the Montagnais only). The offer includes Canada's proposal to convert the Mingan Archipelago National Park Reserve into a national park with socio-economic development and joint management initiatives specifically with the Montagnais.

Finally, Quebec proposes that families engaging in harvesting activities on specific trapping sites outside the traditional activity area would retain exclusive rights in subsistence harvesting. As part of economic development, the province also proposes to open access to 186,000 cubic metres of timber in forest already covered by timber supply and forest management agreements, with support to establish Aboriginal forestry operations.

Aboriginal and non-Aboriginal harvesting and related activities on all other lands would be subject to laws of general application. As for other Aboriginal nations in the territory (James Bay Crees), the offer stipulates that, following the 1988 framework agreement, Canada will settle overlapping territorial concerns.

Although the offer states that provisions regarding access to lands by the public and third parties will be made in the final agreements, Quebec proposes that certain pre-existing rights (such as mineral rights) in the Aboriginal lands selected should remain in force until expiry. In return, as part of the proposed transitional process, the province offers not to transfer or attribute permanent rights on the lands except those for the resources that Quebec continues to own. In addition, Quebec would provide support to involve the Montagnais and Atikamekw in the development, maintenance, operation and management of hydro development operations producing less than 25 megawatts of energy. Finally, municipalities affected by the proposal would receive compensation.

Schedule C of the offer outlines terms and conditions governing the expropriation of Atikamekw and Montagnais domains. A provincially authorized authority may expropriate these lands for public purposes in accordance with provincial statutes. However, the authority must negotiate with the affected community to provide compensation (new lands or money). In the absence of such agreement, public hearings must be undertaken and lands would be expropriated only with the approval of cabinet.

Appendix 4B: Co-Management Agreements

1. Claims-Based Co-Management

James Bay and Northern Quebec Agreement: Fish and Wildlife Management Regime

The 1975 James Bay and Northern Quebec Agreement (JBNQA) established the first claims-based fish and wildlife co-management regime between Aboriginal and non-Aboriginal governments in Canada. Since its establishment, most subsequent co-management systems either have been modelled after the James Bay arrangement or have adopted its specific characteristics; the regime has been the subject of much analysis.

The schedule to section 24 of the agreement outlines the rights of the Aboriginal beneficiaries and non-Aboriginal people to fish and wildlife harvesting, and the management regime for the territory. As described in the companion land provisions (see Appendix 4A), the Aboriginal beneficiaries retained the right exclusively to harvest all aquatic species and furbearers in Category I and II lands and received priority subsistence harvesting rights in Category III lands via a guaranteed level of harvest stipulation. Briefly, this principle means that the Aboriginal beneficiaries will continue to have access to the levels of wildlife resource harvesting they had at the time of settlement, provided the resources are available. In the instance of surplus harvests, the surplus is allocated between Aboriginal and non-Aboriginal users in a manner that will ensure non-Aboriginal access but give priority to Aboriginal harvesters.

A unique element of the agreement is the guaranteed minimum income program for full-time hunters. A hunters and trappers income security board was established to administer benefits that were set initially at \$1,000 per annum for the head of the family, \$1,000 for the spouse, \$400 for each dependent, and \$10 per day, per adult, while fishing, trapping or hunting, to an annual maximum of \$2,400.

The hunting, fishing and trapping co-ordinating committee is the instrument through which the fish and wildlife management regime is administered. The Aboriginal parties and provincial government are represented equally on the committee, while the development corporations attend as observers. Aboriginal committee members are selected by the appropriate Aboriginal authority. (In the case of Inuit, the Makivik Corporation succeeded the Quebec Inuit Association in 1978 to represent Inuit beneficiaries. Crees are represented through the Cree Regional Authority). Committee members may be appointed and replaced at the discretion of the parties. The chairperson is rotated annually from among the parties.

The primary mandate of the committee is to review, manage and, in certain cases, supervise and regulate the regime. However, the committee's responsibilities are defined in the context of the provincial government's ultimate responsibility for the management of fisheries and wildlife. Thus, the regime is advisory in nature, except that it has the authority to establish an upper kill limit for certain wildlife species in certain zones. Committee recommendations are forwarded to the minister, who may accept, reject or alter them. The sole obligation of the minister is to make known the reasons for decisions before taking any action. A technical secretariat provides support to the committee and is funded and maintained by Quebec. Note that the Aboriginal parties must pay their costs associated with participating in the committee from the agreement's compensation funds.

At the local level, the individual community landholding corporations were established to manage the exclusive harvesting rights of the Aboriginal beneficiaries and to provide a certain level of authority on Category I and II lands concerning sport hunting and fishing, outfitting, and non-Aboriginal access. As the regime evolved, the Aboriginal parties have attempted to resolve flaws in the regime by creating structures and/or processes not originally anticipated by the agreement. For example, in response to the heavy research demands required to establish and monitor Aboriginal harvesting levels and patterns, Inuit were compelled to create a research department within Makivik Corporation, which has conducted a significant amount of costly research. Inuit also incorporated Anguvigaq Wildlife Management as a community-level hunters and trappers association specifically to represent Inuit lands and resource interests. In so doing, Anguvigaq established a much-needed link between Makivik Corporation, the Kativik regional government, the communities and the hunters.⁴⁶³ Unfortunately, because of lack of funding, Anguvigaq was disbanded in 1988. For these and a host of other reasons, commentators have generally concluded that while the regime is an improvement over what previously existed, it has experienced limited overall success as a co-management exercise.

Inuvialuit Final Agreement: Wildlife and Environmental Management Regime

The Inuvialuit Final Agreement (IFA) between the Committee for Original Peoples' Entitlement and the government of Canada in 1984 established many new institutions to manage renewable resources and the environment in the Inuvialuit settlement region (ISR). The bodies include Inuvialuit institutions and five joint government/Inuvialuit management bodies. As part of a comprehensive claims settlement, the management bodies are constitutionally protected and permanent.

The institutions are founded on the recognition of Inuvialuit harvesting, land and resource rights.

With respect to harvesting, Inuvialuit have the exclusive right to harvest furbearers and the preferential right to harvest all species of wildlife, except migratory birds, for subsistence use throughout ISR. However, while Inuvialuit settlement lands are owned and controlled by Inuvialuit beneficiaries, "the laws of general application continue to apply and the Crown retains ultimate jurisdictional authority for environmental management".⁴⁶⁴

The management mechanisms established under the final agreement are expected to achieve the following objectives:

- integrate the interests of harvesters and government in wildlife, habitat and protected area management;
- integrate wildlife management jurisdictions;
- integrate wildlife and habitat management;
- integrate traditional and scientific knowledge in wildlife management;

463 Lorraine F. Brooke, "Experiences of the Inuit of Nunavik (Northern Québec) with Wildlife Management and the James Bay and Northern Québec Agreement (1975-1993)", research study prepared for RCAP (1994).

464 Lindsay Staples, "The Inuvialuit Final Agreement: Implementing its Land, Resource and Environmental Regimes", research study prepared for RCAP (1995).

- balance wildlife conservation and environmental protection interests with those of development;
- compensate harvesters for actual harvest loss or future harvest loss from development; and
- promote self-management and self-regulation among harvesters, backed by government regulations.

A brief description of the management regime is provided below.⁴⁶⁵

Hunters and trappers committees

A hunters and trappers committee (HTC) is based in each of the six Inuvialuit communities. Its members are Inuvialuit beneficiaries who have applied to and been accepted by HTC and registered on a master list. Its directors are HTC members elected by the general membership to represent them. They provide advice to the Inuvialuit game council on issues of local concern, including their wildlife requirements and the sub-allocation of the quotas that IGC has allotted to that community. In addition, they establish by-laws that regulate Inuvialuit harvesting rights in their area, collect harvest data and generally advise on and promote Inuvialuit participation in research, management, enforcement and the use of wildlife resources in ISR. They have been active in the preparation of community conservation plans and assist the wildlife management advisory councils and the fisheries joint management committee in carrying out their duties when requested.⁴⁶⁶

Inuvialuit Game Council

The Inuvialuit Game Council (IGC) represents the collective Inuvialuit interests in wildlife. First established in 1979, it is one of the two major umbrella organizations charged with implementing IFA. (The other is the Inuvialuit Regional Corporation.) The council consists of 13 representatives: two from each of the six hunters and trappers committees and a chair. It appoints Inuvialuit members to all joint government-Inuvialuit bodies with an interest in wildlife; advises the appropriate governments about legislation, regulations, policies and administration involving wildlife conservation, research, management and enforcement; and assigns community hunting and trapping areas and allocates harvesting quotas among the communities. It represents Inuvialuit interests in any other Canadian or international group concerned with wildlife issues in ISR. It also assists the wildlife management advisory councils when requested on matters for which the latter are responsible.

Fisheries Joint Management Committee

The Fisheries Joint Management Committee consists of five members: two appointed by IGC, two appointed by the federal government and an independent chair appointed by the committee. It was established to assist Inuvialuit and the federal government administer their respective obligations relating to fisheries management under IFA. It reviews information on the state of fishing in any waters in ISR where Inuvialuit have an interest. It also determines current harvest levels, maintains

465 The summary is excerpted from Staples, "The Inuvialuit Final Agreement".

466 Community conservation plans have been prepared by Inuvialuit communities in association with the Wildlife Management Advisory Council of the Northwest Territories and the Fisheries Joint Management Committee to supplement a regional wildlife conservation and management plan for the Inuvialuit settlement region required under the Inuvialuit Final Agreement. See Community of Paulatuk 1990, Community of Sachs Harbour 1992, Community of Tuktoyaktuk 1993, Community of Aklavik 1993, Community of Inuvik 1993.

a registration system for and regulates general public fishing in waters on land owned by Inuvialuit. It allocates subsistence fishing quotas among Inuvialuit communities, recommends quotas for marine mammals and fish to the federal minister of fisheries and oceans, and advises the minister on matters regarding regulations, policy and administration of fisheries and fisheries research in ISR.

Wildlife Management Advisory Council

The Wildlife Management Advisory Council of the Northwest Territories consists of seven members: three appointed by IGC, two appointed by the government of the Northwest Territories, one appointed by the federal environment minister, and a chair appointed by the government of the Northwest Territories with the consent of Inuvialuit and the government of Canada. The council is responsible for addressing matters related to wildlife in ISR in the Northwest Territories. It provides advice to the appropriate ministers, the IGC, the Environmental Screening Committee (see below), the Environmental Impact Review Board (see below), and other appropriate bodies on all matters relating to wildlife policy and the administration of wildlife, habitat and harvesting. It also determines and recommends appropriate Inuvialuit harvesting quotas and reviews and advises on proposed Canadian positions for international purposes that affect wildlife in ISR. In addition, the council is responsible for the preparation of a wildlife conservation and management plan for the western Arctic region.

Wildlife Management Advisory Council (North Slope)

The Wildlife Management Advisory Council (North Slope) consists of five members: two appointed by IGC, one by the Yukon government, one by the federal environment minister, and a chair appointed by the Yukon government with the consent of Inuvialuit members and Canada. The council is responsible for that portion of ISR falling within the Yukon, an area known as the Yukon North Slope, which is assigned special conservation status in IFA. The responsibilities of the council largely parallel those of its N.W.T. counterpart, with additional responsibility for advising the appropriate minister on the planning and management of Ivvavik National Park and Herschel Island Territorial Park and for preparing a wildlife conservation and management plan for the entire Yukon North Slope.

Environmental Impact Screening Committee

The Environmental Impact Screening Committee consists of seven members: three appointed by the IGC, one each by the federal, Northwest Territories and Yukon governments, and a chair by Canada with the consent of Inuvialuit. The screening committee examines all development proposals in ISR to determine whether they could have significant negative environmental impact or a potential impact on present or future wildlife harvesting (section 11, section 12(20-23) and section 13(7-12)). Proposals deemed deficient are rejected. Proposals considered to have a significant impact are referred to the review board or another appropriate body for public review. This determination of the appropriate referral body for the review is based on the opinion of the screening committee as to the adequacy and the willingness of other public bodies to assess and review the development proposal.

Environmental Impact Review Board

The Environmental Impact Review Board consists of seven members: a chair appointed by the federal government, with the consent of Inuvialuit; three members appointed by IGC and three by the federal government, including at least one member designated by the territorial government in whose jurisdiction the development is proposed to take place. The board conducts public reviews of development projects referred to it by the screening committee (section 11, section 12(3)(d), section 12 (21, 23)). It recommends to the appropriate government authority whether the project should proceed and, if so, under what conditions. Where projects are found to affect wildlife harvesting, the board is required to provide an estimate of the potential liability of the developer, given a worst case scenario, for compensation to harvesters for actual and future harvest loss and for the restoration of wildlife and habitat as far as practical to its original state (section 13(11)(b)).

Joint secretariat

The joint secretariat serves all IFA joint bodies except the wildlife management advisory council (North Slope), whose secretariat is based in Whitehorse. It was established under the Territorial Societies Ordinance in 1986 by agreement between Inuvialuit and the governments of Canada and the Northwest Territories to provide administrative and technical support services. It is administered by an executive director accountable to a board of directors representing the chairs of the bodies it serves. In addition to administering implementation funding for these bodies, it provides them with full-time staff support to assist them in responding to issues, carrying out their activities and sharing information in a co-ordinated manner. It also provides the staff support for the Inuvialuit harvest study.

Unlike other comprehensive claims agreements that limit harvest studies to determining basic needs levels, IHS has a much broader application to the work of the co-management bodies, HTC and government agencies. An important requirement is that the harvest information be collected through local HTC and IGC, which guarantees a strong level of harvester involvement in the management process and in improving the information available for hunters and government agencies.

The harvest study underscores the importance of independent research and technical support provided to the IFA management regime. In addition to the harvest study, IFA provided for significant funding devoted to a wildlife research program and placed responsibility on governments to improve their state of knowledge of wildlife and habitat in the region in order to meet their obligations within the agreement.⁴⁶⁷

All decisions of the joint management boards are conveyed by way of recommendations to the appropriate minister. The decisions of the bodies are not final and are subject to ministerial override. However, in practice, no formal recommendation from these institutions has been rejected or ignored. This has been attributed largely to the collaborative relationship that has developed between the parties, in which difficult issues and potential problems are resolved at the board level before a recommendation is made. This approach provides both the ministers and members of the co-management bodies with a satisfactory level of comfort in accepting and implementing board decisions.

⁴⁶⁷ For the initial ten-year period identified to implement IFA, Treasury Board allocated approximately \$18.25 million or 28 per cent of the total funds for wildlife management research. Staples, "The Inuvialuit Final Agreement" (cited in note 2).

The most notable prevailing difficulty with the co-management bodies relates to establishing institutional understanding, support and practices between Inuvialuit and the government that are consistent with the agreement. In particular, achieving amendments to wildlife (including fisheries) legislation, regulations and administrative arrangements to ensure consistency with the provisions of IFA has been a challenge.⁴⁶⁸

The author of a case study prepared for RCAP on implementation of the Inuvialuit management regime concluded that overall the Inuvialuit experience has been largely successful:

[O]n balance it is reasonable to say that a great deal of progress has been made towards achieving the IFA's general goals and specific objectives. The participation of the Inuvialuit in the IFA's management regime is both extensive and substantive, and has had a significant influence on government decision making. The level of management and research activity related to fish, other wildlife and the environment has risen dramatically since the IFA was signed. The effectiveness of this activity and the research associated with it has contributed substantially to an improved understanding of wildlife populations, habitat and the Inuvialuit harvest of wildlife in the Western Arctic. The harvesting rights established for the Inuvialuit under the IFA and the authority held by Inuvialuit institutions to regulate Inuvialuit harvesting have generally created a climate of confidence, certainty and control for the Inuvialuit with regard to the protection of wildlife, habitat and traditional harvesting. The co-management institutions created under the IFA continue to be regarded by the parties to the IFA as important mechanisms for implementing areas of shared Inuvialuit and government responsibilities and assisting each party to the IFA in the implementation of certain responsibilities for which they hold exclusive responsibility.⁴⁶⁹

Denendeh Conservation Board

The Denendeh Conservation Board (DCB) was established in 1986 in anticipation of the completion of the Dene/Métis comprehensive land claims negotiations. The board was intended to serve as the pre-implementation tool for the provisions of the wildlife sub-agreement of the Dene/Métis land claim agreement in principle. As such, DCB was modeled on the wildlife management board described in the claim and would have been folded into the management regime resulting from a final agreement.⁴⁷⁰ Because negotiations on wildlife and other renewable resources were not finalized at the time of the board's creation, both parties acknowledged that the establishment of DCB would be without prejudice to future negotiations on the substance of wildlife provisions within the final agreement.⁴⁷¹

A co-management board made up of five Aboriginal representatives from all five tribal regions and five representatives from the government of the Northwest Territories was created. The members were nominated by their respective organizations and appointed by the minister of renewable resources.⁴⁷² The board elected its chair, subject to the minister's confirmation.

The objectives of the Denendeh Conservation Board were to conserve and protect all renewable resources and habitat in a manner that would ensure their future availability for use by the

468 Staples, "The Inuvialuit Final Agreement".

469 Staples, "The Inuvialuit Final Agreement".

470 Denendeh Conservation Board Authority and Procedures Manual, June 1988, Appendix III, p. 1.

471 Authority and Procedures Manual, Appendix III.

472 Authority and Procedures Manual, section 1.5, p. 2.

Dene/Métis in the settlement area; to provide for the direct involvement by the Dene/Métis in renewable resource policy, planning and management; to ensure that non-Aboriginal persons were treated equitably; and to respect and protect the harvesting and management practices of the Dene/Métis.⁴⁷³ The board was to address the issue of renewable resources throughout the Denendeh region of the Northwest Territories. DCB was strictly advisory in nature, as reflected in its overall mandate:

The Board will have the responsibility of providing advice to the Minister on renewable resource policy and legislation which are within the mandate of the department. It is recognized that the Board may wish to provide advice on other renewable resource matters that are not presently within the mandate of the department but are of importance to GNWT and residents of the Mackenzie Valley.

*The advice on policy and legislation may include but is not limited to wildlife, habitat, forestry, environmental protection, land-use planning and water.*⁴⁷⁴

The board's mandate was phrased so as to allow the board to provide input on matters such as forestry, habitat and the environment, which are in the jurisdiction of the federal government but also are the subject of intergovernmental working arrangements with the territorial government. (With respect to forestry, this area has subsequently been transferred to the territorial government.)

To carry out its mandate, the board was to reach consensus on issues such as commercial and subsistence wildlife quotas, scientific research results and recommendations to the territorial minister of renewable resources. Although DCB accepted these provisions as guidelines for its operations, it became increasingly apparent as comprehensive claims negotiations proceeded that the Dene/Métis wanted to develop a much stronger agency in which "Dene/Métis would play a dominant role in the management of wildlife, fish and habitat of wild creatures through the claims settlement".⁴⁷⁵

With the demise of the Dene/Métis comprehensive land claim, the board lost its raison d'être. In the absence of a final agreement setting out the final terms of reference under which the board would function, the board did not develop its own clear focus or mandate. Although the Denendeh conservation board continued to operate, government commitment to the board diminished and the resources and authority required to ensure smooth operation did not materialize.⁴⁷⁶ Eventually, in the spring of 1993, the Denendeh Conservation Board was dissolved.

Before dissolution, a consultant undertook an evaluation of the board's performance. Key among the problems identified was the lack of communication between the board and the public, particularly with people at the community level. According to the consultant's report, the board lost the support of the Aboriginal people that it was intended to serve. Thus, the report recommended that the body make a concerted effort to involve communities by using existing local and regional management structures, for example, hunting and trapping associations, and by increasing its communication with communities.⁴⁷⁷ The report also found that the board had not established its

473 Authority and Procedures Manual, section 1.3, p. 1.

474 Authority and Procedures Manual, Appendix III.

475 Laurie Montour, "Natural Resource Management Agreements in First Nations' Territories", research study prepared for RCAP (1994).

476 Montour, "Natural Resource Management".

477 Warren St. Germaine, 1991, quoted in Montour, "Natural Resource Management".

own agenda, but instead was viewed as an extension of the territorial government. Further, inadequate resources were allocated to the conservation board to carry out its responsibilities.

While the consultant's report noted that the board was relatively successful in providing a forum for local involvement in resource management compared to what previously existed, the author of a research study prepared for RCAP concluded that the main reasons for its failure were

- the lack of legal decision-making authority vested in the board;
- the perception that the board was an extension of the territorial government; and
- the absence of any independent fiscal, research and planning capacity.⁴⁷⁸

Yukon Umbrella Final Agreement: Fish and Wildlife Management Regime

Chapter 16 of the Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon sets out a comprehensive framework to guide and integrate the management of fish and wildlife within the entire settlement area.⁴⁷⁹ The management regime is organized into three major sections with responsibility for a particular geographic area. At the broadest level, a fish and wildlife management board is to be established with responsibility for fish and wildlife management within the settlement area. Within each First Nation's traditional territory, the First Nation will be responsible for fish and wildlife management, and a renewable resource council will be established to play an advisory role. As the regime is part of a comprehensive claims settlement, the management bodies created are both permanent and constitutionally protected.

The broad objectives of the proposed management framework are to conserve wildlife resources and their habitats, to guarantee Yukon First Nations' rights to harvest and manage renewable resources on settlement land, to ensure the full participation of Yukon First Nations members and their traditional knowledge in resource management, and to ensure the involvement and fair treatment of other Yukon resource users.⁴⁸⁰

Inside their traditional territory, each First Nation will have the authority to allocate and regulate harvesting quotas for Aboriginal and non-Aboriginal residents and to manage local fish and wildlife populations. The First Nation may participate in the broader management regime governing the entire settlement area. However, the nature of their participation is not clearly defined in the umbrella agreement and likely will be the subject of further discussion as these bodies are established.

Renewable resource councils are to be established to act as "the primary instrument for local renewable resources management" in the First Nation's traditional territory. It appears that the renewable resource councils are to be the venue through which non-Aboriginal resource users provide input and influence resource management, since the agreement states explicitly that the councils are to act in the public interest and to ensure public involvement in the development of their decisions.⁴⁸¹

478 Montour, "Natural Resource Management".

479 *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (Ottawa: Supply and Services, 1993), p. 153.

480 *Umbrella Final Agreement*, section 16.1.0, p. 153.

481 *Umbrella Final Agreement*, sections 16.6.1, 16.6.6, and 16.6.9, pp. 163-164.

Each council is to be made up of six members, of whom three represent the First Nation and three the Yukon government. Although community representatives are nominated by the First Nation, the minister appoints both the council members and a mutually agreed chair. Appointments are for a five-year term, with staggered initial appointments: one-third for three years, one-third for four years and the final third for five years. This method should allow for continuity as the councils develop experience and expertise.

The renewable resource councils are meant to encourage and ensure input into and some control over resource management decisions at the local level. The overall responsibility of a council is to develop and make recommendations to the minister, the individual First Nation and other resource management boards set up under the final agreement. The councils will deal with matters related to the management and conservation of fish and wildlife inside the traditional territory of each First Nation.⁴⁸² Recommendations may pertain to the following broad areas:

- management plans, harvesting plans and requirements, and the allocation of harvests for fish and wildlife;
- local management concerns;
- the management of furbearing animals and the use and assignment of traplines;
- priorities and policies related to enforcement of legislation;
- the granting of research permits; and
- the allocation and terms for commercial uses of wildlife and fish (except salmon).

The councils are also empowered to establish by-laws under the Wildlife Act concerning the management of furbearing animals and are granted status as an interested party in relevant public proceedings. With the exception of the by-law provision, the renewable resource councils are advisory in nature. While the minister and the council must attempt to reach consensus, in the event that the council and the minister disagree on a council recommendation, the minister retains final authority.⁴⁸³

To support their work, each council is to prepare a budget setting out estimates for remuneration and travel for members, for reviewing research, and for informing and consulting with the public. Specifics about administrative requirements and staffing are the subject of individual First Nation implementation plans. The Yukon government is to cover costs associated with the set-up and operation of the councils. Administrative support for councils does not include technical support for gathering independent data because the territorial government is responsible for providing necessary information to councils as requested.⁴⁸⁴

The fish and wildlife management board will be charged with the joint management of fish and wildlife resources throughout the settlement territory. The board will be made up of twelve members: six representatives of the Yukon First Nations and six nominees of the Yukon government, with a mutually acceptable chair selected from its membership. Board members are appointed by the minister.

482 *Umbrella Final Agreement*, section 16.6.9, p. 164.

483 *Umbrella Final Agreement*, section 16.8.0, pp. 173-174.

484 *Umbrella Final Agreement*, section 16.6.7, p. 166.

The fish and wildlife board will be responsible for making recommendations to the minister, the affected First Nations and the renewable resource councils on all issues related to fish and wildlife management, legislation, research, policies and programs.⁴⁸⁵ Recommendations may relate to management plans recommended by the councils, total allowable harvest, adjustments to basic needs levels and restrictions on harvesting methods. The board may also provide assistance to or delegate its duties to the renewable resource councils.

All decisions of the fish and wildlife board are subject to the approval of the minister, who may accept, vary, set aside or replace the recommendation or decision. In the event that the minister proposes to vary or replace a recommendation with respect to total allowable harvest, the territorial government is expected to reach consensus with the affected First Nation. If, however, they are unable to reach any resolution, the minister's decision will stand as long as it is consistent with the principles of conservation. In turn, the board is to communicate to the renewable resource councils the decisions of the minister.

An executive secretariat is to be established to provide the board with administrative support and to act as a liaison with renewable resource councils. However, the board must rely upon existing government agencies for technical support. To ensure a link between the board and government, the director of fish and wildlife for the Yukon is to serve in an advisory capacity.

One community — the First Nation of Na-cho Ny'a'k Dun — set up its renewable resource council at the pre-implementation stage in 1992. Experience has been mixed. The council has enabled the community to generate information and expertise at the community level while exposing local resource use and management knowledge. However, the council has experienced difficulty in gaining departmental acceptance and integration of its work and is thus attempting to insert itself into the bureaucratic network.

The issue of integration and co-ordination will likely become more important as more management bodies come onstream. The umbrella agreement is vague and rather confusing in defining the actual working and reporting relationships among the renewable resource councils, the fish and wildlife management board, and the First Nations within the overall management scheme. All three share, to varying degrees, similar responsibilities over the same geographic area. It is not clear where one body's jurisdiction ends and another's begins. For example, while the First Nations retain authority over harvesting and management for their traditional territory, the renewable resource councils are also charged with preparing resource management recommendations for the same area. Moreover, the fish and wildlife management board makes recommendations affecting the entire settlement area. On the basis of the text, it appears that First Nations retain a degree of decision-making power, but this is couched within a broader management framework. To avoid duplication of effort and interjurisdictional conflict, implementation of the management regime will have to address these concerns clearly.

Nunavut Final Agreement: Wildlife and Environmental Management Regime

A fundamental principle guiding the creation of the new territory of Nunavut is that Inuit of the region are traditional and current users of wildlife with legal rights flowing from this use. In recognition of this principle, article 5 of the Nunavut Final Agreement establishes a wildlife management system that will reflect the harvesting rights and priorities of Inuit within the Nunavut settlement area. The regime is also centred on conservation principles and government's ultimate responsibility for this area.

⁴⁸⁵ *Umbrella Final Agreement*, section 16.7.11, p. 168.

The Nunavut Wildlife Management Board (NWMB) is to be the main instrument of wildlife management, access to hunting and regulation in the Nunavut settlement area. The board will be established as follows: each of four designated Inuit organizations (DIO) will appoint one member, the territorial government one member, and the federal government three members. The chair is appointed by the federal government on the basis of recommendations received from DIO. Members are appointed for a four-year term. NWMB is advisory in nature because the minister retains ultimate authority to manage wildlife. The board is charged with the following functions: to participate in research; to conduct the Nunavut wildlife harvest study (document levels and patterns of Inuit use to determine basic needs levels); to establish and monitor levels of total allowable harvest; to determine and adjust basic needs levels; to allocate resources to non-Inuit residents and interests; and to recommend allocations of surplus. NWMB is also vested with the discretionary authority to approve the establishment of or changes to conservation area boundaries, identify zones of high productivity, and approve management and protection plans for wildlife habitats. Decisions of the board may be rejected, with reasons, by the minister (federal or territorial, depending on the issue).

Generally, Inuit have the right to harvest up to the full level of their economic, social or cultural needs throughout the Nunavut settlement area. Non-Inuit may also harvest wildlife subject to laws of general application, after total allowable harvest and basic needs levels have been established for Inuit. Inuit may dispose of wildlife freely, which includes the right to barter, trade or exchange wildlife inside or outside the Nunavut settlement area.

In addition to NWMB, Inuit harvesting will be overseen by hunters and trappers organizations (HTO) and regional wildlife organizations (RWO). Each community and each outpost camp may choose to establish its own HTO. Each region will have its own RWO. HTO will be responsible for regulating the harvesting practices of members, allocating and enforcing community basic needs levels, and assigning to non-members any portion of these allocations. RWO will be responsible for regulating harvesting practices among HTO members, allocating and enforcing regional basic needs levels, and assigning to non-HTO (persons or bodies) any portion of regional needs levels allocations. The board of an RWO is made up of representatives of the region's HTO. To avoid duplication and facilitate smooth operations, two or more RWO may join together to discharge their responsibilities. Neither organization may unreasonably prevent Inuit from meeting their personal consumption needs. HTO and RWO are funded by NWMB, which is funded by government.

With respect to land and resource management, the agreement establishes a number of public institutions charged with overseeing particular elements: the surface rights tribunal, the Nunavut Impact Review Board, the Nunavut planning commission, and the Nunavut water board. The Nunavut Impact Review Board (NIRB) is responsible for the environmental and socio-economic impact screening process established through the agreement. NIRB will be responsible for screening development project proposals; determining whether projects should proceed, and on what basis; and for monitoring projects.

The board is to be composed of nine members: four appointed by the federal minister responsible for northern affairs on nomination by DIO; two appointed by one or more federal ministers; two by one or more ministers of the territorial government; and, from nominations agreed to by the above members, the chairperson of the board, appointed by the federal minister of northern affairs. A member sits on the board for a term of three years. To carry out its duties, the board may establish by-laws governing procedures and conduct public hearings with the power to subpoena witnesses and require documents. The cost of operations will be funded by government based on an approved annual budget.

NIRB may review projects that are forwarded to it from the Nunavut planning commission. The board may recommend to the minister that the project go ahead without a review. The minister, however, retains final authority with respect to environmental review matters. If the board decides to undertake a project review, its findings are to be forwarded to the minister, who may accept or reject the board's recommendations. The minister is to supply NIRB with written reasons for every decision. Likewise, if the minister decides to refer a project for public review by a federal environmental assessment panel, the panel will conduct its review in accordance with the provisions outlined in the Nunavut final agreement. Finally, the board is responsible for monitoring the effects of projects having to do with the ecosystem and socio-economic environment of the Nunavut settlement area.

2. Crisis-Based Co-Management

Beverly-Kaminuriak Caribou Management Board

The Caribou Management Board was established in 1982, for a 10-year term, in response to a widely perceived crisis in the management of two caribou herds — the Beverly and Qamanirjuaq⁴⁸⁶ barren ground caribou — that range between three jurisdictions: the Northwest Territories, Saskatchewan and Manitoba. During the 1970s, biologists working for natural resource management agencies in those jurisdictions believed that both herds were declining rapidly, and attributed this primarily to overharvesting by Dene and Inuit harvesters in the area. Aboriginal communities are virtually the sole users of the resource because the area is remote.

Government managers saw curtailing the harvest as the most appropriate response to the crisis. Aboriginal harvesters, however, viewed the problem as one of habitat protection and were becoming increasingly hostile to government initiatives that largely excluded their participation. In this climate, and because of media attention surrounding the caribou crisis, several initiatives were introduced to improve communication and understanding between the managers and users of the resource. The most significant initiative was the new board, established in the course of a 10-year management agreement between the governments of Canada, Manitoba, Saskatchewan and the Northwest Territories to co-ordinate management of the two herds.⁴⁸⁷

Aboriginal communities are not an actual party to the agreement, which covers a vast area of land comprising the herds' migratory range, which extends from Great Slave Lake in the western part of the N.W.T., east to Hudson Bay and south of the tree line in northern Saskatchewan and Manitoba. Membership of the board consists of five government and eight user members. The governments appoint members of their respective resource management departments while user appointments are made by the appropriate ministers on the basis of the recommendation of the communities or regional Aboriginal organizations.

Although the Aboriginal communities pushed for the establishment of a board made up entirely of users, the governments were not prepared to delegate their management authority and opted instead to include their own managers on the board. The agreement is not based on recognition of Aboriginal or treaty rights to hunt and/or manage the resource. Instead, the agreement recognizes

486 This is the preferred Inuktitut spelling of the herd name. The old spelling, Kaminuriak, survived in the original name of the board which was changed to the new spelling when the agreement was renewed in 1992.

487 Peter J. Usher, "The Beverly-Kaminuriak Caribou Management Board: An Experience in Co-Management", in Julian T. Inglis, ed., *Traditional Ecological Knowledge: Concepts and Cases* (Ottawa: International Development Research Centre, 1993), p. 113.

the priority of subsistence hunting by traditional users who are defined within the agreement as those persons “recognized by the local population on the caribou range as being persons who have traditionally and/or currently hunted caribou for subsistence”. The virtual absence of third parties (non-Aboriginal people and private interests) in the region was a key reason for the importance given to subsistence harvesting in the agreement and the composition of the board.⁴⁸⁸

The board is responsible for developing and making recommendations to governments and users for the conservation and management of the herds and their habitat to ensure that the population is sustainable for traditional harvesting. The recommendations include limitations on the annual harvest; regulations; user participation; research proposals and data collection; the development and monitoring of a management plan; monitoring habitat; and conducting information programs. While governments have generally accepted the recommendations of the board, it remains advisory in nature, as the governments retain ultimate authority for management of the resource.

In practice, the caribou management board is generally viewed by both government and users as a success within the limits of its mandate. From a government perspective, the board has been quite successful in co-ordinating research and management of the herds among different jurisdictions. It has provided a single and comprehensive venue through which to address management initiatives and to consult those using the resource. Community representatives have viewed the board as a vastly improved management instrument in which they may directly incorporate their interests and concerns. It has afforded Aboriginal harvesters the opportunity to communicate with each other and to learn of developments on the range, and has been successful in promoting public and hunter education. The board members have developed a good working relationship and operate effectively as a team.⁴⁸⁹ This point was cited in our public hearings as a crucial element in successful co-management:

[T]he users and management agencies must agree on the same goal in order to make a management decision or recommendation ... Users and managers must trust each other in order to work together. Honesty and patience are required as it can take time to develop that trust.

Joe Hanly
Deputy Minister of Renewable Resources Yellowknife,
Northwest Territories, 9 December 1992

The board’s mandate was renewed for another 10-year term in 1992. However, the Aboriginal communities are still not signatories to the agreement, and the structure of the board has remained the same. The distinction between users and managers remains fundamental to the board’s structure, and, in this sense, the caribou management board is not a full co-management arrangement.

Auyuittuq National Park Reserve, Baffin Island

The Auyuittuq National Park Reserve was established in 1976 as part of Parks Canada’s overall policy of completing a northern park system to preserve selected eco-regions. The park covers 22,000 square kilometres on Baffin Island. Initially, Parks Canada faced opposition from Inuit in the region, as the entire area was still under claim and the proposed boundaries of the reserve impinged on two adjacent communities, Pangnirtung and Broughton Island.

488 *Beverly Qamanirjuaq Barren Ground Caribou Management Agreement* (Caribou Management Agreement), 4 June 1992, p. 1.

489 For a more detailed evaluation, see Usher, “Beverly-Kaminuriak” (cited in note 25).

Following consultation with the communities affected, the park reserve was established without prejudice to the comprehensive claims negotiations and on the understanding that the boundaries might change subsequent to any land settlement. An advisory committee was formed of community members to provide input into the operation of the park reserve. Since that time, the committee, whose representatives were originally appointed by government, has evolved from a public consultation initiative into a substantive co-management body overseeing the management and administration of the park reserve.

The park management committee is the product of local relationship building between park staff and the two communities. Consequently, there is no defined time frame that guides the initiative nor is there a formal agreement setting out the terms of reference or function of the committee. Technically, the committee does not possess any decision-making authority, but in practice the decisions of the committee are accepted and implemented by park staff. Thus, the committee represents a community-based and community-accepted approach to land and resource management in which local needs and objectives are integrated directly into the park management system.⁴⁹⁰

The committee consists of members from the two communities as well as representatives from the local hunters and trappers associations. Members are elected directly by the communities while the associations appoint representatives. At the time of writing, four members are from Broughton Island and five are from Pangnirtung. Three Parks Canada staff sit on the committee but act as advisers only, providing information and assistance to committee members as required.

The committee is responsible for providing overall policy direction for the management of the park as well as for addressing other issues of concern (ranging from wildlife harvesting to interpretation programs for tourists under park operation). The committee meets twice a year as a group and holds two community-based meetings within their respective communities. Committee decisions are incorporated into park administrative practices. Financing for the committee's operations is provided by the park's internal budget.

The work of the committee has had a positive impact on park management and overall community relationships:

The result of this change in management structure is that it has allowed the community more direct say in the direction of the Park. The intent is to develop a management regime in which local communities feel strongly that Auyuittuq is their park, and the messages which are presented by the park to visitors and residents alike accurately reflect community views.⁴⁹¹

A major factor in the success of Auyuittuq's co-management committee is that all but one of the park's employees are Inuit from the local communities. Therefore, not only does the committee guiding policy represent community needs but so do the internal decisions and administration of the park reserve. Consequently, the potential for problems experienced by other co-management regimes in developing collaborative relationships between government staff and community members may be diminished.

Pursuant to the final agreement with the Tungavik Federation of Nunavut, Auyuittuq will become a national park. Inuit will retain the right of access to the park for the purposes of harvesting, subject to any restrictions developed during the negotiation of an Inuit impact and benefits agreement

490 Bruce Rigby and Alex Zellermeier, "Auyuittuq National Park Reserve", unpublished paper presented at a conference entitled The Benefits of National Parks and Protected Areas in the North, 19 April 1994, p. 4.

491 Rigby and Zellermeier, "Auyuittuq National Park Reserve".

(IIBA). In addition to defining any required limitations on resource access and use in the park, the negotiated IIBA is to address matters related to the establishment of the park, such as ensuring that Inuit obtain employment and economic benefits, determining zones requiring environmental protection, and establishing joint Inuit/government parks planning and management committees.⁴⁹²

Since the Auyuittuq co-management committee is an informal body that has evolved to conform with the specific needs and concerns of the communities, it is not clear what the relationship will be between the committee and the formal co-management structures envisioned in the Nunavut final agreement. Given its success, the committee will likely continue to play a central role in park management.

South Moresby/Gwaii Haanas National Park Reserve, British Columbia

One of the longest-standing and best-known resource use conflicts in Canada is that involving the South Moresby area of the Queen Charlotte Islands in British Columbia. Throughout the 1970s and '80s, members of the Haida Nation and environmentalists joined forces to lobby for permanent protection of this wilderness area from commercial logging. Following several unsuccessful petitions to the British Columbia Supreme Court to prevent renewal of a forestry licence in the area, the Haida Nation submitted a formal land claim to the federal government based on unextinguished Aboriginal title and their inherent responsibility to manage the resources within their traditional territory.

Although the federal government accepted the claim for negotiation in 1983, logging within the claimed territory continued unabated. The Haida decided to take matters into their own hands and created their own 'tribal park', designating Gwaii Haanas and Graham Island as protected areas. Since the mid-1970s, the Haida have been managing and operating their own program for the protection of significant sites on South Moresby, such as the village of Ninistints, which UNESCO designated a world heritage site in 1981. As the number of tourists steadily increased, the Haida expanded the program to include information services, escorted tours and community feasts. A fee charged by the Haida was considered illegal by Parks Canada, but they did nothing to stop it.⁴⁹³

In 1987, the federal and provincial governments signed a memorandum of understanding to turn the area into a national park reserve. The Haida Nation, however, was not a signatory of the agreement, because they were unwilling to participate as joint managers with only an advisory role. Eventually, an agreement was reached between the federal government and the Haida, without prejudice to the Haida Nation's land claim, recognizing their divergent positions on ownership.

The Gwaii Haanas Agreement between the government of Canada (department of the environment) and the council of the Haida Nation is unique in that it contains parallel statements on sovereignty, title and ownership to the archipelago and affirms the parties' willingness to work together, without placing the Haida under the authority of the *National Parks Act*.⁴⁹⁴ The Haida have been successful in obtaining a substantive role in management that respects their rights and responsibilities. The agreement further recognizes the continuing traditional harvesting rights of the Haida and their

492 *Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (Ottawa: Minister of Indian Affairs and Northern Development and the Tungavik, 1993). See the agreement for a complete listing of matters that may be addressed in the development of Inuit impact and benefits agreements in relation to parks.

493 Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada* (North York: Captus Press Inc., 1994).

494 Although Parks Canada, through the National Parks Act, is willing to enter into co-management arrangements with Aboriginal communities, its regulations and policies assume that the federal government retains ultimate authority for the management of lands and resources within parks.

identification of significant spiritual and cultural sites within the region. All other resource extraction activities are prohibited. (The agreement makes an exception for ‘essential activities’ in support of fishing in adjacent waters, consistent with the guidelines to be developed for the protection of the archipelago.)

The objective of the agreement is to protect and preserve the archipelago’s natural environment and Haida culture for the benefit and education of future generations. To achieve these objectives, the agreement establishes an archipelago management board (AMB) responsible for planning, operation and management. The board consists of two Haida representatives and two Parks Canada representatives, with co-chairs designated from each party.

The board is responsible for developing a joint management plan; establishing regulations and guidelines concerning Haida traditional resource harvesting activities; identifying spiritual-cultural sites and managing these sites; producing guidelines for permits and licences for commercial, research and recreational activities; communicating with existing private and government agencies involved in activities affecting the area; and developing economic and employment strategies for the Haida Nation associated with the joint management process. To carry out these activities, the board prepares annual work plans setting out work, staffing requirements and budgets for both parties.⁴⁹⁵ The agreement does not state how the board will be financed, although Parks Canada is responsible for financing all aspects of tourism development, including the Watchmen program initiated by the Haida.⁴⁹⁶

Neither party may take actions to manage or develop the park reserve without the consent of the other. Decision making is based on consensus, and if members disagree on any matter, the decision will be delayed until resolution is reached by the council of the Haida Nation and the government of Canada. A mediator may be requested to participate in resolving any disputes. The board must reach agreement before it can proceed, and its approval is mandatory for any legislation.

Two years after the agreement comes into effect and thereafter every five years, the parties must conduct a joint review that is to be finished in a six-month period. Following the six-month review period, either party may terminate the agreement subject to six months’ unconditional notice.⁴⁹⁷

The Canada-Haida agreement represents an important achievement for Aboriginal people with respect to land and resource management — the Haida were successful in negotiating an understanding that respects their position on title and without Parks Canada retaining full decision-making power. Moreover, as the history leading up to the agreement illustrates, the Haida were instrumental in bringing about the creation of the National Park Reserve by establishing and operating their own tribal park to which the government was forced to respond.

Wendaban Stewardship Authority, Temagami, Ontario

In the late 1980s, conflict over resource use in the Temagami region of northeastern Ontario dominated national headlines. At the centre of the dispute was Canada’s — some say the world’s — largest old-growth red and white pine forest. Protests by logging interests, environmental groups and the original inhabitants of the land — the Teme-Augama Anishinabai — occupied media attention, captured the interest of the public (as measured by public opinion polls), and caught the

495 *Gwaii Haanas Agreement between the Government of Canada and the Council of the Haida Nation*, 30 January 1993, p. 4.

496 Notzke, *Aboriginal Peoples and Natural Resources in Canada* (cited in note 31).

497 *Gwaii Haanas Agreement* (cited in note 33), p. 6.

attention of the provincial legislature. As leader of the opposition, Bob Rae became involved and was arrested at an environmentalist blockade on the controversial Red Squirrel forest access road. The provincial government of Premier David Peterson decided it had to take action to resolve the impasse.

In April 1990, the province of Ontario (represented by Lyn McLeod, minister of natural resources, and Ian Scott, minister responsible for Aboriginal matters) and the Teme-Augama Anishinabai (represented by Chief Gary Potts and Second Chief Rita O'Sullivan) signed a memorandum of understanding, which set up negotiations for a treaty covering 10,000 square kilometres of land. The area had been the centre of a long-standing dispute between the Teme-Augama Anishinabai and the Ontario government over title to the land, one that culminated in a 1991 Supreme Court of Canada decision that the Temagami people had adhered to an 1850 treaty (and at the same time holding that the Crown had breached its fiduciary obligations to them).

In addition to treaty negotiations, the agreement included a bilateral process whereby the Teme-Augama Anishinabai were guaranteed an advisory role in the Ontario ministry of natural resources (MNR) timber management planning process for the Temagami district; and there was a commitment from both parties to establish a 'stewardship council' for part of the area. This council was announced as the answer to the dispute by those at the signing.

The NDP government, which took office in the fall of 1990, continued the policy of its predecessor. An addendum to the memorandum of understanding, signed in May 1991, brought the council into existence as the Wendaban Stewardship Authority (WSA). At a news conference in Temagami, Chief Gary Potts and Bud Wildman, the minister responsible for Aboriginal matters and minister of natural resources, heralded the signing as a positive development in shared jurisdiction between Aboriginal and non-Aboriginal people.

The authority was given jurisdiction over four townships (roughly 400 square kilometres) northwest of Temagami and within the traditional homeland of the Teme-Augama Anishinabai. While most of the area is Crown land, it includes a few patented mining claims and privately owned cottage lands. The Wendaban stewardship area includes the Wakimika Triangle, where much of the old-growth forest is located, as well as the extension to the controversial Red Squirrel forest access road. (The authority was named for Wendaban, who was head of the principal Aboriginal family that traditionally occupied the stewardship area. Wendaban means 'whence the dawn comes'.)

The authority was set up as a decision-making body that would report to Ontario and the Teme-Augama Anishinabai, rather than as an advisory body to a government minister. However, while the Teme-Augama Anishinabai sanctioned WSA as a decision-making body through a general assembly resolution, the authority did not obtain the promised legislative jurisdiction over the four townships from Ontario. The jurisdictional vacuum was temporarily alleviated through the tacit agreement by all parties to act as if the authority possessed the appropriate legislative base.

While useful, this strategy caused some difficulty in practice. On more than one occasion, authority decisions that were contrary to policies of the local planning board were challenged by district staff of the ministry of natural resources because of WSA's lack of legislated decision-making authority. Although the situation was resolved by the minister directing his staff to acknowledge the authority's jurisdiction, it illustrates the problems of operating without a clear legislative base. Indeed, if challenged by a third party, it is unlikely that a court would have favoured the WSA position.

According to its terms of reference, the Wendaban Stewardship Authority is responsible for monitoring, regulating and planning all uses and activities, ranging from recreation and tourism, fish and wildlife to land development and cultural heritage on the land within its jurisdiction. The approach emphasizes holistic land and resource use based on four principles: sustained life, sustainable development, coexistence between Aboriginal and non-Aboriginal peoples and public involvement in the activities of the authority.

The authority has 12 members: six appointed by the Teme-Augama Anishinabai and six by the province of Ontario, and a non-voting chair appointed by mutual agreement. Representatives to the board were selected by both sides with a view to incorporating the diversity of local interests in the planning and management process. None of the members is a provincial public servant. Ontario's representatives included a local township reeve, the manager of a nearby sawmill and a local environmental activist; the Aboriginal representatives included the owner of a contracting business, a trade unionist and the manager of a craft co-operative. The authority built some aspects of traditional Aboriginal protocol into their procedures, such as reaching decisions on the basis of consensus.

There were initial doubts about the potential for success using a consensus approach to decision making, given the diverse cultures and backgrounds of the members, the previous level of conflict over resource management issues, and the fifty-fifty split in representation. These doubts seemed to be backed up by conventional wisdom on resolving conflict: consensus is suited for situations where the level of conflict is low and groups have much in common. Once the members and chair formed a comfortable rapport, however, the authority established an informal routine for decision making.

In fact, in more than three years of operation, not one of the authority's decisions split the membership on Aboriginal/non-Aboriginal lines. The main points of tension were between those in favour of and those opposed to resource development, and there were Aboriginal and non-Aboriginal members in both camps. In June 1994, members reached consensus on a 20-year forest stewardship plan for the area under the authority's jurisdiction, a plan that establishes land use zones and regulates all uses, including recreation, timber, mining, wildlife, water and cultural heritage. That plan was subsequently submitted to Ontario and the Teme-Augama Anishinabai.⁴⁹⁸

The future of the authority is in some doubt. In 1993, Ontario and the Teme-Augama Anishinabai reached an agreement in principle on a treaty of coexistence. That treaty would have provided for a shared stewardship body covering a larger area and having a somewhat different mandate and membership criteria. Difficulties inside the Aboriginal community, however, prevented the agreement from being ratified before the new Conservative government took office in June 1995. Premier Mike Harris has since stated that Ontario would be withdrawing from the agreement in principle. If there is no treaty, the fate of WSA is still very much an open question.

Another difficulty faced by the authority has been the lack of stable funding, since it relies solely upon provincial government funding that is approved on an annual basis. Because of this, the authority has had minimal staff and has not been in a position to undertake long-term planning or to fulfil its mandate effectively. Because the provincial government controls the purse strings, it can control the agenda by withdrawing funds.

498 Wendaban Stewardship Authority, presentation to the Standing Committee on Aboriginal Affairs and Northern Development, 6 December 1994

Whatever its future, there have been several positive lessons from this experiment in shared jurisdiction. Not only has the Wendaban Stewardship Authority generated support and collaboration among a multitude of often conflicting interests, at both the regional and local levels, it has also proven that Aboriginal and non-Aboriginal people can work together on issues of land and resource management. That in itself is a major accomplishment.

Barriere Lake Trilateral Agreement, Quebec

The traditional territory of the Algonquin of Barriere Lake in Quebec has long been subject to encroachment by industrial and recreational interests. Earlier this century, hydroelectric development had adverse effects on wildlife resources and their habitat. Although the province of Quebec established a hunting reserve in 1928 — the Grand Lac Victoria Reserve, for the exclusive use of First Nations people — the construction of a highway through the area increased recreational hunting pressure. As a result, a significant portion of the reserve was turned over to non-Aboriginal use. The reserve became a park, and recreational and tourist use further increased. However, logging operations in the area have been the major source of conflict, exacerbated by the provincial forestry management and land use planning regime, which has made little attempt to address the ecological impact of resource extraction activities.⁴⁹⁹

In the late 1980s, when the province began to lock surrounding lands into 25-year timber supply and forest management agreements (CAAF) with logging companies, the Algonquin decided to challenge the province by seeking a court injunction as an immediate step to alleviate continuing pressure on their traditional land base and to force the federal and provincial governments into negotiations.

The Barriere Lake Trilateral Agreement, between the Algonquin of Barriere Lake, the province of Quebec and the government of Canada, was signed on 22 August 1991. The agreement covers a 10,000 square kilometre territory within La Verendrye Park, in which the Algonquin pursue traditional activities. In a strategic move by the community, the agreement was not based on recognition of Algonquin title or rights to the land and resources within the region. What the Barriere Lake Algonquin sought, rather, was to alleviate immediate resource extraction pressures and force the Quebec and federal governments into “negotiations aimed at a trilateral agreement on integrated resource management which would take Algonquin land use into account”.⁵⁰⁰ The Algonquin succeeded in reaching an agreement built on the concept of “sustainable development” as proposed in the Brundtland report (the report of the World Commission on Environment and Development).

The objective of the agreement is to reconcile the forestry operations of the various companies operating in the area with the environmental concerns and traditional ways of life of the Algonquins of Barriere Lake whose home it is.⁵⁰¹

The trilateral agreement did not establish a board to oversee management activities in the region. Instead, it established a four-year phased process to prepare a draft integrated management plan for renewable resources (defined as forests and wildlife) involving the following activities:

- the design and implementation of interim protection measures for the duration of the agreement;

499 Claudia Notzke, “The Barriere Lake Trilateral Agreement”, research study prepared for RCAP (1993).

500 Notzke, “The Barriere Lake Trilateral Agreement”.

501 M. Clifford Lincoln, Algonquins of Barriere Lake, RCAP transcripts, Maniwaki, Quebec, 2 December 1992.

- the analysis and evaluation of existing data and information and compilation of new inventories and information on renewable resource use, potential impact and interaction of activities related to their exploitation, and development within the perimeter of the territory;
- the initiation of an education process for this comprehensive process;
- the preparation of an integrated management plan for renewable resources based on the above work; and
- the formulation of recommendations for implementing the management plan.⁵⁰²

The agreement created two entities, one at the political level (the special representatives) and the other at the field level (the task force). With respect to the former, each party appointed a special representative to oversee the process; ensure continuous communication among the parties and between technical staff and government officials; develop the work plan and financial requirements for the task force; and take primary responsibility for drafting the plan and recommendations. Moreover, the representatives were to be guaranteed sufficient authority to make decisions and to apply the provisions of the agreement.⁵⁰³

The task force acts as the technical arm and is made up of eight members selected by the three signatories (three members each for the Algonquin and Quebec and two for the federal government). Included in its responsibilities is the identification of sensitive zones and the development of recommendations to provide protection to these zones from resource extraction.

An office was established to co-ordinate the project. Financing is shared equally by the parties, with the government of Canada reimbursing the Algonquin for all of their expenses. The issue of funding quickly became problematic and remained so for two years, as neither the provincial nor the federal government set aside a specific budget to execute the agreement.⁵⁰⁴ Financial problems threatened work at both the management and field level as research and identification of sensitive zones were delayed. A more critical problem for implementation was the province's insistence that the process occur in accord with the primacy of its jurisdiction. As the Barriere Lake special representative, Clifford Lincoln (himself a former Quebec minister of the environment), explained during our hearings:

Quebec views its laws, regulations and jurisdictions as sacrosanct, and the agreement subordinate and insignificant in comparison. Quebec would like to delay any changes until the completion of the integrated resource management plan, at which stage its laws and regulations can be altered if necessary.

In the meantime, it has signed forestry agreements, known as CAAFs, over the agreement territory, and issues under these unrestricted forestry permits, thus giving forestry companies similar rights to those they would enjoy outside the territory as if the Trilateral Agreement did not exist.⁵⁰⁵

Effective interim protection thus became impossible, and a hostile climate developed among the Algonquin, loggers and government over the continuation of timber harvesting. The matter was

502 *Trilateral Agreement between the Algonquins of Barriere Lake, the Gouvernement du Québec and the Government of Canada*, 22 August 1991, p. 2.

503 *Trilateral Agreement*, p. 3.

504 Notzke, "The Barriere Lake Trilateral Agreement" (cited in note 37).

505 Lincoln, RCAP transcripts (cited in note 39).

referred to a mediator, Justice Réjean Paul, whose recommendations included the transfer of power to the special representatives, the transfer of control of the technical work from the Quebec ministries, and the protection of sensitive zones within the existing timber agreement. In spite of the mediator's report, Quebec unilaterally suspended the agreement and the process nearly collapsed.

During the spring of 1993 the Algonquin carried out an effective public relations campaign, applied pressure at senior political levels, and intensified efforts to build a relationship with the forestry industry. These efforts resulted in a dramatic turnaround: the provincial government consented to give Quebec's special representative full decision-making authority and to establish a special interim management regime for the territory. Cabinet conferred temporary authority on the special representative to suspend and amend regulations under the *Forest Act* and CAAF within the area. This authority has enabled the representative to work directly with the logging companies to assist them in changing their practices to meet interim requirements. The special representative also received full control of the budget, and the provincial government committed \$600,000 for the 1993-1994 fiscal year (to be matched by the federal government).⁵⁰⁶ Quebec's special representative is now accountable to the secretariat for Aboriginal affairs, under the purview of the minister of energy and natural resources.

In 1994 work focused on preparing an integrated resource management plan for the area. Recommendations for its implementation were to be developed during the first quarter of 1995. Although the agreement was to expire on 25 May 1995, it has been renewed until December 1996. After that date, the Algonquin will again deal directly with ministerial agencies, and much will depend on Quebec's willingness to participate in some form of co-management. It is doubtful, however, given the gains made thus far, that the Barriere Lake Algonquin will relinquish their influence in any future resource management process.

A research study prepared for RCAP attributes difficulties to the province's refusal to transfer the required authority from line ministries to the special representative during the first two years of the agreement.⁵⁰⁷ With the transfer of power, clear lines of authority and communication were established, and representatives on the technical and political bodies began to work collaboratively toward the same objectives. Credit is also due to the efforts of senior forest industry officials and the Algonquins for building a more co-operative working relationship and accommodating each other's needs.

Interim Measures Agreement between British Columbia and the First Nations of Clayoquot Sound

On 19 March 1994 the province of British Columbia entered into the Interim Measures Agreement (IMA) with the Hawiik of the Tla-o-qui-aht First Nations, the Ahousaht First Nation, the Hesquiaht First Nation, the Toquaht First Nation and the Ucluelet First Nation. The purpose was to establish a joint land and resource management process covering the Clayoquot Sound watershed on Vancouver Island. IMA was the direct result of an intense and highly public period of protest over clear-cut logging in the Clayoquot Sound area. During the summer and fall of 1993 the Aboriginal communities, environmentalists and others staged an extensive campaign, including mass protests and a continuous blockade of logging roads into the area. The protesters were successful in

506 Notzke, "The Barriere Lake Trilateral Agreement" (cited in note 37).

507 Notzke, "The Barriere Lake Trilateral Agreement".

capturing national and international media attention, which ultimately forced the B.C. government to negotiate.⁵⁰⁸

The agreement is set within the meaning of the B.C. claims task force report.⁵⁰⁹ It is therefore without prejudice to Aboriginal rights and treaty negotiations and recognizes that the First Nations have a responsibility to preserve and protect their traditional lands. Moreover, while recognizing British Columbia's authority to manage the subject lands, the agreement qualifies this "to the extent of its [the province's] interest in those lands".⁵¹⁰ As such, the agreement is intended to act as a bridging mechanism toward the making of a treaty and to begin the process of identifying areas of First Nations land and areas of potential joint management with the province. After two years the parties are to review the process and consider extending the agreement (with revisions as required). The province expects that the bodies established as a result of the interim agreement (or their successors) will eventually form part of a joint management regime created through the treaty process.⁵¹¹

The overarching goal of the agreement is to conserve resources for the future benefit of the First Nations within their traditional territories (covering 262,592 hectares of land adjacent to Clayoquot Sound). Within this broad goal are a number of specific objectives: promoting sustainable economic development and employment for the First Nations; restoring and ensuring the ecological integrity of the area; providing a sustainable forest industry; incorporating Aboriginal values and input into the planning process; and reconciling competing concerns about resource use in the region. The agreement contemplates an integrated approach to resource management, which will consider economic, environmental and social factors in decision making.

To achieve these objectives, the agreement establishes a central region board made up of representatives from the First Nations and British Columbia. The First Nations and the province are to appoint five representatives each and a mutually acceptable chair. The First Nations will select their representatives, while the province will officially appoint members to the board.

The board will be charged with monitoring and co-ordinating activities undertaken by existing panels, agencies and ministries responsible for resource management and land use planning in the region. The board will participate in the development and implementation of a comprehensive forestry audit and undertake a feasibility study for the development of ecological zones, including the establishment of tribal parks.⁵¹² Given the intense conflicting interests surrounding resource use in the area, the board's mandate includes hearing public complaints and recommending methods to

508 Montour, "Natural Resource Management" (cited in note 13).

509 British Columbia, *The Report of the British Columbia Claims Task Force* (Vancouver: Ministry of Aboriginal Affairs, 1991). The report recommended that interim measures be negotiated with First Nations as a means of protecting Aboriginal interests in lands and resources pending completion of the B.C. treaty process.

510 *Interim Measures Agreement between Her Majesty the Queen in Right of the Province of British Columbia and the Hwiih of the Tla-o-qui-aht First Nations, the Ahousaht First Nation, the Hesquiaht First Nation, the Toquaht First Nation and the Ucluelet First Nation*, 19 March 1994.

511 Christine Lattey, Director, Special Projects, B.C. Ministry of Aboriginal Affairs, personal communication, 17 May 1994.

512 The concept of a 'tribal park' has been developed and used primarily by First Nations in B.C. as a means of protecting their traditional territory from resource extraction. In declaring Meares Island a tribal park in 1984, the Nuu-chah-nulth Tribal Council stated that they intended to protect and preserve the area as a park in which management and operations are based on their Aboriginal title and jurisdiction to the land. Park management would centre on Aboriginal cultural survival (for example, Aboriginal harvesting and the protection of sacred sites in the park). The province has not developed a working definition of the concept; Parks Canada is beginning to explore the notion.

bring about their resolution. It is through this role that the board may be able to contribute significantly in promoting a broader level of understanding and support at the local level.

A number of additional activities are identified, notably the creation of a co-operative forest management area and a working group on economic development initiatives. This appears to reflect the fact that the agreement involves five individual First Nations, each of which has its own objectives with respect to land and resource management and economic development within its broader territory. The forest management area is eventually to fall under the responsibility of the board and includes separate funds for training First Nations members in management and field operations.

The board will be empowered to review plans and policy decisions respecting land use and resource management prepared by agencies and ministries and may modify or recommend rejection of any of them at any stage in the process. There must be a majority vote of the First Nations members for a decision to pass the board. While not an explicit veto, this innovation may be useful in establishing parity between Aboriginal and non-Aboriginal representatives. Board recommendations are directed to the appropriate body for implementation and, if not implemented to the satisfaction of the board, may be referred to cabinet.

An interesting innovation is the creation of a central region resource council composed of hereditary chiefs and provincial government ministers. The council will act as a forum for dispute resolution if cabinet does not accept the board's decision. No alternative dispute resolution mechanism is mentioned in case of deadlock. This underscores a potential difficulty with respect to the authority of the board relative to that of the province. The board is not empowered to enforce its decisions because it is framed within existing provincial jurisdiction. However, because the parties contemplate amending legislation to circumvent implementation problems, potential avenues are built in to facilitate increasing the authority of the board during the life of the agreement.

To support the board in carrying out its duties, a secretariat is to be established. The secretariat will focus on co-ordination and the provision of administrative support rather than establishing a duplicate bureaucracy. All information is to be provided by existing government agencies and ministries. This may be cause for concern in practice, as the board may become entirely dependent on the province for information on which to base its decisions. The province of British Columbia is committed to funding the regime's operations based on a budget prepared by the board.

Interim Hunting Agreement between the Algonquin of Golden Lake First Nation and the Government of Ontario

The Algonquin of Golden Lake are involved in negotiations with the federal and provincial governments over their claim of Aboriginal rights within the Ottawa Valley watershed. That claim covers 8.5 million acres of land in eastern Ontario, including Algonquin Provincial Park. The issue of harvesting rights in the park has been particularly controversial. An ad hoc committee for the defence of Algonquin Park, representing recreational users, tourist operators, anglers, hunters and loggers, has challenged the merits of the claim and has been lobbying the federal and provincial governments against any Algonquin use of the park or involvement in park management.⁵¹³ In 1990, in response to moose hunting charges laid against community members, the Algonquin of Golden Lake and the Ontario ministry of natural resources entered into an interim hunting agreement to resolve the conflict and provide a bridge for resource management pending the completion of the

513 Montour, "Natural Resource Management" (cited in note 13).

claim negotiations. The agreement is without prejudice to either party's position with respect to Algonquin Aboriginal and treaty hunting and fishing rights.⁵¹⁴

The objective of the agreement is to allow the management of deer and moose hunting by Algonquin within their traditional territory based on the principles of conservation of wildlife, the preservation of Algonquin Park wilderness values, and respect for Algonquin rights to harvesting. The total area covered, including Algonquin Park, amounts to 36,000 square kilometres. Since 1990 the agreement has been renegotiated on an annual basis. Either party may, upon thirty days' notice, terminate the agreement if they believe the other party has violated its terms or intent. The annual negotiations between Ontario and the Algonquin set out the guidelines for the following year's hunting season, such as harvest quotas, boundaries and seasons for hunting each species, and improving the administrative structures to implement the terms as required.⁵¹⁵

The agreement is innovative in that Ontario formally recognizes Algonquin authority to regulate hunting activities within the territory in accordance with Algonquin law. This recognition, however, stops short of provincial recognition of First Nation jurisdiction over natural resource use and management. Nonetheless, the arrangement affirms the First Nation's authority to make and enforce its own laws pertaining to methods of community harvesting and use of the resource.

The agreement established a co-ordinating committee made up of three Algonquin and three Ontario representatives. The committee undertakes the technical work required for the implementation of the agreement's terms, such as the planning, reporting and monitoring of hunting activities, including data maintenance. The committee may also make recommendations to the parties with respect to conservation measures to be implemented through the law. As part of its duties, the committee tables an annual report to the ministry of natural resources outlining biological data on the harvest. Although hunters provide harvesting information, the committee has had to rely upon biologists from the natural resources ministry to gather and prepare the necessary data.⁵¹⁶

The province provides funding for an Algonquin conservation officer, a support staff person and an office. The office is equipped with approximately \$70,000 worth of equipment for carrying out conservation enforcement activities, including a boat, motor and trailer, four-wheel drive vehicle and snowmobile.⁵¹⁷ The agreement also provides for continuing discussions between the two parties concerning the development of terms of reference and funding for an Algonquin nature department.⁵¹⁸

The agreement provides for an Algonquin official who is Ontario's first Aboriginal cross-deputized conservation officer and who is "responsible for the observance of the Agreement through community consultations and surveys". Trained by the ministry of natural resources, the conservation officer works under the direction of the First Nation and enforces Algonquin law with respect to Algonquin community members within the parameters of the agreement. The conservation officer technically cannot enforce provincial laws against non-Aboriginal persons, but notifies provincial officials about possible violations. Similarly, local provincial conservation officers, who are also responsible for the agreement, defer to the Algonquin officer if an incident involves a community member.⁵¹⁹ The Algonquin and local conservation officers have succeeded in

514 *Interim Agreement on Hunting between Algonquins of Golden Lake and Government of Ontario* (September 1993).

515 Montour, "Natural Resource Management" (cited in note 13).

516 *Interim Hunting Agreement* (cited in note 52), p. 4.

517 Montour, "Natural Resource Management" (cited in note 13).

518 *Interim Hunting Agreement* (cited in note 52), paragraph 5(d), p. 4.

developing a good working relationship so there has been little disagreement in practice over each party's jurisdiction.⁵²⁰

A unique element of the agreement is the community-based justice system set up to resolve charges against Algonquin offenders. Five judges, primarily elders, are appointed to the court, with each sitting of the court consisting of three judges. If an offender is found guilty by the panel, that person must perform community work or hunting and fishing rights may be suspended. If the offender refuses to comply with the decision of the panel, the Ontario government is informed that the person is no longer considered to be an Algonquin for the purposes of the agreement and is subject to provincial laws. To date, no one has rejected the system's decision.⁵²¹

A research study prepared for RCAP concludes that one of the major achievements of the agreement has been a more positive relationship between the local ministry of natural resources office and the community. The co-ordinating committee's work has also succeeded in developing a more independent, and hence mutually acceptable, source of information on Algonquin use of the resource. This has been helpful in diminishing — although not entirely eliminating — accusations of overharvesting directed at the community. At the same time, the direct involvement of the Algonquin in managing the harvest has enabled the community to develop management and technical expertise while strengthening Algonquin laws and conservation practices.⁵²²

Whitedog Area Resources Committee, Wabaseemoong Independent Nations and Province of Ontario

The Whitedog Area Resources Committee (WARC) was established pursuant to a memorandum of understanding signed between Wabaseemoong Independent Nations (formerly known as Islington Band No. 29) and the government of Ontario in 1991. The committee represents another step in a protracted series of attempts at resolving the social, economic and environmental problems created by a number of resource-related development projects within the community's traditional territory. The construction of two major Ontario Hydro dams in the late 1950s flooded reserve and traditional land, buried homes and a community cemetery, and forced the relocation of band members from One Man Lake. The artificial raising of water levels severely damaged the land on which the community harvested resources for both traditional and commercial purposes.

In the 1970s, a major pulp and paper mill owned by Reed Inc. and located upstream from the community was found to have emitted an estimated 40,000 pounds of mercury into the environment (including the English River system adjacent to the community). As a result, community members suffered health problems, and the province was forced to ban commercial fishing. It was not until the late 1970s that the province agreed to enter into negotiations, which did not yield an agreement until 1983 (ratified in 1985). In addition to compensation, remedial measures and social and economic development initiatives, the 1985 agreement provided for community consultation but not co-management. The agreement also stipulated that the parties conduct a review every five years "so that all sections of the Agreement are kept relevant to both parties".⁵²³ On the basis of the

519 *Interim Hunting Agreement*, p. 2. In 1995, the United Chiefs and Councils of Manitoulin Island reached a similar agreement with Ontario providing for a cross-deputized conservation officer.

520 Montour, "Natural Resource Management" (cited in note 13).

521 Montour, "Natural Resource Management".

522 Montour, "Natural Resource Management".

523 *Mercury Mediation Agreement Between the Province of Ontario and Islington Band No. 29*, as quoted in Wabaseemoong Independent Nations, "Review of Mercury Mediation Agreement" (unpublished, January 1991), clause 10.3.

review conducted in 1990, the province and Wabaseemoong entered into new negotiations to resolve outstanding problems associated with the 1985 agreement. The Whitedog committee was created as a result of that process.

The committee's mandate is to develop and design a co-management arrangement to govern all proposed activities by any parties in Wabaseemoong's traditional land use area (TLUA). It was established in 1993 with a four-year mandate. "The purpose of the co-management agreement will be to address a program of planned, managed and sustainable development in the TLUA ensuring that the Wabaseemoong Nations share in the benefit of such development."⁵²⁴ The area encompasses 672,060 hectares (including part of a provincial park) surrounding three reserves, totalling 11,800 hectares. WARC's mandate does not include the small area of patented lands within the TLUA or the reserves.

The Whitedog committee consists of equal representation from the signatories, Ontario and the Wabaseemoong Nations, with an independent chair acceptable to both parties. All are appointed by the minister of natural resources, three on the advice of the Wabaseemoong, one on the advice of local third-party interests, and two directly from the ministry. The representation of third parties remains a matter of local controversy, especially in the town of Minaki, which claims an interest. The two signatories maintain that Ontario represents third parties by appointing a representative from the group as one of its members. Not all third parties are satisfied and they would like greater and more direct representation. Alternative proposals include involving more third parties directly (which would have the effect of eliminating the parity of representation now enjoyed by Wabaseemoong) or a direct partnership between Wabaseemoong and the local public in which Ontario plays only an advisory role. It is reported that there is some disagreement about the basis of appointment of Wabaseemoong representatives and some sympathy for the second model proposed by the third parties.

WARC has been given a budget to cover staff, access to expertise, and information sharing. As yet, it has no authority to plan, manage, or regulate land and resource use and has not been delegated any of the powers of Ontario in that respect. In practice, if the ministry declines to override Wabaseemoong's objections at the committee, the latter has gained a greater role in decision making.

The bulk of the committee's work has been devoted to directing the preparation of a comprehensive resource inventory of the traditional land use area in partial fulfilment of the committee's mandate. This is a joint undertaking between the ministry of natural resources and Wabaseemoong staff that is funded by Ontario. From the resource inventory, the joint staff group will identify a host of potential sustainable economic development opportunities within the area and develop a socio-economic development plan for consideration by the community. In turn, the community will decide upon the adoption of the overall socio-economic development approach, including specific initiatives as laid out in the plan. The work of the Whitedog Area Resource Committee is not yet complete and only lays the groundwork for a co-management agreement.⁵²⁵

524 O.I.C. 1673/93, O. Gaz 1993.

525 Anthony Usher Planning Consultant et al., *Partnerships for Community Involvement: A Comparative Analysis of Community Involvement in Natural Resource Management* (Toronto: Ontario Ministry of Natural Resources, 1994).

3. Community-Based Resource Management

*Elk Lake Community Forest Project, Ontario*⁵²⁶

In May 1991, the Ontario minister of natural resources announced that the province would select four community forest pilot projects to test options for increasing local involvement in forestry. This was one part of a five-point sustainable forest program that included changes to legislation, protection for old-growth forests, and improvements to silviculture and private woodland management. In 1992, out of 22 applicants, the province accepted proposals from the Wikwemikong First Nation on Manitoulin Island and the northern Ontario communities of Geraldton, Kapuskasing and Elk Lake.

The community of Elk Lake is part of the township of James, an organized municipality that acted as the project proponent. Located some 250 kilometres north and west of North Bay (100 kilometres from Temagami), the township has a population of approximately 570 people and, typical of most small northern Ontario communities, an economy based entirely on natural resources. Elk Lake has a sawmill with 100 employees, three major logging contractors and several commercial tourist outfitters. A forest access road leading south from the community serves as the major entry point to the nearby Lady Evelyn-Smoothwater Wilderness Park.

Like the Wendaban Stewardship Authority, the Elk Lake Community Forest Project can be considered a response to conflict over land claims, resource use and the building of forest access roads in the Temagami region. Along with other members of his community, the reeve of James Township participated in a counter-blockade to those being mounted by the Teme-Augama Anishinabai and environmental activists in the late 1980s. The pilot project covers an area of some 470,000 hectares, encompassing the existing Elk Lake Crown management unit of the ministry of natural resources. About three-quarters of this area is included in the land claim of the Teme-Augama Anishinabai.

The principal objectives of the project, as developed by the proponent, are as follows:

- Secure local administrative and decision-making authority. This would involve the devolution of authority from the ministry of natural resources, subject to the acquisition of competence in resource management.
- Accelerate the development of sustainable forestry. This includes strategies to promote effective resource-use conflict resolution, improve knowledge of the area through proper data collection, and increase public awareness, knowledge and participation.
- Ensure the economic viability of local communities. This includes strategies to retain existing industry, maintain or enhance recreational opportunities, and promote economic diversification.
- Secure the permanence of the community forest. In addition to delegated management authority, this would include partnerships with outside interest groups and organizations and attempts to become financially self-sustaining.

⁵²⁶ This section is based on Elk Lake Community Forest, "Forest Partners: Caring and Sharing", presentation to the House of Commons Standing Committee on Natural Resources and the Environment (October 1995) as well as on background documents supplied by the Elk Lake Community Forest Pilot Project. See also Brit Griffin, "What's the Buzz: The Elk Lake Community Forest Project", *Highgrader Magazine* 1/3 (May/June 1995), pp. 10-14.

The Elk Lake project is governed by a partnership committee that represents a range of forest user interests. As first constituted, the nine voting members included First Nations (Teme-Augama Anishinabai), the local community (Township of James), business (Elk Lake Planing Mill), labour (Elk Lake Planing Mill Employees' Association), education (Timiskaming Board of Education), and representatives of the mining and forest industries, tourist outfitters, anglers and hunters, and local environmentalists. Representatives of the Ontario ministry of natural resources and the Central Timiskaming Economic Development Corporation sit on the committee as non-voting resource people.

In late 1992 the Teme-Augama Anishinabai withdrew from voting membership because of a potential conflict over treaty negotiations with the Ontario government. An Aboriginal representative remains on the committee in an advisory capacity. The committee make-up has been criticized by environmental activists for being overly weighted toward those with a stake in the forest industry. It is difficult to avoid such an imbalance in a lumbering community like Elk Lake. The project has tried to maintain a forum where the various interest groups can reach consensus on controversial land use issues.

The partnership committee is responsible for establishing the direction to take to meet the goals of the project. Decisions are based on the principle of majority rule. The chairperson, who is chosen by the committee from among its members, has a second vote for the purpose of tie-breaking.

During the first three years of operation, the Elk Lake project received the bulk of its financing from the ministry of natural resources (\$100,000 in the first year and \$475,000 in the next two years). The proponent has invested a total of \$110,000 to date. Provincial funding has been extended for an additional year (1995-96). The pilot project has been aggressive in seeking alternative sources of funding and in generating community development. Contract field work for the ministry of natural resources, as well as other public and private employers, provided 397 days of employment in 1994 and 1,806 days in 1995. Activities undertaken included highway right-of-way brushing, tree planting, line running and conducting worker safety training courses. The provision of contract services has been criticized by some local and regional contracting businesses as unfair competition.

During the first year of operation, the partnership committee hired a professional forestry consulting firm to assist in preparing a pilot project plan, to develop and supervise data collection projects, and to provide professional forestry support. At present, much of the professional and technical support for the project is provided by the ministry of natural resources, Kirkland Lake district.

The partnership is in the process of being revamped to become a non-profit corporation. This will assist in its organizational and financial goals. The long-term political goals are less certain. The pilot project remains an advisory body only; its basic planning ability is circumscribed by its obligation to abide by all provincial forest management legislation and policies. Thus far, the ministry of natural resources has not agreed to devolve management authority to the project.

Nevertheless, the Elk Lake community forest initiative has proven extremely popular with residents of James Township, who see it as a form of local empowerment. The project committee believes it can demonstrate that sustainable forestry is both possible and viable in a local and regional context. While environmentalists remain wary, constructive discussion has replaced confrontation.

Controlled Exploitation Zones, Quebec

During the 1970s the government of Quebec established a number of territorial zones in which development, harvesting and conservation of wildlife and/or a species of wildlife are managed by

local non-profit organizations. These controlled exploitation zones (ZECs) were created as a means of dismantling private hunting and fishing reserves on which the public and Aboriginal people were previously not permitted to hunt, fish or trap. Quebec has approximately 80 ZECs, which are divided into three major categories: wildlife, waterfowl, and salmon. The zones are located in the southern part of the province; the northern region is administered by the hunting and trapping coordinating committee established as part of the James Bay and Northern Quebec Agreement and by exclusive harvesting zones, such as beaver reserves, in which only Aboriginal people may harvest.

The establishment and management of ZECs are based on four main principles: conservation, resource accessibility, user participation and the self-financing of operations.⁵²⁷ To implement these principles ZECs are managed by non-profit organizations made up of community volunteers and representatives of wildlife organizations. Once established, the organization enters into a memorandum of agreement with the government to administer resource management in the area on behalf of the Quebec department of recreation, fish and game. These management organizations are empowered to establish by-laws with respect to

- registration of persons;
- entry or activity fees; and
- types of vehicles, boats and engines, or aircrafts that may be used for recreational purposes.⁵²⁸

The organization responsible for the management of an area exercises its authority within the context of provincially defined regulations and procedures concerning hunting, fishing and trapping activities in the zones. Any by-law passed by the organization must be approved by the minister, who may “amend or replace the by-law if it does not comply with the conditions prescribed by regulation of the Government or if the rules provided for its adoption have not been complied with.”⁵²⁹ The minister, therefore, retains ultimate authority for overall resource management and decision making.

Resources required for ZEC operations are provided in part by funding agreements and by moneys collected from the permits and licences issued by the ZEC agencies for hunting, fishing and other activities within the zone. The management agencies are also supported by the activities of a broader organization — the Quebec federation of ZEC managers. Founded in 1983, the federation represents the ZEC administrators in dealings with government and other agencies, promotes management adapted to the geographical and demographic characteristics of the territory, promotes access to wildlife resources, promotes wildlife development and rational harvesting policies, and defends the interests of its members.⁵³⁰

Aboriginal people may participate as individuals in the local association responsible for managing the zone. However, the ZEC enabling legislation does not provide for guaranteed Aboriginal involvement in zone management, nor does the act recognize Aboriginal rights to resource use within the zones.⁵³¹ Aboriginal representation on a local ZEC board therefore may range from a

527 Fédération québécoise des gestionnaires de ZEC [FQGZ], “Mémoire pour la Commission royale sur les peuples autochtones”, brief submitted to RCAP (3 December 1993).

528 *An Act respecting the conservation and development of wildlife*, L.Q. c. C-61.1, s. 110 (6).

529 *An Act respecting the conservation and development of wildlife*, c. C-61.1, s. 110 (2).

530 FQGZ, brief submitted to RCAP (cited in note 65).

531 *An Act respecting the conservation and development of wildlife* (cited in note 66), c. C-61.1.

minority to a majority position, depending on how the board is set up. Experience varies with the state of relations between the local Aboriginal and non-Aboriginal communities.

In some zones, community members have structured representation to ensure equal Aboriginal and non-Aboriginal representation. For example, the Atlantic salmon agency is involved in a number of co-operative management schemes with several First Nations. They pointed out a number of positive examples in their presentation to the Commission.

[T]here is a river in Quebec which is co-managed, because there is a sizeable non-Aboriginal population on the Escoumins and there is a ZEC which is under delegated management, and which is managed by a bipartite committee made up of equal numbers of Aboriginal and non-Aboriginal people in a management structure that provides access for everyone, but the two communities both derive equal benefits from this management.

... I believe that we have to count on everyone's mutual goodwill to establish a genuine dialogue and recognize, I would say, everyone's efforts. [translation]⁵³²

The ZEC management agencies are not co-management bodies in the sense that the government and a community undertake to jointly manage an area or species, but rather are a form of delegated community-based resource management. In a few cases, the agencies have been relatively successful in building bridges between local Aboriginal and non-Aboriginal residents who share a mutual interest in the resource and in ensuring that resource management is oriented to the needs of the broader community. Some Aboriginal groups, notably the Quebec wing of the Assembly of First Nations, are not supportive of ZECs since the management operations are not based on the recognition of Aboriginal rights in their traditional territories.

Bras d'Or Watershed Stewardship Proposal, Nova Scotia⁵³³

The Bras d'Or Lake watershed covers 3,600 square kilometres of Cape Breton Island (2,500 square kilometres of land and 1,100 square kilometres of fresh and salt water) and is home to about 18,000 people, including members of the Cape Breton Mi'kmaq First Nations. Although the watershed is an area of considerable development potential, there are unique environmental and cultural features that require protection. The region has consistently suffered from a lack of co-ordinated planning: there are 22 separate government agencies at the federal, provincial and municipal level that currently share responsibility for activities in the watershed.

In 1975 the Bras d'Or Institute at the University College of Cape Breton (UCCB) submitted a proposal to the Nova Scotia government to undertake development of a management plan for the Bras d'Or Lake coastal zone. Although this proposal was rejected, it marked the beginning of two decades of effort to protect and guide development in the watershed.

In February 1994 the federal government provided funding to UCCB to design a new watershed management system. The college in turn spearheaded the creation of the Bras d'Or Lake working group, representing various communities and interest groups in the watershed. With the assistance

532 Bernard Beaudin, president, Fédération québécoise pour le saumon de l'Atlantique, RCAP transcripts, Montreal, Quebec, 30 November 1993.

533 This section is based on University College of Cape Breton, "Taking Care of the Bras d'Or: A New Approach to Stewardship of the Bras d'Or Watershed" (Sydney, Nova Scotia: April 1995), as well as on information supplied by Dr. J. Rod Carrow, R.P.F., who chaired the Study Group for Stewardship of the Bras d'Or Watershed.

of a professional forester, the group co-ordinated public consultation and preparation of the final report to government. It also examined other models of co-management and community-based resource development in various regions of Canada (including the Wendaban Stewardship Authority and the Elk Lake Community Forest Project).

In April 1995 the working group submitted a report to the federal and provincial governments, recommending the creation of a Bras d'Or stewardship commission, whose primary mandate would be planning and management of land and water resources in the entire watershed area. To avoid duplication, the proposed commission would operate as a streamlined, single-window agency that would expedite intergovernmental activities and provide an accessible, efficient and responsive public system. Responsibilities of the commission would consist of

- drawing up action plans for high priority issues (such as contamination of the lakes);
- drafting a charter to serve as the basis for policy making and planning, development and protection decisions;
- planning the development and use of land and water resources in the context of ecological, cultural and heritage values;
- promoting the area and educating the public;
- managing the sustainable development of the watershed, including sewage systems, docks, logging, recreational boating, fisheries and aquaculture;
- ensuring enforcement, including compliance monitoring, reporting and laying charges;
- reporting to the public through the provincial legislature; and
- conducting periodic reviews and making adjustments to the watershed plan.

The report recommends that the central principle guiding the proposed commission should be co-management, in which the responsibility for stewardship of the watershed is shared between the Mi'kmaq First Nations and the non-Aboriginal community. The 18 voting and non-voting members would represent the following areas:

- Geographical: seven voting members, one member for each of the seven geographical areas within the watershed; these representatives would be locally elected.
- First Nations: five voting members, one from each of the five Mi'kmaq First Nations. The report recognizes that resolution of Mi'kmaq land claims on Cape Breton may require changes in future representation.
- Government: six non-voting members, one from each of the four municipalities in the watershed, one from the province and one from the federal government, all to be appointed by their respective governments.

The report recommends that the commission use consensus-building as the primary means of reaching decisions: only in cases where consensus has not been possible should voting be used.

The working group's report also recommends that the commission be supported by an advisory panel of experts representing natural resource and cultural interests in the watershed. To develop new skills among Aboriginal and non-Aboriginal residents, it is proposed that UCCB and the five

Mi'kmaq First Nation communities enter into an agreement to develop appropriate technical education programs.

The report recommends that the government of Nova Scotia take the necessary legislative steps to establish the Bras d'Or stewardship commission under the terms of the new *Nova Scotia Environment Act* and that the government of Canada co-ordinate discussions between the Mi'kmaq and federal, provincial and municipal governments to transfer the required authority and responsibility for planning, management and enforcement to the commission.

5 Economic Development

SELF-GOVERNMENT WITHOUT a significant economic base would be an exercise in illusion and futility. How to achieve a more self-reliant economic base is thus one of the most important questions to be resolved. What measures need to be taken to rebuild Aboriginal economies that have been severely disrupted over time, marginalized, and largely stripped of their land and natural resource base?

The question is urgent, and not only because progress toward self-government would be severely constrained in the absence of effective measures to rebuild Aboriginal economies. For Aboriginal individuals and families, whether they live in urban or rural areas, employment levels and income continue to lag far behind Canadian standards. Furthermore, the rapid increase of the Aboriginal population means that thousands of additional young people will be entering the labour market over the next two decades. Indeed, our estimate is that more than 300,000 jobs will need to be created for Aboriginal people in the period 1991 to 2016 to accommodate growth in the Aboriginal working-age population and to bring employment levels among Aboriginal people up to the Canadian standard.

This is a staggering figure. The broader but related challenge of re-creating a stronger, more self-reliant economic base to accompany and sustain self-government is also an enormous task. During the Commission's hearings, we visited a large number of Aboriginal communities, many of which had only a very limited economic base. Under current conditions and approaches to economic development, we could see little prospect for a better future. From this experience, we came to the conclusion that achieving a more self-reliant economic base for Aboriginal communities and nations will require significant, even radical departures from business as usual. We also became convinced that existing conditions and approaches entail enormous human and financial costs, a fact that also adds urgency to the search for better solutions.

Our hearings, a round table on economic development, the intervener submissions, and our research program were also instructive, however, in pointing to some promising new directions.¹ They brought to light many instances where Aboriginal individuals, communities and nations have developed businesses, launched joint ventures, and found new approaches to acquiring capital, providing income support, and delivering education and training. We need to learn from these positive experiences - many of which are featured in this chapter - and to apply their lessons on a broader scale.

Indeed, the situation has not remained static over the past two decades. Major comprehensive claims agreements have been signed in some parts of the country, providing access, in varying degrees, to new human, financial and natural resources for economic development. There has been growth in the number of Aboriginal businesses, especially those started by women. The institutional base to support economic development has also improved, as indicated by the emergence of personnel and organizations specializing in economic development and providing capital, education and training programs. In many parts of the country, there is a realistic appreciation of the enormous challenges still ahead but also a spirit of determination to regain stewardship of Aboriginal

1 The proceedings of the National Round Table on Aboriginal Economic Development and Resources were published in Royal Commission on Aboriginal Peoples [RCAP], *Sharing the Harvest: The Road to Self-Reliance* (Ottawa: Supply and Services, 1993). See *A Note About Sources* at the beginning of this volume for information about RCAP publications.

economies and to develop them in accordance with the priorities of particular communities and nations.

In the first part of this chapter, we describe the historical underdevelopment of Aboriginal economies as well as their diversity and contemporary characteristics. In the second part, we turn to the levers of change - the critical interventions that need to be made if stronger, more self-reliant Aboriginal economies are to be achieved.

Several important themes characterize the Commission's approach to economic development.

The importance of history

We begin by looking at how the contemporary economic deprivation so familiar to Aboriginal people came to be. If they are to be successful, strategies for change must be rooted in an understanding of the forces that created economic marginalization in the first place. Certain conditions essential for economic development were ignored over time. These need to be re-established: the economic provisions in the historical treaties; the freedom for Aboriginal people to manage their own economies; and a fair share of the land and resource base that sustained Aboriginal economies in the past. To ignore these fundamentals and pretend that economic development can be achieved within the limits of the status quo simply by training entrepreneurs or improving their access to capital is to maintain the cycle of disadvantage of the past two centuries.

History reveals that the economies of Aboriginal nations were not always underdeveloped. Many carried on in largely traditional ways well past the time of first contact and trade with Europeans, while others adapted and flourished. Factors largely outside the reach of human intervention, such as periods of drought, played a role. But the principal factor that brought Aboriginal communities to the point of impoverishment over the centuries was the intervention - deliberate or unintended, well-intentioned or self-interested - of non-Aboriginal society.

If this judgement is harsh, it also suggests that the economic marginalization of Aboriginal communities can be reversed if the will to do so is present. But the factors that define how Aboriginal economies operate must change, as must the share of economic power exercised by Aboriginal people. In the economic realm, as in governance, it is necessary to make room so that Aboriginal people can develop their own solutions. The onus is also on Aboriginal people to exercise informed leadership; to take up the challenge of entrepreneurship, education and training; and to take the risk of breaking away from patterns of dependency where these exist.

The importance of the collectivity

Policy makers and the general public have tended to assume that the economic problems of Aboriginal communities can be resolved by strategies directed to individuals thought to be in need of assistance. Thus, welfare for those out of the labour force, training for those who need to upgrade their skills, loans or grants for entrepreneurs wanting to start their own businesses, and relocation assistance for those moving to urban areas in search of jobs are often seen as necessary and sufficient policy interventions. Typically, the problem is defined as Aboriginal individuals not having access to opportunities for employment or business development in the larger Canadian society.

This approach ignores the importance of the collectivity in Aboriginal society (the extended family, the community, the nation) and of rights, institutions and relationships that are collective in nature.

It also overlooks the fact that economic development is the product of the interaction of many factors - health, education, self-worth, functioning communities, stable environments, and so on. Ultimately, measures to support economic development must reach and benefit individuals, but some of the most important steps that need to be taken involve the collectivity - for example, regaining Aboriginal control over decisions that affect their economies, regaining greater ownership and control over the traditional land and resource base, building institutions to support economic development, and having non-Aboriginal society honour and respect the spirit and intent of the treaties, including their economic provisions.

Many Aboriginal individuals will want to or will have little choice but to make their way in the larger Canadian economy - this is especially so for those who migrate to urban areas - but it should not be forgotten that Aboriginal nations want to develop their own economies on their own land and resource base, guided by policies, programs and institutions that they control.

The importance of seeing economic development as a process

The economic development of any community or nation is a process - a complicated and difficult one - that can be supported or frustrated. It cannot be delivered pre-fabricated from Ottawa or from provincial or territorial capitals. The principal participants, those on whom success directly depends, are the individuals and collectivities of Aboriginal nations. The role of Aboriginal and non-Aboriginal governments should be to support the process, help create the conditions under which economic development can thrive, and remove the obstacles that stand in the way.

This involves enabling individuals to contribute to the development of their communities and nations and participate in the wider Canadian economy. Education and training are an important part of the strategy. So is the removal of barriers - the paucity of jobs, the lack of fit between skills and the needs of the labour market, the presence of racism, the shortage of child care. For economic development to succeed, the collective must be strengthened through self-government, institutions must be put in place to support employment and business development, and opportunities must be created through, for example, expansion of the land and resource base.

The importance of recognizing the diversity of Aboriginal economies

Over the last several decades, the media have helped to bring the deplorable state of Aboriginal economies to the attention of Canadians and have also, on occasion, prodded governments to action. In the process, they have unfortunately created a stereotype. Contemporary Aboriginal economies are quite diverse. They include comprehensive claims regions - such as the Inuvialuit region of the western Arctic, Nunavut and James Bay - where economies of considerable size and resource endowments are being built. They include Métis settlements in northern Alberta, where provincial legislation has created some if not all of the conditions required for economic development to be successful. They include reserves such as Six Nations, where a dynamic small business sector has been created and where indices of unemployment and income are comparable to those of the surrounding area. But they also include many communities - rural and urban, Métis, Inuit and First Nation - where a self-sustaining economic base is far from being achieved and where the media stereotype of high unemployment, low incomes and reliance on transfer payments is the reality.

One of the implications of this diversity is that it is no longer helpful, if it ever was, for economic development policy to be issued from Ottawa or a provincial/territorial capital and applied uniformly to a range of conditions. This is one of the compelling reasons for locating authority and

resources to support economic development in the hands of appropriate Aboriginal institutions at the level of the Aboriginal nation and community.

Many Aboriginal economies continue to rely on traditional pursuits, such as hunting, fishing and trapping, largely for subsistence. Public policy has often ignored traditional economies or, at worst, undermined their viability - yet these activities remain a vital component in the mixed economies of northern communities, a preferred way of life for their participants, and an important well-spring of Aboriginal culture and identity.

In this chapter (and more fully in Volume 4, Chapter 6), Commissioners assert that traditional economies must be supported, not only for their intrinsic value but also because there are very few alternatives in many northern communities. The demographic realities of rapid population growth are such that continued rural to urban migration is likely inevitable, and every effort must be made to ensure that those who migrate do so with levels of education and training that will serve them well in an urban environment. But those who choose to pursue traditional activities should also be helped to do so within the constraints of what the lands and resources of the area can sustain.

The goals of economic development

We have emphasized that economic development is a process. Aboriginal people have economic goals that they want to achieve through this process. During our hearings, these were themes that emerged again and again:

- The need to respect the treaties, the comprehensive claims and other agreements made with representatives of the Crown, including their economic provisions, and to remedy past injustices concerning lands and resources. This includes the need to secure a land and resource base for all Aboriginal people, including Métis people.
- The need for jobs that provide a decent income, that do not necessarily require moving from Aboriginal communities, and that provide meaning to people's lives, contributing to the development of self-esteem and Aboriginal identity. To the extent possible, Aboriginal people are saying that their economies should provide choices for people rather than dictating directions. Economies should be capable of supporting those who wish to continue traditional pursuits (hunting, fishing, trapping) while enabling those who wish to participate in a wage and market economy to do so.
- Aboriginal people are saying that they want to develop economies that are largely self-reliant and sustaining, not in the sense of being independent from trade networks or other economic systems but in the sense of being in a position to give and receive fair value in economic exchanges. Economies should provide not just the basis for survival but also an opportunity to prosper and to help build a sense of accomplishment and self-worth for the individual and the collective.
- Choices about the nature of this economy, its structure and processes should be made to the largest extent possible by Aboriginal people and their institutions. Economic development, in turn, is expected to contribute to the development of Aboriginal peoples as distinct peoples within Canada and to permit them to exercise, in a significant and substantial manner, governance in their communities and stewardship of lands and resources. Economic development is expected to enable Aboriginal peoples to govern themselves.

- Finally, Aboriginal people would like their economies to be structured in accordance with Aboriginal values, principles and customs, contributing to the development and affirmation of Aboriginal culture and identity. This includes having the freedom to develop economies in accordance with Aboriginal visions of the goals and processes of development.

These objectives are notable for their breadth and for recognizing that economic development is about much more than individuals striving to maximize incomes and prestige, as many economists and sociologists are inclined to describe it. It is about maintaining and developing culture and identity; supporting self-governing institutions; and sustaining traditional ways of making a living. It is about giving people choice in their lives and maintaining appropriate forms of relationship with their own and with other societies.

In Volume 1, we set out the principles that should guide a new relationship between Aboriginal and non-Aboriginal people in Canada. We called for the establishment of a just relationship based on mutual recognition, respect, sharing and responsibility. These principles apply in the economic realm as much as they do to other dimensions of the relationship. It is these themes, objectives and principles that provide the framework for the Commission's recommendations on economic development.

1. Understanding Aboriginal Economies

1.1 A Brief History of Aboriginal Economies and External Interventions

The historical record has much to say about the current impoverishment of most Aboriginal economies. It is also instructive about the factors that must be addressed if development is to proceed according to Aboriginal priorities. It is useful to discuss this economic history in four stages or periods. These are broadly consistent with the stages in the relationship between Aboriginal and non-Aboriginal people outlined in Volume 1 of this report. When viewed from an economic perspective, however, they differ in emphasis, especially in this century.

The pre-contact period

Before contact with Europeans, most Aboriginal people in the northern half of North America were hunters, fishers and gatherers. Those with access to the Pacific, Arctic and Atlantic coasts had an economy that included substantial sea harvesting, while those living in the St. Lawrence Valley and the Great Lakes region engaged in agriculture. Anthropologist Robin Ridington suggests that the technology of Aboriginal peoples at the time was based on knowledge rather than tools; more than material technology, it was intimate knowledge of the ecosystem, developed over thousands of years, and ingenuity in using it to advantage that permitted Aboriginal people to survive.

For the most part, the Aboriginal population was thinly scattered, with principal concentrations on the Pacific northwest coast and in the lower Great Lakes region. For those engaged in hunting, fishing and gathering, economic activity varied according to the seasonal pattern of their major food sources. Depending on what the natural environment made available, the summer might be a time for congregating at the mouths of rivers for fishing or hunting sea mammals, supplemented by gathering berries, nuts and roots. At the mouth of the Mackenzie River in the Arctic, for example, Inuit established a substantial summer village and hunted beluga whale stranded in the shallow

delta.² In the Yukon, the Kaska Dena people fished for salmon at the mouths of major tributaries or in large river pools further inland. In the fall, small kin-based groups moved inland to higher elevations to hunt fowl, moose, or caribou, and this hunt could extend into the winter period. Ice fishing would also be practised. This might be followed by trapping otter, fox, lynx or marten. In the spring, people moved to productive fishing lakes and to locations where spring muskrat and beaver could be trapped.³

Whatever the cycle, the changing seasonal requirements for obtaining the means of subsistence had an important bearing on the social patterns of the Aboriginal group, in terms of the duration and size of settlements, the division of labour between males and females, and the opportunities for contact with other groups.

The emphasis was on living in balance with nature rather than on accumulating economic surplus or wealth. This generally meant meeting the food needs of the group and sustaining the ability of the land and sea to continue to provide for its human inhabitants well into the future. Those with limited food sources used them well, as this account by a Peigan elder illustrates:

*My grandfather, he was the one who knew all about how the buffalo moved around and they (the people) followed and hunted the buffalo. The men would do the hunting and the women would take care of the kill. They used every part of the buffalo, there was nothing they spoiled or wasted. This is what my mother told me. For example, the hide was used and the meat was sliced and dried so that it would last long. The bones were pounded and crushed and boiled. They were boiled for a long time. It was then cooled and the marrow was taken and used for grease ... The hides they would scrape and stretch and the women would also do this work. This they used for blankets and flooring and many other uses. Those even further back (the first people) would use the hides to build homes.*⁴

The abundance of natural resources varied considerably from one region to another. Where a surplus of a particular product was generated, it provided a basis for trade within and among Aboriginal nations. Agricultural producers living in what is now southern Ontario and the St. Lawrence valley supplied corn and other products to those without an agricultural base, exchanging them for fish or furs. Extensive commercial networks also existed in areas such as the northwest coast of British Columbia, where foodstuffs were transported between the coast and the interior.⁵

Trade routes were also used for the exchange of technology. Archaeologists report the presence on the western plains of obsidian, a volcanic rock used for tools, that originated in British Columbia. Copper from the west end of Lake Superior has been found at Saguenay, Quebec, and abalone from California found its way into the interior in the form of beads and other ceremonial items.

Pre-contact economic activity was undertaken not only for profit or material gain as we would understand it from the perspective of a market economy. Trade was often pursued to gain prestige, build or maintain alliances, or cement agreements as well. This is not to say that material goods were not important, but in some societies, particularly among the Pacific northwest coast peoples,

2 Robert McGhee, *Ancient Canada* (Ottawa: Canadian Museum of Civilization, 1989).

3 Martin Weinstein, "The Ross River Dena: A Yukon Aboriginal Economy", 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.

4 From interviews of elders by Michael Smith, in Roxanne Warrior, "Case Study of the Economy of the Peigan Nation", research study prepared for RCAP (1993).

5 McGhee, *Ancient Canada* (cited in note 2).

the accumulation of wealth was accompanied by ceremonies for giving it away - the potlatch. Status and prestige were accorded to those who were the most generous (see Volume 1, Chapter 4).

The fur trade

With the coming of Europeans, Aboriginal peoples were initially able to continue traditional patterns of economic activity. On the east coast, the Mi'kmaq first encountered Europeans as explorers and then, in the 1500s, as occasional fishermen who, as time went on, began to stay for longer periods to dry their fish on shore. Trade developed and led quickly to a pattern of exchanging furs for European knives, iron goods, foodstuffs and clothing.

The pattern of early contact varied from one part of the continent to another. In the Cumberland Sound area of the Arctic, for example, the early contact period occurred much later and coincided with whale hunting. In the early 1800s, bowhead whale oil and baleen were in great demand in European markets. As whaling ships began to winter in the area, especially in the second half of the century, Inuit were hired or contracted in teams to hunt the whales.

In most locations, whatever the nature of early relations, the fur trade soon followed. The Mi'kmaq and the Wuastukwiuk (Maliseet), as well as the Montagnais and later the Iroquois, Cree, and Ojibwa and nations on the west coast and in the north, were actively engaged in the trade, some as trappers and others as middlemen between the hunters of the north and the interior and buyers for the trading companies.

In contrast to later periods, most Aboriginal groups adapted well to the demands of the fur trade. The fur trade built on traditional lifestyles in important ways, rather than seeking to displace them. Aboriginal people had the skills required to play a major role in the economy of the time, and not only as harvesters. Many of the French and English buyers remarked on the negotiating prowess of Aboriginal people. There is considerable evidence that groups such as the Iroquois and west coast peoples were adept at playing off the English against the French, or one trading boat against another, to get better prices.

Métis people also played a prominent role in the fur trade. Initially tied closely to the activities of the major fur trading companies, Métis people lived in or around the trading posts. While some worked as independent traders or trapped and hunted as primary producers, others worked as labourers, as freighters on the boat brigades, or in clerical and supervisory jobs at trading posts. For a time, their labour was much in demand as inland trading posts expanded in number and geographic scope, requiring staff for the new posts and transporters of furs and trade goods.

Some layoffs occurred after the merger of the North West and Hudson's Bay companies in 1821, but the fur trade continued to provide employment for Métis people. In addition, new opportunities presented themselves in the form of buffalo hunting and the freighting of buffalo hides and furs to the United States in exchange for farm animals, seeds, implements or consumer goods. Expanding settlements also led to the development of a small merchant class and the emergence of skilled tradesmen engaged in the building of churches, housing and commercial establishments and the manufacture of carts.

Although the fur trade proved compatible with Aboriginal patterns of making a living, there were also some strongly negative consequences associated with the period of early contact. The use of new technologies, combined with the need to produce for a market rather than for subsistence, led to the depletion of furbearing animals and to conflict among Aboriginal groups as some pushed into new territories in search of resources. Dependence on an external market brought exposure to the

seemingly inevitable boom and bust cycle associated with staple production, a pattern experienced first in the eastern fur trade but repeated across the continent with whales, forest products, fish, seals and minerals up to the present day.

Contact with Europeans also brought exposure to contagious diseases, which devastated the populations of many Aboriginal societies and disrupted social and economic patterns. While the exposure and susceptibility of Aboriginal groups to disease varied, the decline in numbers was often substantial (see Volume 1, Chapter 2).

The settler period

As Europeans began to settle the continent - creating new and permanent communities, shifting the emphasis to agriculture, and advancing their claims to Aboriginal lands and resources - Aboriginal people were pushed increasingly to the margins. Whereas the fur trade economy permitted both Aboriginal people and Europeans to benefit, the new settlers generally came to see Aboriginal people as a hindrance to development of the country's lands, waters and other natural resources.

The newcomers often simply assumed they had title to these lands and resources. For example, the first European attempt to exploit the salmon resource near Alert Bay, British Columbia, is instructive:

The origins are obscure, but Spencer and Earle were probably the founders of the first saltry on the then-uninhabited Cormorant Island ... They chose this site over the mouth of the Nimpkish River in response to the absence of good deep-draft boat landing sites in the river estuary. The Spencer business plan was simple and straightforward. He would utilize primarily the Nimpkish salmon stocks, principally sockeye, which were until this time the exclusive property of the Nimpkish Band. He would use Indian labour to construct and operate his facility. He would sell his product in the expanding, industrialized British marketplace. If he could combine these factors, he stood to generate a personal profit.⁶

This facility, which eventually became a cannery owned by B.C. Packers, and other canning companies were given licences that enabled them to control who supplied the canneries with salmon. Through these regulatory and other measures, alienation of the salmon resource from Aboriginal ownership and control began.

In some cases, the newcomers recognized that some form of negotiation and compensation, albeit limited, was necessary. These negotiations typically took the form of treaty making, a process described in Chapter 2 of this volume. In other cases, no treaty was offered, and to this day there is no agreement on how lands and resources are to be shared, although comprehensive land claims negotiations are in the offing. Governments generally did proceed, however, to establish reserves of land, both within and outside treaty areas. For example, the Algonquins residing along the Gatineau River in Quebec petitioned the governor general of the time, Lord Elgin, to set aside some land for their exclusive use. He responded with a grant of land of 45,750 acres, thereby establishing the Kitigan Zibi (Maniwaki) reserve in 1854.⁷ Reserves in many other areas of the country were much smaller, however. The 90 reserves established for the Kwakwa ka'wakw in the late 1800s in British

6 Dan Gillis, *Impact Assessment: The Loss of Ten Seine Vessels from the Alert Bay Fishing Fleet* (Alert Bay, B.C.: Nimpkish Indian Band, 1983).

7 Simon Brascoupé, "Kitigan Zibi Anishinabeg Economic Case Study", research study prepared for RCAP (1994).

Columbia, for example, totalled only 16,500 acres, or an average of 183 acres per reserve. Besides being small, reserve land was often of poor quality.⁸

Land and resource rights were also a major issue for Métis people on the prairies, for whom no provision was made as Confederation was negotiated and the transfer of Hudson's Bay Company lands to Canada proceeded. As settlers and surveyors encroached on Métis lands along the Red River, Métis people mobilized under Louis Riel and negotiated the terms of the Manitoba Act, which provided for the entry of Manitoba into Confederation as a self-governing province. While the Manitoba Act provided for recognition of Métis claims to their settled lands, the process of confirming title was very complicated. Faced with this process, and with the racism and aggressive behaviour of the incoming settlers, many Métis families chose to sign over their land rights and move further west to start anew. Additional land in Manitoba was to be made available to benefit Métis children and their families through the provision of scrip. However, the allocation of scrip was fraught with problems, including fraud and land speculation, with the result that, by 1886, only a small proportion of the lands remained in the hands of the original allottees.⁹ Those who moved further west postponed this fate for a time, but the inevitable westward progression of surveyors, railroads and settlers and a second failed attempt at issuing scrip produced a Métis population that was largely without a land base (see Volume 4, Chapter 5).

As the settler economy developed and the fur trade declined, Aboriginal economies were disrupted to the point where extreme economic deprivation became a fact of life. Again, the pattern of disruption varied from one part of the country to another and from one Aboriginal group to another. Métis people on the prairies, for example, saw the competitiveness of their overland hauling routes undermined by railroads and steam boats. The buffalo were devastated by the mid-1880s, damaging the livelihood of Métis and Indian communities. Incoming settlers added to the pressure on the natural resource base, depleting furbearing animals in the woodland areas and overfishing lakes and streams.

Both before and after Confederation, Indian people living on reserves faced the imposition of laws enacted under the provision in the Constitution Act, 1867 making "Indians, and Lands reserved for the Indians" subject to exclusive federal jurisdiction. The new government of Canada arrogated to itself responsibility for virtually all aspects of Indian life. Although the treaty process continued the formality of nation-to-nation dealings, other developments, such as the continued creation of reserves, military actions in the west, and legislative enactments, had the effect of breaking Aboriginal nations apart. Under the terms of the *Gradual Enfranchisement Act* of 1869,¹⁰ traditional Indian governments were replaced by elected chiefs and councillors, and virtually all decisions required the approval of a federally appointed Indian agent and/or the minister responsible for Indian affairs. While many reserves, especially those in more remote locations, managed to retain much of their autonomy and decision-making procedures into the early decades of the twentieth century, the imposition of external control gradually prevailed in all reserve locations. Often the attempt to replace traditional governing structures with new ones created internal divisions that have lasted to the present day, and the ensuing disruptions interfered with the socio-economic development of communities for decades.¹¹ The various laws also contained provisions restricting

8 D.J. Gillis et al., "Case Study of the Alert Bay Aboriginal Economy", research study prepared for RCAP (1995).

9 Larry Heinemann, "Metis Economic Development in Regina: A Case Study in the Aboriginal Economies Research Series", research study prepared for RCAP (1993).

10 *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act*, 31st Victoria, Chapter 42, S.C. 1869, 32-33 Vict., c. 6.

11 David Newhouse et al., "The Six Nations Economy: Its Development and Prospects", research study prepared for RCAP (1994).

mobility and the ownership of property and other measures that have impeded economic development.

Throughout the late nineteenth century and into the twentieth, Indian agents made significant attempts to persuade Indian people to become farmers. Whether it was the Mi'kmaq people on the east coast, Peigan and Métis peoples on the plains, or the nations of the west coast, the goal was to have Indian and Métis peoples 'settle down' and make the transition to the settlers' way of life.

The Peigans who did not pursue the last [buffalo] herds were encouraged to go to their new reserve in 1879, where a farm instructor was appointed to teach them agriculture. By the end of the year about 50 acres of land had been broken and seeded.

By the spring of 1880, it was apparent that the Peigans' old way of life had come to an end. The buffalo were gone, the days of wandering were over, and they now had to find new ways of making a living. Canadian Government policy at that time approved the issuing of rations as a temporary measure, but dictated that the Indians become self-supporting as soon as possible. For most reserves, the government was convinced that the Indians should be taught farming regardless of the location, fertility of soil or climate. As part of this policy, the decision was made to transform the Peigan into farmers.

The Indians were anxious to find a new source of livelihood and willingly turned to the soil ... Crops of potatoes, turnips, barley and oats were planted, and by the end of 1880 the Agent observed that several one-time warriors were "cross-ploughing with their own horses the pieces of land which were broken for them last summer." Indians also went to the nearby Porcupine Hills and brought out timber for log houses to replace their worn teepees.

As part of its treaty obligations, the government issued 198 cows, as well as calves and bulls to the Peigans, but initially these were kept together as a single band herd on the north end of the reserve. Farming was given top priority and initial results were so encouraging that in 1881 the Inspector of Agencies said, "These Indians are very well-to-do and will, in my opinion, be the first of the Southern Plain Indians to become self-supporting. They are rich in horses, and having received their stock cattle from the Government, are rich in them too".¹²

For the most part (and the Peigan case eventually proved to be no exception) these efforts were not successful, in part because government policies did not provide sufficient resources - land, equipment or seed - to permit success. Periods of drought, overproduction and low prices also did not help matters. The problem was more than neglect or climate, however; it was also a matter of conflict with non-Indian farmers, who often persuaded government to sell off productive Indian lands, place restrictions on the sale of produce, and limit Indian use of new technologies to increase productivity.

In many cases, therefore, the agricultural strategy failed. Elias reports that the Dakota people at the turn of the century pursued a variety of economic activities, ranging from continued engagement in traditional hunting and gathering activities to commercial grain production, ranching and wage labour.¹³ Carter reports that during the late nineteenth century and the early years of the twentieth, Indian people in the Treaty 6 and 7 areas of Saskatchewan were becoming farmers.¹⁴ They steadily

12 Hugh A. Dempsey, "The Peigan Indians", *Glenbow* 5/5 (September-October 1972), p. 4.

13 Peter Douglas Elias, *The Dakota of the Canadian Northwest: Lessons for Survival* (Winnipeg: University of Manitoba Press, 1988).

14 Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1990).

increased the number of acres under cultivation and were able to grow enough food for their own subsistence and sale in local markets. Between 1899 and 1929, income from agriculture was the most important source of income for Indian families in these areas.

During the late settler period, as Canada industrialized, Aboriginal people in many parts of the country began to participate in the market economy. For the most part their participation was on the margins and generally in manual occupations. But despite marginality, Aboriginal people coped with the changes occurring around them and again developed a measure of self-sufficiency, although at quite low levels of income. There is evidence of participation in the new industries springing up, of people working their own farms or as hired hands on others, of seasonal participation in construction of housing and community infrastructure. Some were able to establish businesses in areas such as the crafts industry, and others sought their fortunes by moving to areas where jobs were available, including the United States.

Aboriginal men in British Columbia, for example, worked in commercial fishing, canning, road construction, logging, milling, mining, railroad construction, longshoring, and coastal shipping. Aboriginal women in this region worked as domestic servants, cannery workers and seasonal agricultural labourers. By the late nineteenth century, most of the northern canneries were staffed by Aboriginal women and children. On the Atlantic coast, Mi'kmaq men and women gained a foothold in the local economy, working in road construction, ship loading, cutting pit props for the coal mines, or producing arts and crafts. They travelled to the northeastern United States for seasonal harvesting of blueberries and potatoes and, when jobs were hard to come by in the Maritimes, took up longer-term jobs in the emerging manufacturing industries of New England. (While this pattern has slowed substantially in the intervening years, it is still standard practice in the Maritimes to avoid scheduling meetings or other activities in the late summer, when a significant portion of the population goes to 'the States' to pick blueberries, as much for social as for economic reasons.)

There is some evidence, therefore, that Aboriginal people were successfully making the transition from a traditional to a 'modern' economy. These documented examples tend to be overlooked by those who conclude that Aboriginal people were unable to make the transition, that they were prevented from gaining positions in the wider economy because of racism, or that they were unwilling to venture beyond the safe haven provided by reserves.

The period of dependence

The period of dependency began in the middle part of this century (depending on the location, sometime between 1930 and 1960) and continues, for the most part, today. Its roots were in the dislocation and dispossession created by the settler economy, which left Aboriginal people in a decidedly marginal and vulnerable economic position. It was entrenched further by the great depression of the 1930s and by federal and provincial policies adopted in response to economic distress and economic opportunity.

Although Aboriginal people were beginning to participate in the market economy, this participation was tenuous. With the depression, many jobs and businesses disappeared, and Aboriginal participation in the labour force declined. Labour shortages resulting from the Second World War made it possible for Aboriginal people temporarily to increase their role in the economy and to join the armed forces, but the end of the war and the return of the veterans again displaced Aboriginal people.

One factor standing in the way of providing assistance was the view that Aboriginal people, and especially Indian people, were a federal responsibility. Local municipalities and provinces did not see themselves as having any responsibility to assist local Indian populations, especially those living on reserves. First Nations were seen as being outside local society, a point of view that continues to some extent today.¹⁵ Local services were often not available, banks were reluctant to do business with people on reserves without federal government guarantees on loans, and businesses saw the reserve community primarily as a market for their goods and services, without the reciprocal obligation to provide employment or other types of community support.

As the depression wore on, however, some governments became more active. In Alberta, Métis people, who had been pushing for a communal land base for decades, made some headway with the provincial government. A commission was appointed in 1934 whose recommendations led to passage of the *Metis Population Betterment Act 1938*. Under its provisions, a number of pieces of land in the northern half of the province were set aside as Métis colonies with a limited degree of self-government. Of the 12 originally set aside, eight remain in existence, with a total land area of more than 500,000 hectares and a population of about 5,000. The initial legislation had some major limitations with respect to the degree of local autonomy allowed, the fact that title to the land remained with the province and could be revoked by order in council, and the fact that subsurface rights to resources remained with the province. The first two problems were resolved with revised legislation passed in 1990.

Concerned about unemployment and poverty, and pushed into action by negative publicity and by the provinces' insistence that Aboriginal people were a federal responsibility, the federal government undertook a number of initiatives at mid-century. In some areas, it began a process of relocation and consolidation of Aboriginal communities.¹⁶ Sometimes Aboriginal communities were moved to make land available for agricultural development or resource development, such as hydroelectric projects. This type of relocation had begun in the 1800s and continued with some frequency until the end of the 1950s. In other cases, and with particular frequency in the middle decades of this century, the government hoped that by combining small reserves, it could provide services more efficiently and create economies of scale, thereby building self-sustaining economic units. This approach was seldom, if ever, successful. Apart from ignoring the attachment of Aboriginal people to their places of origin, the relocations undermined livelihoods people had developed over time on the smaller reserves, such as subsistence farming or traditional activities. Further, although employment was sometimes available in the new location for a time, principally in building the housing and other facilities required by a growing community, this employment also declined once the needs created by expansion had been met.

The government also put in place an extensive welfare system and other income security programs. By the 1960s, this policy approach was supplemented by attempts to create jobs within Aboriginal communities, primarily on reserves, through make-work programs and other forms of public expenditure. This approach relieved immediate hardship to a degree, but it did little to address the more fundamental issues of rebuilding an economic base. Furthermore, welfare programs were developed and implemented with little Aboriginal involvement. They were applied to situations for which they were not designed in cultural or socio-economic terms, and they in fact retarded the economic recovery of communities. Over time, the need for jobs for the expanding population grew.

15 Several of the community case studies of Aboriginal economies conducted for the Commission note the lack of knowledge about reserve economies and the lack of collaborative action on the part of municipalities surrounding reserves.

16 See Volume 1, Chapter 11 and RCAP, *The High Arctic Relocation: A Report on the 1953-55 Relocation* (Ottawa: Supply and Services, 1994).

So did the demand for social assistance as the rate of job creation failed to match population growth. As a result, dependence on federal assistance grew, and communities came to depend significantly on these outside sources of funds.

In analyzing the roots of the dependency that grew in this period, the policies and practices of governments and the private sector regarding lands and resources must be examined. Especially in the more northerly areas of the provinces and in the territories, major resource companies, encouraged by governments, routinely established operations in areas where Aboriginal people were trying to continue a traditional lifestyle. Mining, forestry, oil and gas and similar projects were highly disruptive of Aboriginal land use and harvesting patterns.¹⁷ Provincial and federal governments applied all manner of regulation - to preserve fish and game, to register traplines, to control access to Crown lands. In the process they either ignored Aboriginal and treaty rights or chose to interpret them as narrowly as possible, until court decisions forced them to adopt a broader interpretation.

In some cases, federal or provincial regulations intended to apply broadly had a particularly damaging effect on Aboriginal people. A case in point was the 1969 fishery regulations in British Columbia. Since fishing is a way of life and not just an economic pursuit for First Nations fishers, they maintained a variety of licences. Rather than fishing only salmon, they held licences for species such as halibut, herring and rock cod as well. The 1969 Davis Plan (named for the federal fisheries minister of the day) sought to solve the problem of too many boats chasing too few fish by limiting access to the fishery. The plan limited salmon fishing licences to boats with the highest annual catch efficiency, thereby contributing to conservation of salmon stocks and providing a better income for the remaining boats. Many of the boats owned by Aboriginal people could not compete with single-purpose vessels, because they fished several species. The result was a substantial reduction in the number of Aboriginal commercial salmon fishers.

This brief account of the roots of contemporary dependence and economic disadvantage emphasizes the role played by disruption in traditional ways of making a living and dispossession from a rich land and resource base. It also points to laws, regulations and government policies that blocked the rebuilding of Aboriginal economies.

These are not the only explanations, but they are among the most significant. Other contributing factors include the failure of educational systems to provide an appropriate education for Aboriginal students; the continued introduction of labour-saving technology, requiring more highly educated and specialized labour for its operation; and the lack of the capital required to own and operate such technology, especially in the natural resources field. These related factors generally excluded Aboriginal people from participation in the broader economy, whether as wage labourers or as entrepreneurs.

Federal and Aboriginal economic development approaches since 1960

Since the 1960s, governments have attempted to promote economic development more actively in Aboriginal communities, with policies and programs that have expanded in scope and objectives over time. But resources allocated to economic development have not come close to the amounts spent on remedial social welfare measures. In this section, we provide a brief overview of economic development efforts, focusing on federal policies.¹⁸ We also review how Aboriginal people have

17 For an overview of these effects, see David DesBrisay, "The Impact of Major Resource Development Projects on Aboriginal Communities: A Review of the Literature", research study prepared for RCAP (1994).

responded and the alternatives they have put forward. There has been some convergence between federal and Aboriginal perspectives, but important issues remain outstanding.

Federal approaches to economic development

Governments were not very active in promoting economic development before the 1960s. In the post-Second World War period, it became clear that approaches such as promotion of agriculture and relocation of communities closer to employment opportunities were too narrow in scope. While new initiatives were undertaken, the federal approach continued to be premised on the idea that development in Aboriginal communities would proceed in a manner similar to that in the mainstream; that is, if given a kick-start, Aboriginal communities would develop businesses and an economic infrastructure resembling that of the rest of Canada. It was also assumed that a significant portion of Aboriginal people would leave rural communities to enter the economic mainstream in urban areas.

In a move to support business activity, the *Indian Act* was revised in 1951 to give the minister of Indian affairs authority to make loans for economic development. A revolving loan fund was established to support Indian activity in areas such as agriculture and arts and crafts. Similar assistance was provided to Inuit through the Eskimo Loan Fund, established to provide small loans to Inuit trappers.

Since 1960, the federal government has pursued at least five approaches:

1. migration to mainstream employment sites, especially urban areas,
2. business development,
3. sectoral development,
4. human resources development, and
5. community economic development.

At times, one approach might dominate, but they overlapped considerably. The federal initiative of the early 1990s, the Canadian Aboriginal Economic Development Strategy (CAEDS), is noteworthy not because it introduced a new approach to economic development, but because it emphasized the need for co-ordination of programs covering all five areas between participating federal departments.

Aboriginal participation in the design and implementation of policy and programs has increased in the last three decades. There is considerable variation from one policy area to another, as pointed out in a recent assessment of CAEDS from an Aboriginal community perspective.¹⁹ Over this period, however, policy, programs and budgets continued to be controlled by federal and provincial/territorial governments, and principally non-Aboriginal perspectives were brought to bear on development.

18 For the most part, provincial and territorial programs are similar to federal programs, differing primarily in scale and scope rather than in kind. For a review of provincial approaches, see John Loxley, "The Economics of Community Development", report prepared for the Native Economic Development Program (Winnipeg: 1986).

19 Aboriginal CAEDS Assessment Project, "An Aboriginal Community Perspective of the Canadian Aboriginal Economic Development Strategy", prepared for Aboriginal communities and the government of Canada (Ottawa: 1994).

Migration

In the mid-1960s, migration to urban areas became one of the principal policy ideas for addressing individual poverty and disadvantage. The impetus was a major report commissioned by the federal government and released in 1966. The Hawthorn report made it clear that Indian people were the most disadvantaged group in Canada's population. The report rejected the notion of assimilation as a solution to the problem. The first recommendation stated that

Integration or assimilation are not objectives which anyone else can properly hold for the Indian. The effort of the Indian Affairs Branch should be concentrated on a series of middle range objectives, such as increasing the educational attainment of the Indian people, increasing their real income and adding to their life expectancy.²⁰

The recommendation also set the stage for the economic development policies that would follow in the next three decades:

The economic development of Indians should be based on a comprehensive program on many fronts besides the purely economic.

The main emphasis on economic development should be on education, vocational training and techniques of mobility to enable Indians to take employment in wage and salaried jobs. Development of locally available resources should be viewed as playing a secondary role for those who do not choose to seek outside employment.

The Hawthorn report did not hold out much promise for people living on reserves, on the grounds that reserves lacked a sufficient resource base to support the growing population. The report rejected assimilation as an appropriate goal of government policy, but the strategies it supported placed a heavy emphasis on migration to urban areas, advocating a series of programs and activities to help Indian people enter the mainstream labour market. Work in traditional sectors such as fishing, forestry, hunting, trapping and farming was de-emphasized in favour of wage employment in commerce and industry. In emphasizing migration, the report recognized that the provinces would necessarily play a greater role in providing services to Indian people. It recommended federal reimbursement of provincial costs.

Some of these themes were picked up three years later in the 1969 white paper, a document notable for its emphasis on achieving individual social, economic and legal equality. The white paper rejected the idea that the federal government had a special responsibility for Inuit and Métis people. With respect to Indian people, it set out to remove many of the distinctive elements that set them apart, recommending that the Indian Act be repealed, that the department of Indian affairs be gradually dismantled, and that Indian people receive services from the provinces on the same basis as other Canadians. Land claims should be settled and reserve lands should be transferred to Indian control. The white paper supported increased economic development funds for reserves but emphasized that migration would be necessary and should be supported through counselling, training, and job placement services.

In his review of approaches to development in this period, Peter Elias concludes that the federal government endorsed modernization - that is, that the model for development should be the attitudes, behaviours, and institutions of 'advanced' western industrial societies, the attributes of which are most clearly evident in urban centres.

20 H.B. Hawthorn, ed., *A Survey of the Contemporary Indians of Canada: A Report on Economic, Political, Educational Needs and Policies* (Ottawa: Indian Affairs, 1966), Volume 1, p. 13

These ideas held that elements of Indian culture and society were obstacles to development. Faith in treaties, special constitutional status, an insistence on the validity of Aboriginal rights, unique land-holding rights, reserves, an emphasis on community and region, ethnic pride and preoccupation with history and tradition, some said, all served to defeat the admission of Indians as full participants in a better world. The attempt to strip those concepts of their power was an attempt to prepare Indians to enter the modern Canadian mainstream.²¹

Business development

Support for business development, begun in the post-war years, continued in the 1960s with a renewed federal commitment to an Indian revolving loan fund. Aboriginal communities had very few businesses of any size except those engaged in the traditional economy. Poverty and underdevelopment were seen as problems of individuals, and the way to solve the problem was to raise individual incomes. This meant that people should have jobs, either in urban labour markets or through the development of local businesses.

Métis people had limited access to federal programs, at least until the 1970s. They had to look to provincial programs for support. Typically, the provincial departments, agencies and programs that were established were not specifically directed to Aboriginal peoples - more often they had a northern or rural community mandate.²²

In the early 1970s, the department of Indian affairs created an economic development fund for on-reserve projects. It provided direct loans, loan guarantees, equity contributions and advisory services; both individually owned and community-owned projects were eligible for assistance.

At the same time, the federal government introduced the Special Agricultural and Rural Development Agreements to improve income and employment opportunities in rural and remote areas. Métis communities and Indian people living off-reserve were also eligible for assistance under this program. Programs intended primarily to support business development followed, including the Native Economic Development Program (NEDP), established in 1980 and made available to all Aboriginal groups. The successor to NEDP was the Canadian Aboriginal Economic Development Strategy (CAEDS), which had a substantial business development component. Recent budget cutbacks have affected CAEDS significantly.

Sectoral development

In the 1980s, support for sectoral development, particularly in natural resources, gained currency. The federal government provided support for controlled sectoral development organizations in areas such as forestry, fishing, agriculture, arts and crafts and tourism, along with resources for loans, technical assistance and training. John Loxley reports that

The sectoral programs have, apparently, been more successful than the previous, project-by-project approach of IEDFYet government involvement continues to be

21 Peter Douglas Elias, *Development of Aboriginal People's Communities* (North York: Centre for Aboriginal Management Education and Training (CAMET) and Captus Press, 1991), p. 9.

22 First Nations Management, "Aboriginal Economic Development in Canada", research study prepared for RCAP (1994).

*large and there are complaints of excessive control over programming and financesSectoral programs have, of necessity, a limited impact on Native communities as a whole and can provide only one, narrow, element of a development strategy to any given community, being based on a single sector or commodity.*²³

Eventually, however, most of the resources devoted to sectoral organizations were diverted to the community level, in part at the insistence of community-based political leaders.

Human resources development

The last three decades witnessed a marked increase in the resources devoted to education and training in Canada, particularly as a preferred remedy directed to those judged to be disadvantaged. Enrolment of Aboriginal children in elementary and secondary school, whether in provincially run school systems or in federal or community-controlled schools located in Aboriginal communities, increased substantially. Greater success at the secondary school level also meant that larger numbers of Aboriginal people were attending and graduating from post-secondary institutions, although rates of attendance, and especially of graduation, still lagged behind those of the population as a whole.

While Aboriginal people participated in vocational programs directed to the broader Canadian population, some programs targeted specifically to their needs were put in place as well, such as the community human resource strategy of 1985-1992 and the Pathways initiative of the 1990s under caeds.²⁴ Education and training institutions controlled by Aboriginal people developed over this period as well, such as the Gabriel Dumont Institute and the Saskatchewan Indian Federated College.

In the early part of this period, education and training programs often encouraged assimilation and were geared to preparing people for migration out of their communities. While programs encouraging participation in the labour market continue, greater Aboriginal participation in decision making has contributed to training better designed to meet the particular needs of Aboriginal communities. Diploma, certificate and degree courses have been developed for band managers, community health representatives, and family and children's services workers. In areas where comprehensive claims agreements have been signed, education and training directed to preparing community members for new opportunities and responsibilities arising from the agreements are being planned or carried out. Aboriginal people are being equipped for technical and professional jobs, in fields such as teaching, nursing, band management and equipment operation, held for the most part in the past by non-Aboriginal personnel.

Community development

In the 1960s, the federal government broadened its policy to include an emphasis on community development. Following successful provincial programs in Manitoba, Alberta and Ontario, the Indian affairs branch established a community development program in 1963. Participants in this program clashed with the established way of doing things, however, and the branch was not prepared to commit the resources necessary to support the ideas that resulted from the process.

The Indian affairs department returned to community-based development in the 1980s through devolution of programs to the community level (that is, community implementation of existing

23 Loxley, "The Economics of Community Development" (cited in note 18).

24 The Indian Community Human Resource Strategy was merged with the Canadian Aboriginal Economic Development Strategy (CAEDS) in 1992-1993.

programs under federal guidelines, not community control) and comprehensive community-based planning. More recently, under CAEDS, the department has sponsored a program that provides support to community-based economic development officers.

Aboriginal approaches to economic development

A sense of the policy directions that Aboriginal people would pursue to achieve a stronger, more self-reliant economic base can be derived from alternatives advanced by Aboriginal leaders in the last several decades. The first major statement on the issues came in reaction to the 1969 white paper and was prepared by the Manitoba Indian Brotherhood (MIB). Its report, *Wahbung: Our Tomorrows*, stated:

In developing new methods of response and community involvement it is imperative that we, both Indian and Government, recognize that economic, social and educational development are synonymous, and thus must be dealt with as a 'total' approach rather than in parts. The practice of program development in segments, in isolation as between its parts, inhibits if not precludes, effective utilization of all resources in the concentrated effort required to support economic, social and educational advancement.

In order that we can effect changes in our own right, it will be necessary to develop a whole new process of community orientation and development. The single dependency factor of Indian people upon the state cannot continue, nor do we want to develop a community structure that narrows the opportunities of the individual through the transferral of dependencies under another single agency approach.

The transition from paternalism to community self-sufficiency may be long and will require significant support from the state, however, we would emphasize that state support should not be such that the government continues to do for us, that which we want to do for ourselves.²⁵

This statement had some similarities with the Hawthorn report, especially in its call for a comprehensive approach to development, but it diverged from Hawthorn in its emphasis on reserve development as both an economy and a community central to Indian life. It called for development to proceed not in bits and pieces but according to a comprehensive plan for progress on several fronts. The proposed strategy consisted of three elements:

1. A plan to help individuals and communities recover from the pathological consequences of poverty and powerlessness. This meant a focus on individual and community health and healing. Adequate health services and community infrastructure were needed to support the individual.
2. A plan for Indian people to protect their interests in lands and resources.
3. A concerted effort at human resource and cultural development. It argued for revitalizing Indian traditions within the context of Canadian institutions, laws and ways of doing things.

At its heart was the concept that if change was to lead to increased self-sufficiency, it must be directed by Indian people themselves, so that both individual and communal interests could be taken into consideration. This would require governments to relinquish some political power and

25 Manitoba Indian Brotherhood Inc., *Wahbung: Our Tomorrows* (Winnipeg: Manitoba Indian Brotherhood, 1971), pp. xv-xvi.

Indian people to combine elements of Canadian and local culture. The MIB proposal also emphasized the need for substantial financial support from the federal government over an extended period of time.

Support for comprehensive approaches to development were also articulated in the North. In 1973, for example, the Council for Yukon Indians (CYI) outlined its case for regaining control over lands and resources and a comprehensive approach to development in its land claims statement, *Together Today for Our Children Tomorrow*.²⁶ While the MIB and CYI approaches to development were similar, they emphasized different priorities, with CYI stressing private business initiatives as the key to a healthy economy - essentially individual interests - while MIB emphasized communal economic initiatives.

These are two of a large number of proposals from Aboriginal people for approaches to development, including the National Indian Brotherhood's 1976-1977 strategy, the 1979 Beaver report, and the recent community-based evaluation of CAEDS.²⁷ In addition, economic development approaches advanced by non-Aboriginal sources (though with substantial Aboriginal input) include the Berger report and the Penner report.²⁸

The reports differ in approach, but together they reveal some recurring themes in Aboriginal approaches to economic development:

- As the statements from the Manitoba Indian Brotherhood and the Council for Yukon Indians illustrated, Aboriginal approaches to development are much broader in conception, including elements such as governance, culture, spirituality, education and training, and community healing and social development.
- An integrated, holistic approach is favoured rather than one that proceeds on the basis of segmented instruments, each pursued more or less independently.
- The achievement of self-government is central to Aboriginal visions of development, not only for its own sake but as a vital element of sustained economic development.
- Recognition of the rights of Aboriginal peoples is vital, and through this means an expanded land and resource base can be obtained.
- Development of the resources, institutions, rights and responsibilities of the community and nation are emphasized. There is an appreciation of the need for Aboriginal people to make their way as individuals in the broader Canadian society, but this needs to be balanced with the development of the community or nation.
- Economic development should be compatible with and strengthen Aboriginal culture and identity rather than undermine it.

26 Yukon Native Brotherhood, "Together Today For Our Children Tomorrow: A Statement of Grievances and an Approach to Settlement by the Yukon Indian People" (Whitehorse: Council for Yukon Indians, 1973).

27 National Indian Brotherhood, *A Strategy for the Socio-Economic Development of Indian People* (Ottawa: National Indian Brotherhood, 1976); Jack Beaver, *To Have What Is One's Own* (Ottawa: National Indian Socio-Economic Development Committee, 1979); Aboriginal CAEDS Assessment (cited in note 19).

28 Mackenzie Valley Pipeline Inquiry, *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (Ottawa: Supply and Services, 1977); House of Commons Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: House of Commons, 1983).

- Aboriginal approaches to development should support traditional economies and the measures required to sustain them, including respect for indigenous knowledge and resource conservation.
- Transition must be made from allocating a large proportion of government funds to social assistance and other forms of remedial and maintenance expenditures to an emphasis on economic development and preventive expenditures.
- The influence of Aboriginal cultures in decision making, business ownership, the distribution of wealth, and the role of kinship is not uniform.

Over the 30-year period we have been examining, federal government policy slowly converged on the direction set out by Aboriginal people. First, the nature of assistance has diversified from direct loans and equity contributions to a broader range of services, including management and technical assistance and planning support. Second, the target groups have expanded to include not only Indian people living on reserves but also Inuit, Métis people, and Indian people living off-reserve. Third, the scope of the objectives has widened from the initial focus on small business development to include community development with a community-based planning approach, sector development of arts and crafts, agriculture, and fishing, and development of economic development institutions. Finally, there has been a shift from programs designed and delivered by a single department (DIAND) to the collaboration of several departments in a somewhat co-ordinated way through CAEDS.

The degree of participation and control by Aboriginal people has also increased. In the 1960s and early 1970s, the federal government retained control over all aspects of economic development. It did the planning, set priorities, developed projects and approved them. Since then, the size of the role assumed by Aboriginal governments and communities has increased gradually. Examples of the increasing influence of Aboriginal people over the development process and related government policy have included the National Indian Socio-Economic Development Committee, joint National Indian Brotherhood-Department of Indian Affairs and Northern Development committees, Indian economic development loan boards, the NEDP advisory board and its various committees, the CAEDS boards, and the Pathways boards. As a result of government and community initiative, there has been significant growth in the institutional capacity of Aboriginal communities to further the process of socio-economic development.

Conclusion

This overview of federal economic development policy and programs has revealed significant changes in the last three decades. There are, however, continuing tensions, such as the need to recognize that Aboriginal economies are both distinctive from the mainstream and diverse. They arise because federal policy emphasizes individual advancement and integration into the broader Canadian economy more than rebuilding Aboriginal economies and all that entails.²⁹

29 Canadian fisheries policy, for example, provides programs to assist Aboriginal fishers to acquire boats or individual fishing licences so they can participate in the coastal fishery. Until the Sparrow decision, there was little evidence of support for collective Aboriginal and treaty rights to fish or for the development of an Aboriginal fishery. See Parzival Copes et al., "West Coast Fishing Sectoral Study: Aboriginal Peoples and the Fishery on Fraser River Salmon", research study prepared for RCAP (1994); and GTA Consultants Inc., "Aboriginal Fisheries in the Maritimes", research study prepared for RCAP (1994).

Tensions also continue over the extent to which policy and programs are designed, implemented and changed by Ottawa, or whether genuine partnerships with Aboriginal people will be realized in the context of self-government, with Aboriginal governments playing the lead role in the design and delivery of economic development policies and programs.

In reflecting on the experience with economic development policy and programs over the last 30 years, several broad conclusions can be drawn. The first is to recognize that this is a complex area and that no single approach will solve the problems within a few years. The single-focus approaches of the past, based on agriculture or business development, will have limited success. Aboriginal economies vary across a wide spectrum, from predominantly traditional economies to modern market economies. They have varying levels of natural and human resources. Government policy must acknowledge the diversity of Aboriginal economies and Aboriginal economic goals. Its aim should be to facilitate, encourage, advocate, assist and support the development of sustainable economies. This means establishing a broad policy framework within which Aboriginal communities and nations can design their own instruments to further their objectives. This framework needs to be sustained over a long period, so as to create a stable, predictable environment for economic development.

Second, the Commission believes that Aboriginal people must have stewardship of their economies if development is to succeed; that is, they must be able to plan the development of their economies, develop the projects, implement them, monitor them and change them if necessary. To accomplish this, government policy should continue to encourage the development of Aboriginal economic institutions to play a variety of roles, including the provision of capital, sector development, management and technical assistance, economic analysis and planning support.

Third, economic development is unlikely to succeed if the severely constrained land and resource base is accepted as given. Public policy must come to grips with these factors before even the best designed business development program can be expected to be broadly successful.

Fourth, we see a need to reconsider the most appropriate units for economic development. With few exceptions, policy and programs have been geared to individuals. Community-based economic development is important, but as we argue later in this chapter, it is also important to consider what can be accomplished by working with units of larger scale. An emphasis on the Aboriginal nation is consistent with our recommendations in the area of self-government, but also has much to commend it for the purpose of achieving stronger Aboriginal economies.

Fifth, economic development of Aboriginal communities cannot occur in isolation from the rest of the Canadian economy. Aboriginal people's overall participation in the Canadian economy has been marginal: if they have participated as workers, it has usually been in low-skilled, low-wage, easily lost jobs; if they have participated as business people, they have encountered significant obstacles, such as racism and insufficient access to capital. In many cases, local Aboriginal economies are invisible to the surrounding economies, even though they are significant contributors to those economies. Aboriginal people must participate in federal, provincial and local economic planning mechanisms (such as economic development commissions, economic planning boards, local economic task forces). The establishment of genuine partnerships with the non-Aboriginal private sector should also be encouraged.

Finally, the Commission favours integrated, holistic approaches to development. Economic development must be accompanied by activities that, while not focusing directly on economic development, still have a significant effect on it. These activities include education, improving overall levels of health, developing positive cultural identities, and building and maintaining

infrastructure and services for communities and families. In the absence of improvements in these other areas, economic development will be curtailed.

These are the general lessons of experience with economic development policy and the approaches to economic development advocated by Aboriginal people. More specific recommendations emerge from the more detailed discussion of issues in the second part of this chapter.

1.2 Contemporary Aboriginal Economies

The amount and quality of empirical information on Aboriginal economies has improved significantly in recent years, making it possible to describe some of the main characteristics fairly accurately. In this section, we move from an historical to a contemporary account. With the assistance of tables and figures, we show that the legacy of history is economies that are dependent rather than self-reliant and that offer labour force participation rates, incomes and levels of business development far below Canadian averages. In the absence of new approaches to economic development, this situation is not likely to improve, particularly given the large anticipated increase in the size of the Aboriginal working age population.

Contemporary issues

Dependence

Their traditional economies disrupted, reduced to a small fraction of their land and resource base, and subjected to inappropriate economic policies and practices, it is hardly surprising that Aboriginal nations are far from self-reliant. There are, of course, important exceptions, usually the result of advantageous location, particularly imaginative leadership, unusual resource endowments, or comprehensive claims agreements, and we refer to these from time to time. On average, however, Aboriginal economies will require substantial rebuilding if they are to support Aboriginal self-government and if they are to meet current and anticipated income and employment needs.

The current level of dependence is illustrated by data on the sources of income of Aboriginal individuals and on the sectors or industries in which they are working. Table 5.1 shows the percentage of the Aboriginal identity population 15 years of age and over that received social assistance in 1990.³⁰ It reveals high levels of dependence on social assistance, especially for Indian people on-reserve. DIAND provides additional data on the latter group and calculates dependency rates based on the number of beneficiaries as a percentage of the total population of the community. According to these figures, the dependency rate was 37.4 per cent in 1981, a figure that remained fairly constant until the end of the decade but then increased to 43.3 per cent by 1992. The rate for the non-Aboriginal population shows a similar pattern of change, increasing from 5.7 to 9.7 per cent over the same period, though at much lower levels.³¹

30 Information on the Aboriginal identity population comes from Statistics Canada's 1991 Aboriginal Peoples Survey, which focused on persons who are of Aboriginal ancestry and who identify themselves as such for census purposes.

31 Allan Moscovitch and Andrew Webster, "Social Assistance and Aboriginal People", research study prepared for RCAP (1995).

TABLE 5.1 Receipt of Social Assistance among Aboriginal Identity Population Age 15+, 1990

	Indian on-reserve %	Indian %	Métis %	Inuit %	All Aboriginal persons %
Total Receiving Assistance	41.5	24.8	22.1	23.5	28.6
Received Assistance 1-6 months	10.6	7.8	7.5	8.2	8.5
Received Assistance 7-12 month	28.1	15.8	13.6	14.1	18.4

Source: Statistics Canada, Aboriginal Peoples Survey (1991), catalogue no. 89-534.

There was also considerable variation between regions for Indian people on-reserve, with the lowest rate in Ontario, at 23 per cent in 1992, and the highest in the Maritimes, at 74 per cent.³² Nor does the future look very encouraging; Moscovitch and Webster project major increases in social assistance expenditures by the federal government for the registered Indian population, based on trends in population growth and migration.

Dependence is related not only to lack of jobs and reliance on social assistance but also to the kinds of jobs held by the employed population, many of which are dependent on government funding, as Table 5.2 illustrates. Table 5.2 shows that Aboriginal people, to a greater extent than other Canadians, rely on employment in the public sector. To some extent these figures reflect the greater presence of government services in Aboriginal communities, but they also suggest greater dependence on externally derived funding and a weaker private sector, especially among registered Indians and Inuit, although the situation is improving, as we will see.

TABLE 5.2 Aboriginal Identity Population in the Employed Labour Force, by Industry Sector, 1991

	Registered North American Indians	Non- registered North American Indians	Métis Persons	Inuit	Total Aboriginal	Total Non- Aboriginal
Primary Industry	7.9	5.4	8.0	4.6	6.5	6.0
Manufacturing	8.1	13.1	9.4	5.2	10.7	14.4
Government Services	29.2	9.6	11.3	24.4	15.1	7.8
Education and Health Services	17.7	14.8	14.7	17.7	15.8	15.4
Other Tertiary Industry	37.1	57.1	56.6	48.1	51.9	56.3

Note: Percentage of the employed Aboriginal labour force working in each sector.

Source: Stewart Clatworthy, Jeremy Hull and Neil Loughran, "Patterns of Employment, Unemployment and Poverty, Part One", research study prepared for RCAP (1995).

32 Department of Indian Affairs and Northern Development [DIAND], "Social Assistance Dependency On Reserve: An Initial Overview of Levels and Trends", report prepared for DIAND (Ottawa: 1994).

We conclude that the challenge of creating a self-sufficient economic base is substantial and not likely to be accomplished by modest measures.

Inequality

Inequality between Aboriginal people and the total Canadian population on measures of economic outcomes is also substantial and in some respects is getting worse, not better. Table 5.3, for example, shows Aboriginal labour force participation rates, the unemployment rate, the proportion of the adult population that is employed, and the percentage of the population with less than \$10,000 in total annual income, comparing these figures with those for the total population. It also shows the results of calculations to determine how many jobs need to be created to make up the difference between employment among Aboriginal people and among Canadians generally - that is, to achieve equality in employment rates.³³

TABLE 5.3 Labour Force Activity of Aboriginal Identity and Total Canadian Populations Age 15+, 1991

	Indian People on Reserve	Indian People off Reserve	Métis persons	Inuit	Total Aboriginal	Canada
% Adult Population in Labour Force	0.0	60.7	63.1	57.2	57.0	67.9
% Labour Force unemployed	30.8	23.4	21.7	25.0	24.6	10.2
% Adult Population employed	31.4	46.5	49.4	42.9	43.0	61.0
% with < \$10,000 Total Income	64.2	50.4	49.3	57.4	54.2	34.0
Number of Jobs Needed to Close Employment Gap*	48,900	27,200	10,200	4,000	82,400	---

Notes: Numbers have been rounded to the nearest hundred.

*See Table 5.14. and note 33 at the end of the chapter.

Source: Statistics Canada. Aboriginal Peoples Survey (1991). catalogue no. 89-534; 1991 Census, catalogue nos. 93-324 and 93-331; M.J. Norris, D. Kerr and F. Nault, "Projections of the Aboriginal Identity Population in Canada, 1991-2016", research study prepared by Statistics Canada (Population Projections Section, Demography Division) for RCAP (February 1995).

Table 5.4 focuses on the unemployment rate in particular, showing variations within the Aboriginal population. It shows how high the rate is for some Aboriginal groups, especially youth, and reveals a major increase in unemployment in the past decade as the size of the youth population grew.

The inequalities of the present have their roots in the policies and practices of the past, and patterns of disadvantage, once begun, tend to perpetuate themselves from one generation to the next;

33 The number of jobs needed to close the employment gap was calculated as follows. First, for each Aboriginal group and for the total Canadian population, the number of employed persons age 15+ was determined. Second, the number who would be employed if the Aboriginal group had the same level of employment as the total Canadian population age 15+ (61 per cent) was calculated. Subtracting the first number from the second yields the size of the employment gap. The number of jobs needed to close the employment gap for each Aboriginal group adds to more than the number shown in the 'Total Aboriginal' column, because people were counted in more than one Aboriginal group if they gave multiple responses to the survey question on Aboriginal identity.

children of parents who are long-term recipients of social assistance are less likely to be healthy, less likely to do well in school, and more likely to be unemployed themselves than are children born into more affluent circumstances (see Volume 3, Chapter 3).

Demography

Because of high birth rates and decreasing mortality rates, the Aboriginal population has increased sharply in recent years. Among other things, this means that the size of the population aged 15 and older is also growing rapidly and is projected to continue to do so. Figure 5.1 documents this point, the implication of which is that thousands of new Aboriginal entrants to the labour force can be expected. Indeed, the surge in the size of the Aboriginal labour force has been under way for several years. Indications are that, even where some progress in employment is occurring on an absolute basis, these developments are being overwhelmed by demographic patterns, so that unemployment rates are rising, not falling, as Table 5.4 showed.

Place of residence plays a role in economic prospects, because jobs tend to be created at a higher rate in urban than in rural areas. The Aboriginal population became more urban in the decade 1981-1991. (A rough estimate is that the proportion of the Aboriginal population living in urban areas increased by 10 per cent from 1981 to 1991.) The data for these two census years are not strictly comparable, however, so it is difficult to be precise. Even in 1991, however, the Aboriginal population was, on the whole, much more rural than was the case for non-Aboriginal Canadians, as Table 5.5 reveals. There is also considerable variation among Aboriginal groups, with about two-thirds of Métis people and non-registered Indians living in urban areas, compared to 34 per cent of registered Indians and 22 per cent of Inuit.

TABLE 5.4 Unemployment Rates in the Aboriginal Labour Force, 1981 and 1991

		Unemployment Rate %	
		1981	1991
Inuit Males	15-24 years	22	36
	25-54 years	12	22
	55+ years	11	—
Inuit Females	15-24 years	22	28
	25-54 years	12	22
	55+ years	8	—
Métis Males	15-24 years	22	31
	25-54 years	11	22
	55+ years	7	25
Métis Females	15-24 years	19	25
	25-54 years	12	16
	55+ years	6	9*
North American Indian (Status) Males	15-24 years	23	46
	25-54 years	14	30
	55+ years	13	29
North American Indian (Status) Females	15-24 years	25	33
	25-54 years	14	23
	55+ years	10	20
Non-Aboriginal Males	15-24 years	13	16
	25-54 years	5	9
	55+ years	4	8
Non-Aboriginal Females	15-24 years	13	14
	25-54 years	7	9
	55+ years	6	8

Notes: — Figures suppressed; the coefficient of variation of the estimate is higher than 33.3%.

* Figure to be used with caution; the coefficient of variation of the estimate is between 16.7 and 33.3%.

Source: D. Kerr, A. Siggner and J.P. Bourdeau, "Canada's Aboriginal Population, 1981-1991", research study prepared for RCAP (1995).

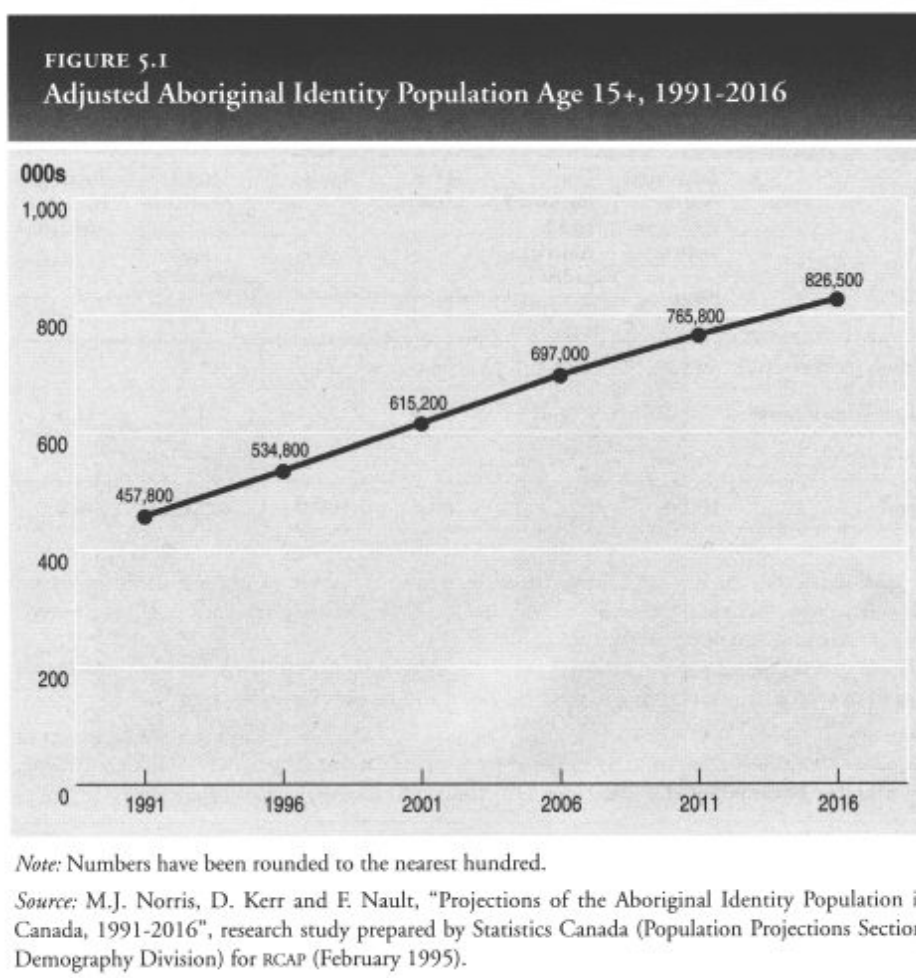


Figure 5.1 - Adjusted Aboriginal Identity Population 15+, 1991-2000 16

TABLE 5.5 Residence of Aboriginal Identity and Non-Aboriginal Populations, 1991

	Registered North American Indians	Non-registered North American Indians	Métis Persons	Inuit	Total Aboriginal	Total Non-Aboriginal
	%	%	%	%	%	%
Urban (non-reserve)	33.9	69.0	64.6	21.9	44.4	77.2
Rural Non-Reserve	8.0	31.0	35.4	78.1	20.3	22.8
Reserve	58.1	0.0	0.0	0.0	35.3	0.0
Total	100.0	100.0	100.0	100.0	100.0	100.0

Notes:

1. Table shows only the registered North American Indian population as having a reserve residence. Although a very small number of non-registered Indian persons, Métis people and Inuit live on reserve, they are shown as part of the rural population.
2. Table reports adjusted population figures for all Aboriginal groups except Inuit, for whom unadjusted data from RCAP custom tabulations of the 1991 Aboriginal Peoples Survey are used.

Source: M.J. Norris, D. Kerr and F. Nault, "Projections of the Aboriginal Identity Population in Canada, 1991-2016", research study prepared by Statistics Canada (Population Projections Section, Demography Division) for RCAP (February 1995); and 1991 Census, custom tabulations.

Even when Aboriginal people live in urban areas, they are more likely than Canadians generally to live in smaller urban centres than in large metropolitan areas (Figure 5.2).

These figures on place of residence are significant because most of the new jobs created in the Canadian economy in recent years have been located in urban areas. Table 5.6 projects this trend into the future, ranking the major occupational groups by their predicted rate of annual growth in the period 1993-2000. It can be readily observed that almost all the occupations with the highest projected growth rates were largely urban in location in 1991. (The representation of what would appear to be rural occupations in urban areas is attributable to the fact that in some urban areas, such as Sudbury, Ontario, for example, there are large numbers of mining jobs in or near the city.)

TABLE 5.6 Projected Annual Growth Rate of Occupational Groups, 1993-2000, and Proportion of Jobs Located in Urban Areas, 1991

Occupational Group	Projected Annual Growth Rate, 1993 - 2000 %	% of Jobs in the Urban Areas, 1991
Managerial-Administrative	2.7	81.3
Natural Sciences	2.6	86.3
Social Sciences	2.4	85.2
Arts and Recreation	2.3	86.5
Service Occupations	2.2	81.1
Medicine and Health	2.1	81.1
Not Classified	2.0	77.1
Construction Trades	1.9	70.4
Clerical Occupation	1.7	83.1
Sales Occupations	1.5	82.9
Product Fabrication	1.3	77.3
Teaching	1.1	79.7
Processing	1.1	65.0
Machining	1.1	76.1
Religion	0.7	77.4
Farming	0.7	27.0
Materials Handling	0.6	79.5
Transportation Equipment Operation	0.5	72.0
Other Crafts	0.4	80.5
Fishing/Trapping	0.1	23.5
Mining	-0.4	63.7
Forestry and Logging	-0.8	0.0
Total	1.8	78.0

Source: Canadian Occupational Projection System. COPS Reference 1993 Projection; and Statistics Canada, 1991 Census, custom tabulations.

Thus, the issue is not only a rapidly increasing Aboriginal labour force but also a mismatch between the geographic location of that labour force and the anticipated location of job growth in the Canadian economy. While the future of Aboriginal employment may not necessarily be as tied to urban locations as non-Aboriginal employment is, it can be expected that in the coming years Aboriginal people will continue to migrate to urban areas for jobs as well as other reasons. Thus policy attention needs to be directed to urban areas and to migrants there, as well as to the challenge of expanding economic opportunities in rural and northern areas.

The diversity of Aboriginal economies

Economic development policies of federal and provincial/territorial governments have tended to treat Aboriginal economies as though they were the same as non-Aboriginal economies, or at least to try to make them like the latter. They are quite different in many respects, however - in their histories, their goals, their cultural bases, their legal relationship to Canada, and their social and economic characteristics.

Thus we need to recognize Aboriginal economies as different in important respects, but also quite diverse. Here we describe three types of Aboriginal economies: First Nations reserves and rural Métis communities, urban Aboriginal economies, and northern economies.

First Nations reserve and rural Métis economies

There are 884 occupied reserves in Canada,³⁴ the large majority located in rural areas, and a much smaller number of rural communities where the bulk of the population is Métis. In some ways they are the same as non-Aboriginal rural communities; in other ways they differ from them and from each other.

In terms of structure, and in contrast to urban Aboriginal communities, reserves have their own governments and a clearly delimited membership, two factors that are important when collective action is contemplated. The identification of the membership is particularly clear on reserves, because lists are kept of all individuals belonging to a particular band; lists also indicate whether a member is living on- or off-reserve.

Communities in which Métis people reside also have their own clearly defined governments, although these are public governments of the municipal type.

While reserve governments can be clearly identified, it is not so easy to identify other differentiated institutions in the economic realm. In comparison with non-Aboriginal communities, a private sector is less evident (especially on reserves) and not likely to be organized in a chamber of commerce or board of trade. Nor is there likely to be a bank or trust company, an industrial park, or clearly understood rules of the game about the relationship between the private sector and the government.

The reserves have a defined land base; title to it rests ultimately with the Crown. As specified in the Indian Act, a reserve is a “tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band”.³⁵ The act gives the governor in

34 A reserve refers to designated lands that have been set aside for the use and benefit of an Aboriginal band. In total, there are some 2,400 reserves in Canada, approximately two-thirds of which are unoccupied. An Indian band may have more than one reserve location. Indian and Northern Affairs and Canadian Polar Commission, 1994-95 *Estimates*, Part III (Ottawa: Supply and Services, 1994).

35 *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1).

council (in practice the minister of Indian affairs) the right to “determine whether any purpose for which lands in a reserve are used is for the use and benefit of the band”. Individual band members may gain possession and use of a defined portion of the land according to the custom of the band, or by being allotted a portion of land by the band council and given a certificate of possession or a certificate of occupation by the minister. Transfers of possession, once obtained, can be to the band or to another member of the band only, again with the permission of the minister.

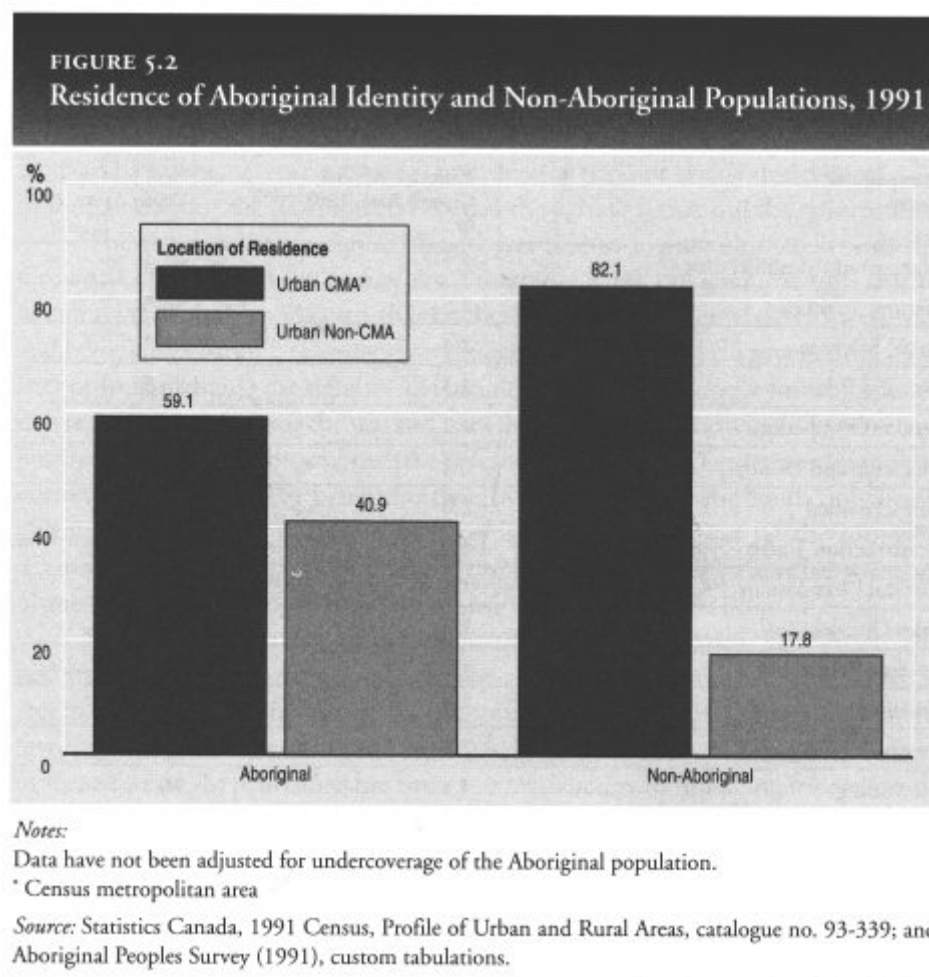


Figure 5.2 - Residence of Aboriginal Identity and Non-Aboriginal Populations, 1991

Reserve lands are not subject to seizure under legal process. In addition, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band. The effect of these Indian Act provisions has been to reduce access to financing for economic development significantly, although an amendment to the property provision has made some property (but not land) seizures possible. Reserve lands, however, may be taken for public purposes. That is, a province, municipality, local authority or corporation may expropriate reserve lands for public purposes, provided they have been given authority to do so by Parliament or a provincial legislature.

While a defined land base exists, the amount of land available to each reserve tends to be quite small on average (Table 5.7).

TABLE 5.7 Size Distribution of Reserve Land

Size (hectares)	Indian Reserve Land ¹		All Types ²	
	No.	%	No.	%
0 to 500	1,968,	79.3	2090	78.3
501 to 1,000	126	5.1	140	5.2
1,001 to 1,500	54	2.2	57	2.1
1,501 to 2 000	54	2.2	57	2.1
2,000 and more	279	11.2	325	12.2
Total	2481	100	2669	100

1. Includes both populated and unpopulated reserves. Data are for some time in the period 1991-1994, depending on the region.

2. Includes land identified as Indian reserves, Crown land settlements (federal or provincial), Category 1A lands, Indian settlements and proposed Indian reserves.

Source: Department of Indian Affairs and Northern Development, from information provided by the Department of Natural Resources, custom tabulations, 1994.

In many cases, too, reserves are not well located from the point of view of access to markets or services (Table 5.8) or in terms of possession of natural resources.

TABLE 5.8 Proximity of Indian Bands to Service Centres

	Bands	
	#	%
< 50 kilometres	184	31.1
50-350 kilometres	279	47.1
> 350 kilometres	20	3.4
Special Access	109	0.0
Number of Bands*	592	100.0

Notes:

1. A service centre is a community where the following services are available: supplies, material and equipment; a pool of skilled or semi-skilled labour; at least one financial institution; and provincial and federal services. The largest reserve or community associated with a band is used when measuring the distance to the nearest service centre.

2. An Indian band is a group of Indian persons for whose use and benefit in common lands (reserves) have been set aside or who are otherwise recognized by the federal government under the *Indian Act*. A band can have more than one reserve, and not all reserves are occupied.

* This total is slightly less than the total number of bands in Canada (608 as of 1995), because some bands are without a reserve.

Source: Department of Indian Affairs and Northern Development, Band Classification Manual (March 1995), custom tabulations.

The title to any subsurface resources rests with either the federal or the provincial Crown, and the most reserves can do is refuse to surrender or designate the lands, or attempt to impose conditions on the surrender. A few reserves, however, do have a valuable resource base and receive substantive resource rents; the best known cases are Alberta reserves with oil and natural gas deposits. These kinds of revenues (as well as income from the sale of capital assets) are held in trust by the minister of Indian affairs, whose approval is required for release of the funds.

Reserve lands, however, are exempt from all forms of taxation except local taxation, and this applies as well to the personal property of a First Nations individual or a band situated on the reserve. This provision can give an economic advantage to individuals and businesses located on reserves, but it does not apply to corporations owned wholly or partially by First Nations people.

Courts have ruled that corporations are not ‘Indians’, nor are they entitled to be registered as Indians; hence, they are not eligible for tax exemptions. First Nations people have argued to no avail that this exclusion is a violation of Aboriginal and treaty rights and takes away a competitive advantage that reserves need if they are to compete from rural and remote locations.

By contrast, most Métis communities do not have a land base, nor are they subject to the *Indian Act*. Métis people own lands and assets as other Canadians do. The Metis Settlements in Alberta are the exception. A substantial land area was transferred to the Alberta Metis Settlements General Council in fee simple in 1990. As in the case of reserves, strict protective mechanisms prevent the loss of settlement lands to outsiders - restrictions deemed important to protect the land base but that stand in the way of obtaining loans for economic development purposes, because the land and its assets cannot be pledged as collateral.

While the land base of the Alberta Metis Settlements is more substantial than that set aside for reserves (an average of 63,178 hectares for each of eight settlements), subsurface rights remain with the province of Alberta. The settlements are negotiating the issue and have not reached agreement to date.

In the case of both reserves and Métis communities, there may be access to Crown lands outside the boundaries of the community for purposes of hunting, fishing or trapping, or in some cases to cut logs or engage in other economic ventures. As discussed earlier in this volume, however, these opportunities are increasingly circumscribed by the activities of other land and resource users and by myriad regulations and restrictions that have the effect of overriding treaty and Aboriginal rights.

Although the communities described in this section have their own governments, the nature of the governments and their powers are defined outside the communities. The *Indian Act* sets out the composition of a band council, the manner of its election, and its term of office (two years). The powers of band councils are limited to making by-laws and enforcing them within the reserve boundaries. The by-laws must be consistent with the act and with regulations adopted by the governor in council. Approval of the minister is required for all by-laws. The act permits band councils to make by-laws with respect to taxation of land and interests in land; licensing of businesses, trades and occupations; and the raising of money from band members for band projects.

The act also contains a number of prohibitions. For example, one provision is little used today but serves as a reminder of the time when the Indian agent could restrict economic activity on a reserve if it would compete with non-Aboriginal producers:

A transaction of any kind whereby a band or a member thereof purports to sell, barter, exchange, give or otherwise dispose of cattle or other animals, grain or hay, whether wild or cultivated, or root crops or plants or their products from a reserve in Manitoba, Saskatchewan or Alberta, to a person other than a member of that band, is void unless the superintendent approves the transaction in writing ... Every person who enters into a transaction that is void under subsection 32(1) is guilty of an offence.

Indeed, this argument about competing with existing interests is still used in the contemporary context to refuse loans and other forms of assistance to those who wish to establish businesses on reserves or in Métis and Inuit communities.

The *Indian Act* removed Indian lands and property from the Canadian economic realm and set them aside in enclaves. Here, creditors and bankers are reluctant to enter because they cannot exercise their rights in case of default; provincial governments are reluctant to enter because it is an area of

exclusive federal jurisdiction; individual entrepreneurs are reluctant to enter because they perceive that reserves are inhospitable to their interests; and band councils have experienced considerable uncertainty and restriction in terms of their capacity to regulate the business environment.

The solution to these problems is not straightforward, however. First Nations people both on- and off-reserve place a high value on the reserves as a refuge from non-Aboriginal society, a place where the bonds of community are strong and where Aboriginal culture and identity can be learned and reinforced. There is strong resistance to measures that would place the few remaining reserve lands at risk in any way, even for the sake of economic development.

Métis people are spared the detailed prescriptions imposed by the *Indian Act*, but they are subject to the same restrictions as other rural municipalities in their province. Their delegated powers from the province leave much to be desired in terms of achieving community control over local resources and economic development projects. Again, the exception is the Metis Settlements in Alberta, which now have fairly extensive powers to organize their economies at the community level and at the level of the regional general council.³⁶

The formalities of the *Indian Act* and of provincial legislation mask a degree of initiative and decentralization that exists informally or by agreement. This is particularly the case with more aggressive communities and those with more extensive material and human resources that have been able to negotiate ways around *Indian Act* restrictions. DIAND has been encouraging bands to assume responsibility for providing programs and services, although typically under terms and conditions defined outside the community. Nevertheless, this has resulted in the takeover of programs in education, housing, health, social services, policing and economic development. In the process, local jobs have been created in band and social service administration; this, together with the weakness of the on-reserve private sector, accounts for the high proportion of Aboriginal people working in the public sector, as documented in Table 5.2.

Business development is weak on reserves, and to a lesser extent in rural Métis communities. With only a small population to serve, it is difficult for businesses to become viable, except those that can function on a small scale, such as a corner store, a gas bar, a hairdressing salon or an auto repair shop. As a result, the considerable funds flowing into communities quickly flow out again to non-Aboriginal businesses in neighbouring towns. A study of the monthly household expenditures of six Shuswap communities in British Columbia, for example, documented that only \$142,645 was spent on-reserve, out of total expenditures exceeding \$750,000 - less than 20 per cent (1991-1992). An analysis of the spending patterns of the Shuswap governments showed a total expenditure of \$13.2 million, of which \$6.32 million, or 48 per cent, was spent for goods and services purchased on-reserve. However, almost all the on-reserve spending took the form of wages, benefits and post-secondary school allowances, which soon found their way to institutions and businesses outside the reserve. The authors of the study concluded that the actual leakage was closer to 90 per cent.³⁷ It is not surprising, therefore, that rural Métis and First Nations communities seek to reduce this leakage through 'import substitution'.

Reserve economies are largely isolated from the economies of surrounding regions except as consumers of goods and services produced outside the community or occasionally as hosts to leaseholders, cottagers or bingo players. They do not supply manufactured goods or services to the region, their residents are not employed by the non-Aboriginal drugstores and supermarkets that

36 Metis Settlements General Council, "Aboriginal Economies Report", research study prepared for RCAP (1994).

37 André LeDressay, Delphine Pinkham, and Maria Stanborough, "Drawing Home: A CED Study of the Kamloops Urban Aboriginal Community", research study prepared for RCAP (1995).

profit from sales to Aboriginal people, and local or regional development agencies are typically ignorant of the First Nation economy in their midst, even if it is significant in dollar terms. While occasionally a regional development authority might have an Aboriginal representative or even an Aboriginal sub-committee, there is not much evidence that these linkages are leading to significant economic development.

Most reserves and rural Métis communities are located in regions that are struggling economically and losing jobs in the natural resources and manufacturing sectors. The depletion of resources, tougher international competition, and the continuing adoption of capital-intensive technology all contribute to this trend. The consequences become immediately obvious if unemployment rates in rural and northern areas are compared with those in urban and more southern areas.³⁸ Exceptionally high population growth rates in First Nations and Métis communities present a major challenge for employment and economic development in these regions.

Urban economies

Since the Second World War, many Aboriginal people living in rural or reserve areas have migrated to urban areas and, in particular, to Canada's largest metropolitan centres. The flow of migrants has not always been steady, but now almost half the Aboriginal identity population lives in urban areas, as documented in Table 5.5. Aboriginal people have moved to cities to pursue jobs, education or training opportunities, to have better access to health or social services, to join a family member or spouse, or to escape an abusive relationship. For a fuller discussion of the varied dimensions of Aboriginal life in urban centres, see Volume 4, Chapter 7.

The urban environment does offer somewhat better employment and business opportunities. To a degree, Aboriginal people have been able to take advantage of those opportunities. Aboriginal people in urban areas, on average, have higher labour force participation and employment rates than those living in non-urban areas (Table 5.9). As well, those who have found work earn more income on average and are more likely to have a steady, full-time job.³⁹ Yet the economic conditions of Aboriginal people in urban areas are still well below those of non-Aboriginal people, and in some cities, especially in Manitoba and Saskatchewan, the differences are very substantial. Table 5.9 reveals unemployment rates for the urban Aboriginal labour force that are more than double the non-Aboriginal level, even though labour force participation rates are almost comparable.

TABLE 5.9 Labour Force Activity of the Aboriginal and Non-Aboriginal Populations Age 15+, 1991

	Aboriginal			Non-Aboriginal	
	Urban	Rural	Reserve	Urban	Rural
Labour Force Participation Rate	62.7	58.3	45.3	68.1	67.9
Employment Rate	48.4	45.5	31.4	61.5	60.7
Unemployment Rate	22.9	22.1	30.8	9.7	10.6

Source: Statistics Canada. 1991 Census, custom tabulations; and Aboriginal Peoples Survey (1991), catalogue no. 89-534 and custom tabulations.

Rates of poverty among Aboriginal people in urban areas are also higher than among other urban residents. In every major metropolitan centre in the country, the proportion of the Aboriginal adult

38 S. Clatworthy, J. Hull and N. Loughren, "Patterns of Employment, Unemployment and Poverty, Part One", research study prepared for RCAP (1995).

39 Clatworthy et al., "Patterns of Employment".

population with a very low income (less than \$10,000) is considerably higher than the proportion in the total metropolitan population. The Aboriginal rate is about double that of the total metropolitan population in every centre but Halifax.⁴⁰

These figures paint a general picture of Aboriginal disadvantage in urban areas, particularly in some cities, but the data may not reflect a substantial amount of informal economic activity among urban Aboriginal residents. The Aboriginal Peoples Survey, for instance, reported that in metropolitan centres from Winnipeg to Victoria, between 17 and 25 per cent of the adult population participated in the informal economy.⁴¹

To understand the distinctive features of urban Aboriginal economies, it is useful to contrast them with the rural economies described earlier. First Nations reserves and, to some extent, rural Métis economies are “enclave economies”.⁴² The urban economies of non-reserve Aboriginal populations are more appropriately conceived of as “interwoven economies”. It is often difficult to distinguish a distinct urban Aboriginal economic unit. In cities such as Winnipeg, Regina and Saskatoon, however, large segments of the Aboriginal population are concentrated in certain parts of the city, usually inner city areas with a greater availability of low-cost rental housing. Even these areas have a mix of Aboriginal and non-Aboriginal inhabitants, however, and the latter tend to be dominant. In fact, there is only one Canadian urban census tract (in Winnipeg) in which Aboriginal people make up the majority of residents.⁴³

Other characteristics also contribute to a more interwoven picture. The urban Aboriginal population tends to be more culturally heterogeneous than rural First Nations or Métis communities. It is usually made up of people from numerous First Nations and, especially in the prairie provinces, it includes a sizeable Métis population as a separate cultural and economic group.

In centres such as Toronto, Ottawa, and Montreal, the population with some Aboriginal ancestry may be large, but the percentage who identify themselves as Aboriginal is small. In fact, Aboriginal people in urban areas usually represent only a small minority of the urban population. People who identify themselves as Aboriginal account for less than six per cent of the population of large metropolitan areas, and in most of those cities the proportion is less than two per cent.⁴⁴ A delegate at the Commission’s round table on urban issues explained that the size of the city affects the Aboriginal community’s sense of cohesion even in Winnipeg, which has the largest urban Aboriginal population in the country:

40 Statistics Canada, "Schooling, Work and Related Activities, Income, Expenses and Mobility", 1991 Aboriginal Peoples Survey, Post-Censal Surveys Program, Cat. No. 89-534 (Ottawa: Minister of Industry, Science and Technology, 1993), p. 100.

41 Statistics Canada, 1991 Aboriginal Peoples Survey, Post-Censal Surveys Program, custom tabulations (Ottawa: 1991).

42 The concepts of ‘enclave’ and ‘interwoven’ economies is derived from David Newhouse and Ken Paul, "Indian Reserve Economies as Enclave Economies" (Peterborough: Department of Native Studies, Trent University, 1990).

43 S. Clatworthy, "The Migration and Mobility Patterns of Canada's Aboriginal Population", research study prepared for RCAP (1995), Table 55, p. 259.

44 Statistics Canada, "Age and Sex", 1991 Census of Canada and 1991 Aboriginal Peoples Survey, Table 2, Cat. No. 94-327 (Ottawa: Industry, Science and Technology, 1993); and "Mother Tongue: Twenty Percent Sample Data", 1991 Census, Cat. No. 93-333 (Ottawa: Industry, Science and Technology, 1992).

The bigger Winnipeg gets, the greater the sense of isolation for Natives, the less they practise togetherness. It is very difficult to 'feel' Native culture in urban areas. In the rural areas, Natives are in closer touch with one another.⁴⁵

The urban population is diverse in other respects as well. Although the proportion of low-income earners is high, there is also a growing middle class of higher income earning professionals working as senior employees of Aboriginal organizations and an increasing number of university graduates in fields such as law, business administration and health care.

The lack of urban Aboriginal governing structures is a further impediment to the development of distinct Aboriginal economic and cultural communities in urban areas. Where representative organizations have developed, they have lacked the resources and the legislative authority to plan and implement economic policies and programs aimed at building linkages within the community. Moreover, the development of these structures has been complicated by debate about the form urban Aboriginal organizations should take. Some support the idea of umbrella organizations to represent all Aboriginal groups, while others advocate separate First Nations and Métis organizations.

In the economic arena, institutional development is weak as well. Community development corporations are more visible in rural communities than in urban. Aboriginal capital corporations - financial institutions that deal mostly in small business financing - have also focused more on the needs of rural and reserve communities than on those of the urban population. Winnipeg, for example, is the headquarters of a Métis capital corporation and two others affiliated with First Nations tribal councils, yet the bias is toward rural community and reserve lending.

Making life more complicated for the urban dweller is the fact that non-Aboriginal governments tend not to recognize urban Aboriginal communities in policies and programs. The federal government has largely denied responsibility for urban Aboriginal people unless they are registered Indians who have moved recently from a reserve or are living away from one temporarily. Usually, responsibility for services for other urban Aboriginal people has fallen on the provinces. For the most part, Aboriginal people have used agencies and programs designed for the general population.

Provincial governments have been generally open to developing targeted policies and programs to address the distinct needs and circumstances of some groups, such as immigrants, but they have been reluctant to do so for Aboriginal people. The provinces argue that Aboriginal people, or at least registered Indians and Inuit, are a federal responsibility, so the cost of Aboriginal-specific programs should be covered or at least shared by the federal government. The federal government argues that service provision is a provincial responsibility anywhere outside reserve boundaries. This jurisdictional stalemate has resulted in a policy vacuum. The implications of this situation, as well as a proposed resolution, are developed in Volume 4, Chapter 7.

Although levels of educational attainment and training among Aboriginal people are higher on average in urban areas than in rural or reserve areas, they are still substantially below those of non-Aboriginal urban dwellers.⁴⁶ As well, Aboriginal people in urban areas have less access to job information and personal contacts in non-Aboriginal businesses and institutions, connections that have been estimated to account for as much as 80 per cent of all jobs found. Employment prospects are affected also by instability in the urban community. Delegates to the Commission's round table

45 RCAP, transcripts of the National Round Table on Aboriginal Urban Issues, Edmonton, Alberta, 21-23 June 1992.

46 Statistics Canada, 1991 Aboriginal Peoples Survey (cited in note 41), custom tabulations.

on urban issues underlined the point that it is considerably more difficult to find employment if basic needs for shelter, food and clothing have not been met.

The effects of racism inhibit economic prospects as well. Racism is felt strongly by Aboriginal people living in urban areas. Delegates to the urban issues round table described racism as pervasive in their dealings with government, business, financial institutions, employers, and the broader community. Indeed, they identified racism as the principal barrier to improving economic opportunities for Aboriginal people in urban areas.

Lack of accessible child care is another barrier. Usually, Aboriginal women living in cities do not have the same support structures - in the form of extended family and community networks - as women in rural or reserve communities. Yet they need child care if they want to pursue educational or employment opportunities. The proportion of Aboriginal families headed by sole-support mothers is significantly higher in urban areas than elsewhere.⁴⁷

An alternative to approaches focusing on individual participation in the mainstream economy is strategies directed to the community as a whole and aimed at increasing economic opportunity within a distinct Aboriginal urban economy. They include mutually reinforcing economic linkages between and among Aboriginal businesses, Aboriginal urban residents, service agencies, financial institutions and political organizations.⁴⁸

One proposed strategy involves creating urban 'incubators' bringing together a number of Aboriginal businesses and service agencies in a single facility where they have access to a central source of financing and managerial expertise and can share scarce skills, capital and overhead costs. An incubator makes it easier for fledgling Aboriginal businesses to learn from and support each other, to develop mutually reinforcing economic linkages, and to economize on costs.

A successful incubator was begun with the opening of the Aboriginal Centre of Winnipeg in 1993, in the old Canadian Pacific railway station in the core area of the city. The centre has brought together a credit union, some small businesses, a number of service agencies, including an employment services organization, and the Aboriginal Council of Winnipeg, an umbrella political organization representing Aboriginal people in the city.

Another strategy for strengthening urban Aboriginal economies emphasizes building supportive links with the community. Within the community, the use and production of goods and services, the expenditure of income and the reinvestment of profit should, as much as possible, be oriented toward the betterment of the community. This approach encourages community members to spend their incomes within the community and also encourages businesses to produce the goods and services consumed in the community, thus aiming to reduce the very high levels of income leakage characteristic of Aboriginal urban economies.

Northern economies

More than one-third of all Aboriginal people live in the territories, Labrador and the northern parts of the six provinces west of the Maritimes. This vast land area is three-quarters of the total area of

47 Statistics Canada, 1991 Aboriginal Peoples Survey, custom tabulations. This matter was also raised by the Ontario Native Women's Association (see Ontario Native Women's Association, *Anishnabequek & Their Families in Ontario*, brief submitted to RCAP (1993), p. 15. For information about briefs submitted to RCAP, see *A Note About Sources* at the beginning of this volume.

48 For a more thorough explanation of the strategies described in this chapter, see John Loxley et al., "Aboriginal People in the Winnipeg Economy: Case Study", research study prepared for RCAP (1994).

Canada, yet just 6.2 per cent of the Canadian population lives there.⁴⁹ In most regions of northern Canada, Aboriginal people form the majority or a large plurality of residents (Table 5.10).⁵⁰ (See Volume 4, Chapter 6 for a full discussion of the North in relation to the Commission's mandate.)

The northern economies share important fundamental structural features but are also enormously diverse. Northern economies range in character from the troubled Labrador coast fishery, where income levels are low and even fishing for domestic consumption is threatened, to the relatively rich mixed economy, based on fur and petroleum, of the Mackenzie Delta. Considering the differences in local resources and other influences, however, there are remarkable similarities in economies across the North. Many Aboriginal people in the North still make their living in much the same way that people have made a northern living for centuries. From time immemorial, northern Aboriginal peoples have been hunting, gathering and fishing. Each nation or people built a regionally appropriate economy, based on seasonal use of resources by relatively small groups of interrelated people.⁵¹ The exact seasonal round varied according to local conditions and local technology, but in all cases people moved across a familiar landscape and made use of detailed knowledge of the animal and plant species upon which they depended. Trade between groups, often across many hundreds of miles, was common.

TABLE 5.10 Non-Aboriginal and Aboriginal Identity² Population Distribution, by Region, 1991

Region	Far North ³		Mid-North		South	
	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal	Aboriginal	Non-Aboriginal
Labrador	6,710	23,665				
Nunavut ⁴	17,795	3,449				
Denendeh ⁴	16,790	19,615				
Yukon	4,520	23,277				
Quebec	14,905	21,405	18,095	539,538	23,295	62,787,25
Ontario			42,005	419,646	72,805	9,550,339
Manitoba			28,810	35,353	70,415	957,364
Saskatchewan			25,075	1,660	61,620	900,573
Alberta			27,855	145,452	75,705	2,296,451
British Columbia			23,190	232,222	77,940	2,948,709
Newfoundland					3,320	534,779
Prince Edward Island					570	129,195
Nova Scotia					8,815	891,127
New Brunswick					5,300	718,600
Canada	60,720	91,411	165,120	1,373,871	399,785	25,205,862

49 Statistics Canada, "Census Divisions and Census Subdivisions", 1991 Census, Cat. No. 93-304 (Ottawa: Industry, Science and Technology, 1992).

50 The North is the homeland of many nations, including the Northern and Southern Tutchone, Han, Kaska, Tlingit, Tagish, Gwich'in, Inuvialuit, Sahtu Dene, Deh Cho Dene, Dogrib, Sayisi Dene, Métis, Cree, Algonquin, Inuit and Innu. Table 5.10 shows the relative number of Aboriginal people in each region of the North.

51 Most commonly, groups of about 50 related people were the primary focus of identification, though in most situations such groups would come together in larger gatherings for specific purposes.

Notes:

1. Non-Aboriginal includes persons with some Aboriginal ancestry but who did not self-identify as Aboriginal people in the 1991 Aboriginal Peoples Survey.
2. The Aboriginal identity population has not been adjusted for undercoverage in the APS.
3. For an explanation of what constitutes the Far North, Mid-North and South, see Volume 4, Chapter 6.
4. The sum of Denendeh and Nunavut constitutes the population of the Northwest Territories.

Source: Statistics Canada, 1991 Census, catalogue no. 93-304; and 1991 Aboriginal Peoples Survey, custom tabulations.

Some aspects of the traditional (pre-contact) northern economies prevail today, but for the last hundred years or more they have been blended with other forms of economic activity.⁵² Occasional wage employment has been available to northern Aboriginal people since their first contacts with Europeans. Inuit worked as whalers and guides; many Dene, Cree and Métis people and members of other nations found casual employment at fur trading posts and in the associated travel and transportation networks. Wages have been a significant source of cash income in many Aboriginal families for decades, though likely an even more important source of cash, overall, has been the fur trade. The great fur trade that once stretched across northern Canada became a permanent source of non-indigenous commodities and cash. In the last 30 years, for Inuit especially, art and handicrafts have grown in importance; like furs, carvings and other items of beauty can be produced from the resources at hand and traded for cash or the goods families require.

Today, outside a few wage employment centres, the household-based mixed economy predominates: extended families share income in kind from gathering, hunting and fishing and cash income from occasional wage employment and social welfare transfers. Sharing occurs within households (or families) and also between them. Within a household, for example, part of grandmother's old age pension and cash income from father's seasonal employment might be used to purchase supplies for fishing, which in turn will yield fish for the entire family to eat. Some of the fish might be shared with other families, especially if the catch is bountiful. Similarly, a moose or a caribou will be shot by one person but consumed by many, some of whom will be earning wages and be in a position to return the favour by subsidizing further hunting or fishing trips.

Effective participation in the mixed economy also relies on detailed knowledge of large territories and the flora and fauna they support. This knowledge connects Aboriginal people to their shared past and to each other. Information is shared about such matters as the likely location of game, but it is also part of an ethical system guiding use of the land and the animals and the attitudes of respect and humility with which they are used. Also necessary is a sophisticated set of skills and abilities, which must be taught over time.

The final requirement for successful land-based production is regular access to cash. As practised today, hunting, fishing and gathering require equipment: snow machines, boats with motors, rifles, ammunition, gasoline. The use of such equipment turns an investment of money into high-quality food, the materials necessary for handicraft production and art, and a healthy way of life. But these products rarely generate sufficient cash to finance further land-based production.

The harvesting of country food does not come cheaply however. The purchase of skidoos, rifles, nets, fuel, etc., requires significant cash resources. Fluctuations in the availability of cash income, as occurred in the 1980s in Nain [Labrador], result in a decrease of harvesting activities as hunters

52 Perhaps the most important feature of pre-contact northern economies was knowledge: the science, technology and moral basis of traditional land use, based in what is sometimes called traditional environmental knowledge. A deep understanding of the characteristics of the animal populations upon which people depended for food and other necessities, insight into climatic, game and other cycles, and strong geographical knowledge were all requirements for successful hunting, fishing and gathering and remain so today.

become unable to finance the purchase of new equipment and supplies. To further aggravate the situation, in the early 1980s protests by animal rights groups against the harvesting of seals led to a sharp decline in pelt prices, drastically reducing yet another source of income to hunters.⁵³

The northern mixed economy is resilient in the face of the vicissitudes of the market but vulnerable to harvest disruption and competing forms of land use. It has a unique dynamic and requires a policy environment quite different from that required by other forms of economic activity. While the fruits of the land are on the whole bountiful, northern Aboriginal people confront severe economic hardships: very high costs for travel, transportation and consumer goods, set against scant and constrained wage opportunities, a harsh climate and distant markets. Furthermore, unlike other forms of modern economic activity, major parts of the mixed economy do not generate cash surpluses that can be taxed or accumulated as a source of capital.

Taxable economic activity - wage employment and profit making - is found in a relatively restricted range of economic sectors, including mining, oil and gas exploration, a small amount of oil and gas production, hydroelectric development, transportation of people and goods, tourism, military bases, the small business service sector and the public sector. Although transportation, mining, and oil and gas in particular have received massive public subsidies in the last 40 years, they have yielded relatively little in terms of full-time employment. For example, only four per cent of the entire mining-related work force in Canada is Aboriginal. In the Northwest Territories, with its very high proportion of Aboriginal adults, only 12 per cent of the 2,200 jobs in the mineral sector were held by Aboriginal people in 1989.⁵⁴

A more stable source of employment has been the public sector. Nearly half the labour force in the territorial North is employed directly by federal, territorial and local governments. Most of these public service jobs are held by non-Aboriginal people, many of whom were drawn to the North by employment opportunities. The proportion of Aboriginal public service employment increases in local and regional government offices and is least noticeable in senior and technical positions in the capital cities and regional centres.⁵⁵ In all northern communities, public service wages represent a very large proportion of the cash entering the community; even small reductions in government spending are noticeable.

Since the establishment of a non-Aboriginal presence in the North, all forms of economic activity have required public subsidy. Infrastructure development, building and maintenance of transportation and communications facilities, identification of mineral reserves and their development, organization and maintenance of tourism - all have been funded from the public purse. It seems clear that further activity of this nature and maintenance of the traditional mixed economy will continue to need subsidy.

The federal perspective on non-renewable resource development in recent decades has assumed a heavy degree of political encouragement and public subsidy.⁵⁶ By contrast, the original federal approach to Aboriginal people in the North was *laissez-faire*: Aboriginal people were considered best left to their own long-standing means of making a living, even in times of famine or epidemic disease. Treaties were negotiated when agricultural settlement or resource development made

53 Sinaaq Enterprises, "Community Economic Case Study: Nain, Labrador", research study prepared for RCAP (1994).

54 Price Waterhouse, "Aboriginal Participation in the Minerals Industry", research study prepared for RCAP (1993); Jon Pierce and Robert Hornal, "Aboriginal People and Mining in Nunavut, Nunavik and Northern Labrador", research study prepared for RCAP (1994).

55 Michael Prince and Gary Juniper, "Public Power and the Public Purse: Governments, Budgets and Aboriginal Peoples in the Canadian North", research study prepared for RCAP (1995).

conflict over land use likely. After the Second World War, systematic efforts to relocate and centralize Aboriginal communities increased (see Volume 1, Chapter 11). In addition, the social welfare state was greatly expanded in Canada as a whole and in the North. From the perspective of Aboriginal northerners, the 1950s and early 1960s were remarkable for dramatic changes in their way of life, produced by unprecedented levels of social expenditures on health, housing, education and transfers to individuals. The systematic analysis of what are generally acknowledged to be massive and far-reaching cumulative effects has barely begun.⁵⁷

Northern economic development has often been described in terms of polarized choices. During the 1970s, for example, debate over the construction of a Mackenzie Valley pipeline was cast as a choice between 'frontier' (as it was for the state and for the resource companies) and 'homeland' (as it was for the Aboriginal people of the North). Sometimes today the choice is expressed as 'sustainable development' versus 'non-renewable resource exploitation'. Although such phrases have some descriptive and explanatory value, they are also misleading. As a federal royal commission of the day argued, the 'homeland' perspective on the North did not preclude non-renewable resource development; rather, it emphasized locally controlled development over externally driven economic processes.⁵⁸ Similarly, 'traditional' production does not preclude participation in the wage economy. On the contrary, hunting, fishing, gathering and trapping can be complementary to the northern wage economy, particularly as that economy moves through boom and bust cycles.

Education and training levels among Aboriginal people in the North are still much lower than those in the general population, a situation that is particularly acute for those just entering the labour market at a time when youth unemployment is a major problem across the country. However, two relatively new developments in northern Canada are having an important positive economic effect: the advent of land claims settlements and the realization of a degree of political self-determination. Negotiation of comprehensive land claims settlements has led to the introduction of stable infusions of capital to certain regions of the North and the creation of Aboriginally controlled organizations to manage these funds.⁵⁹ Although the overall amounts are not great enough to transform local economies, they have put the means for sustained, diversified economic development in Aboriginal hands.

Only a few comprehensive claims agreements have been in place long enough for their economic impact to be assessed. A 1989 assessment of the impact of the *Alaska Native Claims Settlement Act (1971)*, the James Bay and Northern Quebec Agreement (1975), the Northeastern Quebec

56 Kenneth Rea, *The Political Economy of the Canadian North: An Interpretation of the Course of Development in the Northern Territories of Canada to the Early 1960s* (Toronto: University of Toronto Press, 1968); Frances Abele, "Canadian Contradictions: Forty Years of Northern Political Development", *Arctic* 40/4 (December 1987), p. 310; Shelagh D. Grant, *Sovereignty or Security? Government Policy in the Canadian North 1936-1950* (Vancouver: University of British Columbia Press, 1988); G. Robertson, *Northern Provinces: A Mistaken Goal* (Montreal: Institute for Research on Public Policy, 1985); Prince and Juniper, "Public Power and the Public Purse".

57 Ken Coates has gathered the data for Aboriginal peoples who were living in what is now the Yukon Territory. See Ken S. Coates, *Best Left as Indians: Native-White Relations in the Yukon Territory, 1840-1973* (Montreal and Kingston: McGill-Queen's University Press, 1991). Yupik Harold Napoleon has drawn a powerful analogy between these effects and post-traumatic stress syndrome identified in the aftermath of the war in Vietnam. See Y.H. Napoleon, *Yuuyaraq: The Way of the Human Being*, ed. Eric Madsen (Fairbanks: Center for Cross Cultural Studies, University of Alaska, 1991).

58 Mackenzie Valley Pipeline Inquiry (cited in note 28).

59 The first to be negotiated was the James Bay and Northern Quebec Agreement, negotiated with the Crees and Inuit of northern Quebec (1975). This was followed by seven further agreements. See *Quebec, James Bay and Northern Quebec Agreement and Complementary Agreements* (Quebec City: Publications du Québec, 1991).

Agreement (1978), and the Inuvialuit Final Agreement (1984) found that the agreements' potential to produce positive results was frustrated by three factors:

- implementation problems, including, in the Alaskan case, expensive litigation;
- limited local investment opportunities, owing to the highly undiversified nature and small size of regional economies; and
- excessive bureaucratization, as Aboriginal organizations followed patterns established by non-Aboriginal governments and established a large presence in northern economies.⁶⁰

The second major development with important economic effects in northern Canada has been the creation of self-governing institutions by Aboriginal people. For demographic and other reasons, some Aboriginal people in the North have tended to prefer what has been called the 'public government' model. The creation of Nunavut by the division of the Northwest Territories will create a new public government, with a fresh mandate and some new functions. Establishment of Nunavut and implementation of the land claims agreement will create an estimated 2,300 jobs in the region. An estimated 85 per cent of the jobs will require post-secondary education. The Nunavut agreement includes a 'best efforts' clause stating that Inuit should fill 85 to 90 per cent of the jobs in the new government. This clause, and the general need for employment in Inuit communities, creates an enormous challenge to develop appropriate training and development mechanisms. About half the Inuit in Nunavut are under the age of 20, and 50 per cent of adults do not have a high school diploma or skills relevant to public sector employment.⁶¹ (See Chapter 3 of this volume for a discussion of the various forms of Aboriginal self-government, including public government.)

In the northern parts of the provinces and in the rest of the territorial north, as control over institutions is devolved and self-governing institutions are developed, more wage employment opportunities will be created. Provided these jobs are created with Aboriginal employment in mind, self-government could assist in the diversification and development of northern regional economies for many years to come.

Understanding Aboriginal economic development

For many Indian nations and their leaders, the problem of economic development has been defined as one of picking the right project. Tribal governments often devote much of their development-related time and energy to considering whether or not to pursue specific projects: a factory, a mine, an agricultural enterprise, a motel, and so on

Picking winners is important, but it is also rare. In fact, Indian Country is dotted with failed projects that turned sour as investors' promises evaporated, as enterprises failed to attract customers, or managers found themselves overwhelmed by market forces and political instability. In fact, many tribes pursue development backwards, concentrating first on picking the next winning project at the expense of attention to political and economic institutions and broader development strategies.

60 Special Committee on the Northern Economy, Legislative Assembly of the Northwest Territories, *Coping with the Cash: A Financial Review of Four Northern Land Claims Settlements with a View to Maximizing Economic Opportunities from the Next Generation of Claim Settlements in the Northwest Territories* (Yellowknife: N.w.T. Legislative Assembly, 1989). These factors seem likely to affect most or all of the comprehensive claims. See Letha Maclachlan, "Northern Comprehensive Land Claims Agreements", research study prepared for RCAP (1993).

61 Maclachlan, "Northern Comprehensive Land Claims"; and ATII Training Inc., "Northern Education and Training Systems for Inuit: A Strategic Analysis", research study prepared for RCAP (1993).

Development success is marked, in part, by the sustainability of projects. Generally speaking, only when sound political and economic institutions and overall development strategies are in place do projects - public or private - become sustainable on reservations.⁶²

Economic development is complex and difficult, and its ingredients vary from one situation to another. As implied in the passage just quoted, economic development involves the interdependence of many elements going well beyond the strictly economic. Stephen Cornell and Joseph Kalt, the authors of the passage, have been associated with the Project on American Indian Economic Development at Harvard University. Their conclusions about economic development on reservations in the United States are derived from a large number of case studies that sought to identify the factors associated with successful economic development as defined by the tribes themselves, contrasting this experience with the much larger number of development efforts that have not borne fruit. As Cornell and Kalt discovered, economic development is about more than picking winners. They concluded that one of the most important factors in success is external opportunity, which refers to the political, economic, and geographic environment of reservations. Four circumstances are particularly important for economic development:

- political sovereignty: the degree to which a tribe has genuine control over reservation decision making, the use of reservation resources, and relations with the outside world;
- market opportunity: unique economic niches or opportunities in local, regional or national markets that result from particular assets or attributes (minerals, tourist attractions, distinctive artistic or craft traditions) or from supportive government policies;
- access to financial capital: the ability of the tribe to obtain investment dollars from private, government or other sources; and
- distance from markets: the distance tribes are from markets for their products.

Another important factor they cite is internal assets, which are the characteristics of the tribes and the resources they control that can be committed to development. Again, there are four important variables:

- natural resources: minerals, water, timber, fish, wildlife, scenery, fertile land, oil, gas, and so on;
- human capital: the skills, knowledge, and expertise of the labour force acquired through education, training and work experience;
- institutions of governance: the laws and organization of tribal government, from constitutions to legal or business codes to the tribal bureaucracy. As these institutions become more effective at maintaining a stable and productive environment, the chances of success improve; and
- culture: conceptions of normal and proper ways of doing things and relating to other people and the behaviour that embodies those conceptions. As the fit between the culture of the community and the structure and powers of the governing institutions becomes better, the

62 Stephen Cornell and Joseph Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations", in *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development*, ed. Cornell and Kalt (Los Angeles: American Indian Studies Center, University of California, 1992), p. 14. The list of ingredients for economic development referred to below appears on pp. 8-10.

more legitimate the institutions become and the more able they are to regulate and organize the development process.

Cornell and Kalt also listed development strategy as another factor. It refers to the decisions tribes make regarding their plans and approaches to economic development. There are two key decisions:

- choice of overall economic system: the organization of the reserve economy with respect to such questions as the form of ownership of business enterprises and the approach to economic development (such as tribal enterprises, individual or family entrepreneurship, joint ventures). The prospects of successful development are improved if there is a good fit between the economic system chosen by the tribe and its social organization and culture.
- choice of development activity: the selection of specific development projects, such as a convenience store, a gaming operation, a motel or a manufacturing plant. Activities are more likely to be successful if they take advantage of tribes' market opportunities, allow tribes to specialize in using the natural and/or human resources most available to them, and are consistent with tribes' cultures.

Whether in a Canadian or a U.S. context, it is not likely that a particular nation or tribe will be strong in all areas, nor is this necessary. Different development strategies require a different mix of elements - an Aboriginal nation emphasizing high technology development would want to emphasize human resources development and may be less concerned about distance from markets or the natural resources base. In general, however, the more elements in place, the better the nation's prospects.

The situation in Canada is somewhat different from that in the United States; for example, Aboriginal rights and the treaty relationship, including the terms of the treaties and comprehensive claims agreements, are significant factors shaping the context for economic development in Canada. In addition, factors that Cornell and Kalt take as given, such as the degree of political autonomy and the endowment of land and natural resources, remain unresolved to a large degree in Canada - indeed, they are the subject of this Commission's mandate and recommendations. Nevertheless, the importance of these factors for economic development is affirmed by the Commission's research and by testimony at public hearings and round tables, and they figure prominently in the discussion that follows.

2. The Levers of Change

2.1 Transforming Aboriginal Economies: An Overview

The transformation of Aboriginal economies from dependence on government transfers to interdependence and self-reliance is fundamental to the development of self-government. It is now widely accepted that Aboriginal nations and communities must be able to generate sufficient wealth to provide an acceptable quality of life for their members. Without this capacity to generate wealth and to use it for their own development, dependency will continue, and the economic and social costs of maintaining it will continue to rise.

Transforming Aboriginal economies is a large undertaking that will require concerted, comprehensive effort over an extended period. It will take a deliberate commitment of time and resources. Some remarkable achievements in Aboriginal economic transformation over the past

decade have laid the foundation for future efforts. Much work has been done by Aboriginal people to prove that the barriers to economic development can be surmounted. It is heartening to see the spirit of innovation and creativity rekindled in Aboriginal cultures.

Given the diversity of Aboriginal economies, their paths to interdependence and self-reliance may differ. Self-reliance can be practised by following the migrating caribou herd across Labrador, by pursuing a mix of part-time wage jobs and harvesting resources from land and sea, or by conventional wage or entrepreneurial activity. Ways of making a living that are much more adaptable and flexible are becoming prevalent across the Canadian economy. Ideas about fixed hours of work, established places of employment and lifetime employment with a single organization are eroding as the impact of technology is felt. Technology is increasingly able to deliver education and even health care to those who choose to live outside populated centres and make a living by traditional or unconventional means.

Self-reliance is about diversity and understanding the implications of choice. Inhabitants of smaller communities often prefer the quality of life there - with its unique dimensions of time, culture and relationships - to the anonymity and pressure of cities. Many would choose a different mix of cash and other types of income if the prospect of healthy and sustainable communities were attainable. Measurements of social and economic well-being would be different for those communities because of the choices people make. While these communities may never be fully self-reliant, they could make far better use of existing public resources if allowed to do so in a way that corresponds to local conditions.

We saw earlier in this chapter why most Aboriginal communities and many Aboriginal individuals find themselves on the economic sidelines. The desire of Aboriginal peoples to be self-governing political entities can be fully realized only with a transformation in their capacity to provide for themselves. A nation does not have to be wealthy to be self-determining. But it needs to be able to provide for most of its needs, however these are defined, from its own sources of income and wealth.

Ownership of resources is necessary to reach this objective. But ownership, in and of itself, is insufficient to generate adequate incomes or the wherewithal to run a modern government. The organization and skills needed to turn resources into income are becoming increasingly complex for communities that would earn their living in the global economy. For those who would pursue traditional lifestyles, many of the necessary skills have to be rediscovered. A community or nation that wants to control the wealth available from its resources cannot leave critical management, technical and harvesting tasks to outsiders. Ownership alone is not sufficient to ensure desired economic or social outcomes. Mastering the skills of a modern economy or organizing communities to follow a mix of traditional and cash pursuits will provide the keys to self-reliance.

In this section we examine the levers of change that can transform the economies of Aboriginal nations. Much has happened in recent years that creates hope for a different future. However, the challenge of translating these changes into a broad transformation of economic life in Aboriginal communities is multi-faceted and immense.

No single economic outcome is right or appropriate. Canada is blessed with natural and human resources that provide flexibility for people to pursue varied lifestyles, as they have for generations. We will continue to see economic outcomes and income mixes that are as strikingly different as the lives of Inuit carvers in Cape Dorset and Aboriginal professionals in Montreal or Vancouver. What should be common to everyone is the opportunity to acquire the needed education and skills to make a reasonable living no matter which way of life they choose.

In the next decade, what measures can alter sufficiently the economic options available to Aboriginal communities and individuals? The single most important factor in the medium term will be the restoration to Aboriginal peoples of fair shares in the lands and resources of this country. We mention this first because we believe that it is likely the most contentious aspect of a strategy to achieve economic self-reliance, yet the one whose absence would make the prospect of meaningful economic change for Aboriginal communities an empty expectation. The case for this has been made compellingly, and the means to make it happen were identified in the previous chapter. The recognition of Aboriginal rights and treaty provisions and the negotiation of new or renewed treaties are central to this process.

Not all Aboriginal nations will benefit to the same degree from this redistribution. Many, however, would see a striking increase in employment and access to revenues from resource management and development. This might be realized in traditional harvesting of fish and wildlife, in agriculture, or in mineral, forest and hydroelectric development, if the latter is undertaken in an environmentally responsible fashion. Moreover, since these activities occur in proximity to many Aboriginal communities, they would offer a wide variety of skilled jobs and provide an alternative to leaving the communities to earn a living. We therefore emphasize redistribution as a central element in a strategy to achieve economic self-reliance. It is an element that holds great promise but also poses significant challenges for Aboriginal governments.

The next important factor is the ability of Aboriginal peoples to regain control of the key decisions concerning economic strategy. Their institutions of government and economic development must effectively encourage open communication and co-operation, political and legal stability, and fair opportunity if real change is to occur.

Central to the challenge of economic development is the ability to create and manage enterprises that can harvest resources and manufacture the goods and services that generate income and wealth. Aboriginal people are demonstrating the capacity to master a wide range of commercial activity, whether as individual entrepreneurs or as managers of community-owned enterprises. Levels of business formation have been high in recent years, as discussed later in this chapter. Hundreds of Aboriginal people are acquiring the skills needed to work in a modern economy and influence the way business is conducted. The ability to transform resources into income will depend critically on the development of business acumen and organization. Acquisition of management skills and access to equity and loan financing remain the two most important barriers to successful business formation.

Motivating Aboriginal young people to complete their education is vital to transforming the economic future of their communities. A foundation in traditional knowledge and proficiency in the professional and technical skills of contemporary society will build self-reliance. Strong community commitment will be needed to help young people acquire this education, particularly if they have to leave their communities for an extended period. Those who do so while remaining loyal to culture and community deserve to be celebrated as the modern equivalent of the hunters, warriors and leaders of the past.

If Aboriginal people are to achieve employment rates similar to those of other Canadians in the next 20 years, more than 300,000 jobs will be needed. This will take a concerted national effort, well beyond conventional approaches to job creation and training. Partnerships between Aboriginal and other governments, employers and educational institutions, together with the innovative approach to employment brokering and on-the-job training we propose, will be needed to achieve this. These

and other measures to improve employment equity, the provision of child care, and job creation can reduce the number of those currently dependent on social assistance.

Finally, we propose fundamentally new approaches to social assistance for Aboriginal communities. Some cash income is essential for all individuals, even those pursuing traditional lifestyles, but there will not be enough conventional wage employment in many communities to provide it. Existing approaches to income transfer may ward off starvation, but they breed dependency and social disintegration. Income supplements can become a means of encouraging self-reliance and community cohesion, making healthy and sustainable communities a reality.

In essence, then, measures to restore control, secure resources, master professional and technical skills, develop enterprises, broker employment, and relate income supplements to productive activity are the key components of a strategy to transform Aboriginal economies. The end results will vary with the choices people make, but a self-reliant livelihood and access to economic options should be within the grasp of every Aboriginal citizen.

2.2 The Economic Implications of Aboriginal Rights and Treaties

In keeping with the principles of a renewed relationship discussed in Volume 1, Chapter 16, the Commission believes that it is vital to take steps to make it possible for Aboriginal nations to be economically self-reliant. Fundamental changes are required to reverse a situation that has developed over at least two centuries. An obvious starting point on the road to self-reliance is the fulfilment of treaty promises and the conclusion of modern treaties (comprehensive claims agreements) in areas where such agreements have not yet been made.

Too often, the poverty and economic underdevelopment afflicting Aboriginal communities are seen from a narrow perspective. With the present focus on indices of poverty and disadvantage, technical solutions may be prescribed, such as training or loans for small business or incentives to work in an income support program.

The Commission takes a much broader, integrated approach. We place strong emphasis on understanding the historical picture, which helps to explain how the economies of Aboriginal communities reached their present state. We also underline the importance of the issues discussed in this volume - treaties, governance, and lands and resources - for economic development. This chapter is located deliberately at the end of this volume to enable the reader to gain a full appreciation of the larger structural issues that need to be resolved if economic self-reliance is to be a realistic objective.

Our discussion of the levers of change later in this chapter elaborates on the connections between regaining control (governance) and economic development, and between lands and resources and economic development. We do the same with respect to Aboriginal and treaty rights. The theme in each instance is that progress on these major issues will put in place three important levers of change required for economic development in Aboriginal communities.

The connection between treaty discussions and economic development is perhaps most obvious in the parts of the country where treaties or similar accords have not been concluded and Aboriginal communities are either engaged in or preparing for treaty discussions (much of British Columbia, parts of the Northwest Territories, Quebec, Labrador, and with the Métis people). Other areas, such as the Maritimes, where early treaties were concluded but the sharing of lands was not included, are in a similar situation. In all these cases, the discussions will be broad ranging and attentive to the

determination of the Aboriginal peoples concerned to have their historical rights recognized and to achieve a sharing of lands and resources. In fact, a land base of sufficient size to provide economic self-reliance now and in the future is an essential element of the renewed relationship between Aboriginal and non-Aboriginal people.

Other comprehensive claims negotiations over the last two decades, such as those leading to the Inuvialuit Final Agreement, the Nunavut Agreement, the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement, have demonstrated that the results of this process can have a major impact on the resources available to Aboriginal communities for economic development and other purposes. These modern treaties may include provisions for an expanded land and resource base directly under Aboriginal control; improved access to lands and resources in adjacent territories, including a share of revenues from resource developments; and improved control over the management of lands and resources in adjacent territories through co-management and other arrangements. Other forms of assistance may also be provided, such as cash transfers and support for education and training. It is not surprising, therefore, that one of the first conclusions of a case study sponsored by the Commission of an Aboriginal community in British Columbia was that

The history of the relationship between European colonizers and First Nations has resulted in the alienation of rights and dispossession from lands. This process was initiated by the acceptance of undertakings that Kwakwa ka'wakw would retain unencumbered access to and use of their resources. These rights have been eroded over the years to the point where they are a vestige of their initial conception.

It is apparent that the settlement of comprehensive claims is central to economic recovery for the Kwakwa ka'wakw bands ... the foundation of unobstructed access to historically-owned resources on which the Douglas Treaties of 1851 and the reserve lands allocation processes in Kwakwa ka'wakw territory were based must be recognized and respected.⁶³

In areas where historical treaties were signed, it should be recalled that the First Nations that signed the treaties were vitally concerned that their traditional way of life be protected and that, if changes were to occur, they be helped to make the transition to new means of livelihood. In the oral agreements, as well as in the written versions, assurances were given that this would be done, though they varied from one treaty to another.

The treaty implementation and renewal process recommended in Chapter 2 will provide an opportunity to address treaty provisions with a direct bearing on the capacity for economic development. The economic provisions in existing treaties vary from one treaty area to another, but they include items such as the following:⁶⁴

1. Among the clearest and most important provisions is that contained in the Robinson treaties, which contain promises of annuities to be tied to future Crown revenues from ceded lands: should the territory hereby ceded by the parties of the second part at any future period produce such an amount as will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to

63 Gillis et al., "Case Study of the Alert Bay Aboriginal Economy" (cited in note 8).

64 This section benefits from the discussion in "Economic and Social Development: Treaty Foundations", in Thalassa Research, "Nation to Nation: Indian Nation-Crown Relations in Canada", research study prepared for RCAP (1994).

time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or further sum as Her Majesty may be graciously pleased to order.⁶⁵

Despite the wealth generated from these vast lands, the annuity has been revised only once, to \$4.00 in 1874. The numbered treaties also include provisions for annuities to be paid, and these too have become token amounts over time.

2. The 1752 treaty between the Mi'kmaq people and the Crown provides for the “free liberty of hunting and fishing as usual” and the liberty to bring to Halifax and other locations items for sale such as skins, feathers, fowl or fish. A truck house stocked with goods for exchange could also be established at the “River Chibenaccadie” and at other locations.⁶⁶

3. Other early treaty provisions promise the Indian signatories that they can peaceably enjoy all their lands and properties and that certain lands (such as the “beaver hunting grounds” of the Haudenosaunee) will be placed under the protection of the Crown for the continuing use of members of the nation.

4. Many of the treaties include promises that rights to hunt, fish and trap on ceded lands will be respected so that Indian signatories can maintain their traditional lifestyles. These promises have been infringed upon by the activities of mining and logging companies, by court decisions, by federal and provincial regulations, and by legislative alterations that breach at least the spirit and intent of these provisions. Both commercial and subsistence activities have been affected.

5. In some cases, treaties also include specific promises of assistance. In some instances, this is to be provided on a one-time only basis in the form of cash payments or goods such as livestock, farm implements, seeds, powder, shot, and cloth. In other cases there are promises to provide recurring gifts. Again these may take the form of money, goods such as ammunition, twine, and provisions, or services such as assistance with agriculture and stock raising. Usually, such items are part of the written text, but the treaties do not reflect the more general verbal commitments to protect traditional lifestyles or help people rebuild their economies and learn new ways of making a living if traditional patterns are no longer viable.

These promises were part of an exchange. They were not unilateral benefits bestowed by the Crown but a recognition that the Indian parties were making important commitments as well - to live in peaceful coexistence, for example, and to share lands and resources.

In addition to the items contained in the text of treaties, a whole range of other matters should be addressed by the treaty implementation and renewal process recommended in Chapter 2. These include the frequent failure of the written text to reflect the promises made and the understandings reached in the oral discussions, including the Aboriginal understanding that they were sharing lands and resources, not extinguishing their title to them. They include the possibility that informed consent to particular treaties was not obtained, that provisions of the historical treaties have not been implemented in accordance with their spirit and intent, and that the result has been a demonstrably inequitable allocation of lands and resources.

65 James Morrison, "The Robinson Treaties of 1850: A Case Study", research study prepared for RCAP (1993).

66 Quotations are from the text of the treaty reproduced in Union of Nova Scotia Indians and Native Council of Nova Scotia, *The Mi'kmaq Treaty Handbook* (Sydney and Truro, Nova Scotia: Native Communications Society of Nova Scotia, 1987).

There are also hundreds of situations where specific treaty promises have not been kept or where other events have occurred, such as fraud and expropriation, that give rise to valid claims for redress. As we described in Chapter 4, some treaty nations in the west did not receive the full extent of the reserve lands promised to them in the treaties, and now sizeable grants of land and cash are having to be made through a process of treaty land entitlement settlements, after long and arduous negotiations. In other cases, specific communities are pursuing claims regarding expropriation of their lands for military and other purposes, or seeking redress from other actions that have reduced their land and resource base without informed consent and due process. Again, the Commission made recommendations in Chapter 4 concerning the need for a more expeditious and fair process to resolve these issues.

Treaty nations regard their treaties (renewed from time to time as circumstances require) as the centrepiece of their relations with the Crown. Looking to the future, these treaties should encompass the economic and other issues that arise between governments, including matters of fiscal transfers, taxation, trade, and assistance. The treaty framework would replace the current situation where treaty provisions have been allowed to atrophy and where policies and programs often have been determined unilaterally by federal (and provincial) governments. Governments have seen treaty provisions as discretionary matters that could be advanced or retracted at will. They often included service delivery by federal or provincial agents instead of respect for the authority of Aboriginal governments to deliver programs and services according to their own laws and policies.

Thus, Aboriginal and treaty rights are relevant - in fact central - to achieving self-reliant economies for Aboriginal nations. These matters will be high on the agenda in discussions between Aboriginal nations and representatives of the Crown in both treaty and non-treaty areas.

2.3 Regaining Control

It is clear that a long struggle faces us in the pursuit of self-sufficiency and economic independence. Community and groups need vision, skilled leadership, agreement on development plans and many years of persistence to make this a reality. Trust and tolerance must be developed between the political and cultural leaderships and those committed to economic development.⁶⁷

Self-government and economic development

Paul Samuelson, an American economist, predicted that the next area of growth in the late 1950s would be Latin America, not Asia. Latin America was rich in natural resources, Samuelson reasoned, and did not have the population pressures Asia faced. "I was wrong," he said subsequently. "The key to economic development is not resources. The key to economic development is effective self-government."⁶⁸

It is readily understandable why economic strength is an essential ingredient for meaningful self-government; without it autonomy is severely circumscribed. However, some elaboration may be required to explain why the reverse is true as well - why political autonomy is an important ingredient in the economic development of Aboriginal communities and nations.

67 William S. Grodinsky, "For the Benefit of All: Report on Aboriginal Business Management Development" (Montreal: Aboriginal Industries Committee, 1991), p. 1.

68 Joseph P. Kalt, "Sovereignty and Economic Development on American Indian Reservations: Lessons from the United States", in RCAP, *Sharing the Harvest* (cited in note 1), p. 41.

One explanation is simply to point to the historical record and trace the decline of Aboriginal economies from the time Aboriginal people lost the power to control the shape, pace and direction of economic change. That record is replete with decisions made by non-Aboriginal governments or by the private sector that harmed the economic health of Aboriginal communities. These decisions systematically undermined the land and resource base of Aboriginal nations, virtually destroying their economies.

The case for regaining control is not restricted to looking at the past. In our public hearings, intervener submissions and research studies, a recurring theme was the rejection by Aboriginal people of models and approaches to development imposed from outside and a desire for the autonomy to build their economies according to their own culturally grounded visions of development. Just as there is not only one Aboriginal culture, there is not only one Aboriginal vision of development. There is little question, however, that the priorities, processes, and outcomes of economic development would change, and indeed are changing, under Aboriginal stewardship.

Regaining control over Aboriginal economies means a stronger likelihood that decisions about economic development would be culturally and situationally appropriate. It also means that decision making would be more rapid, since most decisions no longer would be made by a distant bureaucracy.

Control over economic decision making lodges responsibility in the hands of Aboriginal people. It provides an opportunity for the development of Aboriginal leadership in economic matters, as well as a stimulus to making the latter accountable for their economic stewardship. Compared with outside decision makers, Aboriginal leadership is more likely to have the commitment required to make development initiatives succeed and to mobilize the support of its communities. As one of the Commission's economic research projects concluded,

Ultimately ... it will be the extent to which the Aboriginal community can be mobilized to draw on its inner strengths and abilities which will determine the pace of Aboriginal development ... State resources will have an important role to play but Aboriginal pride and determination to be self-reliant in the long term will be more important.⁶⁹

Finally, control over economic decision making would enable Aboriginal communities to reduce duplication of programs and services and stabilize the funding of economic development institutions. It would provide an opportunity to change public spending priorities to achieve a better balance between long-term economic development and short-term spending to remedy or alleviate social problems.

The prospects for the self-sufficiency of Aboriginal economies will be improved significantly once Aboriginal nations regain control of the levers of economic decision making. As Joseph Kalt told the Commission's round table on economic development,

69 Loxley et al., "Aboriginal People in the Winnipeg Economy" (cited in note 48).

When we look around reservations, we find key ingredients to economic development. The first is sovereignty itself. One of the interesting phenomena we see in the United States is that those tribes who have broken out economically and really begun to sustain economic development are uniformly marked by an assertion of sovereignty that pushes the Bureau of Indian Affairs into a pure advisory role rather than a decision-making role.

This is not to say that the transition will always be smooth, that mistakes will not be made by those taking charge, that there will not be abuse of power, or that there will not be internal conflict over development priorities and processes. As Kalt went on to tell us,

One of the things we find with American Indian reservations is that tribal sovereignty is sufficient to screw things up ... if the central government of the tribe cannot set in place an economic and social and cultural environment in which inside and outside economic actors, investors and others feel safe and secure in making investments in tribal development, the tribal government has the ability to destroy those [economic] opportunities.⁷⁰

It is to say, however, that one of the key factors in achieving Aboriginal self-reliance - political jurisdiction - will have been put in place.

The desirability of Aboriginal control over economic decision making is increasingly accepted, but the way this will be accomplished is not so clear. Steady progress toward self-reliance is too critical to depend on the eventual resolution of all governance questions. Interim mechanisms can be designed and implemented to be consistent with the institutional framework a nation will adopt when fully self-governing; we outline several in the remainder of this section.

Some economic powers exercised by the government of Canada would be unlikely to accrue to Aboriginal governments: powers over the currency, for example, including interest rates, exchange rates, the growth of the money supply and the authority to enter into international trade and monetary agreements. Aboriginal governments will likely exercise a broad range of other economic powers, sometimes on a shared basis with other governments. These could include

- authority to zone, license, and regulate businesses;
- authority to engage in land use planning and environmental management;
- responsibility for health, education and labour force training;
- the provision of physical infrastructure in Aboriginal territories (for example, roads, docks, communications);
- authority to negotiate and implement commercial arrangements with other Aboriginal nations within Canada or internationally;
- management of lands and resources;
- the capacity to raise capital, guarantee loans, and enter into contracts and joint ventures;
- implementation of business incentive programs;

70 Kalt, "Sovereignty and Economic Development" (cited in note 68), pp. 37, 41.

- regulation of financial and other institutions;
- taxation of business activity, levying user fees for use of facilities, utilities and natural resources;
- regulation of labour relations; and
- implementation of income support programs.

Exercising jurisdiction in these areas could provide tools useful in moving toward economic development. As Lester Lafond pointed out at the Commission's economic development round table, "the existence of distinct and definable geographic areas provides the basis for the creation of incentives to encourage investment, offset development costs, and reduce business risks, both real and perceived". Speaking from the experience of Saskatchewan First Nations communities, he described the incentives that could be available to encourage external investment in reserve communities, ranging from more liberal zoning laws to tax incentives related to investment and employment:

There is little doubt that a competitive advantage can be created, but appropriate measures are required to assure its effectiveness. Suitable policy and/or legislation is required that would clearly outline the incentives and guarantee their enforcement and continuity ... The First Nations must provide appropriate and enforceable legislation to secure the confidence of investors with respect to access, use and securability of lands and assets.⁷¹

Transferring economic development programs

Federal, provincial and territorial governments operate a number of programs to assist Aboriginal businesses, individuals and institutions. At the federal level, the principal programs have been under the umbrella of the Canadian Aboriginal Economic Development Strategy (CAEDS). Involving several departments, CAEDS provides equity contributions to Aboriginal businesses, capitalizes and supports the activities of regional Aboriginal capital corporations, and sustains community economic development organizations on reserves and in Inuit communities. In addition, the Pathways program sponsors national, regional, and local area management boards, composed of representatives from Aboriginal communities, that make decisions about the allocation of training dollars for Aboriginal people. At the provincial and territorial level, there is also a range of programs, some directed explicitly to Aboriginal people, others to regions with large Aboriginal populations.

Not long ago, almost all aspects of these programs were controlled by non-Aboriginal public servants located in territorial, provincial and national capitals. Over the last two decades, a considerable measure of geographic decentralization has taken place, and the degree of Aboriginal participation in the operation of these programs has increased markedly. This has occurred not only through the employment of Aboriginal people by sponsoring departments but also through the establishment of boards that control or advise on decisions and the advent of Aboriginal institutions in fields such as education, the disbursement of loans, and community development.

71 Lester Lafond, "Historical Use of Lands and Resources", in RCAP, *Sharing the Harvest* (cited in note 1), p. 66.

Progress has been substantial, but the record of decentralization and Aboriginal control varies widely, as recent evaluations have pointed out.⁷² Moreover, without exception, these programs are still established, funded and ultimately controlled by federal, provincial or territorial governments. The demands of political accountability place real limits on the amount of decentralization and Aboriginal control possible.

We have argued that Aboriginal governments need to regain effective control over their economies if they are to pursue their own culturally and situationally appropriate forms of development. To do so, they need general powers in the economic realm, but they also need to be able to shape their economies through the design and delivery of economic development programs.

A further compelling reason for transferring economic development policy and program delivery to Aboriginal institutions is the array of federal and provincial programs, each with its own objectives, criteria, decision-making procedures, and bureaucracy. Designing an economic development project to fit the criteria of these programs often results in proposals that meet no one's needs. Further, the few people responsible for economic development in Aboriginal communities, rather than being able to concentrate on assisting Aboriginal entrepreneurs, spend inordinate amounts of time dealing with government agencies, filling out forms, and negotiating with and reporting to distant bureaucracies. If federal and provincial programs are to contribute to the attainment of self-reliance - and we believe they have a vital role to play in the next decade - the manner in which they are delivered must be radically altered.

Development policies and programs should be designed and delivered by Aboriginal institutions. These must embrace economic training, infrastructure development, financing and the provision of business services such as planning, accounting and marketing. Traditionally, governments often put these functions in different departments and agencies. No program comprehensively addresses all elements of economic development; CAEDs was designed to do so but was not implemented as designed.

Instead of Aboriginal communities having to adjust to the criteria and procedures of distant bureaucracies, the process needs to be reversed. It is the communities that should define priorities and the instruments best suited to meet them. Government agencies should adopt a fully responsive service approach rather than the intrusive role they have played traditionally. This will require program frameworks to be more comprehensive and flexible than generally they have been to date. We therefore call upon federal and provincial governments to enter into long-term development agreements with Aboriginal communities to pool program resources with a direct bearing on economic development. These would include not only programs directed to Aboriginal people but also a share of general economic development programs, based on either historical use of these programs by Aboriginal people or their percentage of the relevant population, whichever is higher. This has been done previously on many occasions to implement federal-provincial agreements.

These agreements might be reached through a step-by-step process. First, agreement would be reached between the Aboriginal nation and other Canadian governments on the principles and goals that would drive activity. Next, individual Aboriginal nations would undertake to develop the policies and instruments to implement these goals in relation to their particular circumstances. These then would be brought back to the table for discussion, where government agencies could suggest enhancements. As long as they were consistent with the agreed principles, the final decision about the nature of the activity would rest with the Aboriginal nation.

72 Aboriginal CAEDS Assessment Project (cited in note 19).

Agreements would be multi-year. They would be subject to audit on a biannual basis, with a report to Parliament through the responsible department. They could be terminated by the department if it were shown clearly that expenditures were not being made in conformity with the defining principles in the agreement.

The amount of funding in each agreement would be subject to negotiation. Because needs will always be in excess of available resources, clear parameters should circumscribe these negotiations. Nations that had entered into comprehensive agreements or modern treaties would not have access to this process if resources for economic development were part of their treaty settlement and the authority to pursue their own objectives was clearly within their jurisdiction.

Other factors that should have a bearing on the funds available include the size of the nation, the current revenues available to it, and its stage of development. These factors are not likely to lend themselves to formula financing. For example, a nation at a relatively early stage of development may have a great need for income generation but a relatively low capacity to undertake major economic development. Its early years may be occupied with planning, opportunity identification, small business development and skills acquisition. Another nation may be involved in a greater degree of economic activity and hence enjoy a stronger capacity to participate in activities such as major resource development. This might argue for a larger allocation of program dollars per capita, even though this nation's income-generating capacity is greater than that of the former. Need must play a role in allocating resources, but the capacity to use these resources effectively and the ability to back those who are making solid progress is also crucial. Over time, nations will reach a point where they enjoy sufficient income-generating capacity from their enterprises or resource endowments to reduce their call on future development funds.

The complexity and difficulty of allocating government funds, coupled with the fact that economic development does not occur equitably across the country, will be advanced as reasons to retain allocation and investment decisions in government departments. One factor, however, should outweigh all others. The quality of decision making by the Aboriginal community and the nature of its learning process will be entirely different if it is making decisions with respect to a finite amount of funds that it fully controls, rather than joining the queue in competition with other communities to obtain funds from a government-controlled source.

Responsibility for programming should not be lodged at the level of individual First Nation, Métis or Inuit communities, where most funding and programs are now directed. There is a strong case for implementing economic development programs at the level of the Aboriginal nation, confederation or provincial/territorial organization, given the scarcity and cost of skilled personnel, among other factors. There are also considerations of scale. Better choices can be made if decision makers can choose from a number of alternatives, encourage linkages that go beyond the boundaries of particular communities, and amass the financial resources to support large projects as well as small ones. In a world of large international trading blocks that are gradually eroding the importance of state borders, Aboriginal people will need to have units of sufficient scale and strength to act effectively in a highly competitive environment.

We have suggested that economic development programs continue to be available until Aboriginal nations reach the stage of full self-government. We believe that responsibility for economic development should be exercised by the governments of recognized nations as envisaged in Chapter 3. Many groups that can be expected to emerge as nation governments already operate development initiatives at a larger collective level.

Administration of these programs should be undertaken by Aboriginal institutions wherever this capacity exists. Communities that have entered into comprehensive treaties can be expected to have negotiated economic development support as part of these arrangements. They should therefore fund these programs from their own revenues, recognizing their capacity to borrow funds on the basis of project business plans or against the assets of the nation government. Although these commercial projects should be eligible for regional development, business development or export programs available from Canadian governments to other businesses, the nature of investment decisions is altered significantly when project funding is coming from own-source revenues. A major disadvantage of program funds administered by non-Aboriginal governments is that investors do not have to make hard choices between projects. Much energy is spent submitting as many attractive proposals as possible to the outside funding agency. When funds are within community control, a different dynamic can be expected to operate. Realistic assessments and a focus on the best management of existing resources is likely to replace an opportunistic push for incremental funds.

For communities that are not prepared to move toward nation government, or for individual Aboriginal entrepreneurs operating in cities or other locations where Aboriginal economic development institutions of sufficient scale and scope do not exist, economic development will be no less important. Other means of delivering economic development services will need to be found.

The institutional structures developed in the context of self-government will be determined by Aboriginal governments. The Commission believes, however, that they should not be local but broader in scope and should manage a variety of supporting programs for economic development, such as training, business planning, equity contributions, loans and loan guarantees, and other business services. Indeed, some Aboriginal nations or tribal councils have established development corporations and other organizations to spearhead their efforts in economic development generally or in specific sectors such as fisheries. It would also be logical to assume that Aboriginal capital corporations would play an important role, since they serve all three Aboriginal groups and provide some business-related programs already. However, there are gaps in coverage and funding and other structural problems that need to be addressed, a subject to which we return later in this chapter.

As part of a transition phase, those responsible for existing programs should place a high priority on developing the human resources and institutional capacity of Aboriginal governments to assume responsibility for programs.

The Commission heard numerous interventions about the slight attention given to long-term economic development, especially compared to the time and attention devoted to short-term expenditures on welfare, housing, and remedying social problems. Some Aboriginal governments want to change these priorities gradually but find it almost impossible to do so because of internal political pressures and because funding is externally controlled. In the context of full self-government, however, the prospects for change will improve, especially if fiscal transfers to Aboriginal governments, whether for economic development or for other purposes, are not unduly tied to specifics. It may be unrealistic and perhaps undesirable for transfers to be completely free of terms and conditions, but Aboriginal governments must have the capacity to change spending priorities across broad budget categories as well as within them.

Recommendations

The Commission recommends that

2.5.1

Federal, provincial and territorial governments enter into long-term economic development agreements with Aboriginal nations, or institutions representing several nations, to provide multi-year funding to support economic development.

2.5.2

Economic development agreements have the following characteristics:

- (a) the goals and principles for Aboriginal economic development be agreed upon by the parties;
- (b) resources from all government agencies and departments with an economic development-related mandate be channelled through the agreement;
- (c) policies and instruments to achieve the goals be designed by the Aboriginal party;
- (d) development activities include, but not necessarily be limited to, training, economic planning, provision of business services, equity funding, and loans and loan guarantees;
- (e) performance under the agreement be monitored every two years against agreed criteria; and
- (f) funds available for each agreement be determined on the basis of need, capacity to use the resources, and progress of the Aboriginal entity toward self-reliance.

2.5.3

Aboriginal nations that have negotiated modern treaties encompassing full self-government have full jurisdiction over their economic development programs, which should be funded through their treaty settlements, fiscal transfers and their own revenue sources, and that businesses on these territories continue to be eligible for regional, business or trade development programs administered by Canadian governments for businesses generally.

Building institutions

An expanded range of powers will not lead to long-term economic development unless it is accompanied by effective action. This requires the development of effective institutions of governance and economic development. According to Cornell and Kalt, governing institutions need to perform three basic tasks:

- Mobilizing and sustaining support for institutions and strategies. That is, the institutions and development strategies they pursue must be seen as legitimate by the people of the community or nation. If they are not capable of generating respect, considerable conflict can be anticipated, and it will be difficult to create an environment in which social and economic development can take place. A principal means by which institutions develop legitimacy is by achieving a good match between institutions and the society's culture. In other words, institutions should reflect and reinforce culturally understood ways of doing things on matters such as who has power, how power is exercised, the legitimate rights of and limits on leaders and citizens, and how disputes are resolved.
- Implementing strategic choices effectively. This requires the development of formalized rules and procedures so that things are done and are seen to be done in an accountable and

fair manner. Governance institutions need to hire and train professional and capable staff, recruited on the basis of skills and capacity, who operate by open and clearly understood procedures and are fully accountable to the nation's leadership.

- Establishing a political environment that is safe for development. In a global context where there is considerable competition for and mobility of labour and money, an effective government needs to create the conditions of security and predictability that will attract investment and commitment. This is important for external investors and for those within the nation with savings to invest or with entrepreneurial talents that might contribute to the development process.⁷³

Three problems need to be solved to create a safe environment for development. First, a way needs to be found to separate and limit powers. If power is concentrated in a few hands, and if there are few constraints on its exercise, there is a strong risk that those with power will use it in their own interests, possibly at the expense of others in the community. Second, there must be a means to settle disputes that is open and impartial and provides the assurance of a fair hearing, with judgement rendered by a body not controlled by government or any community faction. Third, a way needs to be found to guard against inappropriate political involvement in the day-to-day decisions of business ventures or economic development institutions.

As part of its research program, the Commission undertook 16 community-based case studies of Aboriginal economies; through these we learned a great deal about the state of institutional development in the economic development field.⁷⁴ Compared to the situation two or three decades ago, there is no question that there has been considerable evolution in institutional structures. This has taken the form of community-based and sometimes regional economic development organizations and staff, the development of Aboriginal education and training institutions such as the Saskatchewan Indian Federated College and the Gabriel Dumont Institute, the formation of some 33 Aboriginal capital corporations serving Inuit, Métis and First Nation communities, and so on.

Impressive as this growth has been, problems with the functioning of existing institutions and gaps in institutional development remain. Using the Cornell and Kalt terminology, there are problems of legitimacy, an inappropriate mix of politics and business, and a lack of checks and balances.

73 Cornell and Kalt, "Reloading the Dice" (cited in note 62).

74 The community case studies prepared for RCAP are as follows: Del Anaquod and Vikas Khaladkar, "Case Study æ The First Nations Economy in the City of Regina (1993); Stephen Augustine, Tammy Augustine, Beatrice Francis, Richard Lacasse, Berthe Lambert, and Darlene Sock, "Economic Profile of Big Cove — Case Study Analysis" (1994); Brascoupe, "Kitigan Zibi Anishinabeg Economic Case Study" (cited in note 7); Gillis et al., "Case Study of the Alert Bay Aboriginal Economy" (cited in note 8); Institut Culturel et Éducatif Montagnais, "Development and Entrepreneurship in the Montagnais Communities of Quebec" (1993) [translation]; Lac Seul First Nation, "Pizaaniziwin (Living a Life in Balance and Moderation); *Giigaagaashgitoomin Kehonjehbimaachi-itizoyung (We Have the Ability to Make our Livelihood)*; and The Economy of the Obishikokaang (Lac Seul) Anishinaabeg" (1994); LeDressay et al., "Drawing Home" (cited in note 37); Loxley et al., "Aboriginal People in the Winnipeg Economy (cited in note 48); Gwen Reimer and Andrew Dialla, "Case Study of an Inuit Economy: Pangnirtung, Northwest Territories" (1994); Sasknative Economic Development Corporation, "Métis Economic Development in Regina" (1994); Sinaaq Enterprises, "Economic Case Study — Nain, Labrador" (cited in note 53); Gary Tompkins et al., "La Loche Community Case Study" (1995); Warrior, "Economy of the Peigan Nation" (cited in note 4); and Weinstein, "The Ross River Dena" (cited in note 3).

Problems of legitimacy

In many First Nation communities, the imposition in previous decades of an elected chief and council system has set up a situation of continuing conflict between this form of government and traditional forms of governance. This conflict has been particularly intense in some Mohawk communities, but it is evident in other communities as well.⁷⁵ Even where a competing government does not exist, there may well be segments of the population that deny the legitimacy of the elected chief and council or believe the existing electoral process allows dominant families or clans to control power.

In other cases, problems arise because traditional forms of governance have been replaced, but the new institutions are not adequate to fill the void. At Alert Bay, British Columbia, for example, traditional forms of dispute resolution are no longer present, but modern mechanisms, such as appeal and grievance procedures for band staff, are inadequate to resolve larger disputes between competing interests and factions in the community.⁷⁶ As self-government proceeds and constraints such as the Indian Act are lifted, we can expect to see many nations rethinking the appropriateness of the chief and council system for governing their communities in light of their own cultural traditions. Indeed, a number of First Nations, including the Siksika (Blackfoot) and the Pikuniwa (Peigan), are currently re-examining their traditional modes of decision making and their applicability to contemporary conditions.⁷⁷

Inappropriate mix of politics and business

Whether in Inuit, Métis or First Nation communities, it is not difficult to find examples of political leaders interfering with economic development organizations and projects for political reasons - for example, demanding that certain individuals be hired, standing in the way of lay-offs that may be necessary on financial or business-related grounds, or trying to influence the distribution of grants or loans. The result of these interventions is the demoralization of staff, the failure of individual business ventures, and sometimes the undermining of an entire economic development organization. Over the long term, the result is an unpredictable, arbitrary business environment that discourages investment and commitment. There are important, indeed crucial, roles for political leadership - to create and sustain an appropriate environment, establish guidelines, and make important strategic decisions about the direction of development - but they do not lie in day-to-day decisions about economic development.

Lack of checks and balances

There are also examples in Aboriginal communities of power that is concentrated in the hands of a small political leadership or a single individual. Without checks and balances, whether in terms of cultural norms, alternative power bases, or restraining laws, procedures or institutions (such as an independent judiciary or a strong legislative branch to restrain executive action), the political leadership can use the resources of the community for personal gain. Again, the result is damaging to communities and to economic development.

75 Our case study at Six Nations, however, shows that slow and delicate progress is being made by the two forms of government in working out ways of living together. See Newhouse et al., "The Six Nations Economy" (cited in note 11).

76 Gillis et al., "Case Study of the Alert Bay Aboriginal Economy" (cited in note 8).

77 See, for example, the description of the "Keep Our Circle Strong" project in Warrior, "Case Study of the Economy of the Peigan Nation" (cited in note 4).

Thus, there is work to be done to improve the operation of existing institutions. Given the diversity of Aboriginal societies, especially their cultural diversity, no one model can be applied across the country. Each community will have to struggle to redesign its institutional base, but they will need support and assistance. As part of the program to assist Aboriginal nations to rebuild their nationhood and design appropriate institutions of self-government, financial support should be made available in such a way that the perspectives of Aboriginal men and women are included.

In addition to problems in the functioning of existing institutions, the Commission also identified gaps in institutional structures. Institutional capacity - including organization and human resources - needs to be strengthened in at least four areas.

Canada level

At present there is no capacity in Canada for sustained research and development on issues of Aboriginal economic development. A few specialists are scattered across the country in universities, governments and consulting firms, and a handful of national organizations are working on economic development issues, including the National Aboriginal Forestry Association, the Canadian Association of Native Development Officers and Economic Development for Canadian Aboriginal Women. Each of these organizations has quite a specific mandate, however, and their funding is limited and tenuous.

The Commission believes it is important to develop a national research and development capacity in economic development, as part of an overall policy capability encompassing this and related fields, such as education, health and social policy. In the Commission's view, this would best be lodged in a national Aboriginal university, a concept developed further in Volume 3, Chapter 5. Such an institution could make a valuable contribution to the support of Aboriginal economic development by

- advising Aboriginal nations and their communities on the development of institutions of economic development;
- assisting Aboriginal groups and organizations on matters of economic development strategy and policy;
- undertaking and stimulating research on Aboriginal economic development; and
- identifying, through research and applied activity, broad economic development opportunities where Aboriginal people have or can develop a competitive advantage.

Such an institute should serve the needs of First Nations, Métis people and Inuit and should operate with close links to other Aboriginal education and training institutions.

Aboriginal nation and sectoral levels

We referred earlier to the importance of organizations and personnel with a horizon larger than a particular community or reserve. This is important in part because personnel with the necessary degree of expertise are scarce and are likely to remain so. It is also a matter of scale, of being able to take initiatives and call on resources that are substantial enough to improve the chances of success. For example, a manufacturing initiative, such as the making of Christmas wreaths from evergreen boughs for export to the New England market, may make little economic sense in the context of an individual reserve but be quite feasible when carried out with the involvement of

several reserves. Furthermore, in a world that is increasingly organized in large trading blocks, economies have to be organized on a scale that goes beyond the community if they are to advance the economic interests of those communities.

During the 1980s, the department of Indian affairs funded sectoral organizations, such as the Indian agricultural program in Saskatchewan and similar initiatives in other provinces and in other sectors (forestry, fisheries, minerals). However, the department subsequently came under pressure from community-based political leaders to transfer the moneys involved to the community level, and most of the sectoral organizations could not continue. While it is important to have economic development capacity at the community level, the Commission believes it was a mistake to end support of sectoral organizations, whose record of accomplishment generally demonstrated a growing capacity to make a valuable contribution to economic development.

In many parts of the country, community-based leaders have been coming together to develop organizations at the nation or regional level, whether as an arm of tribal councils (for example, Kaska Inc. of the Kaska Tribal Council), provincial political organizations (such as the structures developed by the Manitoba Metis Federation), or Aboriginal nations (for example, collaboration among Mi'kmaq communities to develop a common fisheries policy). The Commission believes that initiatives such as these are a very important component of economic development and urges all Aboriginal nations to develop approaches and institutions of this kind.

Community level

While we have emphasized the importance of developing institutional capacity at the nation and sectoral level, Commissioners also heard repeatedly about the need for community economic development. Aboriginal people see this approach as one that is consistent with their values and world view and that provides the maximum amount of authority and autonomy to deal with local circumstances. The Commission agrees that institutional development needs to take place at both the nation or sectoral level and the community level.

Community development, of which community economic development (CED) is a part, is based on the premise that a community can take steps collectively to shift its life in a direction it considers desirable. This approach also holds that the local community and its institutions are the legitimate and lead actors in development. The role of governments is to support the activities identified and endorsed by local communities.

CED is more than the stimulation of local businesses to create jobs. It involves a comprehensive program to improve the entire range of social and physical resources in the community: business and jobs but also education, housing, transportation, public infrastructure, and leisure. The key to this approach is the planned integration of social and economic goals. The approach is holistic and has therefore been attractive to Aboriginal people as one that is consistent with their values and world view.

The adoption of a CED approach in federal Aboriginal economic development policy has been sought by Aboriginal people since the mid-1960s, as described earlier in this chapter. The CED approach, which recognizes the local community as a legitimate location for development effort, requires that communities be able to engage in a planning process to articulate social and economic needs and goals, identify institutions that need to be founded or supported, and identify development strategies consistent with local cultural, social and economic conditions. It requires

that the community have in place a governance process to provide legitimacy and a basis for implementing plans.

The federal government has been sympathetic to CED, but it has experienced difficulty translating that attitude into official action. Budgets for CED and the resulting activities are inadequate, and real control over budgets and development still eludes communities. The Commission's community case studies revealed hamlet councils and related boards with very limited capacity to pursue job creation, training, or community planning. While the need will vary with the size of the community, at a minimum, Aboriginal communities should have some capacity to support economic development in terms of organization, staff resources and training.

In a review of the experience with CED in the United States, Stewart Perry reported that

Perhaps the most significant lesson from the U.S. research is that community economic development must be carried on under local direction, according to local priorities, and by mobilizing local resources first. That is quite different from conventional development policy which begins with central decisions in the economic core areas about what should happen in the peripheral regions.⁷⁸

Perry also found that the federal government should offer three types of support to local communities as they develop and implement their own plans: ideas or knowledge about various aspects of the development process, consultants or staff resources, and technical support and capital.

The CED approach has been adopted successfully by a number of Aboriginal communities. For example, the Lac La Ronge First Nation created the Kitsaki Development Corporation (KDC) in 1981 to serve as the economic development and investment arm of the band council, which represents several member communities.⁷⁹ KDC then focused on a strategy of business development. It adopted a philosophy of capacity building aimed at creating a favourable business environment. Job creation was a secondary goal, since it believed that once the community had the capacity to develop business enterprises, employment levels would increase, as would education levels as individuals recognized the need for knowledge and skills. KDC also worked to help the community increase its knowledge and understanding of community-based planning techniques; business management techniques; project feasibility analysis; and the socio-political aspects of economic analysis. This was accomplished through a series of workshops, seminars and courses.

The success of the decade-long effort is evident: KDC has been able to undertake several joint ventures with local businesses. These businesses hire locally and produce revenues for the operation of KDC itself as well as for new investments. This success was achieved by adopting an economic development strategy that placed responsibility for development squarely in the local community. The La Ronge council created an institution and gave it a mandate to plan, design, finance, implement and operate economic development programs on the reserves that are part of the Lac La Ronge First Nation.

The CED approach enjoys considerable support in many Aboriginal communities because of its foundation in local identification of economic opportunity, local development and implementation

78 Stewart A. Perry, "An Assessment of the U.S. Experience for Purposes of Canadian Development Policy, Paper 1 of The Community as a Basis for Regional Development", in *Regional Development from the Bottom Up*, ed. Mike Lewis (Vernon, B.C.: Westcoast Development Group, 1993) [note omitted].

79 Michael B. Decter and Jeffrey A. Kowall, "A Case Study of the Kitsaki Development Corporation, La Ronge Indian Band, La Ronge, Saskatchewan", local development paper No. 5 (Ottawa: Economic Council of Canada, October 1989).

of appropriate responses, and integration of social and economic objectives. It is being adapted for use by communities located in urban, rural, and northern regions and involving Métis, First Nation and Inuit communities. Support for this approach from the federal government will require economic development agreements that include provisions for broad and flexible support of community economic development institutions and for the staff required to run them.

Linkages with surrounding economies

Finally we note that steps need to be taken to improve linkages between the planning bodies and staff of Aboriginal communities and those of surrounding regions. Aboriginal economies do have connections with the economies that surround them, but for the most part, they have been seen as sources of labour or markets for goods and services. Rarely have Aboriginal economies been seen as distinct economic entities with which surrounding municipalities, regions and counties could have mutually beneficial ties.

Several of the case studies prepared for the Commission described a sense of isolation from surrounding regions felt by Aboriginal economic managers. The economies of Six Nations, near Brantford, Ontario, and the urban Aboriginal community in Kamloops, British Columbia, seemed virtually invisible to the surrounding region. The economic concerns of the Aboriginal communities were not known to local planning officials, nor were leaders of either community included in economic planning efforts. Yet Six Nations was contributing about \$115 million yearly to the regional economy surrounding the community.⁸⁰ In Kamloops, Shuswap governments spent approximately 47 per cent of their annual expenditures off-reserve. A survey of monthly household expenditures for seven Shuswap communities indicated they made 78 per cent (\$585,000) of their monthly expenditures in Kamloops.⁸¹ While only limited data are available for other communities, they indicate similar economic linkages.

From the Commission's case studies of Aboriginal economies, it appears Aboriginal communities rarely have formal representation on local economic planning bodies. The reverse is also true: it is rare for representatives of local economies to have representation on Aboriginal economic or community development bodies. The result is that Aboriginal economic concerns and issues tend to be ignored at the local and regional level beyond the Aboriginal community.

The case for co-operation between Aboriginal and non-Aboriginal economies is strong. Successful economic development requires careful planning and co-ordination of effort and resources. Most Aboriginal communities are too small to support large enterprises. Growth potential is limited unless small enterprises actively seek and enter larger markets, often beginning with the surrounding economy. Market entry could be facilitated with the support of local and regional economic planning councils.

Similarly, non-Aboriginal enterprises seeking to establish themselves in Aboriginal communities might benefit from similar support.

Environmental concerns are also important dimensions of economic decision making that require co-ordination. In many cases, environmental issues that affect one community are also of concern to adjacent communities. Joint planning efforts in this area would yield many benefits. Again, the lack of participation on local and regional economic planning councils leads to ignoring Aboriginal concerns.

80 Newhouse et al., "Case Study of the Six Nations Economy" (cited in note 11).

81 LeDressay et al., "Drawing Home" (cited in note 37).

Finally, the development of local Aboriginal businesses is often seen as an unwelcome competitive threat to local businesses, especially those whose customers include a high number of Aboriginal people or organizations. This issue is likely to arise more often as Aboriginal economies grow in size. It is thus important to recognize these linkages and potential areas of friction and put mechanisms in place to deal with them.

Aboriginal communities are more than sources of labour and extended markets for surrounding economies. They are distinct entities with a broader relationship to local and regional communities. In many cases, leaders in both communities would like to forge relationships between Aboriginal and non-Aboriginal planning and economic development bodies, at both the local and the regional level, so that mutual economic concerns can be raised and addressed there.

Recommendations

The Commission therefore recommends that

2.5.4

Aboriginal nations give high priority to establishing and developing economic institutions that

- reflect the nation's underlying values;
- are designed to be accountable to the nation; and
- are protected from inappropriate political interference.

2.5.5

Aboriginal nations receive financial and technical support to establish and develop economic institutions through the federal funding we propose be made available for the reconstruction of Aboriginal nations and their institutions (see recommendations in Chapter 3, in the first part of this volume).

2.5.6

Responsibility for economic development be divided between the nation and community governments so that policy capacity, specialist services and major investment responsibility reside with the nation's institutions, which would then interact with community economic development personnel at the community level.

2.5.7

The recommended Aboriginal Peoples' International University establish a Canada-wide research and development capacity in Aboriginal economic development with close links to the developing network of Aboriginally controlled education and training institutions.

2.5.8

Leaders of municipalities, counties and larger regional bodies and their Aboriginal counterparts consider how to reduce the isolation between them and develop a mutually beneficial relationship.

2.4 Lands and Natural Resources

Stewardship and development of lands and natural resources represent promising avenues of economic development in the near and medium term for most Aboriginal communities. We say this despite our perception that, for much of Canada's history, the displacement, damage, and distress occasioned in Aboriginal communities by resources development have been so serious that the overall effect on Aboriginal people has been overwhelmingly negative. Clearly, our optimism about the future role of lands and resources in Aboriginal economies is founded on a fundamental departure from past and current approaches.

Despite the inadequacy of current relationships with respect to lands and resources, we believe the challenge of improving the situation may be less daunting today than it was a decade ago. Aboriginal governments in general are more aware of their rights and the vehicles for protecting them. Their institutional capacity to deal with development has increased considerably. More Aboriginal young people are achieving high levels of education. In addition, constitutional and other legal frameworks lend support to Aboriginal perspectives on land and resource issues.

As well, governments across the country have made adjustments, some of them major, in response to the changing legal framework and to Aboriginal representations for a fair share of the benefits of land and resource development. The National Forest Strategy, reflecting a broad consensus, is explicit on this score. Some private sector companies and associations, including those in the oil and gas and mining sectors, have recognized the changing realities and have sought ways to cooperate with Aboriginal governments in the search for mutual benefits. Also, the list of Aboriginal businesses active in the resource sector continues to grow, albeit from a small base.

While we see economic development based on lands and resources as a central feature in the rebuilding of Aboriginal economies, it is not, of course, the only solution. There is no magic answer in the quest by Aboriginal nations and communities to strengthen their economies and achieve a greater measure of self-reliance. Economic development based on lands and resources does not resolve all the economic issues facing Aboriginal people in rural areas or in urban areas. Some might even argue that the emphasis on lands and resources is misplaced given the declining role of natural resources in the Canadian economy over the long term, especially as a source of employment, and the serious problems of resource depletion in sectors such as fisheries. The continuing growth of the service sector and the shift to processing information rather than raw materials might also be noted.

The perspective in Aboriginal communities is different, however. The use of lands and natural resources has formed a central part of Aboriginal economies from time immemorial. For most Aboriginal communities, natural resources are the key to making a living, whether this takes the form of traditional subsistence activities or profit-seeking, wage-providing enterprises.

True, sectors such as mining, forestry, and oil and gas are now characterized by large, capital-intensive production units that generate considerable wealth but little employment. In some cases, the nature of the resource and the cost of extraction and processing leave little room for alternative strategies, but this is not always the case. Even in sectors such as forestry and mining - and certainly in agriculture, wildlife harvesting and fisheries - there are ways of organizing production in smaller units, ways that enable more employment to be generated, more linkages to be made with other aspects of local economies, and more sustainable development to be pursued.

We also reject the notion that the information economy is separate from the development of lands and natural resources. In fact, the information economy pervades all sectors, and lands and

resources are no exception. From an Aboriginal perspective, the successful use and sustainable management of natural resources have always been knowledge-intensive, drawing on a base built up over many centuries and that still has much to contribute, even as mainstream scientific and technical knowledge makes another kind of contribution. Nor is land and resource development divorced from the growth of the service sector, since services such as resource planning and management, accounting and equipment repair, as well as services related to tourism and recreation provide strong links.

The integration approach

While accepting the importance of economic development based on lands and resources, we believe that a substantial change in approach is required. In Volume 1 of this report, we noted that one of the features of the period of displacement and assimilation, especially in this century, was exploitation of natural resources on traditional Aboriginal territories by non-Aboriginal interests. Whether by privately owned companies or Crown corporations, for increasingly large capital-intensive ventures, aided by governments, the trend has been to exploit the resources of forests and mines, hydroelectricity and oil and gas reserves. In the process, Aboriginal and treaty rights to the land and resource base have been largely ignored, traditional economies have been disrupted, and Aboriginal communities have received few if any benefits.

Recently greater efforts have been made to see that Aboriginal communities receive some benefits from resource development, but the main thrust of policy and practice remains unchanged. That is, the emphasis is on how loan and licensing provisions can be structured so that Aboriginal people can take part in the now largely non-Aboriginal commercial fishery, how surface lease agreements issued to uranium mining companies can be worded to give preference in employment to northern residents, or how Aboriginal businesses can be stimulated through contracting for goods and services with a natural resources producer.

By now, there has been considerable experience with this approach. In many instances there has been a genuine commitment on the part of government authorities, resource sector companies and Aboriginal communities to make this strategy work. Research conducted for the Commission suggests, however, that on the whole, the results have been disappointing, with successes notable as exceptions rather than the rule. Overall, the levels of employment achieved have been limited in at least two respects. First, the proportion of Aboriginal people employed in industries such as mining, forestry and oil and gas is little better than the proportion of Aboriginal people in the Canadian population - despite the proximity of Aboriginal communities to resource projects, and counting all Aboriginal people employed in the sector, not just those employed by non-Aboriginal companies. Second, evaluation reports consistently conclude that Aboriginal employment is restricted to less highly skilled, lower-wage occupations.

There is also continuing ambivalence within Aboriginal communities about participating in this form of resource development, despite efforts to accommodate Aboriginal workers through commuter arrangements, Aboriginal-speaking staff, extensive investments in education and training, and outreach to neighbouring communities. The concerns expressed include the large scale of projects, damaging environmental effects, the alien culture of the workplace, lack of community involvement in decision making, sharp inequalities within communities as some individuals find high-wage employment while most do not, and lack of control over these developments by Aboriginal communities. In terms of the success of policies intended to integrate and maintain

Aboriginal participation in the commercial salmon fishery, for example, one study conducted for the Commission concluded that

Overall, Aboriginal participation in the commercial salmon fishery, based on the number of vessels either owned or operated by Aboriginal people, declined from 32.4 per cent of the fleet in 1946 to 15.3 per cent of the fleet in 1977 ... In 1984, the last year for which reliable estimates are available, less than 14 per cent of the salmon fleet was owned by Aboriginal people.

A number of federal initiatives have attempted to staunch such losses and shore up participation ... Whatever the merits of these initiatives, it has generally been conceded by federal policy makers and fisheries department analysts that these programs have not achieved the long-term objectives for which they were intended.⁸²

The conclusions in the minerals sector are similar. A study of Métis involvement concluded that the “Métis people in the province of Saskatchewan have traditionally received few benefits from the mining activities in the north of the province. Those meagre benefits that have accrued to individual Métis have been of the lowest order of benefit in the hierarchy for economic development activities”.⁸³ A more general overview concludes that The benefit regimes of formal mines operating in areas where local labour pools are largely unskilled or semi-skilled, underemployed, and/or partly involved in subsistence activities, have been highly circumscribed - largely restricted to the immediately surrounding communities and to direct employment opportunities for unskilled/semi-skilled job functions. Employment levels, while slowly increasing, remain low relative to the composition of the local labour pool. Job assignment has remained limited to low skilled job categories, with little evidence of improvement thus far.

Work and service contracts for local entrepreneurs have also been limited to certain areas of activity (e.g., transportation, custodial, minor construction, catering and security) and have tended to be relatively small in size and scope (with the exception of transportation and materials handling contracts). Local social infrastructures have benefited primarily from new or expanded recreational facilities. In a few cases, bands have shared in provincial mining royalties, but the existence of distinct federal and provincial jurisdictions has sometimes interfered with the distribution of funds to eligible communities (for example, northern Saskatchewan) ...

As the majority of mineral development to date has occurred off-reserve, Aboriginal groups have not had a strong legal position from which to promote and protect band interests. The record of company/community interaction has not always been positive, with communities often learning about exploration projects or prospective new mines after the fact⁸⁴

With respect to forestry, interviews with forest companies in various parts of Canada yielded the following conclusions:

82 Copes et al., "West Coast Fishing Sectoral Study" (cited in note 29). See also GTA Consultants Ltd., "Aboriginal Fisheries in the Maritimes" (cited in note 29).

83 William J. Hatton and Associates, "Métis Involvement in Northern Saskatchewan Mining Sectoral Study", research study prepared for RCAP (1993), p. 3.

84 Jeffrey Davidson, "Rethinking Aboriginal Participation in the Minerals Industry: An Exploration of Alternative Modes", research study prepared for RCAP (1994). See also Price Waterhouse, "Aboriginal Participation in the Minerals Industry" (cited in note 54). For commentary on the oil and gas sector, see Begley Consulting Ltd., "Oil and Gas Sectoral Study", research study prepared for RCAP (1993).

In matters concerning employment, the industry has reduced its work force significantly over the past decade. Most woodlands operations are contracted and both pulp and saw mills have reduced the number of workers to improve productivity and competitiveness. Aboriginal people are not well represented in the workplace, in any category or level, despite making up a large proportion of the population where many forestry operations are located. Most respondents are opposed to target-driven employment equity but recognize that their workforce must become more representative of local populations.

With regard to contracting and business partnerships, the same study concluded,

A significant portion of saw and pulp mill operations are now contracted, especially woodland operations for timber supply and silviculture. Again, as with employment, Aboriginal businesses make up a very small proportion of total contractors. There are isolated areas within a few company operations where Aboriginal contractors are a significant proportion. Respondents indicated that potential does exist to increase Aboriginal business, but they cited many barriers to increased Aboriginal involvement. The industry does, however, recognize that provision of contracts and equity ventures with Aboriginal people will help to build a better relationship and potentially provide future security of fibre.⁸⁵

The mixed and often disappointing results of this strategy should not lead to the conclusion that it should be abandoned. Some Aboriginal communities have been able to take advantage of the opportunities presented, while for others it may well represent the best, perhaps the only, alternative available. Even if communities are increasingly in a position to pursue a different strategy - for example, to develop their lands and resources themselves, through their own business ventures - employment and contracts with non-Aboriginal resource companies can provide a valuable training ground.

In the future, new mainstream resource development projects will have to respond better to the aspirations of Aboriginal people. One reasonable approach would be to ask what the level of Aboriginal involvement in resource development industries ought to have been and what it should be in the future, keeping in mind that people living near the development should have the first opportunity for employment. What would an Aboriginal government, as a business owner or partner, accept as a reasonable level of employment in a forest operation or a mine in its traditional territory? It would not likely accept four per cent, concentrated in the unskilled portion of the work force; yet this is precisely the situation in these two industries now.

We cannot limit the vision to new resources development, however. To do so would be to abandon many of the current generation of Aboriginal people so seriously affected by unemployment. The bulk of business and employment opportunities must be found, for the foreseeable future, in existing operations.

New approaches are required to provide economic opportunities for Aboriginal individuals and businesses. For the most part, we hope to see this achieved through co-operation and, if necessary, incentives. For example, it may be possible, within existing international trade agreements, to provide selective tax incentives or direct assistance to subsidize the cost of placing Aboriginal interns in companies and to provide financial assistance where new environmental rules imposed as a response to Aboriginal concerns lead to higher costs.

85 Garry Merkel, Frank Osendarp and Peggy Smith, "Sectoral Study: Forestry. The Forest Industry's Relationship with Aboriginal Peoples", research study prepared for RCAP (1994).

Governments in Canada and elsewhere use regulatory powers and lease or licence conditions to ensure compliance with requirements for environmental protection, further processing of resources, worker safety, and reforestation. Most forest management agreements, for example, are ‘evergreen’, rather than ‘perpetual’, meaning that the licensees must comply with all licence requirements and relevant regulations to ensure that their licences will continue beyond the existing term. In many cases the current term is 20 years, but astute firms that learn of a new condition for extension usually seek to satisfy the requirement well in advance of the expiry date.

Aboriginal economic development opportunities have seldom been a requirement in the Crown’s licensing policies. Under the new arrangements, they would be a central consideration.

Such changes must respect the importance of outside capital, however. Our proposals would ring hollow if, in the end, there was little development to share. Canada must remain a stable and secure place for private investment. However, stability that depends on the denial of Aboriginal and treaty rights is purchased at too high a price. Stability on such a basis is not tenable in the long run, as resentments will boil over, to the detriment of Canada’s image as a place to do business. We believe that even with significantly changed rules to enhance the economic benefits to Aboriginal people, the security that would result from more co-operation between governments would leave Canada well placed in the international competition for capital. We must re-emphasize here that the objectives of the system we propose would not be considered anomalous or extreme in most countries that want development to serve the needs of their people. If the new co-jurisdiction lands were a developing country (which in many respects they are), our proposal would be commonplace - in fact, it would probably be approved by institutions such as the World Bank and the Canadian International Development Agency. New arrangements would not mean that employers would have to hire Aboriginal people who are incapable of doing a job. They would not be forced to deal with Aboriginal companies that do not meet their commitments. They would not be subject to rulings by resource managers who lack necessary skills or do not understand business realities.

The best practices of companies that have been successful in attracting and retaining an Aboriginal work force should be identified and disseminated widely. Additionally, ways need to be found for Aboriginal people to obtain a share in a wider range of benefits from such projects. Using an equity position in the project as a lever to obtain a share of profits, as well as to influence policies on hiring, promotion and contracts, is one avenue that some Aboriginal organizations are pursuing. Another might be to take a share of resource revenues, such as lease fees or royalties from companies operating in traditional territories, and deposit it in an economic development fund to benefit the Aboriginal communities in that area.

In this connection, the Bayda Commission (also known as the Cluff Lake Inquiry), established in 1977 to recommend whether Saskatchewan should proceed with uranium mining, concluded that a share of uranium royalties should be paid to “certain northern governing bodies”. The commission argued that

If the distribution of economic benefits (taxes and royalties, spin-off and job benefits) and social benefits is left to the natural market forces and normal governmental processes the chances are high that the people of the province generally will benefit most from that distribution and the Northerners very little

The direct sharing of uranium royalties with Northerners is justified on two broad grounds: first, when one considers that Northerners have been left behind in the struggle to better their lives, that the mineral resources and the revenues generated by developing them are by far the greatest source of wealth in the North and constitute the only tax-producing property of any consequence in the North, that the Northerners will bear most of the social costs associated with the development of uranium, it is only fair that they share more generously than the people in the rest of the province in the revenue to be generated by that development; second, the sharing of revenues will go a long way in giving to the Northerners the kind of control they seek, and it is only fair that they have, over their own affairs.⁸⁶

A step in this direction was taken by the government of Saskatchewan which, since 1979, has been distributing some revenues to northern municipalities. The main vehicle has been the Northern Revenue Sharing Trust Account, which receives revenues from the lease and sale of Crown lands and distributes them to northern municipalities - but not to reserves - to support capital projects and operating costs. However, the amount of money involved is relatively small and does not include royalty payments, which continue to go into the general revenues of the province. The funds are not distributed directly to the communities involved either. In 1993, the joint federal-provincial panel on uranium mine development in northern Saskatchewan echoed the recommendation of the Bayda Commission and was explicit in recommending that groups such as tribal councils, the Saskatchewan Metis Association and the Aboriginal Women's Council for Saskatchewan should be included in discussions of revenue sharing.⁸⁷

Recommendations

The Commission recommends that

2.5.9

Until self-government and co-jurisdiction arrangements are made, federal and provincial governments require third parties that are renewing or obtaining new resource licences on traditional Aboriginal territories to provide significant benefits to Aboriginal communities, including

- preferential training and employment opportunities in all aspects of the resource operation;
- preferred access to supply contracts;
- respect for traditional uses of the territory; and
- acceptance of Aboriginal environmental standards.

86 Cluff Lake Board of Inquiry, *The Cluff Lake Board of Inquiry Final Report* (Regina: Government of Saskatchewan, 1978), p. 206.

87 Hatton, "Northern Saskatchewan Mining Study" (cited in note 83), pp. 61-68.

2.5.10

The efforts of resource development companies, Aboriginal nations and communities, and governments be directed to expanding the range of benefits derived from resource development in traditional territories to achieve

- levels of training and employment above the entry level, including managerial;
- an equity position in resource development projects; and
- a share of economic rents derived from the projects.

2.5.11

Unions in these resource sectors participate in and co-operate with implementation of this policy, because of the extraordinary under-representation of Aboriginal people in these industries.

Partnership and self-development approaches

The integration approach has yielded benefits for some Aboriginal individuals and, to a lesser extent, their communities, and steps could certainly be taken to make it more effective, but it is evident from earlier chapters in this volume that the Commission's approach to economic development based on lands and resources proceeds from different assumptions. The essence of this strategy is achieving a land and resource base under Aboriginal control (whether exclusive or co-managed) sufficient to meet the needs of Aboriginal people and to support Aboriginal industries in the natural resources sector. Once this is achieved, Aboriginal people will be in a position to undertake the development of natural resources through Aboriginal companies and to negotiate from a position of strength with other interests, whether non-Aboriginal companies interested in joint ventures or other governments, concerning issues such as revenue sharing.

Using this approach, as we discussed it in the previous chapter, Aboriginal governments would have sole jurisdiction over an expanded land and resource base established on current reserves, newly acquired Crown lands and, where necessary, purchased private lands. In addition, they would share jurisdiction with other governments over a significant proportion of what are now public, or Crown, lands within their traditional territories.

Some of these lands and resources will have to be purchased from their present, non-Aboriginal, owners but we expect that the dominant focus of negotiations will be Crown lands, and these are vast. They occupy an area (excluding adjacent territorial waters) of more than 8 million square kilometres. Few countries are as large.

Moreover, despite many decades of aggressive development by non-Aboriginal entities, Crown lands remain a major source of wealth. Minerals, timber, oil and gas, fisheries, hydroelectricity and recreational resources are the heart of the economy of several Canadian regions. They provide many thousands of jobs, related business opportunities and tax revenues for local, provincial, territorial and federal governments.

These benefits, for the most part, have eluded Aboriginal people for decades as development has proceeded around them. An expanded land and resource base, including co-jurisdiction, could provide a powerful remedy for this situation. With an enhanced ownership and managerial role, Aboriginal nations and their communities could exercise considerable influence over resource

development in their traditional territories, and they could exercise it through partnerships with non-Aboriginal companies or by launching their own business ventures and developing the resource base in their own way.

The partnership approach

With respect to the first of these alternatives, partnerships with non-Aboriginal companies, it should be possible to foster new community-based business opportunities, new prospects for Aboriginal entrepreneurs, and greatly enhanced employment opportunities in all resource developments.

It is important that such partnerships protect what Aboriginal people value - their environment, their culture, their institutions - from insensitive development and its consequences. For instance, it is widely felt in Aboriginal communities that timber harvest operations damage the habitat needed for successful traplines. Yet under current management systems, choices are made generally on the basis of profit; traplines lose out in that evaluation, because Aboriginal lifestyles, food and culture are undervalued.

Aboriginal partners must have a say in determining the rate and nature of development on their own and shared lands. Without the authority to establish criteria for development (usually by the private sector), economic development based on lands and resources will remain a mirage for Aboriginal communities.

An Aboriginal government in a controlling or co-jurisdiction position might weigh the issues differently and insist on a more reasonable accommodation of cultural values and traditional vocations. Similarly, an Aboriginal government could negotiate set-aside agreements giving preference to local suppliers of goods and services. It could insist that any development plan for oil and gas, forestry or mining incorporate education and training for specified numbers of Aboriginal citizens.

Strong Aboriginal institutions, collaborating with existing mainstream agencies at the federal, provincial and territorial level, will provide large and varied employment opportunities eventually. Management of Crown lands provides employment for thousands of support staff, technicians, professionals and managers at all levels of government. At present, very few of these are Aboriginal people.

Co-jurisdiction means that Aboriginal governments will have to have the same breadth of capacity to play their full part in the partnership. Indeed, they must insist on this, so as not to be overwhelmed by outside 'expert' opinion. That capacity has to come from the people themselves if their governments want to use the arrangements to their fullest advantage. This is doubly important in managing lands and resources, for Aboriginal people have distinct and significant knowledge, insights and values to bring to management and must be encouraged to apply these alongside conventional scientific knowledge. We are not suggesting that Aboriginal governments would need the same number of staff as non-Aboriginal agencies have now, but it is clear that there would be more opportunities available than there are Aboriginal people with the skills to take advantage of them.

These situations - offering interesting, well paid, secure employment without the need to sever ties to communities or give up the chance to blend traditional and modern lifestyles - represent an opportunity for Aboriginal people to live in their own communities without financial penalty. Some of the technical and management jobs will be in urban settings and could provide alternative employment for those who have already left their communities.

Moving from the current situation to one in which at least half the staff of joint management bodies consists of Aboriginal people presents a host of challenges and will take time. The Canadian public must make the commitment to co-jurisdiction now, however, so that a start can be made on the changes that will be needed.

The self-development approach

Self-development refers to the management and development of lands and resources owned by Aboriginal communities by Aboriginal companies. Canadian experience shows that the management of Aboriginal lands and resources by non-Aboriginal parties in industries such as forestry and fisheries can be disastrous. To take forestry as an example, a 1992 report of the federal Auditor General concluded that

Based on the results of our examination, we concluded that DIAND is not discharging its statutory responsibility for Indian forest management with professional and due care.

In view of the uncertainty surrounding this issue and an increasing tendency for the federal government to be called to account for its stewardship of Indian interests, the Department needs to review with the various bands the manner in which forest management is carried out. Failure to discharge its responsibilities in this regard could lead to legal action against the Department.⁸⁸

Problems with DIAND's management included the lack of a clear mandate in areas of management other than the granting of licences to cut timber on-reserve, lack of appropriate numbers of qualified staff to permit the department to carry out its statutory responsibility for Indian forests, and regulations that conflicted in some respects with the *Indian Act* and discouraged joint ventures. The regulations are in any event outdated. In this regard, the Auditor General noted in the same report that

The Indian Timber regulations were enacted in 1954. At that time, forestry was considered to be synonymous with logging. Reforestation was left to nature. The regulations are silent on virtually all of the modern forestry practices that would ensure harvesting of Indian timber on a sustained yield basis. They are also inadequate for the proper management of resources that are significantly affected by forestry operations, such as water and wildlife. Furthermore, preservation of the natural habitat is a vitally important factor in the agricultural, cultural, and spiritual practices of Indian bands.

In the United States the legal situation regarding ownership has been different, but the results of external management have been equally unsatisfactory. With regard to minerals, for example, subsurface rights have long resided with Aboriginal people, but management was in the hands of the Bureau of Indian Affairs. The U.S. experience demonstrates that ownership is not a sufficient condition for the resource to be harvested in a manner that is in the long-term interests of Aboriginal people:

88 Auditor General of Canada, "Department of Indian Affairs and Northern Development", in *Report of the Auditor General of Canada to the House of Commons 1992* (Ottawa: Supply and Services, 1992), p. 368.

Until 1982, it was illegal for Indians to initiate the external development of minerals which lay under their lands. Instead the development of Indian mineral resources was subject to bidding and leasing procedures similar to those used by the U.S. Bureau of Land Management for minerals located under public lands ...

The system provided no built-in protection or guarantees or even a consultation requirement vis-à-vis tribal priorities and values, or respect for sacred sites and the local environment

By the early 1970s, not only did the limited financial returns provided by the fixed royalty system begin to bother the affected tribes, but a spate of other environmental, cultural and self-government issues stirred dissentResistance to large-scale mineral resource development emerged on many reservations, as resentment at being excluded from decision making, at having cultural and religious priorities ignored, at having to bear the brunt of adverse environmental and social impacts without realizing a fair share of the benefits, accumulated. The BIA mineral lease came to be regarded as a prime instrument for effecting the transfer of control and exploitation of Indian mineral and other natural resources to non-Indians. New attitudes and different approaches emerged as the various tribes tried to move beyond leasing to alternative modes of development that would ... allow them to ... safeguard their cultures and environments, while benefiting from the jobs, revenues, and operating and management experience that mineral development could potentially provide

American Indian tribes first assumed responsibility for exercising their own proprietary rights, then assumed various regulatory responsibilities (including permitting, administration of tax regimes and enforcement of certain environmental standards), and finally began to promote mineral resource development on their own reservations as a means to generate tribal revenues and jobs. The potential for direct economic returns and non-cash benefits of on reservation mineral development only became substantial after tribes began negotiating their own deals⁸⁹

With ownership and the exercise of managerial authority comes the ability to shape natural resources development in the way preferred by the Aboriginal nation involved. The chosen path might differ from the mainstream approach. In the case of forestry, for example, the National Aboriginal Forestry Association told the Commission of the importance of the forest to Aboriginal peoples in Canada.

The forests are our home, our hunting grounds, our ceremonial lands. Aboriginal forest values, therefore, play a key role in community social and economic development. Aboriginal peoples perceive their relationship with the forest as being much broader than the mere removal of trees. To Aboriginal peoples, forestry involves the care and management of the entire ecosystem of an area, ensuring that forestry practices do not threaten the continuation of biodiversity and healthy wildlife habitats.

89 Davidson, "Rethinking Aboriginal Participation in the Minerals Industry" (cited in note 84).

Aboriginal values are evident in our preferred forestry practices. We prefer harvesting methods which cause minimal damage to the forest habitat. When replanting, our interest is in the regeneration of an entire habitat; therefore we take great care with respect to the use of such things as pesticides and herbicides. As well, when we look at forest renewal, it is not necessarily limited to one or two species but may include plants that are of cultural importance to us, such as black ash which we use in our basket-making or berries and medicinal plants for cultural and spiritual use. From the Aboriginal perspective, healthy forests must support a broad range of economic activities for Aboriginal communities, such as hunting, fishing, trapping, tourism, logging, and the management of wildlife resources and of course the management of the forests themselves.

Harry M. Bombay
National Aboriginal Forestry Association
Ottawa, Ontario, 1 November 1993*

Ownership and managerial authority also open up the possibility of harvesting natural resources in a different way, on a different scale, and over a different timeframe than is the norm. Small-scale production is quite possible in sectors such as fisheries, agriculture and wildlife harvesting. It is also possible in industries such as forestry and mining. Taking the latter as a case in point, the Commission's research points out that Aboriginal communities can choose to enter into agreements with large, capital-intensive, externally owned mining companies and have their resources mined in the usual manner, using their ownership position to obtain substantial benefits from the venture in the form of employment, contracts or resource revenues. However, they can also choose to develop the resource themselves and to do so with a smaller-scale operation that is a manageable part of the Aboriginal nation's overall strategy of development. Looking at the international experience with mineral development and the disadvantages of large-scale, capital-intensive forms of development, Jeffrey Davidson of McGill University's department of mining and metallurgical engineering makes the case for small mines:

There are compelling reasons for countries to re-examine their attitudes to small-scale mining. Smaller mines offer the prospect of making significant contributions to the physical and economic development of rural areas and to the improvement of rural standards of living on a longer-term basis. Such activities can provide a basis for additional economic opportunities within the area, contribute to the development of community infrastructure, and lead to improvements in the quality of life for workers, their families, and the community at large. They can become vehicles for upgrading the trade skills and management abilities of local people.

Small mines, when properly organized and managed, have the potential to become economically self-sustaining and net-positive generators of wealth, much of which can be retained within the community. Smaller, locally owned and operated mines offer other advantages and possibilities as well, including

- 1. operation in remote areas with more modest infrastructural support;*
- 2. extraction of smaller deposits that may otherwise be non-viable on the larger scale;*
- 3. reduced capital requirements and lead time to bring into production;*

4. *better capability to respond to and survive market vagaries; and*

5. *less disruption of the existing social and economic framework.*

Small mines provide employment and cash income, serving as points of entry to the cash economy, often complementing rather than displacing traditional economic activities, such as farming and fishing.⁹⁰

Davidson goes on to make the point that a small-scale strategy is not possible for all minerals or all locations, but it is feasible in a broad range of situations.

The self-development approach requires policies and programs quite different from those of the integration approach. Governments are already familiar with some of the issues to be addressed. In the west coast fishery, for example, efforts have been under way since the mid-1970s to achieve a larger share of the salmon resource for Aboriginal food and ceremonial use, and these efforts were pushed further by the *Sparrow* decision, leading to the Aboriginal Fisheries Strategy. We also referred earlier to support for sectoral organizations in agriculture and forestry in the 1980s. It does not appear, however, that these initiatives and this approach to developing Aboriginal lands and resources have been a priority, nor have they been well conceived in all cases.

Certainly the issues that remain to be addressed satisfactorily are many. Among them are the crucial issues of recognition of Aboriginal and treaty rights, securing an expanded land and resource base, clarification of rights to own and manage resources on or under Aboriginal lands, and the need to undertake resource inventories. The latter is a pressing need in forestry, mining and agriculture, for without such inventories it is difficult to know what forms of development are possible and what kind of management regimes need to be established. In many of these industries, especially fisheries, forestry and wildlife harvesting, there is a strong need to rehabilitate or conserve the resource stock. These issues were discussed and recommendations were made in the previous chapter.

Debate has arisen in Aboriginal communities about approaches to resource development and indeed whether resources should be developed at all. Thus there is a need to establish community consensus on how resources within the sphere of its authority should be developed, by whom, according to what timetable, with what forms of ownership, and with what implications for other resource users.

In industries such as fisheries and forestry there is a need to deal effectively with the hostility of non-Aboriginal interests, combat racism and defuse conflict at the community level. In developing such strategies, however, it is important to take account of the economic crisis affecting non-Aboriginal resource producers in many parts of coastal, rural and northern Canada, which contributes to hostility toward Aboriginal people.

The Commission's research on fisheries provides some ideas about what might be done. In the Maritimes, one suggestion is to "put resources in the hands of local leaders, both Aboriginal and non-Aboriginal, and to create new structures for them to work together to reduce tensions, to solve technical problems and to establish mechanisms for dispute resolution". It is important that the major fishers' organizations in the region be "co-opted into such a process as quickly as possible to

90 Davidson, "Rethinking Aboriginal Participation in the Minerals Industry".

head off any danger that the more extreme elements among their members will garner greater support for their hostile stance vis-à-vis Aboriginal fishers”⁹¹

With respect to the west coast salmon fishery, especially the Fraser River, another study advocates increasing the supply of available salmon to all interested parties through improved stock-specific management - a process in which Aboriginal people, using traditional technologies, can play a vital role. This increase in supply, coupled with equitable treatment of all stakeholders, could result in a win-win situation and thereby defuse tensions in the salmon fishery.⁹²

Finally, we return to the need to strengthen the capacity of Aboriginal communities for regulation and management. Clearly this involves education and training, as well as the development of institutional capacity. In their sole-jurisdiction lands, Aboriginal nation governments will have full responsibility for stewardship and for establishing the terms and conditions of development, including the economic benefits from such activities. This will involve phasing out the Indian Oil and Gas Corporation and other agencies that now manage and allocate Aboriginal lands and resources and replacing them with Aboriginal agencies.

This will necessitate a substantial build-up of institutional capacity related to lands and resources. It will put the onus on Aboriginal governments to generate economic development strategies that are faithful to community values and that reflect preferences about the relative roles of Aboriginal enterprises and outside companies. The new institutions would be responsible for many tasks, including resource inventory, royalty design and collection, and enforcement of environmental regulations, and for a range of resources from agriculture to water.

To function effectively and efficiently with governments and the private sector, these new institutions must, as a priority, assemble large amounts of information and knowledge from a variety of sources. They will need technology such as geographic information systems and computerized resource inventory and analysis capabilities, as well as tools for reviewing business opportunities if they are to stay in the forefront of the information society.

As we have noted in other contexts, it is especially important to build human resources and institutional capacity at the nation or sectoral levels. This course of action was advocated in a research study prepared for the Commission on the Aboriginal fisheries in the Maritimes, which concluded that

The consultants can identify some important advantages to the elaboration of more broadly based management structures at the provincial or regional level:

- 1. greater political leverage in dealing with governments and non-Aboriginal communities, and perhaps an end to the pattern of ‘divide and rule’ that continues under the DFO Aboriginal Fisheries Strategy;*
- 2. an enhanced ability to negotiate and enter into partnership agreements for co-management of fisheries resources with other stakeholder groups;*
- 3. more effective means to resolve issues arising when fishers from different First Nations, or those not resident on reserves, wish to harvest resources on the same off-reserve fishing grounds;*

91 GTA Consultants, "Aboriginal Fisheries in the Maritimes" (cited in note 29), p. 48.

92 Copes et al., "West Coast Fishing Sectoral Study" (cited in note 29).

4. greater administrative coherence and the achievement of economies of scale in

- *training and supervising personnel;*
- *funding, organizing and implementing research projects;*
- *undertaking stock enhancement and habitat renewal; and*
- *delivering conservation, licensing, catch monitoring, surveillance and enforcement services; and*

*5. greater consistency and less danger of local politics in providing services to the Aboriginal fishing community.*⁹³

The weakness in the strategy to link economic development to an accessible land and resource base is the lack of Aboriginal individuals and businesses with the skills needed by new government institutions, Aboriginal enterprises, and the non-Aboriginal private sector. Later in this chapter, we explore issues related to training and education. We make the point that training is important but not sufficient on its own. Without the conviction that full participation in productive work is a real possibility, it will not be possible to bridge the motivation gap that cuts short the learning careers of so many Aboriginal young people.

Our perspective provides one answer to the question, ‘training for what?’. Indeed, it sounds a note of considerable urgency. The task of planning, developing and implementing the necessary programs and courses of study is surely daunting, but considerable help will be available from the growing number of post-secondary institutions that are pioneering the subjects and teaching methods that will be needed.

We believe, as well, that broadly based coalitions of government, private sector companies, trade unions and educational institutions could be assembled to give tangible effect to statements of support made to this Commission and in other forums. Later in this chapter we discuss practical ways to assemble these coalitions.

The task is enormous; the gap between present reality and what is needed for the vision to work is very large. For example, our research indicates a relatively low representation of Aboriginal people in groups holding university or college credentials in environmental management, geology, forestry, agronomy, biology, zoology, engineering, business, and economic development. These numbers help to explain the low levels of Aboriginal representation in these professions, but students’ choices may have been influenced by a real or perceived lack of opportunity and by inadequate preparation in disciplines such as maths and science.

It is urgent to instill in Aboriginal people of all ages, but particularly in young people, the conviction that now they have a realistic opportunity to shape their own futures, to serve their communities and strengthen their nations. Aboriginal governments will have to flesh out the design of their management institutions, determine in some detail the number of people and skills required,

93 GTA Consultants, "Aboriginal Fisheries in the Maritimes" (cited in note 29). A strong argument for sectoral organizations in agriculture is made by C.M. Williams, "Sectoral Study: Agriculture", research study prepared for RCAP (1993).

and develop strategies to bring their people up to the level of skills and experience required to join these institutions and make them work.

Conclusion

Natural resources industries are quite different from each other; general discussion soon reaches the specific issues and options facing each sector. Without going into detail about each sector, we have sought to outline several approaches to economic development based on lands and resources. We have suggested that, wherever possible, an approach that secures an adequate land and resource base for Aboriginal nations and communities and that supports the determination of those nations to develop the resource base according to their own priorities is the preferred option.

With this approach, we believe natural resources will be managed better, and Aboriginal communities will derive a full range of benefits from the economic development process. There are indications of untapped potential in all the natural resources areas. In forestry, for example, the Auditor General concludes that

According to FORCAN estimates, the current reported harvest levels on reserve forests represent only 25 per cent of the annual potential allowable cut. Indian forests are also growing less wood fibre than they are capable of. Therefore, it appears that existing harvest levels could be increased significantly with improved forest management. In the long term, this could potentially raise the annual harvest to nearly 5 million cubic metres, which would generate log shipments with an estimated value of \$200 million annually and prospective direct employment for almost 10,000 people.⁹⁴

In fisheries on both the east and west coasts, in agriculture on the prairies, and in wildlife harvesting in northern areas, there are further indications of opportunities for economic development that can be pursued if the appropriate strategies and policies can be brought together.

Recommendations

The Commission recommends that

2.5.12

Federal and provincial governments promote Aboriginal economic development by recognizing that lands and resources are a major factor in enabling Aboriginal nations and their communities to become self-reliant.

2.5.13

Aboriginal governments, with the financial and technical support of federal, provincial and territorial governments, undertake to strengthen their capacity to manage and develop lands and resources. This requires in particular

- (a) establishing or strengthening, as appropriate, Aboriginal institutions for the management and development of Aboriginal lands and resources;
- (b) identifying the knowledge and skills requirements needed to staff such institutions;

94 Auditor General of Canada, *Report to the House of Commons 1992* (cited in note 88), p. 368.

- (c) undertaking urgent measures in education, training and work experience to prepare Aboriginal personnel in these areas;
- (d) enlisting communities in dedicated efforts to support and sustain their people in acquiring the necessary education, training and work experience; and
- (e) seconding personnel from other governments and agencies so that these institutions can exercise their mandates.

2.5 Agriculture: An Illustration

As we have discussed, each of the natural resource industries has its own unique characteristics; we looked at several of these industries in Chapter 4, in our examination of lands and resources. In this section, we take a closer look at one sector, agriculture, to illustrate some of the concrete issues of economic development that need to be addressed.

As reserves were established and as traditional ways of making a living could no longer be sustained on a sharply reduced land base, the federal government came to see agriculture as a solution for the economic problems facing Aboriginal people and a means of encouraging civilization and citizenship. Case studies of particular locations suggest that there were some initial successes, but that early efforts to till the soil soon gave way to disappointment and retrenchment.

In perhaps the most thorough historical study of agricultural initiatives involving Indian people on the prairies of the late 1800s and early 1900s, Sarah Carter writes of the reasons for the failure:

The standard explanation for the failure of agriculture on western Canadian reserves is that the Indians could not be convinced of the value or necessity of the enterprise. It was believed that the sustained labour required of them was alien to their culture and that the transformation of hunters into farmers was a process that historically took place over centuries. When I began to investigate the question of why agriculture failed to provide reserve residents a living, I thought I would add detail to this explanation but essentially retain it intact. Before I got very far into the sources, however, I found that little evidence existed to support this interpretation.

It was the Indians, not the government, that showed an early and sustained interest in establishing agriculture on the reserves. Although the government publicly proclaimed that its aim was to assist Indians to adopt agriculture, little was done to put this course into effect. In fact government policies acted to retard agriculture on the reserves. The Indians had to persuade government officials of the necessity and importance of agriculture. In treaty negotiations and later assemblies, they sought assurance that a living by agriculture would be provided to them, and they used every means at their disposal to persuade a reluctant government that they be allowed the means to farm. They proved anxious to farm and be independent of government assistance, despite discouraging results year after year. Not all Indians wished to farm but many did, and circumstances compelled some to consider this option at a time when there were few others. In the decade after 1885, government policies made it virtually impossible for reserve agriculture to succeed because the farmers were prevented from using the technology required for agricultural activity in the West. The promotion of reserve land surrender after the turn of the century further precluded the hope that agriculture could form the basis of a stable economy on the reserves.⁹⁵

Although Métis farmers were not subject to the *Indian Act* or to supervision by agents of the federal government, in other respects their experience with agriculture was similar. In the decades before 1870, Métis people in the Red River area developed farming on small narrow tracts of land extending inland from river frontage. These lands were good for subsistence production and small-scale mixed farming to supplement other sources of food and income (for example, from the buffalo hunt or trading), but they provided a very poor basis for the development of larger-scale commercial farming. When land grants were allocated in the form of scrip after 1870, it appeared to be intended to settle claims to Aboriginal title more than to establish viable commercial farms. Certainly most Métis people lacked the capital and technical expertise to make effective use of the new lands, and they did not receive the assistance they required. The loss of this land base, and the dispersal of the Métis population to points west and north, relegated the Métis people to no land at all in some cases, to land without a secure title in other cases, and at best to a modest living on marginal mixed farms supplemented by other sources of income.⁹⁶

Facing no such constraints, and benefiting from the availability of lands alienated from Aboriginal control, non-Aboriginal farmers proceeded to develop commercial agriculture with the help of government policies, taking advantage of the latest technologies. By the end of the First World War,

95 Sarah Carter, *Lost Harvests* (cited in note 14), p. ix.

96 See Volume 4, Chapter 5. There were, however, some attempts to establish Métis land reserves or co-operative farms, including the Alberta Metis Settlements and the Saskatchewan Farm Co-op Experiment. For a brief history of Métis agriculture, see Richard Fulham, *A Report on Metis Agriculture in Canada*, prepared for the Industrial Adjustment Committee on Aboriginal Agriculture (Winnipeg: 1992); and Richard Fulham, "An Historical Review of Métis Agriculture and Its Current Status in Canada", research study prepared for RCAP (1993).

and especially after the Second World War, the gap between Aboriginal and non-Aboriginal farming was increasingly evident and widening.

Over the last three decades, governments have undertaken some initiatives to reverse the pattern of neglect and marginalization that characterized the Aboriginal agricultural sector. For example, programs such as the *Agricultural and Rural Development Act* (ARDA), Special Agricultural and Rural Development Agreements (special ARDAs), and Economic and Regional Development Agreements (ERDAs) had some success in bringing reserve lands into effective use and, in the process, requiring some land planning to take place.⁹⁷ In the 1980s, Indian affairs funding was provided for a number of agricultural programs in Ontario, Manitoba and Saskatchewan. Research conducted for the Commission concluded that these programs had growing pains, but on the whole represented a significant step forward in providing advisory services to Aboriginal farmers, administering a range of support programs, and providing a training ground for Aboriginal people in agriculture. We return to this topic shortly.

Métis people benefited to some extent from the federal support programs of the 1970s and 1980s, but less so than status Indians. The main problem has been ineligibility for funding. Special ARDAs, for example, were one of the first federal programs Métis people were eligible for, and Métis trappers and fishers did benefit from its provisions, but the criteria for access effectively eliminated Métis applicants in the farm category.⁹⁸ Although Métis farmers had access to later programs and strategies, including the Native Economic Development Program and the Canadian Aboriginal Economic Development Strategy, they have been able to use them to a very limited extent only, and they have not been able to receive support from Indian affairs agricultural programs.

The other factor affecting progress in Aboriginal agriculture is the changes being experienced by the agricultural sector as a whole. These make it more difficult than ever to develop successful commercial livestock, grain or forage operations:

The most recent phenomenon is what is termed the 'global market'. In effect, the aspect of the food system that determines world prices, and who shall supply which market, has moved away from the primary producers and their traditional collection and selling institutions. The livestock auction and the grain elevator, which for many decades represented the market delivery point and the window on the price-setting mechanism, have lost their significance.

Much of the food system (estimated to be one-third of the total) is now dominated by a few major corporations, often linked with others internationally, which purchase and combine commodities from around the world into processed food items. National boundaries are now merely inconveniences rather than limitations to trade, and distance simply a part of overhead. As a consequence, price, quality and ability to supply quantities on demand determine which food-producing area will export its products into the system.

To cite a specific example of the changed situation, only thirty years ago, the beef packing industry in Canada could state quite confidently that they would accept and market any animal the farmers

97 Williams, "Sectoral Study: Agriculture" (cited in note 93), pp. 60-61.

98 For example, grant conditions required projects to employ at least three people and the applicant to contribute 20 per cent of the total equity; see Fulham, "A Report on Metis Agriculture" (cited in note 96), pp. 12-13. For ARDA, see R.S.C. 1985, c. A-3. Discussion of Special ARDAs can be found in *Special ARDA in Relation to the Future Direction of Native Socioeconomic Development* (Ottawa: Department of Regional Economic Expansion, 1978). A description of ERDAs can be found in *Federal-Provincial Programs and Activities: A Descriptive Inventory, 1993-1994 and 1994-1995* (Ottawa: Privy Council Office, 1995).

delivered to their plants. Currently, one has to have precisely the quality of animal demanded in the market or suffer severe discounts, and furthermore, one may have to arrange for a date to have one's animal accepted. The implications for Aboriginal agriculture [are] that a production project, whether individual- or band-managed, must plan to 'land running', so to speak, providing in quantity the quality of crop or animal demanded by a market that has grown very intolerant of beginners and inefficiency.⁹⁹

This trend severely limits the ability of individual producers to compete on their own, making strong Aboriginal agriculture organizations more important than ever. Effective representation of Aboriginal people in broader organizations such as the Saskatchewan Wheat Pool, the Canadian Federation of Agriculture and the Canadian Cattlemen's Association is also important.

Issues concerning scale, technology, knowledge and skills remain very important as well. In Canadian agriculture, since the mid-1960s, the number of farms with annual gross sales of less than \$100,000 has declined precipitously, while the number with gross sales of more than \$100,000 has increased substantially. As these figures suggest, the average size of a farm has also been increasing, growing by well over 100 per cent in all regions of the country except Ontario and Quebec in the period 1941-1986.¹⁰⁰

With respect to technology, knowledge and skills requirements, patterns in the grains industry are typical of agriculture as a whole:

The skills required to operate a farm are changing dramatically. What was once just common sense and hard work has become an ability to handle sophisticated machinery, an in-depth knowledge of chemicals and crop varieties and a significant ability in business management. The result is a growing dependence on off-farm specialist services extending from the professions of law and agronomy to the information provided by chemists and engineers through their products. The Aboriginal farmer is not excused from these changes and must have a channel for receiving information and high technology supplies.¹⁰¹

Like Canadian agriculture in general, Aboriginal agriculture is diverse, ranging from subsistence activities to small mixed farming to larger, more specialized operations. Often farm production is combined with other sources of food or income, such as hunting and wage labour. It also includes larger commercial farms specializing in beef, dairy, grains, forage crops or wild rice production. There are few Aboriginal farms in Atlantic Canada, but Aboriginal farming is significant in Ontario, throughout the prairies and in some regions of British Columbia. It is not uncommon for reserve landholders to lease out a large proportion of their lands to non-Aboriginal farmers, in part because they lack access to the capital needed to farm the lands themselves. They are also attracted by the promise of regular, low-risk incomes from lease payments.¹⁰²

On the whole, Aboriginal farming operations tend to be small-scale. Lands allotted to individuals on-reserve are small, and the prospects of individuals adding to their land base are few. A profile of First Nations agriculture in Manitoba, for example, revealed that the average annual gross sales of 122 farmers were \$29,361 in 1991. Almost three-quarters of this group (71 per cent) reported income after expenses of less than \$15,000, with half claiming a net worth of less than \$25,000.¹⁰³ Almost all were engaged in beef production and related crop cultivation, with a very few in hog production. A survey of 80 Métis farmers on the prairies revealed that most were in the subsistence

99 Williams, "Sectoral Study: Agriculture" (cited in note 93).

100 Williams, "Sectoral Study: Agriculture".

101 Williams, "Sectoral Study: Agriculture".

102 Warrior, "Economy of the Peigan Nation" (cited in note 4).

and mixed farm categories, and indeed 80 per cent of respondents reported receiving off-farm income.¹⁰⁴

Analyzing the characteristics of Aboriginal agriculture in light of general trends in Canadian agriculture raises important questions about future directions. It can be argued that, given the current characteristics of Aboriginal agriculture and the constraints it faces, small-scale farming is a reasonable adaptation to present circumstances. It does not generate great wealth, but it does provide a living if combined with other sources of income. In more northern areas and for some specialty products, it is perhaps the only course of action that makes sense. This does not necessarily mean a continuation of the status quo - there are opportunities for growth, new products, and modest expansion, and steps can be taken to improve the size and quality of the land base or to enhance access to capital. Smaller farming units could serve as a training ground for successive generations of Aboriginal farmers who will, over time, develop the knowledge and skills base and the capital and land resources to make farming their principal, perhaps their only, occupation. Thus, under this model, public policy should support small mixed farms and resist the tendency to favour larger and often more specialized units.

Another view, influenced by Canadian and international trends, sees the future in terms of large farms with the technology, capital and management for success. According to this view, small farms with a significant subsistence or non-farm income element are unlikely to provide the basis for the competitive commercial enterprises of tomorrow, and public policy should be devoted to creating the conditions in which larger farms can develop:

The only manner of organizing in the beginning stages of prairie farm development was obviously for and by the individual small-scale homesteader, or Aboriginal farmer in the case of the reserve lands. There were some very large acreage farms attempted by individuals or groups of non-Aboriginal people in the earliest farm development stages. But they could not, with the tools at hand, survive for long because of the swings in the production and marketing conditions that had not yet been minimized by government policies and technology. The band-based initiatives were usually much more modest in scale. They were inspired by the individual reserve superintendents, or the church, and somewhat later by the band councils but suffered a similar fate

103 Craig Fossay and David Cassie, *A Foundation for Change — A Profile of the First Nations Agricultural Sector* (Winnipeg: Peat Marwick, Stevenson and Kellogg, 1993), pp. 11, 14, 20. This report draws on data provided by the Manitoba Aboriginal Resources Association, whose information base in 1991 included data on 122 of the province's estimated 165 to 200 active Aboriginal farmers.

104 Fulham, "A Historical Review of Metis Agriculture" (cited in note 96), p. 85. Fulham estimates there are approximately 450 Métis farmers in the three prairie provinces. His sample of 80 respondents is not necessarily representative of the entire group.

Jumping ahead in time, the current climate for farm development now favours the larger operations for grain and for most livestock ventures. The small farms with a number of income centres were able to ... cope with more risk, and so survived as long as they maintained a modest expectation for income. But risk-spreading has been shifted from farm family 'belt-tightening' to government support programs and improved management methods as well as institutionalized marketing methods. Despite the ability to handle risk, the difficulties which increase with this larger-unit pattern of farming are the high requirements for capital and management.¹⁰⁵

As this passage makes clear, however, the argument for larger-scale operations pertains to particular kinds of agriculture (livestock, grains, and so on) geared to particular markets. Some Aboriginal communities will have the desire and the potential to be competitive in these markets. Others will continue farming as part of a multiple income mix, or pursue the kinds of agricultural production that permit smaller-scale farms.

It is evident that a full range of opportunities exists. The Commission's research identifies opportunities in large-scale operations such as swine, beef backgrounding, and beef feedlots. With appropriate support from governments, there is significant interest in Ontario and the prairies in the production of ethanol fuel from grain. Distillers grains and stillage water (cattle feed produced as by-products of ethanol generation), can support beef feedlots of considerable size. In addition, there are opportunities in reserve pasture projects, diversified reserve grains operations, game farming with bison or elk, expansion of wild rice production, the growing of herbs for traditional medicines or to flavour foods, the processing and marketing of wild berries, and wild game-related tourism.¹⁰⁶

These possibilities are compatible with a broad range of farm sizes and requirements for capital, technology and management. However, Aboriginal farmers engaged in small-scale and mixed farming feel strongly that agricultural policy and programs neglect their needs in favour of supporting larger farm operations. Métis owners of small farms interviewed for a Commission research project were clear on this point, linking their concerns about government policy to the survival of small rural communities:

A farmer in this area, actually a businessman and farmer, owns 36 sections of land and is constantly seeking to expand his big corporation. A lot of his wealth has been gained through government grants and other assistance and business write-offs. I have lost track of the number of small farmers who have been bought out and shipped out and empty farmhouses now scattered in the municipality. Government people cater to Mr. Big and he is paraded around as a model for all of us to follow. It is all part of our modern brainwash - it's Free Trade and only 'big' people can operate successfully in our new North American economy.

105 Williams, "Sectoral Study: Agriculture" (cited in note 93).

106 Williams, "Sectoral Study: Agriculture". See also Fossay and Cassie, *First Nations Agricultural Sector* (cited in note 103), p. 26.

I might accept that if Mr. Big and his government supporters can prove to me that he can operate his vast estate more efficiently and cheaper than a good farmer with three or four sections of land. But in this assessment, I suggest that we include the associated costs of the loss to the community of all the displaced small farmers, the costs of relocation, and the social and other costs of the urban centres who have received these displaced farmers. The loss of the dignity, the ambitions, and the hopes of all these people is beyond estimate.¹⁰⁷

Whether they own small or large farming operations, those who want to improve their situation are likely to face one or more obstacles: lack of land, problems with land tenure and use, lack of capital, inadequate information and technical assistance, and inadequate education and training.

Lack of land

Farmers who want to expand the size of their land base and new farmers - many of whom have been introduced to farming by their parents or by others in their communities - find that obtaining land is one of the most formidable obstacles they face, whether on- or off-reserve. On-reserve, the total land base available to the community may be much too small, and other uses, such as residential and commercial space, need to be accommodated. Good agricultural land may not be available or if it is, may come at a hefty price. Even if funds are available to purchase land adjacent to a reserve, bands wanting to increase the reserve land base have run into opposition from non-Aboriginal neighbours and municipalities, as discussed earlier in this section.¹⁰⁸

Land tenure and use

Reserve residents are usually allotted lands by the band council, or the distribution of lands may reflect traditional or hereditary ownership. Whatever the allocation method, the size of land parcels available for farming is typically quite small unless the band has reserved a larger acreage for farming by a collectively owned enterprise. That the size of the land base and present patterns of land tenure are unsatisfactory is evident from the following descriptions of two contrasting situations - both located in southern Alberta, the home of Canada's largest reserves:

On the Peigan Reserve in Southern Alberta, 244 square kilometres, or 57 per cent of the reserve's land base, have been individually allotted ... Much of today's distribution pattern goes back to the 1920s, when the Peigan population numbered around 500 (one-sixth of today's population). The educational policy of that period placed particular emphasis on manual training and agricultural instruction, and band members interested in agriculture were allocated a parcel of land by the Indian agent. Yet in the 1950s small-scale agriculture experienced a serious relapse, when mechanization and related changes intensified, and traditional farming became just too uneconomical. Many of the older individuals on the reserve ... recalled working their land with a horse-drawn plough until the late 1950s. Then they resorted to leasing their plots to non-Indian farmers and ranchers because they saw no other way of making a

107 Fulham, "A Historical Review of Metis Agriculture" (cited in note 96), pp. 81-82.

108 Claudia Notzke describes two incidents where "uneasy neighbours" stood in the way of attempts by Indian bands to expand their reserve land base; see *Aboriginal Peoples and Natural Resources in Canada* (North York: Captus Press Inc., 1994), pp. 181-182.

living. While reserve land had been leased before, it was only at this time that band members started leasing out their small individual plots to off-reserve enterprises. With the onset of 'self-government' in the 1960s, political factors gained importance in the process of land allocation.

In the 1980s there were about 170 landholders on the Peigan Reserve. The average size of a large holding was 390 hectares, while small holdings averaged 65 hectares. Small plots accounted for 75 per cent of all individual holdings. Sixty per cent of the individually allocated grazing land, and 90 per cent of the arable land was leased out. This appears logical when we consider the land-people ratio. An economic unit for an Indian dryland farmer would require a minimum of 500 hectares. With regard to ranching, it is assumed that a satisfactory living could be made on a pasture capacity of 250 animal units. Based on a general carrying capacity of 10.1 hectares per animal unit per year, this translates into 2,525 hectares per ranch. Even if this acreage were reduced by the use of a six-month grazing system, supplementary feed and the use of the community pasture, the discrepancy between the actual holdings and economic units is still evident.

... The resultant pattern was the exorbitant leasing out of valuable land, with two-thirds of the revenue leaving the reserve and only one-third being paid out to the 'owner'.¹⁰⁹

On another Alberta reserve, the pattern of land holding is different, but the consequences are similar:

Individual land tenure on the Stoney Reserve in the Rocky Mountain foothills west of Calgary is subject to the same customary system. Here, however, it is even more flexible and informal. The division between 'landowners' and landless band members is less pronounced than on the reserves of the Blackfoot Confederation, as every family by custom has the right to fence off or use a parcel of land to graze some livestock. There are 'acceptable' limits as to the size of holdings an individual may fence off for himself/herself, the majority measuring under 65 hectares. Sixty-nine per cent of a Stoney sample [selected for interviews] ... claimed a parcel of land, with a majority being uncertain about its exact size. Only two of the twenty-two landholders utilized larger areas, in the neighbourhood of 260 hectares. There is no land registry, and as a result there are no data regarding the number of landholders or size of holdings [W]ith over 400 households on the Morley Reserve, and its physical features imposing limitations on settlement and utilization of some parts, there is a pronounced land shortage. The individual holdings are uneconomically small, especially in view of the fact that the wooded character of a major part of the reserve necessitates larger ranch units to make a living than on the Peigan Reserve. Nevertheless, all the individually used land is utilized for grazing livestock, and none is leased to non-band members. Although leasing was practised before self-government, it was discontinued two decades ago as a matter of policy, and thanks to their gas royalties, part of which are distributed on a per capita basis, band members do not depend on this source of income. There is no defined land policy; disputes arising over questions of inheritance and transactions are handled individually by the Council.

109 Notzke, *Aboriginal Peoples*, p. 179. See also Warrior, "Economy of the Peigan Nation" (cited in note 4).

Thus the land situation on these reserves is characterized by a peculiar tension caused by the combination of hard economic facts, perceived and/or real political favouritism, and the enduring Indian holistic concept of land ownership. Referring to supposedly communal ownership of the land base, the landless feel justified in asking where their profit from this resource is likely to occur. Due to population increase and historically established distribution patterns, only a limited number of families can reap the major benefits.¹¹⁰

As this passage reveals, the land is regarded as a collective resource, and this adds to the complexity of the situation. Individuals who have been allotted a certain piece of land do not have the security of knowing that the land will remain in their family's hands for future generations. Since successful farming typically develops over several generations, insecurity of tenure is an impediment to long-term commitment. And since the land cannot be sold, it is more difficult for a reserve-based farmer to build up equity for retirement or to leave a legacy to children. Division within the community is also created if land, a community resource, is allocated to individuals for their profit, with few if any benefits being returned to the community as a whole. To avoid this problem, bands that allocate reserve lands for wealth creation could charge rent for the land, to be paid in cash or as a percentage of the crop. Furthermore, such revenues could be reinvested in the land base or used to promote economic development - for example, creating an internally generated capital fund available for investment as an alternative to borrowing funds from external sources. Charging rent for the land would also act as an incentive for reserve farmers to make more productive use of the land and to further their level of education and training in agriculture and related fields.

Tackling issues of land tenure and use is very difficult for reserve political leadership, but it is important to address the issues and reach compromises if agricultural development is to proceed. The problem is not only that most land units are too small to be economically viable, but also they are not being used to promote the economic development of the band - that is, some land may be leased to non-Aboriginal interests, with revenues accruing mostly, perhaps entirely, to the band member who was allotted the land. Some individuals do very well from these revenues and may be part of the economic and political elite of the community.

The incentive structure could perhaps be changed to encourage more productive use of the lands - for example, resolving access to capital problems so that reserve farmers could invest in farming equipment rather than lease lands to outsiders, or charging rents on allotted lands. Alternatively, the band council could, with the approval of the minister of Indian affairs, reallocate land allotments and place more land in the hands of those who would farm it more efficiently. This would remove an important source of income from those who now hold the land, however.

Difficult as it may be, bands whose lands have agricultural potential have to decide whether to use the lands as part of an agriculture development strategy, or for residential and other purposes. If the lands are to be used for agriculture, consideration needs to be given to land allocation and use issues - should some lands be retained for band projects or, alternatively, assigned to individual members? Should some be set aside for joint ventures with other bands or with non-Aboriginal people? How can land units of sufficient size and productivity be created so that farming activities are economically viable or, alternatively, what kinds of agricultural activities can be pursued successfully given the amount and distribution of available land? How can the resulting revenues be shared so that there are incentives for individuals but also benefits to the community as a whole and retention of funds for reinvestment in the land base? On many reserves, land reform and the

110 Notzke, *Aboriginal Peoples*, p. 180.

development of land use plans should precede, or at least accompany, other plans to develop the reserve's agricultural potential.

Lack of capital

Historically, a major problem standing in the way of Aboriginal agriculture development was lack of access to capital for developing land or purchasing seeds, livestock, ploughs and tractors. Access to capital remains an important issue, certainly for reserve-based farmers, because reserve land cannot be used as security for loans. It is an issue as well for the Métis farmers interviewed for a Commission research study. Access to capital to expand farm operations was, in fact, the most frequently mentioned constraint. Those interviewed strongly advocated expanding the availability of loan capital, not government grants.¹¹¹ Some of the opportunities in agriculture, such as ethanol production and related feedlot operations, would require large amounts of capital. For these operations, the best approach may be projects involving co-operation between several bands or communities and/or joint ventures with non-Aboriginal interests. Access to capital is discussed at some length later in this chapter, in our examination of business development.

Information and technical assistance

The Commission's research underlines the importance of providing appropriate information and technical assistance to farmers. Extension and outreach programs are especially important for Aboriginal farmers struggling to gain a foothold in the industry. Indeed, one of our research studies suggests that it was precisely this kind of support, provided through Indian agricultural programs of the 1980s, that was instrumental in the success stories that have emerged - progress that is now threatened by funding cutbacks in these organizations and the programs they administer.

Possibly the most significant and beneficial change to the system of assisting Aboriginal farmers from the time of the farm superintendents was focusing efforts through the establishment of the Indian Agricultural Programs. Unfortunately, the federal funding cut-backs have centred on these programs and so they are dwindling and disappearing. To say that this is a serious blow to Aboriginal agriculture is an understatement of the obvious. Some items to consider in this move are as follows:

1. The initial cost/benefit from the investments in Aboriginal farming has been low if measured by the criteria for development moneys used in many other sectors of the economy. However, that the programs actually caused a turnaround so that successful farmers now exist, where none were before, as a direct result of daring investments and loans, is positive. And, that bands now take some time to address agriculture specifically, whereas most had not before the 1970s, gives encouragement to those responsible for working with the individual bands. These initiatives will fade as moneys are restricted and staff laid off.
2. The tie-in with the provincial extension services was a major step in giving Aboriginal people direct access to information from specialists serving the non-Aboriginal communities. This service is absolutely essential for advancement and will fade away as the budgets are being reduced, unless other provisions are made.
3. Certain projects, such as land clearing, establishing pastures and wild rice harvesting, were planned and executed with professional staff managing the programs. There were small dedicated groups created in most provinces which could be identified when a new project was being planned.

¹¹¹ Fulham, "A Historical Review of Metis Agriculture" (cited in note 96), pp. 82-84.

This is not to deny that private consultants do not serve a purpose, particularly where high-priced and high tech projects are being established. However, much of the development on the reserves needs almost constant overseeing by trained people, in the very early stages and well into the middle years of a project.

4. An opportunity was created for Aboriginal people with some professional agricultural training to fit into a service of their level of competence, and to work with a critical mass of fellow professionals. This small, but critically important group of Aboriginal people is being laid off and will be lost to the pursuit of agriculture.¹¹²

Agriculture extension services provided by provincial governments are useful, but indications are that they work better for the well-established farmer with specific information needs to which the provincial services can respond. They do not provide the culturally sensitive and active outreach that is more likely to come from an Aboriginal extension service. Thus the Commission believes the Indian agriculture programs are a good investment and supports their re-establishment or continuation in all provinces where this is warranted by the number of First Nations farmers. Similar support should be given to Métis farmers. Aboriginal farmers should also consider establishing their own organizations to improve access to information and government programs and provide a stronger voice in decision making concerning agriculture policy and programs.

Education and training

As in other natural resource fields, levels of education and training in agriculture are widely believed to be inadequate, an issue the federal government recognized with the establishment of the Aboriginal Agriculture Industrial Adjustment Services Committee in 1993. This committee, whose membership was drawn from people involved in Aboriginal agriculture from across the country, identified several important gaps in training:

1. Course content is often too advanced and requires prior knowledge.
2. There is a chronic shortage of Aboriginal trainers.
3. There is a lack of courses that are culturally appropriate to Aboriginal people.
4. There is a lack of courses delivered in local communities to groups of Aboriginal people who know and trust the instructor.¹¹³

The committee made recommendations to heighten the awareness and interest of young people in careers in agriculture, including an 'Agriculture in the Classroom' program. It asked agriculture training institutions to develop customized courses to meet the needs of Aboriginal farmers, using Aboriginal training colleges and instructors where possible. It called on post-secondary institutions to co-operate in developing a pre-agriculture program for Aboriginal youth modelled on the success of similar programs in law and the health professions. It also called for the establishment of a national Aboriginal agriculture training advisory council. These recommendations are worthy of support.

112 Williams, "Sectoral Study: Agriculture" (cited in note 93).

113 Garven and Associates, "Aboriginal Agriculture Training Needs and Strategies: Final Report", prepared for the Aboriginal Agriculture Industrial Adjustment Services Committee (Ottawa: Human Resources Development, April 1994), p. iii.

Recommendations

The Commission recommends that

2.5.14

The government of Canada remove from Aboriginal economic development strategies such as CAEDS and related programs any limitations that impede equitable access to them by Métis farmers and Aboriginal owners of small farms generally.

2.5.15

The government of Canada restore the funding of Indian agricultural organizations and related programs and support similar organizations and services for Métis farmers.

2.5.16

Band councils, with the support of the federal government, undertake changes in patterns of land tenure and land use so that efficient, viable reserve farms or ranches can be established.

2.5.17

The government of Canada implement the recommendations of the Aboriginal Agriculture Industrial Adjustment Services Committee designed to advance the education and training of Aboriginal people in agriculture.

2.6 Business Development

Business development plays a vital role in strengthening Aboriginal economies. In 1990-1991 25,275 Aboriginal people in Canada reported current business ownership and/or income from self-employment.¹¹⁴ Another 12,575 reported prior business ownership. The percentage of each identity group population engaged in business ownership or self-employment is reported in Table 5.11.

TABLE 5.11 Business Ownership/Self-Employment among Aboriginal Identity Population Age 15+, 1991

Situation	Total Aboriginal Identity Population	Registered North American Indians	Non- Status North American Indians	Metis People	Inuit	Other¹
	%	%	%	%	%	%
Current or Prior Business Ownership/ Self-	11	9	19	16	12	21

114 Figures on business ownership were taken from the 1991 Aboriginal Peoples Survey. To the business owners, we added persons who did not report business ownership in 1991 but who stated in the 1991 census that they had income from self-employment in 1990. Figures on the number of persons owning businesses are highly variable, depending on the question asked. For further detail, see Clatworthy et al., "Patterns of Employment" (cited in note 38).

Situation	Total Aboriginal Identity Population	Registered North American Indians	Non- Status North American Indians	Metis People	Inuit	Other ¹
	%	%	%	%	%	%
Employment						
Current Business Ownership/ Self- Employment	8	6	12	10	10	12
Prior Business Ownership/ Self-Employment	4	3	7	6	2	9
Never Owned a Business	89	91	81	84	88	79

Notes

Percentages may not add exactly because of rounding.

1. Includes North American Indians with unknown registry status and individuals providing more than one response to the identity question.

2. Percentage of total population of each Aboriginal identity group.

Source: Stewart Clatworthy, Jeremy Hull and Neil Loughran, "Patterns of Employment, Unemployment and Poverty, Part One", research study prepared for RCAP (1995).

Anecdotal accounts suggest a substantial increase in the number of Aboriginal businesses in the last two decades, although clear data on the matter are not readily available. The Commission has some information on self-employment in non-incorporated businesses, which make up the largest proportion of all businesses, and this shows an increase between 1981 and 1991 in both the absolute number and the proportion of Aboriginal people who were self-employed. Table 5.12 reveals that the sharpest growth in self-employment has occurred among Aboriginal women, although in numbers they still lag behind Aboriginal men by a considerable margin and they are more likely to be working part-time in the businesses they own. Aboriginal men who were self-employed increased in absolute numbers but not as a percentage of the adult male population. The proportion of self-employment among the non-Aboriginal population also grew, however, and remained almost double the Aboriginal rate.

TABLE 5.12 Self-Employment among Aboriginal Identity and Non-Aboriginal Populations Age 15+, 1981 and 1991

	Total Aboriginal		Aboriginal Male		Aboriginal Female		Total Non- Aboriginal	
	1981	1991	1981	1991	1981	1991	1981	1991
	%	%	%	%	%	%	%	%
% of population age 15+	2,4	2,6	3,9	3,6	1,0	1,7	4,5	4,8
% full-time	70,4	63,5	74,2	69,5	56,5	52,0	78,6	77,4
% part-time	23,8	28,0	20,8	22,6	34,4	38,0	17,3	18,6

Notes

1. Self-employment is defined as persons reporting that they worked for themselves, with or without paid help, and whose businesses were not incorporated.

2. Those for whom the part-time or full-time designation was not applicable are not included.

Source: Statistics Canada, 1981 Census; 1991 Census; and Aboriginal Peoples Survey (1991), custom tabulations.

The reasons for the increase among those reporting income from business ownership and/or self-employment are not well understood. However, demographic factors may be playing a role, for there is now a large cohort of Aboriginal people in the young adult category, and business ownership and self-employment tend to be highest among those aged 25 to 54 than among those who are younger or older.¹¹⁵ Growth in the urban Aboriginal population could also be a factor, since the proportion in business ownership and self-employment is generally higher off-reserve and in southern and more urban areas.¹¹⁶ Large numbers of persons searching for work but unable to find wage employment can also lead to self-employment and business ownership.

It is also reasonable to suggest that part of the growth is accounted for by the signing of comprehensive claims agreements and the expansion of the land and resource base for some Aboriginal communities. These agreements result in an infusion of cash into regional economies for investment and other purposes, creating a more dynamic environment for business development. Other types of settlements, such as specific claims agreements and treaty entitlement settlements, have a similar effect. This explanation may help to account for the fact that the highest incidence of current business ownership/self-employment is found in northern Canada (see Table 5.13). The large number of persons engaged in traditional economic activities likely helps to account for this finding.

TABLE 5.13 Business Ownership/Self-Employment among Aboriginal Identity Population Age 15+, by Region, 1991

Region/Province	Current Business Ownership or Self-Employment		Prior Business Ownership or Self-Employment	
	No.	%	No.	%
Atlantic	1,015	8	430	4
Quebec	2,625	9	1,135	4
Ontario	4,730	8	2,505	4
Prairies	9,355	7	5,015	4
British Columbia	5,425	10	2,885	7
Northern Canada	2,125	11	605	4

Note: Percentages refer to the proportion of the Aboriginal identity population that reported provincial location and ownership status.

Source: Stewart Clatworthy, Jeremy Hull and Neil Loughran, "Patterns of Employment, Unemployment and Poverty, Part One", research study prepared for RCAP (1995).

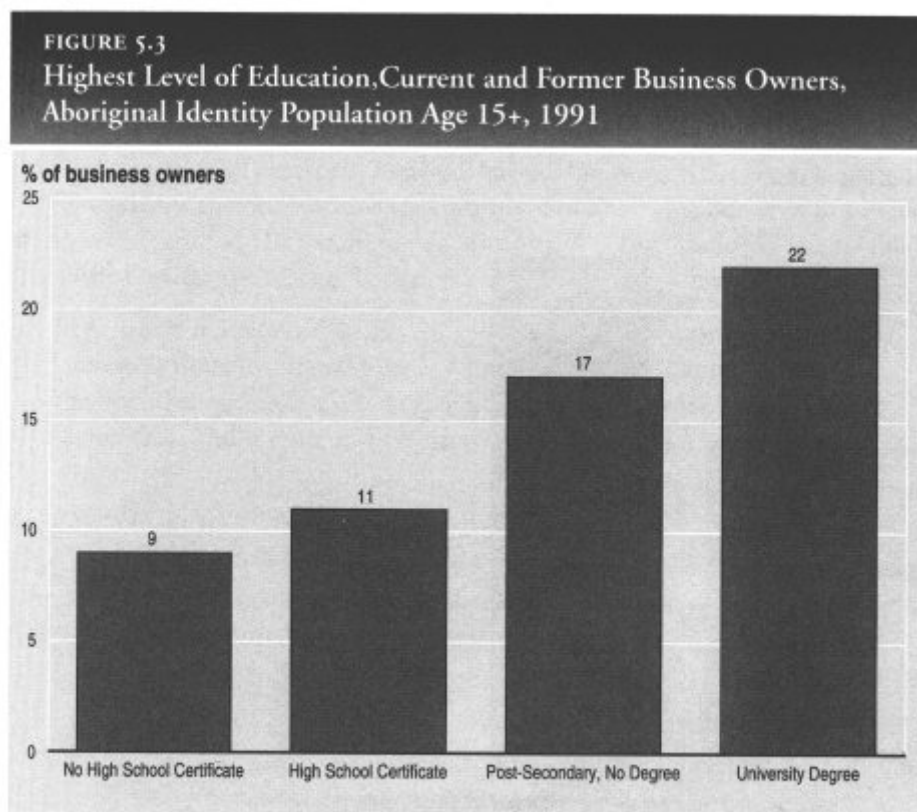
Some have speculated that the increasing education level of the Aboriginal population has translated into an expansion in the number of entrepreneurs, and indeed this hypothesis is supported by the available data. Figure 5.3 reveals that the incidence of business ownership and self-employment is lowest among those with no high school education and increases steadily with further education.

The proportion of university graduates who are business owners is high, but the small number of university graduates nevertheless means that most Aboriginal businesses are owned by people with a high school education or less. There is also evidence that success in business depends on more than formal education. A recent evaluation of Aboriginal businesses assisted by the Canadian Aboriginal Economic Development Strategy (CAEDS) between 1989 and 1990 found that

115 Clatworthy et al., "Patterns of Employment" Table 44.

116 Clatworthy et al., "Patterns of Employment" Tables 47 and 48.

management teams with the least education (elementary school or less) had the smallest proportion of business closures or failures and the highest proportion of businesses in the safe or profitable category.¹¹⁷ The explanation may be that entrepreneurial skills are being passed from one generation to the next, without the benefit of much formal education. This is often the case in regions such as the Beauce in Quebec and the Acadian areas of Nova Scotia, where entrepreneurial skills flourish.



Source: Stewart Clatworthy, Jeremy Hull and Neil Loughran, "Patterns of Employment, Unemployment and Poverty, Part One", research study prepared for RCAP (1995).

Figure 5.3 - Highest Level of Education, Current and Former Business Owners, Aboriginal Identity Population Age 15 +, 1991

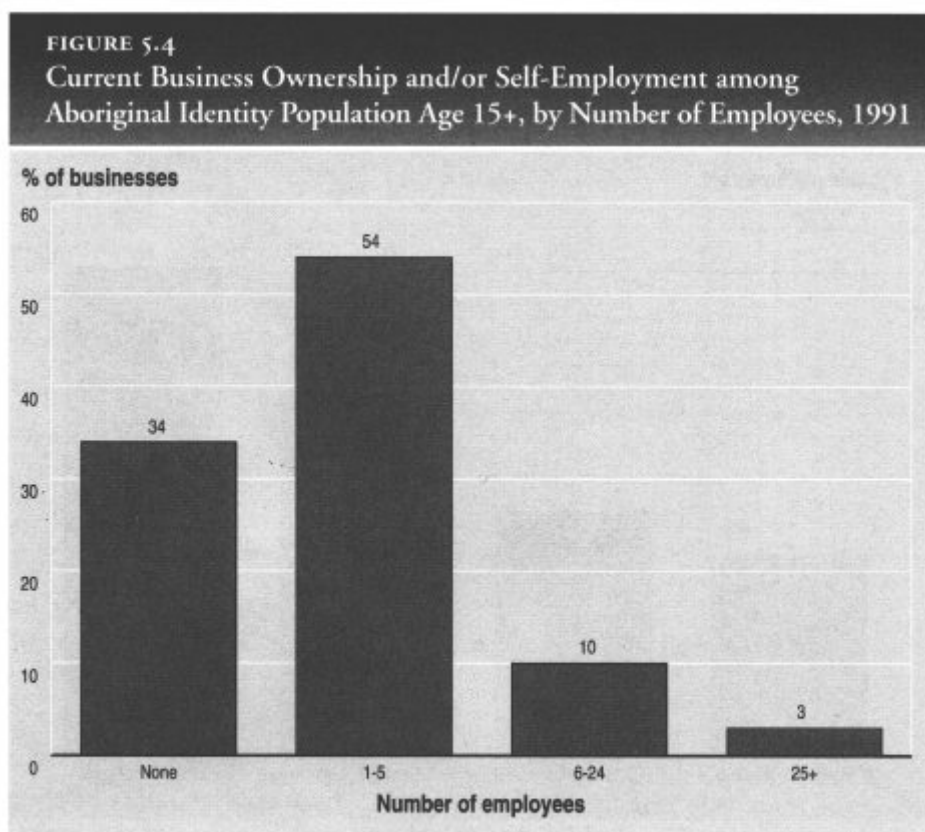
The same study, as well as another evaluation reflecting an Aboriginal, community-based perspective,¹¹⁸ also suggests that the various programs that make up CAEDS are having a positive effect through the provision of training, business development grants, loans, and support for joint venturing and for community economic development organizations. The importance of government programs in influencing business development should not be exaggerated, however, since they are typically a source of financing for only a small proportion of businesses. Self-financing and other sources of capital, such as banks and credit unions, also need to be taken into account.

One other characteristic of Aboriginal businesses is that they are very small in size. Figure 5.4 gives figures on size as measured by the number of employees and reveals that 34 per cent of current businesses have no employees other than the owner(s), while 88 per cent have five employees or fewer.

117 Goss Gilroy Inc., "Financial Performance and Employment Creation Relating to Firms Assisted by ABDP", prepared for Industry, Science and Technology (Ottawa: 1993).

118 Aboriginal CAEDS Assessment Project (cited in note 19).

In summary, there is some encouraging news about small business development in Aboriginal communities, but some major problems remain to be addressed. Not only is the rate of business ownership still substantially less than for the non-Aboriginal population, but there are also sharp differences in access to business ownership among the major Aboriginal groups, for Aboriginal women as compared to Aboriginal men, and by region of the country.



Source: Stewart Clatworthy, Jeremy Hull and Neil Loughran, "Patterns of Employment, Unemployment and Poverty, Part One", research study prepared for RCAP (1995).

Figure 5.4 - Current Business Ownership and/or Self-Employment among the Aboriginal Identity Population Age 15+, 1991

Business development in an Aboriginal context

The reserves exist within a complex and advanced consumer-based economy which is highly competitive and profit-motivated Encouraging conventional investment and business development within the reserve communities will necessitate the identification, development and promotion of realizable competitive benefits, while at the same time effecting a change in perceptions arising from the long period of economic and cultural isolation.¹¹⁹

Self-reliance was fundamental to life in traditional societies. Although the manner in which food and goods were distributed varied, all Aboriginal societies placed a high value on the skill of the providers, be they hunters, fishers, farmers, gatherers or those who transformed the products of forest and field into the goods needed to sustain and enrich life. There was no question that everyone was required to exercise their skills to contribute to the well-being of family, clan and

119 Lafond, "Historical Use of Land and Resources" (cited in note 1), p. 65.

community. In many traditions, the highest honours went to those whose skills provided the greatest benefit to the community as a whole.

The characteristics that hone these skills are qualities that productive societies everywhere uphold as important, qualities as essential to the operation of a modern commercial enterprise as to a traditional hunting party. Ron Jamieson, a Mohawk from the Six Nations community and a vice-president of the Bank of Montreal, told the Commission's National Round Table on Aboriginal Economic Development and Resources:

There is a perception in the Aboriginal and non-Aboriginal communities that Aboriginal people lack the skills and temperament to be effective entrepreneurs. I challenge that assumption ... The personal skills and resources they bring to their business are the same as those which allowed our ancestors to survive in a traditional Aboriginal economy.¹²⁰

He went on to identify four qualities essential for modern business that have long been practised by Aboriginal people: risk taking, discipline, clarity of vision and meeting the needs of the community or customer.

Entrepreneurship without risk taking does not exist ... Traditional economies had high degrees of risk, many of them life-threatening ... True risk means risking your own resources.

Discipline means paying attention to the details of ensuring your business survives and grows ... Traditional economies required personal discipline because survival and the success of the hunt required an attention to detail and the ability to make quick decisions under pressure.

Vision and self-confidence are especially crucial to survive the first five years of business. Traditional entrepreneurs had to have a clear sense of ... results [in order to] feed, clothe and care for their families.

It is essential to meet fully and exceed the customers' expectations ... This is very important in the Aboriginal community where people often see themselves as being taken advantage of by unscrupulous entrepreneurs ... The traditional entrepreneur derived his feeling of self-esteem through his ability to provide the essentials for his family, clan and community.¹²¹

It was made clear to us in the hearings that the fundamental difference in emphasis between the Aboriginal view of economics and the beliefs of liberal capitalism relates less to the means by which wealth is created than to the appropriate distribution of resources once these have been acquired. Aboriginal cultures share a deeply embedded belief that the welfare of the collective is a higher priority than the acquisition of wealth by the individual. Although not all Aboriginal individuals or communities practise that precept, where it is disregarded it is not denied, and its neglect often produces an unsettling effect.

This approach does not detract from the skills and achievements of individuals. Indeed, individuals are as highly valued in the present as in the past. But additional merit is gained by using one's skills

120 Ron Jamieson, "Building an Aboriginal Economy", in RCAP, *Sharing the Harvest* (cited in note 1), p. 272.

121 Jamieson, "Building an Aboriginal Economy", p. 272.

to benefit the community. The more one has to make available to the community, the greater the merit earned.

Attitudes widely present in economically depressed communities cannot be taken as reflective of Aboriginal tradition. It is commonly observed that communities that have been denied resources and marginalized become places of cynicism and inaction that are hostile to achievement. Those who try to break free of oppression are often perceived to be 'letting the side down' by demonstrating that change is possible.

Aboriginal communities, for the most part, have been robbed of the capacity to trust in anyone or anything. Years of manipulation, broken promises, and out-right deception have produced a nation of individuals who hold very low tolerance for what they perceive to be risky ventures. Cynicism, sarcasm and scepticism are the hallmark qualities of both the leadership and grassroots membership of Aboriginal communities ... This tendency to question the potential for success should be seen as a major impediment to growth in the business sector.¹²²

This phenomenon is found in all cultures subjugated by oppression and futility. It takes unusual circumstances and extraordinary people to break the cycle. But the hostility toward achievement and individual effort that is felt in Aboriginal communities is often misinterpreted, particularly by outsiders, as a product of Aboriginal emphasis on the collective and the community. In fact it is part of the pathology of loss and despair - loss of lifeways, of self-reliance and self-esteem.

The closed attitude of local administrations towards private, profit-oriented projects seems very real ... It may even constitute a major obstacle to venture start-up and survival. In more isolated communities, the same values of collective use of resources and sharing of wealth seem ... to be an insurmountable constraint on private enterprise. The ostracism (social isolation, economic sanctions) to which some entrepreneurs say they have been subjected in their own communities by their "brothers", in their view kills private initiative and drives potential entrepreneurs out of the reserves to go into business.¹²³

As discussed earlier in this chapter, governing structures that mirror the basic values of the community are the most effective. Likewise, the means of organizing economic activity to earn income and wealth will be most effective if they reflect a community's values. Some Aboriginal cultures, such as that of Métis people, which place a high value on individual initiative, will see their most effective organizations built around individual entrepreneurs. Others, such as the Ojibwa or Innu, whose social organization is more communal in nature, will be more comfortable using economic units premised on consensus-based action. Other traditions, exemplified by the Haudenosaunee, have fostered both individual and community initiative. Still others, who might come from a strong communal tradition, find themselves comfortable identifying with individual entrepreneurship as a result of extensive interaction with the non-Aboriginal world. There is no 'right' way to structure effort for economic activity.

Nowhere have I seen an outright rejection of capitalism by Aboriginal people. In fact, I have seen a desire to adapt this particular political-economic system to work in accordance with Aboriginal belief systems.¹²⁴

122 Corinne Jetté, "Creating a Climate of Confidence: Providing Services within Aboriginal Communities", in RCAP, *Sharing the Harvest* (cited in note 1), p. 127.

123 Yvon Gasse, Marcelle Bouchard and Aline D'Amours, "The Development of Entrepreneurship in Native Communities: A Matter of Culture and Adaptation", Working Paper 92-48 (Quebec City: Laval University, Faculty of Administrative Sciences, July 1992).

It appears to us that too much is made of the alleged difference between the Aboriginal approach and the ways of liberal capitalism. The mainstream economy incorporates a wide range of structures for economic activity: individual proprietorships, partnerships, corporations governed by boards and with few shareholders, corporations with many shareholders, co-operatives, Crown corporations, joint ventures, and licensing arrangements where companies come together for specific purposes. All can be organized as for-profit or not-for-profit entities. There is little benefit in categorizing approaches to economic activity using outmoded ideological constructs, such as the idea that collectively owned entities should disdain profit or that individually owned enterprises or shareholder-owned corporations are driven solely by the bottom line. How economic organizations choose to use their earnings depends entirely on the nature of the market they are in and the priorities of their owners, whether these are individual proprietors, shareholders or members of a community.

In a market where technologies or tastes are changing rapidly, most net revenues have to be reinvested in the firm so that it can continue to earn sufficient future revenues to remain viable. If that is not the case, if there are genuine surpluses, these are usually distributed in the for-profit enterprise as returns to the owners or shareholders. In the mainstream economy, most firms must take this route if they are to retain the investments of their shareholders. However, community-owned or not-for-profit enterprises will often use their surpluses to support other agreed objectives, such as providing scholarships for community members, funding new community facilities, or supporting cultural or social activities.

There are, however, other ways for an enterprise to realize its goals. If its primary objective is to create employment in the community, it may do so by hiring more individuals than may be warranted by the nature of the business. It will pay a price for doing so; that is, a percentage of what might have been profit will be used to pay the wages of the additional workers. Or the firm may choose to use production techniques that are more sparing of the environment, such as selective timber harvesting. Its profit may not be as high as if it had used other methods, but it will have exercised a value judgement.

The capacity to exercise this choice assumes one thing: that the owners or managers have mastered the organization of their activity so that their product obtains a price sufficient to cover their operating costs. This is the essential commercial parameter that holds true whether an enterprise, however structured, operates solely in the Aboriginal economy or trades extensively outside it. Without this, owners cannot continue to provide employment or generate a surplus to invest in the future of their company, their community and their collective goals.

The alternative is to subsidize the operation from some other source or to shut down. Communities have seen funds that were otherwise earmarked for housing, health or education diverted to keep money-losing operations open and people employed. Canadian governments have done the same by subsidizing coal operations in Cape Breton and operating supply-management regimes for agricultural products. But fiscal burdens on all governments and international trade agreements are now forcing a review of these practices.

Managing an enterprise so that revenues match or exceed costs requires an array of skills and experience. The small business entrepreneur will learn these from family, friends, customers, fellow business owners, and sometimes previous job experience. In the larger enterprise, these skills will be more sophisticated and specialized. The basics are the same, however: production, marketing,

124 David Newhouse, "Modern Aboriginal Economies: Capitalism with an Aboriginal Face", in RCAP, *Sharing the Harvest* (cited in note 1), p. 92.

finance and the management of people. Decisions in these areas, whether made individually or through consensus, need to be informed by professional judgement and advice. The nature of the issues to be dealt with vary little whether a company is individually or collectively owned or managed. The values that govern those decisions may vary considerably, but they must always respect the overall commercial rule: revenues, over time, must equal or be greater than costs.

This rule can be stated in different terms in the contemporary setting, but it applied even more forcefully to traditional economies. If the techniques of production - mastery of the hunt or knowledge of where to find plants and berries or the best fishing sites - were not learned and practised with great skill and patience, the community would be forced to disband or face starvation. Those who were able-bodied but reluctant to participate in the collective effort soon found that community-imposed sanctions made life very uncomfortable. The same choices that existed in traditional society continue in modern commerce.

The colonial mentality characterized traditional Aboriginal economies as lacking an interest in future investment. Yet all Aboriginal societies set a high value on passing on knowledge from one generation to the next. Most people practised harvesting techniques that were conscious of the danger of resource depletion and mindful of the interests of future generations. To impute behaviour conditioned by generations of living in poverty, where output was hardly sufficient to survive let alone invest in increased productivity, to an inability to delay gratification is simply to be ill-informed.

David Newhouse, chair of the department of Native studies at Trent University, believes that Aboriginal values and world views will affect the practice of capitalism in an Aboriginal context. In a paper prepared for the Commission's round table on economic development, he set out the changes he foresaw:

- The concept of personal and social development will be much broader.
- Development will be seen as a process and not a product.
- The emphasis will be upon the quality of the journey rather than the specific place to be reached. This view of development may mean that there will be a willingness to pursue long-term results over short-term improvements.
- Development will be seen as a joint effort between the individual and the collective and its institutions, in this case the community and government. The process will tend to be collaborative rather than competitive.
- The development effort will emphasize human capital investment rather than individual capital accumulation.
- Traditional wisdom as interpreted by the elders will be used to guide planning and decision-making.
- The issues surrounding wealth distribution will be tackled using Aboriginal values of kindness and sharing.¹²⁵

125 Newhouse, "Modern Aboriginal Economies", pp. 95-96.

The Aboriginal entrepreneur

The increasing number of Aboriginal businesses launched in the last decade have ranged from cottage industries providing goods and services in traditional communities to firms that compete in sophisticated, internationally competitive industries such as control technology, fashion, food products, architectural services, communications and computer-based manufacturing.

Most firms that have an individual entrepreneur at the helm are relatively small. Many provide a living for the owner and perhaps three or four employees. Some, especially in isolated and northern communities, may not generate enough income for the family but require supplementation through the harvest of country foods or part-time employment elsewhere. In most cases, however, these enterprises give owners and their employees a sense of self-reliance they may not have had before and an opportunity to acquire skills that may lead to larger undertakings in the future.

As we have seen, the rate of business ownership in Aboriginal communities is, on average, considerably less than it is in non-Aboriginal communities - perhaps half. Genuine entrepreneurs with the skills to turn a small beginning into a major enterprise are few in number. But such individuals are found among Aboriginal people as they are in any other population. Some run their own enterprises. A number direct their skills and energies to the growth of community-owned businesses. There are, however, many more capable of joining the ranks of small businesses. These individuals provide the many goods and services that meet the requirements of any community.

Aboriginal entrepreneurs confront the same challenges as other entrepreneurs in start-up operations: thorough planning, sufficient funds to sustain firms, effective production practices, appropriate marketing for products and all aspects of management. But these are compounded by factors with which other small business owners usually do not have to contend.¹²⁶ Because of their history of economic marginalization, for example, Aboriginal people have not been able to accumulate savings for business ventures or borrow from family and friends. These small pools of funds are the prime source of risk capital essential to any small business start-up.

An equally large barrier is the difficulty of obtaining loan financing from banks and other mainstream financial institutions to acquire equipment and provide cash flow in the early months. Those living on-reserve cannot use their land, buildings or equipment as collateral. It is cumbersome at best, and often impossible, for a bank to seize on-reserve assets should the business fail. Even for those with off-reserve businesses, isolation can prove a major hurdle. Equipment purchases, for example, are often financed by the manufacturer. But if the equipment is located hundreds of miles from the sales depot, the cost of repossessing it, should the business fail, often severely limits the amount of financing the seller is willing to carry. Added to this is the fact that most new Aboriginal business people do not have a track record in business operations. They may not even have a record of consumer loans because of the absence of banks in their home communities.

Aboriginal entrepreneurs wishing to start a business in an isolated location will often face the problem of a limited local market. Usually, this means providing goods and services to the reserve and surrounding communities, unless major resource development activities are nearby, in which case the scope will be larger. Alternatively, entrepreneurs may be able to engage in activities with a high value-added component and in which the cost of transportation to distant markets can be absorbed in the product price. Examples are artistic products such as Inuit sculptures; high quality

¹²⁶ For a discussion of small Aboriginal businesses see Wanda Wuttunee, *In Business for Ourselves: Northern Entrepreneurs* (Montreal and Kingston: McGill-Queen's University Press, 1992).

granite mining; specialty foods such as wild rice and salmon; and tourism related to fishing, hunting and the natural environment.

Isolation also limits the ability to take advantage of business services, such as planning, consulting advice on production or marketing, financial services, and training facilities for staff. Often, speedy access to these services can be critical to success when businesses are facing specific challenges. Technology is making some of these services accessible to small communities. Accounting software designed for small businesses and customized for the particular circumstances of the Aboriginal entrepreneur, make financial management much more accessible.¹²⁷ Other technologies can bring a wide range of advice as close as a telephone line or a fax machine. But these methods of communication are fully effective for start-up businesses only with the assistance of business advisers familiar with the isolated firm and its needs. Such advisers operate out of certain Aboriginal development corporations as well as through other non-government agencies, such as the Canadian Executive Service Overseas, which have served Aboriginal businesses in the domestic market for a number of years.

Isolation may also mean contending with a community that resents entrepreneurs who take advantage of opportunities to provide a better life for themselves and their families. This hostility is, unfortunately, all too common. It severely impairs the chance of business success, and if one family falls prey to such attitudes, it can have a devastating effect on others' aspirations for self-reliance.

Individual entrepreneurs who begin to succeed are often seen as too independent and apart from the collective; this often results in lost opportunities for individuals to develop market niches in their own communities. This issue has to be addressed if the Aboriginal community is to have motivated and self-sufficient entrepreneurs with the ability to take advantage of opportunities in the marketplace and contribute to the economic growth of the community.¹²⁸

Participants in a national conference on Aboriginal entrepreneurship sponsored by the Institute for Research on Public Policy arrived at the following conclusions on this subject:

*Native entrepreneurs need the recognition and support of their communities The communities should understand that enterprises serve the population and bring prosperity and jobs to the communitiesEntrepreneurship needs to be legitimized in the communities and young people must be made aware of it through the education systemIn communities that are more developed economically, the change is already apparent: "At Mistissini, people are proud of their enterprises, and every member of the community is determined to help."*¹²⁹

Entrepreneurs who find themselves in communities with little or no tradition of individual businesses need to make building links with the community an essential part of their business planning. Not only should they plan to keep their lines of communication open to all groups, they may also want to consider returning to their communities a portion of their earnings, for example by sponsoring recreational activities or contributing to educational facilities. Mainstream businesses

127 Abenaki Computer Enterprises Ltd., a First Nations company with offices in Orleans (Ontario), Akwesasne and Winnipeg, developed software geared to the requirements of Aboriginal communities to supplement existing accounting programs. Their programs include modules for administering economic development, education and housing programs.

128 Obonsawin-Irwin Consulting Inc., "Fostering the Growth of the Aboriginal Business Sector", policy paper prepared for RCAP (1994).

129 Yvon Gasse and Harold Bh  rer, eds., *Native Entrepreneurship: the Key to Autonomy*, Proceedings of the National Conference on Native Entrepreneurship (Quebec City: Institute for Research on Public Policy, 1990), pp. 74, 75.

often find this a valuable way to establish their identities in communities. Small-town and village life makes this even more important.

Given the critical need to restore self-reliance and self-sufficiency in Aboriginal communities, what can be done to overcome barriers to entrepreneurship? Government has been relatively active and somewhat effective in the field of Aboriginal economic development in the last decade, even though the resources devoted to it are dwarfed by those spent on welfare and other social programs. Earlier in this chapter, we recommended that delivering small business support be the responsibility of emerging nation governments. That being so, what has been learned from the recent experiences of individuals, communities and governments? We discuss two aspects of supporting entrepreneurship: the provision of business services and the need for loan and equity capital.

Business services

Guides to business planning are available from banks, funding agencies and bookstores. However, most would-be entrepreneurs also need interaction with others experienced in business start-ups. Good advice, however, is hard to obtain.¹³⁰

The risks in hiring consultants to write business plans and funding applications are twofold. Consultants may see their future business as dependent on their clients' success in obtaining funding. They may then be tempted to tell the client what he or she wants to hear or to second-guess what will trigger acceptance from the funding agency. The other possible disadvantage is that the business plan will be constructed by the consultant with little real ownership or understanding by the client. In either case, the entrepreneur ventures forth with a sense of security that the problems have been identified and the remedies designed, only to find that reality is quite different.

Local development agents, especially in isolated regions, admit they do not have sufficient experience to face up to the responsibilities entrusted to them; the band councils say the decisions they have to make often exceed their capacities, thus forcing them to call in increasingly costly advisory services from outside, or involve people who are poorly prepared for work in a Native environment.¹³¹

The need for sound business advice is further justification for its delivery to be monitored by an Aboriginal development agency. If such an agency has staff who can provide frank and objective advice in a way the entrepreneur fully understands, major problems can be avoided. Such advisers do not need to be staff members. The agency can ascertain over time which consultants provide consistently good service.

Putting in place a detailed business plan can be a vital learning experience for the entrepreneur. If the development agency or bank is doing its job, it will require planning and preparation that the entrepreneur may regard as red tape. Criticism about the time taken or the procedures imposed by banks and funding agencies often relates to unnecessarily bureaucratic processes. It may also be the entrepreneur's expression of frustration at the need to address all the issues before opening for business.

An effective business plan is a first step. Equally important are sound accounting advice and specialized production or marketing assistance. Start-up businesses can often benefit greatly from the advice of knowledgeable counsellors who can look at key aspects of the operation, such as

130 Canadian Executive Service Organization, brief submitted to RCAP (1992). The brief stresses the importance of business advice, not only before businesses start up but also in the early stages of their operations.

131 Gasse et al., "Development of Entrepreneurship" (cited in note 123), p. 10.

inventory control, bookkeeping practices and product marketing. Availability of these services is limited in isolated locales. Aboriginal governments that place a high priority on economic development have put in place their own specialized consulting services staffed by trained professionals who understand the requirements and values of these communities and are well versed in the disciplines of commercial enterprise. Touch the Sky, serving Six Nations communities, the Nishnawbe-Aski Development Corporation, which serves 43 communities across northern Ontario, and the Apeetogosan Development Corporation, which serves the Metis Nation of Alberta, are three such services. Business expertise delivered in a manner that is relevant and culturally appropriate for the Aboriginal entrepreneur is a vital factor in creating sustainable businesses.

Recommendation

The Commission recommends that

2.5.18

Governments, as a high priority, improve their economic development programming by

- (a) developing business advisory services that combine professional expertise with detailed knowledge of Aboriginal communities; and
- (b) placing these advisory services within the emerging economic development institutions of Aboriginal nations.

Access to loan and equity capital

Commercial loans are often vital in the start-up phase, when availability of cash from sales is limited. Throughout a business year, expenditures will sometimes exceed receipts, and access to a line of credit will be needed. At other times, new equipment or facilities will be necessary but the funds to invest unavailable. These instances call for a term loan.

However, no business can begin with borrowed funds alone. Loans have to be repaid in regular instalments, putting pressure on the business in its early stages, when revenues from sales are limited and expenditures to establish production and marketing facilities are high. Without the entrepreneur's own funds or interest-free loans, the business is not likely to be viable. The smaller the ratio of debt to equity, the better chance the business has of becoming established successfully. For similar reasons, commercial financial institutions will not lend money unless the business has a significant amount of equity. This equity is also viewed as a measure of the entrepreneur's level of risk in the business and therefore his or her commitment to its success. Thus, both loans and equity capital are required for businesses to succeed.

The role and development of collectively owned enterprises

It is largely through collectively owned enterprises that Aboriginal nations have become significant players in regional economies and industrial sectors. These are companies in which shares are held by the community or the nation government on behalf of its members. The Commission investigated the experience of a number of successful community-owned enterprises operating across Canada. Companies consulted were Meadow Lake Tribal Council Forest Industries in Meadow Lake, Saskatchewan; Torngat Ujaganiavingit in Nain, Newfoundland and Labrador; Westbank Development Indian Band Corporation in Kelowna, British Columbia; Tribal Councils

Investment Corporation of Manitoba in Winnipeg, Manitoba; Burns Lake Native Development Corporation in Williams Lake, British Columbia; Opasqueya Development Corporation of The Pas, Manitoba; Advanced Thermodynamics Corporation of Sault Ste. Marie, Ontario; and B&D Plastics of Regina, Saskatchewan.

Most of these businesses are professionally managed, with direction given by a corporate board. In many cases, these boards operate at arm's length from the political authorities who represent the people to whom the enterprise is ultimately accountable. In some corporations, the separation between political authorities and business managers is either informal or exists only on paper. Others have gone to great lengths to make the division both formal and effective. The issue of political control is critical in the effective operation of these companies.

The corporations operate a wide range of commercial endeavours. They run regional and feeder airlines across the north of most provinces and in the territories. They operate trucking companies and bus routes. They engage in forestry management, silviculture, harvesting and wood processing. They run grocery stores and wholesale food distribution networks. They own motels, hotels, casinos, four-star resorts and golf courses. They arrange eco-tourism expeditions, international snowmobile treks and opportunities for visitors to spend time on the trapline. Game ranching, fish harvesting and processing, catering, construction of every kind, housing co-operatives, health care facilities, and a wide range of manufacturing are all opportunities for self-reliance.

Most of these enterprises are less than 10 years old. Communities have learned a great deal as they grappled with running a major business using procedures, values and market realities that are often at odds with community tradition and expectations. Many mistakes have been made, many investments lost. By the same token, for dozens of communities across the country, the operation of a modern commercial enterprise is no longer a mystery. Hundreds of people have gained the confidence that comes from developing skills and the stability of a regular income and have dramatically altered the way they view the world.

Collectively owned enterprises face many of the same challenges that individual Aboriginal entrepreneurs confront: access to sufficient equity capital, an assured source of loan financing, and acquiring skills in production, finance and marketing. Collectively owned firms often find the necessary equity in the finances of their governments, but this can mean difficult trade-offs and usually requires strong commitment from community leadership. Many of these firms have been able to obtain funding from the federal government's Aboriginal economic development strategy, particularly if they can demonstrate a strong business plan and good employment prospects.

Access to financing is often hampered by the size of these operations and the lack of experience managing complex businesses. Lenders are cautious and will often seek a loan guarantee from the federal or Aboriginal government or assurance that suitable assets are pledged as collateral.

Finding appropriate advice is another challenge. These operations usually require highly detailed business planning that draws on the advice of specialists such as engineers, industry analysts and accountants. Great care needs to be taken to ensure the advice is thorough.

These projects are often politically driven, with the project being held out as a solution to pressing community problems. Such projects are always more complex to put in place and run profitably, often requiring more time and money than initially expected. Successful companies are usually the result of vision and dogged determination, paired with cautious scepticism and an ability to ask the hard questions. An example is the Meadow Lake Tribal Council in Saskatchewan, which has a 20-year plan to reduce unemployment and achieve parity in jobs and incomes with broader Canadian

society. Its strategy includes both ‘pull’ and ‘push’ elements. The pull elements involve creating opportunities that draw individuals into employment. The push element consists of enhancing people’s abilities and thereby creating an environment conducive to the development of Aboriginal subcontractors who can capture the spin-off activity created by the larger businesses. This latter strategy is supported by business development services, employment services, human development resources services and some equity funding.

In addition, because of their ownership structure and the major role they may play in the life of a community, collectively owned enterprises face particular challenges relating to four general themes: securing community support; instilling responsibility among employees; training the work force and management; and relating to the political representatives of the shareholding members of the community.

Securing community commitment

Many company managers have discovered that the commitment required from the community to support collectively owned enterprises, whether in funds invested or skills acquired, is usually found only when the community has been involved in the project from the beginning.¹³² Carry-the-Kettle First Nation held 10 meetings with community members over three years when developing a joint venture with B&D Plastics, a plastics manufacturing operation. Professionals from the company were brought in to explain aspects of the business project when needed. People participated actively in the process and were always aware of the status of the project.

A key part of these meetings was to explain the risks and benefits of the project and its underlying objective to provide meaningful work for community members. People’s questions were answered fully and openly, and objections were considered. What appeared to be critical for this community and for others was that there be effective communicators who could bridge the gap between business language and the language of the community, and between community leadership and members.

Community support is often critical when the business management faces difficult choices. Because of their early involvement, the Carry-the-Kettle chief and council supported community members on the board when the members believed they were not getting either the training their partners had promised or an accurate picture of company performance.

The importance to community members of attending feasts, pow-wows and funerals was explained to the non-Aboriginal manager of B&D Plastics. Attending these events is now accepted as a legitimate reason for being off work. For others, who feared development would undermine their culture, it was pointed out that the increased prosperity available to the community made it possible to pursue Aboriginal language programs and cultural events.

Community members are often concerned about the infusion of what they see as alien values and ways of doing things. Managers who do not structure their projects to conform to community values, communicate constantly with the community, and provide opportunities for feedback may find themselves isolated and their projects a source of strife and division.

When the Meadow Lake Tribal Council initially embarked on its venture with the forest industry, there was little community involvement. As harvesting progressed, community members became

¹³² This finding and subsequent examples in the chapter come from interviews conducted with managers of community-owned enterprises by Dr. Lorne Ellingson of Toronto Consultants International Ltd. on behalf of RCAP.

dissatisfied with approaches being taken, and some resorted to roadblocks against their own company to make a point. A resolution occurred when co-management boards were formed between community representatives and the company to review cutting practices and other company activities and to allow the input of environmental, social and culturally related perspectives.

Community commitment to a granite quarry in Nain, Labrador was secured after project managers demonstrated that their plans did not conflict with community values. Remote communities are often concerned about the impact on traditional activities such as hereditary traplines. Initially, the community of Nain resisted the idea of developing a granite quarry because working on stone was not seen as a traditional pursuit. People wanted their money invested in the fishery instead. The debate ended when a group of artists pointed out that they had always worked with stone, causing people to rethink their definition of traditional work.

Instilling motivation and pride

Some of the challenges facing collectively owned enterprises are lack of motivation and sense of responsibility. When an individual entrepreneur operates a business, his or her own assets are at risk. This usually results in high productivity by the individual and the family who can see a direct link between their work and the success of the business. When the enterprise is collectively owned, everyone's - and therefore no one's - equity is at risk, and other sources of motivation are required. This is where the community's perception of the project is vital. If the project is a source of pride and accomplishment, those who make it successful are seen to bring honour to the community, which can be a powerful source of motivation for them. As one manager said, "pride breeds success and success breeds pride". But if the business is a source of division or is seen as the preserve of a favoured few, this can have a direct bearing on how people approach their work.

The 20 people working at the granite quarry owned by the Torngat Ujaganiavingit Corporation in Nain are proud to be part of a project that is bringing money into the community, money that can be invested in other community projects. At first, there was pressure from the community to spread the work around so that a larger number of community members could work enough days to qualify for unemployment insurance benefits. It was later accepted that such a practice would prevent the development of an experienced work force and jeopardize the company's productivity as well as undermine workers' pride. It was also recognized that workers needed stable incomes to enable them to plan for the future.

Employees express their pride in the project in a number of ways: by wearing jackets identifying themselves as company employees, by upgrading their education in their spare time, and by making the operation of the company a major source of conversation in the communities. Employees wishing to take time off to hunt, fish or visit distant communities find a qualified person to fill in for them.

Merv Tiller, president and chief executive officer of the Tribal Council Investment Group of Manitoba Ltd., sees an example of this pride in his shareholders, the individual Manitoba tribal councils. Although they are always short of funds, the tribal councils have not stripped one of their companies - the highly profitable Pepsi-Cola bottling operation, Arctic Beverages - of cash assets. Instead, cash has been left in the company to pay down debt and fund future investments.

Much has been written in recent years about the effectiveness of team circles in business enterprises. Companies that have organized their work force in teams and given them major responsibility have generally found that people are more productive and innovative than workers

reporting to supervisors. This approach mirrors the way many Aboriginal people have traditionally approached tasks. It avoids the individualism alien to most Aboriginal people's traditions while still encouraging excellence in each person's contribution to the team effort.

Equipping the community with needed skills

Ensuring that the management team and the work force is fully trained is a further challenge. While outside professionals can be hired at the beginning, depending on individuals with little commitment to the community can be risky. Without its own people at key places in the company's operations, the community's assets may be placed in jeopardy. Before undertaking a collectively owned enterprise, then, a community needs to consider whether it is prepared to support those who may need to leave the community for an extended time to gain education and experience.

Many managers conclude that it takes community members, in general, two to five years of work within the company to take over mid-level technical and managerial positions. For positions at the upper levels, at least twice as much time is required. More than just waiting for experience to be acquired is involved; much effort is also spent actively training employees to move to the next level.

The Commission heard of the gap in training available to Aboriginal middle and senior managers. We were told that what was needed was training that did not require long absences from the community but that could be taken over several years in blocks of several weeks at a time.

Companies have suffered major set-backs as a result of high turnover among non-community management. As pointed out earlier, nothing is needed more urgently than a large pool of Aboriginal men and women with the education and work experience needed for technically demanding jobs. The time taken to acquire this experience away from the community is a vital investment in the future.

Role for political leadership

Perhaps the biggest potential obstacle for collectively owned enterprises is the relationship between the political authorities and the managers of the companies.

Communities also have difficulties in separating political and commercial issues. In our experience, Aboriginal industry thrives where community governments choose to put development corporations and community-owned enterprises at arm's-length from the political process for operational purposes.¹³³

Management has a duty to reach agreement with the political leadership of the community on the overall goals for the enterprise and to be accountable in meeting those goals. But the detailed operational decisions - what skills are needed, who should be hired, when workers need to be laid off, what supplies to buy, who receives contracts - are the business of management. Interference in these matters from political authorities destroys managers' confidence and their accountability.

Several collectively owned companies have found ways to preserve their operational independence while acknowledging their accountability to shareholders. Some stress these dual responsibilities during staff training sessions and in their literature. Some provide training on the responsibilities of board members with emphasis for elected politicians on the difference in their dual responsibilities.

¹³³ Aboriginal Industries Committee, *For the Benefit of All: Report on Aboriginal Business Management Development* (Montreal: November 1991), p. 24.

Council members from the Westbank First Nation who serve as the directors of the band corporations are not paid for the latter responsibility and are expected to focus on the profitable operations of the company. Any outside moneys they earn as directors or members of commercial boards during normal council working hours go directly to the band.

It is important that Aboriginal governments vest sufficient operating authority in the economic development organization. The role of these organizations varies with the community. For example, the Batchewana economic development institution, joint owner of Advanced Thermodynamics of Sault Ste. Marie, seeks out business opportunities, analyzes them, structures deals and oversees its investments by taking positions on its boards of directors. In the Westbank community, the economic development institution acts as a developer and landlord, spinning off business opportunities to individual community members.

But the economic development organization has to win the confidence of the political leadership. The chief executive officer of the Peskwayak Development Corporation, Glen Ross, says that this confidence has to be earned and can be built up only over time. But with it comes greater authority to act independently and in the best interests of the enterprise. The Tribal Councils Investment Group of Winnipeg experienced the same need to build and sustain the confidence of its shareholders, the seven tribal councils in Manitoba.

In many communities, chiefs and councils participate in initial planning sessions for the economic development organization and undertake annual reviews. This joint planning process keeps people motivated and enables the political leadership to assess the performance of the organization against its original goals. Planning sessions provide a means for formal accounting without interfering in the running of the business.

The performance of political institutions is important in another respect. Frank Lai, director of economic development for the Meadow Lake Tribal Council, attributes much of the success of his organization to the fact that the tribal council speaks with one voice. Management therefore reports to one boss, the council, and not its nine individual members. This creates a stable environment within which to build the business.

Other factors

A further factor that these managers said was of vital importance was ensuring that the nation had as much control over the development process as possible. The head of the Labrador Inuit Development Corporation, Fred Hall, put it succinctly: “Don’t let others take control of your development projects”. This is true whether it is advisers who want the community to do something it does not want to do, government officials who want the project structured to achieve objectives unrelated to the success of the enterprise, or banks and other funding agencies that want to be protected from project risk.

Merv Tiller of the Tribal Councils Investment Group stressed the importance of taking the time to examine all aspects of a project before investing. He has found that other parties, including government, wanted to close a deal too quickly, before due diligence had been exercised. Others warned of the temptation to accept without question outside advice because one’s organization is small and without the skills to develop business arrangements. Most managers stressed the need to achieve a profitable operation:

Losing money in a business is a waste of your resource. What you are in effect doing is

*subsidizing your stronger people and therefore you will have nothing left to help others. People had to be shown the need for a profitable project to generate money to invest in profitable projects in other communities. If your project becomes a make-work project you are on a treadmill to nowhere.*¹³⁴

*“It is very important to have profit as a prime motivator in business,” says Chief Robert Louie of the Westbank First Nation. “People take pride in working for a profitable business and view it as their own company.”¹³⁵ Employment is a second motivator in many instances. The general manager of the Burns Lake Native Development Corporation pointed out that most administrators on reserves have experience managing allocated funds to maximize job creation but that managing a company to make a product and sell it at a price that exceeds cost requires a wholly different mind-set.*¹³⁶

While most of the communities that are shareholders in Tribal Councils Investment Group understood the importance of profit, those that had their own experience setting up and running businesses were the most informed.

Communities that have successfully launched these kinds of enterprises share a common feature. Once the initial project is under way, work on other projects is stimulated, and business-minded people in the community take initiatives to start their own businesses. Developing self-reliant attitudes can be accelerated by a small, astute group who use their talent to create a project that moves the whole community forward. It appears essential for the success of these enterprises that a ‘champion’ (or more than one champion) step forward to commit to the project with a vision of what it can do to benefit the community at large.

Champions often spend thousands of hours getting an enterprise off the ground. All the businesses surveyed reported the need to overcome a series of obstacles: unhelpful banks, cumbersome government bureaucracies, business partners that don’t follow through on commitments, poor initial purchase decisions, inadequate management experience and lack of confidence in the process. These businesses, and many more collectively owned enterprises, persevered to overcome these obstacles. Others did not, and their collapse often damaged gravely the confidence of their communities.

Many of these firms have entered into joint venture arrangements with non-Aboriginal companies. These are launched for a variety of reasons. The other firms may have access to technology, management, markets or financial resources that make partnership advantageous for the community firm. Managers felt it was critically important to understand what the Aboriginal party was bringing to the table and the value of that to the prospective non-Aboriginal partner. When communities understood and developed their sources of competitive advantage, it worked in their favour.

The Burns Lake Native Development Corporation worked hard to get sizeable timber rights from the British Columbia government, which it could then bring to the table in negotiations with Weldwood to form Burns Lake Specialty Woods. The Labrador Inuit understood the value of their granite. Batchewana Band Industries Ltd. knew that its potential partner was seeking a northern location to put it in a better position to bid on defence contracts. Each of these Aboriginal firms

134 Interview with Fred Hall, reported in Lorne Ellingson, "Community-Owned Enterprises" (Toronto: Toronto Consultants Ltd., 1995), p. 14.

135 Robert Louie, Chief of the Westbank First Nation, quoted in Ellingson, "Community-Owned Enterprises", p. 14.

136 Interview with Gary Kijowski, reported in Ellingson, "Community-Owned Enterprises", p. 14.

invested long hours and considerable resources to understand their advantages and to ensure their credibility.

Much has been learned from experience with partnerships. It is vital that factors such as meaningful representation on the joint venture's board of directors and within the company's management be obtained by the Aboriginal party.

With the passage of time and the increase in personal wealth, a number of these companies may decide to sell shares to the Aboriginal or general public so that there is a greater measure of private ownership. Some communities, such as Westbank, are selling their corporations to individual community members in order to free up capital for investment in new ventures. This approach is not yet widely practised, largely because the necessary private wealth is not yet available. There is little question that the community-owned corporation - whether at the level of the individual community, the region or the Aboriginal nation - will continue to be a major instrument by which the Aboriginal economy is developed in most parts of the country.

A Nation can come up with the best systems and processes yet, if there is no community involvement, it will not facilitate the business of the Nation, because the members had no part in the determination of it.¹³⁷

Access to markets

Any business that is not subsistence oriented has to find a market for its goods and services, and this can be difficult for new enterprises starting out or for existing firms in a competitive environment. The problem is particularly difficult when social or geographic isolation separates a business from its potential market.

There is no magic formula for resolving market-related problems. In the contemporary economy, there are few sheltered markets left, and in the end there is no substitute for a high- quality product (whether a good or a service) offered at a competitive price and promoted in the marketplace by a sales team with highly developed marketing skills. However, the Commission's case studies and other information sources reveal a number of strategies that could be helpful to Aboriginal businesses. Some of these have implications for public policy.

Import substitution

Many Aboriginal communities have made progress with a strategy of import substitution, seeking to provide goods, services or programs to their communities that were previously provided by firms, organizations or governments external to the community. The Shuswap Tribal Council, for example, identified the high level of economic leakage from its communities (discussed earlier in this chapter) and adopted a strategy of developing local businesses to serve one or more of its communities. By acting at a tribal level and demonstrating the collective purchasing power of the Shuswap people, it has been possible to negotiate with off-reserve businesses for employment and business opportunities (for example, to establish a franchise travel agency). Other communities have established grocery stores or gas stations to capture at least some of the business of their residents. A few have joined together to purchase small airlines, trucking companies and food wholesalers and retailers.

137 Peter Quaw, Chief of the Lheit-Lit'en Nation, speaking at the conference "Doing Business with Aboriginal Canada" (Toronto: *The Financial Post*, 21 April 1994).

Contracts, not subsidies

In terms of export-oriented strategies, some Aboriginal business people argue that they should be given contracts, not subsidies. What they mean is that government departments and other funding agencies often appear more willing to subsidize Aboriginal businesses than to purchase goods or services from them. While there may be a need for continued subsidies to emerging Aboriginal businesses that have difficulty getting capital, if self-sufficiency is a major goal it is necessary to balance these subsidies with procurement policies and practices that ensure Aboriginal businesses receive a fair share of contracts to provide governments with goods and services.

The development of set-aside programs, which would ensure that Aboriginal businesses obtain a specified proportion of contracts given out by governments, is therefore an important policy direction that would support the development of Aboriginal businesses. An initiative along these lines is being pursued by the federal government, which has announced a strategic procurement policy favouring small businesses and Aboriginal businesses. The policy would “give them exclusive access to purchases below \$125,000 when qualified, cost-effective suppliers are available”. Another program would set aside “selected procurement over \$125,000 for preferential bidding by Canadian small and Aboriginal businesses, where potential exists to support or develop innovative firms and where cost-effectiveness can be ensured. Increased emphasis will be placed on requiring prime contractors to provide subcontracting plans to Canadian small and Aboriginal businesses”. There are also plans for a set-aside program for Aboriginal businesses “for procurements destined primarily for Aboriginal populations, where cost-effectiveness can be assured”.¹³⁸

This initiative has the potential to open up markets for Aboriginal businesses, although much will depend on the manner of its implementation. There is concern, for example, that if Aboriginal businesses are placed in the same category as all small Canadian businesses, they will be overwhelmed in the bidding process. There is also no special provision for assisting businesses owned by Aboriginal women.

The larger difficulty is that set-aside provisions are not being used in many jurisdictions. Until this initiative, the federal government had resisted the idea, and there is little such activity in provincial and territorial governments. Only a small number of urban governments, notably those in Halifax, Dartmouth and Toronto, are gaining experience in assisting such businesses.

Trade expansion initiatives

Another option that deserves further examination is expanding trade, both among Aboriginal communities and with non-Aboriginal customers. In trade among Aboriginal communities, there is a strong demand for specialty products, such as country foods and materials for arts and crafts production. There are also examples of links between Aboriginal producers and harvesters in rural areas and Aboriginal owners of retail outlets selling goods such as fish, blueberries and wild rice. Urban businesses can perform service functions for rural communities - for example, serving as a broker for the purchase of materials in bulk for distribution in rural communities, or building and managing housing for students and others who migrate to urban areas. These intercommunity links

138 Industry Canada, *Agenda: Jobs and Growth: Building a More Innovative Economy* (Ottawa: Supply and Services, 1994), p. 22. Since this policy document was issued, Industry Canada has encountered strong opposition from the business community to the idea of set-asides for small business. While a cautious initiative is proceeding at DIAND, mostly for on-reserve businesses, Industry Canada is attempting to make the government's open bidding system more accessible to suppliers in general rather than giving preference to particular segments of the business sector.

can also be extended to the international level, and indeed some examples are emerging in different parts of the country.

The brief to the Commission by the Canadian Association for Aboriginal Business recommends the establishment of an Aboriginal trade commission to promote Aboriginal products.

An Aboriginal Trade Commission (ATC) should be established. The Commission would serve the dual purpose of: (1) promoting trade among Aboriginal businesses, Aboriginal and non-Aboriginal governments, and the private sector, and (2) assist and promote the trade of Aboriginal goods and services abroadAn Aboriginal Trade Commission would act as an important conduit for Aboriginal goods, services and market information in national and overseas markets. The ATC should coordinate a “Buy Aboriginal” marketing strategy, identifying products made by Aboriginal companies and entrepreneurs, and advertising them in a manner similar to the “Buy Canadian” strategy. Small and geographically isolated communities could work through the ATC to help identify viable economic opportunities for local goods and services. A permanent secretariat should be created, and offices should be established in every province and territory. Offices should immediately operate in countries where market opportunity presently exists (e.g., Japan, Germany, Great Britain, Hong Kong, Sweden).¹³⁹

Pursuing niche markets

Promoting Aboriginal trade could lead to growing economic opportunities for Aboriginal people in specific sectors of the economy, especially those in which Aboriginal people have a competitive advantage arising from factors such as land claims settlements, the location and natural resources of communities, jurisdictional advantages, and cultural understanding and values. Examples include the following:

- Aboriginal arts and entertainment, showcasing the wealth of Aboriginal talent in cities such as Toronto, Montreal, Edmonton, Vancouver and Ottawa;
- eco-tourism, allowing distinctive Aboriginal environments to attract a public that is becoming increasingly interested in ecologically sound forms of recreation; and
- clothing designed and made by Aboriginal people, including winter clothing produced in northern communities.

Research is needed to identify specific opportunities and to counter the barriers to access experienced at the community level.

Other strategies

Other initiatives include converting services currently provided by the public sector to private Aboriginal enterprises, as in the recruitment of Aboriginal people for the federal public service to fulfil the government’s commitment to employment equity. New markets can also be reached by Aboriginal businesses entering into joint ventures with established non-Aboriginal businesses.

The most beneficial form of intervention to expand markets would be the initiation of effective set-aside programs by all levels of government as part of their procurement strategy and the development of a capacity to promote trade in Aboriginal-produced products.

¹³⁹ Canadian Council for Aboriginal Business, "Presentation to the Royal Commission on Aboriginal Peoples, Spring, 1993", brief submitted to RCAP (1993), pp. 32, 33.

The Commission is not convinced that a single national body, such as the proposed Aboriginal trade commission, could effectively advance trade in a wide variety of goods and services. There is also the danger that such a body would be too remote from the ideas and concerns of those it is designed to serve. Instead, the Commission believes that the objective of trade promotion will be better served by the sectoral and nation-level economic development institutions discussed earlier. In addition, the international trade promotion services of the federal government, as well as provincial consulates abroad, should become skilled in the promotion of Aboriginal-produced goods and services.

Recommendations

The Commission recommends that

2.5.19

The capacity for trade promotion be built into the sectoral and other economic development organizations of Aboriginal nations, as appropriate.

2.5.20

The international trade promotion agencies of the federal and provincial governments, in co-operation with Aboriginal producers and economic development institutions, actively seek out markets for Aboriginal goods and services abroad.

2.5.21

Provincial and territorial governments join the federal government in establishing effective set-aside programs to benefit Aboriginal businesses and that municipal governments with large proportions of Aboriginal residents also undertake these programs.

Access to capital

Generally, access to capital is a problem for small businesses in Canada, especially those located in less developed regions of the country.¹⁴⁰ In Aboriginal communities, the lack of capital is often cited as the principal constraint facing those who wish to establish or expand business ventures. For example, the Commission's community case studies reveal the frustration of on-reserve business people with restrictions imposed by the Indian Act; the limitations placed on business activity by the lack of financial institutions, in northern communities especially; the lack of capital to launch businesses in the Metis settlements of northern Alberta; and the shortage of capital for Métis and First Nations enterprises in urban areas. Similarly, the Commission's research on Métis agriculture shows that 90 per cent of Métis owners of small farms in the prairies would like to expand their farming operations, but that 80 per cent lack capital.¹⁴¹

The issues involved in improving access to capital are complex, and there is no single solution. It is encouraging, however, that there are numerous initiatives - some of them quite innovative - to

140 See, for example, *Canadian Business Speaks Out on Access to Capital* (Ottawa: Canadian Labour Market and Productivity Centre, 1995).

141 Fulham, "An Historical Review of Métis Agriculture" (cited in note 96).

resolve the problems, including the growing involvement of Canada's chartered banks and the credit union movement (the caisses populaires in Quebec).

In this section, the factors that restrict the availability of capital to Aboriginal businesses are examined. We then move to a discussion of the role of financial institutions in helping to resolve the problem, as well as the contribution of other programs or initiatives. The section concludes with a discussion of the Indian Act and how the limitations it places on access to capital are being surmounted.

Barriers to access to capital

The following are the most important limitations that stand in the way of access to capital for Aboriginal businesses:

- The Indian Act. The Indian Act contains certain provisions that make it very difficult for lenders to secure loans using land and other assets located on-reserve as collateral. These provisions serve as a significant deterrent to financing business activity on-reserve.
- Socio-economic conditions. Communities with high levels of unemployment and low incomes provide few opportunities for individuals to accumulate savings that might be used for business investment. These limitations are particularly acute for Aboriginal women if they are sole-support parents, as many are.
- The size and location of communities. The small size of Aboriginal communities and their location far from urban areas can be deterrents to the development of financial institutions, such as bank branches, in the community.
- The characteristics of the businesses. The vast majority of Aboriginal businesses are small in size, and most provide services to the local community. Mainstream lending institutions view these businesses as high risks. As well, small loans entail high relative administrative costs. Under these conditions, more stringent conditions may be demanded, such as a higher level of interest and more security.
- The characteristics of the entrepreneurs. While a skilled entrepreneurial class is re-emerging in Aboriginal communities, many of those applying for loans, grants or equity investments have little education and training and a short or uneven track record in business. They may have limited knowledge of alternatives in acquiring capital and need help with the process.
- The characteristics of the lending institutions. Major lending institutions have, until recently, largely ignored the financial needs of Aboriginal communities, except in so far as local bank branches may have served a neighbouring band council. If loans have been made, the banks have usually insisted on having the loan guaranteed by the government. Banks, trust companies and government departments are all institutions informed by a corporate culture and accustomed to dealing with clients who fit into pre-established frameworks. Their bureaucratic organization and application requirements bear little relationship to Aboriginal conditions. Their major offices are located in urban areas. Until recently, few Aboriginal people have worked for them, particularly at senior levels. Interveners making submissions to the Commission pointed to problems of cultural difference, the lack of understanding of the needs and visions of Aboriginal applicants, and stereotyping and discrimination.

- Gaps in coverage. In the Commission's hearings and through its research program, Commissioners became aware of important gaps in the provision of capital and other financial services. First, many Aboriginal communities, and especially those in northern areas, do not have access to financial services. (See Volume 4, Chapter 6 for a detailed discussion of this issue.) Second, important constituencies, such as Aboriginal women and Aboriginal residents of urban areas, do not have as much access to Aboriginal and mainstream financial institutions as they would like. Third, Aboriginal business projects of a substantial size that create activity beyond particular communities or regions are not well served by institutions with a more limited reach.
- The amount of capital available. This factor is more controversial and more difficult to establish empirically. It is worth considering whether there is sufficient capital available on reasonable terms to meet the needs of Aboriginal businesses, quite apart from the specific barriers to access just listed. Some argue that the shortage is in the availability of sound business proposals or in the match between potential borrowers and lenders. They claim that existing sources of capital are not fully utilized. Many of the Commission's case studies of Aboriginal economies identified projects that cannot proceed because of lack of capital. The brief of the Aboriginal Peoples Business Association of British Columbia estimated the gap between client needs and the availability of capital from seven B.C. Aboriginal capital corporations at some \$43 million.¹⁴²

Promising directions

The Commission found evidence of some promising activities in financial institutions, and heard ideas about what might be done in the future at several levels: community, regional and Canada-wide.

Community level: making banking services available

Most Canadians take for granted the presence of a bank, trust company or credit union close to where they live or work. They would find it hard to imagine organizing their financial affairs without such a service nearby. This is especially true for businesses, which need to deposit receipts, pay employees or apply for loans. Yet most Aboriginal communities have no financial institutions. The closest one may be hundreds of miles away, and its staff may have little understanding of, or empathy with, the conditions under which Aboriginal businesses operate. As a result, community residents tend to cash cheques at a discount at local stores, cheque transactions take a long time in transit, and cash dealings are minimal and inconvenient. Car loans are obtained not from banks but from car dealers at high rates of interest.

In recent years, some credit unions and bank branches have been established within Aboriginal communities. However, much remains to be done. Local financial institutions are important for economic development not only because they provide financial services to businesses but because they encourage savings, guarantee deposits, and allow loans to be made under controlled conditions. Stereotypes of poverty-stricken Aboriginal communities notwithstanding, the fact is there are individuals with savings that could be put to work for the economic development of the community if the proper environment for investment was created.

142 See Aboriginal Peoples Business Association, "Access to Capital: Problems Facing Aboriginal People", brief submitted to RCAP (1993). See also Metis Settlements General Council, "Aboriginal Economies Report", research study prepared for RCAP (1994).

Commissioners heard about the success of credit unions in some Aboriginal communities, such as the Caisse Populaire at Kahnawake and the Northwest Credit Union in Saskatchewan.¹⁴³ Indeed, some credit unions, such as those located at Wendake (Village-des-Hurons, near Quebec City) and Matheusiash (Pointe Bleue, in the Saguenay region) have been in existence almost 30 years. There are also plans for expansion. The Mouvement Desjardins (a network of caisses populaires, or credit unions) is planning to establish new branches in the Cree and Inuit areas of Quebec and is working with Aboriginal financial institutions, the Quebec labour movement and the provincial and federal governments to set up a \$10 million venture capital corporation.¹⁴⁴ It is also examining the possibility of creating an Aboriginal registered retirement savings plan.

For some communities, the co-operative principles underlying credit unions are more in keeping with Aboriginal culture than are the principles governing privately owned financial institutions. There are credit unions serving a population base as small as 900 persons. Once established, they provide a full range of banking services and can be used as a repository for savings and a source of loans. They are controlled by and made responsible to their membership within each community. They provide essential training for staff, board members, and directors. Many credit unions are active in the development of their communities and are part of a Canada-wide network that provides training, support, and financial stability to new member institutions.

In Canada, credit unions are provincially licensed, and provincial governments guarantee their deposits, which facilitates adding new members to the network. In the far north, where the scarcity of financial services is particularly acute, there is no existing system to be joined, and there are major start-up costs to establish a network of credit unions. Briefs to the Commission suggested that the federal government join with co-operatives and credit unions to “provide direct and adequate financial investment to allow for the establishment of financial services in our communities through the development of community credit unions”.

The provision of financial services in our communities is essential to the development of our people individually and to our economy generally. There is a demonstrated lack of access by our people to financial services through their absence in our communities, and frustration in attempting to deal with officials of the banks that do exist in the regional centres of the Northwest Territories. Access to financial services through our credit unions will provide individuals with valuable experience and training in managing finances ... twelve per cent of local households in the communities would participate as staff, directors or on committees of the local credit unions. This represents an opportunity for our people to learn financial skills through participation at a time when those skills are in urgent demand with the implementation of land claim agreements.¹⁴⁵

Apart from the establishment of credit unions, issues relating to their effective operation need to be resolved, such as the tax status of investment earnings.

In the past, banking institutions have not been enthusiastic about providing services in Aboriginal communities. Indeed, they have been almost completely absent. They also do not have a good record of hiring Aboriginal staff. According to a 1994 report, the ‘big five’ banks had only 26 offices or banking machines on reserves across the country. Less than 1 per cent of their full-time

143 Michael L. Rice, Kahnawake Caisse Populaire, transcripts of the hearings of the Royal Commission on Aboriginal Peoples, Kahnawake, 5 May 1993; and Jo-Anne Ferguson, Credit Union Central of Saskatchewan, RCAP transcripts, Ottawa, 18 November 1993.

144 Claude Têtu, Confédération des caisses populaires et d'économie Desjardins du Québec, RCAP transcripts, Montreal, 19 November 1993.

145 See, for example, the presentation by William Lyall, "Retaining Wealth and Control in Remote Aboriginal Communities", in RCAP, *Sharing the Harvest* (cited in note 1), pp. 146-147.

staff were Aboriginal, and almost all of them worked at the junior clerical level.¹⁴⁶ These conditions are now changing for a variety of reasons. Among them appear to be the prospect of an expanding Aboriginal clientele and the developments in comprehensive land claims and treaty entitlements.

Banks and Aboriginal communities seem committed to improving Aboriginal people's access to banking services. Evidence is in the formation of a joint working group by the Canadian Bankers Association and the Assembly of Manitoba Chiefs to suggest ways of reducing barriers that First Nations people encounter at mainstream banking institutions. The areas covered by the working group suggest the concerns of both the banks and the First Nations:

- building management, administrative and business expertise;
- financing in remote areas;
- the issue of collateral among First Nations;
- bridging the cultural gap; and
- phasing the transition to First Nations financial independence.

Other initiatives include increased efforts by some banks to provide services in Aboriginal communities and to make loans to economic development projects or agencies. Several banks are trying to find ways around Indian Act restrictions on lending on reserves. There has also been an increase in the hiring of Aboriginal people. Recently, the federal government agreed to make the provisions of the Small Business Loans Act - loans provided through the banks but guaranteed by the government - available to businesses located on reserves.

While some progress is being made, the Commission believes that much more remains to be done. The means are now available to provide all Aboriginal communities with banking machines or sub-branches open a few days a week. A population of 3,000 to 4,000 people should be enough to merit the opening of a full-service bank branch or credit union. Individual branches may serve a small clientele, but economies of scale could be achieved if a bank or credit union negotiated with Aboriginal leaders in larger regions for branches to serve a number of communities. The arrangement would need to be structured to avoid abuses of monopoly power, but this approach would be more efficient than haphazard competition among financial institutions.

This approach is being pursued in Saskatchewan by a joint venture between the Toronto Dominion Bank and the Federation of Saskatchewan Indian Nations. Negotiations to develop the First Nations Bank of Canada are being concluded. This will see a deposit-taking bank created with initial capital of \$11 million, of which \$10 million will be invested by the Toronto Dominion Bank and \$1 million by the Saskatchewan Indian Equity Foundation. It is proposed that the bank start in Saskatchewan but become national in scope. A formal branch network is not planned but the new bank will use electronic banking services to connect with customers. Initially, transactions will consist chiefly of deposits and commercial, rather than personal, loans.¹⁴⁷

Measures critical to the success of these approaches include a predominance of trained Aboriginal employees, use of Aboriginal languages in the branches, elimination of legalistic and bureaucratic

146 *Aboriginal Business*, October 1994.

147 The proposed bank will be incorporated initially as a Schedule II bank but will later apply to be a Schedule I bank under the *Canada Bank Act*. See *First Nations Bank of Canada Proposal*, Federation of Saskatchewan Indian Nations, Chiefs Legislative Assembly, 20 September 1995.

language, wide availability of information, and the provision of business training programs for clients.

Recommendation

The Commission recommends that

2.5.22

Banks, trust companies and credit union federations (the caisses populaires in Quebec), with the regulatory and financial assistance of federal, provincial and territorial governments, take immediate and effective steps to make banking services available in or readily accessible to all Aboriginal communities in Canada.

Community level: micro-business lending and support programs

In recent years, more attention has been focused on the contribution that very small businesses can make to the economic development of a community in general and to providing business-related income for women in particular. Micro-businesses, as they are called, can be initiated with very small amounts of capital - loans of perhaps \$1,000 to \$2,000. The brief to the Commission from Economic Development for Canadian Aboriginal Women gives examples from developing countries to show how such loan funds operate.¹⁴⁸ Examples include the Grameen Bank in Bangladesh, the Self-Employed Women's Association Co-operative Bank in India, Women's World Banking (based in New York), the Kenya Women's Finance Trust, and the Asociación dominicana para el desarrollo de la mujer in the Dominican Republic.

In Canada, at least two groups operate in this tradition. The best known is the First Peoples Fund, established by the Calmeadow Foundation. Begun as a trial experiment on three Ontario reserves, the fund is now being established Canada-wide and is aimed particularly at reaching Aboriginal women on reserves. A representative of the fund described the program at our Toronto hearings:

This is how it works. The community raises 25 per cent of the cash required to secure an operating line of credit [from a bank or credit union]. The First Peoples Fund guarantees 50 per cent of the line and makes arrangements with the participating financial institution to provide a line of credit for four times the amount of the community security. This line of credit serves as the community's loan fund.

Potential borrowers form circles of from four to seven individuals - business owners or potential business owner/operators - who in effect co-sign or guarantee each others' loans. That is, if one person gets a loan, each of the other circle members have approved that loan and have agreed that they will pay off the loan if the borrower does not. Each of the circle members understands that if a loan is defaulted by someone in their group, there will be no more money advanced to any member of the group until the loan has been paid in full by the borrower and/or by the circle.

148 Economic Development for Canadian Aboriginal Women (EDCAw), "Access to Financial Institutions by Aboriginal Business Women", brief submitted to RCAP (1994).

*There is no collateral or equity needed by the individual borrower. Rather, their reputation or good name in the community is used by other community members to assess their credit worthiness and to make the decision on whether that person will receive that loan or not.*¹⁴⁹

There are also provisions for having the community gradually take over Calmeadow's portion of the security.¹⁵⁰

An example of a somewhat different approach is provided by the SEED Project in Winnipeg. Here, the intended beneficiary is the community in the inner city, especially people with a family income of less than \$30,000. Interested people are invited to apply for loans and then are interviewed, screened and asked to attend a one-day meeting with staff and other potential borrowers. At this event, there is discussion of the business plan and of borrowing obligations. If the loan is approved by a participating credit union, a mentor is assigned to provide advice and support until the loan is repaid. The average loan is \$5,000, with a maximum of \$10,000; very little security is required.¹⁵¹

SEED is funded by grants from a foundation and a credit union. SEED reports that obtaining core funding is the most difficult part of its operations. If governments wish to contribute to making micro-lending projects more widely available, they could do so by contributing to the organizations that co-ordinate this service. Both the projects described here have very low levels of default on loans, and they generate employment at a fraction of the cost of more conventional lending programs.¹⁵²

Recommendation

The Commission recommends that

2.5.23

Federal, provincial and territorial governments, as well as financial institutions, support the development of micro-lending programs as an important tool to develop very small businesses. Governments and institutions should make capital available to these programs and support the operating costs of the organizations that manage them.

Community level: revolving community loan funds

These funds are usually small and are established by non-profit organizations that make short-term loans to community enterprises and local projects. Religious organizations, foundations or businesses may be among those that establish the revolving fund, but governments could help by

149 A baseline study conducted by the project established that one in three reserve households had some cash-generating self-employment activity and could therefore potentially benefit from a micro loan fund. See Lashelle Brant, First Peoples Fund of Toronto, RCAP transcripts, Toronto, 3 November 1993.

150 ADOPEM (Asociación dominicana para el desarrollo de la mujer) in the Dominican Republic adds another wrinkle to the collateral game by requiring all women who borrow to deposit a percentage of the amount of the loan into a savings account when the loan is disbursed. They must also pay a membership fee. Both can be withdrawn when the loan is fully paid, but both also serve as a source of capital for further loans. See EDCAw, "Access to Financial Institutions" (cited in note 148).

151 Loxley et al., "Aboriginal People in the Winnipeg Economy" (cited in note 48).

152 Sinaaq suggests that a similar micro business loan program be put in place to support the domestic harvesting economy in northern Canada and that the moribund Eskimo Loan Program be converted to this purpose. For a brief description of the Eskimo Loan Fund, see RCAP, *The High Arctic Relocation* (cited in note 16), Appendix 6.

providing loans to the fund. Once the community fund has reached a sufficient size to be self-sustaining, the government loans could be repaid.

Some Aboriginal communities have established revolving loan funds, using as their capital base funds from programs such as those that support housing in the community. This is the case at Six Nations and Kahnawake, where housing is managed through a non-profit corporation. Rather than granting individual housing subsidies to home owners, a portion of the money is made available as a loan to those who can afford to repay. Once the loan is retired, the funds become available for other loans.

This approach need not be restricted to housing funds. The Indian affairs department's community economic development officer program has a mandate to support community economic development. These funds usually cover the cost of hiring economic development staff, but communities have also used the funds for other related purposes. The Gwich'in, for example, have set aside a portion of their allocation to be used as a revolving loan fund.

The funds currently administered by the Aboriginal business development program, now known as Aboriginal Business Canada, could be given to Aboriginal development corporations, as we proposed earlier. They would form the basis of a revolving fund for loans and equity investment. Once the business becomes established, the entrepreneur would buy back the shares owned by the development corporation and the released funds could be invested elsewhere.

One of the hurdles to be overcome in implementing these approaches is the belief that individuals have a right to receive these funds directly from government and in the form of grants rather than loans. Some payments are regarded as a treaty right. What is common to the initiatives described above is that the funds are provided, in the first instance, to a development organization and then to the individual - and typically more in loan than in grant form.

Particularly in light of reduced government funding, Aboriginal communities need to learn from each other about innovative ways to obtain the most mileage from the funds they currently receive.

Recommendation

The Commission recommends that

2.5.24

Revolving community loan funds be developed and that federal, provincial and territorial governments review their policies about the establishment and operation of such funds and remove administrative and other barriers.

Community level: access to equity capital

Gaining access to seed capital or equity is challenging for all entrepreneurs, and frequently more so for Aboriginal entrepreneurs. Access to financing in general, and equity financing in particular, was a recurrent theme in our hearings. It must be recognized, however, that acquiring the necessary equity is part of what determines an individual's suitability for the venture. The great majority of entrepreneurs set aside money for the day they start their own businesses. Many approach friends or family. Others seek outside investors. The entrepreneur has to investigate the business opportunity

and develop a business plan that convinces outside participants that their money is well invested. All of this tests the resolve of the entrepreneur and, as such, is essential to the process.

Most government programs designed to help entrepreneurs acquire seed capital insist that they come to the table with a minimum amount of equity of their own, as well as a sound business plan. The programs then supply sufficient equity to ensure the business a base to apply for debt financing from a commercial or Aboriginal financial institution. An increasing number of Aboriginal governments administer similar programs. For both Aboriginal and other government programs, the provision of equity by the individual has become an important means of assessing commitment.

Acquiring equity capital is an essential component of economic development. Canadian governments at one time provided similar financing programs for small businesses. In the face of fiscal restraint and increasing sophistication of small business financing, these programs have been suspended almost universally. However, supplementing equity capital is a continuing and vital requirement for Aboriginal entrepreneurs who face unique barriers. That this investment generates positive returns is demonstrated by a study of the federal Aboriginal business development program, which found that firms returned \$1.20 in taxes for every \$1.00 invested in them by the program.¹⁵³ The delivery of this support and the source of its funding are matters that bear further consideration, but it is apparent that its availability is in direct proportion to the rate of small business creation.

Recommendations

The Commission recommends that

2.5.25

Federal and Aboriginal governments ensure that programs to provide equity to Aboriginal entrepreneurs

- continue for a least 10 more years;
- have sufficient resources to operate at a level of business formation equivalent to the highest rate experienced in the last decade; and
- allow for a growth rate of a minimum 5 per cent a year from that level.

2.5.26

The contribution of equity capital from government programs always be conditional on the individual entrepreneur providing some of the equity required by the business from the entrepreneur's own funds.

2.5.27

Resources for economic development be an important element in treaty settlements.

153 Goss Gilroy Inc., *Economic Impacts of Aboriginal Businesses: A Preliminary Analysis*, study prepared for Industry Canada (Ottawa: January 1994).

2.5.28

Aboriginal nations that have entered into modern treaties, including comprehensive claims, fund their programs to provide equity contributions to entrepreneurs from their own revenue sources, with businesses retaining access to all government programs available to mainstream Canadian businesses.

2.5.29

Equity contribution programs funded by the federal government be administered as follows:

- (a) Programs be administered wherever possible by Aboriginal institutions according to development arrangements set out above.
- (b) Funds for this purpose be allocated to the nation concerned as part of a general economic development agreement.
- (c) Programs be administered by federal officials only where Aboriginal institutions have not developed to serve the client base.

Regional level: Aboriginal capital corporations

Aboriginal businesses need to obtain financing at the lowest possible rate of interest and in a fashion suited to their particular needs. Some have established satisfactory relationships with bank branches or credit unions. However, there is also a strong need for institutions tailored specifically to the needs of Aboriginal business clients.

Under the Native economic development program and its successor, the Canadian Aboriginal economic development strategy, the federal government established 33 Aboriginal capital corporations across the country. These lending institutions, which are governed by Aboriginal boards and have a capital base of \$4 to \$5 million on average, provide commercial loans and loan guarantees to small Aboriginal businesses. They do not provide deposit or other services usually provided by banks and trust companies.

In establishing Aboriginal capital corporations (ACCs), the intention of the federal government was to make available a lending source for Aboriginal businesses unable to secure conventional financing. The dilemma facing ACCs, however, is that their mandate is to serve a high-cost, high-risk market - small, emerging businesses that require considerable support and assistance. Yet, unlike banks and other financial institutions, which have various ways to earn income, accs are expected to become self-sufficient on the earnings of interest charges alone. More precisely, they are expected to cover both their loan losses (which can be substantial in view of their mandate) and their operating expenses from the money they earn in interest revenues, without dipping into their capital base. While ACCs were given some start-up funding for operating costs, they no longer receive operating assistance. A 1993 review of their operations concluded that two-thirds of accs were not able to manage within the terms of such a restrictive mandate.¹⁵⁴

Aboriginal capital corporations are thus in a difficult position, and they are trying various means to cope with the situation. First, they charge fairly high rates of interest and offer little flexibility in that rate. They may also be tempted to shift to lower-risk loans so that their revenues are not eaten

154 David P. Bowra and John C. Bowyer, "Aboriginal Capital Corporations Program: Situation Assessment", report submitted to Aboriginal Economic Programs, Industry, Science and Technology, June 1993.

up by loan losses. However, this requires them to be much more selective (which is time consuming) and moves them away from the constituency they were originally designed to serve.

While ACCs across the country face this dilemma, a particular solution may not apply in all cases. From the standpoint of promoting economic development, however, ACCs are necessary, and the Commission believes that their structural problems must be resolved, even if the prescription differs from one case to another. Several measures could address these problems. For example, the federal government could recognize the important role of accs and mitigate the unrealistic demands placed on them by providing a continuing operating subsidy in compensation for the important role they perform.

The mandate of the corporations could be expanded to include roles that would yield additional sources of revenue. For example, some of the housing funds currently administered by the Canada Mortgage and Housing Corporation (CMHC), which take the form of capital for mortgages and construction, could be channelled through ACCs, which in turn would administer loans to Aboriginal communities or to urban corporations for their housing programs. Similarly, housing loan guarantee funds from the Indian affairs department could be channelled through ACCs. Indeed, CMHC has recently entered into an agreement with several ACCs, allowing them to administer mortgages, a development that should be expanded as rapidly as possible.

Another option consistent with an expanded mandate is the investment credit union model in place in Quebec. This model stops short of providing consumer services such as savings and chequing accounts but provides consumer and business loans and has the capacity to engage in joint ventures and to invest surplus funds in other financial vehicles. Other proposals are more ambitious for example, converting ACCs into full-fledged bank-type institutions that would take deposits, make consumer loans and mortgages, and sell guaranteed investment certificates. It is difficult, however, for one kind of financial institution to make the transition to another. For this transition to work, ACCs would need to develop a reputation as safe havens for deposits and investments. It also carries the risk that the capital corporations would be diverted from their main purpose, which is to serve as a development rather than a commercial institution and to serve the small and emerging business sector.

The capital base of the ACCs could also be expanded by attracting investment from the private sector, including chartered banks, and from bands with money to invest, including revenues derived from comprehensive claims settlements. There are already some initiatives along these lines. For example, the Saskatchewan Indian Equity Foundation is working with the Toronto Dominion Bank to establish an improved financial institution able to raise capital from a variety of sources. The Bank of Montreal has begun to make loans to some ACCs, and in conjunction with other banks has proposed the creation of a First Peoples trust that would make capital available to ACCs for loan purposes, as well as to individual Aboriginal communities for housing and infrastructure projects.

The federal government can encourage these kinds of initiatives in at least three ways. The first is by providing guarantees to those who invest their capital in ACCs or Aboriginal community projects. This is one of the principal features of the First Peoples trust proposal.

Second, the Department of Indian Affairs and Northern Development (DIAND) currently provides direct loans and loan guarantees to Aboriginal businesses under the Indian Economic Development Fund (IEDF). As ACCs have spread, the need for DIAND to make IEDF loans is restricted largely to geographic areas where capital corporations are not active. The department is considering a proposal that would make these funds available to ACCs (and to other Aboriginal financial institutions such as credit unions) in order to guarantee the investments of those who contribute

capital to the loan programs. This would not only permit the corporations to expand their capital base but do so in a manner that reduces the risk to those who contribute their resources and, hence, the interest rate they seek.

The federal government could also encourage Aboriginal capital corporations to seek capital from non-governmental sources by providing an interest subsidy on the capital raised and offering this subsidy to ACCs that perform well. Such a subsidy would reduce the cost to the corporation of borrowing funds from private sector sources (for example, from 8 per cent to 4 per cent) and would increase the spread between its capital cost and the revenue gained from lending. Depending on the size of the subsidy, this arrangement might also permit ACCs to offer loans at more attractive rates than currently possible.

A further option is to improve the administration of weaker ACCs in areas such as the qualifications of staff, separation from politics, operational costs and attention to revenues. It may also be necessary to consolidate the number of institutions through mergers or by linking those that are struggling with those on a stronger footing. This is one of the directions that emerged from Industry Canada's review of the Aboriginal capital corporation program, and some ACCs are taking steps to co-ordinate and consolidate their operations.¹⁵⁵

In conclusion, apart from the basic structural problem facing ACCs, issues relating to accessibility also came to the attention of the Commission. As with other programs for Aboriginal people, capital corporations suffer from being unable to provide complete coverage to all Aboriginal constituencies. Each corporation has a particular mandate or target group, and in the end some groups are left out. The brief from Economic Development for Canadian Aboriginal Women, for example, raises this issue. It recommends that the ACCs mandate be expanded so that all Aboriginal women have access, that more Aboriginal women be included in the decision-making process (on boards and in senior management), and that the corporations design specific programs and services for Aboriginal women.¹⁵⁶

Members of First Nations living off-reserve and Aboriginal people in general who live in urban areas are two constituencies not served as well as they should be by existing capital corporations. In examining the list of ACCs, this is not immediately apparent, since several have headquarters in urban areas. This does not mean, however, that they serve a predominantly urban clientele. Winnipeg, for example, is host to an ACC that serves the Métis population and to two others that are attached to regional tribal councils. In all three cases, however, almost all loans are directed to rural and on-reserve businesses.¹⁵⁷ The solution is either to create new ACCs in urban areas that are not well served or to increase the capital base and geographic mandate of those already in existence.

Recommendations

The Commission recommends that

155 Deloitte & Touche Management Consultants, *ACC Strategic Planning Initiative: Final Report*, prepared by Shorebank Advisory Services and Deloitte & Touche Management Consultants for Aboriginal Economic Programs, Industry Canada (Guelph, 1994).

156 EDCAw, "Access to Financial Institutions" (cited in note 148).

157 Loxley et al., "Aboriginal People in the Winnipeg Economy" (cited in note 48).

2.5.30

The federal government strengthen the network of Aboriginal capital corporations (ACCs) through measures such as

- providing operating subsidies to well-managed ACCs to acknowledge their developmental role;
- enabling ACCs to administer Canada Mortgage and Housing Corporation and DIAND housing funds; and
- providing interest rate subsidies and loan guarantees on capital ACCs raise from the private sector.

2.5.31

Aboriginal capital corporations take appropriate measures, with the assistance of the federal government, to improve

- their administrative efficiency;
- their degree of collaboration with other ACCs; and
- their responsiveness to segments of the Aboriginal population that have not been well served in the past.

Regional level: venture capital corporations

As discussed earlier, the Mouvement des caisses populaires Desjardins is working with Aboriginal financial institutions, the provincial and federal governments, and the Quebec labour movement to set up a \$10 million venture capital corporation. This initiative is timely because different kinds of businesses require or attract different types of capital. Venture capital corporations (VCCs) typically make large investments in enterprises, usually when a business has become established.

Venture capital refers to high-risk investment in a business that can take the form of equity (that is, part ownership) or unsecured debt. Investments are generally in the order of \$100,000. A high rate of return is expected because of the higher risk involved. It would not be unusual for a venture capital fund to look for a return of 30 per cent per annum. (While this may seem high, venture capital funds expect to have success in only one out of five investments). Also, although a venture capital investment can be made for a longer term than a loan and does not require a fixed schedule for repayment, a venture capital corporation will still want a clear strategy for exiting from the venture within a certain period of time.

Sources for investment in such a fund, which conceivably could be as large as \$50 million, include wealthy Aboriginal bands and organizations and Canadian corporate investors.

The need to facilitate the expansion of major Aboriginal projects, especially in light of government cutbacks, calls for this type of financial instrument. Such a fund would expedite investment decision making compared to government programs, and the fund could play a management role in the companies in which it invested.

In addition to private sector VCCs, which have expanded considerably in the last two decades, there are also those sponsored by labour unions that invest in small or medium-sized companies to create or protect employment (for example, the Solidarity Fund of the Quebec Federation of Labour). Such funds qualify for tax credits and may also attract pension funds or loan moneys from governments.

We believe a strong case can be made for investing venture capital in corporations owned wholly or partially by Aboriginal people or that would operate on Aboriginal territory and bring direct employment. Qualification for tax credits for investors would be justified because of the developmental role the fund would play and the enhanced risk related to most of its investments.

Jackson and Peirce report that the United States has considerable experience with community-owned VCCs that make equity investments in community businesses. These are less well developed in Canada, where community development corporations are more likely to operate loan rather than venture capital funds.¹⁵⁸

Recommendation

The Commission recommends that

2.5.32

Federal and provincial governments assist in the formation of Aboriginal venture capital corporations by extending tax credits to investors in such corporations. These corporations should have a status similar to labour-sponsored venture capital corporations and should be subject to the same stringent performance requirements. Tax credits should be available to the extent that Aboriginal venture capital corporations invest in projects that benefit Aboriginal people.

Canada-wide level: a national Aboriginal development bank

Several submissions to the Commission have recommended the establishment of a national Aboriginal bank, including those of the Aboriginal Peoples Business Association and the Canadian Council for Aboriginal Business. The council describes the role such a bank should have:

An Aboriginal Development Bank should be established with capital adequacy of a Schedule B banking institution in the Bank Act. The bank would have a role similar to the World Bank, which not only provides people with access to capital, but also provides technical and legal advice. This would be an institution independent of government and would eventually be run by Aboriginal people. The institution should complement the Aboriginal Capital Corporations and Aboriginal trust vehicles. Initial capitalization should come from Aboriginal communities. Mainline financial institutions and private sector corporations should match a required level of capital to that invested jointly by all Aboriginal communities in the country.

Among the possible responsibilities sanctioned to the Bank would be the issuing of Aboriginal Development Bonds, investment certificates and other securities at fixed or floating rates. These investments should be treated in tax legislation as “tax shelters” to encourage the use of these instruments.¹⁵⁹

158 Edward T. Jackson and Jonathan Peirce, "Mobilizing Capital for Regional Development", in *Regional Development from the Bottom Up*, ed. Michael Lewis (Vernon, B.C.: Westcoast Development Group, (1993).

159 Canadian Council for Aboriginal Business, "Presentation to the Royal Commission" (cited in note 139), p. 30.

The submission suggests that the bank might eventually expand into the international retail and banking services market and other fields such as insurance.

The idea of a Canada-wide Aboriginal financial institution has been discussed for some time. A decade ago, the National Economic Development Advisory Board (of the Native economic development program) commissioned background research on a national Aboriginal bank. In the end it recommended the establishment of a national Aboriginal investment corporation, rather than a chartered bank, and this was to be capitalized by the development program and Aboriginal investors to the extent of \$100 million. Such a corporation was not established, however, apparently because the case was not successfully made that a national institution would be preferable to more regionally based institutions. The Aboriginal capital corporations find their origins in this period.

Now that ACCs have been established, the debate about whether a Canada-wide institution is appropriate and necessary continues. Some argue that national initiatives are inappropriate because they almost invariably engage in a top-down process, distributing funds and direction from a vantage point far removed from the experience of communities. In this view, Aboriginal financial institutions should be developed from the bottom up - that is, beginning with ACCs.

Others, however, seek a financial institution along the lines proposed by the Canadian Council for Aboriginal Business. Having considered various alternatives, the Commission is persuaded that such an institution would make an important contribution to the rebuilding of Aboriginal economies, for several reasons.

While most Aboriginal projects are small, several large-scale projects are developing as a result of specific and comprehensive claims settlements, treaty land entitlement agreements, improved access of Aboriginal people to lands and resources, and urban service-based opportunities such as gaming. Some of these projects are regional in nature while others cut across regions and are of a scale that exceeds the capacity of individual ACCs. Furthermore, the implementation of the Commission's recommendations in the areas of governance, treaties, lands and resources, and economics will serve only to increase the opportunities for larger Aboriginal-owned commercial projects. There is an emerging need for medium- and long-term investments and loans. A development bank, once established, could issue Aboriginal development bonds or investment certificates. To encourage individuals to participate, investments in these securities should be made eligible for tax credits in the same fashion as investments in venture capital corporations.

Second, the Commission believes that what is needed is not so much an institution that provides the lion's share of project financing (although it must have a capital base that allows it to participate in a meaningful way) but rather one that serves a brokerage function, bringing together those who need capital and those who provide it.¹⁶⁰ The challenge, in other words, is not to monopolize funding for such projects but to improve access to loan and equity financing sources, facilitated by an Aboriginal institution that has a solid understanding of the Aboriginal community and of the world of finance and business development.

Where the private sector is not well established, the proposed Aboriginal bank would take a more activist approach. It therefore needs the technical capacity to identify opportunities, assess risks, work with project owners to put an appropriate financing package in place, and provide continuing management advice and counsel. An Aboriginal institution controlled by Aboriginal people and staffed with trained and experienced Aboriginal analysts and managers as they become available is

160 For a discussion of this in the U.S. context, see Richard Pottinger, "The American Indian Development Bank?", *American Indian Culture and Research Journal* 16/1 (1992), p. 137.

expected to have excellent ties to the Aboriginal community and to have a superior capacity to identify promising projects. For institutional lenders that do not themselves have extensive experience in lending to Aboriginal people, the development bank could provide an attractive vehicle for facilitating investments in the Aboriginal community.

The establishment of such a bank should be preceded by studies that determine the demand for its services and the type of structure that would best serve its market. Leadership would need to come from the Aboriginal community, as would initial contributions for its capital base. Significant investments from Aboriginal nations and organizations could induce participation from corporations that have a stake in activity on traditional Aboriginal territories or with Aboriginal nations. The federal government should be asked to match funds from Aboriginal and other sources. Other incentives to investors, at least until the track record of the new institution becomes established, could include federal loan guarantees, tax credits and arrangements to permit the bank's profits (including those earned on the government's contribution) to flow to the private sector investors, thereby providing a higher return on investment.

While the structure and capital base of the bank are being established, Aboriginal staff for the new institution would need to be identified and given experience with other investment institutions. Staff with many years' experience in similar corporations will need to be a part of the bank's operations at first. A strong board, chosen for its expertise and with a majority of Aboriginal people, would also need to be put in place.

Recommendations

The Commission recommends that

2.5.33

A national Aboriginal development bank be established, staffed and controlled by Aboriginal people, with capacity to

- provide equity and loan financing, and technical assistance to large-scale Aboriginal business projects; and
- offer development bonds and similar vehicles to raise capital from private individuals and corporations for Aboriginal economic development, with such investments being eligible for tax credits.

2.5.34

The process for establishing the bank be as follows:

- The federal government, with the appropriate Aboriginal organizations, undertakes the background studies required to establish a bank.
- Aboriginal governments develop the proposal to establish the bank and, along with private sources, provide the initial capital. The federal government should match that capital in the initial years, retiring its funding as the bank reaches an agreed level of growth. Earnings on the portion of the capital lent by the federal government would be available to increase the rate of return to private investors in the early years of the bank's operations.

- The federal government introduces the necessary legislation in Parliament.
- Highly experienced management is hired by the bank with a clear mandate to recruit and train outstanding Aboriginal individuals for leadership of the bank's future operations.

2.5.35

The board of directors of the bank have an Aboriginal majority and be chosen for their expertise.

Canada-wide level: loans for economic development on reserve lands

Under the *Indian Act*, title to reserve land is ultimately held by the Crown, but the right to use the land is given to individual bands of Indians.¹⁶¹ No individual member of a band can possess on-reserve land unless it has been allotted by the band council and approved by the minister of Indian affairs, who issues a certificate of possession. The minister may attach conditions to the allotment and issue a certificate of occupation, which can remain in force for up to four years. At the end of the time, a certificate of possession can be issued or a declaration made that the land is available for re-allotment. An individual given a certificate of possession obtains rights to reserve land that are similar to property ownership - for example, the right of exclusive occupation or to have property inherited by heirs entitled to reside on a reserve - but the Crown is always the legal owner of the land. As such, the Crown can expropriate reserve land or have lands set aside for such purposes as Aboriginal schools, burial grounds or health projects. The band can also surrender reserve lands, but only to the Crown and only with the consent of a majority of the electors of a band voting at a general or a special meeting or by referendum. With similar safeguards, lands can also be declared 'designated', which makes them available for leasing by outsiders. However, the surrender of a band's interest in the land is not absolute - the land remains reserve land and reverts to the band when the lease period expires. Individuals holding a certificate of possession may also lease 'their' land to a third party with the approval of the minister.

Other provisions of the *Indian Act* protect reserve lands from falling into the hands of third parties, that is, parties other than the band and its members or the Crown. Section 29, for example, states that reserve lands are not subject to seizure under the legal process, and section 89(1) provides that "subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band". While these provisions protect reserve lands and therefore have widespread support within reserve communities, they also stand in the way of projects that seek loans from banks or other outside sources, because the land and related assets cannot be pledged as collateral to secure the loan. This is a significant limiting factor for economic development on reserves, and much effort has been spent trying to overcome the problem.

The *Indian Act* provisions do not pose a barrier to all types of capital, only loans. It is not an obstacle to venture capital when funds are made available by non-Aboriginal companies in exchange for a share of ownership of the business enterprise. Some bands are able to generate capital from their own sources, such as annual lease payments, agreements resulting from treaty land entitlement settlements or comprehensive claim negotiations, and revenue sharing agreements.

161 This discussion draws on the proceedings of a workshop on access to capital, sponsored by RCAP and the Canadian Bankers Association and held in Toronto on 22 November 1993. See also John Giokas, "The *Indian Act*: Evolution, Overview and Options for Amendment and Transition", research study prepared for RCAP (1995). The historical development of the *Indian Act* is discussed in Volume 1, Chapter 9 of this report.

It should also be noted that the *Indian Act* is not an absolute deterrent. If a band is determined to risk a portion of its lands and the assets attached to it in exchange for capital to support an economic development project, it can pursue the land surrender provisions of the act. Once the lands are no longer reserve lands, that is, once they have been surrendered to the Crown, they can be pledged as security. The issue, then, is how easily security for loans can be provided and whether there are ways of providing security without surrendering or otherwise risking the loss of land and related assets.

Our objective in what follows is to outline a number of ways that have been attempted or suggested to eliminate or avoid the barriers to capital posed by the *Indian Act*.

Canada-wide level: Indian Act options

The most obvious approach to dealing with *Indian Act* barriers is to abolish the act entirely or to enact legislation that replaces certain portions of it.¹⁶² The question is how to replace the current land seizure provisions.

Aboriginal groups not subject to the act, such as the Metis Settlements of Alberta, and groups that have negotiated alternatives to the Indian Act, such as the Sechelt First Nation and those under the Cree-Naskapi Act, have all insisted on legislation that offers protection against the loss of land, even at the cost of increased difficulty in obtaining capital. In the case of the Cree-Naskapi, “Indians resident on category 1a or 1a-n lands or the band itself [can] ... waive the exemption on seizure by agreement in writing. However, where the waiver deals with land, the consent of the band at a special referendum meeting must be obtained first”.¹⁶³

It is clear that the establishment, protection and enhancement of the Aboriginal land base is vital to the health of Aboriginal communities in Canada. What is not clear is how to protect that land base and how legislative provisions can be designed to minimize adverse implications for economic development.

Amendment or suspension

The governor in council has the power, under subsection 4(2) of the *Indian Act*, to declare by proclamation that almost all the provisions of the act do not apply to “(a) any Indians or any group or band of Indians, (b) any reserve or any surrendered lands or any part thereof”. However, the department of Indian affairs refuses requests of bands to be exempt from sections 29 or 89, the provisions that prevent reserve lands and the personal property of an Aboriginal person or a band from being seized by a non-Aboriginal person.¹⁶⁴

Another problem with the use of subsection 4(2) is that, while sections 29 and 89 can be declared not to apply, the sections concerning band membership and land surrenders cannot be suspended in this way, including section 37(1): “Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty ... by the band for whose use and benefit in common the reserve was set apart”. Thus, it appears that the governor in council can declare that the seizure provisions do not apply but cannot suspend the provision that requires land to be

162 A discussion of a recent initiative to pursue the alternative legislation route regarding land management can be found in Giokas, “The *Indian Act*”. See also Volume 1, Chapter 9.

163 Giokas, “The *Indian Act*”.

164 Giokas, “The *Indian Act*”.

surrendered before it can be sold or its title conveyed. The act spells out a detailed process of community approval for land to be surrendered.

Several amendments to the act in the last decade have eased the problem of access to capital in particular circumstances. As a result of a series of amendments in 1988, reserve lands can be declared to be designated lands that retain their reserve status but may be leased to non-Indians without having to go through the surrender process. While designated lands cannot be seized, the leasehold interest in them “is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution” under an amendment to section 89. For example, a section of a reserve might be set aside for a commercial development on lands designated for the purpose. A bank might approve a loan to the business and take as security the right of the business to lease the designated lands, awarding this right to another business if the first one defaulted. The land is leased for only a certain period of time, however, so the right to use it will expire eventually.

Since designated lands remain reserve lands and therefore under federal and band jurisdiction, bands can levy taxes not only on reserves but also on interests in reserve lands. Thus, a band can tax non-Aboriginal businesses leasing its lands for commercial purposes. Apart from deriving the tax revenue, which can be considerable, as some British Columbia bands with valuable commercial lands have discovered, bands can also use the revenue as a form of security for loans.

However, as with the land surrender process, the designation process is difficult and time consuming, and the lessee must obtain the consent of the minister before a leasehold interest can be mortgaged. Furthermore, any mortgaged leasehold interest is subject to the Crown’s right of reversion on expiration of the lease. All reserve and designated lands are still subject to the authority of the minister to manage, lease or carry out any other transaction affecting such lands. In practice, the land designation alternative is not used extensively.

Another recent amendment to section 89 refers to conditional sales contracts. It states that a person who sells something (a chattel such as a vehicle or equipment) to a band or band member can retain ownership in the chattel and exercise rights under the sales agreement, notwithstanding the fact that the chattel is located on-reserve (that is, the person can seize the goods if full payment has not been made).

Other possible amendments to the *Indian Act* to ease the collateral problem include making personal property, excluding lands, subject to seizure and expanding the definition of who is an ‘Indian’ under the terms of the act. This is significant because section 89 does permit the real and personal property of an Indian person or a band situated on a reserve to be seized by another Indian person or a band. If an Aboriginal lending institution, such as a capital corporation or a community-based credit union, could be defined to be an ‘Indian’, land and related assets pledged as collateral could be seized, if necessary, without being lost to the community. For First Nations that escape from the Indian Act or for other Aboriginal groups that also want to protect their land base but at reduced cost in terms of economic development, the idea of making it possible for their financial institutions to seize Aboriginal lands or property (but not to sell them outside the community) should be kept in mind.

Using forms of collateral other than land or property

Lenders can take forms of collateral other than land to secure loans made in support of on-reserve projects. For example, a band council could agree to pledge security on the basis of future cash flow that the band can reasonably anticipate will be forthcoming to fund band operations and programs.

However, this requires the approval of the minister, which may be withheld, because the department will be concerned that, in the event of a default, it would have to satisfy the terms of the loan and perhaps also provide the program moneys that were anticipated. The department is also afraid of being held accountable for failing in its fiduciary responsibility, especially in the light of such court decisions as *Guerin* and *Sparrow*.¹⁶⁵

Sometimes it is sufficient for lenders to receive what is called an ‘irrevocable band council resolution’ through which the band gives a supposedly irreversible undertaking to comply with the terms of a loan. While technically such a resolution would not be enforceable, in that it could not override the seizure provisions of the *Indian Act*, it seems to be sufficient for some lenders who have established a good working relationship with a particular band. This illustrates that security in the form of land or other forms of property is not always the key consideration. Factors such as a track record, reputation, and an established relationship of trust can also be important in making loans possible.

Community-based solutions

We have already described steps to improve the capacity of communities to mobilize their own resources (with or without outside help) to build a pool of capital. The establishment of bank branches or credit unions would be a step in this direction, as would the establishment of community lending circles for micro business loans.

At Kahnawake, the community-based credit union has developed an innovative approach to lending that relies on respected community members entering into a trust agreement with the borrower. The arrangement is described by those who developed it as follows:

The Caisse populaire Kahnawake has developed and implemented a loan security system for real property on Indian territory which bypasses the restrictions of section 89 of the Indian Act. Called the trust deed system, this system has the approval of the Minister of Indian and Northern Affairs and the Fédération des caisses populaires Desjardins de Montréal et de l’Ouest du Québec and has been operating since 1988. Under this arrangement, an individual Indian, holding a certificate of possession on a parcel of land, may transfer their title (and the land and building included on the land parcel) to a three-person group of Indian Trustees as security on a commercial or housing loan. The transfer takes the form of an Indian Act section 24 transfer and the registration of this transfer is approved by the Minister for each transaction.

Upon complete repayment of the loan outstanding to the caisse populaire, the title of the certificate is transferred from the trustees back to the individual Indian borrower. Upon loan default (which must be confirmed by the trustees), the property described (including land and building) on the certificate of possession is sold by a bid process only to Indians who reside in the same territory (and in our case Kahnawake). The proceeds of the sale are first applied to the loan debt and the remainder is remitted to the borrower by the trustees. The basic feature of this system is that the third party involved is not a government body of any kind (federal, provincial or band council).

165 *Guerin v. R.*, [1984] 2 S.C.R. 335; *R. v. Sparrow*, [1990] S.C.R. 1075.

The basic principle is to commit the individual to feel he or she has really something to lose in such a transaction unlike a government guarantee ... The caisse populaire at Kahnawake has made over 200 housing and commercial loans totalling in excess of \$8 million to September 30, 1994 since implementation of the system in 1988.¹⁶⁶

The borrower is encouraged to be responsible not only by the threat of loss of assets but by the peer pressure exercised by the trustees. The credit union has realized profits on its loans in every year subsequent to the first six months of operation and has had a very low rate of loan defaults (only about 50 per cent of loan applications are approved in the first place). Decision making is also expeditious, with the government involved only to the extent of registering the trust agreement. There are, however, some untested questions about the legality of the trust deed arrangement. Also, the transferability of this approach to other communities depends on the size of the community and the availability of a financial institution, such as a credit union, bank or Aboriginal capital corporation. Transferability is also limited by the fact that not all reserves use the certificate of possession system - it is used on perhaps 40 per cent of the reserves covering 60 per cent of the status Indian population¹⁶⁷ - and this is a requirement for the effective operation of the trust deed system.

Government guarantees

Banks and other financial institutions will make loans on reserves in the absence of reserve-based collateral if governments provide guarantees against risk. This approach has been used extensively in the past, but it requires a very high level of loan guarantees before banks can be enticed to lend.

At present, at least three loan guarantee programs are in place. Aboriginal capital corporations can provide loan guarantees and they do so to a limited extent. The department of Indian affairs also provides some loan guarantees for economic development on-reserve but wants to reduce its involvement in this area.

More recently, steps have been taken to make guaranteed bank loans under the *Small Business Loans Act* more readily available to businesses on-reserve. The issue historically has been whether Aboriginal people living on reserves qualify for guarantees under the act, since the lender is required to obtain an enforceable security. The banks and the federal government have determined that a band council resolution authorizing individual Aboriginal people to give security (such as a certificate of possession or a mortgage) is sufficient evidence to qualify the loan under the act. Some bands review each loan application before giving their authorization, others pass a resolution giving blanket approval, and some do not want to get involved at all, because a seizure is unlikely in the event of a default. In fact, if there were many defaults, it is likely that either the banks or the guarantor (the federal government) would want to reassess the entire process.

Chartered banks are also proposing a variation on the loan guarantee theme. In a proposal calling for the establishment of a First Peoples trust, the Bank of Montreal suggests that the trust would gain access to the capital market using government guarantees to obtain a low interest rate. Funds would be raised from sources such as insurance companies and pension funds that could then be lent to First Nations for housing, capital infrastructure and related projects. Capital raised by the trust could also be available to Aboriginal capital corporations which in turn could make loans to

166 Background document prepared for the National Aboriginal Financing Symposium, Fredericton, New Brunswick, 5-8 February 1995. See also Michael L. Rice, "Native Economic Development in Kahnawake: Banking and Collateral", in RCAP, *Sharing the Harvest* (cited in note 1), pp. 262-263.

167 Bruce Johnstone, "Creative banking set to help Indians", *Regina Leader Post*, 15 September 1994, p. D7.

small businesses as they normally do, albeit with a spread between the cost of the money and the rate at which it is lent. With government guarantees and a positive credit rating from bond rating services, it would be possible to borrow at a low cost. Individual bands that participate in the trust would have access to funds on a line-of-credit basis.

The Bank of Montreal would benefit by receiving fees for services rendered and revenues based on the differential between the interest rate of the cost of capital and the interest rate on loans. The Bank of Montreal would also help train Aboriginal staff for the First Peoples trust, so that the trust could, over time, become completely controlled by Aboriginal people or a partnership involving the bank and the federal government. The proposal is geared not only to reserves but to all Aboriginal communities.

The proposal has attractive features, particularly the prospect of obtaining funds from non-governmental sources. However, the federal government would have to be prepared to assume the liability the guarantee would entail, although this could be reduced by purchasing insurance against loan losses. The Canada Mortgage and Housing Corporation already offers a similar capacity for raising funds on the capital market and reportedly can achieve rates of interest that are lower than would be the case with the bank's proposal. This capital, however, would be restricted to housing.

A more general problem with guarantee programs is that they reduce incentives for efficient and responsible performance, especially if the guarantee level is so high that it removes any significant element of risk. This has long been recognized as a problem with the department of Indian affairs loan guarantee program and with similar arrangements, such as those administered by the Farm Credit Corporation before they were cancelled in 1989. Since the loan recipient knows that the government will step in if there is a default, there is less incentive for the recipient to live up to the terms of the loan. Similarly, with the First Peoples trust proposal, there would be concern not only about loan recipients but also about how diligently and carefully banks would administer the trust if there were a high guarantee level to protect contributors against loan losses.

In conclusion, it appears that the options for resolving the problem of lending on reserves include the long-range alternative of abolishing or replacing the Indian Act. In the interim, the following strategies are worth considering:

- amending the *Indian Act*, which could be time-consuming, but certain amendments such as giving Indian status to Aboriginally owned financial institutions, would be helpful;
- using forms of collateral other than lands or property;
- supporting the wider adoption of the trust deed model; and
- making use of government guarantees.

2.7 Employment Development

The problem

Even with the improved prospects for Aboriginal economic development that are expected to accompany self-government, control over lands and resources, and the growth in Aboriginal businesses, employment prospects for Aboriginal people need urgent attention in light of employment and demographic realities. The Aboriginal population is young and growing rapidly - 56 per cent of Aboriginal people are under 24 years of age, compared with 35 per cent in the general

population.¹⁶⁸ With thousands of new entrants to the labour force each year, the Commission estimates that just under 225,000 jobs will have to be created to accommodate the rapidly growing labour force in the next 20 years (Table 5.14).

TABLE 5.14 - Projected Aboriginal Identity Population Age 15+ and Estimated Number of New Jobs Required, 1991-2016

Year	Projections for Aboriginal Identity Population Age 15+		Estimated Number of New Jobs Required ¹ (based on an employment to population ratio of 61% ²)
	Size	Cumulative Growth	
1991	457,800		
2001	615,200	157,400	96,000
2016	826,500	368,800	225,000
	Number of Jobs required to achieve equality for the existing labour force	82,400	
	Total Number of New Jobs Required 225,000 + 82,400 = 307,400		

Notes:

1. For methodology, see note 33 at the end of the chapter.
2. The 1991 Canadian employment rate was 61 per cent (see Table 5.3).
3. Numbers rounded to the nearest hundred.

Source: Population projections: M.J. Norris, D. Kerr and F. Nault, "Projections of the Aboriginal Identity Population in Canada, 1991-2016", research study prepared by Statistics Canada for RCAP (February 1995).

There is an enormous gap in unemployment rates between Aboriginal and non-Aboriginal people. To bridge this gap, another 82,400 jobs would be needed. Adding these to the number of jobs required to accommodate the growing Aboriginal population yields an overall requirement of 307,300 jobs for Aboriginal people in the period 1991-2016 (see Table 5.14). The difficulties this poses are compounded by the barriers that inhibit job creation for the Aboriginal population.

The Aboriginal unemployment rate tends to vary with the unemployment rate of the general population in the Atlantic provinces, Quebec and Ontario. Typically, Aboriginal unemployment rates are double those for the general population in the eastern part of the country. In the western provinces, the employment gap widens to three times as large and does not follow provincial patterns. This may reflect greater barriers to employment where there are larger concentrations of Aboriginal people.

Existing approaches are insufficient

Meeting the challenge of employment creation is daunting given the inadequacy of current measures to reduce disparities in unemployment rates. A 'business as usual' approach will fail to meet this challenge. If more effective approaches are not developed, all governments - Aboriginal, federal, provincial, territorial and municipal - will face enormous costs brought on by unemployment and related social and economic dysfunction. The recent experience of the Aboriginal labour force in Winnipeg is instructive; growth of the Aboriginal labour force has been so rapid, as a result of population growth and migration from rural areas, that it doubled between

168 Statistics Canada, "Age, Sex and Marital Status: The Nation", 1991 Census, Cat. No. 93-310 (Ottawa: Industry, Science and Technology, 1992); and Mary Jane Norris, Don Kerr and François Nault, "Projections of the Population with Aboriginal Identity in Canada, 1991-2016", research study prepared by Statistics Canada for RCAP (1995).

1986 and 1991, from approximately 10,000 to 20,000. There are some indications of progress in employment creation, but with growing numbers of people looking for work, the Aboriginal unemployment rate in Winnipeg increased by two-thirds between 1986 and 1991.¹⁶⁹

In 1991, the Aboriginal peoples survey asked respondents to identify the barriers they faced in finding employment. The results are given in Table 5.15 for four Aboriginal groups and in Table 5.16 by geographic region. By far the most important barrier is the lack of jobs: of those reporting they faced barriers, 61 to 75 per cent cited few or no jobs, followed by mismatched skills and job requirements. This second barrier can be overcome with education, training and enhanced mobility. Another barrier cited was lack of information about jobs. Appropriate employment services would help remedy this. Being Aboriginal, which likely relates to racial discrimination, was a further barrier, as was lack of child care. Both these factors would, no doubt, be more prominent if responses from Aboriginal women had been given separately.¹⁷⁰

TABLE 5.15 - Barriers to Employment Reported by Aboriginal Identity Population Age 15+ Who Looked for Work in 1990-91

	Indian persons on-reserve	Indian persons off-reserve	Metis persons	Inuit
	% of each group reporting each barrier			
Few or no jobs	75.2	61.4	62.4	71.1
Mismatched education/ work experience	40.1	40.1	42.6	38.0
Lack of job information	32.3	25.0	22.4	23.4
Being Aboriginal	22.2	25.5	11.7	11.9
Lack of child care	8.1	8.5	8.4	9.3
Other barriers	7.3	12.6	8.7	8.5

Source: Statistics Canada, Aboriginal Peoples Survey (1991), catalogue no. 89-534.

169 Statistics Canada, "Age, Sex and Marital Status: The Nation", 1991 Census, Cat. No. 93-310 (Ottawa: Industry, Science and Technology, 1992); and Mary Jane Norris, Don Kerr and François Nault, "Projections of the Population with Aboriginal Identity in Canada, 1991-2016", research study prepared by Statistics Canada for RCAP (1995).

170 For example, in a survey of 122 Aboriginal families in Winnipeg (in which 76 per cent of the respondents were women), 24 per cent of respondents cited lack of child care as the major obstacle to holding a job or looking for work, compared with 5 per cent of respondents in that city in the Aboriginal Peoples Survey. See John Loxley, "Child Care Arrangements and the Aboriginal Community in Winnipeg", supplement to "Aboriginal People in the Winnipeg Economy".

TABLE 5.16 - Barriers to Employment Reported by Aboriginal Identity Population Age 15+ Who Looked for Work in 1990-91, by Region

Perceived Barrier to Employment	Total Aboriginal	Far North	Mid-North		South		
			On-reserve	Non-reserve	Réserves	On-reserve	
						Urban	Rural
Few or no jobs	66.4	71.3	77.1	64.3	76.1	57.2	73.2
Mismatched education/work experience	42.1	38.3	39.7	43.2	42.1	44	40.4
Lack of job information	26.2	22.5	31.4	22.6	34	24.3	24.2
Being Aboriginal	17.7	11.8	20.5	17.5	25	17.3	11.4
Lack of child care	9.9	9.9	8.7	11.1	8.6	9.2	8.9
Other barriers	9.8	7.1	5.5	7.2	8.1	13	10.9

Note: Percentage of respondents reporting each barrier.

Source: Statistics Canada, Aboriginal Peoples Survey (1991), custom tabulations.

To gain some perspective on current approaches to overcoming employment barriers, we review two federal initiatives: employment equity and the Pathways to Success of the human resources development department.

Employment equity

Employment equity initiatives aimed at eliminating barriers to the employment of under-represented groups in the work force can be an important instrument for improving Aboriginal employment opportunities. Unfortunately, evidence suggests that these kinds of initiatives are not working well for Aboriginal people, at least not well enough to meet the demographic and equity challenges just discussed. Among the four groups designated under the *Employment Equity Act* (proclaimed in 1986), Aboriginal people and persons with disabilities are, in the more than 300 federally regulated companies and Crown corporations covered by the act, furthest from reaching representation commensurate with their availability in the experienced labour force (Table 5.17). (Statistics Canada defines the experienced labour force as being individuals who, in the week before the census, were either employed or unemployed but who had worked at some point in the previous 18 months.)

TABLE 5.17 - Federal Employment Equity Program, 1987-1993

Designated Group	Year	Proportion of Employees	Hirings	Terminations
		%	%	%
Women	1987	40.94	42.27	40.05
	1988	41.95	44.33	40.92
	1989	42.53	44.04	41.13
	1990	43.74	46.18	41.42
	1991	44.11	41.88	41.81
	1992	44.74	39.06	39.88
	1993	45.64	41.79	39.93
Aboriginal People	1987	0.66	0.54	0.52

Designated Group	Year	Proportion of Employees	Hirings	Terminations
		%	%	%
	1988	0.71	0.74	0.66
	1989	0.79	1.09	0.96
	1990	0.85	1.39	1.12
	1991	0.96	1.53	1.24
	1992	1.01	1.80	1.40
	1993	1.04	1.87	1.40
Persons With Disabilities	1987	1.59	0.62	1.02
	1988	1.69	0.78	1.28
	1989	2.34	1.25	1.29
	1990	2.39	1.41	1.98
	1991	2.50	1.22	2.27
	1992	2.54	1.27	2.16
	1993	2.56	1.68	2.27
Visible Minorities	1987	5.00	5.21	3.23
	1988	5.67	7.48	5.17
	1989	6.67	10.12	6.60
	1990	7.09	10.40	6.84
	1991	7.55	8.22	6.68
	1992	7.90	8.45	6.65
	1993	8.09	8.41	7.16

Note: The proportion of the experienced labour force accounted for by designated groups in 1986 was women, 44%; Aboriginal people, 2.1%; persons with disabilities, 5.4%; and members of visible minorities, 6.3%.

Source: Employment Equity Branch, Employment and Immigration Canada, Statistical Summary, *The Employment Equity Act, 1987-1991* (December 1992); and Human Resources Development Canada, *Annual Report, The Employment Equity Act, 1994*.

The representation of Aboriginal people in the experienced labour force as a whole stood at 2.1 per cent in 1986, compared with representation of 0.66 per cent in the companies covered by the act in 1987. By 1993, this proportion had increased to 1.04 per cent. This is an improvement, to be sure, but by that time the proportion of Aboriginal people in the experienced labour force had also risen - from 2.1 per cent in 1986 to 3 per cent in 1991 (and presumably higher still since then). Thus, the gap between the target and the reality has, in fact, widened rather than narrowed.

The annual report on the *Employment Equity Act* for 1994 summarizes the situation in the following terms:

The representation of Aboriginal peoples in the work force did not show significant progress in 1993. Employers under the Act hired a relatively high proportion of Aboriginal peoples, but many members of this group left the work force during the same period. Their rate of turnover was the highest among the four designated groups

Aboriginal peoples had a low rate of representation (1.04%) in the work force under the Act and occupied lower paying jobs with fewer responsibilities and less chance for advancement. Aboriginal women were concentrated in clerical occupations, while a relatively large proportion of Aboriginal men worked in semi-skilled and other manual work. The gap between the salaries of Aboriginal men and women who worked full time and those of other men and women was the widest of the minority groups.¹⁷¹

The results have been equally limited within the federal public service, which has not been covered by the act but has promoted employment equity since 1983. Aboriginal representation increased from 1.7 per cent in December 1988 to 2 per cent in March 1993, but the public service is struggling with the problem of retaining such employees once hired, and further progress could be stalled by current initiatives to reduce the size of the public service.¹⁷² The level of Aboriginal representation in provincial government work forces is usually far below what it should be, and, at the municipal level, one is hard pressed to find any Aboriginal employees in such departments as police, fire fighting and public works.

A review of programs in various jurisdictions reveals a number of recurring problems, including

- a lack of commitment, not on the part of those directly responsible for implementing the program, but by the employing departments. In the public sector, for example, two or three departments that have substantial involvement with Aboriginal people tend to account for the bulk of hirings, while others lag far behind;
- a lack of effective auditing, monitoring and enforcement, a situation that may improve at the federal level when the revised Employment Equity Act is implemented;¹⁷³ and
- employment equity legislation at both the provincial and the federal level that is restricted to certain kinds of employers. There is considerable room for expanding the coverage.

If these were the only weaknesses, however, they would affect all designated groups, and that is not supported by the evidence. We believe the lack of effectiveness of these programs for Aboriginal people stems from barriers that are of a different character from those faced by other groups: a combination of racism rooted in long-standing and deeply ingrained stereotypes, and work environments with cultures that alienate Aboriginal employees.

How was I supposed to deal with a manager and a system that continually sought to treat me as a child? I have both a Bachelor and a Masters degree, and their tactics included requests that I submit all of my calculations for verification by a supervisor, ostensibly because they couldn't be sure that my totals were correct. No other person among my forty-three co-workers was required to do this. They told me that my work was being checked because I grew up on a reserve where nobody learned to add properly.¹⁷⁴

171 Human Resources Development, *Annual Report, Employment Equity Act 1994* (Ottawa: Supply and Services, 1994), pp. 27 and 26.

172 Treasury Board, *Employment Equity in the Public Service*, Annual Report 1992-93 (Ottawa: Supply and Services, 1994).

173 *An Act respecting employment equity* (Bill C-64), 1st sess., 35th Parl., given royal assent on 15 December 1995. The bill also brought the federal public service under the provisions of the act

174 Extract from an interview conducted in preparation for an appeals hearing following dismissal from a post in the federal public service, quoted in Corinne Jetté, "The Dynamics of Exclusion: Discrimination and Other Barriers Facing Aboriginal Peoples in the Labour Market", research study prepared for RCAP (1994).

Measuring this type of discrimination is always difficult. Two indices are available, neither without shortcomings. The first is data from surveys in which respondents indicate whether they have experienced discrimination on the grounds of race in employment, housing or access to services. As noted in Table 5.15, 11.7 to 25.5 per cent of Aboriginal respondents (depending on the group) who looked for work in 1990-1991 indicated that being Aboriginal had been a barrier for them. The highest percentage was among Aboriginal people living off-reserve, a group that is visibly distinct from the majority population but in regular contact with it. Survey results are reinforced by personal accounts that detail the experiences Aboriginal people have had, and continue to have, with racist attitudes and behaviour.

Economists take another approach to the role of discrimination in explaining inequalities in outcomes (such as incomes or unemployment rates) between Aboriginal and non-Aboriginal populations. Taking measurable characteristics that can be expected to contribute to the outcome (such as levels of education, training, age and location), they examine how much of a gap remains in levels of earnings or rates of unemployment between the two groups if the Aboriginal group is assumed to have the same characteristics as the non-Aboriginal group. This approach explains about half the difference in outcomes, but a gap of about 50 per cent remains unexplained. This unexplained residual is often taken to be a measure of the effects of discrimination, although other differences not measured and not included in the analysis could also be at work.¹⁷⁵

While the degree of racism cannot be ascertained precisely, the available measures and many personal accounts brought to the attention of Commissioners testify to the fact that it is a significant and painful problem. At the Commission's hearings in Roseau River, Manitoba, an advisory council of Aboriginal people employed by the Manitoba government drew these conclusions from its study of Aboriginal employees in the provincial civil service:

*The central finding of our report is that Aboriginal people face barriers and obstacles in the workplace ... Our findings show that racism and discrimination exist in the Manitoba civil service, and that racism is the basis of the barriers and problems faced by Aboriginal people. Racism is experienced through discrimination, bias, exclusion, stereotyping, lack of support and recognition, negative attitudes, alienation in the workplace, and lack of role models in management positions. Racism is exclusion.*¹⁷⁶

The barrier of discrimination based on stereotypes of Aboriginal people is compounded by the barrier of cultural clash, a barrier of which employers are often completely unaware. We explored some basic cultural differences in Volume 1. In the workplace, differences between Aboriginal cultures and corporate cultures are manifested in interpersonal relations, decision-making processes, concepts of leadership and the organization of work. A report prepared for the federal Public Service Commission in 1991, *A Study on the Retention of Aboriginal Peoples in the Federal Public Service*, made the following observations:

175 Peter George, Peter Kuhn and Arnold Sweetman, "Patterns of Employment, Unemployment and Poverty (Part Two): A Comparative Analysis of Several Aspects of the Employment Experience of Aboriginal and Non-Aboriginal Canadians Using 1991 Census Public Use Microdata", research study prepared for RCAP (1994).

176 Aboriginal Advisory Council, Manitoba Civil Service Commission, "Presentation to Royal Commission on Aboriginal Peoples, December 8, 1992" (1992).

Current and former Aboriginal employees frequently comment on the difficulties faced in adapting to the Public Service. For many, entry involves a culture shock which comes in a variety of guises. The language of the bureaucracy and formalities of government create uneasiness for many Aboriginal peoples. They feel conflicts between their traditional ways and accepted government practices ... The bureaucratic levels and systems within government are also foreign.

The Public Service is perceived to allow minimal room for autonomy or creativity. The environment is perceived to be fiercely competitive, filled with roadblocks to advancement, and with people looking out only for themselves. The individualistic way in which work is done is perceived to be alien and pressure packed.¹⁷⁷

Racism and culturally alien environments have a chilling effect when reports of bad experiences circulate within the Aboriginal community, discouraging others from seeking employment in these workplaces. Added to these barriers are systemic barriers, such as artificial job requirements, lack of knowledge of how the recruitment and hiring systems work, and lack of personal networks to assist in finding job opportunities. Logistical barriers include distance from the job site, lack of work clothing, penalizing welfare regulations and, for reserve residents, the prospect of paying income tax.

Because these kinds of barriers persist, it is vital to develop an effective employment equity program for Aboriginal people. Our recommendations in this regard are presented later in this chapter.

Pathways to Success

At the end of the 1980s, the federal government initiated a significant shift in its approach to training. The Labour Force Development Strategy moved the government toward the development of partnerships with the private sector and others in the planning and delivery of labour force training. Although Aboriginal people were initially left out of the process, subsequent consultations made it clear that a complementary but distinct approach was required. The Pathways to Success program, as it came to be called, was funded at \$200 million a year and involved a significant degree of decentralized decision making about labour force training by Aboriginal management boards established at the local, regional and national levels. More than 80 per cent of the Aboriginal population was represented by Pathways boards. There were some 100 local boards across Canada, 12 regional or territorial level boards, and a national Aboriginal management board.¹⁷⁸

On the whole, Pathways to Success was a significant and welcome step in the direction of Aboriginal control. The local management boards decided such matters as the training priorities for the area, who should benefit from training, who should deliver the training, and whether some of the money allocated to the area should be devoted to services such as counselling, job referrals, interview preparation and skills assessment.

Although in general the approach was well received, Pathways experienced some difficulties. Disputes arose about the allocation of funds by region, within regions and to particular constituencies within regions. The main thrust of Pathways was to have all Aboriginal people

177 Quoted in Jetté, "The Dynamics of Exclusion" (cited in note 174).

178 Information provided by Human Resources Development Canada.

represented on the boards rather than to have separate structures, and while this was acceptable in some areas, in others it ignored a long history of separate institutional development.

Eventually, the human resources development department adjusted its approach to accommodate separate local boards for Métis people and First Nations in Saskatchewan, functioning under a joint board for the province as a whole. In Manitoba, separate structures for Métis and First Nations were established at both the provincial and the local level. Even so, the legitimacy of some boards was challenged. In Saskatchewan, for example, the Metis Society of Saskatchewan and the Federation of Saskatchewan Indians were presumed to represent Aboriginal interests in the area of training but were challenged by groups and institutions who felt that these umbrella organizations would not represent their interests fairly (for example, women who regained their status under Bill C-31 and organizations serving Aboriginal people in urban areas).¹⁷⁹

Other issues revealed in the Commission's community case studies included concerns about the difficulty of obtaining funding for Aboriginal training institutions and the inability of Pathways to make headway against the duplication and confusion that currently exists among the many providers of labour force training.¹⁸⁰

During 1994 and 1995, the federal government initiated a structural review of the Pathways strategy by advisory and working committees that were asked to examine options for the future delivery of Aboriginal human resource programs. The review, whose final report was delivered to ministers on 30 March 1995, focused largely on organizational and administrative arrangements. These were important issues, particularly as they related to shortcomings in the initial arrangements. Although Pathways was innovative, there were significant limitations on Aboriginal control in a model that was essentially one of decentralized decision making in the context of a federal program. While Pathways pushed Aboriginal control several steps beyond the norm, it remained a program in which purpose, funding and duration were determined in Ottawa, albeit with Aboriginal input.

As a result of the review, new arrangements are being put in place that represent a further step toward Aboriginal control. In January 1996, framework agreements were signed with three national Aboriginal organizations, setting out in general language terms of reference, standards and guidelines to govern the provision of training. Bilateral agreements are then to be signed between First Nations, Métis and Inuit organizations at the regional or provincial/territorial level and federal human resources development offices, on the basis of which the organizations will receive funding to organize and deliver training programs.

As they assume a new measure of control, Aboriginal organizations will need to move beyond administrative and organizational issues to come to grips with important substantive and strategic concerns. Some successful and innovative approaches were developed under Pathways in a number of places. At the same time, one of the criticisms of Pathways was its fragmentation through its reliance on many local boards and the lack of an integrated perspective on training priorities.¹⁸¹ There was too much emphasis on meeting local, short-term needs in an ad hoc fashion. An independent assessment of Pathways, prepared for the national management board, reported in 1994:

Only 13% of AMB [Aboriginal Management Board] respondents reported that any

179 Tina Eberts, "Pathways to Success: Aboriginal Decision-Making in Employment and Training", in *Aboriginal Self-Government in Canada: Current Trends and Issues*, ed. John Hylton (Saskatoon: Purich, 1994).

180 Loxley et al., "Aboriginal People in the Winnipeg Economy" (cited in note 48), and Heinemann, "Metis Economic Development in Regina" (cited in note 9).

181 Eberts, "Pathways to Success" (cited in note 179).

*strategic planning has been undertaken by their AMB. Of these, a quarter of the AMB respondents reported that strategic planning has been done in consultation with HRD [Human Resources Development], and only 14% reported that it was done in consultation with the Aboriginal community.*¹⁸²

Aboriginal management boards have also inherited from the department of human resources development and its predecessors a legacy of approaching human resources from a supply perspective, which focuses on training for a labour market where jobs may not exist. It goes without saying that a well-functioning labour market with low levels of unemployment requires a supply of capable, willing individuals and employers with jobs to offer them. While it seems obvious that both the supply and the demand for labour need to come together if employment is to result, the emphasis of policy makers, since the early 1960s, has been very much on the characteristics of the labour force (the supply side), to the neglect of the number and types of jobs available (the demand side).

In the context of the 1960s, this was understandable since the principal problem in the Canadian economy at that time was the supply of a skilled labour force to fill jobs in a rapidly expanding economy. Thus, emphasis was placed on increasing the availability of skilled labour through immigration, expanding educational opportunities, investing in training programs and so on.¹⁸³ Significant structural changes in the economy have not been accompanied by equally significant changes in the approach to training, which continues to be carried out in isolation from employment development strategies. This approach is inadequate to the challenges of the 1990s generally and to the employment of Aboriginal people in particular.

One of the issues that delayed completion of a Pathways agreement in Manitoba (the process took about five years) was the desire of First Nations leadership to bring the program into their emerging structures of self-government so that training could be pursued as part of a comprehensive approach that included education and economic development.¹⁸⁴ With new structures now being put in place, it may be easier to achieve a more holistic approach.

It is hard to say just how well Pathways has done with respect to the employment of trainees. Certainly, a number of projects provided training to persons already employed, thus avoiding the problem of lack of fit between training and available jobs. As far as we know, data are not available that would allow an empirical assessment of this dimension. However, an independent review prepared for the national Aboriginal management board in 1994 made the following observations.

The objectives of the Pathways partnership ... are to:

- invest in and develop a trained Aboriginal labour force, and
- facilitate broader Aboriginal participation in the unique Aboriginal labour market and the broader Canadian labour markets.

Our summary conclusion, based on these objectives is that:

182 Universalialia, "Assessment of the Pathways to Success Strategy, Final Report to the National Aboriginal Management Board" (Montreal: June 1994), p. 23.

183 Lars Osberg, "Social Policy and the Demand Side", paper presented at the Canadian Employment Research Forum Workshop on Income Support, Ottawa, 24 September 1993 (Halifax: Dalhousie University, 1993).

184 Loxley et al., "Aboriginal People in the Winnipeg Economy" (cited in note 48).

- Although Pathways is currently working in and developing a trained Aboriginal labour force ... there appears to have been little strategic policy thinking to date ... about:
 1. what a ‘trained Aboriginal labour force’ means, and what strategies are required to achieve this,
 2. what ‘broader participation’ in the Aboriginal and Canadian labour market means and how to accomplish this, and
 3. what the elements of the ‘unique Aboriginal labour market’ are and how they relate to Canadian labour market characteristics.¹⁸⁵

These observations go to the heart of the Commission’s concerns about employment development. The Aboriginal labour force is young and growing rapidly. Much of this labour force resides in rural and remote areas where jobs are scarce. Other job seekers live in urban areas or are migrating in significant numbers to cities where the local job markets often cannot absorb them rapidly enough and where they face discrimination. New strategies are required to address these issues.

What needs to be done differently?

The Commission sees the need for an integrated, labour-market-driven effort to get Aboriginal participants into real, sustainable jobs. Our prescriptions call for

- a special employment and training initiative, undertaken by Aboriginal leadership, to forge partnerships with public and private sector employers and education and training institutions that will lead to real employment opportunities for which the Aboriginal labour force can be trained, developed and qualified;
- a new approach to employment equity;
- strengthening the capacity of institutions, such as employment services agencies, to forge links between jobs and the Aboriginal labour force through human resource planning to identify existing and emerging opportunities, skills development and related employability initiatives;
- improving Aboriginal employment within Aboriginal communities, both in public service jobs and business creation, which will retain jobs and spending within the communities through ‘import replacement’ strategies;
- providing culturally appropriate and affordable child care services so that Aboriginal parents can be productively engaged in the labour force; and
- emphasizing job creation in the Canadian economy.

Special employment and training initiative

The Commission sees the need for an intensive marshalling of resources and energy to find jobs and qualify Aboriginal people to fill them.

A special effort is also required to ensure that Aboriginal people acquire the skills and experience for positions that are now or shortly to become available in their communities. Jobs associated with

185 Universalialia, "Assessment of Pathways" (cited in note 182), pp. 76-77.

self-government, broadly defined, include public administration, health care, education, economic development, and the management of lands and resources.

The Commission urges that bridges be built between Aboriginal nations, governments, private sector employers, and education and training institutions in the context of a 10-year initiative to identify real job opportunities and develop the training that will qualify Aboriginal people for those jobs. The Commission believes that the federal and provincial governments should fund this initiative.

This initiative would target barriers that currently block Aboriginal access to employment opportunities on a scale commensurate with need. These barriers appear to be threefold:

- knowing where future employment possibilities lie in order to obtain relevant training, a requirement for most job-market entrants;
- obtaining adequate on-the-job experience so that the skills offered an employer have been tested and enhanced; and
- getting a foot in the door, or obtaining access to available jobs to overcome stereotypes and demonstrate capability.

The Commission believes an effective employment initiative would take the following form:

- Federal and provincial governments would be involved in funding the initiative and establishing its framework and operating structure. Together with municipal governments, they would agree, as potential employers, to participate and be responsive to initiatives undertaken by Aboriginal governments and related institutions.
- Leadership and co-ordination would be by national Aboriginal governments, provincial Aboriginal organizations or service entities such as friendship centres in cities. Use of established Aboriginal employment services, where they exist, should be encouraged.
- Public and private sector employers would be approached by the lead agency to participate in all phases of the initiative. They could have access to program funds and expertise to help them forecast their employment requirements for three to five years.
- Where significant employment opportunities were identified through this process, the agency would work with local educational institutions and participating employers to design appropriate training packages.
- Aboriginal governments would identify individuals with suitable backgrounds to participate in this training, and employers would participate with educational institutions to select candidates.
- Training would combine classroom instruction with on-the-job experience, depending on the nature of the skills to be acquired. An allowance would be paid to trainees.
- At the conclusion of the combined classroom and work experience, trainees would move to full-time employment with one of the employers for a term of up to 12 months, during which the training allowance would continue, supplemented with payments by the employer.

- At the end of the term of employment, the trainee would compete for permanent employment in the sector as jobs became available. The participating employer would not be required to hire from within the trainee group but would be encouraged to do so.

This approach could overcome the barriers outlined above. Chartered banks have already undertaken this type of initiative, collectively identifying their requirements for employees and co-operating with community colleges to design appropriate training programs. Market gardeners in the Winnipeg area participated in a similar program to train horticultural workers. Public agencies operating airports, highway maintenance crews, recreational programs, provincial and national parks, fish and wildlife monitoring and conservation programs, and environmental inspection operations are only a few of the public sector activities that would be suitable for such an initiative.

Aboriginal organizations would drive this initiative by identifying employment needs and opportunities, by developing collaborative relationships with major employers in their regions, by working with them to develop employment and training plans, and by sponsoring proposals for funding. In developing proposals, they would focus on real, sustainable employment prospects, not make-work projects. They would also strive to obtain commitment from all parties for these endeavours.

Employers, both public and private sector, would be key participants in the initiative. They know their work force requirements, where opportunities are likely to emerge, and what skills are needed to fill new openings. Employers would participate in the design and review of training programs, help select candidates, and provide on-the-job training and work experience. They would have the option of providing employment based on merit after the training phase.

There are many examples of private sector employers, whether motivated by employment equity requirements or by a sense of justice and responsibility to the community, that have demonstrated best practices in supporting training and hiring of local people. Indeed, there is a growing track record of success on which to build a more concerted effort, and we return to this aspect below.

It will be important for Aboriginal organizations to enlist the support of unions for this endeavour. Historically, Canadian unions have been associated with issues of social and economic justice, and many collective agreements contain employment equity provisions. In addition, some unions, such as the United Steelworkers, have extensive experience with employment equity at the bargaining table and in the workplace.¹⁸⁶

The Commission believes that major employers in the private sector will respond positively to a well-structured program because it makes good business sense and because it will help them meet their employment equity objectives. The Commission also believes there is a special onus on the public sector - federal, provincial and municipal governments and institutions - to contribute to this initiative. Indeed, there should be a mandate for participation. As Aboriginal governments assume many of the responsibilities now carried out by federal, provincial and municipal governments, public sector organizations have an obligation to help develop an Aboriginal work force to take over these activities.

Aboriginal and non-Aboriginal education and training institutions would need to be involved closely in this initiative to provide access to existing programs where these are relevant. They may also need to collaborate in the development of new programs, including the design of curricula for

186 See Canadian Labour Congress, "Aboriginal Rights and the Labour Movement: A Report by the Canadian Labour Congress" (1993); and United Steelworkers of America, "Aboriginal Studies Project" (1993), briefs submitted to RCAP.

classroom and workplace-based training. Outreach services to rural and remote communities and in literacy and pre-employment training will also be required.

The Commission believes that federal and provincial governments should establish the framework for this special initiative by setting out the general principles, by providing funding, and by establishing the criteria for allocating funding in the following areas:

- support for Aboriginal organizations in the development of project proposals;
- support for private sector employers to help meet their cost of job forecasting and planning workplace-based training and work experience;
- institutional training costs for participating trainees; and
- subsidies or tax benefits for on-the-job trainee positions in companies.

Recommendations

The Commission recommends that

2.5.36

Federal and provincial governments fund a major 10-year initiative for employment development and training that is

- aimed at preparing Aboriginal people for much greater participation in emerging employment opportunities;
- sponsored by Aboriginal nations or regionally based Aboriginal institutions;
- developed in collaboration with public and private sector employers and educational and training institutions; and
- mandatory for public sector employers.

2.5.37

This initiative include

- identification of future employment growth by sector;
- classroom and on-the-job training for emerging employment opportunities;
- term employment with participating employers; and permanent employment based on merit.

Employment equity

The special initiative we recommend is directed to selected major employers who can provide the kinds of jobs and work experience that would greatly increase Aboriginal employment. At the same time, the Commission believes that employment equity initiatives should apply to a much broader range of employers, especially given the rapid growth of the working-age Aboriginal population.

Employment equity remains one of the few available levers with legislative backing to open up jobs in the wider Canadian economy.

The Commission believes that employment equity programs can work but that for this to happen, a new approach is needed to address the unique situation of the Aboriginal labour force. During our hearings, the Commission received briefs outlining the ingredients of successful initiatives. Various studies have documented employers' best practices in addressing these issues, including the establishment of cross-cultural and anti-racist education programs, mentoring relationships, support groups, the use of secondments and acting appointments as part of a bridging strategy, inclusion of Aboriginal people in the shaping of employment equity programs, giving Aboriginal people credit for experience that helps them overcome seniority problems for promotion purposes, and involving unions in the design and implementation of programs.¹⁸⁷ At the core of these initiatives is a collaborative approach and a clear understanding of the importance of Aboriginal involvement in the process. The brief submitted by the Canadian Bankers Association sets out these issues succinctly:

*Increasing employment of Aboriginal people has presented special challenges to the banks. A major component of any success that has been achieved so far has been the co-operation and input of Aboriginal organizations and individuals (some of whom have become bank employees) and their willingness to enter into constructive partnerships. With their help, the banks' efforts in employing Aboriginal people have become more focused and more informed in the past several years; the population of Aboriginal people in the industry almost doubled between 1987 and 1991. The industry still has a great distance to go in reaching an appropriate level of Aboriginal representation. The barriers to entry described earlier still exist, but we have now more clearly identified them and can only fully dismantle them with the assistance and understanding of the Aboriginal community.*¹⁸⁸

Another organization with extensive experience in this field is Syncrude Canada Limited, located near Fort McMurray, Alberta, which has an active program aimed at employment, local community development and business development. The company identifies and communicates its employment and work performance standards, offers cross-cultural training to management staff, and provides scholarships and summer employment for Aboriginal students. In 1992, 275 of its 4,300 employees were Aboriginal people, with an average of just over eight years with the company.¹⁸⁹

To make employment equity work, the Commission believes that a new approach should have these central features:

- a long-term, planned and collaborative approach to change;
- a renewed commitment from major public and private sector employers to eliminating discriminatory practices and barriers that impede the recruitment and retention of Aboriginal employees;
- shifting the emphasis from employers seeking to relate to individual applicants to the establishment of mutually beneficial and respectful relations between companies and

187 See, for example, Treasury Board, "Completing the Circle: Report of the Aboriginal Employment Equity Consultation Group", brief submitted to RCAP (1992).

188 Canadian Bankers Association, "Brief submitted to the Royal Commission on Aboriginal Peoples" (1993), p. 8.

189 Information supplied by Jim Carbery, Senior Adviser, Aboriginal Programs, Syncrude Canada Ltd., Fort McMurray, Alberta.

Aboriginal communities, as represented in part by its employment- and training-related institutions;

- shifting the emphasis from the supply side of the problem (that is, counting Aboriginal employees and their representation in the labour force) to the demand side by asking employers to project the occupations in which they expect to see employment turnover and new hirings;
- asking employers to work with appropriate Aboriginal organizations, especially those providing employment services, education and training, to develop a strategy that could, if necessary, be formalized into an agreement whereby, in the short term, suitably qualified candidates could be referred to available positions and, in the medium to long term, Aboriginal people could undertake the education and training needed to qualify them for future openings;
- asking employers to commit to a strategy that would create a hospitable environment for the attraction and retention of Aboriginal employees, taking advantage of best practices elsewhere; here, also, Aboriginal organizations such as those engaged in providing employment services can make a substantial contribution; and
- strengthening the independent auditing, monitoring and enforcement of employment equity programs to increase the accountability of those charged with meeting employment equity objectives and, in the absence of significant progress, considering tougher measures such as mandatory targets and sanctions for non-compliance.

Recommendations

The Commission recommends that

2.5.38

Employment equity programs for Aboriginal people adopt a new long-term approach involving

- the forecasting by employers of labour force needs; and
- the development of strategies, in collaboration with Aboriginal employment services and other organizations, for training and qualifying Aboriginal people to fill positions in fields identified through forecasting.

2.5.39

These employment equity programs be strengthened by

- expanding the range of employers covered by federal, provincial and territorial legislation; and
- making the auditing, monitoring and enforcement mechanisms more effective.

Employment services

Lack of information about jobs was cited by between one-quarter and one-third of respondents in the Aboriginal peoples survey, depending on the Aboriginal group (Table 5.15). There is a significant gap between employers in urban areas, the vast majority of whom have no Aboriginal employees and are unfamiliar with the Aboriginal community, and Aboriginal people looking for work, who have only a limited knowledge of, and even less connection to, potential employers. Sociological studies of the job-finding process have repeatedly underlined the importance of personal connections and networks in finding and obtaining jobs. Notwithstanding models of recruitment that emphasize the importance of formal advertising so that a broad range of applicants can apply and from whom the most qualified are theoretically selected, the reality is that typically only a small percentage of vacancies are advertised.

In many cases, people learn of vacancies through a relative or friend with inside knowledge. Employers, particularly smaller ones, are inclined to accept referrals from existing employees. Interpersonal networks are important in notifying job searchers of new openings and offering advice on how to present applications to meet particular job requirements. Applicants outside these networks may be further restricted by collective agreements that specify that all vacancies above the entry level be offered first to existing employees. Members of the Aboriginal labour force often do not have interpersonal networks or connections with non-Aboriginal employers and vice versa. The connections need to be forged in a deliberate manner by employment service agencies.

Several urban centres have at least one Aboriginal agency providing employment services, usually with financial support from the department of human resources development. These agencies help to connect the Aboriginal labour force in urban areas with potential employers, including employers not covered by employment equity legislation. However, the Commission believes they have an important role to play in making employment equity work more effectively for the Aboriginal community, particularly as catalysts and focal points for the development of collaborative arrangements and integrated approaches.

Aboriginal Training and Employment Services (ATES) in Winnipeg demonstrates the role employment service agencies can play.¹⁹⁰ Established by the Manitoba Metis Federation in 1973, the agency now serves all Aboriginal groups and is governed by an Aboriginal board. It offers a range of services to job seekers, including assessments to identify skills and employment barriers, counselling, résumé writing, interview practice and job search assistance. The agency has also developed innovative training programs, involving employers as much as possible in a range of activities, from the design of training to on-the-job placements and employment. A 1993 bank teller training program, for example, was negotiated by ATES and offered in co-operation with the Bank of Montreal and the Canadian Jobs Strategy. After 22 weeks of training, both in the classroom and on the job, all 12 trainees were offered a minimum of 20 hours per week of employment with the bank as well as the opportunity to compete for more hours and for full-time positions in the future. ATES screened applicants for the project and provided support and follow-up for them.

ATES has also been approached for help by employment equity employers, and has responded out of a conviction that this mediating role is necessary if employment equity is to work. However, it has no formal mandate in this area, nor does it receive financial support to perform this role. Indeed, the agency's staff complement has not increased appreciably since its inception, even though the number of clients has increased enormously.

¹⁹⁰ Our discussion of Aboriginal Training and Employment Services (ATES), formerly called Native Employment Services, draws on Loxley et al., "Aboriginal People in the Winnipeg Economy" (cited in note 48).

Agencies such as ATEs face an unpredictable future because of the lack of commitment by governments to long-term funding.

ATEs's funding is only year to year which places staff in a very insecure position, and increases have not kept pace with the cost of living. Real salaries have, therefore, been falling, and ATEs has not had the resources to put in place its own staff development program for the medium/long term. The net result has been a tendency for staff to move on as soon as they have experience and can command a higher salary elsewhere. This is unfortunate because staff are committed to the work and would develop career plans within ATEs if funding were secure, salaries competitive, advancement possible and the future reasonably predictable. The move to training programs in itself does not help this problem because funding is obtained only on a project by project basis. Apart from perpetuating staff insecurity, this also means that premises and equipment rented for specific training projects must be returned as each project expires and released as new projects are approved. This plays havoc with continuity.¹⁹¹

Because of the role of Aboriginal employment agencies in connecting the urban Aboriginal labour force with potential employers, including employment equity employers, the Commission has reached the following conclusions:

- Aboriginal employment services agencies should be in place in all major urban areas of the country.
- These agencies should have a mandate that includes a role in the Commission's proposed 10-year employment initiative. They could also assist in implementing the Commission's approach to employment equity, which goes beyond short-term application preparation and referral to involve long-term collaboration with employers.
- The agencies also require a firm financial footing so that they have the stability to plan, to develop long-term working relationships with employers and other agencies, and to keep and develop their staff. While governments must shoulder this funding responsibility in large measure, major companies that use the services of Aboriginal employment agencies should provide a fee for service as part of the long-term partnership we have suggested. Such services can be provided by both private and public sector (not-for-profit) organizations.
- Aboriginal people in urban areas need culturally appropriate employment services that can meet their diverse needs arising from sex, age, parental status, migration, temporary job dislocation, recent imprisonment, or severe handicaps related to employability (for example, physical or mental disabilities, drug addiction and low levels of education).
- As with economic development policy and programs, Aboriginal employment services should also make the transition from being funded programs of federal or provincial-territorial governments to becoming part of the range of services provided by Aboriginal institutions in the context of self-government. Again, appropriate financial transfers will need to be negotiated.

Recommendation

The Commission recommends that

191 Loxley et al., "Aboriginal People in the Winnipeg Economy".

2.5.40

Canadian governments provide the resources to enable Aboriginal employment service agencies to

- (a) locate in all major urban areas;
- (b) have stable, long-term financial support;
- (c) play a lead role in the 10-year employment initiative, contribute to the effectiveness of employment equity, and offer the wide range of services required by a diverse clientele; and
- (d) evolve from being a program of federal, provincial and territorial governments to being one of the services provided by Aboriginal institutions on behalf of Aboriginal governments where appropriate, with appropriate financial transfers to be negotiated.

Employment opportunities in Aboriginal communities

Aboriginal people have made employment gains in recent years by taking over the delivery of services previously offered by non-Aboriginal personnel, such as housing, income support and economic development programs. Communities have also employed their own members in reserve-based schools and Aboriginal family and children's service agencies.

This source of employment growth has not yet run its course but will continue to generate jobs as Aboriginal communities pursue self-government. Indeed, negotiations are under way in many parts of the country to assume responsibility for areas of jurisdiction such as education, policing and fisheries management. The Mi'kmaq Nation in Nova Scotia, for example, has formed a province-wide education authority and is in the process of taking over all education responsibilities from the federal department of Indian affairs. A political accord signed by the Mi'kmaq chiefs of Nova Scotia and the minister of Indian affairs on 4 November 1994 commits both parties to actions that will result in Mi'kmaq jurisdiction over education. A formal agreement will lead to enabling legislation being introduced in the House of Commons.

In Cape Breton, a Mi'kmaq police force has been formed to provide policing services to the region's communities once provided mainly by the RCMP. In Saskatchewan, Métis people, in their negotiations for self-government, expect to identify a range of services that can be put under Métis jurisdiction and to staff them with a highly qualified Métis civil service.

The Commission's research also provides some evidence of room for employment growth within Aboriginal communities. In Pangnirtung, for example, only about half the federal and territorial government jobs are held by Inuit, although the ratio is better for local government positions.¹⁹² At Alert Bay, the Nimpkish Band Council has 70 employees, of whom 59 are Aboriginal. There are numerous positions in the local schools, the health centre and other sectors where Aboriginal employment could be expanded.¹⁹³

Figure 5.5, based on special tabulations of the 1991 census, shows that only 59.7 per cent of all on-reserve jobs were held by First Nations people in 1991. While Aboriginal people predominate in the senior management positions (almost 90 per cent), their share of middle management and professional jobs was less than half. In other occupational groups, Aboriginal people accounted for between one-half and two-thirds of employees.¹⁹⁴ The need for Aboriginal management and

192 Reimer and Dialla, "A Case Study of an Inuit Economy" (cited in note 74).

193 Gillis et al., "Case Study of Alert Bay" (cited in note 8).

194 Clatworthy et al., "Patterns of Employment" (cited in note 38).

professional staff will grow significantly as Aboriginal people assume responsibilities associated with self-government and control of lands and resources, and strategies will be needed to ensure that the education of Aboriginal people will meet this demand, an issue addressed in the following section on education and training.

Sustainable employment creation cannot be achieved solely by Aboriginal people taking over public service jobs in their communities. To ensure long-term employment, it will be necessary to build on the opportunities created by self-government and control over lands and resources. The Crees of Quebec provide an instructive example of how this can be done. The Cree Construction Company (Quebec) Ltd. was established in 1976 with a mandate to construct houses in Cree communities. It later expanded into road construction and maintenance, infrastructure and renovation works, and environmental projects. The company reached just under \$66 million in business volume in 1993-94, with a profit of \$4,253,000 before taxes and a net profit of \$2,678,082. During the peak season that year, 250 Cree were employed throughout the territory. The company is now looking to expand into international markets.¹⁹⁵

Employment opportunities can also be created through the strategic leverage of existing capital in Aboriginal communities. The 1992 study conducted for the Shuswap Nation Tribal Council found that close to 80 per cent of all consumer expenditures (groceries, restaurants, auto care, clothing, and cultural and leisure activities) were made off-reserve. At an average of \$16,700 per household, the 457 households in these communities inject \$7.3 million annually into the non-Aboriginal economy.¹⁹⁶ An 'import replacement' strategy based on the development of businesses within Aboriginal communities provides considerable scope for employment creation.

195 Cree Regional Economic Enterprises Company (CREECO), *Annual Report, 1993-94*.

196 André LeDressay, "A Brief Tax(on a me) of First Nations Taxation and Economic Development", in RCAP, *Sharing the Harvest* (cited in note 1), p. 222.

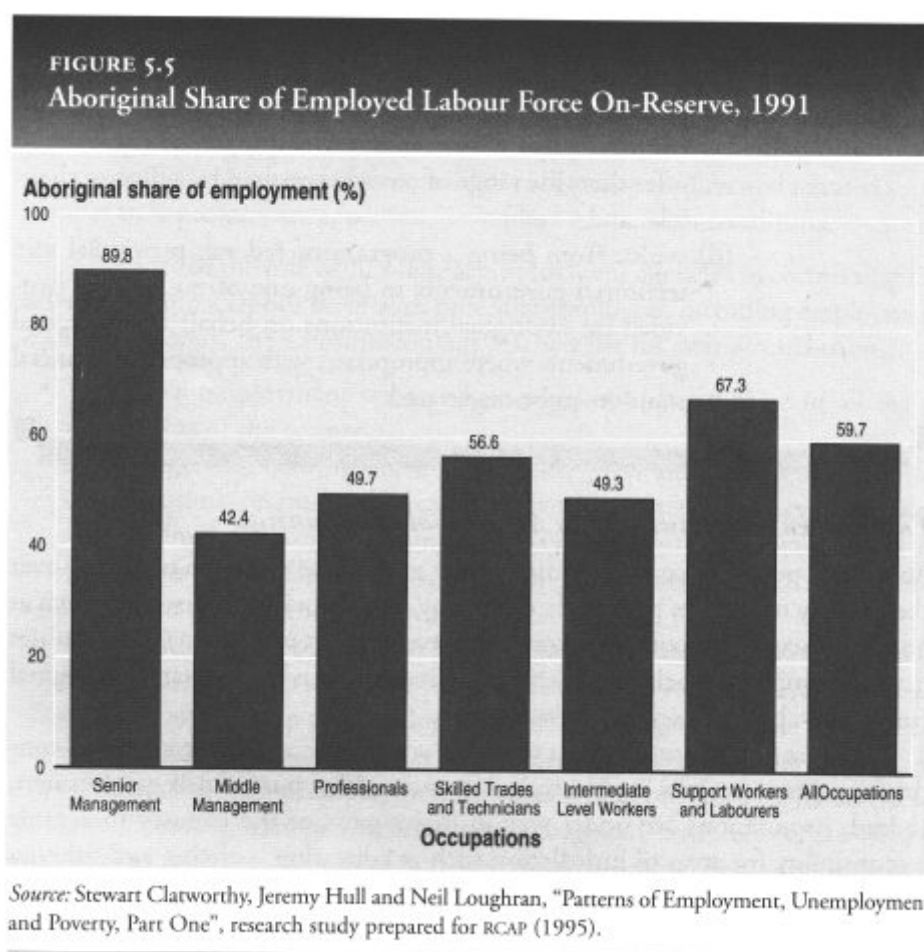


Figure 5.5 - Aboriginal Share of Employed Labour Force on-Reserve, 1991

Recommendation

The Commission recommends that

2.5.41

Aboriginal nations adopt policies whereby

- their members continue to assume positions in the public service within their communities;
- as much as possible, they buy goods and services from Aboriginal companies; and
- they provide opportunities for skills development, business growth and the recycling of spending within their communities.

Child care

As shown in Tables 5.15 and 5.16, close to 10 per cent of respondents in the 1991 Aboriginal peoples survey identified the lack of child care as a barrier to employment. That there is a shortage of long-term, affordable, culturally appropriate child care services is demonstrated by widespread community-based efforts to increase the supply. The initiatives that have succeeded or that promise

success have been realized in the face of many barriers and only with the dedication and creative effort of committed individuals.

Funding arrangements have presented a major barrier in the past, although the situation has improved with the launching of programs such as the federal government's Aboriginal Headstart initiative and the First Nations and Inuit child care program. The Child Care Initiatives Fund (begun in 1988 and terminated in 1995), which funded community-based initiatives in early childhood development, was also useful in demonstrating the variety of creative approaches to child care that communities find appropriate.

Most provinces offer child care subsidies as part of programs to get people back to work or pursue training, but support for the establishment and operation of facilities varies widely. Newfoundland, for example, provides no support. Most successful ventures have been co-ordinated with, and have drawn funding from, a combination of education, child care, employment and social programs.

Inflexible regulations present another barrier. Some licensing requirements, particularly in non-urban communities, are almost impossible to meet (for example, staff qualifications, facilities). Others are simply inappropriate for Aboriginal communities — the use of fences to delimit play areas, for example, and the requirement for cribs when hammocks are used traditionally. In Pangnirtung, housing regulations as well as child care regulations frustrated an initiative on the part of local women:

Many women suggested that running several small daycare centres in homes throughout the community would decrease the financial risk and increase the quality of formal child care. As well, this type of daycare would be a culturally familiar extension of the current system of baby-sitting within and between Inuit families. However, 'business' activity is not allowed in housing units owned by the GNwT Housing Corporation ... The complicating factor ... is that 90 per cent of Inuit families have no choice but to live in a house owned by the CorporationConsequently, women who clearly see a potential opportunity to generate their own income by providing a necessary service ... are stopped at the outset by legislation they feel powerless to avoid or change.¹⁹⁷

Lack of community support often presents problems. A continuing concern of Aboriginal women, especially in northern and remote communities, is a lack of support for child care from male-dominated Aboriginal governments. This was also reported as a problem in some southern communities, where child care staff are not respected by chiefs and councils. Among the possible explanations is that men in management or leadership positions often have the financial means to enable their wives to stay at home.¹⁹⁸

Obtaining the management training and expertise to run a child care centre is a challenge, particularly in northern and remote communities. Similarly, meeting provincial licensing standards, which often require formal qualifications rather than on-the-job experience, can be almost impossible. Finally, where training is available, the curriculum and approach require substantial adaptation to meet the needs of Aboriginal children from varying cultures. There is a strong demand for an Aboriginal cultural component in child care training programs and for training in methods of

197 Reimer and DiIalla, "Case Study of an Inuit Economy" (cited in note 74).

198 Clare Wasteneys, "Regional Overview of Aboriginal Child Care in Ontario and Quebec", research study prepared for RCAP (1994).

child rearing appropriate to the cultures of the children. In this context, there is also a desire to draw on the resources of elders and to have their qualifications and services recognized.

Most provinces have child care subsidy programs, but access to them varies. First, subsidies are generally limited to parents using provincially licensed services and to those pursuing employment or educational opportunities. Generally, there is a cap on the number of subsidies available, putting new entrants to training programs and the labour force at a disadvantage. In addition, although the subsidized cost to parents appears very low (\$1 to \$4 a day per child), affordability and hence access appear to be very sensitive to slight changes in the cost. In Winnipeg, for example, raising the subsidized parents' share from \$1 to \$2.40 per day "is reported to have led a number of Aboriginal families to withdraw their children from day care centres ... [and to have] put child care out of the reach of many poor families, and especially those with more than one child in day care".¹⁹⁹ Chipping away at child care subsidy programs in response to fiscal pressures can have a profound effect on Aboriginal families' access to child care.

As with other social services, child care also suffers from a lack of jurisdictional clarity and a consequent avoidance of funding responsibility:

*Under the **Constitution Act, 1867**, section 91(24), the federal government has jurisdiction for reserve lands and all IndiansMeanwhile, the provincial and territorial governments have jurisdiction over child welfare and child care services. This situation has created a continuing jurisdictional ambiguity over Aboriginal child care in some parts of the country. The federal government has argued that provincial governments should be responsible for funding child care, while some provincial governments argue that the federal government should fund child care services that are directed to reserves or status Indians.*

The Aboriginal child care situation in the Ontario and Quebec region illustrates the variations that have evolved across the country in terms of federal and provincial roles in Aboriginal child care. While Ontario has had a long-standing agreement with the federal government that clearly sets out funding arrangements, in Quebec, there is no similar agreement, although the 1975 James Bay Agreement established that the province should extend child care services to reserves in the James Bay region. The Department of Indian Affairs has a clear and substantial role in Ontario, while it does not have a significant role in Quebec.²⁰⁰

The result of these jurisdictional and funding disputes is that many Aboriginal people are left without the child care services they need. On reserves, there is insufficient provision of child care. Métis people do not qualify for Indian affairs funding. And in urban areas, except where Aboriginal children make up a substantial proportion of the local population, there is little commitment by provincial agencies to fund the development of Aboriginal-specific child care that departs from mainstream models.

Child care services are necessary to allow more parents to take advantage of education and employment opportunities, but it is not enough to view them only from this perspective. In Volume 3, Chapter 5 we examine early childhood education and the importance of instilling Aboriginal identity, building Aboriginal language skills, and introducing the values and customs integral to Aboriginal life during early childhood. From this perspective, Aboriginal people need

199 Loxley, "Child Care Arrangements" (cited in note 170), p. 4.

200 Wasteneys, "Regional Overview" (cited in note 198).

access to child care services that are culturally appropriate and integrated with other social and economic objectives.

Recommendations

The Commission recommends that

2.5.42

Aboriginal, federal, provincial and territorial governments enter into agreements to establish roles, policies and funding mechanisms to ensure that child care needs are met in all Aboriginal communities.

2.5.43

The federal government resume funding research and pilot projects, such as those funded under the Child Care Initiatives Fund, until alternative, stable funding arrangements for child care services can be established.

2.5.44

Aboriginal organizations and governments assign a high priority to the provision of child care services in conjunction with major employment and business development initiatives, encouraging an active role for community volunteers as well as using social assistance funding to meet these needs.

2.5.45

Provincial and territorial governments amend their legislation respecting the licensing and monitoring of child care services to provide more flexibility in the standards for certification and for facilities that take into account the special circumstances of Aboriginal peoples.

Job creation and economic policy

Later in this chapter, we underline the importance of education and training strategies and of more innovative approaches to reducing dependence on income support programs. These measures, and many of those outlined in this section as well, are of little avail when the jobs are not there. Under these circumstances, training programs simply become warehouses for the unemployed, employment service agencies lose their effectiveness, and programs designed to put welfare recipients back to work are likely to end in disillusionment and despair.

The economy appears less and less capable of producing the high levels of employment characteristic of earlier decades. There are many reasons for this — stronger international competition, the effects of labour-saving technologies, reduced demand for goods and services as a result of slower overall population growth and a decline in family income — but the result is that many more Canadians are looking for work than there are jobs to accommodate them.

Indeed, the average rate of unemployment has increased steadily in each decade since 1950. Even in the mid-1990s, a period of economic growth, the unemployment rate hovers around 10 per cent, and

projections for the remainder of this decade do not suggest much change. With this level of unemployment, some 1.5 million Canadians, most of whom were experienced, reasonably well educated, and living within commuting distance of potential jobs, were looking for work.

Despite this, Canadian social policy continues to focus on the supply side of the labour market, addressing poverty and unemployment among particular groups and in specific regions. The typical policy response is to suggest that those on welfare and unemployment insurance should be lured into the labour market by financial or other incentives, yet the intended beneficiaries are well aware of the futility of job searches or training when there are no jobs. As demonstrated in Table 5.15, Aboriginal people are aware of the problem as well. Training strategies in the absence of employment development strategies are inadequate to the challenges of the 1990s.

To date, policy interventions on behalf of the Aboriginal labour force have generally taken the number and types of jobs in the Canadian economy as a given. While some attention has been given to business development in recent years, the main thrust of public policy has been to provide income support (which provides for a bare, and demoralizing, existence) or to carve out a place for the Aboriginal labour force through strategies such as employment equity and education and training. These strategies are important, but a fundamental problem continues to be the lack of jobs.

The Commission therefore believes that the economic policy of all levels of government should emphasize job creation. While recognizing the constraints imposed by international financial markets, the Commission is of the view that government policy should favour macro-economic policy stances that lean toward the creation of jobs through low interest rates and moderate exchange rates. To be effective, such a policy will require co-operation from major players in the economy to hold costs, wages and profits at levels that do not fuel inflation and defeat the aim of maximizing job creation potential in a high-productivity economy. The contribution of lower government debt and, hence, lower taxes to job creation will also be significant.

2.8 Education and Training

Few topics received more mention during our public hearings than education and training as part of a strategy for change. Knowledge, expertise and experience are essential for Aboriginal people to regain control over economic development institutions, to manage their lands and resources, to expand their business base and to participate, if they choose, in the mainstream economy. In this section, we seek to identify the key education and training issues to be addressed if Aboriginal economies are to be strengthened. We leave most recommendations, however, to the more extensive discussion in Volume 3, Chapter 5.

While we wish to underline the importance of investing in education and training, we also emphasize that it is not a panacea. Some types of education and training are more useful than others. Some Aboriginal groups benefit more than others. Other factors also contribute to the sharp differences in unemployment rates between Aboriginal and non-Aboriginal people. We also address specific skills shortages in fields crucial for rebuilding Aboriginal economies.

Education, training and labour market outcomes

In the Canadian labour force as a whole, people with higher levels of education can generally expect to benefit from higher levels of labour force participation, a higher probability of employment, and higher levels of earned income. These patterns hold for the Aboriginal labour force as well, but not always and not equally for all subgroups. Figures 5.6 and 5.7 show that

- with each higher level of education achieved, levels of labour force participation improve and the rate of unemployment usually decreases;
- levels of employment improve substantially with the completion of a university degree but not with a high school certificate and only some post-secondary courses; and
- the gap between Aboriginal and non-Aboriginal people tends to diminish as the level of education improves, showing that investments in education improve labour market outcomes and reduce inequalities.

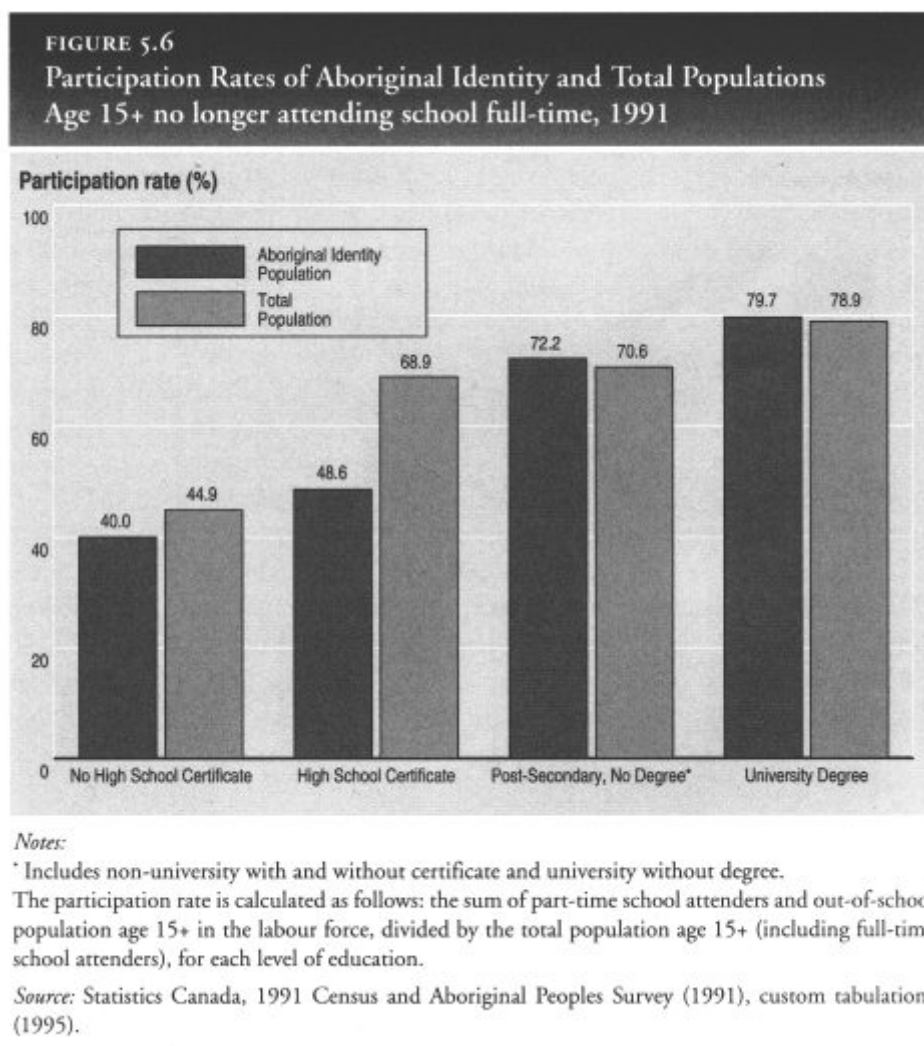


Figure 5.6 Participation Rates of Aboriginal Identity and Total Populations Age 15+ no longer attending full-time, 1991

The Commission was interested to learn what other factors might contribute to successful outcomes. To that end, we made comparisons among Aboriginal people — for example, between those active and not active in the labour market, between those employed and not employed, and between those who have and have not taken post-secondary programs.

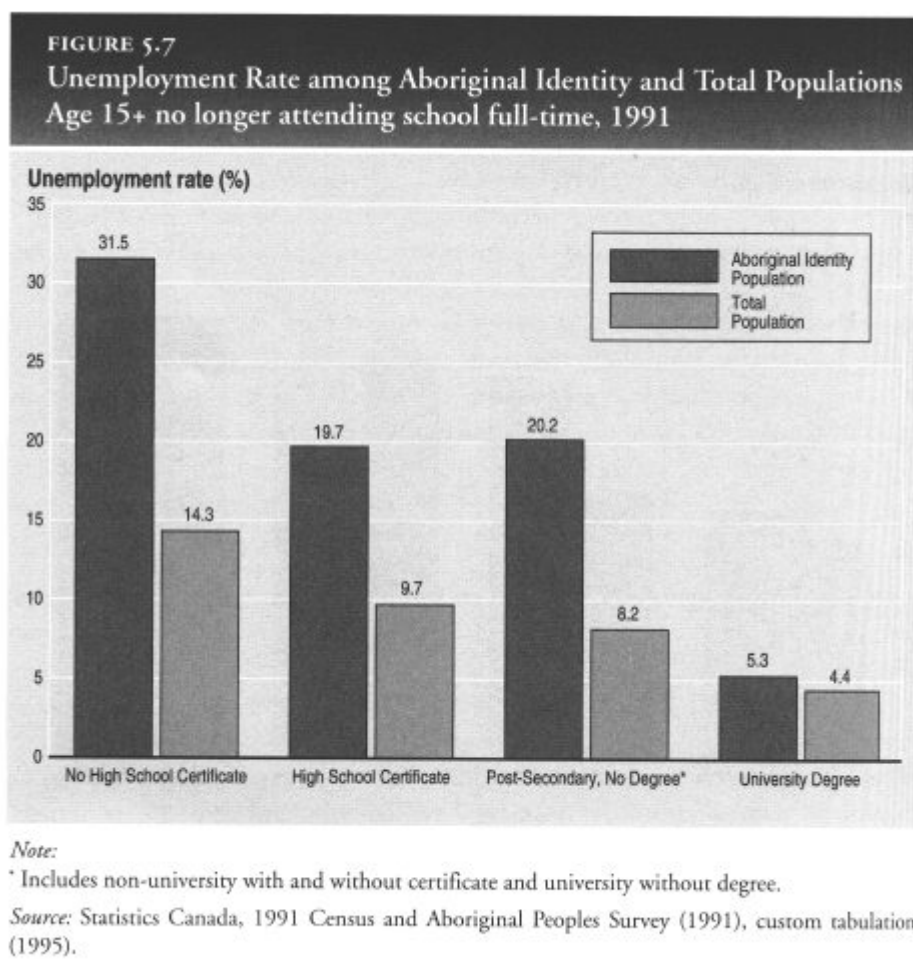


Figure 5.7 - Unemployment Rate among Aboriginal Identity and Total Populations Age 15+ no longer attending school full-time, 1991

The principal factors contributing to higher rates of labour force participation are high school completion, sex and geographic location. Those who complete high school are much more likely to participate in the labour force than those who do not. This is true for both males and females, although the participation rate is lower for females, undoubtedly because of their role in child rearing. Geographic location is, of course, important because the availability of jobs varies significantly between rural and urban areas and from one region to another.

Those who have taken post-secondary studies do not have rates of labour force participation that are very much or uniformly higher than those who have completed high school. Obtaining a university degree does lead to better results, but the university degree group represents only a small proportion of those who have studied at the post-secondary level, and for the group as a whole the results are not strong.

There is also a small difference between those who speak an Aboriginal language and those who do not, with the latter having a slightly higher probability of participating in the labour market. This difference becomes more pronounced as one moves from the north and on-reserve locations (where Aboriginal language speakers are more likely to be in the majority) to off-reserve and southern locations (where Aboriginal language speakers are more likely to be in the minority). Both Aboriginal and non-Aboriginal speakers are less likely to participate in the labour force if they live on reserves.

The rate of employment among those participating in the labour force tends to be highest in the older groups, that is, beyond 15 to 24 years. Females are more likely to be employed than are males, and on-reserve males fare significantly worse than on-reserve females, although their rate is somewhat better if they have a post-secondary education. The probability of employment is higher for non-status Indian people than for Métis people, Inuit and status Indians. It is also higher for those living off-reserve in southern rural and urban areas.

Data from the Aboriginal peoples survey show that the completion of training programs also has a modest positive impact on employment prospects. For the working age population (15 to 54 years) not attending school full-time, the probability of employment improves from about 50 to 62 per cent among those who have completed an occupational training program, a benefit that holds across all regions and for both males and females. As with education, data on training indicate the importance of completing a program. This pattern is consistent across all regions, although less so for those living on-reserve.

Interestingly, those who have completed a longer program have a lower probability of finding employment than those completing a shorter program, but both groups have better results than those who have not completed a program at all. The explanation could be that those who take shorter training programs are more likely to be employed at the time of the program or need only a refresher course to become employable. Those taking longer programs may be less well connected to the labour market.

Thus far, we have seen that education and training have positive effects on labour market outcomes, but they are not the only factors at work. We also know that the Aboriginal population differs in many respects from the general population in that it has less education, is younger, and is more likely to live in remote areas, which may account for some of the inequalities discussed earlier. An important consideration for the Commission was whether differences in labour market outcomes between Aboriginal and non-Aboriginal populations could be accounted for by the characteristics of the Aboriginal population. If policy aimed at reducing inequalities focuses only on education and training and obvious differences such as geographic location, other more subtle differences may go unobserved.

Researchers for the Commission analyzed the reduction in inequalities that could be expected to occur if the Aboriginal population had the same characteristics as the non-Aboriginal population.²⁰¹ The groups differ on a range of characteristics, including province of origin, marital status, level of education and training, age, and bilingualism in English and French. These differences can be expected to have an impact on labour market outcomes. Some of the main conclusions of the analysis are as follows:

- In comparing Aboriginal persons living off-reserve and outside the Yukon and the Northwest Territories with non-Aboriginal Canadians, most of the gap in labour market outcomes is found with single-origin Aboriginal persons (that is, persons who stated on the census form that they were Métis, Inuit or North American Indian) — those reporting multiple origins are much closer to the Canadian average.
- If single-origin Aboriginal people are assumed to have the same level of education and training as non-Aboriginal Canadians, the gap on outcome measures such as the

201 The following discussion is drawn from George et al., "Patterns of Employment (Part Two)" (cited in note 175). The Commission normally uses data from the 1991 Aboriginal Peoples Survey, but in this study, 1991 census data were used to compare Aboriginal and non-Aboriginal groups.

unemployment rate, employment in full-time, full-year jobs would be reduced by 10 to 25 per cent, and the gap in earnings for full-time full-year workers would be reduced by 19 per cent for men and 43 per cent for women.

- If all observed characteristics were assumed to be equal (not only education and training but also age, marital status, province of residence and so on), then the gap would be reduced by an average of 50 per cent (although the range is from one-third to two-thirds depending on the outcome measure).
- Single-origin Aboriginal people living off-reserve generally have more positive labour market outcomes than those living on-reserve. If we compare the two groups and assume that the on-reserve group has the same education and training as the off-reserve, the reduction in the gap between them is approximately the same as that reported above — an improvement of seven to 33 per cent on employment outcomes but less than 10 per cent on earnings. If all observable characteristics were the same, the reduction in the gap on employment and earnings outcomes would range from 31 to 89 per cent.

The remaining gap in labour market outcomes between Aboriginal and non-Aboriginal Canadians could perhaps be accounted for if other characteristics could be factored into the equation, but data are not available. In the off-reserve context especially, the unexplained residual is usually attributed to the effects of discrimination, but since this is not measured, it could be mixed up with other factors such as lack of information about and personal connection to the job market and a reluctance to work in non-Aboriginal settings perceived as hostile. In the on-reserve context, the remaining gap could be accounted for by such factors as the lack of jobs in the local labour market, discrimination against reserve residents seeking employment off-reserve, or the effect of tax benefits on wages.

Shortages in specialized knowledge and skills

Investments in education and training are needed to improve employment prospects for Aboriginal people and to develop Aboriginal economies. A new order of skills is required for effective self-government, resource management and enterprise development.

In this regard, the Council for the Advancement of Native Development Officers (CANDO), which represents community economic development officers, has concluded that there are key knowledge and skills gaps among Aboriginal economic development officers that cannot be filled by any one of the many economic development-related programs.²⁰² Officers expressed a need for greater knowledge of environmental legislation, business corporation acts, sources of capital, economic development in other Aboriginal communities, economic principles, business taxation, and lands and natural resources management.

Current trends suggest major shortages of Aboriginal people educated in fields such as economics, community planning and development, business management, forestry, biology, resource conservation, wildlife management, geology and agriculture. With only five registered professional foresters and less than a dozen registered professional geologists of Aboriginal ancestry in all of Canada, the challenge of overcoming these shortages is clear. There are also serious gaps in other fields where a math or science base is required, such as engineering and the health sciences.

202 Council for the Advancement of Native Development Officers, "Final Report and Recommendations on Native Community Economic Development Officers Training Needs Assessment", brief submitted to RCAP (1993).

The dimensions of the problem are revealed in Table 5.18, which compares Aboriginal and Canadian populations aged 15 to 49 years, showing the percentage in each group that has completed a post-secondary degree or certificate in various fields of study. Typically, the percentage of Aboriginal people with a certificate or degree in these fields is about half that of the Canadian population, and sometimes the percentage is much smaller.

TABLE 5.18 - Selected Fields of Study, Aboriginal Identity and Canadian Populations Age 15-49, 1991

Field of Study	Aboriginal Identity population		Canadian Population	
	No.	%	No.	%
Economics	185	0.06	63,160	0.44
Business and Commerce	3,115	0.96	266,120	1.82
Finance Management	2,470	0.76	316,580	2.16
Industrial Management and Administration	995	0.31	121,380	0.83
Institutional Management and Administration	345	0.11	39,920	0.28
Marketing, Merchandising and Retail Sales	1,060	0.33	112,145	0.77
Agricultural Science and Technology	515	0.16	73,035	0.5
Biological Science and Technology	230	0.08	59,925	0.41
Household Science and Related	2,370	0.73	110,845	0.76
Veterinary, Zoology and Other	470	0.15	34,740	0.24
Engineering and Applied Sciences	555	0.18	219,900	1.5
Environment and Conservation Technology	390	0.12	13,910	0.1
Geography	135	0.05	31,855	0.22
Man and Environment	0	—	14,705	0.11
Loisirs,et,voyages	525	0.17	49,075	0.34
Primary Industry	975	0.3	30,635	0.21
Geology and Related	0	—	23,010	0.16
Total Population Age 15-49	325,460		14,664,240	

Note: Includes persons who have a completed university degree or post-secondary non-university certificate.

Source: Statistics Canada, 1991 Census and Aboriginal Peoples Survey (1991), custom tabulations.

The challenge for Aboriginal nations is not just to close the gap in a static environment, but to close it in an economic environment that increasingly demands higher levels of skills, knowledge and expertise. In 1990, the Economic Council of Canada observed:

Overall, the occupational shifts that have occurred over the past 15 years have led to an acceleration in the growth of highly skilled jobs — i.e., managerial, administrative, and professional and technical occupations. These categories accounted for one third of all employment growth from 1971 to 1981, and 77 per cent of the growth from 1981 to 1986.²⁰³

In its recent discussion paper on social security reform, the federal department of human resources development estimated that nearly half (45 per cent) of new jobs created between 1990 and 2000 will require more than 16 years of education and training.²⁰⁴

Prospects for the future

To appreciate the magnitude of the challenge presented by the need for an educated Aboriginal work force, it is necessary to look beyond current shortages to the pool from which future expertise will be developed. Table 5.19 compares the Aboriginal and non-Aboriginal adult populations, showing their highest level of education received.

TABLE 5.19 - Education Levels among Aboriginal Identity and Canadian Populations Age 15-64 No Longer Attending School, 1991

Highest Level of Education	Registered North American Indians		Non-Registered North American Indians	Metis	Inuit	Total Aboriginal	Total Canada
	On- reserves	non- reserve					
Less than 9 Years	39.7	18.3	11.6	19.1	46.6	25.4	11.8
Secondary, No Certificate	29.8	35.3	31.1	34.2	20.1	32.1	22.8
Secondary Certificate	8.3	13.4	19.4	14.8	8.7	12.8	21.2
Non-University, No Certificate	6.9	8.8	7.2	8.5	8.6	8.0	6.2
Non-University Certificate	10.6	14.9	19.0	15.3	13.2	14.1	17.9
University, No Degree	3.4	6.1	6.0	4.4	1.8	4.7	7.9
University Degree	0.9	2.8	5.2	3.3	-----	2.6	12.2

Note:

* Figure suppressed; coefficient of variation is higher than 33.3 percent.

Source: Statistics Canada, 1991 Census and Aboriginal Peoples Survey (1991), custom tabulations.

These figures show that the sharpest differences between Aboriginal and non-Aboriginal populations exist at the two extremes of the education continuum — in the higher percentage of Aboriginal people with education levels of Grade 8 or less and the smaller percentage of Aboriginal people with post-secondary, especially university, education. Table 5.20 shows the same figures by age group.

203 Economic Council of Canada, *Good Jobs, Bad Jobs: Employment in the Service Economy, A Statement* (Ottawa: Supply and Services 1990), p. 14.

204 Human Resources Development, "Improving Social Security in Canada: A Discussion Paper" (Ottawa: 1994).

The first row of Table 5.20 suggests that incomplete elementary school education is concentrated largely in the population aged 50 to 64 years. This concentration is not surprising, but it is troublesome because the older group is most vulnerable to displacement and long-term unemployment in the event of job loss. It is also disturbing to see, in the second row, the high proportion of youth who fail to complete high school when the jobs of the future, including those associated with self-government and resource management, demand high school completion or better. The last two rows of the table also show a retention problem with respect to Aboriginal university students. For each of the age groups, the percentage of Aboriginal students who have left university with no degree is larger than the percentage who graduated.

TABLE 5.20 - Education Level among Aboriginal Identity Population Age 15-64 No Longer Attending School, by Age Group, 1991

Highest Level of Education	15-24 years	25-49 years	50-64 years	Total Aboriginal	Total Canadian
Less than 9 Years	20.7	19.9	54.9	25.4	11.8
Secondary, No Certificate	47.8	30.5	16.7	32.1	22.8
Secondary Certificate	15.1	13.2	7.9	12.8	21.2
Non-University, No Certificate	7.7	8.8	4.8	8.0	6.2
Non-University Certificate	5.7	18.1	9.5	14.1	17.9
University, No Degree	2.3	5.8	3.3	4.7	7.9
University Degree	0.0	3.4	2.6	2.6	12.2

Note:

* Figure to be used with caution; the coefficient of variation of the estimate is between 16.7 and 33.3 per cent.

Source: Statistics Canada, 1991 Census and Aboriginal Peoples Survey (1991), custom tabulations.

The development of expertise to support Aboriginal economic development requires concerted action on four fronts:

- improving high school completion rates so that more Aboriginal students qualify for post-secondary education and training;
- strengthening the teaching of mathematics and science in elementary and secondary schools so that young people entering post-secondary programs have the qualifications to enter fields of study requiring these capabilities and knowledge;
- improving levels of enrolment in and completion of university education; and
- increasing the number of Aboriginal students enrolled in and graduating from programs of study that are particularly needed for the development of Aboriginal economies.

Figure 5.8 suggests there has already been impressive progress in keeping on-reserve children (the only group for whom data are available) in school to the grade 12 level. However, a 1991 retention rate of 53.6 per cent is still very low by Canadian standards and suggests the need for a much greater effort to keep children in school. In Volume 3, Chapter 5 we examine the factors contributing to the successful education of Aboriginal children and, in particular, the importance of factors such as curriculum design, language education, Aboriginal control and parental involvement.

Educational reforms, role models and the need for Aboriginal control and commitment to better approaches to education are critical to the success of our strategy for economic development. They will raise aspirations and help to ensure that Aboriginal children are qualified for post-secondary education. The proposals for Aboriginal-controlled post-secondary institutions and improved access to programs in other institutions will ensure that Aboriginal students can pursue courses in environments that are culturally relevant. Beyond those reforms, the Commission believes that educational institutions need to take a close look at the kinds of programs offered to Aboriginal students.

A shortage of educated Aboriginal personnel has been identified in various fields in the past, and it is helpful to reflect on how these shortages were overcome. An important factor has been the design of programs to attract students to particular disciplines. When the program of legal studies for Aboriginal people was started in 1973 at the University of Saskatchewan, there were, as far as could be determined, only four lawyers and five law students of Aboriginal ancestry in Canada. Of the estimated 250 Aboriginal lawyers in Canada today, most were introduced to the study of law through the University of Saskatchewan's program.

The Indian Social Work Education Program at the Saskatchewan Indian Federated College had just a half-dozen students in 1976, but since then, more than 390 have graduated with degrees or certificates. In 1987, the college began offering math and science courses for students interested in entering one of the health science programs or the school of business and public administration. In 1991, more than 650 semester-course students were enrolled.²⁰⁵

Other efforts are also helpful. Over the past few years, infrastructure has been developed to promote interest in science and technology among Aboriginal youth. For example, the Canadian Aboriginal Science and Engineering Association (CASEA) seeks to enhance the number of Aboriginal scientists and engineers. CASEA works directly with Aboriginal youth through a role model program, support for summer science camps, teacher instruction programs, science and engineering career fairs and other activities. Since 1992, it has co-ordinated and supported the participation of Aboriginal youth in the Shad Valley program, an award-winning education and work experience program for high achieving youth. About 30 Aboriginal youth have gone through the program so far.

The Canadian Aboriginal Science and Technology Society (CASTS), a non-profit organization established in 1992, also seeks to increase the number of Aboriginal engineers and scientists and to develop technologically informed leaders within Aboriginal communities. CASTS supports networking opportunities for corporate members, professionals, educational institutions and students from elementary schools, secondary schools, and universities and colleges. Both CASEA and CASTS are important innovations because they reach out to the youngest part of the population to build the interest that will lead to career paths so important for Aboriginal economies.

Conclusions

Our recommendations on education and training are set out in Volume 3, Chapter 5. Here, the Commission draws conclusions about the policy implications of education and training for economic development and recommends areas for priority attention.

205 Del C. Anaquod, "Aboriginal Economic Training, Education and Employment", research study prepared for RCAP (1994).

First, while there is strong reason to believe that further investments in education and training will improve labour force outcomes, the potential benefits should not be exaggerated. They will help, but they will reduce inequalities by only 10 to 25 per cent, even if equality in levels of education and training is achieved. Even when other observable characteristics are taken into account, there remain gaps in labour market outcomes for single-origin Aboriginal and non-Aboriginal Canadians on the order of 50 per cent.

Second, high school completion rates must continue to improve. Youth who fail to complete high school face a labour market that increasingly demands completion or better. Future generations must have at least the minimum required for success in employment and for entry into higher education.

Third, we have the drawbacks of obtaining some post-secondary education or training but not acquiring a degree or certificate. This does not apply to university education or to all subgroups uniformly. For example, the results differ somewhat by sex, age and on- or off-reserve location. Nevertheless, this finding warrants further investigation. The picture might change if it were possible to separate out those who completed non-university post-secondary studies from those who enrolled but did not complete their studies. The result may also hinge on the kinds of occupations that predominate in the non-university post-secondary field and their vulnerability to fluctuations in the demand for labour.

Fourth, in addition to increased enrolment in and completion of university education, more graduates in scientific technology and economic development are particularly needed. A very low number of Aboriginal students are enrolled in, or have graduated from, scientific and technical programs.

Finally, lack of completion of elementary school among older Aboriginal people must be addressed. As we discuss in Volume 3, Chapter 5, the most pertinent policy direction for this portion of the population is adult education and literacy programming, including encouragement to return to school to complete studies. Educational solutions may not always be appropriate, however, and a number of our recommendations would go some distance to improving the economic situation of those with low levels of education (for example, expanding the land and resource base, supporting the traditional economy, making innovative use of income support programs).

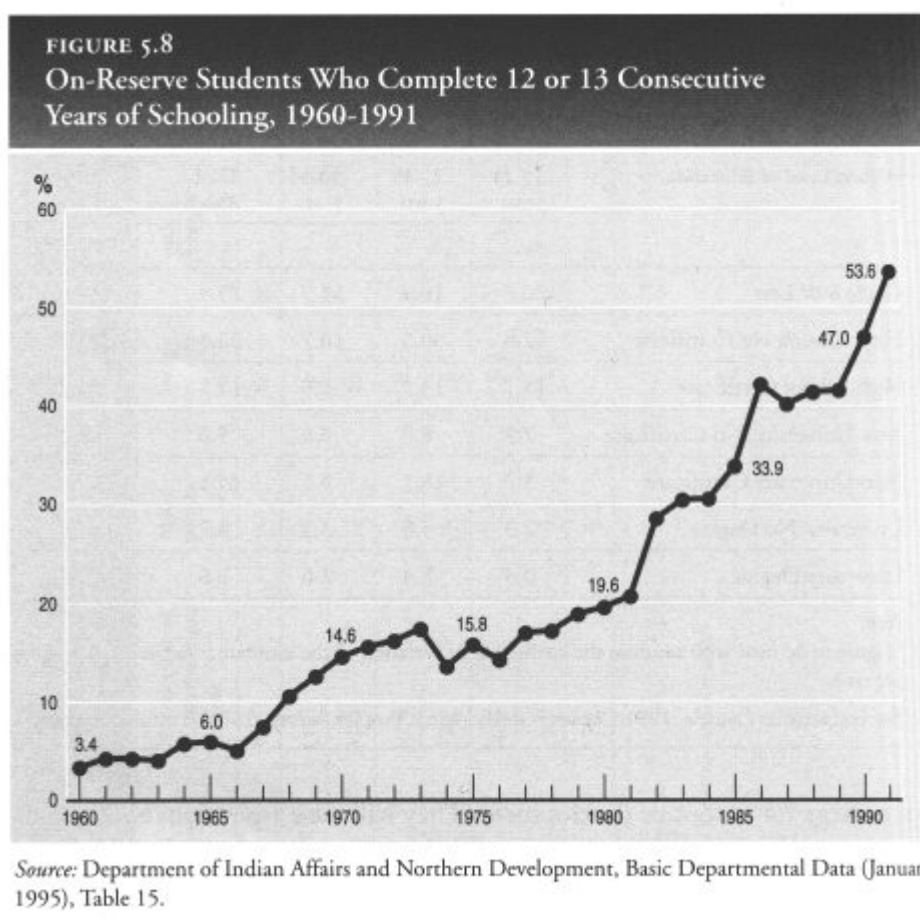


Figure 5.8 - On Reserve Students Who Complete 12 or 13 Consecutive Years of Schooling, 1960-1991

Recommendation

The Commission recommends that

2.5.46

To rebuild Aboriginal economies, all governments pay particular attention to

- the importance of enrolment in education and training programs and of retention and graduation;
- strengthening the teaching of mathematics and the sciences at the elementary and secondary levels;
- improving access to and completion of mathematics and science-based programs at the post-secondary level; and
- making appropriate programs of study available in fields that are relevant to the economic development of Aboriginal communities (for example, business management, economic development and the management of lands and resources).

2.9 Making Innovative Use of Income Support Alternatives

As seen earlier in this volume, the loss of the lands and resources on which First Nations economies traditionally depended severely undermined the capacity to maintain economic self-sufficiency. With widespread poverty in most Aboriginal communities, the federal solution was to offer relief, which for many decades was distributed in the form of food rations.²⁰⁶ Relief took priority over the more complex task of rebuilding a sound economic base for Aboriginal peoples. In fact, it is not unfair to say that even as relief, followed by national income security measures, was extended to the Aboriginal population in this century, governments and the private sector were continuing to take actions that undermined Aboriginal economies.

With shrinking land resources for subsistence and little access to employment, Aboriginal people became increasingly dependent on the social assistance extended to them. Since the 1960s in particular, there has been a continuing expansion of welfare dependency. For example, between 1973-74 and 1991-92, total social assistance expenditures (in constant dollars) for the registered Indian population increased more than two-and-a-half times.²⁰⁷ The number of registered Indian recipients nearly doubled between 1980-81 and 1991-92.²⁰⁸ Among the Aboriginal population 15 years of age and older, an estimated 28.6 per cent receive social assistance (see Table 5.1 earlier in the chapter). On-reserve figures are more dramatic: a recent DIAND study suggests that "national on-reserve social assistance dependency grew from 37.4 per cent in 1981 to 43.3 per cent in 1992. By comparison, mainstream dependency rates grew from 5.7 per cent to 9.7 per cent over the same period".²⁰⁹

Additional data analyzed by our researchers demonstrate that this social assistance dependency is long-term and marked by a general lack of attachment to market-based economic activity. The mainstream rate is more closely related to changes in economic activity. Furthermore, there is extreme variability in Aboriginal dependency rates from one region to another. The Atlantic region has the highest dependency rate, exceeding 77 per cent in 1993. Manitoba followed with a rate of 67.5 per cent, while the Yukon and Ontario were the lowest, with 24.2 per cent and 25.2 per cent respectively.²¹⁰

These general trends are alarming. From the size of the dependent population it is evident that social assistance has become the staple of many Aboriginal communities. Under such circumstances, it appears that social assistance plays a different role in Aboriginal communities than in mainstream society, where most income continues to be derived from the labour market.

In turn, Aboriginal people argue that the application of the welfare system has contributed to the persistence of individual and community economic dependency. While welfare provides a basic income, it does not provide even a partial solution to the economic problems facing communities. A representative of Arctic Co-operatives told our researchers:

206 For example, in 1945, the Indian relief monthly ration scale consisted of "flour, 24 lb.; oats, 6 lb.; sugar 2 lb.; lard, 3 lb.; beans, 5 lb.; rice 2 lb.; cheese, 1 lb.; and meat, 5-10 lbs. depending on price. These sad rations were calculated on the basis of 3,000 calories per day---". See Moscovitch and Webster, "Social Assistance and Aboriginal People" (cited in note 31).

207 These figures reflect not only growing dependency but also population increases and the effects of Indian persons regaining status through Bill C-31.

208 DIAND, Quantitative Analysis and Socio-demographic Research, Management Information and Analysis, Finance and Professional Services, "Basic Departmental Data, 1992" (Ottawa: 1992).

209 Moscovitch and Webster, "Social Assistance and Aboriginal People" (cited in note 31).

210 Moscovitch and Webster, "Social Assistance and Aboriginal People".

In many Aboriginal communities, like Nunavut, you have a closed economy that is very different from anywhere else in the country. It is very easy to measure the cost of delivering social services like welfare — the administrative costs, the payments, the dependency it creates and negative consequences like alcoholism, violence, etc[C]urrent programs ... discourage employment and just create a welfare mentality. This needs to be replaced by programs that motivate people to participate in the economy.²¹¹

A system designed to provide temporary assistance to individuals who need help because of a shift in the labour market, a disability, or single parenthood is simply not a solution for individuals experiencing the economic and social conditions of most Aboriginal communities.

Historically, many Aboriginal communities did not follow the mainstream pattern of transformation from an agricultural to industrial economy. Rather, they continued as subsistence communities involved in some trading long into the twentieth century. However, both the subsistence and the trading economy have been replaced to a large extent — and not by a market economy, as elsewhere in Canada, but by welfare. The central issue is therefore whether income support funds are being used optimally, given a long-term objective of improving conditions in Aboriginal communities. Can these funds be used in a more dynamic, constructive way to meet the social and economic goals of Aboriginal people?

The Commission maintains that income security programs can be reformed to support Aboriginal people in their quest for social and economic development of their communities. In practice, such a shift must include a significant measure of Aboriginal control over social assistance to allow innovative use of welfare funds. Social assistance programs must be flexible enough to overcome the disincentives associated with a system currently restricted to individual payments and regulated limits on their distribution and use.

The Commission suggests three principles to guide efforts to address welfare dependency:

- a substantial shift in the use of social assistance funds to a more dynamic and constructive system of programming that will support social and economic development in Aboriginal communities and territories;
- a holistic approach to programs rooted in Aboriginal traditions and values and designed to integrate social and economic development, an interrelatedness that should be explicit in the design and operation of any new institutions created to implement income security reform; and
- Aboriginal control over the design and administration of income support programs as the foundation of any reform to the present social assistance system.

On the basis of these principles, we envision two distinct but coexisting alternative approaches:

- reforms to the system based on individual entitlement; and
- new systems based on community entitlement.

The Commission recognizes that the transition recommended here will be long and difficult, but we are equally confident that steps can be taken to reform the provision of income security for Aboriginal people. As a preamble to our discussion of current welfare systems and possible alternatives, we present an historical perspective on Aboriginal welfare dependency.

211 Interview quoted in First Nations Management, "Aboriginal Economic Development in Canada" (cited in note 22).

Welfare dependence in historical perspective

Welfare dependency among Aboriginal people did not begin with the advent of the modern welfare state.²¹² Among First Nations, welfare dependency had been developing for decades as Indian people were confined to reserves and subjected to a ration system based on the British *Poor Law*. The fact that *Poor Law* principles and practices were applied to Indian relief long after being abandoned elsewhere in Canada served to isolate the population from the development of the mainstream income security system.

While its origins date to 1349, the British *Poor Law* was reformed in 1834. It was the principles of this reformed law that strongly influenced thinking about public welfare in the young Canadian colonies and well into the twentieth century. Hence, when the question of Indian relief arose after the development of the reserve system in the nineteenth century, the Indian department relied on the principles of the *Poor Law* with its attendant attitudes and underlying assumptions. In essence, the British *Poor Law* was an attempt to regulate the poor in the belief that poverty sprang from an inherent character defect. Relief systems were developed to combine punishment and assistance, according to a strict distinction between employable and unemployable poor. Poor people with disabilities were assisted on the basis that they were unemployable through no fault of their own. Those judged employable, on the other hand, were compelled to work as a punishment for laziness and a deterrent to idleness.

The reserves to which Indian people were confined were the analogue of the workhouses and poorhouses that emerged in Britain at that time. Policy — regulated through the *Indian Act* — pressured Indians to "relieve their 'savage' idleness through labour".²¹³ The reserve became the central means of organizing the removal of Indian people to a defined territory run by non-Aboriginal administrators. In confining Indians to reserves, the Crown sought to isolate Indians from the larger population, minimizing racial friction and relief expenses. Within these confines, the purpose was to change Indian character and to retrain Indian people to enter the market economy as citizens of a new Canada. Likewise, analogous to the parish relief administration under the British *Poor Law*, Indian policy pressured bands on reserves to develop municipal organizations in large part to fund and administer relief. Indian relief thus played a significant role in the Indian department's plans to establish municipal government on reserves.

A common assumption underlying relief was that all Indians ultimately had a way out of the 'poorhouse' as farmers or common labourers — despite the minimal economic potential on reserves and few employment opportunities outside. Administrators believed that a correct attitude toward work had to be demonstrated, even if the means to work were absent. In the eyes of the Indian department, Indians who "refuse to work, and refuse to settle down on their reserves ... must take the consequences ... [and] remain miserably poor".²¹⁴ Entitlement to Indian relief was conditional upon "actual suffering" as defined by Indian agents and agreed to by headquarters. As in the mainstream relief system, assistance was provided at a level intentionally below the wages of the most menial work, a factor seen as important in forcing recipients into the market economy. Indian people were also subject to relief distributed as in-kind rations rather than as cash. They were not trusted with money, and it was not until 1959 that cash relief began to be introduced. Furthermore, Indian policy insisted that treaty annuities be used to pay the full cost of relief. Any additional relief was at the department's discretion. At the same time, the Indian department was given full authority over all Indian trust moneys, whether on- or off-reserve.

212 Based on Moscovitch and Webster, "Social Assistance and Aboriginal People" (cited in note 31).

213 Moscovitch and Webster, "Social Assistance and Aboriginal People".

214 Quoted in Moscovitch and Webster, "Social Assistance and Aboriginal People".

In sum, the principles of the *Poor Law* were influential in requiring relief recipients to conform to the market system. For the non-Aboriginal population, relief and, later, social assistance were used to promote the social integration of the poor by providing a minimum income in return for acceptable behaviour. The reserve and ration system served the same purpose for Indian people, who were expected to adopt or at least conform to Euro-Canadian cultural norms.

However, Indian people's participation in the non-Aboriginal economy was frustrated by inconsistent policies. Indian people were required, for example, to reside on their original reserves in order to receive relief. At the same time, if they ceased to live like 'Indians' — by entering the market economy — they were at risk of being enfranchised as Canadian citizens, losing their Indian status. A job off the reserve meant that one could expect no assistance in the event of failure, that one might be subject to involuntary relocation back to the reserve or to enfranchisement. Dependency on relief within the reserve context became the only secure means for Indian people to maintain some semblance of a traditional communal way of life.

Non-registered Indians, Métis people and Inuit remained on the periphery of the Indian relief system, although their economic circumstances were similar to or worse than those of First Nations. Métis people and Inuit were caught between the non-Aboriginal relief system and the Indian relief system and found access to both difficult. Métis people were often refused relief from the interior department, in charge of 'half-breed' affairs, on the grounds that they were 'Indians'. The Indian department, on the other hand, refused to pay on the grounds that Métis people were not registered Indians. Until the 1950s, non-Indian relief was administered through municipalities, so Métis people living in unincorporated areas had few prospects for assistance. For Inuit, federal responsibility for relief was shifted and neglected for more than half a century. Sporadic and unsystematic relief was provided to Inuit from the late 1870s onward. Although the Indian department made some attempts, in practice the Indian relief system failed to provide assistance to Inuit, and no serious attempt was made to address Inuit destitution until the 1950s.

By the 1930s, the roots of Aboriginal welfare dependency were well established, driven by a combination of need arising from the weakness of Aboriginal economies and by policies that stifled economic activity. The response to distress was to provide relief, and this took priority over economic development. It was not until the 1950s that public funds were made available for Indian business ventures.

The Indian relief system reached maturity just as the Canadian welfare state was becoming well established. The *Old Age Pension Act* was introduced in 1927, but it specifically excluded Indians persons from receiving benefits. In 1940, the first major national social insurance program for unemployment was established. The *Unemployment Insurance Act* provided benefits as a right to the limited list of workers spelled out in the legislation. Excluded were seasonal workers; workers in agriculture, forestry, logging, fishing, hunting and trapping, and transportation; provincial and federal public servants; teachers; domestic workers; employees of charitable institutions; and those earning more than \$2,000 a year — that is, workers in occupations that had either a very high risk or a very low risk of unemployment. Aboriginal people were thus excluded by virtue of being employed in many of the high-risk occupations listed.

In 1945, the federal government began to provide family allowances to all families with children under the age of 16. It was a program, based on Keynesian principles, that was as much about reviving the postwar economy as it was about attracting votes that might have gone to the emergent social democratic party, the Co-operative Commonwealth Federation, which had supported the

program's introduction. For its time it was a massive public expenditure program.²¹⁵ Benefits depended on the age of the child, from \$5 a month for a child under five years of age to \$8 a month for a child 13 to 15 years of age. For most Canadians, this was the first family-income supplementation program and one that was available to all families in cash, regardless of income, simply by virtue of citizenship.²¹⁶

Aboriginal families were permitted this benefit, but in the case of Indian people, administration of the benefit was placed in the hands of the Indian department. The extension of family allowances to Indian people exposed the gross inadequacy and inconsistency of the Indian relief system and spelled the beginning of the end for Indian rations.

In 1947, two years after the end of the war, pensions were made available to persons over the age of 21 who were blind. In 1951, the legislation was revised to provide for federal-provincial cost sharing to make possible provincial allowances to persons between the ages of 21 and 69 who were blind. In 1951, the old age pension legislation of 1927 was repealed and replaced by the *Old Age Assistance Act*, which provided for federal-provincial cost sharing of pensions for persons aged 65 to 69, and by the *Old Age Security Act*, which provided a federal pension to all persons over the age of 70. The amount of the pension was set at \$40 per month under both laws. Indian persons could now apply for a pension, whether for reasons of blindness or age. For the first time, Canada had a national statutory cash pension to which access was not precluded by Aboriginal ancestry. For persons over 70 and for blind persons over 21, including Indian people, the spirit of the *Poor Law* had finally been put to rest.²¹⁷

In 1954, the *Disabled Persons Act* was passed, authorizing federal-provincial cost-shared benefits for disabled persons aged 18 to 69. Again, the benefit was set at \$40 per month, and Aboriginal people were not excluded. Thus, by the mid-1950s, relief had been substantially transformed by the advent of federal and provincial programs applying to specified groups. People over the age of 70 were eligible for a pension on the basis of citizenship alone, while persons between the ages of 65 and 69 who were blind or had a disability were eligible for a \$40 per month pension by virtue of citizenship and low income. Women raising children on their own were eligible for benefits as well under provincial programs.

The administration of relief for the unemployed, however — the classic 'undeserving person' — was still largely the responsibility of municipalities (or the Indian affairs department in the case of Indians living on reserves, in communities, and in the north). As Harry Cassidy noted in a 1947 report about the mainstream system, with the exception of British Columbia and some of Ontario, "The provisions for general assistance are limited, restrictive, mean, and antiquated[T]hey are literally disgraceful and unworthy of a nation of Canada's status".²¹⁸

215 See Brigitte Kitchen, "Wartime Social Reform: The Introduction of Family Allowances", *Canadian Journal of Social Work Education* 7/1 (1981); and David A. Wolfe, "The Rise and Demise of the Keynesian Era in Canada: Economic Policy 1930-1982", in *Modern Canada: 1930-1980s: Readings in Canadian Social History*, Volume 5, ed. M.S. Cross and G.S. Kealey (Toronto: McClelland and Stewart, 1984).

216 For a discussion of the development of the family allowance, see B. Kitchen, "The Introduction of Family Allowances in Canada", in *The 'Benevolent' State: The Growth of Welfare in Canada*, ed. A. Moscovitch and J. Albert (Toronto: Garamond Press, 1987), pp. 222-241.

217 Health and Welfare, "Chronology of Selected Federal Social Security Legislation, 1918-1993" (July 1993), p. 10.1

218 Quoted in Allan Moscovitch, "The Canada Assistance Plan: A Twenty Year Assessment", in *How Ottawa Spends, 1988-89, The Conservatives Heading into the Stretch*, ed. K.A. Graham (Ottawa: Carleton University Press, 1995). The quotation from Cassidy appears in a work on the development of the Unemployment Insurance Act by James Struthers, "Shadows from the Thirties: The Federal Government and Unemployment Assistance, 1941-1956", in J.S. Ismael, ed., *The Canadian Welfare State: Evolution and Transition* (Edmonton: University of Alberta Press, 1987), p. 10.

The return of high unemployment levels in 1953-54 led the federal government to reconsider a scheme to finance unemployment assistance administered by the provinces and municipalities. The Canadian Welfare Council's campaign for increased public funding for welfare had the effect of forcing the federal government to become directly involved in negotiations with the provinces. The result was the 1956 *Unemployment Assistance Act*.²¹⁹

The *Unemployment Assistance Act* was the first federal law to provide a commitment to funding social assistance. The purpose of the act was, for the first time, to allow the provinces to provide "assistance to persons who are in need".²²⁰ It provided for cost sharing on a sliding scale, to a maximum of 50 per cent of the cost of assistance in each participating province. The act made federal funding available for the relief of the unemployed employable person, the last category of person to be covered by national legislation and the last category of relief to shed its *Poor Law* form.

With the introduction of universal programs, eligible Indian people living on-reserve were receiving benefits such as the old age pension, disability benefits, and family allowances, but not provincial or municipal social assistance. Under these circumstances, the department's ration system became virtually meaningless.²²¹ In addition to amendments to the *Indian Act* in 1951 and a new emphasis on Indian self-management later in the decade, the department of Indian affairs gained approval to develop a cash social assistance program in accordance with provincial practices.

Nevertheless, the in-kind ration system continued to operate into the 1960s for registered Indians.²²² Furthermore, the Indian relief system survived just long enough to be used effectively in the northern settlement schemes of the 1950s. Rations and family allowances were used as a reward and a sanction to encourage northern Aboriginal people to settle in permanent communities and to promote approved settlement behaviour.

Since the *Unemployment Assistance Act* (1956) and the Canada Assistance Plan (1966), social assistance for Aboriginal people has remained embroiled in a continual jurisdictional debate between federal and provincial governments. Once it abandoned the ration system and adopted provincial standards, the federal government began to pressure the provinces to accept responsibility for social assistance for Aboriginal people. However, the provinces continued to argue that the federal government was responsible for 100 per cent of the cost. The Canada Assistance Plan (CAP) brought in 50/50 cost-sharing of programs to which all Canadians, except Aboriginal people living on-reserve had access, so the provinces were coerced into including Aboriginal people living off-reserve. The current government's decision to terminate the Canada Assistance Plan and to introduce a block funding arrangement — the *Canada Health and Social Transfer Act* — again places the issue of Aboriginal social assistance in question.

The application of relief principles to generations of Aboriginal people — including tests of means and needs based on individual entitlement — has resulted in great social and cultural damage. No thought was given to the existence of distinctive Aboriginal approaches to social welfare based on

219 Struthers, "Shadows from the Thirties", pp. 10-26.

220 *Unemployment Assistance Act*, S.C. 1956, c. 26, s. 4(1) (c).

221 Food rations in 1945 amounted to \$4 or \$5 of relief per month at a time when the maximum means-tested old age pension benefit for non-Aboriginal people was \$25. See Moscovitch and Webster, "Social Assistance and Aboriginal People" (cited in note 31).

222 The legacy of the ration system is not to be underestimated: 'welfare' and 'rations' are still synonymous in many communities. One Aboriginal man told our researchers about his memories of the ration system. Because only certain items in the local store were set aside as relief rations, people on welfare in his community were recognizable by the type of jeans and checked shirts they wore.

the extended family, and certainly no consideration was given to Aboriginal service delivery. Social assistance, however, quickly became established as a vital source of Aboriginal income.

Working within the current social assistance system

If we have an economic development mandate, what can we implement or initiate or develop that will affect the community? If an Aboriginal community's economy is based on social transfers, then recognize that and work with it. Don't just accept it as a program. Relate to the people and then to the value of the dollar. We should not be concerned with the dollar for the dollar's sake — we should be concerned with the value of that dollar impacting on the individual.²²³

In general, social assistance for Aboriginal people living off-reserve, including Métis people and Inuit, is administered through arrangements established by the provincial and territorial governments (Table 5.21). Although the actual administration and delivery of off-reserve social assistance varies, it is generally cost shared 50/50 with the federal government under the Canada Assistance Plan, an arrangement that may now change with the demise of CAP.²²⁴ For most on-reserve residents, the department of Indian affairs administers an analogous system, funded entirely by the federal government but administered in accordance with provincial and territorial practice.

TABLE 5.21 - Administration of Social Assistance for Aboriginal People

Aboriginal Group	Delivery and Funding	
	Federal	Provincial/Territorial (with federal cost sharing)
Indian persons on-reserve	x	
Indian persons off-reserve		x
Metis		x
Inuit		x

Whether social assistance is administered by a band, by Indian affairs, or by a province or territory, provincial guidelines are followed, and exceptions are not tolerated under CAP legislation or policy.²²⁵ No self-government or funding arrangement has come close to changing the conditions under which assistance must be administered. As a result, First Nations on-reserve are not allowed to establish by-laws that would permit them to make more innovative use of income support transfers.

Examples do exist where Aboriginal communities have stretched the rules in an attempt to overcome the disincentives inherent in the welfare system. In Fort Franklin, N.w.T., for example, several experimental voluntary projects, best characterized as social or community development, were initiated in the 1970s. They included a community-wide effort involving remodelling and painting public buildings and cleaning public spaces. As well, a winter firewood supply project was

223 Interview quoted in First Nations Management, "Aboriginal Economic Development (cited in note 22).

224 The system of financing social assistance is in the process of being changed as a result of the federal government's February 1995 decision to terminate the Canada Assistance Plan by 1 April 1996 and to replace it with a block grant under the Canada Health and Social Transfer. The conditions to be attached to the grant have yet to be determined.

225 The financing, administration and delivery of Aboriginal social assistance is very complicated. For more details, see Allan Moscovitch and Andrew Webster, "Aboriginal Social Assistance Expenditures", in *How Ottawa Spends 1995-96: Mid-Life Crises*, ed. Susan Phillips (Ottawa: Carleton University Press, 1995), pp. 214-217.

initiated by younger men who saw a need to provide fuel for elders and single mothers. Although these projects demonstrated various degrees of success in terms of participant productivity and project goals, they were terminated abruptly when outside authorities discovered that recipients were 'working for welfare'.

An Aboriginal economic development consultant in Eskasoni, Nova Scotia, told our researchers of a similar attempt to restructure welfare programming in her community. In her view, while some success has been achieved by daring to go beyond the regulations, what is needed is Aboriginal control over programming and community-based planning:

We have a program here in my community where they have taken welfare monies, bunched them up and put them together over a five year period. They created employment. I think it can work well to give everyone an opportunity to go for training and to also have the experience in working. Most of these people have been on welfare a long time and they will never be off welfare. The welfare syndrome is a catchy thing that people feel so secure about. If they are going to undertake those initiatives, they have to carefully manage them and they have to create employment which is meaningful ... I think it has to be very carefully planned, and it has to be managed properly. And it has to suit peoples needs, not the band government's needs.²²⁶

Provinces have also developed initiatives to overcome disincentives to work, but generally these are not being cost-shared by CAP. Examples of such initiatives include top-up payments for low wage earners, which allow recipients to keep some assistance once they find work, based on the idea that work should result in more, not less income, and bridging mechanisms such as enhanced earnings exemptions, temporary extensions of non-cash benefits, and reduced tax-back rates.²²⁷ An example is Quebec's Parental Wages Assistance Program, which supplements the wages of low-income working parents and assists with child care and housing costs. Because provinces have both the legislative and the fiscal leverage to do so, these programs are implemented despite CAP's restrictions.

There are also several federally supported pilot projects, such as the Self-Sufficiency Project, which is being tried out in British Columbia and New Brunswick. This project provides earnings supplements for up to three years to single-parent welfare recipients ready to work, but whose family needs are greater than what entry-level wages can provide. The hope is that participants will gain the experience and connections necessary to progress to higher-level jobs with higher levels of pay within a limited period of time. This project is being evaluated as it is being implemented.²²⁸

Aboriginal nations and their communities do not have recognized legislative authority or financial independence to allow them to initiate similar programs. Nevertheless, some flexibility is gained under DIAND's alternative funding arrangements, which give some First Nations limited discretion in developing and implementing social assistance policy and programs.

The Moricetown Indian Band in British Columbia has taken advantage of the Work Opportunity Program to fund a local sawmill project.²²⁹ This program, authorized by the federal Treasury Board in 1971, allows the use of social assistance funds to create on-reserve employment. The sawmill has

226 Interview quoted in First Nations Management, "Aboriginal Economic Development" (cited in note 22).

227 Human Resources Development, "Improving Social Security in Canada" (cited in note 204).

228 National Council of Welfare, *Incentives and Disincentives to Work: A Report by the National Council of Welfare* (Ottawa: 1993).

229 Hugh E.Q. Shewell, "The Use of Social Assistance for Employment Creation on Indian Reserves: An Appraisal", report prepared for the Institute for Research on Public Policy (Toronto: 1989).

been relatively successful, but is hampered by program regulations stipulating that social assistance funds can be used only for specific wage supplements. While the mill sustains steady employment, the funds cannot be used to expand the mill or to replace or repair equipment. When the mill's chipper was destroyed by fire, for example, several positions had to be eliminated. Furthermore, the requirement that project revenues be applied against the social assistance transfer does not allow for business reinvestment and growth. Difficulties also arise from a program requirement that there be some turnover of staff to give as many eligible persons as possible a chance to work. This undermines long-term skills development, as well as the continuity of staff important in quality control of the product. In the case of the sawmill, the band chose to stretch the guidelines, allowing employees to remain as long as they wished and transferring funds for as long as the band deemed necessary.

Although the work opportunity program has been used by other First Nations communities across the country, this does not demonstrate its effectiveness. In most cases, little continuing employment has been created, and social assistance expenditures have not been reduced significantly. Rather, First Nations people see the program as a marginally better alternative to the dependence created by the simple provision of social assistance. On the other hand, the community entitlement alternative, described later in this chapter, is particularly suited to this type of community effort and would correct the shortcomings of such limited programs as the work opportunity program.

A major problem has been fragmentation resulting from isolated approaches to the issues and the involvement of numerous levels of government. In an attempt to apply more holistic principles, several Aboriginal organizations have proposed client-focused service delivery models aimed at meeting the multiple needs of community residents. Known as the single-window or one-stop-shopping approach, this model is particularly suited to urban Aboriginal communities.

The single-window model is premised on community-based program delivery flexible enough to integrate training, job creation, and business development at the community and/or regional level. The thrust of this approach is that social assistance and social services must be community-specific in design, management and delivery, an approach echoed in recent department of human resources documents.²³⁰

This approach suggests condensing efforts to develop and deliver programs that are appropriate for each community. Likewise, single-window development bodies provide an opportunity to cluster a wide range of expertise:

As such, we believe that in addition to providing provinces with the opportunity to establish one stop social security services, where employment insurance, welfare and employment programs would be housed under one roof, the federal government should extend the same opportunity and flexibility to Aboriginal Community development institutions.²³¹

In urban areas, friendship centres could be one model of Aboriginal one-stop shops.²³² Friendship centres are already experienced in program innovation and development and in delivery mechanisms appropriate to particular urban communities. Despite a poor funding base and overextended resources, friendship centres have become known for their culturally sensitive, efficient and effective service provision. Friendship centres and similar urban institutions could act

230 Human Resources Development, "Improving Social Security in Canada" (cited in note 204).

231 Congress of Aboriginal Peoples, "Submission to the Standing Committee", p. 25.

232 National Association of Friendship Centres, *National Consultation on Social Security Reform*, final report, Human Resources Development, 1994.

as single-window agencies to serve Aboriginal residents under the current system, but they need to be freed from the restrictions and disincentives discussed earlier.

These examples demonstrate that modifications in the existing income security system are possible, but there are limits on how far one can go within the existing system. We believe that more substantial change is required, and we turn now to some more far-reaching alternatives.

Principles of change

We have identified three principles for reforming social assistance for Aboriginal people: (1) an active income security development approach; (2) an holistic approach to programming; and (3) Aboriginal control. These principles are consistent with the self-government initiatives outlined elsewhere in this report.

Principle 1: Social assistance aimed at development

There is widespread agreement that the current disincentives to development inherent in the welfare system must be replaced by a more dynamic and productive approach. At present, welfare is viewed as an enormous unproductive expenditure on passive social spending.²³³ Increasing amounts of money are spent on welfare and, ultimately, on poverty maintenance and misery. These moneys could be spent instead on active assistance for economic and community development or to equip

Aboriginal people through training and education to work and improve life in their communities. (See also Volume 4, Chapter 6 for our discussion of innovative uses of social assistance and the role of income supplements in sustaining a mixed economy in isolated areas.)

Job creation is a central concern and a goal for which social security reform must aim. However, we must break away from the notion that the only solution to social assistance dependency is a job in the labour market. This may be a solution for some, but for others living in areas where little or no employment is available, it is not likely a solution for the foreseeable future. In some communities it has been, and continues to be, possible to generate employment in the production of goods and services for sale primarily outside the community. In others it has not been possible. But all communities, whether urban, rural or reserve, could benefit from additional social development. Improved schools, water, heating, housing, and social services would have a positive effect on the capacity of people and communities to generate self-sustaining employment. Whether such development is seen as economic or social, many Aboriginal organizations are prepared to design and implement systems to redirect welfare funds into projects that develop and help sustain a healthy and productive community.

Principle 2: Holistic, integrated programming

*People are talking about 'the healthy community' — community well-being. You cannot do that without looking at everything involved in the community ... I look at it from a holistic perspective.*²³⁴

Social assistance reform will work best within a framework of integrated economic and social reform. In many communities, social assistance is an important source of income, a component in

233 Shewell, "The Use of Social Assistance," (cited in note 229), p. 7.

234 Interview quoted in First Nations Management, "Aboriginal Economic Development (cited in note 22).

the search for economic and social development. Employment, health, housing, social services, education, training, recreation, and social assistance must all be a part of community development.

The holistic approach to social security reform has received widespread support from Aboriginal organizations. This principle embodies the notion that the spiritual, cultural, political and economic realms cannot be treated as separate and disconnected realities, each with a distinct set of programs. A recent Pathways structural review makes the following point:

*Often insurmountable difficulties have resulted for Aboriginal peoples with regard to the building of holistic, local and regional development approaches, while struggling with the barriers of unlinked government decision-making structures and conflicting criteria.*²³⁵

Another perspective on economic development is that it is a matter of health, not growth. Some submissions to the Commission emphasized that a healthy community is a prerequisite for a healthy economy and that social programs need to be restructured to promote economic activity:

*So the economy requires a healthy society — generally. If you have an unhealthy society, no matter what you do in economic development, it's not going to go very far ... There is a need to re-examine the whole issue of social programs to become integrated into economic development. If you have a social welfare system that does not encourage involvement in the work force, then no matter what you do in the work force (employment, training, job opportunities) — it will be extremely difficult to get the work force motivated to participate. The message I get ... is that there has to be a significant change in how social programming is delivered ... and that this will in itself contribute to economic development.*²³⁶

Governments should abandon the idea that the problems of Aboriginal societies can be separated, categorized and ordered. The overall health and well-being of Aboriginal people is intrinsically tied to the social, political and economic development of their communities.

Principle 3: Aboriginal control

*A lot of employment could be created if the band could respond to the needs the community itself generates ... As long as the community remains dependent on government programs it will not be able to 'see' beyond the reserve boundaries.*²³⁷

The Commission supports the view that Aboriginal control of social assistance and related services is a prerequisite for culturally and situationally appropriate programs and for the effectiveness of the alternatives discussed here. The underlying principle of social assistance reform is the full recognition of the inherent Aboriginal right of self-government.

The same point was made by the First Nations project team in Ontario, which argued that social assistance must be

- determined, designed and developed within the Aboriginal community and by its membership;

235 Human Resources Development, "Pathways Structural Review" (1995), p. 5.

236 Interview quoted in First Nations Management, "Aboriginal Economic Development (cited in note 22).

237 Moricetown Indian Band, B.C., in Shewell, "The Use of Social Assistance" (cited in note 229), p. 35.

- designed to address community needs in harmony with local culture and social structure;
- provided under the authority and sanction of Aboriginal government and fully accountable to members of the community; and
- managed and delivered within the Aboriginal community.²³⁸

Under the aegis of Aboriginal control, the role of non-Aboriginal governments would be to facilitate and promote rather than to design and administer. In other words, funding arrangements rather than program design would be the focus of interactions between non-Aboriginal governments and Aboriginal people. These arrangements would need to be flexible, consistent and dependable.

Changes to the system: alternative approaches

Canada's income security arrangements are in a state of flux. This time of change provides an opportunity for Aboriginal people to promote reform of social assistance that is appropriate to their cultures and circumstances and that makes more efficient use of decreasing public resources.

A new social assistance program for Aboriginal people will have to address several major issues.

- **Administrative standards:** What standards will apply in the administration of social assistance? Will society be prepared to accept culturally different standards developed by and for Aboriginal communities and nations?
- **Accountability:** In what ways and to whom will Aboriginal communities and nations be accountable for their use of social assistance funds?
- **Social and economic development:** Will society accept the use of social assistance funds for programs that go beyond passive income support? Will Aboriginal recipients accept substantially different arrangements?

The key issue in developing a social assistance program that permits Aboriginal people to develop culturally specific arrangements is what is known as entitlement. In the mainstream system, each person or head of a household in need is eligible to apply for social assistance. That is, they have an individual entitlement. Individual entitlement is based on the idea that persons or households in need should be supported by society through a system of taxes and transfers organized by government. Individual entitlement makes sense if society is seen as being composed of individuals or individual households — the classic liberal view.

But is this approach the best one for Aboriginal people? For many Aboriginal people raised and still living in Aboriginal communities, the sense of mutual dependence and support among family and friends remains strong:

Traditionally [within First Nations cultures], assistance from others was expected in times of individual need and was provided according to understood rules or norms of reciprocity — typically from specific others within the extended family and not from a central government or agency. Help was provided when required in a non-judgmental manner as a social duty or obligation, not reluctantly — for the well-being of the

238 Ontario, First Nations' Project Team, "Social Assistance Legislation Review" (Toronto: Queen's Printer for Ontario, 1992), p. 12.

*collective was understood to depend on the continued well-being of its individual members. This central concept remains strong in most First Nations communities despite the fact it has been undermined by imposition of the categorical system for several generations.*²³⁹

Although Aboriginal people may now participate to a greater or lesser extent in the general labour market, the traditional relationship between individual work and community responsibility has not been completely replaced by the idea that the fruits of labour belong solely to self-sufficient individuals and their immediate families.

We present two alternative approaches. The first is a reform of the social assistance system that retains individual entitlement. The second accommodates a form of community entitlement in which the applicant for assistance is not the individual but the community. Both alternatives address issues of income support provision to Aboriginal people while generating economic and/or social development. Both alternatives could serve as a basis for social assistance but are not necessarily mutually exclusive — that is, both approaches could be used in the same community.

The individual entitlement approach

We present three models for reform of the current system while continuing the concept of individual entitlement — the opportunity planning process, the business development model, and income support programs directed at traditional mixed economies. Each illustrates how the system can be changed to help recipients become more productive members in the community or to assist those who are already productive but in need of supplementary support. Each is based on a transition to self-reliance, which in turn will reduce the cost of social assistance over time.

Opportunity planning

Opportunity planning is a process to assist recipients in the transition from welfare to self-reliance in the following ways:²⁴⁰

- assistance in identifying their strengths and weaknesses;
- advice on available services and programs;
- assistance in gaining access to these opportunities;
- development of an individual action plan; and
- monitoring and support in the implementation of that plan.

The purpose of opportunity planning is to help recipients overcome barriers to education, training and employment and to assist recipients who may not be able to participate more fully in community life. Opportunity planning is not a work, training or education program in itself; rather, it aims to co-ordinate social assistance with labour market systems and other services to improve access for recipients. As such, opportunity planning is very much in keeping with the individualism of mainstream social assistance programs.

239 First Nations' Project Team, "Social Assistance", p. 8.

240 Ontario, Ministry of Community and Social Services, Advisory Group on New Social Assistance Legislation, *Time for Action: Report on Legislative Reform* (Toronto: Queen's Printer for Ontario, 1992), p. 73.

At least one Aboriginal community has begun to implement this type of process. The McLeod Lake band in Ontario has developed a program for individuals who are on social assistance for longer than three consecutive months.²⁴¹ Each recipient is required to submit a personal development plan. Six areas are covered: education, literacy and cultural development; career development; management of personal resources, including money; health and physical development; social and emotional development; and home management. The individual is responsible for securing the funds to realize the plan, drawing on the support of the extended family, available government programs, and the band's social assistance program up to the limit of the person's entitlement. This program has holistic elements and encourages a measure of individual responsibility in interaction with the person's extended family and the wider community.

Opportunity planning provides the financial and other kinds of support people require to take a training course or to hold down a job. For some Aboriginal people, this approach may lead to education, training and jobs; for others, opportunity planning will provide support that leads to greater participation in community life.

Business development approach

This approach involves agencies, institutions, or business ventures established for the express purpose of directing social assistance recipients and funds to employment-generating projects. While this approach is implemented by community organizations, it is funded through a charge-back system based on individual entitlements. That is, persons qualify for participation through their individual entitlement to social assistance. This approach depends on the availability of a market for products and services and is therefore particularly appropriate for urban Aboriginal communities. Such projects have been implemented in cities across Canada.

In Halifax, for example, the Human Resources Development Association (HRDA) has developed several long-term employment projects funded by cost-shared municipal and provincial social assistance moneys and directed to welfare recipients.²⁴² Businesses established by HRDA have included a car rental franchise, a ship cleaning operation, a small clothing manufacturing venture, and a contract to collect recyclable materials. The association employs mainly social assistance recipients and provides employment and training opportunities and wages equivalent to social assistance benefits, plus a small supplement. HRDA charges the city of Halifax a fee for services amounting to 50 per cent of the salaries and benefits paid to social assistance clients (to a maximum of \$7,000 in 1989). A placement fee is also paid to the association for employees who move on to other employment.

The association's system has proven cost-efficient in the long term. In 1987, HRDA's fee for service per client averaged \$376 per month. This was well below the estimated cost of maintaining an individual on municipal social assistance, which ranged from an average of \$460 per month for a single client without dependants to \$666 per month per family. In terms of moving clients off social assistance, an evaluation of HRDA, then in its tenth year of operation, demonstrated that close to 45

241 The Personal Development Program of the McLeod Lake Indian Band is funded under the alternative funding arrangements (AFA) of the Department of Indian Affairs and Northern Development. Through AFA, a First Nation community may develop and implement its own social assistance projects. However, it must meet certain standards defined by the department's national program standards, as well as the standards set out in the Canada Assistance Plan. First Nations' Project Team, "Social Assistance" (cited in note 238), pp. 40-41.

242 Elizabeth J. Beale, *Regional Development in Atlantic Canada: An Overview and a Case Study of the Human Resources Development Association*, Local Development Paper No. 3 (Ottawa: Economic Council of Canada, 1989).

per cent of previous HRDA employees who responded to a survey were currently working full-time or part-time. Although only 20 per cent of respondents had been employed for the entire time since leaving HRDA, this should not be taken as an insignificant achievement. Considering the serious employment problems facing social assistance clients and the fact that all were unemployed and on social assistance before working at HRDA, these results can be taken to indicate a step in the right direction.

Harvesters income support programs

Social assistance programs are poorly suited to the needs of wildlife harvesting because they are designed as a support for consumption rather than for investment in production.²⁴³

Disincentives to harvesting inherent in the current welfare system include penalties against income earned from the products of the harvest and the monthly payment system, which works against spending prolonged periods in the bush. Hence, hunters state that increasingly they must limit their expeditions to day and weekend trips.²⁴⁴ The current method of administering social assistance unnecessarily limits the ability of many northern Aboriginal families to participate fully in traditional harvesting.

The Commission proposes a strategy designed to support harvesting activities. This type of approach might be considered a preventive measure, in which support is given to help maintain self-employed hunters who are already involved in productive activities. This approach also potentially includes the use of unemployment insurance funds in this same context, in particular for seasonal workers involved in commercial resource harvesting (such as fishing), non-standard workers such as those in cottage industries, or part-time employees and multiple-job holders. (See Volume 4, Chapter 6 for a detailed discussion of these issues.)

In the long term, it is obviously cheaper to provide occasional support for someone generating at least some income than it is to support someone who depends solely on social assistance. The lack of will evident in most provincial and territorial systems to supplement low incomes among self-employed and seasonal workers highlights the shortcomings of the existing system, which ties Aboriginal social assistance to provincial or territorial programs.

Several strategies for hunter and trapper income support can serve as models. The James Bay Cree Income Security Program, the Northern Quebec Hunter Income Support Program, and the Nunavut Hunter Support Program directly support the traditional mixed economy. Each provides a more productive and constructive use of funds than spending strictly on social assistance.

The Cree income security program — part of the James Bay and Northern Quebec Agreement — is one that funds hunters and trappers according to the time they spend on the land. It offers financial support through a structure similar to a negative income tax, guaranteeing a minimal level of income based on family needs. In addition, cash income is provided to harvesters according to the number of days spent harvesting, in the form of a per diem rate. To be eligible for the program, the harvester must work no less than 120 days at harvesting, spend more time harvesting than working for a wage income, and earn less from harvesting than from wage labour.²⁴⁵

243 Frederick H. Weihs and Sinaaq Enterprises Inc., "A Review and Assessment of the Economic Utilization and Potential of Country Food in the Northern Economy", research study prepared for RCAP (1993).

244 Lynda Lange, "Fractured Vision: Frustration and Hope in Fort Resolution, N.w.T.", research study prepared for RCAP (1993).

245 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).

The basic income levels, per diem rates and offset percentages can all be adjusted to a particular situation. The value of the Cree program is that it involves the Cree people directly in program design, recognizes and supports economic activity that provides meaningful work, and contributes to a diversified economy that is in harmony with the land, the seasons and the people who live and work in these communities.

The northern Quebec hunter income support program is an Inuit-designed program administered by the Kativik regional government and 15 participating Inuit communities. It is funded by the Quebec ministry of recreation, fish and game.²⁴⁶ This program provides for the purchase of harvested food and also invests in capital equipment for harvesting, such as boats for communal use. Country food is distributed, free of charge, to Inuit living in the north who cannot hunt and to those living in the south. The northern Quebec Inuit hunter income support program encourages hunters to bring food into the communities and ensures that it is shared among all those who wish it. This contrasts with the Cree program, which compensates people for going out on the land, regardless of what they do with the produce.

The Nunavut hunter support program has not been operating long and hence is still somewhat experimental. It was not included in the comprehensive claims agreement and so has a much less secure future than the Cree program. Costs for the Nunavut program are shared by Nunavut Tunngavik Incorporated and the government of the Northwest Territories in its first five years of operation. It provides annual lump-sum payments (up to \$15,000) to a limited number of full-time hunters to help cover costs of equipment, fuel and supplies. So that the funds can be distributed as broadly as possible, a hunter is eligible for support only once during this initial five-year period. At present, the program has little leeway to develop into more than a capital and operating fund for full-time hunters and as such does not have the long-term features of the Cree program.

A final example — one related specifically to social assistance — comes from a proposal by First Nations located on the Ontario side of James Bay.²⁴⁷ In response to serious threats to their harvesting economy, the Omushkegowuk Harvesters' Association has proposed a detailed modification of the social assistance system, which it believes will reverse the current negative relationship between welfare and harvesting. They propose using social assistance funds to provide supplementary income to families and individuals engaged in full-time harvesting. These funds would be provided as grants, which would enable the capitalization of the harvesting process, and as seasonal payments in recognition of extended periods of time spent in the bush. The Omushkegowuk Harvesters' Association suggests that this program be integrated with other programs involving product marketing, resource management, transportation support and bush schooling for children of the harvesters.

The community entitlement approach

High levels of social assistance among Aboriginal people is attributable mainly to high levels of unemployment, a situation that reflects the relatively underdeveloped labour market in Aboriginal communities. The Commission believes that if Aboriginal communities are to make improvements in this context, they should be able to use social assistance funds for development purposes, whether economic or social. Some communities or nations may wish to pursue an approach based on community entitlement.

246 See Canadian Arctic Resource Committee, "Aboriginal Peoples, Comprehensive Land Claims, and Sustainable Development in the Territorial North", brief submitted to RCAP (1993), Appendix E, pp. 11-16.

247 Ontario, *Time for Action* (cited in note 240), pp. 42-43.

This is the approach of the Australian community development employment program (CDEP), which provides part-time employment for some 26,000 Australian Aboriginal people.²⁴⁸ Since 1977, a program has operated to permit remote communities to initiate economic and social development projects that provide employment for members of the community initiating the project. Since 1987, when CDEP and its funding were substantially expanded, projects have been initiated in a wide range of urban and rural areas. In 1987 the Commonwealth government set out the purpose of CDEP:

*The purpose of the policy is to promote Aboriginal economic independence from the Government and to reduce Aboriginal dependency on welfare in accordance with growing Aboriginal demands for employment and the capacity to control their own destiny. The overall objective is to assist Aboriginal people to achieve broad equity with other Australians in terms of employment and economic status.*²⁴⁹

Under current program rules, agreement among community members is necessary to initiate a development project. Members of the community agree that they will accept employment in the project instead of receiving welfare. They are guaranteed an amount equivalent to their individual social assistance benefit entitlement. They are paid for hours worked at the equivalent of the minimum wage. This means roughly two days' work per week. Further incentive to participate is in the form of additional funds for equipment of up to 20 per cent of the community development employment project wages fund.²⁵⁰

After deciding to participate, communities must come up with a viable project, which may be economic or social or both. The project could involve fish farming, mining, forestry or other activities aimed at producing for export. Alternatively, it could involve building or renovating community housing, constructing community infrastructure, improving roads or the water supply, or other similar activities. The project must be approved by the Aboriginal and Torres Strait Islander Commission (ATSIC), an Aboriginal-run organization that took over administration of many Aboriginal-related national government programs in 1990 but is responsible to the Commonwealth minister for Aboriginal affairs.²⁵¹ ATSIC officials maintain close contact with officials of the social security department to ensure an orderly transition from welfare to funding from the community development employment program. Once the project is approved and funds are made available, the community becomes an employer with responsibility for managing the project, and the former recipients become employees with the obligation to work on the project in order to receive wages that amount to the equivalent of income support benefits.

Several studies have reviewed the experience of CDEP, particularly since 1987. While there are significant criticisms of the program, it appears nonetheless to have been an effective program for some Aboriginal communities.²⁵² The CDEP approach permits Aboriginal communities to go further than simply administering social assistance funds allocated to them; they can use the funds for economic and social development.

248 For a discussion of the Australian program, see Deloitte, Touche, Tohmatsu, *No Reverse Gear: A National Review of the Community Development Employment Projects Scheme*, Report to the Aboriginal and Torres Strait Islander Commission (1993).

249 Government of Australia, "Aboriginal Employment Development Policy Statement, Policy Paper No. 1" (Canberra: Australian Government Publishing Service, 1987), p. 3.

250 Aboriginal and Torres Strait Islander Commission, "Community Development Employment Projects: Participant Information Booklet" (1995).

251 Aboriginal and Torres Strait Islander Commission, *ATSIC at a Glance* (no date).

One of the key issues in community development employment projects is the inherent tension between welfare and employment. CDEP uses welfare funds to generate part-time employment. It is neither an employment program nor a welfare program. It is not really an employment program, because provincial and territorial employment legislation would have to be suspended to permit this type of 'near'-wage work. Neither is it really a welfare program, because participants are employed and do not have access to the secondary or supplementary benefits available to welfare recipients.

The Australian experience also suggests that if a community entitlement alternative is developed in Canada, it will be necessary to specify standards of accountability. The key components are community planning, approval and accountability for funds expended.

- **Planning.** The onus would be on governments representing Aboriginal nations and their communities to provide a plan for the use of social assistance funds. The plan would specify the details of the proposed project, including the wages and the number of persons employed, the use of capital funds, and the administration of the project. The plan would also have to ensure that social assistance recipients who are not able to work on a project continue to receive income support.
- **Approval.** The proposed use of social assistance funds would need the approval of the members of the community through a democratic process. An appeals process should be put in place to provide recourse for individuals who feel they have not been dealt with properly.
- **Accountability.** Aboriginal governments accepting the funds would be accountable for the administration of the project at specified intervals and for the project as a whole upon its completion.

Careful planning, approval and accountability measures will help to avoid the abuse of power by those in charge of the implementation of the project.

Alternative interim funding possibilities

The advent of the Canada Health and Social Transfer in April 1996 created both the opportunity and the need for a legislative solution that could establish a framework for Aboriginal communities to participate on an equal footing with the provinces and territories. We present here alternatives which, if implemented, would provide a basis for the restructuring of Aboriginal social assistance. We have sought approaches that would give Aboriginal communities the flexibility and "the power necessary to develop and implement solutions consistent with their material circumstances and cultures".²⁵³

In the Commission's view, the long-range goal is for Aboriginal nations to regain responsibility for community welfare. As we stated in Chapter 3 in the first part of this volume, social services and welfare should be included in Aboriginal jurisdiction. This means that on Aboriginal territory, Aboriginal law would take precedence over provincial or federal legislation in the area of social assistance.

252 Deloitte, Touche, Tohmatsu, *No Reverse Gear* (cited in note 248); Aboriginal and Torres Strait Islander Commission, *Review of the Aboriginal Employment Development Policy*, 1994; Will Sanders, "The CDEP scheme: bureaucratic politics, remote community politics and the development of an Aboriginal 'Workfare' program in times of rising unemployment", *Politics (Australasia)* 23/1 (May 1988), pp. 32-47; and Will Sanders, "The Rise and Rise of the CDEP Scheme: an Aboriginal 'Workfare' Program in Times of Persistent Unemployment" (Centre for Aboriginal Economic Policy Research, 1993).

253 First Nations' Project Team, "Social Assistance" (cited in note 238), p. ii.

This goal may take some time to achieve, however, and transitional measures may be required, such as:

- New federal legislation. Such legislation would provide a legal framework and general principles and standards for Aboriginal nations and their communities that are prepared to establish and operate their own social assistance programs and related services. It would also specify the funding arrangements that would apply. Such an approach would sever the link between Aboriginal social assistance programming and provincial practice, making room for innovation leading to social and economic development. The disadvantage of legislation is, of course, the long time that may be required for passage.
- The Canada Health and Social Transfer (CHST). Aboriginal nations and their communities would become direct signatories of CHST, thereby qualifying for block funding in a manner similar to the provinces. However, the funding formula would differ, since Aboriginal governments do not have other sources of revenue, as the provinces do, out of which to cover the remainder of social assistance costs. The general standards that would apply to the provinces could also apply to Aboriginal nations, or a different set of standards might be developed. Subject to these limitations, Aboriginal nations and their communities would be able to design and implement their own social assistance programs and related services.
- Tripartite agreements. A third option is to establish federal-provincial-Aboriginal agreements specifying principles and standards for the design and administration of social assistance and setting out the roles of each government. The agreements would also specify a cost-sharing formula. A precedent for this approach, albeit one that did not involve Aboriginal governments as signatories, is the 1965 Canada-Ontario memorandum of agreement respecting welfare programs for Indian persons.
- A new federal program. A fourth option, and one that could perhaps be implemented most readily in the short term, is for the federal government to make available a new program to replace the existing arrangement for social assistance on reserves. As with the other options, the new program would specify certain principles and standards and would offer an opportunity for innovation in the design and delivery of social assistance and related services that would lead to individual and community development. Funding would be provided in response to proposals from Aboriginal nations and communities.

These examples of interim arrangements can be seen to apply most readily to nations and communities with their own land base. However, we do not intend to limit innovative uses of social assistance to these situations. In urban and off-reserve areas, however, it is more likely that innovation would be pursued under an individual entitlement approach than a community entitlement approach, because individual employment opportunities are more promising and Aboriginal governing structures less well developed. If social assistance in urban and non-reserve areas continues to be organized under the aegis of provincial and territorial governments for the foreseeable future, it will be necessary to find ways to introduce a significant degree of Aboriginal control, program flexibility and innovation in these locations. For example, provincial and territorial governments might open the door to new programs that match federal initiatives, include urban, non-reserve constituencies in tripartite negotiations, or include them as members of Aboriginal nations that become signatories of the CHST or that take advantage of new federal legislation.

Whatever interim approach is used, it should allow for steady progress toward Aboriginal control over the design and administration of social assistance and related services. It should also permit

innovation, leaving room for holistic approaches and social assistance based on individual or community entitlement. While these two paths are different, they are not mutually exclusive. For example, a community may opt for an entitlement approach to accomplish a particular infrastructure project and perhaps to employ a majority of its social assistance recipients. However, seniors and persons with disabilities, who may not be able to participate in the project, will continue to need public support under an individual entitlement model. This example also implies that, under specified conditions and agreed time frames, it would be possible for a community to shift from an individual to a community approach and vice versa.

Under either alternative, however, it is important that social assistance be transferred as a block grant so that Aboriginal nations and communities have the flexibility to make innovative use of these funds, including the possibility of combining social assistance moneys with other funds, such as those for training, housing and economic development.

Conclusion

Conventional Canadian approaches to social assistance have failed Aboriginal people. While welfare is putting more cash resources into communities, the system is doing little to change the economic and social conditions that contribute to high and rising rates of dependency. National on-reserve social assistance dependency rose to 43.3 per cent of the population by 1992 (the most recent year for which data were available), more than four times the rate for all Canadians. Without reform, on-reserve dependency will continue to grow to an estimated 50 per cent or more in the near future.²⁵⁴ Many Aboriginal communities are caught in a situation where individuals receive assistance but live in a community where much needs to be done. A bridge must be erected to connect employable individuals with opportunities that meet the economic and social needs of their communities. The Commission believes such a bridge can be built. What is required is far-reaching and substantial reform of social assistance to permit communities to work toward reversing the trend to ever greater levels of dependency. Reform must be innovative, allowing communities and nations to control their fate through the use of social assistance dollars for economic and social development. Only through reform can the looming social crisis be averted.

Recommendations

The Commission recommends that

2.5.47

Social assistance funds be directed toward a more dynamic system of programming that supports employment and social development in Aboriginal communities, whether in rural or urban settings.

2.5.48

Governments providing financial support for social assistance encourage and support proposals from Aboriginal nations and communities to make innovative use of social assistance funds for employment and social development purposes and that Aboriginal nations and communities have the opportunity

²⁵⁴ Moscovitch and Webster, "Social Assistance and Aboriginal People" (cited in note 31).

(a) to pursue personal development, training and employment under an individual entitlement approach, and

(b) to pursue the improvement of community infrastructure and social and economic development under a community entitlement approach.

2.5.49

In their active use of social assistance and other income support funds, Aboriginal nations and communities not be restricted to promoting participation in the wage economy but also be encouraged to support continued participation in the traditional mixed economy through income support for hunters, trappers and fishers and through other projects aimed at improving community life.

2.5.50

Aboriginal control over the design and administration of social assistance programs be the foundation of any reform of the social assistance system.

2.5.51

All governments support a holistic approach to social assistance programming for Aboriginal peoples that is

- rooted in Aboriginal society, its traditions and values;
- aimed at integrating social and economic development; and
- explicitly included in the design and operation of any new institutions or programs created to implement social assistance reform as it relates to Aboriginal people and communities.

2.5.52

Initiatives to reform the design and administration of social assistance encourage proposals from Aboriginal nations and tribal councils, acting on behalf of and in co-operation with their member communities.

2.10 Conclusion

As this chapter has illustrated, among the many economic issues facing Aboriginal nations and their communities, three stand out:

- the need to develop stronger, more self-reliant Aboriginal economies to accompany and sustain self-government;
- the need to eliminate the sharp inequalities in employment and incomes that separate Aboriginal people from Canadian standards; and
- the need to come to grips with the rapid increase in the Aboriginal population, which provides thousands of new entrants to the labour market each year.

We have emphasized that economic development is a process in which the principal participants are Aboriginal individuals, communities and nations. The most Aboriginal and non-Aboriginal governments can do is facilitate the process of change — to set the stage for economic development, remove barriers, create opportunities in some cases, and provide support. In some cases, Aboriginal governments may also own and manage business ventures on behalf of their communities.

In carrying out this enabling role, governments need to be clear about the goals Aboriginal individuals and collectivities want to achieve. They need to recognize that these goals are often significantly different from those of other Canadians. They also reflect diverse Aboriginal cultures and circumstances.

The most important steps non-Aboriginal governments can take to facilitate economic development in Aboriginal communities are as follows:

- Recognize Aboriginal rights and honour and implement treaty provisions, with particular attention to the economic dimensions of those provisions. Where historical treaties have not been signed, new agreements must be concluded. In existing treaty areas, updated or additional treaties may be necessary.
- Through the treaty process and by other means outlined in this volume, make available a land and resource base that is sufficient to provide the basis for self-reliant Aboriginal economies.
- Make it possible for Aboriginal governments to regain stewardship over their own economies. Over the medium to long term, this will be accomplished as part of the process of achieving self-government. In the interim, we believe it is important for federal, provincial and territorial governments to enter into economic development agreements with Aboriginal governments, or institutions representing them, to provide multi-year funding for Aboriginal-controlled economic development programs and projects.

Aboriginal governments, for their part, need to be particularly concerned with institutional and human resource development. They need to establish institutions for economic development that are legitimate in the eyes of their people and consistent with their cultures and traditions. These institutions need to be accountable but also have authority to make day-to-day decisions that are economically sound and free of political interference. We have also emphasized the importance of establishing institutions at the sectoral and nation level that work out effective, co-operative relationships with community-based institutions. Finally, Aboriginal and non-Aboriginal governments need to confront the crucial task of raising general education levels and correcting the shortage of trained personnel in fields that are especially relevant to economic development.

At the level of Aboriginal business, we have discussed the community context for business development, noting the need to rekindle culture, identity and pride to promote a framework that supports and celebrates individual and group achievement in economic ventures. We have emphasized the need for professional business advisory services for businesses starting out and in their early stages of development. We have made several recommendations for improving access to markets: the pursuit of import substitution strategies, an effective set-aside program for Aboriginal businesses on the part of governments and major resource companies, and the strengthening of institutional capacity to identify appropriate markets and promote sales.

Improving access to banking services and to sources of capital is particularly important. We urge banks, credit unions and trust companies to make banking services available in or near all Aboriginal communities. We support the use of micro-business lending and revolving loan funds and the expansion of programs to provide equity financing. In addition, we see a need to strengthen Aboriginal capital corporations, broaden the availability of tax credits for those who invest in venture capital funds that directly benefit Aboriginal communities, and establish a Canada-wide Aboriginal development bank.

Measures to strengthen the economic capacity of Aboriginal nations, communities and businesses have little meaning if they do not bring with them improvements in the economic situation of individuals and families. Our analysis of the steps needed to improve individual and family prospects began with the estimate that more than 300,000 jobs will have to be created by 2016 to accommodate the rapidly growing Aboriginal labour force and achieve parity with overall Canadian employment levels. Respondents to the Aboriginal peoples survey gave their own assessment of the obstacles to employment: the lack of available jobs, but also the mismatch between their education and work experience and the requirements of the jobs that were available. Other important barriers were the lack of job information, the threat or reality of discrimination ('being Aboriginal'), and the lack of child care.

To address these obstacles, major employers in the private and public sector should co-operate with the leadership of Aboriginal organizations in a special 10-year education, training and employment initiative. Its goal will be to provide education, training and jobs for Aboriginal individuals, but also to develop the personnel that Aboriginal nations and their communities need as they regain stewardship of their economies. In addition, we have outlined a new approach to employment equity programs, an expansion and strengthening of the role of Aboriginal employment services agencies, and the provision of culturally appropriate and affordable child care. We also underline the importance of job creation in the Canadian economy as a whole.

Education and training arise in virtually all aspects of economic development discussed here. While these issues are dealt with more fully in Volume 3, Chapter 5, our analysis in this chapter has revealed the generally positive link between higher levels of education and training and labour force participation and employment rates. We have also identified particular problem areas — the low education level of the older age groups, low levels of high school completion among young persons, weaknesses in preparation for post-secondary math and science programs (and the professions that draw on these disciplines), low levels of university completion, and the scarcity of Aboriginal students graduating from programs of study vital to the development of Aboriginal economies.

Finally, we recognize that in many Aboriginal communities most of the population derives income not from employment but from social assistance and other forms of income transfers. The way social assistance programs are designed and regulated provides income support at a minimal level but also places barriers in the way of more innovative and potentially more effective ways of using these funds — for example, to support individual training and employment or community social and economic development. Individual entitlement arrangements, with control vested in Aboriginal nations and their communities, can continue, but Aboriginal people should also have the opportunity to receive social assistance funds under a community entitlement approach through which they can support economic development and community infrastructure projects. Under either the individual or the community entitlement approach, social assistance funds should be provided as a block grant, with the flexibility to combine these funds with other resources such as capital funds and training moneys. If pursued vigorously, these and the other measures we propose would help to

generate a momentum that would result, over time, in strong, self-reliant Aboriginal communities that are both economically and socially healthy and vibrant.

6 Conclusion

IN THIS VOLUME WE HAVE ADDRESSED the political and economic dimensions of the relationship between Aboriginal peoples and the Crown and how they can be restructured to resolve the unfinished business of Confederation and to achieve the full participation of Aboriginal peoples in Canadian society.

We are persuaded that the organizing principle around which this restructuring should occur is the recognition that Aboriginal peoples constitute nations; that they were nations when Europeans arrived on these shores and entered into alliances with them; that they were nations when treaties were made to provide for the sharing of lands and resources; and that they constitute nations today. Since the first contact with non-Aboriginal people, Aboriginal peoples have demonstrated the enduring will to remain distinct peoples with their own laws, cultures and identities, despite persistent attempts to control and assimilate them.

Historical fact and contemporary preference are not the only public policy grounds for looking to the Aboriginal nation as the core around which this Commission's recommendations are built. What leads us to this approach is the evidence that the road back from economic and political marginalization and social despair has undeniable features:

- For Aboriginal individuals, association with their various peoples as collectivities is central to individual and community identity.
- Aboriginal culture and values are distinct and often sharply at variance with those of the dominant culture.
- Those values and that sense of collective identity are vital to restoring health and effectiveness to individuals and communities.
- After almost a century and a half of treating Aboriginal peoples as wards of the state, mainstream institutions must make way for them to design their own solutions and institutions.
- To be effective, many of these Aboriginal institutions will require the resources, size, and checks and balances that come from being organized at the nation level rather than the community level.

Aboriginal peoples are not impoverished racial minorities whose interests need to be served better by the Canadian state. They are political entities that, because of their treaties, the recognition of their rights in Canada's constitution, and the nature of their social and cultural cohesion, need to be recognized as nations, negotiated with as nations, and thereby empowered to implement their own solutions within a flexible Canadian federation.

1. An Act of National Intention

We began this volume with a discussion of the treaties that, from early contact, were the defining instruments in the relationship between Aboriginal peoples and the newcomers to this continent. While still using treaties to gain peaceful access to lands for settlement, however, imperial and later Canadian governments unilaterally transformed the relationship by implementing what later became

the *Indian Act*. This political act imposed wardship and dominance in place of partnership between autonomous peoples. All subsequent efforts to deal with 'the Indian problem' have stopped short of honouring the original treaty relationship, thereby demonstrating an unwillingness to regard Aboriginal peoples as nations and accord them the respect they are due as distinct political entities.

Canadian governments must break with this past. We propose that this be done through a major act of national intention: the promulgation by Her Majesty the Queen of a royal proclamation that will indicate to all Canadians the nature of the new relationship to be created, the principles that support it, the processes envisaged for its establishment, and the government of Canada's intention to give the relationship a legislative base through companion legislation.

We recommend that this be undertaken by the Queen in her role as Canada's head of state and because the monarch has been seen by Aboriginal peoples for more than 200 years as embodying the Crown's protection and good faith. We refer the reader to the opening chapter of Volume 5 of this report, where we recommend what the proclamation should contain.

The approach we propose would do much to bring the importance of this renewed relationship home to Canadians and would help to restore hope among First Peoples. On its own, however, this gesture will not achieve the intended result, given the history of dashed expectations and broken promises. For that reason, and to inform all parties of the nature of the road ahead, the proclamation should be accompanied by a companion act indicating the government of Canada's intention to propose the following legislation for parliamentary review and approval:

1. An *Aboriginal Treaties Implementation Act* setting out the processes by which existing treaties, particularly the historical treaties, would be clarified, reinterpreted or modernized and new treaties, agreements or accords entered into; defining the institutions to govern the treaty process, that is, the treaty commissions to oversee the treaty negotiations; and providing guidelines for federal policies with respect to the negotiation of lands and resources for Aboriginal nations.
2. An *Aboriginal Lands and Treaties Tribunal Act* as the instrument to deal with specific claims and as the body to which parties to the treaty negotiations can turn, if necessary, to seek fair and impartial implementation of the treaty process; initially the tribunal would implement federal jurisdiction in the field but over time would be accorded similar authority by provincial governments.
3. An *Aboriginal Nations Recognition and Government Act* requiring the government of Canada to support Aboriginal peoples seeking to assume the responsibilities of nation status, that is, setting out the criteria and process the government would use to recognize an Aboriginal nation; acknowledging that, once recognized, Aboriginal nations can exercise on their existing territories the law-making capacity they deem necessary in the transition period with respect to the life and welfare of their people, their culture and identity; indicating that the federal government would vacate its relevant legislative authority under section 91(24) of the *Constitution Act, 1867* with respect to these core powers; indicating which additional federal powers the Parliament of Canada is prepared to acknowledge as being core powers to be exercised by Aboriginal governments; and indicating the manner in which these responsibilities would be financed in the interim period before the conclusion of renewed or new treaties.
4. An *Aboriginal Parliament Act* to give Aboriginal peoples and nations an effective presence at the federal level that supplements representation in the House of Commons; the parliament would be a consultative body until such time as its role in decision-making processes in the Canadian federation could be implemented by constitutional amendment.

5. 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 peoples and replace the Department of Indian Affairs and Northern Development.

The process of developing this proclamation and legislation should be undertaken in close consultation with national Aboriginal organizations and provincial and territorial governments. A constitutional amendment is not required for either the royal proclamation or its companion legislation. Consultations to prepare the way for the proclamation and its companion legislation should be the first item of business for the forum that we recommend be established by first ministers and national Aboriginal leaders to negotiate a Canada-wide framework agreement on Aboriginal treaties and governance.

The government of Canada should do all it can to encourage a collaborative process, involving provincial and territorial governments and national Aboriginal organizations, for reaching consensus on the royal proclamation as an act of national political will. In the end, because of its primary responsibility for Aboriginal affairs, it should move to implement these measures with the agreement of as many parties as possible.

2. Negotiating a Canada-Wide Framework

The forum for negotiating a framework agreement would be the next major initiative of the government of Canada following the royal proclamation and enactment of the companion legislation. This forum would have the vital task of providing the means for provincial and territorial governments to join representatives of Aboriginal peoples and the federal government in determining the main parameters of their relationship. Implemented effectively, this forum could save much time and expense in the subsequent treaty negotiations with individual Aboriginal nations. It could also provide a means for smaller nations to receive equitable treatment in their negotiations.

The forum would be commissioned by first ministers but conducted by federal/provincial/territorial ministers of Aboriginal relations along with the leaders of national Aboriginal organizations. It would provide an opportunity for the following matters to be discussed and, it is hoped, settled:

1. principles to guide the treaty processes;
2. principles to guide the negotiations leading to the allocation of lands and resources;
3. principles to govern the negotiation of interim relief agreements to take effect before the conclusion of treaties;
4. the full extent of the jurisdiction to be exercised by Aboriginal governments after treaty processes have been concluded;
5. co-operative agreements to handle areas of co-jurisdiction;
6. fiscal arrangements among the three orders of government; and
7. an interim agreement setting out the core powers that Canadian governments are prepared to acknowledge Aboriginal nations can exercise once they are recognized.

This forum would respond to a work plan authorized by first ministers and national Aboriginal leaders and would report annually to them. The forum would be staffed by a secretariat and would

seek to reach comprehensive agreement on these issues among as many governments as possible by the year 2000. Unanimity would not be needed, and regional variation would be encouraged where all the relevant parties agreed. By the same token, while this forum would be a means of advancing understanding and consensus on these issues, Aboriginal nations seeking to enter a treaty negotiation would not have to wait until agreement is reached in the forum on the issues those nations wished to negotiate.

3. Rebuilding Aboriginal Nations

In Chapter 3 of this volume we set out a process by which Aboriginal nations can begin to reconstitute themselves as nations and create institutions with the breadth and capacity to exercise self-government. This will not be accomplished easily. It will take time to overcome patterns established by the practices imposed by the *Indian Act*. Effective governance will require structures that are consistent with a people's culture and heritage and that, at the same time, encompass sufficient numbers of people to exercise the full authority of effective governance.

We believe that the inherent right of self-government can be exercised only by peoples and nations and not by individual communities, except as part of a larger nation. Ensuring this requires a process by which Aboriginal governments can be recognized by the government of Canada. Access to enhanced financial resources for self-government and the means to negotiate intergovernmental arrangements should also be regulated by the recognition process established under the *Aboriginal Nations Recognition and Government Act* we propose.

We envisage an intense, and at times complex, process of nation rebuilding before recognition. Many Aboriginal peoples are already well on their way to recapturing their sense of historical identity. But even they are likely to encounter some problems as they determine the effective allocation of power between the nation and its communities. Institutions do not readily share authority, particularly where they have fought so long and hard to acquire it. For Aboriginal peoples, the vision of recapturing their strength and pride as nations, and the recognition that they will be able to accomplish so much more operating as a whole nation rather than as fragmented communities, will, we believe, be persuasive in time.

It is of paramount importance to eliminate the barriers created by the *Indian Act* that prevent nations from coming together. Membership in these nations should be governed by criteria related to heritage, association and acceptance that are defensible by international human rights standards. This is why access to participation in nation building by all those with a reasonable claim to citizenship should be a central criterion for recognition under the *Aboriginal Nations Recognition and Government Act*. It is particularly vital for decisions about a nation's fundamental law and its citizenship code.

The government of Canada will be concerned that expanding the membership of Aboriginal nations will increase its financial obligations. We propose that the cost of Aboriginal self-government and the delivery of related programs be financed as provincial programs are now under federal-provincial fiscal arrangements — taxation by each jurisdiction of its own resources along with fiscal transfers based on per capita formulas that take into account fiscal capacity and need.

Treaty entitlements, as a separate category of financial or resource transfer, would be negotiated in the treaty process and would become obligations of the government of Canada to the relevant treaty nation rather than to its members. Whether, and to what degree, these entitlements would be

determined by membership numbers would be subject to negotiation, but treaty payments would not be counted as resources of the nation government in determining fiscal capacity and need.

4. A Legislative Process for Treaties

In the transition between formal recognition as a nation and the conclusion of a new or renewed treaty, federal government payments (whether they are treaty entitlements or transfers governed by policy) would constitute financing commensurate with the agreed scope of the jurisdiction exercised by the Aboriginal nation in core areas and would help it prepare for treaty negotiations. Funds would be paid to the nation government, to be distributed as the nation considers appropriate.

Following recognition, Aboriginal nations would obtain a mandate from their citizens to enter into a new treaty process with other Canadian governments to encompass an expanded land base, co-jurisdictional arrangements over other lands and resources, and the full extent of their self-governing jurisdiction.

All parties need the confidence that their agendas will be addressed in an open, fair and impartial manner in this treaty process. While recognizing that such negotiations will take many years to complete for all Aboriginal nations, the procedures used must ensure effective resolution of long-standing misunderstandings and grievances. For these negotiations to function effectively and at the least financial cost, trust in the process will be essential. To date, negotiations over land have been governed entirely by policies devised within and approved by the federal bureaucracy and cabinet. This has provided maximum flexibility for ministers and officials, and minimum stability and predictability for Aboriginal and other parties with an interest in the outcome. It has also shielded the policies and procedures from legal challenge.

The fact that these procedures have been governed by policy rather than law has contributed to the inordinate amount of time it has taken to resolve these claims and the hugely wasteful expense involved in their negotiation. If treaty making and land allocation are to become effective means of defining the new relationship, applicable policies and procedures must be subject to the discipline of legislation and to the effective operation of the treaty commissions and the Aboriginal lands and treaties tribunal, which, while appointed by governments, will operate at arm's length from them.

The treaty commissions' tasks would be to provide primarily a framework for the negotiations, to facilitate and monitor the negotiations, to develop a body of expertise with respect to the subject matter on the table and the procedures for arriving at agreement, to offer alternative dispute resolution processes, and to report on progress to the Parliament of Canada and the provincial legislatures.

The lands and treaties tribunal's principal function would be to resolve specific claims over land and other issues where the Aboriginal party did not wish to await resolution within a renewed treaty process. The tribunal would also play a critical role at points in the treaty processes to encourage fairness in the allocation of financial resources to Aboriginal parties and to provide a means of adjudication in the event of deadlock. An arm's-length tribunal to determine the outcome of issues in dispute will undoubtedly reinforce fair dealing.

The tribunal would also be an effective instrument for achieving interim relief where the resources of a territory subject to treaty negotiation were being depleted for the benefit of third parties or government. In those circumstances, the Aboriginal party would be able to have a role in regulating the development and in benefiting from its proceeds. We foresee an effective role for the tribunal in

encouraging settlements that are just and timely for all parties. With respect to interim relief agreements, we propose that any party to the negotiation may choose to take a matter to the tribunal for resolution. This must be so because third parties with interests in developing the resource, and the communities that often rely on this activity for their livelihood, have as legitimate an interest in resolving the matter as the Aboriginal party does. The intent is a fair accommodation of all interests.

While these institutions will play a vital part in treaty processes, in the end treaties must be political agreements entered into freely and acceptable to all parties and their constituencies. Ratification of a treaty or agreement by the political bodies of the Aboriginal nation and by the Parliament of Canada and the provincial/territorial legislature involved should therefore be required. Ratification of a treaty by an Aboriginal nation would be viewed as a self-determining act signalling its willing participation in the Canadian federation. Once ratified, a treaty would have the protection of section 35 of the *Constitution Act, 1982*.

5. Redistributing Lands and Resources

We have made the case, in the strongest possible terms, for a new deal with respect to sharing the country's lands and resources. Aboriginal self-government would be a sham without a reasonable basis for achieving economic self-reliance. Depending primarily on outside sources of revenue, even if the nation has the right to decide how to spend those resources, is not acceptable. Responsible government requires raising a substantial amount of the revenue needed for government operations from the nation's own people and resources. This in turn requires the capacity to generate income and levy taxation. The location of some Aboriginal nations is such that their members can earn significant incomes away from the territory, but most nations are highly dependent on territorial-based activity such as forestry, fishing and tourism. The opportunity for employment income and for wealth generation from effective business activity will depend directly on ownership of a more extensive land and resource base as well as revenue sharing on other traditional lands.

In the chapters on treaties and lands and resources in this volume, we made the case for a redistribution of lands between the Crown and Aboriginal nations based on the following factors:

1. compelling evidence that Aboriginal peoples could not have intended to surrender all connection with their traditional territories and their ways of governing when they entered into the historical treaties with the Crown to share these lands with newcomers;
2. the requirement to reinterpret legal treaty documents in the light of the spirit and intent with which treaties were entered into, as understood by the Aboriginal party and as evident in the words Crown officials used in the negotiations;
3. the fact that as much as two-thirds of the territory put aside in treaties for the exclusive use of the Aboriginal party has over the years been removed from reserve status; and
4. the requirement for a modern accommodation defined not by disputed terms of an agreement drawn up in an entirely different age, but by the stated desire on all sides that fair compensation for past wrongs and the means for self-reliance for the future be made available.

Before Canadians can expect to see an end to the enormous waste in human and financial resources that accompanies the economic and social marginalization of Aboriginal peoples, they must come to terms with a redistribution of this country's land and resource base. This will entail defining,

through legislation, the nature of Aboriginal title — a process that can be initiated by the courts but requires legislative completion — and reallocating lands and resources. That reallocation would see significant expansion, determined by rational criteria, of lands wholly owned and controlled by Aboriginal nations and a share in the jurisdiction of and benefits from a further portion of their traditional lands, as determined in treaty negotiations.

6. Meaningful Work and Sustainable Wealth

The final pillar in the structure supporting a renewed relationship (the first three being treaties, governance and lands) is economic development — the means by which meaningful work and sustainable wealth are created.

Many forms of work and wealth can be envisaged, each embodying values and choices. We propose that Aboriginal people who choose to retain or return to a traditional lifestyle — where many of life's requirements for sustenance are harvested from the land — supplemented by periodic wage employment, be helped to do so. Healthy, sustainable communities that create the conditions for a rounded life are infinitely preferable to forced emigration to the margins of an essentially alien urban environment. Even if such communities have to be subsidized in the long term to give their citizens access to standards of health and education equivalent to those of other Canadians, the costs, both social and financial, are likely to be significantly less than those occasioned by a rootless urban existence. Innovative uses of the resources that now flow so unproductively into these communities in the form of social assistance could contribute to changing standards of living and quality of life.

Given the choice, however, most Aboriginal people and communities will likely want to participate in the market economy. Such activity gives them the chance to choose careers and lifestyles as most Canadians do. They want to be able to do that and also to retain their values and collective identity. They are struggling to reshape the way they participate in commerce and professional activity to make their participation compatible with those values.

The reality is that a large percentage of Aboriginal people today face a bleak economic future. Their prospects for breaking out of the cycle of dependency and despondency are slim unless methods of education and skills acquisition undergo significant changes, and unless business and economic development efforts are greatly improved. The fundamental reforms in education we call for in the next volume are a vital component of these changes. The approach to employment training and placement recommended in the previous chapter is essential to achieving any real breakthrough in youth unemployment. A sustained supply of equity capital and enhanced access to business management skills are also critical ingredients in maintaining momentum toward economic development and self-reliance.

7. Equipping for Self-Government

In Volume 5, Chapter 2, we analyze the present and future costs of the remedial measures necessitated by the social and economic marginalization of Aboriginal people — social assistance and unemployment insurance, health care, child and family services, counselling, policing and correctional services, and so on. We also examine the current and projected income losses that occur when Aboriginal people lack the opportunity to be as productive as other Canadians. The cost to Canada of these remedial measures and lost income is immense. The human cost of disrupted and unfulfilled lives is incalculable.

This situation cannot continue. With the tools set out in this volume and the awakening of confidence among Aboriginal people, fundamental change is possible. We believe that the regenerative capacity of individuals and communities will transform the lives of Aboriginal people.

Early in the next millennium, we see Aboriginal communities organized into nation governments, responsible for most aspects of their economic, social and legislative affairs. An expanded land base and the acquisition of management and professional skills will give them the possibility of a return to self-reliance for the first time in well over a century. We see Aboriginal governments raising more and more of their own revenues over time and being assisted — as other Canadian governments with lower than average resources are — through fiscal agreements.

Many of their citizens will live outside their nation territory for a period, contributing to the larger economy and paying taxes to federal and provincial governments and returning periodically to contribute to their home communities. Other Canadians will respect the territories of Aboriginal nations and will abide by their laws when they choose to live, do business, or vacation therein. Canadians will honour the treaty entitlements they have negotiated with Aboriginal nations, recognizing that wealth that has flowed to them as a result of the sharing of this country's lands and resources.

Aboriginal peoples will influence the culture and lifeways of this country in myriad subtle and profound ways, and Canada will have a richer identity and a more just and vibrant society because of Aboriginal peoples' role in national life.

The restructuring of the relationship proposed in this volume is attainable. Its achievement will depend certainly on the readiness of Canadians at large to embrace change, but far more will depend on Aboriginal peoples being equipped for the tasks ahead. It is to this endeavour we turn in the next volume.

Appendix A: Summary of Recommendations in Volume 2, Parts One and Two

Conclusions and recommendations are grouped by theme and do not necessarily appear here in the same order as in the text. The original numbering of recommendations has been retained, however (with the first number representing the volume, the second the chapter, and the third the recommendation number), to facilitate placing them in their original context.

Chapter 2 Treaties

With respect to the historical treaties, the Commission recommends that

2.2.2

The parties implement the historical treaties from the perspective of both justice and reconciliation:

- (a) Justice requires the fulfilment of the agreed terms of the treaties, as recorded in the treaty text and supplemented by oral evidence.
- (b) Reconciliation requires the establishment of proper principles to govern the continuing treaty relationship and to complete treaties that are incomplete because of the absence of consensus.

2.2.3

The federal government establish a continuing bilateral process to implement and renew the Crown's relationship with and obligations to the treaty nations under the historical treaties, in accordance with the treaties' spirit and intent.

2.2.4

The spirit and intent of the historical treaties be implemented in accordance with the following fundamental principles:

- (a) The specific content of the rights and obligations of the parties to the treaties is determined for all purposes in a just and liberal way, by reference to oral as well as written sources.
- (b) The Crown is in a trust-like and non-adversarial fiduciary relationship with the treaty nations.
- (c) The Crown's conflicting duties to the treaty nations and to Canadians generally is reconciled in the spirit of the treaty partnership.
- (d) There is a presumption in respect of the historical treaties that
 - treaty nations did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by entering into the treaty relationship;
 - treaty nations intended to share the territory and jurisdiction and management over it, as opposed to ceding the territory, even where the text of an historical treaty makes reference to a blanket extinguishment of land rights; and

- treaty nations did not intend to give up their inherent right of governance by entering into a treaty relationship, and the act of treaty making is regarded as an affirmation rather than a denial of that right.

With regard to new treaties and agreements, the Commission recommends that

2.2.6

The federal government establish a process for making new treaties to replace the existing comprehensive claims policy, based on the following principles:

- (a) The blanket extinguishment of Aboriginal land rights is not an option.
- (b) Recognition of rights of governance is an integral component of new treaty relationships.
- (c) The treaty-making process is available to all Aboriginal nations, including Indian, Inuit and Métis nations.
- (d) Treaty nations that are parties to peace and friendship treaties that did not purport to address land and resource issues have access to the treaty-making process to complete their treaty relationships with the Crown.

In relation to all treaties, the Commission recommends that

2.2.11

The following matters be open for discussion in treaty implementation and renewal and treaty-making processes:

- governance, including justice systems, long term financial arrangements including fiscal transfers and other intergovernmental arrangements;
- lands and resources;
- economic rights, including treaty annuities and hunting, fishing and trapping rights;
- issues included in specific treaties (for example, education, health and taxation); and
- other issues relevant to treaty relationships identified by either treaty party.

2.2.5

Once the spirit and intent of specific treaties have been recognized and incorporated into the agreed understanding of the treaty, all laws, policies and practices that have a bearing on the terms of the treaty be made to reflect this understanding.

With respect to establishing a new treaty process, the Commission recommends that

2.2.7

The federal government prepare a royal proclamation for the consideration of Her Majesty the Queen that would

- (a) supplement the *Royal Proclamation of 1763*; and
- (b) set out, for the consideration of all Aboriginal and treaty nations in Canada, the fundamental principles of
 - (i) the bilateral nation-to-nation relationship;
 - (ii) the treaty implementation and renewal processes; and
 - (iii) the treaty-making processes.

2.2.8

The federal government introduce companion treaty legislation in Parliament that

- (a) provides for the implementation of existing treaty rights, including the treaty rights to hunt, fish and trap;
- (b) affirms liberal rules of interpretation for historical treaties, having regard to
 - (i) the context of treaty negotiations;
 - (ii) the spirit and intent of each treaty; and
 - (iii) the special relationship between the treaty parties;
- (c) makes oral and secondary evidence admissible in the courts when they are making determinations with respect to historical treaty rights;
- (d) recognizes and affirms the land rights and jurisdiction of Aboriginal nations as essential components of treaty processes;
- (e) declares the commitment of the Parliament and government of Canada to the implementation and renewal of each treaty in accordance with the spirit and intent of the treaty and the relationship embodied in it;
- (f) commits the government of Canada to treaty processes that clarify, implement and, where the parties agree, amend the terms of treaties to give effect to the spirit and intent of each treaty and the relationship embodied in it;
- (g) commits the government of Canada to a process of treaty making with
 - (i) Aboriginal nations that do not yet have a treaty with the Crown; and
 - (ii) treaty nations whose treaty does not purport to address issues of lands and resources;
- (h) commits the government of Canada to treaty processes based on and guided by the nation-to-nation structure of the new relationship, implying
 - (i) all parties demonstrating a spirit of openness, a clear political will and a commitment to fair, balanced and equitable negotiations; and
 - (ii) no party controlling the access to, the scope of, or the funding for the negotiating processes; and

(i) authorizes the establishment, in consultation with treaty nations, of the institutions this Commission recommends as necessary to fulfil the treaty processes.

2.2.10

The royal proclamation and companion legislation in relation to treaties accomplish the following:

- (a) declare that entry into treaty-making and treaty implementation and renewal processes by Aboriginal and treaty nations is voluntary;
- (b) use clear, non-derogation language to ensure that the royal proclamation and legislation do not derogate from existing Aboriginal and treaty rights;
- (c) provide for short- and medium-term initiatives to support treaty implementation and renewal and treaty making, since those processes will take time to complete; and
- (d) provide adequate long-term resources so that treaty-making and treaty implementation and renewal processes can achieve their objectives.

2.2.12

The royal proclamation and companion legislation in relation to treaties provide for one or more of the following outcomes:

- (a) protocol agreements between treaty nations and the Crown that provide for the implementation and renewal of existing treaties, but do not themselves have the status of a treaty;
- (b) supplementary treaties that coexist with existing treaties;
- (c) replacement treaties;
- (d) new treaties; and
- (e) other instruments to implement treaties, including legislation and regulations of the treaty parties.

2.2.13

The royal proclamation and companion legislation in relation to treaties:

- (a) establish a Crown Treaty Office within a new Department of Aboriginal Relations; and
- (b) direct that Office to be the lead Crown agency participating in nation-to-nation treaty processes.

With regard to provincial and territorial responsibilities, the Commission recommends that

2.2.9

The governments of the provinces and territories introduce legislation, parallel to the federal companion legislation, that

- (a) enables them to meet their treaty obligations;

(b) enables them to participate in treaty implementation and renewal processes and treaty-making processes; and

(c) establishes the institutions required to participate in those treaty processes, to the extent of their jurisdiction.

2.2.14

Each province establish a Crown Treaty Office to enable it to participate in treaty processes.

Regarding the creation of treaty institutions, the Commission recommends that

2.2.15

The governments of Canada, relevant provinces and territories, and Aboriginal and treaty nations establish treaty commissions as permanent, independent and neutral bodies to facilitate and oversee negotiations in treaty processes.

2.2.16

The following be the essential features of treaty commissions:

- Commissioners to be appointed in equal numbers from lists prepared by the parties, with an independent chair being selected by those appointees.
- Commissions to have permanent administrative and research staff, with full independence from government and from Aboriginal and treaty nations.
- Staff of the commissions to act as a secretariat for treaty processes.
- Services of the commissions to go beyond simple facilitation. Where the parties require specialized fact finding of a technical nature, commissions to have the power to hire the necessary experts.
- Commissions to monitor and guide the conduct of the parties in the treaty process to ensure that fair and proper standards of conduct and negotiation are maintained.
- Commissions to conduct inquiries and provide research, analysis and recommendations on issues in dispute in relation to historical and future treaties, as requested jointly by the parties.
- Commissions to supervise and facilitate cost sharing by the parties.
- Commissions to provide mediation services to the parties as jointly requested.
- Commissions to provide remedies for abuses of process.
- Commissions to provide binding or non-binding arbitration of particular matters and other dispute resolution services, at the request of the parties, consistent with the political nature of the treaty process.

2.2.17

The Aboriginal Lands and Treaties Tribunal recommended by this Commission (see Volume 2, Chapter 4) play a supporting role in treaty processes, particularly in relation to

- (a) issues of process (for example, ensuring good-faith negotiations);
- (b) the ordering of interim relief; and
- (c) appeals from the treaty commissions regarding funding of treaty processes.

With regard to fostering public education and awareness, the Commission recommends that

2.2.1

Federal, provincial and territorial governments provide programs of public education about the treaties to promote public understanding of the following concepts:

- (a) Treaties were made, and continue to be made, by Aboriginal nations on a nation-to-nation basis, and those nations continue to exist and deserve respect as nations.
- (b) Historical treaties were meant by all parties to be sacred and enduring and to be spiritual as well as legal undertakings.
- (c) Treaties with Aboriginal nations are fundamental components of the constitution of Canada, analogous to the terms of union whereby provinces joined Confederation.
- (d) Fulfilment of the treaties, including the spirit and intent of the historical treaties, is a test of Canada's honour and of its place of respect in the family of nations.
- (e) Treaties embody the principles of the relationship between the Crown and the Aboriginal nations that made them or that will make them in the future.

Chapter 3 Governance

With regard to the establishment of Aboriginal governance, the Commission concludes that

1. 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.
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.

4. 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.

The Commission therefore recommends that

2.3.2

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

With regard to government recognition of Aboriginal nations, the Commission concludes that

6. 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.

The Commission therefore 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.

With regard to the jurisdiction of Aboriginal governments, the Commission concludes that

7. 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.

8. 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.

10. 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 the Sparrow decision. 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.

The Commission therefore 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.

With regard to the right of self-government, which is vested in Aboriginal nations, the Commission concludes that

18. 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.

The Commission therefore 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.

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.

Regarding Aboriginal peoples and citizenship, the Commission concludes that

19. 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.

The Commission therefore 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.

With regard to Aboriginal governments as one of three distinct orders of government in Canada, the Commission concludes that

20. 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 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.

The Commission therefore 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.

With respect to Aboriginal governments and the Canadian Charter of Rights and Freedoms, the Commission concludes that

17. 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.

With regard to financing Aboriginal governments, 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.

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.

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.

2.3.22

Non-Aboriginal residents be represented effectively in the decision-making processes of Aboriginal nation governments.

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.

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.

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.

With regard to a legal framework for recognizing Aboriginal governments, 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.

With regard to creating a Canada-wide framework agreement to guide treaty negotiations, 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 treaties are renegotiated.

With respect to rebuilding Aboriginal nations and reclaiming nationhood, 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.

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.

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.

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.

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.

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.

2.3.38

A partnership program be established to twin Aboriginal governments with Canadian governments of similar size and scope of operations.

In regard to establishing and maintaining accountability in governments, 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.

Regarding the acquisition of information and information management systems, 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.

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.

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.

With regard to restructuring federal institutions, 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.

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.

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.

2.3.54

The enumeration of Aboriginal voters take place during the general enumeration for the next federal election.

Regarding the fulfilment of Canada's international responsibilities with respect to Aboriginal peoples, 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.

Chapter 4 Lands and Resources

With respect to principles and policies governing the negotiation of a land base for each Aboriginal nation, the Commission recommends that

2.4.1

Federal policy and all treaty-related processes (treaty making, implementation and renewal) conform to these general principles:

- (a) Aboriginal title is a real interest in land that contemplates a range of rights with respect to lands and resources.
- (b) Aboriginal title is recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.
- (c) The Crown has a special fiduciary obligation to protect the interests of Aboriginal people, including Aboriginal title.
- (d) The Crown has an obligation to protect rights concerning lands and resources that underlie Aboriginal economies and the cultural and spiritual life of Aboriginal peoples.
- (e) The Crown has an obligation to reconcile the interests of the public with Aboriginal title.
- (f) Lands and resources issues will be included in negotiations for self-government.
- (g) Aboriginal rights, including rights of self-government, recognized by an agreement are 'treaty rights' within the meaning of section 35(1) of the *Constitution Act, 1982*.
- (h) Negotiations between the parties are premised on reaching agreements that recognize an inherent right of self-government.
- (i) Blanket extinguishment of Aboriginal land rights will not be sought in exchange for other rights or benefits contained in an agreement.
- (j) Partial extinguishment of Aboriginal land rights will not be a precondition for negotiations and will be agreed to by the parties only after a careful and exhaustive analysis of other options and the existence of clear, unpressured consent by the Aboriginal party.

(k) Agreements will be subject to periodic review and renewal.

(l) Agreements will contain dispute resolution mechanisms tailored to the circumstances of the parties.

(m) Agreements will provide for intergovernmental agreements to harmonize the powers of federal, provincial, territorial and Aboriginal governments without unduly limiting any.

2.4.2

Federal, provincial and territorial governments, through negotiation, provide Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy.

2.4.3

The goal of negotiations be to ensure that Aboriginal nations, within their traditional territories, have

(a) exclusive or preferential access to certain renewable and non-renewable resources, including water, or to a guaranteed share of them;

(b) a guaranteed share of the revenues flowing from resources development; and

(c) specified preferential guarantees or priorities to the economic benefits and opportunities flowing from development projects (for example, negotiated community benefits packages and rights of first refusal).

2.4.4

Aboriginal nations, through negotiation, receive, in addition to land, financial transfers, calculated on the basis of two criteria:

(a) developmental needs (capital to help the nation meet its future needs, especially relating to community and economic development); and

(b) compensation (partial restitution for past and present exploitation of the nation's traditional territory, including removal of resources as well as disruption of Aboriginal livelihood).

2.4.5

Negotiations on the amount and quality of additional lands, and access to resources, be guided by the

(a) size of the territory that the Aboriginal nation traditionally occupied, controlled, enjoyed, and used;

(b) nature and type of renewable and non-renewable resources, including water, that the Aboriginal nation traditionally had access to and used;

(c) current and projected Aboriginal population;

(d) current and projected economic needs of that population;

- (e) current and projected cultural needs of that population;
- (f) amount of reserve or settlement land now held by the Aboriginal nation;
- (g) productivity and value of the lands and resources and the likely level of return from exploitation for a given purpose;
- (h) amount of Crown land available in the treaty area; and
- (i) nature and extent of third-party interests.

2.4.6

In land selection negotiations, federal, provincial and territorial governments follow these principles:

- (a) No unnecessary or arbitrary limits should be placed on lands for selection, such as
 - (i) the exclusion of coastlines, shorelines, beds of water (including marine areas), potential hydroelectric power sites, or resource-rich areas;
 - (ii) arbitrary limits on size, shape or contiguity of lands; or
 - (iii) arbitrary limits on the ability of the Aboriginal nation to purchase land in order to expand its territory.
- (b) Additional lands to be provided from existing Crown lands within the territory in question.
- (c) Where parties are seeking to renew an historical treaty, land selection not be limited by existing treaty boundaries (for example, the metes and bounds descriptions contained in the post-Confederation numbered treaties).
- (d) Provincial or territorial borders not constrain selection negotiations unduly.
- (e) Where Crown lands are not available in sufficient quantity, financial resources be provided to enable land to be purchased from willing third parties.

2.4.7

The government of Canada adopt the principles outlined in recommendations 2.4.1 to 2.4.6 as policy to guide its interaction with Aboriginal peoples on matters of lands and resources allocation with respect to current and future negotiations and litigation.

2.4.8

The government of Canada propose these principles for adoption by provincial and territorial governments as well as national Aboriginal organizations during the development of the Canada-wide framework agreement.

2.4.9

Following such consultations, the government of Canada propose to Parliament that these principles, appropriately revised as a result of the consultations, be incorporated in an amendment to the legislation establishing the treaty processes.

Regarding categories of land ownership that result from negotiations and the determination of jurisdiction over them, the Commission recommends that

2.4.10

Negotiations aim to describe the territory in question in terms of three categories of land. Using these three categories will help to identify, as thoroughly and precisely as possible, the rights of each of the parties with respect to lands, resources and governance.

2.4.11

With respect to Category I lands,

(a) The Aboriginal nation has full rights of ownership and primary jurisdiction in relation to lands and renewable and non-renewable resources, including water, in accordance with the traditions of land tenure and governance of the nation in question.

(b) Category I lands comprise any existing reserve and settlement lands currently held by the Aboriginal nation, as well as additional lands necessary to foster economic and cultural self-reliance and political autonomy selected in accordance with the factors listed in recommendation 2.4.5.

2.4.12

With respect to Category II lands,

(a) Category II lands would form a portion of the traditional territory of the Aboriginal nation, that portion being determined by the degree to which Category I lands foster Aboriginal self-reliance.

(b) A number of Aboriginal and Crown rights with respect to lands and resources would be recognized by the agreement, and rights of governance and jurisdiction could be shared among the parties.

2.4.13

With respect to Category III lands, a complete set of Crown rights with respect to lands and governance would be recognized by the agreement, subject to residual Aboriginal rights of access to historical and sacred sites and hunting, fishing and trapping grounds, participation in national and civic ceremonies and events, and symbolic representation in certain institutions.

2.4.14

Aboriginal nations exercise legislative authority as follows:

(a) primary and paramount legislative authority on Category I lands;

(b) shared legislative authority on Category II lands; and

(c) limited, negotiated authority exercisable in respect of citizens of the nation living on Category III lands and elsewhere and in respect of access to historical and sacred sites, participation in national and civic ceremonies and events, and symbolic representation in certain institutions.

2.4.15

As a general principle, lands currently held at common law in fee simple or, in Quebec, that are owned not be converted into Category I lands, unless purchased from willing sellers.

2.4.16

In exceptional cases where the Aboriginal nation's interests clearly outweigh the third party's rights and interests in a specific parcel, the Crown expropriate the land at fair market value on behalf of the Aboriginal party to convert it into Category I lands. This would be justified, for example, where

(a) a successful claim for the land might have been made under the existing specific claims policy based on the fact that reserve lands were unlawfully or fraudulently surrendered in the past; or

(b) the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance).

2.4.17

Lands that at common law are held in fee simple or that in Quebec are owned can be included within Category II lands.

2.4.18

Lands affected at common law by third-party interests less than fee simple or under the civil law by third-party rights of enjoyment other than ownership may be selected as Category I lands. If such lands are selected, the Aboriginal nation is to respect the original terms of all common law tenures and all civil law dismemberments of ownership and personal rights of enjoyment.

2.4.19

In exceptional circumstances, where Aboriginal interests significantly outweigh third-party rights and interests, the Crown revoke the common law tenure or the civil law dismemberment of ownership or personal right of enjoyment at fair market value on behalf of the Aboriginal party to convert it into Category I lands. Examples of when this would be justified are where

(a) a successful claim for the land might have been made under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past); or

(b) the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance).

2.4.20

Lands affected at common law by interests less than fee simple or under the civil law by rights of enjoyment other than ownership can be selected as Category II lands.

2.4.21

Existing parks and protected areas not be selected as Category I lands, except in exceptional cases where the Aboriginal nation's interests clearly outweigh the Crown's interests in a specific parcel. Examples of when this would be justified are where

- (a) a successful claim for all or part of the park or protected area might have been made under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past);
- (b) all or part of the park or protected area is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site); or
- (c) a park occupies a substantial portion of a nation's territory.

2.4.22

Existing parks and protected areas, as well as lands being considered for protected area or park status, may be selected as Category II lands.

2.4.23

Crown lands to which the public has access be available for selection as Category I or II lands.

2.4.26

Provincial governments establish policies parallel to the processes and reforms proposed in recommendations 2.4.1 to 2.4.22.

2.4.27

Provincial governments participate fully in the treaty-making and treaty implementation and renewal processes and in negotiations on interim relief agreements.

2.4.28

In addition to provisions made available under recommendations 2.4.2 to 2.4.5, provincial governments make Crown land available to an Aboriginal nation where traditional Aboriginal territory became provincial Crown land as the result of a breach of Crown duty.

With respect to measures to provide interim relief pending the resolution of land negotiations, the Commission recommends that

2.4.24

Federal and provincial governments recognize, in the Canada-wide framework agreement, the critical role of interim relief agreements and agree on principles and procedures to govern these agreements, providing for

- (a) the partial withdrawal of lands that are the subject of claims in a specific claims treaty process;
- (b) Aboriginal participation and consent in the use or development of withdrawn lands; and

(c) revenues from royalties or taxation of resource developments on the withdrawn lands to be held in trust pending the outcome of the negotiation.

2.4.25

In relation to treaties, the companion legislation to the proposed royal proclamation state that the parties have a duty to make reasonable efforts to reach an interim relief agreement.

Regarding the jurisdiction and operation of the Aboriginal Lands and Treaties Tribunal, the Commission recommends that

2.4.29

Federal companion legislation to the royal proclamation provide for the establishment of an independent administrative tribunal, to be called the Aboriginal Lands and Treaties Tribunal.

2.4.30

Parliament, and provincial legislatures when they are ready, confer on the tribunal the necessary authority to enable it to discharge its statutory mandate pertaining to both federal and provincial spheres of jurisdiction.

2.4.31

Even without provincial delegation of powers to the tribunal, Parliament confer on the tribunal jurisdiction to the full extent of federal constitutional competence in respect of "Indians, and Lands reserved for the Indians", including the power to issue orders binding provincial governments and others, when they relate essentially to this head of federal competence.

2.4.32

The tribunal be established by federal statute operative in two areas:

- (a) settlement of specific claims, including those removed by the Aboriginal party from the broader treaty-making, implementation and renewal processes; and
- (b) treaty-making, implementation and renewal processes.

2.4.33

In respect of specific claims, the tribunal's jurisdiction include

- (a) reviewing the adequacy of federal funding provided to claimants;
- (b) monitoring the good faith of the bargaining process and making binding orders on those in breach; and
- (c) adjudicating claims, or parts of claims, referred to it by Aboriginal claimants and providing an appropriate remedy where called for.

2.4.34

In respect of the longer-term treaty-making, implementation and renewal processes, the tribunal's jurisdiction include

- (a) reviewing the adequacy of federal funding to Aboriginal parties;
- (b) supervising the negotiation, implementation, and conclusion of interim relief agreements, imposing interim relief agreements in the event of a breach of the duty to bargain in good faith, and granting interim relief pending successful negotiations of a new or renewed treaty, with respect to federal lands and on provincial lands where provincial powers have been so delegated;
- (c) arbitrating any issues referred to it by the parties by mutual consent;
- (d) monitoring the good faith of the bargaining process;
- (e) adjudicating, on request of an Aboriginal party, questions of any Aboriginal or treaty rights that are related to the negotiations and justiciable in a court of law;
- (f) investigating a complaint of non-compliance with a treaty undertaking, adjudicating the dispute and awarding an appropriate remedy when so empowered by the treaty parties; and
- (g) recommending to the federal government, through panels established for the purpose, whether a group asserting the right of self-governance should be recognized as an Aboriginal nation.

2.4.35

The enabling legislation direct the tribunal to adopt a broad and progressive interpretation of the treaties, not limiting itself to technical rules of evidence, and to take into account the fiduciary obligations of the Crown, Aboriginal customary and property law, and the relevant history of the parties' relations.

2.4.36

The Aboriginal Lands and Treaties Tribunal replace the Indian Claims Commission.

2.4.37

The tribunal's jurisdiction to determine specific claims be concurrent with the jurisdiction of the superior courts of the provinces.

2.4.38

The membership and staff of the tribunal

- (a) reflect parity between Aboriginal and non-Aboriginal nominees and staff at every level, including the co-chairs of the tribunal; and
- (b) be representative of the provinces and regions.

2.4.39

The process for appointing full-time and part-time members to the tribunal be as follows:

- (a) the appointment process be open;
- (b) nomination be by Aboriginal people, nations, or organizations, the federal government, and provinces that delegate powers to the tribunal;
- (c) nominees approved by a screening committee be qualified and fit to serve on the tribunal;
- (d) members be appointed by the federal government on the joint recommendation of the minister of justice and the proposed minister of Aboriginal relations; and
- (e) the terms of appointment of the co-chairs and members provide that, during their period of office, they be dismissable only for cause.

2.4.40

The tribunal operate as follows:

- (a) emphasize informal procedures, respect the oral and cultural traditions of Aboriginal nations, and encourage direct participation by the parties;
- (b) take an active role in ensuring the just and prompt resolution of disputes;
- (c) maintain a small central research and legal staff and provide a registry for disputes; and
- (d) hold hearings as close as is convenient to the site of the dispute, with panels comprising members from the region or province in question.

2.4.41

Decisions of the tribunal be final and binding and not subject to review by the courts, except on constitutional grounds and for jurisdictional error or breach of the duty of fairness under paragraphs 18.1(4)(a) and (b) of the *Federal Court Act*.

Concerning interim steps to expand First Nations' land base, the Commission recommends that

2.4.43

The federal government enter into an interim specific claims protocol with the Assembly of First Nations embodying, at a minimum, the following changes to current policy:

- (a) the scope of the specific claims policy be expanded to include treaty-based claims;
- (b) the definition of 'lawful obligation' and the compensation guidelines contained in the policy embody fiduciary principles, in keeping with Supreme Court decisions on government's obligations to Aboriginal peoples;
- (c) where a claim involves the loss of land, the government of Canada use all efforts to provide equivalent land in compensation; only if restitution is impossible, or not desired by the First Nation, should claims be settled in cash;
- (d) to expedite claims, the government of Canada provide significant additional resources for funding, negotiation and resolution of claims;

(e) the government of Canada improve access to the Indian Claims Commission and other dispute resolution mechanisms as a means of addressing interpretations of the specific claims policy, including submission to mediation and arbitration if requested by claimants; and

(f) the government of Canada respond to recommendations of the Indian Claims Commission within 90 days of receipt, and where it disagrees with such a recommendation, give specific written reasons.

2.4.44

The treaty land entitlement process be conducted as follows:

(a) the amount of land owing under treaty be calculated on the basis of population figures as of the date new negotiations begin;

(b) those population figures include urban residents, Bill C-31 beneficiaries and non-status Indians; and

(c) the federal government negotiate agreements with the provinces stipulating that a full range of land (including lands of value) be available for treaty land entitlement selection.

2.4.45

Land purchases be conducted as follows:

(a) the federal government set up a land acquisition fund to enable all Aboriginal peoples (First Nations, Inuit and Métis) to purchase land on the open market;

(b) the basic principles of 'willing seller, willing buyer' apply to all land purchases;

(c) joint committees, with representatives from municipalities and neighbouring Aboriginal governments, be formed to deal with issues of common concern;

(d) the federal government do its utmost to encourage the creation of such committees;

(e) the federal government clarify the 1991 additions to reserves policy to ensure that the process of consultation with municipalities does not give them a veto over whether purchased lands are given reserve status; and

(f) the federal government compensate municipalities for the loss of tax assessment for a fixed sum or specific term (not an indefinite period), if the municipality can show that such loss would result from the transfer of the purchased lands to reserve status.

2.4.46

Unsold surrendered lands be dealt with as follows:

(a) the Department of Indian Affairs and Northern Development compile an inventory of all remaining unsold surrendered lands in the departmental land registry;

(b) unsold surrendered lands be returned to the community that originally surrendered them;

(c) First Nations have the option of accepting alternative lands or financial compensation instead of the lands originally surrendered but not be compelled to accept either; and

(d) governments negotiate protection of third-party interests affected by the return of unsold surrendered lands, such as continued use of waterways and rights of access to private lands.

2.4.47

If reserve or community lands were expropriated by or surrendered to the Crown for a public purpose and the original purpose no longer exists, the lands be dealt with as follows:

(a) the land revert to the First Nations communities in question;

(b) if the expropriation was for the benefit of a third party (for example, a railway), the First Nations communities have the right of first refusal on such lands;

(c) any costs of acquisition of these lands be negotiated between the Crown and the First Nation, depending on the compensation given the First Nation community when the land was first acquired;

(d) if the land was held by the Crown, the costs associated with clean-up and environmental monitoring be borne by the government department or agency that controlled the lands;

(e) if the land was held by a third party, the costs associated with clean-up and environmental monitoring be borne jointly by the Crown and the third party;

(f) if an Aboriginal community does not wish the return of expropriated lands because of environmental damage or other reasons, they receive other lands in compensation or financial compensation equivalent to fair market value; and

(g) the content of such compensation package be determined by negotiation or, failing that, by the Aboriginal Lands and Treaties Tribunal.

Regarding interim measures to improve Aboriginal peoples' access to resource-based economic opportunities, the Commission recommends that

2.4.48

With respect to the general issue of improving Aboriginal access to natural resources on Crown land:

(a) the federal government seek the co-operation of provincial and territorial governments in drafting a national code of principles to recognize and affirm the continued exercise of traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands; and

(b) the provinces and territories amend relevant legislation to incorporate such a code.

2.4.49

With respect to forest resources on reserves, the federal government take the following steps:

- (a) immediately provide adequate funding to complete forest inventories, management plans and reforestation of Indian lands;
- (b) ensure that adequate forest management expertise is available to First Nations;
- (c) consult with Aboriginal governments to develop a joint policy statement delineating their respective responsibilities in relation to Indian reserve forests;
- (d) develop an operating plan to implement its own responsibilities as defined through the joint policy development process;
- (e) continue the Indian forest lands program, but modify its objectives to reflect and integrate traditional knowledge and the resource values of First Nations communities with objectives of timber production; and
- (f) in keeping with the goal of Aboriginal nation building, provide for the delivery of the Indian forest lands program by First Nations organizations (as has been the case with the Treaty 3 region of northwestern Ontario).

2.4.50

The following steps be taken with respect to Aboriginal access to forest resources on Crown lands:

- (a) the federal government work with the provinces, the territories and Aboriginal communities to improve Aboriginal access to forest resources on Crown lands;
- (b) the federal government, as part of its obligation to protect traditional Aboriginal activities on provincial Crown lands, actively promote Aboriginal involvement in provincial forest management and planning; as with the model forest program, this would include bearing part of the costs;
- (c) the federal government, in keeping with the goal of Aboriginal nation building, give continuing financial and logistical support to Aboriginal peoples' regional and national forest resources associations;
- (d) the provinces encourage their large timber licensees to provide for forest management partnerships with Aboriginal firms within the traditional territories of Aboriginal communities;
- (e) the provinces encourage partnerships or joint ventures between Aboriginal forest operating companies and other firms that already have wood processing facilities;
- (f) the provinces give Aboriginal people the right of first refusal on unallocated Crown timber close to reserves or Aboriginal communities;
- (g) the provinces, to promote greater harmony with generally less intensive Aboriginal forest management practices and traditional land-use activities, show greater flexibility in their timber management policies and guidelines; this might include reducing annual allowable cut requirements and experimenting with lower harvesting rates, smaller logging areas and longer maintenance of areas left unlogged;
- (h) provincial and territorial governments make provision for a special role for Aboriginal governments in reviewing forest management and operating plans within their traditional territories; and

(i) provincial and territorial governments make Aboriginal land-use studies a requirement of all forest management plans.

2.4.51

In keeping with its fiduciary obligation to Aboriginal peoples, the federal government renegotiate existing agreements with the provinces (for example, the 1924 agreement with Ontario and the 1930 natural resource transfer agreements in the prairie provinces) to ensure that First Nations obtain the full beneficial interest in minerals, oil and natural gas located on reserves.

2.4.52

The federal government amend the Indian mining regulations to conform to the Indian oil and gas regulations and require companies operating on reserves to employ First Nations residents.

2.4.53

The federal government work with First Nations and the mining industry (and if necessary amend the Indian mining regulations and the Indian oil and gas regulations) to ensure the development of management experience among Aboriginal people and the transfer to them of industry knowledge and expertise.

2.4.54

The provinces require companies, as part of their operating licence, to develop Aboriginal land use plans to

- (a) protect traditional harvesting and other areas (for example, sacred sites); and
- (b) compensate those adversely affected by mining or drilling (for example, Aboriginal hunters, trappers and fishers).

2.4.55

Land use plans be developed in consultation with affected Aboriginal communities as follows:

- (a) Aboriginal communities receive intervener funding to carry out the consultation process;
- (b) intervener funding be delivered through a body at arm's length from the company and the respective provincial ministry responsible for the respective natural resource; and
- (c) funding for this body come from licence fees and from provincial or federal government departments responsible for the environment.

2.4.56

The provinces require that a compensation fund be set up and that contributions to it be part of licence fees. Alternatively, governments could consider this an allowable operating expense for corporate tax purposes.

2.4.57

The federal government work with the provinces and with Aboriginal communities to ensure that the steps we recommend are carried out. Federal participation could include cost-sharing arrangements with the provinces.

2.4.62

The principles enunciated by the Supreme Court of Canada in the *Sparrow* decision be implemented as follows:

- (a) provincial and territorial governments ensure that their regulatory and management regimes acknowledge the priority of Aboriginal subsistence harvesting;
- (b) for the purposes of the *Sparrow* priorities, the definition of 'conservation' not be established by government officials, but be negotiated with Aboriginal governments and incorporate respect for traditional ecological knowledge and Aboriginal principles of resource management; and
- (c) the subsistence needs of non-Aboriginal people living in remote regions of Canada (that is, long-standing residents of remote areas, not transients) be ranked next in the *Sparrow* order of priority after those of Aboriginal people and ahead of all commercial or recreational fish and wildlife harvesting.

2.4.63

All provinces follow the example set by Canada and certain provinces (for example, Ontario and British Columbia) in buying up and turning over commercial fishing quotas to Aboriginal people. This would constitute partial restitution for historical inequities in commercial allocations.

2.4.64

The size of Aboriginal commercial fishing allocations be based on measurable criteria that

- (a) are developed by negotiation rather than developed and imposed unilaterally by government;
- (b) are not based, for example, on a community's aggregate subsistence needs alone; and
- (c) recognize the fact that resources are essential for building Aboriginal economies and that Aboriginal people must be able to make a profit from their commercial fisheries.

2.4.65

Canada and the provinces apply the priorities set out in the *Sparrow* decision to Aboriginal commercial fisheries so that these fisheries in times of scarcity

- (a) have greater priority than non-Aboriginal commercial interests and sport fishing; and
- (b) remain ranked below conservation and Aboriginal (and, in remote areas, non-Aboriginal) domestic food fishing.

2.4.66

The federal government ensure effective Aboriginal representation on the Canadian commission set up under the 1985 Pacific Salmon Treaty with the United States.

2.4.67

To establish adequate baseline data for assessing the relative impact of the Aboriginal and non-Aboriginal harvest, and to assist in determining quotas to be allocated in accordance with the principles set out in the Sparrow decision, federal and provincial governments improve their data gathering on the non-Aboriginal harvest of fish and wildlife.

2.4.68

Federal and provincial governments carry out joint studies with Aboriginal people to determine the size of the Aboriginal harvest and the respective effects of Aboriginal and non-Aboriginal harvesting methods on stocks.

2.4.69

Public education form a major component of government fisheries policy. This will require joint strategies to inform the public about Aboriginal perspectives on fishing, to resolve differences and to overcome fears that Aboriginal entry into fisheries will mean overfishing, loss of control, or loss of property.

2.4.70

Provincial and territorial governments take the following action with respect to hunting:

- (a) acknowledge that treaty harvesting rights apply throughout the entire area covered by treaty, even if that area includes more than one province or territory;
- (b) leave it to Aboriginal governments to work out the kinds of reciprocal arrangements necessary for Aboriginal harvesting across treaty boundaries; and
- (c) introduce specific big game quotas or seasons for local non-Aboriginal residents in the mid- and far north.

2.4.71

Provincial and territorial governments take the following action with respect to outfitting:

- (a) increase their allocation of tourist outfitters' licences or leases to Aboriginal people, for example,
 - (i) by including exclusive allocations in certain geographical areas, as Ontario now does north of the 50th parallel;
 - (ii) by giving priority of access for a defined period to all new licences; and
 - (iii) by giving Aboriginal people the right of first refusal on licences or leases that are being given up.

(b) not impose one particular style of outfitting business (lodge-based fly-in hunting and fishing) as the only model; and

(c) encourage Aboriginal people to develop outfitting businesses based on their own cultural values.

2.4.72

By agreement, and subject to local capacity, provincial and territorial governments devolve trapline management to Aboriginal governments.

2.4.73

In Quebec, where exclusive Aboriginal trapping preserves have existed for many decades, the provincial government devolve trapline management of these territories to Aboriginal governments and share overall management responsibilities with them.

2.4.74

Unless already dealt with in a comprehensive land claims agreement, revenues from commercial water developments (hydroelectric dams and commercial irrigation projects) that already exist and operate within the traditional land use areas of Aboriginal communities be directed to the communities affected as follows:

(a) they receive a continuous portion of the revenues derived from the development for the life of the project; and

(b) the amount of revenues be the subject of negotiations between the Aboriginal community(ies) and either the hydroelectric utility or the province.

2.4.75

If potential hydroelectric development sites exist within the traditional territory(ies) of the Aboriginal community(ies), the community have the right of first refusal to acquire the water rights for hydro development.

2.4.76

If a Crown utility or non-utility company already has the right to develop a hydro site within the traditional territory of an Aboriginal community, the provinces require these companies to develop socio-economic agreements (training, employment, business contracts, joint venture, equity partnerships) with the affected Aboriginal community as part of their operating licence or procedures.

2.4.77

Federal and provincial governments revise their water management policy and legislation to accommodate Aboriginal participation in existing management processes as follows:

(a) the federal government amend the *Canada Water Act* to provide for guaranteed Aboriginal representation on existing interjurisdictional management boards (for example, the Lake of the

Woods Control Board) and establish federal/provincial/Aboriginal arrangements where none currently exist; and

(b) provincial governments amend their water resource legislation to provide for Aboriginal participation in water resource planning and for the establishment of co-management boards on their traditional lands.

With regard to measures to implement co-jurisdiction or co-management of lands and resources, the Commission recommends that

2.4.78

The following action be taken with respect to co-management and co-jurisdiction:

(a) the federal government work with provincial and territorial governments and Aboriginal governments in creating co-management or co-jurisdiction arrangements for the traditional territories of Aboriginal nations;

(b) such co-management arrangements serve as interim measures until the conclusion of treaty negotiations with the Aboriginal party concerned;

(c) co-management bodies be based on relative parity of membership between Aboriginal nations and government representatives;

(d) co-management bodies respect and incorporate the traditional knowledge of Aboriginal people; and

(e) provincial and territorial governments provide secure long-term funding for co-management bodies to ensure stability and enable them to build the necessary management skills and expertise (which would involve cost sharing on the part of the federal government).

Regarding the ownership and management of cultural and historic sites, the Commission recommends that

2.4.58

Federal, provincial and territorial governments enact legislation to establish a process aimed at recognizing

(a) Aboriginal peoples as the owners of cultural sites, archaeological resources, religious and spiritual objects, and sacred and burial sites located within their traditional territories;

(b) Aboriginal people as having sole jurisdiction over sacred, ceremonial, spiritual and burial sites within their traditional territories, whether these sites are located on unoccupied Crown land or on occupied Crown lands (such as on lands under forest tenure or parks);

(c) Aboriginal people as having at least shared jurisdiction over all other sites (such as historical camps or villages, fur trade posts or fishing stations); and

(d) Aboriginal people as being entitled to issue permits and levy (or share in) the fees charged for access to, or use of, such sites.

2.4.59

In the case of heritage sites located on private land, the federal government negotiate with landowners to acknowledge Aboriginal jurisdiction and rights of access or to purchase these sites if there is a willing seller, so that they can be turned over to the appropriate Aboriginal government.

2.4.60

The federal government amend the *National Parks Act* to permit traditional Aboriginal activity in national parks and, where appropriate, Aboriginal ownership of national parks, on the Australian model. Parks could then be leased back to the Crown and managed jointly by federal and Aboriginal governments.

2.4.61

Federal, provincial and territorial governments develop legislation and policies to protect and manage Aboriginal heritage resources in accordance with criteria set by negotiation with Aboriginal governments. These might include

- (a) detailed heritage impact assessment and protection guidelines for operations involving such activities as forestry, mining, aggregate extraction, road building, tourism and recreation;
- (b) funding and undertaking heritage resource inventories, documentation and related research, and archaeological and other scientific survey, in partnership with Aboriginal governments; and
- (c) carrying out salvage excavation or mitigative measures at sites threatened by development, looting, resource extraction or natural causes such as erosion, and providing for Aboriginal monitoring of archaeological excavations.

With respect to public involvement in lands negotiations, the Commission recommends that

2.4.42

Public education be a major part of treaty processes and of the mandates of the treaty commissions and Aboriginal Lands and Treaties Tribunal, in keeping with the following principles:

- (a) federal and provincial governments keep the public fully informed about the nature and scope of negotiations with Aboriginal peoples and not unduly restrict the release of internal reports and other research material;
- (b) Aboriginal parties participate in educating the general public and ensure that their members fully understand the nature and scope of their negotiations with provincial and federal governments;
- (c) the federal government ensure that negotiation processes have sufficient funding for public education; and
- (d) treaties and similar documents be written in clear and understandable language.

Chapter 5 Economic Development

With respect to co-operative arrangements between Aboriginal and other governments in Canada to promote economic development, the Commission recommends that

2.5.1

Federal, provincial and territorial governments enter into long-term economic development agreements with Aboriginal nations, or institutions representing several nations, to provide multi-year funding to support economic development.

2.5.2

Economic development agreements have the following characteristics:

- (a) the goals and principles for Aboriginal economic development be agreed upon by the parties;
- (b) resources from all government agencies and departments with an economic development-related mandate be channelled through the agreement;
- (c) policies and instruments to achieve the goals be designed by the Aboriginal party;
- (d) development activities include, but not necessarily be limited to, training, economic planning, provision of business services, equity funding, and loans and loan guarantees;
- (e) performance under the agreement be monitored every two years against agreed criteria; and
- (f) funds available for each agreement be determined on the basis of need, capacity to use the resources, and progress of the Aboriginal entity toward self-reliance.

2.5.3

Aboriginal nations that have negotiated modern treaties encompassing full self-government have full jurisdiction over their economic development programs, which should be funded through their treaty settlements, fiscal transfers and their own revenue sources, and that businesses on these territories continue to be eligible for regional, business or trade development programs administered by Canadian governments for businesses generally.

2.5.5

Aboriginal nations receive financial and technical support to establish and develop economic institutions through the federal funding we propose be made available for the reconstruction of Aboriginal nations and their institutions (see recommendations in Chapter 3 of this volume).

With regard to building capacity within Aboriginal nations to pursue economic development, the Commission recommends that

2.5.4

Aboriginal nations give high priority to establishing and developing economic institutions that

- reflect the nation's underlying values;
- are designed to be accountable to the nation; and
- are protected from inappropriate political interference.

2.5.6

Responsibility for economic development be divided between the nation and community governments so that policy capacity, specialist services and major investment responsibility reside with the nation's institutions, which would then interact with community economic development personnel at the community level.

2.5.7

The recommended Aboriginal Peoples' International University establish a Canada-wide research and development capacity in Aboriginal economic development with close links to the developing network of Aboriginally controlled education and training institutions.

2.5.8

Leaders of municipalities, counties and larger regional bodies and their Aboriginal counterparts consider how to reduce the isolation between them and develop a mutually beneficial relationship.

Recognizing the importance of lands and resources to Aboriginal economic development, the Commission recommends that

2.5.12

Federal and provincial governments promote Aboriginal economic development by recognizing that lands and resources are a major factor in enabling Aboriginal nations and their communities to become self-reliant.

2.5.9

Until self-government and co-jurisdiction arrangements are made, federal and provincial governments require third parties that are renewing or obtaining new resource licences on traditional Aboriginal territories to provide significant benefits to Aboriginal communities, including

- preferential training and employment opportunities in all aspects of the resource operation;
- preferred access to supply contracts;
- respect for traditional uses of the territory; and
- acceptance of Aboriginal environmental standards.

2.5.10

The efforts of resource development companies, Aboriginal nations and communities, and governments be directed to expanding the range of benefits derived from resource development in traditional territories to achieve

- levels of training and employment above the entry level, including managerial;
- an equity position in resource development projects; and

- a share of economic rents derived from the projects.

2.5.11

Unions in these resource sectors participate in and co-operate with implementation of this policy, because of the extraordinary under-representation of Aboriginal people in these industries.

2.5.13

Aboriginal governments, with the financial and technical support of federal, provincial and territorial governments, undertake to strengthen their capacity to manage and develop lands and resources. This requires in particular

- (a) establishing or strengthening, as appropriate, Aboriginal institutions for the management and development of Aboriginal lands and resources;
- (b) identifying the knowledge and skills requirements needed to staff such institutions;
- (c) undertaking urgent measures in education, training and work experience to prepare Aboriginal personnel in these areas;
- (d) enlisting communities in dedicated efforts to support and sustain their people in acquiring the necessary education, training and work experience; and
- (e) seconding personnel from other governments and agencies so that these institutions can exercise their mandates.

Regarding the role of agriculture in economic development, the Commission recommends that

2.5.14

The government of Canada remove from Aboriginal economic development strategies such as CAEDS and related programs any limitations that impede equitable access to them by Métis farmers and Aboriginal owners of small farms generally.

2.5.15

The government of Canada restore the funding of Indian agricultural organizations and related programs and support similar organizations and services for Métis farmers.

2.5.16

Band councils, with the support of the federal government, undertake changes in patterns of land tenure and land use so that efficient, viable reserve farms or ranches can be established.

2.5.17

The government of Canada implement the recommendations of the Aboriginal Agriculture Industrial Adjustment Services Committee designed to advance the education and training of Aboriginal people in agriculture.

With respect to measures to promote business development, the Commission recommends that

2.5.18

Governments, as a high priority, improve their economic development programming by

- (a) developing business advisory services that combine professional expertise with detailed knowledge of Aboriginal communities; and
- (b) placing these advisory services within the emerging economic development institutions of Aboriginal nations.

2.5.19

The capacity for trade promotion be built into the sectoral and other economic development organizations of Aboriginal nations, as appropriate.

2.5.20

The international trade promotion agencies of the federal and provincial governments, in co-operation with Aboriginal producers and economic development institutions, actively seek out markets for Aboriginal goods and services abroad.

2.5.21

Provincial and territorial governments join the federal government in establishing effective set-aside programs to benefit Aboriginal businesses and that municipal governments with large proportions of Aboriginal residents also undertake these programs.

Regarding the financing of Aboriginal economic and business development, the Commission recommends that

2.5.22

Banks, trust companies and credit union federations (the caisses populaires in Quebec), with the regulatory and financial assistance of federal, provincial and territorial governments, take immediate and effective steps to make banking services available in or readily accessible to all Aboriginal communities in Canada.

2.5.23

Federal, provincial and territorial governments, as well as financial institutions, support the development of micro-lending programs as an important tool to develop very small businesses. Governments and institutions should make capital available to these programs and support the operating costs of the organizations that manage them.

2.5.24

Revolving community loan funds be developed and that federal, provincial and territorial governments review their policies about the establishment and operation of such funds and remove administrative and other barriers.

2.5.25

Federal and Aboriginal governments ensure that programs to provide equity to Aboriginal entrepreneurs

- continue for a least 10 more years;
- have sufficient resources to operate at a level of business formation equivalent to the highest rate experienced in the last decade; and
- allow for a growth rate of a minimum 5 per cent a year from that level.

2.5.26

The contribution of equity capital from government programs always be conditional on the individual entrepreneur providing some of the equity required by the business from the entrepreneur's own funds.

2.5.27

Resources for economic development be an important element in treaty settlements.

2.5.28

Aboriginal nations that have entered into modern treaties, including comprehensive claims, fund their programs to provide equity contributions to entrepreneurs from their own revenue sources, with businesses retaining access to all government programs available to mainstream Canadian businesses.

2.5.29

Equity contribution programs funded by the federal government be administered as follows:

- (a) Programs be administered wherever possible by Aboriginal institutions according to development arrangements set out above.
- (b) Funds for this purpose be allocated to the nation concerned as part of a general economic development agreement.
- (c) Programs be administered by federal officials only where Aboriginal institutions have not developed to serve the client base.

2.5.30

The federal government strengthen the network of Aboriginal capital corporations (ACCs) through measures such as

- providing operating subsidies to well-managed ACCs to acknowledge their developmental role;
- enabling ACCs to administer Canada Mortgage and Housing Corporation and DIAND housing funds; and
- providing interest rate subsidies and loan guarantees on capital ACCs raise from the private sector.

2.5.31

Aboriginal capital corporations take appropriate measures, with the assistance of the federal government, to improve

- their administrative efficiency;
- their degree of collaboration with other ACCs; and
- their responsiveness to segments of the Aboriginal population that have not been well served in the past.

2.5.32

Federal and provincial governments assist in the formation of Aboriginal venture capital corporations by extending tax credits to investors in such corporations. These corporations should have a status similar to labour-sponsored venture capital corporations and should be subject to the same stringent performance requirements. Tax credits should be available to the extent that Aboriginal venture capital corporations invest in projects that benefit Aboriginal people.

2.5.33

A national Aboriginal development bank be established, staffed and controlled by Aboriginal people, with capacity to

- provide equity and loan financing, and technical assistance to large-scale Aboriginal business projects; and
- offer development bonds and similar vehicles to raise capital from private individuals and corporations for Aboriginal economic development, with such investments being eligible for tax credits.

2.5.34

The process for establishing the bank be as follows:

- The federal government, with the appropriate Aboriginal organizations, undertakes the background studies required to establish a bank.

- Aboriginal governments develop the proposal to establish the bank and, along with private sources, provide the initial capital. The federal government should match that capital in the initial years, retiring its funding as the bank reaches an agreed level of growth. Earnings on the portion of the capital lent by the federal government would be available to increase the rate of return to private investors in the early years of the bank's operations.
- The federal government introduces the necessary legislation in Parliament.
- Highly experienced management is hired by the bank with a clear mandate to recruit and train outstanding Aboriginal individuals for leadership of the bank's future operations.

2.5.35

The board of directors of the bank have an Aboriginal majority and be chosen for their expertise.

With respect to employment development, the Commission recommends that

2.5.36

Federal and provincial governments fund a major 10-year initiative for employment development and training that is

- aimed at preparing Aboriginal people for much greater participation in emerging employment opportunities;
- sponsored by Aboriginal nations or regionally based Aboriginal institutions;
- developed in collaboration with public and private sector employers and educational and training institutions; and
- mandatory for public sector employers.

2.5.37

This initiative include

- identification of future employment growth by sector;
- classroom and on-the-job training for emerging employment opportunities;
- term employment with participating employers; and
- permanent employment based on merit.

2.5.38

Employment equity programs for Aboriginal people adopt a new long-term approach involving

- the forecasting by employers of labour force needs; and

- the development of strategies, in collaboration with Aboriginal employment services and other organizations, for training and qualifying Aboriginal people to fill positions in fields identified through forecasting.

2.5.39

These employment equity programs be strengthened by

- expanding the range of employers covered by federal, provincial and territorial legislation; and
- making the auditing, monitoring and enforcement mechanisms more effective.

2.5.40

Canadian governments provide the resources to enable Aboriginal employment service agencies to

(a) locate in all major urban areas;

(b) have stable, long-term financial support;

(c) play a lead role in the 10-year employment initiative, contribute to the effectiveness of employment equity, and offer the wide range of services required by a diverse clientele; and

(d) evolve from being a program of federal, provincial and territorial governments to being one of the services provided by Aboriginal institutions on behalf of Aboriginal governments where appropriate, with appropriate financial transfers to be negotiated.

2.5.41

Aboriginal nations adopt policies whereby

- their members continue to assume positions in the public service within their communities;
- as much as possible, they buy goods and services from Aboriginal companies; and
- they provide opportunities for skills development, business growth and the recycling of spending within their communities.

2.5.42

Aboriginal, federal, provincial and territorial governments enter into agreements to establish roles, policies and funding mechanisms to ensure that child care needs are met in all Aboriginal communities.

2.5.43

The federal government resume funding research and pilot projects, such as those funded under the Child Care Initiatives Fund, until alternative, stable funding arrangements for child care services can be established.

2.5.44

Aboriginal organizations and governments assign a high priority to the provision of child care services in conjunction with major employment and business development initiatives, encouraging an active role for community volunteers as well as using social assistance funding to meet these needs.

2.5.45

Provincial and territorial governments amend their legislation respecting the licensing and monitoring of child care services to provide more flexibility in the standards for certification and for facilities that take into account the special circumstances of Aboriginal peoples.

2.5.46

To rebuild Aboriginal economies, all governments pay particular attention to

- the importance of enrolment in education and training programs and of retention and graduation;
- strengthening the teaching of mathematics and the sciences at the elementary and secondary levels;
- improving access to and completion of mathematics and science-based programs at the post-secondary level; and
- making appropriate programs of study available in fields that are relevant to the economic development of Aboriginal communities (for example, business management, economic development and the management of lands and resources).

With respect to restructuring social assistance programs to support employment and social development, the Commission recommends that

2.5.47

Social assistance funds be directed toward a more dynamic system of programming that supports employment and social development in Aboriginal communities, whether in rural or urban settings.

2.5.48

Governments providing financial support for social assistance encourage and support proposals from Aboriginal nations and communities to make innovative use of social assistance funds for employment and social development purposes and that Aboriginal nations and communities have the opportunity

(a) to pursue personal development, training and employment under an individual entitlement approach, and

(b) to pursue the improvement of community infrastructure and social and economic development under a community entitlement approach.

2.5.49

In their active use of social assistance and other income support funds, Aboriginal nations and communities not be restricted to promoting participation in the wage economy but also be encouraged to support continued participation in the traditional mixed economy through income support for hunters, trappers and fishers and through other projects aimed at improving community life.

2.5.50

Aboriginal control over the design and administration of social assistance programs be the foundation of any reform of the social assistance system.

2.5.51

All governments support a holistic approach to social assistance programming for Aboriginal peoples that is

- rooted in Aboriginal society, its traditions and values;
- aimed at integrating social and economic development; and
- explicitly included in the design and operation of any new institutions or programs created to implement social assistance reform as it relates to Aboriginal people and communities.

2.5.52

Initiatives to reform the design and administration of social assistance encourage proposals from Aboriginal nations and tribal councils, acting on behalf of and in co-operation with their member communities.

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