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ABORIGINAL PEOPLES AND CANADIAN FEDERALISM: AN OVERVIEW

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INTRODUCTION[i]

Federalism as a way of political life is essentially about how diverse communities share power. There are both strong elements of political culture -- a certain set of assumptions and biases in how we interact in political ways -- as well as distinguishing institutions which mark federal systems of government. The Canadian hybrid of federalism has had a good deal of success in terms of a lifespan of now over 125 years, but it continues to face challenges in terms of the ability of its institutions to reflect the underlying political culture. In recent decades the fit between our institutions and our evolving political culture has become increasingly ineffective.[ii]

One of the more important sources of change in the Canadian political culture has been the rising demands of Aboriginal Peoples[iii] for self-determination, including self-government. The federal system is being challenged to adapt to the renaissance of autonomous Aboriginal political communities and to change its institutions accordingly. In a broader sense, the political community of Canadians is also coming to acknowledge, if rather late, the pre-existing political culture of Aboriginal Peoples, including constitutional aspects which have been "hidden" both inside and outside the dominant federal system.[iv]

Aboriginal political culture and institutions have continued, if in suppressed and circumscribed forms, since before the first treaties with European powers were signed. They have continued under the aegis of treaties, the Royal Proclamation of 1763, legislation of the federal Parliament authorized by section 91(24) of the Constitution Act, 1867 and, most recently the explicit recognition of Aboriginal rights in the Constitution

Act, 1982. And yet the exercise of what might be termed as even a modest degree of power by self-determining and self-governing Aboriginal Peoples has often been seen by non-Aboriginal Canadians as threatening not only to their economic and social interests but also to their political institutions, including the federal system itself.

In its most fundamental form, the reassertion of Aboriginal self-determination has been cast by its proponents as entailing political sovereignty in the fullest sense of the term.[v] And as recently as September, 1990 a Canadian Prime Minister responded to the declarations of sovereignty of the Mohawk Nation with declarations of his own that Canadian sovereignty was indivisible.[vi] Without commenting at this stage on the validity of either position, it is symptomatic of the problems of Canadian federalism that such political discourse ignored completely the point of federalism, which is shared power and coordinate spheres of government, each sovereign in its jurisdiction.

That the Aboriginal Peoples in Canada would not necessarily partake of the federalist assumptions of Canadian political culture should not be surprising. The federal system has been the instrument of colonialism, a dividing of the spoils among factions of the settler community, in ways which subordinated or ignored Treaty rights, fundamental Aboriginal rights and the fiduciary obligations of the Crown. The process of "Confederation" in the 1860s did not include Aboriginal Peoples and has been imposed on them without their consent.[vii]

It should also not be surprising that non-Aboriginal Canadian political leadership has suppressed a broader understanding that our federal society excluded Aboriginal Peoples. The same assumptions and institutions of colonialism which suppressed Aboriginal political culture and institutions also served to suppress any wider acceptance that the federal political society included Aboriginal Peoples, and that the federal system would have to reflect the "deeper diversity" of Aboriginal Peoples in the federal system.[viii]

Canadian federalism is at a crossroads. A generation of demands from the Province of Quebec for fundamental restructuring of the federal system (even if these demands amount to a return to what many Quebecers see as the original federal bargain of 1867) created a window of opportunity for constitutional reform. Aboriginal leadership took advantage of that window to press their own demands for change to the federal system to reflect their proper role in the federal community. According to many observers, that window of opportunity for constitutional reform is now closed.[ix] In the meantime, however, the perspectives of many Aboriginal Peoples have been placed on the public record, the political consciousness of the Aboriginal and non-Aboriginal communities alike have been raised, and there appears to be a broad consensus on the need for progress towards Aboriginal aspirations. Indeed the Royal Commission on Aboriginal Peoples, despite the history of such inquiries as synonymous with political delay, provides a continuing if somewhat narrower window of opportunity to address many of the issues related to Aboriginal Peoples and Canadian federalism.

The purpose of this paper is to provide an overview of the issues involved in the intersection of Aboriginal rights, interests and perspectives and the Canadian federal system as a whole. The intent is not to attempt to fit Aboriginal aspirations or positions into the Procrustean bed of Canadian federalism. The authors' own biases should be stated at the outset as in favour of a continuing and viable federal community of Canada, one which includes Aboriginal Peoples as much as possible on their own terms. That having been said, this paper is not meant to be prescriptive except to point out the several avenues for further inquiry, debate and negotiation. Rather the objective is to present a broad discussion of the federal system in Canada as it affects Aboriginal interests, exploring issues and options which may or may not entail the full integration of Aboriginal Peoples into the federal community. In the process, this paper will illuminate some of the potential for adaptation in the federal system to meet the requirements of Aboriginal self-determination, as well as the ways in which Aboriginal political culture

and institutions can help to redefine the meaning of Canadian federalism. As outlined further in this text, there is a potentially large range of options for framing the basic relationship of Aboriginal Peoples and the Canadian state, from international sovereignty through confederal solutions to integration within the existing federal system. While this paper reaches a conclusion favouring the latter option, we also discuss, where appropriate, the significance of other options.

Part I provides a review of the elements -- social, constitutional and institutional -- of federal systems in general and in Canada in particular. It is important to view the system as a whole if a full range of issues is to be addressed. In surveying each important aspect of the federal system, this part provides an agenda of issues to be addressed in terms of adapting the self-determination of Aboriginal Peoples in a federal context, or of finding other solutions for accommodation. Part II illustrates the emerging issues related to Aboriginal Peoples and federalism by examining in historical context the reemergence of the Aboriginal political community in Canada and the sharpening debate over the role of Aboriginal Peoples in the federation, culminating with a discussion of the Meech Lake Accord and the "Canada Round" of attempts at constitutional reform. The traditional and contemporary perspectives of Aboriginal Peoples on a range of federal-type forms of government is also surveyed. Part III presents conclusions, and draws out the continuing issues for debate.

PART I: THE CANADIAN FEDERAL SYSTEM

Federalism is both a very old and a very widespread political idea. As a means of organizing political society, it is pre-modern and pre-democratic, with roots in western political thought in the Biblical covenant, through the medieval concept of "feodus", to confederal forms of government and political thought in Europe up to the seventeenth century.[x] Scholars have more recently come to recognize as well the importance of confederal practice and philosophy by many First Nations in North

America existing both before and after contact with European powers. It is important, for example, to underline the significance of Aboriginal traditions of confederalism as an inspiration for the original Articles of Confederation of the thirteen American colonies in 1775 and the subsequent United States federal constitution of 1787.[xi] The nature of Aboriginal ideas of confederalism is reviewed in greater detail below. Suffice to note at this stage that while aboriginal ideas of confederalism had an impact on the American founders, they seemed to be little considered by the mid-nineteenth century when British North American colonists considered a federal form of government for Canada.

As old as the idea of federalism and federal or confederal principles are, we may take as the starting point for all modern federal constitutions and states, the United States constitution of 1787. This was the first political regime established on the principles of the "compound republic" of coordinate spheres of government with a separately constituted union government directly accountable to the people -- hence with its own source of sovereignty. In this respect the US Constitution broke ranks with all previous forms of federal government, by creating a powerful central government, not dependent for its authority on the delegation of powers from the confederal partners. This constitution set the precedent followed by virtually all other truly federal regimes since: constitutionally separated and guaranteed constituent (state) and federal orders of governments under the rule of law, in which the constitution itself is the supreme law; a constitutionally protected Supreme Court as the ultimate arbiter of the rule of law; representation of regional views within central government decision-making; and popular sovereignty expressed by the same set of citizens through democratic representative government at both the state and federal level.[xii]

To the liberty-conscious Americans, their federal constitution was designed to prevent the abuse and concentration of power by sharing the power of the people among the states and between the states and the union. Essential to the American scheme but not essential to federalism itself was also the constitutional separation of powers among the

executive, legislative and judicial branches at both levels of government, and a Bill of Rights to guarantee civil and political rights of individuals from the laws of any legislature. In summary, while it was originally designed for rather limited government, the U.S. federal constitution rendered governable a large continental territory divided by a diverse group of pre-existing political communities, at the same time creating a form of government that met the demands of local autonomy with national territorial integrity and commerce. And yet the political culture to be federated and sustained was not nearly as diverse as were many of the federal unions which followed the American example. The Americans shared broadly similar legal and political institutions, and a dominant English culture. In 1787 no attempt was made to directly incorporate the full diversity of societies then existing on American territory (e.g. the slave population) or its neighbouring Aboriginal nations. With territorial expansion of the Union, Indian sovereignty gradually became subsumed within American constitutional law in the status of "domestic dependent nations". The effect of this status is for continuing tribal governments to be de facto federacies within the United States. The self-government of the Aboriginal population is not constitutionally entrenched and operates as retained sovereignty unless Congress legislates otherwise, and is subject to some state laws and taxes.[xiii]

As outlined more fully below, the British North America Act, now Constitution Act, of 1867 created in Canada the first federal constitution to be grafted onto British parliamentary institutions. The convention of the sovereignty of the crown and the supremacy of the Queen in Parliament to pass laws throughout the realm were adopted in a federal framework, such that crown sovereignty (exercised through representative democracy) was to be split between the federal Parliament and the provincial legislatures. Instead of the US separation of powers, the Canadian federation continued the parliamentary practice of the executive being drawn from and responsible to the legislature. This fusion of executive and legislative powers creates powerful and executive-dominated government, which in turn means that intergovernmental relations

are dominated by prime ministers, cabinet ministers and officials. The tilt towards the concentration of authority was also unchecked by the lack of a bill of rights in the Canadian model -- at least for the first 115 years.

Indeed the choice of federal government in Canada was not, as it was in the U.S.A., first and foremost a means of enhancing liberty, but rather a means of preserving sectional autonomy. Canada was and is a more federal society than the U.S.A. The original rationale for an expanded federal union was to solve the stalemated politics of the United Province of Canada, in which the French Canadians were a minority. By re-establishing a province of Quebec within a federal union, the French Canadians were able to form a majority for purposes of local and regional matters, thus achieving significant protection for their language and culture. The existence of cross-cutting religious and linguistic minorities also introduced an element of "non-territorial" federalism in Canada which the federal union to the south did not enjoy.

Subsequent federal constitutions have in the main followed either the American model with its emphasis on republican institutions and the separation of powers, or variations of the Canadian model with its parliamentary institutions. Nonetheless, the number and variety of hybrids in existence today defies easy or useful classification, particularly when the element of federal society is introduced with varying degrees of diversity of national, linguistic, religious, ethnic and other characteristics to be integrated.[xiv]

Despite these difficulties, it is important to this analysis to select several components of the federal political system as it has evolved in Canada which may better illuminate the whole. These include: (1) the overall constitutional setting; (2) the underlying pluralism of the civic society; (3) and (4) the organization of territorial and non-territorial aspects of the federal union; (5) federal institutions; (6) the distribution of powers; (7) fiscal relations and the *de facto* exercise of powers; and (8)

intergovernmental relations. It seems most productive to think of the operating federation as a system of government, where the processes of government are as important as the structures, the black letter of the constitution can be interpreted through evolving practice, and the operative assumptions and symbolic forces in the political culture and civic society provide essential background to the exercise of power. Finally this discussion will delineate characteristics of the system which has been adapted over the years. Such characteristics may promote the integration or coexistence of Aboriginal self-determination with the Canadian federation. It is also important to outline aspects of the system which are antithetical to aboriginal aspirations.

(1) Constitutional Setting

As noted above, the Canadian federation is set within the framework of Westminster-style parliamentary government. The "Fathers of Confederation" had no intention of departing from the basic Whig principles of responsible government for any version of republicanism, not particularly when several generations of both French and English-speaking Canadians had risked both blood and political careers to achieve it. They sought a continuation of British institutions and conventional practices, at least as much as was practical in the North American setting and in a federal framework. This continuity was of course also important to Aboriginal Peoples in that the extent to which treaties and the Royal Proclamation bound the Crown before Confederation, they did so afterwards as well. The creation of provinces with jurisdiction over and ownership of Crown lands would complicate these matters greatly, but would not necessarily negate pre-Confederation arrangements.

A chief characteristic of the overall constitutional setting is, however, the prevailing notion that Parliament plus the provincial legislatures together exhaust the legislative sovereignty of the Crown, and taken severally can legislate on any matter. The Charter of Rights and Freedoms introduced in 1982 introduced significant constraints to

the exercise of this legislative power. And since 1867 the constitution has also included a number of provisions to guarantee linguistic and religious rights.[xv] That there also has existed another body of law affecting Aboriginal Peoples and constraining legislatures, i.e. as provided by the Treaties and the Royal Proclamation, was far less acknowledged until recently. As reviewed at greater length in Part II, the federal parliament's exercise of its legislative jurisdiction over "Indians and lands reserved for Indians" honoured Aboriginal and treaty rights more in the breach than in the observance. For the first century of Confederation the British and the Canadian courts only sporadically acknowledged that Treaty and Aboriginal rights have constitutional standing. They have done so in a systematic way only since the general entrenchment of those rights in 1982. While there have been recent judgements that have been encouraging with respect to Aboriginal Treaties and rights, the courts have not yet interpreted the constitution to date in a way which would allow much room for the exercise of Aboriginal self-government, broadly conceived.

(2) Pluralism and the civic society

The free association of persons for myriad economic, social, cultural and political purposes, unregulated and uninitiated by the state, is essential if local government, and democratic institutions are to flourish.[xvi] This civic society can stand a great deal of diversity, indeed under the basic western liberal model is expected to be composed of a plural mix of free individuals, with diverse religious and political views. Under American federalism, there is both an undefined and a constitutionally entrenched civic culture by which individuals of diverse backgrounds partake of individual rights, but not of collective rights. Canadian federalism has had to be more broadly plural from the beginning, given the binational character of its founding. Political rights were vested in French Canadians not only in the creation of a province of Quebec where they could expect to be the majority, but also in federal institutions and in education rights extended to the entire federation.

Canadian society is of course even more diverse than the constitution acknowledges. However, Canadian federalism remains chiefly a device to share power among the two language groups and the ten provinces. It has thus tended to reinforce territorial distinctions and dualist (French-English) divisions to the exclusion of other differences. Since the 1960s there has been a rather weak and ambiguous effort to extend the plural framework beyond the two linguistic groups to embrace "multiculturalism", but without any of the vested interests of territorial federalism and collective rights. Nonetheless the result has tended to dilute the primarily territorial and dualist differentiation of Canadian society, as Canadians come to see themselves more and more according to social characteristics not tied to their language or their province. This has been especially so since the addition of the Charter.[xvii]

Thus, the federal system did not expressly incorporate and recognize the collective plurality of Aboriginal Peoples as part of the federal community. "Indians" were of course noted in the British North America Act, as a separate head of federal jurisdiction, but the prevailing assumption was that Aboriginal persons were sub-social: uncivilized and unenfranchised. They were excluded from the civil society until and unless they gave up their aboriginal identity and adopted the culture, economy, religions and languages of the settler society. The assumptions were increasingly of a linear path of assimilation into the liberal and plural society of other Canadians. There were seeds of promise of a more expansive form of pluralism such as the Manitoba Act and other provisions for the Métis, and the post-Confederation treaties for First Nations from Ontario to the Rockies. But these seeds fell mainly on barren ground. As Aboriginal Peoples were not considered at the time of Confederation to constitute part of the civic society, the resulting federal design did not incorporate Aboriginal elements into the federal system as such. They were not considered "founding peoples", despite their enormous role in enabling the country to be founded at all!

On the other hand, the political pressure from Aboriginal Peoples for the recognition of their distinctiveness, and for the constitutional restoration of their collective rights is forcing a new definition of pluralism in Canada. The inclusion of collective Aboriginal rights in the Constitution Act, 1982 (sections 25 and 35) has been the most concrete result of this pressure, but as will be noted below, continuing debate over the nature and scope of Aboriginal rights, including the right of self-government, is leading others to question the basis of pluralism underlying our federal system: and whether the existing model of federation can accommodate greater diversity.

The challenge for the federal system today is at least in part to allow for a sufficiently broad conception of civic society for Aboriginal Peoples to participate as full partners. For this to occur Aboriginals and non-Aboriginals alike must examine the underlying assumptions and values essential to the civic society, and what level of diversity is tolerable on the basis of common citizenship.

(3) Territory and the federation

As just noted, Canada as a federation was conceived and has developed to a very significant degree as a standard territorial federation. To the original four provinces federally united in 1867 were added three provinces by unilateral acts of Parliament and three more by negotiated terms of union. All of the provinces enjoy essentially the same set of basic powers, in that no one province is dramatically different juridically from the others, although the original union agreement of 1867 and the subsequent arrangements for various provinces has allowed a number of important elements of asymmetry.[xviii]

The shape of the provinces originally and over time reflects, however, both the underlying federal society as well as elements of a created federal society. The three Maritime provinces (and later Newfoundland), as well as Ontario, Quebec and British Columbia, were all pre-existing colonial units, and of course Quebec was from the

beginning of the federation different from the rest with its majority French and Catholic population. Manitoba was originally created with bi-national (French-English) characteristics and a recognition of the role of Métis, while Alberta and Saskatchewan were somewhat arbitrarily carved out of the Northwest territories. Regardless of whether the provincial boundaries reflected real or arbitrary social factors on the ground, the continuing existence of provincial boundaries over time has allowed institutional factors to shape economic and social forces in unforseen ways. So that now it does indeed matter whether a citizen resides in Alberta or Saskatchewan with respect to any number of public policy outcomes, benefits and costs of the state, and treatment under the law.[xix] Moreover, from the 1860s onwards, the expectation and the reality has been that Canada would be composed entirely of provinces -- even in the two remaining territories their fate has often been perceived in terms of standard provincial-type status when the time was deemed right.

This basic territorial design of the federation has two important outcomes for Aboriginal Peoples. First, their own territorial interests have tended to be at best secondary to those of the provinces, existing as enclaves within provinces with varying and inconsistent treatment in law and policy. For Treaty Nations this has often meant that the territory of treaties overlaps provincial boundaries and that the jurisdiction of treaties has been ignored by provincial governments. The federal government's relationship to the Treaty Nations -- as further discussed below -- has been mixed, but from a territorial perspective the broad scope of Treaty lands has generally been ignored, with federal policy concentrating on reserve enclaves within provincial boundaries.

Second, the bias towards the province as a defined and relatively uniform constituent unit of the federation means that there is considerably less tolerance or understanding of the potential for different types of constituent units than there would be in other federations which have more than one type of constituent unit.[xx] Indeed, some commentators see the ultimate solution for Aboriginal self-government as lying in a

"First Nations Province". Such discussion may or may not be itself a victim of the prevailing assumptions of Canadian federalism, but at the least it takes seriously the need to make room and to adapt the federation to Aboriginal territorial units.[xxi]

(4) Non-Territorial Citizenship and the Charter of Rights and Freedoms

While Canada's design is biased towards the territorial constituency of provinces, non-territorial aspects cutting across provincial boundaries have also been important from the beginning. The most significant has been the collective rights of linguistic and religious minorities. Nonetheless, the history of French language minorities outside Quebec and their attempts to assert their rights has demonstrated the limitations of such rights in the face of hostile provincial governments and/or indifferent federal governments. Partly as a result of this history, Prime Minister Trudeau sought and attained the further expansion and protection of these nonterritorial rights in the Constitution Act, 1982.

The 1982 set of constitutional reforms also introduced another major thrust towards a more non-territorial pluralism, by entrenching the Charter. The political movement to create the Charter and the subsequent mobilization by so-called "Charter-Canadians" to protect and extend the Charter has set up a powerful new political dynamic in Canada. It has tilted power away from governments in general and provinces in particular, towards individual citizens, and also towards political advocacy groups organized to speak for disadvantaged categories of citizens reflected in section 15 of the Charter, i.e. women, the disabled, ethnic, religious and racial minorities and seniors. While the Charter protects the rights of all Canadians by prohibiting legislative or other actions by both the federal and provincial legislatures, its political effect is to legitimize in the federal community at large a new set of interests which compete with the regional interests as represented by the provinces. The central government per se is thus strengthened in political terms as it can play off regional interests against nonterritorial

interests in defining national or federation-wide interests.

Another significant outcome of the Charter if as yet not entirely defined, may be to strengthen the place of individual rights in the political culture, and subsequently weaken the acceptability and understanding of collective rights. While it is true that the Constitution Act, 1982 also included collective rights, among them Aboriginal rights, it may be argued that the entrenchment of individual rights is having a more immediate effect on the political culture. In particular, it has elevated the equality of rights-bearing citizens to a higher plane in the value structure of the federal system -- and among some adherents leading them to political positions which are in essence antithetical to federal principles. This trend has included a tendency to see any special arrangements or greater decentralization for one province, such as Quebec, as special treatment and contrary to the spirit if not the letter of the Charter. Thus equal provinces is seen as an extension of equal rights. The force of this view was obvious in its role in defeating both the Meech Lake and Charlottetown Accords. It may present a significant obstacle to future attempts to extend asymmetrical powers to provinces, or to Aboriginal Governments, or to an increased recognition of collective rights in the Constitution.

On the specific issue of the Charter's applicability to Aboriginal Governments, the same political trends apply. Currently the Charter applies to all federal and provincial law unless explicitly declared exempt, invoking the "notwithstanding" provision (section 33) of the Charter. A strong set of political interests, although perhaps not a majority of Canadians, supported the notwithstanding clause as a safeguard for legislatures to be used in extreme cases. The insertion of the clause in the 1980-82 negotiations was controversial but probably essential to getting any Charter at all. This does not mean that the clause has been or could be invoked with impunity. When the government of Premier Robert Bourassa used section 33 to pass language legislation struck down by the Supreme Court of Canada in December 1988, the move was widely criticized outside Quebec (and contributed to increased opposition to Quebec objectives as expressed in the

Meech Lake Accord).

Should the Charter apply to Aboriginal governments, and if so, should they also avail of section 33? As will be discussed at greater length below, a model of integration would argue "yes" to both questions. Other types of relations might not require such commonality. However, section 25 of the Constitution Act, 1982 partially shields Aboriginal rights from the Charter. The question is whether this shield applies as well to Aboriginal governments as an order of government in the federation. There is also the difficult and potentially explosive issue of the Charter rights of individual Aboriginal persons vis à vis their own governments. Some Aboriginal women's organizations are determined to ensure that recognition of the inherent aboriginal right of self-government does not infringe on their Charter rights.[xxii]

In summary, Canada's evolution towards a more nonterritorial political community presents both problems and opportunities for Aboriginal Peoples. The existence of provinces and their near monopoly over lands and resources has been a huge obstacle to the territorial needs and ambitions of Aboriginal Peoples, including in many cases their rights under treaties. Nonetheless,the traditional territories of Aboriginal Peoples seldom fit into the geography of provincial boundaries, and to the extent to which Aboriginal Peoples look to a fiduciary role of the Crown to protect their rights across the whole territory of Canada, they constitute an important nonterritorial force in the Canadian political culture. We will return to these issues in remaining sections of this paper, but it is worth emphasizing here that Aboriginal rights do now and must continue to have a significant non-territorial aspect if they are to have meaning -- and here, one refers to application off the specific territory of Aboriginal Peoples (whether that is traditional lands, treaty areas or reserves). However, the growing hostility in the Canadian public to collective rights and to constituted governments with unique powers or perceived special treatment, poses a major challenge to be overcome in the exercise of Aboriginal self-determination, including self-government.

(5) Federal Institutions

In all federal countries, the institutions of the central government have been designed to ensure that they represent not only the individual citizens of the federation but also the constituent units (states, provinces, etc.) and significant regional minority or national groups. The Aboriginal Peoples have never been formally recognized in the design or operation of any major federal institution in Canada, but a brief summary of the ways in which existing Canadian federal institutions reflect the non-Aboriginal federal society should point out key issues to be addressed.

In Parliamentary federations, the central Parliament itself is the key institution for symbolic and actual representation. The monarchy is a part of these institutions, but the Crown in the person of the Queen, her predecessors and heirs is outside Canadian society, resident in the United Kingdom -- a fact which has been in itself a source of division and debate, as a result of the perceived symbolism of British or anglophone imperialism. For Aboriginal Peoples, there is among some First Nations a vital importance attached to the Crown as the trustee of their treaty relationship, and as a "higher" authority than the federal government to which to appeal. For this reason Aboriginal Peoples might be highly sensitive to any major change such as abolishing the monarchy in Canada.

The Governor-General as the Queen's representative in Canada has been appointed from Canadian citizens since 1952 and the office has come by convention to be filled by a series of persons who embody some part of the broad spectrum of Canadian society (thus far anglophones, francophones, women, and persons of Ukrainian and German descent -- but as yet no Aboriginal persons).[xxiii]

Parliament itself is primarily designed, as in other federations, with a lower house to represent the federal electorate by population, and the upper house to represent the

broader divisions in federal society. The House of Commons generally functions to represent on equal terms the whole population, although not without a number of constitutional guarantees for minimal representation for smaller provinces, and normal legislative provisions for electoral boundaries which over-represent rural and remote populations. Many fewer Aboriginal Canadians vote in federal elections than non-Aboriginals. The reasons for low turnouts are complex, including general apathy and alienation in Aboriginal communities, the history of being excluded from the vote until 1960, and the conviction in some communities that voting in Canadian elections would deny Aboriginal sovereignty.[xxiv] Even if they did vote in larger numbers, the current system would produce few seats where their votes can have a determining effect, given the dispersed nature of the Aboriginal population. The Royal Commission on Electoral Reform reviewed this issue in depth and recommended Aboriginal Electoral Districts as a means of ensuring Aboriginal representation in the House.[xxv]

The Senate, as is well known, has never functioned adequately to reflect the broader representation of the federal society. Its appointments are still by federal order-in-council on primarily patronage grounds, with regional representation that is not only unelected but on a formula which is perceived as discriminating against the western provinces, Newfoundland and the North. These deficiencies limit the ability of the current Senate to play a full role in the legislative process, including significant political constraints on the use of the considerable powers it now possesses. It does not function at all in terms of representing the constituent units of the federation, i.e. the provincial governments as such.

Various reform proposals range from an elected Senate with more equal or strictly equal representation for each province, to a house of provincial government delegates, to a house of gender parity. Proposals also range from a Senate with powers nearly equal to those of the House of Commons, to various degrees of more circumscribed powers, and to various ideas about special majority voting rules on issues of concern to specific

minority interests, such as French language and culture. Should the Senate be reformed, even without formal amendment of the Constitution, it could play a significantly greater role in representing Aboriginal interests in the federal Parliament. While this has not been the major priority of reform for Aboriginal Peoples, aboriginal organizations have supported such ideas.

Another key federative institution is the Supreme Court as the final court of appeal for constitutional law. The court's rulings have the force of domestic law not only for the law of federalism narrowly defined, but also for the broader constitutional law involving Aboriginal and treaty rights in Canada. The current Supreme Court is formed by ordinary federal statute, not entrenched in the Constitution. Conventional practice stipulates that appointments to the nine member bench are drawn from across the regions, with Quebec's civil law system getting three seats to ensure adequate appeals from that body of law. If in the future the Supreme Court were to hear appeals from Aboriginal courts or similar bodies, or to undertake judicial review of the laws of Aboriginal legislatures, adherence to federal principles would suggest that some way must be found to represent the views and values of the Aboriginal legal system on the Supreme Court itself.

Finally, there are a number of other federal institutions where direct or indirect representation of various components of the federal society have been at issue. These include regulatory bodies at arm's length from government such as the National Transportation Agency, the civil service in general, and the institutions of intergovernmental relations (the latter is dealt with below).

In considering reform to federal institutions, it is important to bear in mind that from the Aboriginal perspective reform of Canadian federal institutions to better represent Aboriginal Peoples should not be a substitute for progress on self-government. There is thus tension within Aboriginal political circles between "intrastate" and

"interstate" solutions.[xxvi] Intrastate refers to the issue of representation in central institutions, and dwells on increasing the power of Aboriginal Peoples in federal government decision-making. Interstate federalism refers to the issue of establishing a relationship between Aboriginal governments as such, and other governments in the federation. The two types of solutions need not be exclusive, but from a strategic perspective, success on one front may preclude movement on the other. On this point, institutional reform might also be more effectively addressed to the development of specific federal institutions expressly designed to represent Aboriginal interests, such as an Aboriginal tribunal or parliament, rather than to the more general institutions of the federation. In all of these considerations, the degree of political support for and tolerance of separate institutions as compared with integration into existing federal institutions will be an important factor.[xxvii] Such support appears to be strong from time to time among various Aboriginal communities, but is unlikely to be as strong in the Canadian population as a whole.

(6) The Distribution of Powers

The formal distribution of powers in a constitution, in a way which protects for each order of government a sphere of activity over which that government may exercise sovereignty, is one of the chief defining characteristics of federations. For this reason many Aboriginal leaders have sought to have Aboriginal governments recognized as an order of government within the federation. As will be reviewed later in this paper, not all Aboriginal Peoples seek such a designation. And even if the federation were to have a third order of government, several issues would have to be resolved.

In the original Confederation debates, emphasis was placed on lists of "exclusive" powers of the federal and provincial legislatures, to ensure that the provinces in particular would have greater certainty regarding their powers. Sections 91 and 92 of the Constitution Act, 1867 provide both a general description and a long enumerated list of

exclusive powers for the federal Parliament and the provincial legislatures. Concurrent powers were confined to only a short list[xxviii] providing little of the extensive leeway for concurrency found in many other federations, i.e. the partial occupancy of many fields by the central legislature to enact framework legislation, regulatory mandates, conditions on financing and so on. Instead, in Canada the Constitution Act 1867 concentrates on a finely honed dual list of federal and provincial powers. These lists were too finely honed in 1867 to stand the test of time, and the addition of new fields of activity and a greatly expanded role of the state in the economy and society.

While the distribution of powers has been formally amended on occasion,[xxix] for most of the period since Confederation the task of more finely interpreting and updating the Constitution has been left to the courts. Much of this judicial review, particularly concerning economic matters, has taken place under a "classical" doctrine of watertight compartments, the role of the court being seen as defining legislation in as finely a way as possible in order to fit it into either 91 or 92 alone. In some cases this has not been deemed appropriate and defacto concurrency has been allowed to emerge as the courts recognized the utility of letting both orders of government legislate in certain fields. In these cases, however, the legislation of the federal Parliament is considered paramount where there is a strict conflict of laws.[xxx]

In undertaking their role of judicial review, the courts have been remarkably balanced over time, although not without controversy for certain judgements and for some trends of judgements. It can be argued that the courts have not tilted their judgements too far in favour of either the federal or provincial power and a similarly restrained approach may now also be emerging in Charter cases.[xxxi]

If Aboriginal governments are to exercise powers within the federal system as a third order of government, there will have to be jurisdictional room for them to occupy.

Legal doctrine to date has tended, in the absence of express constitutional enumeration of Aboriginal government powers, and often ignoring or dismissing other Aboriginal rights, to assume that the federal and provincial legislatures together exhaust the jurisdictional room. Unlike the eighteenth or nineteenth century when the regulatory power of the state was not in full throttle, making room for Aboriginal laws today will in many cases mean proactive removal of federal and provincial authority from the scene.

Finally, there will in all likelihood have to be considerable initial flexibility in the distribution of powers to an Aboriginal order of government, for two important reasons. The first is the diversity of governing situations and aspirations among the various Aboriginal Peoples. The second is the need to provide for the gradual occupancy and exercise of jurisdictional fields by Aboriginal governments, as legislative and judicial institutions, financing and political consensus are secured. In determining the extent of flexibility a number of important issues need to be addressed. These include: how to characterize the general scope and context of self-government powers (in the Charlottetown Accord this was covered in the "contextual statement");[xxxii] what powers if any to expressly enumerate; whether powers should be exclusive or concurrent; if concurrent, whether special paramountcy rules should be adopted; and what if any emergency powers for federal or provincial intervention are to be provided.[xxxiii]

(7) Fiscal Relations and the Defacto Exercise of Powers

The formal distribution of powers is one thing, its practical use another. Several factors can effect the exercise of powers, including the ideological disposition of governments, the development of governmental administrative and legal capabilities over time and, most important, the fiscal ability to pay for expenditures within legislative jurisdictions. These factors have all been combined over the history of the Canadian federation. For example, exclusive provincial jurisdiction over health, education and welfare -- the three largest categories of provincial expenditure since the 1940s -- were

legislated if at all in the nineteenth century to preserve these activities in private hands. In Quebec in particular, governmental activism was eschewed in favour of a strongly independent role in social matters for the Roman Catholic Church. Not until the Great Depression of the 1930s did the need for public expenditures in provincial domains (and the ability of most provinces to provide them) become so acute that demand grew for a comprehensive approach to revenue sharing in the federal system.

Legislative jurisdiction is meaningless if there is not the financial resources to exercise it. This includes the authority to tax, but of course it also assumes a base of wealth to tax. Federal systems of government usually undertake a variety of measures to transfer money from one level of government to another as well as for one government to collect revenue on behalf of another and to share the proceeds. This sharing principle is important not only for equity purposes but also to promote economic efficiency.[xxxiv] All federations have, to a greater or lesser degree, imbalances between the ability of provinces to raise revenues and their responsibilities under the constitution to make public expenditures. This is a natural outcome of increasing economic integration through an economic union as the central government becomes the primary level of government able to effectively tax mobile labour and capital. Thus all federal systems have developed some form of fiscal transfers to meet the "vertical" fiscal gap between the central and constituent governments. Most federal systems also attempt to bridge the "horizontal" gap between richer and poorer units by providing funds to the poorer units to bring their financing up to some determined national benchmark.[xxxv]

The autonomy of constituent units in federations need not be excessively compromised by fiscal arrangements. The degree of autonomy will depend not only on the degree of dependence on transfers as opposed to own source revenue, but also on the design of the transfers. Nonetheless, provincial autonomy is inevitably compromised where a province is dependent on the federal government for funding, and it is also compromised if the federal government, by virtue of its fiscal resources (spending

power), undertakes expenditures in a provincial area of jurisdiction. Many federal programs while not regulating a sphere of provincial jurisdiction, have deeply affected the outcome of provincial policy through the exercise of the federal spending power. The problem has been partly resolved through the myriad of cost-shared programs and fiscal transfers where federal payments are tied to provincially designed and delivered programs. The two largest federal-provincial transfers in Canada today, Established Programs Financing (EPF) and Equalization, are essentially unconditional, preserving a large degree of provincial autonomy.

In summary, fiscal arrangements in Canada have several objectives, all of which are important to the exercise of jurisdictional powers. They provide for national standards in certain programs such as health insurance and social services (the Established Programs Financing -- EPF -- and the Canada Assistance Plan -- CAP); they equalize revenue capabilities among the provinces to enable them to provide comparable levels of public services at comparable levels of taxation (Equalization); and they contribute to economic efficiency through tax harmonization (the Tax Collection Agreements).[xxxvi] However, as a result of mounting federal and provincial deficits, these programs are currently under considerable strain and will be renegotiated one way or the other in the near future.[xxxvii]

Aboriginal governments seeking to exercise their formal powers face special difficulties. First, they face developmental costs and time-lags, as they set up new institutions, or reinvigorate traditional ones, as they develop a financial base and as they determine the values, objectives and means of exercising their autonomy. As a group, Aboriginal governments will face much more severe fiscal dependency than even the poorest of provinces. While many of these issues will be resolved through time by Aboriginal Peoples themselves, the financial issues in particular must be seen as the responsibility of the federal system as a whole.

Many Aboriginal Peoples look upon financial support for their governments as a basic Aboriginal or treaty right, an entitlement for sharing the land and its resources with non-Aboriginals Canadians. How this entitlement is realized is nonetheless a significant question given the shrinking public sector and the current financial "crisis" in the federation. One can envision a variety of approaches including resource sharing agreements, revenue sharing of tax bases such as sales and income taxes and gaming revenue, and specific compensation settlements and transfers of land, all of which can contribute to the independent revenue base of Aboriginal governments. For the remainder of the required funding intergovernmental transfers will be essential. Canadian intergovernmental transfers have shown a remarkable degree of flexibility over the years, and it does not seem impossible to devise a set of both conditional and unconditional payments to meet the needs of Aboriginal governments on principles of fiscal federalism similar to those which now prevail for federal-provincial arrangements. This being stated, such payments would almost certainly be less secure than own-source revenues and would need to be renegotiated on a frequent basis. Many of these issues fall into the domain of implementation and not of initial design, but it would be an empty scheme for Aboriginal self-determination which ignored the financial issues.

(8) Intergovernmental Relations

Just as fiscal relations can have a determining effect on the exercise of power in a federal system, so too can the nature of intergovernmental relationships. In any federal system in the late twentieth century, the interdependence of governments is a predominant characteristic. Many aspects of jurisdiction spill onto one another and powers are less and less amenable to preservation within watertight compartments. Thus intergovernmental relations arise whereby individual governments attempt to do together with other governments what they cannot achieve alone. These relations extend not only to the administrative details of mundane interdependence, but to vital public matters

when emergencies arise or when agreement on formal constitutional amendment is neither practical nor possible (as has often occurred in Canada). Cooperation among governments becomes necessary to get the job done, and conflict arises when governments consistently blame other governments for preventing them from getting on with the task at hand.

In most federal systems intergovernmental relations are at least partly institutionalized by representing the constituent government interests directly (e.g. Bundesrat in Germany) or indirectly (e.g. US Senate) in the central government. In this way important federal-provincial matters are dealt with directly within federal institutions. In parliamentary federations, however, intergovernmental relations are concentrated because power itself is concentrated in the fused executive-legislative role of responsible government -- in practice, this means the "executive federalism" of intergovernmental relations dominated by Premiers, other cabinet ministers and senior officials.[xxxviii] In part because the Senate is ineffective in regional representation, provincial leaders have assumed the role of representing the broader regional interests -- broader than the more narrow institutional concerns of the governments themselves.

The chief function of intergovernmental meetings has been to foster the coordination of a wide range of matters -- with increasing intensity since the 1940s. The nature of these relations were at first relatively technical, but have since expanded to be more political, even primarily conflictual on occasion. This latter point is reinforced by the trend for the relations to be increasingly dominated by political representatives and their aides, especially at the First Ministers level. The outcomes of executive federalism also range from a mere exchange of views to the formal establishment of new institutions, and many other variants of consensus and coordination in between. While rarely a decision-making forum as such, First Ministers conferences and similar intergovernmental bodies have assumed an important part in the overall decision-making process of government. This development has in turn spawned central agencies within the federal and provincial governments to coordinate and control

intergovernmental relations on behalf of their governments.

Executive federalism in Canada has many accomplishments to its credit, including the results of important intergovernmental negotiations such as on unemployment insurance in 1939-40, health care and pensions in the 1960s, regional development in the 1970s, and the constitutional and energy agreements of the 1980s. Nonetheless, the practices of executive federalism have come under increasingly heavy criticism, particularly on democratic grounds. This includes criticisms that executive federalism is not sufficiently representative, that it lacks direct accountability, and that it is not accessible to the public given the largely closed nature of its meetings. But other criticisms that can be levied are that intergovernmental relations in Canada are not powerful enough, to effect necessary coordination, that there are no effective decision-making rules beyond lowest common denominator consensus or unanimity, and that important institutions such as First Minsters Conferences lack any constitutional recognition.

From the Aboriginal perspective, nowhere has their lack of representation and participation in Canadian government been as symbolically and practically evident as in the institutions of intergovernmental relations. Executive federalism is an exclusive club. Until recently it was assumed that the chief membership qualification was to be a constitutionally recognized constituent unit of the federation -- i.e. the federal government or a province. With considerable pressure from the Territories (with support from the Aboriginal organizations) many of the meetings -- including the highly political First Ministers meetings -- now include the government leaders of the Northwest Territories and Yukon. This inclusion does not confer "voting rights" because none exist. Provinces, unlike territories, do count in the constitutional amending formula of 1982, but it is the legislatures of those provinces, and not their premiers at First Ministers meetings, who have their final say. (The irony of this fact was driven home when the Meech Lake Accord, itself the paragon of the allegedly abusive powers of executive federalism, was

defeated in the Manitoba legislature.) Nonetheless, on most matters, the executives do carry the support of their legislatures and for this reason intergovernmental relations has been sensibly confined to governments per se. The question arises whether Aboriginal governments should or can be integrated into this process.

Many Aboriginal governments in Canada are now and are likely in the future to be smaller (in terms of population) and more numerous than the provinces. For practical and political reasons there are differences in the nature of the forum and in what can be achieved between eleven First Ministers and a meeting including as many as 500 leaders of Aboriginal communities. This problem has been temporarily resolved since the early 1980s by the aggregation of Aboriginal interests in four (but not the only such) national Aboriginal political organizations (the Assembly of First Nations (AFN), the Native Council of Canada (NCC) (now called the Congress of Aboriginal Peoples), the Inuit Tapirisat of Canada (ITC) and the Métis National Council (MNC)). The leaders of these four organizations have gained a place at the executive federalism table in recent years -- although only for a very specific purposes such as constitutional reform negotiations and issues of specific Aboriginal affairs. But these organizations have ongoing difficulties representing their broad constituencies and do not directly represent, in any constitutional or institutional sense, Aboriginal governments.

With or without constitutional reform to recognize Aboriginal governments as constituting one of three orders of government, effective intergovernmental relations will be essential for the implementation and success of Aboriginal self-government. There may be options for getting past the numbers and representation problems of integrating Aboriginal governments into executive federalism. And the philosophies and practices of Aboriginal government, with an emphasis on consensus decision-making and the equality of the circle may yet offer improvements to the worst effects of executive federalism. In the meantime, many diverse sorts of intergovernmental arrangements may be considered, including modified First Ministers meetings for specific purposes, an expanded forum for

discussion with the federal and provincial ministers and officials responsible for Aboriginal affairs, and regional councils or provincial roundtables. Such issues will resolve themselves when Aboriginal governments have power to exercise -- indeed it is already occurring to a degree. This being said, the nature and effectiveness of the relationship cannot be taken for granted. The issues of forum and representation should be considered in their own right.[xxxix]

(9) Summary

In reviewing the preceding elements of the federal system in Canada, it is clear that Aboriginal Peoples have only been partially integrated into the political system. The overall constitutional setting was designed to deal primarily with settler society concerns; the definition of civic society excluded Aboriginal Peoples; territorial and nonterritorial power-sharing also tended to ignore Aboriginal and Treaty rights; and Aboriginal Peoples have not benefitted from explicit representation, nor have their governments been recognized as full partners in the federation.

This assessment may seem excessively bleak. Partly on purpose, this paper stresses the gap between the ideal of partnership within the federal system and the reality of the Canadian design. There has been from the beginning an important degree of recognition of Aboriginal Peoples, but by no means a comprehensive or complete recognition.

In the last part of this paper we will return to the issues addressed here, including the issue of integration and other options for accommodating Aboriginal Peoples and the Canadian federal system. In this first part the emphasis has been on the lack of integration and on what constitutes an agenda for achieving integration. The analysis would not be complete, however, without a discussion of the evolving relationship between Aboriginal Peoples and the Canadian state, and of recent efforts to redefine that

relationship. From this discussion it will also be clear that integration is not the only option proposed either by Aboriginal Peoples or others. Elements of sovereignty options, "Treaty federalism" or confederal options and other types of federal solutions will be noted as they arise. We will return in the conclusion to an assessment of the integration option in light of these other options.

PART II: ABORIGINAL GOVERNANCE, FEDERALISM AND THE CANADIAN STATE

In the previous part of this paper, the emphasis was on examining the Canadian federal system, noting how and where it has not been designed to accommodate Aboriginal Peoples and their governments. This section reviews the other side of the coin, the relationship of Aboriginal governments to one another and to the Canadian state and its predecessors. While this paper will not attempt a description of Aboriginal government as it was traditionally practiced and is currently re-emerging, some essential features of Aboriginal government as it relates to federal principles and practice will be important to underscore.[xl] In particular, Aboriginal philosophies and practices which may be termed as "federal" or "confederal" are important to understand if Canadian federalism is to adapt and make room for a new relationship.[xli] The discussion that follows will address the philosophy and practice of federal principles among Aboriginal Peoples, and survey Aboriginal-Canadian political relations in three historic periods: before 1867, from 1867 to 1969, and since. The part concludes with an analysis of the role of Aboriginal peoples in Canadian constitutional reform.

(1) Confederalism, Treaty Federalism and Related Concepts

For the purposes of this paper, Aboriginal political and social traditions in North America may be termed as confederal.[xlii] By this is meant that power was shared among

self-governing nations in a confederal form, for purposes of peaceful coexistence, war on other nations, trade and social and cultural exchange. It is confederal in our definition in that the political organization indicates that several independent nations delegated their powers to a confederal council or similar body for common purposes, but that sovereignty, such that it existed as an operating concept, remained with the nation and was not transferred to the confederacy. The most commonly cited example of this political arrangement among North American Aboriginal Peoples is the Iroquois Confederacy (Haudenosaunee) which inspired the founding fathers of the American republic -- in particular the Articles of Confederation joining the thirteen colonies in a confederal union.[xliii] It would appear from a substantial part of Aboriginal tradition that such confederal practice was widespread, far beyond the Iroquois nations. And while "confederalism" may only scratch the surface in terms of defining pre-contact (and continuing) political relations among Aboriginal nations, it was sufficiently common to warrant attention in any reappraisal of federal ideas for Canada today.[xliv]

It is often difficult for non-Aboriginal Canadians to understand the continuing importance to Aboriginal Peoples of a political identity tied to self-governing and autonomous national (tribal) allegiances and social organization. And yet no scheme of self-government and certainly no federal or provincial government policy is likely to have much lasting impact if it does not recognize the essential reality there are several Aboriginal Peoples, that they are constituted in several nations and tribal communities, and that the aggregated political community of Aboriginal Peoples would be at best a confederal and not a unitary political forum. Thus while there may be a widespread common sense of "Indianess" among First Nations, their primary identity is as Micmac, Mohawk, Cree, Inuit, Dene, Gitksan. The Assembly of First Nations, and perhaps to a lesser degree, the other national (as in Canada-wide) Aboriginal organizations, face an enormous challenge in attempting to represent the collective interests of Aboriginal Peoples and to exercise their combined political clout vis à vis the Canadian state, when in reality current political power resides at the level of the individual Aboriginal

communities -- Indian Act bands and their elected Chiefs and Councils, for example. And in terms of broader aboriginal rights, the more legitimate basis of power likely rests as well with individual Aboriginal Peoples (Nations).

The recognition of the essentially confederal relationship among Aboriginal nations must be reinforced by a recognition of the relationship which Aboriginal peoples had with European powers at the time of initial contact and, within the context of colonialism and assimilation, ever since. The term "treaty federalism" has been coined to describe the relations between the Aboriginal and non-Aboriginal parties to treaties since the early 1600s. The term is meant to convey the idea of a type of federalism parallel to that of the "provincial federalism" or the "British North America Act federalism " among the settler political communities in Canada.[xlv] In legal terms, the concept of treaty federalism is drawn from the assertion that constitutional law in Canada consists not only of the law of the federation through the Constitution Act, 1867 but also the law of Aboriginal rights which while recognized in the Constitution Act, 1982, preceded that Act. The fundamental premise of treaty federalism is that the relationship between the Crown and the First Nations, where treaties have been made -- and where they have not, by more general recourse to the terms of the Royal Proclamation of 1763 or to preexisting Aboriginal rights -- is a relationship of equals, of autonomous members of a new political community. Clearly the treaties were not and have not been interpreted as international treaties drawing upon the force of international law, but they may nonetheless be seen at the least in the family of federal arrangements in the sense that they set out terms for co-existence and mutual exchange. The Aboriginal perspective is that the treaties constitute permanent nation-to-nation understandings between autonomous parties, regardless of the changing interpretation put on the treaties by British administrations, and the succeeding Canadian governments and courts. These latter perspectives have often viewed the treaties as narrow land transactions cast within a specific time-frame and superseded by the laws of the settler state.

As has been argued elsewhere, the rigid confines of "federalism" as practiced in Canada today often preclude a modern exercise of treaty federalism. The features of Canadian federalism which make it difficult to co-exist with Aboriginal self-determination (whether or not expressed as treaty federalism) have been reviewed in Part I of this paper. These include the emphasis on only one form of constituent unit (the province), the narrow cast of collective rights, the stronger and growing emphasis on individual rights, and the opposition to perceived special treatment or formally asymmetrical powers. However, at the present conjuncture of Canadian history, with the continuing receptivity in Quebec and elsewhere for a redefinition of the federal relationship, a new relationship to embrace the treaty federalism of Canada's Aboriginal Peoples is not a totally abstract concept. To succeed, this project would nonetheless have to proceed in terms of a transformation of the institutions of Canadian federalism, as well as the underlying political culture, in particular prevailing notions of liberalism, pluralism and the role of diversity in political communities.[xlvi] Some of the required change in political culture has already occurred, although it may not yet be sufficient. Certainly institutional change continues to lag far behind.

As Ronald Watts has outlined in his study for the Commission,[xlvii] the concepts of federalism and confederalism are undergoing substantial change in the late twentieth century, as indeed is the closely related concept of sovereignty. In both the theoretical and philosophical discourse of federal ideas as well as emerging practices in other countries, there may well be considerable material by which Canadians could fashion a new federal political culture and new federal-type institutions to accommodate Aboriginal self-determination.

The rest of this part of the paper provides an overview of the history of attempts by Aboriginal Peoples to assert their visions of a new relationship, to the present day. The terms of that vision have changed somewhat over time, but the striking and potent aspect of current Aboriginal political consciousness is the increasing recourse to traditional

Aboriginal philosophy and practice of governance. Within this reality the roots of Aboriginal government in confederalism and treaty federalism should not be ignored. In the concluding part of this paper we will return to a more specific discussion of the prospects for a formal, confederal relationship based on treaty federalism.

(2) Relations Before 1867

For our purposes here it is sufficient to note a few major features of the evolving relationship between Aboriginal Peoples and the British Crown and its colonial governments prior to the Canadian Confederation. The first feature noted in Part I, is the Crown's role as fiduciary, set out in the Royal Proclamation and elsewhere. The Crown intervened between Aboriginal nations and the settler communities -- not in a disinterested way, but in a way which made it possible for imperial power to bear upon local encroachments of Aboriginal interests. As historians have pointed out, this Crown role with its primary emphasis on making and maintaining treaties of mutual coexistence and military alliance, lasted only as long as -- and only where -- the fur trade retained its economic ascendency over settler agricultural interests.[xlviii] It has been argued, nonetheless, with considerable help from the courts, that the fiduciary obligation has survived the long period of misuse and neglect, and may be resurrected to protect Aboriginal rights today.

The seeds of destruction and disruption of Aboriginal government and of an equal relationship with Treaty nations were also sown by direct legislation, such as the Gradual Civilization Act, 1857 of the Legislature of Canada (under the United Province, 1841-1867), later to be expanded by the Indian Acts of the Parliament of Canada. The 1857 legislation sought to enfranchise Indians, to provide them with individual ownership of land and to settle them on reserves. It capped a gradual transition in Aboriginal - European relations from the objective of protection to that of "civilization".[xlix] The

Aboriginal nations in the Province of Canada were powerless to prevent this encroachment on their way of life and the British Crown chose to ignore the provisions of the Royal Proclamation then almost a hundred years old. This set the stage for the relationship which would generally prevail under the federation.

(3) Confederation to 1969: Towards Assimilation

The story of the development of the Canadian federation with respect to Aboriginal Peoples, at least to 1969, may be summarized in four basic sub-developments, all of which have crucial bearing on current circumstances. First, was the evolution of the Indian Act as the primary tool for assimilation of Indians, and for the division of Aboriginal Peoples into legal and political categories which denied and obscured their traditional identities. Second, and to a minor degree counterindicatory to the Indian Act, were the so-called numbered Treaties 1-9 covering much of Canada west of Lake Huron, which continued if in a more limited way the treaty federalism of the pre-Confederation period. Third was the initial recognition and later ignorance of a special relationship within the federation of the Métis Nation. And fourth, was the late-coming but essentially colonial relationship of the federal government with the Inuit.

The Constitution Act, 1867 awarded legislative jurisdiction for "Indians and lands reserved for Indians" to the Dominion (federal) Parliament, but is otherwise silent on Aboriginal matters. This minimalism did not prevent Parliament from passing a series of acts which were premised on a long-term project of integrating and essentially assimilating "the Indian" into the mainstream of Canadian society -- or as some might also submit, to keep them at the margins of the National Dream. Beginning in 1868 and 1869 Parliament enacted legislation to manage Indian lands and to encourage individual Indian property holders. Voluntary adaptation to Euro-Canadian society gave way to the more coercive Enfranchisement Act of 1869 which gave the federal government wide

latitude to set aside traditional Aboriginal leaders and government and to bestow the benefits of the state on governing structures of its own design. The Act also began a century-long practice of deciding who was and who was not to be considered Indian for the purposes of government policy -- abrogating to federal authorities the very act of defining the membership of Aboriginal political communities.[1]

In 1876 came the first Indian Act as such, consolidating and extending the control of Parliament over Indians' lives. Notable later revisions to the Act include those in 1880 which allowed for the imposition of elected band councils, in 1885 to allow for the disposal of chiefs, and in 1927 to outlaw the raising of funds for the prosecution of land claims without the permission of the Department of Indian Affairs. While by 1951 many objectionable provisions of the Act were repealed (e.g. bans on the Sun Dance and potlatch, prohibitions on the consumption of alcohol and compulsory enfranchisement), the essential political control over Aboriginal communities so characteristic of colonialism remained (and continues to remain in the current Indian Act). It is also important to note the weighty bureaucratic presence of the Indian Act through a succession of agencies, but generally called the department of Indian Affairs. Until only twenty years ago, Indian agents were the ubiquitous and overarching presence of the department on every reserve, never mind the Chief and band council. Through these agents, the authority of the state extended to all aspects of life from economic development to housing to education and health, and since the 1950s, to welfare. Through the mutual goals of suppressing traditional institutions where deemed necessary, and promoting and funding the introduction of allied agents of cultural assimilation (e.g. residential schools and the Churches), Indian Affairs pursued its overall objective of preparing Aboriginal Peoples for their gradual absorption into Canadian society.

Despite the Indian Act, and co-existent with it, the Canadian federation also signed treaties with First Nations. It has always been significant that Canada was settled and developed (by France, then Britain and later the Canadian federation) essentially

from east to west. British Columbia was a separate colony from the 1850s onward, but on the whole, colonial expansion came from the east. For this reason, the treaties with Aboriginal nations situated between the Great Lakes and the Rockies came later, and after Confederation, as compared to the Treaties signed in B.C. and in eastern Canada. The terms of those numbered treaties are distinct from pre-Confederation treaties in the specificity of their provisions. While the requirement to surrender lands is made more explicit, so too are government commitments with respect to reserve lands, mineral rights, hunting and fishing, education, agriculture and economic development, as well as annual cash payments. As a result the First Nations who have inherited these treaties have placed considerable emphasis not only on the continuing validity of the terms of their treaties as such, but on the underlying relationship of treaty federalism which the treaties represent. It is no accident that the political support for a treaty-based relationship, and by extension hostility to any measure which might dilute that relationship (as apparently was the perception of the Charlottetown Accord) is strongest among the nations of these post-Confederation treaties. The political position of treaty federalism can also be juxtaposed to the position of those First Nations which do not enjoy specific treaty rights. However, this has not meant that the provisions of the Indian Act have not been applied to the treaty nations, and federal policy has generally been to downplay the provisions of specific treaties and to undermine claims for special treatment.

The position of the Métis also demonstrates some of the ambiguous attitude of the new federal system in Canada after 1867. The creation of the new province of Manitoba in 1870, with bilingual French and English legislative and educational institutions held the promise to not only extend French-English dualism to the west, but also to attempt through the full participation of the Métis people, the extension of political plurality to Aboriginal Peoples. The result of the Manitoba experiment, which set the pattern for the entire northwest, has been a bitter failure for the Métis and the francophone minority.

The Métis nation emerged from the half-breed population of First Nations (primarily Cree) and French and Scots settlers (or more accurately perhaps, traders and workmen) of the Hudson's Bay and Northwest companies. As such, its descendants today argue that it still constitutes a sociological nation with a right to self-determination and a homeland.[li] As bearers of aboriginal rights, the Métis were recognised in the land grants of the Manitoba Act, subsequent federal legislation in other parts of the former Northwest Territories, and in several of the numbered treaties reached with First Nations. The Manitoba and other land grants took the form of land or money "scrip" intended as alienable title to the land in return for extinguishment of aboriginal title. However, the rapacious land settlement interests in Manitoba and later across the prairies -- supported vigorously by the federal government which, unlike in the other Canadian provinces, retained control over Crown lands -- essentially cheated the Métis of most of their land, leaving them with little or nothing to show for their Aboriginal title.

The political promise of Manitoba -- that Métis would enjoy equal rights with settler society within the legislative processes -- was undercut by the land fraud, leading to the dispersal of Red River Métis to disperse across the northwest. The English-speaking settlers soon outnumbered the primarily French-speaking Métis, and the practice (if not legal status) of francophone institutions was suppressed. The Métis of Alberta have been perhaps more fortunate, with legislated recognition of their settlement lands in that province. Nonetheless, it remains true that political, economic and social forces of the new federal state in the late nineteenth century failed to live up to the early promise of including the Métis Nation in the federation on equitable terms, with the continuing legacy of neglect and grievance affecting the Métis today.

The Inuit were the last of Canada's Aboriginal Peoples to feel the full brunt of the colonial regime of the Canadian federal state. Contact with the remote southern settler society was sporadic, even though Inuit in the eastern Arctic and the coast of Labrador had been in contact with Europeans for centuries. Thus, the Inuit way of life remained

essentially unchanged, or so has been argued, to the mid-twentieth century. Although not without the missionary presence of the churches, the RCMP and the Hudson's Bay Company, Inuit communities suffered benign neglect from Ottawa. Only with the advances of telecommunications and air travel and the post-war resources boom have southern settler interests encroached with a vengeance on the North. The provisions of the Indian Act have never been applied to the Inuit (indeed, they have been expressly exempt). But in 1939 the Supreme Court of Canada ruled that "Eskimos" came under the meaning of "Indians" in section 91(24) of the Constitution Act, 1867.[lii] The federal government has provided goods and services to Inuit communities through the Department of Indian Affairs, but in the period to 1969 no attempt was made to ensure self-government in Inuit communities. The physical isolation and dispersed population across the Arctic and sub-Arctic was even more divided by the evolving divisions of the federation. Until 1949, Inuit in Labrador were not in Canada; in 1912 Quebec's boundaries were expanded to include the Inuit of the Ungava peninsula; and the Inuit of the eastern Arctic and the Inuvialuit of the Western Arctic have been part of the Northwest Territories since 1870. Nonetheless, the Inuit still constitute in almost all of their communities, a majority of the population, whether one considers their permanent villages or the broader territory of Aboriginal occupation.[liii]

In conclusion, at the end of the first century of the Canadian federation, it could be argued that as a political community and as a set of distinct cultures and societies, the Aboriginal Peoples were in a seemingly endless decline. The instruments of colonialism had largely suppressed whatever separate political autonomy survived the onslaught of settler society. The treaties were turning out to be empty promises. The special relationship of the Métis had come to practically nothing. And the Inuit had been discovered by the south only to be treated as obstacles to northern development.

As discussed in Part I, the design and dynamics of the federal system tended to exclude Aboriginal reality. The expanding provinces crowded out land and jurisdiction.

The increasingly liberal ideology downplayed Aboriginal and treaty rights. And the institutions of federalism made no effort to represent Aboriginal interests.

The political renaissance of Aboriginal consciousness that has occurred in the past twenty-five years has challenged the trend of the past century. The post-war ideology of decolonization around the world, more participatory and direct democratic processes, the effects of universal education and telecommunications -- all were external influences bringing new hope and models for resistance to Aboriginal Peoples. But as outlined next, a particular miscalculation of a Canadian government policy in 1969, a proposal that attempted to cap the century-long process of assimilation, only proved to be the catalyst for a renewed Aboriginal political movement.

(4) Political Renaissance

The 1970s and 1980s were a period of tremendous social change for Aboriginal Peoples in Canada -- "an Indian Quiet Revolution"[liv] -- triggered by the federal government's Statement of the Government of Canada on Indian Policy, the (in)famous 1969 White Paper.

The White Paper asserted that Canada's Indians were disadvantaged because of their unique legal status, arguing that this "separate legal status of Indians and the policies that have flowed from it have kept the Indian people apart from and behind other Canadians." It further went on to assert that Canada and the Indians had erred in travelling "the road of different status, a road that has led to a blind alley of deprivation and frustration." The White Paper offered a "new road that would lead gradually away from different status to full social, economic and political participation in Canadian life."[lv] It therefore recommended the abolition of Indian status, the provision of services to Indians through the same channels and same government agencies as other Canadians, and transfer of control over Indian lands to Indian people. It proposed that the Indian Act

be repealed, that provinces take over the same responsibilities for Indians that they had for other citizens, and that the Indian Affairs sections of the Department of Indian Affairs and Northern Development (DIAND) be shut down. According to J. R. Miller:

> Indians would relate to their governments as individuals in precisely the same way that other citizens did, and as a collectivity they would function just like French Canadians or citizens of Ukrainian ancestry ... Indians, as Indians, would disappear; Indians would become just another element in a multicultural Canada.[lvi]

The '69 White Paper may be seen as the culmination of a policy of assimilation that can be traced back to the pre-Confederation years. Indeed the paper's proposals are remarkably similar to those of the Gradual Civilization Act of 1857. Driven by the liberal individualist assumptions of the Trudeau government, and despite a consultative process that supposedly canvassed the views of aboriginal groups across the country, the paper adopted government solutions and ignored aboriginal proposals.[lvii] According to one major study, "the policy was a response to values within the policy-making arena, not to the basic problems facing Indians."[lviii] Indians had said that they wanted social and economic recovery without losing their identity -- the paper proposed the extinction of status as a step toward dealing with problems seen as the result of that status. Indians wanted to hold the government to treaty commitments -- the paper proposed to absolve the government of these commitments by revoking Indian status, eliminating Indian Affairs, and transferring responsibility for Indians to provincial governments.[lix] Aboriginal groups had pressured the government for an Indian Claims Commission to address their concerns over land, title and resources. The paper proposed instead that "Aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community."[lx]

The rejection of the White Paper by Indians and its eventual retraction by the government in March 1971 mark a watershed in the evolution of aboriginal politics in Canada. The policy of assimilation was officially put aside (although it has often been perceived to be present as a hidden agenda behind many federal government actions). Until the White Paper, Indian policy had been formulated with little input from Aboriginal peoples and frequently in opposition to aboriginal goals and interests. In the '70s and '80s Aboriginal Peoples were to be deeply involved. Aboriginal Canadians were suspicious of every subsequent government initiative, seeing them as attempts to do in a piecemeal fashion what the White Paper had tried to do all at once. In the words of one study, "The 1969 statement became a benchmark against which every initiative or proposal was measured, a crude litmus test into which every politician's speech was dunked for instant reading."[lxi] The White Paper experience also gave a stimulus to Indian politicization and organization.

One of the more tangible developments from the White paper episode was that it brought together in common cause the entire Aboriginal community in Canada. The experience and relative success in making the government back down from its proposed policy gave new life to the national Aboriginal lobby groups, who began the long road back to self-respect and self-determination. The rising prominence of national Aboriginal organizations was the culmination of years of failed efforts and partial successes.[lxii] The obstacles of geography, language, illiteracy and legal suppression worked against common Aboriginal organizations until the mid-twentieth century. Various organizations such as the League of Canadian Indians and the North American Indian Brotherhood were formed but collapsed. Founded in 1961 the National Indian Council attempted to represent both status Indians, non-status and Métis. In 1968, the internal differences were too great and the organization split into what would become two organizations, the National Indian Brotherhood (NIB), representing primarily reserve-based status Indians, and the Canadian Métis Society. The latter organization itself split in 1972 into the Métis

National Council (MNC), representing the Métis community of the Red River and its descendants, mainly living in the prairie provinces, and the Native Council of Canada (NCC) representing non-status Indians, urban Aboriginals in general and "metis" who are not part of the Red River inheritance. Finally, in 1971, the Inuit Tapirisat of Canada (ITC) was formed to represent Inuit interests on the national scene.

The NIB in particular, under the forceful leadership of George Manuel and others, led the charge against the White Paper and went on to an active decade of effective lobbying for devolution of DIAND programs to the bands, the comprehensive land claims policy and other initiatives. Beginning in the 1970s, all four national organizations received annual funding from the federal government to pursue their activities -- not a unique victory given that the federal government of Pierre Trudeau began the process of funding a very wide range of interest group organizations. The national support and organization was nonetheless crucial, particularly in the long battle for constitutional recognition that lay ahead (see below).

Despite the many misgivings and difficulties inherent in the loose political coalitions that constitute these organizations, without them it is doubtful that the several First Nations, Inuit and Métis communities would have been able to mount effective advocacy, garner media attention and bring to bear the collective political clout to achieve their aims. The existence of competing agendas among them has on occasion produced tensions, if not outright hostility.[lxiii] The general Canadian public may be excused for being confused, and the grassroots Aboriginal population may at times resent the political grandstanding of the national leadership. Over the years problems have arisen from the sometimes tenuous link of the NIB/AFN to its First Nations constituencies, the dispersed and often invisible constituency of the NCC, and the markedly different tactics of the MNC and ITC reflecting the differing legal situations, history and political culture of the Métis and Inuit. All of these aspects have the potential to divide the Aboriginal cause, and have provided opportunities for other governments

and interests to play one group off the other. To the nonaboriginal Canadian public a distinction arises between the forceful advocacy by a talented and visible national Aboriginal elite, and the confusion and apathy of many individual Aboriginal communities across Canada.

The same problem exists in reverse for many Aboriginal Canadians. The essence of the political community of an Aboriginal nation lies in its separateness and distinctness, as does the force of its claim to Aboriginal and treaty rights. And yet, the irony is that it may only be through a very broad coalition with similarly but not identically situated Aboriginal communities that progress in relations with the Canadian state can be achieved. The challenge is to ensure that the result is not a denial of the very Aboriginal distinctness in the first place.

These challenges of political organization are not ones which this author would presume to resolve, and yet observation of the organizations in practice indicate that they do benefit from traditional patterns of Aboriginal participatory politics and consensus-building in order to survive. It may be that their traditions of consensus politics and confederalism can be channelled into more expressly representative institutions for the purpose of accommodating differences among Aboriginal communities and for aggregating interests within the federal system as a whole. This issue is also germane to the discussion on constitutional politics, which is addressed in the next section.

It would be beyond the scope of this paper to outline the effect of the political renaissance of Aboriginal Peoples in Canada on the Canadian state, or broader Canadian society -- let alone on Aboriginal communities themselves. However, the record of the impact of Aboriginal Peoples on the constitutional order, and the dynamic politics of constitutional reform, is crucial to an understanding of how the Canadian federal system is to adapt to Aboriginal self-determination. The next section surveys the Aboriginal role in constitutional reform attempts from the 1970s to 1992.

(5) Success and Failure in Constitutional Reform

1982 Amendments

The constitutional renewal process begun in the early 1970s had nothing initially to do with aboriginal concerns. It was driven by Quebec's desire for greater autonomy within the federation, intergovernmental feuding as there came to be greater and greater entanglement between programs of the federal and provincial governments, and by growing western alienation. But aboriginal groups soon saw the opportunity offered by the constitutional discussions.

Aboriginal leaders were quick to realize in the early 70s that a new constitutional process could provide a vehicle for the affirmation, protection and entrenchment and maybe even expansion of aboriginal and treaty rights. "Constitutional protection, they hoped, would provide an effective shield against the kinds of threats represented by the 1969 White Paper."[lxiv] They also realized that their future would be seriously compromised if a new constitution were silent on the issues of aboriginal or treaty rights. Such silence would imply that Indians were not important enough to merit inclusion in the constitutional framework of the country. Thus the constitutional process that stretched across the 1970s and early 1980s was of critical importance to aboriginal peoples.

In the early 70s Aboriginal political organizations were in no position to make a significant contribution to the constitutional discussion, nor did anyone offer them the opportunity to do so. But a series of events away from the constitutional front did make their mark on that process and allowed an opening for aboriginal concerns to be heard.[lxv] In 1973 the Nis'ga (Calder) case acknowledged the existence of aboriginal rights beyond

the usufructuary interest in the land.[lxvi] This prompted the federal government to begin negotiating aboriginal land claims. The first of the modern claims agreements, the James Bay Northern Quebec Agreement of 1975, provided formal recognition of the existence of aboriginal rights, even if it did so in a negative sense, by extinguishing them without ever defining them.

The election of the Parti québécois government in November 1976 opened up the constitutional debate to a greater public discussion, if not formal participation by Aboriginal Peoples. As part of a resulting flood of task force reports, editorial comment, and academic analyses some attention was paid to aboriginal issues, including an increasing advocacy for the recognition of aboriginal rights in the constitution.

As a consequence it became increasingly difficult for the federal and provincial

> governments to avoid aboriginal issues in their own constitutional deliberations as external lobbies and, to a greater and greater extent, aboriginal organizations themselves pushed for the inclusion of aboriginal issues on the constitutional agenda.[lxvii]

After the defeat of the Quebec referendum in 1980 the federal government changed its constitutional strategy in a way that benefitted Aboriginal Peoples. The earlier imperatives of constitutional renewal were put aside in favour of a more specific focus on patriation, an amending formula and an entrenched Charter of Rights. The debate over the Charter especially proved to be an opening for aboriginal Canadians to get their points across.

In the ensuing attempt to garner general Canadian support for their unilateral patriation package, the Liberal government sought constitutional amendments to affirm Aboriginal rights and to distinguish them from the proposed Charter of Rights and

Freedoms. In the subsequent compromise agreement with the provinces in November, 1981, the sections on Aboriginal Rights were dropped at the suggestion of some provinces, but by this time Aboriginal expectations and public consciousness had been raised. A brief but successful campaign restored the deleted clauses, although not before the insertion of the word "existing" in section 35(1).[lxviii]

Thus, the round of constitutional discussion that began in the early 70s ended with the passing of the Constitution Act and subsequent patriation of the constitution in April, 1982. Three sections of the Act dealt (specifically) with Aboriginal Peoples. Section 25 shielded aboriginal rights from the Charter by guaranteeing that the Charter would not

... abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including:

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

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Section 35 stated that:

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

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

Section 37 required a First Ministers' Conference on Aboriginal Constitutional Matters within one year. Matters to be discussed included "the identification and definition of the rights of those peoples to be included in the Constitution of Canada." This section also provided for the participation of aboriginal groups and the governments of the Northwest Territories and Yukon in the Conference.

The "Section 37" Process

The first of what was to become a series of first ministers' conferences (FMCs) on aboriginal affairs was held in March of 1983. Unlike the later conferences, the first resulted in concrete action. An accord was reached among the parties on (i) a process for negotiating the definition of aboriginal rights; (ii) sexual equality of aboriginal persons; (iii) consultation with aboriginal groups on constitutional amendments affecting them; and (iv) the protection of future and existing land claims settlements. The resulting constitutional amendment changed all three sections of the Constitution Act, 1982 relating to aboriginal peoples.

Section 25(b) was amended to read "any rights or freedoms that now exist by way of land claims agreements or may be so acquired." Two new subsections were added to section 35. One included existing and future land claims agreements in the definition of "treaty rights." This gives existing and future land claims settlements the same constitutional status as the historic treaties. The second new subsection guaranteed aboriginal and treaty rights equally to all male and female persons. Section 35 was also amended to provide for a First Ministers' Conference (FMC) including aboriginal representatives, before any constitutional amendment directly affecting aboriginal peoples is made. Section 37 was amended to include a provision for at least three more FMCs on aboriginal constitutional matters.

The subsequent First Ministers Conferences held in 1984, 1985 and 1987 did not achieve the same degree of success as the first. Indeed none resulted in any agreement to amend the constitution or further define the nature of the rights guaranteed to Aboriginal Peoples in section 35. The conferences did however result in considerable clarification of what was at stake in discussions about aboriginal rights. From 1984 onwards the focus was on aboriginal self-government.

There were two main issues in the three conferences in the mid-80s. The first was about the nature of the aboriginal right of self-government: was it an inherent or a contingent right? Secondly, who was going to pay for the exercise of self-government? A number of sub-issues flowed from these two main ones.[lxix]

The controversy over the nature of the right to self-government was about whether the right to aboriginal self-government was a pre-existing right of aboriginal peoples, or whether this right was one that must be recognized by federal and provincial governments, the exercise of which is conditional upon their agreement. David Hawkes explains the distinction:

"If it were the former, the right would be embedded in the constitution and aboriginal governments would be a constitutionally recognized third order of government in Canada. If it were the latter, federal and provincial governments would protect the principle of aboriginal self-government in the constitution, but it would be given definition, or form and substance, through subsequent negotiations."[lxx]

Thus the nature of the right has implications for other issues, notably the idea of a third order of government wherein aboriginal governments would join federal and provincial governments as equals in terms of constitutional recognition and protection. Independently of the merits of the aboriginal case for an inherent right, this option was feared by some because they thought that it would of necessity diminish federal and provincial government powers and lead to an unworkable federal system.

There were a host of related secondary issues. Under the general rubric of lands and resources, concerns were raised with respect to aboriginal title to lands, the relations between land claims and self-government, and the question of a land base for the Métis. Also in this secondary range was the issue of justiciability (whether a constitutional amendment on self-government would be enforceable in the courts). Many governments were not willing to accept the possibility that the court could intervene either to force a

government to negotiate self-government agreements or, worse yet from their point of view, to enforce a court determined remedy regarding aboriginal self-government in their jurisdiction. Most of the governments were willing to commit themselves to an accord to negotiate self-government and once negotiated these agreements would be justiciable. The issue of whether the Métis do or should fall under exclusive federal jurisdiction, as is the current situation with Indians and Inuit, and the associated issue of government responsibility for Métis, non-status and off-reserve Indians also emerged.

Despite its undoubted success as an educational project, the section 37 process is generally counted as a failure. Except for the important, if minor, amendments of 1983, nothing substantive came out the process and no general agreement on aboriginal self-government was reached. The process failed for both substantive and procedural reasons.

It is obvious in retrospect that the parties approached the negotiations with different and competing values and norms. This came out in the discussions of individual versus group rights and of assimilation, integration and co-existence. Some of the governments at the table did not understand what they had gotten into in the 1982-1983 amendments and their commitment to these earlier agreements was weak. Indeed some provincial governments were at the table only because they were forced to attend by the original section 37 requirement and subsequent amendment. On the Aboriginal side of the table, the expectations may have been unrealistically high, with a tendency to see self-government as a panacea for all of the ills plaguing aboriginal communities across the country. There is a sense then that in some ways the two sides were talking past each other.[lxxi]

As noted, the key substantive roadblock to agreement was disagreement over the nature of the aboriginal right of self-government -- inherent or contingent. The twin issues of financing and federal-provincial responsibility were also difficiult. At the most basic level, the governments did not understand the fundamental importance to aboriginal

peoples of the inherency of the right of self-government. Governments felt that the aboriginal groups would have to move from this position if negotiations were to be successful. Indeed, "most governments thought that the aboriginal peoples "were kidding" on the sovereignty issue, and that it was just a hard line negotiating tactic."[lxxii] On the aboriginal side the feeling was just the opposite -- the major barrier was perceived as the governments' failure to move on the sovereignty issue and to recognize a pre-existing legal authority still held by the aboriginal peoples of Canada.

The multilateral lack of trust between the participants also made agreement very difficult. Provincial governments were extremely wary of federal cutbacks and attempts to offload programs and services for Indians to provinces. Aboriginal groups were suspicious of both levels of government. Western provincial governments in particular may have been afraid of a "white" backlash against any form of agreement on aboriginal self-government. Some provinces clearly had more at stake than others and were therefore less likely to be adventurous in accepting proposed solutions. Differences among the Aboriginal groups themselves presented obstacles to agreement. The AFN pushed hardest for the inherent right of self-government and for further guarantees of Aboriginal and treaty rights. The Inuit and NCC were less specific and sought more practical access to the benefits of Aboriginal rights for their constituencies. The Métis' interests were specific enough to merit a side-agreement alone.

The process itself was also a barrier to agreement. This included: the high profile, often televised proceedings which inhibited compromises; the rigid timing of the meetings; excessive bureaucracy; too many players; and an unclear agenda. On these points, critics point to the parallel discussions leading to the Meech Lake Accord which were held in private with informal, flexible meetings, small delegations and clear objectives.

Despite its failures, the section 37 process went a long way to raising the profile

of aboriginal issues and injecting aboriginal content into Canadian constitutional discourse. The Aboriginal leadership and (perhaps to a lesser degree) the general Aboriginal population became sensitized to the significance and potency of constitutional politics, as well as to the problems and opportunities of working together as a group of Aboriginal organizations to obtain a coordinated set of goals. These lessons were not lost on Aboriginal peoples in the next two rounds of constitutional reform discussions.

The Meech Lake Episode, 1987-90

One month after the end of the last section 37 conference, the provincial premiers and the Prime Minister, meeting at Meech Lake north of Ottawa, reached an agreement to bring Quebec back into the constitutional fold. This accord was immediately condemned by Aboriginal leaders. This criticism stemmed in part from the failure of the Section 37 process to define aboriginal self-government and rights. The main thrust of this criticism, however, was that the Accord completely ignored the existence of aboriginal peoples in both substance and process.[lxxiii]

The Accord was silent about the uniqueness and distinctness of aboriginal peoples. Aboriginal leaders were upset that despite four years of intense consultations and meetings federal and provincial politicians could not accept what they saw as an unclear and vague concept of aboriginal self-government, yet one month later could endorse the equally vague notion of "distinct society" for Quebec. Further, despite the obvious implications of the Accord for aboriginal communities there had been no consultation with them.

Another bone of contention was the opting-out provisions for national shared-cost programs. The scenario feared by aboriginal groups was one in which at some point in the future Ottawa and the provinces reach an agreement, for example, on Indian

education. After a couple of years some provinces drop out. The opting out province(s) continue with an Indian education program and thereby meet the requirements of the Accord which said that such a province carry on a program that is compatible with national objectives -- these being the education of aboriginal people. But under this scenario, the provincial program could in fact be inferior to the education services earlier provided by the federal government and to those agreed upon in the federal-provincial agreement.[lxxiv]

The Meech Lake Accord also made northern provincehood more difficult by requiring unanimous consent of the existing provinces for the creation of new ones. The historic antipathy of provincial governments to aboriginal concerns suggested to aboriginal leaders that when the time comes for new (and perhaps aboriginally-dominated) provinces to be formed the provinces (in particular Quebec) might object. The proposals for provinces to nominate Senators and Supreme Court justices also bothered aboriginal groups who did not see provincial governments as friendly to their concerns, and yet who saw the Supreme Court as a potential ally in interpreting aboriginal rights. Dominated by provincial nominees, the Court might not serve their cause. Further, the NWT and Yukon were excluded from this nomination process. Louis Bruyere, former president of the Native Council of Canada, said,

> Aboriginal peoples' view on the Accord can be summarized in four words: It abandons Aboriginal peoples. It does this by being silent about the uniqueness and distinctiveness of Aboriginal peoples.[lxxv]

Provincial governments had three years, until the 23rd of June 1990, to pass resolutions in the legislature approving the Accord. All but the legislatures of Manitoba and Newfoundland did so, and in the end it was the organizations of Aboriginal Peoples in general and Manitoba MLA Elijah Harper in particular who killed the Accord in Manitoba.

From the summer of 1987 aboriginal groups had proposed alternatives to the Accord.[lxxvi] The groups had emerged from the section 37 process united and organized. When the Meech Lake agreement was reached they were ready with a "Companion Resolution" based on the "Joint Aboriginal Proposal for Self-Government" to address the neglect of aboriginal issues in the Accord. This resolution was intended to be introduced by provincial governments in their respective legislatures and would take effect at the same time as the Meech Lake resolution, without reopening the delicate "seamless web" the proponents of the Accord had constructed.

Initiatives on the self-government front were launched by aboriginal groups as well. Later in 1987 the NCC and ITC tried to restart dialogue on a new package of substantive amendments addressing self-government. In 1988 a revised set of principles based on this package was endorsed by all the national aboriginal groups. In early 1989 a federally sponsored tour in support of this package received support from seven provinces (including Quebec) for a reopening of dialogue on self-government. Also in 1989 the Manitoba legislature passed a resolution calling for an FMC on Aboriginal constitutional matters by April, 1990. But according to a recent analysis, "after November 1989, the failure of the Meech Lake Accord became a real probability, and the political context of Aboriginal efforts shifted from self-government proposals directly to the Companion Resolution."[lxxvii]

In the spring of 1990, as the deadline for ratification drew near, an all-party House of Commons committee, headed by Conservative MP Jean Charest, conducted hearings on various ways of dealing with aboriginal concerns about the Accord. Its May 18th unanimous report included recommendations intended to resolve Aboriginal concerns about the admission of new provinces and to place aboriginal issues back on the constitutional agenda. It also included a proposal that Aboriginal and ethnic Canadians be recognized in a "Canada Clause" preamble to the Constitution. None of the proposals

necessitated reopening the Accord. But on June 4 Prime Minister Mulroney proposed accepting the Meech Lake Accord as is and that the first post-Meech constitutional discussions be held not on aboriginal concerns but on Senate reform and the "Canada clause". The ensuing week of discussion between the federal and provincial leaders resulted in a document including provisions for a Senate Reform Commission; discussions regarding territorial representation on the Supreme Court; the protection of women's and minority language rights; for Constitutional conferences on Aboriginal matters every three years; provision for a Parliamentary committee to discuss the "Canada clause"; and for a review of the legal impact of the "distinct society" clause.

Manitoba, New Brunswick and Newfoundland had yet to ratify the Meech Lake Accord. New Brunswick became the last province to do so on June 15. The Manitoba government planned to introduce a motion of ratification in the legislature, hold public hearings and a debate in the legislature and conduct a final vote before the June 23rd deadline. But on Tuesday June 12 when Premier Gary Filmon rose in the legislature to request unanimous consent to introduce the motion without the usual two days' notice, Elijah Harper, NDP MLA for Rupertsland, denied his consent. Harper's position was taken in close consultation with the Manitoba chiefs and other leaders of the AFN. By late June it became clear that Harper's failure to grant consent to the Manitoba Legislature to waive certain procedural rules had the potential to prevent the Accord from being ratified on time. Filmon accused Harper of abusing his position, of holding the country hostage until Aboriginal concerns with the Accord were dealt with. But Harper again denied his consent on June 13th and 14th.

On June 18th, the Prime Minister offered a six-point program for dealing with Aboriginal concerns. This last-minute program included (i) a federal-aboriginal process to set the agenda for an FMC on Aboriginal constitutional matters at an earlier date than previously proposed; (ii) a commitment by the government of Canada to full constitutional recognition of Aboriginal Peoples as a fundamental characteristic of

Canada; (iii) participation by Aboriginal groups at any FMC held to discuss the "recognition clause;" (iv) participation in all FMCs discussing matters directly affecting Aboriginal Peoples; (v) the joint definition of treaty rights; and (vi) the establishment of a Royal Commission on Native Affairs. Leaders of the Aboriginal groups refused to negotiate. Four days later the Manitoba legislature adjourned without bringing the Accord and companion agreement to a vote. Later that evening the Newfoundland House of Assembly also adjourned without a ratification vote.

Why had the Aboriginal leadership remained so opposed? Hawkes provides this summary assessment:

> For aboriginal peoples in particular, the Meech Lake Accord represented a betrayal of self-government aspirations that had been nurtured, albeit sometimes reluctantly, by the federal government for nearly twenty years. Only a complete lack of faith in the federal government's sincerity can explain the absence of Aboriginal response to the Prime Minister's offers outlined in his letter of June 18, when it became clear that Aboriginal people had the unexpected power to break the Accord.[lxxviii]

The Canada Round, 1990-92

The failure of the Meech Lake Accord, followed closely by the confrontations between the Mohawk Nation and the Quebec and federal governments surrounding the "Oka crisis" of the summer of 1990, contributed to a significant reappraisal of the Aboriginal relationship with the federation.[lxxix] In a statement to Parliament in September 1990, Prime Minister Mulroney outlined a new departure for Federal-aboriginal relations through four initiatives: an acceleration of the land claims process, a review by band chiefs of the Indian Act, the appointment of a Royal Commission and the initiation of a

federally-funded consultative process for Aboriginal organizations to determine their positions on constitutional reform.

The constitutional initiative in the post-Meech Lake period nonetheless lay not with the Mulroney-led federal government, but with Quebec, and its parliamentary commission on the political and constitutional future of Quebec (Belanger-Campeau Commission). In the first twelve months after June, 1990, while the independence movement in Quebec gathered steam, Quebec's agenda continued to drive the timing of the Canadian constitutional debate. This was especially so after the passage of legislation by the Quebec National Assembly in June, 1991 to hold a referendum on sovereignty by October, 1992 if offers for a renewed federalism had not been approved by that time.

The federally-dominated process to re-commence constitutional negotiations in order to respond to Quebec's deadline, this time through what was promised to be a broader and more inclusive "Canada Round", took shape slowly following the appointment of Joe Clark as Minister responsible and the report of Keith Spicer's Citizens Forum in 1991. The federal government's proposals for reform were released in September, 1991. [lxxx] The proposals included as a prominent goal to entrench the "constitutional recognition" of Aboriginal Peoples' "right to self-government".[lxxxi] The proposals called for a generally justiciable right to self-government, subject to the Charter, but that judicial enforceability be delayed for ten years to allow for negotiations. [lxxxii] The proposals were in any case, rather general, and at least one analysis is that the federal government at this stage was ready to proceed with whatever the provinces would agree to do on this issue. [lxxxiii] The reaction from Aboriginal leaders was positive about the prospects of having self-government issues prominent in the new round, but negative with respect to the lack of recognition of the right of self-government as inherent (recalling this issue as major stumbling blocks of the section 37 round) and the ten-year delay in justiciability.

The federal plan was to submit their proposals to a joint parliamentary committee, which would hold hearings and report by the end of February, 1992. These plans went awry when the committee seemed incapable of organizing hearings and eliciting interest. A series of hastily organized semi-public conferences on the "Renewal of Canada" salvaged the initiative by adeptly combining expert opinion with special interest group advocacy and so-called ordinary citizen input.[lxxxiv]

At first Aboriginal leadership was content to remain aloof from this process, while proceeding with their own activities to sound out the grassroots in their communities. Each of the four national organizations launched consultative exercises within their own constituencies in 1991, and the positions adopted in their later participation with the federal and provincial governments would reflect these consultations.

When the federal government's Renewal conferences started to become successful and take a life of their own, however, Aboriginal leadership lobbied behind the scenes for recommendations in their interests, and fought for an additional conference, held in March, 1992 in Ottawa, on "First Peoples and the Constitution" co-chaired by Prine Edward Island's premier Joe Ghiz and Mary Simon. [lxxxv] By the time this conference was held considerable progress towards the major objective of an "inherent right of self-government" had already been achieved. The "Beaudoin-Dobbie" report of the joint parliamentary committee of February 29 endorsed the concept. Two weeks later, the federal government and the provinces reached the unprecedented decision to include territorial and aboriginal consultations. These negotiations led to the so-called "Pearson Accord" of July 7, 1992 and, after Quebec's re-entry to the process, continued to the Charlottetown Accord and subsequent negotiation of the legal text of proposed constitutional amendments in October 1992. During the negotiations, aboriginal delegations were involved in virtually every meeting and at every stage and level of the process.[lxxxvi]

Thus, for the first time in Canadian history, Aboriginal participation in constitutional negotiations was on a par with the other constituent members of the federation -- and on an agenda not solely confined to aboriginal matters. It was a process that was not offered in the round leading to the Meech Lake Accord and was seen by many observers as an essential ingredient to a successful conclusion of the Canada Round. Indeed it is ironic that during the period since June 1990, including the multilateral negotiations on the constitution right up to July, 1992, Quebec boycotted almost all intergovernmental meetings while the four major aboriginal organizations took their seats.

Even before the negotiations were completed, Aboriginal Peoples had made considerable progress in reaching their constitutional goals, both procedural and substantive. This breakthrough did not come easily. It was helped by the generally prominent place in the media of aboriginal issues following the Meech Lake denouement and the Oka crisis. As a result, public opinion was becoming generally more sympathetic towards aboriginal issues and the aboriginal leadership lobbied hard and effectively to be included.[lxxxvii] The breakthrough was also helped by the more open approach of Joe Clark, federal Minister for Constitutional Affairs who as early as July 1991 met with First Nations leaders to assure them of their inclusion in the coming process. Other leaders were very supportive, including Prince Edward Island Premier John Ghiz, and Ontario Premier Bob Rae. Elected in September 1990, the New Democratic government of Ontario made aboriginal issues a priority, and pushed, among other things, for the participation of Aboriginal leaders in the August, 1991 Annual Premiers Conference. Ontario also reached an accord with Indian leaders in Ontario in early 1991, recognizing the inherent right of self-government. There was a slowly gathering consensus, unlike in the 1980s, that self-government could be accepted, even if circumscribed.[lxxxviii]

The ultimate result of the Canada Round of negotiations was the Charlottetown

Accord reached on August 28, 1992. It covered enormous ground, and within it the section on "First Peoples" covered at least sixteen separate issues.[lxxxix] And yet the basic principle of including Aboriginal peoples in the federal system informed the entire text of the agreement. In the first section entitled "Peoples and Communities", Aboriginal Peoples were provided primary place in the list of Canada's fundamental characteristics in the proposed "Canada Clause" (para.1). A provision ensured that the Canada clause would not derogate from the powers of the federal, provincial and Aboriginal "legislative bodies or governments" (para.1). Another paragraph in this first section would have strengthened Section 25 of the Constitution Act, 1982 to ensure that the Charter of Rights and Freedoms does not infringe "Aboriginal, treaty or other rights" of Aboriginal Peoples, particularly with respect to languages and cultures (para. 2).

The second section of the Charlottetown Accord dealt with "Institutions". Here there was a commitment to additional aboriginal seats in the reformed elected Senate, with powers identical to those of other Senators, and a "possible double majority power in relation to certain matters materially affecting Aboriginal people". These latter issues were to be the subject of a political accord (para. 9). The role of Aboriginal peoples in the Supreme Court was also to be subject to further negotiation in a future First Minsters Conference on Aboriginal issues (although not part of proposed amendments in "this round") (para. 20). However, Aboriginal Peoples were to be consulted by the provincial and territorial governments in the process of nominating candidates to fill vacancies on the Court. The agreement also referred to the intention of the federal parliament to review the report of the Royal Commission on Electoral Reform and Party Financing which recommended Aboriginal electoral districts for the House of Commons (para.22). Finally, the agreement to entrench the role of First Ministers Conferences stipulated that "Representatives of the Aboriginal peoples of Canada" be invited to participate in "discussions on any item on the agenda...that directly affects the Aboriginal peoples " (para. 23).

The third section, entitled "Roles and Responsibilities" included some general provisions that would protect intergovernmental agreements (para. 26), including agreements with Aboriginal governments, and provided a cover-all nonderogatory statement to the affect that any amendments to the federal-provincial division of powers would not affect the "rights of Aboriginal peoples and the jurisdictions and powers of governments of Aboriginal peoples" (para 40).

The fifth section on the Amending Formula would have restored the pre-1982 rules for creating new provinces (an issue of concern to Aboriginal groups since the Meech Lake Accord) (para. 58). Of even greater significance was the agreement that there should be "Aboriginal consent" to future constitutional amendments directly affecting Aboriginal peoples. There were no details on how this consent would be expressed, but progress on such a procedure was promised prior to the introduction in Parliament of a formal constitutional resolution (para. 60).

Despite the significance of attention to Aboriginal interests throughout all of the above noted sections of the agreement, the guts of the agreement of concern to Aboriginal peoples were contained in the fourth section on "First Peoples". Here the agreement provided for a new section 35.1 (1) of the Constitution Act, 1982 to recognize that Aboriginal Peoples in Canada have an inherent right of self-government "within Canada", as "one of three orders of government in Canada". (para. 41). The agreement called for a contextual statement of that right which stressed the authority of aboriginal governments "to safeguard and develop their languages, cultures, economies, identities, institutions and traditions" and "to develop, maintain and strengthen their relationship with their lands, waters and environment". The statement would be taken into account by the courts in any conflict arising from the exercise of self-government, but the "justiciability" of the court would be delayed for a five year period (para. 42).

Other provisions in this section included that:

! Negotiations are to be triggered by aboriginal requests, and to result in self-government agreements (para. 46);
! A dispute resolution mechanism including mediation and arbitration to be established (para. 46);
! Aboriginal governments committed to providing public services at levels comparable to those available to other Canadians "in the vicinity" (i.e. similar if not identical to provisions in section 36 of the Constitution Act, 1982) (para. 50);
! Federal and provincial governments are committed in principle to providing aboriginal governments with fiscal and other resources to help them meet their commitments (para 50);
! Commitment to holding four First Ministers Conference on aboriginal constitutional matters (para 53); and
! Agreements of the federal government and five provinces with the Métis National Council to reach accords on Métis self-government, lands, and resources and a share of Aboriginal programs and services (para. 56).

In summary, the Charlottetown Accord was a remarkable achievement for Aboriginal and non-aboriginal negotiators alike. There was an impressive degree of compromise and many of the tough issues which were deal breakers in the section 37 process or which could have derailed this process, were resolved. These included the acceptance of the concept of an inherent right of self-government, although circumscribed by the phrase "within Canada", and subject to the Charter and to be not inconsistent with laws for "peace, order and good government". The courts could mandate an agreement where negotiations had not proceeded in good faith, even though such litigation could not begin for five years. For all this, the self-government content was left remarkably open. It was perhaps indicative of the degree of mutual trust that the negotiators achieved, in that the results hinged so much on the credibility of the promise to negotiate self-government agreements. Much was left to work out in future

negotiations, not only the many self-government agreements, but also the more immediately required political accords to cover such issues as delayed justiciability, negotiation mechanisms, financing, gender equality and changes to section 91(24) of the Constitution Act, 1867, as well as details concerning Aboriginal peoples and institutions such as the Senate, Supreme Court, House of Commons and First Ministers Conference.[xc]

The overall result represented a victory for moderates. Yet much of the agreement constituted unfinished business. These facts formed the basis of much of the opposition to the Accord among various parts of the Aboriginal community. The referendum campaign witnessed unambiguous support for the Accord from the leadership of the Inuit, Métis and NCC organisations. The AFN had more difficulty, in that the national leadership endorsed the Accord, but could not get the approval of the chiefs following a conference held in mid-October 1992, where it became clear that no consensus could emerge in favour of the agreement. As for the grassroots, it is impossible to know the full picture. Some opinion sampling and specific election results indicate widespread opposition in First Nations communities, but strong support in Inuit communities. Many aboriginal Canadians (perhaps the majority) did not vote in the referendum held across Canada on the Charlottetown Accord on October 26, 1992.

There are many reasons for the negative vote, and they can only be summarized here.[xci] At a broad, general level, the Aboriginal residents of communities across Canada were extremely hesitant about the vague and confusing terms of the Accord. This reflects not only a legacy of betrayal and distrust, but also a disregard for the "power politics" of their own leadership and an apparent dissatisfaction with the short time-frames in which the Aboriginal communities were expected to evaluate the agreement.[xcii] Some also likely vote against the agreement (or abstained from voting) because it was perceived as giving to too much power to the chiefs and band governments. In this latter group are found the NWAC.

On a more specific basis, it would appear that the Charlottetown Accord was most strongly opposed by treaty First Nations, particularly in Alberta and Saskatchewan, as well by by the Mohawks and others in eastern Canada, on the principle that it infringed on treaty rights and compromised the fiduciary obligations of the Crown. In this respect, this opposition reflects the nationalism of some communities, unwilling to circumscribe Aboriginal sovereignty within the federal state.[xciii]

If the response of Aboriginal Canadians to the agreement was mixed, what about non-aboriginal Canadians? The conclusion of the most extensive and sophisticated public opinion survey tracking the entire referendum campaign, including the declared vote of the respondents in the actual referendum, was that the aboriginal self-government package on the whole was a mildly positive aspect of the Agreement.[xciv] A strong majority favoured the self-government package but not sufficiently to carry the day, given their antipathy to other parts of the Agreement (e.g. the 25 percent guarantee for Quebec, the distinct society clause and the Senate reform provisions). Similarly, the minority opposed to the self-government provisions did not feel so strongly that their feelings in this aspect drove the overall result. There is nonetheless sketchy evidence here and there that in some parts of the country (e.g. northern Ontario, British Columbia), the sweeping and open-ended nature of the aboriginal provisions made a difference in the negative vote.[xcv] Nonetheless, the answer seems clear: it was not due to the aboriginal provisions that the Charlottetown Accord was lost.

Having been part of a complicated yet single set of negotiations, the details of the Charlottetown Accord cannot somehow be salvaged. All of the agreement is lost and no part as significant as the provisions for First Peoples is ever likely to be restored untouched.[xcvi] For all that, the agreement holds many lessons which may be applied, some sooner rather than later. The Royal Commission on Aboriginal Peoples, and apparently the federal Liberal government elected in October 1993, have endorsed the

idea that an inherent right of self-determination exists. The momentum which would have been created by the Charlottetown Accord is gone, but agreement on this principle may allow much bottom up negotiation to proceed.

No doubt many of the provinces -- notably Quebec -- do not feel bound by the exact terms of the Charlottetown provisions. Nonetheless, some of the basic issues resolved in 1992 -- and notably not resolved in earlier rounds -- may stand the test of time. New Aboriginal leadership may see the results as the floor, not the ceiling of any future arrangements, and other political forces such as the Reform Party may interpret issues in exactly the opposite way. For this reason alone, however, the key compromises in the Accord are, for the foreseeable future, likely to form the basis of any middle ground solutions.

Another important lesson of the agreement is its comprehensiveness. As the first part of this paper stressed, Aboriginal People's perspectives, traditions and aspirations need to be integrated into all aspects of the federal system. The Accord would have begun that work across a significant array of the features of the federation: the key federal institutions; the distribution of powers; collective and individual rights; fiscal arrangements; intergovernmental arrangements; the amending formula; and symbolic declarations. The precedent, if not a binding rule of aboriginal participation in constitution-making, was also strongly established. These achievements hold promise for future progress. However, in the absence of the ongoing processes and institutions which the Accord would have set in place, the fall-back is the status quo, the weaknesses of Indian Act government and the loose and unstable coalitions of interest at the national level. There is no forum quite like the constitutional reform process to keep up the heat on Aboriginal demands. Without this mega-politics, Aboriginal needs and perspectives are likely to be lost in the flurry of day to day political life. What remains to be seen (and this is of course the basis of key assumptions for the Royal Commission) is whether in the crucible of the Canada Round, the Canadian political system was sufficiently changed

to make Aboriginal self-determination and self-government a lasting priority.

CONCLUSIONS

(1) The Post-Charlottetown Era

This paper began with a discussion on the "window of opportunity" for change in the federal system. By most assessments, the prospects for constitutional amendment, and therefore any broad-scale or radical transformation of the federal system, appears unlikely for some time with the defeat of the Charlottetown agreement in the referendum of 1992. For those who prefer the evolutionary approach, progress will now have to take place as a result of ad-hoc agendas within the existing constitutional framework, through judicial decisions, administrative arrangements and ordinary legislation. More fundamental change would occur if Quebecers were to vote in favour of Quebec independence. However, under such a scenario many features of the federal system itself would be up for grabs, not least of which is the stability of the union itself.

From the perspective of enhanced aboriginal self-determination, one may see the defeat of the Charlottetown Agreement as a significant lost opportunity. It represented the first comprehensive effort in Canadian history to deal with the full range of issues involved in the integration of Aboriginal Peoples as full "partners in Confederation" -- to use the title of a recent report from the Royal Commission. Even if the agreement included some half-baked solutions and general principles to be taken with a large degree of trust, the Charlottetown agreement succeeded in proposing terms acceptable to moderate Aboriginal leadership . Such opportunities for full-scale reform must be recognized as extremely rare in the lifetime of political systems -- the next time around the agenda will be different and the leverage of Aboriginal peoples may be considerably

weaker.

Alternatively, many in the Aboriginal community breathed a sigh of relief with the defeat of the agreement. It would have been change that was too little and too soon, in their view -- before Aboriginal Peoples were ready and before they have a clearer idea of exactly what they want. In this camp may be those who were distrustful of the aboriginal leadership which negotiated the agreement, as well as those who saw it as compromising of their aboriginal and treaty rights. For those who did not want to move so far so soon, the fall-back to the more flexible and organic methods of change in the federal system may produce a slower but more grassroots result. Indeed the ability of the system to deliver on the issues of aboriginal self-government in particular will be an important litmus test of the alleged adaptability of the unamended federal constitution. In addition, for those First Nations who are holding out for arrangements which are more accommodating of treaty rights and confederal solutions, time may be on their side.

If Quebecers do vote for independence, as noted above, it is very difficult to predict with any certainty what would happen with respect to Aboriginal Peoples. It could be argued that the resulting instability in the rest-of-Canada would delay any substantial reform for a long time to come and force Aboriginal Peoples into what would be a much more restrictive straight-jacket of constitutional liberalism -- assuming that any kind of stable ROC survives to provide a "Canadian" buffer between a northern version of liberalism and that prevailing in the United States. As for Quebec itself, Aboriginal self-determination is already a key issue affecting the viability of that option, but it is not clear that it could prevent the project altogether. How the fiduciary obligations of the Crown would apply to an independent Quebec is not clear, but any significant options that come available to redefine the Quebec-Aboriginal relationship could have an impact on relations in Canada.

The working assumption in this paper has been that, for the time being one must

deal with the constitutional status quo. Yet a constitutional stalemate does not mean political inaction. For example, the emerging consensus among the federal and provincial governments does appear to be to recognize in practical terms what they were prepared to state constitutionally in the Charlottetown Accord: that Aboriginal Peoples have an inherent right of self-government. Indeed, the legal definition of this concept is that it forms part of the existing rights entrenched in section 35 of the Constitution Act, 1982. It may take a long time for the practical impact of this consensus to be revealed. There will need to be court judgements to clarify many points, legislated room for self-government in federal and provincial legislatures, and most importantly Aboriginal communities moving ahead on the basis of their own consensus and determination. In this light, we now turn to revisit some key issues identified earlier in this paper to examine more specifically the context for addressing these issues in the near future, and in particular in a "post-Charlottetown" context of assuming that an inherent right of self-government exists.

(2) Continuing Issues

One of the issues of enormous underlying importance is the continuing debate over identity and citizenship. The Charlottetown Accord would have addressed this matter to a degree, and yet in the sense in which it is an issue that goes to the heart of the notion of a plural and federal society, it is a question that would in any case take a long time to sort out. As long as the *Indian Act* exists, many Aboriginal Canadians will continue to be citizens-minus, unable to determine in their own communities who they consist of and how to deal with what is theirs. But a full expression of citizenship in Aboriginal political communities is challenging to the liberal norms of universal citizenship. It is becoming increasingly recognized that Aboriginal Peoples cannot be just somehow added to the federal political culture: the federal political culture will have to adapt to the integration of the collective notions of citizenship which appear to be strengthened everyday in Aboriginal communities. As the Royal Commission's own

hearings have made abundantly clear, the process of healing which is seen as so essential to the restored health of Aboriginal communities hinges in large part on a renewed sense of identity.

Can a renewed identity as a citizen of a First Nations coexist with a continuing identity as a Canadian? We do not yet know the answer to that question. In theory, federalism is all about multiple identities and levels of citizenship. And it seems to us that healthy federalist relationships rely upon the sustenance of multiple loyalties, and do not force citizens to choose in exclusive ways between one set of loyalties and another. Citizenship as Aboriginal persons has been denied and suppressed for so long that many Aboriginal communities may prefer to consolidate their own identity first.

For the more practical perspective of coexistence with the Canadian state, the benefits of Canadian citizenship are nonetheless important to Aboriginal Peoples. If practically no Canadian laws applied in such communities and if, for example, basic rights such as those in the Charter did not also apply, it may be difficult to sustain the political support for sharing financial and other resources which federal principles would otherwise encourage.

There is also danger that undue emphasis within some Aboriginal communities on separatist notions of citizenship could erode the general sympathy within the Canadian public at large for aboriginal aspirations. In this respect, we suspect that the application of the Charter as stipulated in the Charlottetown Accord -- to take a key citizenship issue -- represents the most likely sustainable common ground. Canadians are not alone in struggling to find a balance between federal-type integration and identity-based fragmentation. Whatever solutions we find to redefine citizenship to reflect and legitimize our differences will be watched with interest around the world.

Another issue which will only be resolved after some time and as a pattern gets

established among the diverse circumstances of Aboriginal Peoples, is the *scope of aboriginal government.* Aboriginal government could be solely confined to a defined territorial base, but that base will have to be substantial if it is to provide sufficient scope for meaningful government. For most Aboriginal nations this would mean an increased exclusive land base and/or increased access to traditional lands and resources. As this paper has demonstrated, the existence of provinces across southern Canada, and their monopoly over most land, poses immediate challenges to restoring land-based government with scope that is anything more than local. New treaties which include land settlements and renewed understandings of old treaties will be important to provide this base. However, throughout most of Canada practical reality will demand that there also be a nonterritorial component of both citizenship and governmental powers for many aboriginal governments. This is especially so if urban-based aboriginal populations are to have access to the inherent right of self-government.

Part of the working out of self-government arrangements will therefore mean a whole new range of special purpose bodies for self-governing institutions off reserve lands, in adjacent rural areas, and in towns and cities. The complexity and diversity of these arrangements need not present an obstacle if they are seen as suited to local conditions and the practical aspirations and rights of the Aboriginal Peoples concerned. Non-territorial aspects of government is already a Canadian habit; it is destined to become more so with Aboriginal governments. Such arrangements will work best if the governing institutions are clearly defined and accountable to the constituency they are meant to serve, and if there are well-functioning intergovernmental relationships to smooth the way.

Even without making assumptions about territorial or nonterritorial scope, the issue of what powers Aboriginal governments exercise will make an enormous difference to how these governments are perceived by their own communities and by other Canadians. It makes little sense at this stage to enter into a debate about the <u>set</u> of powers

to be potentially available to the diverse communities of Aboriginal Peoples who would exercise the inherent right. With some important legal distinctions on the margin (and this is not a legal analysis) one may assume for purposes of politics and public administration that all Aboriginal governments will draw from the same well of powers. What matters is what powers they choose to exercise, how they will be financed (if major expenditure is involved) and what the relationship with other constituent governments will be. We are faced, in the absence of the Charlottetown Accord, with a piece-meal, bottom-up and experimental set of answers to these questions. This has its advantages. From an administrative point of view, it is somewhat more risk-adverse than the top-down, comprehensive approach, and may allow for more flexible adjustment over time. From a political and community perspective, it may provide the time and the experimentation for an order of government truly accountable to and representative of all of Canada's Aboriginal Peoples.

The chief disadvantage of the lack of a constitutional accord on governmental powers and their exercise is that there is no constitutionally mandated blueprint and sanctions to which to appeal over the heads of reluctant federal and provincial governments. The Charlottetown agreement clearly specified that Aboriginal governments would form one of three orders of government in the federal system. It provided a contextual statement to guide the courts on the scope of powers to be exercised, and it further circumscribed those powers with respect to their exercise "within Canada" and subject to federal and provincial legislation for the "peace, order and good government " of Canada. While these very concessions may have been the source of much Aboriginal opposition to the accord, their inclusion provided a sense of security to federal and provincial governments about what might otherwise be unacceptably open-ended negotiations. Without these provisions the uncertainty about the scope of self-government remains, and ultimate decisions will lie with the existing governments. Of course there are other avenues to force the hand of recalcitrant governments. But litigation is costly, time-consuming and probably unsatisfactory in that no court is likely

to mandate the details of a self-government agreement. Even riskier is the politics of direct action. Nonetheless these are the two routes open if the spirit of Charlottetown fails to prevail in implementing the inherent right.

A third category of issues relates to the federal institutions. The lack of progress on formal constitutional reform may put off changes in this area for some time, and some Aboriginal leaders see a danger in any case in proceeding too quickly on this front while self-government is not yet established. Nonetheless a full federal partnership of Aboriginal Peoples within the Canadian federal system will require the adaptation of our federal institutions including the Senate, House of Commons and Supreme Court. Some elements of reform can proceed without constitutional amendment, but will not proceed without Aboriginal consensus, broadly defined. The Charlottetown Accord was short on specifics in this area, perhaps reflecting a lack of such consensus.

Other institutions which will require attention are intergovernmental bodies and processes. Just as the interdependence of federal and provincial governments has spawned a network of intergovernmental relations, so too will implementation of a third order of government require effective intergovernmental networks -- and not just confined to the current meetings of Ministers and officials charged with "native affairs". An important issue in this context is who or what organization or governmental agency or agencies the other two orders of government are to regularly deal with. To be effective, long-term intergovernmental relations with Aboriginal governments must also be within a framework of certain and recognized constitutional status. And effective intergovernmental relations must be primarily with Aboriginal governments, not with advocacy organizations.

This leads to the issue of the role of aggregate representatives institutions among Aboriginal Peoples (e.g. a proposed Métis parliament, or House of First Peoples, etc.) in the overall exercise of the inherent right, as well as the role of existing national aboriginal

organizations such as the Assembly of First Nations. The latter organizations could continue to play an important role to advise the federal government on its policy and to represent the interests of Aboriginal Peoples to the general public, but they are not now constituted to exercise a formal representation role -- either within the federal legislative and executive process, or within intergovernmental relations -- and therefore do not have the power to both speak and act on behalf to the Aboriginal Peoples. It is not the role of this paper to recommend specific institutions for national (Canada-wide) representation of Aboriginal Peoples, any more than to make recommendations on the specifics of Aboriginal governance. However, if relationships between the federal and provincial governments and the Aboriginal Peoples are to get beyond client-patron characteristics, then Aboriginal institutions need to be able to bring to the table the same type of authority and power of representation as their partners in Confederation.

Finally, there is the broad issue of establishing a new relationship. Again, the Charlottetown Accord attempted to do just this, although in retrospect it seems that the Accord's expression of it was incomplete, confusing and not very uplifting. Nonetheless, its provisions were sufficient to begin fleshing out a new relationship between Aboriginal Peoples and the Canadian state. It would have been a fitting, if partial fulfilment of the 25-year political renaissance of Aboriginal Peoples in this country. Regardless of its merits as a "deal", it would have intensified the intergovernmental adjustment to increasing Aboriginal power and would have signalled in many different ways a departure from the past.

It will be important for the Royal Commission on Aboriginal Peoples to consider ways in which such a new relationship may be re-crafted in the "post-Charlottetown" era. It may wish to consider some sort of symbolic and political accord which, while not duplicating the Charlottetown Agreement, would amount to a reaffirmation of it. In some respects, the Commission's broad mandate, examining not only the issues of governance but also the social and cultural issues of Aboriginal peoples, will be better placed to

propose a more integrated and holistic approach to redefining a new relationship that the sterile legal jargon of a constitutional agreement. The Commission is not a substitute for constituted power -- it dissolves once its report is delivered. Yet within its report and recommendations it could provide considerable support for a new relationship by educating the broader public opinion and pointing out avenues for practical progress. In this respect, the Commission should pay attention to the federal political system as a whole, and the several component aspects of the system. Progress towards Aboriginal goals of self-determination can be met across a wide front. But in recommending a variety of initiatives, the central and symbolic task will be to describe the normative basis for a new relationship for Aboriginal Peoples within or coexisting with the Canadian federal system.

Some may seek to found this new relationship on principles of self-determination which are expressed in terms that differ from the standard federal arrangements of Canada since 1867. This paper has surveyed the importance of confederal ideas in the traditional governance and relations among First Nations, and the continuing appeal among some nations of what has been called "treaty federalism". In these traditions and current concepts may lie the basis for a relationship which recognizes the coexistence of First Nations and the federation.

There are many types of solutions which could, in theory, be applied.[xcvii] Four which have been suggested most frequently are: full international sovereignty for Aboriginal nations; a confederal relationship between Canada and Aboriginal nations; a federacy between Canada and Aboriginal nations; and a full partnership in the Canadian federation.

The first of these is unadulterated sovereignty in the international sense, by which Aboriginal nations are territories separated from the Canadian state and have essentially international relations with Canada. This solution is apparently favoured by only a

minority of First Nations, although it is a view strongly held by their leadership. While the recognition of such sovereignty may have important symbolic value to these First Nations, it is difficult to see how a truly "international" relationship would work in the Canadian context. It is likely to be unacceptable to the Canadian public; and such Aboriginal political entities would have minimal call upon the resources of the Canadian state. In such a situation, these First Nations could degenerate into the false kind of "sovereign" homelands that typified the former South African constitution.

Confederal solutions properly defined -- where citizenship is not multiple and where sovereignty is shared by delegation agreements to joint authorities -- is a somewhat more promising avenue. In such arrangements Aboriginal Peoples could have a relationship with the Canadian state as juridically equal partners, with institutions to manage the confederal relationship suited specifically to Aboriginal needs and political culture. It could also be the means by which treaty Nations retain the full sense of their treaty relationship with the Crown. In constitutional terms, confederal arrangements could be said to grow directly out of section 25 and 35 of the Constitution Act, 1982 -- separate from but pragmatically linked to the federation of the central (federal) government in Ottawa and the provinces.

How such an arrangement might be designed in detail is well beyond the scope of this paper -- and has not, to the author's knowledge, been well fleshed out elsewhere.[xcviii] Confederal arrangements would have much less call upon the fiscal and other resources of the federation than would a more integral role of Aboriginal Peoples, through their governments as a third order of government in the federation and through their representation in federal and intergovernmental institutions. And despite the growing interest and application of confederal ideas worldwide, Canadians may be less amenable than before to such solutions (either for Quebec or for Aboriginal nations). Political and constitutional arrangements which emphasize separateness, in our view, are less promising that those which stress integration.

The idea of federacy is perhaps the most novel of the four. By federacy is meant a looser associate statehood arrangement such as applies between the United States and Puerto Rico, Portugal and the Azores, Denmark and Greenland, among many others.[xcix] Ronald Watts defines a federacy as "a fundamentally asymmetrical relationship between a smaller polity and a larger polity whereby, the former has greater internal autonomy than the other segments of the former, but in return foregoes significant participation in the governance of the larger polity and where any changes in this relationship must be determined by mutual agreement of both parties."[c] One analyst has described the tribal governments in the USA as "defacto" federacies.[ci] The experience of U.S. tribal governments is that Congress perceives their retained sovereignty as something which it can erode at any time. Thus the specific U.S. model may be of limited appeal to the Aboriginal Peoples of Canada. However, if the powers of the Aboriginal governments were to be constitutional protected, a federacy arrangement may be more acceptable.

Federacy arrangements seem to work best when the smaller party is both actually as well as perceptually an island separated from the main, which again begs the question of whether such an arrangement could work in Canada where Aboriginal communities and populations are thoroughly intermixed with the general population. And, at the risk of being excessively pessimistic, it seems likely that some of the fiscal and political problems that would be entailed in the confederal option applies here as well.

This brings us to the fourth option, of integrating Aboriginal government in the federation. What would be required is to establish a new relationship which is symbolically and practically based on important federal notions of equality and diversity (e.g. the sharing principles of equalization, the application of the Charter, full participation in intergovernmental relations, and a juridically independent order of government by Aboriginal Peoples). The basis for this relationship could be founded squarely in self-determination and the desire of nations to coexist, but their form would

be of integrating Aboriginal self-determination within the federal system.

Falling back on solutions which are integrated into the existing federal system has all the advantages of working within the status quo -- but all the disadvantages of being perceived as continuing within a neocolonial mode. We do not see easy solutions to this conundrum. The full international sovereignty option seems to us to be a non-starter. The confederal (treaty federalism) and federacy options have more chance of success, but still tend to stress separateness over integration. It may be that, at the end of the day, it is the values of distinctiveness and separate identity that prevail over the need for integration. Canadian and comparative experience suggests however, that such a fundamental change of relationship is unlikely to be achieved easily, and that once begun, the dynamic of separating would preclude any efforts at association, with the loss of whatever benefits the current arrangements entail. (This would be the case for Quebec as for the Aboriginal Peoples).

For this reasons among others, this paper concentrates on the integration option. Part I provided an analysis of how the federal system fails to integrate Aboriginal Peoples. Part II discussed recent efforts to achieve integration. In the recommendations to follow, the focus is on "post-Charlottetown" development of the integration option. These recommendations are made in a spirit of reaching a new relationship with Aboriginal Peoples. It may be that in working through these issues that elements of more separate political and other arrangements are preferred -- by both Aboriginal Peoples and Canadians as a whole. A new Canadian hybrid may certainly be possible over time. But in our view the route to such solutions lies first in building self-government and improving representation of Aboriginal Peoples within the existing federal system.

(3) Recommendations

What follows are recommendations to the Commission, based on discussion in

this text, especially in the conclusions. This paper is intended to provide an overview of the key issues in federalism and intergovernmental relations which affect the Aboriginal Peoples of Canada. The paper has been commissioned to be an introductory paper within a series of more detailed examinations of related aspects of these questions. The other papers in this series deal with: comparative analysis of other federal-type systems; the application of non-territorial models to aboriginal citizenship; jurisdictional issues in the exercise of an inherent right of self-government; representation of Aboriginal Peoples in Canadian institutions; exploring concepts of treaty federalism; and the intergovernmental relations of the transition to self-government.[cii] The conclusions and recommendations in this paper belong to this paper alone, but it is important to acknowledge the wealth of information and insight provided in these other studies. As a whole these papers provide a broader understanding of the relationship between the federal aspects of Canadian government and the struggle of Aboriginal Peoples for self-determination, and may assist the Royal Commission in its efforts to define a new relationship.

1.The Canadian federation and the Aboriginal Peoples need to establish a new relationship based on federal principles of equality, pluralism, autonomy and respect. The federal and provincial governments and the Aboriginal Peoples should agree on means to symbolically establish and practically implement a new relationship.

2.Canadian federal values have usually been predicated on the existence of multiple citizen identities. The recognition and acceptance of Aboriginal Peoples identities as coexisting with and enriching their identity as Canadian citizens should be an important principle of Canadian federalism, and one which can help Canada to better define its place in the world.

3.While there may be some danger in defining or labelling the new relationship there is also danger in lack of clarity and consistency surrounding such key concepts as

sovereignty. Four possible options to define the relationship are: (1) full international sovereignty for Aboriginal nations; (2) a confederal relationship between Aboriginal nations and Canada; (3) a federacy between Aboriginal nations and Canada; and (4) full partnership in the Canadian federation. This paper recommends the fourth option, full partnership in the federation as the most feasible in political and practical terms, and the one most likely to lead to a lasting and fundamental relationship based on the principles stated in recommendation 1.

4. In the process of redefining the relationship of the Aboriginal Peoples to the Canadian state, it is important to consider the operation of the federal system as a whole. The objective should be to adapt and to integrate Aboriginal values and presence into all aspects of the federal system, including: the overarching constitutional framework; our notions of pluralism and citizenship; the territorial divisions of Canada; non-territorial aspects of pluralism; the federal institutions such as Parliament and the judiciary; the distribution of powers among governments; fiscal relations; and intergovernmental relations.

5. Full partnership in the federation should ultimately mean that the chief federal institutions reflect and assist this partnership. Reform of the House of Commons, Senate and judiciary, among other institutions, to better represent Aboriginal Peoples should proceed at a pace that is mutually agreeable to the Aboriginal Peoples and Canadians in general, but should not detract from or be a substitute for progress in implementing Aboriginal self-government.

6. The right of self-government should be explicitly recognized by the federal government and all of the provincial and territorial governments, as well as by local governments for neighbouring Aboriginal communities, including Aboriginal Peoples living in urban areas. While all Aboriginal communities should have the same basic right, the exercise of self-government should allow for the inevitable

diversity of governing situations. Governing authorities should include nonterritorial jurisdiction where necessary. A general framework for self-government should be negotiated to provide for all self-governing communities a contextual statement of the scope of powers, exclusive and concurrent powers, provision for paramountcy where laws conflict and for emergency powers.

7. Attention should be paid to the processes of intergovernmental relations. Aboriginal governments should have the recognition, resources and, where required, specific institutional support to enter into effective intergovernmental relations. This includes relations at the local and regional government level; at the treaty-area or provincial level for the negotiation of self-government agreements and comprehensive settlement of claims to land and resources; and at the national level to integrate with key institutions of executive federalism such as the First Ministers Conferences. Aboriginal Peoples may wish to consider the creation of national (Canada-wide) representative bodies which can both speak and act on behalf of the Aboriginal Peoples in certain circumstances.

8. Financial arrangements to enable Aboriginal governments and their agencies to operate effectively should be a priority of intergovernmental relations. These fiscal relations should be based on principles of Aboriginal entitlement within the context of limited resources and the need to balance budgets. Fiscal arrangements should include: (1) the establishment of an independent fiscal base for Aboriginal governments, drawn from their own taxing powers, access to land and resource revenues and revenue sharing agreements with other governments; and (2) intergovernmental transfers which are both conditional and unconditional.

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End Notes

[i] The author wishes to acknowledge the assistance of Alan Kary in preparing initial drafts of parts of this paper.

[ii] For a general discussion of the elements and varieties of federal-type systems of governments, see Watts (1994). An overview of recent strains in Canadian federalism is found in Russell (1993). A broader historical and conceptual treatment is Simeon and Robinson (1990).

[iii] In this paper, Aboriginal Peoples will mean in a general sense, all of the indigenous peoples now resident in Canada, including those defined as such in the Constitution Act, 1982. Where more specific groups of Aboriginal Peoples is meant, these will be specified e.g. First Nations (referring in the main to those defined as "Indians" but also those of these Aboriginal peoples who are not Indians as defined by the Indian Act), Inuit and Métis.

[iv] See for example, Slattery (1985), RCAP (1993), Macklem (1991), and Boldt and Long (1984).

[v] See Johnston (1986) re. Six Nations (Iroquois Confederacy); and more generally see Macklem (1991).

[vi] See York and Pindera (1991), pp. 409-410.

[vii] For this perspective, see William Many Fingers (1981) and Opekokew (1982).

[viii] See Taylor (1991) for a fuller discussion on this sense of "deep diversity".

[ix] See Russell (1993) pp. 228-235 and Russell (1993a); see also Watts (1993) and the Introduction to McRoberts and Monahan (eds.) (1993).

[x] See Hueglin (1994) and Watts (1994).

[xi] See Johansen (1982).

[xii] For a fuller description of the typical characteristics of a "federation", see Watts (1994), pp. 10-13.

[xiii] See Barsch and Henderson (1980) and Wilkinson (1988). Also: Julnes (1993) and Barsch (1993).

[xiv] See Watts (1994) pp. 6-13 and references therein.

[xv] For example, provisions for language rights, section 133, Constitution Act, 1867; s.23 of Manitoba Act, 1870; education rights in section 93, Constitution Act, 1867 and s.22, Manitoba Act, 1870.

[xvi] These issues are explored more fully in Elazar (1994).

[xvii] For a fuller discussion see Cairns (1992).

[xviii] See Milne (1991) and Watts (1991).

[xix] The classic analysis of this result is found in Cairns (1977).

[xx] For further discussion from a legal perspective see Bartlett (1986). For an overview of the practice in other federations see Watts (1994) pp.28-34.

[xxi] For two recent proposals see Courchene (1991) and Elkins (1993).

[xxii] For a discussion see Turpel (1993) and RCAP (1993).

[xxiii] Note, however, that at least two Lieutenant-Governors of Canadian provinces have been of Aboriginal descent.

[xxiv] For a further discussion, see Milen (1991).

[xxv] See Royal Commission on Electoral Reform and Party Financing, Final Report (1991); for a discussion see Milen (1993).

[xxvi] For a distinction and introduction to these terms see Alan C. Cairns From Interstate to Intrastate Federalism in Canada (Kingston: Institute of Intergovernmental relations, 1979).

[xxvii] See Milen (1993).

[xxviii] Section 95, Constitution Act, 1867 lists agriculture and immigration as concurrent jurisdictions.

[xxix] Significant amendments included those in 1941 to transfer jurisdiction over unemployment insurance to the federal Parliament, and in 1951 to establish pensions as a matter of concurrent jurisdiction. Amendments in 1982 clarified provincial jurisdiction over natural resources (by adding section 92A).

[xxx] The chief exception to this rule was the provision in creating section 95A in 1951 to allow federal legislation on pensions, where provincial paramountcy is implied. For a discussion of paramountcy rules that have emerged through judicial review see Ryder (1991).

[xxxi] The balance of federalism cases has been both observed and advocated by Lederman (1965).

[xxxii] Canada (1992B), paragraph 41, p.14.

[xxxiii] For a more complete discussion see Hogg and Turpel (1994).

[xxxiv] For the classic statement of the importance of fiscal equity to economic efficiency in Canada see Boadway and Flatters (1982) and Economic Council of Canada (1982).

[xxxv] See Richard Bird (1986) and (1994).

[xxxvi] For a discussion see Boadway and Hobson (1993).

[xxxvii] For a comprehensive assessment of the strain on the current system of fiscal federalism see Banting,

Brown and Courchene (eds.) (1994).

[xxxviii.] For the basic discussion of executive federalism see Smiley (1980) and for a comparative survey, Watts (1989).

[xxxix.] For a more complete discussion see Brown and Rose (1995).

[xl.] The Royal Commission on Aboriginal Peoples has commissioned a series of case studies on Aboriginal governance, in cooperation with existing Aboriginal governments and organizations.

[xli.] For an introduction to Aboriginal philosophies of governance, see Smallface Marule (1984); and Boldt and Long (1984).

[xlii.] For a discussion on the meaning employed in the term confederal, and its distinction with federation, see Watts (1994), p. 9.

[xliii.] See Johansen (1982).

[xliv.] This is the conclusion reached in Hueglin (1994), pp.6-13.

[xlv.] For further discussion see Andrew BearRobe (1992); Henderson (1993); Tulley (1992); Darlene Johnston (1986) and Macklem (1991).

[xlvi.] Scholars who have pursued these issues from a philosophical perspective include Charles Taylor (1991) and (1993) and William Kymlicka (1989).

[xlvii.] Watts (1994), pp. 6-13 and 18-26.

[xlviii.] Miller (1989).

[xlix.] For a fuller discussion see Miller (1989) and Milloy (1991).

[l.] This discussion is based in part on Miller (1989) and Milloy (1991).

[li.] See Chartier (1985).

[lii.] Legal reference is Re: Eskimos [1939] SCR, 104; 2 DLR 417.

[liii.] This isolation holds important advantages for the Inuit in proceeding to self-government compared to southern First Nations, who are marginalized and often a very small minority within their traditional territories.

[liv.] Ponting and Gibbins (1980), p.13.

[lv.] From Foreword (p.5) of: Minister of Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy, 1969 (Ottawa: Queen's Printer, 1969).

[lvi] Miller (1989), pp.226-227.

[lvii] The whole White Paper episode is exhaustively discussed in Sally M. Weaver, Making Canadian Indian Policy: The Hidden Agenda 1968-1970. (Toronto, University of Toronto Press, 1981).

[lviii] Weaver (1981) p. 197.

[lix] Miller (1989) p.228.

[lx] Miller (1989), p. 227.

[lxi] Miller (1989) p.232.

[lxii] Ponting and Gibbins, (1980).

[lxiii] See for example Ponting and Gibbins (1980); Hawkes (1989).

[lxiv] Gibbins (1986) p.304.

[lxv] This chronological discussion is based in part on Gibbins (1986), pp. 305-306.

[lxvi] Calder et al v. Attorney General of British Columbia, (1973) SCR 313 (SCC).

[lxvii] Gibbins, p.305.

[lxviii] Sanders (1983).

[lxix] This discussion is based on Hawkes (1989).

[lxx] Ibid. p.17.

[lxxi] Ibid. pp. 59-60.

[lxxii] Ibid. p.33.

[lxxiii] A summary of aboriginal objections to the Meech Lake Accord is provided by Behiels (1989), pp. 416-417.

[lxxiv] This scenario is proposed by Purich (1989), p. 50.

[lxxv] Bruyere, (1989), p. 511.

[lxxvi] The following account is from Hawkes and Devine, (1991) pp. 40-46.

[lxxvii] Ibid. p. 42.

[lxxviii] Ibid., p.46.

[lxxix] The chronology of events in this section is based on the author's own records of events, and checked against the following sources: Brown and Young (eds.) (1992); Hawkes and Devine (1991); and Long and Chiste (1993).

[lxxx] Canada (1991) Shaping Canada's Future Together: Proposals.

[lxxxi] Canada (1991), p. vi.

[lxxxii] Canada (1991), pp. 6-9.

[lxxxiii] See Robert A. Young and Douglas Brown, "Overview" in Brown and Young (eds.) (1992), p. 7.

[lxxxiv] See David Milne (1992).

[lxxxv] Canada (1992A).

[lxxxvi] Turpel (1993),pp. 121-122. The aboriginal delegation included representatives of four national organizations: the Assembly of First Nations, the Native Council of Canada, the Inuit Tapirisat of Canada and the Métis National Council. The Native Womens Association of Canada charged that Aboriginal womens voices were not adequately heard by the exclusion of their organization from the delegation, and launched an ultimately unsuccessful legal challenge to remedy the situation. For details and a rebuttal of the NWAC position from the perspective of a key player within the AFN, see Turpel (1993), pp.132-35.

[lxxxvii] Turpel (1993)n.20 cites a May-June 1992 Angus Reid poll as illustrative of such public opinion soundings. Young (1992), p. 37, refers to a poll released in the Ottawa Citizen in February, 1992.

[lxxxviii] The first interim report of the Royal Commission on Aboriginal Peoples, entitled The Right of Aboriginal Self-Government in the Constitution: A Commentary (Ottawa, February, 1992) made a timely and assertive intervention to argue in favour of recognizing the inherent right of self-government.

[lxxxix] The so-called Charlottetown Accord was released to the public as Consensus Report On the Constitution, Charlottetown, August 28, 1992 Final Text. The legal text is called Draft Legal Text, October 9, 1992. Paragraph numbers refer to the August text. This source is listed in the references as Canada (1992B).

[xc] For a list of political accords, see Document 800-032/006, First Nations Meeting on the Constitution (Final) Political Accords, dated Sept. 1, 1992; see also Best Efforts Draft: Political Accord Relating to Aboriginal Constitutional Matters (in author's possession).

[xci] For a fuller discussion, see Long and Chiste (1993), pp. 160-163; Turpel (1993), p. 132-144; and Smith (1993), pp. 229-32. The author is also indebted to the comments of the readers of this paper for the Royal Commission for their insights on this issue.

[xcii] See for example, Kathy Brock "Consensual Politics" in M. Mancuso, R. Price and R. Wagenberg (eds.)

Leaders and Leadership in Canada (Toronto: Oxford University Press, 1994), pp. 236-37.

[xciii] For an expression of this opposition see Sharon Venne "Treaty Indigenous Peoples and the Charlottetown Accord: The Message in the Breeze?, Constitutional Forum Vol. 4., No. 2 (Winter, 1993).

[xciv] See Richard Johnson, et.al. (1993).

[xcv] See for example, Dan Smith (1993), p. 136.

[xcvi] One small part of the Charlottetown Accord did proceed. The federal and New Brunswick legislatures passed by resolution an amendment confirming the bilingual status of certain New Brunswick institutions -- the amendment was proclaimed on March 12, 1993. Nonetheless, the broader and sweeping "First Peoples" part of the Accord could not proceed by bilateral agreement alone, and was in any case, an integral part of a much bigger negotiated result.

[xcvii] See for example Watts (1994) pp.1-14 for the varieties of federal-type solutions.

[xcviii] See Hueglin (1994) for a discussion of some of the principles that would underlie his conception of "treaty federalism."

[xcix] Watts (1994), pp.9-10.

[c] Op. cit.

[ci] Daniel Elazar, cited in Watts (1994), pp. 9-10.

[cii] See Watts (1994); Elkins (1993); Hogg and Turpel (1994); Milen (1993); Hueglin (1994) and Brown and Rose (1994).