government. For example, community chiefs may also sit as representatives at national or regional-level councils or assemblies.

Decision-making processes will likely differ among nations and among the various units of government within nations. Decision making at the community level may be structured to achieve the broad participation of all community members, including families, clans, elders, youth and women. Community decision-making processes may be vote-based or consensus-based, or may be rooted in a combination of traditional and non-traditional methods. Some decisions may be made by a community government structure, such as a council, while other decisions, especially in matters of broad community interest, or affecting collective interests and well-being (such as those that affect a nation's lands and resources), may require the consideration of the whole community. On a day-to-day basis, decision making at regional, tribal and nation levels would likely be carried out directly by representative leaders and would be vote- or consensus-based.

Accountability of Aboriginal nation government will be determined primarily by processes rather than by structures and institutions. Such processes may mirror Aboriginal governing traditions. They may also replicate accountability measures common to Canadian governments. For example, these might include

• financial and operational reporting regimes (possibly based on statutes);

• clear and transparent administrative policies, procedures and operations (including administrative decision-making procedures);

• a code of ethics for public officials;

• conflict of interest laws or guidelines;

• access to information procedures;

• the development of communication systems to keep citizens informed; and

• the establishment of procedures to deal with individual or community grievances.

Constitution

The internal structure and authority of a nation government and its various units of government would be reflected in a constitution, charter, law(s) and in unwritten conventions that reflect the nation's cultural norms and social and traditional values. The elements of such constitutions could include

• a statement of values, beliefs, principles;

• a description of units or levels of government and associated legislative, executive and judicial structures, written procedures (for example, for selecting officials, leaders and representatives to decision-making bodies), and definitions of jurisdictions, powers and authority;

• criteria, and application and appeal procedures for citizenship;

• provisions regarding lands, resources and the environment;

• individual and collective rights protections; and

• procedures for amending the constitution.

Urban extensions of Aboriginal nation government

The authority of an Aboriginal nation government authority has both a territorial and a communal character (see the section on visions of governance earlier in the chapter for an elaboration of these terms). Its exercise can be in respect of a particular territory (for example, an Aboriginal land base) or in respect of persons (for example, citizens, whether or not they live on Aboriginal lands). Aboriginal nation governments may also extend their government activities and authority to their

Teslin Tlingit Government

The Teslin Tlingit Nation in Yukon is restoring its traditional system of government, particularly in the area of leadership and decision making, with some contemporary adaptations. Teslin Tlingit government is clan-based. The five Tlingit clans determine who is a member, select leaders and assume government-type responsibilities in respect of clan members.

The Teslin Tlingit are building upon the family at the level of the nation through the establishment of several branches of government, including a general council (legislative branch), executive council, an elders council and a justice council. While these councils are not exact duplicates of traditional Tlingit institutions, they do reflect structurally the tradition of maintaining balance within the community through the five clans. For example, the general council comprises five representatives from each clan. Decision making is by consensus, but requires a quorum including at least three members from each clan. Similarly, each clan leader has a seat on the executive council, and the justice council comprises the five clan leaders. Each clan has its own court structure called a “peacemaker court”.

Source: Teslin Tlingit First Nation, “Aboriginal Self-Government and Judicial Systems”, research study prepared for RCAP (1995).

citizens living in urban areas. In all cases, however, urban Aboriginal citizens’ participation in such governance initiatives will be voluntary, based on individual choice and consent. Urban extensions of an Aboriginal nation government might take the form of

• extra-territorial jurisdiction,

• host nation,

• treaty nation government in urban areas, or

• Métis Nation government in urban areas.

Each of these approaches is considered in greater detail in Volume 4, Chapter 7.

Accountability Processes

For Shubenacadie (Indian Brook), a First Nation community in Nova Scotia, the accountability of government institutions, leaders and officials is important. Accountability is defined in terms of council's responsiveness to and operation for the benefit of community members.

Suggestions for improving band council accountability made by community members are pragmatic. They suggest various measures to be taken by the community and its leadership through a process of community review and adjustment. For example, suggestions include open council meetings, improved systems for communicating community concerns and council decisions such as newsletters, home visits by political leaders, and increased involvement of members through committee structures.

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

Extra-territorial jurisdiction

The extra-territorial jurisdiction approach will likely be of greatest interest to Aboriginal nation governments that wish to extend government activities to urban citizens living outside the nation's Category I lands. They might extend services through urban service delivery programs, agencies or institutions established and operated by the nation or by the nation's urban citizens under the nation government's authority. Another possibility is to establish separate urban political institutions (for example, urban councils) or to represent the urban constituency in the nation's main political structures (for example, through urban councillors).

Extra-Territorial Jurisdiction

Precedents for the exercise of extra-territorial jurisdiction exist in the Yukon. While not confined to urban areas, First Nations, pursuant to their individual self-government agreements, may enact laws in respect of their citizens for

• programs and services for spiritual and cultural beliefs and practices;

• provision of programs and services in Aboriginal languages;

• aspects of health care, social and welfare services;

• training programs;

• most aspects of care, custody, adoption and placement of the First Nation's children;

• marriage; and

• dispute resolution services.

See, for example, "First Nation of Nacho Nyak Dun Final Agreement between the Government of Canada, the First Nation of Nacho Nyak Dun and the Government of the Yukon", 1992.

A nation could extend the application of the nation's laws to urban residents who choose to be subject to them, in matters described in a treaty or self-government agreement (for example, child welfare, marriage, health, education, language and culture). Finally, a nation could contract with other urban service delivery agencies and institutions on behalf of urban citizens to have these agencies provide programs and services to the nation's citizens.

Host nation

Acting as a host nation, Aboriginal nations would have rights and responsibilities having to do with citizens of other Aboriginal nations living in urban areas within the traditional territories of the nation who choose to participate in the host nation's urban governance activities. In an urban area, an Aboriginal nation government would most likely confine its activities as host

nation to program and service delivery.

Treaty nation government

Treaty nations may singly or jointly establish centres in urban areas to deliver services and treaty entitlements. The authority to deliver programs and services to treaty people in urban areas would be delegated by participating treaty nations to the centres. These institutions need not be empowered by a particular Aboriginal nation government but could be a common governance concern of several treaty nations — whether or not they are signatories of the same treaties.

Historical and Contemporary Confederacies

The Haudenosaunee Confederacy provides an example of a traditional confederacy. It incorporates five distinctive though linguistically related nations of people (the Mohawk, Onondaga, Oneida, Cayuga and Seneca nations). The Covenant Circle of wampum represents the 50 chiefs *(rotiianeson)* of the five nations and the peace, balance and security that are achieved for all through the mechanism of the confederacy.

The Nishnawbe Aski Nation (NAN) embodies a newer confederal arrangement. It involves the participation of Cree, Ojibwa and Oji-Cree First Nation communities in northern Ontario. NAN has developed an extensive infrastructure for program and service delivery in areas such as education, justice and health. It has also established political structures to oversee all activities jointly undertaken by the members.

Métis Nation government in urban areas

The Métis Nation has advocated the development and operation of urban institutions to serve urban Métis residents. Some Métis Nation government proposals anticipate a local or community level of Métis government integrated with provincial, regional and national Métis government bodies. This model of local government would include urban areas with Métis populations. Urban Métis locals, as governments, would have responsibilities in areas such as education, training, economic development, social services and housing. They would deliver programs and services organized at the provincial or national level of the Métis Nation or their own programs.

Aboriginal Public Government

The public government model expresses self-determination through an Aboriginal-controlled public government rather than an Aboriginal-exclusive form of self-government. It is identified by the following key characteristics:

• government over a geographic territory, coinciding with an existing or new government administrative jurisdiction, a treaty area or a comprehensive claims settlement area;

• a constituency of residents that includes Aboriginal persons possessing Aboriginal and treaty rights in Canada, as well as non-Aboriginal people;

• jurisdiction in areas considered important by residents and that may include a mix of comprehensive powers and authority;

• the establishment of legislative, executive and judicial structures of government and internal government procedures broadly similar to those of other Canadian governments, but that may be adapted to reflect Aboriginal customs, culture and traditions;

• the possibility of relationships with other units of government operating within a public government framework;

• the possibility of relationships with other Aboriginal governments; and

• the use of internal government procedures broadly similar to those of other Canadian governments, adapted to reflect Aboriginal traditions

Associated models of inter-Aboriginal government organization

Several nations may join together to establish a confederacy or similar type of political alliance or supra-nation government organization. These may reflect historical alliances (for example, the Haudenosaunee, Wabanaki or Blackfoot confederacies) or new alliances that take into account relationships that have evolved between Aboriginal peoples in more recent years. Confederacies may be established to

• maintain treaty relations with federal and provincial governments;

• further political purposes, such as advocacy;

• carry out intergovernmental tasks such as regulating land and resource use in shared traditional territories (Category II lands); and

• carry out administrative tasks, such as program and service delivery.

Some nations may be too small to sustain a broad range of government activities, especially in program and service delivery. More effective service delivery may be achieved when several nations pool their resources through co-operative intergovernmental arrangements.

Administration of Lands and Resources

Inuit proposals for Nunavik, a regional public government in northern Quebec, would see the establishment of administrative departments (such as the department of environment, lands and resources proposed in the Nunavik constitution) to implement Nunavik government legislation and policy.

Government action would strongly reflect Inuit relationships with their traditional land and resource base, and Inuit rights would ultimately be protected through a Nunavik charter. For example, this charter would recognize Inuit priorities in harvesting wildlife subject only to principles of conservation.

Source: Marc Malone and Carole Lévesque, “Nunavik Government”, research study prepared for RCAP (1994); see also Nunavik Constitutional Committee, “Constitution of Nunavik”, 1991.

Structures

Nations with continuing associations may establish joint political and administrative structures, including councils, assemblies, administrative agencies, boards or institutions. For example, a group of nations, through a confederal organization, may set up a post-secondary education facility.

Jurisdiction

Based on our opinion that the right of self-determination and the right of self-government reside primarily with nations, we believe a confederacy would need to be empowered by participating Aboriginal nations. They would have to delegate or transfer to the confederacy and its political and administrative institutions jurisdiction and associated powers and authority. Jurisdiction and associated powers to be delegated to a confederacy may be limited (for example, the administration of selected programs) or comprehensive (for example, making and enforcing laws in a range of subject matters including education, health, taxation, lands and resources).

Model 2: The public government model

The public government model of Aboriginal government includes aspects of lands and territory, citizenship, jurisdiction, forms of internal organization, and the relationship with other Aboriginal governments.

Lands and territory

Public governments exercise jurisdiction over a geographically defined territory. The territorial boundaries of the public government may coincide with or encompass

• an existing administrative territory such as a region or northern territory, a northern regional municipality, improvement or similar administrative district, a municipality, town, hamlet or village;

• a treaty area or comprehensive claims agreement settlement area; or

• the traditional territory of an Aboriginal nation.

Rights Protections in a Public Government Context

Reporting in 1993, the Northwest Territories Commission for Constitutional Development (the Bourque commission) proposed a constitution for a new western territory, Nunavut, incorporating public, Aboriginal and mixed governments. The commission recommended affirmation of the rights and freedoms set out in the *Canadian Charter of Rights and Freedoms*. It also recommended recognition and protection of the rights of First Peoples, including the inherent right of self-government; the status of Aboriginal languages as official languages; the right of Aboriginal First Nations to opt out of a new western territory and pursue direct relationships with the federal government; and affirmation, recognition and protection of treaty rights, Métis rights and the rights of First Nations that have already entered into modern land claims agreements.

Source: Linda Starke, *Signs of Hope: Working Towards Our Common Future* (Oxford: Oxford University Press, 1990).

Within the territorial boundaries of the public government, land is likely to be organized according to the three categories of land referred to earlier. (These categories are described further in Chapter 4.)

Category I lands are Aboriginal lands held and controlled by the Aboriginal nation or nations participating in the public government. Category II lands are shared lands encompassing parts of the traditional Aboriginal territories over which the Aboriginal public government will exercise jurisdiction shared with other Canadian governments and possibly with other Aboriginal nation governments in accordance with negotiated arrangements. Category III lands are Crown lands and privately held lands.

Treaties to be made between the Aboriginal peoples who reside in the territory and Canadian governments will deal with self-government, lands and resources, and federal or provincial legislation required to establish a public government. They will determine what jurisdictional regimes apply to the three categories of land within the public government's territory.

Regional Public Government Jurisdiction

A research study on Métis self-government in Saskatchewan suggested that Métis communities in the northern parts of the province may be in a position to exercise a range of government powers through a Métis-controlled regional public government. As proposed, the authority of this government might encompass provincial-type responsibilities; for example, lands and resource management, fire control, highways, health, education, justice and economic development.

Source: Clement Chartier for the Metis Family and Community Justice Services Inc., "Governance Study: Metis Self-Government in Saskatchewan", research study prepared for RCAP (1995).

The draft constitution of Nunavik proposes authority in areas normally within the purview of federal and provincial governments, including lands, education, environment, health and social services, public works, justice, language, offshore areas and external relations.

Source: Nunavik Constitutional Committee, "Constitution of Nunavik", 1991.

Constituency of residents

A public government would be organized to serve a constituency of residents, including Aboriginal and non-Aboriginal people who live within a defined territory. The Aboriginal residents may be from different Aboriginal nations and backgrounds.

The Aboriginal public government model differs from non-Aboriginal public governments in that the rights of residents may be differentiated to allow the Aboriginal majority to retain constitutionally protected Aboriginal and treaty rights, including the right of self-government. Aboriginal residents may have certain exclusive economic rights, for example, in renewable resource harvesting activities. Aboriginal residents may have the right to own, use, regulate and enjoy specific cultural property, and to promote and protect Aboriginal heritage, culture, language and traditions. Both Aboriginal and non-Aboriginal persons may have to prove they are residents to establish their eligibility to stand for government office or leadership positions.

Aboriginal or treaty rights that limit a public government's power may be reflected in a treaty, a comprehensive claims settlement or a similar agreement. Both shared and differentiated rights of Aboriginal and non-Aboriginal citizens would be set out in a constitution or laws of the public government.

The *Canadian Charter of Rights and Freedoms* and provincial charters or human rights codes, where appropriate, would apply to Aboriginal public governments. Charters may be developed to reflect Aboriginal values and the Aboriginal realities of public government, and to protect and promote the specific rights and interests of the Aboriginal residents.

Jurisdiction, powers and authority

Powers and authority in a variety of areas will be variously recognized, transferred, devolved or delegated to Aboriginal public governments by other Canadian governments. The jurisdiction of Aboriginal public governments will almost certainly differ from that of comparable non-Aboriginal governments. For example, local Aboriginal governments in some areas might have enhanced municipal jurisdiction to deal with provincial areas of jurisdiction (for example, lands and resources, environment, education, social affairs, administration of justice). Even some federal areas of jurisdiction (for example, migratory birds) might logically be dealt with by local and regional governments.

The objective is to ensure that the public government is sufficiently empowered to support Aboriginal peoples' aspirations in economic, cultural, social and political spheres, and to protect all residents' civil and political rights. The section on self-government identifies core areas of regional jurisdiction, as well as matters that might be considered to fall within the periphery of Aboriginal nation government jurisdiction. The types of jurisdiction that might be exercised by a local or community form of public government would have to be negotiated, and would be delegated by another government (for example, the Aboriginal, provincial or federal government). Aboriginal-controlled local public governments might be permitted to exercise authority different from that normally assigned to comparable municipal governments. For example, they might receive delegated authority to regulate certain hunting, fishing and trapping activities, subjects normally within the purview of the province.

Like Aboriginal nation governments, Aboriginal public governments can be expected to exercise the law-making, judicial and executive powers of government. The way these powers are exercised, and the structures that

administer them, can reflect Aboriginal traditions and cultures.

Internal government organization

Units of government

Aboriginal public governments may operate at community, regional or territorial levels. They may incorporate one or more units of government. The relationship between regional or territorial units differs according to whether the units are organized centrally or federally.

Under a centralized form of government, powers and authority, including the power to establish, empower and legislate in respect of other orders of government, may be concentrated in one central unit of government. This is the case, for example, in the newly established territory of Nunavut.[235] A centralized form can be implemented in a regional public government when there is a history of co-operative action among the communities and they decide to form a new government such as Nunavik in northern Quebec.

Federal Forms of Organization

The Bourque commission proposed a federal form of government organization for the western Northwest Territories. Two distinct levels of government, a district and central government, would coexist, each with its own constitutionally protected sphere of authority, law-making capacities and structures of government.

Source: Commission for Constitutional Development (the Bourque commission), "Phase I Report: Working Toward a Common Future" (Ottawa: Supply and Services, 1992).

Reflecting the principle of subsidiarity, proposals for a western Arctic district government encompassing Inuvialuit, Gwich'in and mixed Aboriginal/non-Aboriginal communities describe the relationship between regional and community levels of government as follows:

The proposed regional government will have no legislative powers in fact unless and until the communities, through representatives in the regional

assembly, wish to confer a given power upon the regional government. The legislation creating the regional government ... is simply enabling legislation to empower the regional assembly ... to legislate. Thus, the proposed new regional government should properly be considered as empowering communities.

Source: Inuvialuit Regional Corporation, “Inuvialuit Self-Government”, research study prepared for RCAP (1993).

Under a federal form of organization, two or more units of government, most likely regional and local governments, would coexist in the public government framework. Jurisdiction would be divided among them. Each level of government would be autonomous within its respective field of jurisdiction. This form of organization may be appropriate where communities want to exercise powers and authority in respect of specific matters, rather than have these rest with a regional or territorial government.

A public government may also be organized federally according to the principle of subsidiarity.[236] Under this arrangement, a regional public government might be set up and controlled by other participating governments, including community and Aboriginal nation governments. A regional government may have its own powers and authority, but for the most part it would exercise these at the discretion and according to the will of participating governments. Through the regional government, participating governments would pursue common interests and objectives, for example, in program and service delivery. Organization on the basis of subsidiarity works well where diverse communities benefit by participating in regional alliances for some but not all government purposes.

Allocation of jurisdiction among units of government

Like Aboriginal nation government, Aboriginal public governments may include more than one level of government. As with the Aboriginal nation government model, some authority may be exercised more appropriately at the community level (for example, program and service delivery), while others (such as program and service design, and law and policy making) may rest at regional or territorial levels of the public government.

Representation in the Western Arctic Regional Government

Proposals for this government anticipate a regional council composed of eleven councillors. One would be elected from each of the participating Inuvialuit and Gwich'in communities, two elected at large from each of the Beaufort and Delta areas, and a mayor would be elected at large from within the region.

Source: Western Arctic Regional Government, "Inuvialuit and Gwich'in Proposal for Reshaping Government in the Western Arctic", 1994.

Legislative, executive and judicial structures

Aboriginal public governments will include legislative, executive and judicial branches, although the form these take may be influenced by the traditions, values and cultures of the Aboriginal people who control the government. Public governments will also establish administrative agencies and institutions to carry out government business.

Internal government procedures

Internal procedures include rules for leadership selection, representation in government agencies and boards, decision making and other activities to enhance government accountability. Aboriginal public governments may wish to adopt the procedures of other Canadian public governments. They may also adapt procedures to reflect the culture, values and traditions of Aboriginal peoples participating in the public government.

Leaders most likely will be selected through electoral processes. Representatives to regional or territorial legislative bodies may be the leaders of community governments, or directly elected representatives. In some instances it may be desirable to have some combination of the two approaches. Members of executive bodies may be elected, for example, through at-large elections for specific offices, or selected from representatives to the legislative body.

Decision-making processes may reflect Aboriginal traditions of consensus or may be based on majority vote. Regional and territorial public governments may carry out government responsibilities and activities through sector-specific departments, ministries, public corporations and related government agencies.

Internal government procedures, administrative systems and the corporate culture of government institutions may reflect Aboriginal traditions, values and ways. Many of these adaptations might not be readily apparent on the surface of the government's operations. Aboriginal public governments would be accountable to all residents. The form of accountability, like that of nation-based governments, in part reflects traditional Aboriginal customs and in part measures common to mainstream Canadian government.

Constitution

Various features of an Aboriginal public government may be formally described in instruments such as the constitution (where specifically created), or in agreements (treaties, comprehensive claims agreements). Characteristics of the government may also be formalized in the legislation of another Canadian government that recognizes or enables the public government. For example, the *Nunavut Act* was passed by Parliament permitting the establishment and implementation of the Nunavut government and legislative assembly. The elements that would be included in each of these instruments are similar to those described for Aboriginal nation government constitutions.

Relationships with other Aboriginal governments

An Aboriginal public government might establish formal and working relationships with other Aboriginal governments in two situations: when the boundaries of an Aboriginal nation and an Aboriginal-controlled public government are contiguous, and when Aboriginal communities of interest operate in urban areas located in its territory. In either case, intergovernmental arrangements, including co-jurisdiction and co-management, might be established to deal with lands and resources, environmental matters and program and service delivery (for example, in the areas of health, education, justice, public services and infrastructure).

Model 3: The community of interest model

The community of interest model of Aboriginal government deals with aspects of lands and territory, citizenship, jurisdiction, forms of internal organization, and the relationship with other Aboriginal governments.

Lands and territory

Community of interest governments are not land-based or territorial. The model is not based on exercising jurisdiction over an Aboriginal land base or territory. However, such governments may operate within a clearly defined geographic area. This area may be determined by the dispersion or concentration of the government's membership, or by its location in a rural or urban area. For example, governments may operate within the boundaries of a city, town or municipality, while non-urban community of interest governments may operate province-wide or within a region defined by other means. The model is distinctive because it is not primarily land-based either in terms of the location of its membership or its jurisdiction. However, a community of interest government may own or hold land or be involved in land and resource co-management projects. (Co-management, as it pertains to urban communities of interest, is considered in Volume 4, Chapter 7.)

A land base or access to one may be acquired by a community of interest government for the following purposes:

• cultural, spiritual or educational

• institutions (including schools and offices)

• housing

• economic development and revenue generation.

Membership

Membership in the government is based on Aboriginal identity and voluntary affiliation. It consists of individuals (or families) of Aboriginal heritage, who may or may not have emotional, familial, cultural, political or other affiliations with a particular nation.

Such a government could have the authority to establish membership rules and to determine the criteria to assess a person's affiliation with an Aboriginal people. Individuals might be eligible for membership on the basis of

• self-identification as an Aboriginal person;

• claims of affiliation with, or citizenship in, an Aboriginal nation; or

• documented evidence of affiliation with an Aboriginal people or nation.

We believe that community of interest governments and nation governments should allow individuals to retain citizenship in an Aboriginal nation as well as being members of a community of interest government.

Depending on the structure and purpose of the government, membership rights and entitlements may be limited primarily to political rights (for example, the right to stand for executive office) and to social, economic and cultural rights (for example, entitlement to programs and services delivered by the government).

The *Canadian Charter of Rights and Freedoms* and provincial, territorial and appropriate Aboriginal charters would apply to community of interest governments.

Intergovernmental Arrangements

In a report to the Northwest Territories Constitutional Steering Committee in 1994, the Dogrib Treaty #11 Council described the type of arrangements that might exist between Dogrib and public government institutions. It suggested that such relations would take place in a framework of negotiated inter-governmental agreements, inter-delegation of powers and sharing of resources.

Source: Constitutional Development Steering Committee (N.w.T.), "Summaries of Member Group Research Reports" (Yellowknife, N.w.T.: Constitutional Development Steering Committee, 1994), p. 32.

Jurisdiction and powers

Unlike Aboriginal nation and public governments, a community of interest government would not exercise the right of self-government unless it is one of the communities of a specific Aboriginal nation, nor would it have comprehensive powers. Jurisdiction and authority will be limited and will be assigned, delegated or transferred by other Canadian and Aboriginal governments. Under such arrangements, authority may be transferred on a sector-specific basis.

Areas in which these governments are likely to be active include those with a

human focus, for example,

• education, culture and language,

• social services,

• child welfare,

• housing, and

• economic development.

Areas in which they are likely to have less involvement include those with an infrastructure or land base focus, for example lands, resources, environment, aspects of the economy (for example, wildlife management), public infrastructure and services, and communications.

Aboriginal community of interest governments may exercise their jurisdiction exclusively for their members in accordance with arrangements that result from a delegation of power. Alternatively, they may exercise devolved or delegated jurisdiction on behalf of other governments (federal, provincial, other Aboriginal) in specific service delivery sectors (for example, education, health). These areas would likely involve negotiated co-management arrangements. They also may deliver the programs and services of other governments under service delivery agreements.

Community of interest governments will engage primarily in by-law, rule and policy making, and exercise administrative powers and authority. It is also possible that a government would administer justice services and enforce its own by-laws, as well as the laws of other authorities, according to agreement.[237]

Internal government organization

Given that they fulfil a limited set of functions, these governments will not have all the organizational features of other governments. In general, the size of the government and its associated organization would correspond to the range of activities being undertaken. The more limited and focused its functions and activities, the less political and administrative infrastructure will be required.

Units of government

Community of interest governments likely will be organized with only one level. This form of organization is most appropriate for urban or non-urban areas where the participating Aboriginal population is fairly concentrated.

An organization of more than one level would be less common but appropriate for non-urban Aboriginal communities where the population is dispersed but can be organized in local or regional associations or communities. As discussed previously, two or more levels of government can be organized according to centralized or federal principles.

Structures of government

Community of interest governments for the most part would not have a full set of government structures. Executive and legislative functions likely will be fused in one body (for example, an elected executive council). However, if the community of interest is large enough, and government responsibilities are comprehensive, a legislative body may be established with representation drawn from local or regional associations or participating institutions and agencies. The executive could be a subset of the members of the legislative council, or could be separately selected.

Most community of interest governments will carry out their government responsibilities and activities through sector-specific agencies and institutions. These institutions may be fairly autonomous, enjoying an arm's-length relationship with political bodies and having their own boards. Alternatively, the government may elect to establish tight control over them and make them administrative branches of the government.

Internal government procedures

Internal government procedures relating to the selection of leaders, decision making and accountability would be set out in the government's constituting document.

Leadership selection and decision-making procedures would be determined by several factors, including the homogeneity of the population and the functions served by the government. As a non-traditional form of Aboriginal government, involving individuals from diverse Aboriginal traditions, leadership selection is

likely to be by election, although other methods should not be precluded. Decision making may be by majority vote or consensus. Accountability to the community served may be enhanced by procedures similar to those described for Aboriginal nation and public governments.

Constitution

The community that associates for purposes of pursuing this form of government will determine the scope, functions, structure, institutions and procedures of that government. These characteristics might be described in a constituting document, which would be recognized or given effect by another government's legislation, delegating powers to the community of interest government.

Aboriginal Community of Interest Government

The community of interest model of Aboriginal government is an Aboriginal-exclusive form of government of a group of Aboriginal people who associate voluntarily. It does not operate on the basis of the inherent right of self-government, but rather has self-governing authority delegated by an Aboriginal nation government or by federal or provincial governments. It has the following key characteristics:

• it operates within territorial limits but without jurisdiction over a territory or land base, although the acquisition of land is not precluded;

• its membership includes individuals of different Aboriginal heritage who choose to be members, and who may or may not pursue an affiliation with their home nations;

• its powers and authority have been delegated to it in a limited range of jurisdictions or matters concentrated on program and service delivery in areas of importance to its members;

• in most cases, it has a single level of government organization, with government operations conducted through institutions and agencies;

• it has some decision- or rule-making authority and a dispute-resolution mechanism; and

• it may act as a service delivery agency for other Aboriginal governments.

Relationships with other Aboriginal governments

Since Aboriginal community of interest governments will include individuals from different nations, relations with Aboriginal governments, especially nation governments, will be significant. Aspects of inter-Aboriginal government relations might include

• service delivery arrangements to provide services to citizens of the nation who reside in areas where the community of interest government operates;

• co-operation in program and service delivery in specific sectors (for example, post-secondary education, justice initiatives, and health facilities); and

• co-operation for the purpose of political advocacy and to pursue relations with Canadian governments at a municipal, provincial, territorial or national level.

Participation in Land and Resource Management

A community of interest government, in agreement with a provincial government, may have access to a specific area of unoccupied Crown land. It may operate educational and cultural centres or programs or manage resources on the land base (for example, forests). Access to the land and resource base would be permitted even if it is not being used primarily for residential purposes.

Community of interest governments will also enjoy significant relations with municipal governments, notably in urban areas. These will likely require establishing formal agreements for program and service delivery in certain sectors, and establishing associated structures (such as committees and councils) to facilitate communication and consultation. In Volume 4, Chapter 7, we explore some possibilities for reforming existing government authorities and structures in urban environments in consideration of Aboriginal perspectives and interests. Such reforms could also entail establishing joint structures to co-ordinate activities and agreements with urban Aboriginal community of interest governments.

Community of Interest Proposals

The Native Council of Prince Edward Island has proposed a non-urban variant of the community of interest model. Their draft recognition act provides for the registration of members in accordance with a by-law to be developed by the governing council. The by-law would require documented evidence of descent from one of the Aboriginal peoples of Canada defined in the *Constitution Act, 1982*. Associated "rights and obligations" of membership would be spelled out in a by-law.

Source: Native Council of Prince Edward Island, "Report on Self-Government Structures for Micmacs Living Off-Reserve in Prince Edward Island", brief submitted to RCAP (1993).

The Aboriginal Council of Winnipeg proposes to extend membership to Aboriginal people in the city of Winnipeg. As proposed in its draft constitution, an Aboriginal person is defined as "any person whose ancestral beginnings or roots can be traced, in full or in part, to the first inhabitants of North America".

Source: Linda Clarkson, "A Case Study of the Aboriginal Council of Winnipeg as an Inclusive Status-Blind Urban Political Representative Organization", research study prepared for RCAP (1994).

Conclusion

We have considered three models of Aboriginal governance that might be developed to meet the aspirations of Aboriginal peoples in Canada. These approaches do not exhaust the possibilities for Aboriginal self-government and self-determination.

The nation government model provides a largely autonomous form of governance for Aboriginal peoples who choose to exercise their collective self-determination around the principles of a nation with a defined citizenship base. However, nation government requires a certain amount of aggregation on the part of an Aboriginal people and associated communities, either to reinstate traditional nation affiliations and confederacies or to create new ones, and to sustain an adequate citizenship and resource base for the practical implementation of self-government.

Program and Service Delivery

Aboriginal peoples want more control over how programs and services are delivered to their citizens. Current co-management type regimes permit varying levels of Aboriginal involvement in design, development and delivery of programs and services. However, such involvement must occur within the parameters of provincial or federal government legislative or policy regimes.

In delivering programs to a mixed Aboriginal constituency, the New Brunswick Aboriginal Peoples Council envisions short-term co-management arrangements and the gradual assumption of greater government powers and self-sufficiency over the longer term.

As Aboriginal self-government becomes a reality, it will be the responsibility of the government to formulate, initiate and maintain programs and services for its constituency. The NBAPC, as such a government, would design programs to meet the needs of the membership and conduct objective research. Program design and delivery would involve contemporary management methods coupled with traditional techniques, which will be used as guidelines for all programs.

Source: New Brunswick Aboriginal Peoples Council, "Aboriginal Self Governance Within the Province of New Brunswick", research study prepared for RCAP (1995).

For some Aboriginal peoples and nations, leadership and control over public governments in their traditional territories represent an effective route to self-determination and provide a vehicle for protecting, promoting and exercising Aboriginal and treaty rights. This form of government may result in Aboriginal peoples or nations controlling territorial or regional public governments through law-making, executive and judicial powers in much the same way as nation governments do.

Nation Governments and Community of Interest Governments

The need for co-operation between nations of origin and urban communities of interest was noted by the Native Council of Canada. It suggested that urban governments representing Aboriginal people of different heritage

need [not] be at the expense of tribal or national distinctions, any more than it would to clan or other collective distinctions that cut across and link national and local identities ... .Regimes for dual citizenship can be developed, as indeed they now exist internationally. Membership in an urban government need not and should not imply loss of citizenship in a nation, clan or family.

Source: Native Council of Canada, "The National Perspective", Book 1 in *The First Peoples Urban Circle: Choices for Self-Determination* (Ottawa: Native Council of Canada, 1993), p. 17.

Community of interest governments provide an inclusive and practical response to the needs of Aboriginal people who, while they may not share the same Aboriginal group origin, do have a shared sense of identity arising from their common experience in urban and other areas. Where nationhood is not an issue, these governments may provide a meaningful and effective way for individuals and groups to protect and preserve the essential elements of their aboriginality that might otherwise be threatened by time, distance and other circumstances. Affiliations with Aboriginal nation or public governments may provide opportunities for mutually beneficial arrangements, such as shared program delivery.

We emphasize again that these models of Aboriginal government should not be considered either exhaustive of the possibilities, mutually exclusive or static in time. We have presented them here as suggestions of possible forms of Aboriginal governments. Governance, like nationhood, has a dynamic character. Should Aboriginal peoples choose to follow one or another of these paths to Aboriginal government, depending on their geographic situation, we anticipate that the outcomes will be as richly diverse as the traditions, aspirations and experiences of Aboriginal peoples in Canada.

Recommendations

The Commission recommends that

2.3.13

All governments in Canada support Aboriginal peoples' desire to exercise both territorial and communal forms of jurisdiction, and co-operate with and assist them in achieving these objectives through negotiated self-government agreements.

2.3.14

In establishing and structuring their governments, Aboriginal peoples give consideration to three models of Aboriginal government — nation government, public government and community of interest government — while recognizing that changes to these models can be made to reflect particular aspirations, customs, culture, traditions and values.

2.3.15

When Aboriginal people establish governments that reflect either a nation or a public government approach, the laws of these governments be recognized as applicable to all residents within the territorial jurisdictions of the government unless otherwise provided by that government.

2.3.16

When Aboriginal people choose to establish nation governments,

(a) The rights and interests of residents on the nation's territory who are not citizens or members of the nation be protected.

(b) That such protection take the form of representation in the decision-making structures and processes of the nation.

3.2 Financing Aboriginal Government

Earlier in this chapter, we identified three attributes that any government must have to be effective: legitimacy, power and resources. A new relationship between Aboriginal and non-Aboriginal people must provide for all three elements if self-government is to become a reality for Canada's First Peoples. It

is not enough to say that Aboriginal peoples, by virtue of recognition of their inherent rights, can establish (or re-establish) their own governments with varying degrees of independent and shared authority. Such governments would be relatively ineffective without sufficient resources and financial arrangements in place to enable the effective exercise of this governing authority.

Thus far, we have addressed two of the fundamental ingredients for Aboriginal self-government, legitimacy and power. We now shift our attention to the issue of financing, beginning with a focused treatment of the financial arrangements that will be required to support Aboriginal governments under the new relationship. Lands and resources and economic development are addressed further in Chapters 4 and 5 (in Part Two of this volume).

First, we outline the main objectives that should be pursued in financing Aboriginal governments. Second, we revisit the features of the new relationship in light of the particular circumstances of Aboriginal governments and communities, recommending principles to guide the development of new financial arrangements between the Aboriginal, federal and provincial orders of government. Third, we identify and comment upon the array of funding sources and instruments potentially available to Aboriginal governments under a new relationship. Fourth, we build upon the models of Aboriginal government elaborated in the previous section, proposing ‘packages’ of financial arrangements suited to the features and characteristics of each. Finally, we present an argument for a Canada-wide fiscal framework to govern the fiscal relationship among federal, provincial and Aboriginal governments.

> True Aboriginal self-government will be elusive and illusionary unless Aboriginal people have the means by which to effect it ... .The mistakes of the past must not be allowed to continue and we must jointly work together to break the current bondage of poverty that ... continues to marginalize Aboriginal people to the lowest end of the social economic ladder.
>
> Gary Gould
> Skigin Elnoog Housing Corporation
> Moncton, New Brunswick, 15 June 1993

> Again and again I hear, ‘To whom will Aboriginal governments be accountable and for what?’ Well, our answer [is that] Métis people will be accountable to Métis people.
>
> Robert Doucette
> Metis Society of Saskatchewan
> Saskatoon, Saskatchewan, 27 October 1992

Objectives for financing Aboriginal governments

In addressing the challenge of financing Aboriginal governments under a new relationship, we need to ask ourselves, what are the fundamental goals or objectives for financial arrangements that will support Aboriginal peoples’ quest for effective and meaningful self-government? Establishing such objectives is important for several reasons. They are a starting point for the negotiations on funding arrangements that will ensue when Aboriginal peoples, acting as nations, choose to exercise their inherent right of self-government. The objectives themselves will be a subject of these negotiations and will influence the design of the financial framework for Aboriginal self-government that will be worked out among the confederation partners. These objectives will also allow for an evaluation of the implementation and continued operation of particular funding arrangements to determine whether they fulfil the purposes they were designed to achieve.

Self-reliance

First and foremost, effective government depends upon a sound economic base. Without an adequate land and resource base, and without flourishing economic activity, Aboriginal governments will have little access to independent sources of revenue. Aboriginal governments will need access to fiscal instruments such as taxation. Fiscal arrangements should be structured to provide for Aboriginal self-reliance to meet their governing responsibilities.

Equity

Financing arrangements must provide for an equitable distribution of resources — financial and otherwise — among and between governments, groups of people and individuals. In the design of new funding arrangements, we would emphasize the importance of (1) equity among the various Aboriginal governments that make up the third order of government in Canada, (2) equity

between Aboriginal and non-Aboriginal people as a whole, and (3) equity between individuals.

> It is not program monies [from DIAND] that are going to do things for us. They are not the solution. What ... it [the *Indian Act*] has done to us ... it has deprived us of our independence, our dignity, our respect and our responsibility.
>
> June Delisle
> Kanien'Kehaka Raotitiohkwa Cultural Centre
> Kahnawake, Quebec, 6 May 1993

Efficiency

Efficiency dictates that a government should use limited resources in as effective a manner as possible, and in so doing promote sustainable development. This is not unlike the long-standing Aboriginal tradition of respect for the land and its uses. Financial arrangements for Aboriginal governments, and the processes employed to achieve them, should therefore be designed to be efficient.

Accountability

Governments with the authority and responsibility to spend public funds for particular purposes should be held accountable for such expenditures, primarily by their citizens and also by other governments from which they receive fiscal transfers. In the context of Aboriginal governments, it is our view that this accountability rests with the Aboriginal nation rather than with individual communities. Funding arrangements should reflect this basic objective, allowing for processes and systems of accountability that are both explicit and transparent.

Harmonization

Finally, financial arrangements should include mechanisms that provide for harmonization and co-operation with adjacent governing jurisdictions. This is to ensure that decisions made by individual Aboriginal governments take account of the effects of their policies on other governments. This consideration should include federal, provincial and municipal governments.

A principled basis for new financial arrangements

Building on the fundamental objectives for financing Aboriginal governments — self-reliance, equity, efficiency, accountability and harmonization — we now present a series of principles that should govern the design and development of funding arrangements for Aboriginal governments.[238]

The renewed relationship and financial arrangements for Aboriginal governments

The new relationship between Aboriginal and non-Aboriginal people that we have proposed consists of three key elements:

• Aboriginal self-government based on a recognition of the right of self-determination and the inherent right of self-government for Aboriginal peoples;

• a relationship between Aboriginal and non-Aboriginal people and their governments that takes the form of a nation-to-nation relationship;

• recognition of Aboriginal governments as one of three constitutionally recognized orders of government in Canada.

The nature of this new relationship gives rise to the following principles, which should shape the development of financial arrangements for Aboriginal governments.

First, a renewed relationship requires fundamentally new fiscal arrangements. It is our view that developing a system of finance for Aboriginal governments based on adapting or modifying existing financial arrangements with Indian bands would be ill-advised, because those arrangements are based on a radically different kind of governing relationship. *Indian Act* band governments, for example, are perceived as a form of self-government; but in fact they are a form of self-administration, not self-government. Band governments under the *Indian Act* do not have independent authority; they derive their powers from the federal government. Moreover, given the limited range of powers delegated to them, there is little opportunity for band governments to have access to independent sources of revenue. Consequently, the financial arrangements are characterized by dependency, by extensive accountability provisions, by elaborate administrative structures and by other features that reflect that type of governing relationship. The accountability procedures for Aboriginal nation

governments should not be more onerous than those imposed on the federal and provincial governments. (A brief overview of existing financial arrangements for Aboriginal governments and regional and territorial governments is provided in Appendix 3A to this chapter.)

Second, the development of a Canada-wide framework to guide the fiscal relationship among the three orders of government should be a prerequisite for negotiations leading to the development of long-term financial arrangements for individual Aboriginal governments. A key feature of the new relationship we are recommending is that it provides an opportunity for Aboriginal peoples to aggregate their collective interests as self-governing nations. This is an important step toward restoring balance in a relationship between Aboriginal and non-Aboriginal people that all too often has been weighted unduly against the interests of Aboriginal peoples.

Likewise, Aboriginal nations collectively forming a third order of government should have an opportunity to aggregate their interests on fiscal matters. This would best be achieved through a Canada-wide fiscal framework negotiated by representatives of the federal and provincial governments and national Aboriginal peoples' organizations. The elements of such a framework, and its role in negotiations to develop financial arrangements for individual Aboriginal governments, are elaborated later in this chapter.

Third, financial arrangements should reflect the principle that for Aboriginal self-government to be meaningful, fiscal autonomy and political autonomy should grow together. This relationship should be reflected in the proportion of transfers to Aboriginal governments from the federal and provincial governments that are unconditional. A government cannot be truly autonomous if it depends on other governments for most of its financing. The nature of transfers from other governments, for example, should reflect this principle. We note that under existing financial arrangements, most of the funds Aboriginal governments receive from the federal government are of a highly conditional nature, with Aboriginal governments having to meet predetermined, detailed program criteria to continue receiving these funds.

Conditional transfers are legitimate fiscal instruments for certain purposes — for example, when the delivery of a program has an impact beyond a single community, or when country-wide standards in the delivery of certain public services are seen as desirable. As Aboriginal governments become more autonomous politically, however, the proportion of transfers from federal or provincial governments that is conditional should fall. This principle is reflected

in federal-provincial fiscal relations and should also underlie fiscal relations with Aboriginal nation governments.

Fourth, financial arrangements should provide greater fiscal autonomy for Aboriginal governments by increasing access to independent revenue sources of their own. As we argue throughout this report, a critical element of fiscal autonomy is a fair and just redistribution of lands and resources for Aboriginal peoples. Without such a redistribution, Aboriginal governments, and the communities they govern, will continue to lack a viable and sustaining economic base, which is integral to self-government.

Aboriginal governments should be able to develop their own systems of taxation. While most Aboriginal people already pay taxes in Canada, the difference is that under a new relationship Aboriginal citizens would pay taxes mainly to their own governments. Accordingly, Aboriginal governments should have the tools to raise revenues from the development of their lands and resources. This taxing authority, when recognized, will be an important step toward increased fiscal autonomy for Aboriginal governments and will also encourage greater fiscal accountability and citizen participation. If Aboriginal nations have the power to tax and have a tax base, non-Aboriginal governments will expect them to levy taxes. If no effort is made by Aboriginal governments to collect taxes, there will be a negative impact on their transfer payments from other governments.

Recommendation

The Commission recommends that

2.3.17

Aboriginal governments established under a renewed relationship have fundamentally new fiscal arrangements, not adaptation or modification of existing fiscal arrangements for *Indian Act* band governments.

Features distinguishing Aboriginal and non-Aboriginal governments: implications for financial arrangements

There is considerable diversity among Aboriginal nations and their communities. Many Aboriginal peoples do not possess a formally recognized land base, and among those who do, there are large differences in resource

wealth and economic potential. The cost of delivering services to Aboriginal people who live in remote areas is very high. Compared to the non-Aboriginal population, more Aboriginal people live in small communities whose size limits the economies of scale that urban governments can achieve. The territories of an Aboriginal nation government may not be contiguous, which also affects the cost of delivering services.

Membership in Aboriginal nations is not necessarily defined by residency. For example, a member of a particular Aboriginal nation might make his or her home in a non-Aboriginal community (often an urban one). Likewise, non-Aboriginal persons might reside within an Aboriginal community or territory but not be citizens of that political constituency. This is an important issue, given that existing fiscal transfers for non-Aboriginal governments are based wholly on the principle of residency.[239]

In terms of the transition to self-government, it is likely that Aboriginal governments will assume varying degrees of jurisdictional authority, at least initially, because of political choices that nations or peoples make regarding their ability or preparedness to exercise the full powers of self-government. This is true of any new or developing system of government.

As a final example, the policy of taxation exemption as applied to 'on-reserve Indians' is unique to band governments under the existing *Indian Act* relationship. Under section 87 of the act, status Indians residing on-reserve and their property are exempt from certain kinds of taxation levied by non-Aboriginal governments. Under the new relationship, we note that Aboriginal people will be subject to taxation levied by their own governments. Application of the section 87 exemption in the transition phase is a matter that must be considered in the treaty negotiations leading to self-government agreements for status Indians.

> [To] receive funds which match neither community needs nor abilities is to invite failure. To receive no funds [at all] is to invite disaster.
>
> Darryl Klassen
> Mennonite Central Committee
> Vancouver, British Columbia, 2 June 1993

All of the features distinguishing Aboriginal from non-Aboriginal governments, taken together, will necessarily have an impact on the effectiveness of

financing arrangements that are developed for Aboriginal governments. Thus, we will suggest several considerations that should govern the design of financing mechanisms for Aboriginal governments under the new relationship.

The financing mechanisms employed in arrangements for individual Aboriginal governments should provide for considerable institutional flexibility, especially during the transition to self-government. Assuming that all Aboriginal nation governments will have the potential to exercise the same range of governing authorities, it is nonetheless evident that individual governments will proceed at varying speeds in assuming these responsibilities.

In this context, the financing mechanism should be designed so that it does not force Aboriginal governments to assume fewer areas of jurisdiction than they need. For example, if the financing mechanism for a program or policy sector requires a large bureaucratic structure to be effective, the associated costs of administration — in the face of scarce resources — may be so high that Aboriginal governments are unable to gain access to it. Similarly, it is important to ensure that the financing mechanism does not prevent an Aboriginal government from asking other governments to deliver public goods or services for which it is not yet ready to assume responsibility, or that it may never wish to deliver itself.

The financing mechanism should be designed to promote cost-effectiveness and the incentive to innovate. This is directly linked to our earlier arguments that Aboriginal people should be given the opportunity to reorganize or structure their governments in a manner that provides for greater economies of scale in delivering public services. If financing mechanisms are focused only on supporting public services in small individual communities, as under the existing DIAND-band government relationship, it is evident that some public functions will simply be too costly to administer and support. The financing mechanism should enable Aboriginal governments to realize greater economies of scale through co-operative service delivery arrangements with adjacent jurisdictions (including non-Aboriginal ones, depending on the nature of the activity).

It follows that as Aboriginal governments become more autonomous, a significant proportion of the transfers received from the other orders of government should be unconditional. This will enable Aboriginal governments to take into account the costs and benefits of providing public services and goods in various ways, and ensure that decisions regarding the necessary trade-offs among alternative means are sensitive to the needs and aspirations

of the nation itself.

It is also important that financing agreements minimize administrative costs as much as possible. Keeping administrative costs as low as possible is particularly important for Aboriginal governments, given limited own-source revenues. Therefore, the vast majority of transfers received from the other two orders of government should be devoted as much as possible to supporting actual services, rather than to the high costs of constantly negotiating and renegotiating annual financial agreements. Formula funding such as that found in the fiscal arrangements for the territorial governments is based on a set of indicators and is usually reviewed every five years. This allows for better planning and greater predictability and autonomy.

The financing mechanism should also reflect the capacity of the Aboriginal government to raise own-source revenues and promote fiscal equity. The equalization principle is a cornerstone of federalism and is enshrined in section 36 of the *Constitution Act, 1982*.

36(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

We believe that this equalization principle should extend to the Aboriginal order of government as well.

For provincial governments, equalization is achieved through a system of payments that takes into account a government's revenue-raising capacity to determine eligibility for and the level of unconditional transfers. However, the capacity of Aboriginal governments to raise revenues through instruments such as taxation is considerably less than that of non-Aboriginal governments generally. Moreover, differences in the need for and cost of providing public services across Aboriginal communities are greater than for comparable non-Aboriginal communities. For example, a northern or isolation allowance similar to that of the government of the Northwest Territories will be required for many Aboriginal governments.

When the provinces entered Confederation, several received statutory subsidies, partly for surrendering their indirect taxes to the federal government and often to offset their debt.[240] In 1907, at Canada's request, the British government passed *An Act to make further provision with respect to the sums*

to be paid by Canada to the several Provinces of the Dominion, effectively amending section 118 of the *Constitution Act, 1867* and increasing the burden of the federal government's payments to the provinces. Later, special payments were made to the maritime provinces following the Royal Commission on Maritime Claims (the Duncan commission report of 1926) and to both the prairie and maritime provinces during the 1930s, when several provinces were on the verge of bankruptcy.[241]

Consideration of need is not new to fiscal arrangements in Canada. New Brunswick received a half-yearly grant for ten years following Confederation,[242] and British Columbia a railroad. Prince Edward Island was promised regular transportation to the mainland, which the federal government provided through a ferry service. Honouring this promise required a constitutional amendment in 1993 to replace the commitment to 'steam service' with one to 'a fixed crossing', and to prevent the imposition of tolls or the private operation of the crossing.[243]

Similar treatment should be considered now as we lay the groundwork for three orders of government in Canada and try to meet the particular needs of Aboriginal governments.

Recommendation

The Commission recommends that

2.3.18

The financing mechanism used for equalization purposes be based not only on revenue-raising capacity, but also take into account differences in the *expenditure needs* of the Aboriginal governments they are designed to support, as is done with the fiscal arrangements for the territorial governments, and that the tax effort that Aboriginal governments make be taken into consideration in the design of these fiscal arrangements.

Funding sources and instruments for Aboriginal governments

Governments rely on a variety of sources and related instruments for financing their public activities. Here we consider four categories relevant to the financing of Aboriginal governments in Canada:

• own-source funding;

• transfers from other governments;

• funding from treaties and land claims settlements; and

• borrowing authorities for capital expenditures.

> In the old days we had a tradition of caring and sharing. If a person was sick or injured, the Chief would delegate others to hunt for him and provide fire wood. We redistributed our wealth for the good of all, and that is what any good system of taxation is supposed to do.
>
> Elder Ernie Crowe from Piapot as retold by Chief Clarence T. Jules
> Kamloops First Nation
> Ottawa, Ontario, 5 November 1993

These will serve as the basis for the financial packages associated with particular models of government and will inform the negotiations leading to a proposed Canada-wide fiscal framework for financing Aboriginal governments.

Own-source funding

In theory, a broad array of instruments is available to governments for raising their own revenues. For Aboriginal governments these might include taxes; tax-sharing; resource rents and royalties; user fees, licences and fines; proceeds from gaming activities; and corporation revenues. In reviewing these sources, however, we should keep in mind that the potential for each instrument to raise revenues will, in practice, vary considerably.

Taxation

Here we consider four main kinds of taxation:

(a) personal income tax, which in the case of Aboriginal governments could apply to Aboriginal citizens and to non-citizen residents within an Aboriginal-controlled territory;

(b) corporate taxes on private business, both Aboriginal and non-Aboriginal;

(c) sales or consumption taxes;

and (d) taxes or lease fees on land and property. The revenue-raising potential of these kinds of taxation depends directly on levels of income, the nature and degree of economic development and activity, and the degree of authority to use the various forms of taxation.

When governments share authority over a particular kind of taxation — for example, personal or corporate income tax — they can establish a common base and then negotiate the share of the revenues collected for each order of government. As part of the financial arrangements for Aboriginal governments, this kind of tax-sharing arrangement would depend naturally on the authority that Aboriginal governments have over certain kinds of taxation, their willingness to assert or exercise this authority, and the revenue-raising potential of any taxes to be levied.

> We want control of our destiny and a peaceful co-existence with Canadian society. In order for this to happen, First Nations must have an equitable share of lands, resources and jurisdiction, and fiscal capability to fulfil their responsibilities as self-determining peoples.
>
> Chief Clarence T. Jules
> Kamloops First Nation
> Ottawa, Ontario, 5 November 1993

As we have stated, attaining a significant measure of fiscal autonomy is a fundamental prerequisite for effective self-government. A people that does not possess the means to finance its own government will be dependent on the priorities of others. This can be mitigated by negotiating long-term arrangements that commit other governments to fiscal transfers. But ultimately, a government that must look to others for most of its financial requirements remains dependent. Hence the importance of own-source revenues and authority for Aboriginal nations to tax their own resources and citizens.

Given the many responsibilities of Aboriginal governments, and assuming that Aboriginal people will want to receive a wide range of high quality services, Aboriginal governments will need to collect significant amounts of revenue. Other governments that support Aboriginal governments through transfers will expect them to do so. Indeed, transfers are likely to depend on the revenue collection effort of the recipient government, as is common in fiscal

arrangements between governments in Canada.

Aboriginal nation or public governments will find it necessary to tax economic activity on their territory. This will take the form of personal income tax on their residents, corporate tax on businesses operating on their territory and, most likely, some form of royalty tax on resources extracted from their lands and waters. Income tax will not be a suitable instrument for financing community of interest governments.

It can be expected that Aboriginal governments will tax the personal income of all residents on their territory, whether or not a resident is a citizen under the nation government model. Income tax will likely be levied regardless of whether a resident's income was earned on the territory or elsewhere. Citizens of an Aboriginal nation residing off the territory can expect to continue to pay personal income tax to the governments in whose jurisdiction they reside and from whom they receive services, that is, the federal and provincial governments. Residency as the determinant of tax status is the arrangement that applies in all jurisdictions across Canada today.

The Commission proposes that residents on an Aboriginal nation's territory would pay all income tax to the Aboriginal government and not, as is the case with other residents of a province, to the federal and provincial governments. Residents under the jurisdiction of an Aboriginal public government would continue to pay income tax to the public, federal and, where appropriate, provincial government. We argue in favour of this position for two reasons.

First, levels of economic activity and hence of personal income on the vast majority of existing Aboriginal lands are well below those in most neighbouring communities. Aboriginal governments will be hard-pressed, until significant additional lands and resources are transferred to them, to raise a major portion of the financial resources they will need from their own tax base. Even after the acquisition of an adequate land base, economic development to raise personal income levels will be a long process in most communities. Aboriginal governments will need the full resources that the taxation capacity of their communities can generate for some time to come.

A second reason for advocating this arrangement relates to the controversy over tax exemption for Aboriginal people. A widely held perception among Canadians is that Aboriginal people enjoy generous tax exemptions. This is not the case.[244] By the same token, many Aboriginal people believe that tax exemption is an Aboriginal or a treaty right that should benefit all Aboriginal

people wherever they live.[245]

The current tax exemptions leave room for taxation that could be taken up readily by First Nations governments. Doing so would not be an infringement of Aboriginal rights, and the issue of compensation therefore does not arise. Some would argue further that the exemption is a reflection of the original autonomy of Aboriginal rights, and should be seen as being closely linked to the inherent right of self-government.

The Commission believes that the question of taxation needs to be addressed in the context of self-governing Aboriginal territories. If Aboriginal governments emerge with an adequate land and resource base to sustain self-reliance for their people, those governments will want to exercise control over their finances for reasons already discussed. We believe that responsible self-government is the most effective route for resolving the divisive debate over taxation. The severely limited fiscal capacity of most Aboriginal communities and the willingness of most Aboriginal people to support their own governments through appropriate taxation both argue that personal and corporate income taxes payable by residents and levied on economic activity should be paid to Aboriginal governments.

Circumstances might arise where residents on an Aboriginal nation's territory will attain a level of average income equivalent to that enjoyed by residents of the region surrounding them. By the same token, some Aboriginal governments will in time have fiscal capacity equal to that of neighbouring governments. These circumstances will affect the level of fiscal transfers Aboriginal governments receive, including, where the financial situation justifies, the elimination of such transfers.

Aboriginal nations will exercise taxation authority, including decisions on the level of taxation on their territory. Those governments may choose, as some provincial governments do now, to use lower levels of taxation to stimulate economic activity. In so doing, they will have to bear in mind the impact of such actions on the federal government's calculation of fiscal capacity in determining fiscal transfers.

If they establish tax rates significantly lower than neighbouring jurisdictions, Aboriginal governments may find their territories becoming tax havens for non-citizen residents. In such circumstances, the federal government can be expected to lower the level of fiscal transfers to reflect the taxation capacity not used. There is a fine line between differentiated tax rates for purposes of social

and economic policy and the creation of artificial tax havens. In provinces that levy a lower rate, taxpayers must still pay a common level of tax to the federal government. If the federal government agrees, as we propose, to see the revenues it would have raised go directly to the Aboriginal nation government, it can be expected to require arrangements that do not permit tax havens.

Where services continue to be provided by the province, we believe they should be paid for by a contractual arrangement between the governments involved, thus eliminating the rationale for provincial taxation.

Recommendations

The Commission recommends that

2.3.19

Financial arrangements provide greater fiscal autonomy for Aboriginal governments by increasing access to independent own-source revenues through a fair and just redistribution of lands and resources for Aboriginal peoples, and through the recognition of the right of Aboriginal governments to develop their own systems of taxation.

2.3.20

Aboriginal citizens living on their territory pay personal income tax to their Aboriginal governments; for Aboriginal citizens living off the territory, taxes continue to be paid to the federal and relevant provincial government; for non-Aboriginal residents on Aboriginal lands, several options exist:

(a) all personal income taxes could be paid to the Aboriginal government, provided that the level of taxation applied does not create a tax haven for non-Aboriginal people;

(b) all personal income taxes could be paid to the Aboriginal government, with any difference between the Aboriginal personal income tax and the combined federal and provincial personal income tax going to the federal government (in effect, providing tax abatements for taxes paid to Aboriginal governments); or

(c) provincial personal income tax could go to the Aboriginal government and the federal personal income tax to the federal government in circumstances

where the Aboriginal government decides to adopt the existing federal/provincial tax rate.

2.3.21

Aboriginal governments reimburse provincial governments for services the latter continue to provide, thereby forgoing the requirement for provincial taxes to be paid by their residents.

Measures will have to be taken to ensure that non-Aboriginal residents are represented in the decision-making processes of the Aboriginal nation government.[246] In the case of the Sechelt Indian band government in British Columbia, this was accomplished through provincial legislation, the *Sechelt Indian Government District Enabling Act.* Among other matters, the legislation provides for the creation of an advisory council, which is the primary mechanism for non-Aboriginal residents on Sechelt lands to participate directly in the affairs of the district.[247]

Recommendation

The Commission recommends that

2.3.22

Non-Aboriginal residents be represented effectively in the decision-making processes of Aboriginal nation governments.

Resource rents and royalties

Rents or royalties can be levied on the extraction and development of natural resources. For Aboriginal governments, they are another possible source of revenues whose potential depends on the existence of natural resources within a given territory, on the value of the resources and the cost of developing them, and on the degree of authority and control Aboriginal governments have over the development and taxation of such resources.

User fees, licences and fines

Governments can also charge user fees and licence fees — instruments targeted at individual users of particular government services. There has been

a growing trend among governments everywhere in the last decade to make greater use of such levies. However, as with taxes, their potential for raising revenues is limited by the number and level of such fees that residents are willing to tolerate. Fines are raised from those breaking a law, and traffic violations can account for a significant revenue base.

Gaming

In the last decade or so, some Aboriginal governments in Canada and the United States have established gambling casinos on their territories, both to assert their self-governing authority and to develop a potentially lucrative revenue source in communities that are significantly disadvantaged economically. The feasibility of establishing gaming enterprises is highly dependent on the distribution of legislative authority, on the proximity of such establishments to densely populated centres, and on the willingness of these populations to engage in gaming activities. Given the uncertainty and controversy surrounding the issue, it would be better to negotiate gaming within the treaty processes.

Aboriginal and public corporation revenues

Own-source funding is also available in the form of revenues from Aboriginal government or public corporations. Such corporations, where Aboriginal ownership is collectively held, can be either single or joint ventures; and in the case of public government, potentially can include both public and Aboriginal corporations. Unlike royalties and resource rents, the potential for revenue from such corporations is not dependent on the level and nature of economic activity within a given territory, because these corporations may choose to invest outside of their Aboriginal nation's traditional territory.

Notwithstanding the apparent variety of sources potentially available to a government through these instruments, the reality is that own-source financing for Aboriginal governments is currently very limited and likely will remain so for some time. This brings us back to a key point about the financing of Aboriginal governments — the overwhelming importance of a sufficient land and resource base and of sustainable economic development to effective self-government. Without access to land and resources, it will be impossible to establish a viable and sustainable economic base upon which Aboriginal governments will be able to finance their activities. (See Chapters 4 and 5, in Part Two of this volume, for detailed coverage of these issues.)

Transfers from other governments

Transfers from other orders of government can be a key source of financing, especially in federal systems of government. Provincial governments, for example, receive a significant portion of their funding in the form of transfers from the federal government, as do municipal governments from the provinces.

The existing arrangements for financing *Indian Act* band governments are realized largely through fiscal transfers, although the nature of these transfers differs from the federal-provincial arrangements in several important ways. (See Appendix 3A for a brief overview of these arrangements.) Here we consider two types of intergovernmental transfers, conditional and unconditional.

Conditional transfers

Conditional transfers entail conditions established by the donor government to influence the behaviour of the recipient government. They are either spending-conditional or program-conditional.

Spending-conditional transfers require the recipient government to match a portion of the funds received from the donor with their own expenditures. The requirements are usually quite strict, leaving little autonomy to the recipient government. Matching transfers are usually employed when the services they are designed to finance have an impact beyond a particular community — what economists call ‘externalities’ — and when both donor and recipient governments have sufficient own-source revenues to draw upon.

An example drawn from the recent history of federal-provincial fiscal arrangements is the Canada Assistance Plan (CAP), under which the federal and provincial orders of government shared expenditures for basic welfare services, usually on a fifty-fifty basis.[248] If this form of transfer were used to finance Aboriginal governments, special attention would need to be given to the capacity of Aboriginal governments to raise their own-source funding — that is, to their ability to match funds from a donor government — as well as to the degree of their jurisdictional authority. Matching need not occur only on a fifty-fifty basis, and such transfers could potentially be available from both federal and provincial governments.

Spending-conditional transfers can also be used for specific purposes that are

narrower in scope. Such transfers are more incidental in nature, arising when the need for particular public goods or services is not anticipated by either the donor or the recipient government (for example, in case of flood or other natural disaster), or where such expenditures do not fit neatly with the distribution of jurisdictional authority.

Rather than being built into the basic intergovernmental fiscal framework, specific purposes transfers are usually developed through ad hoc arrangements based on consultation and co-operation among federal, provincial and municipal governments. This system was used to introduce a national infrastructure program in 1993 and to promote regional development across Canada through federal-provincial general development agreements and other instruments during the past 30 years. Other common examples are recreation facility capital grants that provincial governments provide for municipalities and the contribution agreements between DIAND and Indian bands for major capital projects (see Appendix 3A). Such transfers may be relevant particularly for Aboriginal governments in the transition phase to self-government because Aboriginal peoples or nations decide upon the range of governing jurisdiction they want to assume initially.

Conditional transfers may also be tied to specific types of expenditures for program areas. This provides the recipient government with more autonomy in designing programs and services to match regional conditions. If certain conditions or objectives — usually identified in legislation — are not met in the program area, the donor government may impose a penalty, often in the form of a reduced transfer to the recipient government.

A practical example of program-based conditional transfers is the federal funding the provinces have received for medical and hospital services. This funding is received by provincial governments on the condition that provinces adhere to the five basic objectives of the *Canada Health Act* — universality of coverage, comprehensiveness of insured services, accessibility, portability and public administration. If these objectives are not adhered to, the federal government may decide to withhold a percentage of the funds to discourage the deviant practice.

Conditional transfers might be available for financing Aboriginal governments when such governments decide that they do not want to assume full responsibility for particular program areas, or where regional or Canada-wide standards or objectives in the delivery of certain public services are seen as desirable, such as in the field of health.

Unconditional transfers

The key characteristic of unconditional transfers is that funds, or sources of funds, are transferred unconditionally — with no strings attached — thus leaving the recipient government with the independent authority to spend such funds as it sees fit. Unconditional transfers also come in a variety of forms.

Cash transfers provide lump sums of money, usually determined according to an agreed formula, that are transferred from one level of government to another annually. This kind of transfer was reflected in part in the financial arrangements for health and post-secondary education shared by the federal and provincial governments under the former Established Programs Financing (EPF) program. The EPF arrangements involved a mix of instruments reflecting several of the transfer characteristics outlined in this section, one of which is a cash or lump sum grant. Since the EPF program was negotiated in 1977, provincial governments have been free to use these funds for any purpose, regardless of whether it related to post-secondary education or health. The new Canada health and social transfer is comparable in approach, although the cash portion of the transfer is expected to diminish over time.

Cash transfers would allow for considerable autonomy in the financial arrangements for Aboriginal governments, even if the initial arrangements are nominally based on the distribution of expenditures for general program areas, as they were in EPF.

In tax-sharing, revenues are either collected by two governments or they are returned to the jurisdiction where they originated by the government that collects the taxes. In *revenue-sharing*, one government (usually the federal or provincial) pools its revenues from various sources (such as resource royalties), then shares these revenues with provincial or municipal governments. As a source of financing for Aboriginal governments, this would be relevant in the case of co-management and co-jurisdiction of lands and resources, and would depend on the particular agreements reached with the other governing jurisdictions.

Equalization grants are an element of federal-provincial tax-sharing. They replaced the tax rental agreements instituted during the Second World War, in which the federal government rented exclusive control of personal and corporate income tax and succession duties. First formally introduced in 1957, equalization provides that the provinces will receive 10 per cent of the personal

income taxes raised, 9 per cent of corporate profits and 50 per cent of federal succession duties. Of course, 10 per cent of income taxes generates more revenue in a wealthy province than in a poor one. To compensate, the governments agreed to bring all provinces' revenues up to a certain per capita standard. Under the current program, employing a more broadly representative tax base, a five-province standard is in effect. All provinces are guaranteed access to revenues equal to the per capita average from applying national-average tax rates to the representative tax bases in the five designated provinces (Ontario, Quebec, British Columbia, Saskatchewan and Manitoba). All provinces receive equalization grants except British Columbia, Alberta and Ontario.[249]

The equalization principle was enshrined in section 36(2) of the *Constitution Act, 1982,* committing Parliament and the government of Canada to "making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation".

If equalization were extended to Aboriginal governments, account would be taken of both the fiscal capacity and the fiscal need of the Aboriginal government — how much capacity they have to tax and how much revenue they need to provide required services. Likely it would be assumed, as it is for provincial and territorial governments, that Aboriginal governments tax at national-average rates. If Aboriginal governments chose not to tax, this would be reflected in reduced equalization payments — that is, if Aboriginal governments had the capacity to raise revenues, but chose not to do so. If Aboriginal governments kept all income and sales taxes, this too would be factored into the equalization formula, in effect reducing the transfer from other governments. If an Aboriginal nation government's revenues are great enough that they no longer require equalization payments, consideration should be given to transferring some of their revenues to other Aboriginal nations — in effect, sharing the wealth through inter-Aboriginal nation equalization.

Aboriginal nation governments would enjoy intergovernmental immunity from taxation by the Crown, as the federal and provincial governments do. They would also be eligible for grants in lieu of taxes on federal and provincial property on Aboriginal lands, just as federal and provincial governments pay grants in lieu of taxes to municipalities to make up for the fact that municipal governments cannot tax federal or provincial property.

Finally, there may be very specific unconditional transfers, such as northern or

isolation allowances to offset the higher cost of living in northern and remote communities.

Regardless of the type of fiscal transfer, the level or magnitude of such transfers may also depend upon certain characteristics of the recipient government. For example, amounts transferred can be based on the fiscal capacity of the recipient government, using measures such as the revenue potential of various tax bases under a given jurisdiction. The principle of fiscal capacity, for example, is at the core of the unconditional transfers paid to qualifying provinces under the current equalization program.

As well, the level of intergovernmental transfers can be related directly to the expenditure levels of a recipient government in providing particular services to its citizens.[250] An example of this is the conditional matching or cost-shared transfers under the former Canada Assistance Plan, where the general level of expenditures is determined by the demand for welfare services in particular provinces.[251] The needs basis has also been used in the fiscal arrangements for the Yukon and Northwest Territories and in other federal systems as one of the factors determining the appropriate level of equalization payments for the constituent governments of the federation. Consideration of both fiscal capacity and fiscal need in the design of fiscal arrangements for Aboriginal governments will be especially important, given the generally lower level of economic development in Aboriginal communities.

It is clear that transfers from other levels of government will be a prominent feature of financial arrangements for Aboriginal governments, now and in the future. This is because, first, Aboriginal peoples' right of self-government has not been fully recognized by the Canadian state, and Aboriginal governments accordingly have not had access to the instruments necessary for own-source financing. This is exacerbated by the continuing inequitable distribution of lands and resources between Aboriginal and non-Aboriginal people in this country, which leaves Aboriginal governments without a viable and sustainable economic base upon which to finance basic public services for their citizens. As these injustices are corrected over time, Aboriginal governments will gradually become less reliant on transfers from other governments.

Second, transfers from other orders of government will continue to be an integral part of financial arrangements for Aboriginal governments because of the nature of the federal system of government in Canada. Significant efficiency and equity benefits accrue from having the federal government assume a relatively stronger revenue-raising role in the federation, then distribute these

revenues in the form of fiscal transfers to other governments so they can meet their expenditure responsibilities more effectively. Aboriginal governments, as one of three constitutionally recognized orders of government, will necessarily become a part of this intergovernmental fiscal framework and receive transfers from the federal government as the provinces do now.[252]

Entitlements from treaties and land claims

There is a third category of funding sources specific to the circumstances of Aboriginal governments in Canada, especially those established on the nation-based model. These are revenues arising from specific claims settlements and comprehensive land claims and treaty land entitlement settlements. Because of the unique nature of these arrangements, they deserve special treatment in terms of being considered as potential sources for the financing of Aboriginal governments.

Specific claims settlements

Specific claims settlements can sometimes be indirect sources of funding for Aboriginal nations, but only for some, since many do not have treaties with the Crown or may not be engaged in related specific claims processes.[253]

The Commission is of the view that revenues arising from specific claims settlements should not be considered a direct source of funding for Aboriginal governments, even if some governments choose to use some of these funds directly for government purposes. Often, the purpose of these settlements is to compensate for lands taken fraudulently or expropriated by the federal government; for example, for a military base, or for reserve lands previously reduced, without compensation, for a railway right of way. These specific claims settlements are granted generally to right a wrong, not to provide for the financial support of Aboriginal governments. For the most part, Aboriginal people are seeking to replace the land they lost with other land. Payments for specific claims would likely produce temporarily increased economic activity in a local economy and provide only indirect funding to Aboriginal governments, for example, through taxation.[254]

Recommendation

The Commission recommends that

2.3.23

Revenues arising from specific claims settlements not be considered a direct source of funding for Aboriginal governments and therefore not be included as own-source funding for purposes of calculating fiscal transfers.

Comprehensive claims settlements and treaty land entitlements

Comprehensive claims settlements and treaty land entitlements are another potential source of funding, but again only for some Aboriginal governments and only in an indirect way. Resolution of comprehensive claims or treaty land entitlements can include a financial settlement as well as land as part of the compensation package for the Crown having denied Aboriginal peoples access to and control of their territories.[255]

In comprehensive land claims settlements, as in specific claims settlements, a payment of funds should not be considered a direct own-source of funding for Aboriginal governments. However, if an Aboriginal government decided to invest the monies from a financial settlement — perhaps through an investment corporation established for the purpose — it would be appropriate in certain circumstances to consider any resulting income as a continuing own-source of funds for that government. Under such circumstances, this kind of funding would also be compatible with the public model if an investment corporation were established under its authority.[256]

The earnings from the funds (the indirect income) may or may not be included in own-source revenues for purposes of calculating fiscal transfers. If they are used to make loan repayments for funds advanced to finance treaty negotiations, to offset the effects of inflation in order to preserve the value of the principle agreed to in the treaty (cash settlements are usually distributed over a long time — up to 20 years — thus discounting their value), or for charitable activities or community good works, they would not be included.

Interesting precedents in this regard are included in the Atlantic Accord and the Canada-Nova Scotia Offshore Petroleum Resources Accord. For example, the Atlantic Accord addresses, among other matters, revenue-sharing between Canada and Newfoundland with respect to offshore oil and gas and how this revenue would affect the equalization payments Newfoundland now receives. Article 39 of the accord states, in part, that the two governments recognize that there should not be a dollar for dollar loss of equalization payments as a result of offshore revenues flowing to the Province. To achieve this, the Government

of Canada shall establish equalization offset payments.[257]

> Progressive First Nations realize that public financing is required by Native government in order to build the sorts of community Native peoples want. For instance, Westbank wants to use its property tax revenues to arrange financing to build a new community hall to replace the existing small one. There is no structure, however, which allows First Nations to borrow as governments. The absence of an ability to borrow as governments has exacerbated the program of underdevelopment on reserves.
>
> Larry Derrickson
> Councillor, Westbank Indian Band Kelowna, British Columbia, 16 June 1993

Two types of offset payments are foreseen, both adjusting for the loss in equalization payments that would result if Newfoundland's own-source revenues increase. The first type provides for a 12 year phase-out of equalization entitlements from the commencement of production (assuming that resource revenues make Newfoundland a 'have' province). The second type provides for federal government payments equivalent to 90 per cent of any decrease in equalization payments compared to the previous year. In the fifth year of offshore production, this offset rate is to be reduced by 10 per cent, then by 10 per cent in each subsequent year.

Recommendations

The Commission recommends that

2.3.24

Financial settlements arising from comprehensive land claims and treaty land entitlements not be considered a direct source of funding for Aboriginal governments.

2.3.25

Investment income arising from Aboriginal government decisions to invest monies associated with a financial settlement — either directly or through a corporation established for this purpose — be treated as own-source revenue for purposes of calculating intergovernmental fiscal transfers unless it is used to

repay loans advanced to finance the negotiations, to offset the effect of inflation on the original financial settlements, thereby preserving the value of the principal, or to finance charitable activities or community works.

Borrowing authority

The funding sources and instruments we have identified have focused principally on the operating costs of government. Another important component of financial arrangements is the financing of capital expenditures by means of borrowing money through public offerings and loans from financial institutions.

This is a critical issue for Aboriginal peoples because many of their communities lack basic infrastructure, including schools, good roads and sewage systems. Throughout our public hearings, we heard Aboriginal people deplore the fact that when DIAND devolves responsibility for certain programs or services, the associated funding arrangements are often designed to meet only normal operating costs and not to provide the means to maintain or replace existing infrastructure as it declines in value or utility over time. Moreover, existing financial arrangements under the *Indian Act* severely limit the ability of band governments to pursue independent sources of financing for such capital expenditures because of their lack of corporate capacity and the uncertain legal status of reserve lands. Accordingly, band governments pay very high interest rates on loans.

If Aboriginal peoples decide to exercise self-government at the level of nation or public government, borrowing authority will be an important component of financial arrangements that are designed to support the full range of public expenditures, both operating and capital. The constitutional and legal status of Aboriginal governments under the new relationship would provide the necessary basis to establish these borrowing authorities.

> Our preference is really ... to be financially independent from the government. I don't want to have to depend, and my children, on the [federal] government's whim of the day, if they want to send the money that day or not, if the Minister of Finance says, 'We can't afford it', so Indians will become a social program and we can be cut, as they are doing already. That's not the objective ... All we want is recognition of the tools that are required to sustain ourselves economically.
>
> John 'Bud' Morris
> Executive Director, Mohawk Council of Kahnawake
> Kahnawake, Quebec, 6 May 1993

Financial arrangements for models of Aboriginal government

Earlier in this chapter we elaborated three models of government: nation, public and community of interest. In part, this was to help answer the question, "What might Aboriginal government look like under a new relationship?" The value of these models is to demonstrate, in a practical and understandable way, some of the opportunities and constraints that exist for Aboriginal self-government, as well as the diversity possible within these models.

Funding instruments and sources: compatibility with the models and feasibility

We now examine the funding instruments and sources introduced earlier to show how they fit with each of the models.[258] Our focus will be on the extent to which the four primary sources — own-source revenues, transfers from other governments, funding from treaties and land claims settlements, and borrowing authorities — are practical and feasible for each of these models. Mindful of the principles that should inform the design of financial arrangements for Aboriginal governments, we also indicate whether a particular source of funding is compatible with the operation of a given model.[259]

Own-source funding

Own-source revenues are a critical component of any self-government arrangement because they provide for a sufficient level of fiscal independence and autonomy to support the effective exercise of governing jurisdiction and authority implicit in such an arrangement. The existence of own-source revenues also allows for important accountability links between governments and the citizens they serve.

All of the own-source funding instruments are compatible with both the nation and the public model of government. This reflects their status as full-fledged governments capable of exercising a broad range of authority over an explicitly defined territory. The practicality or feasibility of these sources for use by either type of government depends on a number of factors, however, including

• the level of income among the citizens or residents within a governing jurisdiction;

• the level of economic activity within these jurisdictions;

• the presence of, and control (either solely or shared) over, certain types of land or natural resources; and

• the level of administrative capacity.

These factors need to be considered on a case-by-case basis for each funding instrument.

The community of interest model is not compatible with many of the own-source revenues. One reason is that many of these funding instruments — for example, personal and corporate taxation, and resource royalties — will simply not be available to community of interest governments, which would have no jurisdiction in these fields. There are exceptions. A portion of municipal taxes, such as those currently available in some provinces for separate schools, would be available. In that case, individuals elect to identify themselves or their property with a particular agency, and the taxes collected flow to that agency. User fees for the delivery of particular services could be a further revenue source.

Examining these sources in detail, we see that personal and corporate income taxation, while compatible with the nation-based and public models, nonetheless poses certain problems in terms of cost-effective administration. These types of taxation are costly to administer and require a large volume of revenues in order to take advantage of economies of scale in collection. It is because of these efficiency considerations that the federal government collects personal income taxes on behalf of all provincial governments (except Quebec), at no cost to the provinces and remits these revenues to the provinces.[260] These arrangements are formally recognized in tax collection agreements negotiated between the federal and provincial governments.

Even a Canada-wide Aboriginal system of income tax collection would be prohibitively expensive. Average collection costs would be high compared to the small volume of revenues to be collected and the fact that the Aboriginal population is widely scattered across the country. This is a reflection of the small population base and the fact that Aboriginal people, as a group, have significantly lower levels of income than other Canadians. A more realistic possibility would see the federal government collect all income taxes and then return the revenues designated for an Aboriginal government back to that government.

Other forms of taxation are available only to the two territorially-based models of Aboriginal government. The feasibility of sales taxes, for example, as revenue source would necessarily depend on the level and nature of economic activity within a particular jurisdiction. Tax collection agreements would also be required for cost-effective administration, although in this case such agreements would likely be negotiated with provincial governments.

Taxes or lease fees on land and property are another likely source of revenue that is considerably easier and less costly to administer than other taxes. Its revenue-producing capacity would depend on the number of private leases and the extent of commercial property in an Aboriginal-controlled territory.

Resource rents and royalties are compatible with both the nation and the public model. Their efficacy as own-source revenue depends, in part, on the nature of tax arrangements (especially where management and control over lands and resources is shared with other governing jurisdictions), as well as on the existence of commercially desirable natural resources in an Aboriginal government's territory.

User fees, licences and fines are compatible with all three models and are likely to be one of the more important sources of revenue for community of interest governments. Their efficacy as a revenue producer is subject to the level of fees that citizens seeking these services are willing to pay. This is less true of fines, unless they are regarded as unfairly high and simply a covert form of taxation.

Proceeds from gaming activities are compatible with all the models. However, this source would not be available to all Aboriginal governments as revenues would depend on the establishment of profitable gambling casinos or large-scale bingo operations in or near densely populated urban centres. However,

given the uncertainty and controversy surrounding the issue, it would be better for Aboriginal governments to reach agreements through the treaty processes.

Finally, corporate revenues generated by collectively owned Aboriginal corporations are potentially available to the nation and public models of Aboriginal government. Revenue-raising capacity will depend on the level and nature of economic activity in a particular jurisdiction.

Transfers from other governments

Transfers from other governments are another important source of financing to be considered in the design of financial arrangements for Aboriginal governments. Our focus here is on transfers from the federal and provincial governments. Municipal governments may also be involved in intergovernmental fiscal arrangements, but their relationship with Aboriginal governments is more likely to occur on an ad hoc, contract basis focused on the delivery of particular services.

At the outset, several general observations can be made. All forms of transfers are compatible with territory models. At the same time, however, the mix of transfers available to nation and public governments should be predominantly unconditional in nature. This is consistent with the independent decision-making authority implied by constitutionally recognized self-government. Territory-based governments, when fully developed, are capable of exercising jurisdiction and governing functions over a defined territory, and unconditional transfers will allow for the planning, autonomy and flexibility required to make self-government real. At the same time, such transfers assume an increased administrative capacity on the part of Aboriginal governments.

Governments based on the community of interest model will find unconditional transfers generally incompatible with their governing arrangement. Their jurisdiction is limited by the lack of a defined land and resource base, and by the weakness of authority for the exercise of that jurisdiction, which is likely to be delegated from other governments, either Aboriginal or non-Aboriginal.

Instead, community of interest governments are likely to function more as urban-based institutions delivering programs in the areas of education and social services. Services delivered by municipal and community of interest governments in an urban setting will necessarily have effects beyond their individual jurisdictions, given that all residents — Aboriginal and non-Aboriginal — share the same territory. To account for these potential external

circumstances, funding involving conditional transfers would ensure that a basic level of compatibility with services being offered in an urban area is met, while at the same time allowing community of interest governments to control the delivery of these services to reflect the special needs of Aboriginal people. Thus, the intergovernmental fiscal transfers received by community of interest governments would be primarily conditional.

Exploring all these transfers in more detail, we see that those of an unconditional cash nature would need to allow for adjustments to account for both the fiscal capacity and the actual cost of delivering public services. There is also the possibility that unconditional cash transfers could form a component of the finances available to a community of interest government, perhaps to cover overhead costs of administration. Other unconditional transfers, such as revenue-sharing, grants in lieu of taxes, and northern and isolation allowances, are compatible with the nation and public models. (The rationale for this expenditure needs component, which is a feature of federal-territorial transfers but not a feature of current federal-provincial transfers, was discussed earlier.)

As for conditional transfers, both types — program-conditional and spending-conditional — are available to Aboriginal government of any type. As a general rule, conditional transfers are compatible when the programs or activities they are designed to fund have effects beyond the jurisdiction of the recipient government, or when they are directed at financing large capital projects. In the case of the community of interest model, especially when operating as a single-function government on the basis of delegated authority, conditional transfers are likely to be a primary source of funding.

Entitlements from treaties and land claims settlements

This third funding source is unique to Aboriginal governments and arises from specific claims settlements, comprehensive land claims settlements and treaty land entitlement. These sources of funding are available almost exclusively to nation governments — to nations that have treaties with the Crown, to those engaged in specific-claims processes, and to those that have not yet made treaties. In terms of specific claims, feasibility will depend on whether any monies are owed as part of the treaty obligations or claims settlement. However, as we argued earlier, such funds should not be considered a direct source of funding for these Aboriginal governments.

Nor should any treaty entitlements, such as education entitlements, affect the calculation of the Aboriginal government’s fiscal capacity. Moneys flowing from

these sources would likely provide only indirect funding for Aboriginal governments. These distinctions would need to be accounted for in determining own-source revenues for purposes of calculating fiscal transfers from other governments. In the case of comprehensive land claims settlements, for example, a payment of funds associated with the settlement should not be considered a direct, own-source of funding for Aboriginal governments.

Borrowing authority

Finally, borrowing to finance capital expenditures, through public offerings or loans from financial institutions, is a funding instrument that is compatible with both the nation and the public model of government. The ability of these governments to use borrowing instruments will depend on their asset base, the stability of their political and fiscal arrangements, and their continued ability to raise own-sources of revenue.

Aboriginal governments based on the community of interest model, in the absence of a defined land base and a consolidated government structure, are more restricted in their ability to use borrowing instruments. We expect that other governments, notably those based on the nation model, will play an instrumental role in meeting the capital expenditure needs of this form of Aboriginal government.

Toward a Canada-wide framework for fiscal relations among the three orders of government

Financial arrangements to support the functioning of a system of government are rarely the product of a single grand design drawn up at a particular time. The number and variety of factors to consider in such arrangements are so broad and diverse that it would be impossible, in theory or in practice, to design a ‘once-and-for-all’ fiscal master plan that would meet the needs of all citizens and adapt to changing circumstances over time. On the contrary, financial arrangements are inevitably the product of extensive and continuing discussions and negotiations among the officials and elected representatives of the affected governments, who are in the best position to understand the needs of their citizens and to determine what workable arrangements will best equip governments to deal with these demands and responsibilities.

In terms of financing Aboriginal governments under the new relationship, negotiations to develop particular arrangements will occur in two stages. The first step will be the negotiating process discussed here, aimed at establishing

a Canada-wide framework to set up the general fiscal relationship among the three orders of government — Aboriginal, federal and provincial. While these negotiations are going on, interim financial arrangements should be made for recognized nations to exercise their core powers. In the second step, building on the Canada-wide framework, negotiations will proceed at the level of individual Aboriginal nations through treaty processes (outlined in Chapter 2) to work out the fiscal arrangements particular to their circumstances and in accordance with the form of government through which they choose to exercise their inherent right of self-government.

> Although First Nation people have been invited to partnership we still do not have the resources to implement our traditional ways.
>
> Norma Sorty
> Kwanlin dun First Nation
> Whitehorse, Yukon, 18 November 1992

Having considered the design of financial arrangements that would be appropriate for individual Aboriginal governments — as they are realized through nation, public or community of interest models of governance — we turn now to the broader fiscal relationship that these governments, collectively, will share with other governments in Canada.

In federal systems, individual constituent governments are rarely completely self-financed. Many areas of responsibility are shared by two orders of government and therefore require joint financing arrangements. As well, there is often a gap between the fiscal needs of governments and their fiscal capacity, requiring a system of intergovernmental subsidies and grants. In Canada, these kinds of fiscal relations, involving both federal and provincial governments, are currently realized through an umbrella framework called the *Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act*.[261] We will now identify some of the key elements that should govern the design and operation of a fiscal framework for Aboriginal governments.

Objectives of a framework agreement for financing Aboriginal governments

The framework should be prefaced by a statement of fundamental objectives for making Aboriginal self-government operational and for the financing of Aboriginal governments. This statement, in turn, should be reflected in the

design of fiscal arrangements. In this regard, we offer the objectives of self-reliance, equity, efficiency, accountability and harmonization as a starting point for these negotiations. Moreover, this statement should specify the various commitments of the Aboriginal, federal and provincial governments in fulfilling these objectives.

Transfer regime

At the core of the framework is the development of a regime to govern how fiscal transfers are effected between and among the three orders of government. This regime could comprise the following elements: purpose, nature of receipt, form and basis of calculation.

The transfer regime should specify the purposes to which particular transfers should be directed:

• financial assistance for Aboriginal governments in terms of the general operations of government, infrastructure and so on;

• financial assistance in specific policy or program areas, for transition purposes and/or on a continuing basis;

• availability of financial resources to meet the equity principles articulated in section 36 of the *Constitution Act, 1982;*

• availability of financial resources to meet the regional development principles articulated in section 36 (“furthering economic development to reduce disparity in opportunities”); and

• the application of tax immunity to Aboriginal governments, so that they cannot be taxed by the federal and provincial governments; or

• the eligibility of Aboriginal governments for grants in lieu of taxes from the federal and provincial governments (for example, for highway maintenance, federal and provincial property).

The transfer regime should identify the nature of receipt (conditional or unconditional) for transfers directed to Aboriginal governments. There should be explicit criteria to determine when conditional transfers are appropriate, the manner in which conditions will be identified and how they will be enforced. The

nature of receipt should include the principle that as the political and jurisdictional autonomy of an Aboriginal government increases, the proportion of transfers that are conditional in nature should fall.

The regime should also determine the forms in which fiscal transfers will be realized: cash payments, revenue-sharing, grants in lieu of taxes, and northern or isolation allowances.

Finally, the transfer regime should develop a formula to calculate the magnitude of transfers received by particular Aboriginal governments. In addition to the relevant factors considered in typical federal-provincial fiscal transfer formulas, consideration should be given to

• transition and start-up costs for Aboriginal governments established under the renewed relationship;

• the range of own-source revenues particular to the Aboriginal governments to be included;

• the costs borne by Aboriginal governments in the delivery of programs and services (that is, the needs-basis);

• catch-up (equalization) grants and subsidies; and

• equalization offset payments.

Co-ordination mechanisms and agreements

In addition to the development of a transfer regime, the framework should allow for the harmonization and co-ordination of other shared fiscal arrangements through various mechanisms and agreements. A key issue is the negotiation of tax-sharing agreements to co-ordinate the taxing activities of the Aboriginal, federal and provincial orders of government where they share a common tax base and to allow for the collection of certain Aboriginal government taxes (for example, personal income and corporate taxes) by other orders of government when efficiencies can be realized through greater economies of scale.

Implementing the framework

The framework, once negotiated by representatives of federal and provincial

governments and national Aboriginal peoples' organizations, should be recognized in a political accord signed by all parties.

Recommendation

The Commission recommends that

2.3.26

Federal and provincial governments and national Aboriginal organizations negotiate

(a) a Canada-wide framework to guide the fiscal relationship among the three orders of government; and

(b) interim fiscal arrangements for those Aboriginal nations that achieve recognition and begin to govern in their core areas of jurisdiction on existing Aboriginal lands.

4. Transition

So far, we have focused our discussion of governance on what must be done to establish a renewed and constructive relationship between Aboriginal peoples, their governments and the other orders of government in Canada. It is important to consider how the transition to this renewed federalism can be made. We conclude the chapter by dealing with transition and capacity-building issues — the 'how' questions.

We consider these from the perspective of Aboriginal peoples, as they realize their nationhood, and that of Canadian governments. First, we develop recommendations concerning how to launch the restructured relationship between Aboriginal peoples and Canada and what transitional steps should be taken on the road to self-government. Next, we discuss strategies for Aboriginal people to rebuild their communities and nations and to ensure that their governments have the capacity to be good governments. Third, we recommend changes in the structure of the government of Canada necessary to launch and sustain the renewed governing relationship. Finally, we address the issue of the Aboriginal peoples' representation in the institutions of the Canadian federation.

4.1 Transitional Measures on the Road to Self-

Government

How might we begin to clear a path for Aboriginal peoples to set about the enormous undertaking before them? We see the task in the area of governance as building or rebuilding Aboriginal nations, including financial and administrative support, until they are able to become more economically self-sufficient and administratively autonomous; creating a jurisdictional space within which they can start to act as one of three orders of government instead of as the delegates of the existing orders; and assuring them an adequate land and resource base upon which economic self-reliance and local autonomy can be based.

Each of these actions, which must result from the initiative of Aboriginal peoples themselves, will obviously require the assistance of the other orders of government. Those orders have been the beneficiaries of the lapse in Aboriginal government over the past century and a half and now purport to occupy all the law-making space and to control the vast majority of the land and resources in Canada. There may also be a legal requirement, in the form of the Crown's fiduciary obligation, for the federal and provincial governments to assist in repairing the damage caused to Aboriginal nations.

In short, the question arises as to how Canada might assure Aboriginal peoples the assistance they want in a way that does not impede or overly restrict Aboriginal peoples in the exercise of their rights. This section sets out our ideas about how this might occur. We foresee a process comprising four distinct but related elements that will clear the path for Aboriginal self-governance:

1. the promulgation by the Parliament of Canada of a royal proclamation and companion legislation to implement those aspects of the renewed relationship that fall within federal authority;

2. activity to rebuild Aboriginal nations and develop their constitutions and citizenship codes, leading to their recognition through a proposed new law, the Aboriginal Nations Recognition and Government Act;

3. negotiations to establish a Canada-wide framework agreement to set the stage for the emergence of an Aboriginal order of government in the Canadian federation; and

4. the negotiation of new or renewed treaties between recognized Aboriginal

nations and other Canadian governments.

A royal proclamation and companion legislation

As the first step, the Crown would issue a royal proclamation declaring in unequivocal terms the fundamental principles that will guide the Crown in its future relations with the Aboriginal peoples and nations of Canada. The new royal proclamation would elaborate on and supplement the original principles set out in the landmark *Royal Proclamation of 1763*. It would acknowledge the errors and injustices of the past, recognize Aboriginal nations as possessing the right of self-determination in the form of the inherent right of self-government within the Canadian federation, affirm a continuing commitment to the historical and modern treaties and to the treaty process, and outline a contemporary legislative program to restore the relationship between Aboriginal peoples and the Crown on a foundation of mutual respect. The proclamation would follow upon extensive consultations with Aboriginal peoples and provincial and territorial governments. We described this proclamation in some detail in Chapter 2 and recommended its adoption by the Parliament of Canada. We return to the subject in Volume 5, where we propose a strategy for implementing this report.

Our proposed approach also involves enacting federal companion legislation to commit government to assist new or restored Aboriginal nations to emerge from their present state of fragmentation. This legislation would include the following:

• an Aboriginal Treaty Implementation Act to commit the federal Crown to the treaty renewal and treaty-making processes, to enable its participation in the treaty commissions that would facilitate and oversee the treaty negotiations, and to establish general guidelines for the ensuing negotiations on the reallocation of lands and resources to Aboriginal nations. We discuss these approaches in Chapters 2 and 4 of this volume;

• an Aboriginal Lands and Treaties Tribunal Act to establish and empower a tribunal to deal with specific claims and assist the treaty process. We discuss these measures in detail in Chapter 4;

• an Aboriginal Relations Department Act and an Indian and Inuit Services Department Act to create new federal departments to discharge federal Crown obligations to recognized Aboriginal nations and replace the existing Department of Indian Affairs and Northern Development;

• an Aboriginal Parliament Act to establish a new federal Aboriginal institution;

• amendments to the *Canadian Human Rights Act* to create mechanisms to inquire into harms to Aboriginal peoples and communities as a result of relocations; this recommendation was developed in Volume 1, Chapter 11; and

• an Aboriginal Nations Recognition and Government Act to provide a means for Aboriginal people and communities to come together and obtain federal recognition as nations. This act would amend the *Indian Act* to exclude these nations from provisions that no longer apply as they gain access to their self-government powers, and to provide access to the financial resources recognized Aboriginal governments will need to begin building their government infrastructure before exercising their full self-government powers as a result of the treaty processes.

We discuss most of these proposals elsewhere in this volume. What follows is confined to the proposed Aboriginal Nations Recognition and Government Act. This federal legislation will formally acknowledge the existence of Aboriginal nations and establish the criteria and process for recognition. Some fundamental principles are associated with this proposal, which are based on our conception of Aboriginal nations:

• A broad and flexible standard of Aboriginal nationhood should be embraced, emphasizing the collective sense of Aboriginal identity, shared by a sizeable body of Aboriginal people, and grounded in a common heritage.

• Aboriginal groups might assert their modern nationhood in a variety of ways, incorporating, among other things, modern political affiliations.

• Nationhood is linked to the principle of territoriality. This principle does not require exclusive territorial rights and jurisdiction for an Aboriginal nation and its government to exercise the inherent right of self-governance.

• Except for rare exceptions, Aboriginal nations are not synonymous with *Indian Act* bands or small communities.

• One formula for self-government cannot be expected to satisfy the interests and needs of every Aboriginal nation or meet the requirements for its relations

with the other two orders of government.

The proposed recognition and government act would prescribe how the government of Canada would give formal recognition to Aboriginal nations and make explicit what is implicit in section 35 of the *Constitution Act, 1982,* namely that those nations have an inherent right of self-government. The legislation would provide that Aboriginal nations, once recognized, may exercise on their existing territories the law-making capacity they deem necessary in the transition period in core areas of jurisdiction vital to the life and welfare of their people and to their culture and identity. Under this legislation, the federal government would vacate its relevant legislative authority under section 91(24) in such core areas. Further, the act would identify which federal areas of jurisdiction the Parliament of Canada is prepared to acknowledge as being core. The federal government would make a commitment to provide recognized Aboriginal nations with financing commensurate with the scope of the jurisdiction in core areas that they propose to exercise and to help them prepare for renewed treaty negotiations.

To promote greater co-operation and certainty, the government of Canada would negotiate with the provinces and Aboriginal representatives, in the context of the Canada-wide framework agreement, an interim agreement on the core powers that Canadian governments are prepared to acknowledge that Aboriginal nations could exercise once they are recognized. This would reduce the risk of legal conflict. Short of an agreement with all the provinces, the government of Canada would proceed with those provinces that were ready to act.

The full extent of these law-making powers and their application to expanded Aboriginal territory in both core and periphery areas would ultimately be negotiated with the federal and provincial governments in the context of the Canada-wide framework agreement and in the subsequent treaty negotiation.

Although we are proposing *recognition* legislation, Aboriginal nations do not require federal (or provincial) legislation to have the constitutional authority to function as governments. That authority, it will be recalled, has its source outside the Canadian constitution, although it is recognized and affirmed in it. What we are proposing, therefore, is simply legislation to make this explicit and to offer guidance to Aboriginal nations and to Canadian governments on how to facilitate the re-emergence of self-governing Aboriginal nations. To make the context of this legislation clear, it would be useful to have a provision that any law-making powers assumed by recognized Aboriginal nations are not to be

construed as contingent, delegated or limited, unless limitations are agreed to through negotiations with the other two orders of government.

The Aboriginal Nations Recognition and Government Act would also clarify other important matters. Among them, federal, provincial and territorial laws would continue to apply to Aboriginal people unless and until displaced by a law passed by a recognized Aboriginal nation acting within its proper sphere of inherent law-making authority. It might also be useful to add a non-derogation provision. This would assure Aboriginal people that recognition will have no impact on existing Aboriginal or treaty rights except to the extent agreed upon through subsequent negotiations.

The most important function of the recognition legislation would be to establish the criteria for formal recognition of Aboriginal nations and the process by which this would take place.

Rebuilding and recognizing Aboriginal nations

As a second element of the transition, we see the process for seeking recognition under the Aboriginal Nations Recognition and Government Act unfolding in three broad stages: (1) a preliminary organizational stage; (2) the stage of preparing an Aboriginal nation's constitution and seeking the endorsement of its citizens; and (3) the stage of seeking recognition under the proposed legislation.

Stage 1: Organizing for recognition

Preliminary consultations with each community could be undertaken by local communities themselves or by larger organizations representing more than one community, a regional or even a national population of Aboriginal people. Tribal councils, provincial associations of *Indian Act* bands and self-governing groups under delegated authority (such as the James Bay Cree and Naskapi), treaty nations, Inuit regional governments or the provincial Métis associations come to mind. Regardless of who begins it, the process of grouping and regrouping scattered elements to rebuild a nation will have to begin from within. The recognition process we foresee is primarily self-directed.

A preliminary step would be for local communities to hold referendums or some other mechanism of community approval to authorize representatives to take the first steps in organizing the nation's institutions, with a view to being recognized. At this first stage, eligibility to vote would, of necessity, be

restricted to current members of the community. Thus, in the case of *Indian Act* bands, those eligible to vote would be all band members, including off-reserve members. Where a band operates according to the *Indian Act*, which restricts voting to on-reserve members, it should use custom to enlarge its list of eligible voters for this initial vote to include all members, regardless of residency. In the case of non-status Indian communities, such as the Mi'kmaq in the province of Newfoundland, and Inuit and Métis communities, the list of eligible voters should include everyone considered to be a community member, regardless of where such persons reside.

When a referendum is used rather than a consensus-building approach, we recommend that at least one-third of eligible voters must vote for the referendum to be valid; then, a simple majority of 50 per cent plus one of those actually voting would be sufficient to carry the referendum.

Having received a mandate to pursue recognized nation status, the initiating communities or organization would be in a position to seek funding and other governmental assistance. Funding should be based on a readily understood formula and be used to enable the elements of the Aboriginal nation, be they representatives of communities or of other organizations, to come together to discuss the many items that will have to be resolved; to enumerate all potential citizens of the Aboriginal nation and to inform them how to apply for citizenship; to engage technical and other assistance where required to begin the process of developing a constitution and a citizenship code; to lay out the possible structures of the nation and its government; and to facilitate the internal healing necessary for the successful completion of these preliminary tasks. An important part of this stage will be to begin the healing process in Aboriginal communities where political cohesion has been fragmented.

One of the most important tasks at this stage will be enumerating the nation's potential citizens. For those directly affected by the *Indian Act*, this poses a particular challenge. As discussed in Volume 1, Chapter 9 and Volume 4, Chapter 2, membership has been and remains a contentious issue in many reserve communities. There were real problems with both the substance of Bill C-31 and its implementation. Unfortunately, it appears from the evidence presented to the Commission that sexual discrimination and fundamental unfairness continue to be problems in the status and membership provisions of the *Indian Act* and in their application, despite the 1985 amendments.

Self-government within section 35 of the *Constitution Act, 1982* is subject to the requirement in subsection (4) of equality between the sexes. Ultimately, the

artificial and unfair distinctions between status and non-status Indians under the *Indian Act* should be eliminated once Aboriginal nations are properly constituted with all their eligible members. Funding arrangements for Aboriginal nations will no longer be based on such distinctions or on the formulas now used by federal officials that discourage Indian communities from including a broader range of persons in their membership.

Thus, in this first stage in the recognition process, the errors and injustices of past federal Indian policy should be corrected by identifying candidates for citizenship in the Aboriginal nation that include not only those who are currently members of the communities concerned, but also those who desire to be members of the nation and can trace their descent from or otherwise show a current or historical social, political or family connection to a particular community or nation. From this enlarged pool of potential citizens of the Aboriginal nation, an appropriate citizenship code could make rational and defensible distinctions based on the principles contained in the *Constitution Act, 1982*, subsection 35(4), the *Canadian Charter of Rights and Freedoms*, and international human rights instruments.

This task in some cases will undoubtedly give rise to controversy. Potential citizens should be informed as early as possible of the process under way. All those seeking citizenship will be required to indicate the circumstances that give rise to their claim. The requirement to offer evidence of descent or connection to the emergent nation should be reasonable, bearing in mind that written records or other documentary forms of evidence are often not available.

Stage 2: Preparing the nation's constitution and seeking its endorsement

We see the constitution of a recognized Aboriginal nation containing several elements: a citizenship code; an outline of the nation's governing structures and procedures; guarantees of rights and freedoms; and a mechanism for constitutional amendment.

A draft constitution should incorporate a citizenship code that is fair and in harmony with Canadian and international standards (this will have been determined earlier in the nation-rebuilding process). Although domestic and international law in this area is still in its formative stage, there is a small body of case law as well as many statements of principle that together would provide guidance in drafting citizenship codes. Care must be taken to abide by the spirit and intent of domestic and international law and principle, rather than relying on narrow interpretations, for example, to suit the views of a small minority that

may now be enjoying the advantages of recognized membership under the *Indian Act*. If a citizenship code is overly exclusive, this could be grounds for a recognition panel, established under the provisions of the proposed Aboriginal Lands and Treaties Tribunal (see Chapter 4), to recommend against recognition and propose steps to make the code more inclusive.

Aboriginal people with a rational connection to a particular community or nation, whatever their current residence or circumstances, should be given a fair opportunity to acquire citizenship, should they so desire, according to fair standards fairly applied. A nation's code would be applied by an impartial body or bodies selected by the membership of the initiating communities or organization. The task of applying the code justly will be an onerous one, and we urge selection of persons with broad vision and the greatest integrity. It will also be crucial to develop an appeal mechanism to ensure that citizenship decisions are subject to a second impartial review. Indeed, the existence of an appeal process should be a condition of recognition in the recognition act. The appeal mechanism should be at the nation level rather than the community level. A nation-level appeal mechanism will ensure consistency of decisions between and across communities.

In the second stage, developing the citizenship code and the bodies to apply it will be one of the first tasks in moving toward recognition. Those deemed to be citizens through these processes will participate in drafting and ratifying a nation's fundamental laws or constitution. The structure of government and how it will function may also be set out clearly in the draft constitution. The paramount consideration will be the presence of internal checks and balances to ensure the smooth running of the proposed government. Many traditional governance systems contain just such mechanisms, and we will not make specific recommendations in this regard. Obviously, one of the challenges facing modern Aboriginal nations will be adapting traditional mechanisms to modern conditions.

In any event, the constitution should contain an outline of the governing structures and their rules and procedures. It should also provide for a system of impartial and independent review of the executive or administrative decisions of the government and public officials. The grounds for review should include alleged illegalities under the constitution and applicable laws, and unreasonableness or lack of fairness in substance or procedure. Citizens need to have a way of challenging government actions without resorting to civil disobedience or other socially disruptive forms of protest. In this regard, the draft constitution could also contain mechanisms for removing elected and

appointed officials from office and identify the grounds for their removal.[262]

Although the *Canadian Charter of Rights and Freedoms* will protect the individual rights of citizens, if Aboriginal nations develop their own charters or recognize conventions or traditional practices that would offer interpretive assistance in applying Canadian Charter protections, these should also be set out in a nation's constitution. Finally, a constitution should contain a provision describing how it can be amended as well as a description of the territory over which the Aboriginal nation will exercise governance.

At all stages of development of a draft constitution, the process must be an open one to ensure that all views are canvassed. Persons who have become citizens at this stage of the process should have an opportunity to take part in discussions on preparing a draft constitution. A number of approaches could encourage broad participation: questionnaires could seek the views of all concerned; the draft constitution could be circulated to all citizens; discussion of the draft constitution could occur through community- and nation-based media; and a variety of ratification procedures could be used to address the circumstances of different groups. For example, provisions could be made for mail-in voting, and voting facilities could be established in urban centres.

A draft constitution should be subject to a 'double majority' standard of ratification before it is adopted. The draft constitution would be presented for approval in a referendum to all individuals who are citizens. Given the historical policies that led to the forced removal or emigration of community members from their home communities, it is likely that the citizenry accepted under the citizenship code will be larger than the total membership of the individual communities that have come together to seek recognition.

Given the importance of the matters being voted on, we recommend that at least 40 per cent of eligible voters vote before a referendum is considered valid and that 50 per cent plus one be needed to achieve the first of the double majority requirements.

As a second requirement of the double majority ratification process, we propose that acceptance of a draft constitution require the approval of a majority in each of the communities that have come together to seek recognition. The objective of this requirement is to preserve the primacy of established communities in the important decisions that will have to be made on the road to recognition.

In our view, a majority of those voting in a community would have to approve the constitution for that community to participate in the new nation government, and a strong majority of communities, say 75 per cent, would be required to ratify the package before the double majority could be said to have been met. Communities that do not decide to join an Aboriginal nation will remain under current *Indian Act* arrangements but will be entitled to join the nation at any time in the future.

To sum up, a draft constitution would be considered adopted as drafted if 40 per cent of the eligible voters participated in the referendum; if the constitution was approved by 50 per cent plus one of those eligible voters across the nation as a whole (the first majority); and if a simple majority of those voting in each community approved the constitution in 75 per cent of the communities (the second majority).

It may also be advisable, given the extreme importance of the ratification stage, that the entire double majority voting process be monitored by outside observers. In this regard, observers from other Aboriginal nations or Elections Canada officials could assist. The important thing will be to ensure due process.

Stage 3: Getting recognition

Assuming that a nation's constitution is approved and the decision to seek recognition under the Aboriginal Nations Recognition and Government Act is endorsed, the third stage would be an application for recognition. In our view, application for recognition should be made to a neutral body, a recognition panel appointed by, and operating under, the proposed lands and treaties tribunal. The panel would consist of a minimum of three persons, the majority of whom would be Aboriginal. It would have broad investigative powers to ensure that the criteria for recognition established in the Aboriginal Nations Recognition and Government Act had been met and that fundamental fairness had been observed in the processes leading to the application.

The authorized representatives of an Aboriginal nation would submit to the recognition panel a draft of their proposed constitution along with evidence that the referendum had been held and that citizens had given their consent. The recognition panel would make a recommendation to the governor in council (the cabinet) once it had reviewed the application against established criteria. If, for any reason, the panel recommended against recognition, the panel would provide reasons for its recommendation and guidance on how its concerns

might be addressed. Although the government would not be obliged to accept the panel's recommendation, it would have to have compelling reasons not to do so and should be required to state those reasons publicly. Recognition would be accomplished by an order in council published in the *Canada Gazette*.

The Aboriginal Nations Recognition and Government Act should amend the *Indian Act* to clarify that the provisions of the *Indian Act* would apply to a recognized Aboriginal nation exercising powers under section 35 of the *Constitution Act, 1982*, but only to the extent the nation wishes.

We make no particular recommendation regarding the amendment or repeal of the *Indian Act*. The future of this act, and particularly the issue of lands, resources and the fiduciary obligation that attaches to reserve lands under the *Indian Act*, are matters that should be subject to negotiations. As a practical matter, withdrawal from the *Indian Act* regime should be phased to provide an appropriate transition period for bands that become part of recognized Aboriginal nations under the proposed recognition and government act. Once recognized, a nation government should receive enhanced funding to exercise expanded powers for its increased population base. In the longer term, the exercise of powers by Aboriginal nations and their governments will be dealt with through the comprehensive treaties that we see as the end products of negotiations between the federal and provincial governments and recognized Aboriginal nations. These agreements will be ratified by Parliament and the relevant provincial legislatures, so as to be binding on Canada and the provinces, and, as treaties, will have constitutional protection.

Recommendation

The Commission recommends that

2.3.27

The Parliament of Canada enact an Aboriginal Nations Recognition and Government Act to

(a) establish the process whereby the government of Canada can recognize the accession of an Aboriginal group or groups to nation status and its assumption of authority as an Aboriginal government to exercise its inherent self-governing jurisdiction;

(b) establish criteria for the recognition of Aboriginal nations, including

(i) evidence among the communities concerned of common ties of language, history, culture and of willingness to associate, coupled with sufficient size to support the exercise of a broad, self-governing mandate;

(ii) evidence of a fair and open process for obtaining the agreement of its citizens and member communities to embark on a nation recognition process;

(iii) completion of a citizenship code that is consistent with international norms of human rights and with the *Canadian Charter of Rights and Freedoms;*

(iv) evidence that an impartial appeal process had been established by the nation to hear disputes about individuals' eligibility for citizenship;

(v) evidence that a fundamental law or constitution has been drawn up through wide consultation with its citizens; and

(vi) evidence that all citizens of the nation were permitted, through a fair means of expressing their opinion, to ratify the proposed constitution;

(c) authorize the creation of recognition panels under the aegis of the proposed Aboriginal Lands and Treaties Tribunal to advise the government of Canada on whether a group meets recognition criteria;

(d) enable the federal government to vacate its legislative authority under section 91(24) of the *Constitution Act, 1867* with respect to core powers deemed needed by Aboriginal nations and to specify which additional areas of federal jurisdiction the Parliament of Canada is prepared to acknowledge as being core powers to be exercised by Aboriginal governments; and

(e) provide enhanced financial resources to enable recognized Aboriginal nations to exercise expanded governing powers for an increased population base in the period between recognition and the conclusion or reaffirmation of comprehensive treaties.

A Canada-wide framework agreement

The third element necessary to establish Aboriginal nations as one of three orders of government is a Canada-wide framework agreement to guide the

development of subsequent treaties and self-government agreements between recognized Aboriginal nations and the federal and provincial governments.

The development of this framework agreement would involve broad and sustained consultations between the federal and provincial governments and the representatives of Aboriginal peoples. This process should begin within six months after the publication of this report and should be a prominent feature of a special first ministers conference we believe should be called early in 1997 to consider implementation of this report. A final, Canada-wide framework agreement should be in place no later than the year 2000 if positive momentum is to be maintained and if federal and provincial good faith toward Aboriginal peoples is to be demonstrated.

It will be vital that adequate financing be made available to the national Aboriginal organizations to enable them to consult properly with and adequately represent their member populations and communities during the process of developing the framework agreement. These funds should be provided according to a reasonable and generally agreed basis of calculation. The willingness of the existing two orders of government to provide financial assistance at this early stage will be a barometer of the commitment of Canadians to the process.

The framework discussions should have three primary purposes: to achieve agreement on the areas of Aboriginal self-governing jurisdiction; to provide a policy framework for fiscal arrangements to support the exercise of such jurisdiction; and to establish principles to govern negotiations on lands and resources and on agreements for interim relief with respect to lands subject to claims, to take effect before the negotiation of treaties.

Concerning the first purpose, what are the potential areas of Aboriginal jurisdiction that would be listed in the Canada-wide framework agreement? The following is a tentative list of the areas of self-government that we see accruing to recognized Aboriginal nations, pursuant to their inherent right. This list includes examples of the core and peripheral jurisdiction discussed earlier in this chapter. It was derived from the scope of section 91(24) and the implied principles reflected in section 35 of the *Constitution Act, 1982* as refined by the *Sparrow* test. It is evident that not every Aboriginal government will wish to have access to all these areas of jurisdiction. Some may choose to exercise them later. This list is a suggested starting point for the negotiations that must occur if the framework agreement is to encompass the extent of Aboriginal nations' law-making powers:

• constitution and governmental structures

• citizenship

• elections and referendums

• access to and residence in the territory

• lands, waters, sea-ice and natural resources

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

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

• operation of businesses, trades and professions

• transfer and management of public monies and other assets

• taxation

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

• property rights, including succession and estates

• education

• social services and welfare, including child welfare

• health

• language, culture, values and traditions

• criminal law and procedure

• the administration of justice, including the establishment of courts and

tribunals with civil and criminal jurisdiction

• policing

• public works and housing

• local institutions

The second purpose of the Canada-wide framework agreement will be to establish a policy framework for fiscal arrangements to support the exercise of those powers once the treaty process has been completed. The policy framework must flow from and reflect the principles we suggest for new financial arrangements:

• A renewed relationship requires fundamentally new fiscal arrangements in which the accountability procedures for Aboriginal nations are not more onerous than those imposed on the federal and provincial governments.

• The fiscal and political autonomy of Aboriginal nations should grow together, so that as they become more politically and administratively autonomous, the share of federal and provincial transfer payments that is conditional diminishes.

• Financial arrangements should provide greater fiscal autonomy for Aboriginal governments by increasing their access to independent own-source revenues founded on the fair and just distribution of lands and resources to Aboriginal nations and enhanced economic development and the development of their own systems of taxation.

The third purpose of the agreement should be to establish the principles on which a fair and just distribution of lands and resources to Aboriginal nations can be accomplished. Negotiations concerning lands and resources must accompany self-government and fiscal negotiations if they are to be accomplished within a reasonable time and produce acceptable results for Aboriginal nations that will give them the measure of autonomy due to them in a renewed federation. In the next chapter we outline the principles that must guide these negotiations — principles that should be reflected in the framework agreement:

• Aboriginal title is a real interest in land that contemplates a range of rights with respect to lands and resources and is recognized and affirmed by section 35(1)

of the *Constitution Act, 1982.*

• The Crown has a special fiduciary duty to protect the interests of Aboriginal peoples, including Aboriginal title, requiring it to protect the Aboriginal land and resource rights fundamental to Aboriginal economies and to the cultural and spiritual life of Aboriginal peoples.

• Blanket extinguishment of Aboriginal land rights will not be required in exchange for rights or other benefits contained in an agreement, and partial extinguishment of Aboriginal land rights will not be made a precondition for negotiating agreements but will be considered only after careful and exhaustive analysis of alternatives.

• All agreements regarding lands and resources will be subject to periodic review and renewal.

• Agreements regarding lands and resources will contain dispute resolution mechanisms tailored to the circumstances of the parties.

For additional clarity, and to allay any possible suspicions regarding the intent of the federal and provincial governments, the Canada-wide framework agreement should also contain a clear statement to the effect that the requirement to negotiate the extent of Aboriginal nation law-making powers is in no way to be construed as considering them contingent powers dependent on the delegation of federal, provincial or territorial law-making authority.

Transition from Aboriginal dependency on federal and provincial governments to greater political autonomy will be neither swift nor without obstacles and problems. Accordingly, it might also be useful for the framework agreement to provide for interim arrangements that would be without prejudice to the long-term negotiations. Existing jurisdictional arrangements could be preserved, or Aboriginal nation self-government powers could be implemented in stages. There are many precedents for such arrangements in recently concluded self-government agreements, such as those in the Yukon and Northwest Territories.

The advantage of a framework agreement is that it will provide guidance to the parties in the subsequent treaty negotiations, saving time, effort and expense. It will also encourage greater fairness across Aboriginal nations in treaty negotiations, because nations with less bargaining power can take advantage of provisions negotiated by Aboriginal organizations or nations bargaining from a position of greater strength.

Subsequent negotiations between individual recognized Aboriginal nations and the federal and provincial governments will build on the framework agreement negotiated by the national Aboriginal organizations. For Aboriginal nations that already have treaties, these subsequent agreements may amount to new treaties, implementation and renewal of their original treaties, or protocols regarding interpretation of the original treaties.

Recommendation

The Commission recommends that

2.3.28

The government of Canada convene a meeting of premiers, territorial leaders and national Aboriginal leaders to create a forum charged with drawing up a Canada-wide framework agreement. The purpose of this agreement would be to establish common principles and directions to guide the negotiation of treaties with recognized Aboriginal nations. This forum should have a mandate to conclude agreements on

(a) the areas of jurisdiction to be exercisable by Aboriginal nations and the application of the doctrine of paramountcy in the case of concurrent jurisdiction;

(b) fiscal arrangements to finance the operations of Aboriginal governments and the provision of services to their citizens;

(c) principles to govern the allocation of lands and resources to Aboriginal nations and for the exercise of co-jurisdiction on lands shared with other governments;

(d) principles to guide the negotiation of agreements for interim relief to govern the development of territories subject to claims, before the conclusion of treaties; and

(e) an interim agreement to set out the core powers that Canadian governments are prepared to acknowledge Aboriginal nations can exercise once they are recognized but before the renegotiation of treaties.

Negotiation of new or renewed treaties

As a fourth step in the transition leading to full self-government, Aboriginal nations recognized under the Aboriginal Nations Recognition and Government Act may proceed to enter into treaty negotiations with the federal and provincial governments for a new or renewed treaty relationship. These negotiations, described in Chapter 2 of this volume, would include expanding lands and resources over which an Aboriginal nation would have sole control and jurisdiction, and identifying a further area of its traditional territory in which it would have shared jurisdiction with other governments.

Having passed through the recognition process, Aboriginal nations would also be able to negotiate directly with the federal and provincial governments in political and constitutional forums for redress of their historical grievances without arousing concerns about representation and membership issues that were evident during the constitutional discussions in the 1980s or that have reached the courts more recently. For example, a single Métis nation or several Métis nations might emerge from this process. Métis people would no longer have to justify their collective presence and explain what they believe their self-government rights to be. They would be able to move directly into power- and resource-sharing negotiations with federal and provincial governments.

At this stage, Aboriginal nations would be entitled to enter into fiscal transfer arrangements as negotiated under the framework agreement with the federal and provincial governments. The scale of funding will be related to the scope of powers to be exercised by an Aboriginal nation and the corresponding services to be delivered within the limits negotiated in the Canada-wide framework agreement.

Although jurisdiction over core areas would accrue to Aboriginal nations upon their recognition, no sovereignty is absolute or exclusive in any federation; nor are the law-making powers associated with that sovereignty. For example, the law-making powers of Parliament and the provincial legislatures have undergone a process of harmonization that continues to this day as the Canadian federation evolves and adapts to new challenges and changing economic circumstances. In the same way, the law-making powers of Aboriginal nations will need to be harmonized with those of the federal and provincial governments if the federation is to move forward in a renewed relationship on the basis of consensus and mutual respect.

Following recognition of an Aboriginal nation, there will be great pressure on

the federal and provincial governments to arrive at workable arrangements that will satisfy the needs and aspirations of Aboriginal nations, and preserve a strong measure of predictability and co-operation between neighbouring jurisdictions. In the same way, given their need to build a government infrastructure, acquire stable sources of funding, and draw the population together into cohesive and functioning societies, newly recognized Aboriginal nations will be highly motivated to arrive at practical arrangements to make this possible.

The more difficult issues can and should be left for the negotiation process, seen as taking place within the context of the Canada-wide framework agreement, and the subsequent individual treaty negotiations. These include the full scope of potential Aboriginal jurisdiction; the paramountcy to be accorded to Aboriginal or to federal and provincial laws in cases of shared jurisdiction; the exact nature of the long-term system of fiscal transfers; the size and nature of land allocations; and many related issues. These negotiations will culminate in treaties within the meaning of section 35 of the *Constitution Act, 1982*.

In the final analysis, resolving all the issues raised in this chapter will be for the parties — the new partners in Confederation — to achieve. The process described here is intended only as illustration. By definition, a federation is a flexible and evolving entity, and the shape and direction it takes must likewise be somewhat flexible and capable of responding to change. If there is one quality that Aboriginal and non-Aboriginal Canadians have shared historically and continue to share, it is the ability to be flexible, to respond to change, and to look to the future with hope and confidence. It is in this spirit that we offer these suggestions for transition.

4.2 Capacity Building: Aboriginal Strategies for the Transition to Self-Government

The Commission’s vision of Aboriginal governance is one in which Aboriginal peoples are free to determine the form of political organization and government that is appropriate for them. To assume their rightful place in this vision, Aboriginal peoples need to have at their disposal tools to ensure their success in reclaiming nationhood, in constituting effective governments, and in negotiating new relationships with the other partners in the Canadian federation.

Earlier in this chapter we identified three basic attributes of effective government: power, legitimacy and resources. We are concerned with the legitimacy of Aboriginal governments, the confidence and support they enjoy, and the resources needed to support them throughout the transition process. Legitimacy will be determined by the way Aboriginal governments are created and structured, the way leaders are selected and held accountable by the people, and the extent to which basic human rights are respected. The capacities of government, especially the people who will propel and steer Aboriginal government, are equally important.

Our discussion of these issues is organized around the capacities and strategies that will be required to effect the transition to a future in which Aboriginal governments are fully functional as one of three orders of government. Throughout the transition process, Aboriginal people will need capacities and strategies that allow them to

• rebuild Aboriginal nations and reclaim nationhood;

• set up Aboriginal governments;

• negotiate new relationships and intergovernmental arrangements with the other two orders of government;

• exercise Aboriginal governmental powers over the longer term; and

• support the building of all these capacities.

Capacity to rebuild Aboriginal nations and reclaim nationhood

The colonial experience and its legacy have touched all Aboriginal people in Canada in some way. The effects of colonialism have been felt not only by individuals, families and communities but also in political structures and activities. This legacy has disrupted many of the institutions essential to Aboriginal governance.

The reclaiming of Aboriginal nationhood is an aspiration actively sought by Aboriginal peoples. It is a key to unlocking Aboriginal autonomy and creates the tools that can be used to reduce dependency, disparity and marginalization and to ensure cultural and political survival.

In practical terms, organizing beyond the community level in the larger political unit of the nation will enable Aboriginal peoples to develop their own laws, institutions and services through governments that command greater power and influence than current community-level arrangements. The aggregated wealth and assets of a nation can be administered for the benefit of the nation as a whole. Duplication of key services, in health and education, for example, can be eliminated and improvements in the quality of those services realized when they are redesigned to serve the nation.

Rebuilding and reclaiming nationhood will be a daunting challenge for some Aboriginal peoples but one that we believe can be met through strategies of healing and reconciliation. These strategies must be designed and directed by Aboriginal people themselves, drawing upon their initiative, imagination and energy. While the main responsibility for rebuilding Aboriginal nations rests with Aboriginal people, given the central role played by the Crown in colonizing Aboriginal nations, processes to rebuild them should receive the full support of Canadian governments.

What then can be done by Aboriginal peoples to rebuild their nations and reclaim nationhood? What can Canadian governments do to aid this process? We believe that developing the capacity of Aboriginal peoples to rebuild their nations has to take place at both the community and the nation level and involves two primary but interrelated dimensions: cultural revitalization and healing, and political processes for consensus building.

Cultural revitalization and healing

Cultural education and awareness will be vital to the rediscovery and revitalization of an Aboriginal nation. The objective of these activities and processes is to build strength and self-esteem in nations and to build nation identity. Cultural revitalization might include the gathering and sharing of knowledge about history, languages, traditions, customs and values. These activities can involve all members of an Aboriginal community but would likely require the special participation of elders, teachers and traditionalists.

Such activities might include organizing research and cultural circles; establishing history and language projects; developing profiles of role models; holding meetings with elders; and offering discussion groups for all ages aimed at restoring self-confidence, pride and self-esteem. These activities might be designed for various social groups, such as families, educators, and political leaders, and could be undertaken by single communities or co-operatively by a

number of communities that share cultural ties.

Cultural healing and revitalization aimed at reclaiming nationhood will require capacities in research and education, the preparation of teaching materials, and public communication efforts at the community level and beyond. Resources will have to be organized in support of these activities. These processes might dovetail with the implementation of recommendations in other parts of our report — those concerned with education and health and healing in particular. We see a strong link between cultural healing as part of nation building and the recommendations for healing made in Volume 3 of this report, particularly in Chapter 5 on cultural institutions, where we recommend community-level strategies to counter language shift and further erosion of Aboriginal culture and knowledge.

Political processes for consensus building

The types of cultural healing and revitalization activities we describe are central to reclaiming nationhood. But these need to be complemented by a process to develop consensus around re-empowering nations for political and governmental action.

The transition process we proposed assumes the development of consensus, first within the community — because it is at this level that most Aboriginal peoples are organized today — and then at the nation level. All members of Aboriginal communities, including women, elders, elected representatives, teachers, healers, artists and others must be involved in reclaiming their culture and identity and reaching consensus about their political future. Initially, this might involve the sparking of public discussion by groups representing a cross-section of the community or particular segments of the community. Alternatively, individuals from within the community might be appointed or come forward voluntarily to act as facilitators in consensus building and as catalysts in starting the process of public discussion.

These individuals or groups would be responsible for collecting and disseminating information on the nation-building process, determining levels of community interest, identifying concerns about or opposition to the focus on nationhood, and generally facilitating the exchange of views and information.

Special consideration will need to be given to establishing links with community members who live away from the community, who have been excluded from participating in community political and social life because of non-residence, or

because of loss of Indian status or their own alienation and distrust of community leaders and political processes.

Efforts should be made to ensure that consensus-building activities are co-ordinated with cultural healing and revitalization projects and other social healing processes.

Informal processes of information gathering and sharing and consensus building should eventually give way to more formal processes, culminating in confirmation by the community, through a referendum or other ratification process, of the community's desire to participate in further nation-building exercises organized at the nation level and to establish nation-level organizations and leaders to represent their interests.

Preliminary nation-building activities and processes involving communities that share a nation affiliation should be organized on a broader basis, concurrently with those taking place at the community level. These preliminary forums for nation building should be concerned, initially, with planning and organizing nation-level political organizations and structures and with establishing protocols and agreements on Aboriginal nationhood and processes by which communities can join together under the umbrella of an Aboriginal nation.

Recommendation

The Commission recommends that

2.3.29

Aboriginal peoples develop and implement their own strategies for rebuilding Aboriginal nations and reclaiming Aboriginal nationhood. These strategies may

(a) include cultural revitalization and healing processes;

(b) include political processes for building consensus on the basic composition of the Aboriginal nation and its political structures; and

(c) be undertaken by individual communities and by groups of communities that may share Aboriginal nationhood.

Aboriginal communities and nations should have access to financial and other assistance to aid in developing and implementing these processes. Of critical importance to nation rebuilding is the willingness of other governments, notably the government of Canada, to support and assist in a neutral and non-interfering manner in the preliminary and subsequent phases of the transition to Aboriginal self-government.

The Commission proposes the establishment of a national centre to co-ordinate and oversee the provision of assistance and support to Aboriginal nations in capacity building through all stages of the transition process, from reclaiming Aboriginal nationhood to implementing Aboriginal governments. We believe that this centre will have a significant role to play in supporting preliminary, pre-nation organizational activities at the community level, including cultural revitalization and healing and political consensus-building processes, as well as the emergence of nation-level political structures. While this centre would have a catalytic role in supporting the transition to Aboriginal self-government, we foresee both mainstream and Aboriginal-controlled educational institutions and organizations centrally involved in delivering support services, programs and projects to Aboriginal peoples and governments.

Recommendations

The Commission recommends that

2.3.30

The federal government, in co-operation with national Aboriginal organizations, establish an Aboriginal government transition centre with a mandate to

(a) research, develop and co-ordinate, with other institutions, initiatives and studies to assist Aboriginal peoples throughout the transition to Aboriginal self-government on topics such as citizenship codes, constitutions and institutions of government, as well as processes for nation rebuilding and citizen participation;

(b) develop and deliver, through appropriate means, training and skills development programs for community leaders, community facilitators and field workers, as well as community groups that have assumed responsibility for animating processes to rebuild Aboriginal nations; and

(c) facilitate information sharing and exchange among community facilitators, leaders and others involved in nation rebuilding processes.

2.3.31

The federal government provide the centre with operational funding as well as financial resources to undertake research and design and implement programs to assist transition to self-government, with a financial commitment for five years, renewable for a further five years.

2.3.32

The centre be governed by a predominantly Aboriginal board, with seats assigned to organizations representing Aboriginal peoples and governments, the federal government, and associated institutions and organizations.

2.3.33

In all regions of Canada, universities and other post-secondary education facilities, research institutes, and other organizations, in association with the proposed centre, initiate programs, projects and other activities to assist Aboriginal peoples throughout the transition to Aboriginal self-government.

Capacity to set up governments

Once consensus on the composition of an Aboriginal nation and its political structures has been reached by participating Aboriginal communities, Aboriginal peoples will have to engage in a formal process of setting up their governments. This is the second stage of our proposed process for rebuilding and recognizing Aboriginal nations; it precedes formal recognition under the proposed recognition and government act, but culminates in a mandate to seek formal recognition.

Activities at the nation level will be focused on preparing for recognition. At this stage, development activities and associated capacity requirements will be concerned with

• designing and planning distinctive Aboriginal nation governments and reflecting these in the constitutions and laws of the nations; and

• developing education and communication strategies to ensure community input into constitution development processes and, ultimately, in preparation for ratification of the draft constitution before recognition is sought.

At this stage, Aboriginal people require the capacity to determine the form, key features and dimensions of their governments; to plan and design structures, institutions and procedures; to determine the scope of government operations and how Aboriginal government authority is to be exercised and distributed among different components of the nation; and to define the extent to which traditional forms of political organization will be incorporated or adapted in new or restored Aboriginal governments.

As noted by the Kwakiutl district chiefs, people must be adequately prepared to plan, manage and support such processes.

Community members are their own experts on defining the scope/goals of a treaty and their needs with the process. However, leaders, staff and others engaged in the land and sea question require support in information and skill development to facilitate this definition and planning process. ‘How do we get started’; ‘What kind of research is necessary’ are questions which illustrate expressed concern at community levels.[263]

The planning, design and development of Aboriginal governments will require the capacity to identify and consider options and make informed decisions with confidence; it will also require access to the necessary technical expertise.

Recommendation

The Commission recommends that

2.3.34

The Aboriginal government transition centre support Aboriginal nations in creating their constitutions by promoting, co-ordinating and funding, as appropriate, associated institutions and organizations for initiatives that

(a) provide professional, technical and advisory support services in key areas of Aboriginal constitutional development, such as

• citizenship and membership;

• political institutions and leadership;

• decision-making processes; and

• identification of territory;

(b) provide training programs to the leaders and staff of Aboriginal nation political structures who are centrally involved in organizing, co-ordinating, managing and facilitating constitution-building processes;

(c) provide assistance to Aboriginal nations in designing and implementing community education and consultation strategies;

(d) assist Aboriginal nations in preparing for, organizing and carrying out nation-wide referenda on Aboriginal nation constitutions; and

(e) facilitate information sharing among Aboriginal nations on constitutional development processes and experiences.

Capacity to negotiate new intergovernmental arrangements

Assuming that Aboriginal nations receive recognition under the proposed recognition and government act, they will move to the negotiation phase of the transition to Aboriginal government. They will have been recognized as the political unit capable of exercising the inherent right of self-government.

Nations will undertake two main types of transition activities:

• implementation of Aboriginal nation government, with government activities focused on core areas of jurisdiction and, where appropriate, on retained areas of *Indian Act* governance, on an interim and transitional basis; and

• preparation for the negotiation and subsequent ratification of treaties, including lands and resources agreements, agreements regarding the scope of Aboriginal legislative jurisdiction, in relation to both core and periphery areas, and financial arrangements.

Our focus here is on measures and special initiatives to support negotiation activities. Aboriginal nations will require strategies and capacities for

negotiating new relationships and renewing existing relationships with other governments in Canada. This will require the ability to develop consensus around the nature of the relationship to be negotiated or renewed, and to undertake technical negotiations with other governments. We have noted that Aboriginal people and governments already have extensive experience in negotiations and negotiating skills in a broad range of areas. However, we anticipate that this skills base will have to be expanded.

Currently there are few, if any, organized programs for developing negotiating skills. The pool of candidates who can assume positions as negotiators for Aboriginal governments or organizations is accordingly limited. We think that the proposed new national centre and its associated institutions and organizations would have a role to play in this area.

We also believe that the period of negotiation will place special demands on the leaders of Aboriginal nation governments to approve negotiation mandates, support negotiators, and establish and participate in processes to inform their members of developments during negotiations.

Recommendation

The Commission recommends that

2.3.35

The Aboriginal government transition centre promote, co-ordinate and fund, as appropriate, in collaboration with associated institutions and organizations, the following types of initiatives:

(a) special training programs for Aboriginal negotiators to increase their negotiating skills and their knowledge of issues that will be addressed through negotiations; and

(b) training programs of short duration for Aboriginal government leaders

• to enhance Aboriginal leadership capacities in negotiation; and

• to increase the capacity of Aboriginal leaders to support and mandate negotiators and negotiation activities, as well as nation-level education, consultation and communication strategies.

Capacity to exercise governmental powers over the long term

Immediately following recognition, Aboriginal governments will be in a position to act in what they see as core areas of jurisdiction. However, we anticipate that community-level administrative systems and structures, such as those associated with the *Indian Act*, may remain operative for a period of time, working in parallel and co-operatively with emergent nation governments. They may also be adapting and restructuring themselves to assume new government functions and responsibilities within the framework of nation government. Thus, community government structures, such as band and tribal councils and associated administrative organizations, could retain their role in the short and medium term following recognition.

Certain strategies and capacities are needed to sustain Aboriginal government operations. Our recommendations address the following:

• human resource capacity generally, particularly in fields not covered in other areas of the report (for example, management and administration, leadership);

• accountability capacities; and

• statistical and data collection capacities.

We also recommend a special program of partnerships between Aboriginal governments and Canadian governments of similar size and scope of operations.

Current Aboriginal human resource base

One of the most significant challenges confronting Aboriginal governments will be to bring together and maintain a trained, professional Aboriginal public service to carry out the many functions of Aboriginal government. As noted in Volume 3, Chapter 5 (especially the section on education for self-government), the pool of trained Aboriginal people has grown steadily over the past two decades, encompassing a wider range of skills and professions. Aboriginal people now operate governments and single- and multi-function organizations and institutions of diverse sizes and degrees of complexity. They deliver myriad programs and services and manage budgets and staff. Notwithstanding dramatic growth in their administrative and service delivery capacity over the last two decades, Aboriginal governments face a shortage of skilled human

resources drawn from their own ranks to fill the wide range of jobs that will accompany Aboriginal self-government. (A more detailed analysis of the current Aboriginal human resource base and its capacity to meet the demands of Aboriginal self-government is reviewed in Volume 3, Chapter 5.)

While it is difficult to estimate the exact requirements of Aboriginal governments, we anticipate that, at a minimum, people with the following experience and skills will be needed:

- negotiators
- leaders
- program managers and evaluators
- social animators
- engineers
- storytellers
- traditionalists
- cultural experts
- judges and lawyers
- elders
- artists
- administrators
- human resource managers
- economists
- communicators

• linguists

• financial administrators and managers

• accountants

• healers

• scientists

This list is not exhaustive; there will be a large demand for specialized technical and related skills in key service sectors, including housing, economic development, health and healing, justice and education. Other parts of our report are concerned more specifically with developing government institutional and human resource capacities in key service delivery areas (see, for example, Volume 3, Chapters 2 to 5).

Data from the 1991 Aboriginal peoples survey and the 1991 census suggest that the range of skills and professional qualifications held by Aboriginal people will need to be broadened to meet the demands of an emergent Aboriginal public service. Although some of the human resource needs of Aboriginal governance can be met from the current pool of skilled people, in many areas the demand for qualified Aboriginal people will outstrip the supply of candidates for some years to come.

Aboriginal governments currently contract with Aboriginal and non-Aboriginal consultants and professionals to provide a variety of services to Aboriginal communities. While Aboriginal governments in the future will not be able to meet all their human resource capacity needs with local expertise, the widespread use of non-Aboriginal professionals and consultants in areas central to the operation of government (such as law, program development and evaluation, accounting and auditing) suggests the need for special measures to meet the demand for more qualified Aboriginal people with these skills.

Human resource capacity has in fact been growing in areas where special initiatives have been established, notably in law, elementary education, social work, management and some areas of community health. In the area of public administration and management, some post-secondary institutions have begun to offer programs and courses geared to the needs of Aboriginal governments. For example, the University of Victoria’s school of public administration offers a

part-time university credit program leading to a certificate in the administration of Aboriginal governments. Courses focus on communication, organization and management in Aboriginal government contexts as well as on legal, political, economic and policy dimensions. (Other programs are reviewed in Volume 3, Chapter 5.)

Ensuring that they have the human resource capacity to conduct their public affairs was a concern noted by participants in the community consultation component of the Commission's research studies on Aboriginal government. For example, a study of Siksika Nation governance, observed that

On the basis of the 1986 Census and interviews with senior management in the Siksika administration, it is abundantly clear that there must be a large scale fiscal resourcing of human resources development and training if Siksika self-government is to be successful. Due to high drop-out/push-out rates, the pool of skilled human resources on-reserve is relatively shallow even in some of the most basic occupations such as mechanics, accountants and carpenters. During community consultations, many respondents stated that the Siksika Nation does not have the skilled management and expertise to undertake self-government. It is a genuine community concern which should not be treated lightly.[264]

In another case, a majority of respondents to a community survey felt that the Indian Brook Band, near Shubenacadie, Nova Scotia, had the human resource capacity to run its government, but those interviewed emphasized the need for training, especially in the areas of basic literacy, legal issues, business management, financial administration, and social policy development.[265]

A submission by the Kwakiutl District Council stated that

In almost all cases, the lack of human resources was identified as a major barrier to preparing for negotiations in our community survey on our land and sea question ... .Serious negotiation preparation will require significant finances to increase basic human resource capabilities.[266]

The Commission does not believe that the shortage of administrative, management, professional, technical and other skills and expertise should be an impediment to implementing of Aboriginal government. Broadening the human resource base available to Aboriginal governments will, however, require major efforts in training and education. We explore elsewhere in our

report the shortcomings of existing education and training opportunities for Aboriginal people and recommend improvements to meet the needs of Aboriginal people and communities and the demands of Aboriginal self-government in the future. Here we consider some specific strategies for human resource development in the field of Aboriginal government management and administration, particularly as they concern senior managers and Aboriginal leadership.

Professionalization

Professionalization can be a source of significant tension in Aboriginal governments today; it can be both a critical element in effective governance and a major source of division between the Aboriginal people served and the government employees serving them. The tension arises from the need for employees to fulfil their responsibilities in an objective and professional manner, while at the same time retaining the confidence and trust of the community and its individual members. As described in a research study prepared for the Commission by Leslie Brown, 'being professional' often involves adopting certain behaviours, language and values as well as attaining a level of formal education. These requirements may set professional Aboriginal people apart from their fellow community members and introduce mistrust in both professional and personal relationships.

First Nations bureaucrats face a bifurcated reality. They are expected to be 'Aboriginal', to be community members, to be culturally aware and thereby retain close communication and relations with the community. At the same time, they are expected to be 'professional', to behave in a way that is credible to federal, provincial and territorial governments and agencies. The two are not always compatible.[267]

Professionalization also has implications for the systems used to structure and control the work of government organizations. Sophisticated Aboriginal bureaucracies have developed around formalized administrative systems, largely as a consequence of Aboriginal governments having to structure themselves administratively to respond to the demands of external governments. While these forms of administrative organization have their advantages, they can also alienate community members, especially when they reflect values and practices that are foreign and in many cases inappropriate to Aboriginal cultures. In the absence of clear administrative systems and procedures, however, officials may be rendered ineffective as a consequence of uncertainty about their roles and responsibilities. Further, they may act in

ways that contribute to administrative inefficiency or leave them unaccountable for their actions. This phenomenon was noted in a case study involving the Indian Brook Band in Nova Scotia.

Staff members, when asked about the study findings, indicated that structure was the key element in correcting the community's outlook on job accessibility and availability. They felt that structure needs to be imposed so that staff will fully understand the band's mandate. They felt that it can be confusing at times for them, when government policies state that they are unable to provide certain services but they are expected by the community to do so. It places them in a moral dilemma: whether to give services that will not be reimbursed and eventually cause a deficit, or release the funds and hope that it will be overlooked by the auditors.[268]

Another dimension of professionalization stems from the presence and influence of non-Aboriginal consultants and professionals in Aboriginal government environments. In the absence of a broadly skilled human resource base, Aboriginal governments frequently contract with or directly employ non-Aboriginal people to fill certain roles and perform certain functions. While outside professionals may have a certain objectivity as a consequence of disengagement from community social and political structures, they may also, unwittingly, bring their own cultural baggage to their tasks, with a consequent impact on the Aboriginal government, its administrative culture and, in the domain of accountability, its legitimacy in the eyes of the Aboriginal people served.

Commenting on a case study of a Dene community's experience with non-Aboriginal people, Brown observed:

The study revealed how Eurocanadians were constructing subtle, as well as more tangible, barriers to the creation of a post-colonial society during a struggle for decolonization. [The author] felt that the Eurocanadians involved in constructing such barriers, while seemingly concerned with the implementation of self-government, were not yet ready to give up their image as humanitarian benefactors or their positions as persons with power and authority ... .Sabotaging community processes for gathering input, reinforcing federal and provincial guidelines and authority, and manipulating conflict within the Dene community were among the ways the Eurocanadians involved in the process attempted to prevent effective and autonomous First Nations governance.[269]

We conclude that many of the tensions associated with professionalization will

dissipate with increased Aboriginal autonomy and the emergence of Aboriginal-controlled governments and public service. Aboriginal assumption of control over the education and training facilities where Aboriginal people receive their professional qualifications will also have an impact by re-orienting the language, values and objectives of Aboriginal professionals and by adapting professional qualifications and standards to meet Aboriginal needs and priorities.

Tensions may also recede as accountability regimes shift responsibility and reporting relationships toward the people served and away from remote, non-Aboriginal governments. Also, under Aboriginal government, administrative and management practices can be scrutinized more easily by Aboriginal governments and harmonized with the cultural practices and values of the people. Finally, community education that includes information sharing about the activities and administrative practices of government will help to bridge the gap between Aboriginal people and the personnel of Aboriginal governments.

Leadership

The nature and quality of leadership is an important determinant of effective government. As discussed earlier in the chapter, Aboriginal people have particularly strong traditions in the area of leadership that are a source of pride and inspiration for many. Ensuring that these traditions of leadership are carried into the future and, where these skills have been lost, rediscovered and restored, will be vital to capacity-building strategies.

A useful reminder of the nature of traditional leadership was recorded in a booklet published by the James Bay Cree Cultural Education Centre in Chisasibi. For Cree people, being a man and a good hunter are related.

A good hunter

• does not boast about his successes or kills,

• never causes embarrassment to less successful hunters,

• never (or seldom) talks about how he killed an animal,

• conducts himself with dignity and with restraint,

• reveals the information about his catch slowly and quietly, often by non-verbal means,

• shows modesty, does not make an exhibition of himself,

• shares, is generous, and

• even when game is scarce, often manages to catch something.

A good leader

• is a good hunter in the first place,

• teaches by example,

• consults others and values their opinions,

• exercises leadership subtly, he is not pushy, and

• obtains consensus among his hunters when making decisions; he seeks agreement.[270]

Forging new leadership styles and improving the practice of leadership should be deliberate and permanent goals of Aboriginal government capacity building. Any distance between the people and their leaders must be bridged, and gulfs that may have formed as a consequence of the imposition of colonial institutions must be narrowed. The challenge will be to restore Aboriginal government leadership traditions and learn new leadership styles that draw on Aboriginal customs, values and traditions in a way that builds on the respect for leadership and knowledge of modern circumstances.

Once again, the current challenge for Aboriginal peoples is to build on the relevant and positive traditions of leadership, to recall these practices, to measure current practices against these norms and to create healthy models for the future.

Strategies supporting capacity building

We have concluded that, in view of current realities and the many challenges posed in establishing Aboriginal governments as an order of government in

Canada, strategies need to be implemented to develop Aboriginal governing capacities. We suggest that such strategies encompass training and human resource development as well as the establishment of formalized systems for Aboriginal government accountability and responsibility. In addition to these strategies, components of which can be implemented at the level of individual Aboriginal governments as well as through Canada-wide measures, we propose changes to the existing system of statistical data collection at the Canada-wide level and information management systems for individual Aboriginal governments. Finally, we recommend a strategy for partnerships or 'twinning' Aboriginal and non-Aboriginal governments to establish forums for information exchange and to enhance understanding among governments in Canada.

Training and human resource development

Developing human resource capacity may mean the difference between success and failure in implementing and sustaining effective Aboriginal government over time. Immediate as well as long-term needs for administrative and management training and education must be recognized as a priority in the transitional phase toward establishing and operating Aboriginal government.

In Volume 3, Chapter 5, we make specific recommendations for education and training strategies to support the development of human resource capacities for Aboriginal government. (See also Volume 3, Chapter 3 on health and healing, and Volume 2, Chapter 5 on economic development.) These recommendations focus on two strategic points of intervention: increasing institutional capacity and increasing support for students. Our recommendations include the following:

• establishing an education for self-government fund to support partnership initiatives at the post-secondary level;

• introducing student bonuses and incentives to reward completion of programs in fields related to self-government;

• increasing co-operative work placements, internships and executive exchanges for Aboriginal people through partnerships with the private and public sector;

• instituting a Canada-wide campaign to increase youth awareness of opportunities in Aboriginal government;

• involving professional associations in the co-operative development of opportunities for Aboriginal professional training; and

• establishing distance education models for professional training.

Each Aboriginal government will have its own particular human resource needs, determined by the scope of its government operations. These needs will be defined according to short-, medium- and long-term planning and priorities and the progressive emergence of Aboriginal governments. In this regard human resource development transcends and overarches all phases in the transition process.

Human resource strategies should encompass the preparation of inventories and assessment of existing skills available to an Aboriginal government, as well as the identification of human resource needs that can be anticipated throughout transition and implementation. Strategies will also involve establishing personnel policies to attract qualified Aboriginal people and to retain them in the Aboriginal public service. These activities might be undertaken as part of the general planning for Aboriginal government, in constitution-building phases, and in preparation for treaty and self-government negotiations.

Recommendation

The Commission recommends that

2.3.36

Early in the process of planning for self-government agreements, whether in treaties or other agreements, provisions be drafted to

(a) recognize education and training as a vital component in the transition to Aboriginal government and implement these activities well before self-government takes effect; and

(b) include provisions for the transfer of resources to support the design, development and implementation of education and training strategies. We also suggest that human resource development strategies for Aboriginal government be based on the following principles:

• a broad rather than a narrow focus; opportunities should be made available for training and education in a broad range of subject matters, skills areas and professions;

• objectives complementary to self-determination, rather than the administrative objectives of non-Aboriginal governments;

• sufficient flexibility to accommodate the different needs and objectives of Aboriginal governments, whether nation governments, public governments or Aboriginal community of interest governments;

• strategies that are culturally based and relevant to the nation or community served; and

• structures that take advantage of education and training programs offered by Aboriginal-controlled educational institutions, including distance education components, and that place a priority on creating a supportive environment for Aboriginal students.

In addition to our recommendations for human resource development to support self-government contained in chapters dealing with sector-specific matters (for example, education, health, economic development), we make a few additional observations and recommendations on training and education for Aboriginal people working in the administration and management of Aboriginal government, especially those with leadership and senior management and administrative responsibilities.

At present, training opportunities for Aboriginal people in administration and management tend to focus on developing skills for administrative support and middle management. Aboriginal people are being trained to implement the decisions of other governments and decision makers outside the Aboriginal community. We see training for administrative and support positions as a valuable component of Aboriginal government human resource strategies. We draw particular attention, however, to the urgent need to train Aboriginal people to assume senior management and administrative positions in Aboriginal governments. Senior managers will need to be trained in such areas as finance, policy and program design, planning and management. They will also need the capacity to provide objective and sound advice to Aboriginal leaders on these matters and on the law- and policy-making activities of government.

We believe special initiatives should be established immediately to increase the number of persons qualified to assume senior management positions in Aboriginal governments. Opportunities for training and education should be created encompassing innovative education and accreditation techniques, including distance education, on-the-job training, and co-operative and internship arrangements.

Consideration should be given to locating these initiatives in Aboriginal or mainstream post-secondary education institutions. These initiatives and programs should offer opportunities for distance education and accreditation and include periodic updating to support and refresh the skills of senior managers in Aboriginal government.

We conclude that training opportunities of short duration should be made available to Aboriginal leaders through education facilities controlled by Aboriginal people. Leadership training and education initiatives should be concerned with enhancing the interpretive, analytic and decision-making skills of leaders, for example, in the areas of financial and personnel management, in policy formulation and assessment, and in law making. They should be extended to Aboriginal leaders in a way that ensures minimal disruption in the exercise of leadership responsibilities. Initiatives to enhance leadership skills might be offered through distance education technologies, through periodic short sessions at designated educational institutions, or through on-site workshops in Aboriginal communities on a contract basis with education facilities. In accordance with our observations on the development of leadership capacities that are culturally appropriate, these programs and initiatives should reflect Aboriginal peoples' customs and traditions of leadership and be responsive to the unique demands and expectations placed on individual leaders.

Recommendation

The Commission recommends that

2.3.37

To assist Aboriginal nations in developing their governance capacities, the Aboriginal government transition centre promote, co-ordinate and fund, as appropriate, in collaboration with associated education institutions initiatives that

• promote and support excellence in Aboriginal management;

• reflect Aboriginal traditions; and

• enhance management skills in areas central to Aboriginal government activities and responsibilities.

Partnerships between Aboriginal and Canadian governments

In Volume 3, Chapter 5 we recommend, as part of an overall human resource development strategy for self-government, that corporations and governments extend to Aboriginal people opportunities for internships, co-operative work placements and executive exchanges. Among other benefits, these initiatives will contribute to the development of management and administrative expertise and skills, applicable in the private and public sectors, through on-the-job training. In addition we see considerable merit in formalizing a program to facilitate co-operation and greater understanding among Aboriginal and non-Aboriginal governments in Canada, at the same time contributing to the development of the skills and capacities of Aboriginal government employees.

We commend the government of Canada for its initiative to begin such a program in collaboration with the Assembly of Manitoba Chiefs. Under this arrangement a number of Aboriginal administrators are being seconded for training to federal departments, including central agencies, in Winnipeg and Ottawa.

Recommendation

The Commission recommends that

2.3.38

A partnership program be established to twin Aboriginal governments with Canadian governments of similar size and scope of operations. Under this program, twinned Aboriginal and Canadian governments would share information on management, administration, programs and other government activities, enter into economic and other partnerships, and conduct personnel and executive exchanges. The overall objective of the program would be to establish a climate of mutual understanding and dialogue, and to give partners the opportunity to learn from each other’s experience.

Establishing accountability systems for Aboriginal government

As described by many interveners at our public hearings, in briefs presented to us and in our research, Aboriginal people have recognized that establishing mechanisms for government accountability and responsibility must go hand-in-hand with the autonomy that these governments will enjoy under self-government and associated fiscal arrangements. Aboriginal governments must be able to demonstrate to their citizens that they are exercising authority and managing the collective wealth and assets of the nation and administrative structures in a responsible and open manner.

Currently, Aboriginal governments and organizations are accountable mainly to non-Aboriginal governments and agencies, such as the Department of Indian Affairs and Northern Development (DIAND), that provide funding for their activities. There is a widespread perception in some communities that their leaders rule rather than lead their people, and that corruption and nepotism are prevalent. Increasingly, Aboriginal people are challenging their leaders through a variety of means, including legal suits brought against leaders by individual members for alleged breaches of public duty. For First Nations people, this situation is traced to the *Indian Act* system of governance and associated administrative policies. Over the past 100 years the act has effectively displaced, obscured or forced underground the traditional political structures and associated checks and balances that Aboriginal peoples developed over centuries to suit their societies and circumstances.[271]

At the level of administration, reporting systems and lines of accountability to external agents such as DIAND are time-consuming and complex and divert the energies of Aboriginal service providers away from delivery responsibilities. These arrangements have created a situation where Aboriginal governments are more responsive to external agencies than to community members. Further, the development of the capacity for political accountability has been stymied by the fact that key policy and program decisions are made by non-Aboriginal officials and political leaders.

Dislodging administrative and related practices associated with the *Indian Act* and similar forms of delegated governance will be an important element of healing and capacity building for self-government. The transformation of administrative regimes may be difficult, in part because many of the current practices are familiar and have become ingrained in existing administrations. In many cases, however, First Nations people have already begun to adapt *Indian*

Act practices to suit their unique circumstances, needs and preferences.[272]

Interveners before the Commission recognized that systems for accountable and responsible government must be deeply embedded in the fundamental structures of Aboriginal governments and must be consonant with the cultural norms of the people. As stated in one brief:

Accountability must be carefully considered and assessed. Traditionally, there were checks and balances that were functional and appropriate for the Anishinabek. The leaders were servants to the people and upheld the values that were inherent in the community. Accountability was not a goal or aim of the system, rather it was embedded in the very make-up of the system. Traditionally there existed an authentic consensual holistic approach to governing. Consensus as a practical option for decision-making must be re-instated by the Anishinabek.[273]

Checks and balances to promote accountability in government are present in Aboriginal cultures and political traditions. Aboriginal peoples and cultures have a rich tradition and a tremendous variety of practices and customs to draw upon. In general, interveners expressed a desire to see their traditions at the centre of responsible Aboriginal government. Given the significant and new challenges facing contemporary Aboriginal governments, however, Aboriginal peoples may wish to consider the inclusion of formalized accountability mechanisms, including codified standards concerning ethical conduct and conflict of interest.

Developing the internal capacities of their governments for political, financial and administrative accountability should be an element in the constitution-building activities of Aboriginal nations and in the implementation of their governments. The essence of accountability is the responsibility of government officials and government employees for their conduct while in public office or otherwise in a position of authority. Citizens must be assured that government is conducted by individuals who are beyond reproach and that public administration is carried out by competent public servants.

Accountability falls into three broad categories: for political decisions, for the administration of public affairs, and for the use of public funds. Elected and appointed officials are formally responsible through clearly defined rules and mechanisms. Accountability means that those dealing with or receiving services from governments will be treated impartially, fairly and on the basis of equality; that government decisions will not be influenced by private

considerations and will be carried out efficiently and economically; and that public officials will not use public office for private gain. In short, the constituency of people served rather than the office holder should benefit from the discharge of public functions.

Accountability mechanisms normally include reporting requirements regarding how government spends public funds, a code of ethics for public officials, and conflict of interest guidelines and enforcement mechanisms. The goal of such mechanisms, and of accountability regimes generally, is to maintain public confidence in the integrity of government, to uphold high standards in public service and to encourage the best people in the community to present themselves for public office. In this sense, accountability is integrally linked with other elements of governance, including leadership selection and decision-making processes.

Accountability strategies for Aboriginal government may include both informal and formal mechanisms. In terms of formal accountability, a variety of mechanisms could be reflected in Aboriginal constitutions, laws and other public authorities. With respect to accountability for the use and expenditure of public funds, public authorities, including laws and administrative procedures that govern financial management and reporting, can be developed by Aboriginal governments. These may include structures and procedures for the independent review and evaluation of all government activities, including the expenditure and management of public finances.

There is wide experience in Canada with public accountability mechanisms that Aboriginal peoples may wish to draw upon. For example, all jurisdictions in Canada have legislation, policies or guidelines to ensure that the private and personal interests of public officials are not inconsistent with the fulfilment of public duties. These specify the types of behaviours or activities considered unacceptable for a public official: among others, selling or purchasing of a public office, influencing appointments, receiving compensation for services rendered in respect of laws or contracts, disobeying laws, obstructing justice, engaging in businesses or political activity that might conflict with official duties, and failure to disclose information about a public official's financial interests. These laws also specify penalties, ranging from imprisonment, fines and reprimands to suspension or removal of the official from public office.[274]

Tribal governments in the United States enjoy a high degree of internal sovereignty in political affairs. Their experience may also be of interest and relevance to Aboriginal peoples in Canada designing and implementing their

own systems for accountable and responsible government. For example, the Navajo Nation has had an *Ethics in Government Act* since 1984, outlining acceptable standards of conduct and restricted activities for public officials and employees, as well as sanctions and penalties. The act requires public officials annually to complete a form disclosing their financial and other interests. Such disclosures, and the overall promotion and supervision of ethical conduct within Navajo Nation government, are the responsibility of the ethics and rules committee of the Navajo tribal council. This body enjoys quasi-judicial powers in monitoring public officials and investigating and conducting hearings on alleged contraventions of Navajo Nation ethics law.[275]

More informal mechanisms of accountability, involving direct interaction among government leaders, officials and citizens, might also be instituted to ensure that Aboriginal governments, particularly nation-level structures, remain connected with the people served.

Informal accountability strategies with a community education orientation could encompass the following:

• regular public meetings and consultation processes on public matters;

• communication through newsletters, radio, television and cable broadcasting;

• regular community surveys and assessments to provide feedback on government activities, priorities, initiatives, and so on;

• establishment of citizen advisory bodies for elders, youth and women, and in key areas of government activity (for example, finance, employee selection and review); and

• opportunities for direct interaction involving individual citizens, leaders and officials, such as citizens' question periods.

Recommendations

The Commission recommends that

2.3.39

Aboriginal governments develop and institute strategies for accountability and responsibility in government to maintain integrity in government and public confidence in Aboriginal government leaders, officials and administrations.

2.3.40

Aboriginal governments take the following steps to address accountability:

(a) Formalize codes of conduct for public officials.

(b) Establish conflict of interest laws, policies or guidelines.

(c) Establish independent structures or agencies responsible for upholding and promoting the public interest and the integrity of Aboriginal governments.

(d) Establish informal accountability mechanisms to ensure widespread and continuing understanding of Aboriginal government goals, priorities, procedures and activities, administrative decision making and reporting systems.

2.3.41

To the extent deemed appropriate by the Aboriginal people concerned, strategies for accountability and responsibility in Aboriginal government reflect and build upon Aboriginal peoples' own customs, traditions and values.

Data collection and information management

Improvements and adjustments will need to be made to Canada-wide statistical and data-gathering systems to respond to and support emerging and new forms of Aboriginal government. Ultimately, improvements in the structure and activities of Statistics Canada, as they relate to Aboriginal people, and the census, post-census and other surveys on Aboriginal people will be beneficial to Aboriginal government planning activities as well as to the determination of fiscal transfers to Aboriginal governments.

For Aboriginal people, knowing how political, demographic, social and economic changes will affect their nations and having in place data collection vehicles that provide a community and nation level aggregate picture will be essential to Aboriginal government implementation and planning processes. Having a reliable, valid and continuous statistical system, however, will require

the participation of all Aboriginal people and nations if the system is to have the utility and credibility that users need.

Because of the evolving nature of Aboriginal societies, their government structures, economies and social conditions, we believe that it is essential to have a flexible survey vehicle or instrument to measure changing conditions over time. A post-census survey provides the opportunity to reach a large sample of the Aboriginal population, especially those living off-reserve in rural and urban areas, and enables the type of in-depth analysis required for policy development and for planning and evaluation of programs and services affecting Aboriginal people — activities that increasingly will be the responsibility of Aboriginal governments in the future. Statistics Canada might wish to consult with national Aboriginal organizations on the range of off-reserve communities to be included in a post-census survey.

With respect to the content of survey instruments, there is evidence that Aboriginal people are increasingly describing themselves according to their nation or tribal affiliation, instead of accepting the terms supplied in the survey instrument. Although there has always been the opportunity for respondents to write in an ethnic group not covered in the list of responses, an Aboriginal person would have to write in his or her tribal or nation affiliation in the ‘other ethnic group’ space, which is usually at the end of the ethnic group list. This may discourage Aboriginal people from responding to the ethnic/cultural question, since they are not an ‘ethnic group’. Other problems are posed for the selection of sample populations for the post-census survey.

It has come to our attention that changes may be required in the geographic coding system used by Statistics Canada in census and other survey instruments to account for the establishment of new jurisdictions in which Aboriginal governments operate, or areas in which these may emerge in public or other government form. These areas include the Metis Settlements of Alberta, mid-north communities with significant Aboriginal populations, and Nunavut. The changes we recommend may assist Aboriginal people and local groups in acquiring data from Statistics Canada more easily and at reduced cost.

Recommendation

The Commission recommends that

2.3.42

Statistics Canada take the following steps to improve its data collection:

(a) continue its efforts to consult Aboriginal governments and organizations to improve understanding of their data requirements;

(b) establish an external Aboriginal advisory committee, with adequate representation from national Aboriginal organizations and other relevant Aboriginal experts, to discuss

• Aboriginal statistical data requirements; and

• the design and implementation of surveys to gather data on Aboriginal people;

(c) continue the post-census survey on Aboriginal people and ensure that it becomes a regular data-collection vehicle maintained by Statistics Canada;

(d) include appropriate questions in all future censuses to enable a post-census survey of Aboriginal people to be conducted;

(e) in view of the large numbers of Aboriginal people living in non-reserve urban and rural areas, extend sampling sizes off-reserve to permit the statistical profiling of a larger number of communities than was possible in 1991;

(f) test questions that are acceptable to Aboriginal people and are more appropriate to obtaining information relevant to the needs of emerging forms of Aboriginal government;

(g) test a representative sample of Aboriginal people in post-census surveys;

(h) include the Metis Settlements of Alberta in standard geographic coding and give each community the status of a census subdivision;

(i) review other communities in the mid-north, which are not Indian reserves or Crown land settlements, to see whether they should have a special area flag on the census database; and

(j) consider applying a specific nation identifier to Indian reserves and settlements on the geographic files to allow data for these communities to be

aggregated by nation affiliation as well as allowing individuals to identify with their nation affiliation.

We commend the federal government on its efforts to involve Aboriginal people in conducting the 1991 census and post-census Aboriginal peoples survey. Statistics Canada broke new ground in terms of its extensive consultation efforts with Aboriginal groups. It established a number of agreements with First Nations organizations in several provinces, resulting in Aboriginal people assuming a meaningful role in conducting and supervising data-collection operations. In those regions where such agreements were in place the data collection phase proceeded smoothly.

Recommendation

The Commission recommends that

2.3.43

The federal government take the following action with respect to future censuses:

(a) continue its policy of establishing bilateral agreements with representative Aboriginal governments and their communities, as appropriate, for future census and post-census survey operations;

(b) in light of the issues raised in this report and the need for detailed and accurate information on Aboriginal peoples, the decision not to engage in a post-census survey, in conjunction with the 1996 census, be reversed; and

(c) make special efforts to establish such agreements in those regions of Canada where participation was low in the 1991 census.

The capacity of Aboriginal government to design, plan and manage a broad range of government functions and operations in the future will be improved if Aboriginal people have adequate information management skills and access to appropriate technologies within their own government organizations. Information management systems currently in place in Aboriginal communities may be sufficient for administering limited local government responsibilities, small service delivery institutions, societies and non-profit associations. However, as Aboriginal governments assume significantly increased authority

and responsibility in areas such as citizenship, financial planning and management, and new services sectors, the demand for data management systems and related capacities will increase.

Aboriginal governments must have at their disposal the human resource skills, technologies and equipment to assist them in meeting the challenges of managing information in an Aboriginal government with confidence. Information management systems in support of self-government should allow for controlled access to confidential information, collection and analysis of information within and across communities in a nation, pooling of information among multiple Aboriginal nations, and maximum compatibility with Canada-wide statistics gathered by Statistics Canada. A recommendation for an Aboriginal statistics clearing house to serve these ends appears in Volume 3, Chapter 5.

Recommendation

The Commission recommends that

2.3.44

Governments provide for the implementation of information management systems in support of self-government, which include

(a) financial support of technologies and equipment proportional to the scope of an Aboriginal government's operations; and

(b) training and skills development, including apprenticeships and executive exchanges with Statistics Canada, to facilitate compatibility between Aboriginal government systems and Statistics Canada.

4.3 The Structure of the Government of Canada for the Conduct of Aboriginal Affairs

Implementation of our recommendations will require changes in the organization of the government of Canada for the conduct of its responsibilities related to Aboriginal affairs. Without seeking to

predetermine choices about implementation that will best be made by the political leaders and officials directly involved, it is part of our responsibility to consider the changes needed in the structure of the government of Canada as

a result of our recommendations. We propose what we believe to be the best organization for the development and implementation of Aboriginal policy through the cabinet system. By implication, we consider the future of the Department of Indian Affairs and Northern Development.

An essential condition for change is the establishment of effective agencies through which the federal government can fulfil the commitments called for in our recommendations. If the last several decades have revealed anything about federal administration in Aboriginal affairs, it is that no real change will occur without agencies structured in such a way as to facilitate change, staffed by committed people who can work unencumbered by conflicting policy instructions.

We have already established that there are deep structural reasons for failures in federal management of Aboriginal affairs. We addressed these at length in Volume 1, and our recommendations relating to restructuring the relationship and improving the social and economic circumstances of Aboriginal peoples reflect our assessment of how to remedy the failure. The specific institutional changes discussed here are necessary companions to our other recommendations.

We begin our analysis with a review of the history of federal organization for the conduct of Aboriginal affairs. An understanding of this history is important because, despite many reorganizations and changes in philosophical direction, other characteristics of the federal approach to managing Aboriginal affairs have proven resistant to change over many decades. Some of these more intransigent characteristics have prompted what are now conventional critiques of DIAND and, more generally, the federal government's performance.

Our proposals and recommendations are not based solely on the lessons of history, however. There are a number of contemporary challenges associated with reform of the status quo. To a considerable extent, these are shaped by the current social and economic environment and by the realities of organizational life within the government of Canada. We also develop our recommendations on the basis of important principles for federal institutions, such as the goal of transparency — public policies that are readily understood by Aboriginal people and other segments of the attentive public, as well as within the government of Canada. In summary, the approach we recommend to reshape the federal government takes into account the lessons learned from the past and the current environment, as well as the Commission's recommended direction for Aboriginal policy.

Lessons from history

The current state of federal organization for the development and implementation of Aboriginal policy reflects historical conflicts and strains in political and bureaucratic philosophy about Aboriginal issues. It also reflects the fact that federal policy making has rarely taken a comprehensive approach to Aboriginal affairs. Instead, the various departments with responsibilities for matters of interest to Aboriginal peoples have developed policies and programs independently of each other, and frequently only for specific groups of Aboriginal people.[276]

Historically and today, the federal approach reveals an interplay among ideas of federal custodianship, an emphasis on infrastructure development born of a desire both to improve the objective conditions of Aboriginal people and to permit the opening of lands and other developments in their traditional territories; and an emphasis on micro-scale and 'holistic' community development. More recently, we see an emphasis on political and administrative devolution. This emerged first as an aspect of northern development policy, beginning in the late 1960s; but it also underlies the various federal self-government initiatives of recent years. Unfortunately, the different organizing principles and philosophies for the conduct of Aboriginal affairs have often competed with one another, both within DIAND and in the federal government as a whole.

Reviews of DIAND and its predecessors reveal almost constant organizational and policy flux. Until recently, critiques by Aboriginal people and others have, however, been remarkably consistent.[277] The conventional criticisms are as follows.

DIAND operates under a legacy of colonialism and paternalism and is resistant to change.

As the department charged with implementing the *Indian Act*, DIAND could hardly have escaped this criticism. For at least 30 years, successive ministers of Indian affairs have announced their intention to change the department's orientation and to create a new role for the department in promoting and enabling the economic and political development of Aboriginal communities. Whatever successes there have been in this area have come more slowly than predicted and with less than wholehearted support from the department.[278]

DIAND's performance in the federal policy arena is inadequate.

Departments with more focused functional responsibilities and budgets are seen as being able to 'walk over' DIAND, at least in its policy role. Critical departments include defence, health, natural resources (and its various predecessors) and fisheries. In addition, over the years DIAND has been seen as having insufficient capacity to bring its own policy initiatives to fruition through the cabinet decision process.

The relative weakness of DIAND may seem odd, considering its large budget and the minister's ability to lever supplementary funds from the expenditure budget.[279] It is likely a result of the contradictory mandate, which has made the department prone to protracted internal policy debates and has made it difficult for the department to benefit from the efforts of its politically active and effective constituency.[280] That constituency is extremely diverse, including at various times resource developers, status Indians, Inuit, and northern political leaders with aspirations to provincehood, among others. At different times virtually all members of this constituency have tried to circumvent DIAND to make claims more directly on other ministers or on cabinet.

DIAND is evasive or negligent on the matter of meeting federal treaty and claims obligations.

Federal policy on Aboriginal rights and title, as well as that with respect to treaties and comprehensive claims, has been extremely inconsistent over time.[281] And if policy directions have vacillated dramatically, it is plain that federal *behaviour* has been relatively consistent: the federal role has been to deny the original spirit and intent of the treaties and to attempt to restrain any expansion of federal responsibilities to all Aboriginal peoples in Canada. The absence of any effective oversight mechanism, aside from the courts, has been a matter of concern.[282]

The organizational challenge

Linking these perceptions and lessons from history with current reality, the Commission faced three important challenges in developing a vision of federal executive organization for Aboriginal affairs:

• Policy capacity: How can organizational capacity within the federal government be enhanced to ensure that it will be possible to develop policy to

implement a restructured relationship?

• Implementation: What institutional arrangements will make it most likely that major reforms will be implemented once policy has been developed?

• Current trends in government organization: How can these wide-ranging proposals for structural and program reform be explained and defended in the real world of government in the 1990s?

Policy capacity

Our recommendations related to the policy capacity of the federal government suggest a number of imperatives.

First, there is a need to identify the policy initiatives that will start the process of implementing the new relationship, in contrast to those that will sustain it.

Several of the Commission's major recommendations are in the first category — measures that will launch the process of developing a new relationship between Aboriginal peoples and other Canadians. These include, for example, the proposal for a royal proclamation to establish an appropriate context for negotiations; the Aboriginal Nations Recognition and Government Act; the decision to establish and support treaty commissions; and, for the prime minister, the decision to reorganize the government to reflect the new relationship and agenda for change, as recommended by the Commission.

For such initiatives, the leadership of the prime minister and the support of the government — as well as the sustained effort of the prime minister's office and the Privy Council Office — will be required.

Second, recommendations must deal with the establishment of a federal policy capacity related to the full range of its responsibilities for Aboriginal peoples.

The Commission has recommendations covering many functions, such as health, education and economic development. The DIAND experience indicates that a multi-functional unit faces major obstacles to effectiveness across the full range of responsibilities. When many functions must be served by a single department, it is difficult to develop sufficient depth of expertise in all areas. Compounding this problem is the capacity of departments and agencies of government that carry the lead responsibility for a particular function (for

example, human resources development or natural resources) to dominate policy debates within government related to Aboriginal-focused initiatives or to influence the situation of Aboriginal people, through their action or inaction.

Third, both the reputation and the reality of past federal practice suggests the need for recommendation(s) for policy oversight and guidance other than through the courts.

Implementation issues

Regardless of the substance of future federal policy, there are fundamental organizational issues related to policy and program implementation.

What will the operational relationship be between Aboriginal governments and the federal government?

This question may be particularly critical during the transition to self-government. The federal government will still have responsibility for assisting Aboriginal governments to build suitable capacity to manage their affairs. Over the longer term, relations will continue, at the administrative level, between Aboriginal governments and the federal government on matters such as policy and program co-ordination and funding.

It is likely that both symbolic and practical considerations will induce Aboriginal governments to seek a federal/Aboriginal government relationship that will be in some respects analogous to that of federal and provincial governments. This implies diffuse access to the various departments and agencies of the federal government.[283]

For treaty nations and those with comprehensive claims, can organizational improvements be made that will result in the more timely and effective implementation of federal obligations?

Is an organization like DIAND the best means for fulfilling federal fiduciary and operational obligations related to the *Indian Act?* This question becomes particularly important when we recognize that some Aboriginal communities may not want to depart from the act in the near future.

Current trends in government organization

The question of how best to organize for effective Aboriginal policy development and implementation should be addressed in light of recent experience and the current direction of reform in the machinery of government.

Two previous experiments with federal cabinet reorganization are worth noting, both of which were ultimately abandoned. The first was the creation of a new ministry of state, a potentially tempting device for reorganizing federal policy responsibilities in Aboriginal affairs.[284] A ministry of state unencumbered by operational responsibilities may seem an appropriate instrument to usher in a new era in which Aboriginal governments themselves control much of the public expenditure in their own territories. Assessments of such ministries, such as the former ministry of state for urban affairs and the ministry of state for science and technology, suggest, however, that they have had very little claim on the attention of departments with operating responsibilities and significant budgets, or on cabinet.[285] Some means of increasing a policy ministry's clout under these circumstances would seem advisable.

A second institutional approach to policy development emphasized cabinet committees and the clustering of ministries into envelopes or other groupings. This instrument, used on its own, is not promising. Bruce Doern's work suggests that the envelope system of the 1970s failed to capture the breadth of the Aboriginal policy field, instead channelling all Aboriginal policy into the social policy area.[286]

Establishing an Indian affairs department devoted to policy concerns and reforming the expenditure process play a role in our recommendations, but neither step is adequate on its own.

In considering institutional options, we have also taken into account more recent trends in federal government organization, sparked to a considerable degree by the imperatives of expenditure reduction, in particular,

• The creation of large, multifunctional departments, such as human resources development, public works and government services, and Canadian heritage. These very large departments were intended to enhance policy and program co-ordination within the federal government by creating departments with interconnected responsibilities, as well as to facilitate the process of reducing the number of employees in the federal public service by combining similar functions and responsibilities.

• A preoccupation with creating partnerships between the federal government and other governments, non-governmental organizations and the private sector. Partnerships are often seen to facilitate program delivery and to provide a means for renewing the federal policy capacity. In popular terms, the federal government would prefer to emphasize steering, not rowing.[287]

• Retention of some of the 'businesslike' functions of government but housing them in more independent special operating agencies.

• An overwhelming preoccupation with reducing the apparent overall size of the federal government.

In making our recommendations, we have not followed any one or all of these trends blindly. It

is our best judgement, however, that our proposals for institutional reform tread a reasonable if assertive middle path: they make sense in the existing climate without necessarily following the loudest drummer. Most important, they provide a sound organizational basis for moving ahead to implement the new relationship and sustain federal momentum for developing the many policy and program initiatives we recommend.

Finally, there are two important realities about the way government bureaucracies operate that form the permanent backdrop for any of the Commission's institutional recommendations:

• Existing central agencies have persistent and strong interests in Aboriginal policy. The departments of finance, justice and treasury board are particularly important, as is the Privy Council Office.

• The Commission hopes to stimulate a lasting impetus for change, but must recognize that this impetus will be met by significant natural 'drags' that will slow or curtail implementation of the key recommendations.

Such countervailing forces include the absence of institutional capacity to do everything at once or to do some things at all; preoccupation by the government with other policy agendas; and conflicts among the different institutional arms of the federal government about what should be given priority. The last two factors indicate a need for a strong and focused capacity to develop policy on Aboriginal affairs, as well as clearly assigned responsibility

for co-ordinating the different parts of the federal government that may be charged with implementing the new relationship.

All of the considerations just reviewed argue for a careful and fundamental reconsideration of the federal institutions through which the new relationship could be realized. The organizational complexities, as well as the volatility of Aboriginal affairs and the many costly episodes of confrontation and stalemate, suggest that developing new institutions appropriate to bringing about fundamental change is not a simple matter. When thinking about the various possibilities for reform, we were guided by a number of principles that speak to the public interest and to organizational needs.

Proposed principles

The following principles underlie our recommendations concerning federal government organization. These are not intended as evaluation criteria; the fact that some of them are seemingly contradictory would bedevil an effort to use them in this way. They are complementary to the preceding analysis, to serve as *inuksuit*, to assist in navigation.

• Simplicity: Organizational changes should be as straightforward as possible; all other things being equal, where there is a choice of format or mechanism, preference should be given to the simpler form.

• Transparency: The reasons for and content of recommendations must be capable of being readily understood within the government of Canada, by Aboriginal peoples and by other segments of the attentive Canadian public.

• Link between policy development and implementation: Experience suggests that initiatives in which the ultimate doers create the policy and in which the idea people share responsibility for implementation are most likely to be successful. This principle implies rejection of ministry of state approaches, as they have been conceived in the past, but requires consideration of how to enhance policy development and implementation.

• Oversight: The general perception of unmet federal commitments requires specific attention to oversight other than through the courts.

• Respect for difference: Policies and institutional arrangements must reflect fundamental differences among Aboriginal peoples. This may imply

differentiation within a single federal organization or policy regime, or different organizations or regimes.

Implications for the federal role

Our recommendations fall into three broad categories.

First are recommendations fundamental to restructuring the relationship between the government of Canada and Aboriginal peoples. Two examples of this type are the recommendation to form the foundation of the new relationship through a royal proclamation and companion legislation; and the development of new institutions through which better policies will be developed and sustained, as in the restructuring of the federal government and the establishment of the treaty commissions and the Aboriginal Lands and Treaties Tribunal.

These initiatives will be necessary to launch the process of building the new relationship. They will require prime ministerial leadership, the full commitment of the cabinet, and sustained and ingenious support from the key central agencies of the cabinet, the Privy Council Office and the prime minister's office.

Second, several key recommendations will require federal executive attention over a longer period. These recommendations are essential to complete implementation of the new relationship but are not symbolically or legally essential to the launching of a new relationship. They imply the need for a federal capacity for

• sectoral policy reviews, in such areas as education, health and healing, and housing; and

• reviews of the federal fiscal framework as it relates to fiscal arrangements between Canada and Aboriginal governments and funding levels for continuing federal programs and new institutions and arrangements.[288]

Finally, there is an important third category of recommendations that support or improve measures already mandated by legislation (most often, the *Indian Act*). These activities are

• implementation — the conclusion of new comprehensive claims and self-government arrangements under the approaches recommended by the

Commission, together with the requirement that the federal government live up to the terms of existing agreements and initiatives (recent examples of which are the agreement to establish Nunavut and the Nunavut land claim agreement, as well as the Manitoba initiative and the 1995 federal policy guide on Aboriginal self-government), suggests a need for enhanced capacity within the federal government to implement such agreements; and

• reformed servicing — for communities that decide that, for the immediate future, they want to retain a relationship with the federal government under the *Indian Act* and established administrative practices for governance and community servicing. The Commission's recommendations on remedial reform, perhaps most particularly in Volume 3, point to improvements in federal practice that should be made, even in the *Indian Act* context.

These activities suggest that the federal government needs the following institutional capabilities:

• a capability to negotiate new treaty arrangements, self-government accords and claims agreements;

• a capacity to develop and review policy;

• a capacity to service and deliver programs to communities operating under the terms of the *Indian Act;*

• a capacity to facilitate and implement new policies and relationships. This implies specialized expertise, in areas such as education, health, and economic development, to implement policy and program changes resulting from federal policy reviews and new agreements with Aboriginal peoples and their governments. It also includes the capacity to get funds and other forms of support out to Aboriginal governments, Aboriginal agencies and organizations established jointly by Canada and Aboriginal peoples (and perhaps provinces), consistent with any federal commitments for such support;

• a capacity to develop and establish alternative dispute resolution mechanisms, such as the lands and treaties tribunal; and

• a centralized executive oversight capability, within the cabinet structure, to ensure that the practices of departments and agencies throughout the federal government conform to federal policy.

The proposed organizational structure

Lessons from the past, the current context and the challenges posed by the Commission's recommendations require a federal government with the capacity to develop and implement the new relationship while continuing to meet federal obligations. The federal organizational structure must also have the capacity to conduct intergovernmental relations with provincial and territorial governments, encouraging co-ordinated and constructive initiatives at all levels of government. The federal government's organization must have these capabilities while avoiding some of the institutional conflicts of interest and other difficulties associated with past arrangements.

The key elements of this new approach are reflected in our recommendations on

• the leadership initiative of the prime minister;

• the overall structure of the federal cabinet;

• the role of the Privy Council Office;

• the establishment of a new department of Aboriginal relations, under a minister of Aboriginal relations; and

• the establishment of a new Indian and Inuit services department to meet continuing federal obligations to Indian communities and Inuit, until transition to self-government.

The cabinet structure

The proposed cabinet structure reflects the important lessons from past government organizations, the different requirements for centralized and more decentralized executive action, and the realities of the operational milieu for implementing the Commission's recommendations. Figure 3.2 indicates five central elements of our proposed approach.

1. Responsibility for beginning and sustaining renewal in the conduct of Aboriginal affairs lies with the prime minister.

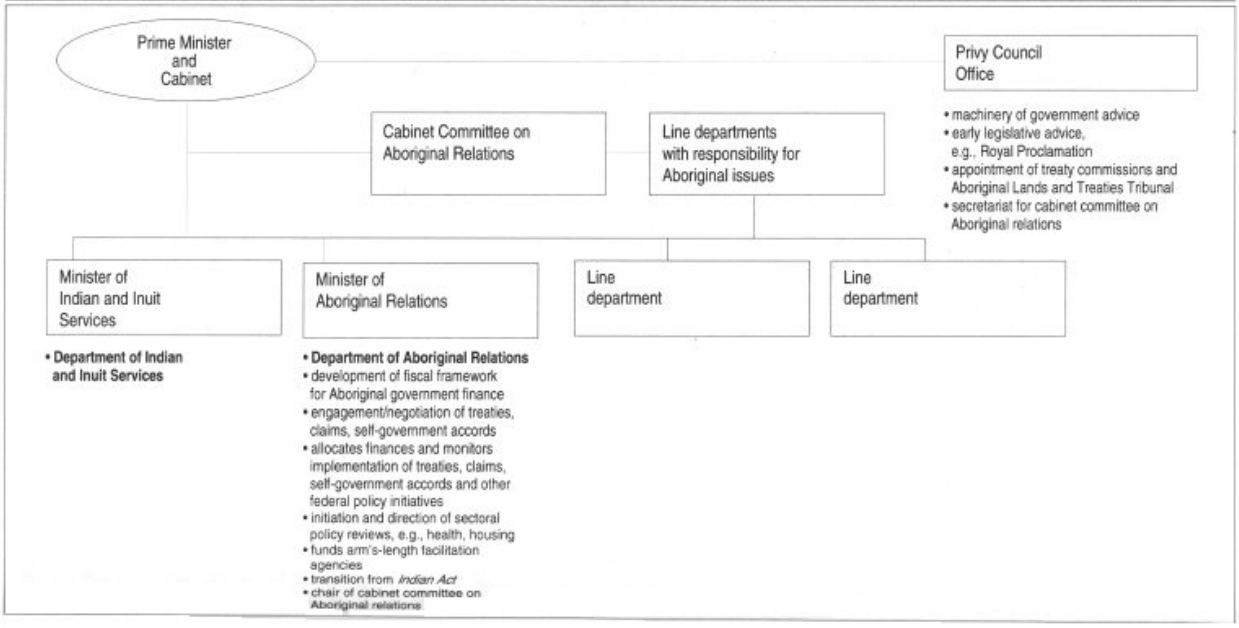
The prime minister would, as a matter of course, carry out this role in

consultation with cabinet and supported by the branch of the Privy Council Office (PCO) that deals with machinery of government. This latter group will have responsibility for guiding the federal role in relation to any independent tribunals and bipartite or tripartite organizations that might be established. For example, appointments to the Aboriginal Lands and Treaties Tribunal would be made through the PCO by cabinet.

More generally, as discussed later, PCO will support the prime minister and cabinet as a new cabinet committee on Aboriginal relations conducts its work.

The pivotal role of the prime minister is not restricted to initiating institutional reform or launching federal support for independent tribunals and bipartite and tripartite organizations. At the most fundamental level, it falls to the prime minister to launch and nurture the renewed Aboriginal/Crown relationship, through a vehicle such as a royal proclamation and its companion legislation. We discussed our recommendation for a royal proclamation in Chapter 2 of this volume.

FIGURE 3.2
Proposed Organization of the Government of Canada as it Relates to Aboriginal Peoples



2. A new senior ministerial portfolio, the minister of Aboriginal relations, and a new department of Aboriginal relations are established.

Created to guide all federal actions associated with developing and

implementing the new federal/Aboriginal relationship, this new department would combine policy and intergovernmental responsibilities with responsibility for the overall fiscal framework and federal spending related to Aboriginal affairs. We have tried to build on the experience of the federal government with other attempts at institutional change. Specifically, we have concluded that there is a need for a minister with real power to oversee policy development throughout the federal government, to lead the federal intergovernmental relationship with Aboriginal governments and with provinces and territories on Aboriginal affairs, and to make sure that federal policies and other commitments reflecting the new relationship between Canada and Aboriginal peoples are implemented by federal departments and agencies.

Previous efforts have failed, both in the conduct of Aboriginal affairs and in federal efforts to co-ordinate initiatives related to such diverse fields as urban affairs and science and technology policy. In the latter instance, ministries of state lacked the real policy levers, most importantly the financial levers, to do their job. From the mid-1970s until its abandonment in 1984, the envelope system attempted to link policy development and spending decisions across policy fields. It failed, however, to provide adequate emphasis on Aboriginal matters or to reflect the breadth of Aboriginal issues. Aboriginal issues were collapsed under the rubric of social policy, both at the department level (through the ministry of state for social development) and in its mirror cabinet committee on social development. We also reviewed the history of the administration of the *Indian Act* and concluded that DIAND does not provide the appropriate structure or environment for the task ahead.

Conventional criticisms of DIAND support this conclusion.[289] One may take issue with these criticisms. The fact remains, however, that the perceptions are widely shared, and the criticisms are supported by the Commission's own research. We believe the legacy of DIAND's corporate history since its establishment has contributed to two somewhat contradictory tendencies: internal resistance to change and a reluctance to 'expose' the department as it relates to obligations under historical treaties or more contemporary claims agreements and, in the most recent period, a tendency to move relatively quickly on policy initiatives without adequate consultation with those affected, raising questions about whether adequate attention has been paid to their implications. We do not think either tendency will contribute to the development of a sound foundation within the government of Canada for the new relationship we envision.

The practical effect of the proposed innovation would be that the new minister

would oversee Aboriginal policy and program development across the departments and agencies of the federal government. The minister would have the authority to ensure that new initiatives and continuing activities reflect the spirit and intent of the new relationship. To a significant degree, this would occur by virtue of the minister's authority to allocate funds from the federal government's expenditures on Aboriginal issues and operations across the government. The minister would also have the authority, by virtue of a monitoring role, to withdraw or withhold funds should federal commitments be unmet by other federal departments and agencies or by initiatives contrary to the spirit and intent of the new relationship being proposed.

It is important to note that the minister of Aboriginal relations would carry out fiscal responsibilities within the overall federal fiscal framework established by the minister of finance. We expect, however, that the minister of Aboriginal relations would engage with the minister of finance in vigorous negotiations about the overall fiscal framework. As Figure 3.2 indicates, within the context of the fiscal framework of the federal budget, the minister of Aboriginal relations would have the lead

responsibility for managing the fiscal envelope related to Aboriginal affairs. This includes negotiating and concluding financial arrangements associated with comprehensive and specific claims, treaties and self-government accords; developing the foundational federal/Aboriginal relationship related to Aboriginal government finance; allocating funding to other federal departments with line responsibility for meeting federal obligations and implementing initiatives; and funding the various arm's-length agencies the Commission recommends to facilitate the new relationship.

One of the principal responsibilities of the minister would be the conduct of the recognition and self-government process under the Aboriginal Nations Recognition and Government Act and the negotiation of renewed and new treaties with Aboriginal nations, to be undertaken through the Crown treaty office in the department of Aboriginal relations. Of equal importance will be a capacity to monitor the Crown's implementation of its treaty and other undertakings as well as its fiduciary obligations to Aboriginal nations. This responsibility should be discharged by a Crown implementation office within the department.

This new senior minister would not have direct responsibility for service delivery. Our next two recommendations address the principles and practicalities related to service delivery and implementation of new federal

commitments.

3. Responsibility for direct implementation of new federal initiatives relating to Aboriginal people should be assigned to the relevant line departments and agencies of the federal government.

In every instance, the work of the line departments would be subject to monitoring by the minister for Aboriginal relations. As appropriate, line departments and agencies would also be involved in functional policy reviews (with respect to housing or economic development, for example) as recommended by the Commission. This is consistent with the government's current effort to enhance the co-ordination of initiatives by establishing ministries that work across broad policy fields. It is also consistent with the characteristics of a real government-to-government relationship between Aboriginal governments and the federal government. As already indicated, the minister of Aboriginal relations would have the lead role in co-ordinating policy reviews, overseeing implementation through its funding responsibilities, and broadly monitoring implementation. This arrangement speaks to our principle of linking policy development to implementation.

4. Another minister, the minister for Indian and Inuit services, would head a new Indian and Inuit services department and be responsible for delivery of the government's remaining obligations to status Indians, Inuit and reserve communities under the Indian Act.

In keeping with the increasing self-reliance of all Aboriginal peoples and communities, we see the role of this minister and department as secondary to that of the minister of Aboriginal relations. There are two important manifestations of this. First, the minister for Indian and Inuit services would probably combine this responsibility with another portfolio. Second, the principle that the minister of Aboriginal relations controls the purse strings for federal activities related to Aboriginal peoples and is responsible for monitoring would apply to the relationship with the minister of Indian and Inuit services, in the same manner as with other ministers overseeing departments with line responsibilities for particular Aboriginal issues.

The Department of Indian and Inuit Services would have no policy role in the transition to self-government. Its establishment is intended to reflect the fact that many First Nations and Inuit communities will choose to live under existing legislation while reconstructing their nations.[290] In some cases, the federal government, through this department, will be involved with such communities in

overseeing the construction of housing and other forms of infrastructure. For Inuit, who are rapidly developing public government institutions that will eventually be capable of assuming all governmental responsibilities, there may still be some federal obligation — such as in the area of post-secondary education — that would be administered by the Indian and Inuit services department, at least in the interim. For Métis people, federal initiatives of an interim nature, such as the administration of scholarship funds, would also, prior to the negotiation of a full treaty relationship, be administered by this department.

The needs of nations, bands and communities for effective support and service delivery should not be overshadowed by the important initiatives we foresee in terms of fundamental policy. Although the Inuit and Indian services department would have no policy role, it would be expected to develop and implement the best practices possible for the support of Indian peoples and Inuit and of communities using its services. It should not just be a bastion of the past.

Establishing this department alongside the department of Aboriginal relations is intended to differentiate the context in which the remnants of the old relationship are administered from the fundamentally new relationship associated with the Commission's recommendations. As peoples and communities move to embrace the new relationship, their connection with this department will wither away, to the point where it will be redundant.

5. There should be a permanent cabinet committee on Aboriginal relations, chaired by the minister of Aboriginal relations.

We have already emphasized the central role of cabinet in supporting the prime minister's role in renewing the fundamentals of the relationship between Canada and Aboriginal peoples. We believe there are two continuing aspects of the collective responsibility of cabinet that suggest the need for a permanent cabinet committee dedicated specifically to Aboriginal relations.

First, cabinet will have to approve many new policy initiatives. These are of several types, including new mandates for the renewal and negotiation of treaties, claims and self-government accords; policy recommendations regarding transition from the *Indian Act*; and policy recommendations resulting from the various sectoral reviews we have recommended. The importance and volume of this work suggests the need for a cabinet committee to provide knowledgeable guidance to the full cabinet.

Second, cabinet colleagues will have to support the minister of Aboriginal relations as he or she initiates the various reviews and reforms that require interdepartmental/agency co-ordination. There will be a natural tendency for competing agendas to erode the momentum of Aboriginal policy development. Establishment of a focal point for collective responsibility and leadership within cabinet should help sustain co-operation, while it will also signal this purpose to federal officials, Aboriginal peoples and the attentive public.

Membership on the committee should reflect the fact that the federal/Aboriginal relationship is diverse and that this committee is not simply dealing with a particular aspect of social policy. We have seen the pitfalls of this latter approach in our review of the past.

It is important that the minister of Aboriginal relations chair the committee. There are a number of reasons for this. First, holding the chair will reinforce the new minister's senior status within cabinet and should provide extra leverage in obtaining the support of colleagues. Second, chairing this committee will create strong links between the minister of Aboriginal relations and the Privy Council Office. In addition to overseeing the structure of government, PCO also performs the crucial function of supporting the work of cabinet and its committees. Each cabinet committee has a dedicated secretariat within PCO, which provides guidance to the process of moving business through cabinet. In the thick of cabinet agenda making, it is not uncommon for PCO to exert a strong influence as gatekeeper, controlling what does and does not move forward. As the chair of the cabinet committee on Aboriginal relations, the new minister would be informed promptly and first hand, from a central-agency perspective, on how Aboriginal matters were progressing. This would increase the minister's ability to move issues through cabinet.

Finally, we foresee that there will be occasions when Aboriginal nations or peoples will meet with cabinet as the collective representative of the Crown. In the period before full treaty/nation government, these meetings would be with existing national Aboriginal organizations. These would not be cabinet meetings in the legal sense. Neither, however, would they be 'cap in hand' sessions, held so that Aboriginal peoples can make requests of cabinet. Instead, we see these meetings as a manifestation of the principle that Aboriginal governments and the government of Canada have common needs and interests that require joint planning and initiatives at the highest level.[291] Again, the practicalities of government business suggest that such meetings will be held in a more timely fashion if there are designated representatives of cabinet who generally attend. Chairing this group would confirm the stature of

the minister as the senior cabinet member dedicated to Aboriginal issues. Existence of the committee itself would mean that such meetings could involve knowledgeable substantive discussions, as well as have a ceremonial and symbolic character.

Portfolio of the minister of Aboriginal relations

Figure 3.3 illustrates a proposed structure for the ministry of Aboriginal relations. It is intended to highlight the responsibilities assigned to the portfolio and to avoid the conflict of interest problem associated with combining negotiation and implementation responsibilities within the same departmental structure, as has been the case mostly recently with DIAND. The ministerial structure sketched in Figure 3.3 reflects the concept that a single minister is crucial to knit all the pieces of the new relationship together, while being able to provide specific and clear direction to officials responsible for policy, negotiation and implementation.

Initially, there are two main functions associated with fulfilling the minister's responsibilities: development of new federal policies associated with Aboriginal affairs and negotiation/engagement related to treaties, Aboriginal claims and self-government accords. Results of the sectoral and fiscal policy reviews recommended by the Commission should feed into discussions of treaties, claims and self-government accords. The need for a good link between the two suggests the wisdom of combining them in a single ministry.

Nonetheless, distinctions between the roles of policy development and negotiation are very real. The former implies the need for consultation with Aboriginal peoples, within the federal government and with provincial/territorial governments. These consultations will be oriented to developing federal policies that reflect the spirit of the new relationship and what the federal government thinks it can realistically accomplish, given fiscal and other constraints. The negotiation role involves continuous and intense engagement with Aboriginal nations and their governments. Although the negotiating atmosphere may be constructive, there will almost inevitably be differences in perspective that will cause the relationship to have its ups and downs. We think it is necessary to achieve the appropriate connections and distinctions between the policy and negotiation roles within the ministry itself. Specifically, we suggest that responsibility for the policy component of the ministry's role be vested in the deputy minister. This will be carried out through the work of three branches of the department: the policy branch, the Aboriginal finance branch and the transition branch. The specific functions of each of these are as

follows.

Policy branch

• conducting sectoral policy reviews

• implementing and funding sectoral initiatives

• providing advice on the negotiating mandate

• overseeing intergovernmental relations with respect to policy review and initiatives Aboriginal finance branch

• developing a fiscal framework

• continuing fiscal analysis

• providing advice on managing the fiscal envelope

• liaison with department of finance and treasury board secretariat

• conducting research and development on the fiscal framework of negotiations Transition branch

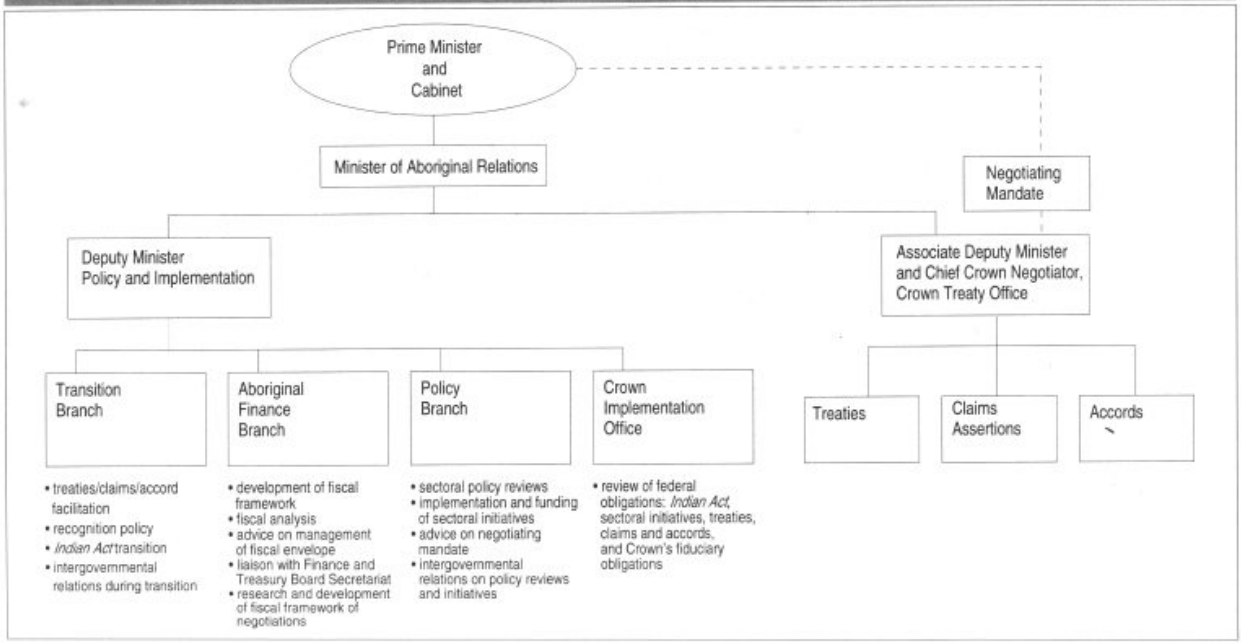
• facilitating treaties/claims/accords

• implementing recognition policy

• overseeing *Indian Act* transition

• managing intergovernmental relations regarding transition

FIGURE 3.3
Department of Aboriginal Relations: Proposed Structure



Responsibility for actual negotiations would be vested in another senior official holding associate deputy minister rank. This person's title would be Chief Crown Negotiator, Crown Treaty Office; as head of the Crown Treaty office the official would be responsible for negotiation of treaties, claims and self-government accords.

The chief Crown negotiator would be expected to work closely with the deputy and take direction from specific negotiation mandates given by cabinet and resulting from the work of the transition, Aboriginal finance, and policy branches of the department.

Both the deputy minister and the associate deputy minister would have significant contact with the minister of Aboriginal relations, as befits their important roles and the need for the minister to ensure that the policy development and negotiation functions are moving in concert.

The minister of Aboriginal relations would also be responsible for overseeing implementation of federal obligations under treaties, claims and self-government accords; for overseeing the actual transition from the *Indian Act*; and for supervising the implementation of new federal policies and programs in specific sectors, such as housing and health, that result from the various policy reviews we have recommended. This is the crucial oversight function

associated with the new ministerial mandate. We foresee this occurring in two ways.

First, the minister's control of the fiscal envelope will result in effective leverage to induce action by other federal departments and agencies. We have already discussed the innovative and important nature of this aspect of our proposal.

In addition, we propose that the new department contain a distinct Crown implementation office. It would be responsible for oversight review of federal obligations relating to treaties, claims and self-government accords, the *Indian Act* transition, sectoral initiatives and the Crown's fiduciary obligations to Aboriginal nations. This office would perform comprehensive assessments of federal activities and prepare timely reports for the minister, cabinet and Parliament (perhaps through a standing parliamentary committee). In part, its role would be similar to that of a comprehensive auditor. We have chosen, however, not to isolate this office from the new ministry structure, as is frequently the case with such functions. Instead, we suggest that it be included in the responsibilities of the deputy minister to make maximum use of its potential to provide early warning signals to the department's other branches and to the minister.

Our proposals and the North

We have not referred extensively to the implications of our executive proposals for the northern mandate now associated with DIAND. This is because we see that mandate, as it relates to the North, being assumed by the territorial governments as they evolve. The varying approaches to self-government envisioned by Aboriginal peoples in the North, including nation-based government and public government, can be further developed and accommodated through the executive structure we propose.

Conclusion

No institutional change will sustain the long-term fundamental political objective of reforming the relationship between the Aboriginal peoples of Canada and their fellow citizens, or even between Aboriginal nations and the Canadian political system. The institutional changes are necessary, but not sufficient in themselves. Also required is the sustained effort of individuals in many key positions of power and influence, and their ability to keep their attention on these longer-term goals.

We have highlighted the responsibility of the prime minister and cabinet to provide leadership, creativity and practical direction. We have lodged considerable responsibility for breaking new ground in our proposal for an unusually powerful federal minister of Aboriginal relations. The new minister's authority would come from the power of the purse, from the formal responsibility to oversee the entire range of federal behaviour with respect to Aboriginal peoples, and from the freedom from dealing directly with service delivery issues. This minister will be charged with making the ideals of the royal proclamation, the treaties and the other political accords a reality.

An essential complement to executive leadership will be the commitment of public servants charged with realizing the new relationship and the new agenda. With fresh institutions and a new mandate to work toward a more just relationship, we hope that appropriate attention will be paid to having the right skills and the right people in place within the new departments of Aboriginal relations and Indian and Inuit services. For example, we think that negotiators in the office of chief negotiator should be senior officials with excellent negotiating skills and a demonstrated capacity to arrive at successful outcomes despite difficult circumstances, rather than people with a long history in the Department of Indian Affairs and Northern Development. Negotiators will also need a detailed mandate with sufficient breadth and authority to provide a real chance of attaining far-reaching agreements. The chief negotiator will need direct access to the minister, and through the minister to cabinet, to enable speedy decisions when required. We see the changes we propose as providing an opportunity for retaining the services of a significant number of Aboriginal people.

There is also a need to sensitize people through the federal government to the essence of the new relationship and to promote genuine commitment to the work ahead. To a considerable degree, we see this happening through leadership by example on the part of the political executive. This would involve an early announcement of the royal proclamation and a legislative agenda. We think that the new executive structure we propose will promote this.

Development and implementation of the new executive structure and fulfilment of the mandate we propose will occur over time. For example, development of new negotiating mandates related to treaties, claims and self-government accords should logically precede full staffing of the office of the chief negotiator and the commencement of full-scale negotiations. We sincerely hope, however, that unnecessary delays in implementation will be avoided. We think that our proposals related to the executive structure and to implementation of the new

relationship are sufficiently consistent with trends in government organization that they can move ahead. For example, our proposals for the executive structure do not increase the total number of federal ministers. They are also consistent with the evolving government-to-government relationship between Aboriginal and territorial governments and Canada.

Finally, we think that these proposals can be implemented expeditiously. Precedent indicates that decisions about the structure of cabinet are initiated at the sole discretion of the prime minister. The mandate and organization of the Department of Aboriginal Relations and the Department of Indian and Inuit Services can be implemented initially by order in council.

The policy work that we foresee for the minister of Aboriginal relations and other federal departments and agencies need not derive its authority from any specific legislation, such as the *Indian Act*. Indeed, current government initiatives related to Aboriginal self-government are based on the federal government's broad constitutional responsibilities, not on the specific provisions of the *Indian Act*.

Ultimately, there will be a need for legislative change. This can be done retroactive to establishment of the new structure, as was the case with the major reorganization of the federal government undertaken in 1993. There is also a long list of federal legislation, on matters ranging from natural resources to health to employment, that may require modification in light of the new government organization and future policies related to Aboriginal peoples. This will be increasingly so as the new relationship takes hold. These legislative changes are no different in content or complexity from those in other federal policy fields undertaken in the past.

Recommendations

The Commission recommends that

2.3.45

The government of Canada present legislation to abolish the Department of Indian Affairs and Northern Development and to replace it by two new departments: a Department of Aboriginal Relations and a Department of Indian and Inuit Services.

2.3.46

The prime minister appoint in a new senior cabinet position a minister of Aboriginal relations, to be responsible for

• guiding all federal actions associated with fully developing and implementing the new federal/Aboriginal relationship, which forms the core of this Commission's recommendations;

• allocating funds from the federal government's total Aboriginal expenditures across the government; and

• the activity of the chief Crown negotiator responsible for the negotiation of treaties, claims and self-government accords.

2.3.47

The prime minister appoint a new minister of Indian and Inuit services to

• act under the fiscal and policy guidance of the minister of Aboriginal relations; and

• be responsible for delivery of the government's remaining obligations to status Indians and reserve communities under the *Indian Act* as well as to Inuit.

2.3.48

The prime minister establish a new permanent cabinet committee on Aboriginal relations that

• is chaired by the minister of Aboriginal relations;

• is cabinet's working forum to deliberate on its collective responsibilities for Aboriginal matters; and

• takes the lead for cabinet in joint planning initiatives with Aboriginal nations and their governments.

2.3.49

The government of Canada make a major effort to hire qualified Aboriginal staff to play central roles in

• the two new departments;

• other federal departments with specific policy or program responsibilities affecting Aboriginal people; and

• the central agencies of government.

2.3.50

The government of Canada implement these changes within a year of the publication of this report. Complying with this deadline sends a clear signal that the government of Canada not only intends to reform its fundamental relationship with Aboriginal peoples but is taking the first practical steps to do so.

4.4 Representation in the Institutions of Canadian Federalism

We have focused our attention so far on implementing Aboriginal self-government as one of three orders of government. As we suggested, this is the area of governance in which the Commission can make the greatest contribution. We recognize that federalism has two main pillars: self-rule and shared rule. Much of what we have written has been on the topic of Aboriginal self-rule. We turn now to the second component — how Aboriginal people can share in the governing of Canada.

A key component in the design of federal systems is how people are represented in federal institutions and processes. People can be represented directly in institutions and processes through elected or appointed representatives (as people are represented indirectly in the House of Commons and the Senate), or people can be represented indirectly through their governments, be they federal, provincial, territorial or Aboriginal (which we refer to as intergovernmental relations). What concerns us is how Aboriginal people can participate directly and more fully in the decision-making processes of Canadian institutions of government.

We wish to make two initial points. First, Canadian political institutions often

lack legitimacy in the eyes of Aboriginal people. Many have noted that Aboriginal peoples were not involved in designing the Canadian state or in fashioning its institutions and processes. Second, there are good reasons to question the capacity of Canadian political institutions to represent Aboriginal people. Until recently, Aboriginal people were systematically denied participation in the Canadian electoral process, and only a handful of Aboriginal people have sat in Parliament since Confederation.

Representation in Parliament

To date, Aboriginal people have been prevented from playing an active role in sharing the governing of Canada; they have not been adequately represented in the federal structures of government. The Royal Commission on Electoral Reform and Party Financing, in its 1991 report, explored the reasons for this sorry state of affairs in some detail.[292] In the period before Confederation it was widely assumed that Aboriginal people were simply inferior or were to be excluded on grounds of their lack of 'civilization' and that they had to become assimilated before they could enjoy the benefits of citizenship.

Before the movement to universal suffrage, most Aboriginal people failed to meet the property ownership qualifications for voting. Although only men were eligible to vote at that time, these qualifications were made legally inapplicable to reserve-based Indian men. Then, from 1920 to 1960, the ground for exclusion appeared to reflect the belief that Indian people enjoying certain types of tax exemption should have no representation in the House of Commons.

With a few exceptions, everyone covered by the *Indian Act* was technically denied the franchise until 1920, and then very few could vote until 1960, when the franchise was extended to all Indian persons. Inuit were legislatively barred from voting from 1934 to 1950 and rarely enumerated for federal elections until the early 1960s. Inuit and the Innu of Labrador, like other citizens, received the right to vote in 1949 when Newfoundland joined Confederation. Métis and Indian people of the north-west faced criminal charges under the *Indian Act* if they met in public assembly in the decade following the Riel rebellion, effectively curtailing their political right of association. Although Métis people have been entitled to vote since Confederation on the basis that they are provincial residents, they have also faced problems of enumeration and had limited opportunities for exercising their franchise.[293]

Finally, Aboriginal people themselves have resisted participating in Canadian

institutions of government. Since Aboriginal people played no role in the design of Canadian government institutions or the Confederation agreement, many see these as ‘settler’ institutions. In some cases, treaty nations view their relationship with Canada as one of nation-to-nation only, and they want their relationship mediated by their own governments and leaders through their treaties — not by another institution. In other cases, Aboriginal people think that they should have their own distinct institutions, leaving Parliament to non-Aboriginal people. This lack of participation by Aboriginal people in Canadian institutions has been a growing problem in Canadian federalism and undermines the legitimacy of our system of government.

The extent of under-representation of Aboriginal people in Canadian governing institutions is startling. Since Confederation, almost 11,000 members of Parliament have been elected to the House of Commons. Of these, only 13 members have self-identified as Aboriginal people.[294] The record for the Senate is not much better, at one per cent of all senators appointed since Confederation. This is far from proportional to the Aboriginal population of Canada.

Two major initiatives in recent years have addressed the issue of Aboriginal representation in Canadian governing institutions — the report of the Royal Commission on Electoral Reform and Party Financing, and the Charlottetown Accord. In its final report, the Royal Commission on Electoral Reform and Party Financing advocated an innovative model that would see the creation of up to eight Aboriginal electoral districts in the House of Commons.[295] These districts would be created only if a sufficient number of Aboriginal people registered to vote in the designated district. The proposal guarantees a process for establishing these electoral districts rather than simply guaranteeing seats for Aboriginal people. The decision about whether they wish to have this type of representation would then rest with Aboriginal people.

The approach taken was limited by a decision not to make a recommendation that would trigger the general amending formula of the constitution, as a proposal for proportional representation by province and territory would do. The Aboriginal electoral districts proposal would simply require the consent of the House of Commons and the Senate.

A special enumeration of potential Aboriginal electors would be conducted, with a test for ‘aboriginality’ and a related dispute resolution procedure. An Aboriginal person would choose to vote in either the general electoral district or the Aboriginal one. A variant of this approach has been in use in New Zealand

since 1867, with four seats set aside in the Parliament for Maori, the Indigenous people of New Zealand.[296]

The Charlottetown Accord of 1992 dealt only briefly with the representation of Aboriginal peoples in the House of Commons, proposing that the matter should be pursued by Parliament, in consultation with representatives of the Aboriginal peoples of Canada, after it received the final report of the House of Commons committee studying the recommendations of the Royal Commission on Electoral Reform and Party Financing.[297] The accord had much more to say about the representation of Aboriginal people in the Senate. It proposed guaranteed representation in the Senate for Aboriginal peoples. Aboriginal Senate seats would be additional to provincial and territorial seats, rather than drawing away from current allocations. The accord suggested that Aboriginal senators would have the same roles and powers as other senators, as well as the possibility that a double majority would be required to approve certain matters affecting Aboriginal people. These issues and other details relating to the number of Aboriginal senators, the distribution of Senate seats, and the method of selecting Aboriginal senators were to be the subject of further discussion.[298]

It is clearly in the interests of all Canadians that Aboriginal peoples be represented more adequately and participate more fully in the institutions of Canadian federalism. This will help to build the moral and political legitimacy of such institutions in the eyes of Aboriginal people.

However, we are concerned that efforts to reform the Senate and the House of Commons may not be compatible with the foundations for a renewed relationship built upon the inherent right of Aboriginal self-government and nation-to-nation governmental relations. Three orders of government imply the existence of representative institutions that provide for some degree of majority control, not minority or supplementary status.

An Aboriginal parliament as a first step toward a House of First Peoples

A third chamber of Parliament would be a logical extension of three orders of government. A separate chamber, the Senate, was designed to represent the interests of Canada's regions and provinces (although in practice it has been less than successful). It follows that Aboriginal nations should also have distinct representation in Parliament, which could take the form of a third chamber established alongside the existing House of Commons and Senate. This third house would provide a means for the Aboriginal peoples of Canada to share in

governing the country, while at the same time acknowledging the distinct interests, cultures and values of Aboriginal peoples. It would give Aboriginal people a permanent voice in processes of national decision making, in what might be called ‘shared-rule decisions’. The idea of a third chamber is a relatively new one, first proposed during the Canada round of constitutional negotiations that led to the Charlottetown Accord. See Appendix 3B for a summary of the proposal by the Native Council of Canada (now the Congress of Aboriginal Peoples) for a House of First Peoples.

A third chamber representing Aboriginal nations would address a number of problems. It would provide an institutional link whereby Aboriginal peoples’ concerns could be voiced in a formal and organized way in the decision-making process of the Parliament of Canada. The third chamber approach would also avoid conflict with provincial and territorial governments, all of which — in the Charlottetown Accord — saw the Senate as representing primarily regional and provincial interests. A third chamber would be freed from accommodating the regional and provincial interests of the Senate.

If a third chamber is to be established, it should have real power. By this, we mean the power to initiate legislation and to require a majority vote on matters crucial to the lives of Aboriginal peoples. This legislation would be referred to the House of Commons for mandatory debate and voting. We recognize that, to accomplish this objective, the constitution would have to be amended. To move immediately in this area, we suggest a staged approach, which would not require a constitutional amendment initially. While full implementation will await a constitutional amendment and the rebuilding of Aboriginal nations, the government of Canada can act now, in terms of public policy and legislation, by enacting an Aboriginal Parliament Act.

Although the idea of an Aboriginal parliament is new to Canada, such institutions do exist in other countries. The first Aboriginal parliaments were established in northern Europe. There is much to be learned from the experience of the Saami parliaments of Scandinavia.[299] The Saami (or Lapps) are the indigenous people of what was formerly called Lapland (now Saamiland), whose traditional territories are now divided among Sweden, Norway, Finland and Russia. There are approximately 75,000 Saami dispersed across these countries.[300] The *Saami Codicil of 1751*, an addendum to a treaty between Sweden and what was then Denmark-Norway, recognized some of the Aboriginal rights of the Saami, including the customary law of the Saami (with exclusive jurisdiction of Saami courts over Saami disputes), the acknowledgement of a Saami Nation, and the free movement of Saami

reindeer herders.

The Saami parliament in Norway — the *Saømediggi* — was created following the passage of the *Saami Act* by the Norwegian assembly in 1987. The legislation also recognized the Saami as a distinct people entitled to particular rights in such fields as culture, language and social life. There are 13 Saami constituencies, each of which returns three members. Eligible voters are enrolled on a Saami electoral register. To be eligible, voters must identify as a Saami and declare Saami as their mother tongue or have a parent or grandparent who does. The powers of the Saømediggi are very limited, however. It is to be consulted on appropriate matters, and it is to bring matters before public authorities and private institutions.

The Finnish Saami parliament, established in the early 1970s and officially called the Delegation for Saami Affairs, has 20 elected members. Of these, 12 are elected from four Saami constituencies, and two each from four Saami locals. Neither the Norwegian nor the Finnish Saami institutions have legislative functions. In this sense, the use of the term ‘parliaments’ is misleading.

Simply put, the Saami parliaments lack clout. Nor were the Saami people adequately involved in the design of these institutions. These are not inherent flaws in the concept of an Aboriginal parliament, however. Aboriginal parliaments can have real power, and Aboriginal peoples can be fully involved, if not primarily responsible, for the structure and processes of such institutions.

Several other problems of adaptation present themselves. For example, unlike Finland and Norway, Canada has a federal system of government. Also, unlike the Saami, who are a relatively homogeneous people, Aboriginal peoples in Canada — Indian, Inuit and Métis — are diverse in language, culture and geography.

Recommendations

The Commission recommends that

2.3.51

The federal government, following extensive consultations with Aboriginal peoples, establish an Aboriginal parliament whose main function is to provide advice to the House of Commons and the Senate on legislation and

constitutional matters relating to Aboriginal peoples.

2.3.52

The Aboriginal parliament be developed in the following manner:

(a) the federal government, in partnership with representatives of national Aboriginal peoples' organizations, first establish a consultation process to develop an Aboriginal parliament; major decisions respecting the design, structure and functions of the Aboriginal parliament would rest with the Aboriginal peoples' representatives; and

(b) following agreement among the parties, legislation be introduced in the Parliament of Canada before the next federal election, pursuant to section 91(24) of the *Constitution Act, 1867,* to create an Aboriginal parliament.

Although we do not wish to circumscribe the role of an Aboriginal parliament, we suggest that it should provide advice to the House of Commons and the Senate in the following matters:

Legislation

• legislation relating to matters pertaining to section 91(24) of the constitution ("Indians, and Lands reserved for the Indians");

• legislation relating to Aboriginal self-government, treaties and lands;

• legislation of general application, but whose subject matter would directly affect Aboriginal peoples in relation to their identity, language, tradition, culture, land, water and environment; and

• legislation flowing from the recommendations of this Commission.

Constitutional matters relating to Aboriginal peoples

• Sections 25 and 35 of the constitution (shielding certain Aboriginal and treaty rights from a construction of the *Canadian Charter of Rights and Freedoms* that would abrogate or derogate from them and recognizing and affirming Aboriginal and treaty rights, including, we believe, the inherent right of Aboriginal self-government);

• other rights and freedoms that pertain to the Aboriginal peoples of Canada.

Review and oversight

• reports from treaty commissions;

• the proposed royal proclamation, the proposed ministry of Aboriginal relations, and the proposed Aboriginal Lands and Treaties Tribunal;

• Aboriginal self-government and land claims agreements; and

• monitoring of the implementation of Aboriginal self-government.

Fact finding and investigation

• Aboriginal parliamentarians could sit on joint committees of the House of Commons and the Senate on specific issues, such as justice and solicitor general and the standing committee on Aboriginal affairs.

• An Aboriginal parliament could receive references from the House of Commons or the Senate for investigation and have the power to hold hearings. This would enable an Aboriginal perspective to be brought to bear on possible legislative initiatives while they are still at an early stage. A similar role has been played in the past with respect to law reform commissions. For this reason, we think that the Aboriginal parliament should have a research branch to assist its members to fulfil this and other functions.

As the preceding list implies, an Aboriginal parliament should have the option of reviewing all legislation coming before the Parliament of Canada. This would permit a careful clause-by-clause assessment of proposed legislation from the perspective of Aboriginal peoples' representatives. It would also be helpful for the Aboriginal parliament to meet with the minister of Aboriginal relations on a regular basis, and at least twice per year.

This brings us to the question of how Aboriginal peoples are to be represented in an Aboriginal parliament. Here, we find the proposal of the Congress of Aboriginal Peoples instructive: base the representation on the nation or peoples. Each nation or people would have its own representative, yielding an Aboriginal parliament of between 75 and 100 seats, according to the proposal.

Larger Aboriginal nations or peoples, such as the Cree, Ojibwa, Mi'kmaq, Dene, Inuit, and Métis — or confederacies of nations such as the Iroquois Confederacy and the Blackfoot Confederacy — might have more than one representative. Addressing representation in this way would have the added advantage of reinforcing what we consider to be a fundamental value of the new relationship between Aboriginal and non-Aboriginal people — that it is a nation-to-nation relationship within Canada. The issue of what constitutes an Aboriginal nation would be resolved by applying the proposed recognition policy.

While the fully developed and constitutionally entrenched House of First Peoples would eventually have representatives of up to 60 to 80 Aboriginal nations, we suggest that it would be wise to start with a smaller number of representatives for the Aboriginal parliament. Based on the work of the Royal Commission on Electoral Reform and Party Financing, it might be appropriate to begin, as an interim step, by allocating seats by province and territory. The Aboriginal parliament could begin with two Aboriginal constituencies per province and territory, with more populous regions receiving additional seats. For example, for each 50,000 people who identify as Aboriginal persons, an additional seat could be added. Roughly speaking, this would give Ontario three additional seats; British Columbia, Alberta, Manitoba and Saskatchewan two additional seats; and Quebec one additional seat, for a total of 36 seats in the initial Aboriginal parliament. As nations rebuild themselves, representation in the Aboriginal parliament would shift from representation by province to representation by nation.

Recommendation

The Commission recommends that

2.3.53

(a) Aboriginal parliamentarians be elected by their nations or peoples; and

(b) elections for the Aboriginal parliament take place at the same time as federal government elections to encourage Aboriginal people to participate and to add legitimacy to the process.

Several reasons led us to this recommendation. The first is that an appointed parliament, like the present Senate, lacks legitimacy in the eyes of many Canadians. Second, it would be more difficult to claim that an Aboriginal

parliament did not truly represent the Aboriginal peoples of Canada if its members were elected. Aboriginal parliamentarians would serve the same terms, typically from four to five years, as federal members of Parliament.

It would be necessary to have a roll or list of voters, and this would entail the enumeration of Aboriginal Canadians. An enumeration of Aboriginal voters would help to ensure that the process is fair and that the parliamentarians are representative.

Recommendation

The Commission recommends that

2.3.54

The enumeration of Aboriginal voters take place during the general enumeration for the next federal election.

Conclusion

The creation of an Aboriginal parliament would not be a substitute for self-government by Aboriginal nations. Rather, it is an additional institution for enhancing the representation of Aboriginal peoples within Canadian federalism. The design of the institution, however, must provide for more than symbolic representation. At the centre of our proposal for an Aboriginal parliament is the principle that the renewed relationship between Canada and Aboriginal peoples is a nation-to-nation relationship that supports the inherent right of Aboriginal self-government. The proposed powers and responsibilities of an Aboriginal parliament reflect this principle and provide the basis for an effective role for Aboriginal nations in the decision-making processes of the Parliament of Canada.

Notes:

* Because of its length, Volume 2 is published in two parts, the first containing chapters 1 to 3 and the second chapters 4 to 6.

* Transcripts of the Commission’s hearings are cited with the speaker’s name

and affiliation, if any, and the location and date of the hearing. See *A Note About Sources* at the beginning of this volume for information about transcripts and other Commission publications.

1 Chiefs of the Shuswap, Okanagan and Couteau (Thompson) Tribes of British Columbia to Prime Minister Sir Wilfrid Laurier, as quoted in Kamloops *News*, 25 August 1910.

2 Chief James Montour of Kanesatake (Oka), appearing before the Joint Committee of the Senate and the House of Commons on Indian Affairs, as quoted in John Thompson, "A History of the Mohawks at Kanesatake and the Land Dispute to 1961", in *Materials Relating to the History of the Land Dispute at Kanesatake*, report prepared for the Department of Indian Affairs and Northern Development (DIAND), revised edition (1993), p. 42.

3 This figure includes reserves, Indian settlements and Métis settlements in Alberta. Reserves south of the sixtieth parallel amount to approximately 26,600 square kilometres. See DIAND, *Schedules of Indian Bands, Reserves and Settlements Including Membership and Population Location and Area in Hectares* (Ottawa: Government Services Canada, 1992).

4 In 1990, there were 1,878,285 Native Americans in the lower 48 states æ or .008 per cent of the total U.S. population of 248,709,873: *1990 Census of Population: General population characteristics, United States* (Washington, D.C.: U.S. Department of Commerce, 1992). There are 64,647,429 acres (261,822 square kilometres) of Indian lands in the lower 48 states: Bureau of Indian Affairs, "Acreage of Indian Lands by State", 1992 (unofficial figures). In Australia, Aborigines make up 1.2 per cent of the total population and hold title to 10.3 per cent of the land mass: Robert White-Harvey, "Reservation Geography and the Restoration of Native Self-Government" (1994) 17 Dalhousie L.J. 587 at 588.

5 See Royal Commission on Aboriginal Peoples [RCAP], *Focusing the Dialogue: Discussion Paper 2* (Ottawa: Supply and Services, 1993).

6 Rudy Platiel, "Coping with a land claim", *Globe and Mail* (1 October 1994), pp. A1 and A9; Diane Forrest, "Our Home and Native Land", *Cottage Life*, November/December 1994, pp. 30-39. See also Appendices 4A and 4B to this chapter.

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

8 These three categories are discussed at some length in *Treaty Making in the Spirit of Co-existence*.

9 Patrick Moore and Angela Wheelock, eds., and Dene Wodih Society, comp., *Wolverine Myths and Visions: Dene Traditions from Northern Alberta* (Edmonton: University of Alberta Press, 1990), pp. xxi-xxv, 59-70, 84-86.

10 One of these parcels, Moose Prairie Indian Reserve #208, was surrendered to the Crown in 1954.

11 Moore and Wheelock, *Wolverine Myths and Visions* (cited in note 9), pp. xii-xiii; Dennis Madill, *Treaty Research Report: Treaty Eight* (Ottawa: Indian Affairs and Northern Development, 1986), pp. 85, 135-142, 149.

12 Moore and Wheelock, *Wolverine Myths and Visions*, pp. 72-76.

13 See Volume 4, Chapter 6.

14 For this and the following discussion, see generally, Peter J. Usher, Frank J. Tough and Robert M. Galois, “Reclaiming the land: aboriginal title, treaty rights and land claims in Canada”, *Applied Geography* 12/2 (1992), pp. 109-132.

15 Eleanor B. Leacock, “Les relations de production parmi les peuples chasseurs et trappeurs des régions subarctiques du Canada”, *Recherches amérindiennes au Québec* 10/1-2 (1980), pp. 79-80.

16 Olive Patricia Dickason, “For Every Plant There is a Use: The Botanical World of Mexica and Iroquoians”, in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, ed. Kerry Abel and Jean Friesen (Manitoba: University of Manitoba Press, 1991), p. 23.

17 J.A. Cuoq, *Lexique de la langue algonquine* (Montréal: J. Chapleau et Fils, 1886), p. 296.

18 John Joe Sark, transcripts of the hearings of the Royal Commission on Aboriginal Peoples [hereafter RCAP transcripts], Charlottetown, Prince Edward Island, 5 May 1992.

19 National Archives of Canada (NAC), Record Group (RG) 10, volume 266, p. 163126, report of Commissioners Alexander Vidal and T.G. Anderson, 1849. See also James Morrison, “The Robinson Treaties of 1850: A Case Study”, research study prepared for RCAP (1993). For information about research studies prepared for RCAP, see *A Note About Sources* at the beginning of this volume.

20 See also Morrison, “The Robinson Treaties of 1850”.

21 An elder quoted in Anastasia M. Shkilnyk, *A Poison Stronger than Love: The Destruction of an Ojibwa Community* (New Haven, Conn.: Yale University Press, 1985), p. 66.

22 Shkilnyk, *A Poison Stronger than Love*, pp. 71-72.

23 F.G. Speck, *Family Hunting Territories and Social Life of Various Algonkian Bands of the Ottawa Valley: Memoir 70, No. 8, Anthropological Series* (Ottawa: Government Printing Bureau, 1915), p. 21. Aboriginal people are generally reluctant to discuss spiritual sanctions to cause misfortune, as the potential consequences of doing so are understood as being just as harmful. Others, however, have documented instances where its use, or threat of use, has been a means of punishing or resolving conflicts (including those related to resource access and allocation) among clans or between nations. See, for example, Shkilnyk, *A Poison Stronger than Love* (cited in note 21) and Edward S. Rogers, *The Round Lake Ojibwa*, Occasional Paper 5 (Toronto: Royal Ontario Museum, 1962).

24 See Peter Usher, “Contemporary Aboriginal Lands, Resources, and Environment Regimes æ Origins, Problems, and Prospects”, research study prepared for RCAP (1993); Adrian Tanner, “Existe-t-il des territoires de chasse?”, *Recherches amérindiennes au Québec* 1 (1971), pp. 69-83; José Mailhot, “La mobilité territoriale chez les Montagnais-Naskapis du Labrador”, *Recherches amérindiennes au Québec* 15/3 (1985), pp. 3-12; Jean-Guy Deschênes, “La contribution de Frank G. Speck à l’anthropologie des Amérindiens du Québec”, *Recherches amérindiennes au Québec* 11/3 (1981), pp. 205-221.

25 Speck, *Family Hunting Territories* (cited in note 23), p. 17.

26 Quoted in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which they were based, and other information relating thereto* (Toronto: Belfords, Clarke & Co., Publishers, 1880; Saskatoon: Fifth House Publishers, 1991), p. 59.

27 World Wildlife Fund Canada, "Protected Areas and Aboriginal Interests in Canada", brief submitted to RCAP (1993). For information about briefs submitted to RCAP, see *A Note About Sources* at the beginning of this volume.

28 William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (New York: Hill and Wang, 1983).

29 Henry T. Lewis, "A Time for Burning", Occasional Publication Number 17 (Edmonton: Boreal Institute for Northern Studies, University of Alberta, 1982), p. 25.

30 On this general topic, see the collected papers in Nancy M. Williams and Eugene S. Hunn, eds., *Resource Managers: North American and Australian Hunter-Gatherers* (Canberra: Australian Institute of Aboriginal Studies, 1986).

31 Andrew Chapeskie,"Land, Landscape, Culturescape: Aboriginal Relationships to Land and the Co-management of Natural Resources", research study prepared for RCAP (1995).

32 Chapeskie, "Land, Landscape, Culturescape".

33 Chapeskie, "Land, Landscape, Culturescape".

34 Canadian Arctic Resources Committee, "Aboriginal Peoples, Comprehensive Land Claims, and Sustainable Development in the Territorial North", brief submitted to RCAP (1993), Appendix F; see also The Inuit Circumpolar Conference, "The Participation of Indigenous Peoples and the Application of their Environmental and Ecological Knowledge in the Arctic Environmental Protection Strategy: A Report on Findings", report prepared for DIAND (1993).

35 Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas, 1492-1992* (Vancouver: Douglas and McIntyre, 1991), pp. 126-139.

36 Dianne Newell, *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993).

37 See Victor P. Lytwyn, "Ojibwa and Ottawa Fisheries around Manitoulin Island: Historical and Geographical Perspectives on Aboriginal and Treaty Fishing Rights", *Native Studies Review* 6/1 (1990), pp. 1-30; John J. Van West, "Ojibwa Fisheries, Commercial Fisheries Development and Fisheries Administration, 1873-1915: An Examination of Conflicting Interest and the Collapse of the Sturgeon Fisheries of the Lake of the Woods", *Native Studies Review* 6/1 (1990), pp. 31-65; and Tim E. Holtzkamm, Victor P. Lytwyn and Leo G. Waisberg, "Rainy River Sturgeon: An Ojibway Resource in the Fur Trade Economy", *The Canadian Geographer* 32/3 (1988), pp. 194-205.

38 The discussion that follows is taken from Peter Usher, "Lands, Resources and Environment Regimes Research Project: Summary of Case Study Findings and Recommendations", research study prepared for RCAP (1994).

39 See, for example, Fikret Berkes, "Native Subsistence Fisheries: A Synthesis of Harvest Studies in Canada", *Arctic* 43/1 (1990), pp. 35-42.

40 See Elizabeth Robinson, "The Health of the James Bay Cree", *Canadian Family Physician* 34 (July 1988), pp. 1606-1613.

41 Even in the early 1970s, it was still unusual for graduate students in English Canada (though not in Quebec) to consider writing a thesis dealing with an Aboriginal issue. On the general topic of the treatment of Aboriginal people in educational materials, see Donald B. Smith, "A Look Backwards: Canada in 1892, 1927 and 1967", *ASC [Association for Canadian Studies] Newsletter* 14/3 (Fall 1992), pp. 10-15; and Sylvie Vincent and Bernard Arcand, *L'Image de l'Amérindien dans les manuels scolaires du Québec* (Montreal: Hurtubise HMH, 1979).

42 See Jacques Rousseau, "The Northern Québec Eskimo Problem and the Ottawa-Québec Struggle", *Anthropological Journal of Canada* 7/2 (1969), pp. 2-15; Barnett Richling, "Diamond Jenness and 'useful anthropology' in Canada", *Stout Centre Review* 2/1 (1991), pp. 5-9; and T.F. McIlwraith, "'At Home with the Bella Coola Indians'", *B.C. Studies* 75 (Autumn 1987), pp. 43-60.

43 See Jean-Paul Bernard, "L'historiographie canadienne récente (1964-94) et l'histoire des peuples du Canada", *The Canadian Historical Review* 76/3

(September 1995), pp. 330-332, 348-350; Harold Franklin McGee, Jr., "No Longer Neglected: A Decade of Writing Concerning the Native Peoples of the Maritimes", *Acadiensis* 10 (Autumn 1980), pp. 135-142; James W. St. G. Walker, "The Indian in Canadian Historical Writing, 1971-1981", in *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, Nakoda Institute Occasional Paper No. 1, ed. Ian A.L. Getty and Antoine S. Lussier (Vancouver: University of British Columbia Press, 1983), pp. 340-357; and Bruce G. Trigger, *Natives and Newcomers: Canada's 'Heroic Age' Reconsidered* (Kingston and Montreal: McGill-Queen's University Press, 1985), pp. 3-49.

44 Claims of territorial sovereignty by European nation-states were bolstered by indefensible assertions of religious, ethnic, cultural and political superiority. As described by Chief Justice John Marshall of the United States Supreme Court, in *Johnson* v. *M'Intosh*, 5 U.S. (8 Wheaton) 543 at 573 (1823):

The character and religion of [North America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.

See also William Edward Hall, *A Treatise on International Law*, 8th ed. (London: Oxford University Press, 1924), p. 47 (international law only governs states that are "inheritors of that civilization"); Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Volume 1 (Boston: Little, Brown, and Company, 1922) p. 164 ("native inhabitants possessed no rights of territorial control which the European explorer or his monarch was bound to respect"); and John Westlake, *Chapters on the Principles of International Law* (Cambridge: University Press, 1894), pp. 136-138, 141-143 (a distinction is drawn between "civilization and want of it").

45 See generally, Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1996) Osgoode Hall L.J. (forthcoming).

46 See RCAP, *Treaty Making in the Spirit of Co-existence* (cited in note 7) and RCAP, *Partners in Confederation: Aboriginal*

Peoples, Self-Government, and the Constitution (Ottawa: Supply and Services, 1993), pp. 5-27. See also J.C. Smith, "The Concept of Native Title" (1974) 24 U.T.L.J. 1 at 9 (the origin of the law of Aboriginal title lies in institutions that give recognition to the near-universal principle that land belongs to those who have used it from time immemorial).

47 See *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313; see also *Mabo* v. *Queensland* (1992), 107 A.L.R. 1; *Worcester* v. *Georgia (1832)*, 8 U.S. 6 Peters 515.

48 For the view that extinguishment did occur, see Henri Brun, "Les droits des Indiens sur le territoire du Québec", in *Le territoire du Québec: Six études juridiques* (Quebec City: Presses de l'Université Laval, 1974), pp. 49-51; and G.F.G. Stanley, "The First Indian 'Reserves' in Canada", *Revue d'histoire de l'Amérique française* 4/2 (1950).

For the pluralist perspective, see Denys Delâge, "L'alliance franco-amérindienne 1660-1701", *Recherches amérindiennes au Québec* 19/1 (1989), pp. 3-15; Gilles Havard, *La grande paix de Montréal de 1701: Les voies de la diplomatie franco-amérindienne* (Montreal: Recherches amérindiennes au Québec, 1992); Brian Slattery, "Did France Claim Canada Upon 'Discovery'?", in *Interpreting Canada's Past*, ed. J.M. Bumsted, Volume I (Toronto: Oxford University Press, 1986), pp. 2-26; and Brian Slattery, "The Land Rights of Indigenous Canadian Peoples", PH.D. dissertation, Oxford University, 1979, pp. 70-94.

49 See Andrée Lajoie, "Synthèse introductive", research study prepared for RCAP, in A. Lajoie, J.-M. Brisson, S. Normand and A. Bissonnette, *Le statut juridique des autochtones au Québec et le pluralisme* (Cowansville, Quebec: Les Éditions Yvon Blais, 1996).

50 *Connolly* v. *Woolrich* (1867), 17 Rapport judiciaires revisés de la Province de Québec. 75 at 82 (Sup. C.).

51 The Proclamation provides:

In order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to

make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively, within which they shall lie; and in case they shall lie within the Limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose. The complete text of the Royal Proclamation is reproduced in Volume 1, Appendix D.

52 *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3, s. 91(24) (assigning exclusive legislative authority over "Indians, and Lands reserved for the Indians" to the Parliament of Canada); *Rupert's Land and North-Western Territory Order*, 1870 (U.K.), reprinted in R.S.C. 1985, App. II, No. 9 (admission of northern territory to Canada conditional on "adequate provision for the protection of Indian tribes whose interests and well-being are involved in the transfer"); *Adjacent Territories Order*, 1880 (U.K.), reprinted in R.S.C. 1985, App. II, No. 14; *Manitoba Act, 1870* (U.K.) 33 Vict., c. 3,
5.31, reprinted in R.S.C. 1985, App. II, No. 8 (providing for land allotment to Métis people); and *British Columbia Terms of Union*, 1871 (U.K.), reprinted in R.S.C. 1985, App. II, No. 10 ("the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government"). Natural resource agreements were entered into between Canada and the three prairie provinces and were given constitutional effect by the *Constitution Act, 1930*, 20-21 George V, c. 26 (U.K.), reprinted in R.S.C. 1985, App. II, No.
26. The natural resource agreements guarantee Indians the right to take game and fish "for food" at all seasons of the year on specified territory. *Constitution Act, 1982*, s. 35(1) (recognizing and affirming "existing aboriginal and treaty rights of the aboriginal peoples of Canada").

53 *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1052-53.

54 See *Indian Treaties and Surrenders from 1680 to 1890,* Volume I (Ottawa: King's Printer, 1905).

55 On this general subject, see Morrison, "The Robinson Treaties" (cited in note 19).

56 NAC RG10, volume 5, pp. 2082-2084, statement of the Mississauga Indians, 3 April 1829. See also Donald B. Smith, *Sacred Feathers: The Reverend Peter Jones (Kahkewaquonaby) & the Mississauga Indians* (Toronto: University of Toronto Press, 1987).

57 NAC RG10, volume 27, p. 420, speech of Chief Quinepenon, 6 September 1806. See also Smith, *Sacred Feathers*.

58 See J.E. Chamberlin, *The Harrowing of Eden: White Attitudes Toward North American Natives* (Toronto: Fitzhenry & Whiteside, 1975).

59 See, for example, Eugene C. Hargrove, "Anglo-American Land Use Attitudes", *Environmental Ethics* 2/2 (1980).

60 *Indian Treaties and Surrenders* (cited in note 54), p. 112.

61 See Paul Tennant, "The Place of *Delgamuukw* in British Columbia History and Politics æ And Vice Versa", in *Aboriginal Title in British Columbia:* Delgamuukw *v.* The Queen, ed. Frank Cassidy (Montreal: Institute for Research in Public Policy, 1992).

62 See Denys Delâge, "Le Français, l'Anglais et l'Indien allaient être égaux: Autochtones du Québec dans l'histoire", research study prepared for RCAP (1995); Marc Jetten, "Recognition and Acquisition of Aboriginal Property in North America (from the 17th to the 18th Centuries): The Case of the Nations Domiciled in Canada", in Denys Delage et al., "Cultural Exchanges within the Franco-Amerindian Alliance, 1600-1760", research study prepared for RCAP (1995) [translation]; Sylvio Normand, "Les droits des Amérindiens sur le territoire sous le Régime français", in Lajoie et al., *Le statute juridique des autochtones* (cited in note 49); and Alain Beaulieu, "Réduire et instruire: Deux aspects de la politique missionnaire des Jésuites face aux Amérindiens nomades (1632-1642)", *Recherches amérindiennes au Québec* 17/1-2 (1987), pp. 139-154.

63 Thompson, "A History of the Mohawks" (cited in note 2), p. 17. See also our discussion of this topic in Volume 1, Chapter 6, and "Documents relatifs aux Droits du Séminaire et aux Prétentions des Indiens sur la Seigneurie des Deux Montagnes", *Recherches amérindiennes au Québec* 21/1-2 (1991), pp. 93-94.

64*Indian Treaties and Surrenders* (cited in note 54); Peter S. Schmalz, *The Ojibwa of Southern Ontario* (Toronto: University of Toronto Press, 1991); Morrison, “The Robinson Treaties” (cited in note 19).

65 John F. Leslie, *Commissions of Inquiry into Indian Affairs in the Canadas, 1828-1858: Evolving a corporate memory for the Indian department* (Ottawa: Indian Affairs and Northern Development, 1985).

66 The example of the Mohawk sachem Thayandanega (Joseph Brant) æ who lived among his people on the Six Nations Reserve on the Grand River and also owned land on Burlington Bay in his private capacity æ had clearly been forgotten.

67 Amendments made to the *Indian Act* purposively excluded treaty Indians from acquiring a homestead unless they became enfranchised, while European immigrants were offered free land holdings. See *An Act to amend and consolidate laws respecting Indians*, S.C. 1876, c. 18, s. 70.

68Note that this section deals primarily with the experience of treaty and non-treaty Indian peoples, as Inuit remained relatively isolated until the mid-20th century, and Métis people were left to their own resources. See Volume 4, Chapters 5 and 6.

69 Although RCMP officers were generally uncomfortable with the pass system (believing it to be illegal), whenever they stopped enforcing it æ as in 1893 in southern Alberta æ they received angry criticism from the local settler population. There is at least some evidence that the pass system was still in use in the areas covered by Treaties 4, 6 and 7 as late as the mid-1930s. See Brian Bennett, “Study of Passes for Indians to Leave their Reserves” (Indian and Northern Affairs, 1974); and Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen’s University Press, 1990).

70 See also J.R. Miller, “Owen Glendower, Hotspur, and Canadian Indian Policy”, *Ethnohistory* 37/4 (1990); Carter, *Lost Harvests*; and John L. Tobias, “Canada’s Subjugation of the Plains Cree, 1879-1885”, in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller (Toronto: University of Toronto Press, 1991).

71 Stewart Raby, “Indian Land Surrenders in Southern Saskatchewan”, *The*

Canadian Geographer 17/1 (1973).

72 See J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, rev. ed. (Toronto: University of Toronto Press, 1989).

73 See D.N. Sprague, "The Manitoba Land Question 1870-1882", *Journal of Canadian Studies* 15/3 (1980); and Paul L.A.H. Chartrand, "The Obligation to Set Aside and Secure Lands for the 'Half-Breed' Population Pursuant to Section 31 of the *Manitoba Act, 1870*", LL.M. thesis, University of Saskatchewan, 1988.

74 DIAND, *Specific Claim Settlement Agreement between Her Majesty the Queen, in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development and the Keeseekoowenin Indian Band, as represented by its Chief and Councillors* (Ottawa: 16 March 1994).

75 George Stewart, Jr., *Canada Under the Administration of the Earl of Dufferin* (Toronto: Rose-Belford Publishing Company, 1878), pp. 492-493.

76 *British Columbia Terms of Union* (cited in note 52). The following discussion is based on a number of sources. See especially Louise Mandell and Leslie Pinder, "B.C. Issues", research study prepared for RCAP (1993); Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990); Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977); Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871-1913* (Vancouver: University of British Columbia Press, 1974); Dennis Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa: Indian and Northern Affairs, 1981); and Duane Thomson, "The Response of Okanagan Indians to European Settlement", *B.C. Studies* 101 (Spring 1994).

77 NAC, Manuscript Group (MG) 26A, Sir John A. Macdonald Papers, pp. 127650-127651, Trutch to Macdonald, 14 October 1872. See Robin Fisher, "Joseph Trutch and Indian Land Policy", *BC Studies* 12 (1971-72).

78 The historical population data in the 1931 census put the Indian population at 29,275 in 1871. See John Lutz, "The White Problem æ State Racism and the Decline of Aboriginal Employment in 20th Century British Columbia", paper

presented to the 1994 Canadian Historical Association Meeting, p. 7; and Robert Galois and Cole Harris, “Recalibrating Society: The Population Geography of British Columbia in 1881”, *The Canadian Geographer* 38/1 (1994), pp. 37-53. See also Plate 36 (by the latter two authors) in *Historical Atlas of Canada*, Volume II: *The Land Transformed, 1801-1891* (Toronto: University of Toronto Press, 1993).

79 S.B.C. 35 Vict. cap. 37 s. 13 (1872). Since women could not vote either, the electorate consisted entirely of men who met the property qualification æ in effect, only a few hundred people.

80 *An Ordinance to amend and consolidate the Laws affecting the Crown Lands in British Columbia*, 1 June 1870. Article III gave males age 18 and over the right to pre-empt up to 320 acres of land north and east of the Cascade mountains and 160 acres elsewhere, with the proviso that “such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor’s special permission in writing to that effect”. See Cail, *Land, Man and the Law* (cited in note 76).

81 An 1864 colonial ordinance had limited reserves made thereafter to 10 acres per head; the effective average at that time was between one and three acres per person. When the federal government in 1873 instead proposed a formula of 80 acres, the provincial government offered 20 acres per head. See Cail, *Land, Man and the Law*.

82 See Tennant, *Aboriginal Peoples and Politics* (cited in note 76).

83 *An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia*, S.B.C. (1874), No. 2.

84 NAC MG11 CO42/735, folios (ff.) 99-120v, dispatch of Governor-General Lord Dufferin to the Colonial Secretary, 26 January 1875, enclosing Minute of the Canadian Privy Council (23 January 1875) with Opinion of the Minister of Justice (19 January). The opinion itself is at ff. 99-115v.

85 Madill, *British Columbia Indian Treaties* (cited in note 76).

86 Usher et al., “Reclaiming the Land” (cited in note 14).

87 See Tennant, *Aboriginal Peoples and Politics,* pp. 92-93; and Cail, *Land,*

Man and the Law (both cited in note 76).

88 "Report of Commissioners for Treaty No. 8", in *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* (Ottawa: Queen's Printer, 1966).

89See generally Morris Zaslow, *The Opening of the Canadian North 1870-1914* (Toronto: McClelland and Stewart, 1971).

90 See Gérard L. Fortin and Jacques Frenette, "L'Acte de 1851 et la création de nouvelles réserves indiennes au Bas-Canada en 1853", *Recherches amérindiennes au Québec* 19/1 (1989), pp. 31-37.

91 *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 14 & 15 Vict. 106, S.C. 1851. See also Lajoie et al., "The French Regime" (cited in note 49).

92 Greg Sarazin, "Les Algonquins de l'Ontario", in *Minuit moins cinq sur les réserves*, ed. Boyce Richardson, trans. Jacques B. Gélinas (Montréal: Libre Expression, 1992), pp. 134-168.

93 See Larry Villeneuve, "The Historical Background of Indian Reserves and Settlements in the Province of Quebec", rev. Daniel Francis (Ottawa: Indian Affairs and Northern Development, 1984); Jacques Frenette, "Kitigan Zibi Anishnabeg: Le territoire et les activités économiques des Algonquins de la Rivière Désert (Maniwaki), 1850-1950", *Recherches amérindiennes au Québec* 23/2-3 (1993).

94 For a detailed examination of the background and content of those agreements see Morrison, "The Robinson Treaties" (cited in note 19).

95 Quoted in Morrison, "The Robinson Treaties".

96*The James Bay Treaty: Treaty No. 9 (made in 1905 and 1906), and Adhesions made in 1929 and 1930* (Ottawa: Queen's Printer, 1964), p. 5; Pierre Trudel, "Comparaison entre le Traité de la Baie James et la Convention de la Baie James", *Recherches amérindiennes au Québec* 9/3 (1979).

97 See *Re Paulette and Registrar of Land Titles* (1973), 42 D.L.R. (3d) 8.

98 Rémi Savard and Jean-René Proulx, *Canada: Derrière l'épopée, les*

autochtones (Montreal: L'hexagone, 1982).

99 House of Commons, "Report from Inspector for Treaty No. 8", in Sessional Papers No. 27 (1904) at 235. See Madill,*Treaty Research Report: Treaty Eight* (cited in note 11).

100 See *Lubicon Settlement Commission of Review Final Report*, March 1993.

101 *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 A.C. 46 (P.C.) at 54. For more discussion of this case, see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

102 *In re Southern Rhodesia* (1918), [1919] A.C. 211 (P.C.). But see *Amodu Tijani* v. *The Secretary, Southern Nigeria*, [1921] 2 A.C. 399 at 407 (P.C.) ("a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners"). For discussion of this case, see McNeil, *Common Law Aboriginal Title* (cited in note 101). See also *Calder* v. *A.G.B.C.* 1970, 13 D.L.R. (3d) 64 at 66 (B.C.C.A.) per Davey C.J.B.C. at 66 ("I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation"). For discussion of the Court of Appeal's decision in *Calder*, see Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), pp. 47-49.

103 Special Joint Committee of the Senate and the House of Commons to Inquire into the Claims of the Allied Indian Tribes of British Columbia, as set forth in their Petition submitted to Parliament in June 1926, *Proceedings, Reports and the Evidence* (Ottawa: King's Printer, 1927), p. 187.

104 See, for example, *R.* v. *Syliboy*, [1929] 1 D.L.R. 307 at 313, (N.S. Co. Ct.) in which the Mi'kmaq nation is said to be an "uncivilized people" and its 1752 treaty "at best a mere agreement made by the Governor and council with a handful of Indians"; and *Pawis* v. *The Queen*, [1980] 2 F.C. 18 (F.C.T.D.) at 25 where the Robinson-Huron treaty is said to be "tantamount to a contract". For more discussion of these and related cases, see Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.

105 Department of Indian and Northern Affairs, *Statement of the Government*

of Canada on Indian Policy, 1969 (Ottawa: Queen's Printer, 1969), p. 11 (the 'white paper'). For more discussion of the white paper in the context of lands and resources, see RCAP, *Treaty Making in the Spirit of Co-existence* (cited in note 7), pp. 33-34. See, generally, Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).

106 Quoted in Edwin May, "The Nishga Land Claim, 1873-1973", M.A. thesis, Simon Fraser University, 1979.

107 *An Act to amend the Indian Act*, S.C. 1927, c. 32, s. 6.

108 See John Giokas, "The Indian Act: Evolution, Overview and Options for Amendment and Transition", research study prepared for RCAP (1995).

109 *Copy of the Robinson-Huron Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron, Conveying Certain Lands to the Crown* (Ottawa: Queen's Printer, 1964), p. 4.

110 The texts of the first seven numbered treaties are in Morris, *The Treaties of Canada* (cited in note 26). For the texts of Treaties 8 through 11, see Madill, *Treaty Research Report: Treaty Eight* (cited in note 11); James Morrison, *Treaty Research Report: Treaty Nine (1905-06)*, *The James Bay Treaty*, report prepared for DIAND (1986); Kenneth S. Coates and William R. Morrison, *Treaty Research Report: Treaty Ten (1906)*, report prepared for DIAND (1986); and Kenneth
S. Coates and William R. Morrison, *Treaty Research Report: Treaty Eleven (1921)*, report prepared for DIAND (1986). See also Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal and Kingston: McGill-Queen's University Press, 1992).

111 Neal Ferris, "Continuity within Change: Settlement-Subsistence Strategies and Artifact Patterns of the Southwestern Ontario Ojibwa A.D. 1780-1861", M.A. thesis, York University, 1989; see also Edward S. Rogers and Flora Tobobondung, "Parry Island Farmers: A Period of Change in the Way of Life of the Algonkians of Southern Ontario", in Canadian Ethnology Service Paper No. 31, *Contributions to Canadian Ethnology, 1975*, ed. David Brez Carlisle (Ottawa: National Museums of Canada, 1975).

112 Leo G. Waisberg and Tim E. Holzkamm, "'A Tendency to Discourage

Them from Cultivating': Ojibwa Agriculture and Indian Affairs Administration in Northwestern Ontario", *Ethnohistory* 40/2 (1993), pp. 175-211.

113 George Manuel and Michael Posluns, *The Fourth World: An Indian Reality* (Don Mills, Ont.: Collier-Macmillan Canada, Ltd., 1974), pp. 33-34.

114 On the subject of federal Indian agricultural policy generally, see Buckley, *From Wooden Ploughs to Welfare* (cited in note 110) and Carter, *Lost Harvests* (cited in note 69). For a parallel study of Indian agriculture in the United States in the last half of the nineteenth century, see Leonard A. Carlson, *Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming* (Westport, Conn.: Greenwood Press, 1981).

115 Waisberg and Holzkamm, "'A Tendency to Discourage them from Cultivating'" (cited in note 112).

116 NAC RG10, volume 10,872, file 901/20-10, part 2, Indian Agent E. McLeod, Lytton, to Chairman of Game Conservation Board of British Columbia, 20 May 1925; Indian Agent H.E. Taylor, Williams Lake, to Assistant Indian Commissioner for British Columbia, 24 January 1936.

117 NAC RG10, volume 3661, file 9755-6, W.E. Ditchburn to D. Pattullo, 28 August 1923. See Thomson, "The Response of Okanagan Indians" (cited in note 76).

118 British Columbia Archives and Records Service (BCARS), GR 1995, file: micro B 1454, McKenna-McBride Commission Testimony, 10 June 1913, p. 279. See Lutz, "The White Problem" (cited in note 78).

119 *Indian Conditions: A Survey*, cat. no. R32-45/1980E (Ottawa: Department of Indian Affairs and Northern Development, 1980).

120 Archives of Ontario (AO), MU 1514, Irving Papers 75/16, p. 261, Order in Council, 8 July 1874. See S. Barry Cottam, "Federal/Provincial Disputes, Natural Resources and the Treaty #3 Ojibway, 1867-1924", PH.D. dissertation, University of Ottawa, 1994, p. 263.

121 The Agreement of 16 April 1894 was made pursuant to *An Act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian Lands*, S.C. 1891, 54-55 Vict., c. 5. See Cottam,

“Federal/Provincial Disputes” (cited in note 120), p. 211.

122 Morrison, *Treaty Research Report: Treaty Nine* (cited in note 110).

123 Madill, *Treaty Research Report: Treaty Eight* (cited in note 11).

124 See Richard H. Bartlett, “Indian and Native Rights in Uranium Development in Northern Saskatchewan” (1980-81) 45 Saskatchewan L.Rev. 13 at 24-26.

125 *Montreal Gazette*, 7 July 1849, p. 2.

126 See Pierre Berton, *Klondike: The Last Great Gold Rush 1896-1899* (Toronto: McClelland and Stewart, 1972).

127 See Julie Cruikshank, “Images of Society in Klondike Gold Rush Narratives: Skookum Jim and the Discovery of Gold”, *Ethnohistory* 39/1 (1992), pp. 20-41.

128 Vernon Dufresne and Dave Ohring, “Early History of the Larder Lake Gold Camp”, *Proceedings of the Local History Workshop, 29 April 1995* (Temiskaming-Abitibi Heritage Association, 1995).

129 NAC RG10, volume 3109, file 315,190. See Bruce W. Hodgins and James Morrison, “Tonene (c.1841-1916)”, *Dictionary of Canadian Biography*

130 . *St. Catherine’s Milling* at 54, and McNeil, *Common Law* (both cited in note 101).

131 *Quebec (A.G.)* v. *Canada (A.G.)* (1921), A.C. 401.

132 *Ontario Mining Company* v. *Seybold* (1900), 31 O.R. 386; *Ontario Mining Company* v. *Seybold* (1901), 31 S.C.R. 125. For a detailed discussion of the background to this case, see Cottam, “Federal/Provincial Disputes” (cited in note 120).

133 Morris, *The Treaties of Canada* (cited in note 26). See also Morrison, “The Robinson Treaties” (cited in note 19). Morris went on to say that that right would not apply on off-reserve lands; however, “as regards other discoveries, of course, the Indian is like any other man. He can sell his information if he can

find a purchaser".

134 *Indian Act, 1876*, S.C. 1876 c. 18, s. 3(6).

135 *An Act for the Settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Land*, S.C. 1924, 14-15 Geo. V, c. 48.

136 See *An Act to confirm and give effect to certain agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan respectively* (U.K.) 20-21 Geo. V, c. 26

137 . *The British Columbia Indian Reserves Mineral Resources Act*, S.C. 1944, c. 19.

138 NAC RG10, Red Series, volume 2217, file 43168-71, Thomas Walton to Superintendent-General of Indian Affairs, 21 August 1893.

139 See James T. Angus, "How the Dokis Indians Protected their Timber", *Ontario History* 81/3 (1989); and Ian Radforth, *Bushworkers and Bosses: Logging in Northern Ontario, 1900-1980* (Toronto: University of Toronto Press, 1987).

140 See John Charles Pritchard, "Economic Development and Disintegration of Traditional Culture Among the Haisla", PH.D. dissertation, University of British Columbia, 1977, p. 147.

141 BCARS, GR1995, file: micro B 1454, McKenna-McBride Commissions Transcripts, examination of William Robertson, 10 June 1913. See Lutz, "The White Problem" (cited in note 78).

142 Ontario Environmental Assessment Board, *Reasons for Decision and Decision: Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario* (Toronto, 20 April 1994); National Aboriginal Forestry Association, "Forest Lands and Resources for Aboriginal People", brief submitted to RCAP (1993), p. 10.

143 NAC RG10, volume 6743, file 420-8, volume 2, F.R. Latchford to Attorney

General J.J. Foy, 31 October 1914; Latchford to D.C. Scott, Deputy Superintendent General of Indian Affairs, 13 November 1914. Justice Latchford had considerable experience in fish and wildlife matters. A prominent amateur zoologist, he had been the first commissioner (in 1898) of the provincial fisheries branch.

144 NAC RG10, volume 6743, file 420-8, volume 2, Mulligan to Department of Indian Affairs, 29 March 1915. See generally, Frank Tough, "Ontario's Appropriation of Indian Hunting: Provincial Conservation Policies vs. Aboriginal and Treaty Rights, ca. 1892-1930", paper prepared for Ontario Native Affairs Secretariat (1991); and Morrison, "The Robinson Treaties" (cited in note 19).

145 The English common law relating to fishing was that in navigable (tidal) waters, the right was vested in the public as a whole, while in non-navigable (non-tidal) waters, the right was vested in the Crown or its grantees. Private fishing clubs in Quebec and New Brunswick owed their existence to the latter. See Roland Wright, "The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada", *Ontario History* 86/4 (1994). In Quebec, under the Civil Code, there has been a long controversy over the ownership of fishing rights, but the provincial legislature has granted and regulated fishing rights.

146 On the lands of the Cree, Assiniboine and Métis in what are now southern Manitoba and southern Saskatchewan, the great herds had largely vanished by the early 1870s, although in the Blackfoot country of the western plains, buffalo were still hunted throughout the rest of the decade. See John S. Milloy, *The Plains Cree: Trade, Diplomacy and War, 1790 to 1870* (Winnipeg: University of Manitoba Press, 1988).

147 Robert G. McCandless, *Yukon Wildlife: A Social History* (Edmonton: University of Alberta Press, 1985).

148 Wright, "The Public Right of Fishing" (cited in note 145).

149 *The Fishery Act*, S. Prov. C., 20 Vict., c. 21.

150 See Wright, "The Public Right of Fishing" (cited in note 145).

151 Lytwyn, "Ojibwa and Ottawa Fisheries" (cited in note 37).

152 Van West, “Ojibwa Fisheries”; and Holtzkamm et al., “Rainy River Sturgeon” (both cited in note 37).

153 For a discussion of eastern Canada and the salmon fishery, see Anne-Marie Panasuk and Jean-René Proulx, “Les rivières à saumon de la Côte-Nord ou ‘Défense de pêcher æ Cette rivière est la propriété de---’”, *Recherches amérindiennes au Québec* 9/3 (1979), pp. 203-219.

154 Lutz, “The White Problem” (cited in note 78).

155 R. Alan Douglas, ed., *John Prince, 1796-1870: A Collection of Documents* (Toronto: The Champlain Society, 1980), p. 155.

156 See United Chiefs and Councils Manitoulin, “UCCM Fish & Wildlife Project”, brief submitted to RCAP (1993).

157 U.S. Department of the Interior, “Casting Light Upon the Waters: A Joint Fishery Assessment of the Wisconsin Ceded Territories” (1991).

158 Morrison, “The Robinson Treaties” (cited in note 19).

159 *An Act to amend the Act for the Protection of Game and Fur-bearing Animals*, S.O. 1892, 55 Vict., c. 58; *An Act to amend and consolidate the Laws for the Protection of Game and Fur-bearing Animals*, S.O. 1893, 56 Vict., c. 49; *An Act to amend and consolidate the Acts for the Protection of certain Animals, Birds, and Fishes*, S.B.C. 1895, 58 Vict., c. 23; and *An Act respecting Game in the Northwest Territories of Canada*, S.C. 1917, 7-8 Geo. V, c.36.

160 McCandless, *Yukon Wildlife* (cited in note 147). Toby Morantz, “Provincial Game Laws at the Turn of the Century Protective or Punitive Measures for the Native Peoples of Quebec: A Case Study”, paper presented at the annual Algonkian meetings, October 1994.

161 *An Act respecting a certain Convention between His Majesty and The United States of America for the Protection of Migratory Birds in Canada and the United States*, S.C. 1917, c. 18 and *An Act respecting the transfer of the Natural Resources of Alberta*, S.C. 1930, c. 3.

162 See Farley Mowat, *Sea of Slaughter* (Toronto: McClelland and Stewart, 1984).

163 Wright, “The Public Right of Fishing” (cited in note 145). Whitcher ended his professional career as the first superintendent of Banff National Park.

164 NAC RG10, volume 2064, file 10,009 1/2, W.F. Whitcher to L[awrence] Vankoughnet, Deputy Superintendent General of Indian Affairs, 15 September 1878.

165 NAC RG10, volume 2064, file 10,009 1/2, Charles Skene to L[awrence] Vankoughnet, 24 October 1878.

166 Wright, “The Public Right of Fishing” (cited in note 145).

167 Van West, “Ojibwa Fisheries”; and Holtzkamm et al., “Rainy River Sturgeon” (both cited in note 37).

168 *An Act to amend the Act for the Protection of Game and Fur-bearing Animals*, S. O. 1892, 55 Vict., c. 58, s. 12.

169 See *An Act to amend and consolidate the Acts for the Protection of certain Animals, Birds and Fishes*, R.S.B.C. 1897, c. 88.

170 See, for example, E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Markham, Ont.: Penguin Books Canada Ltd., 1975); Douglas Hay, “Poaching and the Game Laws on Cannock Chase”, in *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay et al. (Markham, Ont.: Penguin Books Canada, Ltd., 1975).

171 NAC RG10, volume 6746, file 420-8X, part 3, D.J. Taylor to T.R.L. MacInnes, 15 January 1936.

172 See the detailed exchange of correspondence on this topic in NAC RG10, volume 6742, file 420-6, volumes 1-3.

173 NAC RG10, volume 8863, file 1/18-11-8, part 1, J.P.B. Ostrander to F. Matters, 17 September 1954.

174 NAC RG10, volume 8862, file 1/18-11-5, George Mitton to Superintendent General, 26 October 1925; J.D. McLean to Mitton, 2 November 1925.

175 *Syliboy* (cited in note 104).

176 *Simon* v. *The Queen*, [1985] 2 S.C.R. 387.

177 NAC RG10, volume 8862, file 1/18-11-5, Mrs. Peter Wm. Narvie to Department, 9 April 1929.

178 NAC RG10, volume 8862, file 1/18-11-5, Indian Agent Charles Hudson to Department, 16 April 1929; Department to J. Thomas Troy, 12 July 1929.

179 Ontario Federation of Anglers and Hunters, “Position Paper on Comanagement of Crown Lands and Resources in Ontario” (1993), p. 3 [emphasis in original].

180 NAC RG10, volume 8862, file 1/18-11-5, Petition of Chief and Members of the Restigouche Band, 10 April 1899; Department of Indian Affairs to Attorney General New Brunswick, 5 May 1899; Attorney General to Department, 25 May 1899

181 . For a detailed treatment of the issues discussed in this section, see generally Arthur J. Ray, *The Canadian Fur Trade in the Industrial Age* (Toronto: University of Toronto Press, 1990).

182 NAC RG10, volume 6750, file 420-10; see Morantz, “Provincial Game Laws” (cited in note 160).

183 NAC RG10, volume 6750, file 420-10, Armand Tessier, “Les Lois de chasse et les sauvages”, *Action sociale* (January 1913).

184 Hudson’s Bay Company Archives (HBCA), series II, A12/FT 319/1 (a), C.C. Chipman to William Ware, 1 March 1910; NAC RG10, volume 6743, file 420-8 1, McCarthy, Osler, Hoskin and Harcourt to Deputy Superintendent General of Indian Affairs, 17 March 1910

185 . HBCA, series II, A12/FT 319/1 (a) ff. 57-62, C.C. Chipman to William Ware, 8 April 1910; series II, A12/FT 319/1 (b) ff. 1-3, McCarthy, Osler, Hoskin and Harcourt to Premier J.P. Whitney, 20 January 1913; NAC RG10, volume 6743, file 420-8 1, McCarthy, Osler, Hoskin and Harcourt to Deputy Superintendent General of Indian Affairs, 23 August 1912.

186 HBCA, series II, A12/FT 319/1 (b) ff. 30-32, A.M. Nanton to F.C. Ingrams, 25 June 1914; AO RG4, series C-3, file 441, McCarthy, Osler, Hoskin and Harcourt to J.J. Foy, 14 January 1914; NAC RG10, volume 6743, file 420-8X 1, M.V. Ludwig, K.C., to Secretary of Indian Affairs, 15 October 1930.

187 NAC RG10, volume 6743, file 420-8X 1, J.D. McLean to D.F. McDonald, 11 March 1929.

188 NAC RG10, volume 6743, file 420-8X 1, typescript copy of *Rex* v. *Joe Padjena and Paul Quesawa*, unreported, Fourth Division Court of the District of Thunder Bay, 10 April 1930.

189 NAC RG10, volume 6743, file 420-8X 2, Department to Charles McCrea, 16 May 1930.

190 NAC RG10, volume 6743, file 420-8X 2, Ludwig, Schuyler and Fisher to Department, 13 December 1930.

191 NAC RG10, volume 6743, file 420-8X 2, M.H. Ludwig to D.C. Scott, 16 June 1929.

192 NAC RG10, volume 6743, file 420-8X 2, D.C. Scott to Ralph Parsons, Hudson's Bay Company, 28 November 1931; T.R.L MacInnes to Boulton Steward Marshall, 2 June 1939; M.P. for Algoma to Deputy Superintendent General, 14 January 1931; volume 6743, file 420-8X 3, Memorandum of Hugh R. Conn, 19 April 1944.

193 Philip H. Godsell, *Arctic Trader: The Account of Twenty Years With the Hudson's Bay Company* (New York: G.P. Putnam's Sons, 1932), pp. 196-197. See also Kerry Abel, *Drum Songs: Glimpses of Dene History* (Montreal and Kingston: McGill-Queen's University Press, 1993).

194 NAC RG10, volume 10-872, file 901/20, part 1, George Pragnell to Provincial Game Board, 21 August 1924.

195 P.C. 1862, 22 September 1923.

196 Regulation respecting beaver reserves, R.R.Q., c. C-61, r. 31. See Commission des droits de la personne du Québec, *La controverse des droits de chasse, de pêche et de piégeage des autochtones au Québec*, a report

prepared for the Quebec Human Rights Commission by Marc Voinson (1980).

197 Morantz, “Provincial Game Laws” (cited in note 160).

198 Ontario had begun the process in 1935 (though registration did not reach the more northern parts of the province until after the Second World War), followed by Alberta (1937), Manitoba (1940), Quebec (1945), Saskatchewan (1946), the Northwest Territories (1949) and the Yukon (1950).

199 NAC RG10, volume 8862, file 1/18-11-5, part 1, Indian Agent A. Lee Fraser, Hexton, N.B., to Branch, 4 August 1945; DIAND file 373/30-22-0, volume 1, D.J. Allan to Hugh Conn, 24 August 1945.

200 NAC RG10, volume 6748, file 420-8-2 1, H.R. Conn to Dr. W.J.K. Harkness, Chief, Fish and Wildlife Division, Dept. of Lands and Forests, 29 October 1947. See also Volume 1, Chapter 12.

201 NAC RG10, volume 6748, file 420-8-2 1, Dr. W.J.K. Harkness to Hugh Conn, 4 November 1947.

202 See Lutz, “The White Problem” (cited in note 78).

203 NAC RG10, volume 8865, file 1/18-11-13, part 1, Frank Edwards to General Superintendent of Indian Agencies, 15 April 1939. This quotation is cited in the 1994 Ontario Environmental Assessment Board ruling on the province’s timber management plans, Chapter 10, page EA-87-02.

204 See, for example, Ken Coates and W.R. Morrison, “The Federal Government and Urban Development in Northern Canada after World War II: Whitehorse and Dawson City, Yukon Territory”, *BC Studies* 104 (Winter 1994-95).

205 Paul Charest, “Les barrages hydro-électriques en territoire montagnais et leurs effets sur les communautés amérindiennes”, *Recherches amérindiennes au Québec* 9/4 (1980), pp. 323-338.

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and the killing in self-defence of a bear whose hide was later sold under licence (see *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901; dissenting judgement by Madam Justice Wilson).

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208 NAC RG10, volume 7051, file 486/20-7-4-69 1, Fred Matters to Department, 21 July 1958.

209 Manitoba, Committee on Manitoba's Economic Future, *Manitoba, 1962-1975, A Report to the Government of Manitoba,* as quoted in Buckley, *From Wooden Ploughs to Welfare* (cited in note 110), p. 74.

210 Canadian Labour Congress, "Aboriginal Rights and the Labour Movement", brief submitted to RCAP (1993). See also Canadian Labour Congress, RCAP transcripts, Ottawa, 15 November 1993.

211 For this and the following discussion see generally Daniel W. Bromley, *Environment and Economy: Private Rights and Public Policy* (Oxford: Basil Blackwell, 1991).

212 Daniel W. Bromley, "Property Rights as Authority Systems: The Role of Rules in Resource Management", in *Emerging Issues in Forest Policy*, ed. Peter N. Nemetz (Vancouver: UBC Press, 1992).

213 British Columbia, *Timber Rights and Forest Policy in British Columbia*, Volumes 1 and 2, Report of the Royal Commission on Forest Resources (Victoria: Queen's Printer, 1976); British Columbia, report of the Forest Resources Commission *The Future of Our Forests* (Victoria: 1991).

214 L. Anders Sandberg, ed., *Trouble in the Woods: Forest Policy and Social Conflict in Nova Scotia and New Brunswick* (Fredericton: Acadiensis Press, 1992).

215 See McCandless, *Yukon Wildlife* (cited in note 147).

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217 Wright, “The Public Right of Fishing” (cited in note 145).

218 John W. Bruce and Louise Fortmann, “Property and Forestry”, in *Emerging Issues* (cited in note 212).

219 F. Murindagomo, “Wildlife management in Zimbabwe: the CAMPFIRE programme”, *Unasylva* 43/168 (1992); D.M. Lewis, A. Mwenya and G.B. Kaweche, “African solutions to wildlife problems in Africa: insights from a community-based project in Zambia”, *Unasylva* 41/161 (1990).

220 See Lawrence Berg, Terry Fenge and Philip Dearden, “The Role of Aboriginal Peoples in National Park Designation, Planning and Management in Canada”, in *Parks and Protected Areas in Canada*: *Planning and Management*, ed. Philip Dearden and Rick Rollins (Toronto: Oxford University Press, 1993).

221 Ontario Federation of Anglers and Hunters, “Self-Government and Comanagement in Ontario,” brief submitted to RCAP (1993), p. 17.

222 Lorne Schollar, Northwest Territories Wildlife Federation, RCAP transcripts, Yellowknife, Northwest Territories, 9 December 1992.

223 G. Hardin, “The Tragedy of the Commons”, *Science* 162/3859 (1968).

224 Neil S. Forkey, “Maintaining a Great Lakes Fishery: The State, Science, and the Case of Ontario’s Bay of Quinte, 1870-1920”, *Ontario History* 87/1 (1995), pp. 45-64.

225 Bromley, “Property Rights” (cited in note 212).

226 Chapeskie, “Land, Landscape, Culturescape” (cited in note 31).

227 North Shore Tribal Council, “North Shore First Nations Government”, brief submitted to RCAP (1993).

228 Quoted in Barry May, “Newfoundland and Labrador: A Special Place”, in *Endangered Spaces: The Future for Canada’s Wilderness*, ed. Monte Hummel (Toronto: Key Porter Books, 1989), p. 128.

229 Bruce and Fortmann, “Property and Forestry”, in *Emerging Issues* (cited in note 212).

230 World Wildlife Fund Canada, “Protected Areas and Aboriginal Interests in Canada”, brief submitted to RCAP (1993).

231 Patrick Madahbee, speech to Robinson-Huron Treaty Commemoration, Garden River First Nation Territory, 9 September 1995.

232 Lloyd I. Barber, “Indian Land Claims and Rights”, in *The Patterns of “Amerindian Identity”: Symposium, Montmorency, October 1974*, ed. Marc-Adélard Tremblay (Quebec City: Les Presses de l’Université Laval, 1976), pp. 73-74.

233 On these legal instruments generally, see Volume 1; on Jay’s Treaty, signed by Britain and the United States in 1794, see Rémi Savard, “Un projet d’État indépendant à la fin du XVIIIe siècle et le Traité de Jay”, *Recherches amérindiennes au Québec* 24/4 (1994), pp. 57-69.

234 Special Joint Committee of the Senate and the House of Commons appointed to examine and consider the *Indian Act*, *Minutes of Proceedings and Evidence*, 1946, 1947, 1948. See John Leslie, “A Historical Survey of Indian-Government Relations, 1940-1970”, paper prepared for DIAND (1993), pp. 6-8.

235 Joey Thompson, “Dancing Between Two Worlds”, *National* [Canadian Bar Association] 2/2 (1993).

236 Richard C. Daniel, “A History of Native Claims Processes in Canada, 1867-1979”, report prepared for DIAND (1980).

237 See *An Act to amend the Indian Act* (cited in note 107). This remained in force until the *Indian Act* was extensively amended in 1951.

238 Hugh L. Keenleyside, *Memoirs of Hugh L. Keenleyside*: *On the Bridge of Time*, Volume 2 (Toronto: McClelland and Stewart, 1982).

239 *An Act to create an Indian Claims Commission, to provide for the powers, duties and functions thereof, and for other purposes.* (U.S.) Pub. L. No. 79-726 (13 August 1946).

240 During House of Commons debates in 1950 on amendments to the *Indian Act*, John Diefenbaker argued publicly for an independent commission similar

to the American body. See Indian Claims Commission, *Indian Claims Commission Proceedings [ICCP]*, Volume 2, Special Issue on Land Claims Reform (Ottawa: Supply and Services, 1995), p. 30.

241 In January 1950, the Indian affairs branch was transferred from the department of mines and resources to the newly created department of citizenship and immigration, with Walter Harris as minister.

242 Leslie, “A Historical Survey” (cited in note 234), pp. 14-15.

243 Leslie, “A Historical Survey”, pp. 33-34.

244 Letter from Prime Minister John Diefenbaker to Senator James Gladstone, 11 March 1963. See Hugh A. Dempsey, *The Gentle Persuader: A Biography of James Gladstone, Indian Senator* (Saskatoon: Western Producer Prairie Books, 1986),
p. 188.

245 This and the following discussion are based on Daniel, “A History of Native Claims Processes” (cited in note 236). See also Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240).

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247 Daniel, “A History of Native Claims Processes”, pp. 152-153.

248 William B. Henderson and Derek T. Ground, “Survey of Aboriginal Land Claims” (1994) 26 Ottawa L. Rev. 187 at 197-198.

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251 In April-May 1995, B.C.’s ministry of Aboriginal affairs prepared a document entitled “British Columbia’s Approach to Treaty Settlements”. The document has not been officially published, but it is on the Internet and is considered public. Copy provided to RCAP by Nerys Poole, Executive Director, Treaty Mandates Branch, B.C. Ministry of Aboriginal Affairs.

252DIAND, *In All Fairness: A Native Claims Policy æ Comprehensive Claims* (Ottawa: 1981; amended 1986).

253 DIAND, *Outstanding Business: A Native Claims Policy* (Ottawa: 1982).

254 DIAND, *Federal Policy for the Settlement of Native Claims* (Ottawa: 1993).

255 The following documents contain critiques of land claims policy: Indian Commission of Ontario, "Discussion Paper Regarding First Nation Land Claims" (Toronto: 1990), reprinted in Indian Claims Commission, *ICCP,* Volume 2 (cited in note 240), p. 177; Chiefs Committee on Claims/First Nations Submission on Claims (Ottawa: 14 December 1990), reprinted in *ICCP*, Volume 1 (1994), p. 187; Canadian Human Rights Commission, *Annual Report 1990; Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: 1988); D.M. Johnston, "A Theory of Crown Trust Towards Aboriginal Peoples", 18 Ottawa L. Rev 307; D. Knoll, "Unfinished Business: Treaty Land Entitlement and Surrender Claims in Saskatchewan" (unpublished, 1986); Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements æ Report of the Task Force* (the Coolican report) (Ottawa: DIAND, 1985); Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* (the Penner report) (Ottawa: House of Commons, 1983); B.W. Morse, ed., *Indian Land Claims in Canada* (Wallaceburg: A.I.A.I. et al., 1981); and Eric Colvin, *Legal Process and the Resolution of Indian Claims* (Saskatoon: University of Saskatchewan Native Law Centre, 1981).

For more recent comment, see S.M. Weaver, "After Oka: 'The Native Agenda' and Specific Land Claims Policy in Canada" (University of Waterloo, April 1992); Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991); Assembly of First Nations, "Background and Approach to Changing the Federal Claims Process" (unpublished draft, 19 May 1994); John A. Olthius and H.W. Roger Townshend, "Is Canada's Thumb on the Scales? An Analysis of Canada's Comprehensive and Specific Claims Policies and Suggested Alternatives", research study prepared for RCAP (1995); Henderson and Ground, "Survey of Aboriginal Land Claims" (cited in note 248) , p. 187; Indian Commission of Ontario, "Indian Negotiations in Ontario: Making the Process Work" (Toronto: 1994); Indian Claims Commission, *ICCP*, Volume 2; A.C. Hamilton, *Canada and Aboriginal Peoples: A New Partnership* (Ottawa: DIAND, 1995).

256 Indian Commission of Ontario, “Discussion Paper” (cited in note 255).

257 DIAND does have a test case funding program, but it has no mandate to fund litigation at the trial level. While this frustrates most claimants, government did find significant funds for trial of the *Delgamuukw* case [*Delgamuukw* v. *British Columbia* (*A.G*.) (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), Lambert J.A.], underscoring for others the arbitrary nature of claims policies.

258 For a discussion of government’s response to some claims as technical breaches not remediable under the claims policies, see Indian Commission of Ontario, “Discussion Paper” (cited in note 255), pp. 45-46. The Indian Commission of Ontario suggests that such glosses on the policies are calculated to frustrate the negotiation and settlement of claims.

259 Indian Commission of Ontario, “Discussion Paper”, p. 27.

260 Georges Erasmus, “Vingt ans d’espoirs déçus” and “Les solutions que nous préconisons”, *Recherches amérindiennes au Québec* 21/1-2 (1991), pp. 7, 25.

261 DIAND, *Comprehensive Land Claims Policy* (Ottawa: Supply and Services, 1987), p. 23.

262 *Baker Lake* v. *Minister of Indian Affairs and Northern Development* (1979), 107 D.L.R. (3d) at 513 (F.C.T.D.).

263 DIAND, *Federal Policy* (cited in note 254), pp. 5-6.

264 Indian Claims Commission, “Interim Ruling: Athabasca Denesuline Treaty Harvesting Rights Inquiry” (May 1993), *ICCP*, Volume 1 (cited in note 255), pp. 159-168.

265 Ross Howard, “A terrible territorial tangle”, *Globe and Mail* (29 May 1995), p. A13; Melvin H. Smith, *Our Home or Native Land? What Governments’ Aboriginal Policy Is Doing to Canada* (Victoria: Crown Western, 1995), p. 97. The misperception appears to have arisen from a response to a question on a government form asking a claimant to identify its traditional territory. In that particular case it included territory jointly claimed by others. History is replete with examples of joint use of territory by neighbouring Aboriginal peoples, and

all modern treaties have had to deal with questions of overlapping territory.

266 DIAND, *Comprehensive Land Claims Policy* (cited in note 261), p. 12.

267 Michael Jackson, “A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements”, research study prepared for RCAP (1994).

268 DIAND, *Comprehensive Land Claims Policy* (cited in note 261), pp. 12-15 and 17-18.

269 DIAND, *Aboriginal Self-Government: The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995).

270 DIAND, *Comprehensive Land Claims Policy* (cited in note 261), p. 18; and *Federal Policy* (cited in note 254), p. 9.

271 DIAND, *Comprehensive Land Claims Policy*, p. 14.

272 DIAND, *Comprehensive Land Claims Policy*, p. 14.

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

274 See John Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre 1991).

275 Task Force to Review Comprehensive Claims Policy, *Living Treaties* (cited in note 255), p. 30.

276 DIAND, *Comprehensive Land Claims Policy* (cited in note 261).

277 RCAP, *Treaty Making* (cited in note 7).

278 The Gwich’in and the Sahtu Dene and Métis agreements have yet to receive royal assent.

279 Olthius and Townshend, “Is Canada’s Thumb on the Scales?” (cited in

note 255).

280 Agreement between the First Nations Summit, Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of the Province of British Columbia, 21 September 1992. See *British Columbia Treaty Commission Act,* S.C. 1995, C. 45.

281 Task Force to Review Comprehensive Claims Policy, *Living Treaties* (cited in note 255), pp. 79-82.

282 Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 114.

283 Hamilton, *Canada and Aboriginal Peoples,* p. 71.

284 RCAP, *Treaty Making* (cited in note 7), pp. 59-60.

285 Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 88.

286 While this was a significant change to those affected by the exclusion, it was a relatively minor one in terms of the overall policy. Yet it remains the only official change to that policy since 1982.

287 G.V. La Forest, “Report on Administrative Processes for the Resolution of Specific Indian Claims” (DIAND, 1979, unpublished), p. 14.

288 The policy directs that neither is to be considered. Since the department of justice’s legal opinion is not disclosed, however, it is not possible to know what actual weight, if any, is given to these factors. Before the Indian Claims Commission, for example, government has argued that evidence of preliminary negotiations of treaties is barred by the parol evidence rule, a technical rule of evidence, even though the policy states that “All relevant historical evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law”.

289 See Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255), p. 179. The policy also includes examples described as “Beyond Lawful Obligation” to accept claims for the taking of reserve lands without compensation and claims based on fraud by government agents. The first set was clearly intended to incorporate B.C. ‘cut-off lands’ claims relating to the reduction of certain reserves on the advice of the McKenna-McBride

Commission early in this century. See our discussion earlier in this chapter on how losses occurred.

290 When this argument was made before the Indian Claims Commission, it was found to be "an overly narrow interpretation of the Policy": Indian Claims Commission, ICCP, Volume 1 (cited in note 255), p. 82.

291 Manitoba Treaty Land Entitlement Commission, "Report of the Treaty Land Entitlement Commission" (1983), pp. 69-71.

292 *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335, a landmark decision awarding compensation in respect of the Crown's breach of fiduciary duty and equitable fraud in leasing Indian land. The enlargement of the fiduciary concept to the constitutional level in *Sparrow* (cited in note 250) has also failed, as yet, to have any impact upon claims policy.

293 This doctrine is particularly appropriate in the case of the historical treaties because, although the formal treaty documents are written in English, they were negotiated in Aboriginal languages through interpreters. This is the basis for the rule, advanced by the Supreme Court in *Nowegijick* v. *The Queen,* [1983] 1 S.C.R. 29, *Simon* (cited in note 176), and *Sioui* (cited in note 53), that treaties must be construed "in the sense in which they would naturally be understood by the Indians".

294 *Guerin* (cited in note 292) at 354.

295 Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255).

296 Increased funding for claims settlements was one of the initiatives taken by the federal government in the wake of the 1990 Oka crisis.

297 Coopers & Lybrand Consulting Group, "Draft Report on the Evaluation of the Specific Claims Negotiation and Settlement Process" (unpublished, 1994).

298 Russel Lawrence Barsh, "Indian Land Claims Policy in the United States" (1982) 58 North Dakota Law Review 7 at 22-23; 76-77. As in Canada, Native American tribes generally lack investment opportunities or sources of goods and services on their reservations. A cash settlement therefore amounts to a substantial indirect transfer payment to regional non-tribal businesses but results in relatively little reservation capital formation. See also Chapter 5 of this

volume.

299 Coopers & Lybrand, “Draft Report” (cited in note 297).

300 See generally Weaver, “After Oka” (cited in note 255).

301 This document and subsequent correspondence are reprinted in Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255).

302 Order in Council P.C. 1992-1730, amending P.C. 1991-1329.

303 *Indian Claims Commission Annual Report, 1991-1992 to 1993-1994* (Ottawa: Supply and Services, 1993). The commission did not indicate whether it was prepared to assume the backlog of several hundred claims already submitted but unresolved.

304 Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240), p. 23.

305 Indian Claims Commission, *ICCP*, Volume 2.

306 Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993), p. 103.

307 *Indian Claims Commission Annual Report* (cited in note 303).

308 Manuel and Posluns, *The Fourth World* (cited in note 113), pp. 163-165.

309 Quoted in Leslie, “A Historical Survey” (cited in note 234), p. 16.

310 The following discussion is based on Leslie, *Commissions of Inquiry* (cited in note 65); Leslie, “A Historical Survey” (cited in note 234); and J.S. Milloy, “A Historical Overview of Indian-Government Relations, 1755-1940”, paper prepared for DIAND (1992).

311 Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (cited in note 255), pp. 12-14.

312 For example, a recent book by a former official of the B.C. government begins with a laudatory account of the white paper policy. See Smith, *Our*

Home or Native Land? (cited in note 265).

313 In 1992, the Roman Catholic Church formally committed itself to "effectively block or eliminate assimilationist policies of forced integration which cause autochtonous cultures to disappear, as well as the obverse policies which seek to keep native people isolated on the periphery of national life" (John Paul II, Santo Domingo Document No. 251, 1992, as quoted in Peter-Hans Kolvenbach, "Living People, Living Gospel", *Mission* 1/2 (1994), p. 325).

314 RCAP, *Treaty-Making* (cited in note 7).

315 DIAND and Department of Justice, "Background Paper: Achieving Certainty in Comprehensive Land Claims Settlements" (Ottawa: 1995).

316 Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 84.

317 L.I. Barber, "Indian Claims Mechanisms" (1973-1974) 38 Sask. L. Rev. 11 at 15.

318 See also *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34.

319 Robert Mainville, "Visions divergentes sur la compréhension de la Convention de la Baie James et du Nord québécois", *Recherches amérindiennes au Québec* 23/1 (1993), pp. 69-80.

320 Treaty 9 was negotiated in 1905-1906, with adhesions in 1908 and 1929-1930.

321 John S. Long, "Treaty Making, 1930: Who got what at Winisk?", *The Beaver* 75/1 (February/March 1995).

322 See Volume 4, Chapter 6 of this report for a description of this program; see also Ignatius E. La Rusic, "Subsidies for Subsistence: The place of income security programs in supporting hunting, fishing and trapping as a way of life in subarctic communities", research study prepared for RCAP (1993).

323 *Calder* (cited in note 47). Six members of the court held Aboriginal title to be recognized by Canadian law. Three members of the Court (Judson, Martland and Ritchie JJ. concurring) were of the view that Aboriginal title had

been extinguished by Crown and legislative action; three members of the court (Hall, Laskin and Spence JJ. concurring) were of the view that Nisg_a'a title had not been extinguished; the remaining member (Pigeon J.) held that judicial determination of the case required a fiat from the lieutenant governor of the province.

324 *Guerin* (cited in note 292).

325 *Simon* (cited in note 176) at 402 quoting *Jones* v. *Meehan* 175 U.S. 1 (1899); see also *Nowegijick* (cited in note 293) at 36 ("statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians").

326 *Sparrow* (cited in note 250) at 1108. For an analysis of this case as it relates to the inherent right of self-government, see Chapter 3 and RCAP, *Partners in Confederation,* (cited in note 46). For a discussion of this case in light of federal extinguishment policy, see RCAP, *Treaty Making* (cited in note 7). For academic commentary on *Sparrow*, see W.I.C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217; Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta.
L. Rev. 498.

327 *Kruger et al.* v. *The Queen*, [1978] 1 S.C.R. 104 at 109.

328 *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654 at 678. See also *Sparrow* (cited in note 250) at 1112 ("[c]ourts must be careful---to avoid the application of traditional common law concepts of property as they develop their understanding of---the *sui generis* nature of aboriginal rights").

329 *Baker Lake* (cited in note 262). See also *Bear Island Foundation* (cited in note 273) (requiring "sufficient" occupation).

330 See, for example, *Calder* (cited in note 47); *Baker Lake*; and *Mabo* (cited in note 47).

331 *Sparrow* (cited in note 250). See also *Twinn* v. *Canada*, [1987] 2 F.C. 450 at 462 (F.C.T.D.) ("aboriginal rights are communal rights").

332 RCAP, *Treaty Making* (cited in note 7), p. 50; see also *Sparrow* at 1093

("an approach---which would incorporate 'frozen rights' must be rejected").

333 For a discussion of Métis rights, see Volume 4, Chapter 5. For discussion of the impact of the fur trade and Christianity on Ojibwa identity, see John J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291.

334 *Johnson* v. *M'Intosh* (cited in note 44) at 574 ("They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion"); see also Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 728 at 746 ("The doctrine of aboriginal title attributes to a native group a sphere of autonomy, whereby it can determine freely how to use its lands").

335 *Sparrow* (cited in note 250).

336 See, for example, *Canadian Pacific Ltd.* (cited in note 328) at 677 (Aboriginal title cannot "be transferred, sold or surrendered to anyone other than the Crown").

337 *Guerin* (cited in note 292) at 382. (Aboriginal title "gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians"); see also *Sparrow* at 1108 ("the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples").

338 *Sparrow* at 1110.

339 Canadian Bar Association [CBA], *Report of the Canadian Bar Association Task Force on Alternative Dispute Resolution: A Canadian Perspective* (Ottawa: 1989), p. 23. See also *MacMillan Bloedel Ltd.* v. *Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.) at 607, Macfarlane J.A. (a judicial proceeding is "but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange between governments and the Indian nations"); *Pacific Fishermen's Defence Alliance* v. *Canada*, [1987] 3 F.C. 272 (T.D.) at 284 ("Because of their socio-economic and political nature, it is indeed much preferable to settle aboriginal rights by way of negotiations than through the Courts").

340 See Owen M. Fiss, "Against Settlement" (1984) 93 Yale L.J. 1073.

341 See Melvin Aron Eisenberg, “Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking” (1976) 89 Harv. L. Rev. 637.

342 For more discussion of the relationship between participation and legitimacy, see “Opening the Door” in Volume 1 of this report. For an assessment of the relationship between participation and legitimacy in the context of negotiated settlements, see Carrie Menkel-Meadow, “For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference” (1985) 33 U.C.L.A. L. Rev. 485.

343 See Kent Roach, *Constitutional Remedies in Canada* (Aurora: Canada Law Book, 1995), p. 15-3 (“negotiation---has historical origins in the treaty-making process”).

344 See Robert L. Hale, “Coercion and Distribution in a Supposedly Non-Coercive State” *Political Science Quarterly* 38 (1923), p. 470 (bargaining power constituted in part by background distribution of property rights).

345 CBA, *Alternative Dispute Resolution* (cited in note 339), pp. 85-86. See also Roach, *Constitutional Remedies in Canada* (cited in note 343); Abram Chayes, “The Role of the Judge in Public Law Litigation” (1976) 89 Harv. L. Rev. 1281 at 1302 (a fundamental feature of public law litigation is that “the remedy is not imposed but negotiated”).

346 Alberta Law Reform Institute, “Towards a New Alberta Land Titles Act” (Report for Discussion No. 8), Edmonton, 1990, p. 72.

347 *Paulette* v. *R.,* [1977] 2 S.C.R. 628.

348 *Uukw* v. *B.C. Govt.* (1987), 16 B.C.L.R. (2d) 145 (B.C.C.A.); *Lac La Ronge Indian Band* v. *Beckman*, [1990] 4 W.W.R. 211 (Sask. C.A.); *James Smith Indian Band* v. *Saskatchewan (Master of Titles)*, [1994] 2 C.N.L.R. 72 (Sask. Q.B.); but see *Ontario (A.G.)* v. *Bear Island Foundation* (cited in note 273).

349 See, generally, Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book Limited, 1983), ch. 2.

350 See *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396 (H.L.); and *Manitoba (A.G.)* v. *Metropolitan (MTS) Stores Ltd.*, [1987] 1 S.C.R. 110.

351 See, generally, Kent Roach, “Remedies for Violations of Aboriginal Rights” (1992) 21 Man. L.J. 498; Roger Townshend, “Interlocutory Injunctions in Aboriginal Rights Cases”, [1991] 3 C.N.L.R. 1.

352 *Société de Développement de la Baie James* v. *Kanatewat,* [1975] C.A. 166, rev’g [1974] R.P. 38, leave to appeal to S.C.C. dismissed [1975] 1 S.C.R. 48; see also *Ominayak* v. *Norcen*, [1985] 3 W.W.R. 193 (Alta. C.A.).

353 *MacMillan Bloedel* (cited in note 339); *Westar Timber Ltd.* v. *Ryan* (1989), 60 D.L.R. (4th) 453 (B.C.C.A.); *Touchwood File Hills* v. *Davis* (1985), 41 Sask. R. 263 (Q.B.); and *Mohawk Bands of Kahnawake* v. *Glenbow-Alberta Institute*, [1988] 3 C.N.L.R. 70 (Alta. Q.B.).

354 See, for example, *Vieweger Construction Co. Ltd* v. *Rush & Tompkins Construction Ltd. (1964)*, [1965] S.C.R. 195; see, generally, Sharpe, *Injunctions and Specific Performance* (cited in note 349).

355 Roach, *Constitutional Remedies* (cited in note 343), p. 15-3.

356 *R.* v. *Agawa* (1988), 28 O.A.C. 201 at 216; *R.* v. *Sparrow* (cited in note 250). See also Slattery, “Understanding Aboriginal Rights” (cited in note 334), 727 at 753 (governments ought to protect Aboriginal people “in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands”).

357 *Sparrow* at 1077.

358 *Guerin* (cited in note 292).

359 *Delgamuukw* (cited in note 257). See also Leonard I. Rotman, “Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility” (1994) 32 Osgoode Hall L.J. 735. Reference should also be made to the landmark decision by the High Court of Australia in *Mabo* (cited in note 47), in which six members of a seven-member panel agreed that Australian common law recognizes a form of Aboriginal title that, in cases where it has not been extinguished, protects Aboriginal use and enjoyment of ancestral land. Justice Toohey would have gone further to recognize a general fiduciary obligation on the part of the Crown that exists independently of any “obligation arising as a result of particular action or promises by the Crown” (at 204). Extinguishment or impairment of Aboriginal rights to land “would not be a

source of the Crown's obligation, but a breach of it" (at 205). Justice Brennan, Chief Justice Mason and Justice McHugh concurring, together with Justice Dawson dissenting on other grounds, did not agree with this approach, holding that the Crown is not in breach of any duty when it exercises sovereign authority and extinguishes Aboriginal rights. For commentary on *Mabo*, see Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" (1995) 17 Sydney L. Rev. 5. For a collection of essays on Australia's legislative response to *Mabo*, see M.A. Stephenson, ed., *Mabo: The Native Title Legislation æ A Legislative Response to the High Court's Decision* (St. Lucia: University of Queensland Press, 1995).

360 *Sparrow* (cited in note 250) at 1108.

361 See Henderson and Ground, "Survey of Aboriginal Land Claims" (cited in note 248), p. 225 ("The concept of the fiduciary relationship between the Crown and Aboriginal peoples must be at the heart of any claims process").

362 *Sparrow* (cited in note 250) at 1113 ("We find the 'public interest' justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights").

363 *Pacific Fishermen's Defence Alliance* (cited in note 339) at 280-281. See also Mary Ellen Turpel, "A Fair, Expeditious, and Fully Accountable Land Claims Process", in Indian Claims Commission, *ICCP*, Volume 2 (cited in note 240), p. 61; Wilson A. McTavish, "Fiduciary Duties of the Crown in the Right of Ontario" (1991) 25 Law Soc. Gaz. 181.

364 "Draft Declaration on the Rights of Indigenous Peoples" (as agreed to by the members of the working group at its eleventh session), U.N. Doc. E/CN.4/Sub.2/1994/ 2/Add.1 (20 April 1994), Article 3.

365 S. James Anaya, "Canada's Fiduciary Obligation Toward Indigenous Peoples in Quebec under International Law in General", in S. James Anaya, Richard Falk and Donat Pharand, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, *International Dimensions* (Ottawa: RCAP, 1995), p. 24.

366 "The Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries", in International Labour

Organisation, *Conventions and Recommendations Adopted by the International Labour Conference, 1919-1966* (Geneva: International Labour Office, 1966), pp. 1026-1042. Canada is not a party to the Convention. For an assessment of the ILO convention, see Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991), pp. 334-368. See also Martinez-Cobo, *Analytical Compilation of Existing Legal Instruments and Proposed Draft Standards Relating to Indigenous Rights*, U.N. Doc. M/HR/86/36, Annex V, for a summary of submissions by indigenous organizations sharply criticizing the convention on a number of grounds.

367 *Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*, in Centre for Human Rights, *Human Rights*: *A Compilation of International Instruments*, Volume 1 (second part), Universal Instruments (New York: United Nations, 1994), p. 475. The convention was adopted 27 June 1989 by the general conference of the International Labour Organisation and entered into force 5 September 1991.

368 Anaya, "*Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, *International Dimensions*" (cited in note 365); and Donat Pharand, "The International Labour Organisation Convention on Indigenous Peoples (1989): Canada's Concerns", in Anaya et al., *Canada's Fiduciary Obligation* (cited in note 365), Annex 3; Lee Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989" (1990) 15 Okla. City University L. Rev. 677. See also Patrick Macklem, "Normative Dimensions of the Right of Aboriginal Self-Government", in *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: RCAP, 1995), pp. 1-54.

369 Anaya, "*Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, Volume 1, *International Dimensions*", p. 20.

370 *Manitoba Act, 1870*, 33 Vict., c. 3 (Canada) reprinted in R.S.C. 1985, App. II, No. 8. See, generally, Volume 4, Chapter 5 on Métis perspectives.

371 This figure is based on the B.C. government's policy position that settlement land would be proportional to the percentage of First Nations people in the total provincial population æ that is, approximately three to five per cent (information furnished by Nerys Poole, Executive Director, Treaty Mandates Branch, B.C. Ministry of Aboriginal Affairs).

372 To the extent that Aboriginal title is inalienable except to the Crown, treaty recognition of Aboriginal title alone may not establish Aboriginal authority to grant interests to third parties. However, we are of the view that an Aboriginal party can be vested with such authority by treaty.

373 Labrador Inuit Association, "Submission to the Royal Commission on Aboriginal Peoples" (1992), p. 28. See also Task Force to Review Comprehensive Claims Policy, "*Living Treaties*" (cited in note 255).

374 See, for example, "Submission of the Inuit Tapirisat of Canada", brief submitted to RCAP (1994); and Draft Conference Proceedings, "ITC Inuit Round-Tables on Economic Development, Negotiation and Implementation, and Self-Government", Pangnirtung, Northwest Territories, 26-28 July 1993.

375 See, generally, Rotman, "Provincial Fiduciary Obligations" (cited in note 359).

376 *Intervenor Funding Project Act*, R.S.O. 1990, c. I.13. Enacted in 1988 and renewed for five years in 1991, the act was allowed to lapse at the end of March 1996.

377 *P.E.I. Potato Marketing Board* v. *Willis*, [1952] 2 S.C.R. 392. See also *British Columbia (Milk Board)* v. *Grisnich*, [1995] 2 S.C.R. 895.

378 Peter W. Hogg, *Constitutional Law of Canada*, third ed. (Toronto: Carswell, 1992), 27.1 (c). See also Volume 4, Chapter 5, where we discuss Métis people and the constitution.

379 *Crevier* v. *Quebec (A.G.)*, [1981] 2 S.C.R. 220.

380 See, for example, *Sobeys Stores Ltd.* v. *Yeomans*, [1989] 1 S.C.R. 238.

381 *Canadian Pacific Ltd*. v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3.

382 Barrie Conkin, RCAP transcripts, North Battleford, Saskatchewan, 29 October 1992.

383 Hamilton, *Canada and Aboriginal Peoples* (cited in note 255), p. 91.

384 Indian Claims Commission, *ICCP*, Volume 1 (cited in note 255), pp. 169-

205; and *ICCP*, Volume 2 (cited in note 240).

385 Indian Claims Commission, *ICCP*, Volume 1, pp. 159-168.

386 Indian Claims Commission, *ICCP*, Volume 2, p. 55.

387 Leon Mitchell, Q.C., "Report of The Treaty Land Entitlement Commission" (Winnipeg: 1983).

388 For a brief discussion of some of the problems inherent in using government documents to research historical Aboriginal populations, see Bennett Ellen McCardle, *Indian History and Claims: A Research Handbook*, Volume 1 (Ottawa: Indian and Northern Affairs, 1982), pp. 130-139.

389 Morrison, "The Robinson Treaties" (cited in note 19).

390 Chief Gerald Beaucage, Nipissing Band of Ojibways, RCAP transcripts, North Bay, Ontario, 10 May 1993.

391 Township of Onondaga, Resolution 12, 12 October 1993.

392 Union des municipalités du Québec, "Mémoire de l'Union des Municipalités du Québec présenté à la Commission royale sur les peuples Autochtones", brief to RCAP (1993).

393 DIAND, "Additions to Reserves", in *Land Management Policies and Procedures Manual* (November 1991).

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