DISCUSSION PAPER

NEW APPROACHES TO ABORIGINAL PROGRAMS:

SHIFTING FOCUS FROM INDIVIDUAL STATUS INDIANS TO FIRST NATIONS AS COLLECTIVITIES

A report prepared for the Research and Analysis Directorate, Indian and Northern Affairs Canada,

by

Ginger Group Consultants,
Ottawa

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The views expressed in this report are those of the authors and not necessarily those of Indian and Northern Affairs Canada.

PREFACE

This report examines the implications of shifting the focus for delivery of federal programs for Aboriginal peoples from an individual to a collective or community basis. It was commissioned by the Research and Analysis Directorate, Indian and Northern Affairs Canada, and prepared by Ginger Group Consultants, Ottawa.

The reader should note that the three main chapters in this report have been written by three different authors, representing different perspectives and ways of approaching the issues. The consultants were asked to define, explore and make links between the issues from a variety of angles. However, the three chapters are complementary and together provide a comprehensive view of the changing nature of programs for First Nations in particular, and Aboriginal people in general.

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TABLE OF CONTENTS

TABLES

APPENDICES

EXECUTIVE SUMMARY

This paper examines the implications of shifting the focus for delivery of federal government programs for First Nations from an individual to a collective basis. It attempts to provide some guideposts and practical direction which may be useful in navigating the transition from the present relationship of the federal government with First Nations communities to a more equal and autonomous future relationship. Some implications for other Aboriginal peoples are also explored.

Chapter 1 provides a concise picture of the ***present pattern of federal spending on Aboriginal peoples*** broken down by department and program. This expenditure totalled $4.5 billion in 1992–93, along with a significant portion of the $1.08 billion paid in transfers to the governments of the Yukon and the Northwest Territories.

Chapter 1 goes on to ***examine six programs that are currently being provided to Aboriginal peoples on a community rather than individual basis.*** This review highlights a number of issues, including the differing approach to consultation taken by different programs; inadequate levels of funding; difficulties relating to decision–making in such areas as program design and implementation; lack of clarity about responsibility and accountability; and the need to build institutional capacity.

Chapter 2 reviews ***the benefits and disadvantages of registered Indian status*** for Aboriginal people and goes on to discuss means of maximizing the benefits while minimizing current drawbacks. This is the first such review of status in the literature on Aboriginal peoples in Canada.

The chapter focuses on problems in eligibility for programs related to divergence between those people who are entitled to status under the *Indian Act* and those who are accepted as Indians through membership in their First Nation. The divergences in needs and entitlements between on– and off–reserve Indians, between status and non–status Indians, and between Indians who are members of bands and those who are not band members are also discussed. It concludes that registered Indian status is of diminishing importance, but cautions that status should not be eliminated unless equivalent policies are in place to ensure that First Nations peoples and communities have guaranteed access to their rights.

Chapter 2 identifies a need for vigorous initiatives to address issues related to status, and points out the importance of a truly collaborative process in which decision–making authority is shared with First Nations people rather than imposed on them. Accordingly, it emphasizes the need for joint efforts to find ways to reduce INAC's control in favour of transferring administrative powers to First Nations. Such efforts might include, for example, the creation of independent institutions to carry out functions now exercised by INAC. These could operate in areas such as Indian registration, the oversight of band by–laws, and the review of disputes or appeals relating to First Nations governance or administration.

Similar initiatives are also suggested for eliminating or at least neutralizing the adverse effects of the *Indian Act*, and for removing administrative and legal barriers which hinder the ability of First Nation

governments to act effectively. The paper comments favourably on the recommendation of the 1966 *Hawthorn Report* that an office within INAC take on an advocacy role on behalf of First Nations people.

These practical approaches are balanced by the principles which are developed in Chapter 3 as a means of addressing the problems which result from the growing divergence between people with and without registered Indian status. In Chapter 3, the paper ***looks beyond the current situation to set out a principled, long-term approach to the funding and delivery of services to Aboriginal communities.***

This approach distinguishes between community-based benefits whose primary purpose is to sustain First Nations identity, and individual benefits that correspond to services being provided to other Canadians and that are based on individuals' Canadian citizenship as well as their First Nations status. The chapter proposes that community-based benefits be available only to band members and come under exclusive First Nation control. Programs that produce individual benefits could be administered by First Nations to reflect the community's culture and heritage, but would also be subject to national standards and would be delivered to all persons living in a First Nations community, regardless of status or band membership.

Finally, Chapter 3 views these themes as a basis for the development of First Nations communities as a potential third order of government in the Canadian political community. The related issues of how to ensure accountability for funds transferred to First Nations communities, and how to make political accountability and Charter requirements co-exist with traditional First Nations forms of government, are also explored.

INTRODUCTION

This paper examines the implications of shifting the focus of federal government programs for First Nations[1] from an individual approach based on status to a collective or community-based approach. While this shift of focus has been taking place for some time, it has been largely on an ad hoc, program-by-program basis. The paper seeks to outline a broader, more unified approach. It attempts to provide some guideposts and principles which may be useful in navigating the transition from the present situation to a more equal and autonomous relationship of the federal government with First Nations communities in the future.

The study was initiated by the Research and Analysis Directorate of Indian and Northern Affairs Canada (INAC), and is based on the recognition that self-government is an existing inherent right of Aboriginal peoples. The Directorate wanted to explore how program eligibility may change if the federal government deals more with Aboriginal collectivities in the future[2]. It anticipated that some First Nations will likely want to base eligibility for programs on criteria other than registered Indian status, such as band membership or residence on reserve. We were asked to examine how changes in program eligibility might affect individual Aboriginal peoples, First Nations governments, and the federal and provincial/territorial governments involved, and to look at the issues from a number of different perspectives.

We begin by reviewing the current situation. Chapter 1 provides a concise picture of the present pattern of federal spending programs for Aboriginal peoples, and of how these programs are delivered. It then reviews what lessons can be learned from programs that are currently being provided to Aboriginal peoples on a community rather than individual basis. This discussion is supported by a table of federal spending on Aboriginal programs in **Appendix B** and by a separate *Working Paper* on the lessons learned from existing programs.[3]

Even though the federal government is now committed to move forward with Indian self-government, full implementation will probably take many years. Therefore, the concept of Indian status, with its accompanying rights and entitlements, will remain important at least for a time. It may continue to be of importance even after self-government is achieved, since the future relationship between status and self-government has not yet been determined. As INAC's request to us indicated, future program

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1 While the term "First Nations" can be used to signify all individuals, communities and tribes of Indian origin, it is used in this report to mean those Indian ***communities*** that are recognized by the federal government for the delivery of federal programs and services, and those ***individuals*** who are recognized as Indians either through the *Indian Act* or through being accepted as members by their band.

2 See Appendix A for Statement of Work.

3 *Some Recent Evaluations of Federal Aboriginal Programs: Lessons for Program Delivery. Working Paper II.* Ottawa: Ginger Group Consultants. October 1994.

arrangements with First Nations communities will need to maximize the maintenance of the current benefits associated with registered status while minimizing the disadvantages.

Accordingly, Chapter 2 examines closely all aspects of registered Indian status under the *Indian Act*. We have first assessed the advantages and disadvantages associated with status, then discussed means of maximizing the one and minimizing the other. The discussion in this chapter is focused on the short and medium term — the transitional period before self-government is fully in place. It is not intended as a substitute for the resolution of broader issues such as land claims and self-government. As there is no comparable review of status in the literature on Aboriginal issues, this chapter is also supported by a separate Working Paper.[4]

Finally, Chapter 3 looks beyond the current situation to set out principles on which both the funding and the delivery of services to First Nations communities could be based in future. While the specific focus of this paper is on First Nations, the principles developed here could also apply to the delivery of federal services to other Aboriginal peoples, including the Aboriginal population of the North.

Registered Indian status has been a central feature of the federal government's policy for Indians almost since Confederation. The *Indian Act*, first consolidated in 1876, remains the cornerstone of the unique relationship that has been legislated between Indians and the federal government. That situation is now changing. While the *Act* still gives great powers over Indian bands and territories to the federal government or to the Minister of Indian and Northern Affairs, this hold is weakening. Indian governments are taking on more responsibilities. Bands have acquired the right to determine their own membership, a power that was exclusively in federal hands prior to the adoption of *Bill C-31* in 1985. The growth in population of status Indians living off-reserve and in urban areas has raised important questions, since most federal services are directed only to people living on reserves.

These changes have created new issues. For the future, the delivery of federal programs will likely be affected by the divergence in needs and entitlements between on- and off-reserve Indians, between status and non-status Indians, and between Indians who are members of bands and those who are not. Various permutations of these categories may create even more complexity. These same issues are likely to affect program delivery by First Nations governments as well as by federal and provincial/territorial authorities.

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[4] *Working Paper I: Benefits and Disadvantages of Indian Status.* Ottawa: Ginger Group Consultants, October 1994.

CHAPTER 1: THE CURRENT SITUATION

This chapter looks at how federal programs are currently being delivered to Aboriginal peoples, and reviews the experience available to date with programs that were designed to be delivered on a community or collective basis. These reviews are based on the most recent estimates of federal expenditure and on evaluations of existing programs carried out since 1988.

It should be noted that a significant proportion of shift in program delivery has already taken place. Apart from health services, well over 80% (by value) of the major programs directed to people in First Nations communities are already being delivered on a community basis, through First Nations governments.

The transfer of program delivery from direct federal administration is a continung trend. It is parallelled by the increasing use of flexible funding formulas that give First Nations governments more autonomy and more discretion in how they spend funds provided by the federal government. Further shifts in responsibility can be expected with the dismantling agreement that has been signed between INAC and the Assembly of Manitoba Chiefs and with the advent of new agreements for self-government in other parts of Canada.

1.1 Federal Spending on Aboriginal Peoples

The federal government spent $4.5 billion on programs specifically directed to Aboriginal peoples and communities in 1992–93, plus an undetermined proportion of the $1,080 million in federal transfer payments provided to support territorial governments in the Yukon and Northwest Territories.[5] In the current year, the federal government projects spending about $5.2 billion on Aboriginal programs.[6]

Table I *(p. 7)* summarizes the major areas of federal spending on Aboriginal programs. Further detail is provided in **Appendix B**, which lists federal Aboriginal programs by department and provides for each program a summary of the program mandate, eligibility requirements, and how the program is delivered.

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[5] 1992–93 was the most recent fiscal year for which information on actual spending is available. Figures on federal spending do not include the value of tax exemptions to Indians with status, as tax exemptions are not treated as an expenditure in the Government of Canada *Estimates* or in the federal *Public Accounts*.

[6] This figure is based on the 1994–95 *Estimates* (Ottawa: Treasury Board, 1994).

A number of points are worth noting:

- **Most money goes to the reserves.** Approximately 90% of the federal spending for Aboriginal peoples, excluding the North, was for programs directed to status Indians living on reserves.

- **Nine federal departments were significantly involved in delivering programs for Aboriginal peoples in 1992–93.** The largest single share ($2.8 billion out of $4.5 billion) was that of Indian and Northern Affairs Canada. Health Canada's spending for Indian health services amounted to $748 million. Canada Mortgage and Housing Corporation ($305 million), Human Resources Development (approximately $200 million) and Canadian Heritage ($63 million) had the next largest budgets for Aboriginal programs.[7]

- **Most expenditures are already community–based.** Based on spending, the lion's share of programs for Aboriginal people on reserves was administered or delivered by Indian bands or tribal councils in 1992–93. An estimated 77% of social assistance spending was band–administered; 87% of post–secondary education assistance; and 75% of spending on primary and secondary education. Spending for band administration was almost completely in the hands of Indian governments.[8]

- **Health services was the only major federal program for Aboriginal peoples that was still primarily delivered by the federal government.**

1.2 Changing Requirements for Eligibility

Up until the 1970s registered Indian status was almost automatically a requirement for eligibility for most federal Aboriginal programs. These programs were generally delivered to Indians living on reserves by federal departments. Status as defined by the *Indian Act* was also a requirement for band membership in the eyes of the federal department of Indian and Northern Affairs. It was either a legal or *de facto* condition for benefitting from federal programs.

This situation has altered substantially over the past two decades, and the importance of Indian status for the delivery of many programs is beginning to decline. The major reasons for this change are:

- **Bands can now define their own membership.** The passage of *Bill C–31* in 1985 changed the rule which allowed only the federal government to determine who is considered to be an Indian and a band member, through its administration of status and the Indian Register. As a result, the *Indian Act* now provides for two classes of people who enjoy benefits under the

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[7] In the 1994–95 Estimates, INAC projected spending of $3.35 billion on Aboriginal programs and Health Canada's budget for Indian health services had risen to just under $900m.

[8] The conditions governing a band's administration of programs that have been devolved or delegated vary, depending on the nature of its funding arrangements with the federal government.

Act: it defines "status" and inheritance rules; and it allows for bands to determine membership. Some of the consequences of this change are discussed in Chapter 3.

- **An increasing number of federal Aboriginal programs have been devolved or transferred to band or tribal council governments for delivery on a community basis.** Even if individuals benefit — as in the on-reserve native housing program — decisions on allocation are made by Indian governments rather than by the federal government.

- **Criteria for delivery of some programs have been broadened beyond "status".** For example, in practise some First Nations delive the social assistance program funded by INAC to all people living on reserves, including non-status Indians and non-Indians. Health clinics on reserves operated by Health Canada are mandated to serve all of the resident population and not to discriminate on the basis of status.

- **Greater Aboriginal control means less federal control.** With devolution, it is becoming more difficult for the federal government to monitor Aboriginal programs being delivered by Indian governments, or to insist that people who benefit from these programs must be status Indians. This is particularly the case for the 40% of bands that have chosen to define their own membership under *Bill C-31*.

- **More flexible funding also lessens federal control.** Bands have greater freedom over their spending decisions because of the greater use of Alternative Funding Arrangements and other flexible forms of funding. They can therefore deliver services to Indians who are non-status band members, provided they stay within their overall budget.[9]

- **Residence, not status, has become an important criterion in eligibility for basic services.** The funding for such areas as education and social services now being delivered by Indian bands and tribal councils is sometimes based on resident population rather than on the population of status Indians or of band members.

The decline in importance of status mainly relates to the delivery of Aboriginal programs on reserves. As Chapter 2 indicates, many of the distinctive rights, privileges and handicaps of Indians are closely related to status and to the *Indian Act*. Status remains very important for Indians living off-reserve because it allows them to access non-insured health benefits and post-secondary education assistance. And the exemption from income and sales taxes that Indians enjoy is generally restricted to status Indians as defined by the *Indian Act*.

The table in **Appendix B**, *Federal Programs for Aboriginal Peoples*, provides a snapshot of the current eligibility criteria for federal Aboriginal programs. This illustrates the degree to which communities have replaced individuals as the target (through status) for most of these programs.

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[9] This latitude is limited, however, since band governments operate these programs under the same constraints of increased demand and declining resources being faced by all governments today.

Very few federal programs are now being delivered exclusively to status Indians on an individual basis. These include the INAC program of wills and estate administration, Health Canada's provision of non-insured health benefits, and the federal exemption from income tax for income earned by status Indians on reserves.

Some Aboriginal programs are still being delivered to individuals by federal departments, but not on the basis of status. Programs such as Pathways to Success, the Native Courtworker program, and the Public Service Commission's special measures to encourage the recruitment and retention of Aboriginal employees in the federal government are directed to all Aboriginal peoples and not just to status Indians.

Table I: Federal Spending on Aboriginal Programs 1992–93[10]

PROGRAM	AMOUNT	COMMENT
Governance:	$309m.	Most of this ($274m.) is devoted to administration costs for band and tribal council governments.
Social Development:	$784m.	Major spending items include $540m. for social assistance, $155m. for child and family services, $22m. for family violence, and $2.5m. for Aboriginal women.
Education:	$943m.	Includes $739m. for schooling including buildings, and $195m. for post–secondary education assistance to Indian students.
Housing:	$440m.	New housing commitments under the urban and rural native housing programs were cancelled after 1994. The total allocation for on–reserve housing was $206m.
Infrastructure:	$695m.	These funds are for band councils (and Inuit communities) to build roads, sewers, water supplies, and community buildings.
Health Services:	$748m.	Primarily provided by the Medical Services Branch of Health Canada.
Claims:	$135m.	This sum includes the cost of negotiations both for self–government and land claims. 80% is provided for use by First Nations.
Treaty Relations:	$2m.	Of this sum, $1.3m. is spent on annuity payments as required by various treaties with Indian bands.
Lands and Resources:	$45m.	Includes lands management, Aboriginal forestry and mining.
Economic Development:	$366m.	This covers a variety of programs under the Canadian Aboriginal Economic Development Strategy, including $200m. on training under the Pathways to Success program.
Justice:	$35m.	Total does not include the costs incurred for Aboriginal peoples in the non–Aboriginal justice system, in policing, courts and imprisonment.
The North:	$1,080m.	This is total federal support for territorial governments; the amount devoted to Aboriginal peoples is not specified.

[10] **Table I** does not include the value of exemptions from income and sales taxes granted to status Indians under the *Income Tax Act* and other legislation, as these items are not counted as expenditures in the *Estimates*.

1.3 Recent Evaluations of Federal Aboriginal Programs: Lessons for Program Delivery

Over the past 15 years, a number of federal government departments have developed initiatives to deliver programs for Aboriginal peoples on a collective or community basis. Since a full evaluation of these initiatives would exceed the scope of this study, we chose to review existing assessments of these programs to determine what lessons could be learned.

Evaluations were available for six federal programs that had been designed to increase Aboriginal involvement and control and that were being delivered on a collective or community basis. Together these programs accounted for more than 10% of all federal spending for Aboriginal peoples in 1992–93. The six programs are:

- **post-secondary education support**
- **training**
- **health transfers**
- **economic development**
- **family violence**
- **Aboriginal friendship centres**

We compared programs using criteria such as consultation, eligibility, roles and responsibilities, institutional capacity building, funding mechanisms and community accountability. Summaries of these comparative assessments are published as a separate Working Paper.[11]

Of more immediate relevance, the research yielded a number of conclusions that may be of value for future program design and delivery. These can be summarized under **Consultation, Problems with Funding, Decision-making,** and **Accountability.**

Consultation

For the past 20 years, First Nations and other Aboriginal organizations have been particularly vocal in asserting the need for local or community control of programs. To accommodate their concerns, federal agencies have attempted to consult with Aboriginal leaders before launching new programs through a variety of methods such as joint consultation, community surveys and direct interviews. As a result, program delivery has been transformed over the past decade. The move toward greater local control has been variously termed "devolution", "program transfer", or "partnership".

The most elaborate consultations with Aboriginal groups in the programs that were reviewed took place prior to the launch of the Pathways to Success Strategy under the Ministry of Human Resources Development, formerly Employment & Immigration Canada. Over a two-year period

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[11] *supra* Note #2

these consultations led to working partnerships at the local, regional and national levels. They also resulted in the formation of 88 local boards made up of federal officials and Aboriginal representatives. Program delivery and client satisfaction were enhanced both by the consultations and by the co-ordination of responsibilities which followed.

However, the evaluations noted inadequacies and inconsistencies in the consultations for program design. In some programs consultation was restricted to the community level; in others, it was both local and national, using Aboriginal political organizations and other quasi-professional groups to provide input. In several cases, respondents felt that consultations were too limited or one-sided to be adequate. There was also too little attention paid to the need for training and for building the capacity of Aboriginal institutions to take on new responsibilities.

Problems with funding

The evaluations identified inadequate funding as a consistent obstacle to the success of the six programs which were devolved or put under Aboriginal control. The problems experienced by Aboriginal administrators included government delays in making transfer payments, corresponding delays in the delivery of service, and difficulty in determining actual expenditures due to inadequate information provided by federal departments. Two cases in point are the loan programs under the Canadian Aboriginal Economic Development Strategy (CAEDS), and the implementation by First Nations of the federal Post-Secondary Education Assistance Program.

The evaluation studies noted that low levels of funding contributed to the achievement of only rudimentary campaigns aimed at raising awareness in Aboriginal communities, as in the case of INAC's Family Violence Initiative. At the same time, however, there was general agreement that the transfer of funds had enabled communities to achieve maximum results with the budgets they had available, and to deal with the priorities that they themselves had identified.

Decision-making

Like people in any society, Aboriginal people in Canada need to develop their own institutions, based on cultural values and traditional organizational methods which are modified to meet today's requirements. The CAEDS assessment concluded that "unresponsive decision-making in the areas of program design and implementation can represent a major hindrance to effective Aboriginal development". It also concluded that the capacity of Aboriginal institutions and individuals to achieve greater self-reliance and autonomy was hindered not so much by inadequate funding levels, but by factors such as the lack of input into the decision-making process around funding, the burden of reporting, lack of clarity about responsibility and accountability and lack of control of the policy development process.

The evaluations indicated that programs that integrated Aboriginal values with modern management techniques and that involved regular financial monitoring generally achieved their

objectives. They also tended to achieve high levels of satisfaction among their target group of users. Examples include the Aboriginal Friendship Centre program and the Aboriginal Capital Corporations program created under CAEDS. Both programs emphasized board and management training for improved internal functioning and problem solving. Training and skill development were seen as essential elements for successful program or project implementation. However, this was not reflected in the objectives of the programs reviewed or in the provisions for funding.

Accountability

Accountability for federal funds transferred to programs for off-reserve Indians and Aboriginal communities is hamstrung by several factors. These include a general lack of statistical data and management information on the population of the client group to be served. The lack of input by Aboriginal people into a structured process by which Aboriginal and federal agencies can be held accountable is also an important factor. Particular problems were experienced with respect to people from Aboriginal communities who had become dislocated from their home reserve. They often failed to participate in programs and were perceived as being "overlooked" in the delivery of services.

1.4 Summary

This chapter has briefly reviewed the current pattern of spending on Aboriginal programs and the available experience with programs that have been delivered on a collective basis to Aboriginal peoples for some period of time. A number of conclusions can be drawn from this initial examination:

- First, a large portion of the $4.5 billion spent on federal Aboriginal programs is already being delivered on a community basis through First Nations governments. This trend is continuing, with the result that federal departments are becoming ***funding*** rather than ***delivery*** agencies for Aboriginal programs.

- Second, registered Indian status is declining in importance as a criterion for the funding of programs to members of First Nations and for eligibility to benefit from these programs. We return to this subject in Chapters 2 and 3.

- Finally, past experience indicates that there are many practical problems to resolve in developing new mechanisms for program delivery. These include ensuring adequate consultation; problems with program data; the adequacy of funding; administrative relationships and accountability; capacity-building; and unresponsive decision-making.

The problems identified in this chapter will likely continue to emerge as Aboriginal communities acquire greater autonomy and more control over the delivery of federally-funded programs. In the next chapter, we discuss transitional strategies that may assist in addressing some of these problems.

CHAPTER 2: ADVANTAGES AND DISADVANTAGES OF REGISTERED INDIAN STATUS

Registered Indian status plays an important role in the lives of First Nations people and communities because of its connection to the various rights and entitlements that distinguish status Indians from other Aboriginal peoples and from other Canadians. Any examination of shifting program focus must therefore consider how such a shift will affect these rights and entitlements.

As noted in the introduction, we have assumed that status will likely continue to be important in the short run because of the time that will be required to implement self-government, and because the future relationship between status and Indian self-government is not yet determined. Whether or not the concept of Indian status survives in the long run, it will continue to be important for a transitional period that will last for some time.

We can also assume that First Nations people will want to maintain, or improve, those elements of status which they consider as benefits while reducing or eliminating those elements that are seen as disadvantages. This chapter therefore reviews the advantages and disadvantages of registered Indian status and discusses how the benefits of status can be improved.

2.1 Introduction

Originally it was intended that the analysis in this chapter would be based on a review of academic literature, policy reports and literature by Aboriginal writers. This proved to be a difficult and frustrating task. A close examination of these sources uncovered very little material that bore directly on status, and not nearly enough to lead to conclusions. The same picture emerged from the hearings of the Royal Commission on Aboriginal Peoples: very few witnesses dealt directly with the issue of status during its extensive hearings in 1992 and 1993.

A fresh look at status was required, one that examined all aspects of the special body of rights, privileges and handicaps that are distinct to status Indians. We have carried out this review and published it in table form as *Working Paper I*[12]. For each element of status, this compendium includes an assessment of benefits and disadvantages from the viewpoint of individual Indians and of their communities. The number of special provisions in the Paper made it impossible to comment on how to maximize the benefits of every single element of status. We decided it was preferable to look for common themes and general approaches to maximizing the benefits

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12 *supra*, Note #3

and minimizing disadvantages of Indian status, approaches which could be useful both for policy-makers and for administrators.

This chapter first presents an examination of the scant literature which has addressed status issues directly. It explains our analysis of the rights, privileges and handicaps that relate to status and offers a set of criteria for assessing the benefits and disadvantages of status.
We have also reviewed the social-psychological impact of Indian status on Indian identity as expressed by Aboriginal writers, both historically and in the recent past (see Appendix C).[13] Questions related to status have not been a priority for these writers either. Aboriginal writers have focused on questions of Aboriginal identity and on relations between Indian people and the dominant society, but have tended to view the *Indian Act* as an instrument of oppression without delving into the particular privileges and problems connected to Indian status.

Next, we summarize the benefits and disadvantages of status based on the longer study in *Working Paper I.* The summary is presented in Tables II-VI. We then go on to discuss a number of approaches to maximizing the benefits of status, based on our own review and on ideas drawn from the available literature.

The research for this chapter indicates that for the most part, status Indians and Indians recognized as band members currently enjoy the same rights and benefits ***if they are living on reserve.*** The divergence between the two groups is much more substantial if they live off reserve. We return to this issue in Chapter 3. Our research confirms that the recognition of standing as "Indian", whether by status or by a combination of band membership and residency, is still of major importance in determining access to many benefits and services and in excluding other Aboriginal peoples from these benefits.[14]

2.2 A Review of the Literature

As already noted, there is very little in the literature about Aboriginal people that deals with the issue of status directly. Some reports and other works are pertinent, however, including the *Hawthorn Report* (1966); the federal government's *White Paper on Indian Policy* (1969) and the response of Indians in what is known as the Red Paper, *Citizens Plus* (1970); the *Penner Report* (1983); and the *Nielsen Report* (1985). These works are examined in **Appendix D.**

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[13] This review was prepared by Indian poet and publisher Greg Young-Ing.

[14] "Non-status" Indians living off reserve and Métis have no access to the benefits available to registered status Indians and to band members living on reserve. Inuit people have some access to these benefits. They are eligible for post-secondary education support on the same basis as Indians, but are not exempt from income tax, since the federal tax exemption only applies to income earned by status Indians on reserves, and there are no Inuit reserves. As Métis and non-status Indians are currently not eligible for status under the *Indian Act*, they do not receive any special treatment. Although this is a major disadvantage of the status system in the view of these two Aboriginal peoples, this issue falls outside the terms of reference of this report.

The following are some of the conclusions and judgments that emerge from this literature:

- The basic concepts of federal responsibility and of federal control over reserve Indians are largely unchanged from the original legislation of 1869 on which the *Indian Act* is based.

- The structure and powers of First Nation governments as established under the *Indian Act* have been at variance with First Nation traditions and have restricted the authority and legitimacy of Indian leaders.

- Treaty Indians view the treaties as basic to their self-identity, while the federal perspective is that most government involvement with Indians has been a matter of policy rather than of treaty or constitutional obligation. This view is enunciated in the *Hawthorn Report*, the 1969 *White Paper*, and the *Nielsen Report*.

- Since many federal programs for Indians do not have a statutory basis, the federal government appears to have a great deal of legal (if not political) flexibility in the way it delivers programs and the amount it spends on them.

- Indian communities have a distinct status very different from that of non-Indian local governments, and face particular problems in governance because of their location, their size, limited resources, and the high proportion of band members living off-reserve.

- Federal responsibility for Indians under the Constitution should not prevent individual Indians and Indian communities from accessing provincial programs.

- Indians continue to support the concept of separate services being provided to their communities and to oppose federal efforts to substitute general, mainly provincial, programs available to all Canadians.

Even though the *Hawthorn Report* was prepared almost 30 years ago, many of its observations remain pertinent today. One of its most useful sections is its discussion of the distinctive features of Indian community governments and comparison with non-Indian communities. **Table II** sets out the major points in that discussion.

TABLE II: A COMPARISON OF INDIAN AND NON-INDIAN COMMUNITIES
(Based on the 1966 *Hawthorn Report*)[15]

INDIAN RESERVE COMMUNITY	NON-INDIAN COMMUNITY
Individuals as band members	Individuals as individual citizens.
Membership in community stable and has a legal basis.	Membership in community is voluntary and conditional even if maintained over a long period.
Electors must be status Indians and/or band members	Any resident Canadian citizen may be an elector.
Difficult to dissociate from community because of band membership, tribal identity, kinship, and shared ownership of community assets.	Relatively easy to dissociate, usually by moving to a new community.
Communal use of land	Individual ownership and use of land
Possession and use of property restricted because of communal ownership of land.	Most property is part of a free market
Corporations may lease but may not own land.	Corporations and other legal persons have same property rights as individuals.
Band holds communal assets for on- and off-reserve members in addition to function as local government.	Exclusive local government function.
Most programs paid through federal funding; local taxation on reserve limited and often non-existent.	Programs primarily financed through local property and other taxes and through provincial grants.

2.3 Overview of Status Indian Rights

This section provides a summary of the distinctive rights, privileges and handicaps of status Indians, both as individuals and in their communities, and seeks to assess the benefits (or advantages) and disadvantages of status. This is a large task, because of the extent to which the world of Indians differs from that of most Canadians as a consequence of their status. Many of the issues are complex and a great deal of detail is involved.

The *Indian Act* is the major source of legislative authority for the federal government in its dealings with status Indians, although most government programs for Indians do not have statutory authority except for their inclusion in the *Estimates* and in *Appropriations Acts*. This was noted both in the 1966 *Hawthorn Report* and twenty years later in the *Nielsen Report*.

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[15] Hawthorn, Harry B., *A Survey of the Contemporary Indians of Canada. Economic, Political, Educational Needs and Policies. Vol. I.* Ottawa: Queen's Printer, 1967-68, pp. 271-279

While viewed through Indian eyes as fulfilling treaty or constitutional obligations, these programs are seen from the federal perspective either as being discretionary or as matching provincial/municipal programs provided to other Canadians.

However, there are a number of sources besides the *Indian Act* which give rise to the distinctive individual and collective rights of status Indians. These include customary Aboriginal law and Aboriginal rights; international law; the Constitution and constitutional law as interpreted by the courts; the fiduciary obligation of the Crown; treaty rights; federal and provincial legislation other than the *Indian Act*; land claim settlements; and the discretionary decisions of successive governments reflected in government policy and programs.

Before discussing how to maximize the benefits (and minimize the disadvantages) of status, we had to make an assessment of what those benefits and disadvantages are. To make that assessment, we found it useful to distinguish between the theoretical and the practical: between the abstract concepts of "rights" and "constraints", on the one hand, and the more directly-experienced "benefits" and "disadvantages", on the other.

We define ***rights*** for the purpose of our analysis as ***entitlements of individual Indians and of First Nation communities that flow from such sources as treaties, legislation, or government programs or policies***. These rights as Indians are distinct from the rights Indian people could expect to enjoy by virtue of the laws and policies that apply to all Canadians. They allow Indians to organize their communities or to live their lives in ways that are different from the majority of Canadians, and provide Indians with access to the benefits to which other Canadians do not have access.

Rights as we define them may be open to varying interpretations over time (witness the evolution of thinking about the inherent right of self-government), but the underlying concept can be said to be relatively fixed. Examples of what can be considered rights of First Nations people include the special status of reserve land, Aboriginal hunting, fishing and trapping rights, and — in the eyes of First Nations — the special federal programs of health services and of post-secondary education assistance for Indian people.[16]

We define ***benefits*** as ***the tangible and concrete advantages that Indians derive from having access to their rights***. For example, Indians generally have special rights to hunt and to trap stemming either from treaties or from their Aboriginal rights as First Peoples. These rights are, however, of little benefit for an urban Indian who does not wish to hunt. Therefore, the specific benefits that flow from Indian hunting and trapping rights lie in the harvest and use of moose, deer, fish and other wild life for family consumption and for income.

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[16] As this last example indicates, there may be differences of opinion in what are considered rights between First Nations and non-Aboriginal governments. We do not mean to imply that the rights discussed in this analysis are necessarily equivalent to Aboriginal rights under the Constitution.

The distinction we draw between rights and benefits may be clarified by examples. The communal ownership of land is a right enjoyed by status Indians and band members living on reserves, for example, but not something that can be easily maximized or minimized. The benefits that can be drawn from this form of ownership may be economic, or they may be social-psychological benefits such as community solidarity and continuity. These benefits may be enhanced through such measures as better management or more autonomous control by the community.

A particular right may have a number of benefits: for example, Indian hunting and trapping rights provide cultural benefits for Indians through helping to maintain traditional ways of life, but also provide economic benefits in the form of food or income for individuals and for First Nation communities.

Just as rights are the basis for benefits, we see ***constraints*** as forming the basis for specific disadvantages experienced by Indians. We define constraints as ***specific restrictions that apply to Indians by virtue of their status or their residency on an Indian reserve.*** Some of these restrictions have a broad impact, such as the bias and racism experienced by Indians; other constraints are very specific, such as the control that the *Indian Act* gives to the Minister of Indian Affairs over by-laws and other actions of Indian bands.

Disadvantages refers to ***the obstacles and negative results that flow from the constraints applying to status Indians (and band members) and their communities, and that hinder their attempts at personal and community development.*** In the case of band council by-laws, the constraint would be the Minister's powers under the *Indian Act* to disallow by-laws or to refer them back. The disadvantage that flows from this constraint would be the difficulties faced by the band in making decisions promptly or, in some cases, finding a way to address important local problems.[17]

Of course, things are not quite so simple. The special, communal status of reserve land — discussed above as a right — can also be a constraint, since it restricts the sale of parts of this land to non-Indians. This restriction limits the ability of Indians to raise mortgage finance either for housing or for business purposes, putting them at a disadvantage compared to non-Aboriginal Canadians. Thus a right may in some respects operate as a constraint, and give rise to both benefits and disadvantages.

One could attempt to classify the various rights, privileges and handicaps of status Indians on the basis of whether they are legal rights, whether they involve eligibility for Indian programs and services, or whether they relate to the distinct social and psychological identity of Indians. These distinctions have not been used because of their potential for confusion and overlap. If someone

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[17] As an example, efforts by the Akwesasne Band Council to assert control over gambling on the reserve were thwarted in 1988-89 because the Minister ruled that the council's by-laws on this subject exceeded its authority and were *ultra vires*.

lives on a reserve where the band has its own membership code, for example, recognition as a band member entitles the individual to a number of legal rights; makes them eligible for most Indian programs and services; and certainly serves to reinforce their social and psychological identity as a member of their community. ***In policy terms, therefore, it would appear easier and more practicable to approach the issue of increasing the benefits and minimizing the disadvantages of status directly without having to worry about which particular categories of rights may apply.***

The assessment of benefits and disadvantages in this paper is made primarily from the perspective of individual Indians and of their communities. It reflects the collective desire for community autonomy, effective recognition of Indian identity and Aboriginal rights, and the powers and resources needed to create viable, prosperous communities. For individual Indians, the criteria include the ability to participate in their community, to have an effective share in the collective rights of their First Nation, to sustain their Indian identity and culture and to maintain the economic benefits that they have received as Indians.[18]

The choice of perspective reflects the intent of this chapter, which is to examine how to maximize the benefits of status and reduce its disadvantages ***as seen by First Nations people.***

Readers should be cautioned that, given the disparities that exist among Canada's 600 First Nations, our summaries of the benefits and disadvantages of status are quite simply an overview and cannot be taken as representing the view of all Indians or of every Indian community. It should also be noted that we do not deal with funding issues, even though this is a concern which touches almost every aspect of the relationship between governments and status Indians.

The tables that follow provide summaries of the special attributes that relate to Indian status, based on the lengthier analysis in *Working Paper I.* **Table III** compares the ***rights*** of on- and off-reserve Indians and lists rights that can be considered to be collective. **Table IV** summarizes the individual and collective ***benefits*** flowing from these rights. The same framework of analysis is used in **Table V** with respect to ***constraints***, while **Table VI** examines the concomitant ***disadvantages*** of status.

Readers are encouraged to review these tables because they cannot easily be summarized in any briefer form. A sample of the more extensive analysis found in *Working Paper I* appears at the end of this chapter. Since many elements of status are linked to the *Indian Act*, the major provisions of the *Act* are summarized in **Appendix E.**

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[18] To be discussed further in Chapter 3.

TABLE III: Summary of Rights of Status Indians[19]

On-reserve Indians	Off-Reserve Indians	Collective Rights
• Band membership, share in band resources. • Participate directly in band council and band elections, indirectly in choice of national and regional First Nations leadership. • Access to below-cost housing. • Exempt from sales taxes, tax on on-reserve income. • Federally-funded education, social services, health benefits. • Post-secondary education assistance. • Hunting, fishing and trapping rights. • Share in collective community rights. • Acknowledgment of Indian identity.	• Band membership, share in band resources. • Right to live on reserve. • Access to off-reserve programs for Indians and other Aboriginal peoples. • Exempt from tax if income earned on reserve. • Non-insured health benefits (drugs, dental, etc.). • Post-secondary education assistance. • Hunting, fishing and trapping rights. • Share in collective community rights. • Acknowledgment of Indian identity.	• Communal right to occupy reserve land. • Long-term stability and land base. • Band Council system of community government or custom equivalent. • Special status in relation to federal governments. • Inherent right of self-government. • Constitutional protection of rights. • Fiduciary obligation of Crown to First Nations. • Potential benefit from land claims. • Special recognition in international law. • Federal (rather than provincial) funding for education, PSEA, health services, welfare, etc. • Potential for own system of Aboriginal justice.

[19] Tables III to VI are based on the assessment of Indian status in *Working Paper I.*

Table IV: Summary of Benefits of Indian Status

Benefit	Comments
1. Individual Benefits	
Provides access to reserve and to services on reserve.	Basic right which touches all other individual and collective rights.
Basis for sharing in collective rights relating to band membership.	Community is the basis for Indian identity and for exercise of treaty and territorial rights; many benefits received on a collective basis.
Supports, reinforces Indian identity.	Many of the special provisions relating to status have this effect.
Economic benefit.	Notable items: tax exemption; non-insured health benefits; post-secondary education support; access to on-reserve housing; Indian hunting, fishing and trapping rights.
Protects human rights of Indians.	Notable items: designation for purposes of employment equity; gender equality provisions of *Bill C-31*; "Citizens plus".
Meets special needs of Indians off-reserve.	A few special programs, such as friendship centres, Indian child welfare agencies.
2. Collective Benefits	
Basis for special status of Indian communities and for self-government.	Notable items: *Indian Act*; *BNA* and 1982 *Constitution Act*; Aboriginal land rights; recent self-government agreements.
Basis for communal ownership of land, collective rights relating to band membership.	Bands only acquired the right to determine their own membership under Canadian law in 1985.
Honours federal treaty and constitutional obligations.	In many areas this benefit is more potential than real.
Promotes Indian identity and culture.	Unique Indian institutions; cultural centres; band administration of many services.
Promotes political effectiveness of Indians.	Various forms of support, recognition for band councils and Indian organizations such as AFN.
Helps make delivery of Indian services more effective.	Tribal councils; funding arrangements for band councils; federal fiduciary duty.
Economic benefit for Indian communities.	Post-secondary education; administration of Indian resources and Indian lands.
Basis for providing services available to non-Indians by other means.	These include education, social assistance, economic development, on-reserve housing, etc. which are provided elsewhere under provincial legislation and through Canada Assistance Plan, *Canada Health Act*.

Table V: Summary of Constraints Affecting Status Indians

On-reserve Indians	Off-reserve Indians	Collective Constraints
• Status and status rights determined by non-Indian body for many Indians. • Services are below standard compared to other Canadians & are hindered by limits on funding. • Must be resident on reserve to access many benefits related to status. • Rights under Indian treaties superseded by international agreements & by federal legislation prior to 1983. • Bias and systemic discrimination a common experience (although one shared with other Aboriginal peoples). • Limited access to provincial services as reserve resident. • C-31 rules restrict ability to pass on Indian status. • Federal, provincial governments constrain hunting and fishing rights. • No tax exemption for income earned off reserve. • Restricted access to mortgage and business financing because of *Indian Act* and communal use of reserve lands. • Administration of wills & estates comes under INAC rather than Indian control.	• Status and status rights determined by non-Indian body. • Excluded from Band Council voting in *Indian Act* elections. • No direct or indirect voice in selecting national or regional First Nations leaders. • Services for Indians off-reserves hindered by limits on funding. • Non-Indian services often not appropriate for Indian needs. • Bias and systemic discrimination a common experience. • Little power to influence allocation of post-secondary assistance. • No tax exemption for income earned off-reserve. • No new off-reserve housing for native housing societies. • Access to services often affected by federal-provincial jurisdictional disputes.	• Many federal controls over band governance and administration of reserves. • Recognition of bands, reserve territory, land claims depends on INAC and federal government. • Band Council powers severely limited by *Indian Act*, disallowance power, restrictions on funding. • Treaty, constitutional rights not fully defined and hard to enforce. • Many Indians not under treaty, or treaties not recognized. • No legislative recognition for Indian organizations above band level. • Right of self-government not recognized in practice for most bands. • Federal policy has made extinguishment of Aboriginal title a condition for land claims settlements. • Aboriginal delivery of services confined to local, regional level. • Problems often experienced with implementation of programs. • Bands lack access to programs provided by the provinces to other communities. • Reserves inadequate as economic and social base for many Indian communities. • Economic development on reserves constrained by Indian Act restrictions, problems of access to financing. • Limited support for efforts to preserve Indian language and culture.

Table VI: Summary of Disadvantages of Indian Status

Disadvantage	Comments
1. For Individuals	
Unfair denial of rights and services.	Notable items: band membership; residence on reserve; voting by off-reserve band members.
Discrimination against off-reserve members.	Areas include post-secondary education support; housing support; tax exemption; cultural centres.
Bias, racism.	Notable areas: employment, justice system, prisons, hunting and fishing rights, access to human rights.
Restriction on economic development, opportunity.	Obstacles include the reserve system and location of reserves; land tenure on reserves; access to financing and business skills; restriction of hunting, fishing and trapping rights.
Ghettoization.	Residence requirement, restrictions on mobility.
2. For Communities	
Many rights of Indians are not well defined, not yet realized, hard to enforce.	The whole range of "framework" issues is involved, including the right of self-government, federal fiduciary duty, Aboriginal right over land, control of traditional territories.
Lack of funding, poor level of services on and off reserves.	The need for increased resources is perceived in almost every area of service to Indians, whether by governments, by band and tribal councils, or by regional and national Indian organizations.
Too much control in hands of federal government, INAC, and the Minister.	This affects band elections, membership, by-laws, and most other band activities; management of Indian lands, housing, moneys and resources; and resolution of claims for land, self-government.
The current regime relating to Indians is paternalistic, colonial, inappropriate.	This is reflected in the *Indian Act*, in federal control over determining status, in arbitrary decisions involving post-secondary support, schools, funding, and in use of band council system in place of Indian forms of government.
System of support for Indian communities lacks flexibility, not oriented to Indian needs, fosters federal-provincial jurisdictional fights.	Many examples in service areas including child welfare, income support programs, child care, INAC funding mechanisms, ineligibility of bands for programs provided by provinces to other communities.
Specific violations of treaty or Aboriginal rights.	Examples include overriding of hunting and fishing rights, failure to acknowledge Jay Treaty, expropriation of Indian lands without surrender.
Restriction on economic development, opportunity.	Same reasons as those cited above for individuals.

A number of observations arise from the review of the rights, benefits, constraints and disadvantages of status in **Tables III–VI:**

- **Rights:** As **Table III** indicates, ***most of the rights available to Indian people living off–reserve are individual rights.*** These include a limited right to tax exemption and basic programs such as post–secondary education assistance and non–insured health benefits. The collective rights that status Indians enjoy are closely related to band membership and residency on reserve. Indians living off–reserve can also take advantage of these rights, but would normally have to move back to their First Nation community in order to benefit. Where off–reserve Indians have access to specially–designated services, these are generally directed to Aboriginal people as a group and not solely to status Indians.

- **Benefits: Table IV** provides a global picture of the collective and individual benefits of status. The table identifies such broad themes as the promotion of Indian identity, the ability of individuals to share in collective Indian rights, and the promotion of the political effectiveness of Indians. ***These benefits are primarily available to those living on–reserve or maintaining close links with their home reserve.*** A more limited bundle of economic and cultural benefits is available to Indians living off–reserve.

- **Constraints and disadantages:** Most of the constraints listed in **Table V** flow directly from the *Indian Act* and other government legislation and from policy and program decisions made by various levels of government. These constraints are reflected in the disadvantages summarized in **Table VI**, which include: too much control by government over First Nations; the continuing paternalism of the present relationship; failure to adequately define many rights of Indians; discrimination against different groups of Indians (notably those living off–reserve); and various restrictions on First Nations economic development.

The general problems of racism and of bias directed against Indians are included in these summaries because of the impact they have on employment opportunities, on First Nations economic development, and on the access of Indians to such benefits as special hunting and fishing rights. The fact that these problems also apply to other Aboriginal peoples, and in some cases to other groups of Canadians, does not exclude them from being a major disadvantage for band members and status Indians.

Although most of the provisions for Indians listed in *Working Paper I* are based on sources of authority other than the *Indian Act*, many of these are the subject of controversy, of lengthy negotiation, or of litigation. Examples include Aboriginal land rights and the inherent right of self–government. Thus the greatest opportunities to maximize the benefits and to reduce the disadvantages of status, in the short–term, still lie in the federal government's administration of the *Indian Act* and of its programs for Indians.

2.4 Maximizing Benefits: A General Approach

The issue of maximizing the benefits of status can be dealt with on two levels, one of general principles and one in terms of specific suggestions for action. The discussion that follows is focused on approaches that could be initiated by the federal government and by INAC. Taking principles first, the overall challenge will be to find ways to clarify existing rights; to make them more accessible; and to assist First Nations and their peoples to derive more benefit from their rights.[20] Achieving these objectives will probably require removing or circumventing constraints that now create obstacles for First Nations and their peoples.

The research for this chapter indicates that reducing the federal government's control over Indians and First Nations communities, and replacing it by First Nations control, are basic to maximizing the benefits of status. Achieving such a change in control will require effective collaboration with First Nations and may require the creation of new institutions that are wholly or partly Aboriginal-controlled.[21]

2.4.1 Reducing control

The scope of the *Indian Act* and the prerogative powers of the federal Cabinet and of the Minister of Indian Affairs extend far and deep into the lives of status Indians. Problems with decision-making by federal authorities and lack of control over the policy development process were two of the major concerns raised in the evaluations of program already being delivered on a collective basis, as was noted in section 1.3.

Federal powers include the right of the Minister to recognize Indian bands and of the Cabinet to create new reserves; the Minister's powers to establish regulations governing First Nations territories and to disallow band by-laws; and the control exercised by INAC over the management of Indian lands and resources. INAC also serves as a point of appeal for groups from Indian communities who feel that they have been unfairly treated by their band council or tribal council, and is a source of last-resort assistance to bands that have suffered from financial setbacks.

If INAC wants to demonstrate its willingness to accept change, it should be prepared to systematically review these areas of control in collaboration with work groups selected by First Nations. If these work groups are to be seen as legitimate, they will likely require the involvement of the Assembly of First Nations, and possibly involvement of other

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20 As noted earlier, by "rights" we mean the range of rights and entitlements attached to Indian status that are outlined in *Working Paper I*, not just those Aboriginal rights guaranteed by the Constitution.

21 INAC has begun a number of initiatives that may bear on questions of status, such as the B.C. Treaty process, negotiations over the dismantling of INAC administration in Manitoba, and the department's current study of the inherent right. The ideas in this chapter focus specifically on issues related to status, with a view to developing transitional solutions that can be implemented quickly.

organizations representing status Indians such as the various provincial assemblies of Chiefs.[22] The objective would be to find ways that INAC control over Indian communities can be reduced and further INAC administrative powers passed over to First Nations.

2.4.2 Collaboration

The AFN and other Aboriginal organizations have played a substantial role in constitutional negotiations with federal and provincial governments over the past 15 years. But while regular contacts exist at a working level between the AFN and INAC, the inclusion of Indians in constitutional negotiations has not been matched by the creation of instruments for ongoing consultation on other issues.

Beginning with their reaction to the federal government's 1969 *White Paper*, Indian people and their organizations have made it clear that unilateral changes in policy that affect them and their communities are not welcome. If the federal government wishes to improve the benefits of status/band membership and reduce the disadvantages, it would be counterproductive to try to tackle this issue without substantial First Nations input. This input cannot come just from Indian people selected by INAC or by federal politicians. A consensus-seeking mechanism will be required that is seen as legitimate by Indian people and that enjoys the general support of Indian organizations.

We see the discussion of status as contributing to the larger task of restructuring the relationship between First Nations and other peoples in Canada, rather than detracting from it. The maintenance of benefits that are now attached to status will continue to be an issue for First Nations and their members even if self-government is on the horizon. Efforts to maximize the benefits of status can play an important role in the transition to self-government arrangements, and may also allow change to be delivered more quickly.

It goes without saying that the need for initiatives to improve the benefits of status would be greatly reduced if progress was made in resolving some of the larger issues such as land claims and self-government. Efforts to increase the effective autonomy of First Nations, such as the dismantling process in Manitoba, will also be of assistance in this regard. Similarily, successful efforts to resolve specific problems related to status may raise First Nations' confidence in the federal government's commitment to build a new relationship.

Several precedents exist for the kind of collaboration proposed here. One is the working group, primarily made up of Indian representatives, whose recommendations led to the formation of the Indian Claims Commission in 1992. Other precedents include the substantial role played by the National Association of Friendship Centres in directing the Aboriginal Friendship Centre Program, and the special mechanisms used to give Aboriginal

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[22] The Congress of Aboriginal Peoples represents both status and non-status Indians in urban areas and could therefore be consulted on issues that affect off-reserve Indians.

representatives decision-making powers under the Canadian Aboriginal Economic Development Strategy.[23]

2.4.3 New institutions

Many First Nations are still in the process of developing administrative structures and governing institutions. Various mechanisms for monitoring their activities or for dealing with appeals may continue to be needed. Some services will need to continue on a national basis for reasons of efficiency or of maintaining uniform standards. Transitional mechanisms may also be required, for example to assist with the transfer of Indian lands and resource management from INAC to First Nations.

With the declaration by the Minister of Indian and Northern Affairs of the government's intent to reduce INAC responsibilities and to transfer responsibility to First Nations, joint study and possibly negotiations will be of value in many areas. These might include the process of Indian registration now carried out by INAC, oversight over Indian lands and resources, the creation of some form of review or appeal process for disputes within communities and the review of band by-laws.

There is anecdotal evidence that at present, people from many Indian communities bring issues relating to band governance and administration to officers of INAC, making the Department a kind of court of appeal. This is an area where the involvement of a First Nations form of mediation might be more effective than intervention by the Department.

The suggested creation of new institutions may raise concern at a time of severe financial restraint. However, there could also be benefits. We reiterate that the restrictions related to status are likely to continue affecting many First Nations communities for a number of years. Any steps that succeed in reducing these disadvantages should be reflected in some positive results. These could take the form of increased economic development, more effective use of federal program funds, and reduced requirements for social assistance.

2.5 Ideas for Action

The analysis and discussion in this chapter suggests a number of areas that might be treated as priorities for action to help maximize the benefits and reduce the disadvantages of status over a transitional period. These ideas should be viewed as suggestions or directions that could be adopted by the federal government and by First Nations.

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[23] See *Working Paper II*, Ginger Group Consultants, October 1994.

2.5.1 Shifting control

The autonomy of Indian communities could be increased and the level of federal control greatly reduced with a thorough revision of the *Indian Act*, or even its repeal. However, such a change is unlikely to take place in the immediate future.

What could occur is **a systematic and voluntary dismantling, through administrative action, of the controls and restrictions contained in the *Act*.** If the federal government were to accept this approach, it could discuss how to implement it through the process of collaboration already referred to.

2.5.2 Building institutional capacity

Until self-government is recognized administratively and constitutionally, INAC and the federal government will retain a constitutional, financial, and fiduciary responsibility for the administration of the *Act* and of many of the services that are provided to Indian communities under its general authority. Hence a simple elimination of ministerial oversight with nothing to put in its place may not satisfy either the federal government or its Indian partners.

A better option, for those powers of oversight which cannot be eliminated, could be transferring them to new institutions with a strong Aboriginal presence. This could occur even if, for the time being, formal responsibility remained with the Department. As noted earlier, areas where this approach could be valuable might include the process of Indian registration, the review of band by-laws, oversight over Indian lands, and the creation of a review or appeal process for dispute resolution.

2.5.3 Joint review of status

As already noted, **it would be very useful to have a joint federal-First Nations review of all aspects of Indian status to identify those areas where action could be taken to maximize benefits, and to reduce disadvantages.**[24] The focus of this review would be to ensure that First Nations can make the best use of their existing rights and resources; it might be preferable to address the adequacy of federal financial support for First Nations and other Aboriginal peoples separately.

2.5.4 Rights of band members

Much of this paper deals with the potential problems that may be created by the disparity between band membership and registered Indian status. This is clearly an area where a joint

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[24] Provincial governments and Aboriginal groups who are currently excluded from status benefits may wish to participate in this process. Their inclusion, however, could slow the process almost to a halt. It might therefore be more effective to focus on specific reforms related to status that can be quickly implemented, and that can be carried out without prejudice to the concerns of provinces or other Aboriginal groups.

federal–First Nations review would be desirable. These problems have already begun to emerge with the refusal of some Alberta bands to accept as members people qualified under *Bill C–31*. The disparity has the potential to create particular problems in the three areas of post–secondary education assistance, non–insured health benefits and the exemption of Indians from paying sales and income tax.

It would seem logical to adopt the principle that all band members resident on reserve should be entitled to the full range of services and rights provided by the band or by the federal government, irrespective of status. Such a change would be relatively easy to arrange administratively, though it might require that bands share their membership lists with INAC to ensure access to certain rights such as tax exemptions and non–insured health benefits. The political and financial implications of this issue would have to be addressed.

The adoption of this principle, however, could lead to a disparity in federal benefits paid to members of different bands, depending on whether bands have a membership code which is more restrictive or more inclusive than that used under the *Indian Act.* Not adopting the principle, however, can be predicted to yield growing disparities in benefits available to members within individual bands. This issue is explored at greater length in Chapter 3.

2.5.5 Indians off–reserve

There are special problems related to Indians who want to live on their reserve, but cannot do so for lack of housing and land, as well as limits imposed by Certificates of Possession. Many are thereby denied a number of benefits related to status and band membership. In other cases, people live in the traditional territory of their First Nation and have no wish to move to the reserve.

First Nations communities are currently not funded to provide services to members living off–reserve, even if these members participate in the community and live nearby. Since this issue has financial implications, **the starting point for a joint review could be an attempt to measure how many Indian people are in the off–reserve group and the extent to which bands wish to provide them with services.**

2.5.6 Traditional forms of Aboriginal government

One issue that could usefully be addressed on a joint basis is the system of governance in First Nations territories. Many First Nations use a hereditary or customary system of government, but the majority are still subject to the restrictions of the band council system established under the *Indian Act*. This latter system is based on Euro–Canadian ideas of liberal democratic government and makes no attempt to reflect community traditions or a special Aboriginal approach. It has been criticised for its resemblance to various models of local government, for limiting the effectiveness of band councils by restricting their terms of office to two years, and for the degree of oversight that remains in the hands of INAC and of its Minister.

As a general rule, Indian communities want much more freedom to determine their own systems of governance. If some form of oversight is still required, there is no reason why it could not be exercised primarily by First Nations rather than by INAC and the Minister. A review commission with a strong Aboriginal presence could provide useful assistance in this regard.

2.5.7 Democratic rights

The *Indian Act* excludes band members who live off-reserve from voting in band council elections. It even excludes them from voting in referenda dealing with the criteria for determining band membership, although this restriction can be lifted by the band council. Off-reserve band members enjoy a number of collective rights through their band membership. This exclusion from voting is therefore difficult to defend in terms of basic democratic rights, and has in fact been judged as a violation of the *Charter of Rights* in the *Batchewanna* decision.[25]

Canada has recently accepted the principle that Canadian citizens living abroad should have the right to vote in federal elections, even though they are only a small proportion of the electorate. For First Nations communities, in many of which half or even more of the band membership live off reserve, this principle is even more important. At the same time there is a need for balance between the rights of on- and off-reserve band members, since the first group are much more directly affected by the actions of their First Nations government than band members living off-reserve. Chapter 3 discusses this in further detail.

One way to achieve this balance might be to allow for outside participation in band council elections and referenda, but without allowing the votes of off-reserve members to overwhelm those who live on-reserve. This is another issue which First Nations representatives could address jointly with INAC, since in this case changes to the *Indian Act* would probably be required.

2.5.8 Cultural identity

The support and reinforcement of cultural identity are major benefits flowing from Indian status and band membership and, for off-reserve Indians, from the availability of special Aboriginal institutions and services. These off-reserve services are not heavily supported by the federal government. The total spending by the Department of Canadian Heritage on Aboriginal Friendship Centres, on native broadcasting and on native social and cultural development was just under $35 million in 1992-93, while INAC contributed a further $9 million for cultural centres located on reserves. These items total less than 1% of the estimated $5 billion in federal spending for Aboriginal peoples, even though the majority of Canada's Aboriginal population has become urban and almost 40% of the status Indian population now lives off-reserve.

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[25] Federal Court of Canada Trial Division, *John Corbière, Charlotte Syrette, Claire Robinson and Frank Nolan v. the Queen* (Ottawa: Court No. T-3038-90, September, 1993).

Friendship Centres provide support for Indians moving from reserves to urban areas. Many centres have acted as catalysts in the development of special programs and services for urban Aboriginal people, including status Indians. These centres also act as a base for programs of cultural education and preservation and of Aboriginal languages, and as a catalyst for contacts between Aboriginal and non-Aboriginal peoples. **With the continuing movement of Indian people from reserves to urban areas, a joint review of the adequacy of support for cultural programs and special services for Aboriginal peoples would be desirable.** Such a review would likely involve other federal departments as well as INAC, and other Aboriginal groups, such as the Congress of Aboriginal Peoples and the National Association of Friendship Centres, as well as First Nations.

2.5.9 Funding priorities

The adequacy of federal funding for services to status Indians is often cited as a disadvantage related to status, and was a constant refrain during the hearings of the Royal Commission on Aboriginal Peoples. As already noted, the easy answer of providing more funds may not be available because of the federal government's fiscal position. However, current funding practices do not necessarily reflect the priorities of First Nations. They could be usefully reviewed on a joint basis by INAC and by First Nations.

An example is the regulations governing programs delivered by Indian governments, which can limit the flexibility in administration that new INAC funding formulas were meant to achieve. These rules could limit the band's capacity to develop innovative means to make their communities self-sufficient. Other funding issues involve level of resources, funding areas, and flexibility of funding authorities.

As part of the move toward effective First Nation autonomy, **it would be useful to examine these restrictions on a joint basis to determine whether there are better ways for individual bands, or for the federal government, to spend the funds that are now available for Indian programs. Such a review could also address the financial implications of the continuing growth of Indian population, especially on reserves.**

2.5.10 Federal administration

INAC currently bears the primary federal responsibility for status Indians and Inuit and for Indian lands, but a number of other federal departments — several larger and more influential than INAC — also have special responsibilities for status Indians. While INAC works in co-operation with these departments, mainly through bodies such as committees of deputy ministers, its ability to co-ordinate their delivery of programs is limited.

The fragmentation of federal responsibilities for Indians is already an issue. It could become even more of a problem if INAC, the department chiefly responsible for Indian people, were disbanded with no equivalent agency or department put in its place. It would be useful to apply the process of joint review recommended in this paper to programs and

services delivered by other departments, as well as INAC. Some consultations of this nature are already underway, such as the current discussions between Health Canada and the AFN regarding the possible transfer of non-insured health benefits to administration by band councils.

2.5.11 Aboriginal administration

We have emphasized the importance of the collaborative process to address fundamental issues. **A strategy using working groups would probably be more flexible and productive than formal public negotiations. For this to succeed, Indian representatives in working groups would need to be accountable to the Assembly of First Nations or to First Nations communities. This process could lead to the creation of institutions that are totally or largely Indian-controlled, which could take on functions now exercised by INAC and by the Minister.**

One can envisage alternative approaches, such as the creation of an Aboriginal Peoples' Commission or of an Aboriginal Parliament that represented all First Nations — or even all Aboriginal peoples — across Canada. The problem with these alternatives is the time and resources that would be needed to make them a reality, and the likelihood that any new approach would still require the endorsement and co-operation of the existing national, and possibly regional, structures representing First Nations.

Whatever approach is adopted, it should be recognized that there will be a need in First Nations for adequate resources to take on these new responsibilities. They will require skilled personnel to develop policy and planning strategies and to take part in the joint process of policy review suggested in this paper. Resources will be required for communications to ensure that First Nations communities and band members have the opportunity to understand changes being considered. Support will also be needed for the accountability mechanisms that link First Nation leadership with their communities and grass-roots membership.

The economic position of most First Nations communities makes it impossible at this time for them to provide the resources necessary for this process. However, the potential costs of assisting First Nations to fulfil the responsibilities outlined in this paper can be seen as an investment which will help ensure better use of resources, and which may ultimately lower federal administration costs for Indian programs.

2.5.12 An advocacy role for INAC

The *Hawthorn Report* recommended almost 30 years ago that the Indian Affairs Branch — now INAC — take on an advocacy role on behalf of Indian people. Its recommendation was quoted in the Indian response to the 1969 government *White Paper on Indian Policy* and is worth quoting again today:

> The Indian Affairs Branch should act as a national conscience to see that social and economic equality is achieved between Indians and Whites. This role includes the persistent advocacy of Indian needs, the persistent exposure of shortcomings in the government treatment that Indians receive and the persistent removal of ethnic tensions between Indians and Whites. [26]

This concept has considerable value, and has been useful in shaping the proposals presented here. **One step that would reflect the Hawthorn recommendation would be the establishment of a Directorate of Indian Advocacy, either within INAC or elsewhere within government.** This directorate would be expected to provide leadership in advocating for Indian needs and in developing policies and approaches to reduce the burdens and improve the benefits of the unique set of institutions and policies that affect the lives of Indians. Its advocacy would complement the federal government's commitment to devolution and to self-government, and its activities could be directed at all departments that serve status Indians, not just INAC.

A useful beginning could be made with a series of seminars and policy consultations to discuss the implications of INAC's moving to a collaborative relationship with First Nations. Such discussions are already underway with respect to how the inherent right to self-government might operate. These seminars would involve representatives of First Nations communities and other stakeholders, and could be held in various parts of Canada. Participants could examine exactly how a collaborative approach might work and how it might affect other federal responsibilities for Indian people, such as those flowing from the treaties, the constitution, from self-government agreements and from the federal fiduciary obligation towards Indians.

There is little risk that this process will conflict with the recommendations likely to emerge from the report of the Royal Commission on Aboriginal Peoples, now expected in the Spring of 1996. The Royal Commission's key objective is to assist in the development of a new relationship between Aboriginal and non-Aboriginal peoples living in Canada. This chapter suggests practical approaches that can be initiated with little delay, as an effective way of moving toward that objective.

2.6 Summary

The case for maximizing the benefits of Indian status rests on the assumption that status will continue to have a major influence on the lives of First Nations communities and of their members, at least over the medium term. Our analysis suggests a number of approaches that could be explored. These include:

- **continuing to find ways to reduce INAC's control over First Nations communities and to transfer administrative powers to First Nations.**

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[26] *A Survey of the Contemporary Indians of Canada.* H.B. Hawthorn, editor. Ottawa, Indian Affairs Branch, 1966. Page 13.

- **ensuring that these initiatives are based on a process of collaboration, with direct and representative involvement of First Nations, and that they are not imposed.**

- **exploring the creation of institutions which are clearly distinct from government, to carry out functions now exercised by INAC.** These could include such areas as Indian registration, the registration of Indian lands, the review of band by-laws (when this is requested by people in the community), supervising the management of Indian lands, and the review of disputes or appeals relating to First Nations governance or administration.

- **undertaking a joint effort to develop practical approaches for dismantling or neutralizing constraints imposed by the *Indian Act*, pending the development of new legislation or of agreements that will replace the *Act*.**

- **developing practical approaches to a number of issues which may be hindering the development of First Nations governments and their ability to act effectively. These include:**
  - *allowing First Nations greater freedom to determine their own forms of government;*
  - *allowing off-reserve members to participate in First Nations governments;*
  - *sharing the determination of funding priorities for First Nations programs;*
  - *enhancing support for cultural and language programs for First Nations people and other Aboriginal peoples in urban areas.*

- **mandating INAC or some other arm of government to take on an advocacy role on behalf of First Nations people,** as the *Hawthorn Report* recommended almost 30 years ago.

These ideas should be seen as suggestions rather than as policy recommendations. We reiterate that they should also be seen as transitional measures, and should not stand in the way of progress toward self-government. The fact that most federal programs for Indians are based on government policy decisions rather than on statutes may provide some flexibility for implementing some of the ideas suggested here, over a transitional period.

CHAPTER 3: THINKING BEYOND STATUS — A PRINCIPLED APPROACH

This chapter proposes a long-term framework for the transfer of program control to the community level. In moving beyond the transitional period covered in the previous chapter, it takes a more theoretical and in-depth approach and examines some fundamental assumptions underlying the concepts of government and citizenship.

Section 3.1 defines and examines correspondences between two pairs of concepts: community-based vs. individual benefits, and the right to equal citizenship vs. the right to separate cultural identity. Many of the challenges inherent in the historical relationship between First Nations and the federal government can be accounted for within this model. Yet understanding the essential conflict within each pair can lead to opportunities for intelligent policy-making.

Section 3.2 builds on that foundation. It develops a policy framework for defining the terms and conditions for the transfer of program control to the community level, and for determining who is a member of the serviced population for various programs. Section 3.3 explores some problems that accountability poses for the implementation of the framework. Finally, the summary offers four key insights for the future.

3.1 A new Basis for Policy?

This section further refines the distinction between community-based and individual benefits, and develops the idea that this distinction can provide a basis for a new policy on the design and delivery of services. It also identifies links between the right to services that provide individual benefits and some fundamental values of Canadian citizenship.

3.1.1 The essential benefits of status: Community-based vs. individual benefits

Chapter 2 set out several criteria by which the ***benefits*** of Indian status were distinguished from its ***disadvantages***.[27] A status-related effect was considered to be a benefit to the extent that it contributes to: participation in community life; an effective share in the collective rights of the individual's First Nation; sustenance of the individual's Indian identity and culture; or security with respect to the economic benefits connected to status.

From these criteria it can be seen that for individual Indians, programs deliver benefits in two ways. Either they ***contribute to the maintenance and development of the cultural and historical***

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[27] See Section 2.3 above, p.18.

identity of Indians (e.g. education in a native tongue); or they ***provide direct economic or social benefits*** to recipients (e.g. non-insured health benefits).

This distinction is important. To be enjoyed, benefits of the first sort assume the existence of a group of like individuals with whom the experience of being Mohawk, Ojibwa or Dene can be shared. For example, individuals cannot live in their ancestral language unless they are among others who speak it; nor can they sustain, on their own, a way of life rooted in the values, traditions, customs and beliefs of their ancestors. We can call these benefits, the enjoyment of which requires the existence of a particular cultural or linguistic community, ***community-based benefits.***

The value of a community-based benefit can be assessed from two points of view: the individual and the collective. Sometimes the two aspects are reinforcing: a community benefit will help to strengthen an individual's sense of Indian identity. Sometimes there is tension between the two. For example, from the collective point of view, a more traditional form of life-style and government may be desirable in that it strengthens ties with the past and encourages respect for traditional values. Arguably, cultivating a sense of continuity with and respect for the past will be crucial to the long-term stability and viability of many Aboriginal communities.

From the point of view of some individual members — perhaps even a majority of them — the benefits of traditionalism may be less than clear. Not only might it weaken their influence ***as individual members of the community***, it may conflict with what they feel ought to be the goals of a self-governing First Nation community in Canada today. They may, for example, want to commercially develop reserve lands, or even open a casino. When such tensions occur, there is often no clear way to decide which point of view should prevail. As a general rule, the maximization of community-based benefits requires that a balance be struck between the two points of view.[28]

Programs also deliver what can be called direct or ***individual benefits***. In contrast to community-based benefits, these can be enjoyed by individuals even if they have no contact at all with other Aboriginal persons or have only limited interest in maintaining their Aboriginal heritage. Non-insured medical benefits, tax exemptions, subsidized housing and support for post-secondary education are examples.

Of course, individual benefits can be used to promote a First Nation's identity. The community will not flourish if its members have no shelter, are sick, lack the necessary skills to learn about their cultural heritage, or fail to see the value of its unique traditions or spiritual practices. Indeed, one can expect that programs that deliver individual benefits will generally also be designed to reinforce First Nations' identities. This would contribute to community stability and help ensure that the objectives and design of these programs do not conflict with those that deliver community-based benefits. Moreover, to ensure stability and coherence, control over the

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[28] How this balance is to be struck will be further discussed in Section 3.3

design and delivery of these programs should, where possible, be placed in the community's hands.

The point remains, however, that individual benefits are portable and culturally transferable in a way that the community-based ones are not. Individuals can enjoy good health or higher learning independently of their participation in the life of a First Nation community. And such benefits may even be used as a means to fuller participation in the mainstream of Canadian society.

With these thoughts in mind, we can say that status is a benefit for individuals insofar as it provides:

- **a basis for their membership and participation in a First Nation community**
- **through that participation, a basis for the maintenance of their Indian identity**
- **security with respect to their individual economic or social well-being**

Status is a benefit for the community in general insofar as it provides a secure and viable basis for the community's existence. As in the case of individuals, it does this by providing members with a basis for their membership and participation in the First Nations community and security with respect to certain economic and social benefits.

These are the ***essential benefits*** of status. Like the criteria in Chapter 2, they are not specific entitlements or rights, but general objectives which status should promote. These objectives are identified here in terms of the kinds of benefits associated with them. They are therefore more than criteria for distinguishing benefits from disadvantages. They are also a way of classifying different kinds of benefits according to whether they are community-based or individual.

The distinction between these two kinds of benefits can be used to develop a policy framework for implementing the inherent right to self-government. Section 3.2 below pursues this task. First, however, the relationship between the two kinds of benefits, the idea of citizen equality and the inherent right of self-government needs to be examined. It will be helpful to begin by contrasting the idea of citizen equality in the 1969 *White Paper on Indian Policy* with some current views on the topic.

3.1.2 Two views of citizenship equality

The *White Paper*'s view of the equality of citizens reflects a vision of Canada as a single community united by a pan-Canadian form of citizenship that treats all citizens as having an equal share in the rights, benefits and responsibilities associated with common citizenship. From this point of view, membership in cultural communities is essentially a matter of private choice. The state should not promote one group's identity over another. To do so is to treat some citizens' interests as more important than those of others. This is the traditional liberal-democratic view of the equality of citizens.[29]

In response, the *White Paper* proposed to promote Indians' fuller participation in Canadian society by eliminating the laws, institutions and practices that distinguish Indians from other Canadians. Integration was seen as the only real way to overcome inequality. As for those who choose to "withdraw" from the mainstream, the paper concluded that they should not expect to enjoy "the benefits that flow to those who participate."[30]

According to the *White Paper*, making Indians a separate legal class ghettoizes them, fostering dependency on the federal government and discriminatory attitudes among non-Indians. By perpetuating this condition, the *Indian Act* and other measures prevent Indians from full participation in the cultural, social, economic and political life of Canada. As a result, they are deprived of many benefits and opportunities enjoyed by other Canadians.[31]

Since the *White Paper* — in part, ***because*** of it — many Canadian political theorists have begun to rethink the relationship between individual equality and freedom on the one hand and cultural identity on the other. They argue that both human well-being and meaningful individual choice require access to a range of values, goals, customs, practices and other "cultural goods". Access to these goods is gained through membership in a healthy, developing cultural community. According to the new thinking, being a member of such a community is not simply a private choice regarding life-style. It is a precondition for having such choices.[32]

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[29] See Ronald Dworkin, "Liberalism," in S. Hampshire (ed.), *Public and Private Morality* (London: Cambridge University Press, 1978).

[30] Minister of Indian Affairs & Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printers, 1969), p. 8.

[31] *Ibid*, p. 8.

[32] Two influential examples of the new thinking are Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989); and Charles Taylor, "The Politics of Recognition," in Amy Gutmann (ed.) *Multiculturalism and "The Politics of Recognition"* (Princeton: Princeton University Press, 1992). For a collection of essays assessing collective rights from a number of points of view, see Michael McDonald (ed.), *The Canadian Journal of Law and Jurisprudence*, Volume IV, no. 2., 1992.

Thus, nowadays few will claim that the social problems in a community like Davis Inlet result from a failure of community members to choose the right life-style after they were relocated. The view is rather that when these people were uprooted from their traditional territory, they lost an essential element of their way of life. As a result, their social structures collapsed. In such cases, the disorientation that follows can lead to an inability to see the world as containing meaningful choices and, eventually, to the disintegration of the community and its members. People in this predicament may be unable to adjust to a new life-style even when one is available. For them — especially for the children — the world may lack any meaningful arrangement of values, priorities and goals.

The lesson of such experiences is that cultural orientation cannot be changed easily. The *White Paper* failed to appreciate this. It over-estimated the capacity of First Nations communities to maintain their separate identities without some form of state intervention. At the same time, it underestimated the impact that loss of identity can have on community members. The paper assumed that, as long as the larger society permits private choices regarding life-style, those Aboriginal persons who wish to maintain their special identity will be free to do so. In reality, to deny First Nations the political and social tools needed to preserve their distinct ways of life is to abandon them and their members to the potentially disintegrating forces of mainstream Canadian society. This is hardly a guarantee of fuller participation.

As a result, in opposition to the *White Paper*, many Canadian political theorists now agree that a liberal democratic state is sometimes justified in treating people differently in order to treat them equally; indeed, it may have a ***duty*** to do so. In particular, they think the Canadian state has an obligation to respond positively to First Nations' desire to protect their historical identities.[33] Nevertheless, if the *White Paper*'s views on citizen equality overshadowed the federal government's obligation to help First Nations preserve and promote their distinct identities, one could say that the concerns of First Nations for their separate identities threatens to create the opposite problem by overshadowing the importance of citizen equality.

If a new model of Canadian citizenship is to take root, one that does justice to First Nations' legitimate aspirations for self-rule, it must not undermine Canada's existing commitment to equality. In a regionally, culturally and linguistically diverse country like Canada, the sense of mutual responsibility among citizens depends upon mutual respect. Altering the terms of citizenship in ways that stray too far from the common sense of fairness and justice will only undermine this respect and make the new arrangements unworkable in the long-term.[34] Whatever its faults, the *White Paper* has the virtue of clarity on this cardinal point. Indeed, in some ways,

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[33] For such an argument, see Donald G. Lenihan, Gordon Robertson and Roger Tassé, *Canada: Reclaiming the Middle Ground* (Montreal: Institute for Research on Public Policy, forthcoming, November 1994), Chapter 7.

[34] This argument does not take account of injustices that occurred in the past. There is ample documentation of Canada's historical failure to deal fairly and justly with its Aboriginal population, including both the terms of the *Indian Act* and its administration. The reason why new arrangements are needed with respect to Aboriginal peoples is to correct the failures of the past.

the thinking behind the *White Paper* and that behind the inherent right are like two halves of a whole: one is preoccupied with the similarity between First Nations and other Canadians, the other focuses on their differences. Is there a principled way for policy-makers to separate and then balance the two?

3.1.3 Balancing diversity and equality: a conceptual basis

The 1969 *White Paper* took issue with what can be called the "separateness of services" principle, contending that "[i]t has been shown many times that separation of people follows from separation of services."[35] On the face of it, however, the principle seems to be a reasonable one. It explains, for example, why Quebec has long insisted on the right to "opt out" of federal programs. The separation of services also seemed to be behind much of the "province-building" in the 1960s and 1970s.

The principle is important here because it implies that community control over the design and delivery of services is essential to the development of an effective nation- or community-building strategy. It therefore establishes a link between the objective of preserving and promoting First Nations' distinct identities and the transfer of control over the design and administration of services to the community level. However, as it stands, the principle is too general.

The argument about "separateness of services" fails to register a very important difference in the way services relate to community members, namely, according to whether they deliver community-based or individual benefits. Refining the principle to take account of this distinction throws new light on the rationale behind various services and programs; it also provides a basis for balancing First Nations' right to design and administer services in ways that will preserve and promote their distinct cultural identities with the pan-Canadian commitment to citizen equality.

On the one hand, services and programs that deliver ***community-based benefits*** will tend to ***increase community solidarity*** by reinforcing distinctive cultural practices; they may also enhance members' awareness of their shared identity by focusing their attention on the special values, goals and practices that culturally distinguish their community from others. On the other hand, the primary goal of services/programs that produce ***individual benefits*** is not to maintain a separate identity. It is either to meet ***basic needs*** (e.g. health benefits) or to promote ***equality of opportunity*** (e.g. post-secondary education assistance). The interests these benefits address do not flow directly from First Nations' separate identities. They are more general and overlap with those of other Canadians. That is why individual benefits are culturally transferable and often portable.

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[35] *Ibid.* p. 9.

This does not mean that services and programs producing individual benefits cannot contribute to community integration or to a community's distinct identity. It only means that they do not do so automatically. If they are to contribute, they must be specifically designed to reinforce the values, goals and practices that define the community's distinctive life. In the absence of such values, goals and practices, there are no common points of reference around which to develop a culturally unique community-based education curriculum or health program — indeed, there is no culturally distinct community.

However, where such a community does exist, and where its members seek to maintain their separate identity, control over community-based benefits is essential. **In keeping with this, First Nations' right to design and administer the services/programs that deliver community-based benefits should be seen as flowing directly from the inherent right to self-government.**

By contrast, the primary goal of services and programs that produce individual benefits is to meet needs and promote equality. These goals are not unique to First Nations communities; they are fundamental goals of the Canadian state. That is what explains the state's commitment to providing the services and programs that promote these goals. **The right to such individual benefits, therefore, should be seen as flowing through Canadian citizenship.** Accordingly, the design of services/programs that promote these goals should reflect the constitutional values on which they rest. In particular, they should reflect section 15 of the *Charter*, which guarantees all citizens "equal benefit of the law"; and sections 36(1)(a) and (c) of the *Constitution Act* of 1982. The latter two clauses commit governments to "promoting equal opportunities for the well-being of all Canadians" and "providing essential public services of reasonable quality to all Canadians."[36]

This is not to suggest that First Nations should not design or administer these services/programs. Nor is it to suggest that they cannot have specific Indian content or that they should not be designed to promote a community's specific values, goals or practices. The claim is that, **because the benefits are linked to promoting fundamental values of citizenship, the state has a legitimate interest in how the programs are designed.** More specifically, it has a responsibility to ensure:

- **that they meet broad national objectives regarding the range and level of services/programs required to meet Native Canadians' basic needs**
- **that the eligibility criteria for such benefits promote equitable access**

How these national objectives might be defined and tested will be discussed further below.

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[36] A similar argument is made by Alan Pratt in "Federalism in the Era of Aboriginal Self-Government," in David C. Hawkes (ed.), *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1991), pp. 38-53.

It should be clear that the claim that the state has an interest in how certain programs are designed and administered is not a result of lingering paternalism. It is a direct consequence of Canadians' fundamental commitment to citizen equality.

The goal of distinguishing between community-based and individual benefits is to ensure that, after taking cultural differences into account, every Aboriginal person enjoys the benefits of being a Canadian in a manner comparable to Aboriginal people in other communities and to non-Aboriginal Canadians.[37]

To ensure that cultural differences are taken into account, the role of overseer might best be performed by First Nations themselves, through existing national organizations or possibly through a new national First Nations body.

As a final point, individual benefits may also be determined by treaties for a significant number of Indians. Where this is the case, the right to the benefits flows directly from those agreements. The nature of the terms and conditions placed on the benefits would therefore be decided, as far as possible, by reference to the agreements, and through consultation or negotiations with Treaty First Nations.

Where treaty provisions are adequate for the needs of a First Nation, they fall outside the scope of this study. Our goal is to provide a fair and rational way of defining the federal government's responsibility to First Nations people where treaties either do not exist or do not adequately address the state's commitment to provide the programs and services in question.

3.2 Status vs. Membership

This section builds on the foundation already laid. It develops a policy framework for deriving the terms and conditions for the transfer of program control to the community level, and for determining who is a member of the serviced population for various programs.

Here, we propose the creation of two spending envelopes to fund services/programs in First Nation communities, one for each of the two main functions: sustaining collective identity, and meeting needs and promoting equality of opportunity for individuals. The section concludes with a proposal for two general rules regarding terms and conditions to be attached to the transfer of these funds.

3.2.1 The 1985 amendments to the Indian Act

Before 1985, a status Indian was anyone listed on the Indian Registry. The system worked in the following way: names were organized into membership groups and each group was identified

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[37] These benefits may vary for Aboriginal people in different provinces, just as they do for non-Aboriginal Canadians, because of variations in provincial standards for different programs and services.

with a band. The list of names under a particular registry group therefore constituted the list of members for that band. Thus, under the old system, the class of status Indians was identical to the class of band members.

Bill C-31, implemented in 1985, fundamentally changed the system. It provided for the reinstatement of many Indians who had lost status (and hence band membership) for what are now recognized as unjust reasons.[38] In particular, the new law was meant to eliminate a gender bias in the rules, according to which Indian women who married non-Indians lost their status, while Indian men who married non-Indians could have status extended to their wives. *C-31* also gave First Nations the right to determine their own membership codes, though this is supposed to be subject to certain restrictions. For example, band codes were not allowed to prevent women who had a right to be reinstated under *C-31* from regaining their lost band membership.[39] By 1993, 237 of the existing 605 First Nations had assumed control of their membership codes.[40]

C-31 also grants status to the children of reinstatees. But they are registered under a separate section of the *Indian Act* — section 6(2). The inheritance rules for status are stricter under this section than those for Indians registered under section 6(1). Thus if a 6(1) Indian has a child with a non-Indian, that child is eligible for status, though as a 6(2) Indian. But if a 6(2) Indian has a child with a non-Indian, that child is not eligible. Some membership codes under *C-31* do not guarantee band membership to children of reinstatees registered under section 6(2). Their eligibility is determined by appeal to the rules in the *Indian Act* or to the band's membership code.

Since bands now have the right to define their own membership criteria, codes can and do vary greatly. How membership and status diverge depends on the code. Generally speaking, if the membership rules are more liberal than the inheritance rules in the *Act*, the number of non-registered band members can be expected to grow. If the band's membership code is more restrictive than the *Indian Act*, the number of registered non-band members will grow.

The result is that status and band membership have begun to diverge. For the moment, however, the distinction is more important in theory than in practice, since band membership lists still correspond relatively closely to band lists of registered status Indians prepared by the Department. This is because *Bill C-31* guaranteed the right of membership to anyone who was a band

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[38] See Government of Canada, *Indian Band Membership: An Information Booklet Concerning New Indian Band Membership Laws and the Preparation of Indian Band Membership Codes* (Ottawa: Minister of Supply and Services, 1990), pp. 6-7.

[39] In fact, these restrictions were challenged by the Sawridge band in Alberta. In an initial ruling, the Federal Court upheld the restrictions. The case is now on appeal to the Federal Court of Appeal.

[40] Indian and Northern Affairs Canada, *Indian Register Population by Sex and Residence 1993* (Ottawa: Minister of Government Services Canada, 1993), p. xi (hereafter, *Indian Register 1993*).

member before 1985, who was entitled to membership at that time or who qualified under *Bill C-31* — even if the band membership code was subsequently changed.

The divergence between status and band membership will probably become more important when the children born after 1985, and hence subject to the new rules, reach adulthood some 10 years from now. This explains why Chapter 2 made the assumption that for the most part, "status Indians and band members currently enjoy the same rights and benefits if they are living on reserve".[41] The focus in Chapter 2 was on the short- to medium-term. Over the longer-term, however, *C-31* will give rise to structural cleavages in some First Nation communities, as well as to a class of off-reserve status Indians with no band affiliation.[42]

TABLE VII: Categories of Indians After *Bill C-31*

Individual is:	**Status** [a]	**Non-status**
Recognized as band member[b]	Status band member	Non-status band member
Not recognized as band member	Status non-member	Non-status non-member

a. "Status" refers to registered status under the *Indian Act*.
b. "Recognized as band member" refers to acceptance under the band's membership code.

3.2.2 Future Trends in Population and Membership

A study by Clatworthy and Smith on the population implications of *Bill C-31* indicates that by 1991, 40% of First Nations had passed their own membership by-laws, while 60% continue to rely on membership eligibility determined under the *Indian Act*.[43] **Table VIII** below shows the range of membership codes that have emerged as a result. Of those bands that have adopted their own membership rules, 38% have adopted a one-parent rule that is more inclusive than the rules for registration in *Bill C-31*; 21% have adopted rules resembling the 1985 *Indian Act*; and 41% have adopted a blood quantum rule or two-parent rules that are more restrictive than *Bill C-31*.[44]

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41 Part II, p. 14

42 An analysis of some of the implications of the C-31 changes, along with demographic projections of their effects on the Indian population, can be found in Stewart Clatworthy and Anthony Smith, *Population Implications of the 1985 Amendments to the Indian Act* (Ottawa: Assembly of First Nations, 1992).

43 *Supra*.

44 Under the *Indian Act*, people with one Indian parent are entitled to Indian status but may not pass on that status to their children unless both parents have Indian status.

TABLE VIII: Overview of Band Membership Codes

Membership Code	Basis of Membership	Use by First Nations (%)
One-parent rule	Eligibility for membership based on one parent being Indian	15%
Blood quantum rule	Eligibility based on amount of Indian blood in one's ancestry, i.e. parents' blood quantum divided by 2.	5%
Two-parent rule	Eligibility based on both parents being Indian	11%
Indian Act rule	a) Band membership code is based on Indian Act rules after Bill C-31. b) Band has no code for membership; eligibility based on Indian Act.	8% 60%

First Nations that control their own membership are not required to report membership numbers to the federal government. However, the most recent returns from First Nations for the INAC database used in funding band governments indicate that there are at least 22,000 non-status band members resident on reserve, some 6.4% of the total on-reserve population.[45] This is an increase from almost none in 1987-88.

Looking ahead, Clatworthy and Smith saw the potential for substantial disparity between the number of Indians entitled to status under current rules and the total number of band members, depending on which membership rules bands choose to follow. Their report estimates that the population of status Indians would increase from 520,000 in 1991 to an estimated 786,000 in the year 2036 on the basis of the current Indian Act rules, then decline to around its present level at the end of the 21st century.

Their estimates show that the projected population of recognized band members could be as high as one million at the end of the next century if all bands followed a one-parent rule for band membership. At the other extreme, the recognized Indian population could fall to under 100,000 if all bands imposed a two-parent criterion for membership.

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[45] Interview with Robert Sterling, Senior Adviser, Indian Programming and Funding Allocations Directorate, INAC, September, 1994.

The current population of Indians on reserve, where some 90% of direct federal spending on Aboriginal programs is directed, is approximately 350,000. DIAND[46] has projected the on-reserve population in the year 2015 to be 483,000.[47]

Projecting the future number of non-status band members living on reserve is also very difficult. This population will depend on the growth in total reserve population, on the proportion of bands that adopt their own membership codes, and on the degree to which band codes differ from the rules used for registration under the Indian Act. All one can safely say is that there will likely be a substantial and increasing population of non-status band members living on reserve, if numerous First Nations continue to apply membership rules that are substantially more inclusive than the Indian Act and *Bill C-31.*

3.2.3 Emerging cleavages in First Nation communities

i) On Reserve:

In First Nations communities which adopt membership codes at variance with the inheritance rules in the Act, a kind of hierarchical arrangement is set to emerge regarding access to benefits and political rights. One level will consist of individuals who are both band members and status Indians. As band members, these individuals will have full political rights. For example, they may have the right to stand for office or participate in band council elections. As status Indians, they will have a right to whatever programs and services the federal government provides for Indians.[48] For purposes of discussion, these individuals will be referred to as ***full members.***

In communities with more liberal membership codes, a second category will emerge composed of individuals who are band members but not status Indians. For example, a band may have a membership code that allows it to extend band membership to the grandchildren of reinstatees, even though the children do not qualify for status under the Indian Act. When these children come of age, they will have the full range of political rights accorded band members, but will have no legal entitlement to benefits from programs that require status.

In communities with membership codes that are less liberal than the registration rules in the Act, a third category will emerge composed of individuals who are status Indians but not band members. For example, the children of some reinstatees will qualify for status under the new inheritance rules. Such persons may grow up on a reserve, go to a reserve school, participate in reserve life in most normal ways, but not be eligible for membership under the band's code. On coming of age, they therefore will not have a claim to the same political rights as other band

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[46] DIAND (1993): Population Projections of Registered Indians, 1991-2015.

[47] The numbers of Indians living on reserves will depend on such factors as the future rate of out-migration and of marriage to non-Indians. These factors cannot be accurately forecast based on past experience, and may vary depending on the adequacy of future treaty and land claims settlements and the economic opportunities available to First Nations people on reserves relative to those off-reserve.

[48] For a list of these programs and services, see **Appendix B.**

members. They may also be denied other benefits associated with membership, such as band housing.[49]

Finally, some individuals may live their whole lives in a particular community but be neither band members nor status Indians. Thus, in some cases, the grandchild of a reinstatee may be born, grow up, and die on a reserve while failing to meet either the inheritance terms of status or the criteria of band membership. Such a person would have no political rights and no legal claim to benefits from programs for status Indians.

The emergence of these different groups can be safely predicted. At this stage, as noted above, it is not possible to predict their size or importance in the future population of Indian reserve communities; even the total population of these communities is subject to too many variables to predict.

ii) Off Reserve:

A different kind of divergence may be opening up among Indians living off-reserve, where Bill C-31 may lead to the creation of two different kinds of status Indian: those with and those without band affiliation.

Many Indians live and work off-reserve for reasons of convenience. Some are in close proximity to their reserves and return frequently. Others may live a long distance away. Before 1985, status Indians could generally choose whether they wanted to live on- or off-reserve. However, many are now forced to live off-reserve for reasons beyond their control, such as a shortage of housing, land, or employment opportunities. This is the case for numerous C-31 reinstatees.[50] A second consequence of C-31 is the emergence of a class of off-reserve Indians who, because of the new membership codes, will have no band affiliation. This includes individuals who, as the children of C-31 reinstatees, were eligible for status but failed to meet the membership criteria of the band to which their mother belonged.

In 1993, of 553,316 status Indians, 226,872 were living off-reserve.[51] It is not known how many of these were living off-reserve for reasons of convenience, how many were forced to do so for reasons beyond their control, such as lack of housing, or how many simply had no band affiliation. There were also 10,352 status Indians who, while living on a reserve, were not on the reserve that corresponded to their registry group. How this has affected their ability to

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[49] According to the report of the National Aboriginal Inquiry, a reinstated status Indian who is denied band membership may also be denied access to PSEA funding. See Volume 1, *Impacts of the 1985 Amendments to the Indian Act* (Ottawa: Minister of Supply and Services, 1990), p. 44, hereafter referred to as *Impacts*. As noted in Section 1.2, however, bands that wish to deliver services to non-status band members now have the flexibility to do so, provided they stay within their overall hudget.

[50] *Impacts*, pp. 35-36.

[51] A further 21,197 were living on Crown land. See *Indian Register 1993*, p. XV.

benefit from status or how many of them may have gained membership in the band on whose reserve they now live, is unknown.

The divergence of Indian status and band membership could affect program funding, equality rights, and political stability in many First Nations communities. This raises important questions about the terms and conditions that should be negotiated regarding the transfer of program control. Addressing the issues here will require a rethinking of the nature and extent of the federal government's obligations to First Nations people. This task has already been broached by the Supreme Court. In ascribing to the federal government a "fiduciary responsibility" to First Nations, the Court may have signalled its intention to take a more activist view of the federal government's responsibility to First Nation communities and persons.[52] Any attempt to rethink the basis of policy must take account of the Court's thinking.

3.2.4 The fiduciary responsibility

In recent years, some commentators have argued that government policy-makers need to distinguish more clearly between jurisdiction and responsibility.[53] In essence, the distinction is meant to underline the difference between the federal government's jurisdictional authority for Indians under section 91(24) of the *Constitution Act*, 1867 and its moral responsibility to them as a kind of trustee; and to show how this moral responsibility ought to shape policy-makers' views about the duties imposed upon them by the federal government's jurisdiction.[54]

To speak of Parliament's jurisdictional authority regarding Indians is to refer to its constitutional right to legislate in matters regarding Indians. The traditional view of the courts has been that Parliament is under no obligation to exercise its power. When it does, it is constrained mainly by the distribution of powers and, more recently, also by the Canadian Charter of Rights and Freedoms.

Those who argue for the distinction between responsibility and jurisdiction reject this view. They contend that Parliament has a positive duty to promote the interests of Aboriginal Canadians, one that not only obliges it to exercise its legislative power, but that obliges it to do so in quite specific ways. In this view, interpretation of section 91(24) should raise more than technical constitutional questions about the scope of Parliament's jurisdictional authority over Indians. It should also raise questions about the underlying principles that legitimate that authority. This would take the courts beyond the letter of the Constitution and into a consideration of its spirit.

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[52] *Guerin v. The Queen* (1984) 13 D.L.R. (4th) 321 (S.C.C), p. 358 (italics added).

[53] See Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*, in David C. Hawkes (ed.), *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1991), pp. 59-64.

[54] The distinction has important implications for other parts of the Constitution as well, such as sections 25 and 35 of the *Constitution Act*, 1982.

The Supreme Court has indicated that a positive duty exists and that it should be considered by the federal government when interpreting the Indian Act or section 91(24). In 1984, in *Guerin v. the Queen*, the Court ruled that the Minister of Indian Affairs and Northern Development has a "fiduciary responsibility" to First Nations people. The case involved a band that sued the Crown for breach of trust because it had leased Indian land to a tenant on terms far less favourable than the market would have justified. The Court agreed with the band.

The arguments given by the Court in defence of its finding rely on something like the distinction between jurisdiction and responsibility. Chief Justice Brian Dickson, writing for the majority opinion, described a fiduciary responsibility in the following way:

> ...where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise that relationship by holding him to the fiduciary's strict standard of conduct.[55]

The reference here to "equity" is important, in the sense that it imposes a positive duty upon the state. In the liberal democratic tradition, it has long been accepted that relationships based on equality sometimes impose positive duties on those involved. In liberal political theory, this is the basis for the state's positive obligation to promote equality of opportunity among citizens through, for example, state-sponsored education or worker adjustment programs.[56]

As Alan Pratt notes, the Court's ascription of a fiduciary role to the Crown with respect to First Nations peoples provides a basis on which the principles underlying their special relationship can be elaborated. Commenting on Guerin, he concludes that the Court's ascription of a fiduciary role:

> ...appears to [create] a new branch of law, spanning public and private law, to which familiar principles apply only by analogy. It places in the realm of law at least part of a relationship which has previously been described as political. It thus provides a context and a rationale for canons of construction favourable to aboriginal people...[57]

The implications of the Court's arguments have been much debated over the last decade, particularly with respect to whom and what the responsibility encompasses. Bradford Morse, for example, suggests that the fiduciary responsibility likely includes individuals, and may extend to social programs and non-status Aboriginal people:

> Although we know that a fiduciary obligation (or trust) exists, we are unsure who qualifies as beneficiaries under this relationship. It is obvious that bands recognized under the Indian Act are

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55 *supra*, note 49.

56 See, for example, John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), pp. 504-512.

57 "Federalism in the Era of Aboriginal Self-Government," *supra*, pp. 27-28.

> in this position as collective entities, but does the relationship also extend to individual band members? A strong argument could be made that they do so benefit, at least concerning trust account funds held for them personally and administered by the Department of Indian Affairs and Northern Development...Does the relation also extend to encompass services, as opposed to personalty or realty, provided to band members on an individual basis, for example, regarding health care or post-secondary education? We also do not know if the federal government has fiduciary obligations in relation to unrecognized Indian bands, to the Inuit, the Métis or non-status Indians.[58]

As these comments suggest, **further elaboration of who and what is covered by the fiduciary responsibility is likely. A possible source of such a ruling is a court challenge regarding the link between program funding and status. The likelihood that such a challenge will occur, and that it will be successful, will increase as the cleavages opened by C-31 deepen.**

3.2.5 Status and funding

In the past, program funding was closely tied to the number of status Indians on reserves. Information about the serviced population was usually acquired from the Indian Register. As membership and status diverge, however, the Register is becoming an increasingly unreliable source of information on community membership, making the question whether status should remain the legitimate basis for such calculations increasingly acute. As a result, in recent years, efforts have been made to rely less on the Register and more on assessments of the community's needs. For example, where possible, the funding formulas for capital infrastructure emphasize the objective costs involved in maintaining, repairing or building structures that serve the whole community, thus placing minimum emphasis on the number of status Indians in the community. As we noted in Chapter 1, the criterion for eligibility for many basic services delivered on reserve has already been extended from on-reserve status Indians to include all people resident on the reserve.

Nevertheless, population size remains a key component in funding allocation. The sum needed for a new community centre cannot be determined without knowing the size of the community. The same is true for new schools, health services, or a fire station. Moreover, in many cases, project budgets are determined by costing a particular unit of service and then multiplying it times the number of units involved.[59] Insofar as the unit may be a service or good delivered to a community member, such as Post-secondary Education Assistance benefits, the number of members is crucial. This poses a serious difficulty: What is the population at which services/programs should be targeted?[60]

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[58] Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*, in David C. Hawkes (ed.), pp. 81-82.

[59] See Government of Canada, *DIAND's Evolution from Direct Service Delivery to a Funding Agency* (Ottawa: Ministry of Indian Affairs, 1993), p. 7.

[60] A draft version of a recent INAC discussion paper proposing a new "community-based" funding arrangement explicitly ties core funding (most of the budget) to the *Indian Register*. See Indian & Northern Affairs Canada, "A Community-Based Transfer Payment for First Nations," July 1994, p. 15.

If program funding remains tied to the Register, in some communities the divergence between status and membership will cause the ratio of dollars to community members to shrink as the number of non-status members grows. This would lead to a general decline in the quality of services available to community members. Such a decline could create internal tensions as status Indians see the range and quality of their own services and programs diminish while non-status band members receive an increasingly large share of the benefits. This could lead to a court challenge regarding the band's right to use status-designated funds to create programs that benefit non-status Indians, including non-status band members.

Suppose that a decade from now a full member living on-reserve (i.e. someone with both status and band membership) challenged the right of band members who were not status Indians to benefit from a band-administered PSEA program. Suppose further that the funding formula for that program were still tied to status. How might the court decide?

It seems unlikely that the courts would agree to accord benefits to status members and to deny them to non-status members in such a situation. Such a decision would entrench a glaring social inequality. In order to conform to the equality provision in section 15 of the Charter, the court would have to find that status-based eligibility criteria for PSEA benefits did not discriminate against non-status band members. This would come down to saying that, while the federal government has a right under section 91(24) to provide special services for Indians, non-status band members are not Indians and so can be excluded from Indian programs. Such a conclusion would be awkward in an era in which the federal government has acknowledged the inherent right of Aboriginal self-government. It would also conflict with the *Indian Act* itself which, since 1985, has explicitly recognized First Nations' right to define their own membership codes.

Since the *Act* now acknowledges that there are two legitimate definitions of "Indian" — its own and that established by any band with its own membership code — there is now a potential for the two definitions to conflict. If a court were forced to choose beween these two definitions, it is hard to imagine that it would not support First Nations' right to define their own membership. Not to do so would be to implicitly deny the right of First Nations to govern themselves.

At the same time, the courts would be reluctant to simply rule that Indian status is not a legitimate basis for program eligibility and hence that all band members should be eligible for program benefits. That could amount to sanctioning the erosion of benefits that could occur if band membership grew faster than the status population and federal funding was not increased to match the larger number of users.

This dilemma cannot easily be resolved, except to say that it is a decision which the courts would probably prefer to avoid.

3.2.6 Status and program eligibility

As the preceding sections suggest, *Bill C–31* has made status a potentially very destabilizing force for First Nations. Tensions between life–long band members and reinstatees have already become apparent as a result of the strain *C–31* has put on local resources such as housing.[61] Problems caused by the increasing divergence of status and membership may be more serious.

The most obvious source of tension is for the funding base of First Nations communities to shrink relative to their population. Since this would result from a link between funding and status, a way to avoid conflict is to cut the link by basing funding on the more inclusive category of community membership. But this raises a hard question: membership in which community?

The concept of community membership is ambiguous. It has both a ***legal*** and a ***sociological*** definition.

Legally, the community is composed of all those listed on, or having a right to be listed on, the community's membership list. These persons also have a right to share in the assets and moneys owned by the collectivity.

Sociologically, however, the community is composed of all those whose principal social, cultural and (where applicable) linguistic identity has been constituted through personal participation in the social, cultural and linguistic practices of the community.[62]

In many cases, the list of members produced by these two definitions will be very different. Which one ought to replace status? Or, if both, which is to be used where? And how would the choice of one or the other affect off–reserve members?

Whichever definition is adopted, this much is clear: moving to community membership amounts to adopting a new policy on eligibility, one that recognizes that at least some non–status Indians living on–reserve are entitled to benefit from what are now considered as status rights. This raises further questions: On what would the new policy be based? Would the new basis provide a rational and fair interpretation of the fiduciary responsibility? And what implications would

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[61] The problems posed by reinstatement are chronicled in *Impacts*. For example, some life–long members have viewed special funds set up to provide housing for reinstatees as queue–jumping. For their part, reinstatees say bands often try to prevent them from returning to the reserves. Some even charge that band councils have appropriated housing funds earmarked for *C–31s* and used them for other purposes. *Impacts*, pp. 38–40.

[62] An interesting discussion of the significance that the sociological definition of membership has for immigration policy can be found in Joseph H. Carens, "Membership and Morality: Admission to Citizenship in Liberal Democratic States," in William Rogers Brubaker (ed.), *Immigration in Europe and North America* (Lanham, Maryland: University Press of America, 1989), pp. 31–49.

it have for the three groups of off-reserve Indians,[63] as well as for status non-members living on reserve?

These questions take us beyond the narrower question of the link between status and funding. They make it clear that, in order to answer that question, we must tackle the broader question of the basis for program eligibility: Who has a right to what?

3.2.7 Reshaping federal policy

One way to respond to this question is to develop a new policy framework, based on the distinction drawn in Section 3.1 between community-based and individual benefits, for use in defining programs and distributing benefits. This section sketches such an approach. The core idea to be developed is as follows:

> **Benefits provided for persons on reserves should be distinguished according to their function: community-based benefits should flow directly from band membership, while the right to individual benefits should flow through Canadian citizenship.**
>
> **To construct a policy framework around this principle, we would establish two categories of programs based on the main function that they perform, *either:***
> - **sustaining identity, *or***
> - **meeting needs and promoting equality of opportunity.**

In most cases, the function a program serves will be fairly clear. For example, Indian government support, Indian cultural centres, and comprehensive land claims all aim primarily at delivering community-based benefits. These programs assume the existence of First Nations communities. In the absence of such communities, the programs would have no point.

By contrast, housing, education, and health services aim at meeting individuals' basic material needs. These are services that would be required in some form even if all First Nations people became fully "integrated" into mainstream society. Similarly, a major objective of post-secondary education assistance is to provide individual Indians with the same chance as other Canadians to acquire the special skills and knowledge needed for the career or life-style that they believe will fulfil them as individuals.

In some cases the function a program serves will be less clear. This will usually occur because the program is intended to promote a variety of objectives, some directed to the community and some to individuals. Cases like these might be handled by breaking the program up into smaller component parts, which could be assigned by function, or by a negotiated decision as to the category to which the program should be assigned.

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[63] The three groups are: status Indians with band affiliation, status Indians with no band affiliation, and non-status Indians.

Once programs have been assigned by category, funding for them could be placed in two separate envelopes for the two major categories. Funding levels could then be calculated on the basis of formulas tied to the programs on the lists. In order to keep the funding base from shrinking relative to population served, funding could be based on community membership rather than status, where applicable. But which definition of membership is to be used, the legal or the sociological one?

In some communities membership codes are more inclusive than the Register. In consequence, there are increasingly more members than status Indians on-reserve, and hence the per capita funding base may be shrinking. In these cases, basing funding on band membership rather than status will stop the shrinkage, and so makes sense.

In other communities, however, the membership code may be less liberal than the Register. As a result, there are increasingly fewer members than status Indians. Here a shift in funding from status to band membership means the per capita funding base will decrease, not increase. Rather than improve the situation on these reserves, such a move would only encourage bands to deny services and programs to status non-members who, in turn, would no longer have a clear right to the benefits from programs. On the other hand, one must ask whether it makes sense for government to expand the band's funding base for programs by shifting to a sociological definition of the community, when the band itself refuses to recognize some of these individuals as members.

The answer to the question is yes and no; or, more precisely, that the nature of the funding base should be determined by the function that the program serves. A closer look at the problems posed by the two kinds of membership codes — those that are more and those that are less inclusive than status — reveals an important difference between the two cases. In the first, band members face a reduction in per capita services because of a policy that continues to link funding to the status population without regard to changing circumstances. The federal government could change its policy to accommodate the new situation. In the second case, however, the problem stems from the membership code adopted by the band, not from a government policy. By denying some community residents band membership, the band effectively denies that they have a right to enjoy programs provided by the community.[64]

If recognizing the inherent right of self government means anything, it means respecting a First Nation's right to define the terms of membership in the community. Government policy, then, ought to respect a First Nation's decision. This raises a problem of exclusion, however, that can only be fully resolved if the band adopts a more inclusive membership code. In lieu of this approach, federal policy could aim at two objectives:

- **to ensure that services/programs producing *individual* benefits continue to reach non-members;**

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[64] In bands with substantial community assets such as oil and gas revenues, restrictive rules for membership may be used to prevent dilution of the assets shared by existing band members.

- **to encourage the band to adopt a more inclusive membership code so that all community members may benefit from the full range of services/programs associated with community life.**

With respect to the first objective, the obvious way to ensure that services and programs that produce individual benefits reach those who need them would be to link funding for them to a *sociological* definition of membership. For example, funding criteria for these programs might consider whether one lives on-reserve, speaks the language, attends reserve schools, or is married to a band member. At least one major program sponsored by INAC — the First Nations' Child and Family Services Program — is already based on this broader definition of membership.[65] As noted in Chapter I, funding practices are also evolving in this direction.

We have suggested that the right to access programs that produce individual benefits should flow through Canadian citizenship. As noted in Section 3.1, this means local control over their design and administration would be subject to national standards concerning equity of access and the range and level of services provided. The main focus of equity standards would be to ensure that key benefits continued to flow to status non-members living on reserve. The standards required to achieve this would likely be quite general. Regarding the range and level of services, the kind and specificity of standards needed would depend on the program. In education, for example, the curriculum might require (as it does now) that students receive certain levels of instruction in key areas, such as reading, writing and mathematics. This would not prevent communities from integrating Indian content into the curriculum, including history, cultural and social studies. Instruction could also be conducted in native languages.

Basing individual benefits on a sociological rather than legal definition of community membership would also reinforce political culture, institutions, and administrative practices within the community that reflect a wider view of membership. This would strengthen those structures and practices that encourage the social and economic integration of those who are members in the sociological but not the legal sense and those who are both sociological and legal members of the community. Over time, this might lead to a more liberal membership code which included a larger number of the former.

With respect to community-based benefits, the principle of linking funding to function dictates that the right to these benefits flows from band membership - not government policy. Funding for programs that produce these benefits should therefore follow the First Nation's lead by being tied to band rather than sociological membership. This would result in a smaller funding base for these programs if the band had a restrictive membership code. However, at least some community-based benefits will still be enjoyed by on-reserve non-members simply from living in the community. Use of native language is an obvious example. The policy also has a positive side, in that a restriction in funding for programs that benefit the community might act as an incentive for the First Nation to adopt a more liberal membership code.

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[65] See matrix, **Appendix B.**

Finally, there remains the question of what benefits, if any, should be available for persons living on reserve who have neither status nor band membership. Tying of funding levels for programs producing individual benefits to a sociological, rather than legal, definition of community membership would also ensure that services and programs that produce individual benefits are delivered to non-status non-members living on-reserve. This would ensure that all community members enjoy these benefits.

Drawing all this together, this argument implies that funding for programs that produce community-based benefits (i.e. those which aim at sustaining identity and which individuals can enjoy only in a community setting, such as education in a mother tongue) should be tied to band membership, while funding for programs that produce individual benefits (i.e. those which are culturally transferable and largely portable) should be tied to community membership in the sociological sense. **Thus, in a fully self-governing community, conditions governing the use of the funds would fall under one of the following two general rules:**

- **Funding for community-based programs would be block-funding; it would be based on band membership and subject only to conditions of "adequate accountability"** *(see Section 3.3 below).*

- **Funding for needs-based and equality of opportunity programs would be based on community membership; they would be subject to conditions of adequate accountability and to an additional framework of national objectives, possibly defined jointly by the federal government and a national First Nations body.**

3.2.8 Implications for off-reserve Indians

The implications of the functional approach for off-reserve Indians and for band members living on a reserve other than their own must also be explored.

First, consider the difference between two kinds of off-reserve band members. One group consists of members who have more or less permanently left their communities. It seems reasonable to treat these individuals as having, temporarily at least, foregone their right to enjoy either the community-based or individual benefits of the services and programs administered by the community.[66] However, as long as they hold band membership, in principle they have a right to return to the reserve.

By contrast, the second group has a strong claim to these benefits. It consists of members who remain in the vicinity, often visit the reserve and participate regularly in community life but who, for special reasons, do not live there. This may be because of a housing shortage, the need to work off-reserve, or to travel to traditional lands to hunt, fish or trap. Such individuals would

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[66] An exception would be individuals who have gone elsewhere to study.

seem to qualify as community members under either the legal or sociological definition of a member. It is therefore hard to see why they should not benefit from community programs. As program emphasis shifts from status to membership, it would seem reasonable and fair to count the members of this group among community members, thus allowing the community to extend its services to them.

The band members who have more or less permanently left the reserve (and status Indians with no band affiliation) would still have a right to the benefits of status that can be claimed directly. But, as noted in Chapter 2, this is currently limited to three main areas: non-insured health benefits; post-secondary education assistance; and limited exemptions from income and sales tax. As program eligibility shifts from status to membership, perhaps the best option would be to continue to deliver these benefits under a new set of programs targeted specifically to off-reserve Aboriginal Canadians.

At the same time, if the federal government has adopted a new basis for funding services and programs that severs the link between eligibility and *Indian Act* status, consistency and fairness require that, where possible, the same criteria be applied to non-status Indians. In effect, this means the government's traditional argument for excluding non-status Indians from any special benefits — i.e., that they do not qualify under the *Act* — would no longer be available. In short, the shift in focus from status to membership would almost certainly strengthen the claim of non-status Indians to benefits comparable to those of First Nations members.

There is nothing in principle that precludes this group from administering and designing many of the programs which they now enjoy, including both special initiatives for Aboriginal peoples (e.g. Friendship Centres and employment and social services focused on Aboriginal persons' needs), and those they receive as Canadian citizens or as citizens of a particular province (e.g., in the areas of health, welfare and education). As on reserves, programs that provide individual benefits and that are delivered in this way could incorporate Aboriginal values but would also be expected to meet broad national (or provincial) objectives. Off-reserve, these initiatives would require co-operation from the provinces, since many of the basic services that are federal responsibilities on reserves fall under provincial jurisdiction off-reserve.

If, in addition to non-status Indians, access to these programs and participation in their management were accessible to off-reserve members who had more or less permanently left their reserves, and to status Indians with no band affiliation, a greater integration of these three groups of off-reserve people would be achieved. This would likely strengthen the sense of community among them. It could help to create sociological bonds of membership that would be analogous, though perhaps less strong, to those that exist on reserve.

The development of Aboriginal institutions delivering programs off reserves will over time lead to a need to define membership both in a legal sense and in terms of who is eligible to benefit, and to develop mechanisms of governance and of accountability. This should be treated as a problem but not as an obstacle; as this chapter illustrates, on-reserve communities will also need to deal with issues of membership and eligibility for services.

Finally, regarding the case of band members living on reserves other than their own, this problem seems essentially parallel to that of on-reserve status non-members. If Indians in this category do not meet the criteria of the membership code in their new place of residence, that is a decision which, from the approach we have outlined, the government should respect. The conclusion is that these individuals have no claim on the services and programs that deliver community-based benefits. However, as community members in a sociological sense, they ***would*** have a claim on the services and programs which deliver individual benefits.

It was already noted that in 1993 there were more than 10,000 band members living on reserves other than their own. The problems presented by inter-community migration are potentially substantial. This may be an area where a national First Nations body could perform an important function. It would be in the interest of First Nations communities to attempt to negotiate some sort of First Nations accord on the status and treatment of band members who migrate for compelling reasons, such as marriage.

Before concluding this section, a final point should be made. The analysis has treated individual bands as the constituent units of a First Nation. In theory, then, there are 605 independent First Nations. Each has a right to its own self-government agreement and a right to administer its own programs. In practice, however, this is probably neither feasible nor likely. Most bands are simply too small. It is to be expected, therefore, that many bands will organize into tribal groups, regional groups and perhaps even provincial groups, and that programs will be designed and administered at this level. Nothing said here prevents this from happening. How "the nation" is to be defined is, again, a question for First Peoples to decide.

3.3 The Problem of Accountability

Both spending envelopes discussed above would be subject to "adequate accountability". In similar vein, a 1994 draft version of an INAC discussion paper (*A Community-Based Transfer Payment for First Nations*, hereafter referred to as the *CBTP Paper*) speaks of the need to develop an "accountability framework."[67] This section explores some problems that accountability poses for the implementation of a policy framework like the one sketched above.

3.3.1 Accountability and service delivery

The shift in program focus that is the subject of this paper has in fact been under way for a number of years. During that time, the process has been criticized by the Auditor General on a number of points.

At present, moneys managed by INAC are appropriated by Parliament for specific purposes. However, if INAC transfers both funds and decision-making authority to bands, what guarantee

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[67] Indian and Northern Affairs Canada, "A Community-Based Transfer Payment for First Nations," July 1994.

is there that moneys will be used for the stated purposes? A related point raised by the Auditor General has to do with INAC's right to transfer decision-making authority. There is a long-standing parliamentary principle that, "[w]hile the Minister is free to delegate administrative responsibility, he cannot delegate a policy role."[68] At present, the Department lacks a clear legislative mandate to devolve decision-making power over policy. As a result, some of the present band funding arrangements may exceed the Minister's authority.

To respond to these criticisms, INAC needs a mandate that legitimates the transfer of decision-making power. This could take the form of a funding authority that defines the respective roles of the Minister and of band leaders; and hence clarifies the limits of the Minister's accountability to Parliament and of band leaders' accountability to the Minister.

The primary task of the Minister would be to oversee the appropriation of funds for First Nation communities. This is consistent with INAC's own view that it is evolving into a funding agency.[69] The Minister's accountability to Parliament would require that he or she be able to show Parliament that the funds have been used for the intended purposes, and that any restrictions on their use have been observed.

For the community-based spending envelope, these conditions could be largely met by ensuring that bands have good accounting and reporting practices. In Section 3.2, it was suggested that these funds should come in a block with as few restrictions as possible. The band's accountability to the Minister would therefore be minimal.

A second task of the Minister would be to ensure the development of a framework of national objectives for programs that produce direct or individual benefits. In this case, the Minister's accountability to Parliament would be more substantive. It would require that he or she show Parliament that ***value*** has been derived from the monies, where this means the interests of Canadian citizens (i.e. First Nations persons) have been promoted in appropriate ways through the use of the funds.

In practice, this means showing that programs developed with those funds meet national objectives. How detailed the accounting and reporting practices would be depends on the level of detail in the list of objectives. As envisioned in this paper, they would be, by and large, quite general. Hence accountability requirements might often be met by providing a combination of accurate demographic information about the effects of programs developed, such as numbers of graduates from high school, mortality rates, level of health and employment levels,[70] and information regarding program design such as objectives, eligibility criteria, etc.

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[68] Government of Canada, *Report of the Auditor General of Canada 1987-88* (Ottawa: Supply and Services, 1988), p. 14: 115.

[69] DIAND, *DIAND's Evolution*, p. 1. The present Minister of Indian & Northern Affairs has indicated that the whole department will be wound up within a short period of time.

[70] *CBTP Paper* sketches such a system, see Annex 3.

Band leaders, in turn, would be accountable to the Minister to the extent necessary to ensure his or her accountability to Parliament.[71] But insofar as band leaders have the authority to set objectives, reallocate priorities and funds, and design programs — in short, to make policy — they would be accountable to the community. The ultimate test of band leaders' legitimacy would lie in public support from their constituents.

In theory, this is a sound answer. In practice, it raises a very fundamental question: What sorts of practices and institutions must be in place before it can be said that the band leadership is adequately accountable to its public?

The Auditor General has expressed concerns about the accountability of band leaders, and has discussed the need for some form of redress mechanism by which individual members of the community will be able to contest policy-decisions by the leadership.[72] The *CBTP Paper* puts considerable emphasis on the same point. It declares that "accountability criteria applied to First Nations governments should be consistent with those of other forms of governments in Canada."[73]

The *CBTP Paper* does not elaborate on what such mechanisms might be like or how they might operate. Presumably, they would include some form of tribunal or, perhaps, a community ombudsman. These are good initiatives and important to any respectable conception of leadership accountability. But are they enough? Indeed, do they meet the test set by the *CBTP Paper* itself, namely, that the standards of accountability for band leaders should be the same as those of any other government in Canada?

The answer to the second question, at least, is no. The ultimate sanction that the Canadian public has on its provincial, federal and municipal leaders is its right to vote them out of office in regular elections. Judged by international standards, this is a basic condition of ***full political accountability***. But tribunals and ombudsmen can have only partial political accountability. They are usually appointed, have circumscribed mandates and powers, and are intended to respond to individual grievances. As such, they can be effective remedies for specific injustices. But they are usually an ineffective remedy for systematic forms of discrimination or oppression by entrenched political élites.

The *CBTP Paper* anticipates the need for emergency action by proposing to reserve INAC's right to take "remedial action" in cases where the terms and conditions of an agreement are not met,

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71 Similar rules would apply to leaders of tribal councils and other Indian governments.

72 Government of Canada, *Report of the Auditor General of Canada 1991-92* (Ottawa: Supply and Services Canada, 1992), p. 24.

73 *CBTP Paper,* p. 7.

insolvency threatens, or "the health, safety or welfare of community members is endangered."[74] The leverage retained by INAC would be the right to withhold funds.[75]

As a check on local decision-making, this is probably less than adequate. As noted, INAC is transforming itself into a ***funding agency***. As such, it will have progressively less motivation and opportunity to scrutinize local policies and practices. As we saw, on the proposal developed above, accountability for the community-based envelope would require little more than good accounting and reporting practices. As for the funding of programs in the second envelope, this would require some monitoring of specific programs to see that national objectives are met. But this may require little more than general demographic and program information. In short, in the era of self-government, band leaders' accountability to the Minister will diminish quickly.

While the accountability requirements that will remain may be adequate to protect against insolvency, gross incompetence or flagrant disregard for public health and safety, it is doubtful that they will provide an adequate check on subtler forms of discrimination and abuse, even though these may be deeply damaging to the community's morale or the well-being of its members.

The best check against misuse of power is ***full political accountability***. According to the United Nations' *International Bill of Human Rights*, this requires the establishment of essential democratic institutions and practices. The basic conditions for this can be found in Article 25 of the *International Covenant on Civil and Political Rights*.[76] It states that every citizen shall have the right and the opportunity:

- **To take part in the conduct of daily affairs, directly or through freely chosen representatives;**
- **To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of electors;**
- **To have access, on general terms of equality, to public service in his or her country.**

By contrast, section 2(b) of the *Indian Act* allows that band councils may be "chosen according to the custom of the band, or, where there is no council, the chief of the band [may be] chosen according to the custom of the band". At present, over 40% of native communities use their own

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[74] *CBTP Paper,* page 18.

[75] See Department of Indian Affairs, *Managing Funding Arrangements: DIAND's Accountability Framework* (Ottawa: DIAND, September 1993), Slide 6.

[76] It is worth noting that this is the same document cited by many Aboriginal leaders in support of their claim to a right of self-determination. See Article 1(1).

leadership selection practices. In a number of cases, communities are headed by hereditary chiefs. Alternatively, the *Act* permits that the band council and chief may be elected by band members.

Interestingly, the *Act* is silent as to how the decision is to be made regarding which option will prevail. Section 74 says only that "the Minister may declare [that]...the council of the band...shall be selected by elections". Apparently, then, traditional forms of government exist at the Minister's discretion. Insofar as this is the case, one way to ensure full political accountability would be for the Minister to simply disallow traditional forms of government and insist on democratically accountable practices. The imposition of the *Indian Act* form of band councils in this way would, of course, generate a tremendous backlash in these Indian communities.

It would also challenge one of the key reasons for accepting self-government in the first place, namely, that First Nations have distinct cultural histories with their own ways of life which they wish to continue to practice. The question must be raised, then, whether such traditional forms of organization can provide sufficient political accountability to ensure that the interests of all community members are protected.

Whether respect for tradition should be allowed to override the basic conditions for political accountability is a question which can be considered from either a *legal* or a *theoretical* standpoint. In the next two sections, these approaches are explored in turn.

3.3.2 Political accountability under the Charter

The *CBTP Paper* lists accountability as one of the criteria required for the development of a new funding arrangement. The commentary states that:

> ...The withdrawal of DIAND from control over service delivery .[would] be offset by increased local political and administrative accountability measures; which may be unique within each community but which are consistent with other governments in Canada. The Canadian legal framework and Charter of Rights would continue to apply.[77]

The paper does not say how far it intends to stretch the idea of "unique political accountability measures" in order to accommodate traditional forms of government. But, insofar as it proposes to make these consistent with the *Charter* (not to mention other governments), it is questionable whether, say, a hereditary chief, acting without an elected band council, would qualify as an acceptable form of government. The case at least would be open to a *Charter* challenge, probably under the equality rights guaranteed in section 15[78].

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[77] *CBTP Paper,* Page 10.

[78] Such a challenge would doubtless provoke reference, in response, to section 25 of the Charter, which seeks to protect existing Aboriginal and treaty rights from being undermined by the Charter. This issue is discussed in Reiter, Ropert. A., *Fundamental Principles of Indian Law,* chapter on "Indians and the Constitution", p. 24-28 (Edmonton, First Nations Resource Council, 1990).

The recent decision of the Federal Court in *Corbiere et al. v. The Queen* (hereafter "the Batchewana decision") may be a milestone here.[79] It indicates the court's willingness to disallow decision-making practices that infringe community members' right to a say in matters that affect the use of community assets. The court struck down section 77(1) of the *Indian Act* which states that only on-reserve band members have voting rights in band elections. Justice Strayer noted that "operational funds" provided by the federal government are intended for purely local purposes. As such, he concluded, the exclusion of off-reserve members from a direct say (through voting rights) in how these funds are used does not discriminate against them.[80] However:

> when that franchise has to do with the disposition of lands and Indian moneys held by Her Majesty for the `use and benefit of the band', the "band" [includes] all members and not simply those resident on the reserve.[81]

Thus, in the Court's view, to deny off-reserve members the right to participate in decision-making that affects the use of common assets discriminates against them with respect to their right to equal treatment before and under the law. These assets exist for the good of the whole community, including off-reserve members, and all have a right to a say in how they are to be used.

A similar section 15 argument presumably could be made against some traditional forms of government. Consider, for example, a community governed by a hereditary chief, and a band council whose members are chosen by a traditional, non-democratic selection practice, say, appointment by the Elders. Band members who disagreed with this system might argue that the Minister had discriminated against them with respect to their right to equal treatment before and under the law, by investing decision-making authority in a non-accountable body, without seeking their consent.

The question of the legality of such governments may become even more important as we move toward the era of full recognition of self-government. At some point, the courts will probably acknowledge the existence of an inherent right of self-government. This could come in a number of ways. It may be the logical conclusion to draw from the existence (some years ahead) of a series of self-government agreements that contain official recognitions of that right. Or it may come as the result of a constitutional amendment that entrenches it, as was proposed in the Charlottetown Accord. Or, perhaps the courts will be faced with a case that compels them to take a stand on whether or not such a right exists under section 35 of the *Constitution Act*, 1982, as the federal government now maintains.[82]

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79 Federal Court of Canada Trial Division, *John Corbiere, Charlotte Syrette, Claire Robinson and Frank Nolan v. the Queen* (Ottawa: Court No. T-3038-90, September 1993).

80 *Batchewana*, pp. 20-21.

81 *Batchewana*, p. 21.

82 See Section 2.5 for a possible scenario leading to such a decision.

Insofar as the legitimacy of a First Nation's right to govern itself would be thought to flow from the inherent right, its government would be *sui generis* (i.e. not derived from another body) rather than a creature of the federal government. In other words, its authority would not be delegated. In this case, the courts would have to decide whether in fact the *Charter* applied to the inherent right, and, if it did, how.[83]

If it did apply, there would be a serious question not only of how a hereditary form of government is to be squared with section 15, but also what the political and democratic rights set out in sections 3 – 5 would imply for a system of government like the one described above. On the face of it, at least, such a government would fall far short of the conditions for full political accountability set out in the UN *Covenant*. The courts would thus have to decide whether the Canadian state should sanction the existence of such a government within its own borders. It is certainly possible that they would feel compelled to disallow at least some forms of government that are presented as being traditional.

On the other hand, the courts could decide that the Charter did not apply to the inherent right. The next section examines the theoretical implications of sanctioning forms of government that do not fit into a conventional liberal–democratic model.

3.3.3 Balancing rights and tradition: toward a political accountability framework for First Nations Communities

The task of government in a liberal–democratic society is to make policies and laws that promote the collective or common interest, while respecting the individual freedom and equality of citizens. There is often a tension between the two.

The long debate over language in Quebec illustrates this well. Most French–speaking Quebeckers accept that, as individual citizens, their interest in free choice may legitimately be restricted by the state to promote their collective interest in preserving and promoting the use of French. Thus the restrictions *Bill 101* placed on French–speaking Quebeckers' right to send their children to English–speaking schools, or on the use of English on signs, were widely supported by francophones in Quebec. At the same time, many English–speaking Canadians attacked *Bill 101* as an intolerable infringement of basic liberties.

There is no "right" view on such questions. The logic of human freedom is far too richly textured to arrive at a single authoritative answer. Freedom and equality mean many things to many people. If we look at how individuals or societies actually understand freedom, we find that it is defined partly in terms of the capacity to attain certain goals and objectives, to cultivate certain values, and to live by certain principles, that reflect the group's own historical experience. Their participation in such a cultural context is what provides community members with

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[83] If there is a constitutional amendment entrenching the inherent right, its relation to the Charter could be explicitly stated.

meaningful options. Without such a context, constitutional guarantees of individual freedom would be empty abstractions.

In short, there is often no clear, unambiguous way to draw a line between the interests of individual citizens and those of the collectivity. They are like two poles on a continuum. Where the proper balance lies will vary from place to place, and from time to time, depending on cultural practices and traditions, institutions, commitments, norms and values. This, as we saw in Section 3.1, was what the *White Paper* failed to fully appreciate.

As a general rule, the more culturally diverse or fragmented a society is, the stronger the case for expanding the scope of individual choice and contracting the power of the state. The state must yield ground to provide space for the expression of difference. The greater individual differences become, the harder it will be to get agreement on what is in the collective interest. One way to solve the problem is through democracy. It approaches the task of defining the collective interest as though it were a mere sum or aggregate of the interests of individual members. Thus, for the state to justify an initiative, it must convince a majority of the citizens — or at least of their representatives — that the action serves their interests. If it succeeds, it is assumed the initiative is in the best interest of the collectivity. In this way, majority rule provides an authoritative way of defining the collective interest and, in the process, puts a check on the use of state power.

But in relatively small self-contained societies, this may not always be the best way to approach the task of balancing the rights of the collectivity and those of the individual. The more self-contained and culturally homogeneous a society is, the greater will be the correspondence between the interests of individual members and those of the collectivity. As a result, it may be possible to significantly expand the collectivity's right (i.e. that of the state) to act to promote the collective interest, without impinging on individual freedom.

Where an underlying consensus exists on the norms and goals of political and social life, citizens have a shared sense of the limits of fairness, respect, and legitimacy within their community. They simply "know" what these limits are, how they work, and, broadly speaking, what sorts of claims, objectives and policies are consistent with them. Thus, for them to give informed consent to government policy, it may be enough that they do not openly protest it. There may not be a need for regular public debates or votes. The consensus on what the state should or should not do may be clear enough in everyone's mind that any attempt by leaders to suddenly and significantly diverge from the norm would be immediately checked by community members in a thousand small but effective ways.

Such considerations have led some commentators to argue that a good balance between the exercise of state power and respect for individual freedom can be achieved without full political (i.e. democratic) accountability. Traditional systems of governance, they say, already contain their own set of checks and balances. Thus, in a community where the Elders command the genuine respect of community members, a public reprimand of an appointed band councillor or a hereditary chief by them would lead to loss

By the same token, if the Elders look on their own role with appropriate respect, and if they are in regular communication with community members, listening and talking to them about important community matters, they may be more effective as representatives of community members' interests than would be an elected band council. In such a community, concludes the argument, it is quite conceivable that adequate accountability could be achieved through a traditional form of government.

For such a system of "internal checks and balances" to work effectively, the community has to ensure a high degree of cultural cohesion. In practical terms, this means it probably has to remain small and relatively closed.[84] Experience in other countries suggests that the larger, more open and more pluralistic traditional societies become, the less effective are traditional forms of social and political control.

Some Aboriginal communities probably still have the degree of cultural cohesion necessary to support the system of checks and balances in their traditional form of government. It is unlikely, however, that all of them do. It is hard to square the rhetoric of cultural cohesion with the schisms that exist in some communities, especially between traditionalists and modernists. Whatever the reality, one thing is clear. **The politics and political culture in First Nations communities diverges from that of mainstream Canadian society in at least two fundamental ways:**

- **First Nation communities are based on a collective ownership of land and resources.**

- **The struggle for self-government has been linked so closely to the preservation of distinct Aboriginal identity that maintenance of traditional cultural/linguistic practices now has enormous legitimacy and prestige in Aboriginal politics.**

These two points together ensure that for some time to come Aboriginal politics will place what, from the point of view of mainstream Canadian politics, amounts to a huge emphasis on the importance of promoting the collective interest.

In the early stages of the new era, this may give rise to a wave of "nation-building" programs aimed at various forms of cultural revival. If so, the objectives, policies and political institutions adopted will often appear oppressive and anti-democratic in mainstream Canada. In anticipation of this, the point needs to be clearly made that, for those on the inside, it may well seem that a good balance has been struck between the rights of the individual and those of the collectivity.

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[84] For a discussion of the need for cultural insularity to preserve social values in traditional societies, see Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge: Harvard University Press, 1985), ch. 8. For the way societies transmit and maintain cultural practices, see Paul Connerton, *How Societies Remember* (Cambridge: Cambridge University Press, 1989), pp. 6-40.

Nevertheless, to admit that non-democratic forms of governance can meet conditions of adequate accountability is a long way from a blanket endorsement of traditionalism. The schisms that exist in many communities are real and deep. And there are communities where the "pursuit of the common good," left unchecked, will be excessive.[85] Standing on the threshold of a new era, the federal government may be tempted to wash its hands of such problems, and simply defer to the rhetoric that insists that cultural cohesion, solidarity or consensus politics exist where, in fact, they do not.

If the Canadian state is to sanction the existence of what are, at least in appearance, non-democratic forms of government within its own borders, a clearer understanding will be needed of how the mechanisms of accountability operate in traditional systems, how they can be identified, and how their adequacy can be tested. In short, what is needed is a *political accountability framework* for self-government. The development of such a framework might be undertaken by a national First Nations body, working in conjunction with the federal government. Such a framework could provide crucial guidance in the attempt to implement self-government. Over the long-term, this body might also oversee the on-going implementation of self-government in First Nations communities. The First Nations body might also serve as an extraordinary appeals tribunal, with effective powers to act in cases where a political system is failing.

3.4 Summary

At least four general conclusions can be drawn from the analysis that has unfolded over these three sections.

1. **If implementation of the inherent right is to lead to the emergence of what amounts to a third order of government, there must be a principled basis for explaining how the new order fits into the Canadian political community.[86] This would include both an account of its relationship to other governments and of the relationship between individual First Nations governments and their citizens. These persons will have certain constitutional rights and entitlements as Canadian citizens in addition to their constitutionally-protected Aboriginal and Treaty rights.**

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[85] Let us recall here that one of the effects of Bill C-31 will be a new class of status non-members and an expanding one of non-status non-members. People in these groups will have no political rights in their First Nations community. As their numbers grow, their political disenfranchisement could make them a politically volatile and destabilizing force in some communities.

[86] Federal, provincial and Aboriginal leaders agreed on the recognition of Aboriginal governments as a third constitutional order of government in the Charlottetown Accord. We are therefore assuming that some kind of third order will eventually emerge in which First Nations governments enjoy a significant degree of autonomy.

Self-government should place in the hands of First Nations peoples the necessary tools for the preservation and development of their distinct cultural identities. Transferring control over programs and services is a key part of this. Nevertheless, these communities will not be sovereign states. They will be embedded in the larger Canadian community alongside the federal and provincial orders of government.

If this new order of government is not to end up as 605 *ad hoc* arrangements for that many First Nations communities, there must be a principled basis underlying the relationship between it and the other two. At the same time, there must be a principled way of balancing the community's right to promote the group's cultural identity with the rights of its individual members, who are also Canadian citizens. In short, self-government must rest on a general theory of how the third order fits into the existing structures of Canadian federalism. This paper argues that the distinction between community-based and individual benefits provides a principled approach to balancing these various interests, and hence to implementing the inherent right.

2. **The federal government will require some mechanism to manage its interdependent interests with First Nations communities. This need could be met by making Indian and Northern Affairs Canada into an office of intergovernmental affairs for issues relating to the Aboriginal order of government, or by creating such a structure elsewhere in government.**

The analysis in this paper suggests that there will be an on-going need for the federal government to deal with issues at a policy level as the new third order of government emerges. The reason for the need can be seen by considering Canadians' experience with federalism.

The division of powers in the Constitution consists mainly of exclusive areas of jurisdiction. In 1867, it was thought that areas of governance were essentially separable and that each order of government could pursue its tasks in its various areas independently of the other. It is now widely recognized that the roles and responsibilities of the two orders are interdependent in ways that may make it impossible to fully disentangle their respective activities. As a result, many academics, public servants and politicians now recognize the need for a new institution to manage federal-provincial interdependence. Proposals for such an institution have taken various forms, including reforms to the Senate and the creation of a Council of the Federation.[87]

Given Canadians' experience with federalism, it can be predicted with confidence that a similar kind of interdependence will arise between an Aboriginal order of government and the other two orders. If so, the federal government will require the institutional capacity to develop and implement policy for the management of its interdependent interests with First Nations communities. It would seem reasonable, then, to explore the possibility that INAC be transformed into an office of intergovernmental affairs for matters relating to Aboriginal governments — or that such an office be established elsewhere in the federal structure.

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[87] Within the federal government, the responsibility for managing intergovernmental relations with the provinces currently resides with the Privy Council Office.

3. **There is an important need for a national First Nations body with the legitimacy and authority to coordinate important intercommunity initiatives among First Nations.**

At various places in this paper, we suggest a role for a national First Nations body. In particular, we suggested that such a body could work with the federal government in developing and implementing national standards and objectives for programs that deliver individual benefits. It could play the same role in helping to develop and implement a political accountability framework. One could even conceive that this body could take over the functions executed by INAC.

Another task that such a body might perform would be to develop a First Nations accord on intercommunity mobility. Such an agreement would set out conditions under which community members moving from one First Nations community to another could have a special claim to membership, or to the benefits of membership, in their new community. Inter-community marriages might provide one ground for such a right.

While the specific functions and authority of such a body should be decided by First Nations, it seems certain that some such structure will be essential. Whether this role is assumed by one or more existing organizations, or an entirely new one, it will be crucial that the body have legitimacy among First Nations. This presumably means that it must be established and designed by First Nations peoples themselves.

4. **While the full significance of the divergences created by *Bill C-31* will not be known for another 10 years, it can be expected that they will create tensions in First Nations communities. These might be avoided by moving away from the use of status as a basis for program funding and of access to benefits.**

This chapter has dealt at length with the implications of First Nations taking control of their own membership and ceasing to rely on the *Indian Act* system of registered status. However, any move away from status will need to be carefully considered. While many Indians view status as a vestige of colonialism, it nevertheless stands as a clear legal recognition of the special place that First Nations occupy in Canadian society. If status is to be abandoned, it will likely have to be replaced by some other arrangement — one which First Nations agree provides adequate protection for and recognition of their rights and special interests. An attempt to suddenly eliminate status without providing an acceptable replacement would almost certainly be met with strong opposition from First Nations people.

One strategy would be to work to replace status with a series of self-government agreements. Each agreement would be adapted to the specific needs of the community, i.e., one or a number of First Nations, but would be based on general principles that define the place of the third order of government in Canada. The result would be a "withering away" of status as it falls into disuse. Ideally, the self-government agreements which replace status would be constitutionally protected to provide security for First Nations.

CHAPTER 4: CONCLUSIONS

There are many aspects to the question of shifting the focus of federal programs for Aboriginal peoples in order to accommodate the growing autonomy of First Nation governments and the movement towards Aboriginal self-government. Taken to the extreme, this question could serve as the basis for volumes of speculative research on the nature of future government-to-government relations between the federal and provincial governments of Canada, on the one hand, and First Nation governments on the other.

The purpose of this paper has been more modest. At a time when many responsibilities are already being transferred to First Nation communities, the paper has looked at the issues of program delivery from a number of viewpoints; offered some practical suggestions that would improve the situation of status Indians and band members, and their communities, during the current period of transition to self-government; and outlined some principles that could be used in determining the basis for federal transfer payments to First Nation governments and other Aboriginal organizations over the long term.

Chapter 1 of the paper points to a number of problems experienced with federal programs which have come under substantial Aboriginal control in the past few years. This experience suggests that a successful transition to self-government will require sound planning, extensive training and building of institutional capacity, adequate funding, and time.

Chapter 2 focuses on practical suggestions and identifies a need for vigorous initiatives to address issues related to status, provided that these initiatives are based on a process of collaboration that is shared with First Nations people rather than imposed on them. It emphasizes the need for joint efforts to find ways to reduce INAC's control over First Nations communities and to transfer administrative powers to First Nations, including the creation of independent institutions to carry out functions now exercised by INAC. These could operate in areas such as Indian registration, the oversight of band by-laws, and the review of disputes or appeals relating to First Nations governance or administration.

Similar efforts are also suggested for dismantling or at least neutralizing the constraints imposed by the *Indian Act*, and for removing administrative and legal barriers which hinder the ability of First Nation governments to act effectively. Our dicussion comments favourably on the recommendation of the 1966 *Hawthorn Report* that an office within INAC take on an advocacy role on behalf of First Nations people.

These practical approaches are balanced by the principles which are developed in Chapter 3 as a means of addressing problems that are emerging in First Nation communities, notably the growing divergence between people with registered Indian status and those who are accepted as Indians through membership in their First Nation. The chapter suggests that a distinction be drawn between community-based benefits that are delivered primarily through a First Nation community, and individual benefits that correspond to services being provided to other Canadians and that are based on individuals' Canadian citizenship as well as their First Nations status.

The first group of community-based benefits would be available only to band members and would be under exclusive First Nation control. Programs that produce individual benefits could be administered by First Nations to reflect the community's culture and heritage, but would also be subject to national standards and would be delivered to all persons living in a First Nations community, regardless of status or band membership.

The challenge will be how to minimize the tensions between the emerging clevages of Indians, namely:

On - Off Reserve
Status - Non Status
Member - Non Member

In an era of restrained and reduced funding, the primary issues remain how to: facilitate easier access to programs and funding; simplify administration and delivery; clarify lines of reporting and accountability.

The coming of self-government can be expected to generate many of the same problems as those mentioned throughout the paper. It will undoubtedly benefit both First Nations and their members, but should not be seen as a panacea. All the parties to this process will be breaking new ground, and there is a danger that they either resort to *ad hoc* solutions or find themselves taking extreme positions that are impossible to reconcile. This is why practical solutions such as those offered here, and principled approaches to governance on which both Aboriginal and non-Aboriginal partners can agree, may make a useful contribution to the new relationship between the federal government and First Nations which is beginning to emerge.

4.1 Areas for further research

This paper aims to develop the core ideas of a new approach to the delivery of services. This has required that a number of key issues be kept in the background. Now that the basic framework has been assembled, a natural next step would be to ask how its implementation would affect policy in areas where pressing issues exist. A few areas will be identified where further work could be done to begin to apply the framework and to elaborate its implications. These are explored below under the headings ***institutional capacity, cluster communities, jurisdictional issues, treaties, fiscal reality*** and ***community-based benefits off-reserve.***

Institutional Capacity

Chapter 3 calls for the creation of separate spending envelopes for programs intended to create community benefits and those that provide individual benefits. The analysis goes on to suggest general conditions that could be attached to the transfer of the funds within them. It should be stressed, however, that the full system need not be implemented all at once. In some cases, there may be good reasons why the transfer of control should take place in a series of stages. In particular, some communities may lack the institutional capacity to design and administer their

own programs. If so, this could be a legitimate ground for either slowing down the transfer or for placing additional conditions on it.

At the same time, a lack of institutional capacity should not become a Catch–22, where program transfer is denied because of a lack of institutional capacity but greater capacity cannot be developed without the transfer of control. Where institutional capacity is lacking, what is needed is a "transfer strategy" that builds on the community's strengths by turning over control in stages and by adopting measures to increase the community's institutional capacity.

One option for further research would be to do a series of case studies that focus on communities with different population and land sizes, resources, locations, degrees of institutional capacity and other relevant characteristics. The goal would be to use the framework to develop possible transfer strategies in each case, aimed at promoting a balanced development of institutional capacity and political stability.

Cluster Communities

In the paper, a framework is developed and discussed in terms of the smallest unit: the band. In theory, this framework therefore could be applied individually to each of the 605 First Nation communities. However, nothing in the analysis prevents bands, tribes, regional, provincial or even national groupings from forming and from acting together as a unit for the purposes of designing and delivering programs and services. Indeed, given that many communities are probably too small to take on the task of designing and delivering all their own programs, it seems both likely and desirable that communities will agree to integrate into larger "cluster units."

However, the development of such clusters poses questions. For example, how difficult would it be to develop, say, an education curriculum at the regional or tribal level that both meets national objectives and still integrates sufficient cultural content to meet the needs of individual communities? Another set of questions for study concerns the flexibility of the framework: to what extent would it allow a First Nation to design and administer some programs itself, while agreeing to have others handled at the regional or tribal level? Could the principle be followed that decision–making should be kept as close to the community level as possible, using the principle of "subsidiarity" that has been adopted in the European Union?

Jurisdictional Issues

The suggested distinction between community–based and individual benefits may have implications for the existing distinction between federal and provincial jurisdictions. For example, if there are to be national objectives for education when delivered by First Nations, this may overlap with legitimate provincial interests in defining province–wide testing or curriculum standards. Further study is needed on the principles underlying the third order of government and its relationship to federal and provincial governments.

Treaties

In some cases, the right to some individual benefits may be defined by treaties. Where this is the case, the right to the benefits could be seen to flow directly from those agreements. The nature of the terms and conditions placed on the benefits would then be decided, as far as possible, by reference to the agreements. The goal of this study has been to provide a fair and rational way of defining the federal government's responsibility to First Nations people where treaties either do not exist or do not adequately address the state's commitment to provide the programs and services in question. In the latter case, it would be useful to apply the framework to some particular cases where treaties identify commitments but do so in a vague or contentious manner. The object would be to see whether the framework provides a basis for a rational and fair interpretation of such commitments. One might, for example, interpret the "medicine chest" clause in terms of the distinction between community-based and individual benefits.

Fiscal Reality

The proposed framework has been worked out without attempting to balance the policy implications that flow from it with the fiscal pressures on government. At the same time, the framework is not indifferent to these pressures. On the contrary, insofar as it clarifies the overarching goals of various programs and initiatives, it provides some guidance in setting priorities. In particular, it suggests that spending priorities must strike an adequate balance between the goals of sustaining identity on the one hand and of meeting needs and promoting equality of opportunity on the other. Further work needs to be done on identifying what programs are most and least essential to the overall well-being and viability of self-governing communities, and on how much emphasis should be placed in allocating federal funds on the task of promoting identity at the cost of meeting needs or promoting equality of opportunity.

Community-Based Benefits Off-Reserve

As developed here, the framework identifies the delivery of community-based benefits with on-reserve communities. This is explained by the nature of the benefits themselves: they can only be delivered in a community environment. Thus one cannot live in one's native language outside a community of users. In concluding this study, however, it is worth noting that off-reserve First Nations people living in urban centres still constitute a cultural community, albeit a dispersed one. As such, these individuals have cultural needs which should be addressed. While it is not possible to deliver the full range of community-based benefits to them, it is possible to provide some measure of support for the preservation and promotion of their Aboriginal identities through urban-based programs like the Friendship Centres. Further work in this area could attempt to identify viable options for addressing the cultural needs of First Nations people in urban environments and examine the extent to which some measure of "community" control over services delivering individual benefits would be feasible.

APPENDICES

A. Terms of Reference for Research

B. Federal Government Spending on Aboriginal Peoples

- Anthony Vincent

C. The Issue of Indian Status as Reflected in Aboriginal Literature

- Greg Young-Ing

D. Brief Review of Literature on Status

- Michael Cassidy

E. Major Provisions of the Indian Act

Having recognized self-government as an existing inherent right of Aboriginal peoples, the federal government is currently consulting widely on the implementation of self-government. Most (80%) of the administration of DIAND programs for Aboriginal peoples has already been devolved to First Nations. In addition, Alternative Funding Arrangements (AFAs) have been established to allow communities to access block funds for programming. Many First Nations may want to develop and administer all of their own programs with funding provided by the federal and provincial governments.

An important element of program arrangements for First Nations will be the eligibility criteria for access to programs. Some First Nations will likely want to base eligibility to these programs on criteria other than registered Indian status (e.g., membership, on-reserve residence, etc.). Other First Nations may not want to develop or operate their own programs immediately but desire, nevertheless, to have access to federally administered programs based on eligibility criteria other than status. Those First Nations seeking to negotiate self-government will likely desire an agreement that is suited to the unique character and needs of their community. Program arrangements with the federal and provincial governments will need to reflect this diversity and yet ensure equitable access.

In addition to the crucial issue of individuals versus collective eligibility for programs, there are a plethora of other issues that need to be considered in the context of a government to government relationship, such as jurisdictional authority, rights to access, treaty issues, program delivery mechanisms, and funding arrangements. A separate study will examine the legal implications of these issues.

There is a need to improve our basic understanding of the current system of program delivery designed for Aboriginal individuals, primarily status Indians living on-reserve, and how this system may change if the Federal Government deals more with Aboriginal collectivities in the future. Of particular interest, is how program eligibility might be changed as a result of the implementation of self-government and how these changes may affect individual Aboriginal peoples, First Nations governments, as well as the federal and provincial/territorial governments involved.

The Contractor shall:

1. Identify all federal programs (individual and community-based) targeted for Aboriginal peoples and develop a matrix (or chart) to include the following information:

   i) program authority (i.e. statutory, quasi-statutory, policy, etc.);
   ii) eligibility criteria for Aboriginal users (e.g, registered status Indian, band membership, residence on-reserve, resident North of 60, self-identification as Aboriginal person, etc.);
   iii) program objective;
   iv) federal department(s) involved;
   v) delivery centre (ie. federal, First Nation, independent, combination, etc);
   vi) annual number of Aboriginal users (# individuals or # communities);
   vii) annual program costs.

The Contractor may wish to organize programs into the following categories: socio-economic; health; cultural; justice; governance/leadership development, etc.

Sources of information on Aboriginal programs include Part III of the Estimates and departmental financial information for DIAND, Health Canada, Human Resources Development, Justice, Industry Canada, etc. Documentation from other departments and central agencies should also be reviewed. If necessary, the Contractor should contact program managers in order to obtain further information for the matrix.

The Contractor shall submit a sample of the proposed matrix format and a list of information sources to the Departmental Representative for review and approval.

2. Analyze programs that are designed for communities to determine what lessons can be learned from those programs.

   The Contractor shall submit a draft of the proposed method and design for this analysis for approval by the Departmental Representative.

Part III: Understanding the Effect of Shifting Program Focus From Individuals to Collectivities

This part will analyze and integrate the findings of Parts I and II in order to develop a clear understanding of the effects of a possible change to dealing with Aboriginal collectivities on program arrangements. The report is intended to be a conceptual discussion piece that identifies and elaborates on the types of policy issues to be addressed by the Department on the question of shifting program focus. Although it will present and analyze the issues from different perspectives, this research is not intended to provide definitive answers.

The Contractor shall:

1. Propose a methodology to explore and analyze the impact of changing federal Aboriginal program focus from individuals to groups. Some issues to be included in this analysis are:

   i) Individual versus collective rights;
   ii) Jurisdictional authority for providing services;
   iii) Funding arrangements (e.g., transfer payment, resource revenue sharing);
   iv) Equitable access to programs;
   v) Maintenance of national standards (e.g., education, housing);
   vi) Program delivery mechanisms (e.g., institutions required, organizational changes);
   vii) role of the State vis à vis individuals, collectivities and other levels of government.

The Contractor shall submit a draft of the proposed methodology to the Departmental Representative for review.

2. Write a report that defines, describes and analyzes the policy issues to be addressed in shifting federal Aboriginal program focus from individuals to collectivities. The focus of this analysis will be in the context of self-government, and on the policy and structural impacts of shifting program orientation and design that DIAND and the overall federal government must consider.

S.W.6 CONTRACTOR'S PROPOSAL

The Contractor's proposal dated May 10, 1994, insofar as it is not at variance with anything contained herein, shall apply to and form part of this contract.

APPENDIX B

MATRIX TABLE,
"Federal Programs for Aboriginal Peoples"

This table provides a concise overview of all federal programs directed to Aboriginal peoples. It includes information about program costs, program authority, and eligibility as well as data on the number of users, where available; whether the program is individual, community or organization based; and at what level the service or function is delivered.

Programs from all federal departments are grouped in the broad categories of Governance; Social Development; Land and Economy; Justice and Policing; and the North.

Some material remains to be inserted in the final draft of the matrix when information is received. The missing information spans 4 Departments: Human Resources Development Canada, Fisheries and Oceans Canada, Industry Canada and Justice Canada; and one Central Agency, the Public Service Commission of Canada.

1.1 Methodology

The methodology used to obtain the Matrix information was a combination of written material, when available, from published and unpublished sources and from contacting Departmental officials. The "Mandates" were drawn from the Main Estimates and from other material prepared by INAC and other federal departments. In particular, the Devolution Report, 1993, was extensively used for extracting information for the INAC programs. A list of sources is attached after the appendices to the matrix.

1.2 Guide to Acronyms

AFA	-Alternative Funding Arrangements
CA	-Contribution Arrangement
CAEDS	-Canadian Aboriginal Economic Development Strategy
CFA	-Co-operation and Funding Agreement
CRF	-Consolidated Revenue Fund
FTP	-Flexible Transfer Payment
INAC	-Indian and Northern Affairs Canada

1.3 Definitions of Matrix Parameters

Program Title: Name given to the program, strategy, initiative, service or activity by the responsible authority.

FEDERAL PROGRAMS FOR ABORIGINAL PEOPLES - 1993/94

PROGRAM TITLE	PROGRAM AUTHORITY	INDIVIDUAL/ COMMUNITY/ ORG'N BASED	# OF USERS	ELIGIBILITY CRITERIA	DELIVERY CENTRE(S)	ANNUAL PROGRAM COSTS ($000'S)ACT. 92/93	COMMENTS & REFERENCES
GOVERNANCE							
Indian & Northern Affairs Canada							
INDIAN REGISTRATION AND BAND LISTS	MANDATE:	To ensure that INAC's duties for the registration of individuals including adoptees in accordance with the Indian Act are met. To amalgamate and consbtute new First Nations in accordance with the wishes of local communities. To provide First Nations communities with more authority over their own affairs when they have assumed control of their own membership lists.					
	Statutory	Individual and Community	605 Bands	All Band Councils. Registered Indians and persons seeking registration.	Federal & First Nations	9,031*	Population of registered Indians, as of December 1993, was 553,316. 236 Band Councils have assumed responsibility of their membership lists. INAC maintains register of status Indians and maintains Band lists for about 60% of First Nations.
INDIAN GOVERNMENT SUPPORT	MANDATE:	To provide support to elected bands and tribal councils responsible for providing services, mainly on-reserve, to residents of their communities. It enables them to hire general administrative staff, and in the case of Tribal Councils, to provide advisory services to member bands.					
	Discretionary	Community	605 Bands	All Band Councils / Tribal Councils	Federal	274,806	Cost includes Alternate Funding Arrangements. SEE APPENDIX A.
INDIAN TAXATION ADVISORY BOARD	MANDATE:	To provide advice to the Minister on real property taxation issues. To develop tax policies as well as to provide a centre of expertise in the department on tax issues that impact on Indian people.					
	Discretionary	N/A	N/A	Bands, and Individuals requesting assistance at the Indian Taxation Secretariat	Federal	1,026*	Served through the Indian Taxation Secretariat and the Indian Taxation Advisory Board.
ELECTORAL SYSTEMS / APPEALS/ BAND BY-LAWS	MANDATE:	To ensure that the legislative requirements set out in the Indian Act and the accompanying regulations are properly executed in support of the legitimacy of Band Councils.					
	Statutory	Community	317 Bands	All Band Councils with Indian Act Electoral Systems. Band Councils selected under traditions and customs are not eligible.	Federal	2,693*	94.4% is administered by INAC.
Canadian Heritage							
ABORIGINAL REPRESENTATIVE ORGANIZATIONS	MANDATE:	To provide program funding to Inuit, Métis and Non-Status Indian representative organizations which work to enable Aboriginal peoples to participate in the political, social and economic life of Canada.					
	Discretionary	Organization	24 Organizations	Aboriginal Representative Organizations recognized by Federal Government	Federal	6,394	This program funds organizations such as the Assembly of First Nations, the Congress of Aboriginal Peoples, the Metis National Council and the Inuit Tapirisat of Canada.
ABORIGINAL CONSTITUTIONAL REVIEW	MANDATE:	Provided funding to national Aboriginal representative organizations to assist these organizations in negotiating constitutional change for Aboriginal peoples in the Canadian constitutional renewal process.					
	Discretionary	Organization	4 Organizations	(Program ended in March 1993.)	Federal	16,176	(Program ended in March 1993)
SOCIAL DEVELOPMENT							
Social							
Indian & Northern Affairs Canada							
SOCIAL ASSISTANCE	MANDATE:	To provide financial assistance and services to eligible individuals and families enabling them to maintain health, safety and family unity.					
	Quasi-statutory	Individual	66,550 recipients/mth and 149,738 dependants/mth	Indigent Status and non-Status Indians and non-Indian persons residing on Indian reserves and certain Crown lands.	First Nations	540,537	77.2% of program costs are Band administered SEE APPENDIX B4.
INDIAN MONIES	MANDATE:	To manage those monies which are held by the Crown on behalf of Bands and individuals in the CRF including decisions to open accounts, release monies and appoint guardians and administrators of the property of individuals.					
	Statutory	Individual and Community	23,000 Indians & 605 Bands	All Bands and status/on-reserve minors and mentally incompetent Aboriginals.	Federal	640*	Monies held for Indians and Bands derived mostly from revenues from oil and gas leases, leases of Reserve land and land claim settlements.

FEDERAL PROGRAMS FOR ABORIGINAL PEOPLES - 1993/94

PROGRAM TITLE	PROGRAM AUTHORITY	INDIVIDUAL/ COMMUNITY/ ORG'N BASED	# OF USERS	ELIGIBILITY CRITERIA	DELIVERY CENTRE(S)	ANNUAL PROGRAM COSTS ($000'S)ACT. 92/93	COMMENTS & REFERENCES
FIRST NATIONS' CHILD AND FAMILY SERVICES	MANDATE:	To ensure that Indian children and families have access to culturally sensitive child and family services in their communities and that these services are comparable to those available to other provincial residents in similar circumstances.					
	Discretionary	Individual & Community	4,533 Children	Status Indian Children and families living on reserve.	First Nations & Provincial	155,184	55% of program costs provincially administered (money's transfered from INCA). Costs include support for the development of Indian standards for those services. SEE APPENDIX B5.
INDIAN & INUIT DEVELOPMENT	MANDATE:	To support First Nations in strengthening their management capacity.					
	Discretionary	Community	N/A	First Nations	First Nations or Region & District	9,608*	This program provides financial, technical,and advisory resources to First Nations in developing their management capability.
ESTATE ADMINISTRATION	MANDATE:	To encourage and promote estate planning and appoint departmental administrators at the request of the family members. To administer the provisions of the Indian Act with respect to estates of Indians and to settle disputes that arise during the course of the administration of an estate.					
	Statutory	Individual	N/A	All Status Indians ordinarily resident on a reserve prior to time of death.	Federal	2,420*	15.9% of program costs is Band administrated. 3.9% is provincially administrated and 80.2% administered by INAC.
ADULT CARE	MANDATE:	To enable persons with functional limitations because of age, health problems or disabilities to maintain their independence and reach their highest possible level of functioning.					
	Discretionary	Community	547 persons	Bands and institutions where services required and resources available.	First Nations	17,865	INAC is one of 10 departments involved in the national strategy for the integration of persons with disabilities.
FAMILY VIOLENCE	MANDATE:	To support Indian people and their communities in establishing and operating programs and services aimed at arresting and offsetting high levels of family violence among populations living on reserves.					
	Discretionary	Community	N/A	Proposal approval by INAC. Criteria based on awareness, prevention, early identification and intervention, clinical support and networking.	First Nations	22,313*	Part of Federal initiative involving 5 federal departments and CMHC. Allocation is primarily based on a per capita basis.
Public Service Commission of Canada							
SPECIAL MEASURES INITIATIVES	MANDATE:	Retains successful elements of previous Employment Equity programs and broadens the focus to include recruitment, development, retention and managing diversity issues					
	Discretionary	Individual	N/A	Status, non-Status, Metis and Inuit and other target groups	Federal	5,000 est. '94	Program effective as of April 1st, 1994. Other groups include disabled persons, visible minorities and women in non-traditional roles.
Canadian Heritage							
ABORIGINAL FRIENDSHIP CENTRE	MANDATE:	To improve the quality of life for Aboriginal peoples residing in or travelling through urban communities.					
	Discretionary	Organization	99	Recognized Friendship Centre	Federal	19,654	12 Friendship Centres do not receive Federal core funding. Funding for Friendship Centres cut by 10% in 1993 Budget.
NORTHERN NATIVE BROADCAST ACCESS	MANDATE:	To provide production and distribution funding to Aboriginal broadcasters to operate and maintain regional network production centers and to produce and broadcast radio and television programs for Aboriginal peoples.					
	Discretionary	Organization	13 Broadcasters	Recognized Aboriginal Broadcasters organization	Federal	11,267	Serves 400 Aboriginal Communities in Northern Canada. No comparable program for Aboriginal broadcasting in Southern Canada.
ABORIGINAL WOMAN'S	MANDATE:	To encourage Aboriginal women to initiate/influence public policies and decision-making which affect their individual as well as community well-being, and to promote the enhancement of strong leadership and management capacities.					
	Discretionary	Organization	101	Recognized Aboriginal Woman's Organization	Federal	2,549	Includes the Family Violence Initiative involving 5 federal departments scheduled to end in March 1995.
NATIVE SOCIAL AND CULTURAL DEVELOPMENT	MANDATE:	To increase, promote and strengthen the individual opportunities of Aboriginal peoples to develop their full potential and talents in various fields of socio-cultural endeavour.					
	Discretionary	Organization	96	Organizations & programs selected by the Department	Federal	1,039	

FEDERAL PROGRAMS FOR ABORIGINAL PEOPLES - 1993/94

PROGRAM TITLE	PROGRAM AUTHORITY	INDIVIDUAL/ COMMUNITY/ ORG'N BASED	# OF USERS	ELIGIBILITY CRITERIA	DELIVERY CENTRE(S)	ANNUAL PROGRAM COSTS ($000'S)ACT. 92/93	COMMENTS & REFERENCES
Education and Culture							
ELEMENTARY / SECONDARY EDUCATION	MANDATE:	To enable eligible on-reserve residents to access elementary/secondary education relevant to the social, economic and cultural needs and conditions of First Nations and their members and comparable to other Canadians.					
	Quasi-Statutory	Individual & Community	100,890 Individuals	Status Indians living on reserve, Bands, provincial and federal schools.	First Nation, Provincial and federal	641,393	75% of program costs are Band administered; 19% provincially administered; 6% departmentally administered. SEE APPENDIX B2.
POST-SECONDARY ASSISTANCE	MANDATE:	To provide First Nations with financial assistance to support the participation and success of Indian and Inuit students in recognized post-secondary education programs and thereby improve post-secondary participants.					
	Quasi-Statutory	Individual and Community	21,566 Individuals	Status Indians living on or off reserve and Inuit accepted in recognized Post-Secondary educational program.	First Nations and Federal	195,262	87% of programs delivered by First Nations. SEE APPENDIX B3.
CULTURAL/EDUCATIONAL CENTRES	MANDATE:	To support Indians and Inuits in preserving, developing, promoting and expressing their cultural heritage.					
	Discretionary	Community	72 (1991)	Cultural/Educational centres meeting the criteria by INAC.	First Nations	9,187*	Proposals are reviewed by headquarters and funded within overall National budget.
Infrastructure							
Indian & Northern Affairs Canada							
HOUSING	MANDATE:	To support individuals and Bands in obtaining adequate housing by providing subsidies towards the construction and renovation of houses on reserve as well as for providing training, management and technical assistance to Bands. The purpose is to establish and maintain a level and a quality of family accomodation that is consistent with recognized national building code standards.					
	Quasi-Statutory	Community	4,295 new dwellings & 2,630 renovated dwellings	All Bands for construction and renovation on reserves for the dwelling of Status Indian Band members.	First Nations	126,571	Subsidy of between $19,000 and $45,000 per newly constructed unit. Funds are allocated on a weighted per capita formula. Also provides loan guarantees. SEE APPENDIX B1.
CAPITAL FACILITIES & SERVICES	MANDATE:	To support Band Councils, Indian settlements and Inuit communities in acquiring and maintaining capital and services consistent with recognized standards. It involves the construction, operation and maintenance of basic community capital facilities such as water, school, sanitation, roads, community building, and special services such as flood and erosion control.					
	Quasi-Statutory	Community	630 Bands	Indian & Inuit Community	Federal	679,366	Cost includes Alternate Funding Arrangements SEE APPENDIX A
EDUCATION: CAPITAL FACILITIES	MANDATE:	To support First Nations in acquiring or constructing educational facilities that are comparable to those of nearby non-native communities in accordance with approved Departmental policies and standards.					
	Quasi-statutory	Community	353 Bands	All Band Councils with education facilities	First Nations	97,875*	As of Sept 1991, there were 353 on reserve schools with average enrollment of 140 students.
FIRE & OTHER PROTECTION	MANDATE:	To provide for the purchase or construction of varied protection services comparable to those available to nearby non-native communities.					
	Discretionary	Community	All Bands	Identification of First Nation's needs and regional approval.	First Nations or Indian Organizations	15,854*	96% of program costs Band administered. 522 of 829 communities received adequate fire services as of March 1991.
Canada Mortgage & Housing Corporation							
EMERGENCY REPAIR	MANDATE:	To assist eligible homeowners or occupiers in rural areas to undertake emergency repairs required for the continued safe occupancy of their houses.					
	Discretionary	Individual	892 units	Recipient must live in a rural area. The house requires urgent repairs. The total household income is below the established income ceiling. Available to Status Indians, non-Status Indians, Metis and Inuit.	Federal	N/A	A significant portion of this program is directed to Natives. This financial assistance is in the form of a contribution.
RURAL AND NATIVE HOUSING	MANDATE:	To help eligible families and individuals in rural areas obtain adequate, suitable and affordable housing through Rental, Lease-to-Purchase and Self-Build Homeownership options.					
	Discretionary	Individual	24,536 units	Criteria based on residence, household income, adequacy of present housing and affordability of current housing. Program available to Status, non-Status, Metis and Inuit as well as non-Natives.	Federal	137,100	The program has three options: Self-Build Homeownership, Lease-to-Purchase and Rental. Construction of additional housing units under this program has been cancelled as of 1994.

FEDERAL PROGRAMS FOR ABORIGINAL PEOPLES - 1993/94

PROGRAM TITLE	PROGRAM AUTHORITY	INDIVIDUAL/ COMMUNITY/ ORG'N BASED	# OF USERS	ELIGIBILITY CRITERIA	DELIVERY CENTRE(S)	ANNUAL PROGRAM COSTS ($000'S)ACT. 92/93	COMMENTS & REFERENCES
ON-RESERVE RENTAL HOUSING	MANDATE:	To assist Indian Bands in providing suitable, adequate and affordable rental housing units on Indian reserves.					
	Discretionary	Community	14,630 units	All Bands Councils are eligible and responsible for determining criteria for project tenants. They must apply to INAC and be approved and given priority in their planning process.	Federal	80,700	INAC provides a financial contribution to assist in the construction. Approved lenders provide loans which are insured under the National Housiong Act.
URBAN NATIVE HOUSING	MANDATE:	To help low-income Native households living in urban areas obtain suitable adequate and affordable rental housing on the private market by provoding assistance to Native sponsors of housing for low income Native households.					
	Discretionary	Organization	10,001 units	Non- Profit housing groups in urban communities with populations larger than 2500. The groups must be sponsered by a Native organization.	Federal	87,500	Assistance is equal to the difference between the actual cost of operating the project and the project's revenue from rents or occupancy charges. New deliveries cancelled as of 1994.
Health							
Health Canada							
INDIAN AND NORTHERN SERVICES	MANDATE:	To assist Inuit, on-reserve status Indians and residents of the Yukon to attain a level of health comparable to that of other Canadians living in similar locations. Limited assistance availatble to Status Indians living off-reserve.					
	Quasi-statutory	Individual and Community	N/A	Inuit and on/off-reserve Status Indians	Federal or First Nations	747,967	SEE APPENDIX B6 for a program resource breakdown of the 7 subactivities comprising this program. Includes Non-Insured Health Benefits for Indians living off-reserve.
LAND							
Indian & Northern Affairs							
INDIAN ENVIRONMENTAL PROTECTION	MANDATE:	To develop and implement a program that would support IIAP's legal and policy obligations as they relate to federal environmental protection laws, regulations and policies.					
	Statutory	Community	N/A	All Bands with environmental concerns	Federal	9,823*	29% of program costs are administered by bands. 70.6% administered by INAC.
FORESTRY	MANDATE:	To ensure the Department's otligations concerning the cutting and removal of reserve timber are fulfilled in accordance with the Indian Act, the Indian Timber Regulations and all other applicable laws.					
	Statutory	Community	N/A	Bands with resources of commercial timber on their reserve.	Federal	2,614*	
MINERAL MANAGEMENT	MANDATE:	To ensure the Department's statutory obligations are discharged for disposal of mineral resources under Indian lands in accordance with the Indian Act, the Indian Mining Regulations and other applicatle legal requirements.					
	Statutory	Community	N/A	Bands with mineral resources on or under their reserve, capable of commercial development.	Federal	341*	Totally administered by INAC.
OIL & GAS MANAGEMENT	MANDATE:	The prudent management of oil and gas resources from reserve lands in accordance with legislative, legal and fiduciary requirements.					
	Statutory	Community	N/A	All Band Councils	Federal	5,529*	
LAND REGISTRY & SURVEYS	MANDATE:	To ensure that documents regarding interests and Indian lands are registered and are maintained together with related abstracts and indices in accordance with the Indian Act and the Canada Lands and Surveys Act.					
	Statutory	Community		All Band Councils	Federal	1,896*	Entirely administered by INAC.
LANDS MANAGEMENT	MANDATE:	To ensure that the Department's statutory duties for managing interests and Indian lands in accordance with the Indian Act and all applicable legal requirements are performed.					
	Statutory	Community	N/A	Management of interest in reserves and other related lands.	Federal and First Nations.	25,519*	62% of program costs are administered by INAC. 38% of program costs are Band administered.
SELF GOVERNMENT	MANDATE:	To develop a new relationship between Indian communities and the federal government by working out practical new arrangements for Indian government at the community level.					
	Discretionary	Community and Organization	N/A	Self-government proposals developed by Indian communities. Proposals are evaluated by INAC.	First Nations	22,009*	67.7% Band administered.
SPECIFIC CLAIMS	MANDATE:	To resolve all specific claims outstanding as of 1990 by the year 2000AD.					
	Quasi-Statutory	Community	N/A	Claims based on alleged non-fulfillment of Indian treaties or the misadministration of lands and assets under the Indian Act or other formal agreements.	First Nations	44,053*	83% of program costs are Band administered. At the end of 1992-93, there were 259 claims under review andn 105 claims under negotiations.

FEDERAL PROGRAMS FOR ABORIGINAL PEOPLES - 1993/94

PROGRAM TITLE	PROGRAM AUTHORITY	INDIVIDUAL/ COMMUNITY/ ORG'N BASED	# OF USERS	ELIGIBILITY CRITERIA	DELIVERY CENTRE(S)	ANNUAL PROGRAM COSTS ($000'S)ACT. 92/93	COMMENTS & REFERENCES
COMPREHENSIVE CLAIMS	MANDATE:	To resolve aboriginal land claims based on continuing Aboriginal rights and title.					
	Quasi-Statutory	Community	N/A	Assertion of continuing aboriginal title by claimant groups and acceptance of claim for negotiation by INAC.	First Nations	69,940*	88% of program costs are Band administered.
TREATY RELATIONS	MANDATE:	To develop and coordinate policies on treaty issues and to fulfill outstanding financial obligations under existing treaties in cooperation with other federal departments, Indian groups and provincial governments.					
	Statutory	Community	N/A	Indian Bands that have signed treaties.	Federal	2,206	Includes $1.3 million in annuity payments pertaining to some of the obligations outlined in various treaties between Her Majesty and different Indian bands.
ECONOMY							
Indian & Northern Affairs							
REGIONAL OPPORTUNITIES	MANDATE:	To provide the means for Indian, Inuit and Innu peoples to take maximum advantage of region-wide economic development opportunities.					
	Discretionary	Organization	45	Indian, Inuit or Innu organizations must submit a detailed operating plan as outlined in the CAED Strategy on-reserve services hand-book.	Federal	14,164*	A CAED Strategy component. Funding is provided through various regional economic development projects and organizations. SEE APPENDIX C.
COMMERCIAL DEVELOPMENT	MANDATE:	To provide viable Indian and Inuit businesses ready access to commercial debt financing in a manner complimentory to Industry Canada's business financing programs, to maximize the cost effectiveness of INAC's business loan portfolio administration, and, to offer business advocacy, advisory and developmental support where these are not otherwise available.					
	Discretionary	Organization	800 loans, 133 loan guarantees (March 1992)	Indian and Inuit businesses.	Federal	5,922*	A CAED Strategy component: provides loan guarantees, loan approvals and loan collection services. SEE APPENDIX C.
COMMUNITY ECONOMIC DEVELOPMENT	MANDATE:	To assist communities and their members to define and achieve their goals and objectives through business employment and resource development activities.					
	Discretionary	Community	379	Policies and standards must conform to CAEDS criteria	Federal(regions)	58,579*	A CAED Strategy component: all bands, Inuit and Innu communities are serviced by a Community Economic Devlopment Organization. SEE APPENDIX C.
RESOURCE ACCESS NEGOCIATION	MANDATE:	To assist Indian Bands and Inuit and Innu communities to access business and employment opportunities and to attract investment in the natural resource and tourism sector.					
	Discretionary	Community	60 to 70 projects annually	Band Councils and Native Organizations	Federal(Regions)	9,381*	Projects are approved in nine resource areas: Agriculture, Fisheries, Forestry, Minerals, Oil & Gas, Resource Co-Management, Tourism, Small Hydro, Major Projects and Multi-Sector.
Human Resources Development Canada							
PATHWAYS TO SUCCESS	MANDATE:	To provide training and related services to improve the labour market prospects of Aboriginal Canadians by developing a partnership between Human Resources Development Canada and Aboriginal Peoples.					
	Discretionary	Individual, Community & Organization	N/A	Aboriginal People who self-identify and members of community/organization driven project meeting the established criteria. This includes Status Indians, non-Status Indians, Metis and Inuit.	First Nation, Regions, Federal	200,000 estimated	A five year strategy scheduled to end April 1996. Employment and training component of CAED Strategy for Aboriginal Peoples, undertaken in co-operative partnership with Industry Canada and INAC. SEE APPENDIX C.
Fisheries & Oceans							
ABORIGINAL FISHERIES	MANDATE:	The strategy seeks to meet departmental obligations to consult with Aboriginal People as the Supreme Court directed , while removing any doubt regarding the authority and ability of the federal Government to conserve and manage the fisheries.					
	Statutory	Community	N/A	All Aboriginal Communities who have historically engaged in fishery in the Atlantic Region and in British Columbia where the Department is responsible for the management of the fisheries.	Community	approx. 21,000	This strategy was in response to the Supreme Court of Canada decision in the Sparrow case which found that an Aboriginal right to fish for food, social and ceremonial purposes.

FEDERAL PROGRAMS FOR ABORIGINAL PEOPLES - 1993/94

PROGRAM TITLE	PROGRAM AUTHORITY	INDIVIDUAL/ COMMUNITY/ ORG'N BASED	# OF USERS	ELIGIBILITY CRITERIA	DELIVERY CENTRE(S)	ANNUAL PROGRAM COSTS ($000'S)ACT. 92/93	COMMENTS & REFERENCES
Industry Canada							
ABORIGINAL CAPITAL CORPORATIONS	MANDATE:	To provide contributions to aboriginal capital corporations, which in turn make commercial loans to businesses owned by aboriginal individuals or organizations.					
	Discretionary	Organization	34	Submission approval by Industry Canada.	Region & Local	14,538	A CAED Strategy component. Total Capital Base of $150 million. SEE APPENDIX C.
ABORIGINAL BUSINESS DEVELOPMENT	MANDATE:	To provide financial & developmental assistance to eligible Aboriginal individuals or groups for the establishment, expansion, modernization or acquisition of businesses.					
	Discretionary	Individual & Organization	N/A	Submission approval by Industry Canada	Region	40,352	A CAED Strategy component. SEE APPENDIX C.
RESEARCH & ADVOCACY	MANDATE:	To support research, policy & analysis, conferences & economic development studies.					
	Discretionary	Organization	N/A	Studies and projects accepted by federal goverment under CAED Strategy.		3,880	A CAED Strategy component with shared program responsibility with Indian & Northern Affairs Canada & Human Resources Development Canada. SEE APPENDIX C.
JUSTICE AND POLICING							
Solicitor General							
FIRST NATIONS POLICING	MANDATE:	To provide First Nations' communities with access to First Nations' policing arrangements and services.					
	Discretionary	Community	74	Indian and Inuit communities on reserve or Crown land.	Federal & Provincial	28,385	Policing agreements are on a cost sharing basis, 52% federal and 48% provincial. Currently 13 sets of negotiations covering approximately 60 communities are under way. 40 communities are at the preliminary stages.
Justice Canada							
ABORIGINAL JUSTICE	MANDATE:	To support the Department's policy and program activities regarding aboriginal justice.					
	Discretionary	Individual, Community, Organization and Provincial	N/A	Aboriginal Organizations, Aboriginal Communities, provincial amd territorial governments	First Nations, Provincial and Territorial	2,251	The funding will assist communities to undertake demonstration projects, research and cross-culture training. It will also aim at strenghtening the relationship between Aboriginal people and the justice system
NATIVE COURTWORKERS	MANDATE:	To meet the counselling (other than legal) and referral needs of Natives in conflict with the law, to enhance their access to the criminal justice system, and to reduce the communication barriers between Natine Peoples and those involved in the administrstion of the criminal justice system.					
	Discretionary	Individual	N/A	An Status Indian, non-Status Indian, Metis or Inuit charged with an offence under any federal or provincial statute or municipal by-law and includes a young person as defined by the Young Offenders Act	Community	4,265	Expenditures are shared between the federal and provincial/territorial governments. Program does not operate in every province.
RCMP							
ABORIGINAL CONSTABLE DEVELOPMENT	MANDATE:	To increase the proportion of Aboriginal members within the RCMP and to encourage recruitment of this target group.					
	Discretionary	Individual	44 (1992-93)	Metis, Status, non-Status and Inuit	Federal	N/A	Aboriginal participation in the RCMP is 2.8%.
THE NORTH							
Indian and Northern Affairs							
TRANSFER PAYMENTS	MANDATE:	To transfer funds to the territorial governments in accordance with agreements entered into by the Minister of Finance with the approval of the Governor in Council on belhalf of the government of Canada and the ministers of Finance of the Yukon and the Northwest Territories on behalf of their respective governments.					
	Quasi-Statutory	Territorial	2	Territorial Governments	Territorial Governments	1,073,264	Transfer payments are all grants and contribution expenditures
Canadian Heritage							
CANADA/ TERRITORIES ABORIGINAL LANGUAGES AGREEMENT	MANDATE:	These agreements enable the territorial governments to undertake activities related to language maintenance and revitalization, including the provision of essential government services.					
	Discretionary	Community	2	Territorial Governements	Territorial Governments	7,377	Co-operation & Funding Agreement for the Northwest Territories & the Yukon.

Indian Government Support Program

The Following Services and Activities Comprise this Program:

Band Support Funding
Tribal Councils
Band Advisory Services
Band Employee Benefits
Indian/Inuit Management Development

* Approximately 72% of the funding is allotted to band support funding.

* A further 21% of the funding is allotted to tribal councils.

Alternative Funding Arrangements (AFA):

A self-government initiative - in efforts to offer greater flexibility over the management of funds to First Nations, AFA is a means of Community Funding which provides Indian Councils with expanded authority to develop programs and reallocate standard program funding to better meet community needs, opportunities and values. For example, First Nations may provide services on reserve such as elementary/secondary education, social maintenance, social support services, adequately maintained community capital infrastructure, housing, and local government, and may further the potential for community members to access economic development, employment and post-secondary education opportunities.

All First Nations have the option to apply for AFA authority and it is provided where the applicants meet the entry criteria. Conditions applied by INAC to AFA funding are minimized in order to provide increased flexibility to Indian Councils over the management of the funds. AFA emphasizes local accountability for local management decisions.

The percentage of total program expenditures under AFA has increased from 2.9% to 17.8% between 1988-89 and 1992-93 ($531,740,877).

AFA Participation Rates 1992-93:
Signed Agreements.....139
Bands Involved.....244
Band Participation Rate.....43%

Housing Program

Total Number of New and Renovated Dwelling Units On-Reserve in 1992-93:

Highlights: Between 1983-84 and 1992-93, an average of 3,320 new dwelling units per year were built on-reserve. In 1992-93 more than 4,200 new units were constructed.

Just under 4,000 dwelling units on average per year were renovated between 1983-84 and 1992-93.

Adequate Housing on-Reserve:

Highlights: In 1992-93 almost 44% of dwellings on-reserve did not require renovations or replacement.

The total number of housing units on-reserve in 1992-93 was 71,531 and the number of adequate housing units was 34,460, leaving 37,071 housing units that required renovation or replacement.

On-Reserve Dwellings with Adequate Water Supply and Sewage Disposal:

Highlights: In 1992-93, about 91% of dwellings on-reserve had adequate water supply compared with slightly over half in 1977-78.

The proportion of dwellings with adequate sewage disposal also increased considerably from about 47% in 1977-78 to almost 83% in 1992-93.

Elementary/Secondary Education Program

Enrollment of On-Reserve Population in Kindergarten, Elementary and Secondary Schools:

Highlights: The number of on-reserve children enrolled in elementary and secondary schools has increased in the last three decades. The number doubled between 1960-61 and 1992-93 reaching approximately 100,900 students in the school year 1992-93.

Enrollment is increasing due both to the increase in school-age population and a decrease in the number of dropouts.

The percentage of school-aged children on-reserve enrolled in kindergarten, elementary and secondary schools has increased from 72% in 1960-61 to nearly 97% in 1992-93.

In 1992-93, there were 49,290 on-reserve children enrolled in band-operated schools; 43,545 on-reserve children attending provincial schools; and, 8,055 attending federally-operated schools.

On-reserve Students Remaining until Grade 12 for Consecutive Years of Schooling:

Highlights: Indian children are remaining in school longer.

The percentage of Indian children who remain in school until grade twelve has increased from about 3% in 1960-61 to more than half in 1992-93.

The proportion of registered Indian children graduating from Grade 12 in 1992-93 was 62.2%.

Post-secondary Education Program

Enrollment in University and Post-secondary Institutions:

Highlights: The number of registered Indians enrolled in university increased from 60 in 1960-61 to 5,800 in 1985-86.

The number of Indians enrolled in post-secondary institutions under the PSE program has nearly doubled between 1985-86 and 1992-93 from 11,170 to 21,566 students.

Full-time Post-secondary Enrollment Rates - Registered Indians Compared to all Canadians:

Highlights: While the rate of participation in post-secondary education for registered Indians continues to rise, the participation rate of registered indians aged 17 to 34 remains below the canadian rate for the same age grouping. From 1989-90 to 1991-92, the rate rose from 7.51 to 8.08 percent compared to 9.95 and 10.68 percent for all Canadians.

Social Assistance Program

Average Monthly Number of Social Assistance Dependants - Registered Indian Population:

Highlights: Between 1981-82 and 1991-92, the average number of social assistance dependants among registered Indians has increased 72% from slightly over 88,000 dependants to just over 151,000, respectively. In 1992-93 the number of dependants has decreased to almost 150,000.

The average number of social assistance recipients per month in 1992-93 under this program was 66,550. The average number of dependents was 149,738.

Social Assistance Expenditures - Registered Indian Population:

Highlights: Total social assistance expenditures in current dollars almost tripled between 1982-83 and 1992-93.

Expenditures per recipient increased 90% from 1982-83 to 1992-93, from 4,661 dollars to 8,877 dollars. Over the same period, the consumer price index increased by 53%.

First Nations Family and Child Services Program

Children in Care - Registered Indian Population On-Reserve:

Highlights: The ratio of registered Indian children in care to Indian children aged 16 and under, peaked at about 6.5% in the mid-seventies and has gradually declined to 3.5% in 1986-87.

Since 1987-88, the ratio increased slightly to reach 4% in 1991-92. In 1992-93, the ratio dropped to 3.7% with 4,533 children in care.

Children in Care and Per Child Expenditures - Registered Indian Population:

Highlights: The number of children in care has fluctuated since 1980-81, while the total expenditures expressed in 1986 constant dollars have been increasing.

Total cost per child expenditures in 1986 current dollars has increased gradually from 1,948 dollars in 1970-71 to 34,234 dollars per child in 1992-93.

Sub-Activity Breakdown for the
Indian & Northern Health Services Program
Forecasted 1993-94 Amounts ($Thousands)

Non-Insured Health Benefits	460,659
Community Health Services	215,938
Brighter Futures	17,925
National Native Alcohol & Drug Abuse	58,808
Environmental Health & Surveillance	11,800
Hospital Services	41,000
Community Health Services Under First Nations Control	38,500
Total	844,680

Health Conditions Statistics

Life Expectancy at Birth by Sex - Registered Indian Population:

Highlights: Life expectancy for Indians at birth is increasing and is expected to continue to increase.

Between 1975 and 2015, the life expectancy of registered Indians at birth is expected to increase by approximately 14 years for both sexes.

Life expectancies for males and females is expected to increase between 1975 and 2015.

Current (1990) and projected (year 2015) life expectancy for males is 66.9 years & 72.9 respectively; for females, these are 74.0 years & 80.1 respectively.

The age gap between sexes in 1975 was 6.7 years in favor of females and could climb to 7.2 years by 2015.

Mortality Rates - Registered Indian Population:

Highlights: The mortality rates (MR) have decreased from 8.8 to 4.4 deaths/1,000 population from 1960 & 1990. Over this same period, infant MR (children under 1 year) dropped from 82 to 10.2. In 1991, this rate increased to 11.9.

Canadian Aboriginal Economic Development Strategy
(Caed Strategy)

Overall Objective:

To help the aboriginal peoples achieve economic self-reliance by providing them with the means to take advantage of economic development opportunities to achieve employment & develop their own businesses.

Responsible Departments:

Although many departments have a role to play, the CAED Strategy is implemented in partnership with Aboriginal Canadians by three Federal Departments:

Indian & Northern Affairs Canada (INAC)

Industry Canada (IC)

Human Resources Development Canada (HRDC)

Areas of Departmental Responsibilities:

INAC
- community economic & resource development
- commercial development
- research & advocacy

IC
- business development & joint ventures
- establishment of aboriginal capital corporations
- research & advocacy

HRDC
- skills development & urban employment
- research & advocacy

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APPENDIX C

The Issue of Indian Status

as Reflected in Aboriginal Literature

Greg Young-Ing

"The definition of an Indian under Canada's Indian Act is the strictest and narrowest definition of a native person in any country in the world... Today we are faced with a situation where half the Indian people of Canada lack a legal status recognizing their rights as Indian people."

George Manuel
"The Fourth World"
1974

"... we reach out into the mist
to women you refuse to see
to strength you cannot give

and will not give to emotion
you cannot feel to the other
half of our beginnings

we have ourselves and our daughters
and you my fathers have
sons and sons and sons

and section 12 (1) (b)
in the Act of Respecting Indians"

Lenore Keeshig-Tobias
"A Found Poem"
1984

INTRODUCTION

The purpose of this study is to cite examples of how issues concerning rights and benefits flowing from recognition of "Indian status" under the Indian Act are reflected in Aboriginal literature.

The material used in the study draws from the limited number of books written by Aboriginal authors over the past 20 to 30 years as well as the various anthologies of Aboriginal literature. As many of the Aboriginal authored books tend to blur and/or cross over literary categories, the materials used also come out of novels, drama, poetry, essays, biography and autobiography.

One of the initial findings from the literary review is that the issue of rights and benefits of Indian "status" is not often referred to in any direct manner. This is likely attributable to the tendency of Aboriginal Literature to focus on the philosophy, visions, aspirations and experience of Aboriginal peoples more than on an external imposition such as a distinction set out in a piece of federal legislation. Nonetheless, as the following section will explain, the recognition of Indian "status" and the Indian Act itself does affect many aspects of the lives of Aboriginal people and does, therefore, does enter into the literature on occasion. Examples will be cited and discussed in the body of this paper.

The material will be generally dealt with chronologically in terms of the date of publication. Since much of the material was written and/or set in the past, it should be noted that many passages contain references to rights and benefits that have since been altered under amendments to the Indian Act such as: disposition of the right to vote in federal elections, alcohol prohibition and Indian women losing status through marriage under the former Section 12(1)b.

BACKGROUND

The Indian Act: The Indian Act is the primary piece of legislation that presently regulates Canada's relationship with and responsibility toward the First Nations. The power and control that the Act holds over First Nations cannot be underestimated or downplayed. It outlines all the regulations that Indian bands must operate under, intrudes into virtually every aspect of life on-reserve, and, in Sections 6 to 11, defines which of the First Nations people will be defined as an "Indian" and thus receive benefits under the Act.

Although the Indian Act has a dramatic impact on First Nations, it was conceived, drafted, and passed without any consultation or consent from First Nations peoples. The original version of the Act first came into effect in 1876 under a government which believed that Indians had no special rights as the original occupants of the land, and that they should be eliminated as distinct peoples and assimilated, as soon as possible, into the mainstream of Canadian society.

In the past, the Act has been used to deny "Indians" the right to vote; disallowed "Indians" from entering establishments where alcohol was served; stripped women of their status as Indians and prevented them and their children from living in their communities; required "Indians" to ask for permission to leave their reserves; designated all "Indians" as "minors" within Canadian law; declared that wills written by "Indians" were invalid; required that a federal government official be the chairperson for band- council meetings; prohibited "Indians" from forming political organizations; and banned the sacred Potlatch which was the centre of political, social and spiritual life for some First Nations.

The paternalistic attitude and colonialist relationship is maintained in the Indian Act to this day. Through the authority of the present Act, the federal government retains ultimate jurisdiction over reserve lands; the Minister of Indian Affairs has the power to "disallow" by-laws passed by band councils while, at the same time, provincial laws apply on reserve; bands are regulated on how they spend funds and held accountable to the minister for all expenditures. Bands must get the minister's approval to develop resources on reserve lands while, at the same time, the minister can grant outside parties permission to exploit resources on reserve land. The Minister may refuse to recognize traditional forms of First Nation government; the Federal Government usually dictates the process by which band elections are carried out. Finally, the criteria defining who is an "Indian" is formulated and regulated by the federal government. These are just a few examples of how the Indian Act continues to work today.

The Indian Act is now close to 120 years old (almost as old as Canada itself) and even though it has undergone a major revision in 1951 and minor revisions in 1886, 1906, 1927, 1985 and 1988, its basic essence has remained the same.

Contemporary Aboriginal Literature: Aboriginal literature has had to struggle through a number of debilitating factors including cultural and language barriers, residential schools, discrimination in the academic establishment, competition from non-Aboriginal authors, alienation in the publishing industry, and a lack of Aboriginal-controlled publishing. Under these conditions, it is not surprising that in the Canadian publishing industry, Aboriginal literature has gone from being virtually nonexistent to currently being delegated a low-profile marginal position.

The late Mohawk author Pauline Johnson was the first Aboriginal author to be published in Canada. Johnson published four books in the early 1900s and was actually one of the most prominent poets of her day. After Pauline Johnson's untimely death in 1913, almost six decades passed before another Aboriginal author would be published in Canada. The Pauline Johnson phenomenon did not serve as a catalyst to open up the Canadian publishing industry to Aboriginal literature. In hindsight, her success as an Aboriginal author must be viewed as an aberration.

The void in Aboriginal literature that existed from Johnson's time up to the late 1960s was largely a result of the devastating impact the Canadian Residential School System has had, and continues to have, on First Nations. As part of the federal government's vigorous strategy to indoctrinate and subjugate First Nations, generations of children were removed from their homes, families and communities; punished for speaking their language or practising their religious ceremonies; forced to pray to the Christian God; forced to wear uniforms; subjected to rigid, culturally-alien daily routines; separated by gender; and

subjected to physical and sexual abuse.

At these schools, children were also exposed to a culturally-alien curriculum and taught that the teachings of their ancestors were "pagan" and "uncivilized"; that the world view that they had developed in their earlier, formative years was "illegitimate" and "wrong." The strong traditions of the First Nations were not reflected in the curriculum in any way. Instead, children were indoctrinated into relating to traditions and historical events based in Europe. It has, also, frequently been noted that the standards of education were considerably lower (than Canadian public schools) in the residential schools; substandard curriculum was taught by substandard teachers.

This schooling system was hardly a training ground or a vehicle for promoting Aboriginal writers. In fact, the effect of the residential school system was to almost stifle the Aboriginal Voice by denying generations of children access to their cultural knowledge, while instilling them with negative perceptions of their cultural identities. Apart from all other social and economic barriers, even if exceptional First Nation children were able to miraculously overcome these impositions, they were not given adequate skills enabling them to write.

The renowned, First Nations author Lee Maracle would later state that the residential school system produced "languageless generations as it forbade them to speak their own language and impeded their mastery of English, creating an entire population , with few exceptions, who were unfamiliar with language in general" (Gatherings: The En'owkin Journal of First North American Peoples - Volume II, "Skyros Bruce: First Voice of Contemporary Native Poetry," Lee Maracle, Theytus Books Ltd., 1991, Page 85).

In the late 1960s and early 1970s, an explosion of Aboriginal literature followed the upswing in Aboriginal resistance and political organization. The Cree writer Harold Cardinal published **The Unjust Society** in 1969. The Odawa author Wilf Peltier seemed to come out of nowhere with three books including his classic **No Foreign Land** in 1973. An anthology of essays by Aboriginal people entitled **The Only Good Indian** edited by Waubageshig and Lee Maracle's autobiographical **Bobbi Lee: Indian Rebel** both came out in 1970.

A number of important books by Aboriginal authors followed including: **Chiefly Indian** by Henry Pennier in 1972, **The Fourth World** by George Manuel in 1974, **My Heart Soars** by Chief Dan George in 1974, **Prison of Grass** by Howard Adams in 1975, and Maria Campbell's classic autobiography **Halfbreed** in 1973.

The quantity of writing by Aboriginal authors in the late 1960s and early 1970s can be attributed not only to the political activism of the day, but also to the related fact that this was the first generation of Aboriginal people not to be subjected to residential schools; many of them had been able to learn to write by attending college and university.

In the late 70s and early 80s, the frequency of published books written by Aboriginal people tapered off dramatically. Some of the more notable books of this period were Beatrice Culleton's **In Search of April Raintree**, Basil Johnson's **Moose Meat and Wild Rice** Chief John Snow's **These Mountains Are Sacred Places** and

Poems of Rita Joe by Rita Joe. Although books written by Aboriginal authors were sporadic, this period was important because a uniquely Aboriginal form of literature began to take hold.

Throughout the 1980s and early 1990s writers like Lee Maracle, Jeannette Armstrong, Ruby Slippperjack, Beth Cuthand and Thompson Highway have further developed Aboriginal literature to the point that it now stands alone as a distinct body of literature. The work of contemporary Aboriginal authors is now clearly on the upswing; it continues to gain increasing recognition from the literary establishment.

THE ISSUE OF INDIAN STATUS AS REFLECTED IN ABORIGINAL LITERATURE

The books by Aboriginal authors published in the 1960s and early 1970s, which marked the advent of Aboriginal literature in Canada, tended to be characteristic of protest literature - political in content and angry in tone. The quantity of writing by Aboriginal authors in this period could be attributed to the political activism of the day as the fervour created by the 1969 White Paper spawned an upswing in political activism and Aboriginal organization. The vast majority of this first rash of Aboriginal literature almost seemed to be lashing out in the face of the Canadian establishment and the Federal Government's Indian Policy.

Among the most prominent of this first wave of Aboriginal authors was the Cree writer, Harold Cardinal, who stunned the publishing world with his unrelenting and articulate denunciation of the Canadian Indian Policy **The Unjust Society: The Tragedy of Canada's Indians**, which was released the same year as the White Paper. In his critique, Cardinal made reference to the issue of Indian "status," stating:

> The Indian Act defines Indian as "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian." This simplistic legalism, however, eliminates roughly 250,000 native people who, under the American system, would be recognized as Indian... If you are legally an Indian, then you and your family can live on reserves and are entitled to certain limited rights. No matter how full-blooded you may be, if you are not a legal Indian, you can forget the reserve. You can't live there (1).

Here Cardinal becomes the first to make a statement in Aboriginal literature, that would come out time and again, clearly pointing out the Indian Act's lack of scope in applying to all those, rightfully entitled, to the rights and benefits contained therein. He also refers specifically to one of the most devastating impacts - the separation of families due to the banishment of non-status Indians from residency on reserve.

In The Unjust Society, Cardinal goes on to articulate his perspective that the source of the definition of "status" comes from the treaties:

> The whole silly bit about who is an Indian and who isn't came about as a result of treaties.. If they chose to be Indian under treaty, native people were promised certain treaty rights, including land on reserve, perpetual hunting and fishing rights, along with myriad lesser pledges (2).

Harold Cardinal's second book, **The Rebirth of Canada's Indians** published in 1977, focuses heavily on issues related to Indian poverty in general and poverty on reserve in particular. Here he writes about the difficulties of status Indians receiving welfare on reserve:

> "Our people have mistakenly believed that the welfare services provided by Indian Affairs resulted from treaty commitments... until the 1960's, Indian Affairs provided no real welfare programme to Indian people... Welfare is a problem of rapidly escalating importance on nearly every reserve... An Indian needing social assistance shall first apply to receive welfare, and then shall report to the Tribal Administration that he/she is on welfare. The Indian's welfare money is transferred to the tribal account. No Indian would receive welfare money unless that person is certified by a doctor as being too sick to work, certified by the Tribal Council as being needed at home, or over 55 years old.." (3).

It would seem that Cardinal uses the reserve welfare system to illustrate the irony in the situation whereby poverty and unemployment on reserve is the worst in the country, yet status Indians on reserve have extreme difficulty in accessing welfare. In doing so, Cardinal brings out a rather twisted disadvantage in being recognized as status Indian.

The Fourth World: An Indian Reality by George Manuel released in 1974 was a groundbreaking book that was, in many respects, years ahead of its time. In a skilful and effective manner, the book drifts back and forth between insightful academic analysis of the Aboriginal situation both in Canada and around the world and autobiography from his life on growing up on reserve along with his experiences in the Aboriginal political movement. As former band chief, founder of the Union of British Columbia Indian Chiefs, longtime president of the National Indian Brotherhood and founder of the World Council of Indigenous Peoples, he certainly had a wealth of valuable first-hand experience to draw from.

In **The Fourth World**, Manuel deals extensively with issues related to Indian "status." The first time he directly discusses the matter, he makes the emphatic statement:

> The definition of an Indian under Canada's Indian Act is the strictest and narrowest definition of a native person in any country in the world. It is a definition that has been made narrower and stricter with the passage of time... Today we are faced with a situation where half the Indian people of Canada lack a legal status recognizing their rights as Indian people" (4).

As with Cardinal, Manuel emphasizes the Act's lack of scope in applying the rights and benefits to all those rightfully entitled; while, in keeping with his international

perspective, makes the astonishing statement that the Canadian Indian Act definition is the most restrictive definition of an Indigenous person in the world.

Later in the same chapter, Manuel goes on to a discussion of the Supreme Court challenge against Indian women losing status through marriage under Section 12(1)b of the Indian Act, a case which was proceeding at the time of publication of his book:

> ...lawyers from eighteen different parties are arguing in the Supreme Court of Canada whether certain provisions of the Indian Act violate the Bill of Rights, namely the provision that an Indian woman who marries a non-Indian loses her status... Strict patrilineal descent seems to have crept into Canadian Law from the customs of the church. The Indian Act took the general measure of Canadian Law and applied it to us - but only when it was found to be convenient to narrow the group to whom services would be provided under the Act (5).

In this passage, Manuel also becomes the first author to introduce two key arguments into Aboriginal literature: 1) the point that Section 12(1)b of the Indian Act was based on Euro-Christian values that were then imposed on First Nations, many of which, ironically, had matrilineal traditions; and, 2) that part of the federal government's underlying intention with narrowing the definition of "Indian" was to keep down the cost of administering programs, services and benefits.

Both these points would later be reiterated over and over again by First Nations in discussions of the controversial case which went on for many more years right up through to International Court and in debates which would ensue right up to and after the Bill C-31 amendments to the Indian Act in 1985.

Continuing with an extensive discussion over the issue of Indian status, the book also points out a major inconsistency between the Indian Act and the Canadian Constitution:

> The same Act that recognized persons reputed to be Indians made a distinction between Indian half-breeds and non-Indian half-breeds. One was to receive scrip with which to procure land. The other was to receive membership in the band to which he already belonged. The promises made to one group were no better than those made to the other... Even today there are two definitions of "Indian" in Canadian law. The definition that is generally known is the one in the Indian Act. But the federal government's authority to pass an Indian Act comes from its powers under the BNA Act which provides exclusive federal jurisdiction for "Indian and lands reserved for Indians." The courts have said that Inuit people and non-status Indians are nonetheless Indian within the meaning of the BNA Act. The Indian Act definition simply says that while Parliament has the power to legislate for all Indians, it chooses to make laws only for some (6).

It is worth noting, in hindsight, that although Manuel is referring to the then Canadian Constitution, the British North America Act, the same inconsistency exists

today in an even more contradictory manner in Section 35 of the Canada Act of 1982 which states that "Canada hereby recognizes and affirms the Aboriginal and treaty rights of the Aboriginal peoples of Canada." The section then defines "Aboriginal peoples" as "Indian, Inuit and Metis" - not making a distinction of non-status Indian and even including Metis, many of whom overlap with non-status Indians.

Again, illustrating his international perspective, Manuel writes:

> The BNA Act definition of "Indian" could be as wide as the New Zealand Definition of "Maori" or the Swedish definition of "Sami." When the National Indian Brotherhood adopted a statement on Aboriginal Rights, we said that these rights apply to every person who is Indian within the meaning of section 91(24) of the BNA Act. Parliament can not dispossess our right simply by saying that we are no longer Indians (7).

Further contradictions in the application of policy and legislation for status and non-status Indians are also elaborated on by the author as he states:

> Canada already has a list for Indians who are not on the list of any bands. The rights that Indian people have that do not relate to membership in any band are enjoyed equally by those on the general list. Many non-status Indians live in Metis colonies on land to which they have no title, and which is not reserved under the Indian Act... Whether the lands to which the non-status Indian are entitled should become reserves under the Indian Act is a decision the local Metis community must make. They have suffered as much from the policies shaped by the centralized cookie cutter in Ottawa as we have (8).

Finally, Manuel delivers the following closing statement on the matter identifying the roots of the problem and offering the formula for a solution:

> There are only three barriers to granting full Indian status to all those people who fall into the meaning of the word "Indian" in the BNA Act: (1) The goodwill of the government and the people they represent needed to increase the size of the reserved lands and the federal budget in proportion to the increase in numbers; (2) the creation of the administrative machinery that will allow the transition to be made as smoothly as the settlement of refuges has so often been done; (3) the individual and community decision as to which identity people wish to choose (9).

George Manuel's **The Fourth World** deals extensively with issues of Indian "status" versus non-status. Indeed, **The Fourth World** contains one of the most comprehensive and lucid analysis of the related issues in Aboriginal literature. As has been mentioned, many of Manuel's points were to be reiterated in the ongoing debate over the issue of status and non-status up to the present day.

Emma Laroque's **Defeathering the Indian,** published in 1975, was a general overview of Indian policy from the personal perspective of the author. Although the book focuses on the issue of education, it briefly touches on the status/non-status issue in the following passage:

> While many treaty Indians live on the 42 reservations of Alberta, the province's 60,000 Metis and non-status Indians do not, although some live on the fringes of reserves because of their relatives... **(10).**

As a Metis herself, here Laroque makes reference to the issue of non-status Indians not being able access the benefit of DIA housing programs through maintaining residency on reserve. She also speaks of a subsequent phenomenon which occurred in various regions of the country, where small non-status and Metis communities settled around reserves so that they could be close to their status-Indian family members on reserve.

Another Metis author, Beatrice Culleton, wrote the top-selling novel In Search of April Raintree published in 1983. Throughout the story line, one of the key themes is how the central character, April, and her friend, Cheryl, struggle together in coming to terms with their identity as Metis or Indian.

At one point in one of the many arguments that ensue on their road to increased awareness, April exclaims to Cheryl:

> I think you put too much blame on the whiteman for everything. The Indians did allow themselves to be treated like children. They should have stood up for their rights instead of letting themselves be walked on **(11).**

To which Cheryl, who identifies herself more as "Indian" albeit non-status, replies:

> But what exactly do the Metis want? To live like Indians on reservations? To be dependent of the governments and therefore the white people. You once said Metis people were an independent breed, freedom lovers **(12).**

In the following chapter another argument takes place in which April says:

> New houses, yeah, but cheaply made, no plumbing, no sewer system. Besides, those housing programs were thought up by Indian Affairs which means only Treaty Indians get any of the supposed benefit out of them. Non-status and Metis get welfare and that's it **(13).**

The text then goes immediately from dialogue into April's first-person perspective:

> I didn't know what to say. I felt it was good that they didn't have the federal government to rely on. That they would be independent to a certain point. But I knew what Cheryl said was true about non-status and Metis and employment was hard for them to come by **(14).**

The above-mentioned dialogue makes direct reference to the issue of housing benefits for status and Treaty Indians but not for non-status and Metis. Although it also says that the benefit is not so desirable because of the inadequacy of the housing. It also brings up the argument that one of the effects of being eligible for benefits is to make "status" Indians dependent on government.

One of the key aspects about the reference to Indian "status" in In Search of April Raintree is how it is tied in with the issue of self-identity as Metis or Indian. It is

also interesting to note how Treaty Indians are grouped in with status Indians and Metis with non-status Indians.

Prison of Grass: Canada from a Native Point of View written by Howard Adams was first published in 1975. Along the lines of **The Fourth World** and **The Unjust Society**, Adam's book provided a sharp analytical critique of Canada's treatment of Aboriginal peoples, although the focus was more on central Canada and the Metis situations. In the book's only direct reference to the rights and disadvantages of Indian "status," Adams writes:

> In Canada treaties legitimized the imprisonment of status Indians under white agents... In return the Indians received almost nothing for their land and resources except promises as empty as the treaties themselves... [Status] Indians possess certain political awareness today but still cling to the illusion, dating back to the time of treaties, that they have citizens plus status. Indians were not citizens, were judged incapable of participation in society as civilized people, and were denied even the basic right of voting in elections (15).

Adams criticizes as cynical the point of view that benefits associated with Indian "status" gives an outward appearance of government goodwill; in fact, many of the benefits are extended to Canadian citizens through other programs. In backing the argument with the fact that "status" Indians were even denied the most basic democratic right, he brings up a paramount disadvantage of "status" which existed at the time.

As already noted, the frequency of published books written by Aboriginal people tapered off dramatically in the late 70s and early 80s. In retrospect, in terms of the number of books published, the late 60s and early to mid 70s could be seen as something of a golden age in publishing by Aboriginal authors. However, as with Pauline Johnson, this rash of books did not manage to carve a respectable ongoing niche for Aboriginal literature in the Canadian publishing industry. Indeed, much of the interest from the Canadian publishing in this era could be attributed to the novelty value in the first wave of books written by Aboriginal people.

Generally, the focus of Aboriginal literature began to change in the 1980s as authors began to develop a unique body reflective of Aboriginal cultural values. The works published in this era has focused on the positive philosophy, visions and aspirations that are unique to Aboriginal people, and thus the themes have drifted away from condemnation of Federal Indian Policy. As a consequence, the issue of rights and benefits of Indian "status" tended to appear far less frequently in the literature.

In 1984, an essay entitled "Canada's Natural Resource" written by Midnight Sun was published in **A Gathering Of Spirit: A Collection of North American Indian Women** edited by Beth Brant. In the essay, Sun refers to issues of "status" writing:

> The Indian Act, passed in 1876, has jurisdiction over "Indian and land reserved for Indians." Although slightly amended, in essence it is the same as 106 years ago.
>
> The descendants of those who did not sign treaty or become

> registered are not legally recognized as "Indians." This document has become legislated discrimination, and is used as a means to "divide and conquer" Native people. Those whom have status are legally separated from those who don't.
>
> Having signed treaties, the government changed its course of action. They encouraged enfranchisement, the forfeiting of one's legal status as an Indian, to accelerate assimilation. This allowed the government to relinquish their monetary commitments... Until 1969 Indians could not vote or buy liquor...
>
> Enfranchisement held the promise of acceptance and equality in Canadian Society (16).

Here, Sun makes the accusation that "status" is used by the federal government as a tactic to "divide and conquer" Aboriginal people. She then goes on to imply that it is also used as part of the goal of assimilation which would, as Manuel alluded to earlier, ease the burden of the federal budget. In the process, Sun also implies that such disadvantages to recognition of "status" as alcohol prohibition and voting rights were used to lure Indians into enfranchisement and assimilation.

Also published in A Gathering Of Spirit is Lenore Keeshig-Tobias' poem entitled, "A Found Poem" which reads in its entirety as follows:

> A FOUND POEM
>
> Chapter 149
>
> An Act Respecting Indians
>
> Section 11. Subject to section 12,
> a person is entitled to
> be registered, if that
> that person (c) is a male who
> who is a direct descendant in
> the male line of a male
> male person described in
> in paragraph (a) or (b);
>
> Section 11. Subject to section 12,
>
> a person is entitled to
> to be registered, if that
> that person (f) is the wife or
> or widow of a person who is
> is registered by virtue of paragraph
> paragraph (a), (b), (c), (d) or (e);
>
> Section 12 (1) (b)
>
> The following persons are not

not allowed to be registered
registered namely, (b) a woman who married
married a person who is not an Indian,
Indian, unless that woman is subsequently
subsequently the wife or widow of a person
person described in section 11.

(subsequently and
without reservation)

Fathers brothers uncles
chiefs warriors politicians

we reach out into the mist
to women you refuse to see
to strength you cannot give

Where are the Women

"out there" you point
"somewhere"

we reach out into the mist
to women you refuse to see
to strength you cannot give

and will not give to emotion
you cannot feel to the other
half of our beginnings

we have ourselves and our daughters
and you my fathers have
sons and sons and sons

and section 12 (1) (b)
in the Act of Respecting Indians (17)

Keeshig-Tobias' "A Found Poem" is one of the most direct comments on the issue of Indian "status" in Aboriginal literature. Through the title, the author proposes that she "found" the first part of the poem in the controversial sections of the Indian Act that took "status" away from Indian women who married non-Indian men. In a sarcastic manner, she then proceeds to quote the sections directly as if they are poetry and, in doing so, ridicules their blatant discrimination. The second part of the poem then denounces the legislation and the Indian male leadership who defended it. Again Keeshig-Tobias ends off the poem employing sarcasm and the technique of quoting directly from the Indian Act calling it, "The Act of Respecting Indians."

Lee Maracle's I am Woman was published in 1988 and stands out in Aboriginal literature in its clever combination of genres. The most notable aspect of the book is that the author manages to relate a cohesive storyline interspersed with autobiography, prose, poetry and novel. Maracle makes a passing reference to one

drawback to Indian "status" in **I am Woman** in the following section as she writes about the late Squamish leader, Andy Paul:

> Which European child in your classroom knows of... our much lauded statesman and self-taught constitutional lawyer Andrew Paul... I might add that Andrew Paul was self-taught because Native men were not permitted to attend law school without renouncing their status as Natives (18).

Through this passage, Maracle claims that Paul did not attain a law degree because (in his time, before the 1951 Indian Act amendments) he would have lost his Indian "status" and, among other things, his residency on reserve.

Published in 1989 and edited by Boyce Richardson, **Drumbeat: Anger and Renewal in Indian Country** is a collection of historical essays written by First Nation leaders. The essays tended to focus on First Nation groups who have come into conflicts with the federal government. In his essay "The Covenant Chain," Grand Chief Donald Marshall writes:

> The Native Council of Nova Scotia was established to represent the specific interests of those Mi'kmaq citizens who are not recognized as "Indians" by the Federal Government. It has always been the position of the Mi'kmaq that we know who we are. However, successive federal governments have seen fit to decide for us who is, and who is not, a Mi'kmaq, and this has had the effect of dividing our communities and creating a second class of Mi'kmaq citizens (19).

As with Midnight Sun's above-mentioned essay, Marshall points out the divisions between status Indians and non-status Indians that the Indian Act has created. He then goes on to declare that the Mi'kmaq Nation, not the federal government, should determine Mi'kmaq citizenship. By using the term "citizenship" Marshall also makes the point that recognition is a much larger issue about belonging to a First Nation and having rights based on that.

Another essay in **Drumbeat** entitled the "Last Ditch Defence of a Priceless Homeland" by Chief Gary Potts mentions Indian status in the following context:

> In 1979 the Teme-Augama Anishnabai resolved to return cheques issued to status Indian members under the Robinson-Huron Treaty system. A declaration was issued ... It reads in part, "The Federal Government recognized that we are a separate tribe of Indians and were given Indian monies because we became registered Indians under the Indian Act in 1883. We did not sign treaty in 1883 so any monies received then and since cannot be treaty monies, it can only be Indian Monies (20).

Here, Potts is referring to the treaty benefit annual payments that are only made to "status" Indians; although, he does not speak of treaty payment as a benefit. Rather, he claims that those "status" Teme-Augama Anishnabai, who received the money, want to return it because they did not agree to be included under the Robinson-Huron Treaty.

Drew Taylor's **Toronto at Dreamers Rock/Education is Our Right** was released in

1990 and contained two of the Ojibway author's one-act plays. The second play, "Education is Our Right" deals in a fictional manner with the controversial issue of post-secondary education funding for status Indians. The following excerpt contains dialogue between an educational worker in a band office and a student trying to get educational funding:

> MAN: .. There's no money left to send you. You know the priority: people already in school first: people living on the reserve second; then other band members. You've been living off the reserve for five years now.
>
> WOMAN: But I'll move back after school, honest I will.
>
> MAN: That's not the point. There's no money left.
>
> WOMAN: What am I going to do now. I was counting on DIA for tuition.
>
> MAN: Have you tried other government sources?
>
> WOMAN: Oh, come on, you know they won't touch Native people. It's always the same answer. You have your own source of funding, we're not your responsibility. Request denied. DIA won't fund me, nobody else will fund me. It's like I'm in an economic Bermuda Triangle (21).

In this excerpt, Taylor is making reference to regulations in the Department of Indian Affairs Post Secondary Education Assistance Guidelines which provides education funding for status Indians. Presumably, although the woman is a Status Indian, she still cannot get educational funding due to federal-program cutbacks and the consequent "prioritizing" of eligibility introduced in the guidelines. In writing this, Taylor points out how the post-secondary funding benefit is accessible to status Indians, but shows how restrictive it has become.

Crazy Water: Native Voices on Addiction and Recovery compiled and written by the Mohawk author Brian Maracle was published in 1994. **Crazy Water** features personal stories that Maracle has compiled featuring Aboriginal people talking about their experience with alcohol addiction. In his introduction to the section entitled "Prohibition," Maracle writes:

> It should be remembered that until twenty years ago, the stated goal of Canada's Native affairs policy was to extinguish Indian and Aboriginal rights... One of the methods the federal government used was to enact prohibition and enfranchisement provisions in the Indian Act... the enfranchisement provisions were extremely damaging because they helped split Indian Country into status and non-status factions (22).

Here Maracle refers not only to the divisions caused by recognition of "status," but also how previous versions of the Indian Act encouraged status Indians to enfranchise so that they could drink alcohol. This serious allegation brings up a very sinister effect of past Indian Policy because this would leave enfranchised Indians to drink alcohol in the cities while being cut off from access to Indian Affairs' programs and to family and housing on reserve. Later in the section, this

point is enhanced through a personal perspective in "John's Story":

> ... so the government came up with this idea of saying that if you give up your Indian rights, and take the white man's rights, then you're allowed to go and buy liquor. You're allowed to sit in a cocktail lounge or what ever it might be, and do what ever you want. I just went "Where's the papers? I'll sign them right now" ... In the past five years they passed another law stating that if I wanted to I could get back my Indian status. Now I've got a little card that says I'm 100 percent Indian (23).

Mary John also made reference to status Indians prohibition in her 1988 book **Stoney Creek Women** and added the following explanation that prohibition clauses were changed due to Native participation in World War II:

> They drank in canteens, as they called the beer parlours, just like the white soldiers. When those who survived the war returned to Canada, the Native ex-servicemen found that under the Indian Act they were forbidden to drink alcohol in their own country. People say that it was the returned soldiers who brought about a change in the Indian Act in 1952. The change said the Natives could drink off reserve (24).

These passages, both taken from relatively recent publications, speak of the alcohol restriction imposed on status Indians up until the 1951 Indian Act amendments. It is interesting to also note that prohibition was not mentioned as a "disadvantage" to having status recognition in earlier Aboriginal literature.

Enough is Enough: Aboriginal Women Speak Out, edited by Janet Silman was published in 1992 and features personal testimonies from Aboriginal women. Much of the book focuses on the women from Tobique Reserve who started the lobby against Section 12(1)b of the Indian Act.

In this excerpt from **Enough is Enough,** Millie Harris writes about her experience of returning to the reserve after the death of her husband and finding that her land rights have been forfeited:

> When I married I lost my status, but I didn't know it at the time. I didn't find out until I moved back in the mid 1970s ...when I came back I thought I could build a little house if I had land. I went to the chief and he said,
> "I can't give you land. You're not an Indian anymore." I said, "What do you mean? You know I'm an Indian, you know I was born and brought up here." ...He said, "No, when you married that guy, it made you white." I said, "I just need a little piece of land so I can build a house." With all the land here! He said, "I can't do that. You can't own anything here, any land." I was so surprised when he told me I was non-status. I said, "How come these white women living here are Indians and I'm white? ...I couldn't get even a little piece of land. I wasn't asking for a house. I was going to build my own little house. He said, "None of the non-status people can own anything" (25).

Harris' testimony illustrates the tragedy of how many women were not aware that

they were losing their "status" and their subsequent rights and benefits through Section 12(1)b. Later in the book, Joyce Sappier tells of her experience of having the band overlook her loss of "status" under 12(1)b until she opposed the chief. This shows that there were cases of leniency with regard to 12(1)b, but that it could always be taken away. She also highlights the denial of voting rights in band election as a disadvantage of being non-status.

> I found out I was still on the band list, even though when we came back I told the chief and his wife that I was Lane now. They issued me a status card - my Indian card - even though they knew I'd married out. Until I defied them at the election. That's when they went and turned around and claimed I was non-status... If we would have voted for the chief he would have kept us on - it was all political (26).

The following section from the retrospective of **Enough is Enough** features Mavis Goeres' looking back at the effects of 12(1)b and telling about how her daughter was excluded from Indian sport events on the grounds that she was non-status:

> When I look back I see that we became more and more aware of the Indian Act standing behind a lot of our problems ...Lilly had got up to say something at a meeting, and this woman said, "Aw shut up! You non-status don't have nothing to say here." That hurt. Another thing that hurt me regards my youngest daughter, Susan. She is very, very active in sports, very good in teams. When it came to Indian Summer Games, they said, "You can't play because you're non-status. You're not an Indian." I said, "My God, she's got as much Indian in her as a lot of them here."
>
> That Indian Act and the discrimination against women had such far-reaching effects - on relationships between people and on little day-to-day things. It's a good thing no white woman came and called me "non-status" like they did Lilly, because I would fight them - physically, I mean (27).

In this closing section of **Enough is Enough,** Goeres provides a summary of how the loss of Indian "status" was felt by thousands of women who were affected by it. Perhaps the most salient part of Goeres' testimony, and much of the other material contained in **Enough is Enough,** is that it illustrates the strong anger felt by the women who lost their "status" and subsequently their entitlement to rights and benefits as Indian people.

CONCLUSION

The material covered in this literary review of how the issue of Indian "status" is reflected in Aboriginal literature has drawn from books by Aboriginal authors published over the past three decades. As the issue of "status" verses "non-status" has at least some impact on virtually every Aboriginal person, it might have seemed at the onset that the issue would be dealt with frequently in the literature. However, after conducting the literary review, it became apparent that references to "status" in the overall body of Aboriginal literature are rare. Even with the high frequently of issues of "Indian identity" present in the literature, it is usually dealt with without any reference to recognition of "status".

The most general tendency that becomes apparent in the review is that the distinction of "status" and "non-status" are regarded negatively in Aboriginal literature. In all of the passages cited above the whole system of "status" was criticized heavily, and the multitude of problems it has caused is criticized more heavily still. It is also clear that this criticism has remained constant and consistent throughout three decades of Aboriginal literature.

The examples quoted above reflect responses to a wide variety of issues related to Indian "status" ranging from basic issues of housing, to personal and deep emotional issues of identity, to larger political issues such as the exercising of ones most fundamental democratic right. It is also apparent that as certain clauses in the Indian Act applying to rights and benefits of "status" were changed under successive amendments, these issues did not disappear from the literature. In fact, some of the books published in the 1990s still deal with restrictions that existed in the Indian Act prior to the 1951 amendments.

In conclusion, this study has shown clearly that, with regard to issues of Indian "status" recognition, Aboriginal literature has struck an appropriate balance; not overlooking the imposed "status" system and all its consequent problems, while at the same time not harping heavily on a subject that was created entirely outside of Aboriginal culture. Through this study, Aboriginal literature comes out remaining true to its purpose of reflecting Aboriginality and documenting the past and present Aboriginal experience.

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FOOTNOTES

1) Cardinal, Harold. The Unjust Society: The Tragedy of Canada's Indians, page 18

2) Cardinal, Harold. The Unjust Society: The Tragedy of Canada's Indians, page 19

3) Cardinal, Harold. The Rebirth of Canada's Indians, page 130

4) Manuel, George. The Fourth World: An Indian Reality, page 241

5) Manuel, George. The Fourth World: An Indian Reality, page 241

6) Manuel, George. The Fourth World: An Indian Reality, page 242

7) Manuel, George. The Fourth World: An Indian Reality, page 242

8) Manuel, George. The Fourth World: An Indian Reality, page 243

9) Manuel, George. The Fourth World: An Indian Reality, page 243

10) Laroque, Emma. Defeathering the Indian, page 18

11) Culleton, Beatrice. In Search of April Raintree, page 170

12) Culleton, Beatrice. In Search of April Raintree, page 170

13) Culleton, Beatrice. In Search of April Raintree, page 171

14) Culleton, Beatrice. In Search of April Raintree, page 174

15) Adams, Howard. Prison of Grass: Canada from a Native Point of View, page 63

16) Brant, Beth. A Gathering Of Spirit: A Collection of North American Indian Women, page 78

17) Brant, Beth. A Gathering Of Spirit: A Collection of North American Indian Women, page 123

18) Maracle, Lee. I Am Woman, page 103

19) Richardson, Boyce. Drumbeat: Anger and Renewal in Indian Country, page 90

20) Richardson, Boyce. Drumbeat: Anger an Renewal in Indian Country, page 221

21) Taylor, Drew. Toronto at Dreamers Rock/Education is Our Right, page 128

22) Maracle, Brian. Crazy Water: Native Voices on Addiction and Recovery, page 45

23) Maracle, Brian. Crazy Water: Native Voices on Addiction and Recovery, page 52

24) Moran, Bridget & John, Mary. Stoney Creek Women, page 106

25) Silman, Janet. Enough is Enough: Aboriginal Women Speak Out, page 97

26) Silman, Janet. Enough is Enough: Aboriginal Women Speak Out, page 101

27) Silman, Janet. Enough is Enough: Aboriginal Women Speak Out, page 219

Appendix D

Brief Review of Literature on Status

The concept of status was originally created in order to define who should be considered as Indian for the purposes of the Indian Act, and therefore be subject to the special regime of benefits and constraints that distinguished these Indians from all other Canadians. The effect of the Act was also to restrict who should be considered as Indian and therefore to restrict the federal government's responsibilities under s. 91 (24) of the British North America Act. In a 1939 decision, the Supreme Court extended the meaning of "Indians" as used in this section to include Inuit (re Eskimos, 2 DLR 417). The 1983 amendments to the Constitution expanded the definition of Aboriginal peoples to include Inuit, Metis and non-status Indians, but have had no practical impact on the more restricted concept of Indian defined by the Indian Act.

Many observers have commented on how consistently the basic principles of the Indian Act have been maintained for more than a century, and on the degree to which the Act and its administration by the federal government has constrained individual and collective Indian rights. Bartlett (1986) cites this comment from the 1876 annual report of the federal Department of the Interior, which was then responsible for Indians: "Today Indian Legislation generally rests on the principle that the aborigenes are to be kept in a condition of tutelage and treated as wards or children of the State."

He goes on to state:

"The manner of federal Government control and administration of reserve lands is essentially unchanged from that declared in 1876 at the time of the first consolidation of legislation termed the Indian Act. The Minister of Indian Affairs, then described as the Superintendent General, was empowered to approve who might be allotted reserve lands by the band, to remove persons unlawfully occupying reserve lands, to punish those removing timber, hay, stone, soil, minerals, metals, or other valuables, and to direct surveys and the construction of roads, bridges , ditches and fences. . . .

"The above described provisions remain almost entirely unchanged to the present. The band council still has little power to control or administer reserve lands. Such power continues to be vested in the Minister of Indian Affairs. In some instances, the powers vested in the Minister of Indian Affairs have become more extensive or have become more detailed."

Paul Tennant, in a comment on Aboriginal rights and the 1983 Penner report (Boldt, 1993), notes the extent to which the federal policy on Indian government is at variance with Indian traditions and views:

"The source of the authority exercised by Indian governments established under the federal government policy was the British Canadian legal system. Each Indian government was created by federal officials under Parliamentary authority. Title to land was claimed for the Crown and Aboriginal title was flatly denied.

"The federal government's purpose in establishing Indian governments was to destroy traditional Indian political structure and practices that were based on a belief in the collective Aboriginal community. The federal government also intended to undermine the authority and prestige of Aboriginal leaders, thereby facilitating control over Indian communities by the agents of the dominant society. No allowance was made for traditional Indian social organization or any other organization of Indian choosing.

"The powers granted to Indian governments were both delegated and limited in scope, and the exercise of these powers was subject to the control of the federal government. Indians could never expect to achieve the full range of powers they had exercised in their communities before contact with the colonizers. Indian government was limited to the individual band, whose membership was defined and assigned under Parliamentary authority. Autonomy was non-existent because Indian communities were totally financially dependent on the federal government.

"The structures of band government were copied from the municipal mode. A chief and a council, equivalent to a mayor and aldermen, were to be elected by adult suffrage. Each adult was to have the right to seek elective office. Political equality, elections, and access to public office are central tenets of individualistic philosophies. When applied to the Aboriginal community setting, these ideas undermined traditions of individual obligation and accountability to the community and subverted the notion that political power is best exercised by elders having exceptional wisdom and experience. Moreover, in the Aboriginal communal setting the elective system promoted factionalism in the population, instability in leadership, and inconsistency in public policy."

The Hawthorn Report

The Indian Act has been regularly assailed for being paternalistic and colonial, even in some documents issued by the Department of Indian Affairs (INAC 1990). However, efforts to repeal the Act have been strongly opposed because of the consistent desire of Indians to resist assimilation and to maintain the special status which they enjoy by virtue of their original occupation of the country; their treaties; the Constitution; and, ironically, the Indian Act itself.

The Hawthorn Report of 1966 summed up this view with its recommendation that: "Indians should be regarded as 'citizens plus"; in addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Indian community."

This report was commissioned by the Indian Affairs Branch and prepared by a team of non-Aboriginal researchers and academics. It was the most comprehensive review of questions relating to federal policy towards Indians until the Penner Report of 1983. The Hawthorn Report dealt at length with the concept of Indian status and with the underlying foundations for Indian rights. Many of its comments remain pertinent today, despite the increased recognition of Aboriginal rights both in the constitution and through jurisprudence.

The report argued that there was a great deal of flexibility available to the federal government in determining the nature of the special relationship of Indians to governments, and that the Indian Act represents a role voluntarily assumed by the federal government rather than a constitutional obligation. The major exception that it found to this rule was the federal responsibility for Indian lands, which is mandated by the treaties.

The report concluded that while the basic source for defining federal policy toward the Indian people lies in the Indian Act, many of the consequences which governments have attached to Indian status have been the results of policy. It should be noted that despite this finding of fact, the report offered a very generous vision of the future place of Indians and of the role of the then Indian Affairs Branch, which it said should engage in "persistent advocacy" for Indian needs.

The report recognized the Indian perception of the treaties as basic to their self-identity, and the discrepancy between this view and the relative unimportance of the treaties as determinants of government policy. However, it concludes: "It is worth repeating that the rights and privileges guaranteed by treaty to some Indians are insignificant in relation to both Indian needs and the positive role played by modern governments. The economic base of Indian existence will continue to diverge from the traditional dependence on game, fish and fur, and reserve-centred activities. The claims of a socio-economic nature founded on treaties are generally unimportant when contrasted with the role which governments have assumed for the non-Indian population."

Many areas of Indian policy were not covered by the treaties, the report suggested, including economic development, local government, health and welfare services, and much of education policy. "In essence, the situation is that with only minor exceptions, federal policy cannot be derived from the treaties. Indian status, therefore, even for treaty Indians is largely derived from the Indian Act rather than from the treaties."

Pursuing its argument, the report rejected the view that the federal government is exclusively responsible for legislation affecting the lives of Indians on a reserve. Federal involvement had been a matter of policy, but most of the important functions that had been undertaken by the federal government " . . . are not inevitable developments from treaty or constitutional considerations . . . and could have been performed by the provinces."

" . . . there is a remarkable degree of potential flexibility or "play" in the roles which have been and in the future could be assumed by either level of government. For the entire history of Indian administration this play has been exploited to the disadvantage of the Indian. The special status of the Indian people has been used as a justification for providing them with services inferior to those available to the Whites who established residence in the country which once was theirs . . . "

The Hawthorn report also discussed a number of issues arising from the distinctive features of Indian community governments based on their unconventional legal status and on the Indian Act. This discussion bears directly on the issue of Indian status, since so many of the rights and constraints related to status are collective rather than individual and relate directly to Indian communities. Table I sets out a comparison between Indian and non-Indian communities, based on the report.

TABLE I:
INDIAN VS. NON-INDIAN COMMUNITIES AS SEEN IN THE HAWTHORN REPORT

INDIAN RESERVE COMMUNITY	NON-INDIAN COMMUNITY
Individuals as band members	Individuals as individual citizens.
Membership in community stable and has a legal basis.	Membership in community is voluntary and conditional even if maintained over a long period.
Electors must be status Indians and/or band members	Any resident Canadian citizen may be an elector.
Difficult to dissociate from community because of band membership, tribal identity, kinship, and shared ownership of community assets.	Relatively easy to dissociate, usually by moving to a new community.
Communal use of land	Individual ownership and use of land
Possession and use of property restricted because of communal ownership of land.	Most property is part of a free market
Corporations may lease but may not own land.	Corporations and other legal persons have same property rights as individuals.
Band holds communal assets for on- and off-reserve members in addition to function as local government.	Exclusive local government function.
Most programs paid through federal funding; Local taxation on reserve limited and often non-existent.	Programs primarily financed through local property and other taxes and through provincial grants.

From today's perspective, the Hawthorn report was remarkably far-sighted in discussing the problems of band governance, when one considers the rudimentary state of band councils 30 years ago and the degree to which they were under federal control at that time. The report explored problems such as the potential for conflict between band responsibilities to on- and to off-reserve members; the difficulty of defining eligibility to vote in band council elections, particularly if band members are working away from their reserve purely for economic reasons; the problems of effective service delivery in small, impoverished communities; and the degree of autonomy that can be exercised by small local governments.

In its conclusions on local government, the Hawthorn Report argued that it is at the local level that the administrative and political consequences of Indian status have had their greatest impact. It goes on to suggest that the future development of local Indian self government should proceed through an approach that combines revisions to the Indian Act with the framework of local government already in place in the provinces.

It noted that "the small size of many Indian communities, their poverty, and the absence of developed administrative structures constitute basic limiting factors which preclude a high degree of local control." However, the barriers to greater local control "do not lie in legal or constitutional restraints, but in endemic socio-economic factors in their community existence."

The report noted that certain services such as education, welfare, and roads must be of a certain size for efficient delivery, but suggests that this need can be met by developing unique models suited to native needs. The task of self government "may be facilitated if it is remembered that the goal is not necessarily a stereotyped model of government which prevails in the textbooks, but the devising of instrumentalities to allow groups of people both large and small, the degree of flexibility that is possible."

Many of the problems which the report outlined apply equally to non-Indian communities. As Hawthorn noted, the northern parts of most provinces are not even municipally organized. Hence, if Indian communities were to be placed within the framework of local government at the provincial level, they would experience no increment of self government from the change.

As a principle, the report recommended that Indian bands be treated as municipalities for the purposes of all provincial and federal Acts which provide grants except where that would conflict with the provisions of s. 87 of the Indian Act "or is unacceptable to the band involved." Indians should not be required to give up their special community status for the sake of equal treatment under these programs of general application. The report suggests Indian governments could benefit from application of relevant provincial legislation to the extent this is compatible with special reserve status, and calls for elimination of the "pervasive attitude of mind that Indian communities fall outside the ambit of the normal operations of provincial departments because of an alleged special link with Ottawa which precludes provincial involvement. "

1969 White Paper

The Hawthorn report was careful to recommend that Indian communities not be required to give up their special status in order to benefit from provincial programs for local governments. Its exploration of the issue, however, was one of the strands that led to the federal government's 1969 White Paper, officially titled Statement of the Government of Canada on Indian Policy.

The White Paper proposed to repeal the Indian Act, to withdraw the special status of Indians, to disband the Department of Indian Affairs, and to place Indians on a basis of equality with other Canadians. It called for a transfer of reserve lands to Indian ownership and for a rapid withdrawal of federal involvement from the lives of Indians. As noted below, this approach was quickly rejected by Indians and by Indian leaders.

Although the White Paper policy was withdrawn less than a year after it was announced, it is notable both for its efforts to do away with special status for Indians and also for its argument, echoing the Hawthorn report, that the treaties have only limited importance.

The White Paper's approach is summed up in this introductory passage: "Special treatment has made of the Indians a community disadvantaged and apart. Obviously, the course of history must be changed. To be an Indian must be to be free - free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians."

The Paper envisaged legal equality as meaning a state of rights that would be the same as other Canadians - no more and no less. To this end it proposed removing the legislative and constitutional bases of discrimination, specifically the Indian Act and the special status of Indian lands. To argue against the right of full and equal participation "is to argue for discrimination, isolation and separation," it said. "No Canadian should be excluded from participation in community life, and none should expect to withdraw and still enjoy the benefits that flow to those who participate."

The government's 1969 proposals included an insistence that services "must come through the same channels and from the same government agencies for all Canadians." The White Paper continued: "This is an undeniable part of equality. It has been shown many times that separation of people follows from separate services. There can be no argument about the principle of common services. It is right."

Continuing this argument, the White Paper stated: "The government believes that services should be available on an equitable basis, except for temporary differentiation based on need. Services ought not to flow from separate agencies established to serve particular groups, especially not to groups that are identified ethnically.

"Separate but equal services do not provide truly equal treatment. Treatment has not been equal in the case of Indians and their communities. Many services require a wide range of facilities which cannot be duplicated by separate agencies. Others must be integral to the complex systems of community and regional life and cannot be matched on a small scale.

"The government is therefore convinced that the traditional method of providing separate services to Indians must be ended. All Indians should have access to all programs and services of all levels of government equally with other Canadians."

With respect to treaties, the White Paper goes to great lengths to minimize the federal government's obligations, using arguments similar to those of the Hawthorn report. It maintains that the government has for the most part met its basic obligations under the treaties, i.e. the payment of annuities and the provision of reserve lands.

"The terms and effects of the treaties between the Indian people and the government are widely misunderstood." the White Paper says. "A plain reading of

the words used in the treaties reveals the limited and minimal promises that were included in them."

"The significance of the treaties in meeting the economic, educational, health and welfare needs of the Indian people has always been limited and will continue to decline. The services that have been provided go far beyond what could have been foreseen by those who signed the treaties."

The White Paper sees treaties as an anomaly and speaks of a future review to see how the treaties "can be equitably ended." It is equally dismissive of Aboriginal claims to land, which it contends are so general and undefined that they can only be satisfied through a general policy - i.e. the White Paper's proposals - that will end injustice to Indians as members of the Canadian community.

The White Paper's criticism of the concept of "separate but equal" services has its roots in the thinking of the 1960s and in particular, in the thinking of the American civil rights movement. Today, the concept of services tailored to the needs of special groups on the basis of ethnicity, age, gender, religion, or economic status has become common in many Canadian communities. The experience is that these initiatives can lead to empowerment and to the creation of more appropriate, more effective services in cases where the particular community a) takes control b) has adequate resources c) is not ghettoized or excluded from access to those services provided for the mainstream population.

"Citizens' Plus"

The galvanizing effect of the White Paper on Indians and on their leaders has been extensively recorded (Weaver; Cardinal; Tennant). The government's new policy came as a bombshell because there had been no advance warning; during the process of consultation that preceded the White Paper, which involved the then minister, Hon. Jean Chretien, as well as DIAND officials, Indians had proposed improving the Indian Act rather than ending it.

The general reaction of Indians is reflected in Citizens Plus, also known as the Red Paper. This statement originated with the Indian Chiefs of Alberta, of which Harold Cardinal was then president, and was subsequently adopted by the National Indian Brotherhood as its response to the government's White Paper.

"What Indians asked for land ownership that would result in Provincial taxation of our reserves?" the Red Paper asked. "What Indians asked that the Canadian Constitution be changed to remove any reference to Indians or Indian lands? What Indians asked that Treaties be brought to an end? What group of Indians asked that Aboriginal rights not be recognized? What group of Indians asked for a [Treaty] Commissioner whose purview would exclude half the Indian population in Canada? The answer is no Treaty Indians asked for any of these things and yet through his concept of "consultation", the Minister said that his White Paper was in response to things said by Indians."

In their statement, the Alberta chiefs spoke directly to the issue of status and rejected the federal government's declaration that the legislative and constitutional bases of discrimination should be removed.

"We say that the recognition of Indian status is essential for justice," they said. "Retaining the legal status of Indians is necessary if Indians are to be treated justly. Justice requires that the special history, rights and circumstances of Indian people be recognized. . . The legal definition of registered Indians must remain. . . . We believe that to be a good useful Canadian we must first be a good, happy and productive Indian."

The Red Paper also took issue with the White Paper's call for positive recognition of the unique contribution of Indian culture to Canadian culture. "We say that these are nice sounding words which are intended to mislead everybody. The only way to maintain our culture is for us to remain as Indians. To preserve our culture it is necessary to preserve our status, rights, lands and traditions. Our treaties are the bases of our rights."

Like other items in the literature dealing with status, the Red Paper dealt mainly with issues of principle rather than detail. Its primary purpose was to lay out a counter-policy to the federal government proposals to do away with any special responsibility for Indians. To this, the Chiefs contended that the federal government was bound to accept legislative responsibility for Indians both by the Constitution and by the treaties. They said the federal government's treaty obligations included the provision of reserves; assistance in the social, economic and cultural development of Indians; provision of health and education services to Indian people "at the expense of the federal government"; and "the right of the Indian people to hunt, trap and fish for their livelihood free of government interference and regulation and subject only to the proviso that the exercise of this right must not interfere with the use and enjoyment of private property."

The Chiefs agreed with the White Paper proposal that Indian people should control Indian lands, but opposed any system of allotment that would give individuals ownership with the right to sell. They advised that the Indian Act could be changed to give Indians control of lands, without removing the trust status that now governs the title.

"Indian lands must continue to be regarded in a different manner than other lands in Canada," the Chiefs said. "It must be held forever in trust of the Crown because, as we say, "the true owners of the land are not yet born."

The Chiefs criticised the Indian Act for its paternalism, but rejected the government's proposal that the Act be repealed. This was neither possible nor desirable, they said, because of the Act's importance in providing for Indian people the legal framework that federal and provincial statutes provide for other Canadians. They called instead for review of the Act and for its reform.

The Red Paper also calls for reform of the Indian Affairs Branch - now Indian and Northern Affairs Canada - rather than its elimination. Quoting the Hawthorn report, they recommended that: "The Indian Affairs Branch should act as a national conscience to see that social and economic equality is achieved between Indians and Whites. This role includes the persistent advocacy of Indian needs, the persistent exposure of shortcomings in the government treatment that Indians receive and the persistent removal of ethnic tensions between Indians and Whites."

Harold Cardinal was president of the Indian Chiefs of Alberta at the time of the 1969 White Paper. Writing in 1977, he recalled how Indians felt betrayed by the government's pre-1969 consultations and the way in which the government White Paper gave Indians a cause around which to unite.

There were misconceptions in Indian communities over what was in the Indian Act, according to Cardinal. The Act permitted provincial intrusion and it did not protect hunting and fishing or treaty rights as some Indians supposed, but there was fear among Indians that to change the Act would be to wipe out the treaties.

"Many Indian leaders have held that the Indian Act must be drastically changed," he wrote, "but after widespread discussion, the consensus reached in 1970 was that we must first consider general policy areas, particularly land claim settlements, treaties and aboriginal rights."

Weaver (1981) and Dyck (1991) also note the emergence of this priority among Indian leaders. Its effect was to put incremental changes to the Indian Act that might affect issues of status on the back burner, during the 1970s and the 1980s.

A 1974 review of the Indian Act by the Indian Association of Alberta did lead to draft legislation in 1975 but was not followed through. According to Cardinal, the provisions of this draft included regular decennial review of the Act by Indians and the creation of a special Indian branch of the Federal Court to adjudicate issues relating to Indians, with appeals to the Supreme Court of Canada. Another set of revisions to the Act was brought forward in the last months of the Trudeau government in 1984, too late to be considered by Parliament. Major revisions to the membership provisions of the Act were enacted with the adoption of Bill C-31 in 1985. These changes removed the discrimination in the Act against Indian women who married non-Indians, and came as a result of the Lovelace referral to the United Nations and of the adoption of equality provisions of the Charter of Rights. As noted in the main paper, Bill C-31 also gave Indian bands the power to determine their own membership lists under Canadian law, for the first time.

Penner Report

The 1983 report of the Special Committee of the House of Commons on Indian Self-Government, known as the Penner Report after its chairman, was a high water mark for official recognition of Indian rights and self government up to the Charlottetown Accord. This report focused on framework issues and therefore did not deal directly with issues of status.

The Committee held extensive hearings, however, and its report documents many of the problems which Indian communities experienced because of their arrangements for special status under the Indian Act. These included administrative problems involved with funding and oversight by the Indian Affairs bureaucracy; the federal government's failure to respect the sovereignty and integrity of reserves; and the amount of federal control over band councils.

The special committee recommended against using the Indian Act as a route to self-government. It proposed a more flexible legislative arrangement which

involved recognition of the jurisdiction of Indian governments rather than a delegation of powers. With respect to the definition of status, the committee recommended that registration under the Indian Act be equivalent to registration on a general list, while band membership should be a decision of the community rather than of the department. This distinction between band membership and registered status became a reality when Bill C-31 permitted bands to establish their own membership codes in 1985.

Nielsen Report

A final document that touches on issues of status is the 1985 Task Force on Program Review headed by Eric Nielsen, then a senior minister in the Conservative government. The Nielsen Report volume on Indians and Natives is a 522-page review of all federal programs for Aboriginal people including Metis, Inuit and non-status Indians. Most of its recommendations deal with improving the effectiveness of these programs by eliminating duplication, transferring responsibilities, cutting costs and changing program focus.

The report echoes the earlier findings of the Hawthorn Report and of the 1969 White Paper in concluding that most federal spending on status Indians is discretionary or is used to provide services of a provincial or municipal nature that have come, by convention, to be considered as though they were rights. It estimated that only 25% of the federal spending on status Indians and Inuit can be directly attributed to federal obligations under the treaties or the Indian Act.

The report questions the federal policy of providing a complete range of services to all reserves as though it were a right, regardless of need. It said that the standards used for services being provided to northern Indian communities were too high, and that the model of local government used by INAC was inappropriate and not suited to the scale of Indian communities.

Echoing many other critics, the Nielson report delivered this judgment: "The existing framework of federal policy in native affairs is inconsistent, uncoordinated and, in too many cases, rooted in the anachronisms of the Indian Act. . . . A large number of revisions (to the Act) are required and . . . a piecemeal approach will likely condemn Indian people to further decades of social and economic inertia." For the purposes of this paper, the primary importance of the Nielsen report is to provide further evidence of the disadvantages of status for Indian communities. Its judgments are reflected in the compendium in Working Paper I.

Royal Commission on Aboriginal Peoples

Close to 2,000 intervenors appeared at the hearings of the Royal Commission on Aboriginal Peoples. Their comments covered every aspect of Aboriginal life, ranging from passionate denunciation of the Indian Act to heartrending testimony about the need for healing in their communities. A number of intervenors put forward detailed proposals for self-government and for new models of governance.

The priorities that Aboriginal people have expressed over the past 25 years were reflected at the hearings in the concern expressed over self-government, the settlement of land claims and the constitutional recognition of Aboriginal rights.

These concerns were balanced, however, by intervenors who focused on the need for improvements in local services, more local control, and more adequate funding. the hearings of the Royal Commission on Aboriginal Peoples. Their comments covered every aspect of Aboriginal life, ranging from passionate denunciation of the Indian Act to heartrending testimony about the need for healing in their communities. A number of intervenors put forward detailed proposals for self-government and for new models of governance.

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In its final presentation, the Assembly of First Nations dealt with some issues related to status, but not in the context of the Indian Act. Its primary focus was on the framework issues of self-government, land claims and inherent rights.

The AFN recommended that the Indian Act be phased out and that the transition to self-determination be made a top priority for all governments in Canada. It called for the right of First Nations to determine and control their citizenship, in place of the government determination of citizenship provided under the Indian Act. Among other proposals, the AFN recommended that the inherent Aboriginal rights to hunt, fish, and trap take precedence over other third party interests and that these rights extend to commercial activities as well as subsistence.

The AFN did not specify what legislation, if any, should replace the Indian Act or what provision should be extended to status Indians living away from their reserve. The Native Council of Canada, representing non-status and urban Indians, did address these issues. In its submission the NCC also recommended repeal of the Indian Act and its replacement with an Aboriginal Authorities Act that would provide legislative recognition of non-Indian Act communities. The NCC made equity of access the cornerstone of its proposals, as a means of ensuring that non-status Indians and their communities have the same access to government services as registered Indians and Indian reserve communities.

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APPENDIX E

Major Provisions of the Indian Act

Provision	Comments
Register: The Act provides for the appointment of an Indian Registrar and maintenance of an Indian Register in the Department to record the names of all registered (or status) Indians. (S. 2, 5)	Bands now have the option to establish their own membership system, independent of the Indian Act system of determining band lists on the basis of status.
Determination of Status: The Act sets out rules for determining status for entry in the Indian register, including the additional gender equality provisions adopted through Bill C-31.	S. 5 to 7 establish the register and set out the qualifications for entitlement to status.
Band membership: The 1985 amendments created a two-track system for determining band membership: - Band lists maintained by INAC based on the Indian Register's list of status Indians; - Band lists maintained by a band which has established own membership rules and won approval for them from its electors.	S. 8 to 14 set out the procedure for both kinds of band membership and establish a procedure for individuals or communities to object to names being included or omitted from the Indian Register.
New bands: S. 17 gives the Minister the power to amalgamate bands (on their request) or to constitute new bands.	The deletion or addition of names from band lists as a result of this section cannot be appealed under S. 14.
Power over reserves: S. 18 and 19 give Cabinet and the Minister wide powers over land use on reserves, including the power to divide a reserves into lots or subdivisions and to determine compensation for lands taken for community purposes.	S. 18 also confirms the right of a band member living on a reserve to have his children or other children who are in his custody live with him.
Land tenure on reserves: The Act establishes a land tenure system on reserves based on collective use rather than individual ownership. It provides for Certificates of Possession, and for a Register of Reserve Lands to be maintained by INAC. S.20-27.	S. 20 allows band councils to allocate land but provides for Ministerial approval and INAC administration of the certificate system.
Protection of reserve land: S. 28 prohibits any agreement to allow a non-member of a band to live on a reserve or use part of a reserve. S. 29 protects reserve lands from seizure under legal process. This protects reserve territory from being taken over by non-Aboriginal creditors, but also inhibits the use of reserve land as security for economic development. S. 89 and 90 prohibit the use of any mortgage or charge on reserve property, except if it is held by an Indian or a band.	S. 28 would apply to a status Indian who is not a band member. It can be waived with consent both from the band council and the Minister. Since an "Indian" is defined by the Act as being a status Indian, S. 89 might affect a band member who does not have status.

Provision	Comments
Trespass on reserve: S. 30 provides penalties against anyone who trespasses on a reserve.	The concept of trespass applies to private property in non-Aboriginal communities, but not to the community as a whole.
Sale of produce: S. 32 restricts any sale of farm produce or livestock from a Prairie reserve except with the Minister's consent.	This section reflects the pre-1951 Indian Act which gave Ministerial powers over every aspect of Indian life.
Management of reserve land: S. 34-41 provide a means for non-Indian use of reserve lands through a process of surrender to the Crown. S. 53-60 give the Minister power to manage Indian lands and resources used for economic development by persons other than band members.	Band council consent is required for surrenders and for the use of reserve land, but many of these powers can be exercised by the Minister with little or no reference to the band.
Management of Indian moneys: S. 61 to 69 establish a regime for the management of Indian moneys which also involves very substantial control by the Minister.	Indian moneys are to be held in the Consolidated Revenue Fund at interest rates set by Cabinet. Any use of capital or revenue moneys requires the Minister's consent and is very time-consuming in practice.
Estates, wills and guardianship: S. 42 to 52 create a regime to be administered by the Department for dealing with estates, wills, guardianship, mental incompetency, and minors where the persons involved are Indians on reserves.	These powers are exercised by the provinces for non-Indians. Since most Indians die intestate, these sections give the Minister, rather than the community, the power of decision over many Indians' estates.
Treaty money: S. 72 authorizes the payment of treaty money to Indians or Indian bands out of the Consolidated Revenue Fund.	
Ministerial regulations: S. 73 authorizes the federal cabinet to unilaterally make regulations governing such local matters on reserves as speed limits, dog control, and the regulation of pool halls and dance halls.	This power also includes authority to provide medical treatment and health services for Indians.
Band Council Elections: S. 74-80 give the Minister powers to supervise Band Council elections and establish the term (two years) and structure of Band Councils,	Under S. 2, band councils may be selected by "band custom" according to local rules which, once adopted by the community, are exempt from the Minister's scrutiny. About 40% of Indian bands have this form of governance.
Voting rights for band councils: S. 77 restricts voting in Band Council elections to band members who are "ordinarily resident" on the reserve. This excludes band members living off reserve, even if they are active members of the community.	The restriction on voting by off-reserve members does not necessarily apply to band custom elections.
Powers of band councils: S. 81, 83 and 85 set out the areas in which band councils have authority to pass by-laws. Some of these powers overlap those granted the federal Cabinet in S. 73.	Band council powers extend from the regulation of bee-keeping to such municipal functions as water supply, zoning, and building standards.

Provision	Comments
Ministerial disallowance: Under S.82, almost all band council bylaws are subject to being disallowed by the Minister within 40 days of their being forwarded to the Department.	By-laws relating to liquor sales and intoxication must be approved by a special meeting of the band but do not require approval of the Minister.
Taxation: S. 83 confirms the power of band councils to collect local property taxes both from non-Aboriginal users of reserve property and from Indian residents. S. 87 confirms the exemption of Indians and Indian bands from any taxation on reserve except that applied under S. 83.	This is the basis for the exemption of Indians from sales and income taxes provided that income is earned on reserve and that goods subject to tax are bought on reserve or delivered to a reserve. Corporations cannot be registered Indians and are therefore not exempt from tax even if they operate on a reserve.
Application of provincial laws: S. 88 provides for provincial laws of general application to apply to status Indians even if they are on a reserve, except if they conflict with the Indian Act and related regulations.	
Miscellaneous: S. 91 to 108 deal with a variety of minor issues including Indian artifacts and the legal measures needed to enforce provisions of the Act.	
Education: S. 114 to 122 empower the Minister to establish and operate schools for Indian children or to enter into agreements for Indian schooling with provincial governments, local school boards, churches or charities. The Act makes no provision for Indian control of schooling.	Band councils now operate schools for close to half the Indian pupils living on reserves.