CUSTOM, TRADITION, AND ABORIGINAL SELF-GOVERNMENT WITHIN THE CONTEXT OF CANADIAN CONSTITUTIONAL PRINCIPLES AND FEDERAL GOVERNMENT PRACTICE - FINAL REPORT

CONTENTS

A BRIEF OVERVIEW

The terms of reference for the present study set forth four objectives: i) to research the ways in which custom and tradition have been operationalized in Canada and elsewhere from legal, historical and policy perspectives; ii) to conduct an analysis of the Department's needs in addressing self-government proposals incorporating custom and tradition; iii) to engage in an in-depth analysis of the reconciliation of custom and tradition with Canadian constitutional principles and practice; and iv) to provide a basis for the development of self-government policy on custom and tradition and for the assessment of self-government proposals under the present policy.

The results of this study relating to points i), iii), and iv) are found in the body of the report. The needs analysis (point ii)) is found in the Appendix (Section 7). The needs analysis details those issues that we have addressed in this study, as well as some issues beyond its scope. In our "Conclusions and Recommendations" (Section 6), we include recommendations for further research that would be useful in building on what is begun here.

The report in its structure proceeds from general perspectives to specific discussion of rationale and techniques for accommodating custom and tradition in aboriginal self-government in Canada. Section 1 provides a framework for conceptualizing custom and tradition by outlining the meanings of these terms in current social and legal theory, and by providing some basic insight into how custom and tradition function in the general context of cultural practice. The nature of the "dissonance" between indigenous and imposed legal-political systems is interpreted in these terms.

Section 2 reviews, briefly, the policy approaches adopted in -- and general lessons to be learned from -- other states in which aboriginal systems of customary law and government have historically conflicted with Anglo-European legal-political systems, and in which attempts of various kinds have been made in recent years toward greater respect and recognition for customary and traditional institutions and values. More detail and commentary on this international experience is found in the extensive annotations of literature, given in Section 8.

We then turn to the Canadian context, first by providing in Section 3.1 an historical overview of the ways in which custom and tradition have been operationalized in Canada: in legislation, in government policy, in treaties and land claims agreements, and in judicial pronouncements absent treaty provisions. The constraints and the opportunities which pertain to a recognition of custom and tradition in aboriginal government are identified.

Section 3.2 then illustrates the recent development of support among non-aboriginal political leaders for aboriginal culture ('custom and tradition' if you will) as expressed at First Ministers Conferences on Aboriginal Constitutional Matters. This review shows that there is much support, but little specificity, about how aboriginal culture is to be accommodated. The meanings of custom and tradition as viewed by aboriginal leaders are less vague, referring to basic institutions of territory, economy and government as culturally-infused. In Section 3.3, the implications of aboriginal positions on cultural and self-government rights for the present self-government policy -- in regard to the prerequisites for the survival and development of basic institutions according to custom and tradition -- are addressed.

Section 4 opens with a consideration of some of the obstacles posed by ethnocentric beliefs to a greater recognition of aboriginal custom and tradition in self-government. Having cleared this ground, we go on to an analysis of the how the characteristics of the Canadian State as a level of corporate organization relate to aboriginal nations having their own socio-cultural premises and forms of corporate organization. It is argued that the functional limitations of the State should be recognized for what they are, and that with this recognition could come greater support for autonomous development of aboriginal Nations, building on their own customary and traditional modes of corporate organization. The levels and characteristics of corporate organization in aboriginal Nations as loci of political life and social reglementation are reviewed, with specific consideration to matters of leadership selection, representativity (accountability), and the protection of personal autonomy and rights inherent in consensus-based traditional government.

Section 5 then develops in various respects the legal rationales that support the recognition of aboriginal custom and tradition in self-government, and the principle that the positive law of state may be checked from interfering with institutions and processes based in aboriginal custom and tradition.

Section 5.1 examines the administrative law principles governing judicial review of public bodies, and in particular the common law notions of natural justice and fairness. Following this, fundamental issues raised by the application of the Canadian Charter of Rights and Freedoms to the exercise of custom and tradition in the context of self-government legislation, are considered in Section 5.2.

Section 5.3 considers the extent to which aboriginal society can operate with a minimum of positive law/legislation applying and the legal means of insulating aboriginal peoples from laws of general application. This leads to a consideration of how custom and tradition can replace positive law. It is proposed that federal legislation be equipped with expanded incompatibility provisions that would refer not only to treaties, federal legislation, or Band laws but also customary law.

Section 5.4 examines the precedents in legislation that recognize or incorporate principles of customary participatory democracy and consensus as processes of political representativity.

Section 5.5 stresses the importance of keeping self-government arrangements flexible and dynamic. Various techniques are suggested including 'most favoured nation clauses' or saving clauses, general language and amending formulas. An analogy is suggested with the legislative technique of incorporation by reference.

1.0 OPERATIONAL DEFINITIONS IN SOCIAL AND LEGAL THEORY

The "operationalization" of custom and tradition requires policies rooted in informed theory, that take into account the meanings that custom and tradition (or their synonyms) have for the parties to self-government negotiations. The discourse of "mainstream" Canadians sometimes involves quite circumscribed meanings of custom, tradition, and culture generally -- e.g. "folk", "ethnic", and "high" culture -- meanings which underplay the profound extent to which everyday life is culturally structured. By contrast, aboriginal people, whose cultural systems have been under enormous pressure for decades and centuries, are often more explicitly aware of the fundamental ways in which culture defines political interests, goals, resources, and strategies. The meanings of "custom" and "tradition" in legal, constitutional, and policy arenas, and the rights entailed, are accordingly of great consequence to aboriginal people.

1.1 CUSTOM

'Custom' is a term having multiple meanings in the vernacular. Excerpts from a dictionary entry are instructive:

> 1. a habitual practice; the usual way of acting in given circumstances. 2. habits or usages collectively; convention. 3. a long-continued habit that is so established that it has the force of law; 4. such habits collectively... 6. a group pattern of habitual activity usually transmitted from one generation to another...1

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1. Random House Dictionary of the English Language.

It is not difficult to see from parts 3. and 6. above why custom and tradition are frequently mentioned in the same breath, and have overlapping connotations. But anthropologically, there is an important distinction to be made, which helps us to be more clear about the difference between custom and tradition as well as their essential interaction in social practice.

By standard anthropological definition, custom is "the totality of socially acquired behavior patterns which are supported by tradition and generally exhibited by members of a society".2 In general anthropology, the term 'culture' has largely superseded the term 'custom'. But in legal and political anthropology the terms 'customary law' and 'custom' are still used to distinguish rule-governed behaviour and social control in local societies from the formal, written law of state-organized societies.

In some legal parlance, 'custom' and 'customary law' are synonyms, because the accent is on custom as rule:

> In modern law a custom is a particular rule which has long been recognized in a particular locality and has attained the force of law, which is distinct from but not contrary to the general common law of the realm and which, where it applies, replaces the general common law...3

In other legal parlance, however, practice or 'usage' is recognized as integral to 'custom', defined thus:

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2. D.E. Hunter and P. Whitten, Encyclopedia of Anthropology, Harper & Row, New York, 1976, p. 113.
3. The Oxford Companion to Law, p. 327.

> Custom... A usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject-matter to which it relates. It results from a long series of actions, constantly repeated, which have, by such repetition and uninterrupted acquiescence, acquired the force of a tacit and common consent...4

In this paper, when anthropological statements are being made, we use the term 'custom' to mean rule-governed practice supported by tradition, and 'customary law' to mean the rules per se. This definition of custom has much in common with vernacular meanings of custom, which tend to include the practices themselves, as well as the rules governing the practices.

Customary laws do not have to be stated in the literate jurisprudence and legislation of formal state institutions to be recognizeable and to function as "law". Furthermore, even in state systems, there are extensive areas of social life ordered only by the rules of custom, with little recourse to formal, written laws, or recourse only as a last resort. As one writer expresses a view widely held in anthropology:

> ...law exists where it is found that reasons, conventionally known and approved, are needed for adverse treatment of others. The methods for ascertaining the nature of the convention, for deciding whether it has in any particular case been infringed, and of visiting infringers with consequences are, of course, most interesting, and differ widely among cultures. However, it is the existence of reasons themselves which indicates the presence of law.5

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4. Henry Campbell Black, Black's Law Dictionary: Definitions of the Terms and Phrases cf American and English Jurisprudence Ancient and Modern, Fifth Edition, West Publishing Company, St. Paul Minn., 1979, p. 347.
5. Alex Frame, Colonizing Attitudes Towards Maori Custom, New Zealand Law Journal (March), pp. 105-110.

The emphasis on law as rationale for adverse treatment in upholding convention, however, should not lead us to overlook the fact that there are also typically a range of positive inducements to conform to social rules -- moral sentiment, reputation, complementary rights and obligations. Indeed, no social order could long endure if conformity to its laws depended only on negative sanction. A form of recognition of this fact on the part of legislatures and courts is that "good law" is law which keeps in step with evolving public standards -- with existing cultural practice. "Good law", moreover, is law which is capable of enforcement -- and this becomes problematic in the extreme if formal law contradicts general customs and usages.

Our understanding of 'custom' and 'customary law' is greatly enhanced if we locate custom in the wider spectrum of cultural practice. This is a particularly important to our definitions, because both aboriginal people and mainstream Canadians are apt to use "customs", "traditions", "culture" somewhat interchangeably. Cultural practice includes: 1. social practice at the level of explicit discourse, the deliberate formulation of rules, values, norms, traditions, models, institutional charters and 2. the implicit axiomatics of culture, the largely unconscious "grammar" of cultural practice, analogous to the grammar of a language. Most speakers are incapable without linguistic training of explicitly formulating the rules of their native language, although they are perfectly capable of conforming to the rules, and know when a rule has been broken. Similarly, the premises of culture are often below the surface of consciousness, simply implicit or assumed (the practical aspect of this level of culture has been extensively

analyzed as "the habitus" by Bourdieu 1977).[6] In any culture, there is an intimate and ongoing relationship between dimensions 1. and 2. Custom in the narrower legal sense of 'rule' (customary law) pertains to level 1. only. Custom in the broader sense of a repetitive practice partakes of both levels.

In the European tradition, the relationship between general custom and the written law is well known. In the course of the historical evolution of European states, general custom has been a source of common law by judicial acceptance, and has frequently been recognized in legislation. Hence, there is some organic and functional cross-over between the levels of cultural practice outlined in the preceding paragraph.

But laws and institutions imposed by alien authority bear no inherent relation to the cultural premises of aboriginal people. Alien authorities can do little to change adherence to the largely unconscious axiomatics of aboriginal culture. It is this disjuncture -- between imposed regimes and both the explicit rules and implicit axiomatics of aboriginal culture -- that largely accounts for the inability of state authorities to make "good law" by aboriginal standards. Hence, the alienation of aboriginal people, and the failure of the state to achieve legitimacy among them.

The denial of aboriginal culture through the imposition of alien rules has been particularly destructive for peoples who governed themselves at band and tribal levels of corporate integration. For these peoples, custom and tradition were "the organizing and regulating force for group order and

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6. Pierre Bourdieu, Outline of a Theory of Practice, translated by Richard Nice, Cambridge University Press, Cambridge, 1979.

endeavour".7 Authoritative forms of social control, and consent to the hierarchical, centralized state authorities was not only foreign but opposed to indigenous institutions and values of social reciprocity, personal autonomy, and consensus politics.

A further point that must be considered in connection with a conceptual definition of custom is that customary practice is not static. A moment's reflection tells us that customary practice is not the stereotypic repetition of identical acts; repetition necessarily involves innovation, as new historical circumstances are encountered. Conversely, innovation cannot spring from a vacuum -- it is only through the reworking and elaboration of custom that innovation occurs. Change which maintains this dynamic of cultural continuity/innovation, however much it may alter custom in the long run, is socially constructive. But forced policies which prevent a people from bringing custom and tradition to bear on novel circumstances, which prevent a people from responding in a culturally coherent fashion, are invariably destructive.

A legal distinction capable of acknowledging the genesis of custom in the dynamics of social practice is the distinction between 'usage' and 'custom':

> "Usage" is a repetition of acts, and differs from "custom" in that the latter is the law or general rule which arises from such repetition; while there may be usage without custom, there cannot be a custom without a usage accompanying or preceding it. 8

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7. Ibid, p. 545.
8. Black, op cit, p. 347.

As social practice alters usage, customs and traditions develop and evolve.

1.2 TRADITION

Tradition is invoked, in both literate and non-literate societies, as a powerful source of reasons in support of custom, and as a powerful source of legal reasons specifically. A vernacular definition of tradition, partially valid and partially in need of qualification, is again a useful point of departure:

> ... the handing down of statements, beliefs, legends, customs, etc. from generation to generation, especially by word of mouth or by practice.9

It is the "especially by word of mouth" aspect that needs qualification; traditions are, of course, no less important in literate cultures than in oral cultures, although literate record of a tradition may render it less flexible in some respects. The other aspect of the vernacular definition concerns connectedness through the generations; witness the following anthropological definition:

> Traditions are values, beliefs, rules, and behavior patterns that are shared by a group and passed on from generation to generation as part of the socialization process10

This definition is consistent with a legal one:

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9. Random House Dictionary of the English Language.
10. Hunter and Whitten, op cit, p. 391.

> Tradition...The aggregate of beliefs, customs, habits, and practice which develop in a particular culture and, by being continued, give it continuity. Legal institutions and at least some rules of law, particularly of customary and common law, are part of a country's traditions. Also in it are accepted attitudes, practices, and ways of thinking and working about law, which may have no other authority than that they have developed in time and are part of the tradition...11

Central to the preceding legal definition is the notion that tradition develops or evolves. Like custom, tradition is understood by contemporary anthropology to be involved on both sides of the repetition/innovation dialectic. One tends to think of tradition as conservative, because it invokes the authority of past forms of social practice to rationalize and justify current practices. But very different practices can be covered by the same traditional norm. In stateless societies regulated by custom, appeals to tradition are meant to maintain the social constitution. But the maintenance of that constitution may itself be seen to require modifications in social practice vis-a-vis novel historical circumstances, and tradition can as easily be invoked to authorize radical innovation as to maintain established social arrangements.

Legal definitions of tradition explicitly incorporate the notion of tradition as supportive of custom and usage:

> Tradition... Past customs and usages which influence or govern present acts or practices12

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11. The Oxford Companion to Law, p. 1230.
12. Black, op cit, p. 1340.

Hence, tradition bears on current practices, informing these latter as "repetitive" usage which is yet potentially innovative, and innovation in turn inflects the field of custom and tradition for future practice.

When communities make elements of their customary rules and procedures explicit as models for collective practice (as in charters for self-government), they bring the authority of tradition to bear on novel and changing circumstances. It is the normal course of cultural development and change. A people's freedom to respond to historically novel circumstances in terms of their own perceived traditions is what guarantees meaningful and viable cultural continuity. Far from invalidating or undermining tradition, adaptation to a changing present is what gives tradition living voice.

Tradition assumes the voice of resistance in circumstances of forced change and externally imposed institutions. The human casualties and social costs associated with such circumstances are typically very high -- alienation, despair or defiance, and denial of the legitimacy of external authority.

2.0 EXPERIENCE IN COMPARATIVE WORLD AREAS

In examining the experience elsewhere of aboriginal peoples surrounded by immigrant European majorities, one finds a growing literature relating to attempts by state legal/political systems to accommodate: 1. aboriginal custom in the general law; and 2. forms of aboriginal self-

government, actual and contemplated. But there is little experience integrating both aspects; with custom as the basis for aboriginal self-government. There are constitutional instruments from earlier colonial periods, such as the Treaty of Waitangi in New Zealand, which explicitly and extensively recognize Maori custom as integral to law and autonomous government in Maori areas.13 But the simultaneous denial of aboriginal political institutions and customary law was the corollary of repressive policies of assimilation which dominated during much of the 19th and 20th centuries in Australia, Canada, New Zealand, and the United States.

In the last twenty years, it would seem that provisions for customary law and aboriginal self-government have been pursued by state authorities as separate remedies for the manifest problems created by past treatment of aboriginal peoples. Australia's accommodation of aboriginal customary law is exemplary of the the first approach; the United States' measured accommodation of the inherent sovereignty of Indian Tribal Governments is exemplary of the second. Aboriginal people, for their part, are saying that legal and political aspects of self-determination go hand-in-hand, and that custom and tradition are basic to both.

The history has been somewhat different in new Third World states. In many of these areas, the British policy of indirect rule involved the deliberate maintenance and adaptation to colonial administration of customary forms of government, a policy which predominated in the more densely populated territories of agricultural indigenous peoples.

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13. Alex Frame, Maori Affairs: Colonizing Attitudes Towards Maori Custom, New Zealand Law Journal, March 1981, pp. 105-110.

With decolonization and the emergence of new states governed by indigenous populations, some have made customary law the basis of their new general law. There are moves in this direction, as well, by states where indirect rule was not the colonial policy, as in Papua New Guinea.

There are important parallels between the experience of many Third World states and our own, however. Third World states, too, grapple with issues of tribal autonomy and differences in the customs and traditions of peoples within their boundaries. A state, after all, is a level of corporate integration sui generis; its constituent peoples may have been self-governing only at band or tribal levels of integration prior to -- and sometimes during -- European colonization. Hence, notwithstanding the fact that the state authorities of, say, Papua New Guinea are now themselves indigenous people, they face many of the same issues in responding to demands for the autonomy of customary and traditional forms at village and tribal levels that Australia, Canada, New Zealand and the United States also increasingly face.

2.1 POLICY APPROACHES TO CUSTOM AND TRADITION

We can summarize six general approaches by state legal and political authorities to the customs and traditions of aboriginal peoples. One approach or another usually dominates in a given country and historical period, although elements from different approaches can co-exist:

1. Imposition of foreign legal systems/institutions of government, involving wholesale attempts to replace indigenous institutions and laws, by force or by inducement (Australia, Canada, New Zealand during long periods of assimilationist doctrine until as recently as 1970).

2. The policy of so-called "indirect rule", common in British colonial jurisdications with aboriginal, usually agricultural majorities, where tribal laws and institutions continued as the major forms of social control.

3. The comprehensive incorporation/codification of customary law into the general law of decolonizing states (the approach of certain African countries, and one recommended by the Law Reform Commission of Papua New Guinea).

4. "Sensitization" of the general law of foreign majorities to aboriginal institutions and customs, through overtly defined rights in statute and/or accommodation in judicial process, always within the framework of the general law and subject to "basic" human rights. Central authorities claim ultimate discretionary power (the Australian approach since the 1960's).

5. The implicit accommodation of custom and tradition, or its explicit recognition in general principle via treaties and legislation having constitutional status. Here the effect is to enable a degree of autonomy of aboriginal custom without specifying/codifying it in detail (an approach reflected to some extent in the early

constitutional history of New Zealand and Canada, and one being rediscovered in the context of modern aboriginal claims).

6. The recognition of sovereign powers of aboriginal authorities on aboriginal lands (as endorsed by judicial interpretations of Indian tribal powers in the United States, yet susceptible at some level to interference by Congress -- a "domestic dependent" sovereignty). This approach, like '5.', above, creates room for Indians themselves to decide the extent to which custom and tradition will enter into evolving institutions of government and law enforcement.

Of these approaches, 4., 5., and 6. are those most capable of achieving reform with respect to the aboriginal rights in Australia, Canada, New Zealand, and the United States. Since the mainstream institutional development of each of these countries has flowed from British traditions, measures adopted in one are of particular interest as models for the others. Aboriginal peoples in these countries increasingly borrow from each other in formulating strategies for self-determination.

2.2 KEY LESSONS FROM INTERNATIONAL EXPERIENCE

Some key lessons can be derived from experience internationally:

1. The support of aboriginal custom and tradition is a policy which has considerable popularity with non-aboriginal, as well as aboriginal citizens in "liberal democracies". Perhaps the most striking example is legislation aimed at restoring aboriginal lands in Australia. Aboriginal rights in Australia are supported by far weaker legal and constitutional precedents than in Canada or the United States. Yet the Australian Government's statutory recognition of the rights of aboriginal clans to territories defined by sacred sites has, in many cases, resulted in the restoration of more complete regulatory and economic rights in traditional lands than those obtained by Indians in Canada.

2. The statutory definition or "codification" of custom and tradition, however, can have the effect of distorting the operation of custom and tradition on-the-ground. Codification lifts custom out of social context and may "fossilize" an inappropriate form -- particularly so when translation into a foreign cultural paradigm is involved.

3. Codification of aboriginal custom and tradition by the state can run counter to the objective of enhanced self-determination. Codification could remove from aboriginal people the "control", interpretation and application of custom and tradition, which could potentially be just as alienating as the imposition of foreign rules.

4. As outlined in 1.1, above, custom and tradition in band and tribal society involves dynamic processes of political consensus and collective adaptation to concrete histories.

The aim of legislation should therefore be to open zones within which custom and tradition may recover and develop full, free, and flexible functioning, according to aboriginal design.

3.0 CUSTOM, TRADITION AND SELF-GOVERNMENT IN CANADA

3.1 HOW CUSTOM AND TRADITION HAVE HISTORICALLY BEEN OPERATIONALIZED IN CANADA

There are extensive references to custom and tradition in a variety of Canadian legislation, policies, treaties and judicial pronouncements beginning very early in colonial history and continuing to the present. A review of these is central to the legal rationales for the operationalization of custom and tradition as forms of self-government.

3.1.1 In Legislation

1) Early Indian Acts

Certain provisions of the early Indian Acts recognized explicitly or implicitly the custom of the Band. Examples would be:

- definition of "Indian" (until 1951)
- the holding of meetings

The Indian Act R.C.S. 1886 c. 43 contained the following definitions:

> "2.(h) The expression 'Indian' means -
> First. Any male person of Indian blood reputed to belong to a particular band;
>
> Secondly. Any child of such person;
>
> Thirdly. Any woman who is or was lawfully married to such person;"
>
> "2.(i) The expression 'non-treaty Indian' means any person of Indian blood who is reputed to belong to an irregular band, or who follows the Indian mode of life, even if such person is only a temporary resident in Canada;"
>
> "128. If any band has a council of chiefs or councillors, any ordinary consent required of the band may be granted by a vote of a majority of such chiefs or councillors, at a presence of the Superintendent General or his agent."

2) **Present Indian Act**

> Section 2(1) 'child' includes a child born in or out of wedlock, a legally adopted child and a child adopted in accordance with Indian custom;

Section 2(1) 'council of the band' means
(a)....
(b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

Section 10 Band control of membership - a band may adopt membership rules that incorporate or reflect the custom of the band in the area of membership or citizenship;

Section 31(3) trespass on a reserve - existing (customary) remedies for bands are preserved;

"31(3) "Nothing in this section shall be construed to impair, abridge or otherwise affect any right or remedy that, but for this section, would be available to Her Majesty or to an Indian or a band. R.S., c. I-6, s. 31; R.S., c. 10 (2nd Supp.), s. 65."

Section 74(1) implicitly acknowledges customary elections until Minister otherwise decides - (see earlier Acts).

Section 88 - Can be said to operationalize custom or tradition insofar as they are recognized or protected through treaty (see Simon; Sioui).

3) Cree/Naskapi (of Quebec) Act

The Cree/Naskapi (of Quebec) Act reflects the principles which the Crees felt were important to their system of self-government and land tenure. It sets out the systems procedures, powers and responsibilities with which they feel comfortable. In many cases new legal techniques have evolved in order to accomodate and reflect Cree customs and traditions.

At the same time, the Act is forward looking in providing for a large range of possibilities for the use of local government powers to deal with concerns which may arise in the future.

An examination of the options considered and chosen during the negotiations of this legislation provides an idea of how Aboriginal peoples can work with legislative instruments in incorporating customs and traditions.

i) Options considered concerning the overall format of the legislation to be enacted.

1. The negotiators considered the option of drafting a complete Cree/Naskapi Act including all detailed requirements important for the powers and functioning the Cree and Naskapi self-government.

The negotiators considered placing all of the details, e.g. all procedural requirements, requirements for notices, time delays etc. directly into the legislation.

This option was eventually rejected by the negotiators, first, the legislation became unwiedly and much too long, but, more importantly, this approach did not leave sufficient flexibility to deal with differences between the nine communities concerned, and locked them into a series of procedural and other requirements which, it was felt, could prove overly burdensome and inefficient and which could lead to a constant series of procedural amendments being required on relatively minor points.

2. The Negotiating Committee considered the adoption of framework legislation in conjunction with individual charters for each community.

The negotiators considered the option of enacting legislation which would sketch the broad outlines of the powers and responsibilities of Cree and Naskapi self-government and which would be completed for each community in a separate charter which would fill in the appropriate details.

This option was ultimately rejected because the legal status of the charter enacted by the Governor-in-Council or the Minister of Indian Affairs was uncertain.

In addition, when working through this type of system to see how it could be put into practice, it became clear that it was a complex system because it set up four possible forms of legislation (the Act, the Charter, regulations and by-laws). The relationship between these four forms of legislation was uncertain and it was felt that requiring each government to deal with four separate forms of legislation was

overly complicated and unjustified in the circumstances, particularly as it was felt a large number of subject matters could be dealt with through expanded by-law powers.

3. The Negotiating Committee considered the enactment of legislation setting up certain minimum requirements, when necessary, and including extensive by-law powers and some regulatory powers.

This third option was the one eventually adopted for the Cree/Naskapi Act because while it ensures that certain minimum standards are met, it allows each band to deal individually with its own procedures and priorities. The large range of by-law powers enables the bands to act in a variety of areas should they wish to do so.

Regulations enacted by the Governor-in-Council can provide fall back procedures for specific cases in which the bands do not enact by-laws where required e.g. election procedures.

this option is explained more fully below.

ii) Options considered for certain basic provisions of the Act.

a) Elections

The James Bay and Northern Quebec Agreement (paragraph 9.0.1(b) and the Northeastern Quebec Agreement (paragraph 7.1.2) provide that the community shall have the option between electing

their chiefs and councillors according to either a formal or customary election system. These paragraphs also require that if a community opts for a customary election system, the custom shall be set out in a by-law and must be approved by the Minister. This was deemed necessary, at the time of the negotiation of the Agreements, in order to ensure that there would be no conflict between the provisions of the custom system and the corporate status of the band. (See below for the approach in the Act)

1. No standards for enactment of band by-law on elections.

This first option would have allowed a band to enact any type of election by-law it chose. It was assumed that if the by-laws in question were unfair or discriminatory, the Minister would not have approved it.

A potential problem was foreseen, however, in that a band might enact a by-law which was acceptable to the Minister which did not cover some unforeseen circumstance of subject matter. In this case, because the band opted for a customary election by by-law, the regulations would not apply, and serious doubt could be cast upon the legitimacy of the council.

2. Band free to enact by-laws with regulations enacted by the Governor-in-Council acting as supplementary provisions.

In this option, it was foreseen that, in order to avoid possible consequences of the above-mentioned situation, the regulations by the Governor-in-Council could serve as supplementary provisions which would fill in any gaps left by the by-law enacted by the band.

This option was rejected because of the fact that the regulations enact quite formal election procedures and that if one were obliged to read both the band by-law and the regulations together in order to decipher the election system there could be major problems of interpretation which, again, would cause confusion and possible serious consequences.

3. Minimum standards set out in the Act for the passing of an election by-law.

This option is the one which has been adopted. The provisions in the Cree/Naskapi Act provide, firstly, that each elector is entitled to one vote and also provide for the filling of vacancies in office and certain other problematic areas such as contestation of elections.

Under this system, the band may enact its by-laws setting out the custom of the band with respect to elections but this by-law must provide for or cover a certain number of subject matters such as notices, the number of positions of council members, the length of the term of office of the council, the method of election of the council members, the means by which an individual is named deputy-chief, nomination procedures and the recording and certification of election results. As long as these subject matters are covered in the band by-law, the Minister must approve the by-law. In addition, the election by-law must be approved at a meeting of the band members at which at least 20% of the electors were present.

This option allows the band to choose its election system incorporating custom while at the same time ensuring that important features of any election system will be discussed and included in the by-law and that no important gaps will be left in the system.

b) Participation of band members in important decisions.

1. The negotiators considered the option of having the band council act in the name of the band on all matters.

In this option, the band council would be elected and would act in the name of the band in all decisions. This option was rejected as it does not reflect either the tradition of the Cree and Naskapi people or the reality of the way in which decisions are actually made in the Cree and Naskapi communities.

2. The negotiators considered placing the requirement in the Act that the band be consulted or have the power to make decisions on certain matters as well as the band having a general overide on any decisions of the council.

In this option, the band members would have the power to make certain decisions and the band council would have the power to make other, less important decisions. The band members would have the power to overide the council on any decisions which the council might be empowered to make.

This option was rejected as it might have led to a situation in which one was never sure whether a decision made by the council was final thereby causing potentially serious difficulties particularly with respect to the rights of third parties.

3. The negotiators considered specifying that band members were to approve certain types of decisions while leaving the council free to make other decisions.

This option was the one finally chosen by the negotiators. In the Cree/Naskapi Act it is clearly specified that certain types of decisions (particularly those relating to the disposition of interests in land) and the enactment of certain types of by-laws such as the election by-law and hunting, fishing and trapping by-laws (those dealing with obvious areas of custom or customary law) are subject to approval by band members. The Act provides for minimum quorums to be present at band meetings when these types of decisions are made. The quorums provided for in the Act are the result of extensive consultations held in the Cree and Naskapi communities.

The band may, by by-law, raise the minimum quorums specified in the act for any given decision and may also require that certain decisions which are not normally subject to approval by band membership may become subject to this approval if the band by by-law so decides.

This option guarantees that the traditional and present practice of submitting important decisions to band membership will be continued while at the same time allowing a certain amount of flexibility in regard to the quorums required to approve such decisions as well as the nature of the questions to be submitted to the band members.

> It also ensures, however, that once the decision is validly made by council, it is a binding decision, and the rights of third parties are protected.

These provisions of the Act dealing with successions incorporate custom (s. 174).

These provisions incorporate notions of customary adoption, marriage and disposition of property at death.

S. 174:

"Child" includes an adopted child, where the adoption

> (a) was done in accordance with, or is recognized by, the laws of the Province,
>
> or
>
> (b) was done in accordance with Cree or Naskapi custom;

"Consorts" means

> (a) a man and a woman who are married and whose marriage was solemnized in accordance with, or is recognized under, the laws of the Province, or
>
> (b) an unmarried man and an unmarried woman who live together as husband and wife, taking into account Cree or Naskapi custom;

S. 181 - Disposition of traditional property.

"181(1) Where a Cree beneficiary or Naskapi beneficiary dies intestate leaving traditional property, the family council of the deceased shall meet within one year of his death to decide on the disposition of his traditional property.

(2) The family council referred to in sub-section (1) may dispose of the deceased's traditional property in accordance with its decision, and may appoint a willing individual to administer the deceased's estate accordingly.

Part XVIII - Administration of Justice

These sections of the Act refer to Section 18 of the James Bay and Northern Quebec Agreement - Administration of Justice (Crees).

Section 18 of the Agreement contains a number of references to the "customs, usages and way of life" of the Crees. For example:

"18.0.7 The Minister of Justice of Québec shall designate one or more judges or other persons required to dispense justice in the "judicial district of Abitibi". The said judges or persons must be cognizant with the usages, customs and psychology of the Crees.

18.0.9 Justices of the peace, preferably Crees, are appointed in order to deal with infractions to by-laws adopted by Cree local authorities and other offences contemplated in section 107 of the Indian Act. These appointments are subject to the approval of the interested Cree local authority.

18.0.15 The rules of practice for the "judicial district of Abitibi" must take into consideration the particular circumstances of the district, the customs, usages and way of life of the Crees in order to facilitate the administration of justice and render justice more accessible to the Crees.

(Similar provisions are found in Section 20 of the James Bay and Northern Quebec Agreement Administration of Justice - Inuit.)

sec. 201 provides that a person's mark constitutes a signature.

Custom and tradition is recognized and given effect in a number of Quebec Statutes adopted pursuant to the James Bay and Northern Quebec Agreement. Several examples follow.

The Act respecting hunting and fishing rights in the James Bay and New Quebec territories, R.S.Q. c. D-13.1 embodies the Cree and Inuit customs and traditions respecting the harvesting of wildlife. Specific mention of custom is found in the Act.

Section 19 of the Act defines family as follows:

> "The word "family" is used in a broad sense and means persons allied or related by blood, or by legal or customary marriage or adoption."

The James Bay and Northern Quebec Agreement (1975) and the Northeastern Quebec Agreement (1978) and the legislation enacted pursuant to them recognize and protect the prevailing system of Cree and Naskapi traplines both through specific reference to the exercise of rights and the general incorporation of the indigenous systems of land tenure.

In the James Bay and Northern Quebec Agreement (1975), specific recognition of the right to harvest includes the exercise of the right over the entire Territory where the activity is physically possible (24.3.5) at all times of the year (24.3.10); the right to possess and use all equipment reasonably needed to exercise that right (24.3.12); the right to travel and establish such camps as are necessary to exercise that right (24.3.13); the use of present and traditional methods of harvesting (24.3.14); and the right to possess and transport within the Territory the products of harvesting activity (24.3.15). The right to harvest is not subject to the obtaining of permits, licences, or other authorizations (24.3.18).

The incorporation of indigenous Cree and Inuit land tenure systems is accomplished through general language, although somewhat more specific in the case of the Crees. The system of Cree traplines and the disposition of the beaver reserves allocated to the Crees are guaranteed to continue unless otherwise agreed by the interested Cree community or communities (24.3.25). No change may be made without the consent of the Cree community concerned.

Of considerable importance is the fact that "Cree trapline" is defined in the Agreement with reference to the traditional Cree system, not to the government system (24.1.9). The Agreement, therefore, recognizes the Cree traditional system, not a government-established one. It defines "Cree tallyman" (principal trapper) as a person recognized by the Cree community as responsible for the supervision of harvesting

activity on a Cree trapline (24.1.8) and "Cree trapline" as an area where harvesting activities are by tradition carried on under the supervision of a Cree tallyman (24.1.9). Of interest here is the balance established between individual and community. The special status of the individual derives from community recognition.

These provisions are repeated in the Quebec legislation enacted pursuant to Section 24 of the Agreement - An Act respecting hunting and fishing rights in the James Bay and New Quebec territories, R.S.Q. 1980, c. D-13.1 ss.1 [n] + [r], 24.

Section 24 of the James Bay and Northern Quebec Agreement and the related legislation contain significant provisions recognizing the customary practice of aboriginal groups to share or exchange territories without intervention by government. The Cree and Inuit beneficiaries may by mutual agreement and without government intervention modify the respective areas in which they have a right to harvest. The Quebec statutes in fact provides that the Crees and Inuit may, in accomplishing this, force an amendment to the legislation. Section 29 of the Act reads:

> "29. The Cree Regional Authority and Makivik Corporation, after consulting the Coordinating Committee, may from time to time by mutual agreement agree on modifications to be made to sections 11, 12, 13, 14 and 15. These modifications must not affect the Northeastern Québec region nor prejudice the exercise of the rights provided by this Act for the Naskapis.

Any modifications so agreed to must be for reasons related to the actual or anticipated distribution and population size of wildlife species or to the use of wildlife resources by Native people or non-Natives or access to or the availability of wildlife resources for Native people or non-Natives.

The Government shall take the necessary measures to give effect to such modifications."

Another example in Quebec legislation would be An Act respecting Income Security for Cree Hunters and Trappers who are Beneficiaries under the Agreement concerning James Bay and Northern Quebec, R.S.Q., c. S-3.2.

Several definitions in the Act recognize specifically native culture and tradition:

"1.(c) "activities for the development of the territory" means activities attached to the traditional culture and way of life of the Natives which are connected with the management of the environment and the development of the resources of the territory and with the maintenance of optimum biological productivity, or with training programmes which fit with the activities contemplated in the programme;"

(j) "consort" means a person who lives with another person, as husband and wife, taking into account native customs;

(m) "family" means the consorts, with or without dependent children, or a person who is eighteen years old or over with one or more dependent children, taking into account native customs;"

Recent proposed amendments to this legislation, agreed to by Quebec representatives and awaiting tabling in the National Assembly specifically recognize and operationalize the harvesting customs and traditions of Cree communities and the right of the Cree communities to determine in accordance with those customs who is practicing harvesting and related activities as a way of life. The proposed texts read:

> "31.1 A Cree community within the meaning of An Act respecting Cree, Inuit and Naskapi Native Persons (R.S.Q., chapter A-33.1) may set up a local committee to prepare a list identifying persons who are recognized by community custom to be practicing harvesting and related activities as a way of life in compliance with the harvesting traditions and rules of the community.
>
> 31.2 A local committee is made up of not fewer than three nor more than seven members. They are chosen for a fixed period in accordance with the custom of that community by and among the adults who have previously been beneficiaries of the program. However, one member may be designated by the Council of the Band within the meaning of the Cree-Naskapi (of Quebec) Act (Statutes of Canada 1983-84 c. 18) from among its members.

3.1.2 In Government Policy

In the domain of federal policy, there was little positive endorsement of aboriginal custom and tradition in Canada until the 1970's, after the assimilationist "White Paper" of the Trudeau government had been laid to rest. Aboriginal customs and traditions became policy values in the context of comprehensive and specific claims settlements from the mid-1970's on into the 1980's. Cultural preservation and self-determination have increasingly been a stated goal of federal policy on aboriginal self-government.

This association of self-government with preservation and enhancement of aboriginal culture is not incidental; the greater the powers and the wider the scope of aboriginal governments, the better able they will be to safeguard (and embody) the cultural institutions, values, and culturally-informed aspirations of their constituents. The success of federal policy in accommodating aboriginal "custom and tradition", therefore, is directly related to the extent of aboriginal government powers the policy is prepared to recognize and support.

Aboriginal peoples do not believe that constitutionally subordinate "self-management" arrangements, subject to veto by non-aboriginal governments, are capable of assuring the continuity and development of their cultures. In this judgement, they were supported by the all-party Special Parliamentary Committee on Indian Self-Government, chaired by Keith Penner, which reached its conclusions after exhaustive consultation with Indian grassroots and leaderships.[14]

The Committee recommended a separate order of Indian First Nations Governments with the following requisite powers and jurisdictions:

> self-government would mean that virtually the entire range of law-making, policy, program delivery, law enforcement and adjudication powers would be available to an Indian First Nation Government within its territory.[15]

The Special Committee emphasized as a primary principle:

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14. Canada, Indian Self-Government in Canada: Report of the Sepcial Parliamentary Committee, Supply and Services Canada, Ottawa, 1983.
15. Ibid, p. 63.

> "the importance of Indian control in areas central to the cultures of the First Nations....in some cases only Indian control of legislation and policy would ensure the survival and development of Indian communities."[16]

And again, later in the report:

> "there are matters that must be controlled by Indian communities to ensure their cultural survival...By exercising control over these matters, Indian people could ensure that future generations were able to preserve and enjoy their culture and heritage.[17]

The areas of legislative jurisdiction required by aboriginal governments to meet this goal of culture preservation included, in the Committee's view, lands and resource use, education, family relations, health, justice and law enforcement, among others.

In its response to the Penner Committee Report, the Government of Canada committed itself to recognizing, in legislation and by other means, Indian culture, heritage and institutions:

> "This legislation would be based on a reaffirmation of the Government's commitment to the preservation and enhancement of Indian culture and heritage, including Indian institutions, and the acceptance of the Government's new responsibilities for Indian First Nations on Indian lands. In addition, Indian First Nation Governments themselves would have substantial responsibilities to their members." (our emphasis)[18]

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16. Ibid, p. 27
17. Ibid, p. 35
18. Canada, Response of the Government to the Report of the Special Committee on Indian Self-Government, Supply and Services Canada Ottawa, 1984, p. 4.

In its response, the federal government also recognized that Indian nations were historically self-governing, that the erosion of Indian self-government over time has undermined conditions in Indian communities and has not benefitted Canadians in general, and that to reverse this syndrome, substantial restructuring of the relationship between Indian people and the Government of Canada is required.

Four avenues for giving effect to Indian self-government were identified in the federal government's response: constitutional proposals, general framework legislation, other more specific legislative proposals, and improvements under existing legislation. There are key references under these headings endorsing Indian First Nation governments' power to act in the preservation of their culture, and reaffirming the federal government's "committment to the preservation and enhancement of Indian culture and heritage, <u>including Indian institutions</u>...(our emphasis)"[19]

On the topic of general framework legislation, it is further stated:

> "....legislation must be framed so as to allow Indian First Nations to evolve within Canada in a way that is consistent with their own culture, history and philosophy..."[20]

Clearly, the ability of First Nation Governments to structure themselves according to Indian institutions and traditions which are capable of evolving in their own right is a central value in federal policy at this stage.

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19. Ibid.
20. Ibid.

In June 1984 the government introduced Bill C-52 - An Act relating to self-government for Indian Nations that proposed to replace the Indian Act for those Indian nations wishing to be recognized under the new legislation. The bill is instructive as an indication of the kind of measures that are politically feasible in the 1980's. Bill C-52 was the Liberal Cabinet's concrete answer to the objective of general framework legislation.[21] The legislative powers set out in the Act for Indian nations went well beyond Indian Act provisions and included areas where customary or traditional law could clearly operate.

Although time did not permit the Bill to be adopted by Parliament before the end of the session and the calling of an election, the content of the Bill was approved by Cabinet, the Department of Justice and Department of Indian and Northern Affairs as well as the central agencies and represented an advance in the recognition of Indian government and institutions.

Examples follow:

1. The preamble includes statements such as the following:

> "AND WHEREAS Parliament and the government of Canada are committed to the preservation and enhancement of Indian rights and culture and to the economic development of Indian communities;
>
> "AND WHEREAS Indian communities in Canada were historically self-governing;"

2. "Indian Nation" is defined as not only bands but also:

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21. Government of Canada, Bill C 52: An Act Relating to Self-Government for Indian Nations, first reading, June 27, 1984.

"(b) any other Indian communities with a common language, culture and history, including any nation or tribe of Indians referred to in the Royal Proclamation of October 7, 1763;"

3. The structures of Indian Nation Governments are not prescribed in the legislation but are left to the constitutions of the First Nations (section 6, section 14);

4. The legislative powers for Indian nations set out in the Act went well beyond Indian Act provisions and included areas where customary or traditional law could clearly operate. Examples are found at section 19 of the Bill paragraphs j), k) and l):

"(j) the administration of justice within the boundaries of the lands of the Indian Nation, including

(i) the constitution, maintenance and organization of judical and quasi-judicial bodies with jurisdiction in relation to laws of the Indian Nation, and

(ii) the establishment and maintenance of jails, the provision of police services and prosecutions;

(k) family law in relation to members of the Indian Nation permanently resident within the boundaires of the lands of the Indian Nation, including marriage, separation, divorce, legitimacy, adoption, child welfare and guardianship of minors and incompetents;

(l) property within the boundaries of the lands of the Indian Nation, including rights in property, descent of property, expropriation, and access to and residence on lands of the Indian Nation;"

The report of the "Coolican" task force on comprehensive claims policy is a more recent document which affirms the central importance of self-government in encouraging "the development of aboriginal communities as strong, confident, and distinctive societies within confederation (our emphasis)".[22] Further on:

> "Aboriginal peoples should exercise the greatest possible control over matters that directly affect the preservation and enhancement of their culture...in principle, aboriginal people should be free to determine the form of government best suited to them; however, discussions between governments and the aboriginal people will be necessary to determine how the structure of aboriginal self-government would relate to the larger Canadian political system (our emphasis)."[23]

Ministers of Indian Affairs in the current federal government have abandoned the objective of general framework legislation on aboriginal government, seeking instead to tailor self-government agreements and legislation on a "community-by-community" basis:

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22. Canada, Living Treaties: Lasting Agreements, Report of the Task Force to Review a Comprehensive Claims Policy, Minister of Indian Affairs and Northern Development, Ottawa, 1985, p. 35.
23. Ibid, pp. 71-72.

> "The federal government's policy approach to self-government is to acknowledge the desire expressed by communities to exercise greater control and authority over the management of their affairs. This may result in the establishment of different types of institutions in different parts of the country which reflect the particular circumstances of each distinct aboriginal group or community. The objectives of the government's policy on community self-government are based on the principles that local control and decision-making must be substantially increased; that flexibility is needed to recognize diverse needs, traditions and cultures; and that greater accountability to community members must be achieved. Any particular approach to community self-government must respect existing constitutional principles and be consistent with government practices (our emphasis).
>
> ....In keeping with the federal government's policy on self-government, aboriginal people themselves will play the major role in defining the content of self-governing arrangements....Legislation will be required to establish the scope of law-making authority granted to any new institutions or bodies.[24]

There are hints in the language now used by federal policy-makers of a retreat from the more aggressive recognition of Indian nations and governments that became common currency in the early 1980's. "First Nations" have been pruned down to "Indian communities", and "First Nation Governments" have been supplanted by "self-government arrangements". Without speculating on political motives, we find this rhetorical shift disturbing. Any dilution of federal commitment to autonomous aboriginal governments will inhibit the defence and development of aboriginal custom and tradition.

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24. Indian and Northern Affairs Canada, Comprehensive Land Claims Policy, Supply and Services Canada, Ottawa, 1987, pp. 17-18.

Second, cultural survival and development for most Indian nations is an issue which transcends the level of individual "bands" -- it is an "aboriginal-national" issue. As we point out in Section 4.2, the "Band" is only one level of corporate integration in Indian nations. While the current federal policy as stated does not preclude the negotiation of self-government "arrangements" with larger collectivities, in practice most Indian parties to self-government negotiations seem to be individual bands. Without recognition and development of self-government structures on a regional (aboriginal-national) scale, Indian nations are left divided and generally less able to marshall the material and political resources which are prerequisites of their survival as cultural systems.

Many First Nations have formal customary and traditional political institutions (potlatching, tribal councils, tribal confederacies, etc.) that connect their constituent "bands" regionally, and that are capable of being built upon. The language of Federal policy could better recognize and indeed invite the development of such systems if it retained "First Nations Governments" as the operative terminology. Certainly also, this would dignify the process from the aboriginal standpoint.

The success with which custom and tradition can be "operationalized" in policy depends heavily on the extent to which aboriginal rights in general are recognized and respected. Only aboriginal nations secure in their political authority and territorial integrity can be expected to achieve vigorous cultural continuity and development of custom and

tradition. Short of this, whole cultures will continue to incur losses well beyond the ability of current policies to counteract. Custom and tradition cannot be salvaged on a piecemeal basis; their survival and development depend on enhancing the overall position of aboriginal societies in the Canadian state -- constitutionally, governmentally, and territorially.

In the view of aboriginal leadership and many expert observors, there are signs that momentum toward these goals has diminished in Canada in the latter half of the 1980's; failure to achieve explicit constitutional entrenchment of aboriginal self-government; subordination of aboriginal interests to those of the provinces in the Meech Lake Accord; and meagre progress on comprehensive claims while industrial intrusion on aboriginal lands continues apace.

Policies adopted to promote custom and tradition in the context of self-government negotiations will be constructive if they strengthen the hand of First Nations in overcoming the aforementioned constraints of current 'realpolitik'. In this vein, it would be useful to take advantage of existing but relatively untested elements of the Constitution (see section 5.2, below) which certainly recognize cultural rights (if they recognize anything at all) and which could serve as rationales for operationalizing customary and traditional institutions of aboriginal government.

The federal government has the requisite powers vis-à-vis Indians and Indian lands to innovate in this domain, rather than wait for court challenges and decisions to provide definition. If it is objected that such initiative goes beyond "existing government practices", it can only be pointed out that no approach totally dictated by existing practice is going to fulfill current policy objectives regarding custom and tradition; it is precisely the point that custom and tradition have been inadequately recognized under existing government policy and practice -- or the federal government would not now be looking for ways to give increased scope to custom and tradition.

3.1.3 In Treaties and Lands Claims Agreements

The historic pre-confederation and post-confederation treaties are increasingly being seen as instruments through which Indian custom, traditions and institutions were either explicitly recognized or implicitly acknowledged to continue. On the Indian side there is little doubt that the understanding was that treaties were political, commercial or military arrangements or alliances to facilitate the continuation of Indian institutions, not terminate them.

As Michael Jackson has written:

> "Recent research undertaken by the Indian nations themselves, with the help of social scientists, has revealed some of the continuities between the treaty negotiations involving the Indian nations of western Canada in the late nineteenth century and the negotiations involving the Iroquois Confederacy in the previous century in the eastern colonies. As with the treaties negotiated in the eighteenth century with the Iroquois, the post-confederation treaties negotiated by the Indian

> nations of western Canada were viewed by them as establishing compacts to deal with the issues of territorial and political integrity within the framework of a protectorate relationship with the Crown".[25]

Professor Jackson emphasized the importance of the Indian understanding of the treaties and the treaty process:

> "As the result of the recent research conducted by Indian nations it has now become clear that the dissonance between the Indian understanding of the treaties and the government's understanding, as that is reflected in the text of the treaties, is directly related to the different legal conceptions about how agreements are negotiated, recorded and interpreted. For the Indian negotiators, who brought to the negotiations an oral tradition, it was the promises and discussions during the negotiations which were the centrepiece of the agreements. For the negotiators on the Canadian Government's side it was the written text of the treaty which determined its scope and meaning."[26]

The courts in Canada increasingly acknowledged the importance of the Indian understanding of treaties and the role of treaties in confirming and protecting custom and traditions.

The treaties prior to the contemporary land claims agreements are characterized by a general treatment of hunting, fishing, and trapping rights -- if indeed the subject matter is dealt with at all. The significant juridical development in recent years, however, has been an increasing recognition by the courts that lack of reference to hunting, fishing and

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25. Michael Jackson, Aboriginal Rights and the Constitution of Canada, Paper prepared for the Conference on Human Rights from a Canadian Perspective, Acadia University, Nova Scotia, October 3-4, 1983, at pp. 8-9.
26. Ibid, p. 10.

trapping in the treaties, or very general language concerning these activities, does not imply that rights relating to hunting, fishing, and trapping did not survive the treaty process. On the contrary, silence on the part of the treaty implies the continuation of the aboriginal rights unaffected by the treaty. This has been referred to as the "flow-through" of rights. Rights not addressed in the treaty are presumed untouched and "flow through" the treaty process. In the words of Mr. Justice Trainor of the Ontario Divisional Court in R. v. Taylor and Williams, [1980] 1 C.N.L.R. 83, affirmed by the Ontario Court of Appeal, [1981] 3 C.N.L.R. 114, at page 90:

> Aside from the question as to whether or not aboriginal rights were reserved in the treaty, it is also my opinion, that even in a situation where there is no treaty, or if a treaty remains silent with respect to aboriginal rights, such as native hunting and fishing, these rights that have existed from the beginning of time continue.

Indeed, courts have even maintained that the purpose and effect of treaties was to evidence grants by the Indian signatories to the Crown or the United States, not the reverse. Rights not granted by the Indian signatories were considered "reserved" by those Indians.[27]

The Court of Appeal of British Columbia in the R. v. Bartleman (1985), 12 D.L.R. (4th) 73, pointed with approval to the decision of Ontario Court of Appeal in Taylor and Williams. Mr. Justice Lambert, at pages 88-89, outlined the important findings in Taylor and Williams:

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27. See, for example, the U.S. Supreme Court judgment in State of Washington et al. v. Washington State Commercial Passenger Fishing Vessel Association et al. (1979), 443 U.S. 658.

> The Taylor and Williams case is particularly relevant here. The documents said that six chiefs of the Chippewa Nation, for the Chippewa Nation, with respect to a tract of land comprising 1,951,000 acres "do freely, fully and voluntarily surrender and convey the same to His Majesty without reservation or limitation in perpetuity". The document said nothing about hunting rights. But, during the discussions that led up to the creation of the treaty document, there was a discussion between the Deputy Superintendent-General of Indian Affairs, on behalf of the King, and the six chiefs and others, on behalf of the Indians. In response to a question about hunting, the Deputy Superintendent-General said: "The Rivers are open to all, and you have an equal right to fish and hunt on them." On the basis of the historical factual matrix and the evidence of the understanding of the meaning of the treaty held by the Indians from 1820 to 1980, the Court of Appeal of Ontario decided that the treaty confirmed the traditional and historic rights of the Chippewa Nation to hunt and fish for food, notwithstanding that nothing at all was said in the treaty document about hunting rights.

In regard to the issue before his court, Mr. Justice Lambert concluded at p. 89:

> I think that the third interpretation is the correct interpretation. That is, that the treaty itself confirmed all the traditional hunting rights; and that it did not set aside the hunting rights outside the ceded land, leaving them to be dealt with at some other time, in some other way. I think the conclusion I have reached is similar to the conclusion of the Ontario Court of Appeal in Taylor and Williams.

Fair, Large and Liberal Construction. In regard to specific provisions in treaties, there is little doubt now that the courts in Canada, led by the Supreme Court of Canada, clearly support the doctrine of liberal interpretation of treaty provisions in favor of the Indian signatories. The Supreme Court in Nowegijick v. The Queen, [1983] 1 S.C.R. 29, citing with approval United States jurisprudence, which has long supported liberal interpretation of Indian treaties[28],

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28. See, for example, Worcester v. The State of Georgia (1832), 31 U.S. 350.

stated through Mr. Justice Dickson (as he then was) at page 36:

> "It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In Jones v. Meehan, 175 U.S. 1 (1899), it was held that Indian treaties "must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians".

In the 1985 Supreme Court of Canada decision in the case of Simon v. The Queen[29], Chief Justice Dickson reaffirms the Court's commitment to a "fair, large and liberal" construction of treaties in favor of the Indians. Having concluded that the general language in the treaty under consideration constituted a positive source of protection against infringements on hunting rights, the Chief Justice stated at page 402:

> Such an interpretation accords with the generally accepted view that Indian treaties should be given a fair, large and liberal construction in favour of the Indians. This principle of interpretation was most recently affirmed by this Court in Nowegijick v. The Queen, [1983] 1 S.C.R. 29.

As a final general point, the effect of section 35 of the Constitution Act, 1982 should not be forgotten. Section 35, which affirms existing aboriginal and treaty rights of the aboriginal peoples of Canada, gives further significance to treaties. In the words of Mr. Justice Murphy of the Ontario District Court of the District of Manitoulin in R. v. Hare and Debassige, [1984] 1 C.N.L.R. 131, at pages 143-144:

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29. [1985] 2 S.C.R. 387.

> There is one further matter which I feel I may consider in determining how I should view the rights which I have found were given to the forefathers of the appellants in the Manitoulin Treaty of 1862. While there may have been some doubt in the minds of jurists regarding the extent and validity of the treaty rights of Indians as they were called upon to interpret them in earlier years, there can be no such doubt in the mind of anyone called upon to deal with those rights today. Section 35(1) of the Canada Act 1982 provides as follows:
>
> > The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> Subsection 2 of the Act brings the Indian people of Canada within the provisions of s-s.1. While the Canada Act does not create new rights for Indian people, it recognizes and affirms [emphasis added] existing rights, and in my mind at least, removes any doubt there may have been regarding the validity and efficacy of those earlier agreements or treaties entered into with the native people of Canada. In my view, those treaties should be treated with the same solemnity and seriousness as are treaties entered into with foreign sovereign states and as being as valid and binding as an Act of the Parliament of Canada. (In fact, s. 88 of the Indian Act in effect gives the treaties equal status with Acts of Parliament vis à vis Acts of the provincial legislatures.)

Although the judgment of Murphy J. was reversed on appeal on the grounds that the treaty right had been abrogated prior to the coming into force of the Constitution Act, 1982, Mr. Justice Thorson of the Ontario Court of Appeal confirmed the lower court's statements respecting the effect of section 35 and the manner in which treaty rights must be interpreted:

> ... as I read s. 35 any treaty right for which protection may be claimed thereunder must have been in existence on April 17, 1982 when the Constitution Act, 1982 was proclaimed in force, and if any such right had become extinguished before that date, s. 35 does not have the effect of reviving it. In this I agree with the interpretation of s. 35 favoured by Professor P.W. Hogg in his Canada Act 1982 Annotated (1982) at p. 83, that these rights have been "constitutionalized" prospectively, so that past (validly enacted) alterations or extinguishments continue to be legally effective, but future legislation which purports to make any further alterations or extinguishments is of no force or effect.[30]
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> ...
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> Before concluding these reasons I should like to say that while I have found it necessary to disagree with certain of the conclusions reached by Judge Murphy, I fully sympathize with and applaud his very evident concern that the treaty rights here in issue ought not to be held to have been abridged or abrogated in the absence of compelling reasons for so holding."[31]

Chief Justice Dickson in Simon v. the Queen refers to treaty guarantees as "a positive source of protection against infringements. He states:

> "In my opinion, the Treaty, by providing that the Micmac should not be hindered from but should have free liberty of hunting and fishing as usual, constitutes a positive source of protection against infringements on hunting rights. The fact that the right to hunt already existed at the time the Treaty was entered into by virtue of the Micmac's general aboriginal right to hunt does not negate or minimize the significance of the protection of hunting rights expressly included in the Treaty."[32]

The Chief Justice also addressed the issue of evolving custom in interpreting the 1752 Treaty. He stated:

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30. R. v. Hare and Debassige, [1985] 3 C.N.L.R. 139 at p. 155.
31. Ibid, pp. 155-156.
32. Op cit, at pp. 401-402.

"Having determined that the Treaty embodies a right to hunt, it is necessary to consider the respondent's contention that the right to hunt is limited to hunting for purposes and by methods usual in 1752 because of the inclusion of the modifer 'as usual' after the right to hunt.

First of all, I do not read the phrase 'as usual' as referring to the types of weapons to be used by the Micmac and limiting them to those used in 1752. Any such construction would place upon the ability of the Micmac to hunt an unnecessary and artificial constraint out of keeping with the principle that Indian treaties should be liberally construed. Indeed, the inclusion of the phrase 'as usual' appears to reflect a concern that the right to hunt be interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices. The phrase thereby ensures that the Treaty will be an effective source of protection of hunting rights.

Secondly, the respondent maintained that 'as usual' should be interpreted to limit the treaty protection to hunting for non-commercial purposes. It is difficult to see the basis for this argument in the absence of evidence regarding the purpose for which the appellant was hunting, In any event, art. 4 of the Treaty appears to contemplate hunting for commercial purposes when it refers to the construction of a truck house as a place of exchange and mentions the liberty of the Micmac to bring game to sale: see R. v. Paul, supra, at p. 563 per Ryan J.A., dissenting in part."[33]

The recent case of Sioui v. Attorney-General of Quebec, [1987] 4 C.N.L.R. 118 provides a good example of an instrument recognizing and confirming custom and a court of appeal giving a large and liberal interpretation to that instrument.

The Quebec Court of Appeal in this case was required to determine the legal effect of a 1760 document signed by Governor James Murray in favour of the Hurons of Lorette.[34] The document in question read as follows:

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33. Ibid, pp. 402-403.
34. at pp. 122-123.

"THESE are to certify that the CHIEF of the HURON Tribe of Indians, having come to me in the name of His Nation, to submit to His BRITANNICK MAJESTY, and make Peace, has been received under my Protection, with his whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English: - recommending it to the Officers commanding the Posts, to treat them kindly.

Given under my hand at Longueil, this 5th day of September 1760.
By the Genl's Command,
JOHN COSNAN, Ja. MURRAY
Adjut. Genl.

The Courts held that the document was a treaty within the meaning of section 88 of the Indian Act and gave a large and liberal construction to the reference to "their Customs" in the document. The Court held that customs included the cutting of trees, camping and making fires and camp sites in a provincial park, activities for which the accused had been charged under the Quebec Parks Act.

Mr. Justice Bisson quotes a report of General Murray of June 5, 1762 which referred to the Hurons of Lorette as follows:

"...le gouvernement français s'est toujours appliqué, autant que possible, à faire conserver aux Hurons leurs anciennes coutumes..."[35]

Mr. Justice Bisson concludes:

"Dans cette perspective, la référence aux coutumes dans le traité D-7 prend une importance particulière, Murray tenant les Hurons en estime et voulant sans doute leur être du meilleur secours."[36]

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35. Ibid, p. 131.
36. Ibid, p. 131.

As a consequence, the Court held that Huron customs and traditions were protected against the application of provincial law in virtue of section 88 of the Indian Act.

3.1.4 Judicial Pronouncements Absent Treaty Provisions.

The Courts have indicated (at least implicitly) that customs, traditions, institutions (and presumably 'customary law') are included in aboriginal rights and titles. Mr. Justice Judson stated, in the Supreme Court of Canada decision in Calder v. Attorney-General of British Columbia:

> "Although I think it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came,the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished."[37]

A number of cases have expressly recognized and applied customary law dealing with family law matters. Norman K. Zlotkin writes:

> "The small number of reported judicial decisions in which Indian and Inuit customary law has been expressly recognized and applied by Canadian courts is of more than historical interest. These cases show that it is possible to integrate aboriginal customary law with Canadian statutory and common law in appropriate, though limited, areas of law."[38]

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37. [1973] S.C.R. 313, at p. 328.
38. Norman K. Zlotkin, "Traditional Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases", [1984] 4 C.N.L.R. 1, at p. 1.

While the early case of Connolly v. Woolrich and Johnson, (1867), 11 L.C. Jur. 197, 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Q.S.C.) held that a marriage in accordance with Cree custom concluded prior to the reception of English law into the Territories was valid, the later cases holding that Indian customary marriage was valid even if it had occurred since reception of English law are of greater interest as they indicate that custom can displace positive law and statutory provisions.

In the case of R. v. Nan-E-Quis-A-Ka, (1889), 1 Terr. L.R. 211, 2 C.N.L.C. 368 (N.W.T.S.C.) Mr. Justice Wetmore held that Indian customary marriage was valid even if it had occurred since the reception of English law. Mr. Justice Westmore unequivocally stated that he did not believe the laws of England respecting the solemnization of marriage applied to the Indians in the Northwest Territories. He stated:

> "... I am satisfied however that these laws are not applicable to the Territories quoad the Indians. The Indians are for the most part unchristianized, they yet adhere to their own peculiar marriage custom and usages. It would be monstrous to hold that the law of England respecting the solemnization of marriage is applicable to them. I know of no Act of the Parliament of the United Kingdom or of Canada, except as hereinafter stated, which affects in any way these customs or usages. The Ordinance respecting Marriage, chapter 20 Revised Ordinances (1888), does not in my opinion affect the question."[39]

The court also held that the Indian Act then in force, in referring to marriage and family matters, amounted to a statutory recognition of marriages according to Indian custom. Mr. Justice Wetmore stated:

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39. 2 C.N.L.C. 368 at p. 372.

> "The Indian Act, R.S.C. c. 43, and the amending Act 50-51 Vic. (1887) c. 33 recognize the relation of husband and wife among the Indians. Section 9 of the Indian Act refers to "any illegitimate child." Section 12 mentions "Any Indian women who marries an Indian" and "her husband." Section 13 mentions "the widow of an Indian." Section 20 refers to the property of a deceased Indian in certain cases devolving on his "widow;" and the "widow" of an Indian is repeatedly mentioned in this section. Section 88 referring to an Indian uses the expression "a married man, his wife and minor unmarried children." References of a like description will be found in sections 90 and 93 sub. secs. 2, 3 and 4, and section 9 of the amending Act of 1887. In view of what the intention of Parliament was in passing these acts, whom they were intended to embrace and the general purview, I cannot conceive that these references were intended only to Indians married according to Christian rites. No doubt there are many such Indians, especially in the East, but I think these expressions were intended to apply to all Indians, Pagans and Christians alike. If so they amount to a statutory recognition of these marriages according to Indian custom in the Territories."[40]

A strong endorsement of the recognition of Inuit custom (specifically Inuit adoption customs) in the common law is to be found in the judgment of the Northwest Territories Court of Appeal in Re Kitchooalik et al. and Tucktoo et al., (1972) 28 D.L.R. (3d) 483. Mr. Justice Johnson held that the detailed Adoption Ordinances in force in the Territories did not apply to the Inuit and that Inuit adoption custom displaced the application of these ordinances. At page 488 Mr. Justice Johnson states:

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40. Ibid, pp. 372-373.

> "... I am of the view that it was never intended that these provisions would exclude the well-established custom of Eskimo Adoption. To interpret it otherwise would be to deprive many of these people of a custom that is so valuable to the safety and survival of children where death of a parent in a common hazard of their existence. It would also invalidate a large number of custom adoptions that have been confirmed by the Courts throughout the years."

Although the court makes the unfortunate obiter that as Inuit are brought more closely into the Canadian community, the necessity to retain the custom adoption will disappear, t makes it very clear that as long as an Inuit custom of .option is in place it should be recognized and given effect. Mr. Justice Johnson refers to the Indian Act as recognizing customary adoptions for Indians and states that Inuit customary adoption has been recognized by the common law. At page 488 he states:

> "It is said that the Court of these Territories cannot recognize or give effect to custom adoptions by the Eskimo. While the Indian Act, R.S.C. 1970, c. I-6, recognizes such adoptions by Indians there is no corresponding legislation for Eskimos. From this, it is argued that Parliament did not intend to extend recognit. of this practice to these people. Custom has always beer. recognized by the common law and while at an earlier date proof of the existence of a custom from time immemorial was required, Tindal, C.J., in Bastard v. Smith (1837), 2 M. * Rob. 129 at p. 136, 174 E.R. 238, points out that such evidence is no longer possible or necessary and that evidence extending "... as far back as living memory goes, or a continuous, peaceable, and uninterrupted user of the custom" is all that is now required. Such proof was offered and accepted in this case."

Clearly, in the areas considered integral to "Indianness" the courts have been ready to allow custom to operate notwithstanding existing legislation or positive law norms.

3.2 INTERPRETATIONS OF CUSTOM, TRADITION, AND CULTURE BY ABORIGINAL AND NON-ABORIGINAL LEADERSHIP

Any realistic analysis of aboriginal interpretations or of federal and provincial political practice with regard to culture cannot ignore the fact that 'custom', 'tradition' and, above all, 'culture' are politically contested terms. There is a contest for the definition and control of culture, for culture has become a political resource, just as surely as cultural survival is a social reality and a political objective for aboriginal people.

Cultural survival, of course, has been a social reality and a political objective of aboriginal people for a long time. But one could argue that culture has only recently become a significant political resource; indeed, until perhaps twenty years ago, to have aboriginal culture was a definite political liability in Canada. Until the 1970's, the termination of aboriginal culture and the assimilation of aboriginal people was the explicit objective of the state in Canada, Australia, the United States, and New Zealand.

There are those who argue that this objective of state governments is still on the hidden agenda. But the language, at least, has changed; and this change reflects a shift in the status of culture as a public value and as a political resource. In the 1980's, there is not a provincial or federal First Minister in the land who will openly dismiss Indian, Inuit, or Metis culture. Indeed, they compete among themselves to be recognized as admirers and supporters of aboriginal culture. They will publicly dismiss Indian sovereignty, they will publicly minimize

aboriginal rights -- but they will not dismiss aboriginal custom and tradition. A sampler of quotations from the First Ministers' Conferences on Aboriginal Constitutional matters is illustrative:

> Je comprends nos amis inuit et amérindiennes quand ils parlent du maintien de leur culture, du maintien de leur identité, bien nous aussi... (René Lévesque)[41]

> We appreciate that native peoples wish to be economically self-reliant and want the ability to preserve and enhance their unique culture, languages and traditions. We are not fearful of these legitimate aspirations and will work closely with the aboriginal people of our province to shape the new institutions that can fulfill these functions. (Brian Peckford)[42]

Some provincial premiers merely tipped their hats to culture, and saw it as just one in a range of values supportable through relatively benign reforms in education, social services, community development, etc. Others expressed an awareness of cultural autonomy as something more fundamental:

> At the time of the European settlement in what is now Canada, our ancestors found hundred aboriginal peoples who existed and who had long existed as distinct nations.

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41. Canadian First Ministers' Conference on Aboriginal Constitutional Matters, Unofficial and Unverified Verbatim Transcript, Canadian Intergovernmental Conference Secretariat, March 15-16, 1983, p. 48.
42. Canadian First Ministers' Conference on Aboriginal Constitutional Matters, Unofficial and Unverified Verbatim Transcript, Canadian Intergovernmental Conference Secretariat, March 26-27, 1987, p. 117.

> These aboriginal peoples exercised the power of self-government over their religious, their cultural, their economic and their political life. They exercized control over their territory and over the living and the natural resources in the land that they inhabited..." (Howard Pawley)[43]

One of the chief functions of aboriginal self-government today, according to James Lee of Prince Edward Island, would be that

> such structures would enable Aboriginal People to protect their culture and traditions and to develop better social and economic conditions for their people.[44]

Premier David Peterson of Ontario observed:

> Canadians are deeply disturbed by the social and economic inequities that aboriginal peoples face... In my view, these conditions can be alleviated only if we provide a framework under which aboriginal people will be able to develop their communities as centres of cultural integrity and economic opportunity. That is the goal of aboriginal self-government.[45]

Prime Minister Mulroney acknowledged that the existing Canadian system is woefully inadequate to the requirements of aboriginal culture:

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43. Canadian First Ministers' Conference on Aboriginal Constitutional Matters, Unofficial and Unverified Verbatim Transcript, Canadian Intergovernmental Conference Secretariat, March 15-16, 1983, p. 59.
44. Canadian First Ministers' Conference on Aboriginal Constitutional Matters, Unofficial and Unverified Verbatim Transcript, Canadian Intergovernmental Conference Secretariat, April 2-3, 1985, p. 65.
45. Canadian First Ministers' Conference on Aboriginal Constitutional Matters, Unofficial and Unverified Verbatim Transcript, Canadian Intergovernmental Conference Secretariat, March 26-27, 1987, pp. 63-64.

> In Canada, we assume that our cultural and our linguistic backgrounds and traditions will be respected, even cherished and enhanced. Let somebody put a finger on them and see what happens. But Indian, Inuit and Metis peoples do not have this assurance, but not at all, nor the power to determine their own cultural development. In fact, there were times when aspects of their cultures were subject to legal sanctions and suppression.[46]

Mulroney went on to say that only the aboriginal people could

> decide what mix of traditional and modern life they find appropriate to meet their needs... they alone can strike that critical balance between the old and the new.[47]

The problem for many Canadian First Ministers, however, was -- and remains -- how to demonstrate support for native culture on the one hand, without on the other hand recognizing that aboriginal self-governing institutions have inherent authority. It must be asked whether this duality of objectives is not self-contradictory. Provincial and federal governments state their desire not to interfere in the cultural systems of aboriginal people, yet insist on their sovereign ability to do so. The content of culture, custom, and tradition are still being bent to fit European ideologies of the state.

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46. Canadian First Ministers' Conference on Aboriginal Constitutional Matters, Unofficial and Unverified Verbatim Transcript, Canadian Intergovernmental Conference Secretariat, April 2-3, 1985, p. 10.
Both institutions are integral to self-government proposals now before the INAC's Self-Government Sector.
47. Ibid, p. 14.

The view of aboriginal leaders is that culture, custom, tradition are not mere window-dressing, but constitute -- as well as survive and develop through -- the basic economic, governmental, moral and religious institutions of a society. This view is the more accurate one from the standpoint of cultural science.

A statement by John Amagoalik, co-chairperson of the Inuit Committee on National Issues at the 1983 First Ministers' Conference, summarizes important aspects of the position most widely held among aboriginal people regarding custom, tradition, culture:

> Our position is that aboriginal rights, aboriginal title to land, water and sea ice flows from aboriginal rights; and all rights to practise our customs and traditions, to retain and develop our languages and cultures, and the rights to self-government, all these things flow from the fact that we have aboriginal rights. ...In our view, aboriginal rights can also be seen as human rights, because these are things that we need to continue to survive as a distinct people in Canada. The right to cultural survival is a human right, and all these things, all these aboriginal rights that we are talking about... shouldn't be seen as extraordinary rights or anything like that. They are there because we were here first, we had certain customs and traditions and the way we did things before the Europeans came, and we have the right to continue to practise and retain these things (our emphasis).[48]

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48. Canadian First Ministers' Conference on Aboriginal Constitutional Matters, Unofficial and Unverified Verbatim Transcript, Canadian Intergovernmental Conference Secretariat, March 15-16, 1983, p. 130.

Bill Wilson, Vice-President, Native Council of Canada said:

> (The aboriginal right) is a right to self-government, a right to govern yourselves with your own institutions, whichever way you want those institutions to be or to run; the right to culture, to language, the right basically to practise your own religion and customs, the right to hunt, trap and fish and certainly gather ...and also the right to utilize the resources, exploit them...in terms of what is happening in Canada today" (our emphasis)[49]

The implication of this view of aboriginal cultural autonomy for Canadian society more generally were interpreted by George Erasmus, Assembly of First Nations leader at the 1987 Conference, as follows:

> Canada must be truly reflective of the reality of the diversity of cultures and languages and traditions of which it is really made up; let us together build a genuine confederation or alliance of nations to be the soul of the nation-state called Canada that will inspire future generations of all of its component nations and be a model of multilingual and multinational harmony that is second to none in this world.[50]

So the aboriginal leadership are saying -- and it is not a position which is likely to weaken with time -- that the authority of their customs and traditions, and associated rights, derive from the customs and traditions themselves, not from the state. Anthropologically speaking, they are correct. Custom and tradition either have authority in their own right, or they do not.

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49. Ibid, p. 134.
50. Canadian First Ministers' Conference on Aboriginal Constitutional Matters, Unofficial and Unverified Verbatim Transcript, Canadian Intergovernmental Conference Secretariat, March 26-27, 1987, p. 25.

3.3 IMPLICATIONS OF ABORIGINAL PEOPLE'S POSITION ON CUSTOM AND TRADITION FOR CURRENT SELF-GOVERNMENT NEGOTIATIONS

The exhaustive hearings leading up to the "Penner report" and the proceedings of four Constitutional Conferences have solidified a consensus position among aboriginal representatives that exclusive legislative jurisdictions are their inherent and constitutional right. It is improbable that the expectations associated with this position will diminish, or that aboriginal people will ultimately be satisfied without some sharing of constitutional powers with provincial and federal levels of government. This will remain an implicit item on the agenda, even for aboriginal groups who in some cases are prepared procedurally to separate the negotiation of self-government arrangements from the constitutional clarification of aboriginal self-government rights.

It remains as important today for the federal government to respond in a progressive and imaginative way to the "sovereign" aspirations expressed by aboriginal communities, as it was when the Penner Committee released its report. We believe that a notion of "relative" or "shared" sovereignty is consistent with much that is laudable in Canada's constitutional and legal tradition, and conforms better to the needs both of Canada and of aboriginal communities than monolithic notions of -- and needless competition for -- "absolute" or "final" sovereignty.

As we have said, even when Indians agree to separate the negotiation of on-the-ground self-government arrangements from constitutional discussions, much of the energy and determination devoted to working out self-government arrangements relates to the importance of "sovereign" aboriginal powers as key symbols and conditions of cultural autonomy. We must not assume that "sovereignty" carries the same connotations for aboriginal people as for Euro-Canadians, who are inured to a centralized, hierarchical vision of the "Sovereign Crown".[51] But cultural autonomy would seem by definition to demand at least freedom from interference with aboriginal institutions by the "Sovereign Crown". Several communities' proposals for self-government under the present policy make no secret of the fact that exclusive jurisdictions are on their self-government agendas, and that they will not regard these jurisdictions as "delegated".

At the same time, self-government means for Indian people concrete, on-the-ground improvements in control of their own lives, and they will attempt to achieve this objective in ways that will enhance, or at least not inhibit, their Constitutional objectives. In the context of its Self-Government Sector negotiations, Indian and Northern Affairs

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51. Statements by aboriginal leaders frequently explicitly reject the hierarchical, centralized authority implied by European notions of the "sovereign crown", in favour of a vision of authority as delegated in various ways by grassroots constituents to leaders. The consensual practices of face-to-face aboriginal communities are in fact better able to maintain high standards of participatory democracy than more centralized, hierarchical "mass" institutions of state. See especially entries for Marule (1984), Porter (1984) and Boldt and Long (1984) in the "Canada" section of the annotated bibliography.

Canada (INAC) has defined self-government arrangements as "the practical measures which can be taken in the community to enhance control and decision-making authority".[52] Furthermore, it is federal policy that self-government negotiations will be without prejudice to constitutional issues and aboriginal rights. The involvement of numerous bands in negotiations under the current federal government policy suggests that those bands believe there is progress to be made toward de facto authority and control, pending progress on constitutional matters.

Self-government negotiations are not intended by INAC to involve constitutional change, or to involve significant new material transfers to Indians. The prospect of gaining recognition of custom and tradition in self-governing structures is therefore all the more crucial to Indian participation in the policy. It is our view that any policy that holds to a narrow vision of the constitutional and political status quo will be self-defeating, and will ultimately be unable to accommodate customary and traditional forms without serious distortions. Elsewhere in our analysis, however, we show that sufficient guarantees are already in the Constitution to enable the federal government to deal with the fact that custom and tradition represent a basis for authority in aboriginal government that cannot be legislated into (or out of) existence. The federal government can only recognize, or refuse to recognize what is already there.

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52. Indian and Northern Affairs Canada, General Parameters for Self-Government Negotiations, Internal Document, 1987.

The current process of self-government negotiations is novel in that it represents the first occasion, outside treaty or claims processes, that terms of legislation are being negotiated with aboriginal nations. For most if not all aboriginal parties to these negotiations, it will be essential that their agreement to a legislated regime not be legally interpretable as acquiesence to the idea that the authority of customary and traditional self-government forms derives from federal legislation. Some consideration of techniques pertinent to this constraint is given in section 5.5, below.

Negotiating self-governing arrangements on a band-by-band or nation-by-nation basis has the positive potential of recognizing forms of self-government which respond to the cultural diversity of groups involved. If the policy fails to satisfy Indian aspirations for authoritative self-governing institutions in their own cultural terms, however, it cannot be expected to maintain the interest and support of many groups.

It comes as no surprise that many Indian bands are proposing self-government structures based on traditional institutions and values. The proposals include such traditional and customary features as clan systems, tribal elders, consensus decision-making, "hereditary" chiefs, potlatching, etc. Such proposals (e.g. the Akwesasne Mohawk and the Lake Babine Carrier-Sekani) identify their institutions as the

vehicles of supreme law for their nations, established by the Creator. In many cases, these aboriginal institutions have never ceased to govern several aspects of Indians' lives. In other cases, bands feel that they have lost touch with traditional forms of government in the course of colonial history, but want to restore them. All communities, of course, have custom and traditions, and all will seek to protect them in self-government negotiations, whether or not custom and tradition become an explicit basis for their proposed structures of Indian government.

The proposals now before the federal government vary widely because aboriginal nations are extremely diverse, with different cultures, histories and positions in the Canadian economy and state. There are cultural features, however, which are common to most Indian societies in Canada, and which indeed are found in small-scale, face-to-face polities the world over. Examination of these features (below) leads to the conclusion that the traditional institutions for which aboriginal people seek recognition are highly democratic in character, and entail a high degree of autonomy and personal satisfaction for individuals.

4.0 ON THE COMPATIBILITY OF STATE INSTITUTIONS WITH FIRST NATION AUTONOMY

It is likely that a better understanding of aboriginal institutions on their own terms would ease fears about doing something that in principle should not be difficult -- to permit aboriginal institutions to function without interference from institutions of the immigrant majority. The fear of surrendering control is of course a complex

subject, but one dimension of this fear is revealed when non-aboriginals suggest that the state is a better guarantor of the rights of citizens than aboriginal institutions. This proposition would be shocking if we were able to examine it independently of our own cultural biases.

A principle barrier to understanding is ethnocentrism -- belief in the inherent superiority of one's own cultural premises, values, and institutions. Ethnocentrism manifests itself in two principal ways in the relationship of non-aboriginal Canadians to aboriginal Nations. First, non-aboriginal Canadians have great difficulty believing that there are effective ways of organizing political life other than those represented by our own electoral, executive, legal and administrative models. Second, we often experience great difficulty in accepting the fact that aboriginal customs, traditions and institutions have survived centuries of contact with European society. This difficulty is rooted in ethnocentrism, because it is assumed that "inferior" cultural values and practices should gradually but inevitably have been traded in for those of our own "superior" civilization.

It is also assumed that the adoption (or imposition) of certain surface traits of Euro-Canadian culture indicates a general erosion of aboriginal culture. This is generally not the case. It is our experience in Indian communities subject to several decades of Indian Act "Band Government" provisions, for example, that customary premises and processes of consensus-building continue to dominate political life, and that the formal authority of Band Councils in the community is worthless if these customary processes are not respected.

A further effect of ethnocentrism is to recognize certain "surface" features of another culture, but to distort their meaning and function by evaluating them not in terms of their their own cultural context, but in terms of the foreign observer's cultural categories and beliefs. An example of this is the suspicion that the authority of aboriginal elders amounts to gerontocracy, or that the political influence of leaders with "hereditary" title is undemocratic. Yet, in Canada, these institutions pertain to indigenous systems that social science recognizes as among the most democratic and egalitarian of the world's cultures. Personal autonomy is highly valued, and the authority of leaders is routinely and continuously subject to the consensual agreement of grassroots constitutents -- not just every four years at election-time. Our intention is not to idealize aboriginal government -- all human systems are subject to abuse. But aboriginal societies, no less than our own, recognize this potential and have developed their own checks and balances -- those which allow them to benefit from democratic procedures which our own society, because of different traditions or because of its scale and complexity, lacks.

The question of the scale and complexity of corporate organization is an important one -- aboriginal nations are of a scale on which face-to-face politics are practicable, and where consensus-building can be a functional procedure even at the level of "tribal" and "tribal confederate" decision-making. The state, on the other hand, is a scale of complexity where more mechanistic and legalistic techniques are required to foster democratic outcomes. It is inappropriate to impose those techniques on Indian Nations, even if we have chosen to duplicate them in our own "municipal" governments. This is largely a cultural choice.

Aboriginal nations will of course adopt some techniques of formal law and bureaucracy -- the necessity of dealing with federal and provincial governments demand some adaptation of traditional institutions to the institutions of the former. But defining the institutional means of accomplishing this adaptation must be in aboriginal hands, because only they are capable of innovating in ways which will not hinder and distort their cultural realities and priorities.

4.1 LIMITATIONS ON THE STATE AS A LEVEL OF CORPORATE INTEGRATION

The orthodox ideology of the state is that its authority is paramount and that

> its institutions alone can be the source of law. Laws are valid only in so far as they are acknowledged in some way by the organs of the state. The law is defined, in other words, as a set of consistent principles, valid for and binding upon the whole population and emanating from a single source. The written, rational state system is the only one which is 'properly law'.[53]

As the same author goes on to say, however, this view is not sustainable in culturally and economically heterogeneous states:

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53. M.B. Hooker, Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws, Clarendon Press, Oxford, p. 1.

> An undue emphasis on this view of law is often a distortion of reality and not uncommonly a downright misrepresentation in many states. The official or state legal system may not in fact be effective for a number of reasons. The reality of the law might be quite different from its formulation in code or statute. This occurs where there are multiple systems of legal obligation existing within the confines of the state.[54]

Multiple systems of legal obligations arose in the colonial context as the "introduced" law of colonial powers came into contact with indigenous law and institutions. In European "settler" states such as the U.S.A., Canada, Australia, New Zealand, and the Republic of South Africa, aboriginal peoples have been made largely subject to the "general" laws of the states which have enclaved them. Yet aboriginal people have at the same time been subject to and limited by special "protective" and assimilative legislation. The "White" Dominions and the U.S.A. have vacillated between assimilation and separation/"protection" of indigenous peoples, normally suppressing (but spasmodically supporting) the "primitive" law and custom of aboriginal peoples. When there has been support for aboriginal institutions, the state has frequently afforded them a status inferior to and dependent upon its own institutions.

Yet there are other examples ("Home Rule" in Greenland, the autonomous status of the Isle of Man, the Faroes, etc.) which demonstrate that it is functionally possible for large states to restore political autonomy to small aboriginal populations. If we are to find existing models for the further evolution of autonomous Indian Nation government, it will be useful to look beyond the experience of the "White Dominions" and the United States.

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54. Ibid, p. 2.

The attempt to regulate aboriginal societies by defining their law as subservient to the law of the central state is destined to chronic failure in practice, if not in legal theory. This is related not only to the notorious perseverence and resilience of indigenous cultures, but also to the intrinsic character of state law and institutions. As Falk Moore reminds us:

> Ordinary experience indicates that law and legal institutions can only effect a degree of intentional control of society, greater at some times and less at others, or more with regard to some matters than others...the impossibility of durable full systematization has implications for the analysis of reglementation and for applied planning and administration.[55]

An obvious lesson, in the Canadian context, is that legislators should not attempt "positive law" regulation beyond their reach, should not tinker with those autonomous arenas of aboriginal reglementation where state authority is experienced by aboriginal people as intrusive, and where there is all the more reason to believe that legislation will have effects quite other than the intended ones. This can only interfere with indigenous reglementary institutions and customs, exacerbating the frustration and social problems caused by past intrusions. Rather, legislation should recognize those areas of autonomous activity and self-regulation which, incidentally, are crucial to the cultural distinctiveness of aboriginal society.

The challenge for policy-makers in the pluralist state is to balance their own "centripetal" ideology of standardized law and institutional control against the "centrifugal" tendency toward autonomous reglementation of aboriginal nations. If

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55. Sally Falk Moore, Law as Process: An Anthropological Approach, Routledge & Kegan Paul, London, 1978, pp. 2-3.

we are serious about the cultural survival and development of aboriginal institutions, we will have to surrender our Eurocentric biases: the bias, for instance, that the rules of our own regimes enjoy superiority as "law", while the rules of aboriginal cultures are inferior "custom".

4.2 LEVELS OF CORPORATE ORGANIZATION IN INDIAN NATIONS

There are two main reasons that it is necessary to consider the kinds of corporate groupings represented by aboriginal nations. The first is that to have dealings with the state, an aboriginal nation must have a defined corporate identity or identities of its own. The second is that once the definition of indigenous corporate entities is known, we are in a much stronger position to recognize custom and tradition in their appropriate context of cultural structures and process. The forcing of indigenous political reality into an administratively uniform system of "bands", "band councils" and "chiefs" does scant justice to the corporate and processual complexity and variability of indigenous social systems.

The corporate groupings inherent to Indian Nations have received extensive attention in anthropological literature. Families, lineages, clans, bands, tribes, tribal confederacies, etc. are the most familiar corporate groupings, listed in order from less inclusive to more

inclusive levels of organization.[56] Within each of these general types, there are many specific cultural variations.

Corporate groupings of each type entail decision-making and reglementation of social life in their own right. Interaction among the levels, and with the state level in Canada, entail further processes of decision-making and reglementation. Despite adverse interference by non-aboriginal governments in the past, all of the corporate groupings just mentioned continue to be active loci of political life and reglementation for Indian nations in Canada.

To assemble the very extensive ethnographic information about aboriginal corporate groupings that would be pertinent to the operationalization of custom and tradition in aboriginal self-government is a major undertaking. It has not been within the means or the time-frame of the present study to do this, but it is recommended that such work be done. Otherwise, it is difficult to imagine how federal policy-makers and negotiators will obtain sufficient knowledge of aboriginal values and institutions to engage in informed discussion with aboriginal parties to self-government negotiations. It is astonishing (and perhaps a further manifestation of ethnocentric tendencies) that little of the voluminous multi-disciplinary literature which

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56. A number of general typologies of socio-political organization have been developed in anthropological analysis which are pertinent to an understanding of the corporate groupings mentioned, and others. These include Elman Service, Primitive Social Organization, Random House, New York, 1962; Morton Fried, The Evolution of Political Society, Random House, New York, 1967; and Diamond Jenness, Indians of Canada, 7th edition, Queen's Printer, Ottawa, 1967 (especially Chapter IX "Social and Political Organization - Primitive Migratory Tribes" and Chapter X "Social and Political Organization - Iroquois and Pacific Coast Tribes").

has emerged in recent years on the subject of aboriginal government has dealt with the political and legal institutions of aboriginal systems. We are not aware of a single contemporary volume devoted to this question, although Franks (see "Canada" section in our Annotated Bibliography) has a chapter on a general typology of aboriginal political systems in Canada, borrowed from work earlier in this century by Diamond Jenness.

We can, however, identify some general features of indigenous corporate organization in Canada. Most Indian Nations are or were hunting societies organized at progressively inclusive levels of corporate integration. At the least inclusive level are families, both nuclear and extended, and in some societies families are corporately integrated into clans. These corporate groupings may involve customary law and forms of leadership and decision-making in their own right, as with the special rights and management responsibilities of subarctic Algonkian families over defined hunting territories; and with the particular territorial or jurisdictional duties and prerogatives which could obtain by virtue of membership in one Ojibwa or Carrier-Sekani clan as opposed to another. But families and clans do not stand alone. Even in the corporately simplest indigenous systems, families and clans are constituent units of "higher" corporate identities, by virtue of association, cooperation and complementarity with like units in marriage, production, and ritual and religious life.

As the next most inclusive level of corporate organization, the hunting 'band' is an extremely widespread form, present among subarctic Algonkians and Athapaskans, as well as among Plains nations, and interior groups between the Rockies and the Pacific coast. For northern hunters, bands are loose but well-defined confederations of families, seasonally dispersed in family or multi-family groupings, but seasonally living and subsisting together. In recent times, serviced villages have come to represent permanent focal points for these northern bands; but customary usage, rights, leadership, and management of traditional lands typically continues. There are well-defined 'band' territories, whether as internally undifferentiated collective property, or as composites of the hunting territories of families belonging to the band. Traditional leadership, typically exercized by more experienced and senior members of families and clans, still frequently prevails for land-based production and associated social relations. Indian Act "Band Councils" represent an overlay for dealings with external governments and other non-aboriginal institutions.

Most northern bands frequently did not have a single office of "chief", or formal councils prior to Indian Act regulation. Bands on the Plains, on the other hand, co-produced and co-resided year-round, and were traditionally more politically centralized than northern bands. Frequently there was one civil chief for the band as a whole (who nonetheless took the counsel of elders and more role-specific leaders).

But it is inaccurate to think of the band as a free-standing level of corporate organization for any Indian nation. At the very least, neighbouring bands did and do intermarry, share hunting privileges from time to time, and cooperate for purposes of trade and defense. Most typically, this cooperation emerges along lines of cultural-linguistic identities that are "national" in character; they transcend the band level. Northern groups in recent decades (the Cree Nation of eastern James Bay, the Dene Nation, Nunavut, etc.) have been formalizing the looser national affiliations of former times into self-governing corporate identities with increased state recognition. [A superimposed constraint of recent times, however, is that political organization at the aboriginal-national level has been made to adapt to artificial provincial and territorial boundaries].

In some regions, the "tribe" represents a level of corporate organization inclusive of several bands. This is the case on the Plains, where traditionally the several bands of the "tribe" gathered seasonally for economic production, ritual celebration (most notably the Sundance) and, when necessary, for military purposes. This regularized "tribal" association was, in many cases, coterminus with the "nation" as a cultural-linguistic identity. It entailed some greater centralization of governmental functions at the "tribal" or national level than occurred in the arctic and subarctic.

Political centralization is most strongly institutionalized among the Iroquois Nations and the Northwest Coast Nations. The Northwest Coast is famous for intricate systems of ranked chiefs and clans, expressed and maintained through potlatching. The Iroquois Nations, as sedentary semi-horticulturalists, developed formal tribal councils, as well as a yet more inclusive level of corporate integration, the inter-tribal confederacy.

The tribal and tribal confederate levels of corporate integration were vigorously opposed by European Canadians, as a policy of divide-and-rule. Indian Act legislation was applied early in this century to suppress aboriginal custom, through enforced election provisions and the banning of "ceremonies". The most notorious examples include the jailing of leaders and adherents of Six Nations Longhouse Government, and similar attacks on Northwest Coast Potlatching and the Plains Sundance. Important elements of "tribal" and "tribal confederate" corporate organization have, however, survived despite the oppressive policies of the past -- and these offer opportunities for rebuilding under the current federal support for customary and traditional institutions.

4.2.1 Leadership, Representativity, and Individual Autonomy

It is important to outline why Indian societies in Canada have generally been regarded by anthropologists to be egalitarian and democratic in nature. This will help to illustrate the point that numerous checks exist on the authority of leaders such that consensual processes of participatory democracy are difficult to thwart even by influential leaders, and such that individual rights and autonomy are not easily abused.

Very generally, and with a myriad of specific ethnographic variations, the form and process of leadership in indigenous nations in Canada correspond to two general kinds of society. These societal types were identified by Diamond Jenness as "migratory" versus "sedentary", the former type including the arctic, subarctic and Plains tribes, and the latter type including the non-migratory Iroquoian and Northwest Coast tribes. A more current and insightful terminology is used by Morton Fried in his distinction between 'simple egalitarian' societies and 'rank' societies:

> An egalitarian society is one in which there are as many positions of prestige in any given age-sex grade as there are persons capable of filling them... an egalitarian society is characterized by the adjustment of the number of valued statuses to the number of persons with the abilities to fill them.[57]

A rank society, on the other hand,

> "is one in which positions of valued status are somehow limited so that not all those of sufficient talent to occupy such statuses actually achieve them. Such a society may or may not be stratified. That is, a society may sharply limit its positions of prestige without affecting the access of its entire membership to the basic resources upon which life depends.[58]

Taking each type in turn, in simple egalitarian societies the leader's authority is taken voluntarily. Leaders are selected for demonstrated experience and competence, and the selection process is subtle and informal, as a collective consensus develops in support of a leading individual. This principle was given tangible expression in the James Bay Cree adaptation of "Indian Act" election of chiefs, with election accomplished by literally "standing behind" one's preferred candidate in electoral assembly.

Leaders are typically unable to compel others to carry out a wish; authority and influence, rather than force, characterize the exercize of leadership. Authority, moreover, is quite fluid, shifting from one competent person to another as the situation requires. To maintain influence demands high standards of unselfishness and generosity; otherwise, people

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57. Morton H. Fried. The Evolution of Political Society: An Essay in Political Anthropology, Random House, New York, 1967, p.33.
58. Ibid, p. 109.

simply do not follow the suggestions of the leader. These constraints on the authority of chiefs and councils, notwithstanding the overlay of an electoral process under Indian Act regulations, are very much alive in Indian communities today.

In rank societies, authority is more regular and repetitive, extending into more aspects of social life. Individuals of high rank are frequently also of high religious standing (to be expected, given the integration of political and ritual functions in single institutions). The form of authority is somewhat changed from simple egalitarian societies, but the checks on the leader's authority are remarkably similar. It is still the case that although leaders can lead, followers may not follow. There are few sanctions that can be applied to compel compliance, and holders of "hereditary" titles may be ostracized or impeached if they alienate constituents.

Among the Iroquois, the holders of titles can be recalled by the same clan mothers who selected them. Although these chiefly title-holders or "sachems" are male, their selection is the prerogative of women, who are expected by custom to choose candidates who by their actions since infancy have demonstrated high standards of generosity and concern for others. The clan mothers are expected to maintain in office only those leaders who continue to uphold these standards. It is, then, a system which responds in a direct and immediate way to public sentiment, and which furthermore achieves in practice an admirable sexual balance of political authority, wherein the interests of women are almost certainly better represented than they are in the electoral systems of "mainstream" North American democracy.

Holders of hereditary title (or their selectors), like leaders in simple egalitarian society, have no ability to monopolize property or the use of force -- it would be totally missing the point to interpret these traditional roles as petty feudal lordships, or mini-Ayatollahs. Title-holders in rank societies are managers and custodians on behalf of the group. To maintain popular support, they must be unselfish in managing community resources, and they have no ability to alienate the lands and resources of clan or more inclusive corporate groupings, in the absence of popular consensus.

The authority of chiefs, moreover, is specified and circumscribed by ritual and custom more generally. While ritual position confers power of a sort, this power is specified and limited by ritual prescriptions, taboos, and supernatural sanctions. Custom both confers authority, and limits its exercize to standards which prevail in the community.

The premises and practice of consensus is fundamental in both simple egalitarian and rank systems, and guarantees that no leader stays a leader in the absence of popular support. This principle is fundamental to the theory of the Iroquois confederacy, such that decisions of leaders at each higher level are supposed to reflect consensus at each lower level, from confederate council down through tribal council and sub-tribal levels, to the general populace.

4.2.2 Questions Raised by "Revival" of Traditional Institutions

The marriage of traditional/customary and "electoral-bureaucratic" forms of government is one that only aboriginal nations can accomplish, after due discussion and consideration of their means and objectives.

There are, however, certain considerations relating to the restoration of traditional forms, particularly where these have been badly undermined by past federal policies or other circumstances, that should make it easier for the federal government to take the leap of faith required to relinquish control. First, all aboriginal nations, no matter how badly oppressed, retain customs that are significantly different from the mainstream. Even if the institutional structures of traditional government have been undermined, the likelihood is that the cultural premises and everyday practices which underlay those institutions have shaped the specific adaptations of these nations to adversity. It is therefore virtually guaranteed that aboriginal nations, given the opportunity, will "know how" to reconstruct self-government institutions that are coherent with their cultural premises.

Second, we need not be overly concerned about instances in which present-day aboriginal custom has changed substantially from some earlier point in time. It has adapted, as it must, to changing historical circumstances. A change in custom entails no necessary loss of rights -- certainly not for Euro-Canadians, whose culture has changed drastically over the past hundred years. The general test applied to aboriginal rights generally can equally be applied to aboriginal cultural rights -- unless they have been explicitly extinguished, they must be presumed to survive.

Third, tradition dies hard, even when its expression in everyday practice is suppressed. It is natural that aboriginal nations, as part of the process of recovering dignity and autonomy, will undertake institutional reconstruction on the basis of tradition, even in some cases when they feel tradition is quite remote from their present experience. Such nations may feel more need to codify, as part of the collective process of reinstituting "traditional" government, drawing on the knowledge of elders, or even on archival sources. Other nations with strong continuity of traditional institutions may feel little need for codification. The choice whether to codify, and the process of codification of custom and tradition, must remain in aboriginal hands.

Fourth, the fact that an aboriginal nation decides to adopt formal "electoral-bureaucratic" means of self- government that appear in some cases rather similar to our own institutions does not necessarily mean that those institutions are inconsistent with aboriginal custom and tradition. There are, after all, potential areas of overlap in the ways that different cultures operationalize shared values of democracy and personal autonomy. In general, we would expect cultures which emphasize consensus-style democracy to stress such participatory processes as general assemblies, leadership review, and referenda. The fact that these mechanisms are also used in our own system does not detract from their customary significance to aboriginal nations.

Finally, there is inevitably internal controversy in some aboriginal nations over the appropriate scope of traditional and customary institutions, and the formal "electoral-bureaucratic" means required both to secure the former and to

advance other interests. This, in itself, is an important part of the process required to achieve better articulations with non-aboriginal institutions. If the federal government is offering something truly worthwhile in terms of enhanced recognition of cultural and self-government rights, aboriginal nations will work through these controversies to a socially constructive conclusion.

The articulation of indigenous corporate groupings to the state system is in a process of evolution. The current self-government negotiations could be one step in this evolution; an important step, inasmuch as they may result in a withdrawal of interference by state legislators in the free and normal functioning of customary and traditional institutions.

5.0 CUSTOM AND TRADITION IN CENTRAL STRUCTURES OF ABORIGINAL GOVERNMENT

5.1 ABORIGINAL SELF-GOVERNMENT INSTITUTIONS

The questions raised under the rubric of institutions originate from concerns expressed by both community negotiators and the federal authority. They essentially relate to the process of decision-making by whatever indigenous bodies will be identified in the self-government legislation. More specifically, the focus seems to be not only on those bodies identified as being "customary" but also on the exercise of power by these bodies based on custom and tradition. Also, it would appear that the basis of the concerns is rooted in an attempt to reconcile the interests of the individual with that of the collectivity (i.e. the particular aboriginal "State").

In the larger Canadian context such questions are dealt with by reference to the Constitution (in particular, the Canadian Charter of Rights and Freedoms, infra) and the common law concepts of natural justice and fairness. Whether these

are applicable or even appropriate to indigenous decision-makers and indigenous decision-making are fundamental questions in need of analysis.

The following is an overview of the law governing the exercise and reviewability of powers of public bodies. A few caveats, however, are necessary at this point.

Firstly, the analysis that follows is in no way a confirmation or acknowledgment that the principles elaborated therein are indeed "legally" applicable to the situation at hand. Indeed, the state of the law is unclear regarding the extent to which the common law rules of natural justice and fairness apply to indigenous institutions (i.e. whether customary law displaces common law generally or in certain circumstances).

Secondly, the actual application of the rules is extremely fact-specific. As is the case with various "Canadian" administrative entities, the courts have applied the rules so that they "make sense" in the context within which these bodies operate.

Thirdly, it must be remembered that not all the entities which will be put in place (or which are already in place) will be <u>public</u> entities. Therefore, purely private indigenous bodies will be outside the scope of judicial review, to the extent that the latter applies or is appropriate in any case.

Fourthly, as we are dealing with a "negotiated" legislative process, it is open to the parties to agree to define how some or all of the judicial review rules will apply without abrogating or distorting customs and traditions.

Finally, we would strongly advise against the use of appeals to outside institutions as the latter generally lack the "expertise" required to make fully informed and culturally relevant decisions in the aboriginal context, particularly as aboriginal customs and traditions are for the most part not codified or codifiable.

5.1.1. Decision-making and Public Authorities

"Administrative Law" deals with how public bodies are to proceed in their functioning and with the sanctions and corresponding remedies attaching to illegal actions by such bodies.

"Judicial Review of Administrative Action" is the phraseology utilized to describe the process of review of a public entity's decision-making.

1) Judicial review distinguished from appeals

Judicial review is not an appeal. Appeals from decisions only exist if specifically provided for by legislation.[59] Judicial review, on the other hand, is a common law recourse which is automatically available if the prerequisites, which have been elaborated over the years by the courts, are present in a given case. Furthermore, judicial review differs from an appeal in that in the former, the courts may not substitute

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59. D.P. Jones and A.S. de Villars, Principles of Administrative Law, Carswell, Toronto: 1985, p. 329.

their judgment on the substance or merits of a decision taken by a decision-maker. The notion of jurisdiction is central to judicial review of administrative action.[60] The basic principle can be summarized as follows: if a body acts within its jurisdiction (the latter being determined primarily through statutory interpretation) it can decide as it pleases, whether right or wrong, without interference by ordinary courts, but if it acts outside its jurisdiction the decision cannot stand and therefore the courts may intervene. In the latter instance, the decision is ultra vires - the decision-maker being said to have exceeded his jurisdiction.

It should be noted that judicial review and appeals are not mutually exclusive. That is, a statute may provide for an appeal, but this does not necessary exclude recourse to the courts based on the principles of judicial review. However, as judicial review is discretionary, the existence of an appeal procedure has on a number of occasions been utilized by the courts to refuse to grant judicial review remedies.[61]

2) Judicial review and jurisdiction

The range of matters considered to be within an entity's jurisdiction and, therefore, unreviewable, has been considerably narrowed as a result of a wide definition given to excess of jurisdiction. The House of Lords concluded

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60. Ibid, pp. 6-7.
61. Harelkin v. University of Regina [1979] 2 S.C.R. 561; D.P. Jones, "Discretionary Refusal of Judicial Review in Administrative Law", (1981) 19 Alta. L. Rev. 483.

in Anisminic Ltd. v. Foreign Comp. Commn., (1969) 2 A.C. 147, that jurisdiction was exceeded when a statutory decision-maker, inter alia, either gave its decision in bad faith, failed to observe the requirements of natural justice, misconstrued the provisions giving it power to act, took into account irrelevant factors or failed to consider relevant ones (per Lord Reid at p. 171). The Supreme Court of Canada has endorsed this view.[62]

3) Natural justice and fairness

Traditionally, how a function or power was classified had a great impact on the reviewability of a decision. Administrative decisions (as opposed to ministerial or judicial) were said to be unreviewable unless a right was affected and there existed a superadded duty on the part of the administrative decision-maker to act judicially.[63]

A breakthrough came in 1978 when the Supreme Court of Canada held in Nicholson v. Halimand-Norfolk Police Commrs. Bd., [1979] 1 S.C.R. 311, that although administrative tribunals had no natural justice obligations as such, they were nonetheless bound by a general duty of fairness.

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62. Metro Life Insurance Co. v. International Union of Operating Engineers, [1970] S.C.R. 424.
63. Calgary Power Ltd. and Halmnast v. Copithorne, [1959] S.C.R. 24.

The Supreme Court of Canada had occasion to consider the question of reviewability of administrative decisions the same year, only one month later, in Coopers and Lybrand v. M.N.R., (1979) 92 D.L.R. (3d) 1, where it introduced the 'spectrum theory'. Mr. Justice Dickson stated that administrative decisions did not lend themselves to a rigid classification of functions, but rather, that there existed a continuum of administrative actions. This theory was reiterated by the learned Justice in another administrative law landmark case, Martineau v. Matsqui Institution Disciplinary Board (No. 2), (1980) 106 D.L.R. (3d) 385, where the 'spectrum' was mapped out. At one end are found purely ministerial (discretionary) decisions and public bodies exercising legislative functions. These decisions afford no procedural protection. At the other end of the spectrum are judicial decisions which provide substantial procedural safeguards. Finally, a grey zone exists in the centre which comprises innumerable types of administrative decisions, entailing a "flexible gradation of procedural fairness" (p. 410).

Whether the duty to act fairly is an extension of the rules of natural justice (which strictly speaking do not apply to administrative bodies) or is simply another way of qualify natural justice is not clear.[64] Often these two terms are used interchangeably.

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64. D.P. Jones and A.S. de Villars, op cit, p. 149; H.L. Kushner, "The Right to Reasons in Administrative Law", (1986) 24 Alta. L. Rev. 305 at p. 313.

The trend in Canadian administrative law is away from an inflexible classification of functions and away from drawing distinctions between natural justice and fairness rules. One author writes that the adoption of a theory of fairness renders the scope of judicial review "potentially unlimited" and that it may "provide the intellectual foundation for substantial control over the entire rule-making process of any administrative body".[65]

4) The content of natural justice/fairness

It is difficult (and probably not wise) to specifically articulate the exact content of natural justice or fairness. Very much depends on the particular facts of a case, including the type of body involved, the functions it exercises and the policies set out in the statute. Few general principles can be derived from the numerous cases on the topic as the decisions tend to be extremely fact-specific. What may be considered fair in one circumstance may be unfair in another.

However, a few observations of a general nature may be made. Natural justice and fairness, in principle, refer to procedure - how the decision was taken and not the substance of the decision itself.

The two "limbs" of natural justice are the following:

(i) the audi alteram partem principle ("hear the other side"). In its most general description, this principle involves giving the affected person adequate notice of the case he must meet, the right to present evidence in support

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65. R.A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law", (1980) McGill L.J. 520 at pp. 549-550.

of his case and the right to argue his case.[66] It should be noted that there is no obligation under natural justice or fairness rules to give the person affected reasons for a decision. However, it is good practice to do so primarily for reasons of accountability, and as a protection against possible accusations of arbitrariness, bad faith and so forth.[67]

(ii) the nemo judex in sua causa debet esse principle ("no man can be a judge in his own case"). This principle, in essence, is a rule against bias. The law has established that it is not necessary for a party to prove actual bias. It suffices that a "reasonable apprehension of bias" be shown.[68] This means that the reviewing court will attempt to determine if on the facts the decision-maker's actions could lead one to reasonably fear that there is bias. Pecuniary interest always constitutes bias,[69] unless exempt by statute or if the decision-maker, although having a pecuniary interest, is the only person who can make the decision.[70] Attitude towards the person may also constitute bias.[71]

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66. J.M. Evans, (ed) de Smith's Judicial Review of Administrative Action (4th), Stevens & Sons Limited, London: 1980, at pp. 195-216; R.F. Reid and H. David, Administrative Law and Practice (2nd), Butterworths, Toronto: 1978, at pp. 49-104; D.P. Jones and A.S. de Villars, op cit, at pp. 197-239; Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board of Quebec, [1953] 2 S.C.R. 140.
67. H.L. Kushner, op cit.
68. P.P.G. Industries Can. Ltd. v. A.G. Can., (1976) 65 D.L.R. (3d) 354 (Supreme Court of Canada).
69. Dimes v. Grand Junction Canal, (1852) 3 H.L. Cas. 759.
70. D.P. Jones and A.S. de Villars, op cit, at pp. 246-247.
71. Re United Steel-Wkrs. of America., Loc. 4444 and Stanley Steel Co., (1974) 6 O.R. 385 (Ont. Div. Ct) - hostile behavior towards a party.

5) Other limitations and the Canadian Charter

Further well-established limitations on a decision-makers' actions have been developed by the courts. These are, namely, that the decision-maker

(i) must act in good faith
(ii) must not act for an ulterior purpose
(iii) must not act upon irrelevant considerations
(iv) must not ignore relevant considerations, and
(v) must treat like cases alike (must be consistent).[72]

A number of legal writers have commented that these open up the possibility of reviewing more than procedural aspects of an entity's decision-making, as they are substantive in nature.[73]

The Charter may also have expanded the notion of procedural natural justice or fairness to include the substantive as well, at least, in matters touching upon the "life, liberty and security" of a person.[74] Indeed, the Supreme Court of Canada in the recent case of Reference re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486, has stated that while many of

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72. Roncanelli v. Duplessis, [1959] S.C.R. 121; Campeau Corp. v. Calgary (No. 1), (1979) 7 Alta. L.R. (2d) 294 (C.A.); Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997 (H.L.); Dallinga v. Calgary City Council, [1976] 1 W.W.R. 319 (Alta. C.A.); Smith & Rhuland Ltd. v. R., [1953] 2 S.C.R. 95.
73. D.J. Mullan, "Natural Justice and Fairness - Substantive as Well as Procedural Standards for the Review of Administrative Decision-Making?", [1982] 27 McGill L.J. 250; J.H. Grey, "Can Fairness be Effective?", [1982] 27 McGill L.J. 360, at pp. 368-370; D.P. Jones and A.S. de Villars, op cit, at pp. 190-191.
74. Section 7 Canadian Charter of Rights and Freedoms which utilizes the term "fundamental justice".

the principles of fundamental justice are procedural in nature, they are not limited solely to procedural guarantees. Just how far the Charter will apply to govern actions of administrative bodies has yet to be determined.[75]

6) Discretion

At times, the courts invoke the principles of natural justice or fairness to strike down a particular decision of an administrative body, when it appears in reality that another administrative law notion is operating - that of abuse of discretion. The law governing discretionary powers is often confounded with judicial review.

A few words on discretionary authority of administrative bodies should be mentioned at this point.

Discretion may be defined as the power to make a decision that cannot be determined to be right or wrong in an objective way. The stronger the discretion the harder it is to review a decision made under it. When the limits of discretion are violated, however, the court may review the decision. The degree of discretion is not intrinsically bound to whether it is administrative or judicial/quasi-judicial. These adjectives merely locate where the discretion is being exercised.

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75. Also See D. Mullan, "Unfairness in Administrative Processes - The Impact of Nicholson and the Charter of Rights", Pitblado Lect (ann), Isaac Pitblado Lectures on Continuing Legal Education, Manitoba Bar Assoc. 1983, p. 68 at pp. 76-79; D.P. Jones and A.S. de Villars, op cit, at pp. 191-193.

There appears to be two views in the case law concerning review of discretion. The restrictive view is that administrative decisions which are based on discretion are not subject to review. That is, the court may not substitute its opinion for that of the decision-maker.[76] The more liberal view has as its precept that even administrative discretion must be exercised properly otherwise the court will intervene.[77] This latter view appears to be the prevalent one.

A discretionary power or duty must be exercised in good faith, in a genuine fashion (with regard to all the relevant considerations) and personally (it cannot be delegated). In other words, the legislation sets the contours of the discretion and there will be abuse of this discretion where the body attempts to "promote purposes alien to the letter or to the spirit of the legislation that gives it power to act" and where such body acts "arbitrarily or capricously".[78]

It should be noted that the term "bad faith" as it applies in administrative law does not necessarily imply an element of dishonesty - an improper use of a power is enough.[79] Courts will also look at the nature of the interest affected by the exercise of the discretion to determine whether or not to intervene. Likewise, courts are greatly swayed against intervention in cases where the "policy content of a power is large and its exercise affects large numbers of people".[80]

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76. Bhadauria v. Board of Governors, Seneca College of Applied Arts and Technology, (1980) 105 D.L.R. (3d) 707; Boulis v. M.M.I., (1972) 26 D.L.R. (3d) 216.
77. Roncarelli v. Duplessis, [1959] S.C.R. 121; Patfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997.
78. J.M. Evans (ed), op cit, p. 285.
79. Roncarelli, op cit; Landreville v. R., (1973) 41 D.L.R. (3d) 574.
80. J.M. Evans (ed), op cit, p. 297.

5.2 LEGAL CONSTRAINTS--CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The question of possible legal constraints on the operation of aboriginal customs and traditions within the context of legislatively "delegated" aboriginal self-government is very far-reaching and extremely complex. We have chosen to focus on one major area of Canadian constitutional law which appears to be, at present, of most concern to federal autorities - the application of the Canadian Charter of Rights and Freedoms.

It should be noted at the outset that what follows is not meant by any means to constitute a comprehensive legal analysis of the chosen topic. Rather, its purpose is to provide a general framework within which one can begin to understand the issues involved. At some later time it would indeed be appropriate to flesh out this framework and or select specific "test cases" for detailed scrutiny.

5.2.1 The Canadian Charter of Rights and Freedoms

Two broad legal questions must be considered when addressing the "application" of the Charter. Firstly, does the Charter apply, and secondly, how does it apply?

In order to answer either of these questions recourse must be had not only to section 32 of the Charter (the specific pronouncement on the Charter's application coupled with section 52 of the Constitution Act, 1982) but also to sections 25 and

35 of the Constitution Act, 1982 (both serve to highlight the special status of aboriginal peoples in Canadian society). Furthermore, Sections 1 (the "limitations section" of the Charter) and 33 (the "override section" of the Charter) may also become significant within the present context.

1) Section 32

The scope of s. 32 of the Charter has been the subject of much writing and specula on, and more often than not, the doctrine has been divide nd contradictory. Although much criticized in terms of i lack of clarity and/or logic, the Dolphin Delivery judgment of the Supreme Court of Canada,[81] has circumscribed the scope in that the Charter was held to apply to "governmental action", thereby rendering it inapplicable for the most part to the private realm and the judiciary.

A number of "tests" have been put forward by the courts and legal authors to determine the circumstances under which an entity can be said to be exercising governmental powers. The courts appear to require a strong nexus between the entity and that of Government (federal or provincial) in order to hold the Charter applicable to the former. It appears that the more "independent" the particular entity is from formal Government, the less likely it is that the Charter will apply.

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81. S.D.G.M.R. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

Relevant to the above is the question of "delegation" of powers. "Parliament" and "legislatures", as these terms are found in s. 32, have been said to include activities of any body exercising statutory authority, including delegated authority. Thus, any entity, operating under such delegation would be subject to the Charter. The legal jusitification for this is found in the constitutional principle that the delegator cannot pass on more than it itself has. In other words, if the delegator is bound to follow Charter dictates then it cannot authorize a subordinate agent, either expressly or implicitly, to violate such dictates. What this obviously implies is that the enabling Act must respect the Charter, and further, that the enabled authority respect the Charter in the exercise of its powers (in legislating and also in taking action in virtue of legislative provisions). For these reasons, the Charter has been held to be applicable to municipalities and by-laws promulgated under their authority.

However, the analysis as concerns aboriginal institutions does not end here. It must be remembered that even if the Charter does apply to those institutions which meet the above criteria, section 25 is part of the Charter.

2) Section 25

It appears to be relatively settled that s. 25 of the Charter is not a substantive provision. That is, it does not confer, recognize or guarantee any rights to aboriginal peoples but rather protects these rights by preventing Charter rights from negatively affecting them.

In other words, it operates in the same way as s. 1 of the Charter (the limitations section) by restricting the scope or interpretation of the various Charter rights.

Although it is clear that s. 25 does not serve a 'positive' function in the sense that it "does not cause any legal rule to operate; rather it prevents other legal rules from operating", it is nonetheless very vibrant on a non-legal level. Noel Lyon writes that the main reason for the enactment of s. 25 was to educate or sensitize the public about the "historical claims and current situation of the many aboriginal groups in Canada".[82] It serves to highlight the special status of aboriginal peoples in Canadian society. Also, the motivation for the section's enactment was the fear on the part of aboriginal peoples that without such protection, a number of laws singling them out for special treatment because of this special status, would be struck down by the courts as being discriminatory according to the dictates of the Charter (provisions in the Indian Act, for instance).

> "The problem here is that the Charter expresses the values of a liberal democracy on the European model. It favours individualism and assumes a highly organized and impersonal industrial society. To apply those values to native societies is to destroy them...Section 25 was therefore inserted to prevent that from happening."[83]

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82. "Aboriginal and Treaty Rights in the Charter of Rights and Freedoms", in Current Issues in Aboriginal and Treaty Rights, The Canadian Bar Association, Continuing Legal Education, Ontario (1984), at p. 5.
83. Ibid, p. 6.

M. Boldt and J.A. Long, have also stressed the inappropriateness of applying the Charter to aboriginal peoples:

> "Native Indian leaders hold that the Canadian Charter of Rights and Freedoms, with its western - liberal principles of legal, social, political and economic individualism, not only lacks relevance but threatens the destruction of their cosmosentric philosophy, their spiritual unity, and the customary precepts of their tribal society"[84].

3) Section 35

Although it is not our intention to embark upon an analysis of s. 35 of the Constitution Act, 1982 as it is not central to our Charter analysis, it is worth looking at, nevertheless for some clarification of s. 25. It should be stressed at this point that cannons of statutory interpretation require that a statute be read as a whole, that every provision be read in context of the whole. This cannon has been held applicable to the interpretation of the Constitution. This is particularly relevant here as sections 25 and 35 are the two major constitutional provisions singling out aboriginal peoples for special consideration.

Section 25, unlike 35 does not limit the rights referred to therein to existing rights. Its terminology is "all-embracive" as it apeaks of any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples. Some legal scholars have noted that pertain to (s. 25) is wider than rights of (s. 35). Since both sections were drafted at similar points in time, and identical language is utilized in both sections in other respects, it is safe to conclude that the drafters chose to derogate from completely identical language for a purpose.

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84. "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in The Quest for Justice: Aboriginal peoples and aboriginal rights, Boldt, M. and Long, J.A. (eds), University of Toronto Press (1985), at p. 170.

Black's Law Dictionary defines "pertain" as: "to belong or relate to, whether by nature, appointment or custom". Surely, if aboriginal customs or traditions are not contemplated in section 25 it is very difficult to imagine what is.

4) Section 1

Section 1 of the Charter could also be invoked in the case of a custom or tradition seen to violate a Charter precept. We will not enter into the domain of tests elaborated upon by the courts regarding the operation of this section, but suffice it to point out that the Supreme Court of Canada has accepted that a limit to a Charter right can be prescribed by common law.[85] The aboriginal equivalent would be custom (aboriginal laws are prescribed by custom and tradition). In a number of precedents, Canadian courts have given effect to aboriginal customs. Thus, an argument could be made that such customs may in fact, if not otherwise extinguished, replace the common law for aboriginal Nations.

5) Section 33

This section allows Parliament and the provincial legislatures to exempt an Act from the application of sections 2 and 7 to 15 of the Charter. The highest court to have considered this section to date is the Quebec Court of Appeal

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85. R. v. Therens, [1985] 1 S.C.R. 613.

in the case of Alliance des Professeurs de Montréal et al. v. Attorney-General of Quebec, (1985) 21 D.L.R. (4th) 354. The Court determined that in order for a statute to validly exempt and/or limit the application of the Charter, an express statement of intention to override must be contained in the statute and this statement must specify which sections of the Charter are being affected. The latter requirement was intended to ensure that the exercise of section 33 was not abused and that there was a rational connection between the object of the particular statute and the overriding of specific Charter provisions.

The use of section 33 is obviously a highly charged political decision. However, should such use be made in the legislation "delegating" self-government to aboriginal Nations, for the purpose of further protecting the customs and traditions of the latter from annihilation or distortion, it is believed that a "rational connection" is found, and indeed is inherent to such legislation. Furthermore, the cautious approach dictated by the Quebec Court of Appeal and legal scholars need not cause much concern, as at the root of such caution is a desire to enlighten citizens regarding their being deprived of fundamental rights and freedoms. In "delegated" self-government legislation, the wider Canadian society would not be the subject of such deprivation, rather, it would be the citizens of the particular aboriginal Nation only, with the latter, through their appointed representatives, having sanctioned it.

5.2.2 Conclusion

While admitting that the above is merely a cursory overview of the legal issues involved, only beginning to touch upon the more intricate distinctions involved in Charter review, we chose to steer away from the more facile answers to complex questions as this is misleading. That is to say, the lack of any substantial judicial pronouncements on those sections of the Constitution specifically addressing "aboriginal rights" (sections 25 and 35) would lead some to ignore them and stay within the realm of the known. Thus, viewed in this light, of course "delegated" authority would imply application of the Charter. But, sections 25 and 35 are part of the Constitution and as such are fully operative, and must be addressed.

Furthermore, in the context in which this analysis is provided, we must examine closely what is being delegated. We are concerned here with the application of the Charter to aboriginal customs and traditions. Surely, the Federal Government is not purporting to state that such customs and traditions are delegations from it. The legislation that will be set up to enshrine these customs and traditions may qualify as "delegating legislation" in the sense that it is being sanctioned pursuant to Parliament's power under s. 91(24) of the Constitution Act, 1867 and that it will be transferring some of the authority that Parliament presently exercises to the aboriginal Nations, but, leaving the issue of inherent rights aside, can it be said that "allowing" the exercise of customs and traditions to operate is a delegation by Government?

In other words, the Government may have made the policy decision to "delegate" self-government powers to the aboriginal Nations, thereby choosing the legislative route, but the very essence of aboriginal customs and traditions is that they are just that - indigenous to the aboriginal peoples and foreign to the larger Canadian society. Giving the Charter provisions their full general effect could change these customs and traditions, perhaps in such a way that they no longer are indigenous, or simply no longer are. Cast in this light, is now appears clear what function s. 25 of the Charter serves - it is a "shield" (or if this is too strong a term, then "screen" is suggested) protecting aboriginal rights from Charter rights which reflect a Euro-western ideology. Some accomodation may have to be made, or a compromise struck, between the negotiating parties, and it is suggested, that, perhaps, the best alternative is to negotiate an aboriginal charter of rights with the aboriginal Nation in question, which would then be incorporated in the enabling legislation.

5.3 LEGAL CAPACITY OF CUSTOM AND TRADITION IN ABORIGINAL GOVERNMENT

This section deals with two related problems: First, how not to distort customary law through legislation/codification. To what extent should aboriginal society be free not to legislate, and what precedent is there in this regard? Since the active authority of custom and tradition may require the absence of "positive" law/legislation, to what extent can aboriginal society exist and operate with a minimum of positive law/legislation (aboriginal, federal or provincial) applying?

The second problem is how to ensure that others will not occupy domains vacated by positive law in favour of custom and tradition. What are the legal means of insulating aboriginal peoples from laws of general application? Here, examination of the effect of band by-laws and treaty terms in "occupying the field" is needed.

5.3.1 Custom and Tradition Replacing Positive Law

> "In place of personal authority, hierarchical power relationships, and a ruling entity, the organizing and regulating force for group order and endeavour in traditional Indian society was custom and tradition. Put another way, Indians invested their customs and traditions with the authority and power to govern their behaviour ... Customary authority protected individuals from self-serving, capricious, and coercive exercise of power by contemporaries. Since customs are not readily changed, or new ones quickly created, authority was not easily or expediently expanded."[86]

It appears that traditional aboriginal society was based more on an understanding of how things should work rather than on norms prescribed by a government or "ruling entity". It was a society of "natural law" rather than "positive law". Bolt and Long express it as follows:

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86. Meno Boldt and J. Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians", (1984) 17 Can. J. Pol. Sc. 537, at p. 543.

> "Custom carried authority of the type that Rees calls of a "moral kind", that is, it obliges individuals, by conscience, to obey. This is quite different from law which is a dictum accompanied by an effective sanction. Rule by custom, without a separate agency of enforcement, was possible in traditional Indian society because a face-to-face society can maintain order with few but broad general rules known to everyone."[87]

This model implies a minimum of norm-prescribing through legislation, regulation or otherwise. In the absence of prescribed norms (the legislative branch) enforcement (Government bureaucracy) becomes less necessary as does adjudication (the court system).

There exist a number of examples of legislation and proposed legislation in Canada where the idea of insulating Indian or aboriginal peoples from the laws of general application exist.

Section 88 of the Indian Act is a good starting point. It reads:

> "Legal Rights
>
> 88. Subject to the terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act. R.S., c. 149, s. 87."

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87. Ibid, pp. 543-544.

Under Section 88, laws of general application are displaced by "the terms of any treaty" and "by-laws" made under the Indian Act. The terms of a treaty or the actions of an Indian band in legislating by by-law, therefore, can have the effect of "occupying the field".

The courts are giving a large and liberal construction to the role of treaties in this matter. In Simon v. The Queen[88] decided by the Supreme Court of Canada in 1985, the issue was the effect of article 4 of a treaty of 1752 between the British Crown and the Micmacs which stated:

> "It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of hunting and Fishing as usual ..."

Chief Justice Dickson in his judgment held that the provisions of section 4 dislodged the specific provisions of the provincial Lands and Forests Act. He stated:

> "In my opinion, s. 150 of the Lands and Forests Act of Nova Scotia restricts the appellant's right to hunt under the treaty. The section clearly places seasonal limitations and licensing requirements, for the purposes of wildlife conservation, on the right to possess a rifle and ammunition for the purposes of hunting. The restrictions imposed in this case conflict, therefore, with the appellant's rights to possess a firearm and ammunition in order to exercise his free liberty to hunt over the lands covered by the treaty. As noted, it is clear that under s. 88 of the Indian Act provincial legislation cannot restrict native treaty rights. If conflict arises, the terms of the treaty prevail. Therefore, by virtue of s. 88 of the Indian Act, the clear terms of art. 4 of the treaty must prevail over s. 150(1) of the provincial Lands and Forests Act."[89]

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88. [1985] 2 S.C.R. 387.
89. Ibid, pp. 413-414.

It is interesting to compare the provisions of section 4 of the 1752 Treaty and section 150 of the Nova Scotia Lands and Forests Act in our context. As seen above, article 4 of the Treaty simply states that Indians shall not be hindered from but have free liberty of hunting and fishing as usual. Section 150 of the Lands and Forests Act establishes elaborate rules for carrying or possessing firearms and the exceptions. The court has acknowledged and made operative an aboriginal system of custom, replacing these norms for the "treaty Indians".

In Sioui v. Attorney General of Quebec, [1987] 4 C.N.L.R. 118, a 1760 document issued by Governor Murray guaranteed for the Hurons, inter alia, the "free Exercise of their Religion, their Customs, and Liberty of trading with the English..."

The Court held that the customs in question included the cutting of trees, camping and making fires and camp sites in a provincial park, activities for which the accused had been charged under the Quebec Parks Act. The Court held, however, that the existence of these customs, guaranteed by the Treaty, had the effect of displacing the application of the provincial legislation. As Mr. Justice Bisson wrote at p. 137:

> "Le traité contient une garantie du libre exercice des coutumes des Hurons qui ne peut être limitée par un texte législatif provincial;
>
> Les activités auxquelles se sont livrés les appelants le 29 mai 1982 entrent dans le cadre des coutumes garanties par le traité;"

The appellate courts appear to be taking an activist role in operationalizing aboriginal custom, albeit with the assistance of treaties.

Proposed Solution:

To the extent that self-government arrangements are embodied in a treaty, the treaty could recognize the operation of customary law and the operation of section 88 of the Indian Act would make the application of provincial laws of general application subject to the customary law.

Federal legislation could contain expanded incompatibility provisions (section 88 Indian Act; sections 3 and 4 Cree/Naskapi Act; ss. 35, 36, 37 Sechelt Indian Band Self-government Act) that would refer not only to treaties, the federal legislation or Band by-laws or laws but also to customary law. Indeed a possible interpretation of section 38 of the Sechelt Indian Band Self-government Act is that customary law is already contemplated:

> "38. Laws of general appliction of British Columbia apply to or in respect of the members of the Band except to the extent that those laws are inconsistent with the terms of any treaty, this or any other Act of Parliament, the constitution of the Band or a law of the Band."

It would be preferable however, to refer specifically to custom or customary law. A possible text would be:

> "Laws of general application do not apply except to the extent that those laws are inconsistent with the terms of any treaty, this or any other Act of Parliament, the constitution of the Nation, an enacted law of the Nation or the customary law of the Nation."

5.4 ELECTIONS AND DECISION-MAKING

To what extent are participatory democracy and consensus present in custom and tradition as processes of political representativity? What precedents in legislation would acknowledge the legitimacy of these processes?

5.4.1 Participatory Democracy and Rule by Consensus

> "Government without rulers requires special procedures. The mechanism used in traditional Indian society was direct participatory democracy and rule by consensus. This implies an adequate level of agreement amongst all who share in the exercise of authority. Custom provided the mechanism to ensure that order did not break down through failure to achieve consensus."[90]

From the earliest Indian Acts, provisions have been included to recognize that the most important decisions facing the tribe or band - the disposition of their lands - be made through a system of direct participatory democracy or consensus.

A typical early example is found in An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands, S.C. 1868, c. 42 (31 Vict.) at section 8:

> "8. No release or surrender of lands reserved for the use of the Indians or of any tribe, band or body of Indians, or of any individual Indian, shall be valid or binding, except on the following conditions:

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90. Menno Boldt and J. Anthony Long "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians", (1984) 17 Can. J. Pol. Sc. 537 at p. 545.

1. Such release or surrender shall be assented to by the chief, or if there be more than one chief, by a majority of the chiefs of the tribe, band or body of Indians, assembled at a meeting or council of the tribe, band or body summoned for that purpose according to their rules and entitled under this Act to vote thereat, and held in the presence of the Secretary of State or of an officer duly authorized to attend such council by the Governor in Council or by the Secretary of State; provided that no Chief or Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near the lands in question;"

Subsequent versions of this provision clarified that the requirement was a vote of the majority of the male members of the band of full age. An example is section 49 of An Act respecting Indians R.S.C. 1906 c.81.

The current Indian Act, R.S.C. c. I-6 at section 39 continues to reflect the idea of participatory democracy on the issue of surrender of lands, albeit in more technical language.

Section 39 provides:

"39.(1) A surrender is void unless

(a) it is made to Her Majesty;
(b) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,
(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed surrender, or
(iii) by a referendum as provided in the regulations; and

(c) it is accepted by the Governor in Council."

It could be said that other provisions in the Indian Acts relating to the disposition of interests in reserve lands rather than the surrendering of the entire Indian interest reflect a policy that does not recognize the authority of a hierarchy or a "ruling entity" (to use the expression of Bolt and Long) in these matters. Of course, the inappropriate solution adopted, probably with its origins in the Royal Proclamation of 1763, was to provide that no disposition of interests in reserve lands is valid without the consent of the Minister.

Two examples in the current Indian Act suffice.

Section 20 reads:

"20.(1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band."

Section 28 provides:

> "28.(1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permits a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve."

The Cree-Naskapi (of Quebec) Act, S.C. 1983-84, c. 18 develops the concept of participatory democracy or consensus decision-making in the matter of disposition of interests in lands.

Unlike a band under the Indian Act, Cree and Naskapi bands may grant any type of interest in their Category IA or Category IA-N lands but significant dispositions are subject to approval by band members.

An example would be sub-section 132(3) which reads:

> "(3) A grant for a term of ten years or more made under paragraph (1)(a) for non-residential purposes has no effect unless approved by the electors of the band at a special band meeting or referendum at which
>
> (a) at least ten per cent of the electors of the band voted on the matter, in the case of a grant for a term of less than twenty-five years; or
>
> (b) at least twenty-five per cent of the electors of the band voted on the matter, in the case of a grant for a term of twenty-five years or more."

The provisions of the Cree-Naskapi (of Quebec) Act dealing with the ceding of the whole of the rights or interest of a band in or on any of its Category IA or IA-N lands (cession) are even more strict in requiring participation of band members.

Section 144, sub-section 1 reads:

"144.(1) A cession requires the approval of the electors of the band in a referendum in which at least sixty-five per cent of the electors of the band vote in favour of the cession."

5.5 EVOLUTION AND MODIFICATION OF SELF-GOVERNMENT ARRANGEMENTS

It is important to ensure that negotiated self-government arrangements do not become a straitjacket for aboriginal nations and governments nor that such arrangements stifle natural evolution of government structures and customary law.

Negotiated or legislated arrangements should not be exclusive and should not preclude the benefits of increased recognition of aboriginal self-government and other areas. Examples of what might be termed "most favoured nation clauses" can be found in some instruments. In other documents the approach has been to insert saving clauses.

The Cree/Naskapi (of Quebec) Act contains, in the preamble, a statement to the effect that the James Bay Crees and Naskapis of Quebec are not precluded from benefitting from future constitutional, legislative or other measures respecting Indian government in Canada. The preamble reads in part:

> "And whereas this Act is not intended to preclude the James Bay Crees and the Naskapis of Quebec from benefitting from future legislative or other measures respecting Indian government in Canada that are not incompatible with the said Agreements;"

The Sechelt Indian Band self-government Act includes the "saving clause" option. Section 3 of the Act reads:

> "3. For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the members of the Sechelt Indian Band, or any other aboriginal peoples of Canada, under section 35 of the Constitution Act, 1982."

A similar approach is adopted in the Inuvialuit Final Agreement. For example subsection 3(6) reads:

> "Nothing in this Agreement or in the Settlement Legislation shall remove from the Inuvialuit their identity as an aboriginal people of Canada nor prejudice their ability to participate in or benefit from any future constitutional rights for aboriginal people that may be applicable to them."

In regard to the amending mechanisms required to accomodate redefinition of traditional and customary forms of government, the first observation would be that instruments recognizing traditional and customary forms of government should be cast in general terms, incorporating a recognition of forms of government as they exist from time to time. An analogy can be drawn with the technique found in federal and provincial legislation incorporating referentially the provisions of legislation of another jurisdiction. Perhaps the most obvious example in our

context is section 88 of the Indian Act. While the Supreme Court of Canada has in the past struggled with the question as to whether section 88 effects incorporation by reference of provincial laws of general application, it appears that the recent decision in Dick v. The Queen, [1986] 23 D.L.R. (4th) 33 accepts that section 88 has such a role.

In Dick v. the Queen Mr. Justice Beetz holds that section 88 does incorporate by reference those provincial laws of general application that otherwise would not apply to Indians as touching their Indianness. He also makes clear that the incorporation accomplished through section 88 applies to provincial law as amended from time to time. Mr. Justice Beetz stated at page 61:

> "In a supplementary factum, appellant argues that a prospective incorporation into the Indian Act of future provincial laws which would regulate the appellant qua Indian, involves interdelegation of powers of a type held unconstitutional in A.-G N.S. et al. v. A.-G. Can. et al., [1950] 4 D.L.R. 369, [1951] S.C.R. 31. In my opinion, A.-G. Ont. v. Scott (1955), 114 C.C.C. 224, 1 D.L.R. (2d) 433, [1956] S.C.R. 137, and Coughlin v. Ontario Highway Transport Board et al. (1968), 68 D.L.R. (2d) 384, [1968] S.C.R. 569, provide a complete answer to this objection."

There exists, therefore, precedents in the constitutional law of Canada, and in the specific area of the law applying to aboriginal peoples, for the notion that one jurisdiction may incorporate or recognize the operation of the laws of another jurisdiction as those laws may be amended from time to time. This is the technique that could be used to recognize customary law as it evolves.

There are as well specific amending techniques. Recent comprehensive treaties contain amending formulas whereby the parties can amend the terms of the treaty from time to time even if the treaty rights are entrenched in virtue of section 35 of the Constitution Act, 1982. Such is the case with the James Bay and Northern Quebec Agreement.

As has been observed elsewhere in this paper, the James Bay and Northern Quebec Agreement contains provisions specifically recognizing the right of the aboriginal parties to modify various terms of the treaty without the intervention of government. Examples are found in Section 24 of the Agreement, the Hunting, Fishing and Trapping Section. The indigenous Cree hunting territory system is recognized including the features of that system which lead to changes in hunting territory boundaries over time. The Cree and Inuit beneficiaries may by mutual consent and without government intervention alter the designation of territories over which they respectively have rights to harvest (paragraph 24.13.9).

With respect to government structures and powers, the Cree/Naskapi Act in providing wide legislative powers for Cree and Naskapi bands also provides those bands with the capacity to modify their government structures and legislation over time.

The Sechelt Indian Band Self-government Act adopts the technique of band constitutions and provides that the band constitution may be amended with the consent of the Governor in Council. This appears to be an unnecessary restriction on the ability of aboriginal nations to adjust.

Bill C-52 (An Act relating to self-government for Indian Nations) provided for the amending of constitutions. Earlier drafts of the Bill provided that a joint government/First Nation body, the Recognition Panel, would decide upon changes to constitutions. A late addition to the Bill added that the Governor in Council could set aside an order of the Panel recognizing an amendment to a constitution. Again this constitutes undue interference in the internal affairs of aboriginal government and more flexible arrangements should be sought.

6.0 CONCLUSIONS AND RECOMMENDATIONS

1. Governmental and reglementary functions in aboriginal societies are extensively ordered by the rules of custom, buttressed by tradition which serves as a powerful rationale for customary practice.

2. Laws and institutions imposed unilaterally by the Euro-Canadian state bear little inherent relation to the cultural premises of aboriginal people. This disjuncture largely accounts for the inability of state authorities to achieve legitimate authority or to make "good law" by aboriginal standards.

3. Custom and tradition are not static - They involve both repetition and innovation as new historical circumstances are encountered. Innovation, however, occurs through the reworking and elaboration of custom if change is to be socially constructive.

4. There is extensive recognition and support of custom and tradition in a variety of Canadian legislation, policies, treaties and judicial pronouncements beginning very early in colonial history and continuing to the present.

5. Strong representations have been made by virtually all provincial and federal First Ministers as to their support for aboriginal culture, custom, and tradition. These representations must now be given concrete effect, if the federal government is to avoid a loss of credibility.

6. As Prime Minister Mulroney said at the 1985 First Ministers Conference on Aboriginal Constitutional Matters, only the aboriginal people can strike the appropriate balance between traditional and innovative institutions.

7. Recent history has seen the development of major momentum towards realizing aboriginal government. The clock cannot be turned back.

8. Participatory democracy and rule by consensus characterize traditional aboriginal government processes in Canada. Legislative precedents exist that recognize and operationalize these processes.

9. The historic treaties, pre-confederation and post-confederation, are increasingly being seen as instruments through which aboriginal custom, traditions and institutions were either explicitly recognized or implicitly acknowledged to continue. Contemporary land claims agreements and treaties continue to fulfill this function.

10. Self-government arrangements should include a formal treaty relationship between the federal crown and the interested aboriginal nation. This would not preclude federal legislation adopted pursuant to treaty arrangements, as with the Cree-Naskapi (of Quebec) Act pursuant to the James Bay and Northern Quebec Agreement, and the Northeastern Quebec Agreement.

11. To the extent that self-government arrangements are embodied in a treaty, the treaty could recognize the operation of customary law and the operation of section 88 of the Indian Act would make the application of provincial laws of general application subject to the customary law.

12. In the areas considered integral to "Indianness" the courts have been ready to allow custom to operate notwithstanding existing legislation or positive law norms.

13. Custom may be codified or enacted by aboriginal societies, but need not be. There should be no obligation upon an aboriginal government or nation to codify custom for the convenience of external persons or agencies.

14. Custom should not be codified in detail by external authorities.

15. Although the Federal Government seems to have made the policy decision to "delegate" self-government powers to Aboriginal Nations, custom and tradition represent a basis for authority in aboriginal government that by its very nature cannot be legislated into (or out of) existence by external authority.

16. The statutory definition or "codification" of custom and tradition can have the effect of distorting the operation of custom and tradition on-the-ground. Codification lifts custom out of social context and may "fossilize" an inappropriate form -- particularly so when translation into foreign cultural terms is involved.

17. Codification of aboriginal custom and tradition by the state can run counter to the objective of enhanced self-determination. Codification could remove from aboriginal people the "control", interpretation and application of custom and tradition, which could potentially be just as alienating as the imposition of foreign rules.

18. It is important to establish that an aboriginal society itself be free not to legislate (i.e. to allow the normal operation of custom), and be free from legislative interference by other levels of government. There exist a number of examples of legislation and proposed legislation in Canada where the idea of insulating Indian or aboriginal peoples from the laws of general application exists. Treaties also have a role to play here, and the appellate courts appear to be taking an activist role in operationalizing aboriginal custom with the assistance of treaties.

19. Custom and tradition in aboriginal nations organized at "band" and "tribal" levels of corporate integration involve dynamic processes of political consensus and collective adaptation to concrete histories. The aim of legislation and other instruments should therefore be to open zones within which custom and tradition may recover and develop full, free, and flexible functioning, according to aboriginal design.

20. The aim of federal legislation should be to recognize that custom and tradition are present and can operate. Legislation of this character would have the effect of general recognition of autonomous systems and processes of custom, rather than detailed specification and codification of those systems and processes.

21. The state of the law is unclear regarding the extent to which the common law rules of natural justice and fairness apply to indigenous institutions (i.e. whether customary law displaces common law generally or in certain circumstances).

22. The actual application of the law with regard to the preceeding point is extremely fact-specific. As is the case with various "Canadian" administrative entities, the courts have applied the rules so that they "make sense" in the context within which these bodies operate.

23. It must be remembered that not all aboriginal governmental entities which will be put in place (or which already are in place) will be public entities. Therefore, purely private indigenous bodies will be outside the scope of judicial review, to the extent that the latter applies or is appropriate in any case.

24. As we are dealing with a "negotiated" legislative process, it is open to the parties to agree to define how some or all of the rules will apply without abrogating or distorting customs and traditions.

25. We would strongly advise against the use of appeals to outside institutions as the latter generally lack the "expertise" required to make fully informed and culturally relevant decisions in the aboriginal context, particularly as aboriginal customs and traditions are for the most part not codified or codifiable.

26. Aboriginal political institutions in Canada are, in general, democratic in character, and include many of their own checks and guarantees with regard to individual rights and freedoms.

27. Giving the Charter of Rights and Freedoms provisions their full general effect could change aboriginal customs and traditions, perhaps in such a way that they no longer are indigenous, or simply no longer are. The function of section 25 of the Charter can only be interpreted to protect aboriginal rights from general Charter rights which reflect a Euro-North American ideology.

28. If a compromise must be struck between parties to self-government arrangement negotiations with regard to Charter rights, we recommend that the best alternative is to negotiate an aboriginal charter of rights with the aboriginal Nation in question, which would then be incorporated into the enabling legislation.

29. Federal legislation could be helpful in clarifying a hierarchy for the various other federal and provincial legislation that could apply; for example through incompatibility provisions that would refer not only to treaties, the federal legislation or aboriginal government legislation but also to customary law.

30. There exist precedents in the constitutional law of Canada, and in the specific area of the law applying to aboriginal peoples, for the notion that one jurisdiction may incorporate or recognize the operation of the laws of another jurisdiction as those laws may be amended from time to time.

31. It is important to ensure that negotiated self-government arrangements do not become a straitjacket for aboriginal nations and governments nor that such arrangements stifle natural evolution of government structures and customary law. The solution is to employ general language, to provide that other arrangements are not precluded and/or to include comprehensive amending formulae.

32. Contemporary self-government instruments (treaties and legislation) often include specific amending techniques which recognize the right of the aboriginal government to modify arrangements without federal or provincial government intervention.

33. More autonomous aboriginal nations, governed through their customary and traditional institutions, are compatible with their participation in the Canadian state, provided that state legislators will refrain from attempts to regulate aboriginal society. Such attempts have consistently failed to achieve a satisfactory relationship between aboriginal and non-aboriginal peoples in Canada.

6.1 FURTHER RESEARCH NEEDED

1. Aboriginal peoples have made extensive and exhaustive representations at a grassroots level before the Penner Hearings. A thorough examination and analysis of the material coming out of the Penner hearings, in regard to aboriginal people's aspirations for culturally-based political institutions, should be undertaken.

2. There are many ways in which modern states have responded to movements toward cultural self-determination and national autonomy. Comparative analysis of indigenous "minorities" in the context of the "White Dominions" and the U.S.A. is too narrow to yield adequate models for the accommodation of aboriginal nations and governments in Canada. We recommend an examination of other models for semi-autonomous nationhood e.g. Home Rule in Greenland, the Isle of Man, and similar arrangements.

3. Contemporary multi-disciplinary literature on aboriginal self-government in Canada is weak on indigenous political-legal systems, and this limits the usefulness of proposed models and implementational strategies in the literature. It is a deficiency that should be remedied, if policy-makers and legislators are to escape ethnocentric premises, and possess sufficient knowledge to engage in self-government negotiations that would include constructive recognition of indigenous institutions.

4. A good deal of work remains to be done on the operationalization of custom and tradition in specific jurisdictions of aboriginal government. Traditional lands, resources, family law, property, aboriginal justice systems, and education stand out as particularly important to aboriginal cultural survival and development.

5. Resources did not permit, in this study, the completion of some policy research needs identified in the needs analysis (Section 7.1, points 5, 12, 13, 15, 16, 17, 18; as well as some specific points under Sections 7.2.1 and 7.2.2).

In particular, we recommend further work on general points 16, 17 and 18 in Section 7.1. Also more in-depth coverage is needed in Section 7.2.1 under "elections" on synthetic electoral/titular systems and dismissals/appeals; under "legal capacity" on the points identified as beyond the scope of the present study; and under "institutions" on citizens' appeals and constitutional or legal difficulties posed by specific aboriginal institutions.

In Section 7.2.2, we have listed some specific issues in relation to probable aboriginal government jurisdictions. Of particular importance is the development of issues listed under the "non-reserve" heading of "lands and resources".

7.0 APPENDIX I -- NEEDS ANALYSIS

The purpose of the needs analysis was to identify the needs for information and analysis relating to policy options for the accommodation of customary and traditional forms in structures of Indian self-government. The following were the questions that should, in our view, be addressed, from the perspective of both aboriginal and federal government perceptions and needs. Where we felt that a question was beyond the scope of the present analysis, this is indicated.

7.1 GENERAL ISSUES

1. What are the opportunities for functional co-existence of state institutions and Indian self-government institutions rooted in custom and tradition, as institutions pertaining to different levels of social integration?

2. What legal rationales are recommendable for the operationalization of custom and tradition as forms of self-government?

3. Is negotiated legislation on self-government agreements necessarily in the character of "delegated" authority? How could definition of self-government agreements as "Treaties" and/or "recognition" of inherent rights in legislation establish Indian governmental structures that are genuinely accountable, and so create an escape from federal government liability for Indian customary and traditional (or other) practices under self-government arrangements?

4. What are the possibilities for clauses in self-government arrangements which build in the right of Indian communities to opt for better arrangements as events unfold? While it is true that much more can be done than has been done under existing legislation, ultimately the federal government will encounter resistance from aboriginal constituencies who will refuse to be locked into a regime of delegated authority.

5. What avenues are available to the federal government in negotiating self-government arrangements with respect to the broadest possible jurisdictional spectrum without needing provincial cooperation, by invoking Section 91.24? The Penner Report recommended opening the field in this way, and it was successfully argued and accepted by the Justice Department in the context of Bill C-52.

6. What degree of legislative specification/codification of Indian government structures based on custom and tradition is necessary for them to receive effective recognition by state institutions?

7. What would be the possible positive or adverse effects of legislative recognition for the sociocultural integrity of custom and tradition in self-government structures? How will different approaches to legislation affect the flexibility and social process of custom and tradition?

8. What amending mechanisms will be required to accommodate the redefinition of traditional and customary forms of government over time?

9. To what extent are traditional institutions already involved de facto in the decision-making and administration of communities advancing proposals? [our response to this question in this study will be limited to what can be discerned from the community proposals themselves, and existing anthropological literature on these areas. Given limitations in the ethnographic record, however, an adequate response to this question would require ethnographic field study, preferably with the cooperation and under the direction of the communities concerned.]

10. What are the basic types and characteristics of traditional political institutions that come into play in self-government negotiations?

11. What are the prospects for aboriginal attempts to revive traditional forms that may have fallen into relative disuse, as opposed to arrangements meant to recognize and enhance customary and traditional forms that have remained active?

12. What information about their traditions are some aboriginal groups seeking or likely to seek from outside their communities, and from what sources, in formulating self-government structures?

13. How can the self-government negotiating process realistically cope, in terms of continuity of informed personnel, with the wide variability in culture history and tradition from community to community?

14. What issues of "translation" of Indian concepts and realities will be involved in ensuring that policy-makers have an adequate comprehension of institutions rooted in custom and tradition, so that they may be more comfortable in their assessment of such issues as political/financial accountability in traditional systems?

15. What are the legal limits pertaining to specific customs and traditions as structures for self-government -- clan-defined mandates, "hereditary chiefs", leaders' privileges, etc.?

16. What is the liability of the federal government as legislators of self-government arrangements if individual Indians declare that their democratic rights are not fulfilled by institutions structured after custom and tradition? (refer also to point 3., above).

17. What transitional measures in the process of implementating new self-government structures will be needed?

18. What are the legal constraints or obligations on the federal government to recognize or accommodate custom and tradition? (e.g., the International Charter of Human Rights, to which Canada is a signatory)

7.2 SPECIFIC ISSUES

This section includes questions that relate specifically to various elements of self-government structures per se (7.2.1), and to substantive areas of decision-making and administration (7.2.2)

7.2.1 Central Structures of Aboriginal Self-Government

These are the specific issues of first piority for 'Stage 2' of the present study:

1. membership

-the need and right of bands/tribal groups to determine their own members

2. elections

-to what extent are participatory democracy and consensus present in custom and tradition as processes of political representativity? What precedents in legislation would acknowledge the legitimacy of these processes?

-do there have to be codified methods of appointing elders, "hereditary" chiefs, or other traditional leaders? What are the implications of a "synthetic" system in which elected officials would "recognize", through formal action, that a hereditary chief has been selected by custom?

-could selection of office-holders rest on the uncodified authority of custom and tradition?

-what are requirements regarding mechanisms for dismissal of elected or appointed officials, and how should they relate to appeal mechanisms?

-can access to an electoral system be biased or restricted by traditional criteria; e.g. an elder must be elected to the representative assembly?

3. legal capacity

-Problem: not to distort customary law through legislation/ codification. To what extent should aboriginal society be free not to legislate, and what precedent is there in this regard? Since the active authority of custom and tradition may require the absence of "positive" law/legislation, to what extent can aboriginal society exist and operate with a minimum of positive law/legislation (aboriginal, federal or provincial) applying?

-Problem: how to ensure that others will not occupy domains vacated by positive law in favour of custom and tradition. What are the legal means of insulating aboriginal peoples from laws of general application? Here, examination of the effect of band by-laws and terms of treaty in "occupying the field" is needed.

-can aboriginal or treaty rights be regulated by the Indian communities or are they individual rights with no collective dimension? [important, but beyond the scope of the present study]

-what are the options for self-government communities to extend social services off-reserve? [beyond the scope of the present study]

-would federal government be able/prepared to allow band by-laws to supersede federal laws on-reserve i.e. Migratory Birds Convention Act, Fisheries Act, Environment Laws, etc.? [important, but beyond the scope of the present study]

-what levels of control could band exercize over the labour codes? [beyond the scope of the present study]

4. institutions

-could traditional (customary) decision making processes be recognized under new self-governing arrangements (cf. the "right to simplicity")?

-does the assignment of specific administrative offices to particular clans on the basis of traditional clan roles raise any constitutional or legal difficulties?

-would there be any difficulty with an Executive Council composed of elected and "hereditary" officials performing all executive functions?

-what provisions or mechanisms for appeal and right of redress can be discerned in custom-based systems? Would such a body as an Elders' Council be the final arbitrers internally?

-what arrangements for redress through external courts would be necessary/desireable?

7.2.2 Substantive Areas of Decision-making/Administration

The following are questions also suggested by our research, raised by community proposals, and mentioned by INAC community negotiators in light of their experience with Indian communities developing their self-government proposals. While most questions certainly warrant further policy research, their consideration is largely beyond the scope of the present study. The legal/political/ administrative approaches to the substantive areas itemized below, however, will be of major consequence for the ability of structures of Indian government to function effectively, and with cultural integrity.

1. lands and resources

-reserve

i. what self-government rights persist and what powers apply with respect to the beds of rivers, lakes and streams contiguous to or running through reserves?

ii. what are the possibilities for the relationship between customary forms of individual and community wealth in a self-government community with respect to the Minister's trust responsibility?

-non-reserve

i. what self-government rights persist and what powers could apply over traditional lands?

ii. what is the role of aboriginal institutions vis-a-vis traditional lands?

iii. what are the options for the management of renewable and non-renewable resources off-reserve, by traditional resource managers and/or by newly-constituted Indian governments?

iv. what are the possibilities for extending self-government beyond reserve lands through such bilateral mechanisms as wildlife management boards?

2. administration of justice

-what is the role of traditional dispute mediation and settlement?

-what are options for the implementation of tribal courts and peace officers under self-government arrangements?

-to what extent could band authorities interpret or ammend the criminal code and define the form of punishment?

3. child welfare and family

-to what extent are customary marriage, divorce, adoption, etc. recognizeable in the context of new self-government jurisdictions?

4. education

- what would be the role of traditional education?

- what are the options for recognition of traditional teaching, teacher certification, determination of ages for school attendance, etc.?

5. health

- what would be the role of traditional medicine?

-what are options for control of health beyond what is currently offered by Health and Welfare Canada in their Health Transfer Program?

-what are the options for bands to license their own health professionals on reserve under new self-governing arrangements?

8.0 ANNOTATED BIBLIOGRAPHY

This bibliography is far from exhaustive, and is intended only to expose the reader to a cross-section of that literature which in our research to date has been found useful in considering custom and tradition in the context of aboriginal self-government.

8.1. GENERAL, THEORETICAL, COMPARATIVE

Boyko-Wuerscher, R. and L. Heon. 1985. Foreign Recognition of Customary Law. In Canada-Saskatchewan-Federation of Saskatchewan Indian Nations. Canada-Saskatchewan-FSIN Studies of the Justice System as They Relate to Indians in Saskatchewan. Working Papers Prepared by the Working Group on Customary Law. Vol.1.

The authors present an overview of the recognition and identification of customary law and practice in four foreign jurisdictions, namely, Australia, Papua New Guinea, New Zealand and the United States. These jurisdictions, particularly the first three, were chosen because of the similarity with Canada of legal and political systems and British historical roots.

The Australian experience as presented in this paper is based almost exclusively on Australian Law Reform Commission (ALRC) Papers developed over a course of approximately ten years. Although the final ALRC Report was not yet published at the time of writing (it is now available and is annotated in this bibliography), the conclusions and recommendations contained in these papers are reflected almost in their entirety in ALRC Report.

This paper does not address questions of structures of government as such, perhaps because they do not exist in these jurisdictions to the same extent as for some aboriginal bands in Canada or perhaps because this was not a central concern of the Central Authority. The focus is primarily on custom and tradition as they relate to family matters (marriage, divorce, adoption), inheritance matters and criminal matters (this is also true of the other three research papers in this volume).

Diamond, Stanley. 1984 (1971). The Rule of Law vs. the Order of Custom. Social Research 38(1). Reprinted in Social Research 51:387-418.

Important questions considered in this article include the following: 1. Can social harmony be achieved in spite of the law? 2. How can the law be reoriented to contribute to the "de-politicization" of society, to help restore the "order of custom"? 3. Will self-government on the basis of customary political systems present a real alternative to the authoritarian rule of law, so that the "natural" law of custom and tradition can emerge? 4. Western law thrives on and contributes to individualism; how do community approaches to law override tendencies by individuals and power blocks to force segmentation for personal gain? 5. If it is to be communitarian in spirit and practice, will customary law necessarily conflict with the larger judicial system, founded as it is in "repression".

Falk Moore, Sally. 1978. Law as Process: An Anthropological Approach. London. Routledge & Kegan Paul.

Several chapters from this prominent book on law and anthropology are particularly useful in thinking through the general issues raised by the present study. In her "Introduction", Falk Moore sets forth her central theme that "the same social processes that prevent the total regulation of a society also reshape and transform efforts at partial regulation... Ordinary experience indicates that law and legal institutions can only effect a degree of intentional control of society, greater at some times and less at others, or more with regard to some matters than others (p. 2)".

As Falk Moore notes, "the impossibility of durable full systematization has implications... for applied planning and administration (p. 3)".

Falk Moore observes that although in Western legal theory a sovereign power is deemed to have ultimate power to legislate and control behaviour, in practice this power is highly circumscribed. "Legislation is intrusive. It is a tinkering with an ongoing social field that has areas of relatively autonomous activity and self-regulation (our emphasis; p. 7)".

Two inherent characteristics prevent the full systematic rationalization of any legal system -- the "piecemeal historical process by which legal systems are constructed", and the "aggregate effect of the multiplicity of reglementary sources and arenas of action... particularly visible in complex societies (p. 3)". From the earliest beginnings, European states have had to deal "with the problematic relation between the centralization and standardization of control over some matters and diversity and local autonomy over others... 'Laws' were the rules of the dominant and geographically widest regime, 'custom' its term for the binding practices of localized subordinate peoples (p. 15)".

Falk Moore retains a terminology wherein 'law' refers to the binding rules enforced by governments or the state, while rules enforceable by other organizations or agencies she refers to broadly as "reglementation... the conventional category 'law' (meaning rules enforceable by government) is a category of our own culture. When it is applied by anthropologists to societies that are very different in structure, what is being sought are analogous phenomena (p. 17)".

Also of relevance to the present study is the notion of contradictory principles in the corporate organization of society: "One such pair of contradictory principles is the tendency toward hierarchy versus the tendency toward equivalence, or equality... Another pair of 'oppositions' which formal groups (and organizations of organizations) must face is a struggle between elements pushing toward greater and greater rationalization of centralized direction, and elements pulling away toward subunit autonomy...The constitution of a state is, among other things, an organization of organizations. The more complex the society, the more the layers of the rule-systems, the more adjacent ones there are, and the more numerous and diverse the separate 'jurisdictions' or autonomous fields, and the more intricate the questions of domination/autonomy, hierarchy /equivalence... in the relations within and among the constituent levels and units (p. 28)." Law in modern societies is one kind of reglementation emanating from a particular kind of organization, that of "the state and its organs, the "theoretically superordinate, most inclusive corporate organization and its sub-branches (p. 29)".

Chapter 1 of the book, "Uncertainties in Situations, Indeterminacies in Culture", in the author's words, "proposes a framework for social/cultural analysis which identifies 'processes of regularization' as a major category of ongoing activity in society. 'Processes of regularization' include all the ways in which conscious efforts are made to build and/or reproduce durable social and symbolic orders. Law is, of course one product of these activities (p. 6)".

Chapter 2 of the book, again in the author's words, "argues that the cumulative effect of legislative tinkering is a compound of preconditions in the regulated social field itself, direct effects of the legislation, secondary effects, and, also, the direct and secondary effects of many other simultaneous events and processes which were not necessarily legislated into being. Given this complex of contingent variables, it is not surprising that prediction is often difficult, nor that consistently successful regulation of the whole of social life is utterly impossible (p. 8)".

Chapter 7, "Law and anthropology", opens on the useful observation, one that is easily overlooked by those who look outward from the central institutions of state at "simpler" societies, that "no society is without law...not only does every society have law, but virtually all significant social institutions also have a legal aspect (p. 215)". The chapter reviews the variety of ways in which anthropologists have classified the legal/political systems of societies, and in which they have defined law. There are useful reviews of empirical studies and current literature, and specific issues in legal anthropology -- dispute settlement, legal norms and social change.

Hooker, M.B. 1975. Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws. Oxford: Clarendon Press.

This book is a comprehensive examination of the variety of ways in which the "multiple obligations" in legal pluralist states have come about, such that the reality of law departs from the ideal of the state: "It is fundamental to the idea of the state that its institutions alone can be the source of law. Laws are valid only in so far as they are acknowledged in some way by the organs of the state. The law is defined, in other words, as a set of consistent principles, valid for and binding upon the whole population and emanating from a single source. The written, rational state system is the only one which is 'properly law'. This may be a proper view in a culturally and economically

homogeneous society, but such societies are the exception rather than the rule. An undue emphasis on this view of law is often a distortion of reality and not uncommonly a downright misrepresentation in many states. The official or state legal system may not in fact be effective for a number of reasons. The reality of the law might be quite different from its formulation in code or statute. This occurs where there are multiple systems of legal obligation existing within the confines of the state (pp. 1-2)."

The multiplicity of obligations arises in four main ways: 1. the "introduced" law of colonial powers in Asia and Africa came into various kinds of relationship to indigenous law under whatever label: 'native law', 'religious law', 'customary law', etc. -- and both indigenous and introduced sources of law persist after decolonization as new states have emerged in these areas; 2. in states such as the U.S.A., Canada, Australia, New Zealand, and the Republic of South Africa, indigenous peoples continue to be administered as a disadvantaged class, largely subject to ordinary state law, limited by supposed welfare or protective legislation, with their own systems of legal obligations only spasmodically supported by organs of state; 3. non-western states have sometimes voluntarily adopted Western laws with the motive of modernizing themselves, but legal plurality results because the original system is not completely, and sometimes only barely, displaced by the new; 4. in states attempting to realize revolutionary ideology, traditional systems have not been completely abolished.

In all cases, there will be elements of strain or conflict, but three features can be distinguished, according to Hooker: "First, the national legal system is politically superior, to the extent of being able to abolish the indigenous system(s). Second, where there is a clash of obligation between systems then the rules of the national system will prevail and any allowance made for the indigenous system will be made on the premisses and in the forms required by the national system. Third, in any description and analysis of indigenous systems the classifications used will be those of the national system.

Indeed, we may speak of 'dominant' and 'servient' laws (p. 4)". We would make the obvious comment that these bleak generalizations, if endorsed and operationalized as positive principles by state government authorities, comprise an impossibly restrictive environment for aboriginal culture to flourish.

Two chapters in this book are of particular interest to the current study: Chapter 1, "Legal Pluralism and the Ethnography of Law"; and Chapter 6, "English Law in the White Dominions and in the United States: The Legal Status of Indigenous Peoples". In the latter, Hooker finds that the Dominions and the U.S. have vacillated between assimilation and separation/protection of indigenous peoples, both rejecting and acknowledging the "foreign" law and custom of minority indigenous peoples -- a situation quite different from the African and Asian colonies in which dual legal systems were thought proper and suitable.

Keon-Cohen, B. A. 1982. Native Justice in Australia, Canada and the USA: A Comparative Analysis. Canadian Legal Aid Bulletin 5:187.

This substantial article addresses the question of how successfully justice is achieved for native peoples in Australia, Canada, and the U.S.A., and seeks reasons for the failure of justice to be done, as well as ways of avoiding injustice in future.

Keon-Cohen observes that in all three countries, a plural society is encouraged, but only on terms acceptable to the majority. For justice to be achieved, ethnocentrism must be abandoned, and the social, cultural and legal moves of native people must be respected.

"It is this writer's view that the most equitable, just and politically realistic solution is legal pluralism -- the development of separate, autonomous constitutionally entrenched native justice systems, whether they be 'traditional' or not (p.253)." "Anglo-based" legal systems have by and large failed to achieve native justice. Legal pluralism would be compatible with philosophies underlying plural democratic states, and would be more consistent with the sustained social and economic development of native communities.

The author finds that American Indians have been more successful than native people in Australia and Canada at asserting autonomy and developing a strong institutional base. This is seen to result directly from the sovereign base of Indian tribes in the United States. Recent moves in Australia and Canada toward vesting limited local government powers in community councils are not seen as sufficient for the internal resolution of legal disputes involving customary law elements. Indeed, these forms of "local government" represent the imposition of alien values and structures which better serve the majority society than native communities.

A difficulty with Keon-Cohen's article is too ready acceptance of the "acculturation" model of aboriginal history. The strength of customary law among many aboriginal groups is underestimated; its practice is acknowledged among the more remote and "traditional" Australian aboriginal groups, the northern Arctic Inuit, and the Pueblo Indians of New Mexico. But it must be observed that all societies have 'custom', and are to varying extents governed by 'customary law'. The characteristic failure of the acculturation model is its inability to contemplate changes in custom and tradition, other than by assuming that change represents increasing convergence and homogeneity with the mainstream.

Leach, Edmund. 1977. Custom, Law and Terrorist Violence. Edinburgh. Edinburgh University Press.

The author examines the differences between small-scale, face-to-face social systems integrated by kinship relations and regulated by customary norms/laws on the one hand, and state systems regulated by formal legislation and jurisprudence on the other. Customary laws as received by oral tradition are seen to be vaguer and more flexible with respect to interpretation, and to be sanctioned chiefly by public opinion and moral/religious sentiment. Such systems are effective because of the homogeneity of shared customary understanding, high level of consensus, and intensity of reciprocity normal in small-scale traditional societies.

The written legislation and jurisprudence of complex states entails precisely-defined laws, backed up by precisely defined penalties which are less flexible with regard to interpretation and application in specific instances. There are fewer shared cultural conventions in pluralistic state societies, so that formal laws do not enjoy the same moral consensus among its constituent community -- particularly among constituent parts who have been subject to colonial domination. Conformity is enforced by institutions of hierarchical, centralized power. But the appearance of uniformity secured by formal law is no substitute, even in the modern state, for shared conventions. People "are able to live together in tolerable amity only when they share more or less compatible ideas about how things ought to be" (p. 27), i.e. share some body of customary rules and conventions.

Very different practices can be covered by the same customary norm. While in simple societies the overt objective is to maintain the existing social constitution, tradition can as easily be invoked to authorize radical innovation as to maintain established social arrangements. In this respect, formal law, while overtly acknowledging the innovating capacity of legislators, can be less responsive in practice to situations of social change.

Poos, L.R. and Lloyd Bonfield. 1986. Law and Individualism in Medieval England. Social History 11:287-301.

This article reiterates the methodological point that neither law nor society can be reduced to the content of "positive law"; rather, any analysis of law in changing societies must be empirically derived from conceptions of normative rules "self-generated" by the people.

(By extention, the compatibility of aboriginal customary law with the Canadian state cannot be judged solely in terms of formal arrangements of positive law; customary law needs to be understood in its own terms and accepted as such in the broader legal/political system.)

8.2 CANADA

Asch, Michael. 1984. Home and Native Land: Aboriginal Rights and the Canadian Constitution. Toronto: Methuen.

This book discusses aboriginal self-government from the viewpoints of aboriginal peoples, the courts, and policy-makers in Canada. It then goes on to consider the potential compatibility of aboriginal values, rights, and institutions of self-government with European forms of the democratic state.

Self-government is shown to be a common denominator in the meaning of aboriginal rights among the major aboriginal associations in Canada, and fundamental to any ability of cultural self-determination. A domain of exclusive legislative authority, with an economic resource base, is seen by aboriginal people to be essential if they are to defend their broader right to pursue ways of life which integrate language, economy, social and political organization, religion and other values as total cultures. This is the crucial point for the present study: custom and tradition cannot adequately be supported in the absence of recognition of the rights associated with the fundamental institutions which comprise culture.

Asch outlines the political characteristics of Dene and other aboriginal societies organized by sharing and consensus, and poses the question whether such Dene values and institutions are reconcileable with "mainstream" ideologies and institutions of state. Asch sees positive evolution in the thinking of courts and non-aboriginal policy-makers. He concludes that neither the translation of aboriginal concepts of rights into terms understandable by Euro-North Americans, nor the accommodation of aboriginal forms of self-government, pose insurmountable obstacles.

Asch cites consociational political systems within European political traditions (Swiss and Belgian) as capable of providing the kind of decentralized authority required to accommodate aboriginal rights of self-government within the modern state context.

Boisvert, David A. 1985. Forms of Aboriginal Self-Government. Background Paper Number 2, Aboriginal Peoples and Constitutional Reform, Institute of Intergovernmental Relations, Queens's University, Kingston.

In this paper Boisvert deals with numerous possible forms of aboriginal self-government: "Broadly speaking, any institutional arrangement designed to secure greater aboriginal participation in the public policy process is called 'self-government' (p. 5)". He reviews the international experience in Chapter 1, identifying various existing forms of self-government: institutional interest groups, special purpose and administrative bodies, and law-making institutions (including participation in existing legislative assemblies, territoral government, local government, aboriginal government, and corporate models).

Chapter 2 outlines the principal alternative models, and their characteristics, for aboriginal self-government -- national, regional, and local aboriginal governments; representation in national governing institutions; regional public government; municipal government; national and regional aboriginal special purpose bodies; band council government; national, regional and local corporate government; and national, regional and local aboriginal interest groups. In Chapter 3, proposals for aboriginal self-government in Canada are reviewed and critiqued, including consideration of how Dene and Nishga proposals conflict with basic principles of liberal democracy with respect to restrictive participation in forms of regional government proposed. "The Nishga proposal does, however, highlight the need to define the relationship aboriginal government will have to lands where aboriginal title remains unextinguished (p. 35)".

Boisvert argues that several forms of aboriginal self-government will need to be considered in government policy, given variable political and demographic circumstances from region to region: "At a very broad level, the policy would have to consider: 1. creating 'public governments' in regions where aboriginal peoples form a majority of the population; 2. establishing special regional boards and commissions on which aboriginal peoples would sit, either on an exclusive or shared basis (e.g. James Bay Agreement); 3. providing for special aboriginal representation in national and regional governments (e.g. Yukon, Denendeh, etc.); and 4. recognition of aboriginal governments on a reserve or land base." In Chapter 4, the implementation of aboriginal government is discussed, with respect to its constitution, lands and resources, membership, revenue base, and jurisdictional matters.

Consideration of Boisvert's models can be useful in stimulating thinking about the range of self-government mechanisms which may be used to link aboriginal societies and the state, while enhancing the autonomy of the former. But the paper is seriously flawed in its absence of understanding of processes of government internal to aboriginal society. The paper "assumes that in recognizing a right to self-government we are concerned not with recognizing what exists -- which is not much -- but with establishing new institutions to respond to aboriginal demands for self-government (p. 2)". It is this assumption which accounts for the fact that a paper which is otherwise a very comprehensive treatment contains no awareness of traditional and customary forms of governance in aboriginal society as they relate to contemporary developments. Later in the paper, Boisvert states that "whatever government they may have had in the past has long since been liquidated or become insignificant (p.46)". This statement is patently wrong, and serves only to illustrate the extent to which lack of information about aboriginal culture, ethnocentric visions of what comprises 'government', and exaggerated assumptions about the acculturation of aboriginal societies, has limited the vision of otherwise well-informed policy-makers.

In Chapter 5, on the relationship of aboriginal government to other governments, Boisvert identifies two principal means of implementing aboriginal government -- constitutional and legislative means. Treaties are seen as a special case of constitutional approaches; "treaties recommend themselves as the preferred technique, especially where aboriginal title has not yet been relinquished (p. 44)". This suggests a strategy of self-government "treaty-making", even where title to aboriginal land has been surrendered by historical treaties.

Since "constitutional entrenchment of aboriginal government is unacceptable to many governments, while delegated jurisdiction offends the aboriginal position of inherent sovereignty", Boisvert recommends a "novel procedure to establish aboriginal governments... called a devolution technique." This would involve statutory recognition as opposed to statutory delegation.

"Recognition, like delegation, has the quality of a grant to the extent that powers do not exist in law unless "recognized" by Parliament. But while a delegated authority can be taken back, it is doubtful that one could "unrecognize" the authority of aboriginal governments simply by rescinding the recogntion (p. 76)"

Boldt, Menno and J. Anthony Long. 1984. Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians. Canadian Journal of Political Science 17:537-553. Reprinted in Menno Boldt and J. Anthony Long, eds. 1985. The Quest for Justice: Aboriginal Peoples and Aboriginal Rights. Pp. 333-346. Toronto: University of Toronto Press.

In the words of the authors, this paper addresses "the question of how the European-western idea of 'sovereignty' fits into traditional tribal Indian customs, values, institutions, and social organizations". The pitfalls of sovereign "statehood" as an objective for aboriginal leadership are examined. The authors argue that the European doctrine of "sovereignty" contains ideas that are inimical to the values and traditions of Indian societies. Sovereign authority, hierarchy, and the ruling entities of state contradict common aboriginal values and institutions of consensus, inherent equality, personal autonomy, sharing, spiritual contract, and a preference for the authority of custom and tradition.

The authors suggest that limitation on the sovereignty of the state as regards aboriginal people, rather than positive exercize of alien forms of sovereign statehood, would be more compatible with aboriginal objectives and institutions, and more palatable to central state authorities. The paper "explores alternative models of self-determination for Canada's Indians and concludes that stateless nationhood offers the best basis on which Indians may be able to negotiate internal self-determination (p. 539)".

Canada-Saskatchewan-Federation of Saskatchewan Indian Nations. 1985. Canada-Saskatchewan-FSIN Studies of the Justice System as They Relate to Indians in Saskatchewan. Working Papers Prepared by the Working Group on Customary Law. Vol.1.

The working papers in this volume comprise a primary source on a range of sociological, legal and political issues and questions, their interplay and complexity, in attempting to understand, rationalize and operationalize aboriginal custom, tradition and customary law. As such, the papers provide a valuable framework for the study of more focused areas within which aboriginal custom and tradition may operate. The fact that this work is Canadian and recent further enhances its value.

Franks, C.E.S. 1987. Public Administration Questions Relating to Aboriginal Self-Government. Backround paper Number 12. Institute of Intergovernmental Relations. Kingston: Queen's University.

The author attempts to "concretize" the notion of aboriginal self-government, concentrating on political and administrative issues, mainly through an analysis of existing 'models of aboriginal self-government' in the Canadian context.

Of particular interest for the present project is chapter 1, based mainly on Diamond Jenness' classification of traditional aboriginal political and social organization in Canada into two types: migratory tribes, and the more sedentary Iroquois and Pacific Coast tribes (Diamond Jenness, Indians of Canada, 7th edition, Queen's Printer, Ottawa, 1967). The first type is characterized by equality of persons, with leadership of family groupings and bands by popular consent, based on personal ability and prestige. The band was a relatively stable unit with definite territorial boundaries. Precise divisions between larger tribal collectivities were not apparent in the subarctic and arctic. Tribal-scale amalgamation of bands was rare, and there was no central governing authority, although there was commonality of customs and language among bands over large regions. On the plains, seasonal tribal gatherings were routine, with a correspondingly "higher" development of central political organization, although the authority of chiefs was less definite than in the case of Iroquois and Northwest Coast political organization. Fraternities spanning a number of bands were integral to plains tribal political organization, and these performed both military and internal policing functions. Law and order involved rules and injunctions passed on in oral tradition, and depended on the strength of public opinion. Persuasion and physical force were the methods of arbitrating disputes. Franks cites Inuit examples to illustrate the point that conflict resolution and control over socially harmful behaviour could be subtle and sophisticated.

The second type of social organization identified by Jenness was that of the Iroquois and the Pacific coast tribes, for whom more concentrated and stable food resources permitting semi-permanent villages. Franks briefly describes the confederacy and matrilineal longhouse/clan systems of the Iroquois nations.

Franks discusses four conclusions which we believe are essentially valid in view of contemporary anthropological knowledge: "First, traditional aboriginal societies did have self-government. The processes of self-government enabled essential political functions to be performed... Second, politics and government were embedded within the social, economic and cultural structure. In fact, they were so closely inter-related with other features, such as religion, family, and means of subsistence, that it is an artificial and distorting process to examine politics as a separate, distinct process... Third, there was no identifiable separate activity of administration in traditional aboriginal societies... Fourth, politics and government in traditional aboriginal societies were not crude or unsophisticated. The word 'primitive' is not appropriate. In contrast with techniques like the (Inuit) song contest, or the use of ridicule to resolve disputes and punish anti-social behaviour, it is the western law courts and systems of justice and incarceration that are crude, violent, and insensitive... The cultural values expressed in traditional aboriginal governments were very different from those of European political culture... strong emphasis was placed on consensus and cooperation rather than arbitrariness and coercion. Fifth, by the time that western scholars began to study aboriginal cultures they had already been influenced by the European invasion... A large number of these changes were of benefit to aboriginal peoples (pp. 12-15)".

Others of Franks' conclusions about aboriginal government -- which seem to stress the greater isolation of aboriginal societies and the greater autonomy of their political decision-making compared to modern states -- bear some qualification. Aboriginal nations, like modern states, have always in their decision-making processes taken into account their relations with political and commercial neighbours.

Of interest to the present study, by way of identifying the historical context in which customary and traditional forms of self-government will be negotiated, is Chapter 2, which traces the evolution of an aboriginal self-government concept in Canada. Chapter 3 includes discussion of the protection, enhancement and adaptation of aboriginal culture as one function of aboriginal self-government. Chapter 4 discusses definition of the people (the "public") subject to self-government and the implications for aboriginal government structures, and concludes that "to the extent that cultural adaptation is an important function of aboriginal self-government, then the definition of the public ought to include those belonging to a culture (p. 34)".

It is in this light that these papers should be consulted when coming to the more specific task of examining custom and tradition in respect of aboriginal structures of government (e.g. the selection of chiefs, the authority of elders etc...).

The background and objective of the Working Group on Customary Law are summarized in the Group's Executive Summary:

"In August 1984, the governments of Canada and Saskatchewan entered into an agreement with the Federation of Saskatchewan Indian Nations (FSIN) to carry out joint studies on certain aspects of the justice system as they relate to Indians of Saskatchewan. Indian customary law was one of the four topics selected for study...

The purpose of the customary law study was to explore the nature of customary laws, to consider how they can be defined, and to identify possible sources and how customary law practices can be accommodated and recognized within the existing law to better take into account Indian concerns and interests." (Volume I, p.i; further elaboration on background, objective, terms of reference and work plan are found at pages 2-5).

Volume I comprises four (4) separately prepared research papers (see Boyko-Wuerscher & Heon 1987, Tyler 1987a and 1987b, Kane 1987) by individual members of the Working Group, including an Executive Summary Report of the Group as a whole. Each research paper is annotated individually in this bibliography.

Delisle, Andrew. 1984. How We Regained Control over Our Lives and Territories: The Kahnawake Story. In L. Little Bear, M. Boldt, and J.A. Long, eds. Pathways to Self-Determination: Canadian Indians and the Canadian State. Pp. 141-147. Toronto: University of Toronto Press.

Chief Delisle states his conviction that there is no alternative for his people but to return to the traditional Six Nations system of government; that it is lack of respect for natural law on the part of non-natives in bureaucratic systems which makes Indian systems which rely on natural law seem out-of-the-ordinary; and that non-Indians by and large do not understand what Indians are talking about when they use such terms as "sovereignty", "nation", and "Indian government", because non-natives have their own (culturally-biased) definitions.

Delisle describes the concrete (sometimes unilateral) measures of the Kahnawake Mohawk to take charge of their health services, police services, and schooling. He decries Canadian government involvement in introducing "land allotment" through a "Certificate of Possession" system.

Feit, Harvey. 1979. Political Articulations of Hunters to the State: Means of Resisting Threats to Subsistence Production in the James Bay and Northern Quebec Agreement. Etudes/Inuit/Studies 3(2):37-52.

Political articulations between indigenous societies and the state necessarily assume a dual aspect: "The political articulation is developed, on the one hand, in response to the kinds and extent of political power the local population can effectively mobilize at the regional or national level, and on the other hand, to local efforts to make such political articulations compatible with local structures and responsive to local needs and aspirations (p. 39)".

In particular, this article is concerned with articulations eveloped by Cree to protect hunting, fishing and trapping rights, and to enhance the Cree subsistence economy and way of life under the James Bay and Northern Quebec Agreement. The articulations include: macro-system recognition of Cree socio-cultural practices with respect to the management of wildlife resources and harvesting activities; exclusive and preferential access to wildlife resources and areas, as well as guaranteed wildlife harvesting levels; a social and environmental protection regime; income support for hunting families, and joint Cree-Canada-Quebec wildlife and environmental committees and boards.

Feit poses two critical questions: "Is it possible for such articulations to be adequately linked with local social and cultural structures in a way that does not seriously endanger the integrity and autonomy of those structures? And, is it also possible for such articulations to be sufficiently effective in the regional, national and international arenas to significantly contribute to the success of the hunters' efforts to maintain their culture and society? (p. 49)". In Feit's view (as of 1979) the critical tests had not yet taken place.

Chapter 6 outlines important considerations regarding the structure of aboriginal political institutions. On the basis of a review of Penner, Bill C-52, Bill C-46, and other policy-relevant sources, Franks concludes that "All of these thrusts towards aboriginal self-government indicate that a condition that will have to be met before self-government is achieved is the formation of a constitution which guarantees universal adult suffrage, the selection of representatives through elections, and some means of accountability. Whatever the traditions and culture of the aboriginal group, and however they are adapted to these requirements, the basic liberal-democratic political values as expressed in the Canadian charter of human rights will have to be recognized (52)".

However, Franks fails to address the implications for aboriginal cultural autonomy and constitutional rights of imposing this condition without aboriginal consent. While Franks asserts that "there are ways that representative procedures can be adapted to be in harmony with traditional forms of aboriginal government and politics... Consensus and representation are not black and white opposites, but can complement each other (pp. 55-56)", he also acknowledges that "the new, rational and representative system of government might also come into conflict with traditional forms of decision-making... the distance between traditional aboriginal politics and governance and representative-rational aboriginal self-government and administration is great, and bridging it will create stress (pp. 98-99)". Missing in Franks is a satisfactory rationale for why aboriginal forms and values should be the ones to yield when traditional forms of decision-making conflict with electoral models.

Gibbins, Roger. 1986. Citizenship, Political and Intergovernmental Problems with Indian Self-Government. In J. Rick Ponting, ed. Arduous Journey: Canadian Indians and Decolonization. Pp. Toronto: McClelland & Stewart.

This article is intent on posing certain "hard questions" for the implementation of Indian self-government, questions which Gibbins feels have not been given adequate consideration in the general debate.

Gibbins believes that an Indian government which could speak with one voice for all groups in Canada, with the power to enforce its decisions, will be required to meet the objectives expressed by aboriginal leadership, and to satisfy the federal government's criterion of "accountability". To Gibbins, this implies a large-scale Indian government which local bands could not have the power to resist or opt out of. The argument is overstated. Although there is an important issue relating to the political efficiencies of scale -- small communities do not wield sufficient independent power to adequately defend their interests -- the author fails to demonstrate why responsible and effective aboriginal governments could not emerge at regional or territorial levels.

This article does raise the issue of how far larger-scale Indian governments could be made consistent with traditional values and institutions. For some useful thoughts on this question, see the paper by Marule, below, especially on tribal government and tribal confederacies. The federal government needs to consider self-government arrangements that are consistent with customary and traditional institutions that represent regional scales of organization, e.g. "tribal" and "tribal confederate" levels of Indian Government.

Finally, Gibbins argues that the individual protections under the Charter of Rights and Freedoms are probably more important in small homogeneous communities than large metropolitan centres and should be retained by native people. This argument appears to invert the usual perception that it is in the complex, depersonalized political environment of mass society that the rights of individuals require special protection; and overlooks the very real limitations on the abuse of individual rights entailed by processes of consensus in simple egalitarian societies governed by consensus.

Kane, Doug. 1985. Customary Law: A Preliminary Assessment of the Arguments for Recognition and an Identification of the Possible Ways of Defining the Term. In Canada-Saskatchewan-Federation of Saskatchewan Indian Nations. Canada-Saskatchewan-FSIN Studies of the Justice System as They Relate to Indians in Saskatchewan. Working Papers Prepared by the Working Group on Customary Law. Vol.1.

The field covered by this paper is central to the development of policies regarding aboriginal customs and traditions within a self-government negotiations context. Kane explores the rationale for recognizing customary law (beyond the typical area of family matters) and the definitional approach to customary law (how to, and who, should define it).

The author explores the arguments for and against recognition from a non-legislative perspective and raises interesting points about the effects of translating customs into "law". He sees "potential to go beyond previous law accommodations of Indian customs" and believes that "parties should not be restrained unnecessarily by the state of the law at the moment" (p. 27). Finally, an important point is made -- which is largely ignored in works on the recognition of aboriginal customary law but which would assist policy-makers -- that "Indian people and their representatives should play a central role in identifying and determining the character of the customs and their applicability in the modern context" (p.29).

Little Bear, Leroy. 1986. Aboriginal Rights and the Canadian 'Grundnorm'. In J. Rick Ponting, ed. Arduous Journey: Canadian Indians and Decolonization. Pp. 243-259. Toronto: McClelland & Stewart.

This article compares standards and paradigms in the legal and political philosophy of aboriginal people, of British common law, and of international law. Little Bear finds that the concept of a "treaty commonwealth by treaties of protection" is an option both supportable in British and international law, and more appropriate to Indian concepts than past judicial and policy practices in Canada. This rationale is perhaps applicable to self-government negotiations, to the extent that they may be construed as treaties between the negotiating parties.

Little Bear decries the prevalence in Canada's handling of aboriginal title of the "Grundnorm" approach which "refers to the fact that whatever a government can 'get away with' (in terms of changing the constitutional law of the land merely through its administrative and legislative actions) might well be held by the courts to be legal, even though it might not conform to the written constitution or to international legal norms (p. 243)".

Little Bear's analysis outlines British common law and international law precedents which run counter to the Canadian judicial position that aboriginal title can be extinguished at the whim of the sovereign. Specific attention is paid in this article to formulations of "property". Little Bear discusses the implications of aboriginal paradigms in relation to the question of what was capable of transfer by Treaty -- specifically, the implication of sharing with aliens a title granted by the Creator. This argument could be extended to institutions of government which are likewise said by aboriginal people to derive their authority from the Creator, not from secular state authorities.

Lyons, Oren. 1984. "Spirituality, Equality, and Natural Law". In L. Little Bear, M. Boldt, and J.A. Long, eds. Pathways to Self-Determination: Canadian Indians and the Canadian State. Pp. 5-13. Toronto: University of Toronto Press.

This chapter by an Iroquois author opens with a thoughtful portrayal of the advantages of consensual decision-making over electoral majority systems, for bringing about genuine social commitment to agreements. The relationship of the "political fire" to the "spiritual fire", the importance of the long-range persistence of indigenous society, the idea of the circle of the nation and of nations, traditional principles regarding lands, and the non-applicability of Canadian and American borders to Ho-de-no-sau-nee are other topics discussed in the chapter.

Marule, Marie Smallface. 1984. Traditional Indian Government: Of the People, by the People, for the People. In L. Little Bear, M. Boldt, and J.A. Long, eds. Pathways to Self-Determination: Canadian Indians and the Canadian State. Pp. 36-45. Toronto: University of Toronto Press.

This chapter opens on a statement of the nature of authority in traditional Indian government, the consequences and potentialities of which are eloquently developed in the remainder of the paper: "In traditional Indian societies, whether band or clan, authority was a collective right that could be temporarily delegated to a leader, under restrictive conditions, to carry out essential activities. But the responsibility and authority always remained with the people (p. 36)". The author cites the problems created by the coercive imposition by the Canadian government of an elected form of government on Indians. The assumption by non-natives that little remains of traditional Indian ideology and philosophy is challenged, and attributed to the mistaken assumption that a culture must remain static to remain Indian.

Marule argues, "It is a fatal mistake for us to assume that solutions to our problems can be found in European-Western structures, systems, and processes (p. 40)". Marule argues that merely substituting Indians for non-Indians in a bureaucratic system of government will not improve the lives of Indians, and argues that the intransigence of federal and provincial governments about recognizing some content in Constitutional aboriginal rights, as well as the ability of the Indian Affairs Department to yield or withold resources, are major obstacles to the development of traditional Indian government. The administration of resources from Indian Affairs via imposed systems tends to create an Indian elite which is more responsive to the federal bureaucracy than to its own people.

"An alternative model of government available to Indians is one that places the locus of authority in the smallest political unit. The larger, more encompassing political units (tribal councils and tribal confederacies) would play only a delegated, co-ordinating function. Under such a model we would resurrect family-clan groups and band communities... ultimate authority would continue to rest within each band community... by vesting authority in the smallest political unit, the necessary administrative structures are kept as close as possible to the people (p. 42)."

Marule suggests that the model of government she describes offers potential advantages to all Canadians, who must deal with a municipal level of government having some of the same difficulties that lead Indian people to reject it as a model for themselves: fragmented authority and severely restricted jurisdiction insufficient for efficient and integrated planning, and alienation of people from central governments.

"If we really want to help ourselves, we must revitalize our institutions. We must turn to our own traditional structures, systems, and processes. This does not mean that we have to return to the way we were two or three hundred years ago... We still have a chance to shape our institutions so they will conform to our traditional philosophies and ideologies and to adapt these to contemporary times so they will be as useful as they were previously to our community. But it is essential that Indians insist on traditional institutions, systems, and processes as the framework for any discussion of Indian government. Our traditional philosophies and ideologies are absolutely vital to our future. They must be clarified to give our people a real alternative (p. 44)".

Porter, Tom. 1984. Traditions of the Constitution of the Six Nations. In L. Little Bear, M. Boldt, and J.A. Long, eds. Pathways to Self-Determination: Canadian Indians and the Canadian State. Pp. 15-21. Toronto: University of Toronto Press.

This paper by an Akwesasne Mohawk outlines what the Ho-de-no-sau-nee mean by 'Indian government', in the context of traditional institutions and cultural revival. The doctrine of the Constitution as deriving from the Creator is stated. The character and functioning of clans, leadership, consensus, impeachment, matriarchal knowledge, the personal qualities of leaders, and the lack of authority of Canadian and American Constitutions with the Ho-de-no-sau-nee, are topics discussed. The vision of traditional Ho-de-no-sau-nee government presented includes specification of the face-to-face social controls which safeguard consensual democracy and equality.

Salisbury, Richard F. 1986. A Homeland for the Cree: Regional Development in James Bay 1971-1981. Kingston and Montreal: McGill-Queen's University Press.

This book examines Cree society over a ten year period, from five years prior to five years after the signing of the James Bay and Northern Quebec Agreement. The study places the Agreement in the context of the emergence of Cree regional society through the unification of "village-bands". Regional participation of bands in the Cree Regional Authority, Cree Health Board, Cree School Board, justice, and communications has provided a structure for positive social and economic development that would not in Salisbury's view have been attainable by individual bands.

Shifts and continuities from the politics of village band society to those of regional society are assessed: "In general, the formal political structure has become a part of the village, rather than a part of DINA, and remains under village control rather than controlled by outsiders. And through their elected officers the villages have a say in the policies of the regional bodies which affect the villages. All Cree can now participate in the political process of the Cree homeland (p. 116)".

This analysis is pertinent as an example of how an aboriginal nation, with little traditional political organization beyond a band level of social integration, has achieved a new national level of government both through an elaboration of indigenous systems of decision-making and administration, and through adaptation to the range of bureaucratic structures required for defending rights and interests in state-level fora.

Tyler, Kenneth J. 1987a. Custom and Common Law. In Canada-Saskatchewan-Federation of Saskatchewan Indian Nations. Canada-Saskatchewan-FSIN Studies of the Justice System as They Relate to Indians in Saskatchewan. Working Papers Prepared by the Working Group on Customary Law. Vol.1.

This paper is a thorough legal analysis of the English common law concerning the recognition of local customs as reflected by British judicial precedants and doctrine. The strict rules of procedure and evidence are elaborated upon. In his short presentation of local custom in Canada, the author states:

"While it is evident that the recognition of local custom was a part of the English tradition, it does not appear to have survived the trans-Atlantic journey". (p.20)

This is even more evident with respect to aboriginal customs. This is not to say, however, that Canadian courts have not recognized the existence and legitimacy of such customs (this is the topic of the next research paper presented by the same author). Rather, it may be an indication that the English common law in this regard is not appropriate to the context of aboriginal custom. Although the author's opinion is that the Canadian courts should be employing the English common law in these circumstances as it would serve the aboriginal peoples well, this appears to be an overly enthusiastic and unrealistic view (the Australian Law Reform commission rejected its use as a method of recognition) and incompatible with the Federal Government's policy of community based aboriginal self-government, which is intended to provide a "flexible" approach to negotiation with individual bands.

Tyler, Kenneth J. 1987b. The Recognition of Aboriginal Customary Law by the Canadian Courts. In Canada-Saskatchewan-Federation of Saskatchewan Indian Nations. Canada-Saskatchewan-FSIN Studies of the Justice System as They Relate to Indians in Saskatchewan. Working Papers Prepared by the Working Group on Customary Law. Vol.1.

A complete review of Canadian judicial precedents regarding the recognition of aboriginal customs forms the subject of this paper. (It should be noted that since the time of writing further precedants have been established). This review is interesting and important in the major respect of demonstrating the persistence of Canadian courts over time in recognizing aboriginal customs, notwithstanding the inconsistency of reasons from one case to the next (an attempt to accommodate recognition despite differing facts) and the lack of application of the strict criteria of the English common law governing proof of local customs.

The jurisprudence examined by the author mainly relates to family matters for the simple reason that court precedents where custom figures as the central issue are lacking in other areas. However, Canadian courts have implicitly (if not expressly) dealt with issues of custom in other contexts (the application or non-application of certain provincial laws, treaty interpretation, land claim litigation etc...). These need to be studied as they may shed light on alternatives for reconciling aboriginal customs and traditions with Canadian constitutional principles and governmental practices.

Mr. Tyler summarily raises the issue of the possibility of courts recognizing aboriginal customary law as one of the "aboriginal rights" preserved by s. 35 of the Constitution Act, 1982 in his treatment of a recent aboriginal adoption judgement. Once again, the implications of this possibility must be examined in more detail.

8.3 AFRICA

Allot, A.N. 1957. The Judicial Ascertainment of Customary Law in British Africa. The Modern Law Review (May) 20:244-263.

This is a concise older analysis of some inconsistencies in the legal status of customary law in the British African colonies and difficulties in the just articulation and recognition of custom between local courts and high courts.

Mechanisms whereby customary law can be more systematically recognized as law, and not only as "fact", are discussed.

There is specific treatment of special witnesses, assessors, referees, allowable evidence, case law, legislation and codification.

Bennet, T.W. and T. Vermeulen. 1980-81. Codification of Customary Law. Journal of African Law 24(2):206-219.

These authors examine two alternative routes chosen by decolonizing African countries: 1. radical reform of the whole legal system (Ethiopia), involving the almost total abolition of customary law and the imposition of codes inspired by foreign systems, and 2. codification in close conformity with customary law (Madagascar), based on the thesis that customary law is better adapted to the needs of the people, and is more in accord with their traditions and social values.

Codifications which seek to impose a foreign system of law run the risk of widespread disregard for the code -- laws should reflect the attitudes of the societies they serve. However, codification of customary law also runs the risk of failing to attain the degree of acceptance needed to be effective, and of being misapplied and/or disregarded as formal law. Because customary law is evolved by the people themselves, any codification of it is apt to be seen as an imposition by outsiders.

The authors suggest that the South African "Homelands" are wisely choosing to "restate" rather than codify customary law, to protect against invasion by Roman-Dutch law.

The attributes of customary law are distinguished from western European systems of law. The unwritten status of customary law entails greater ambiguity, less precision, and more flexibility than is the case with formal law. For customary law, the settlement of dispute and reconciliation are the cardinal values, and tribal courts usually work within these parameters. The precise and impartial application of laws is not a prime value, and there is less concern in customary law with logical systematization or the historical evolution of rules.

A key distinction between customary and European legal systems is that the former are founded in the consensus of the socio-political group, a relatively decentralized process, by contrast with the centralized political authority of European states. Community involvement in the creation of customary law occurs at two levels: 1. the recognition and transformation of standard patterns of behaviour into normative rules, and 2. the articulation of principles, changes and developments in customary law in the trial context, where chiefs/ judges play a passive role in hearing the formal representations of plaintiffs and defendants, and judgements are expected to embody the opinions reached by the assembled community after free debate and discussion.

A fundamental difficulty with codification of customary law by the state is that "once written and promulgated the law becomes fixed; the previous genitors of the law, the people, no longer have a direct role to play in the change and adaptation of the law". (217) It is improbable that codification will reflect with sufficient accuracy and sensitivity the actual functioning of customary rules. Codification, essentially, "is a process of legislation -- a command emanating from the central political authority... Simply because of the nature of the source from which it is derived, a code is necessarily antithetical to customary law; and, because of the social distance between the legislator and the people, the possibility that the view of the two will not coincide is increased." (219)

British Colonial Office, African Studies Branch. 1949. Methods of Recording Native Customary Law. Journal of African Administration 1:130-136.

The article briefly describes thirteen attempts to record customary law in African colonies, discusses general difficulties in the compilation of laws and reccommends methods for ascertaining and recording them.

Morris, H. F. and James S. Read. 1972. Indirect Rule and the Search for Justice: Essays in East African Legal History. Oxford: Clarendon Press.

This is an excellent comprehensive study of the British system of indirect rule as it was applied in East Africa, with reference to the role of customary law in the broader system of law.

It contains articularly useful discussions of the practical, political and juridical reasons for British recognition of customary law, the "native court" system, marriage law, and the status of customary law in the eyes of the colonial authorities.

A wealth of practical experience vis-a-vis the evolution customary law, legal precedent, attempts to define customary law and court systems is considered. The authors highlight the tension between the administrative convenience of more "substantive" (grassroots) justice and the legalistic preference for consistent, authoritarian application of universal rules.

8.4 AUSTRALIA

Kirby, Mr. Justice M. D. 1980. T. G. H. Strehlow and Aboriginal Customary Laws. Adelaide Law Review 7:172-227.

In this tribute to the linguist/anthropologist T.G.H. Strehlow, Mr. Justice Kirby (Chairman of the Australia Law Reform Commission) summarizes and discusses the views presented by Strehlow to the Law Reform Commission on the prospects for the Australian legal system recognizing and enforcing aboriginal customary law. Kirby reviews changing attitudes, important cases and policies in Australian society: from the colonial period when the recognition and enforcement of aboriginal customary law would have been unthinkable, a long history characterized by policies of deliberate assimilation, and increasing efforts in the past several years to accommodate aboriginal law as one measure in the overall attempt to forge a new relationship between indigneous and Euro-Australians.

Several features of aboriginal customary law thought by Strehlow to be incompatible with recognition by the Australian system are summarized, including the following: 1. the secrecy of aboriginal law would lead to difficulties in codification/enforcement as well as discrimination against women who are for religious reasons excluded from the knowledge of some customary law; 2. the aboriginal "enforcement of religious and incest rules without regard to intent and fault" (p. 172) would be unacceptable before the courts; 3. strict rules of interkin relations and strong clan loyalties make enforcement by aboriginal police difficult; 4. aboriginal punishments of death or physical violence for certain crimes would be unacceptable to state institutions of justice.

Strehlow feared that the attempt to incorporate aboriginal custom into the general law could lead to a legal "no man's land", or to "synthetic" law system which is neither white nor aboriginal. Yet it is problem which must be broached by the Law Reform Commission, says Kirby. While traditional aboriginal law is in many respects not tenable for young modern aborigines, "white man's law" has also failed to take root.

Law Reform Commission of Australia. 1986. The Recognition of Aboriginal Customary Laws. Report No. 31. Summary Report. Canberra: Australian Government Publishing Service.

This report represents the final results of a study of approximately ten years duration. The Commission's terms of reference were narrow in that they emphasized criminal law, and more particularly, the accommodation of aboriginal customary law within the general criminal law system of the land. While recognizing the specific scope of its mandate, the need to avoid duplication with other bodies conducting research, and the fact that to adequately cover the field other aspects were integral to the study, the ALRC did nonetheless address some aspects of aboriginal customary law in the civil law context.

In many respects the Report is of limited use for the purpose of the recognition and operationalization of aboriginal customs and traditions regarding aboriginal structures of government under present Canadian Government policy - that is, community based negotiation of self-government agreements. The Report offers no insights into structures of government and furthermore, the ALRC expressly states that although "some of the issues dealt with touch on basic questions of self-government or autonomy ... in the Commission's view, the recognition of Aboriginal customary law should not be seen as the means through which aboriginal self-determination is to be achieved. Many of the demands for self-government cannot be satisfied through any form of recognition of aboriginal customary laws." (p.2, paragraph 3). In other words, the results and recommendations of the Commission are not viewed in the context of self-government.

Recognition of customary law, according to the Commission, can help to overcome failures in general law in respecting the rights of native peoples. The approach to recognition is termed "functional" -- an issue by issue approach -- recognition taking place exclusively within the framework of the general law (p. 21, paragraphs 49 and 50). Customary law must be consistent with "basic human rights" to be recognizeable. Exclusion of aboriginal people from the general law, and incorporation/codification of customary law within the general law, are both rejected as alternatives.

Layton, Robert. 1985. Anthropology and the Australian Aboriginal Land Rights Act in Northern Australia. In Ralph Grillo and Alan Rew, eds. Social Anthropology and Development Policy. Pp. 148-167. London and New York: Tavistock/Methuen.

This article summarizes experience under the Aboriginal Land Rights (Northern Territory) Act, which included a definition of land ownership according to Aboriginal tradition. The orthodox anthropological model of totemic, patrilineal descent groups owning territories defined by sacred sites became a judicial standard for the recognition of claims under the Act.

Some key issues in the legal recognition of custom and tradition emerge. First and foremost, "to obtain legal title, claimants must submit to a procedure defined by whites and administered effectively by white lawyers and anthropologists. The wording of the Act at best crystallizes, and at worst fossilizes, unwritten Aboriginal tradition in legal terms... The essential problem with the Act's definition of traditional ownership is that it does not allow for social process" (p. 151). By "process" is meant the political and demographic dynamics intrinsic to Aboriginal society. From the point of view of legislators, however, some definition of customary law was necessary to determine the formal or structural rules of Aboriginals, in order to distinguish genuine from opportunistic claims.

Significant variation in customary laws among different groups in the Northern Territory had to be taken into account in applying the criteria of the Act. To accurately understand the subtleties of customary law in any given case involved lengthy testimony from and cross-examination of aboriginal people and anthropologists. A major judicial concern was to distinguish between the corporate kin groups who own territory (estate-holders) and the on-the-ground "mobs" inhabiting and using a range (whose members include non-"owners", or may derive from rights which are variously argued to be secondary or complementary to those of the principal "owners").

Maddock, Kenneth. 1982. Aboriginal Land Rights Traditionally and in Legislation: A Case Study. In Michael Howard, ed. Aboriginal Power in Australian Society. Pp. 55-78. Honolulu: University of Hawaii Press.

This article and the next are instructive as a case study in the complexities of accurate translation of aboriginal categories and rules for purposes of statutory codification and application. The author examines aboriginal land rights of ownership and decision-making among the Aborigines of the Beswick Reserve in Arnhem Land, both traditionally and pursuant to the Australian Aboriginal Land Rights (Northern Territory) Act. "Aboriginal land law", Maddock says, "can be arrived at only by abstraction from a wide and, legally speaking, undifferentiated web of social and symbolic relationships, the clearest and most conscious expression of which is to be found in ritual and mythology... Economic and residential aspects of relations to land provide a second body of data from which to abstract Aboriginal land law" (p. 56).

An ethnographic description of the respective territorial rights and responsibilities of moieties paired as 'gidjan' and 'djunggaiji' is given. The usual English glosses 'owner' and 'manager' are found to be misleading translations, inasmuch as 'gidjan' and 'djunggaiji', whose rights derive from birth and marriage respectively, cannot exist independently of their relationship to each other, and cannot be concentrated in the same person, as under English private property law. The Aboriginal Land Rights Act has tended to impute legal personality and title to 'gidjan' or equivalent, and to regard rights of 'djunggaiji' as secondary. This is the result of an invalid analogy to English estate in fee simple.

The accommodation to Australian law represented by Land Councils and Land Trusts provided for in the Act, while foreign to Aboriginal tradition, is seen as essential in reversing past expropriation of land by non-Aborigines. Advantages and disadvantages of the separation of decision-making Land Councils from title-holding Land Trusts (both comprised of and nominated by Aborigines subject to a federal minister's approval) are weighed.

Two purposes of the Aboriginal Land Act are adduced: "...to establish a legal and administrative framework responsive to both the Australian Government and to Northern Territory Aborigines within which title to land can be held and powers of decision over land exercised...." (p. 72) and "to give some sort of recognition to traditional ideas about and relations to land" (p. 73). Maddock argues that the statutory bias toward the rights of members of patrilineal descent groups does not fulfill the latter objective -- and that the full spectrum of traditional rights should be taken into account to broaden the definition of statutory owners. This, however, would still not satisfy recent Aborigines migrants to the Beswick Reserve, many of whom have traditional rights only to lands unrecoverable from whites, or to Crown lands offering few amentities. An alternative would be statutory recognition of rights based on community residence as well as traditional connections, with Aborigines registering themselves as members of the community of their choice.

Maddock, Kenneth. 1983. Owners, Managers and the Choice of Statutory Traditional Owners by Anthropologists and Lawyers. In Nicolas Peterson and Marcia Langton, eds. Aborigines, Land and Land Rights. Pp. 211-225. Canberra: Australian Institute of Aboriginal Studies.

This article attempts to explain why a narrow statutory definition of traditional "owners" became embedded in the Aboriginal Land Rights Act, rather than inclusion of the wider spectrum of rights and interests to territory which exist in aboriginal systems. The weight of anthropological opinion in the late 1960's and early 1970's was biased toward an interpretation of patrilineal descent groups as "owners" of territories defined by the sacred sites for which these groups exercize(d) primary ritual responsbility. Later claims cases under the Act have tended to an enlarged definition which acknowledges the complementary interdependence of intermarrying 'owner' and 'manager' moieties in the ritual maintenance of sacred sites.

Overlapping and conflicting conceptions of ownership -- in vernacular Aboriginal English, anthropological, and ordinary English parlance -- are discerned: "the danger is that, despite the inadequacy of these conceptions as jurisprudential formulas, one or other of them will colour interpretation, that is, will enter into the choice of Aborigines to claim land or to exercise powers of veto or to enjoy special financial benefits under the Act" (p. 216).

The application of the Act in each claim is the outcome of an interplay between the statutory criteria and the customs and traditions of the claimants. Anthropologists have played a large role in the definition and choice of claimant groups -- a role which in itself involves interpretation of the Act and is consequential for the distribution of rights among Aborigines. Aborigines themselves have been relatively silent on the legal formulation of their rights, and this compounds anthropologists' responsibility to be realistic about the state and relationship of their knowledge to statutory definition and application.

The powers created for Aborigines by the Act are judged advantageous and functional with respect to a specific recent history -- the dispossession of aborigines and the appearance of large numbers of immigrants. "We are dealing with rights which did not exist traditionally because the circumstances which call for them did not arise in pre-European times" (p. 219). The task is to determine, in light of knowledge concerning traditional ideas about and relations to land, to which aboriginal claimants should new powers and advantages go.

Statutory provisions stand a better chance of being faithful to aboriginal systems if they avoid terminology such as "traditional owners" which is subject to great difficulties of ethnocentric interpretation and translation. More neutral terminology such as "traditional rights-holders", would promote more culturally sensitive and accurate application in specific cases.

Uncertainties of interpretation might seem to recommend more mechanical statutory defintion and jurisprudence. But conflicts of interpretation are only to be expected when important interests hinge on definitions.

Morse, Bradford. 1984. Aboriginal Self-Government in Australia and Canada. Background Paper Number 4, Aboriginal Peoples and Constitutional Reform, Institute of Intergovernmental Relations, Queen's University, Kingston.

A comprehensive look at: 1. constitutional practices defining aboriginal status; 2. jurisdiction within a co-operative federalism ackowledging paramountcy of the commonwealth; 3. aboriginal land title and legislation; 4. land tenure; 5. aboriginal government and customary law. Of special applicability to the Canadian context is the three-tiered definition of aboriginal status/community membership which Morse views as allowing for flexibility of inclusion and a degree of community control over membership. Also considered is the extention of constitutional arrangements allowing for the protection of sacred sites to protection of language and culture (Aboriginal and Torres Strait Islander Heritage Act). The transfer of lands to aboriginal Land Trusts and Councils (with variable forms of Aboriginal control from state to state) is the basis for nascent aboriginal government. Morse points to various elements of self-government in place and under development: the requisite land base, control over membership and access to the land, use of aboriginal court and policing systems incorporating customary law (Tribal Assesors in South Australia) and resource management and economic development boards.

Morse discusses the shift in viewpoint from the pre-1960's, when aboriginal peoples' customary law was not recognized, to today's orientation toward accommodating customary law; cf. the Australian Law Reform Commission. He notes, however, that Australia is further from acceptance of original sovereignty or the present right to self-government of aboriginal peoples than the United States, which might serve as a better model for aboriginal self-government in Canada. The 1982 Queensland and Torres Strait Islanders Act, however, is a special case with regard to the large degree of aboriginal control over their own affairs and curtailment of state or federal government veto power in certain areas.

Sansom, Basil. 1985. Aborigines, Anthropologists and Leviathon. In Noel Dyck, ed. Fourth World Politics in Canada, Australia and Norway. Pp. 67-94. St. John's, Newfoundland: Institute of Social and Economic Research, Memorial University.

This is a paper on representing aboriginal traditions, rights and social processes in state fora, based on an analysis of the development of the Aboriginal Land Rights (Northern Territory) Act (1976) and on the author's experience of two Australian land claims entered under the Act. The contrast between a "rights claim" (Finniss River) and a "needs claim" (Humpty Doo) is examined. The role of anthropology is highlighted.

A number of propositions are advanced: 1. To have discourse with the state, indigenous groups must be made into corporate entities -- the Hobbesian point that "Systemes that are Private and Irregular" are to be made "Systemes Political and Regular", and so Persons in Law; 2. Representation involves the utilization and development of connecting links to the state, and this requires a creative anthropology of "processural" modelling, not the authoritative citation of anthropological orthodoxy; 3. Anthropologists become involved in these linkages when they are conceded status by central state institutions, not just because of their command of information about other cultures, but when anthropological skills are taken to affect either the definition of a public problem, or the structure of the situation in which representations of the problem are made.

A discussion of the Gove case points to both formal and processural issues involved in linkages between aboriginal rules and institutions and the state. This case contributed directly to measures taken in the Aboriginal Land Rights Act to anchor tradition in aboriginal tradition, circumventing the impasse reached when the judge in the Gove land rights case determined that Aborigines "could neither be credited with corporate groupings nor granted any culturally- entertained notion of proprietory right that could reasonably be translated into any one of the forms of ownership or tenure (e.g. fee simple) that are recognized in Western jurisprudence" (p. 75). However, the attempt to privilege formal corporate clans holding rights by tradition is confounded by the reality of fluctuating groups as constituted "on the ground" (see also articles by Maddock and Layton).

Sansom argues that in an era of special status for indigenous peoples, Departments of Indian, Aboriginal, Bantu, etc. Affairs can either be dismantled, or charged with implementing the provisions of aboriginal special status. Sansom argues that decentralized, pluralistic dealings with a variety of bureaucratic departments and special statutory bodies are beneficial in reducing bureaucratic monopolies.

In the recognition of Aboriginal systems by the state, processural anthropological modelling is needed for four reasons: 1. Fourth World people in their social organization frequently emphasize process rather than produced structure, fluctuating associations rather than formal corporate entities, and only processural modelling will avoid distorted formalizations; 2. process is in the nature of aboriginal survival in contact with the state... "To reconcile active tradition with a history of post-contact vicissitudes, Fourth World populations that have kept tradition have maintained it by exploiting the capacity of tradition to accommodate shifts and changes and to be reworked as tradition itself was brought to novelty to embrace it" (pp. 93-94); 3. measures based on social need require models that keep pace with the dynamic reproduction of social forms in change; 4. anthropological theory has itself outgrown models of mechanical "pattern maintenance", which rely on the artifical arrest of time. To bear the scrutiny of lawyer, bureaucrat, parliamentarian, anthropology must attend to the explanation of the production and reproduction of social forms.

Sutton, Peter. 1984-85. Suggestions for a Bicameral System. Anthropological Forum (University of Western Australia) 5(3):395-399.

Arguing that existing legislation models aboriginal land councils after private companies, thus ignoring the moral/spiritual basis of aboriginal interests in land, Sutton envisages an alternative structural-procedural model. His model encompasses both sacred and secular interests through a bicameral structure. Aboriginal religion would be represented by a non-elected, ceremonial congress of elders augmenting the concerns of the democratically elected councils. The ceremonial congress would have veto powers over areas such as: sacred sites, traditional owners, disbursement of funds in connection with ceremonial life. Sutton feels this model would bolster the "relative autonomy of spiritual deliberations", where change threatens to undermine the traditional moral base. As well, he views this model as articulating all levels of aboriginal representation -- community, regional, national -- and as capable of streamlining into a national aboriginal policy body.

8.5 NEW GUINEA

Gordon R.J. and M. J. Meggit. 1985. Law and Order in the New Guinea Highlands: Encounters with Enga. Hanover: University Press of New England.

The key chapter in this book for our purposes is Chapter 7, which eloquently states the case against the Papua New Guinea Law Reform Commission's recommendation to incorporate customary law as the underlying general law of New Guinea. Currently operative "unofficial" judiciaries of village "insiders" are prefered over a transformed customary law presided over by "outsiders". The key difference and advantage of what the authors prefer to call "homegrown" (rather than customary) law is its procedural and interpretive flexibility in the context of village life.

Pitfalls and misuses of customary law in bureaucratic application are outlined. The state's interest in incorporating and implementing customary law as general law lies in the potential to garner legitimacy through the acknowledgement of indigenous culture, while coopting and undermining the autonomy of "unofficial" local judiciaries. Potential misues of customary law at the village level are also examined; with increasing stratification and competition in villages, the "harmony" model of customary law could be used by stronger parties to legitimize actions against weaker ones, while minimizing the risk of third party bureaucratic intervention.

Law Reform Commission of Papua New Guinea. 1977. The Role of Customary Law in the Legal System. Canberra. Law Reform Commission.

The report is divided into two parts, dealing with the role of customary law in the underlying law, and in the criminal justice system. The Commission recommends that customary law be the primary source of the underlying law in such areas as contracts and compensation for injuries. Their definition of customary law recognizes that variations exist according to time and place, and thus provides for a degree of flexibility. In areas where customary law is lacking, a court decision may be based on analogies drawn from common law or foreign law. Concerning land issues, only customary law shall apply. The report also establishes guidelines for resolving conflict between different customary laws.

Concerning criminal matters, the Commission recommends that indigenous customs and perceptions be given greater consideration when assigning responsibility and determining appropriate punishment. The present Criminal Code is based heavily on Australian and English law. The Report outlines past cases to illustrate how custom has been overlooked, and follows these with its proposals. It is recommended that a person be found guilty, when acting under a customary law, only when s/he causes death or serious injury to another person; otherwise s/he should be acquitted. In determining appropriate punishment the court should: a) consider penalties to be imposed by customary group; b) be able to impose community work as an alternative to imprisonment; and c) be able to impose compensation in cash or in goods and services. Further procedural details are included in the proposed Bill included at the end of the report.

O'Regan, R. S. 1972. Pruning The English Oak. University of Papua and New Guinea.

The author develops an argument, somewhat neo-colonialist in tone, for the retention of British law and legal systems in New Guinea. Modifications are recommended to take account of local cultural circumstances, including the institution of local assessors, but without decision-making power and at judges' discretion, to assist judges in understanding local customary norms and fact situations.

8.6 NEW ZEALAND

Cleave, Peter. 1986. Language and Authority in the Ethnic Politics of New Zealand (Aotearoa): A Case Study of the Treaty of Waitangi. Ethnic and Racial Studies 9(3):

A detailed look at the Treaty of Waitangi (1840) -- which accorded significant autonomy to Maori custom and tradition -- in terms of the differences in Maori and English (Pakeha) understandings of it. Cleave examines the differences in the English version of the treaty and its Maori translation. Of importance are the problems involved in avoidance of Maori concepts (such as mana and tapu), or their mistranslation in the English, and readings of the treaty as highly Christian in nature (and therefore alien to the Maori at that time). Cleave considers the treaty to be an important early example of cultural cross-reference.

Fisher, Ronald J. 1984. Conflict and Collaboration in Maori - Pakeha Relations. University of Wikato, Centre for Maori Studies and Research, Hamilton, New Zealand.

Fisher's study is based on numerous interviews conducted with bicultural, "successful" Maoris, eliciting their opinions about the past, present, and future Maori-Pakeha relations. Opinions seemed to be generally pessimistic about inter-cultural understanding; but Fisher summarizes a number of suggestions for improving intercultural relations.

Improvements in inter-cultural understanding through educational programs and through government policies of bilingualism and biculturalism are recommended. Special emphasis is placed on increased support for Maori self-determination a long tribal lines as well as on more equitable distribution of societal resources.

Frame, Alex. 1981. Maori Affairs. Colonizing Attitudes Towards Maori Custom. New Zealand Law Journal (March): 105-110.

Frame provides a brief historical summary and analysis of the attitudes of the Pakeha (Europeans) during the colonization of New Zealand and the Maoris. He traces British recognition of native laws and customs under the 1840 Treaty of Waitangi, and the 1852 New Zealand Constitution Act, as governing Maori areas, through to erosion of this recognition under the Native Districts

Regulation Act of 1858, the Native Rights Act of 1865, and the Native Lands Act of 1862 and 1865. Maori political movements have argued that separate political institutions were constitutionally guaranteed by the earlier colonial instruments.

Macdonald, Robert. 1984. New Paths to a Maori Future. The Geographical Magazine 56:

A recent look at the Maori and their efforts to gain sovereignty. Macdonald briefly discusses Maori cultural regeneration in urban areas (via new marae or traditional meeting places) and the movements of farmers to organize their land into model collectives. Also discussed are the Maori gangs of the 1970s and the riots of 1981 which caused a dramatic increase in attention and support for the Maori. The Treaty of Waitangi is discussed as the primary focus of political agitation and special reference is made to the 1984 Hikoi (peace march) which protested the government's failure to honour the treaty. Macdonald concludes by discussing the role of the Waitangi Tribunal and a 1983 finding in favour of the Maori and against a proposed government development plan.

McHugh, P. G. 1980. The Fragmentation of Maori Land. Legal Research Foundation Inc. University of Auckland, Auckland, New Zealand.

In this article, McHugh examines the problem of Maori land fragmentation through multiple ownership, which has resulted in an impasse concerning use of the land for Maori economic development. Factors contributing to fragmentation include the grafting of Pakeha (European) values onto traditional land tenure practices, and Europeans legal formulations of Maori "custom" which increasingly diverge from Maori traditions and the cultural significance of land to Maori. McHugh believes that the spiritual alienation of Native land is as serious a social problem as legal alienation.

After discussing the merits of consolidation and development schemes, incorporations and trusts, McHugh concludes that the widespread problem of multiple ownership could best be remedied by the implementation of Native Trusts to represent communal holders.

McHugh, Paul G. 1983. Maori Land Laws of New Zealand. University of Saskatchewan Native Law Centre, Saskatoon.

McHugh's opening emphasis is on the communal nature of pre-European Maori society, particularly in respect of land attachment. Turangawaewae expresses the key symbolic significance of traditional Maori attachment to the land; the socioeconomic significance of the land is encompassed by the religious. Today, McHugh writes, turangawaewae assumes additional significance as a symbol of Maori identity in Pakeha-dominated New Zealand.

Maori customary land title was recognized by the British courts until 1862. The title could only be extinguished by voluntary sale or cession although no restrictions were placed on the Imperial Parliament's legislative capacity regarding these items.

It was only in 1862 that legislation made Maori lands freely alienable. This resulted in the individualization of Maori land title as well as a newly imposed and recognized value of land as commodity. It also provided for the goal of the settlers to acquire as much land as possible and to assimilate the Maoris.

McHugh points out that assimilationist policies are still inherent in the New Zealand Maori land law legislation of today. He hopes that the recognition of this fact coupled with an increased awareness of the importance of turangawaewae will prompt policy-makers of New Zealand to seek equitable reform.

McHugh, P.G. 1985. The Constitutional Role of the Waitangi Tribunal. New Zealand Law Journal (July):224-25; 233.

This article on the constitutional role of the Waitangi Tribunal focuses on aboriginal title in relation to common law principles concerning tribal land rights after British Occupation. Of particular interest is a draft Bill of Rights included in a recent "White Paper on a Bill of Rights for New Zealand", which would reinforce recognition of the constitutional effect of the 1840 Treaty of Waitangi: "The Treaty is to be regarded 'as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent' (p. 224)". This is of particular interest in view of the fact that rights guaranteed by the Treaty of Waitangi went beyond land to encompass culture generally, including customary la

8.7 UNITED STATES

Brakel, Samuel J. 1976. American Indian Tribal Courts: Separate? Yes, Equal? Probably Not. American Bar Association Journal 62:1002-1006.

A main component of Indian self-government in the United States has been the tribal justice system. This article provoked a revealing response, in the form of the article by Collins et al, below. Brakel argued that tribal courts on Indian reservations have poor facilities and inadequately trained judges who are subject to tribal political pressures. He warns that before the jurisdiction of tribal courts is extended the pros and cons should be considered carefully.

Mr. Brakel concludes that Indians would be better served by rural state courts since he seems to believe that ultimately Indian integration is "realistic" and "desirable". Brakel fears that individual Indian rights on reservations will be lost to political separatist and "tribal rights" policies.

Collins, Richard B., Ralph W. Johnson, and Kathy Imig Perkins. 1977. American Indian Courts and Tribal Self-Government. American Bar Association Journal 63:808-815.

This is a response to the article by Brakel. The first author/ researcher, Collins, has practiced law in the American Southwest; author Johnson was an instructor for the Indian court judges program for six years; and author Perkins has been associated with the Indian Court Judges Association for seven years. The key issue between these authors and Mr. Brakel seems to be over the merits of Indian separateness verses integration.

As Collins puts it "For almost a century the abandonment of separatism was clearly the easier path. Instead most Indians have quietly but firmly maintained their separate ways - often at great personal cost. Few more decisive and eloquent public opinion polls exist in the history of human affairs." The authors find that Indian tribes by and large are working to a constructive synthesis of imported and traditional aspects of legal culture.

Included is Brakel's response to these authors' rebuttal of his original argument.

Sanders, Douglas. 1985. Aboriginal Self-Government in the United States. Background Paper Number 5, Aboriginal Peoples and Constitutional Reform, Institute of Intergovernmental Relations, Queen's University, Kingston.

Mr. Sanders divides the history of U.S. Indian affairs into five main periods, the dates of which deduced from his text: 1. Early treaty period 1633-1817 -- the period in which Indian groups were treated as "distinct political entities, whose internal self-government continued unaffected by the treaties or the trade and intercourse acts"; 2. Removal and allotment 1817-1933 -- during this period Indian tribes were moved west of the Mississippi. To break up the communal nature of the Indian reservations, title to specific tracts of land was alloted to Indian families. In the allotment process "surplus" lands were sold to non-Indians. During this period Indian lands were reduced from 138 million acres in 1887 to 48 million acres by 1934; 3. The New Deal 1933-1953 -- The Indian Reorganization Act of 1934 substituted "indirect rule" along the lines of British colonial model with "direct rule" by the Bureau of Indian Affairs. Nonetheless this policy has been seen by many researchers as supportive of Indian self-government. This bill also allowed for the consolidation of unallotted land and the purchase of some additional lands for reservations as well as an economic development section; 4. Termination 1953-1970 -- This period was marked by the ultimate integrationist approach, executive orders were used in an attempt to terminate Indian tribes. This would conclude Federal responsibility for Indians and presumably create independent citizens. During this period some 109 tribes and bands were terminated, involving about 1,362,155 acres of land and 11,500 individual Indians; 3. Self-Determination 1970 - the Present -- The primary act of this period was the Indian Self Determination and Educational Assistance Act of 1975. The policy of this and other acts of the same period was to allow Indians to administer Federal services to Indian communities. The thrust of this type of legislation was to change the Bureau of Indian Affairs from a delivery agency to a supervisory agency. Existing Federal programs were contracted out to Indian communities.

Mr. Sanders goes on to brief but important discussions of structures of government, membership, tribal courts and funding. On balance, it would seem that Indians in the United States enjoy a better position with regard to their ability to exercize customary and traditional self-government structures to the extent they wish to do so. The striking success of the Pueblo Nations of the American Southwest in maintaining traditional government, for example, would be difficult to envision given the Canadian legislative environment.

In the United States, "self-government powers are aboriginal, inherent or pre-existing. They derive from the original sovereignty of the tribes, a sovereignty which has been limited, both geographically and substantively, but never ended (p. 48). This sovereignty is not protected from the legislative power of Congress; however, in the United States it appears that only explicit abridgement of original sovereignty by Congress may occur. Sanders finds, nonetheless, that Indians in the United States are politically more marginal than in Canada, and that the failure to deal seriously with Indian economies is a glaring failure of policy in both countries.