

**FUTURE ISSUES OF JURISDICTION  
AND COORDINATION BETWEEN ABORIGINAL  
AND NON-ABORIGINAL GOVERNMENTS**

*Ian B. Cowie*

Institute of  
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Kingston, Ontario

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## PREFACE

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Section 37 of the *Constitution Act, 1982* (as amended) requires the holding of a series of conferences by 1987 to deal with "constitutional matters that directly affect the aboriginal peoples of Canada." Discussion leading up to and during the First Ministers' Conferences on Aboriginal Constitutional Matters quickly focussed on the task of making constitutional provisions for aboriginal self-government. Many involved in the process openly questioned the meaning of "aboriginal self-government".

In view of the importance of this subject, in May of 1984 the Institute of Intergovernmental Relations launched a research project on "Aboriginal Peoples and Constitutional Reform". Phase One of the project responded to concerns that emerged at the outset of the constitutional negotiating process. As indicated by its title, "Aboriginal Self-Government: What Does It Mean?", Phase One examined various models, forms and proposals for aboriginal self-government. This included an exploration of the citizenship rights of aboriginal peoples, the experience of aboriginal self-government in other nations, and a review of Canadian developments over the past few years. The results of these investigations were compared to the positions taken by parties to the constitutional negotiations, in an effort to identify areas of emerging conflict and consensus. These findings were elaborated in five Background Papers, a Discussion Paper and a Workshop, which was held two months prior to the 1985 First Ministers' Conference (FMC).

Developments in 1985, subsequent to the first Ministers' Conference, may have a dramatic impact on the constitutional negotiation process. At a meeting of government ministers and aboriginal leaders held in June, 1985, several governments indicated their intention to pursue the negotiation of individual self-government agreements, and then to consider their entrenchment in the constitution (the "bottom-up" approach). This contrasts with the proposal, which has thus far dominated discussions, to entrench the right to aboriginal self-government in the constitution, and then to negotiate individual

identifies sectors where self-government arrangements might be concluded, and outlines the current occupation of those sectors by federal and provincial governments. In conclusion, Mr. Cowie offers some suggestions for managing difficulties which may arise in the process of negotiating and implementing aboriginal self-government agreements.

Ian B. Cowie heads his own firm of management consultants in Ottawa, and has held senior executive positions in the field of aboriginal affairs with the federal and Saskatchewan governments.

David C. Hawkes  
Associate Director  
Institute of Intergovernmental Relations  
January, 1987

## ABSTRACT

This paper focusses on issues relating to jurisdictional interface and policy coordination between aboriginal and non-aboriginal governments. Aboriginal self-government is defined as the negotiation of a defined level of jurisdiction or control to be exercised either exclusively or on a shared basis, with either aboriginal and/or non-aboriginal governments, within a broad or narrow range of jurisdictional sectors. Following a section which places the issue in its historical and political context, the study identifies jurisdictional sectors and sub-sectors which might be discussed in negotiations, and describes a prototypical negotiation process. A third section outlines current federal and provincial occupation of the jurisdictional sectors identified.

Reviewing the constitutional and legal basis for the recognition of aboriginal self-government, the paper argues that the federal government has significant authority to delegate unencumbered jurisdiction to aboriginal governments, replacing provincial laws of general application. In the current situation however, with many provinces involved in service delivery to aboriginal peoples, practical considerations dictate that the provinces should be involved in negotiations. While jurisdictional overlap should not occur where aboriginal governments are validly enacted, the paper recommends the establishment of a planning and review body. This body could defuse potential conflicts and act as a clearing house for cooperative study and action on issues that cut across regulatory authorities and/or legislative jurisdictions of aboriginal, municipal, provincial and federal governments.

## SOMMAIRE

*Cette étude traite de la question d'interaction judiciaire et de coordination des lignes de conduite entre les gouvernements autochtones et non-autochtones. On décrit l'autonomie politique autochtone comme la négociation d'un niveau de juridiction ou de contrôle déterminé devant être exercé soit exclusivement ou de façon partagée avec un gouvernement autochtone et/ou non autochtone, à l'intérieur d'un champ large ou restreint de secteurs judiciaires.*

*Après une section mettant la question dans son contexte historique et politique, l'étude identifie des secteurs judiciaires pouvant être discutés lors des négociations et elle décrit un procédé prototypique de négociations. Dans une troisième section sont tracées les grandes lignes de l'occupation fédérale et provinciale courante dans les secteurs judiciaires identifiés.*

*En revisant la base constitutionnelle et légale pour la considération d'une autonomie politique autochtone, l'étude maintient que le*

## INTRODUCTION

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This paper is based on the assumption that Aboriginal Self-Government will be reflected or "entrenched" in some form in the Canadian Constitution, either at the upcoming 1987 First Ministers' Conference on Aboriginal Constitutional matters or sometime thereafter.

The purpose of the paper is to focus on issues in relation to the future interface, overlap and duplication of jurisdictions between Aboriginal and non-Aboriginal governments. Assuming constitutional reference or entrenchment, the paper seeks to identify the nature and extent of jurisdictional issues and the related requirements for policy coordination that might arise, and how difficulties that might be encountered in these areas can be minimized and best managed.

As will become apparent in the body of the paper, there is at present a lack of precision in relation to the nature and content of a constitutional amendment that might prove acceptable to a sufficient number of the government and Aboriginal participants in the constitutional process. More importantly, little consideration has been given to date to the nature and extent of self-governing capacities that might ultimately be exercised by different forms of Aboriginal self-government. For these reasons, much of this paper is inherently speculative and can only provide general answers to the questions identified, rather than specific responses at this stage. It does not attempt to review in detail all alternative models for the structuring of self-government capacities for either a particular aboriginal people or between different aboriginal peoples.

It should also be noted that the report focusses more specifically on the issues and approaches pertaining to the land based Status Indians population, as opposed to the more limited experience with the Métis and the Inuit. The issues involved are, to a large extent, common to all three aboriginal peoples, although they present themselves more fundamentally and with more clarity at the present time in relation to the Status Indian population.

## 1 BACKGROUND AND CONTEXT

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### (1) The Constitution and Aboriginal Self-Government

The background to and present status of constitutional discussions dealing with Aboriginal constitutional matters, and specifically self-government, have been comprehensively detailed in the other publications of the Institute of Intergovernmental Relations in its series "Aboriginal Peoples and Constitutional Reform". The present chapter will highlight some of the factors of particular relevance to a consideration of the issue of future jurisdictional interface.

#### *Constitution Act, 1982*

The patriation of the Canadian constitution in 1982 saw the insertion of a number of general provisions pertaining to the Aboriginal peoples of Canada (defined as encompassing Indian, Inuit and Métis), including the recognition and affirmation of their Treaty and Aboriginal Rights. Given that those general rights were not specifically defined, section 37 of the *Constitution Act, 1982* (as amended) provided for a series of First Ministers' Conferences directed to the identification and definition of the rights of Aboriginal peoples. The 1987 Conference is to be the last under the present provisions.

#### *1985 First Ministers' Conference (FMC)*

Notwithstanding the broad scope of the agenda adopted at the 1983 FMC, discussions occurring at and prior to each of the 1984 and 1985 First Ministers' Conferences were increasingly dominated by the issue of Aboriginal self-government, and in the case of the Métis, self-government and land.

The 1985 First Ministers' Conference came close to reaching agreement on a proposed Constitutional Accord on Aboriginal self-government. Support of the necessary number of provinces to effect

## *Developments Since the 1985 FMC*

The 1985 FMC, although it failed to produce constitutional amendments respecting Aboriginal self-government, nevertheless produced a climate for positive action by several governments and groups of Aboriginal peoples. In a meeting of Ministers and Aboriginal peoples held June 19, 1985, several governments, including the federal government, Ontario, and Manitoba, indicated an intention to act in accordance with the spirit and general content of the proposed accord, and to commence regional and community-based negotiations with those Aboriginal groups that expressed interest. Such discussions are now underway or pending in various forms in the Provinces of Ontario, Manitoba and Saskatchewan.

### *Regional Community-Based Negotiations*

The constitutionally derived regional self-government processes presently underway include the following:

#### **Métis Self-Government Negotiations**

##### *Saskatchewan:*

Discussions involving the federal and provincial governments and the Association of Métis and Non-Status Indians of Saskatchewan (AMNSIS) were the first to commence. Working groups are now examining a broad range of specific areas and initiatives including land, urban Métis "autonomy", education, training and job creation issues, and economic development strategy and issues.

##### *Manitoba:*

Agreement has been reached to commence discussions with the Manitoba Métis Federation. Discussions are focussing initially on the areas of housing and education.

##### *Ontario:*

Preliminary discussions have been held on a process of negotiation to involve "Off Reserve" Aboriginal peoples, (i.e. all Aboriginal peoples not presently residing on a "Reserve" Land Base).

#### **Indian Self-Government Negotiations**

##### *British Columbia:*

Legislation for the Sechelt Indian Band has been enacted and proclaimed. The product of over seven years of negotiations, this



"The government of Canada and the provincial governments are committed, to the extent that each has authority, to

(a) participating in negotiations directed toward concluding, with representatives of aboriginal people living in particular communities or regions, agreements relating to self-government that are appropriate to the particular circumstances of those people; and

(b) discussing with representatives of aboriginal people from each province the timing, nature and scope of the negotiations referred to in paragraph (a)."<sup>1</sup>

The essential difference between the two accords was whether governments would constitutionally assure the commitment to negotiate (federal proposal) or reflect that commitment in an accompanying political accord (Saskatchewan proposal).

One of the central points of commonality between the two proposals was that negotiation aimed at yielding self-government agreements appropriate to the particular circumstances of the group in question would be required. Amongst the areas listed as negotiable were:

"The negotiations referred to in article 2 of this Accord may address any appropriate matter relating to self-government including, among other matters,

- (a) membership in the group of aboriginal people concerned;
- (b) the nature and powers of the institutions of self-government;
- (c) responsibilities of, and programs and services to be provided by, the institutions of self-government;
- (d) the definition of the geographic areas over which the institutions of self-government will have jurisdiction;
- (e) resources to which the institutions of self-government will have access;
- (f) fiscal arrangements and other bases of economic support for the institutions of self-government; and
- (g) distinct rights for the aboriginal people concerned."<sup>2</sup>

### *Métis Self-Government Aspirations*

At the same time and in response to their recognition as one of the Aboriginal peoples of Canada in the provisions of the constitution, the Métis focussed their demands in the form of proposals for self-government and land. This development occurred notwithstanding the major differences that exist between the Métis and Indian people in relation to history, legal status, and land base.

Regional based self-government negotiations with the Métis in Saskatchewan and Manitoba commenced relatively quickly after the 1985 FMC. With the exception of the Métis settlements in Alberta, and unlike the Indian experience, there is almost no modern history of government initiatives in respect of Métis self-government prior to that recently taken in the constitutional process. The Métis leadership, which is both pragmatic and decentralized in structure, is taking advantage of current opportunities to try to negotiate new arrangements. Progress to date has been extremely limited.

### *Inuit Self-Government Aspirations*

Beyond the regional self-government arrangements (Kativik) flowing from the James Bay and Northern Quebec Agreement, Inuit self-government aspirations have found their primary focus in the land claims negotiations, essentially completed in the western Arctic, and underway in the central and eastern Arctic and Labrador. The major proposal "Nunavut" calls for non-ethnic public government structures and approaches, in the context of the proposed division of the present Northwest Territories. At the constitutional level, the Inuit have pressed for a constitutional recognition of the right to self-government, together with a constitutional obligation on governments to negotiate.

### *Situation Prior to Constitutional Discussions*

Prior to self-government becoming the priority for all Aboriginal peoples in the ongoing constitutional discussions, little effective progress had been made in reconciling primarily Indian self-government demands against what governments were prepared to do.

This occurred, notwithstanding a number of attempts made on the part of the federal government to recognize new forms of Indian self-government over and above the form of band government recognized under the current Indian Act. Attempts were made through the late 70s and early 80s to effect change in the form of devolution proposals, proposals for enabling and framework legislation (Bill C-52), and proposals from the Special Parliamentary Committee on Indian Self-Government (the Penner Committee).

### **3. Suspicion of Government Initiatives/Policies**

Reaction to new government approaches and policies is often driven by a continuing sense of suspicion, and in many instances hostility, based on Indian experiences in dealing with governments in the past. The history of the negotiation and implementation of the Treaties, the 1969 White Paper, and most recently, the "Buffalo Jump of the 80s" (a reference to the Nielsen Study Team Report on Native programs), have tended to confirm the legitimacy of continuing Indian suspicion in this regard. Notwithstanding a number of attempts, from creation of a Cabinet-National Indian Brotherhood Consultative Process in the mid-1970s to Mr. Munro's "Joint Drafting" exercise with the Assembly of First Nations in the early 1980s, the federal government faces the problem of its past inability to broadly operationalize a concept of joint policy development involving Indian peoples.

### **4. Lack of Involvement of the Provinces**

There is considerable sensitivity on the part of many Indian peoples to the involvement of the provinces in anything pertaining to Indian self-government. Faced with the very considerable presence of provincial programs and expenditures on Status Indian people, it would appear that the provinces will have to be involved if any meaningful progress is to be made on the specifics of self-government over time.

### **5. Financial Implications of Moving to Self-Government**

Even if the general policy thrust were detailed and proved acceptable to Indian people, the reality of the present fiscal restraint environment creates major difficulties for federal and provincial government support of community-based models of self-government. Such community-based self-government will create diseconomies of scale in program design, delivery and associated infrastructure, which will require much higher levels of financial support if it is to ever become a reality. In addition, present federal programs on reserve are demonstrably inferior in standard to equivalent provincial programming. Appreciating this reality, many Indian leaders view federal government proposals to negotiate self-government and "alternative financial arrangements" as an attempt to abdicate

groups enter into constitutionally derived "regional or community-based self-government negotiations", associations are focussing on the need to develop frameworks and approaches which will allow for the identification and phasing in of self-governing capacities in accordance with the particular needs, aspirations and circumstances of the groups and communities involved.

A number of recent federal initiatives relating to self-government have been identified above, including Bill C-52 and the Cree-Naskapi and Sechelt legislation. While all have been premised on the identification of fields of jurisdiction and to some extent have dealt with some of the consequential jurisdictional interface issues, to date there has been no comprehensive and consistent framework to guide negotiations. Such a framework would provide some structural identification of the sectors of jurisdiction that need to be discussed, if not negotiated. It should not predetermine specifics, which can only be determined in negotiations designed to identify and accommodate particular needs and circumstances of given communities.

In general terms, the preoccupation with issues pertaining to principle and concept, while understandable and legitimate, has had the effect of seeing only minimal attention given to the process and substance needed to generate the specifics of acceptable definitions of self-governing capacities. Such definitions, when they are provided should have the capacity to accommodate the diversity of situation that exists across the country.

This paper attempts to outline such a general framework, as well as identifying some of the questions related to jurisdiction and policy coordination that will be encountered in its use.

Such a framework should reflect a working as opposed to a political definition of what self-government might involve. In this regard, it should be emphasized, that this paper does not attempt to answer or deal in any way with the arguments in relation to the basis of recognition of Aboriginal self-government for the future.

For the purposes of this paper, self-government is taken to mean *the negotiation of a defined level of jurisdiction or control to be exercised either exclusively, or on a shared basis, with either Aboriginal and/or Non-Aboriginal governments, within a broad or narrow range of "government" or jurisdictional sectors.* Description of the jurisdictional sectors potentially open for discussion follows in Chapter 2 of this paper.

#### **(4) Accommodating Diversity Among Aboriginal Peoples**

At least part of the difficulty encountered by governments in trying to understand and accept some working concepts of self-government has

- accommodation of collective and individual rights.

In short, when it comes down to specific negotiations it is clear that no matter what the agreed upon political departure points may ultimately be, there will be significant variation in their translation from province to province, region to region, community to community, and among the different Aboriginal peoples. In the same way as diversity dictates high levels of difference, there will also be identifiable points of commonality, as the results of specific sets of negotiations become available and are used, to the extent relevant, as guidance points for subsequent negotiations with other communities.

### **(5) The Self-Government Choices**

The diversity of Aboriginal peoples predictably generates the requirement for flexibility of choice. This in turn dictates the need for a broad range of "negotiable" self-government options open to individual communities or groups, ranging from measures which can be termed transitional in their nature to more fundamental and all encompassing options.

This requirement for flexibility exists between the different Aboriginal peoples, as well as within a given Aboriginal group.

This requirement of choice among a broad range of options appears to be reflected and permitted under the current federal policy approach as it relates to On-Reserve Status Indians. At this stage, it becomes difficult to anticipate in detail the self-government models that will emerge for those Aboriginal peoples without a land base, or for those such as the Inuit, who remain committed to adopting public non-ethnic forms of government. Because the On-Reserve Status Indian situation captures with most clarity the jurisdiction interface issues that will likely arise, the material that follows focusses on their situation. To a greater or lesser extent, the same options and considerations will be of relevance to the Métis and/or Inuit. Briefly described, the range of theoretical options would appear to encompass the following:

b) Negotiation of self-government arrangements within selected jurisdictional sectors;

Application: - Indian, Inuit, Métis.

c) Enhanced by-law making capacity under existing legislation;

Application: - Indian specific.

d) New financial arrangements (either comprehensive or within selected jurisdictional sectors).

Application: - Indian specific.

In reviewing the options, certain questions of a process nature should be noted:

**1. Comprehensive Claims/Land Matters:**

The federal government has not yet responded to the Coolican Task Force Report on Comprehensive Claims. As such, it is not clear whether or not current or future federal policy will permit the negotiation of self-government together with comprehensive land claims for Status Indians.

In the case of the Métis, the issue still to be resolved is if some constitutional amendment is agreed to, will land be a negotiable issue together with self-government. For the Inuit, "Nunavut" essentially blends land claim issues with many of the questions relating to self-government. There is a question as to whether this will happen with the Inuit claim on the Labrador coast.

**2. Treaty Renegotiation/Modernization**

Similarly for Treaty Indians, federal policy on linking self-government negotiations with treaty-related matters is unclear. Nothing appears to have come out of the pilot Treaty renovation process with Treaty #8, and there is an urgent need for clarification of federal policy intentions in this area.

Recent proposals from the Assembly of First Nations (AFN) for the establishment of a constitutionally mandated process to deal with Treaties, together with similar or related proposals from the Inuit and the Métis and Non-Status Indians, will assure continued focussing on this question in the months ahead.

OVERVIEW OF INDIAN SELF GOVERNMENT  
NEGOTIATION PROCESS

BAND

FEDERAL GOVERNMENT

**(A) Indication of Interest**

.Indicates interest in commencing discussions. May or may not be accompanied by specific proposal.

**(B) Preparatory Phase**

.Material on federal policy/response provided to Band  
.Information sessions/workshops to explain, and exchange views.  
.Examination of options for structuring process.

{ .Community Profile  
{ .Band Information Package describing options under federal policy  
{ .Jurisdictional Framework

Band confirms interest in proceeding.  
Discussions regarding:  
.Preferred approach.  
.Identification of priority jurisdictional sectors.  
.Proposals regarding process.

Formal Proposal/Workplan

Negotiations based on the proposal submitted by the Band leading to a Framework Agreement detailing the terms of reference for the negotiations.

Framework Agreement

**(C) Negotiation Phase**

Information on current arrangements and resources developed with and provided to Band.

Development of profile for identified jurisdictional sectors. Current occupation in terms of:  
.legal  
.policy  
.programs  
.\$ resources

Examples of some of the broader preparatory requirements and issues that would have to be addressed include:

1. Details regarding community/group – profile;
2. Details regarding proposal/applications;
3. Community's preferred approach;
4. Identification of priority jurisdictional sectors and subsectors;
5. Identification of probable instruments/outputs required – proposal, agreement, legislation, etc.;
6. Current occupation of priority jurisdictional sectors and subsectors;
7. Current resource allocations;
8. Current program delivery;
9. What powers/authorities (self-governing capacities) are required within the selected jurisdictional areas;
10. Impact of self-governing capacities – what consequential adjustments would be required;
11. Resourcing of Indian Government;
12. Related issues – training, dispute resolution;
13. Involvement of other parties – Provincial/Federal, etc.;
14. Process questions:
  - vehicle, timeframe, support requirements, etc.

#### **(7) The Role of Provincial/Territorial and Selected Municipal Governments**

A central question in the examination of the issue of jurisdictional interface relates to the present and future roles and responsibilities of the provincial, territorial and municipal governments.

This issue has had considerable profile in the current round of constitutional discussions and is one of particular sensitivity. No attempt will be made at this point to redescribe the historical origins of the sensitivities.



issue of provincial involvement will require careful discussion with communities and, where appropriate, provincial governments, prior to the commencement of negotiations.

#### **(8) Relationship Between Jurisdictional Sectors and the Financing of Aboriginal Self-Government**

As is apparent in the body of the paper which follows, the development of a jurisdictional framework and analysis of issues pertaining to future jurisdictional interface is of importance, not only as a means of assisting communities to begin the definition of their self-governing needs and the capacities required, but also to enable a precise focus on:

1. The current occupation of those jurisdictional sectors by the federal and provincial governments (see Chapter 3);
2. Current federal and provincial programs directed to the Aboriginal groups in question within the identified sectors; and
3. Current federal and provincial resource allocations within each of the identified sectors.

Upon the basis of this process of preliminary identification of current occupation of a given jurisdictional sector, the legislative and related requirements to achieve federal/provincial vacation of the jurisdictional sector can occur, with at least an initial identification of some of the financial resources that will in all likelihood have to be the subject of redirection to resource Aboriginal self-governing capacities in those same sectors.

More broadly, on the question of the need to ensure that the "occupation" of jurisdictional sectors by Aboriginal governments is accompanied by adequate financial commitments, the following should be noted:

- The current "restraint environment" poses a major challenge to those attempting to negotiate the resourcing of future self-government arrangements. It would appear desirable that some level of broad commitment and principles to guide more specific negotiations should be agreed upon constitutionally.
- Related to this issue is the need to address the federal-provincial dimension of this issue (see Chapter 3).

## 2 IDENTIFICATION OF JURISDICTIONAL SECTORS

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### (1) The Jurisdictional Framework

The preceding section advanced a working as opposed to political definition of self-government in the following terms:

“...the negotiation of a defined level of jurisdiction or control to be exercised either exclusively or on a shared basis with other Aboriginal and/or Non-Aboriginal governments within a broad or narrow range of ‘government’ or jurisdictional sectors...”

The departure point for the identification, prioritization, and negotiation of specified levels of control or decision-making authority should be a framework which comprehensively identifies broad areas of “governmental” activity with appropriate secondary and tertiary-level breakdowns. Such a framework should yield, in total, an identification of the full range of institutional, policy and program areas that reflect government areas of activity, organization, and jurisdiction.

Sectors of governmental jurisdiction can be defined and grouped in a number of different ways. Some general observations follow:

1. The process involved is rather like peeling a onion. The identification and associated examination will move progressively from the general (i.e. generic jurisdictional descriptions) to the specific..
2. If the framework is comprehensive of the sectors that could be considered, it would provide a guide to and vehicle for accurately siting particular areas, programs and authorities in relation to other types of government activities.
3. At this stage, the assumption is that such sectors can be described generically as they pertain to governmental functions. It is in the

definition, prioritization and the grouping that the framework will take on more relevance and potential of application to Aboriginal as opposed to Non-Aboriginal governments.

This last observation is critical. For the framework generated to have validity, it should:

(a) Ideally reflect the jurisdictions, both singly and in combination, that flow from the perspective of an Aboriginal collectivity i.e., what are the government decision-making authorities and jurisdictional areas of particular relevance to the governance of an Aboriginal community, and how do such jurisdictions group and interrelate for Aboriginal communities.

(b) While reflecting the particular grouping appropriate to the circumstances and "self-government" requirements of Aboriginal communities, the framework should have to accommodate:

(i) the diversity of situation between Aboriginal peoples and within given Aboriginal groups;

(ii) the particular circumstances and special needs of specific constituencies (e.g., Aboriginal controlled economic and educational institutions, the urban Aboriginal situation, Off-Reserve Status Indians);

(iii) at the same time the framework, in language and content, should allow for the analysis of and ultimate reconciliation required with the realities of Canada's political structure and laws i.e., it should facilitate the required jurisdictional fit.

There has been at least one major attempt to describe the full range of potential sectors of jurisdiction that may be the subject of discussion in whole or in part by Aboriginal governments. This work, which focusses primarily on Indian self-government, also provided preliminary analysis of the occupation by the federal and provincial governments of those sectors, and examples of existing financial resource-allocation by governments within those sectors.<sup>3</sup>

The study attempted to group such sectors from an Indian perspective, while keeping in sight the positions adopted by various Indian associations and the ultimate need to achieve reconciliation with the political institutions, structures and broader legal and political realities of the Canadian political system.

As with the present paper, the work did not assume the adoption of any one self-government concept at the constitutional or legislative level. However, it did assume that some form of Indian self-government would eventually be extensively recognized and implemented in Canada.

The present and succeeding chapters of this paper reflect many of the conclusions arrived at in the Nahwegabow work, rather than presenting a different framework and description. The reasons for adopting the conclusions from this study relate primarily to the requirement that, at both the academic and negotiation levels, there is a critical need for all participants to try to achieve the consistency of approach and uniformity of framework necessary to achieve concrete results.

It is essential, whatever the framework adopted for planning purposes, that it be at the same time comprehensive, yet with inbuilt flexibility in its application to accommodate particular groups and circumstances. It is felt that the framework presented in the Nahwegabow work and reflected in this paper meets those requirements for all three Aboriginal peoples – Indian, Inuit, and Métis.

The study identified five broad holistic environments or “areas of human ecology” as follows:

(i) **Natural Environment:** everything that is within the setting of the collectivity, naturally, and the impact of individual and collective activities on that natural setting (e.g., land, water, natural resources and conservation);

(ii) **Socio-Cultural Environment:** everything that a collectivity does that is related to the social interaction of its people (e.g., domestic relations, communications);

(iii) **Economic Environment:** everything that a collectivity does in relation to life support or wealth creation (e.g., resource development and manufacturing);

(iv) **Physical Environment:** everything that is man-made within the setting of the collectivity (e.g., houses, roads and sewers);

(v) **Government Environment:** everything that is related to the governing of a collectivity (e.g., public finance and administration).

Flowing from these broad environments, primary jurisdictional sectors were identified as follows:

ENVIRONMENT

PRIMARY SECTORS

- |                                |                                  |
|--------------------------------|----------------------------------|
| (1) Natural Environment        | (1) Property                     |
|                                | (2) Natural Resources            |
|                                | (3) Environment                  |
| (2) Socio-Cultural Environment | (4) Citizenship                  |
|                                | (5) Communications               |
|                                | (6) Transportation               |
|                                | (7) Education                    |
|                                | (8) Cultural Development         |
|                                | (9) Health                       |
|                                | (10) Social Development          |
|                                | (11) Domestic Relations          |
|                                | (12) Justice                     |
| (3) Economic Environment       | (13) Economic Development        |
|                                | (14) Energy                      |
|                                | (15) Labour                      |
|                                | (16) Trade                       |
|                                | (17) Companies                   |
|                                | (18) Taxation                    |
| (4) Physical Environment       | (19) Private Works               |
|                                | (20) Public Works                |
| (5) Government Environment     | (21) Public Administration       |
|                                | (22) Finance                     |
|                                | (23) Intergovernmental Relations |

For each of the primary sectors identified, secondary and tertiary-level breakdowns are provided. By way of example, in the Socio-Cultural Environment - Health and Social Development sectors further breakdowns were provided as follows:

PRIMARY SECTOR	SECONDARY SECTOR	TERTIARY SECTOR
HEALTH	A.Preventative Health B.Curative Health C.Environmental Health	1.Health Authority 2.Policy/Planning 3.Education 4.Nutrition 5.Sanitation 6.Health/Safety Standards 7.Primary H.C. 8.Secondary H.C. 9.Dental/Optical 10.Hospitals, Clinics, Mobile Units, etc.
SOCIAL	A.Community Care B.Recreation C.Income Support D.Housing	1.Social Development Authority 2.Policy/Planning 3.Care of Children 4.Care of Elders 5.Care of Mental Patients 6.Counselling, etc.

The examination of what in substance could be negotiable involves discussions of those sectors and subsectors within which adjustments or enhancement of self-governing powers, beyond those presently possessed and exercised, is possible. As indicated in the preceding section, the identification of which sectors should be focussed upon as a matter of priority, and the nature and extent of powers and authorities considered as necessary within those sectors/subsectors, should be negotiated on a community-by-community basis. Once again, it should be emphasized that those sectors and priorities within given sectoral areas can be defined and grouped in a number of acceptable ways. More importantly, different groups priorities and capacities will yield different requirements in terms of phasing in new governmental capacities and associated support requirements.

## **(2) Proposals/Working Experience in Defining Jurisdictional Sectors for Negotiation**

It is useful to make brief reference to the proposals and limited working experience to date in defining self-government jurisdictional sectors.

### **(a) The 1985 Draft Constitutional Accords:**

Both the federal government and Saskatchewan draft accords made highly generalized references to the matters that would be negotiable in the following language:

"6. The negotiations referred to in article 2 of this Accord may address any appropriate matter relating to self government including, among other matters,

....

(b) the nature and powers of the institutions of self-government;

(c) responsibilities of, and programs and services to be provided by, the institutions of self-government;"

### **(b) The Cree-Naskapi (of Québec) Act:**

The *Cree Naskapi Act* provided in section 45 for Band by-law making capacity in the following areas:

- administration of band affairs;
- regulation of buildings;
- health and hygiene;
- public order and safety;
- environmental protection;
- prevention of pollution;
- definition, control and prohibition of nuisance;
- taxation (not income tax);

- local services;
- road traffic and transportation; and
- operation of businesses and trade.

Other powers provided for are as follows:

- land and resource use and planning (sections 46-47);
- hunting, fishing, trapping and wildlife protection (may be disallowed) (section 48);
- band elections, meetings and council procedures (sections 82-86);
- awarding of contracts (section 99);
- residence and access rights (sections 103-105);
- expropriation of local interests (section 153).

**(c) Sechelt Act:**

The *Sechelt Act* (section 14) provides that the Band has legislative and/or executive power within the limits of its constitution in the following areas:

- access and residence;
- zoning and land use;
- buildings;
- taxation;
- administration and management of property;
- land management;
- education;
- social and welfare services;
- health;



- preservation and management of wildlife and natural resources;
- public order and safety;
- roads and traffic;
- business, professions and trade;
- intoxicants;
- fines or imprisonment for contravention;
- devolution of real property;
- financial administration;
- administrative bodies; and
- good government of the band, its members or Sechelt lands.

**(d) The Kativik Act:**

The James Bay and Northern Quebec Agreement provided for the enactment by the province of legislation establishing municipal community government and municipal regional government. *The Act Concerning Northern Villages and the Kativik Regional Government* was assented to on 23 June, 1978. The Act applies to the territory of Quebec situated north of the fifty-fifth parallel. The Kativik Act and the institutions created by it are not ethnically based. The local government represents municipalities in which all residents, native or not, may vote, be elected and otherwise participate. The regional government is likewise non-ethnic.

Under Part I of the Act, Inuit settlements became, after receiving letters-patent, "Northern Village Municipalities" with powers to make by-laws concerning:

- zoning and land use planning to the extent that by-laws do not affect the rights of Inuit Landholding Corporations;
- expropriation subject to the regulations of the Act;
- taxation for local purposes;
- regulation of buildings and other structures;

- public health and hygiene;
- parks, recreation and culture;
- regulation of roads, traffic and transportation; and
- public works.

Part II of the *Kativik Act* creates the Kativik Regional Government, which has the powers of a northern village municipality over those parts of the territory not constituted as municipalities, in addition to territory wide powers in the following areas:

- local administration and assistance to northern village municipalities;
- transport and communications;
- regional police; and
- advising the provincial government about manpower training and utilization.

The Kativik Regional Government has paramountcy in relation to municipal by-laws. It has the power to establish minimum standards for building and road construction, sanitary conditions, water pollution and sewerage. It may establish radio and television aeriels, public transportation services and a regional police force for the enforcement of its ordinances and of other laws.

Subject to the powers of federal and provincial governments, the Kativik Regional Government may make laws governing harvesting activities and hunting and fishing by non-Natives.

Negotiation and enactment of all of the legislation described above essentially preceded initiatives under the proposed new approach to negotiating community-regional self-government.

No attempt will be made to comment on the adequacy of the jurisdictions defined under each of the identified pieces of legislation. Different circumstances, and priorities were present for each set of negotiations.

In particular, this description of initiatives, agreements and legislation to date is not provided with any sense that those are the types of outputs that Aboriginal communities would seek for the future, or that they are

models to be emulated in future negotiations. Rather, they reflect the "products" of what were in each instance, essentially community-regional based negotiation processes, carried out during the last 10 years.

### 3 FEDERAL-PROVINCIAL OCCUPATION OF JURISDICTIONAL SECTORS

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#### (1) Introduction

The preceding material identified the need for and proposed a framework to depict the basic sectors of governmental activity within which a given Aboriginal community might wish to focus its self-government aspirations.

The process involved would entail:

- The identification of those sectors or subsectors of jurisdiction which a group feels are a priority to its self-government capacities for the future. The range of jurisdictional sectors selected could be either broadly or narrowly defined. In any event, such sectors would have to be prioritized or sequenced for negotiation purposes.
- Within the identified jurisdictional sectors or subsectors, the group would have to determine the type of authority or power that it would wish to possess.
- The current occupation of those sectors/subsectors by the federal and/or provincial governments would then have to be determined. This is required for the purposes of:
  - i) Determining those adjustments in legislation, jurisdiction and programs that would likely be required should it be agreed that the community in question would have some level of "self-government" occupation of that sector.
  - ii) Providing an initial indication of some of the current program and associated financial arrangements that would have to be assessed and likely adjusted to facilitate the financing of the Aboriginal self-government capacity in those areas; and

- iii) Determining the interface implications of Aboriginal government jurisdictions with continuing federal and/or provincial jurisdictions in the sectors under discussion.

This chapter provides general observations relating to current occupation of key jurisdictional sectors by the federal and/or provincial governments. In the context of individual sets of negotiations, more detailed profiles of current occupation and associated program and financial arrangements will be required. The material that follows is divided into two sections:

**(a) Jurisdiction and Financial Responsibility**

Discussion of the section 91(24) issue - that is, which government has general legislative jurisdiction for each of Canada's Aboriginal peoples and how has this been reflected in the assumption of program and financial responsibility by the two levels of government. (*Note: the paper will not consider the special situation that prevails in the Yukon and Northwest Territories.*)

**(b) Jurisdictional Sectors**

Selected comments on the current federal-provincial jurisdictional interface in key sectors.

These introductory comments conclude with some general observations related to the objective of the paper - "what areas and problems of jurisdiction and policy coordination might arise and how can these be minimized."

The current situation represents a jurisdictional and coordination mess between the federal and provincial governments, which has remained in large part unresolved for the past 25 years and has been the subject of inconsistent federal government management from one side of the country to the other.

It can only be hoped that in the process of negotiating new self-government capacities for Aboriginal peoples in whatever sectors and at whatever levels of application, some of the long-standing differences between the federal and provincial governments will finally be resolved. While it is unrealistic to expect there to be full agreement on all aspects of the jurisdictional and fiscal responsibility issues that will arise, it is to be hoped that broad understandings and agreements on appropriate "dispute resolution mechanisms" can be reached to minimize difficulties for the future.

Finally, in trying to anticipate some of the jurisdictional and fiscal responsibility issues that will have to be managed, this paper identifies the need in the future to examine issues which relate to jurisdictional interface and coordination between different Aboriginal governments.

## (2) Federal-Provincial Jurisdiction and Financial Responsibility

Identification of current federal-provincial occupation of many of the jurisdictional sectors that will likely be the focus of self-government negotiations involves an understanding of the broad legal and policy situation relating to federal-provincial jurisdiction and financial responsibility for Canada's Aboriginal peoples.

The issue of federal-provincial jurisdiction and responsibility presents itself differently and is bedded in a different historical context for each of Canada's Aboriginal peoples - the Indians, Inuit and Métis.

The major continuing problems over the last 20 years have centred primarily on the Indian population, particularly those residing Off-Reserve.

Prior to the late 1950s, few issues of a federal-provincial nature presented themselves in relation to the Status Indian population. Most Status Indians resided On-Reserve and the federal government provided most basic services, albeit a more limited range and in some instances to different standards than equivalent provincial programming.

An increase in demand for Indian access to provincial programs flowed from the significant increase in Off-Reserve migration through the 60s and early 70s, (16% in 1966, 27% in 1976 leveling off to approximately 33% in the late 1970s).<sup>4</sup>

The increase in demand for provincial services flowed not only from the increase in the Off-Reserve population, but from increased utilization of an expanded provincial program base by Indian people residing On-Reserve in such sectors as health and the administration of justice. In some instances provincial extension of services to Indian people residing On-Reserve was regulated by *ad hoc* program agreements between the federal and provincial governments. In many cases however, such agreements were not struck or failed to cover the significantly increased costs incurred by provinces in meeting Indian demands. Cumulatively these developments had the effect of seeing provincial governments pick up an increasing portion of the cost of providing services to the Status Indian population, in large part without reimbursement from the federal government.

The situation of the Métis and the Non-Status Indian populations was and remains to date, quite different. The federal government accepted no particular responsibility for the Métis and offered few programs

designed to meet their special, let alone basic, needs. While programs developed through the 70s were in some sectors made of application to all Aboriginal peoples (e.g., Justice, Secretary of State programs and some employment and training programs), essentially the Métis were viewed as any other residents of the province and had access to provincial programs in a similar manner. Federal funds, if any, flowed through programs of general application as for other provincial residents (e.g., CAP, Established Program Financing arrangements (EPF) and its predecessor programs). At that time the Métis were accorded no special constitutional or legal status.

In the case of the Inuit, with the exception of those residing in northern Quebec and on the Labrador coast, the issue is one of division of responsibility between the federal and territorial governments. Direct federal funding for program initiatives are few. Most of the programming flows directly from the Northwest Territories government, but with block financing provided by the federal government. For the Inuit of northern Quebec, the provisions of the James Bay and Northern Quebec Agreement essentially defines in modern day terms the adjusted pattern of federal/provincial involvement in the financing of services. Inuit concerns under this agreement centre more on the fact of both governments failing to meet their obligations, than on the terms of the division of responsibility between the two levels of governments as such. For the Inuit of the Labrador coast, understandings with Newfoundland on its entry into confederation resulted in the federal obligation to the native peoples of the province, including the seven predominantly Inuit communities on the Labrador coast, being met through the transfer of federal financial resources to the provincial government for disbursement under provincial programming.

Questions relevant to consideration of future jurisdictional arrangements fall into two categories:

1. As a matter of law, especially the interpretation of section 91(24) of the *Constitution Act 1867*, what is the nature and extent of the responsibilities of the federal and provincial governments for the provision and financial support of services to Indians, Inuit and Métis and Non-Status Indian peoples respectively?
2. As a matter of practice (i.e. policy and related programs), what is the nature and extent of the current involvement of the federal and provincial governments in the provision and financial support of services?

have both taken the position that the Métis are or at least should be included under section 91(24).

3. **Does section 91(24) confer “mandatory” or “permissive” legislative jurisdiction/responsibility on the federal government?**

As with all constitutional heads, the conferring of legislative authority is permissive in nature. Within certain limits, Parliament may define who is an Indian, and the nature and extent of the “responsibility” it is prepared to accept in relation to that specified group of people.

Over time, the federal government has through legislation and policy, limited its responsibility for programs and associated financial responsibility to the provision of services to Indians On-Reserve (with some exceptions), and to Inuit - primarily through the Governments of the Northwest Territories, Quebec (James Bay Agreement) and Newfoundland (Federal-Provincial Agreement covering the Labrador coast). Métis and Non-Status and Off-Reserve Indians have, with some exceptions, in large part been left to the provincial and territorial governments.

4. **Is the jurisdiction conferred under Section 91(24) limited to “Indians On-Reserve”?**

Section 91(24) “...assigns jurisdiction to Parliament over two distinct subject matters – Indians *and* lands reserved for the Indians, not Indians *on* lands reserved for the Indians. The power of Parliament to make laws in relation to Indians is the same whether Indians are on a reserve or off a reserve.”

*Four B Mfg. Ltd. vs UGWA* [1980] 1 S.C.R. 1031 @ 1049-50.

5. **Does section 91(24) preclude the application of provincial laws to Indians and lands reserved for Indians?**

Within certain specified limits – no. “Provincial laws may have application to Indians...as long as such laws do not single out Indians nor purport to regulate them qua Indians.”

*The Queen vs Sutherland* [1980] 2 S.C.R. 451 @ 455.



The answer to the first question should encompass which government or governments have the legislative competence to enact legislation (self-government or otherwise) relating to Canada's Aboriginal peoples. The answer to the second question should include how the field is currently occupied (apart from the issue of jurisdiction and legislative competence in a pure legal sense).

## (A) CONSTITUTIONAL-LEGAL CONSIDERATIONS<sup>5</sup>

Section 91(24) of the *Constitution Act (1867)* (previously the *British North American Act 1867*), confers exclusive legislative jurisdiction on the federal government with respect to Indians and lands reserved for Indians.

The precise ambit of the authority is uncertain to the extent that it has not been definitively considered by the courts. However, some of the questions that arise are the subject of relatively clear guidance from the courts. Some of these key considerations follow.

### 1. Does the jurisdictional head encompass matters in respect of Indians which would otherwise be within provincial jurisdiction?

"The legislative authority is obviously intended to be exercised over matters that are, as regards persons other than Indians, within the exclusive legislative authority of the provinces."

*The Queen v. Drybones* [1970] S.C.R. 382 @ 403.

### 2. Who is encompassed under the term "Indian"?

The term "Indian" includes the Inuit. (*In Re Eskimo* [1939] S.C.R. 104).

In relation to the Métis, it is strongly arguable that if an individual possesses sufficient racial and social characteristics to be termed an Aboriginal person, they will also be considered an "Indian" within the meaning of section 91(24). This means that they are within the jurisdiction of the Federal Government, as a matter of legislative competence, irrespective of the fact that the same individual may be excluded from the coverage of the *Indian Act*. What constitutes sufficient racial and social characteristics to be termed a Native (Aboriginal) person has not been definitively considered by the Courts. The Métis National Council and Native Council of Canada

“No statute of the provincial legislature dealing with Indians or their lands as such would be valid and effective, but there is no reason why general legislation may not affect them.”

*Cardinal vs Attorney General of Alberta* [1974] 2 S.C.R. 695 @ 706.

Within *Cardinal* there is debate as to whether or not such provincial laws apply through:

(1) the operation of section 88 of the *Indian Act* – through referential incorporation, i.e. the provincial law does not apply to Indians of its own force; rather its terms become federal law and apply to Indians as such (Laskin, C.J.) *or*

(2) whether the test is purely whether or not the provincial law is valid as being in relation to a Section 92 subject matter (Martland, J.).

Under the latter view, section 88 of the *Indian Act* simply declares that provincial laws, within its terms, apply of their own force.

*In summary*, from a legal perspective, leaving aside questions relating to government obligations flowing from the Treaties, section 91(24) confers permissive legislative authority on the federal government which encompasses Indians, Status and Non-Status, Inuit, and probably a good number of the Métis, irrespective of where they reside. As a matter of legislative competence, the federal government possesses the jurisdiction under section 91(24) to enact legislation in respect of this specified group of people. Within limits, the federal government has the capacity to define who is an Indian for the purposes of section 91(24) and more particularly, it has the political freedom to define (and therefore to limit) the nature and extent of the responsibility that it is prepared to assume under that head. Its accountability for such limitations is primarily of a political as opposed to a legal nature.

While the authority to “occupy the field” is essentially unfettered from a legal perspective, as a matter of policy, the federal government has chosen, to date, to limit its specifically targetted programs and associated financial responsibility, essentially to Status Indians residing On-Reserve and to the Inuit (with certain programmatic exceptions).

## (B) POSITIONS OF GOVERNMENTS

### *Federal*

The general federal government position reflects the view that section 91(24) of the *Constitution Act (1867)* is an assignment of permissive legislative authority, and that the government has chosen to limit, in legislation and policy, its responsibilities to programs and associated fiscal responsibility for the provision of services to Indians On-Reserve (with some limited exceptions), and to the Inuit. Where provincial governments extend the delivery of provincial services On-Reserve, the federal government has in most instances made variable provisions for reimbursement contingent on a clear agreement among the parties as to client needs and associated costs (provinces typically charge back up to 100 percent of the cost of such services).

With respect to Indians Off Reserve, the federal government takes the position that provinces are responsible for extending provincial services of general application to such Indians.

With respect to the Inuit, the federal government meets large portions, and in some cases, all of the costs of provision of services, although the resources are provided in large part to the governments of the Northwest Territories, Quebec (James Bay Agreement), and Newfoundland (Canada-Newfoundland Agreement covering the Indian/Inuit communities of the Labrador coast).

With respect to the Métis, beyond the application of general "Native" programs to which all Aboriginal peoples have access (e.g. the Native Economic Development Program, Native Courtworker Program, Friendship Centres), the federal government essentially disavows any legal, program or special financial responsibility.

### *The Provincial Position*

Virtually all provinces adopt a formal position which disavows any legal responsibility for the provision of services to Indians on the basis that section 91(24) confers general legal and mandatory financial responsibility on the federal government.

To varying degrees, individual provinces, as a matter of practice, have participated in the direct provision of services and to varying degrees, have picked up some portion of the financial costs of providing services, especially to the Off-Reserve population. In most instances, such *ad hoc* arrangements are accompanied by assertions of the general position indicated above, together with an indication that entry into specific arrangements is not intended to prejudice in any way that position or the

need to address the more general issue of federal-provincial responsibilities at the national level.

With respect to the Métis, virtually all provinces, with the notable exception of Alberta, adopt the general position that section 91(24) extends to encompass the Métis as much as it does other Aboriginal peoples. However, as a matter of history and "working position", provinces have provided and met most of the cost of providing services to the Métis - sometimes through specifically targetted programs, more often however, through provincial programs of general application. The constitutional inclusion of the Métis as one of the Aboriginal peoples of Canada, and the commencement of self-government discussions, has meant that the provinces, no less than the federal government, must reconsider the general position that they will adopt in this area for the future.

### (C) THE PROGRAM SITUATION

Notwithstanding the strict legal positions of the provincial governments as outlined above, the willingness to deliver services to Status Indians and meet some part of the cost of providing such services is markedly different from one province to another.

#### Services to Status Indians

In general terms, provincial approaches and arrangements in respect of programs for the Status Indian population are characterized by reluctance to extend provincial services without special arrangements. More specifically, the following general observations can be made in relation to the current situation.

#### On-Reserve:

Most services are provided directly or indirectly by the federal government mainly through DIAND. Band governments administer well in excess of half of DIAND's On-Reserve spending (over \$500 Million per annum). Some services, such as education and child welfare, are delivered partly or wholly by provincial governments, usually with federal financing. In other sectors, such as health and administration of justice, On-Reserve residents often access provincial programs "Off-Reserve". In many instances, higher utilization rates and higher per capita costs as well as other program-specific features (e.g. universality as it applies to health care programs) result in provincial governments meeting program costs for On-Reserve residents without specific reimbursement from the federal government.

### Off-Reserve:

In most instances, Status Indians residing Off-Reserve must look to provincial governments for required services, given that most federal programs are restricted to Indian people residing On-Reserve. Selected federal programs in such areas as post-secondary education, non-insured medical services, economic development, and training and job creation programs are technically accessible to Indians wherever they live.

For a variety of reasons, including primarily the size and location of the Aboriginal population, significant variations exist in actual program arrangements and procedures.

- Some provinces make provincial services available to Status Indians Off-Reserve on the same basis as for other provincial residents – with no special chargeback to the federal government (e.g. Quebec, New Brunswick, and Prince Edward Island).
- Some provinces only provide Off-Reserve services on the basis of 100 percent chargeback to the federal government – until the recipient of services has met the Off-Reserve residency requirements stipulated by provincial regulations (e.g. Manitoba and Saskatchewan). Residency requirements differ from one province to another.
- Some provinces such as Alberta, work on the basis of a straight 100 percent chargeback to the federal government for services provided to Off-Reserve Indians. The Alberta situation is complicated by a formula that sees some portion of 1st year costs for some Off-Reserve residents covered by the provincial government.
- Until relatively recently, some provinces refused to provide social services to the Off-Reserve population, even on a chargeback basis, until residency requirements were met. This practice seems to have essentially disappeared over the last five years following a number of legal challenges to provincial government practices, especially in the child welfare area in the early 1980s.

In general terms, difficulties have manifested themselves in the following areas:

1. Off-Reserve, especially in relation to social services (income support and child welfare in particular);
2. On-Reserve, because of extensive accessing of Off-Reserve provincial programs by On-Reserve residents, without

reimbursement by the federal government of the actual costs incurred, especially in the health care and administration of justice sectors.

Added difficulties flow from the issue of the range and quality of services provided to On-Reserve residents under federal programming. Past studies have clearly demonstrated that the range and quality of services provided or financed federally On-Reserve, are significantly below equivalent provincial programming in most instances.

### The Inuit

The Inuit generally receive services from the Government of the territory or province in which they live (i.e. the Governments of the Northwest Territories, Quebec (Kativik Regional Government), and the Government of Newfoundland (Labrador coast)). Such services are almost entirely financed by the federal government through different types of agreements - federal transfer arrangements to the territorial government, the James Bay and Northern Quebec Agreement and legislation, and the Canada-Newfoundland (Labrador coast-Native peoples) Agreement.

### Métis and Non-Status Indians

In large part, the Métis and Non-Status Indians access provincial programs and services like other residents of the province, including both programs of general application and a large number of programs developed for and targeted to Native peoples. In addition, the federal government has developed over the years a number of "Native" as opposed to Indian-specific programs in such sectors as economic development (especially the Special ARDA and Native Economic Development Program), administration of justice (Native Courtworker Program), and some employment/training and job creation programs.

In summary, particular patterns of program evolution and involvement by provincial government departments and agencies, in the provision of services, is based primarily on the historical pattern of negotiations and program arrangements within a given province. Current arrangements are not attributable to any particular coherence and consistency in the federal policy position on how it views its program responsibilities for the various Aboriginal peoples. The differences that have inevitably resulted from this *ad hoc* approach to the negotiation of program arrangements have been exacerbated as the pressures of federal deficit reduction have manifested themselves, and more importantly, as

discussions start with Aboriginal groups, especially Indian Bands in the negotiation of self-government arrangements in a broad range of areas.

### (3) Jurisdictional Sectors

#### (A) General

The analysis in the preceding part of this paper clearly demonstrates that identification of jurisdictional interface from a constitutional and legal point of view, will be of limited assistance in determining the current programmatic and financial reality. In addition, it is clear that future self-government negotiations will primarily focus on adjusting or vacating, to a greater or lesser extent, currently exercised federal and/or provincial jurisdiction in favor of Aboriginal self-government jurisdiction within a given sector.

For these reasons, there would appear to be little utility at this stage in attempting to make general observations on potential areas of jurisdictional dispute and related interface or coordination requirements. It seems clear that the priority sectors, the scope of the self-government jurisdiction ultimately recognized, and the impact of the exercise of such jurisdiction on continuing federal, provincial or indeed municipal jurisdiction, will vary considerably from one Aboriginal group to another. Factors of importance include:

- population size;
- geographic location;
- the level at which jurisdiction is recognized and exercised, e.g. provincial, regional, local community; and
- the extent to which a Band/group is in geographic proximity to areas which will involve relatively extensive interface with the surrounding population and governments, e.g. Sechelt.

All of these factors will significantly account for the specific coordination and associated management requirements that will have to be dealt with in a particular situation.

At this stage, all that will be attempted are brief comments on the jurisdictional sectors referenced in Chapter Two. While the question of "who has jurisdiction over this sector" would appear to be relatively simple, the complexity of the current occupation of each sector, together with the fact that the jurisdictional sectors occupied do not always coincide with those in the *Constitution Act (1867)* render this a difficult

question to answer at a generalized level. Reference should be made to pages 56-111 of the work by David Nahwegabow for its more extensive examination of the jurisdictional questions relating to the various sectors identified. The brief comments made here will follow the same order as contained in the jurisdictional framework discussed in Chapter Two. As will become apparent in the selected comments made on the various primary sectors that follow, even the allocation of legislative jurisdiction between governments is rendered extremely complex due to the cross matrixing of section 91(24) (Indians and lands reserved for Indians) with many of the provincial jurisdictional heads under section 92 in particular. In the absence of specific federal legislation, section 88 of the *Indian Act* comes into play, validating to a certain extent provincial laws of general application. There are a number of constitutional questions in respect of the validity, scope, and impact of section 88 which this paper will not attempt to address.

In many areas (e.g. communications/transportation), where some aspects (in these cases the intra-provincial aspects) fall to the provinces, the base position is that the federal government could in all likelihood use its section 91(24) authority to pass laws which would occupy the provincial head, providing that such laws are in pith and substance in relation to either Indians or Indian lands. Provincial laws of general application in such areas are probably applicable to Indians and Indian lands providing that:

1. the laws do not single out Indians or relate to Indians as Indians;
2. the laws do not affect land use; and
3. there are no conflicting federal laws in the field.

Additionally, in areas where legislative jurisdiction rests with the provinces and no specific legislation has been enacted federally under its section 91(24) authority, effective intrusions have occurred on the part of the federal government at various points in time (e.g. the education sector) through use of the federal government's general spending power authority. The constitutionality of such use of the spending power has been strongly debated at various points over the last twenty years.

#### (B) Property

- This sector ultimately requires analysis separately for land, water and air.



- *Public Property.* The *Constitution Act 1867* confers on Parliament and the Legislatures of the provinces the authority to make laws in relation to their respective property holdings.
- Generally, provinces hold the underlying title to Indian lands. Section 91(24) merely authorized Parliament to administer and control Indian lands. The provincial interest was subject to the proprietary rights of the Indians.
- Because of the difficulty flowing from this general rule, agreements were concluded with virtually all provinces, providing that the federal government does have beneficial title to and the right to dispose of Indian reserve lands (subject to federal trust obligations in this regard - see the *Musqueam* case).
- The situation in Alberta, Saskatchewan and Manitoba is governed by the provisions of the *Natural Resources Transfer Agreements* under which Canada retained ownership in Indian reserve lands after 1930.
- Provincial laws of general application in relation to property and civil rights are applicable to Indian lands so long as they do not directly affect land use and there are no conflicting federal laws in the field.

#### (C) Natural Resources

- *Hunting.* It seems clear that provincial hunting laws do not apply to Indians On-Reserve. Off-Reserve provincial game laws apply with exceptions (mainly those rights protected by the *Natural Resources Transfer Agreements* and treaty rights protected by section 88 of the *Indian Act*).
- *Fishing.* It seems the On-Reserve situation falls to the federal government. The Off-Reserve area is generally subject to provincial laws with the two exceptions mentioned in relation to hunting.
- *Minerals.* Legislative jurisdiction over mineral development on Indian lands is generally within federal jurisdiction. There is the possibility of limited provincial jurisdiction.

#### (D) Environment

- This sector is subject to similar breakdowns as for property and natural resources.

### (E) Citizenship

- Generally both the federal and provincial governments are authorized to legislate in relation to immigration. Federal authority is paramount. General legislative jurisdiction regarding citizenship rests with the federal government.
- In relation to Indian status, the jurisdiction is exclusively federal under section 91(24).

### (F) Communications

- Print form communications are generally within the jurisdiction of the provinces. The scope of potential federal authority under section 91(24) is questionable.
- International and interprovincial forms of communication are federal. Intra-provincial jurisdiction rests with the provinces (including telephone, telegraph and other modes of communication). Radio and television jurisdiction rests exclusively with the federal government.

### (G) Transportation

- As with communications, interprovincial and international aspects of all forms of transportation rests with the federal government. Intra-provincial rests with the provinces (with the exception of air transportation which is exclusively federal).

### (H) Education

- Under section 93 this sector is assigned to the provinces. Federal authority is limited to laws which derive their authority from some other head of federal power, such as the federal spending power, section 91(24) or the employment/labour power.
- The federal government has enacted specific legislative provisions pertaining to Indian education under its section 91(24) authority.

### (I) Cultural Development

- This head is not specifically mentioned in the *Constitution Act 1867*. Both governments derive authority from other heads of power (e.g. education, communications, section 91(24)).

## (J) Health

- Similarly this head is not specifically mentioned in the *Constitution Act 1867*. The sector falls primarily under provincial jurisdiction. Once again other federal heads have allowed for both general (e.g., spending power based) or Indian-specific (section 92(24)) incursions legislatively or as a matter of policy.

## (K) Social Development

- Specific subsectors that are incorporated under this general sectoral heading are referenced in separate provisions in the *Constitution Act 1867*. Provincial authorities derive from broad heads, including 92(13) – Property and Civil Rights in the Province; and 92(16) – Matters of a merely Local or Private Nature in the Province.
- Federally, authority is derived from various heads including 91(2A) Unemployment Insurance, 91(24) Indians and Land Reserved for Indians, 91(26) Marriage and Divorce and 94(A) Old Age Pensions.

## (L) Domestic Relations

- Given the breadth of this field, encompassing as it does marriage, divorce, separation, adoption, child care, etc., jurisdiction is divided between the federal and provincial levels with the large part of the jurisdiction resting with the provinces – 91(12)) Marriage; and 92(13) Property and Civil Rights. The federal jurisdiction is derived in large part from section 91(26) Marriage and Divorce.
- See comments under other heads regarding section 91(24) powers and the constitutionality of provincial laws of general application.

## (M) Justice

*Criminal.* Section 91(27) assigns legislative jurisdiction over “the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters” to the Parliament of Canada. Limited provincial involvement is provided for under section 92(15).

*Civil.* Under the 92(13) Property and Civil Rights head, much of the legislative jurisdiction rests with the provinces subject once again in the case of Indians and Lands Reserved for Indians to the

broad potential conferred on the federal government under section 91(24).

*Administration of Justice* Falls under provincial jurisdiction – section 92(14), subject to Federal concurrent jurisdiction in respect to matters over which it otherwise has competence (e.g. criminal law). See also sections 92(6) (Prisons), 91(28) (Penitentiaries) and Section 101 (Federal establishment of courts).

#### (N) Economic Development

- The sectors defined in the framework under the economic development head are not specifically provided for in constitutional laws. A listing of operative heads of provincial and federal jurisdiction that could be of relevance in this regard are summarized in the Nahwegabow work at pages 96-100.

#### (O) Energy

- Different aspects of this head are governed by various federal and provincial legislative powers.

#### (P) Labour

- Almost exclusively within provincial legislative competence, except Parliament's authority to regulate labour relations connected with any work, undertaking or business that is otherwise within its legislative jurisdiction, as well as inter-provincial matters.

#### (Q) Trade

- Intra-provincial jurisdiction rests with the provinces; international and inter-provincial with the federal government.
- Potential questions arise in relation to Indian intra-provincial trade. Once again, a concurrent jurisdiction, with federal paramountcy should it opt to specifically legislate under its section 91(24) authority, is probable.

#### (R) Companies

- Jurisdiction is divided between the federal and provincial governments, with the criteria of differentiation in large part turning on the "provincial" or "federal" objects of the company in question.

In terms of regulation of corporate activity, different divisions will likely apply depending on the power of the government in question to otherwise regulate that sector or kind of activity.

#### (S) Taxation

- The head is divided between the federal and provincial governments – see heads 91(3) and 92(2). Provincial taxation is limited to taxation within the province and further limited to direct taxation. The application of provincial tax laws to Indians “On-Reserve” has recently been considered in the Nowegijick decision. Aspects of the taxation of Indian corporations remain to be considered.

#### (T) Private and Public Works

- Legislative jurisdiction over private works (works, buildings and facilities which are owned privately by individuals or businesses) is generally vested with the provinces under section 92(13). Public works are split between the federal and provincial levels, generally depending on which holds the property in question. Sometimes jurisdiction may flow from the nature of the business or undertaking in question.

#### (U) Public Administration

- Generally, as a matter of constitutional law unless otherwise expressly provided for, legislative jurisdiction carries with it an inclusionary executive or administrative authority.

#### (V) Finance

- Both the federal and provincial governments have certain expenditure and revenue powers under the *Constitution Act 1867*. It is not proposed to list these sources of federal and provincial financial authorities for the two levels of government in detail at this stage. Reference should be made, once again, to Nahwegabow, pages 108-111.

#### *Conclusions*

Determination of which government has the broadly allocated jurisdictional authority in a particular sector is one of the logical starting points for moving forward with self-government negotiations.

However, as is apparent from the brief sector-by-sector comments above, the generalities of federal-provincial jurisdictional interface for a given sector will be of limited value in isolating the questions and considerations that will have to be dealt with in examining future Aboriginal self-government capacities and the jurisdictional coordination requirements in those areas.

Many of the primary and secondary sectors defined under the proposed framework are not reflected with precision in the jurisdictions conferred under the provisions of the *Constitution Act 1867*.

As indicated earlier, the section 91(24) authority that rests with the federal government leaves significant potential for federal "intrusion" into areas which would otherwise fall within provincial legislative competence, providing that the legislation or occupation is in pith and substance related to Indians and Lands Reserved for Indians. Conversely, the fact that the federal government has not opted to move significantly in such a manner to date, leaves broad potential for operation of provincial laws of general application, providing that:

1. the laws do not single out Indians or relate to Indians as Indians;
2. the laws do not affect land use; and
3. there are no conflicting federal laws in the field.

It is clear that the more significant analysis that will be required in each separate set of negotiations, will involve moving from an understanding of the broad constitutional aspects of current jurisdictional interface to a more detailed profile of the current occupation of those sectors for the band or group in question.

A format for the more detailed work that would be required for each set of negotiations might include the following:

1. Jurisdiction – listing of primary and secondary sectors (as above);
2. **Current Administration**
  - a. Programs – Federal  
– Provincial  
– Aboriginal
  - b. Delivery – Federal  
– Provincial  
– Aboriginal

- c. **Financing** – Federal Direct
  - Federal Transfer
  - Provincial Direct (net of Transfers)
  - Aboriginal

3. **Self-Government Authorities/Capacities**

- By jurisdictional sector
- Program implications
- Legislative/Program adjustments required
- Financial requirements.

**(4) Specific Interface Issues for the Future**

Based on the broad identification of jurisdictional areas that an Aboriginal group might wish to examine as part of its self-government negotiations, the following general observations can be made in relation to future interface/coordination requirements.

1. **Land and Natural Resources**

As reflected in the continuing disputes in British Columbia in the fishing area, clarity of the interface between regulatory powers and regimes will be critical. Resolution of this issue, especially in the hunting, fishing, and trapping area, will increasingly have to focus on the content of Aboriginal and treaty rights, the extent of their geographic application, and their primacy over other federal and provincial regulatory regimes.

2. **Education**

Education is one of the “engines” of any effective self-government arrangement. Significant steps have already been taken in moving towards effective Indian control of education: these will now have to be consolidated and developed. Similarly, Métis and Non-Status Indian institutions have been established in some of the Prairie provinces. Standards and curriculum compatibility with provincial technical, and other post-secondary education systems and requirements will need careful consideration. It is clearly in the interest of Aboriginal governments that the mechanisms to achieve effective interface of Aboriginal and provincial jurisdiction and programs in this area be carefully and comprehensively thought

through. The issue of federal transfers under the Established Programs Financing arrangements arises when examining financial issues in this sector.

### 3. **Cultural Development**

This is one of the sectors that would appear to lend itself to early agreement with relatively few jurisdictional interface problems.

### 4. **Health**

This sector is particularly complex. Current Department of National Health and Welfare transfer policies already create a level of working precedent for some of the possibilities in this area. The complexity flows from the practical difficulties associated with primary health care program infrastructure, and higher utilization rates and per capita costs for Aboriginal peoples. These are clearly not solely attributable to the relative isolation of many of the Aboriginal communities. Further complications flow from the current situation, whereby health care is provided through provincial program systems and infrastructure as an insured service, with a high level of the costs attributable to the provision of health care services to Aboriginal peoples being borne by provincial governments without federal reimbursement. Federal transfers under the health component of the EPF arrangements require consideration here.

### 5. **Social Development**

This sector will be central to effective self-governing capacities encompassing such areas as community care, recreation, housing, and income support. Many of the secondary and tertiary sectors involved would appear to present little by way of potential "coordination" difficulties. Issues relative to standards (e.g. housing) and comparability of benefit levels between the On-Reserve and Off-Reserve environments will require consideration.

### 6. **Domestic Relations**

This sector focusses on the family, and as such is critical to future self-government capacities. Legitimate pressures will arise in relation to the requirement to reflect culturally specific differences in approach and regulation, which will on occasion raise interface issues with comparable provincial programs or requirements. Potential areas involved include marriage, divorce, separation,



adoption, child welfare, maintenance, custody, and juvenile delinquency. Reciprocal enforcement questions will arise in a number of these areas.

## 7. **Justice**

This sector is complex in the interfaces it presents in such areas as policing, court structures and jurisdiction, correctional and sentencing policies. See comments above under Domestic Relations where similar interface issues will present themselves. This is an area of considerable jurisdictional sensitivity for provincial governments in particular.

## 8. **Economic Development**

As with education, this is one of the main engines of effective self-government. Aboriginal economies must be assessed in the context of broader regional and provincial economies, which dictate the need for considerable care in relation to joint planning mechanisms and requirements. This sector in the planning stages, needs to be carefully interrelated with issues that arise in relation to land and resources, as well as broader taxation and financial questions.

The current paper cannot hope to identify all potential points of friction, or those where special coordination requirements might present themselves. Only selective highlights have been presented by way of example, where future interface issues of particular importance can be identified at this stage.

## **4 ISSUES FOR THE FUTURE: EXPERIENCE TO DATE AND SOME TENTATIVE CONCLUSIONS**

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### **(1) Introduction**

This paper has focussed on some of the issues that will emerge in the future jurisdictional interface between Aboriginal and Non-Aboriginal governments. The issues identified present themselves irrespective of the basis of recognition of self-government for the future. This final chapter will:

- (i) Summarize the more general issues related to jurisdictional interface and coordination;
- (ii) Discuss briefly the experience to date, primarily in the context of the Cree-Naskapi and Sechelt legislation; and
- (iii) Draw some tentative conclusions in relation to the challenges ahead.

Once again, as the issues are clearer in relation to Indian self-government, this chapter will focus on that area. Separate consideration of the requirements and possibilities for the Inuit and the Métis will be required, although the issues and considerations that present themselves are not dissimilar.

### **(2) Selected Issues**

The preceding material has raised a number of issues relating to jurisdictional interface and coordination. Questions that could now usefully be addressed in a summary way include the following:

- (a) The future relationship between Aboriginal government, jurisdiction, and laws, and federal jurisdiction and laws;

(b) The future relationship between Aboriginal government, jurisdiction and laws, and provincial and/or municipal jurisdiction and laws;

(c) The potential for jurisdictional overlap, whereby the exercise of jurisdiction by Aboriginal and/or non-Aboriginal governments could adversely affect the territory and/or population coming under the jurisdiction of other governments;

(d) The existence of coordination and/or planning requirements that dictate the need for some coordination or dispute resolution mechanism involving all affected governments; and

(e) The issue of of a federal override or disallowance power in respect of Aboriginal government law-making capacities and decisions.

Past identification and discussion of these issues has been driven primarily by a concern that Non-Aboriginal governments and interests must be protected from potential adverse affects of the actions, laws and practices of Aboriginal governments. To a lesser extent, the corollary concern that Aboriginal communities and governments have a legitimate interest in the legislation and actions of other governments which will impact upon them, has also been raised.

These issues will be discussed both generally, and in relation to how some of these questions have been addressed under both the *Cree-Naskapi* and *Sechelt* Acts.

#### (A) FUTURE RELATIONSHIP BETWEEN ABORIGINAL GOVERNMENT JURISDICTION AND LAWS AND FEDERAL JURISDICTION AND LAWS

A full response to this question involves a prediction as to the constitutional basis and procedure for the recognition of Aboriginal self-government. The current debate between "inherent" and "contingent" rights to self-government is indicative of the broader issues that remain unresolved to date in the larger constitutional discussions.

For purposes of discussion in this paper, it will be assumed that the basis of recognition of Aboriginal government will be in accordance with the current constitutional framework, whereby the federal and/or provincial governments will be involved in delegating "self-government" powers and authorities under their current constitutional legislative authorities. It is acknowledged that even the use of the word

“delegation” in the context of future recognition of the rights to self-government is inimical to the broader Indian position on self-government. However, it would appear that whatever the basis of recognition, many of the specific issues identified herein will remain to be addressed.

Under the current constitutional framework, Parliament has the exclusive legislative jurisdiction to make laws in relation to “Indians and Lands Reserved for the Indians”, and this will likely provide the primary constitutional underpinning for future Aboriginal self-government initiatives, certainly for the Indians and Inuit, and possibly for the Métis. It should be noted that the references and focus here will be primarily in relation to Indian self-government for the purposes of discussion.

Federal law is supreme on lands reserved for Indians to the extent that Parliament so legislates. As a result, it is arguable that no provincial law may directly or indirectly interfere with a duly enacted “federal” self-government regime on “lands reserved for the Indians”.

This means that Indian governments can enjoy and exercise whatever powers the federal government is prepared to delegate to them, and reflect in appropriate legislation. Practical considerations that temper somewhat this absolute concept are discussed later. In strictly legal terms, the federal government technically need not concern itself with provincial concerns about self-government on lands reserved for Indians.

It should be noted that the precise territorial scope of federal constitutional jurisdiction under section 91(24) is a matter for debate. It seems clear that the federal capacity to legislate for self-government is much broader than simply an authority which applies to reserves as defined by the *Indian Act*. The issue of the territorial application of federal legislation arises in respect of other lands reserved for Indians upon any terms or conditions, as well as the potential geographic application of self-government capacities based on laws relating to “Indians” (e.g. estates, membership) as opposed to lands reserved for Indians under section 91(24).

The strict legal positions outlined above leave aside, several practical considerations including:

- the issue of future constitutional protection of self-government arrangements; and
- any role that may be assumed by the provinces as part of a constitutional amendment containing both the commitment, as well as the terms of reference for future self government negotiations.

The technical capacity of the federal government to unilaterally enact new Indian self-government regimes will likely be replaced as a matter of practicality by a requirement at least in some areas, for concurrent and complementary federal and provincial legislation. (This is demonstrated to some extent in the legislative requirements agreed to in both the Cree-Naskapi and Sechelt situations.)

In summary terms, under the current constitutional framework, no Aboriginal government can have any power except that which is expressly given it, or which arises by necessary implication from the granting of express power. In a corollary sense, there is no "sectoral fettering" of the federal government's capacity to delegate such self-government powers to Indian governments.

New jurisdiction conferred on Indian governments in fields not previously occupied by federal legislation in general or the *Indian Act* in particular, where that field has effectively been occupied by provincial laws of general application, will likely result in the ouster of the provincial laws in question (i.e. there would be in effect parallel Indian government and provincial powers with complementary territorial application).

Once agreement is achieved on the jurisdictions to be delegated by the federal government, the final issues will involve the question of continuing application of federal laws. This can best be answered by reference to the treatment of this issue under both the *Cree-Naskapi* and *Sechelt* Acts in the following terms:

**(a) Cree-Naskapi Act:**

The Act prevails to the extent of inconsistency or conflict with any other Act of Parliament except the *James Bay and Northern Québec Settlement Act*. (Section 3).

The *Indian Act* does not apply except for the definition of "Indian".

**(b) Sechelt Act:**

- "All federal laws of general application in force in Canada are applicable to and in respect of the Band, its members and Sechelt lands, except to the extent that those laws are inconsistent with this Act." (Section 37).
- The *Indian Act* applies except where inconsistent with the Act, the Band constitution or Band law. (Section 35).

- The Governor-in-Council may declare that the *Indian Act* or some provisions of it do not apply. (Section 36).
- The *Indian Oil and Gas Act* applies. (Section 39).

It should be noted in relation to the Northern Village Municipalities and Regional government (Kativik) created under the *Kativik Act*, that bylaws of the municipalities may not be contrary to the laws of Canada, and of Quebec or inconsistent with any special provisions of the *Kativik Act*.

In summary, the legislative authority of section 91(24) enables the federal Cabinet to delegate jurisdictional authority to Indian governments and over the lands in question, and in so doing to oust any provincial laws of general application that might have previously been operative in that sector and over that territory. It would appear to have the same capacity in respect of federal laws of general application.

## (B) FUTURE RELATIONSHIP BETWEEN ABORIGINAL GOVERNMENT JURISDICTION AND LAWS AND PROVINCIAL JURISDICTION AND LAWS

Flowing from the discussion above in relation to the nature and extent of federal legislative authority under Section 91(24), it is clear that significant authority to recognize and delegate unencumbered jurisdictional power to Indian governments exists. This same line of argument would apply to the Inuit and arguably to the Métis, as a matter of general legal interpretation.

Some issues relative to the roles of the provincial governments flow from the fact that the federal government has chosen in the past to exercise only a small portion of the authority it possesses in legislative terms. To the extent that Parliament has failed to legislate either directly or comprehensively, provincial laws have intruded into the administration of affairs on Indian lands. Such laws do not flow from any constitutional authority of the provinces to legislate directly so as to effect Indian people or lands. Rather, with the valid exercise of provincial power in the absence of direct federal laws occupying the same field, the provincial law applies indirectly to Indians and Indian lands to the same extent as it applies to Non-Indians and the Off-Reserve context. Provinces can and have regulated the effect of such intrusions in various sectors, especially in the area of taxation.

It is clear that the federal government can, and has most recently in the case of the Sechelt legislation, enacted valid laws pertaining to Indian self-government that eliminate the application of any provincial law that

is in conflict with federal legislation, derivative Indian constitutions, laws and related policy.

Once again, reference should be made to the treatment of this issue in both the *Cree-Naskapi* and *Sechelt Acts* as follows:

(a) *Cree-Naskapi*:

- Provincial laws of general application do not apply to the extent of conflict with the *Cree-Naskapi Act* or a regulation or by-law thereunder. (Section 4).
- Forest and gravel exploitation on 1A and 1AN lands is subject to the provincial Act on land regime.(Sections 111-112).
- The Mining Act will continue to apply; other existing servitudes will continue to apply until their expiry. (Sections 115-116).
- Civil Codes of Quebec and Lower Canada apply to the extent that they are not incompatible with the disposition of rights and interests. (Section 130).

(b) *Sechelt*:

- "Laws of general application of British Columbia apply to or in respect of the members of the Band except to the extent that those laws are inconsistent with the terms of any treaty, this or any other Act of Parliament, the constitution of the Band or a law of the Band." (Section 38).
- The council may adopt B.C. laws if authorized by the band constitution. (Section 14(3)).
- Legislative power may be delegated to the Council by the B.C. legislature. (Section 15).
- Provincial laws on mineral resources and the five percent right of expropriation under OC 1036 will continue to apply. (Sections 24, 40-41).

In relation to the Inuit situation in Northern Quebec, the laws of Quebec apply to the Northern Village Municipalities and to the Kativik Regional Government, so far as they are applicable thereto and do not derogate from the *Kativik Act*. The Quebec Minister of Municipal Affairs is

empowered to disallow any by-law passed by the Kativik Regional Government or the Northern Village Municipalities.

In summary, in terms of legal paramountcy, legislation enacted pursuant to current federal legislative authority gives primacy to enabling legislation and directly or indirectly to the constitution of the Band or laws of the Band in question. It is clear that provincial laws of general application can be ousted in their application to the Indian government and the land involved by any or all of:

- The enabling legislation;
- The treaties;
- Any other Act of Parliament;
- The Constitution of the Band;
- Laws of the Band.

The Sechelt legislation is specific in allowing the Band in the exercise of its legislative authority to declare operative selected provincial laws if it deems it desirable.

### (C) IS THERE POTENTIAL FOR JURISDICTIONAL OVERLAPS?

The question arises as to whether or not there is the potential of overlapping powers between Indian governments and the powers of provincial and municipal governments and indeed the federal government itself.

The short answer to this would appear to be that if the Indian government powers are validly enacted constitutionally, and the Indian government does not attempt to exercise its jurisdiction outside its territorial limits, there should be no overlaps.

More specifically, if "conflicting" provincial laws had arguably applied on account of non-occupation of a sector or field by validly enacted Indian-specific legislation (see also section 88 of the *Indian Act*), the valid exercise by the Indian government of its parallel powers would effectively "oust" the province of any jurisdiction it might previously have possessed. If the Indian government exercises its powers without exceeding its jurisdiction in either subject area or territorial application, there is no overlap in jurisdiction. More fundamentally, there is no jurisdiction in the province in question in relation to the Indian land involved. It is arguable that the same line of reasoning could apply



should federal legislation specifically extend in its application to a defined Off-Reserve population.

If there is an apparent conflict the determination of paramountcy will likely see Indian laws prevailing.

**(D) IS THERE THE NEED FOR SOME MECHANISM TO DEAL WITH THOSE INTERFACE AND COORDINATION REQUIREMENTS THAT WILL ARISE?**

While technically, jurisdictional overlaps should not arise, Indian government interests and actions have in the past come into conflict with provincial, municipal, and sometimes federal concerns and interests. Clearly, as more Aboriginal groups acquire jurisdictional autonomy in a much broader range of areas, there is a substantial likelihood of significant increases of such clashes.

For the future, it would appear desirable that all participants focus on the desirability of establishing some form of planning and review mechanism. Some comments on the need for and possible mandate of such a vehicle follow:

1. There is a need for a forum to discuss jurisdictional and other forms of existing and potential conflict between all of the governments involved.
2. This would not be a forum for addressing the issue of who has jurisdiction in particular situations – such issues are better left to the courts. It can be hoped that legislation will be drafted with sufficient precision in relation to the substantive and territorial jurisdiction of all governments involved so as to minimize such issues.
3. The essential functions of such a mechanism would be to defuse potential conflicts before they arise, by providing a forum within which all interested governments and parties would be able to make their views known in advance of specific legislation or other actions by one government or another. Optionally, such a vehicle could be charged with making non-binding comments and recommendations on particular issues, including recommendations in respect of future legislative action by one or more of the governments involved.
4. The scope of mandate could extend to encompass legislation and other actions of all participant governments, which could have an impact on the membership, jurisdiction, or territory of any of the other participant governments. Examples of key issues/sectors

where the potential for conflict exists and which might usefully be considered in such a forum include:

- Land use and planning issues;
- Environmental control issues;
- Natural resource development and management issues, and in particular, wild life management;
- Issues pertaining to access to Indian lands; and
- Taxation issues, especially where the Indian community in question is in close proximity to Non-Indian municipalities (e.g., municipal services and the general taxation and treatment of Non-Indian residents).

Once again, the potential difficulties in such areas flow not from overlapping jurisdictions, but from the exercise of separate powers and jurisdictions. The primary consideration which argues for some form of joint planning and review mechanism are the dictates that flow from physical proximity, and the object of achieving cooperation which will result in adjustments to initiatives on the part of participant governments for the sake of promoting and maintaining good relations.

At a more general level, the same planning/review mechanism would have potential planning for and implementation of program integration, definition of standards and broader policy coordination in such key areas as:

- education;
- social services;
- administration of justice;
- economic development; and
- taxation.

Once again, forums such as those presented by some parts of the current Ontario Tripartite Process have potential to act as clearing houses and mechanisms for cooperative study and action on issues that cut across regulatory and service jurisdictions of Indian, municipal, provincial, and federal governments, in such areas.

Clearly a number of issues arise in relation to the structure and operation of such a vehicle, although these will not be addressed in detail at this time. Such questions include:

- Composition;
- Structure, including level of operation (national, provincial, regional, local);
- Precise mandate;
- Powers and procedures; and
- Financing.

#### Experience to Date

In examining both the Cree-Naskapi and the Sechelt legislation, little provision has been made for the planning review mechanism suggested above.

Under the *Cree Naskapi Act*, sections 157-172, provision is made for the establishment of a "Cree Naskapi Commission" comprised of three members appointed by the Governor-in-Council on the recommendation of the Cree Regional Authority and the Naskapi Band. The Commission is required to prepare bi-annual reports on the implementation of the Act and to investigate any representations submitted to it in relation thereto. This is sufficient technical breadth of mandate to encompass many of the planning and review functions identified above, although it is not apparent that the Commission has been used for such purposes to date. The duties and operation of the Commission shall be reviewed after 5 years.

The *Sechelt Act* makes no provision as such for any form of planning/review mechanism of the type proposed. The fact of a significant number of "Non-Indian" occupants and some future accommodation of their interests is addressed through Sections 17-20 of the Act. These sections provide for the future recognition of the Sechelt Indian Government District and its governing body - the District Council.

(E) IS THERE A NEED TO PROVIDE FOR SOME FORM OF FEDERAL OVERRIDE OR DISALLOWANCE POWER IN RESPECT OF ABORIGINAL GOVERNMENT LAW-MAKING CAPACITIES AND ACTIONS?

In recent years, as the reality of self-government has confronted planners and politicians in more detail, traditional concerns have been raised in relation to the need to protect Non-Aboriginal governments and interests from the adverse effects of Aboriginal government action, laws, and jurisdiction. In a more muted fashion, the counter-balancing concern of ensuring that Aboriginal governments have some ability to protect their communities and interests from activities of other governments has also been discussed.

In the context of these discussions, the issue of whether or not the federal government in legislating self-government arrangements should retain disallowance powers, and if so, in what circumstances, has been extensively debated.

Such an override, or disallowance power, would subject or limit otherwise lawful activity of the Indian government in question, and could arise in either a bilateral (federal-Indian) or tripartite (federal-provincial-Indian) context.

Arguments for a power which would allow for unilateral interference with a decision-making power, otherwise within the jurisdiction of the Indian government, are in part premised on the broad constitutional principle that subordinate governments have and exercise their powers at the "goodwill" of their constituting government or governments. Clearly, opposition to this line of argument is central to Aboriginal concerns and positions in the current constitutional discussions.

In general terms, while arguments can be made for such an approach, this paper will merely make the point that the administrative and operational questions, let alone the inherent conflict between the concept of self-government and continued disallowance capacities, argue strongly for minimal, if any, continuing federal role of this type. Either a matter is to be within an Indian government jurisdiction or it is not - this is essentially a political decision. Following that decision, the Courts and/or some form of planning/review mechanism as proposed above should be the primary forums for hearing any grievances.

Mention will be made, once again, to how this issue has been dealt with in the *Cree-Naskapi* and *Sechelt Acts*. Disallowance powers are minimal under the *Cree-Naskapi Act*, and non-existent as such under the *Sechelt Act*. The extensive provincial disallowance powers under the *Kativik Act* have been referenced above.

*Cree-Naskapi:*

Approval of Minister required with respect to:

- by-laws dealing with wildlife harvesting and protection (Section 48); and
- election by-laws (Section 66).

Minister may also:

- inspect financial records (Section 91);
- appoint an auditor where a council fails to do so (Section 93);
- acquire a copy of an auditor's report (Section 94);
- appoint a financial administrator (Section 100); and
- validate a non-formal will (Section 176).

Governor-in-Council may make regulations:

- prescribing anything that is to be prescribed under the Act (Section 10);
- applying provincial law to certain lands (Section 11);
- respecting the exercise of a band's taxation powers (Section 45);
- respecting band elections (Section 67);
- respecting special band meetings and referenda (Section 87);
- long term borrowing (Section 98);
- establishing and maintaining land registry systems (Section 156);
- concerning expropriation (Section 156);
- setting penalties for violating the provisions of the Act (Section 198); and
- generally, for carrying out the purposes and provisions of the Act (Section 10).

Approval of the Governor-in-Council is necessary for:

## List of Titles in Print

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### Aboriginal Peoples and Constitutional Reform

#### PHASE ONE

##### *Background Papers (second printing)*

1. Noel Lyon, *Aboriginal Self-Government: Rights of Citizenship and Access to Governmental Services*, 1984. (\$12)
2. David A. Boisvert, *Forms of Aboriginal Self-Government*, 1985. (\$12)
3. NOT AVAILABLE
4. Bradford Morse, *Aboriginal Self-Government in Australia and Canada*, 1985. (\$12)
5. Douglas E. Sanders, *Aboriginal Self-Government in the United States*, 1985. (\$12)
6. Bryan P. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984*, 1985. (\$20)

##### *Discussion Paper*

David C. Hawkes, *Aboriginal Self-Government: What Does It Mean?*, 1985. (\$12)  
Set (\$75)

#### PHASE TWO

##### *Background Papers*

7. David C. Hawkes, *Negotiating Aboriginal Self-Government, Developments Surrounding the 1985 First Ministers' Conference*, 1985. (\$5)
8. John Weinstein, *Aboriginal Self-Determination Off a Land Base*, 1986. (\$7)
9. Marc Malone, *Financing Aboriginal Self-Government in Canada*, 1986. (\$7)
10. Jerry Paquette, *Aboriginal Self-Government and Education in Canada*, 1986. (\$10)
11. Richard H. Bartlett, *Subjugation, Self-Management and Self-Government of Aboriginal Lands and Resources in Canada*, 1986. (\$10)

12. C.E.S. Franks, *Public Administration Questions Relating to Aboriginal Self-Government*, 1987. (\$10)

*Position Paper*

- Martin Dunn, *Access to Survival, A Perspective on Aboriginal Self-Government for the Constituency of the Native Council of Canada*, 1986. (\$7)

*Workshop Report*

- David C. Hawkes and Evelyn J. Peters, *Implementing Aboriginal Self-Government: Problems and Prospects*, 1986. (\$7)

*Bibliography*

- Evelyn J. Peters, *Aboriginal Self-Government in Canada: A Bibliography 1986*, 1986. (\$12)

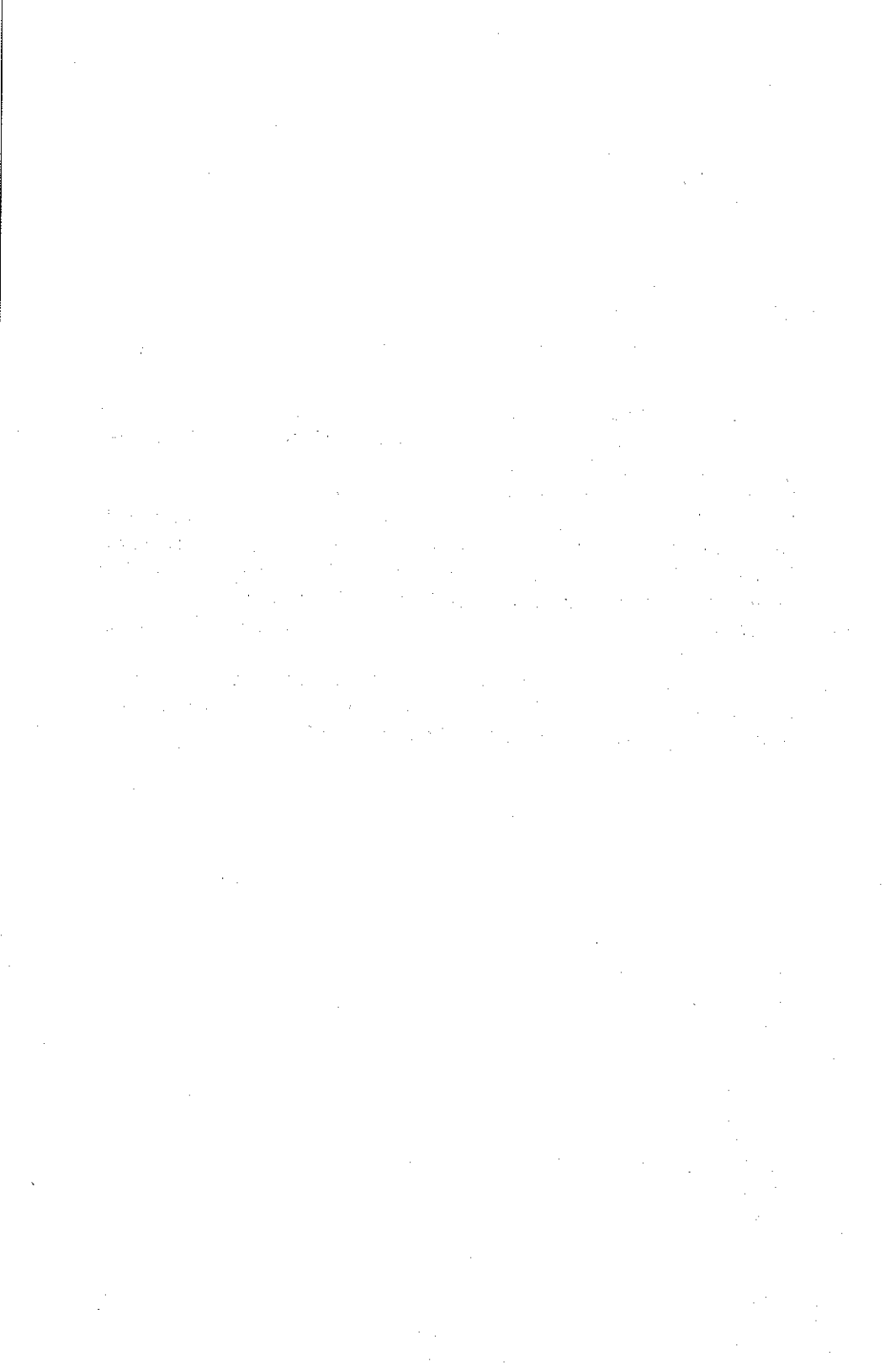
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## NOTES

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1. "Federal" and "Saskatchewan" draft accords tabled at the 1985 First Ministers' Conference. See e.g. - Federal (Document 800-20/041 Part I, Clause 2.)
2. Federal draft - Document 800-20/041 - Clause 6.
3. "Federal-Provincial implications of various concepts of Indian Self Government" - by David Nahwegabow for Ian B. Cowie, Director General - Corporate Policy - DIAND - 1982. Public document developed with input from the Assembly of First Nations.
4. DIAND - Population Projections of Registered Indians (Provincial Series) 1978.
5. See Generally "Aboriginal Peoples and Constitutional Reform - First Principles" - B. Schwartz - Institute of Intergovernmental Relations - Queen's University. Chapters XI-XVII.





- changing the name of a band (Section 16); and
- ceding lands to the province (Section 143).

The Governor-in-Council shall appoint the members and chairman of the Cree-Naskapi Commission on recommendation of the Crees and Naskapi (Section 158).

*Sechelt:*

Authority or Responsibility of the Minister:

- Reserve Land Register to be maintained by Minister for Sechelt lands;
- Minister shall cause constitution or any amendment to be published in Canada Gazette (Section 12);
- Minister may, with Governor-in-Council approval, enter into a funding agreement (Section 33);
- May recommend to Governor-in-Council, that the *Indian Act* or any provision thereof does not apply to the band, its members or any portion of Sechelt lands. May also recommend revocation of any such order (Section 36); and
- The Governor-in-Council or any Minister of the Crown may exercise any powers and carry out any functions or duties that are set out in the band constitution with respect to the Governor-in-Council or that Minister, as the case may be (Section 43).

Authority of the Governor-in-Council:

- Governor-in-Council may by order approve the band constitution and declare it in force (Section 11);
- Governor-in-Council may declare by order that sections related to Sechelt Indian Government District (17-20) are in force and transfer some powers, duties and functions of the band (Section 21(2)). These transfers can be returned to the band by another order (Section 21);
- Transfer of lands to the band is confirmed by letters patent caused to be issued under the Great Seal of Canada by the Governor-in-Council;

- Approves agreements between the Minister (representing Canada) and the band, concerning funding (Section 33);
- On the advice of the Minister may by order declare that the *Indian Act* or any provision thereof does not apply to the band or its members or any portion of Sechelt lands. May revoke any such order; and
- The Governor-in-Council or any Minister of the Crown may exercise any powers and carry out any functions or duties that are set out in the band constitution with respect to the Governor-in-Council or that Minister, as the case may be (Section 43).

As indicated the provisions of the *Sechelt Act* provide for minimal continuing federal intervention and no disallowance powers as such. In relation to the *Cree-Naskapi Act* provisions, little information is available on the extent of federal intervention since the enactment of the legislation. Once again disallowance powers are minimal.

The key issue once again will be the nature and extent of the jurisdictions to be legislatively recognised, after which the issue of disallowance should essentially be a non-issue.

### **(3) Conclusions**

It is apparent that Aboriginal self-government in varying forms is now and will increasingly become an operative reality in the immediate future. Translating broad conceptual positions into operational self-government capacities, which meet the needs and aspirations of their varying constitutencies in a manner compatible with the broad constitutional-political framework of Canada, presents immense challenges to all involved.

This paper has tried to outline some of the issues in relation to the future interface between Aboriginal and Non-Aboriginal governments. The paper has focussed on general issues and requirements. Because so little consideration has been given to the nature and extent of the self-governing capacities that might ultimately be exercised by different forms of Aboriginal self-government, attempting to address questions relating to future jurisdictional interface and coordination is inherently speculative.

Rather, an attempt has been made to identify and discuss some of the more seminal "building block" issues and considerations, as a guide to the more specific issues that will have to be considered in individual negotiations.

A number of issues, while technically within the scope of the paper, remain to be addressed, including consideration of the future situation in the Yukon and Northwest Territories, issues of jurisdictional interface with municipal governments, and questions relating to future jurisdictional interface and cooperation among Aboriginal governments themselves. At many points in the paper, emphasis has been placed on considerations related to the future implementation of Indian self-government. While many of the considerations in relation to future Métis and Inuit self-government arrangements are similar to those that exist in the Indian context, separate considerations do present themselves which will require more detailed analysis in the immediate future.

By way of general conclusion, some of the key considerations and suggestions contained in the main body of the report are re-emphasized.

## The Constitution

Agreement on some form of self-government amendment appears to be within reach. It seems that beyond a commitment to negotiate, and some specification of the general parameters of what is to be negotiated, why, and how, the constitutional discussions will not provide specific guidance on many of the issues relating to future jurisdictional interface raised in this paper.

## The Need for a Working Definition of Self-Government

As considerations relating to negotiation and implementation replace the broad conceptual and rhetorical discussions of recent years, working definitions to be employed in the definition of the specifics of self-government for individual groups will be required. Agreement on some form of general framework, designed to reflect the range of substantive jurisdictional areas that will require some level of consideration, would be desirable (see Chapter 2).

## Flexibility to Accomodate Diversity

The circumstances and needs of different Aboriginal peoples and communities vary widely. Present policy, and approaches increasingly emphasize the need for flexibility. Such flexibility should be maintained, not only in regard to the broad self-government "models" open for negotiation by a given community, but also in respect of the processes to be employed, and most importantly the end results that are negotiable.

## The Broad Process of Negotiation

Whatever the scope of negotiations agreed to by participants, it is clear that the broad process will involve:

- Identification of those jurisdictions of priority to the Aboriginal groups involved;
- Identification of the type of powers and authorities required within given jurisdictional sectors;
- Identification of how those sectors are currently occupied; and
- The jurisdictional, program and financial adjustments that would have to occur (and are acceptable to all participants), to achieve the required self-governing capacities.

## The Role of the Provinces

The central importance of the future involvement of provincial governments is emphasized. While it is possible for the federal government to accomplish much of what will have to be dealt with, under its section 91(24) authority, exclusion of the provinces would have a major effect on the scope and content of what could be effectively negotiated in reality.

## The Issue of Federal and Provincial Jurisdiction and Financial Responsibility

Negotiation of Aboriginal government jurisdictions will involve achieving an understanding on current federal-provincial occupation of those jurisdictional areas from a legal, as well as from a programmatic and financial responsibility point of view. This complex issue is reviewed in some detail. Tangentially, it should be noted that some level of resolution of outstanding differences of position between the two levels of government in this area is critical to the effective negotiation of financial arrangements that support Aboriginal self-government for the future.

## Jurisdictional Sectors that Might be Negotiated

In addition to suggesting a broad framework to facilitate identification of some of the jurisdictions that might be considered, the paper provides commentary on the current "constitutional-legal" occupation of those

sectors. Such analysis proves to be of limited value in isolating the questions and considerations that will have to be dealt with in examining future Aboriginal self-government capacities and jurisdictional coordination requirements in those areas. Of equal, if not more importance, will be achieving detailed understanding in relation to current occupation, programmatically and financially of identified jurisdictions, and achieving agreement on how these will have to be adjusted for the future. Even more fundamentally, there will need to be the political will on the part of all participants, to engage in pragmatic negotiations relating to required, and workable jurisdictional arrangements for individual groups.

### Status of Federal and Provincial Jurisdictions and Laws for the Future

Following negotiation of and legislation to reflect new self-government arrangements, questions arise in relation to the continuing status and application of federal and provincial laws of general application to Aboriginal peoples and their lands. The pattern that is already emerging is one of establishing the paramountcy of Aboriginal self-governments to the extent that matters are specifically dealt with in enabling legislation or derivative constitutions and laws particularly in relation to provincial laws. Considerable detailed work and practical experience is required to enable a working through of the more detailed questions that will present themselves in this area.

### Need for Planning Review Mechanism to Support Jurisdictional Interface and Coordination Requirements

In large part, the future planning, policy development, and coordination requirements that would desirably be in place for all participant governments are not addressed in the specific self-government legislation enacted to date. Suggestions are advanced in relation to the need for and possible mandate of such planning and review mechanisms for the future.

Instead of speculating on the specific issues that may arise in particular negotiations in the future, this paper has opted to deal with the issue of future jurisdictional interface by identifying issues and considerations that bridge current discussions and concepts with the more general aspects of future "intergovernmental relations" that will flow from the increasing reality of Aboriginal self-government. The challenge for those involved, is to now invest in the more detailed consideration of how these issues will be managed in the context of future negotiations.

