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]

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

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

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

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

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

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

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

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

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

• *Aboriginal nation* refers to a sizeable body of Aboriginal people who possess a shared sense of national identity and constitute the predominant population in a certain territory or collection of territories.

• *First Nation* means an Aboriginal nation composed of Indian people.

• *Aboriginal local community* (or simply, local community) refers to a relatively small group of Aboriginal people living in a single locality and forming part of a larger Aboriginal nation or people. The terms First Nation community, Inuit community and Métis community are also used in this sense.

• *Community* (rather than local community, First Nation community and so on) refers to any group with a shared sense of identity or interest. In this broader sense, Aboriginal nations, peoples and local communities are all communities.

1. Aboriginal Perspectives

1.1 Basic Concepts

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

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

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

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

> As an inherent human quality, sovereignty finds its natural expression in the principle of self-determination. Self-determining peoples have the freedom to choose the pathways that best express their identity, their sense of themselves and the character of their relations with others. Self-determination is the power of choice in action.
>
> Self-determination is looking at our desires and our aspirations of where we want to go and being given the chance to attain that ... for life itself, for existence itself, for nationhood itself ... .

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 restriction. In a study prepared for the Commission, the Metis Family and Community Justice Services of Saskatchewan asserts the following:

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

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

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

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

Dave Courchene, Jr. alluded to this point in his testimony to the Commission:

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

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

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

> What is required here is not an inquiry of the current law or international law to determine the source of our rights. What is required here is the recognition that our rights exist in spite of what international law says, in spite of what the common law says, and in spite of what have been the policies of this government to the present day.
>
> If this issue is to be dealt with in a fair way, then what is required is a strong recommendation from this Commission to government that the source of our rights, the source of our lives and the source of our government is from us. That the source of our lives comes from Gitksan-Wet'suwet'en law.

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

While Aboriginal sovereignty is inherent, it also has an historical basis in the extensive diplomatic relations between Aboriginal peoples and European powers from the early period of contact onward. In the eyes of many treaty peoples, the fact that the French and British Crowns concluded alliances and treaties with First Nations demonstrates that these nations were sovereign

peoples capable of conducting international relations. The president of the Union of Nova Scotia Indians said to the Commission:

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

Alex Christmas
Eskasoni, Nova Scotia
6 May 1992

Some interveners spoke of the need for caution in using the term sovereignty. They noted that the word has roots in European languages and political thought and draws on attitudes associated with the rise of the unitary state, attitudes that do not harmonize well with Aboriginal ideas of governance. For example, in some strands of European thought, sovereignty is coloured by theories suggesting that absolute political authority is vested in a single political office or body, which has no legal limits on its power. The classic notion of the sovereignty of Parliament as developed in British constitutional thought reflects such an approach.

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

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

Greg Johnson
Eskasoni, Nova Scotia
6 May 1992

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

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

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

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

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

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

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

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

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

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

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

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

> have struggled against often overwhelming odds to reclaim our traditional Homeland and assert our sense of nationhood — lies behind much of the current drive towards self-government.[12]

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

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

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

Métis organizations have urged Canadian governments to ratify a Métis Nation accord, similar to the Charlottetown Accord of 1992.[15] They have also called for the explicit entrenchment of the inherent right of Métis self-government in the Canadian constitution. Such measures would allow Métis people to negotiate self-government agreements as a “nation within a nation”.[16]

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

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

Moses Smith
Port Alberni, British Columbia
20 May 1992

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

1.2 Traditions of Governance

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

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

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

Leonard Nelson
Roseau River, Manitoba
8 December 1992

Most Aboriginal people continue to be guided, to some degree, by traditional outlooks in their approach to matters of governance. In some instances, Aboriginal communities have made traditional laws, practices and modes of leadership the basis of their contemporary governmental institutions. In other cases, however, traditional systems of governance have fallen into disuse or been replaced by new systems, such as those imposed by the *Indian Act*.

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

> If self-government is to become the vehicle by which Native people resume their rightful place in North American society, it must grow, unaffected, out of a strong knowledge of the past. Only in this way, is it assured that the Anishinabek, and other traditional governing structures, will be resuscitated for future growth and 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 object of such interest shows their continuing importance in the panoply of indigenous approaches to governance.

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

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

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

The centrality of the land

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

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

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

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

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

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

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

The importance of the land in shaping the values and codes of Aboriginal

people is noted in a Commission study of Dene living in the Treaty 11 area:

> According to our beliefs, the spirit and the land are the boss of Dene life. At the time Treaty 11 was signed Dene culture was still intact in its social, political, and spiritual manifestations. Our leaders of the day were bound by the social norms, the beliefs and customs of a culture which spanned more than ten thousand years.
>
> The land is the boss. She provides all the necessities of life. The Dene are given the responsibility to continue to live with her in that part of her being which has generated the Dene way of life, to govern themselves at personal, family, regional and national levels in a manner which honours and respects her. This is fundamental to survival. To disrespect the spirit of the land is to disrespect life.
>
> In the traditions of the Dene elders, because The Land is the boss and will teach whoever She wants, they will accept as Dene anyone who comes to know and live as they know and live. At that time they will be only too eager to share their responsibility for jurisdiction and governance. This is not a note on racial relationships, it is a statement to the belief of the Dene that The Land is the boss of culture, that culture is inextricably tied to The Land, and that people are required to adapt their way of life to the teachings of the Land.[20]

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

Individual autonomy and responsibility

In most Aboriginal societies, an individual is imbued with a strong sense of

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

> One of the most important and respected attributes of a person in Inuit society is their degree of independence and ability to meet life challenges with innovation, resourcefulness and perseverance. Traditionally, these were traits that would greatly increase the chance of survival for the individual and group ... .In 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 carried ... .It is in the context of mutual benefit to all individuals concerned that collective rights and responsibilities are exercised.[22]

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

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

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

The rule of law

In Aboriginal societies, as in mainstream Canadian society, the rule of law is accepted as a fundamental guiding principle. However, the law is not understood in an exclusively secular sense. For many Aboriginal people, the law is grounded in instructions from the Creator or, alternatively, a body of basic principles embedded in the natural order. Thus basic law is viewed as the 'law of God' or 'natural law'. This basic law gives direction to individuals in fulfilling their responsibilities as stewards of the earth and, by extension, other human beings. The law tells people how to conduct themselves in their relations with one another and with the rest of creation.

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

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

Dennis Thorne
Edmonton, Alberta
11 June 1992

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

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

in Canada outside Quebec, originated as a body of customary law under the supervision of the courts. To this day, it is largely uncodified.

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

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

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

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

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

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

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

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

> Our traditional laws are not dead. They are bruised and battered but alive within the hearts and minds of the indigenous peoples across our lands. Our elders hold these laws within their hearts for us. We have only to reach out and live the laws. We do not need the sanction of the non-indigenous world to implement our laws. These laws are given to us by the Creator to use. We are going to begin by using them as they were intended. It is our obligation to the children yet unborn.

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

The role of women

In many Aboriginal societies, women's roles were significantly different from those of men in governance and politics as in other areas of life. This was the subject of widely varying interpretations and comments among interveners. In

some cases, views reflected differences in personal experience and circumstances, but in others they represented conflicting evaluations of similar experiences. We will give only a brief sampling of these views in this chapter. More detailed discussion of the subject can be found in Volume 4, Chapter 2.

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

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

> Broadly speaking, Stó:lo women did not have complete social and political equality with men. This does not mean women did not hold positions of power or achieve high social rank, but rather that their roles were different, and the power and authority at their disposal was exercised in different ways. For instance, much has been said concerning the fact that only male heads of households were permitted to speak at official public gatherings. However, it was universally recognized that a family leader spoke on behalf of his entire family, and therefore everything he said had theoretically been approved previously by the family.
>
> It was at family gatherings of family members that women's opinions were strongly expressed. Indeed, current Elders point out that while the formal interfamily gatherings (where only men could speak) have fallen into disuse, informal family meetings have not, and that more often than not, families today continue to be controlled, in large part, by powerful matriarchs who exercise their considerable power behind the scenes.[30]

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

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

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

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

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

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

According to these views, the advent of modern, electoral-style governmental systems has in some instances provided greater scope for women to participate actively in communal decision making. Nevertheless, others felt that

modernization has sometimes had the opposite effect. For example, some First Nations interveners maintained that the disempowerment of women in their communities is largely a product of the *Indian Act* and other colonial impositions, which introduced alien and unsuitable forms of government.

> Presently the women in our communities are suffering from dictatorship government that has been imposed on us by the *Indian Act*. We are oppressed in our communities. Our women have no voice, nowhere to go for appeal processes. If we are being discriminated against within our community or when we are being abused in our communities, where do the women go?

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

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

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

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

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

> can give us our power."

Unidentified intervener
Saskatoon, Saskatchewan
13 May 1993

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

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

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

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

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

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

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

The role of elders

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

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

> The oldest members of each clan ... were the ones who formed what we called the Council of Elders. They came together to sit in Council, the oldest members of each clan. They were the ones who made decisions.
>
> The only type of hierarchy that we did have was what we could call a natural hierarchy. Because they have learned all the skills of their clan through their long life, that earned them the right to sit in Council and be part of the decision making.

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

With the arrival of new systems of government and services, the roles and responsibilities of elders have often suffered, not only in the area of communal decision making but also in areas such as health and justice. For example, a study of Inuit decision making suggests that many factors helped to disenfranchise elders and segregate them from the mainstream of Inuit society. These factors include a decline in the importance of the extended family, the

suspension of many traditional sharing practices, the erosion of the obligation to provide for one's kin, and the mixing of populations. This process has gone so far that elders have now formed their own interest groups, a trend that has been reinforced by governmental authorities in creating special elders committees, conferences and centres.

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

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

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

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

Some Aboriginal people have taken formal steps to restore elders to positions

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

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

The role of the family and clan

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

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

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

Leonard Nelson
Roseau River, Manitoba
8 December 1992

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

Dennis Surrendi

Elizabeth, Alberta
16 June 1993

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

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

There was, of course, a great deal of variation across Aboriginal nations in the precise roles played by families, clans and kinship groups. In many Aboriginal societies, the family or extended family was the major self-governing unit. It was responsible for regulating internal social and economic activities, and it provided for the needs of individuals and the security of family members. This situation is exemplified by Inuit, prior to their settlement in permanent communities in the 1950s and 1960s, and also by some groups among them that continue to practise a semi-nomadic lifestyle at certain times of the year.

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

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

Until 40 years ago, most Inuit lived amongst their families and extended families in small camps. Hunting and fishing provided food for the family and furs were exchanged for tea and other goods. Each member of the family had their own roles to fill in camp life ... .Because 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 ranked ... .Among the Stó:lo high rank could not be inherited, rather it had to be earned.[43]

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

Our structure was based on the five clans ... .The 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 medicine ... .When 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 role ... .The selection of leadership was a process that required much time and devotion. To become a leader was a great honour. The role of Chief was not one of power, rather it was a responsibility to fulfil the needs of the people.[45]

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

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

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

Dennis Thorne
Edmonton, Alberta
11 June 1992

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

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

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

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

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

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

Traditional Inuit societies exhibited a variety of patterns of leadership, as revealed in Marc Stevenson's study of traditional decision making in the Nunavut area. Among the Iglulingmiut of the Foxe Basin and north Baffin

Island, the institution of leadership was well developed, with the eldest resident hunter in a band usually assuming the role of *isumataq*, the one who thinks. The authority of the isumataq often extended to socio-economic matters affecting the entire camp, including the sharing and distribution of game and other food. Iglulingmiut society placed great emphasis on the solidarity and hierarchical structure of the extended family, with a person's place in the hierarchy being determined by age, generation, sex and blood affiliation. The Iglulingmiut also recognized a broader tribal identity, beyond the extended family and the band.[49]

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

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

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

The emphasis on individual autonomy made communal action very difficult, and

there was no common council for decision making, no recognized leader to provide direction, and no special deference to the views of elders. As a result, murders and other transgressions against society often went unpunished.

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

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

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

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

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

Many First Nations interveners spoke of how the *Indian Act* system of government had eroded traditional systems of accountability, fostered divisions within their communities, and encouraged what amounted to popularity

contests. The first past the post system, whereby the greatest number of votes elected a candidate, was seen as especially problematic. It permitted large families to gain control of the council and shut other families out of the decision-making process.

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

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

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

Chief David Keenan
Teslin, Yukon
27 May 1992

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

Consensus in decision making

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

Decision making took a variety of forms in traditional Aboriginal societies. For example, decentralized systems of government often relied on the family and its internal structures to make decisions. In such societies, the autonomy of family groups was a fundamental principle.[55] Societies with a more complex political organization made decisions not only at the level of the family but also

through broader communal institutions. The potlatch, as practised among the peoples of the northwest coast, is an example of a communal institution serving multiple functions.

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

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

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

Peter Ochise ... said seven twice is eight ... .It'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 things ... .This process that we had was 100 per cent ownership of the problem.

Mark Douglas
Orillia, Ontario
14 May 1993

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

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

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

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

Jeanette Castello
Terrace, British Columbia
25 May 1993

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

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

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

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

The restoration of traditional institutions

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

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

For some groups, a return to traditional systems of government would mean the restoration of the primary role played by extended families and clans.[62] For example, the extended family might be given initial responsibility for matters affecting the welfare of individuals and the family, such as domestic conflict, child welfare and some aspects of the administration of justice, such as the healing of offenders. Representatives of families or clans might come together as a community council, which would exercise a range of governmental functions and responsibilities. Chiefs or chief spokespersons would then be selected in a traditional manner, which in some cases might involve mutual

agreement among families. Such arrangements would be designed to avoid the situation that sometimes results under conventional electoral arrangements, whereby one or two families in a community are able to dominate the entire apparatus of government.

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

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

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

Chief Jean-Guy Whiteduck
Maniwaki, Quebec
2 December 1992

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

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

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

Likewise, the Metis Nation of Alberta has created a senate of elders selected in recognition of their service to the nation. In addition to being custodians of Métis culture and traditions, senators are charged with presiding over ceremonies and settling certain matters, such as membership disputes. According to a brief submitted to the Commission, a similar approach has been taken by other provincial Métis organizations and by the western Métis Nation.[66]

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

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

1.3 Visions of Governance

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

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

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

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

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

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

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

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

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

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

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

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

We will now examine in greater detail how Aboriginal people have expressed their visions of governance. First, we will review proposals that centre on territorial jurisdiction. Then we will turn our attention to proposals for communal jurisdiction. Finally, we will consider Aboriginal perspectives on an issue that

arises in both territorial and communal contexts: the most desirable level or levels for governmental functions. That is, should self-government be implemented at the level of the local community, the nation, the treaty group, the region, the province, or indeed Canada as a whole?

Territorial jurisdiction

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

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

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

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

• arrangements that involve a broad measure of Aboriginal authority on an exclusive territorial base, whether existing, expanded, or newly created;

• arrangements that involve a significant measure of joint jurisdiction and control over shared traditional lands and resources; and

• public governments that allow for significant Aboriginal participation in decision making.

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

Authority over exclusive territories

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

Aboriginal people want this situation of relative powerlessness to end. They assert the inherent right to govern their own territories within Canada and reject the notion that their powers are delegated from other governments. They claim this right to be free of undue interference from other governments in relation to an extensive range of matters. We consider section 35 of the *Constitution Act, 1982* a recognition of this right as an existing Aboriginal and treaty right (see discussion in the section on Aboriginal self-government later in this chapter).

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

range of matters. We see a blend of these approaches in the examples that follow.

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

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

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

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

Nevertheless, the Siksika Nation seems to accept the concept of shared jurisdiction with non-Aboriginal governments. For example, it anticipates that co-ordination with the provincial government will be achieved through a protocol agreement. The agreement will set out principles for negotiation in relation to priority matters, such as the management of lands and resources; the environment; traffic and transportation; public works; health and justice; and secondary matters such as education and social services. The Siksika Nation

emphasizes that it possesses inherent authority in these areas. The purpose of negotiations is to establish how provincial powers will be co-ordinated with those of the Siksika government in matters of concurrent interest.

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

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

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

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

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

Frank McKay
Windigo First Nations

Sioux Lookout, Ontario, 1 December 1992

Some First Nations communities said that outstanding land issues would need to be resolved before jurisdictional issues could be dealt with in a satisfactory manner. These communities want assurances that they will not find themselves with ample governmental powers but insufficient resources to exercise those powers effectively. As a case study of the Shubenacadie-Indian Brook First Nation noted:

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

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

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

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

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

resources.

Authority over shared territories

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

Territory is a very important thing, it is the foundation of everything. Without territory, there is no autonomy, without territory, there is no home. The reserve is not our home ... .Before the colonization of Abitibi, our ancestors always lived on the territory; my grandfather, my grandparents and my father lived there. This is the territory that I am talking about. [translation]

Oscar Kistabish
Val d'Or, Quebec
30 November 1992

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

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

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

themselves from the land, from their sacred obligation as caretakers of the land.

Les Healy
Lethbridge, Alberta
25 May 1993

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

In this spirit, the Nishnawbe-Aski Nation and its member First Nations communities in northern Ontario are seeking to implement their treaty relationships with respect to shared traditional territories, covered by Treaties 5 and 9.[74] In a "Framework Agreement on Land, Resources and the Environment", drawn up in August 1992, the Nishnawbe-Aski Nation proposes a variety of institutions for land and resource management. Some of these would be exclusively Aboriginal in composition while others would involve sharing jurisdiction with Canada and the province of Ontario. The Nishnawbe-Aski Nation calls for prior consent by First Nations to development activities within traditional territories and the establishment of appropriate dispute-resolution mechanisms. It also envisages the application of Nishnawbe-Aski principles and values in the stewardship and use of traditional lands and resources.

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

These services cover several areas of activity relating to the development of the land, management of the natural and wildlife resources, and relations with other actors in the region ... .To 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 activity ... .Some of the staff of the service, the lands officers, are responsible for applying these tools of management and regulation ... .All 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 properly ... .Eventually we can see that there will be some areas in which we have exclusive use and management responsibilities, and others where these responsibilities are shared with the Crown.[75]

Aboriginal peoples who lack an exclusive land base have also proposed shared jurisdiction over traditional lands and resources. An example is the proposal for

a Mi'kmaq Commonwealth, which includes a plan for co-management of the fisheries.[76] This proposal is modelled on a New Zealand arrangement whereby the Maori are entitled to a negotiated percentage of the commercial fishery, which they manage through their own laws. It is suggested that the Mi'kmaq Commonwealth might conclude similar agreements with relevant Atlantic provinces. These agreements would determine the First Nation's share of the resource, which would then be managed by the Mi'kmaq Commonwealth through its own or contracted enforcement mechanisms.

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

Public governments

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

Plans are now being drawn up to establish a public government for the new northern territory of Nunavut.[78] Under recent proposals (which are still fluid) the territory will be governed by a legislative assembly elected by popular vote, with the first election held in 1999. Consideration is being given to two-member constituencies, with one woman and one man elected in each constituency.

The Nunavut government will be headed by a premier and a cabinet, with cabinet members holding responsibility for specific departments. Inuktitut will be the working language of government, along with English and French. The government will be as decentralized as possible without sacrificing effectiveness. To this end, core departments may be located in the capital, with some or all of the program departments stationed in other communities. The authority of local community governments may also be enhanced. The public sector will employ Inuit in numbers commensurate with their share of the overall population, starting with at least 50 per cent Inuit representation.

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

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

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

merits of public and nation-based forms of government continue to be debated.

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

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

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

Communal jurisdiction

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

Communal jurisdiction comes in many forms, sometimes combined with

territorial arrangements. The submissions, briefs and research studies suggest three main approaches to the subject:

• initiatives featuring territorially based governments exercising jurisdiction over citizens living off the territorial base (the extraterritorial approach);

• initiatives (mainly Métis) featuring multi-level governments with a mix of communal and territorial jurisdiction (the layered approach); and

• initiatives that form urban communities of interest composed of people from various Aboriginal nations (the community of interest approach).

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

The extraterritorial approach

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

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

Margaret King
Saskatoon, Saskatchewan
28 October 1992

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

People who move off a reserve land base are all of a sudden floating ... .It is not a question of jurisdiction. It is a question of a vacuum. A participant said her

identity changes if she moves, that it isn't tied to her, that it depends on where she lives.[84]

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

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

Dave White
Sudbury, Ontario
1 June 1993

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

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

An example of this approach is the *Act Respecting Self-Government for First Nations in the Yukon Territory*.[86] Under this act, a Yukon First Nation has certain powers to enact laws and provide services for its citizens throughout the entire Yukon Territory, in addition to jurisdiction over its exclusive settlement area. These extraterritorial powers are optional and permit a First Nation to offer programs and services in a number of crucial areas: spiritual and cultural matters, Aboriginal languages, health care, social and welfare services, training programs, education, and dispute resolution outside the courts. First Nations governments also have extraterritorial powers regarding guardianship and

custody of children, inheritance, wills and estates, determination of mental competency, solemnization of marriage, and granting of licences.

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

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

The layered approach: Métis initiatives

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

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

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

Programs and services for Metis in urban areas must be designed, developed and delivered by Metis government institutions for Metis people. This concept of Metis institutions of self-government has been developed provincially through the Tripartite Negotiations and nationally through the Metis Nation Accord. In all instances, we intend that these Metis institutions will operate in both rural and urban areas and will be operated for the benefit of Metis.

Ernie Blais
Winnipeg, Manitoba, 2 June 1993

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

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

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

The community of interest approach

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

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

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

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

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

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

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

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

Dan Smith
United Native Nations

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

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

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

The NCC submission discusses four basic models for urban self-government: urban reserves; Aboriginal neighbourhood communities; pan-Aboriginal governments; and sector-specific Aboriginal institutions.[97] The first model envisages establishing urban reserves under the *Indian Act* or other federal legislation. A reserve could be either an autonomous entity or a satellite of an existing reserve or settlement. In the NCC's view, this model is not generally desirable, especially if it relies on the *Indian Act*, with its tainted legacy of fragmentation and exclusion. The NCC also points out that the satellite option may lead to undesirable situations in which the urban community becomes the effective colony of the home reserve or vice versa.

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

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

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

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

Levels of governance

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

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

First Nations approaches

First Nations hold differing views regarding the most appropriate level for governmental institutions. These differences are reflected in the varying ways in which the term First Nation is used. Sometimes, it is used in a broad sense

to indicate a body of Indian people whose members have a shared sense of national identity based on a common heritage, situation and outlook, including such elements as history, language, culture, spirituality, ancestry and homeland. Under this usage, a First Nation would

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

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

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

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

The Dene constitute a nation born of a common heritage within a distinct territorial land base ... and having a distinct culture, including laws, beliefs and 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:

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 people ... .This is what we call self-government. [translation]

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

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

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

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

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

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

with a council of elders, generally composed of the heads of families.

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

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

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

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

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

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

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

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

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

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

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

Elizabeth Beauvais
Kahnawake, Quebec
6 May 1993

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

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

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

Métis Nation approaches

Multi-level governmental structures are a prominent feature of Métis Nation political organization. Four levels of political organization are recognized within the Métis Nation: local, regional, provincial and national. Although recently the

main emphasis has been on the last two levels, Métis people also see the local and regional levels as necessary to future Métis governments.

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

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

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

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

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

Metis governance structures would promote Metis rights at the provincial and federal level while respecting the autonomy of the Metis at the community and regional levels. They could take the form of a provincial Metis legislative assembly mandated to enact legislation and administrative orders at periodic assemblies and be comprised of Local presidents. A provincial executive council or Cabinet elected on a province-wide basis would be empowered to

implement the legislation through its various departments such as economic development, social services, housing, etc.[101]

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

Inuit approaches

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

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

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

consent of the local communities. The district government is primarily a vehicle for empowering local communities. The proposals of many First Nations communities assign primacy to the governments that are closest to the people.

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

2. Toward an Aboriginal Order of Government

2.1 An Overview

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

Attributes of good government

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

Power is the acknowledged legal capacity to act. It includes legislative competence (the authority to make laws), executive capacity to execute the laws and carry on public administration, and judicial jurisdiction to resolve disputes. The power of a government may arise from long-standing custom and

practice or from more formal sources such as a written constitution, national legislation and court decisions. Internal legal authority, however, is not always enough to make a government effective. Another important factor is the degree to which other powerful governments and institutions recognize and accept what is done by the government. Claims to sovereignty and other forms of legal authority may be of limited use if they are not respected by other governments holding greater power and resources.

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

A government lacking one or more of these attributes will be hampered in its operations. For example, a government that enjoys great legitimacy but has insufficient power or resources will be able to accomplish little and will remain largely symbolic — especially if it is competing with other political institutions that do wield substantial power and resources. By contrast, some governments have both power and resources but little legitimacy. To maintain themselves, they must rely on manipulation, intimidation and coercion. Where a government has some power but is lacking in both resources and legitimacy, it is likely to become both oppressive and dependent. To maintain itself, the regime must seek resources from other governments. In return, these benefactors become the real decision makers, imposing conditions on continued financial support and investment. Such dependence makes governments more responsive to their external taskmasters than to their own citizens. This in turn erodes whatever legitimacy they originally possessed, accelerating the need for repressive domestic measures.

Aboriginal governments in Canada often lack all three attributes necessary to be effective. First, the legitimacy of some of these governments is weak because they evolved from federally imposed institutions and historically have been unable to satisfy many basic needs of their citizens, in part because of deficits in power and resources. Sometimes these governments have also failed to embody such basic Aboriginal values as consensus, harmony, respect for individuality and egalitarianism. Second, current Aboriginal governments have far less power than their provincial, territorial and federal counterparts. What power they possess is frequently insecure and depends mainly on federal

legislation or even ministerial approval. Third, Aboriginal governments generally lack a sufficient tax and resource base and are highly dependent on federal funding for their basic operations. This funding has often been conditional, discretionary and unpredictable, fluctuating substantially over time.

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

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

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

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

Self-determination and self-government: overview

In this section we discuss the relationship between the principles of self-determination and self-government and Aboriginal peoples, their governments and the evolution of Canada's constitution. The right of self-determination is

vested in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis. It is founded in emerging norms of international law and basic principles of public morality. Self-determination entitles Aboriginal peoples to negotiate the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs.

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

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

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

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

In our view, the inherent right of Aboriginal self-government was recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty right. The inherent right is now entrenched in the Canadian constitution, therefore, and provides a basis for Aboriginal governments to function as one of three distinct orders of government in Canada.

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

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

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

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

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

respective areas of legislative jurisdiction.

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

In relation to matters on the periphery of Aboriginal jurisdiction, a self-government treaty or agreement is needed to settle the jurisdictional overlap between an Aboriginal government and the federal and provincial governments. This treaty must specify which areas of jurisdiction are exclusive and which are concurrent; in the latter case, the treaty must specify which legislation will prevail if a conflict arises. Until such an agreement is concluded, Aboriginal jurisdiction on the periphery remains

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

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

Only nations can exercise the full range of governmental powers available in the core areas of Aboriginal jurisdiction; nations alone have the power to conclude self-government treaties or agreements regarding matters falling within the periphery. The constitutional right of self-government is vested in the peoples who make up Aboriginal nations, not in local communities. Nevertheless, local communities of Aboriginal people, including communities in

urban areas, have access to inherent governmental powers if they join together in their national units and draft a constitution allocating powers between the national and local levels.

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

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

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

2.2 Self-Determination

International human rights law

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

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

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

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

Because of the fundamental proposition of law that a right without a remedy is meaningless, international human rights instruments generally have to be supported by domestic legislation in countries that sign them. If no such domestic legislation is passed, the fact that a particular country is a signatory does not, of itself, entitle a citizen to take action against the state in its domestic courts, even if the state has violated its undertakings in an international convention or covenant to which it is a party. This does not mean that international instruments are of no help to the citizen. They have significant interpretive value in situations where a case against the state is founded on violation of domestic human rights legislation such as the *Canadian Charter of Rights and Freedoms*. Justice Linden made this point in relation to the International Covenant on Civil and Political Rights, which protects the right of all peoples to self-determination, including the right freely to determine their political status and to pursue their economic, social and cultural development.

On May 19, 1976 Canada acceded to the United Nations Covenant on Civil and Political Rights ... no Canadian legislation has been passed which expressly implements the covenant ... The covenant may, however, be used to assist a court to interpret ambiguous provisions of a domestic statute ... provided that the domestic statute does not contain express provisions contrary to or inconsistent with the 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:

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

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

Preventing discrimination against Indigenous peoples became a focus of United Nations attention in the 1960s and 1970s following major studies in a

number of countries. In 1982, the United Nations established the Working Group on Indigenous Populations under the aegis of the International Labour Organisation (ILO), the UN agency whose primary concern is social justice. Five non-governmental organizations participate in a continuing forum at the annual meetings of the Working Group on Indigenous Populations. They are the World Council of Indigenous Peoples, the International Indian Treaty Council, the Indian Law Resource Centre, the Inuit Circumpolar Conference, and a recently formed body representing four First Nations groups in the United States and Canada, the Four Directions Council.

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

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

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

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

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

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

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

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

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

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

The right of self-determination gives Aboriginal peoples the right to initiate changes in their governmental arrangements within Canada and to implement such reforms by negotiations and agreements with other Canadian

governments, which have the duty to negotiate in good faith and in light of fiduciary obligations owed by the Crown to Aboriginal peoples. Any reforms must be approved by the Aboriginal people concerned through a democratic process, ordinarily involving a referendum. Where these reforms necessitate alterations in the Canadian constitution, they must be implemented through the normal amending procedures laid out in the *Constitution Act, 1982*.

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

The practice in Canada has been to sign such a convention only if all the provinces agree and undertake to implement the convention requirements pertaining to their respective jurisdictions. It will be necessary, therefore, for the federal government to consult with the provinces as well as with Aboriginal peoples before signing the convention. In our view, however, Canada should proceed expeditiously to complete these consultations and sign the convention, particularly in light of the override clause.

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

Conclusions

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

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

Recommendation

The Commission recommends that

2.3.1

The government of Canada take the following actions:

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

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

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

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

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

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

Self-determination and self-government

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

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

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

Consider another example. An Aboriginal nation forms the majority of inhabitants in a region with a population of both Aboriginal and non-Aboriginal

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

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

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

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

Aboriginal peoples: political groups, not racial minorities

For purposes of self-determination, Aboriginal peoples should be seen as

organic political and cultural entities, not groups of individuals united by racial characteristics.[113]

One of the greatest barriers standing in the way of creating new and legitimate institutions of self-government is the notion that Aboriginal people constitute a "disadvantaged racial minority" ... .Only when Aboriginal peoples are viewed, not as "races" within the boundaries of a legitimate state, but as distinct political communities with recognizable claims for collective rights, will there be a first and meaningful step towards responding to Aboriginal peoples' challenge to achieve self-government.[114]

As the Inuit Tapirisat of Canada observes,

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

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

A group has to show historical continuity with the peoples originally inhabiting a certain area only before extensive European settlement took place, not before European contact. This criterion recognizes the fact that, in some parts of Canada, relations existed between Indigenous peoples and newcomers for long periods before a substantial influx of settlers occurred. As a result, there was a blending of cultural and genetic heritages. In western Canada, for example, close ties developed between Indigenous peoples and Europeans in the course of the fur trade, ties that were consolidated during the seventeenth and eighteenth centuries, long before the advent of extensive settlement.

These relations led to significant changes in the culture and make-up of many Aboriginal groups and their European partners. In particular, they gave rise to an entirely new Aboriginal people, the Métis Nation of Red River, who have played a prominent role in the history of western Canada and the evolution of the Canadian federation.

Conclusion

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

The Aboriginal nation as the vehicle for self-determination

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

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

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

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

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

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

The second element in our definition relates to the size and overall capacity of a group. For a body of Aboriginal people to constitute a nation, it must be large enough to assume the powers and responsibilities that potentially flow from the right of self-determination. This right enables an Aboriginal people to opt to govern itself as an autonomous unit within the Canadian federation, with an extensive range of powers. Generally, the right cannot be vested in small local communities that are incapable of exercising the powers and fulfilling the responsibilities of an autonomous governmental unit. Ordinarily, an Aboriginal

nation should comprise at least several thousand people, given the range of modern governmental responsibilities and the need to supply equivalent levels of services and to co-ordinate policies with other governments. Nevertheless, this criterion must be applied in a manner that takes account of the differing situations of Aboriginal peoples. For example, some Aboriginal nations, such as the Huron and the Sarcee, are centred in a single community or band and clearly do not have to join with other nations to exercise their right of self-determination. Other historical Aboriginal nations are dispersed over large areas, sometimes spanning several provinces, which makes reunification of the entire nation difficult, at least in the immediate future.

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

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

By contrast, a group of Aboriginal people living dispersed in Toronto or Vancouver does not possess its own right of self-determination, because the group does not constitute the majority population there. Of course, many Aboriginal individuals living in urban settings are members of Aboriginal nations that have their own geographical bases and rights of self-determination. For example, many Aboriginal people living in Halifax belong to the Mi’kmaq

Nation, which has a geographical base and qualifies for the right of self-determination. If those individuals are recognized members of the Mi'kmaq Nation, they can participate in the nation's exercise of its right of self-determination. Unaffiliated Aboriginal people living in Halifax, however, do not have a right of self-determination of their own.

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

Recommendation

The Commission recommends that

2.3.2

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

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

• a First Nation people with a common historical heritage living on a single territorial base;

• a First Nation people with a common historical heritage living on several distinct territories, whether within a single province or one of the northern territories or spread over several provinces or northern territories;

• a group composed of all or most First Nations communities in a single region, northern territory or province;

• a group comprising First Nations communities belonging to a particular treaty group;

• a group composed of all or most Inuit communities in a single region, northern

territory or province;

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

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

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

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

In our view, an Aboriginal nation cannot be identified in a mechanical fashion by reference to a detailed set of objective criteria. The concept has a strong

psycho-social component, which consists of a people's own sense of itself, its origins and future development. While historical and cultural factors, such as a common language, customs and political consciousness, will play a strong role in most cases, they will not necessarily take precedence over a people's sense of where their future lies and the advantages of joining with others in a common enterprise. Aboriginal nations, like other nations, have evolved and changed in the past; they will continue to evolve in the future.

Conclusions

4. The Commission concludes that the right of self-determination is vested in Aboriginal nations rather than small local communities. By Aboriginal nation we mean a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories. Currently, there are between 60 and 80 historically based nations in Canada, compared with a thousand or so local Aboriginal communities.

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

• the nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland;

• it is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and

• it constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.

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

Identifying Aboriginal nations

Aboriginal peoples are entitled to identify their own national units for purposes

of exercising the right of self-determination. Given the variety of ways in which Aboriginal nations may be configured and the strong subjective element, any self-identification initiative must necessarily come from the people actually concerned.

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

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

In many cases, when a group identifies itself as an Aboriginal nation entitled to self-determination, this act of self-identification will correspond to widespread public perceptions and existing government practice and the point will not be contested. However, in other instances, disputes will arise regarding whether the group's own determination is correct. Three types of disputes may arise: identity, representation and membership. In practice the distinctions between these types are often blurred, because many disputes have multiple aspects.

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

By contrast, a representation dispute concerns which of two or more rival bodies or organizations is entitled to represent a certain Aboriginal nation (or one of its member communities) in processes implementing the right of self-determination. Representation disputes occur where a certain body within a group purports to speak for the entire group but this claim is disputed by

another body, which either claims to be the group's true representative or questions the other body's capacity to speak for the whole group. Sometimes disputes of this kind involve the opposing claims of elected and traditional governing bodies; in other cases, they arise from familial or political splits within the group.

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

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

Conclusion

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

Recommendation

The Commission recommends that

2.3.3

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

(a) The nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland.

(b) The nation is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner.

(c) The nation constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, operates from a defined territorial base.

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

2.3 Self-Government

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

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

sphere of inherent Aboriginal jurisdiction under section 35(1) comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. This sphere of inherent jurisdiction includes both a core, where an Aboriginal nation may act at its own initiative, and a periphery, where action may be taken only after a treaty or agreement with the Crown has been concluded.

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

The following discussion examines

• the legal roots of the right of self-government in the doctrine of Aboriginal rights;

• the contributions of Aboriginal nations to the historical genesis of the Canadian constitution;

• the recognition of Aboriginal and treaty rights in the *Constitution Act, 1982*;

• the entrenchment of the right of self-government in the 1982 act;

• the scope of the constitutional right;

• the application of the *Canadian Charter of Rights and Freedoms*;

• the central role of the Aboriginal nation in implementing the right of self-government;

• the question of citizenship in Aboriginal nations; and

• the three orders of government in Canada.

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

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

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

William and Suzanne lived happily together for nearly 30 years and had six children, one of whom later became Lady Amelia Douglas, the wife of the first governor of British Columbia. William Connolly prospered in the fur trade. He was described by a contemporary as "a veritable *bon garçon*, and an 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 be recognized by the court as validating a marriage even between two Aboriginal people, much less between an Aboriginal and a non-Aboriginal person.

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

In his judgement, Justice Monk of the Superior Court stated that he was prepared to assume, for the sake of argument, that the first European traders to inhabit the northwest brought with them their own laws as their birthright.[122] Nevertheless, the region was already occupied by "numerous and powerful tribes of Indians; by aboriginal nations, who had been in possession of these countries for ages". Assuming that French or English law had been introduced in the area at some point, "will it be contended that the territorial rights, political organization, such as it was, or the laws and usages of the Indian tribes, were

abrogated; that they ceased to exist, when these two European nations began to trade with the aboriginal occupants?" Answering his own question in the negative, Justice Monk wrote: "In my opinion, it is beyond controversy that they did not, that so far from being abolished, they were left in full force, and were not even modified in the slightest degree, in regard to the civil rights of the natives."[123](

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

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

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

A number of lessons can be drawn from *Connolly* v. *Woolrich*. First, the sources of law and authority in Canada are more diverse than is sometimes assumed. They include the common laws and political systems of Aboriginal nations in addition to the standard range of Euro-Canadian sources.

Second, in earlier times, the history of Canada often featured close and relatively harmonious relations between Aboriginal peoples and newcomers. The fur trade, which played an important role in the economy of early Canada, was based on long-standing alliances between European fur traders and

Aboriginal hunters and traders. At the personal level, these alliances resulted in people of mixed origins, who sometimes were assimilated into existing groups but in other cases coalesced into distinct nations and communities, as with the Métis of Red River.

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

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

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

However, this view overlooks important features of our legal system. The laws of Canada spring from a great variety of sources, both written and unwritten, statutory and customary. It has long been recognized, for example, that the written constitution is based on fundamental unwritten principles, which govern its status and interpretation.[130] In Quebec, the general laws governing the private affairs of citizens trace their origins in large part to a body of French customary law, the *Coûtume de Paris*, which was imported to Canada in the 1600s and embodied in the *Civil Code of Lower Canada* in 1866.[131] In the

other provinces, the foundation of the general private law system is English common law, a body of unwritten law administered by the courts, with its roots in the Middle Ages.[132] English common law has never been reduced to statutory form, except in partial and fragmentary ways. Over the years, it has become a supple legal instrument, capable of being adapted by the courts to suit changing circumstances and social conditions.

Given the multiple sources of law and rights in Canada, it is no surprise that Canadian courts have recognized the existence of a special body of 'Aboriginal rights'. These are not based on written instruments such as statutes, but on unwritten sources such as long-standing custom and practice. In the *Sparrow* case, for example, the Supreme Court of Canada recognized the Aboriginal fishing rights of the Musqueam people on the basis of evidence "that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day."[133] The court went on to hold that government regulations governing the Aboriginal fishing right were incapable of delineating the content and scope of the right.[134]

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

Our position is that aboriginal rights, aboriginal title to land, water and sea ice flow from aboriginal rights; and all rights to practise our customs and traditions, to retain and develop our languages and cultures, and the rights to self-government, all these things flow from the fact that we have aboriginal rights ... .In 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

(a) the right to self-government within Quebec;

(b) the right to their own language, culture and traditions;

(c) the right to own and control land;

(d) the right to hunt, fish, trap, harvest and participate in wildlife management; and

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

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

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

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

[The] fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title 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 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 law ... .Then, if this is so as regards Indian lands in the United States ... how is it possible to suppose that the law can, or rather could have been, at the date of confederation, in a state any less favourable to the Indians whose lands were situated within the dominion of the British Crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the Crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such ... [143]

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

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

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

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

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

Conclusion

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

The process of constitution building

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

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

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

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

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

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

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

1. the confederation of the British Provinces was the result of a compact entered into by the provinces and the imperial Parliament, which, in enacting the British North America Act, simply ratified it;

2. the provinces entered into the federal union, with their corporate identity, former constitutions, and all their legislative powers, part of which they ceded to the federal Parliament, to exercise them in their common interest and for purposes of general utility, keeping the rest which they left to be exercised by their legislatures, acting in their provincial sphere, according to their former constitutions, under certain modifications of form, established by the federal compact;

3. far from having been conferred upon them by the federal government, the powers of the provinces not ceded to that government are the residue of their old powers, and far from having been created by it, the federal government was the result of their association and of their compact, and was created by them. [translation][147]

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

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

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

part of a protracted historical evolution that, in one way or another, had already been proceeding for some time and has continued to the present day.

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

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

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

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

As we saw in Volume 1, the *Royal Proclamation of 1763* was the cornerstone

of the principle of national continuity, in its recognition of the autonomous status of Indian nations within their territories. The preamble to the Indian provisions of the Proclamation provides as follows:

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

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

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

In their various ways, then, the *Royal Proclamation of 1763* and the *Quebec Act* manifest the principle of continuity, which was further recognized and elaborated as federation continued into the next century. The distinct identity of Quebec was a cornerstone of the *Constitution Act, 1867*, which reversed the earlier attempt to unite Lower and Upper Canada into a single province. The phraseology of the *Quebec Act* was carried forward in a provision giving the provinces the exclusive right to make laws regarding "Property and Civil Rights in the Province". The unique character of the Quebec civil law system was reflected in a clause that allowed the Parliament of Canada to provide uniform laws in all the federating provinces except for Quebec, thus introducing an asymmetrical element into Confederation.[160]

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

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

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

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

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

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

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

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

A Constitutional Watershed: the CONSTITUTION ACT, 1982

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

The complete text of these provisions follows:

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

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

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

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

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

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

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

The adoption of section 35(1) marked a watershed in relations between

Aboriginal peoples and the Canadian state.[166] As the Supreme Court of Canada noted in its unanimous judgement in the leading case of *R*. v. *Sparrow*, decided in 1990,

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

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

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

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

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

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

effect. In discussing these criteria, the court focused on the position of Aboriginal rights rather than treaty rights, which were not at issue in *Sparrow*.

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

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

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

The court placed a second important limitation on the extinguishment doctrine. It held that legislation that merely regulated an Aboriginal right did not extinguish it, even if the regulations were very detailed and extensive and the right was reduced to a very narrow scope.[177] So long as the right survived in some form, however slight, it qualified as an existing right under section 35(1) and received constitutional protection. Moreover, the section would not freeze an Aboriginal right in the regulated form it happened to hold in 1982.[178]

Restrictions imposed by existing legislation would be open to challenge under section 35(1) as being inconsistent with the constitutional recognition extended by the provision.

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

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

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

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

The strength of this approach is that it follows closely the route identified in *Sparrow* and so benefits from the substantial authority this case carries in Canadian law. However, the approach also has some drawbacks. Taken in

isolation, it could be viewed as conceding that the existence of the inherent right of self-government in Canada today depends simply on whether the right had been extinguished by Canadian or imperial legislation before 1982. The approach therefore tacitly accepts the possibility of unilateral extinguishment, a possibility that few Aboriginal peoples are prepared to contemplate. For them, the right of self-government is fundamental to their very existence as peoples and as such is inextinguishable without their free consent. From this perspective, the approach represents the low road to a destination that would better be reached by the high road of principle and fundamental rights.

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

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

From the time that section 35(1) was first enacted, observers have noted that the right of Aboriginal peoples to govern themselves within Canada was potentially one of the rights recognized in the section. As early as 1983, the

report of a special House of Commons committee on Indian self-government (the Penner report) observed that the inclusion of Aboriginal and treaty rights in the constitution may have altered the traditional understanding of governmental powers:

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

The Penner report remarked that many Indian witnesses appearing before the committee affirmed that the Aboriginal right of self-government had an existing basis in Canadian law. For example, a representative of the Canadian Indian Lawyers' Association, Judy Sayers, invoked the *Royal Proclamation of 1763* and the *Constitution Act, 1982* and concluded that "there is in law and history a definite basis for self-determination and self-government."[185] Noting this possibility, the Penner committee recommended that the constitution be amended to recognize explicitly and entrench the right of self-government. Indian governments would then, in the committee's view, clearly form a distinct order of government in Canada, with their jurisdiction defined.[186]

During the following decade, further constitutional reform was actively pursued. Several intensive rounds of constitutional negotiations occurred between Aboriginal peoples and the federal and provincial governments.[187] One major aim was to secure explicit constitutional recognition of the right of self-government. These efforts culminated in the detailed Aboriginal amendments proposed in the Charlottetown Accord of 1992.[188] Despite the complexity of these provisions, one simple clause lay at their core. The draft legal text of 9 October 1992 included the following provision:

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

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

the inherent right to govern themselves within Canada.

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

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

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

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

The following month, on 7 December 1994, a framework agreement was concluded between First Nations communities in Manitoba, represented by the Assembly of Manitoba Chiefs, and the Queen represented by the minister of Indian affairs. The thrust of the agreement is to dismantle the operations of the Department of Indian Affairs and Northern Development (DIAND) in Manitoba, restore jurisdiction to First Nations peoples, and recognize First Nations governments. The agreement sets out a number of principles to guide this process, including the following:

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

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

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

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

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

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

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

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

Four main arguments need to be considered. The first three are comprehensive in nature: they apply to all Aboriginal peoples in Canada, including First Nations, Inuit and Métis peoples. The final argument is narrower and applies only to peoples covered by the *Indian Act*. In the *Delgamuukw* case, a majority of the British Columbia Court of Appeal accepted the first three arguments and held that any inherent powers of Aboriginal governments in British Columbia were extinguished at the latest when the colony joined Confederation in 1871.[190] The case is now on further appeal to the Supreme Court of Canada and is being held in abeyance pending further negotiations between the parties.

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

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

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

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

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

[While] British policy towards the native population was based on respect for

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

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

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

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

laws of the group would not be extinguished but would continue to exist, subject to the paramount power of Parliament.

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

For example, as seen in the case of *Connolly* v. *Woolrich*, the fact that the British Crown assumed sovereignty over a certain part of western Canada did not mean that the marriage laws of Aboriginal peoples living there were automatically terminated or that Aboriginal jurisdiction to enforce these laws was superseded. To the contrary, indigenous laws and jurisdiction continued to exist, in the absence of British legislation repealing or modifying them.

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

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

The first proposition holds that the *Constitution Act, 1867* divided all

governmental powers between the federal and provincial governments, except for a few matters expressly reserved. As the privy council remarked in the *Reference Appeal* (1912):

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

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

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

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

For example, the Royal Commission to the Governor of Nova Scotia in 1749 authorized him to constitute a council and an assembly and together with them to legislate "for the Public peace, welfare & good government of our said province".[196] The *Royal Proclamation of 1763* contained a similar provision for Quebec, empowering the governor, council and assembly to make laws "for the

Publick Peace, Welfare, and Good Government" of the colony.[197] Likewise, the *Constitutional Act, 1791* gave the councils and assemblies of Upper and Lower Canada the power, together with the Crown, to make laws for the peace, welfare and good government of the provinces in question.[198] The same language is found in the *Union Act, 1840*.[199] These general grants of authority included the power to deal with Aboriginal peoples and their affairs, as is evinced by the many executive acts and statutes concerning Indians and Indian lands in the colonies before 1867.

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

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

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

Save for that reference in s. 91(24), the 1867 Act was silent on Indian affairs. Nothing was said about the title to property in the 'lands reserved for the Indians', nor to the revenues therefrom, nor to the rights and obligations of the Crown or the Indians thenceforward in regard thereto. But I have no doubt that all concerned regarded the royal proclamation of 1763 as still of binding force. It was an unwritten provision which went without saying. It was binding on the legislatures of the Dominion and the provinces just as if there had been included in the statute a sentence: 'The aboriginal peoples of Canada shall continue to have all their rights and freedoms as recognized by the royal proclamation of 1763'.[200]

The continued existence of Aboriginal political systems is borne out by legislation enacted both before and after the *Constitution Act, 1867.* Consider, for example, the *Indian Lands Act*, passed by the Province of Canada in 1860.[201] Section 4 provides that lands reserved for the use of any tribe or band of Indians cannot be surrendered except on this condition:

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

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

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

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

Aboriginal governmental structures, powers and laws from being swept away by the division of powers accomplished by the 1867 act. It leaves these matters in the same state as before 1867, subject to any new legislation passed by Parliament.

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

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

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

1. The care of the public health.

2. The observance of order and decorum at assemblies of the people in General Council or on other occasions.

3. The repression of intemperance and profligacy.

4. The prevention of trespass by cattle.

5. The maintenance of roads, bridges, ditches and fences.

6. The construction of and maintaining in repair of school houses, council houses and other Indian public buildings.

7. The establishment of pounds and the appointment of pound-keepers.[205]

This provision, and others like it, clearly purported to alter the existing governmental structures of Aboriginal groups. It attributed legislative powers to individuals and entities that may not have possessed them previously and

confined these powers to a narrow range of subjects. Nevertheless, these restrictive measures did not build upon completely new foundations. They took for granted the existence of Aboriginal groups as distinct political entities and introduced or authorized changes in their internal political structures.

We see an example of this approach in the second paragraph of the section just quoted, which authorizes chiefs in council to frame regulations dealing with order and decorum assemblies of the people in general council, which assumes the continuing existence of assemblies and councils constituted under Indian custom. Another provision in the same act authorizes the governor in council to order that chiefs be elected by the adult male members of the group and hold office for three years, unless dismissed by the governor for bad behaviour. However, this provision is left to be implemented at the governor's discretion. Otherwise, the group's traditional mode of selecting chiefs continues as before. So, while it is true that federal Indian legislation severely disrupted and distorted the political structures of Aboriginal peoples, leaving them with limited powers, in our view the legislation did not evince a clear and plain intention to strip them of all governmental authority.

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

Conclusions

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

9. The constitutional right of self-government does not supersede the right of self-determination or take precedence over it. Rather, it is available to Aboriginal peoples who wish to take advantage of it, in addition to their right of

self-determination, treaty rights and any other rights that they enjoy now or negotiate in the future. In other words, the constitutional right of self-government is one of a range of voluntary options available to Aboriginal peoples.

The scope of constitutional self-government

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

It follows from what we have already said that the right of self-government is inherent in its source, in the sense that it finds its origins within Aboriginal peoples, as a contemporary manifestation of the powers they originally held as independent and sovereign nations. It does not stem from constitutional grant; that is, it is not a derivative right. The distinction between an inherent and a derivative right is not merely symbolic. It addresses the basic issue of how Canada emerged and what it stands for. According to proponents of the view that the right is derivative, Aboriginal peoples have no rights of government other than those that the written constitution creates or that the federal and provincial governments choose to delegate. By contrast, our approach sees Aboriginal peoples as the bearers of ancient and enduring powers of government that they carried with them as they established relations with the Crown. Under the first theory, Aboriginal governments are newcomers on the constitutional scene, mere neophytes among governments in Canada. Under the second doctrine, Aboriginal governments give the constitution its deepest and most resilient roots in the Canadian soil.

The Aboriginal right of self-government is recognized by the Canadian legal system, under the constitutional common law of Canada and also under section 35(1). So, while the section 35(1) right is inherent in point of origin, as a matter of current status it is a right held in Canadian law. The implication is that, while

Aboriginal peoples have the inherent legal right to govern themselves under section 35(1), this constitutional right is exercisable only within the framework of Canada. Section 35 does not warrant a claim to unlimited governmental powers or to complete sovereignty, such as independent states are commonly thought to possess. As with the federal and provincial governments, Aboriginal governments operate within a sphere of sovereignty defined by the constitution. In short, the Aboriginal right of self-government in section 35(1) involves circumscribed rather than unlimited powers.

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

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

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

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

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

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

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

The core of Aboriginal jurisdiction includes all matters that

• are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity;

• do not have a major impact on adjacent jurisdictions; and

• are not otherwise the object of transcendent federal or provincial concern.

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

jurisdiction.

Under the organic model, the right of self-government is an inherent right in both the core and the periphery. In neither case is the right delegated. The effect of agreements with the Crown is to particularize the inherent right, not to create it. So, for example, where an Aboriginal group concludes a self-government treaty with the Crown, the group's governmental authority is inherent throughout the full extent of its jurisdiction, in relation to matters in both the core and the periphery.

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

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

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

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

Aboriginal and treaty rights, including the inherent right of self-government.

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

Let us now consider the position of the provincial governments in this scheme. In a broad way, we think that the interaction between Aboriginal and provincial jurisdiction is governed by rules similar to those regulating the interaction of federal and provincial jurisdictions in this area. Under this approach, the matter is governed by four general principles.[211]

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

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

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

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

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

What is the concrete scope of the entire sphere of Aboriginal jurisdiction, including both the core and the periphery? We saw earlier that, in principle, the sphere comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. In concrete terms, this probably includes (but is not necessarily limited to) the following subject-matters:

• constitution and governmental institutions

• citizenship and membership

• elections and referenda

• access to and residence in the territory

• lands, waters, sea-ice and natural resources

• preservation, protection and management of the environment, including wild animals and fish

• economic life, including commerce, labour, agriculture, grazing, hunting, trapping fishing, forestry, mining, and management of natural resources in

general

• the operation of businesses, trades and professions

• transfer and management of public monies and other assets

• taxation

• family matters, including marriage, divorce, adoption and child custody

• property rights, including succession and estates

• education

• social services and welfare, including child welfare

• health

• language, culture, values and traditions

• criminal law and procedure

• the administration of justice, including the establishment of courts and tribunals with civil and criminal jurisdiction

• policing

• public works and housing

• local institutions.

Which powers fall within the core of Aboriginal jurisdiction, rather than the periphery? As indicated, the core includes all matters that are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity; do not have a major impact on adjacent jurisdictions; and are not otherwise the object of transcendent federal or provincial concern. To give a partial list, it seems likely that an Aboriginal nation with an exclusive territory would be entitled as a matter of its core jurisdiction to draw up a constitution, set up basic governmental institutions, establish courts, lay down citizenship criteria and procedures, run its own schools, maintain its own health and social services,

deal with family matters, regulate many economic activities, foster and protect its language, culture and identity, regulate the use of its lands, waters and resources, levy taxes, deal with aspects of criminal law and procedure, and generally maintain peace and security within the territory. In particular, the regulation of many substantive Aboriginal and treaty rights protected under section 35(1) would probably fall within the core of Aboriginal jurisdiction.

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

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

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

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

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

(2) The right referred to in subsection (1) shall be interpreted in a manner

consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.

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

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

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

This section was balanced by another, providing as follows:

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

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

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

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

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

languages.[216]

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

More recently, in August 1995, the government of Canada issued a policy guide entitled *Aboriginal Self-Government*, which is designed to serve as a framework for the negotiation of agreements implementing the inherent right of self-government.[218] In broad terms, the statement views the scope of Aboriginal jurisdiction as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution.

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

• the establishment of governing structures, internal constitutions, elections, and leadership selection processes

• membership

• marriage

• adoption and child welfare

• Aboriginal language, culture and religion

• education

• health

• social services

• administration and enforcement of Aboriginal laws, including the

establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments

• policing

• property rights, including succession and estates

• land management, including zoning, service fees, land tenure and access, and expropriation of Aboriginal land

• natural resources management

• agriculture

• hunting, fishing and trapping on Aboriginal lands

• direct taxation and property taxation of members

• transfer and management of monies and group assets

• management of public works and infrastructure

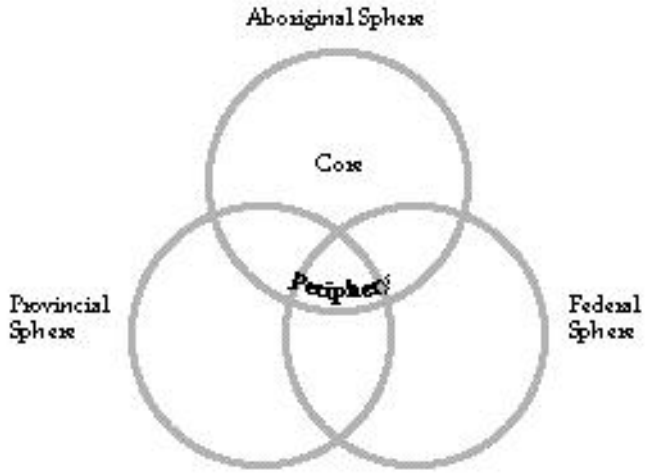
• housing

• local transportation

• licensing and regulation of business

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

FIGURE 3.1
Aboriginal, Federal and Provincial Spheres of Jurisdiction



Subject-matters in this category include the following:

• divorce

• labour and training

• administration of justice issues, including the administration of certain federal criminal laws

• penitentiaries and parole

• environmental protection

• fisheries co-management

• migratory birds co-management

• gaming

• emergency preparedness

The third list includes subject-areas where, in the federal government's view, there are no compelling reasons for Aboriginal governments to exercise law-

making authority and that cannot be characterized as either integral to Aboriginal cultures or internal to Aboriginal groups. These areas are grouped under two headings:

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

• international relations, diplomatic relations and foreign policy

• national defence and security

• security of national borders

• international treaty making

• immigration, naturalization and aliens

• international trade, including tariffs and import-export policy

2. Other national interest powers, including

• management and regulations of the national economy (including such matters as fiscal and monetary policy, the banking system, bankruptcy and currency)

• maintenance of national law and order (including substantive criminal law, emergencies, and matters of “peace, order and good government”)

• protection of the health and safety of all Canadians

• federal undertakings and powers (such as broadcasting and communications, aeronautics, navigation and shipping, and national transportation systems.)

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

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

section 35 of the *Constitution Act, 1982*. This protection may be secured by new treaties or comprehensive land claims agreements, or by additions to existing treaties.

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

Conclusions

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

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

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

13. When an Aboriginal government passes legislation dealing with a subject-matter falling within the core, any inconsistent federal or provincial legislation is

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

14. By way of exception, in certain cases a federal law may take precedence over an Aboriginal law where they conflict. However, for this to happen, the federal law has to meet the strict standard laid down by the Supreme Court of Canada in *Sparrow*. Under this standard, the federal law has to serve a compelling and substantial need and be consistent with the Crown's basic fiduciary responsibilities to Aboriginal peoples.

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

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

Recommendations

The Commission recommends that

2.3.4

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

(a) It is an existing Aboriginal and treaty right that is recognized and affirmed in section 35(1) of the *Constitution Act, 1982.*

(b) Its origins lie within Aboriginal peoples and nations as political and cultural entities.

(c) It arises from the sovereign and independent status of Aboriginal peoples and nations before and at the time of European contact and from the fact that Aboriginal peoples were in possession of their own territories, political systems and customary laws at that time.

(d) The inherent right of self-government has a substantial degree of immunity from federal and provincial legislative acts, except where, in the case of federal legislation, it can be justified under a strict constitutional standard.

2.3.5

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

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

(b) is divided into two areas:

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

• peripheral areas of jurisdiction, which make up the remainder.

2.3.6

All governments in Canada recognize that

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

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

The CANADIAN CHARTER OF RIGHTS AND FREEDOMS

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

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

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

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

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

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

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

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

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

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

This Charter applies

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

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

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

Two approaches

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

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

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

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

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

According to this approach, it is hard to imagine that Aboriginal governments are exempt (or would want to be exempt) from this fundamental guarantee, as

enshrined in the *Canadian Charter of Rights and Freedoms*.

Viewed in this light, then, the main purpose of section 32(1) is to indicate that governments rather than private individuals are subject to the Charter in their actions. While the section identifies some of the main government bodies subject to the Charter, it does not state that the Charter applies exclusively to those bodies or provide a complete list of government bodies affected. In effect, then, the section leaves open the possibility that there are other government bodies, not mentioned in the section, that are subject to the Charter's provisions. The tacit recognition of an Aboriginal order of government in section 35(1) fulfils that possibility.

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

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

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

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

As its wording indicates, section 25 lays down a fundamental rule for interpreting the Charter, stating that the Charter “shall not be construed so as to abrogate or derogate” from aboriginal and treaty rights. The section does not rule out the application of the Charter to aboriginal and treaty rights. Rather, it ensures that the Charter will receive an interpretation that is consistent with those rights in all their amplitude.

The inherent right of self-government is one of the Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada mentioned in section 25. The result, according to the second approach, is that the Charter cannot “abrogate or derogate from” the exercise of inherent powers of Aboriginal self-government. Since any limitation on Aboriginal governmental powers would amount to such a derogation, section 25 effectively prevents Aboriginal governments from being held accountable for Charter violations.

This conclusion is reinforced by section 32(1) of the Charter. According to the second approach, not only does the section fail to mention Aboriginal governments specifically, its wording is not broad enough to cover them. Aboriginal governments are neither creatures of federal or provincial governments nor “matters within the authority” of those bodies. They constitute a distinct order of government whose authority is constitutionally guaranteed under section 35(1).

So, according to the second approach, the wording of section 32(1) supports the conclusion that Aboriginal governments exercising inherent powers are completely exempt from the Charter in their operations. If the drafters of the Charter had intended the Charter to apply to Aboriginal governments, they would surely have said so in explicit language, just as they did with the federal and provincial governments.

This interpretation of section 32(1) is bolstered by the fact that section 33 of the Charter, which allows for notwithstanding clauses suspending the operation of certain Charter provisions, does not specifically mention Aboriginal governments:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision

thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

The section goes on to specify that a notwithstanding clause expires automatically after five years but can be re-enacted.

So, although section 33 allows the federal and provincial governments to suspend the application of certain sections of the Charter, it does not specifically extend this right to Aboriginal governments. According to the second approach, this silence suggests once again that the Charter was not designed to apply to Aboriginal governments exercising inherent powers; otherwise, they would have been mentioned in the section.

These arguments can also be supported on broad policy grounds. One of the main purposes of section 25 is to ensure that Aboriginal peoples can exercise their distinctive rights in a manner consistent with their philosophical outlooks, cultures and traditions. According to the second approach, some Charter provisions reflect individualistic values that are antithetical to many Aboriginal cultures, which place greater emphasis on the responsibilities of individuals to their communities. In any case, interpretation of the Charter lies ultimately in the hands of judges who are often unfamiliar with Aboriginal ways and likely to prove unsympathetic to them when they depart from standard Canadian approaches. According to this view, then, if the Charter applied to Aboriginal governments, it could hamper and even stifle the efforts of Aboriginal nations to revive and strengthen their cultures and traditions. As such, the Charter might operate as the unwitting servant of the forces of assimilation and domination.

The Commission's view

Which of these two approaches should prevail? In our view, each approach has notable strengths and weaknesses, which tend to counterbalance one another. Rather than adopt one or the other, we think it preferable to take an intermediate approach that combines the strengths of both while avoiding the extremes they represent.

This intermediate solution embodies three basic principles. First, all people in Canada are entitled to enjoy the protection of the Charter's general provisions in their relations with governments in Canada, no matter where in Canada the people are located or which governments are involved. On this ground alone, the general provisions of the Charter apply to Aboriginal governments, and section 32(1) of the Charter should be read in this light. Second, Aboriginal

governments occupy the same basic position relative to the Charter as the federal and provincial governments. Aboriginal governments should thus have recourse to notwithstanding clauses under section 33 to the same extent as the federal and provincial governments. Third, in its application to Aboriginal governments, the Charter should be interpreted in a manner that allows considerable scope for distinctive Aboriginal philosophical outlooks, cultures and traditions. This interpretive rule is found in section 25 of the Charter. It applies with particular force where distinctive Aboriginal perspectives on human rights have been consolidated in Aboriginal charters of rights and responsibilities.

Our overall approach is governed by one central consideration. The drafters of the *Constitution Act, 1982* did not provide in explicit language for Aboriginal governments or attempt to describe their exact position in the Canadian federation. They contented themselves with general references to Aboriginal and treaty rights in sections 35(1) and 25, references that, in our view, are broad enough to include the inherent right of self-government. If section 35(1) is interpreted as recognizing the inherent right, we think that section 32(1) of the Charter should be read in a way that takes account of this recognition. Otherwise, there would be a serious imbalance in the application of the Charter, one that should be avoided in the absence of explicit language to the contrary. In other words, the ‘unpacking’ of the rights referred to in section 35(1) should be achieved in a manner that takes account of the central position of the Charter in Canada’s overall constitutional scheme.

We agree that the main purpose of section 32(1) is to indicate that governments rather than private individuals are subject to the Charter. The wording of the section is not exhaustive. It allows for the possibility that government bodies not specifically named in the section are subject to the Charter’s provisions. The tacit recognition of an Aboriginal order of government in section 35(1) leads us to take a broad view of the terms of section 32(1).

This same approach applies, in our opinion, to section 33 of the Charter, the provision regarding notwithstanding clauses. As with section 32(1), the section does not mention Aboriginal legislatures. In interpreting section 33, we should remember that it operates in tandem with section 32(1) and moderates its impact. While section 32(1) makes the Charter applicable to governments, section 33 gives those same governments a measure of latitude and allows them to shield themselves from certain Charter provisions for a period. The close connection between the two sections suggests that they should be interpreted in the same way. For this reason, we think that section 33 should be

read as permitting governments of Aboriginal nations to pass notwithstanding clauses in the same manner as the federal and provincial governments.

This conclusion is tempered by a basic consideration. The power to pass notwithstanding clauses belongs only to an Aboriginal nation and, in the absence of self-government treaties, can be exercised only in relation to matters falling within the core areas of Aboriginal jurisdiction. This means that the governments of local Aboriginal communities do not have the power to pass notwithstanding clauses. It also means that for an Aboriginal nation to pass notwithstanding clauses in relation to matters falling within the periphery, the power to pass such clauses must be acknowledged specifically in self-government treaties or agreements with the Crown.

The application of the Charter to Aboriginal governments is moulded and tempered by the mandatory provisions of section 25. This section clearly rules out any interpretation of the Charter that would attack the existence of Aboriginal governments or undermine their basic powers. It also ensures that the Charter will receive a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices that animate the inherent right of self-government. Section 25 prevents distinctive Aboriginal understandings and approaches from being washed away in a flood of undifferentiated Charter interpretation.

The Charter is a flexible instrument, one that gives governments a significant measure of latitude in implementing its terms. In particular, section 1 enables governments to enact reasonable limits on Charter rights so long as these “can be demonstrably justified in a free and democratic society”. This section is, of course, available to Aboriginal governments. Section 25 gives an Aboriginal government an alternative way to justify its activities when these are challenged under the Charter. The section enables an Aboriginal government to argue that certain governmental rules or practices, which may seem unusual by general Canadian standards, are consistent with the particular culture, philosophical outlook and traditions of the Aboriginal nation, and as such are justified. This approach is consistent with the contextual approach that the Supreme Court of Canada has adopted more generally in applying the Charter.

In reaching this conclusion, we have been assisted by the analysis of Peter Hogg and Mary Ellen Turpel.[221] These authors suggest that, despite the silence of section 32 of the Charter with reference to Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the Charter.[222] This result would be especially likely in cases where self-

government has been implemented with the support of federal or provincial legislation. However, even where an Aboriginal government exercises inherent powers at its own initiative, it is unlikely that a court would regard section 25 as providing blanket immunity from the Charter. The probable effect of section 25 will be to exempt certain actions of Aboriginal governments from Charter scrutiny and to ensure that the Charter will be interpreted in a manner "deferential to and consistent with Aboriginal culture and traditions."[223]

Regarding deference to Aboriginal cultures and traditions, Hogg and Turpel make a number of useful points:

Interpretations of the Charter that are consistent with Aboriginal cultures and traditions would probably be found when the court is faced with a situation where different

standards apply and the difference is integral to culturally-based policy within an Aboriginal community. For example, if an Aboriginal juvenile justice system were created in which legal counsel was not provided to an accused person, would this be considered unconstitutional as denying a legal right to an accused person? If the juvenile justice system reflected Aboriginal culture and traditions, section 25 would shield such practices from attack based on the values expressed in the legal rights provisions of the Charter. In other words, the legal rights provisions would be given a new interpretation in light of Aboriginal traditions.

The important point here is that the application of the Charter, when viewed with section 25, should not mean that Aboriginal governments must follow the policies and emulate the style of government of the federal and provincial governments. Section 25 allows an Aboriginal government to design programs and laws that are different, for legitimate cultural reasons, and have these reasons considered relevant should such differences invite judicial review under the Charter. Section 25 would allow Aboriginal governments to protect, preserve and promote the identity of their citizens through unique institutions, norms and government practices.[224]

In endorsing this approach, we wish to emphasize that section 35(4) of the *Constitution Act, 1982* lays down a broad and unqualified rule ensuring the equality of the sexes in the enjoyment of Aboriginal and treaty rights, including the inherent right of self-government. The section provides that

Notwithstanding any other provision of this Act, the aboriginal and treaty rights

referred to in subsection (1) are guaranteed equally to male and female persons.

This provision is reinforced by section 28 of the Charter, which states that

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Singly and in combination, these provisions constitute an unshakeable guarantee that Aboriginal women and men have equal access to the inherent right of self-government and that they are entitled to equal treatment by their governments. By their explicit terms, these provisions transcend any other provisions of the Charter, including section 33.[225]

Where an Aboriginal nation enacts its own charter of rights and responsibilities, private individuals will benefit from its provisions in addition to those of the Canadian Charter. An Aboriginal charter will supplement the Canadian Charter but not displace it. A person subject to the authority of the Aboriginal government will still have direct access to the Canadian Charter. However, in construing the Canadian Charter in the light of section 25, a court may well find the provisions of the Aboriginal charter a useful interpretive guide. For example, where an Aboriginal charter contains a series of provisions dealing with the treatment of accused persons in an Aboriginal justice system, a court should ordinarily take these provisions into serious account in determining the effect of the legal rights provisions of the Canadian Charter with respect to the Aboriginal government in question.[226]

In our view, the interpretive influence of an Aboriginal charter will likely be amplified if it forms part of a self-government treaty between an Aboriginal nation and the Crown, because section 25 specifically shields treaty rights from the impact of the Canadian Charter. Where a self-government treaty includes an Aboriginal charter among its provisions, it appears that courts would be bound to take the terms of this charter into serious account in interpreting any related provisions of the Canadian Charter.

Conclusion

17. The Commission concludes that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and regulates relations with individuals falling within their jurisdiction. However, under section 25, the

Charter must be given a flexible interpretation that takes account of the distinctive philosophies, traditions and cultural practices of Aboriginal peoples. Moreover, under section 33, Aboriginal nations can pass notwithstanding clauses that suspend the operation of certain Charter sections for a period. Nevertheless, by virtue of sections 28 and 35(4) of the *Constitution Act, 1982*, Aboriginal women and men are in all cases guaranteed equal access to the inherent right of self-government and are entitled to equal treatment by their governments.

The central role of the Aboriginal nation

Which bodies of Aboriginal people currently hold the inherent right of self-government recognized in section 35? Does the right vest in local communities, as these have been moulded historically? Or is the right held only by Aboriginal nations in the sense identified earlier in the chapter? (See our earlier discussion on self-determination.) While our response to this question is similar to that given in our discussion of self-determination, it also has some differences that reflect the distinctive character of the constitutional right of self-government.

In our view, the inherent right of self-government is vested in the entire people making up an Aboriginal nation and so is shared in an organic fashion by the various overlapping groups that make up the nation, from the local level upward. The inherent right does not vest in local communities as such, considered apart from the nations of which they are part. In effect, for an Aboriginal people to exercise the inherent governmental powers at their disposal, they will have to draw up a national constitution that establishes an overall structure of government. In many cases this structure will include not only national but also local institutions. Within such multi-level structures, each level of government can be viewed as exercising its own powers, powers that are appropriate to its particular sphere of authority and that spring in each case from the people concerned.

For example, with respect to matters falling within the core jurisdiction, a national constitution might well provide that local communities have the power to establish their own primary schools and initiate certain training programs as part of their powers over education. However, in most cases only the national government will be able to put in place a full-fledged education system. Likewise, while a local community may take certain initiatives in the area of justice, establishing an Aboriginal court system will normally be the work of the nation.

Turning now to the periphery of Aboriginal jurisdiction, we recall that treaties or agreements with the Crown are necessary to activate inherent powers in these areas. In our view, only the people of the nation as a whole can negotiate and conclude treaties relating to inherent governmental powers. A local community does not have the capacity to negotiate a separate treaty for itself. Of course, a self-government treaty concluded by a nation may take a number of different forms. It may, for example, specify that ratification at the community level is necessary for the treaty to take effect. It may also provide that a substantial measure of power will be exercised by local governments, in both the core and the periphery. The distribution of powers among the various levels of government is a matter for the people of the nation as a whole to determine.

In our opinion, negotiations to implement the inherent right of self-government cannot bypass the nation and proceed on a community-by-community basis. Although it is possible for a local Aboriginal community to obtain delegated powers from the federal or provincial governments, the inherent jurisdiction of Aboriginal peoples can be exercised only through initiatives and treaties at the level of the nation. On this point, we share the view expressed by Sharon McIvor, speaking for the Native Women's Association of Canada:

Self-government should be granted to 'Nations', not to Band Councils ... .Each band council does not represent a nation ... .Any self-government agreement must be negotiated on a nation-to-nation basis. This being the case, discussion in the constitutional meetings must focus on the matter of determining what nations are, and what their governments will be.

Sharon McIvor
Native Women's Association of Canada
Toronto, Ontario, 26 June 1992

We recognize that there are obstacles to implementing this approach to self-government. In the case of First Nations, for example, one of the effects of the band orientation of the *Indian Act* has been to foster loyalties at the level of the local community, at the expense of broader national affinities arising from a common language, culture, spirituality and historical experience. Moreover, as we saw earlier, many Aboriginal people appearing before the Commission emphasized the need for strong local input to decision making and affirmed the principle that leaders should be responsible to the people they represent.

We fully recognize the need for strong local input and political accountability, in

keeping with the democratic traditions of many Aboriginal peoples. There is also a need for larger governmental structures, however, if the full range of powers and benefits associated with an Aboriginal order of government are to be realized. In striking the right balance, there are two major considerations. First, community-level governments will generally continue to be poor, weak and isolated unless they form part of larger governmental structures. Second, there is a danger that such larger structures may become bureaucratic and remote unless they remain in close touch with the communities they represent. These competing considerations point once again to the need for multi-level or federal constitutional structures as a basic mode of governmental organization within Aboriginal nations.

While we do not suggest that current initiatives to implement self-government at the local level should come to a complete halt, we do believe that such initiatives must be placed in the larger context of Aboriginal nations. It is necessary for local communities to join together in their nations to exercise the core powers at their disposal and to negotiate treaties or agreements regarding powers in the periphery. This nation-based approach does not, of course, rule out approaches that encompass two or several Aboriginal nations.

Conclusion

18. The Commission concludes that the constitutional right of self-government is vested in the people that make up Aboriginal nations, not in local communities as such. Only nations can exercise the range of governmental powers available in the core areas of Aboriginal jurisdiction, and nations alone have the power to conclude self-government treaties regarding matters falling within the periphery. Nevertheless, local communities of Aboriginal people have access to inherent governmental powers if they join together in their national units and agree to a constitution allocating powers between the national and local levels.

Recommendation

The Commission recommends that

2.3.7

All governments in Canada recognize that the right of self-government is vested in Aboriginal nations rather than small local communities.

Citizenship in Aboriginal nations

Aboriginal people are both Canadian citizens and citizens of their particular nations. Thus they hold a form of dual citizenship, which permits them to maintain loyalty to their nation and to Canada as a whole.[227] Here we consider the rules governing individual citizenship or membership in Aboriginal nations. (For discussion of the position of non-citizen residents of Aboriginal territories, see section beginning on page 289 and Recommendation 2.3.22.)

In our view, the right of an Aboriginal nation to determine its own citizenship is an existing Aboriginal and treaty right within the meaning of section 35(1) of the *Constitution Act, 1982*. At the same time, any rules and processes governing citizenship must satisfy certain basic constitutional standards flowing from the terms of section 35 itself. The purpose of these standards is to prevent an Aboriginal group from unfairly excluding anyone from participating in the enjoyment of collective Aboriginal and treaty rights guaranteed by section 35(1), including the right of self-government. In other words, the guarantee of Aboriginal and treaty rights in section 35 could be frustrated if a nation were free to deny citizenship to individuals on an arbitrary basis and thus prevent them from sharing in the benefit of the collective rights recognized in section 35.

The most obvious of these constitutional standards is laid down in section 35(4), which states that Aboriginal and treaty rights are guaranteed equally to male and female persons. Since Aboriginal and treaty rights are generally collective rather than individual rights, an individual can have access to them only through membership in an Aboriginal group. It follows that the rules and processes governing membership cannot discriminate against individuals on grounds of sex, for to do so would violate the guarantee embodied in section 35(4).

Section 35 embodies a second basic standard. As we saw earlier, the Aboriginal peoples recognized in the section are political and cultural entities rather than racial groups. While it is true that a group must descend from the original peoples of North America to qualify as Aboriginal, that historical link can be established in a variety of ways. Modern Aboriginal nations, like other nations in the world today, usually represent a mixture of genetic backgrounds. The Aboriginal identity lies in people's collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race.

In our view, this fundamental principle has implications at two levels. It not only governs recognition of Aboriginal groups as collective entities under section 35, it also lays down a basic standard governing individual membership in such groups. It prevents an Aboriginal group from specifying that a certain degree of Aboriginal blood (what is often called blood quantum) is a general prerequisite for citizenship. On this point, it is important to distinguish between rules that specify ancestry as one among several ways of establishing eligibility for membership and rules that specify ancestry as a general prerequisite. By general prerequisite, we mean a requirement that applies in all cases or that only allows for very limited exceptions. For example, a citizenship code that requires that a candidate must be at least 'half-blood', except in cases of marriage or adoption, would lay down a general prerequisite and as such, in our view, be unconstitutional. By contrast, it would be acceptable for a code to specify, for example, that someone with at least one parent belonging to the group qualifies for citizenship, so long as this provision represents only one among several general ways for an individual to qualify for membership, including, for example, meeting such criteria as birth in the community, long-time residency, group acceptance and so on.

In offering this opinion, we recognize the sensitive nature of the subject and the existence of strongly held opposing views. We also acknowledge the legitimate concerns that underlie these views. After all, birth is the normal way to acquire citizenship, and descent is the normal way a nation's culture and identity are perpetuated. The citizenship codes of most countries, including Canada, reflect that reality. None of this leads us to believe, however, that a minimum blood quantum is an acceptable general prerequisite for membership in an Aboriginal group.

For example, suppose that the citizenship code of an Aboriginal nation states that individuals qualify for membership only if at least one of their grandparents was a full-blooded member of the nation, except in cases of adoption. On the surface, this might seem a reasonable minimum qualification. However, in our opinion, the rule places the emphasis in the wrong place and is liable to operate in an arbitrary and unjust fashion.

Consider the position of a child who is born into an Aboriginal community and raised as an ordinary member of the group, playing with the other children, attending the same school, speaking the same language and following the same overall pattern of life. The child's father, while born and raised in the community, is of mixed origins: the father's father, although also born and raised in the same community, is half-blood, while the father's mother is of

Scottish stock. It also happens that the child's mother comes from another part of Canada and, although Aboriginal in ancestry, was born to parents belonging to another Aboriginal nation. According to the applicable rule, this child is not eligible for membership because none of the four grandparents was a full-blooded member of the nation: one was Scottish, another was half-blood and two belonged to another Aboriginal nation. This result is both illogical and unjust.

It should be remembered that, under the traditional practices of most Aboriginal groups, birthright was not the only method by which group membership could be acquired. Methods such as marriage, adoption, ritual affiliation, long-standing residence, cultural integration and group acceptance were also widely recognized. As Rene Lamothe has noted with respect to Dene:

In the traditions of the Dene elders, because The Land is the boss and will teach whoever She wants, they will accept as Dene anyone who comes to know and live as they know and live. At that time they will be only too eager to share their responsibility for jurisdiction and governance. This is not a note on racial relationships, it is a statement to the belief of the Dene that The Land is the boss of culture, that culture is inextricably tied to The Land, and that people are required to adapt their way of life to the teachings of The Land.[228]

In our view, any code that specifies a minimum blood quantum as a general prerequisite for citizenship is not only unconstitutional under section 35, it is also wrong in principle, inconsistent with the historical evolution and traditions of most Aboriginal peoples, and an impediment to their future development as autonomous political communities.

Conclusion

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

Recommendations

The Commission recommends that 2.3.8

The government of Canada recognize Aboriginal people in Canada as enjoying a unique form of dual citizenship, that is, as citizens of an Aboriginal nation and citizens of Canada.

2.3.9

The government of Canada take steps to ensure that the Canadian passports of Aboriginal citizens

(a) explicitly recognize this dual citizenship; and

(b) identify the Aboriginal nation citizenship of individual Aboriginal persons.

2.3.10

Aboriginal nations, in exercising the right to determine citizenship, and in establishing rules and processes for this purpose, adopt citizenship criteria that

(a) are consistent with section 35(4) of the *Constitution Act, 1982;*

(b) reflect Aboriginal nations as political and cultural entities rather than as racial groups, and therefore do not make blood quantum a general prerequisite for citizenship determination; and

(c) may include elements such as self-identification, community or nation acceptance, cultural and linguistic knowledge, marriage, adoption, residency, birthplace, descent and ancestry among the different ways to establish citizenship.

2.3.11

As part of their citizenship rules, Aboriginal nations establish mechanisms for resolving disputes concerning the nation’s citizenship rules generally, or individual applications specifically. These mechanisms are to be

(a) characterized by fairness, openness and impartiality;

(b) structured at arm's length from the central decision-making bodies of the Aboriginal government; and

(c) operated in accordance with the *Canadian Charter of Rights and Freedoms* and with international norms and standards concerning human rights.

Three orders of government

The enactment of section 35 of the *Constitution Act, 1982* had far-reaching structural significance. It confirmed the status of Aboriginal peoples as partners in the complex federal arrangements that make up Canada. It provided the basis for recognizing Aboriginal governments as one of three distinct orders of government in Canada: Aboriginal, provincial and federal. The governments making up these three orders share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties.

Shared sovereignty, in our view, is a hallmark of the Canadian federation and a central feature of the three-cornered relations that link Aboriginal governments, provincial governments and the federal government. These governments are sovereign within their respective spheres and hold their powers by virtue of their constitutional status rather than by delegation. Nevertheless, many of their powers are shared in practice and may be exercised by more than one order of government.

The constitutional reforms of 1982 had another important effect. In completing the process by which Canada became independent of the United Kingdom, the constitution confirmed that the Canadian Crown is constitutionally distinct from the British Crown, even if for historical reasons the two offices continue to be occupied by the same person.[229] The Canadian Crown is no longer the symbol of British imperial authority. It stands for all the people of Canada, regardless of origin, ethnicity, culture, religion or language.

The Canadian Crown also symbolizes the association of the various political units that make up the country. Canada is a federal state composed of a number of political units with diverse origins, bound together by a complex body of basic law making up the constitution of Canada. The constitution governs how the cluster of rights and jurisdictions are shared by various governmental institutions and political entities, including the federal government, the provinces and Aboriginal nations.

The word ‘shared’ is used advisedly here, in preference to a term such as ‘distributed’ which would suggest a single, centralized source. As we have seen, many of the political units that make up Canada entered the federation bearing powers, rights and responsibilities that stemmed from historical roots deeply embedded in the communities in question. So, while the constitution of Canada recognized (and sometimes restructured) those powers and rights, it did not constitute their ultimate source.

The Crown of Canada is, in part, the symbol of the constitutional relationship among various autonomous political communities, each with its distinctive history and internal constitution; it also represents the federal institutions that give concrete expression to this relationship. Contrary to some imperial views, the Canadian Crown is not the notional fountain of all governmental power and jurisdiction; to the contrary, it represents a partial pooling of powers that flow from a variety of sources, Aboriginal and non-Aboriginal alike.

It would be wrong to say that the Crown has sovereignty over Aboriginal peoples, on a quasi-imperial model. Rather, it is the living symbol of a federal arrangement involving a partial merging of sovereignty and the guaranteed retention of certain sovereign powers by the various political units that make up Canada, including Aboriginal peoples.

Of course, Aboriginal peoples have a range of differing relations with the Crown, so their constitutional status within Canada varies, depending on their distinctive histories. Here we can give only a partial sketch of the subject.[230] We will focus on the constitutional position of Aboriginal peoples that hold long-standing treaty or customary relations with the Crown, as this position was reflected in the *Royal Proclamation of 1763*. The proclamation speaks of “the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection” (See the discussion of the proclamation in Volume 1, Chapter 5). For convenience, we will speak of these peoples as having ‘proclamation-style’ governments, in contrast to more standard ‘Westminster-style’ governments.

A proclamation-style government has a distinctive relationship with the Crown of Canada. While the Crown is the head of the executive branches of the federal and provincial governments, the Crown does not constitute the executive head of an Aboriginal government, unless, of course, the people in question adopt Westminster-style arrangements. Strictly speaking, under the proclamation model, there is no Crown expressed through the Mi’kmaq Nation,

comparable to the Crown expressed through the province of Nova Scotia.

This basic difference manifests itself in a number of ways. First, whereas federal and provincial bills technically need the assent of the Crown in order to take effect, laws enacted by proclamation-style governments do not need Crown assent. Even in the case of federal and provincial statutes, the requirement is a purely formal one, because under Canadian constitutional convention the Crown cannot withhold assent. However, in the case of Aboriginal governments, this formal requirement does not exist.

Second, while the activities of the executive branches of the federal and provincial governments are carried on in the name of the Crown, this is not the case with a proclamation-style government. The executive branch of an Aboriginal government of this type acts directly in the name of the people as a whole or in some other capacity under the nation's laws and customs.

Finally, while Canadian courts dispense justice in the name of the reigning monarch, Aboriginal courts and other organs of justice in proclamation-style systems act in the name of the people as a whole or in some other capacity laid down by the nation's laws and customs.

These features point to the fact that, under the proclamation model, Aboriginal peoples and their governments have unique relationships with the Crown, that is, relationships distinctive to the particular peoples in question. The character of these relationships is not determined by the constitutional arrangements reached in 1867 between the French-speaking and English-speaking representatives of Lower and Upper Canada, Nova Scotia and New Brunswick, the four original parties to the *Constitution Act, 1867*. The relationship is governed primarily by the treaties and other historical relationships formed between Aboriginal nations and the Crown and by the inter-societal law and custom that underpinned them. At the core of these inter-societal links is a fiduciary relationship under which the Crown stands as the protector of the sovereignty of Aboriginal peoples within Canada and as guarantor of their Aboriginal and treaty rights. This fiduciary relationship is a fundamental feature of the constitution and more especially of section 35 of the *Constitution Act, 1982.* (See our discussion of the principles of a renewed relationship in Volume 1, Chapter 16.)

On this point, we draw inspiration from the ancient vision of the Great Tree of Peace, as expressed by the Peacemaker, the Huron prophet who inspired the formation of the Five Nations Confederacy. The Peacemaker envisioned a

great white pine with four white roots that extended in the four directions of the earth. A snow-white mat of feathery thistledown spread out from under the tree, carpeting the surrounding countryside and protecting the peoples that embraced the three basic principles of peace, power and the good mind. The Peacemaker explained that the tree represented humanity living according to these principles. An eagle perched at the very summit of the tree was humanity's lookout against people who might disturb the peace. The Peacemaker's vision was thus potentially universal in its scope:

He postulated that the white carpet could cover the entire earth and provide a shelter of peace and brotherhood for all mankind. His vision was a message from the Creator, bringing harmony to human existence and uniting all peoples into a single family.[231]

In some respects, this vision of a federation of peoples united in peace and fellowship resembles the one that we hold for Canada.

We acknowledge that the image of the Canadian federation presented here is not shared by all Aboriginal peoples and that a variety of differing views was expressed in Commission hearings and briefs. In particular, some Aboriginal nations consider that they are not part of the Canadian federation at all but are linked to the Crown by international treaties and other relations. These views are based on historical and political considerations that require thoughtful appraisal. Nevertheless, we consider that the issues they raise are better resolved in a context of political negotiations rather than by Canadian courts as a matter of existing constitutional law. (See the discussion of the legal context of treaties in Chapter 2 of this volume.)

It is important to recognize that whatever the formal legal position, in practice Canadian governments often have little political and moral legitimacy among Aboriginal peoples. This reality reflects the historical fact that Aboriginal peoples have been subjected to shockingly unjust and coercive governmental policies that have denied them their most basic rights, stripped them of their ancestral lands and attempted to suppress their very identities. In our view, there is a profound need for a process that will afford Aboriginal peoples the opportunity to restructure existing governmental institutions and participate as partners in the Canadian federation on terms they freely accept. The existing constitutional right of self-government under section 35 is no substitute for a just process that implements the basic right of self-determination by means of freely negotiated treaties between Aboriginal nations and the Crown.

Conclusions

20. The Commission concludes that, overall, the enactment of section 35 of the *Constitution Act, 1982* has had far-reaching significance. It serves to confirm the status of Aboriginal peoples as equal partners in the complex federal arrangements that make up Canada. It provides the basis for recognizing Aboriginal governments as one of three distinct orders of government in Canada: Aboriginal, provincial and federal. The governments making up these three orders are sovereign within their several spheres and hold their powers by virtue of their inherent or constitutional status rather than by delegation. They share the sovereign powers of Canada as a whole, powers that represent a pooling of existing sovereignties.

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

22. Nevertheless, there is a profound need for a process that will afford Aboriginal peoples the opportunity to restructure existing governmental institutions and participate as partners in the Canadian federation on terms they freely accept. The existing right of self-government under section 35 of the *Constitution Act, 1982* is no substitute for a just process that implements the basic right of self-determination by means of freely negotiated treaties between Aboriginal nations and the Crown.

Recommendation

The Commission recommends that

2.3.12

All governments in Canada recognize that

(a) section 35 of the *Constitution Act* provides the basis for an Aboriginal order of government that coexists within the framework of Canada along with the

federal and provincial orders of government; and that

(b) each order of government operates within its own distinct sovereign sphere, as defined by the Canadian constitution, and exercises authority within spheres of jurisdiction having both overlapping and exclusive components.

3. Implementing an Aboriginal Order of Government

3.1 Models of Aboriginal Government: An Overview

The exercise of self-determination and self-government will assume many forms according to Aboriginal peoples' differing aspirations, circumstances and capacity for change. In practice, therefore, we anticipate that many variations will emerge in the implementation of the broad approaches outlined in this section.

Some Aboriginal peoples will implement forms of Aboriginal government organized around a substantially autonomous nation. For them, internal and intergovernmental relations will focus on a strong sense of nationhood as reflected, for example, in jurisdiction over territory and recognition of a distinct Aboriginal citizenship base. Other Aboriginal peoples, notably those in the northern parts of Canada, may exercise public leadership and control over the government of a territory, representing all residents, Aboriginal and non-Aboriginal alike. That may be the most practical and effective route to ensure that Aboriginal rights and traditions are sustained and protected and that resources are managed in an equitable way now and in the future. Validating nationhood through a form of government that involves responsibility for non-Aboriginal people is seen by some Aboriginal people as consistent with the goals of self-government and the traditional understanding of sharing and interdependency. Finally, some Aboriginal people, especially those living among non-Aboriginal people in an urban or rural setting, will focus their aspirations on acquiring government powers and authority over education, health and social services.

Our approach in this chapter is to consider three primary models of Aboriginal government. These models represent hypothetical forms of government to the extent that they do not exist fully today, although many aspects of the models can be found in existing and traditional Aboriginal forms of government. They are not intended as ideals or prescriptions but rather as one source of guidance from which Aboriginal peoples will choose their direction. We hope that these

models will also demonstrate to non-Aboriginal Canadians that Aboriginal self-government and self-determination are realistic and workable goals.

For purposes of our discussion, the three broad models of Aboriginal government are the nation government model, the public government model, and the community of interest government model. In briefly describing each approach, we consider the following general features:

• lands and territory

• citizenship

• jurisdiction and powers

• internal government organization

• urban extensions of Aboriginal nation government

• associated models of inter-Aboriginal government organization.

There is great variation in how Aboriginal people see themselves as peoples and as nations. The *Indian Act* and associated government policies have had a significant and, in our view, detrimental impact on their consciousness as nations. The act has caused the breakup of Indian nations and the diffusion of their power. Consequently, some people identify their *Indian Act* band as a nation and refer to them as First Nations or nations. Others identify the nation on the basis of a broader traditional affiliation, for example, Cree, Mohawk, Gitksan, Kwakwa ka'wakw and Dene. Some First Nations refer to themselves as treaty nations because they have made treaties with the Crown.

Inuit frequently associate their identity with self-determination, rather than nationhood, although clearly they have a national identity and consciousness. They have strong regional alliances and affiliations with Inuvialuit of the western Northwest Territories, Inuit of Nunavut, Nunavik and Quebec, and Labrador Inuit. These regional alliances have an impact on organization for the purposes of government.

A strong national identity has been articulated by the Métis people of western Canada and has guided the development of Métis Nation political organizations at the community, provincial, territorial and national levels. Métis people in

eastern Canada are organized less cohesively around the model of a single nation.

Among the Aboriginal nations of Canada, factors that will influence the organization of Aboriginal nation governments include

• historical treaty and other relations,

• cultural characteristics,

• social organization,

• economic situation,

• political culture, philosophy and traditions of political organization,

• geographic features,

• territorial size and existing land base,

• degree of contiguity in territory,

• population size and concentration or distribution of population, and

• existing provincial and territorial boundaries.

In testimony and submissions to the Commission some Aboriginal people indicated support for governance relationships that do not take as their starting point Aboriginal-only forms of government. For example, Inuit have actively pursued the public government model, a form of government in which all the residents of a particular region or territory would be represented. For these and other Aboriginal peoples, the most practical route to achieving greater autonomy and effective control over their lives is through leadership and authority in Aboriginal public governments that already exist or may be established within their traditional territory.[232]

Nationhood can be validated and Aboriginal rights and traditions protected through effective control over traditional lands and resources within a defined territory. At the same time, traditional understandings of interdependency and sharing can be realized through a public government's efforts to represent the

interests of all residents. Within a defined geographic area, a public form of government can accommodate and contribute to the realization of Aboriginal objectives with respect to

• self-determination;

• increased Aboriginal control over decision making, management and use of traditional lands and resources; and

• governments that are responsive to the people served; have the legal authority and capacity to define and meet local and regional needs; and contribute to self-sufficiency through the development of local and regional lands, resources and economies.

The most apparent distinction between the public government model and other forms of Aboriginal government is the make-up of its citizenry. Aboriginal public governments would represent all residents within a defined territory, whether or not they are Aboriginal. Like other Canadian governments, Aboriginal public governments would be accountable to everyone who is subject to the exercise of their government authority. Aboriginal public governments would differ from non-Aboriginal Canadian governments in that they could accommodate and reflect Aboriginal cultures, traditions and values in all aspects of government. They could have powers that are different from those of comparable non-Aboriginal governments. For example, a regional Aboriginal public government within a province or territory could have jurisdiction in matters normally under the jurisdiction of a provincial government.

In practice, the nature of an Aboriginal government will be determined by, among other things,

• the size of the territory in which the Aboriginal majority exists;

• whether the majority includes one or more Aboriginal peoples or nations;

• whether the public government will be the only government in the territory or will co-exist with other Aboriginal governments instituted on the nation model; and

• the province or territory in which it will operate, which must pass enabling legislation.

We anticipate that Aboriginal public government might assume a variety of forms. Some of these are already emerging, including

• a public government of a northern territory: Nunavut in the eastern Arctic;

• a regional public government of a northern territory: the proposed western Arctic regional government in the Beaufort-Delta region;

• a regional public government in a province: Nunavik in northern Quebec; and

• a community or regional public government in part of a province: resulting from the merging of band and municipal governments or the enhancement of municipal governments serving predominantly Métis communities.

The community of interest model of Aboriginal government is based on the idea that Aboriginal people with ties to different nations, who share common needs and interests arising out of their aboriginality, may associate voluntarily for a limited set of governing purposes. Community of interest governments may evolve from existing institutions currently providing services to non-land-based Aboriginal people, particularly in urban areas. They will differ from existing institutions, however, because of more secure forms of funding than the short-term, project-dependent funding of existing institutions. While services are an important component of the model, these governments and their associated structures and institutions also could assume gradually a broader range of government features and functions.

As with the other two models, several factors will shape the precise form of Aboriginal community of interest governments. These include

• the size of the Aboriginal population and whether the population is concentrated in a particular area,

• urban or rural location, and

• extent of government activities.

While we believe that this is a workable model, certain factors could constrain the viability of community of interest governments or favour alternative forms of government. These factors include

• the need for these governments to be empowered under authority of the federal or provincial governments or by an Aboriginal nation government;

• population thresholds;

• whether economies of scale can be realized in program and service delivery; and

• the presence of other Aboriginal, notably nation-based, governments and initiatives.

The community of interest model is potentially applicable in either an urban or a rural context. However, we believe that it is more likely to be implemented by urban Aboriginal communities of interest. (Details on the urban community of interest model are provided in Volume 4, Chapter 7.)

Two features — the nature of membership and the relationship to a land base — distinguish this model from other forms of Aboriginal government. First, community of interest governments would be formed by and for Aboriginal people from many nations, and membership would be based on individual choice. Aboriginal community of interest governments would be accountable to these members. Second, although access to and ownership of a land base is a possibility, it is not a distinguishing characteristic of the community of interest model. For example, an Aboriginal community of interest government may own a land base or have access to a land base for cultural purposes, but it will not be organized primarily for governance purposes on that land base, nor will its members be resident or be concentrated on that land base.

Aboriginal Nation Government

The nation government model is identified by the following key characteristics:

• an identifiable land and territorial base consisting of the nation's own lands and resources (Category I lands) as well as parts of its traditional, treaty and land-use areas (Category II lands), which may be shared with non-Aboriginal governments under co-jurisdiction or co-management arrangements;

• citizenship in the nation as a whole;

• the presence of non-Aboriginal residents on the nation's Category I lands and the protection of their rights;

• the exercise of government powers and authority (for example, law making, administration and interpretation) in a comprehensive range of jurisdictions and, depending on the internal structure of the nation government, possibly by units of government at community, regional or tribal levels;

• the possibility of one or more units of government within the nation, organized centrally or federally;

• internal government procedures that vary from one nation to another and that build upon a nation's traditions;

• the possibility of urban components or extensions of nation government, including extra-territorial jurisdiction and urban institutions; and

• the possibility of relationships with other Aboriginal governments through inter-nation associations such as confederacies, treaty associations and provincial or pan-provincial associations.

Aboriginal community of interest governments are also distinguished from other models in that they exercise a more limited range of powers. For example, Aboriginal people living in a city may come together strictly for the provision of primary or secondary education or other such services.

Treaty Nation Jurisdiction over Treaty Territory

The Nishnawbe-Aski Nation (NAN) and its member First Nations provide an example of how treaty relationships, as they affect traditional territories currently shared with non-Aboriginal governments and peoples, and regimes of co-jurisdiction and co-management, might be implemented.

NAN wants to engage in negotiations with Canada and the province of Ontario to clarify how jurisdiction and legislative authority will be exercised regarding the traditional and customary lands and resources affected by Treaty 5 and Treaty 9. Through the draft "Framework

Agreement on Land, Resources and the Environment" (August 1993) NAN has proposed establishing

• institutions for land and resource management (some would be exclusively First Nation, some might be created to facilitate sharing in the management of lands and resources with Ontario and Canada),

• Nishnawbe-Aski principles and values in the use and care of traditional lands and resources,

• First Nation consent to any development activities within their traditional territories, and

• dispute resolution mechanisms to regulate the exercise of authority by First Nations and other governments within the territory.

Source: Nishnawbe-Aski Nation, "Intervention Report to the Royal Commission on Aboriginal Peoples" (1993), Annex L, Draft Framework Agreement on Lands, Resources and the Environment.

Model 1: The nation model

The nation model of Aboriginal government includes aspects of lands and territory, citizenship, jurisdiction, forms of internal organization, and associated models of inter-Aboriginal government organization.

Lands and territory

In most cases an Aboriginal nation's relationship with a land and resource base would originate from its concept of traditional territory. A nation would have an identifiable land base composed of the nation's own Aboriginal lands and resources (Category I lands) and parts of the nation's traditional territories.[233]

An Aboriginal nation's own land and resource base would sustain full rights of ownership as well as beneficial use and enjoyment by its citizens. Aboriginal governments would exercise core jurisdiction in most matters affecting their lands, including resource management and allocation, and the lands would be administered in accord with a nation's traditions of tenure and governance. Only an Aboriginal nation would be able to grant rights and interests in these lands and resources. Parts of a nation's traditional territories (Category II lands)

are shared with non-Aboriginal governments, and the relationship between Crown and Aboriginal rights and interests is negotiated and reflected in co-management, co-jurisdiction or similar arrangements.

Citizenship Rules Based on Nation Acceptance

The constitution proposed by the Native Council of Nova Scotia for the Mi'kmaq Commonwealth would establish a nation-type government for reserve and non-land-based Mi'kmaq peoples. It contains provisions relating to both citizenship and associated fundamental rights. While self-identification is an important criterion, the constitution also provides for developing a citizenship law incorporating other guiding criteria, including parentage, location of birth, residency, adoption, affiliation and community acceptance. Citizenship in other Indian nations must be relinquished if one is to become a citizen in the commonwealth, and the Grand Council of the Mi'kmaq would have authority to judge individual citizenship cases.

Source: Native Council of Nova Scotia, "Mawiwo'kutinej: Let's Talk Together (The Off-Reserve Aboriginal Peoples Perspective)", brief submitted to RCAP (1993).

Citizenship

Aboriginal people may enjoy a form of dual citizenship in their Aboriginal nation and Canada. Citizenship and eligibility for citizenship in a nation would be based on criteria set by the nation's constitution, citizenship law or code, cultural norms, unwritten customs or conventions. The criteria could be applied nation-wide or adapted at the community level or other levels. Persons could be considered eligible for citizenship on the basis of, among other things,

- community acceptance,
- self-identification,
- parentage or ancestry,
- birthplace,
- adoption,

• marriage to a citizen,

• cultural or linguistic affiliation, and

• residence.

Rights Protection Instruments

The Teslin Tlingit constitution provides that all citizens enjoy rights guaranteed in the Canadian constitution, the *Canadian Charter of Rights and Freedoms*, as well as other rights set out in the constitution, including the right to pursue a way of life that promotes Tlingit language, culture, heritage and material well-being. In exercising law-making powers, the Teslin Tlingit government must observe certain norms and work within parameters designed to protect the individual and collective rights of the Teslin Tlingit Nation.

Source: Teslin Tlingit First Nation, "Aboriginal Self-Government and Judicial Systems", research study prepared for RCAP (1995).

As is the case elsewhere, citizens of an Aboriginal nation may also identify with social or political groups within the nation. This identification may be based on clan or family membership or residence in a community or urban area. Some of these other affiliations will have implications for governance and may be reflected in the nation's political structures. Likewise sub-groups, particularly communities within the nation, may have some role in citizenship determination.

The rules governing citizenship would likely incorporate provisions for eligibility, application, enrolment, local community input, and appeal procedures and related structures. The nation's constitution or citizenship law would most likely also identify the circumstances under which the nation would revoke citizenship, whether the nation would permit citizenship in another Aboriginal nation, and associated implications for access to rights and benefits.

In our analysis of citizenship we concluded that a nation's citizenship rules must not discriminate against individuals on the basis of sex, nor can they make ancestry (or blood quantum) a general prerequisite in assessing applications.

Citizenship confers rights, entitlements and benefits upon individuals as well as responsibilities. These rights include civil, democratic and political rights (for example, the right to participate in the selection of leaders), cultural and economic rights (such as the right to pursue traditional economic activities), and rights to social entitlements, such as those flowing from treaties and those in the areas of education, health care, and so on.

Different rights and responsibilities may apply to citizens and non-citizens on Aboriginal lands. For example, cultural rights, or rights to carry on certain economic activities on the nation's lands, may differ for citizens and non-Aboriginal residents on those lands. However, all residents, regardless of citizenship, should have some means of participating in the decision making of Aboriginal governments.

Aboriginal governments may establish charters or other instruments to protect individuals and individual rights from the abusive exercise of power by government. The nation's charter could be an important mechanism to protect, promote and guarantee the fundamental rights and values shared by the people.

The *Canadian Charter of Rights and Freedoms* would protect individual rights as well. However, it would be interpreted and applied flexibly to take into account the particular culture, values, traditions and philosophies of Aboriginal people. Nation governments would have the power to pass notwithstanding clauses under section 33 of the Charter, as explained earlier in this chapter.

Jurisdiction and powers

Aboriginal nation governments will exercise comprehensive government powers and authority in a variety of areas of jurisdiction. They will exercise these powers in respect of all persons resident on their territory. As discussed earlier in this chapter, in some instances these matters will fall within the core area of a nation's jurisdiction and in others within the periphery, thus requiring negotiation and agreement with other governments.

The nature of Aboriginal nation government jurisdiction and its applicability to territory and persons is properly the subject of discussion or negotiation in treaty processes. In general, Aboriginal nations can be expected to exercise jurisdiction of three types:

1. Aboriginal nations exercise paramount authority in core areas of jurisdiction

on Category I lands. These matters

• are of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity,

• do not have a major impact on adjacent jurisdictions, and

• are not otherwise the object of transcendent federal or provincial concern.

2. Aboriginal nations exercise negotiated jurisdiction in subject areas falling within the periphery of their jurisdiction on Category I lands, and negotiated authority in regard to Category II lands. In most instances, on Category II shared lands, nation government laws as they affect lands, resources and the nation's citizens would be determined by negotiated co-jurisdictional agreements. Short of an agreement, the rules governing paramountcy in cases of conflict would be guided by the test set out in the *Sparrow* decision.

3. Jurisdiction would be exercisable in a limited way with respect to citizens living outside Category I and Category II lands, including in urban areas. Again, the exercise of this authority in most instances would need to be negotiated and would be subject to voluntary acceptance by those affected. Ideally, negotiated agreements would clarify situations where power is exercised by both Aboriginal nation governments and non-Aboriginal governments, and normal rules of paramountcy would apply. Agreements would mitigate conflicts and uncertainty by setting out how federal and provincial laws will interact with the laws of an Aboriginal nation government in areas of co-jurisdiction. These agreements may take the form of treaties, co-jurisdictional or co-management agreements, protocols and other intergovernmental arrangements.

In each area of government responsibility, an Aboriginal nation would have powers and authorities in respect of law making (legislative); administration and policy making (executive); and interpretation, application and enforcement of law (judicial).

Law-making powers and authorities normally rest with legislative bodies. They include the development, passage, amendment and repeal of laws, regulations, standards and other legal instruments. These bodies may resemble historical structures, existing structures (a council) or government structures common to other Canadian governments (such as a legislative assembly).The authority to design and deliver programs and services and to establish agencies and other

structures for government purposes will likely rest with institutions assigned to administer the day-to-day business of government. These could include executive offices held by individuals (for example, chiefs) or executive bodies (such as councils).

Judicial powers and authority associated with the interpretation, application and enforcement of law, including policing, sentencing, restitution and healing, will rest with the individuals and institutions that the nation entrusts with providing this counsel and wisdom. Elders and women are likely to play a key role in these areas.[234]

Core Jurisdiction

In most of the documentation it has produced since the 1970s, the Federation of Saskatchewan Indian Nations has focused on the powers and jurisdiction of First Nations governments. Exclusive authority in respect of First Nations lands and citizens is asserted in most jurisdictional areas, for example, administration of justice, education, trade and commerce, lands and resources, gaming, taxation, social development, culture and languages, housing, family services and child welfare, hunting, fishing and trapping, citizenship and property and civil rights.

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

An RCAP case study involving Kahnawake revealed areas in which power would be exercised *exclusively* by Mohawk government and areas in which power might be exercised concurrently or on a shared basis with non-Mohawk governments. Specifically, there was a preference for *exclusive* control in areas such as lands and resources, citizenship, education, infrastructure, justice, taxation and environment, but also some support for power sharing in these areas with other governments (mainly involving administrative and service delivery by these other governments).

Source: Gerald R. Alfred, "The Meaning of Self-Government in Kahnawake", research study prepared for RCAP (1994).

Internal government organization

Units of government

Given their diversity, nation governments will differ significantly in terms of how they are organized internally for purposes of self-government. Within a nation there may be several units of government, which might include nation or sub-nation units, such as tribes, regions, communities, families or clans. Nations with large and dispersed populations or large traditional territories may include all of these units of government. Smaller nations may operate with only one or two unit levels: community and nation.Aboriginal nations may organize their units of government on a centralized or federal basis.

Co-Jurisdiction

Most Aboriginal governments today embrace the concept of shared jurisdiction with non-Aboriginal governments, but call for agreements and protocols to set out clearly how the exercise of government powers within each government's respective sphere of jurisdiction will be co-ordinated.

The Siksika Nation anticipates concurrent jurisdiction with other governments. In respect of the province, the management and co-ordination of activities in areas of concurrent jurisdiction will be achieved through a negotiated protocol agreement. Areas where concurrent jurisdiction is to be negotiated include management of lands and resources, environment, traffic and transportation, public works, justice, education, health, and social services. The Siksika Nation emphasizes that it possesses inherent powers in these areas in respect of Siksika Nation lands and peoples. The purpose of negotiations pursuant to the protocol agreement is to establish how provincial powers in these jurisdiction areas are to be practically co-ordinated with Siksika government.

Source: Andrew Bear Robe, "The Historical, Legal and Current Basis for Siksika Nation Governance, Including Its Future Possibilities Within Canada", research study prepared for RCAP (1995).

Under a centralized form of organization, power and authority, including the power to establish community or local governments and assign responsibilities to them, would be concentrated in a single unit at the nation level. A centralized form of organization would likely be least appropriate for Aboriginal nations whose traditional form of political organization is decentralized and informal, or

for nations having a widely dispersed and large population. However, it may be appropriate for nations with a concentrated population and land base and a tradition of strong centralized government institutions.

Nation Government Jurisdiction in Traditional Territories

The United Chiefs and Councils of Manitoulin view the regulation of fish and wildlife resource use by their own citizens within traditional harvesting areas as an exercise of governance responsibility and stewardship of the resources. They do not advocate exclusive use and management. Under their fish and wildlife initiative UCCM:

• has developed regulations that set out principles for responsible resource use as well as harvesting seasons, methods and procedures and harvester eligibility criteria,

• has established compliance procedures which emphasize prevention, responsibility and enforcement through community sanction, and

• plans to employ conservation officers and engage in conservation projects, monitoring and habitat management.

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

A federal form of government organization would in most cases involve two or more units of government, a nation unit and either community, regional or tribal units. Power would be shared by the units of government. The flexibility of the federal form could accommodate the organizational and administrative needs of Aboriginal nations with large or small, dispersed or concentrated populations and land bases.

Aboriginal nations with large and widely dispersed populations or land bases, and clearly identifiable sub-nation political communities, may wish to adopt federal structures that include political units organized at the provincial or territorial level.

Metis Nation of Alberta Structures

As proposed by the Metis Nation of Alberta, Métis government would include several levels: community, regional/zone, and provincial. Community constituencies will elect representatives to a Métis provincial-level parliament or legislature.

A provincial-level treasury board composed of an equal number of trustees (who are also legislators) from each of the six regions or zones, appointed by constituency representatives from within that zone, will make budget decisions.

At the executive level a Metis Nation of Alberta president will be elected at large by all Métis people in the province, and will select cabinet members from among the trustees of the treasury board. These members will assume portfolio responsibilities for Metis Nation administrative departments and ministries.

A Métis senate, made up of Métis elders, will have advisory powers and will review all matters before parliament. The senate will resolve disputes between various government structures and officials (for example, between parliament and the president).

Source: Metis Nation of Alberta Association, "Metis Nation of Alberta Association Final Report", research study prepared for RCAP (1995).

Allocation of jurisdiction through the nation

Jurisdiction, or specific power to deal with certain matters, may be allocated to different levels of government within the nation. For example, the authority to deliver services and to enforce regulations or certain laws may appropriately be exercised by community-level governments within the nation, while the passage and interpretation of laws for those same matters may be exercised more appropriately at the nation level. Some powers and authority may reside exclusively at the nation level, for example, the authority to conduct intergovernmental relations. Other areas, such as the allocation of interests in local lands and resources, may best be administered at the community level by the people who are most affected by decisions.

The allocation of jurisdictional responsibilities among community (including

family/clan), regional, tribal and nation level units of government ideally would be reflected in a nation's constitution. The centralization or decentralization of power would depend on the traditions of the nation as well as the size and distribution of its population. The allocation of jurisdictional authority to government structures outside the nation (such as a confederacy) is discussed later in the chapter.

Administrative Boards

The Windigo Tribal Council proposes joint First Nation community action through a significantly empowered regional government (Windigo Executive Council) and the development of legislative, policy and administrative capacities on a sector-specific basis.

In order to achieve a separation between political and administrative levels, an executive council, composed of elected chiefs and councillors of individual First Nation communities and an administration and management board, would be established. This board, on a sector-specific basis, would negotiate the takeover or establishment of new programs and services. Within each sector, other management structures, including boards and technical committees, would be established at First Nation, tribal council, and inter-governmental levels with specific responsibility for the development, administration and management of sectoral activities.

Source: Windigo First Nations Council, "Proposal for Regional Governance in the Windigo First Nations Area", brief submitted to RCAP (1993).

Legislative, executive and judicial branches

Aboriginal nation governments will exercise legislative, executive and judicial powers and authority for the purpose of making, implementing, interpreting and enforcing laws. A nation government's constitution would establish institutions to carry out these activities. They may reflect the traditional forms of organization or contemporary adaptations. Examples of legislative structures include councils, assemblies, congresses, senates, elders councils and clan leaders. Examples of executive structures include chiefs, councils, chairpersons and presidents. Examples of judicial structures include justice circles, judicial councils, peacemaker courts, healers and tribunals.