Indigenous Nationals/Canadian Citizens Courchene

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From First Contact to Canada 150 and Beyond

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IIGR

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Foreword

The Institute of Intergovernmental Relations is pleased to publish this book on Indigenous peoples and their relationship with and within Canada. As a leading venue for the analysis of multilevel governance and intergovernmental relations, the Institute has contributed to the debate on indigenous governance with publications such as Alan C. Cairns's MacGregor Lecture *First Nations and the Canadian State: In Search of Coexistence*, and our 2013 State of the Federation volume *Aboriginal Multilevel Governance.* We are delighted to continue this tradition, particularly in this year marking the 150 years since Confederation, with the release of *Indigenous Nationals/Canadian Citizens: From First Contact to Canada 150 and Beyond*, by Institute Fellow and former director, Thomas J. Courchene. In this book, he offers a view forward, and a refreshing one that favours regional and culturally focused institutions, rather than nationally focused strategies. Whatever the path ahead, the growing attention to the transformation occurring in Indigenous-state relations is stimulating and satisfying.

This book continues a long-standing collaboration between the Institute and Tom Courchene, professor emeritus of Economics at Queen's University. One of Canada's most prolific scholars, Tom's diligence and intellectual gravitas are inspiring. I wish to thank him for bringing this important work to the Institute for publication. I also must gratefully acknowledge the valuable contribution Mary Kennedy has made in shepherding this book through the publication process and generally

insuring that things are done right. Thanks also to Wayne Hiebert for the beautiful photographic rendering of Allen Sapp's painting in the centre of the cover design.

Elizabeth Goodyear-Grant
Director, Institute of Intergovernmental Relations

Acknowledgements

It was my great good fortune that Elizabeth Goodyear-Grant, Director of the Institute of Intergovernmental Relations (IIGR), a division of Queen's School of Policy Studies), agreed that the Institute would oversee and underwrite the publication of *Indigenous Nationals/Canadian Citizens*. This included inviting me to present the information in chapter 6 as one of IIGR's Kenneth R. MacGregor Lectures, following in the footsteps of Alan C. Cairns's 2002 lecture (*First Nations and the Canadian State*). Beyond this, Elizabeth, with the assistance of Associate Director Kyle Hanniman, provided advice and encouragement throughout the writing and production processes including arranging for outside assessors.

The Institute's role went much further in that I was allowed to draw upon the expertise of Mary Kennedy, IIGR's long-serving and invaluable administrative secretary and publications coordinator. Over a two-year period chapter drafts moved back and forth, often on a weekly basis, complemented with bi-weekly meetings on a host of organizational and publication issues and challenges, including map selection, providing interim drafts for reviewers, and sorting out myriad technical and organizational complications at my end of the production process. I doubt very much of this book would ever have seen the light of published day were it not for Mary Kennedy's enthusiasm and her generous, continuing, and professional assistance.

The School of Policy Studies was also fully onside with this enterprise. Lynn Freeman, the associate director of the school, was the first

to provide positive feedback and encouragement on a very early draft. Her door was always open, and she was always available to listen and to provide advice on what, over the two-year period, turned out to be a wide range of stylistic, substantive, and analytical issues that are no doubt inherent in wrestling with any manuscript. I was also most appreciative of SPS Director David Walker's continuing interest and encouragement as the manuscript progressed. The SPS staff, especially Fiona Froats, Chris Cornish, and Lee Van Niedek, were always available for addressing my never-ending computer, software, and reproduction challenges.

On the analytical front, in the School of Policy Studies' 2014 Spring term, Bob Watts (a Six Nations resident, chief of staff to Phil Fontaine when he was the national chief of the Assembly of First Nations, and a former senior federal civil servant closely involved with all things Indigenous) allowed me to take his MPA class on "Reconciliation" provided that I would commit to completing all assignments. My essay for the final assignment was entitled "Indigenous Nationals and Canadian Citizens." The opening sentence read: It is the birthright of a First Nations person to be at the same time an Indigenous National and a Canadian Citizen. Given that this has become the title of this book, I am obviously indebted to Bob for providing such a stimulating and insightful class.

At the outset of the project I was fortunate to spend a most informative afternoon in the lobby of the Royal York hotel in Toronto with Manny Jules (former chief of the Kamloops Indian Band and the founder of the First Nations Taxation Commission) and André Le Dressay (director, Fiscal Realities Economists, Ltd.). They are playing significant and continuing roles in introducing economics and business principles across First Nations communities and they have had an important influence on my overall proposal detailed in chapter 10.

Along similar lines it is essential to acknowledge that I am standing on the shoulders of Canada's many scholars who have contributed to the Indigenous file. Those that I drew upon and that appear in the references include Alan Cairns (2000) Tom Flanagan and his co-authors (2000, 2011), Gordon Gibson (2009), John Burrows and Leonard Rotman (2012), Sébastien Grammond (2013), Graham White (2009), John Whyte (2003), Harold Cardinal and the Indian Chiefs of Alberta (1970), Chief Dave Courchene (1971), Tony Penikett (2006), Stephanie Irbacher-Fox and Stephan Mills (2009), Thierry Rodon and Minnie Grey (2009), Doug McArthur (2009), Harry Swain and James Baillie (2015), Peter Hogg

and Mary Ellen Turpel (1995), and the recent uplifting treatise by Greg Poelzer and Ken Coates (2015), among others. Readers should not assume that these authors would necessarily embrace the thrust of this volume.

It is a special pleasure to express gratitude to Hugh Segal, my longtime Queen's colleague and currently the principal of Massey College. When Hugh was president of the Institute for Research on Public Policy, he invited me to become the Institute's senior scholar. Beyond enabling me to publish across a wide swath of Canadian policy issues, it led me to become one of the co-editors of IRPP's *Northern Exposure: Peoples, Powers and Prospects in Canada's North,* along with Frances Abele, Leslie Seidle, and France St-Hilaire, under the leadership of IRPP's president, Mel Cappe. Chapter 9 draws heavily from this volume.

I am especially grateful to professor Shin Imai (Osgoode Hall Law School) for allowing his insightful research article on the Indian Act to be included as a supplement to chapter 8.

I am likewise grateful to those who have provided valuable comments and suggestions on earlier drafts or otherwise provided guidance—among them Jim Lahey, Nadia Verrellli, my brother Bob Courchene, David Elder, Mike Joyce, David Hawkes and, as already noted, Elizabeth Goodyear-Grant, Kyle Hanniman, Mary Kennedy, and Lynn Freeman. My daughter Teri Courchene provided substantive and editorial contributions along with needed encouragement. Arguably most welcome of all was the encouraging assessment from the designated "outside referee" that allowed the book to go forward.

Overseeing the production of this book was the newly-formed School of Policy Studies Publications Program, led by Kim Richard Nossal, including Lynn Freeman, copyeditor Anne Holley-Hime, and production coordinator Mark Howes. As always McGill-Queen's University Press handles the distribution of the School of Policy Studies books. I am grateful to all for their roles in bringing this project to fruition. It is a special pleasure to express my sincerest gratitude for the professionalism, dedication, and on occasion even the cheerleading of Anne Holley-Hime. I am astonished by the talent and concentrated effort that the editing process demands. Mark Howes converted the graphs and maps into print-ready form and oversaw the cover design. I am grateful to all for their roles in bringing this project to fruition.

As always, my research efforts have benefited from Margie and my annual August "policy weekends" with Tom Kierans and Mary Janigan that in recent years focused increasingly on alternative approaches to the relationship between First Peoples and Canada.

Finally, and on a personal note, midway though my public policy career, Margie and I agreed that I should redirect my ongoing research toward Indigenous Canada and in particular to the historical evolution of a range of political and socio-economic policies with respect to First Peoples within federal Canada. It soon became clear that this would have to be a multi-year endeavour and hence best embarked upon when I was formally retired and relatively clear of other professional commitments. The beacon of Canada 150 provided an inviting publication goal.

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On this, the year of our fifty-sixth wedding anniversary, I am proud and privileged to dedicate this volume to Margie without whose full support, thoughtful input, and constant encouragement *Indigenous Nationals/Canadian Citizens* could never have materialized.

About the Cover

Allen Sapp, OC, SOM (1926–2015) was a Cree Indian painter born on the Red Pheasant Reserve in north-central Saskatchewan. The Allen Sapp Gallery is located in North Battleford, SK. Although this is our painting, we have also satisfied the copyright requirements for reproduction. The painting is called "Playing Hockey on Red Pheasant Reserve" and aptly embraces the Indigenous nationals/Canadian citizens theme of this volume. Photographer Wayne Hiebert kindly provided a cover-ready reproduction of the painting and Mark Howes helped with the cover design.

About the Author

Thomas J. Courchene OC, SOM, FRSC was born in Wakaw, Saskatchewan and educated at the University of Saskatchewan, Princeton University and the University of Chicago. He holds honorary doctorates from the University of Regina, Western University, and the University of Saskatchewan. Tom has authored/edited several hundred publications across a wide range of Canadian public policy areas and is the recipient of numerous awards, including the inaugural Donner Prize. He was awarded the Canada Council Molson Prize for lifetime achievement in the social sciences in 2000. On this occasion the jury noted:

> Thomas Courchene's cross-disciplinary approach to issues ranging from economics to federal-provincial relations to law and health has often been controversial though seminal in shaping Canadian public policy. He is a prolific writer whose sharp and versatile intellect has influenced a whole generation of students and stimulated lively and constructive public debate. Thomas Courchene is one of Canada's visionaries and is known as a man of infinite capacity and integrity.

Currently, Tom is Professor Emeritus at Queen's and an adjunct professor in the Department of Economics. He was the founding director of Queen's School of Policy Studies.

List of Abbreviations

AANDC	Aboriginal Affairs and Northern Development Canada
AFN	Assembly of First Nations
ATR	addition to reserve
AUCC	Association of Universities and Colleges of Canada
BC	British Columbia
CAP	Congress of Aboriginal Peoples
CCB	Canada Child Benefit
CHT/CST	Canada Health Transfer/Canada Social Transfer
CPR	Canadian Pacific Railway
CSIN	Commonwealth of Sovereign Indigenous Nations
CWB	Community Well-Being (index)
DIAND	Department of Indian Affairs and Northern Development
EQAO	Education Quality and Accountability Office
FASD	Fetal Alcohol Spectrum Disorder
FMA	Fiscal Management Act
FN	First Nation
FNGST	First Nation Goods and Services Tax
FNP	First Nations province
FNTC	First Nations Tax Commission
FNTI	First Nations Technical Institute
FTE	full-time equivalent
FNUniv	First Nations University of Canada
FSIN	Federation of Sovereign Indigenous Nations Federation of Saskatchewan Indian Nations

GEB	gross expenditure base
GST	goods and services tax
IFA	Inuvialuit Final Agreement
INAC	Indigenous and Northern Affairs Canada
IPAC	Indigenous Peoples' Assembly of Canada
IRS	Indian residential school
ISR	Inuvialuit Settlement Region
ITK	Inuit Tapiriit Kanatami
JBNQA	James Bay and Northern Quebec Agreement
JCPC	Judicial Committee of the Privy Council
NLCA	Nunavut Land Claims Agreement
NTI	Nunavut Tunngavic Inc.
NWT	Northwest Territories
PLSNP	Program of Legal Studies for Native People
RCAP	Royal Commission on Aboriginal Peoples
SCC	Supreme Court of Canada
SIFC	Saskatchewan Indian Federated College
SIIT	Saskatchewan Indian Institute of Technologies
TLE	Treaty Land Entitlement
TRC	Truth and Reconciliation Commission of Canada
UBCIC	Union of British Columbia Indian Chiefs
UFA	Umbrella Final Agreement
UNDRIP	*United Nations Declaration on the Rights of Indigenous Peoples*
US	United States
v.	versus
WDFN	Whitecap Dakota First Nation
YFN	Yukon First Nation

Part One

Introduction and Socio-Economic Overview

Chapter 1

Annotated Introduction and Overview

Canada's sesquicentennial is a momentous milestone and clearly an appropriate occasion to celebrate our nation's many accomplishments. Ranking high in terms of Canada's achievements is that with just over 10 percent of the population of our powerful neighbour to the south, and sharing with the Americans the longest nation-to-nation border, we have nonetheless been able to carve out a society in our own likeness and image in the upper half of North America. In particular, we have been able to marry the American economic model with the continental European social model with the result that, despite our legal, cultural, religious, and linguistic diversity, we have consistently ranked very high (and often topped) the global rankings for the world's "most liveable nation."

However, there is another Canada—Indigenous[1] Canada—whose roots go back centuries and who, by virtually any set of socio-economic indicators, are far too often experiencing third-world living conditions. That this is the case will become abundantly clear in chapter 2 where a range of socio-economic indicators for Indigenous peoples (e.g., incomes, education, poverty, incarceration rates, mortality rates…) are presented in comparative perspective.

1 Although "Aboriginal" is the term that appears in the Constitution and is also employed in the proceedings of the Supreme Court of Canada, "Indigenous" is becoming the preferred way to refer to First Peoples and will be employed in this book, except when dealing with quotations from the Constitution and the courts.

Appropriately the underlying message in the ensuing analysis is that recent developments across a broad range of fronts have been such that there is reason to be optimistic that a brighter future is in store for Indigenous Canada. Among these developments/initiatives are Prime Minister Harper's House of Commons residential school Statement of Apology, the residential school compensation package, the Truth and Reconciliation Commission (TRC) and the associated near-100 "Calls to Action" along with the many favourable Supreme Court decisions.

The year 2015 was especially significant in that Indigenous Canadians voted in record numbers in the federal election. Indeed, there were roughly fifty Indigenous candidates with nearly a dozen of them elected, two of whom became cabinet ministers—Justice Minister Jody Wilson-Raybould, of the Kwakwaka'wakw First Nation and Minister of Fisheries, Oceans and the Canadian Coast Guard Hunter Tootoo from Nunavut. Post election, Prime Minister Justin Trudeau welcomed the final report of the Truth and Reconciliation Commission and in the process indicated that he agreed with *all* of the TRC's Calls To Action. Also welcomed by the Indigenous community was the Trudeau government's quick decision to launch a national inquiry into missing and murdered Indigenous women. And in 2016 the prime minister embraced most of the forty-six articles of the *United Nations Declaration of the Rights of Indigenous Peoples* to apply in all dealings with Indigenous peoples.

With this as backdrop, one hopes that the 150th anniversary of our federation will nonetheless lead Canadians to reflect upon the many unacceptable, often indefensible, policies that were part of the historical legacy of Canada's treatment of Indigenous peoples on the one hand, and to commit ourselves to further improving their socio-economic opportunities going forward.

All of the above is by way of noting that the underlying rationale for this monograph is to propose, and elaborate upon, a bold political and institutional infrastructure for Canada's First Nations as the vehicle for improving their socio-economic futures. While the specific proposal will focus on the land base of the province of Saskatchewan, the essence of the underlying model is replicable elsewhere in Canada.

Part Two, A Voyage to Hell and Back: From First Contact to the Sesquicentennial

Setting aside until later—the chapter 2 statistical overview of the com-

parative socio-economic indicators—the historical storyline of Indigenous-Canada relationships proceeds along the following lines:

Chapter 3, Milestones in Canada-Indigenous Relations: From Columbus to the Constitution Act, 1982

Chapter 3 traces selected policies from first European contact through to Confederation and then up to, but not including, the Constitution Act, 1982. The obvious starting point is the so-called "doctrine of discovery" issued by Pope Alexander VI in 1493 that allowed any lands in the Americas not inhabited by Christians to be "discovered," claimed, and exploited by Christian rulers. Unbelievably, this doctrine has never been repealed although efforts are currently underway to pressure Pope Francis to revoke it. The focus then turns to the earliest North American treaty, namely the 1613 Two Row Wampum Treaty between the Iroquois Confederacy and the Dutch (New Holland) that embraced peaceful and parallel co-existence (i.e., non-integration) which still influences the Iroquois' view of their relations with and within Canada.[2]

The next milestone is arguably the single most important event in Canadian Indigenous history, namely King George III's 1763 Royal Proclamation that recognized Indigenous peoples' title to Indians lands and that embraced the nation-to-nation relationship with the Crown (and, by extension, later with Canada).

Confederation formally transferred authority over Indians to the federal government (section 91[24] of the Constitution Act 1867) and then Ottawa used this power (i) in 1869 to attempt to enfranchise[3] the Indians, (ii) to embark upon clearing Canadian lands for settlement and development via the "numbered treaties" (Treaties 1 and 2 in Manitoba in 1871 through to Treaty 11 in NWT in 1911),[4, 5] (iii) to enact the

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2 Supplement 3.1, which follows chapter 3, focuses in more detail on the Iroquois in North America, including the various Iroquois reserves in Ontario and Quebec. Also featured is the manner in which the Iroquois Confederacy influenced the US Founding Fathers.

3 Enfranchisement would allow Indians to vote (i.e., exercise their franchise) and would imply renouncing Indian status. This legislation was not successful.

4 Appendix A to this monograph elaborates in considerable detail each of the eleven numbered treaties, including naming the individual First Nations that were signatories (normally via an "X") to each of the treaties. Appendix B to the monograph reproduces the text of Treaty 6.

5 Supplement 3.2 to the chapter reproduces Manitoba Indian Brotherhood Chief Dave Courchene's moving 1971 commemorative address on the occasion of the 100th anniversary of Treaty 1.

infamous Indian Act in 1886 and (iv) to introduce the even-more-infamous residential school system. The chapter concludes with the furor surrounding the surprising 1969 Trudeau-Chrétien federal White Paper that yet again called for enfranchisement and that generated significant and substantive pushback from Indian and non-Indian quarters alike.

Then came the Constitution Act, 1982 and the associated Canadian Charter of Rights and Freedoms that ushered in a most surprising and most welcome new dawn for Canada's Indigenous peoples.

Chapter 4, A New Beginning: From the Constitution Act, 1982 to the Sesquicentennial

Inter alia, the 1982 Constitution Act-cum-Charter recognized and affirmed Indigenous rights and freedoms arising from the Royal Proclamation as well as those arising from land claims agreements. Section 35 of the Constitution Act, 1982 defined treaty rights to embrace those existing in current, and in future, land claims agreements. Moreover, all Indigenous and treaty rights would be guaranteed to apply equally to male and female persons.

These and associated constitutional provisions served as a launch pad for redressing historical wrongs and for advancing Indigenous rights and title. In terms of the former, almost immediately Canada introduced Bill C-31 that ensured gender equality and that embraced provisions for restoring Indian status to those who had lost status through Indian Act discrimination.

The 1992 Charlottetown Accord was designed to assuage Quebec after the failure of the Meech Lake Accord. However, in the process of negotiating the Accord virtually every interest group wanted to ensure that its concerns were included. Beyond the many provisions relating to Quebec, the proposals relating to Indigenous peoples included (among others) a constitutionalized Indigenous self-governing order of government, representation in the House and Senate, and a role in Supreme Court appointments among other provisions. The Accord went down to defeat in a national referendum.

However, many of these Charlottetown proposals fed into the 1991–1996 Royal Commission on Aboriginal Peoples (RCAP 1999). Entitled *People to People, Nation to Nation*, RCAP consisted of five volumes, 440 recommendations (over a thousand if one includes sub-recommendations), 80,000 pages of hearings and 250 commissioned research papers. Intriguingly, because it was so encyclopedic, not only did it defy sum-

marizing, but it also ensured no core message could emerge. Moreover, the Chrétien government's response (*Gathering Strength*) did not offset the prevailing view that his government more or less ignored the RCAP report. Nonetheless chapter 4 will highlight some key aspects.

Under Paul Martin's short tenure as prime minister, first ministers and Indigenous leaders were brought together to draft the $5 billion Kelowna Accord for investments in education, health, and remote communities.

While Stephen Harper's initial action was to shelve the Kelowna Accord, he later dramatically reversed direction by (i) initiating the residential school compensation package for survivors, (ii) orchestrating the House of Commons residential school Apology, and (iii) launching the Truth and Reconciliation Commission. These most welcome initiatives were later followed by several Harper policies that were opposed by Indigenous groups—the omnibus bills that triggered the Idle No More movement, Harper's lack of concern over the missing and murdered Indigenous women file, and the First Nations Financial Transparency Act.

The chapter concludes with a focus on the election of the Justin Trudeau Liberals and a new dawn for Canada's First Peoples. The Indigenous participation in the election set record levels both in terms of voter turnout and the number of Indigenous candidates. Among the early initiatives of the Trudeau government were the striking of an inquiry into missing and murdered Indigenous women, embracing all of the 94 Calls to Action of the Truth and Reconciliation Commission, and embracing but not enshrining the *United Nations Declaration on the Rights of Indigenous Peoples*.

Part Three, Indigenous Rights and Reconciliation
Chapter 5, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada

On 3 June 2015 the Truth and Reconciliation Commission issued its long-awaited report—*Honouring the Truth, Reconciling for the Future.* Even though the report runs to 382 pages, it was intended to be a summary of the eventual six-volume final report released in 2016. The TRC was established in 2008 under the terms of the earlier-noted Indian Residential Schools Settlement agreement. The Commission was mandated to reveal to Canadians the complex truth and the pathways

to reconciliation with respect to the government-financed but largely church-run history of residential schools.

The Commission minces no words nor wastes any time in assessing the government's rationale for residential schools. The report opens with the following blunt assertion:

> For over a century, the central goals of Canada's Indigenous policy were to eliminate Indigenous governments; ignore Indigenous rights; terminate the Treaties; and, through a process of assimilation, cause Indigenous peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide."

If this is the "truth," the TRC's framework for "reconciliation" is in large measure to draw upon the principles, norms, and standards of the *United Nations Declaration on the Rights of Indigenous Peoples*. The TRC's analysis then delves into the history and legacy of this dark era of Canadian-Indigenous relations, the effects of which will linger for decades.

The chapter concludes by reproducing many of the ninety-four Calls to Action that the TRC proposes as the way forward on the reconciliation front. The final one reads:

> 94. We call upon the Government of Canada to replace the Oath of Citizenship with the following:
>
> I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada including Treaties with Indigenous Peoples, and fulfill my duties as a Canadian citizen.

Prime Minister Trudeau stated that he agreed with all ninety-four of the Calls to Action.

Chapter 6, The Supreme Court and the Evolution of Aboriginal Rights and Aboriginal Title

Indigenous rights are collective rights that flow from Indigenous peoples' continued use and occupation of certain areas. They are also *inherent rights* that Indigenous peoples have practiced and enjoyed since before European contact. *Indigenous title* refers to the inherent Indigenous right to land or a territory. The Canadian legal system recognizes

Indigenous title as a *sui generis,* or unique *collective right* to the use of, and jurisdiction over, a group's ancestral territories. These rights and title were enshrined in the Constitution Act, 1982 and in the Canadian Charter of Rights and Freedoms, as noted in chapter 4 above.

However, the precise extent of Indigenous rights and title has been left to the judicial system and in particular to the rulings of the Supreme Court of Canada (SCC). The purpose of chapter 6 is to focus briefly on some of the key SCC decisions that have enhanced Indigenous rights and title:

- *R. v. Calder* (1973): The SCC ruled that Indigenous title existed at the time of the Royal Proclamation of 1763.
- *R. v. Guerin* (1984): The SCC ruled that the federal government has a fiduciary responsibility for Indigenous people—that is, a responsibility to safeguard Indigenous interests.
- *R. v. Sioui* (1990): The SCC ruled that "treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians."
- *R. v. Sparrow* (1990): The SCC noted that Indigenous and treaty rights are capable of evolving over time and must be interpreted in a generous and liberal manner and that governments may regulate existing Indigenous rights only for a compelling and substantial objective such as conservation and/or management of resources. This led to the "*Sparrow* test" that defines when an infringement on an Indigenous right may be justified.
- *R. v. Delgamuukw* (1997): The SCC observed that Indigenous title constitutes an ancestral right protected by s. 35(1) of the Constitution Act, 1982 and it is a right to territory and encompasses exclusive use and occupation. Moreover, the courts must be willing to rely on oral history, including traditional stories and songs as proof of use and occupation.
- *R. v. Haida Nation* (2004): Chief Justice McLachlin, writing for a unanimous court, found that the Crown has a "duty to consult with Indigenous peoples and accommodate their interests." This duty is grounded in the Honour of the Crown, and applies even where title has not been proven.
- *R. v. Tsilhqot'in Nation* (2014): The SCC ruled that Indigenous title can extend to lands regularly used for hunting, fishing, gathering, or for exploitation of natural resources over which the First Nation exercised control at the time of the assertion of European

sovereignty in respect of the land in question. This means that those First Nations that have never ceded their territory have been empowered by this decision. This would exclude the First Nations who have signed treaties and in the process ceded their traditional lands.

- *Daniels v. Canada* (2016): The SCC ruled that (1) Métis and non-status Indians are "Indians" under s. 91(24)[6] and that (2) the federal Crown owes a fiduciary duty to Métis and non-status Indians.
- *The Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* and the *Clyde River (Hamlet) v. Petroleum Geo-Services (2017)* are the two most recent SCC cases that relate to the issue of whether the duty to consult can be delegated.

Part Four, Analytical Perspectives
Chapter 7, Embracing Indigenous Nationals/Canadian Citizens

There are three competing models in play in terms of approaching the relationship of Indigenous peoples to the Canadian state. The first of these models is "Canadian Nationals/Canadian Citizens." The term for this is "enfranchisement," namely converting Indians to regular Canadians, i.e., the vision of the 1979 Trudeau/Chrétien White Paper and more recently of Tom Flanagan's *First Nations? Second Thoughts* (2000). At the other end of the spectrum is what might be termed the RCAP model, namely "Indigenous nationals/Indigenous citizens, i.e., an Indigenous-to-Crown relationship that can be characterized as "institutionalized parallelism," e.g., separate parliaments and Indigenous delivery of provincial-type services. Neither of these is acceptable; the first because it is now constitutionally impossible, and the second because, among other reasons, it would be prohibitively expensive. Therefore, and in line with the title of this monograph, the chosen way forward is to ensure that First Nations can be, at the same time, Indigenous nationals and Canadian citizens. This model drives the remainder of the book.

6 91 … it is hereby declared that … the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated…(24) Indians, and Lands reserved for the Indians.

Part Five, Voyages of Recovery
Chapter 8, First Nations Land Claims Agreements

Prior to elaborating on the approach to an Indigenous nationals/Canadian citizens model south of the 60th parallel, it is instructive to survey the range of Indigenous governance models that are already in place. This is the role of chapter 8 (for First Nations agreements) and chapter 9 (for Inuit agreements). The launch point for chapter 8 is to note that virtually all of the First Nations are governed by the provisions of the Indian Act. A supplement to chapter 8 by Professor Shin Imai of Osgoode Hall Law School assesses the Indian Act as follows: "…the structure of the Indian Act… is that the Minister of Indian Affairs has too much power to override decisions of the Chief and Council and that the Indian Act did not require the Chief and Council to be accountable to the community."

In contrast, the modern treaties and the land claims agreements escape Indian Act governance and embrace Indigenous self-government to varying degrees. In this chapter the focus is on First Nations agreements—the path-breaking James Bay and Northern Quebec Agreement, the fourteen Yukon First Nations (YFN) agreements and the Nisga'a Agreement. Considerable detail is provided on the YFN and Nisga'a agreements since they will inform the approach to First Nations self-government in chapter 10. In particular, a key feature of the Yukon agreements is the distinction between what Hogg and Turpel (1995) refer to as "personal jurisdiction" and "territorial jurisdiction": the former would apply to all Indigenous citizens in the Yukon, while the latter would be in force only on Indigenous lands, but would apply to both Indigenous and non-Indigenous people. This will be an important building block of the chapter 10 Indigenous nationals/Canadian citizens model.

Chapter 9, Inuit Land Claims Agreements

All Inuit territories north of 60 degrees have self-government agreements. From west to east these are Inuvialuit, Nunavut, Nunavik, and Nunatsiavut. However, of these Nunavut is a territory (like Yukon and NWT) and, therefore, is a public government, not an Indigenous government. But within Nunavut, Nunavut Tunngavic Inc. (NTI) has a self-government land claims agreement that covers all Inuit within Nunavut. Each of these governance structures is elaborated briefly, including the manner in which their legislatures differ from the Westminster model.

Part Six, A Pathway Forward for Treaty First Nations
Chapter 10, The Commonwealth of Sovereign Indigenous Nations (CSIN)

Readers may well be surprised that the proposed Indigenous nationals/Canadian citizens model for Treaty Indians is not a pan-Canadian model. While this may be an ultimate goal, the complications of having a First Nations entity dealing with ten provinces for delivery of social services without road-testing it on a smaller scale would be far too daunting. Accordingly, the Commonwealth of Sovereign Indigenous Nations (CSIN) will focus on the First Nations in Saskatchewan as an appropriate test case. Saskatchewan has over seventy First Nations with nearly 150,000 citizens, slightly more than half of whom reside on reserve. The existing overarching structure—FSIN, the Federation of Saskatchewan Indigenous Nations—embraces ten tribal councils and a sophisticated governance regime. Moreover, all of these First Nations are covered by Numbered Treaties 2, 4, 6, 8, and 10. Finally, but hardly exhaustively, FSIN is well advanced on the post-secondary education front: as home to the First Nations University of Canada and the Saskatchewan Indian Institute of Technologies.

With this as backdrop the chapter then develops an Indigenous nationals/Canadian citizens model—effectively an "Indigenous province" within, and engaged with, the province of Saskatchewan.

The overriding rationale for the CSIN model is to design a governance structure that can improve significantly on the First Nations wholly unacceptable socio-economic indicators. The chosen framework is modelled in part on the relationship between the Yukon First Nations and the Yukon Territory. Readers should be aware that both FSIN and Saskatchewan may well fully reject the framework, especially since they were not consulted in the development of the model.

Two appendices follow the concluding chapter. The first summarizes each of the eleven numbered treaties including a list of the individual First Nation signatories to each treaty, and the second reproduces the text of Treaty 6.

Readers will observe that the coverage of several issues is rather narrowly focused. For example, the material relating to treaties does not cover the early Atlantic Canada Peace and Friendship Treaties nor the many treaties in Ontario and British Columbia. Along similar lines, the selection of Supreme Court decisions in chapter 6 leaves out earlier precedent-making cases. In this and other ways, the material that fol-

lows is written more from a public policy perspective rather than from a historical one.

The substantive analysis of the book begins in chapter 2 with the reproduction of a broad range of Indigenous Peoples' socio-economic indicators both in their own right and in comparison with other Canadians. As readers will no doubt anticipate, the Indigenous socio-economic indicators are not only very dispiriting but, as well, wholly unacceptable. This is especially so since we are engaged in celebrating Canada's achievements as part of our sesquicentennial. In sharp contrast, the chapter 2 message is that the status quo is dramatically failing our First Peoples. Phrased differently, these data demand that we find a better way forward for Indigenous Canadians.

This is the motivation that drives the remainder of the book.

Part Two

A Voyage to Hell and Back: From First Contact to Sesquicentennial

Chapter 2

First Nations Demographic and Socio-Economic Indicators in Comparative Perspective

Introduction[1]

Given that the objective of this study is to propose a new way forward for Indigenous peoples, we need to know where we now are and how we got here. The role of the three chapters which follow in Part Two is to address some key milestones in the historical, institutional, and constitutional journey from first contact to the sesquicentennial;[2] the role of the present chapter is to provide a demographic and socio-economic snapshot of First Nations in comparative Aboriginal and Canadian perspectives. Beyond providing crucial background data that will inform future policy choices, these comparisons will serve two quite different roles in terms of the ensuing analysis. First, to the extent that First Nations, and Aboriginal peoples more generally, fare poorly in terms of their socio-economic outcomes—as Canadians surely know they do—the historical overviews in chapters 3 through 5 will provide explanations for why this may be so. Second, the presence of unacceptable performance indicators certainly provides a rationale for ensuring that First Nations are able to take full advantage not only of the dramatic Supreme Court decisions (chapter 6), but as well of the creative governance and land claims agreements elaborated in chapters 8 and

1 The original versions of some of the tables in this chapter employ the word "Aboriginal" rather than "Indigenous." This usage will prevail for this chapter.

2 A more comprehensive treatment of modern-day Indigenous Canada is the impressive volume *From Treaty Peoples to Treaty Nation* by Greg Poelzer and Ken Coates (2015).

9. Indeed the overall rationale for this book is to design a political and institutional infrastructure that will lead to significant improvements in the absolute and comparative socio-economic well-being of Aboriginal Canadians.

Aboriginal Peoples in Canada: Selected Socio-Economic Indicators

Population

Table 2.1 presents 2013 population data (in total and by province/region) for Aboriginal peoples. Data columns A through F focus on First Nations. The initial three columns relate to status (or registered) Indians—column A for total status Indians and columns B and C for on-reserve and off-reserve status Indians respectively. Column D records the provincial distribution of non-status Indians. The sum of status and non-status Indians appears in Column E and then column F expresses this total as a percentage of the relevant provincial/regional populations. The numbers of Métis and Inuit appear in columns G and H respectively. The final two columns of the table present the overall Aboriginal population and the percentage by province/region respectively.

In more detail, in 2013 there were 1.6 million Aboriginals in Canada representing 4.5 percent of Canada's population. At the provincial level the Aboriginal population share is over 18 percent for Manitoba and Saskatchewan. The share is much higher for the territories—roughly 25 percent for Yukon, 50 percent for NWT, and rising to 86 percent for Nunavut.

Turning the focus back to the First Nations, there are more than 900,000 status Indians in Canada with more than half residing on reserves (columns A to C) and 214,000 non-status Indians (column D). Ontario leads the way with nearly 200,000 status and 75,000 non-status Indians. However, this represents only 2 percent of Ontario's population. In sharp contrast, the roughly 155,000 total First Nations in Manitoba and 154,000 in Saskatchewan represent 12.3 percent and 13.9 percent, respectively, of their provincial populations (column F).

As will be documented in chapter 6, the recent (2016) Supreme Court decision in the *Daniels* case ruled "that Métis and non-status Indians are 'Indians' under s. 91(24) of the Constitution Act, 1982" and "that the federal Crown owes a fiduciary duty to Métis and non-status Indians." This may well be a game changer since rather than having a fiduciary duty to the 919,745 Status Indians (column A) and the Inuit (column H), this fiduciary duty now extends to an additional 632,000 persons (i.e.,

the sum of columns D and G). However, the relative import of this decision will weigh relatively more on Ontario where the sum of non-status Indians and Métis equals 77 percent of status Indians compared with Saskatchewan where this percentage is 41 percent.

Age Distributions

Figure 2.1 presents age and gender distributions for urban Aboriginals and non-Aboriginals at the all-Canada level. This bar chart compares the percentage of the total population that is in each of several age cohorts, by gender and for both the Aboriginal and non-Aboriginal populations in Canadian urban centres in 2006. Urban Aboriginals have proportionally far more of their citizens in the lower age categories and urban non-Aboriginals have proportionally far more in the older groups, and dramatically more in the 75-plus age category.

As noted in the introductory chapter, the proposed model will be developed utilizing the province of Saskatchewan's Indigenous parameters. This being the case, it is instructive to direct some attention to the demography of this province. Accordingly, Figure 2.2 presents the age profiles for Saskatchewan Aboriginal and non-Aboriginal residents. The results are truly dramatic. The largest age cohort for non-Aboriginals (65 and older) is the smallest for the Aboriginals. At the other extreme there are, proportionally, more than twice as many Aboriginals compared with non-Aboriginals under five years of age and almost twice as many for the five to fourteen age group. Two obvious implications flow from these results. The first is that, in relative terms, the age-related fiscal challenge for the non-Aboriginals will be health care and pensions, whereas the key challenge for Aboriginals must be daycare and education. The second is that the Aboriginal growth rates will be much larger, given that they have proportionally many more of their citizens of child-bearing age, a reality that is enhanced by the fact that Aboriginals typically have larger families.

Along similar lines, Figure 2.3 compares the median age of the Aboriginal and non-Aboriginal populations across provinces. The Aboriginal populations are younger everywhere, and especially so in Manitoba and Saskatchewan where the Aboriginal median age is one-half that of non-Aboriginals.

A final figure relating to Saskatchewan (Figure 2.4) presents the Aboriginal shares of the population for various Saskatchewan cities, including some relevant commentary. Prince Albert (Saskatchewan's

… continued on page 26

Table 2.1

Distribution of Aboriginal Peoples in Canada, 2013

	Registered (Status) Indians[1]									
	Total	On Reserve	Off Reserve	Non-Status Indians[2]	Total First Nations[3]	% of Provincial Population	Métis[4]	Inuit	Total Aboriginal	% of Population
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)
Canada	919,745	481,068	438.677	213,900	1,133,645	3.2	418,380	59,440	1,611,465	4.5
Atlantic	61,742	23,082	38,660	26,880	88,622	3.7	20,565		109,187	4.6
Quebec	82,457	54,846	27,511	29,775	112,232	1.4	35,465	Note[7]	147,697	1.8
Ontario	199,609	93,119	106,496	75,540	275,149	2.0	77,825		352,974	2.6
Manitoba	146,965	88,213	58,752	8,410	155,375	12.3	75,345		230,720	18.2
Sask	144,556	70,654	73,902	9,045	153,601	13.9	50,230		203,831	18.4
Alberta	118,164	72,654	45,539	19,045	137,209	3.4	90,850		228,059	5.7
B.C.	138,709	62,235	76,474	42,615	181,324	4.0	64,525		245,849	5.3
Yukon	9,092	3,990	5,102	875	9,967	27.4	Note[5]	Note[6]	7,705	23.1
NWT	18,451	12,304	6,147	775	19,226	43.8	Note[5]	Note[6]	27,360	51.9
Nunavut	125						Note[5]	Note[6]	21,160	86.3

Notes:

1 Source for Status Indians: INAC Register, 13 December 2013.

2 Data for Non-Status Indian are for the year 2011.

3 This is the sum of columns (A) and (D).

4 Data are from 2011 National Households survey.

5 The total for all three territories is 3,585 Métis.

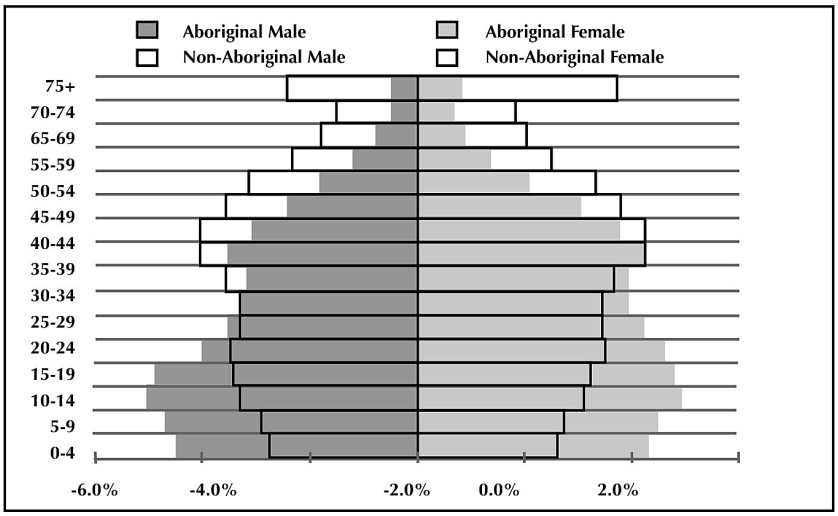
6 Approximately 43,455 Inuit live in the four Inuit regions: Inuvialuit (3,310), Nunavut (27,070), Nunavik (10,750) and Nunatsiavut (2,325). Of the remainder, just over 7,000 live in Canada's cities, especially Edmonton, Montreal, Ottawa, Yellowknife, and St. John's. These data are from 2011.

7 The Inuit in Nunavik were assigned to Nunavik even though Nunavik is in the territory of Quebec.

Source: Author's compilation.

Figure 2.1

Age and Gender Distribution of the Urban Aboriginal and Non-Aboriginal Populations, Canada, 2006

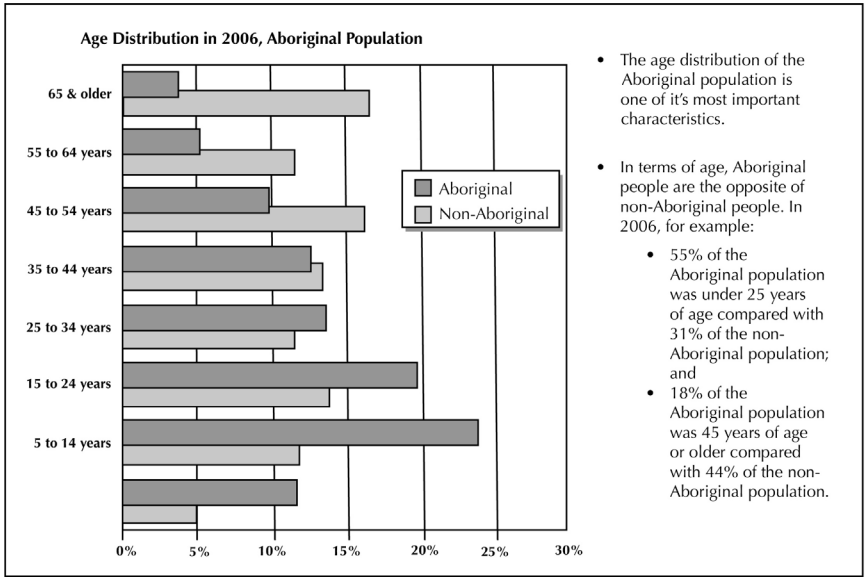


This bar chart compares the percentage of the total population in each of several age cohorts, by gender, for both the Aboriginal and non-Aboriginal populations in Canadian urban centres in 2006. The X axis is the percentage of the population that the age cohort represents and the Y axis is age cohorts. Males are to the left of the black vertical line at the centre of the chart, while females are to the right.

Source: https://www.aadnc-aandc.gc.ca/eng/1100100014298/1100100014302

Figure 2.2

Age Comparison with the Non-Aboriginal Population: Saskatchewan

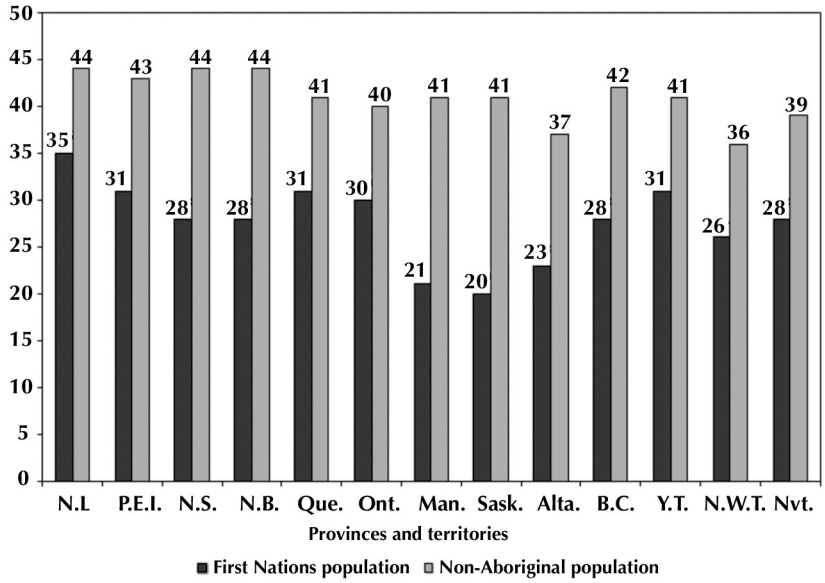


Notes: The age distribution of the Aboriginal population is one of its most important characteristics. In terms of age, Aboriginal people are the opposite of non-Aboriginal people. In 2006, for example: 55% of the Aboriginal population was under 25 years of age compared with 31% of the non-Aboriginal population; and 18% of the Aboriginal population was 45 years of age or older compared with 44% of the non-Aboriginal population.

Source: 2 June 2009 Sask Trends Monitor

Figure 2.3

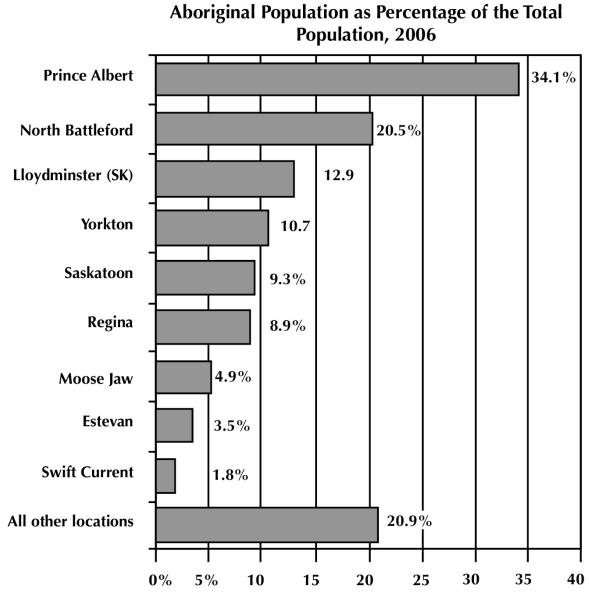
Median Age for First Nations and Non-Aboriginal Population, Provinces, and Territories, 2011



Source: Statistics Canada, National Household Survey 2011

Figure 2.4

Basic Counts: Residence in Urban Areas



- As a proportion of the toal population, Aboriginal people are more common in Prince Albert and North Battleford.
- They are less common in Regina and Saskatoon and almost non-existent in southern urban centres such as Estevan and Swift Current.
- Among urban centres, the fastest growing Aboriginal population from 2001 to 2006 was in Prince Albert.

Note: As a proportion of the total population, Aboriginal people are more common in Prince Albert and North Battleford. They are less common in Regina and Saskatoon, and almost non-existent in southern urban centres such as Estevan and Swift Current. Among urban centres, the fastest growing Aboriginal population from 2001 to 2006 was in Prince Albert.

Source: 2 June 2009 Sask Trends Monitor.

third largest city with a population of 43,000 in 2015) clearly stands apart, with an Aboriginal population share of nearly 35 percent, followed by North Battleford with 20.5 percent. The clear pattern for the province is that the northern cities have higher proportions of Aboriginals than the southern cities, especially when compared with the lower four in the figure. However, the good news in terms of the model proposed in chapter 10 is that several Saskatchewan cities have Aboriginal population levels sufficient to achieve reasonable economies of scale for mounting Aboriginal-run socio-economic programs.

The focus now shifts to a series of socio-economic comparisons among the First Nations, the Inuit peoples, and the rest of the Canadian population.

Comparative Indices of Community Well-Being

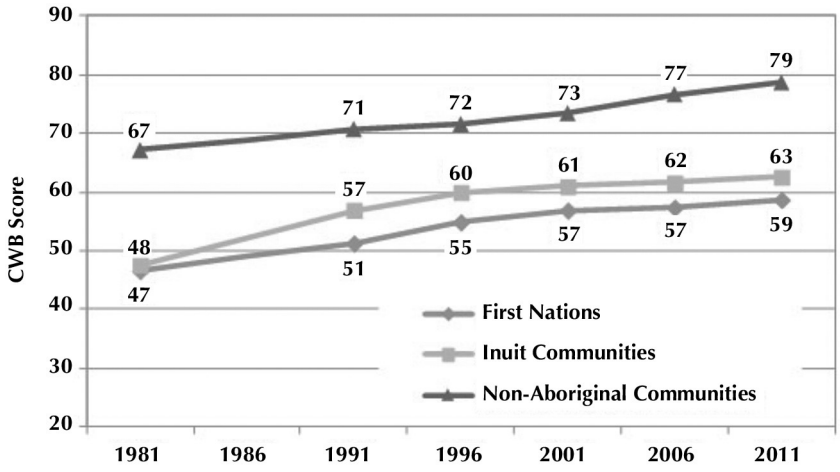
The Community Well-Being (CWB) Index, 1981–2011 was published by Aboriginal and Northern Development Canada (now called INAC—Indigenous and Northern Affairs Canada). Figures 2.5 through 2.9 present comparative data for First Nations, Inuit communities, and non-Aboriginal communities. The overall CWB index (Figure 2.5) comprises four components, measured using Statistics Canada's Census of Population (1981–2006) and its National Household Survey (2011):

- **Income** is calculated based on total income per capita (Figure 2.6);
- **Education** focuses on how many community members have at least a high school education and how many have attained a university degree (Figure 2.7);
- **Housing** assesses the number of community members whose homes are in an adequate state of repair and are not overcrowded (Figure 2.8); and
- **Labour force activity** records how many community members participate in the labour force and how many in the labour force have jobs (Figure 2.9).

In Figure 2.5 these four CWB components are combined to create a single well-being score for each community. CWB scores can range from a low of zero to a high of 100. In 2011 these scores were available for 50 Inuit and 3,784 non-Aboriginal communities and 594 First Nations. While the principal interest in what follows is in the comparison between First Nations and non-Aboriginal communities, the analysis

Figure 2.5

Average CWB Scores, First Nations, Inuit, and Non-Aboriginal Communities, 1981–2011



Source: Statistics Canada, Censuses of Population, 1981–2006 and National Household Survey, 2011

will include some assessment of the relative position of the Inuit communities. The comparisons will proceed with Figures 2.6 through 2.9, returning later to the summary data in Figure 2.5.

From Figure 2.6, while the average income scores for First Nations have increased by sixteen points from 1981 to 2011 (from forty-three to fifty-nine), the gap between First Nations and non-Aboriginal income scores remains essentially unchanged—twenty-six points in 1981 (forty-three and sixty-nine) and twenty-five points in 2011 (fifty-nine and eighty-four). This is because the relative gains over the 1981–2001 period were eroded by 2011. Note, however, that the gap between Inuit communities and non-Aboriginal communities has decreased sharply—from twenty-one points in 1981 to seven in 2011. From the perspective of the theme of this volume, the reason for this may well be the institutional and governance infrastructure associated with the creation of Nunavut in 1999, as well as the other Inuit self-government agreements that are highlighted later in chapter 9.

The gap for education scores between First Nations and non-Aboriginal

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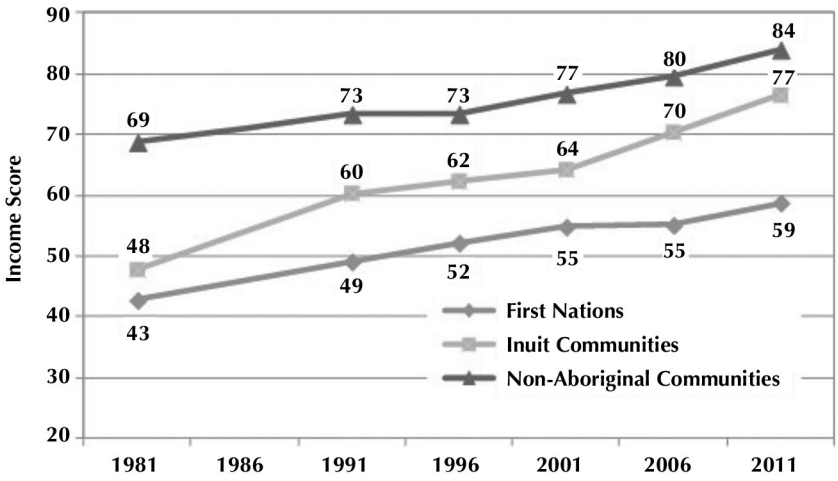
Figure 2.6

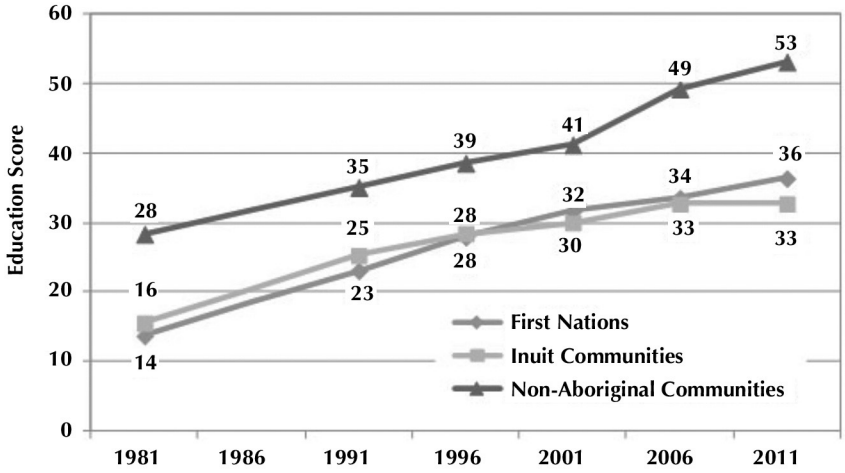
Average Income Scores, First Nations, Inuit, and Non-Aboriginal Communities, 1981–2011



Source: Statistics Canada, Censuses of Population, 1981–2006 and National Household Survey, 2011

Figure 2.7

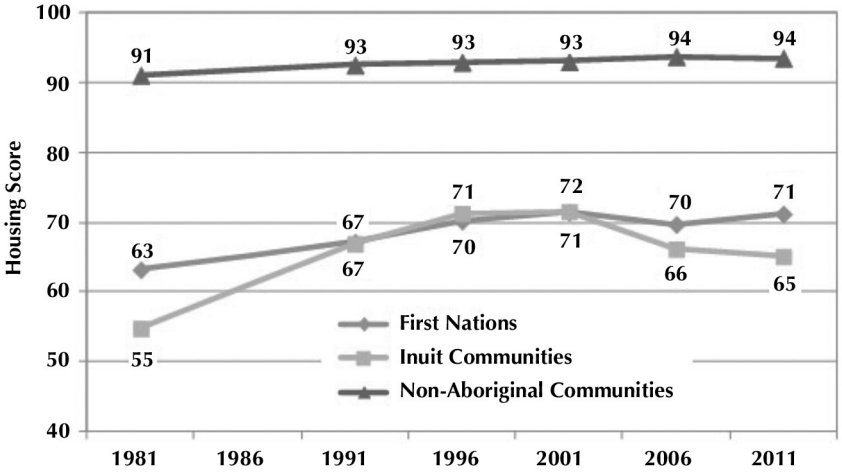
Average Education Scores, First Nations, Inuit, and Non-Aboriginal Communities, 1981–2011



Source: Statistics Canada, Censuses of Population, 1981–2006 and National Household Survey, 2011

Figure 2.8

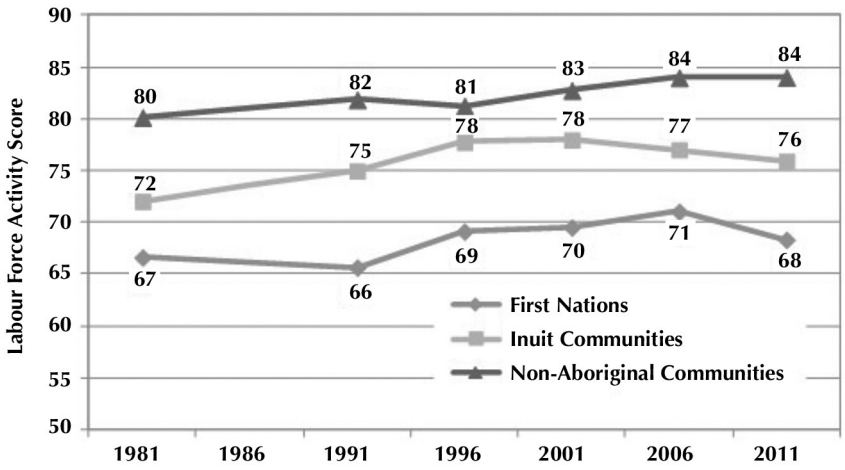
Average Housing Scores, First Nations, Inuit, and Non-Aboriginal Communities, 1981–2011



Source: Statistics Canada, Censuses of Population, 1981–2006 and National Household Survey, 2011

Figure 2.9

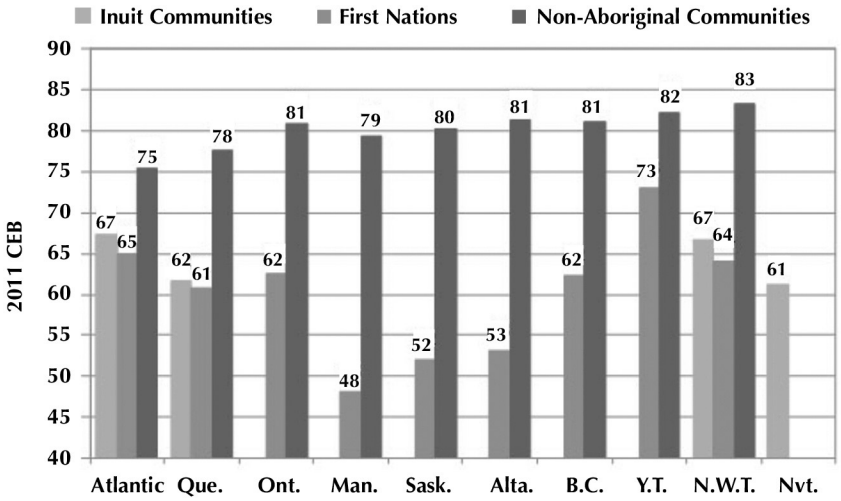
Average Labour Force Activity Scores, First Nations, Inuit, and Non-Aboriginal Communities, 1981–2011



Source: Statistics Canada, Censuses of Population, 1981–2006 and National Household Survey, 2011

Figure 2.10

Regional CWB Scores for First Nations, Inuit, and Non-Aboriginal Communities, 2011



Source: Statistics Canada, Censuses of Population, 1981–2006 and National Household Survey, 2011

communities in Figure 2.7 narrows slightly from 1981 to 2001 (from twelve to nine) but then rises sharply to seventeen points in 2011.

From Figure 2.8, the First Nations housing gap narrows from twenty-eight in 1981 to twenty-three in 2011, a spread which essentially varies little during this span of time). The gap for the Inuit fell from thirty-six in 1981 to twenty-two in 1996 but then increased to twenty-nine points in 2011.

The labour force activity data in Figure 2.9 reveal that First Nations scores remain essentially unchanged in 1981 and 2011 albeit with the gap rising from thirteen to sixteen points respectively.

Finally, and as noted earlier, Figure 2.5 averages the data in Figures 2.6 through 2.9 and presents the overall Community Well-Being indices. The overall scores for First Nations, Inuit, and non-Aboriginal communities increased slowly but steadily between 1981 and 2001. However, in 2011 the average score for First Nations was twenty points lower than the average score for non-Aboriginal communities, a gap that was the same as in 1981.[3]

The Aboriginal Affairs and Northern Development Canada (AANDC) paper contains a final CWB chart cross-classifed on a provincial/territorial basis. This is reproduced here as Figure 2.10. Immediately apparent are the very low scores for the Prairie First Nations: the CWB indices are 61 percent of non-Aboriginal scores in Manitoba (i.e., forty-eight divided by seventy-nine) and 65 percent in Saskatchewan and Alberta. Arguably this may be in part because the First Nations reserves on the Prairies tend to be small, isolated, and without much in the way of resources, unlike many British Columbia Aboriginal lands. It is also noteworthy that the highest Aboriginal score in Figure 2.10 is for Yukon. This is, perhaps, due in part to the creative Yukon First Nations land claims and self-government agreements (elaborated in chapter 8).

On-Reserve and Off-Reserve Income/Labour-Force Comparisons

Table 2.2, sections A through F, presents further socio-economic data; this time classified by on-reserve and off-reserve First Nations communities with comparative data for non-Aboriginal communities. While perusal of these comparisons will be largely left to the reader, a few overview comments are in order. First, everywhere the on-reserve First

3 Except for housing (Figure 2.8) the Inuit tended to register higher scores than the First Nations. This was especially true for the average income scores in Figure 2.6.

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Table 2.2

Comparative Socio-Economic Indicators

A. Employment Rate (15 years and older)				B. Labour Force Participation Rate				C. Unemployment Rate			
	First Nations (on reserve)	First Nations (off reserve)	Non-Aboriginal		First Nations (on reserve)	First Nations (off reserve)	Non-Aboriginal		First Nations (on reserve)	First Nations (off reserve)	Non-Aboriginal
Benchmark: 2006 Employment Rate	39%	54.9%	62.7%	Benchmark: 2006 Labour Force Participation Rate	52.0%	63.8%	66.9%	Benchmark: 2006 Unemployment Rate	24.9%	14.0%	6.3%
2006 Gap with Non-Aboriginals (percentage points)	23.7	7.8	—	2006 Gap with Non-Aboriginals (percentage points)	14.9	3.2	—	2006 Gap with Non-Aboriginals (percentage points)	18.6	7.7	—
2011 Employment Rate	35.4%	52.6%	61.2%	2011 Labour Force Participation Rate	47.4%	62.0%	66.2%	2011 Unemployment Rate	25.2%	15.3%	7.5%
2011 Gap with Non-Aboriginals (percentage points)	25.8	8.6	—	2011 Gap with Non-Aboriginals (percentage points)	18.8	4.2	—	2011 Gap with Non-Aboriginals (percentage points)	17.7	7.8	—
Change in Gap: 2006 to 2011 (percentage points)	+2.1	+0.8	—	Change in Gap: 2006 to 2011 (percentage points)	+3.9	+1.0	—	Change in Gap: 2006 to 2011 (percentage points)	-.09	+0.1	—

Table 2.2, continued

Comparative Socio-Economic Indicators

D. Average Income				E. Median Income				F. Income Received from Government Transfers			
	First Nations (on reserve)	First Nations (off reserve	Non-Aboriginal		First Nations (on reserve)	First Nations (off reserve)	Non-Aboriginal		First Nations (on reserve)	First Nations (off reserve)	Non-Aboriginal
Benchmark: 2005 Average Income	$15,958	$24,519	$35,872	Benchmark: 2005 Median Income	$11,223	$17,464	$25,955	Benchmark: 2005 % of Income from Transfers	28.6%	18.6%	10.9%
% Difference with Non-Aboriginals	55.5%	31.6%	—	% Difference with Non-Aboriginals	56.8%	32.7%	—	2005 Gap with Non-Aboriginals (percentage points)	17.7	7.7	—
2010 Average Income	$18,586	$30,266	$41,052	2010 Median Income	$13,182	$21,521	$30,195	2010 % of Income from Transfers	31.5%	19.3%	12.2%
% Difference with Non-Aboriginals	54.7%	26.3%	—	% Difference with Non-Aboriginals	56.3%	28.7%	—	2010 Gap with Non-Aboriginals (percentage points)	19.3	7.1	—
Change in Gap: 2005 –2010 (percentage points)	-0.8	-5.4	—	Change in Gap: 2010–2005 (percentage points)	-0.4	-4.0	—	Change in Gap: 2005 –2010 (percentage points)	+1.6	-0.6	—

Source: "The Aboriginal Progress Report, 2015," published by the National Aboriginal Development Board.

Table 2.3

Educational Achievement
Proportion of Population with at least a High School Diploma (15 years and older) by Heritage Group 2011

	First Nations (on reserve)	First Nations (off reserve)	First Nations (Total)	Inuit	Métis	Aboriginal	Non-Aboriginal
2011 High School Completion Rate	44.1%	65.0%	57.4%	43.4%	71.0%	62.0%	80.6%
2011 Gap with Non-Aboriginal (percentage points)	36.5	15.5	23.1	37.1	9.5	18.5	—

Proportion of Population with a College, Trades/Apprenticeship, or Other Non-University Certificate, Diploma, or Degree (15 years and older) by Heritage Group, 2011

	First Nations (on reserve)	First Nations (off reserve)	First Nations (Total)	Inuit	Métis	Aboriginal	Non-Aboriginal
2011 College Completion Rate	20.4%	28.3%	25.4%	21.6%	32.4%	27.9%	29.1%
2011 Gap with Non-Aboriginal (percentage points)	8.7	0.8	3.7	7.5	-3.3	1.2	—

Table 2.3, continued

Proportion of Population with a University Certificate, Diploma, or Degree; Completion Rate (15 years and older) by Heritage Group, 2011

	First Nations (on reserve)	First Nations (off reserve)	First Nations (Total)	Inuit	Métis	Aboriginal	Non-Aboriginal
2011 University Completion Rate	5.7%	11.1%	9.1%	4.9%	12.2%	10.2%	25.8%
2011 Gap with Non-Aboriginal (percentage points)	20.1	14.8	16.7	20.9	13.6	15.6	—

Source: The National Aboriginal Economic Development Board, "The Aboriginal Economic Progress Report" 2015.

Nations fare worse, usually much worse, than the off-reserve First Nations, and both fall short, again often disturbingly so, of the performance of non-Aboriginal communities. From sections D and E, for both average and median income the on-reserve Indians have less than one-half the income of non-Aboriginal communities and less than two-thirds of the off-reserve Indian communities (c.f., average income for 2010 from section D).

On-Reserve and Off-Reserve Education Achievement

Table 2.3 presents 2011 data relating to education achievement for First Nations on- and off-reserve as well as for Inuit, Métis, and non-Aboriginal communities. From the uppermost panel less than one-half (44.1 percent) of on-reserve Indians fifteen years of age or older have completed high school. This is 36.5 percentage points lower than that for non-Aboriginals. Although this a bit higher than the Inuit percentage, it is well below the off-reserve percentage (65 percent) as well as that for the Métis (71 percent).

Since a high school diploma (or equivalent) is required for university, it is not very surprising that on-reserve Indians lag badly in terms of attaining a university degree/diploma: from the third panel only 5.7 percent of on-reserve Indians have a university degree—20.1 percentage points below that for non-Aboriginals and about one-half the rate for off-reserve Indians. However, in terms of holding a college degree, a trades certificate, etc., the on-reserve Indians fair quite well—20.4 percent vs. 28.3 percent for off-reserve Indians and 29.1 percent for non-Aboriginals. Note that the Métis lead the way here with their 31.4 percentage.

Incarceration Rates

To round out this survey of comparative socio-economic indicators, attention needs to be directed to some of the most disturbing data: incarceration rates. The source for the data which follows is the Government of Canada's Office of the Correctional Investigator (2013) and is contained in a backgrounder entitled *Aboriginal Offenders—A Critical Situation.*[4]

While Aboriginal people make up about 4 percent of the Canadian population, as of February 2013, 23.2 percent of the federal inmate pop-

4 Much of this section is in the form of direct quotes from this source.

ulation was Aboriginal (First Nation, Métis, or Inuit). There are approximately 3,400 Aboriginal offenders in federal penitentiaries: 71 percent are First Nation, 24 percent are Métis, and 5 percent are Inuit.

In 2010–11, Canada's overall incarceration rate was 140 per 100,000 adults. The incarceration rate for Aboriginal adults in Canada is estimated to be ten times higher than the incarceration rate of non-Aboriginal adults. This over-representation of Aboriginal people in Canada's correctional system continued to grow in the last decade. Since 2000–01, the federal Aboriginal inmate population has increased by 56.2 percent. Their overall representation rate in the inmate population has increased from 17.0 percent in 2000–01 to 23.2 percent today. Since 2005–06, there has been a 43.5 percent increase in the federal Aboriginal inmate population, compared to a 9.6 percent increase in non-Aboriginal inmates.

Prairies' Overrepresentation

In the period between March 2010 and January 2013, the Prairies region of the Correctional Service of Canada (primarily the provinces of Manitoba, Saskatchewan, and Alberta) accounted for 39.1 percent of all new federal inmate growth. Most of this overrepresentation was due to Aboriginal offenders, who now comprise 46.4 percent of the Prairie region inmate population. From a recent month:

- at Stony Mountain Institution in Manitoba, 389 out of 596 inmates—65.3 percent of the population—were Aboriginal;
- at Saskatchewan Penitentiary, 63.9 percent of the population were Aboriginal;
- at the Regional Psychiatric Centre in Saskatoon, 55.7 percent of the count was Aboriginal; and
- at Edmonton Institution for Women, 56.0 percent of the population were Aboriginal.

The brief backgrounder ends with identifying the various socio-economic current and historical factors that are likely at play here:

- effects of the residential school system;
- experience in the child welfare or adoption system;
- effects of the dislocation and dispossession of Aboriginal peoples;
- family or community history of suicide and substance abuse;
- loss of, or struggle with, cultural/spiritual identity;
- level attained, or lack, of formal education;

- poverty and poor living conditions; and
- exposure to, or membership in, Aboriginal street gangs.

Missing from this list is the role of Fetal Alcohol Spectrum Disorder (FASD) in explaining the rate of incarceration of Aboriginals. As Boland, Chudley, and Grant (2002) note, there is a clear connection of FASD and crime. Among other observations, they refer to a Washington study of youths and adults with FASD which revealed that up to 60 percent get into some type of trouble with the law. Indeed, it plays a major role in the incarceration rates reported above. Rather than focus on FASD in the current context, it will be addressed in some detail in chapter 5 in the context of the report of the Truth and Reconciliation Commission.

Reflections

The data in Figures 2.5 through 2.10, and in Tables 2.2 and 2.3 for First Nations' incarceration rates, are at the same time most disturbing and completely unacceptable for a country as wealthy as Canada. Beyond this, the data, and the factors supporting them, are destructive to the spirit and the future of Canada's First Nations and Aboriginals more generally. Moreover, there is little evidence that Aboriginal peoples in Canada are closing the education and socio-economic gaps with their fellow Canadians. The unavoidable reality on the ground is that Aboriginal Canadians are far from able to achieve the lifestyle and future that ordinary Canadians view as their birthright.

The resulting societal challenge going forward has been courageously yet appropriately framed by law professor John Whyte in the conclusion to his 2003 paper, "Social and Constitutional Perspectives on Aboriginal Self-Government":[5]

> If developing the nation state was the political project of modernism, then the challenge of the post-modern age is to manage inter-societal arrangements within states in a way that sustains the stability of states and offers real justice to all of the peoples that comprise a nation. Constitutionalism, particularly Canadian con-

5 John Whyte's paper (2003) was prepared for the Saskatchewan Law Reform Commission and based on a presentation to the Governance, Self-Government, Legal Pluralism conference sponsored by the Assembly of First Nations, the Aboriginal Bar Association and the Law Reform Commission of Canada Association. The paper is available from the Saskatchewan Institute of Public Policy (SIPP), University of Saskatchewan.

> stitutionalism, has been inventive in devising mechanisms that will effectively protect vital historic interests from the tyranny of national majority. It has adopted federalism, the concept of entrenched rights, of separation of powers, the Rule of Law and constitutional recognition of historic language, religious and ethnic communities. Yet, as has been pointed out, notwithstanding these formal commitments to preserving the integrity of its minority communities, Canada must own the record of a destructive colonialist history. It must also, of course, own responsibility for the sad economic and social exclusion of many of its Aboriginal people with the inevitable negative social consequences. The challenges of poverty, inadequate and crowded housing, susceptibility to disease, sexualization of young, high rates of victimization and crime, low rates of job attachment and so forth cannot be ignored. There are two questions facing the Government of Canada. The first question is what are key elements of an effective social and economic development policy. The second is what is owed to Aboriginal communities as a matter of political and constitutional obligation. As has been argued in this paper, the answer to both questions is the same—*recognition of the entitlement of Aboriginal communities to function as self-determining and self-governing political societies* [emphasis added]. Behind this claim is the view that social needs and social priorities will be addressed best when they are self-identified and when the prescriptions for responding come from the communities that are experiencing the challenges. This claim represents nothing more complex than social health flows from autonomy and responsibility, not from being placed under the control and stewardship of another political authority and another population.

To be sure, the First Nations have suffered mightily at the hands of Canadian public policy, as will be documented in what follows. But this is not the whole story. Far too many First Nations citizens are trapped in an environment within which it is well nigh impossible to achieve the Canadian dream. In part at least, the reason for this is that they are saddled with an institutional and governmental infrastructure that effectively traps them in second-class citizenship. Moreover, the way forward does not depend only on Ottawa and the provinces altering their approaches to the First Nations. As I shall argue, the First Nations leadership also needs to undergo significant rethinking with respect not only to their own citizens, but as well to the First Nations relationship to the other levels of government. Phrased differently, the First Nations need to move away from a dependency relationship with Ottawa

and Canada, and toward a relationship in which they and their leaders embrace more responsibility for their collective well-being. While it is appropriate, indeed essential, for those in authority to address the barriers and challenges facing First Nations, it is likewise essential for First Nations authorities to ensure that appropriate institutional structures and incentives are in place to enable their citizens to improve their socio-economic fortunes.

However, before we can move in the direction of creating alternative future pathways, it is necessary that we recognize and understand where we have been. This is the role of the following two historical chapters: chapter 3 deals with the period from the arrival of Europeans to the 1979 Trudeau-Chrétien White Paper, and chapter 4 covers the period from the 1982 Canadian Charter Rights and Freedoms to the 2015 federal election.

Chapter 3

Milestones in Canada-Indigenous Relations: From Columbus to the Constitution Act, 1982

Part A: Pre-Confederation Canada

European Colonization and the "Doctrine of Discovery"

Roughly coincident with the first voyage of Columbus, Pope Alexander VI issued the 1493 Papal Bull[1]—*Inter Caetera*—that gave the green light to Columbus, and later the Spanish conquistadors, to claim lands in the new world. In effect, this edict sanctified, as it were, Spain's exclusive right to the lands "discovered" by these explorers. In more detail, the Papal Bull effectively stated that any land not inhabited by Christians was available to be "discovered," claimed, and exploited by Christian rulers. It was this "Doctrine of Discovery" that became the basis for most of the European claims in the Americas as well as for the foundation for US western expansion.

A more recent elaboration or version of the discovery doctrine as a concept in international public law was that delivered by US Chief Justice John Marshall in the 1823 *Johnson v. M'Intosh* case, namely that title to lands lay with the government whose subjects explored and occupied territory in which the inhabitants were not subjects of a European Christian monarch. Justice Marshall then asserted that the US was

1 A papal bull is a particular type of decree issued by a pope of the Catholic Church. It is named after the lead seal (*bulla*) that was appended to the document in order to authenticate it.

the true owner of such lands because it inherited that ownership from Britain, the original "discoverer" and, therefore, the original owner. As noted above, this cleared the way for the westward expansion of the United States.

It is also the case that the Australian concept of *terra nullius* (a Latin expression derived from Roman law meaning "land belonging to no one") was a variation of the discovery doctrine. Indeed, it was not until 1992 and the landmark *Mabo* decision that the High Court of Australia rejected the doctrine of *terra nullius* in favour of the common law doctrine that privileged original Indigenous title.

Not surprisingly, therefore, the discovery doctrine has been used to support decisions invalidating or ignoring Indigenous possession of land in favour of conquering colonial governments. What is surprising, however, is that the Vatican has never repealed the Doctrine of Discovery in spite of ongoing pressures on Pope Francis from Canada's Indigenous peoples.

More surprising still is that over 250 years ago Britain discarded the Doctrine of Discovery as it related to Canada and in the process laid the groundwork for recognizing Indigenous rights and title in Canada. The vehicle for achieving this was King George III's 1763 Royal Proclamation (INAC 2016) that will be elaborated later in this chapter. Prior to addressing the Royal Proclamation, the focus will be on a select series of peace and friendship treaties, beginning with the Two Row Wampum Treaty.

The 1613 Two Row Wampum Treaty

The movement of Dutch traders up the Hudson River and into Mohawk territory led to the famous Two Row Wampum Treaty in 1613. This was an agreement between representatives of the five nations[2] of the Iroquois (Haudenosaunee)[3] and representatives of the Dutch government in what is now upstate New York. The agreement is considered by the Haudenosaunee to be the basis of all of their subsequent treaties with European and North American governments.

The essence of the treaty was symbolized, or expressed, by the Haudenosaunee in the form of a belt made of purple and white wam-

2 It was not until 1713 when the North Carolina Tuscarora joined the Iroquois Confederacy that it became known as Six Nations. The original Five Nations of the Iroquois Confederacy were (and are) the Mohawk, Oneida, Cayuga, Onondaga, and the Seneca.

3 Iroquois and Haudenosaunee will be used interchangeably in this book.

Figure 3.1

Two Row Wampum Belt

Artwork: Mark Howes

pum shells, known as the Two Row Wampum. This wampum belt (see Figure 3.1) records the meaning of the agreement, namely that it embraces peaceful coexistence between the Haudenosaunee and Dutch settlers in the area. The pattern of the belt consists of two rows of purple wampum shells against a background of three rows of white shells. The purple shells signify the courses of two vessels—a Haudenosaunee canoe and a European ship —travelling down the river of life together, parallel but never touching. The three white stripes denote peace and friendship.

The Dutch initially proposed a patriarchal relationship with themselves as fathers and the Haudenosaunee as children. According to the Mohawk historian Ray Fadden, the Haudenosaunee rejected this vision; instead, they viewed their relationship to, and with, the Dutch in the following terms: [4]

> You say that you are our Father and I am your son. We say, "We will not be like Father and Son, but like Brothers." This … belt confirms our words. These two rows will symbolize two paths or two vessels, travelling down the same river together… We shall each travel the river together, side by side, but in our own boat. Neither of us will make compulsory laws or interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel.

While Canada's Indian Act has imposed a governance regime on Six Nations territories that is in competition with the traditional Iroquois Longhouse, the Iroquois nonetheless view mutual non-interference, as embraced by the intent of the Two Row Wampum, to still be in effect,

4 Quoted in James Wilson, *The Earth Shall Weep: A History of Native America* (New York: Grove Press, 1998), 115–16.

since it was deemed to be binding as long as the sun shines, the grass grows green, and the waters flow.

Three further comments are in order. First, since the Iroquois had no written language, the Two Row Wampum belt *is the treaty*. Second, the original Two Row Wampum belt is stored in the United States under the supervision of the Onondaga, and in 2013 it was presented at various festivities along the Hudson River en route to, and in, New York in celebration of the 400th anniversary of the 1613 Two Row Wampum Treaty.[5] Third, the nation-to-nation view of the Iroquois confederacy's relationship with Canada draws in large measure from the Two Row Wampum Treaty.

The Treaty of Albany (1664)

This treaty, according to Leonard Rotman (Borrows and Rotman 2012, 14), was the first formal alliance between the British Crown and Indigenous peoples in North America. At the

> time of the treaty the Iroquois were more numerous and powerful than the British in North America. Equally important, they had become catalysts in the struggle between Britain and France for economic and military pre-eminence in North America. As noted earlier, the Iroquois had been allies of the Dutch prior to Britain's acquisition of New Netherland, renamed New York by Britain in 1664. Through the Treaty, Britain sought to ally itself with a powerful ally. Meanwhile the Iroquois sought to continue the [type of] relationship they previously enjoyed with the Dutch.

Indeed, an equivalent of the earlier Two Row Wampum concept was a key ingredient of the Treaty of Albany. Rotman (in Borrows and Rotman 2012, 16) notes:

> Future agreements between the Indigenous peoples and Britain built upon the foundations provided by the Treaty of Albany and the Two Row Wampum. Indigenous peoples did not view these treaties as disconnected agreements as the British tended to. Rather they regarded individual treaties as continuations of earlier alliances. Thus, the Treaty of Albany, from the Indigenous point of view,

5 Supplement 3.1 to this chapter documents aspects of the interaction between the Iroquois and the US Founding Fathers. The supplement also deals with the resettlement from the US into Canada of many Haudenosaunee groups in the aftermath of the American Revolution since many of them fought with the British.

> was not an isolated agreement. Rather, it provided the basis for the Covenant Chain[6] alliance that was forged between them and that extended beyond the signing of the Treaty of Niagara in 1764.

Attention now turns to what is arguably the most significant event in the evolution of Indigenous rights and Indigenous title, namely the Royal Proclamation of 1763.

The Royal Proclamation (1763)

The Royal Proclamation sets out guidelines for European settlement of Indigenous territories. After Britain won the Seven Years War, ownership over North America was issued to King George III. However, as Indigenous and Northern Affairs Canada reminds us,

> the Royal Proclamation explicitly states that Indigenous title has existed and continues to exist, and that all land would be considered Indigenous land until ceded by treaty. The Proclamation forbade settlers from claiming land from the Indigenous occupants, unless it has been first bought by the Crown and then sold to the settlers. The Royal Proclamation further sets out that only the Crown can buy land from First Nations.

An abridged version of the Royal Proclamation appears in Figure 3.2.

Grammond (2013, 68) notes that the Royal Proclamation has long been considered the principal source of the territorial rights of the Indigenous peoples.[7] Moreover, the Royal Proclamation has never been repealed, so it remains in effect today. Indeed, by reserving lands not already purchased by the Crown for the Indigenous peoples, the Proclamation thus recognizes the pre-existing Indigenous rights to the lands and that this right could only be extinguished by means of a cession to the Crown (ibid., 70). In this important sense the Royal Proclamation is the ultimate source of Indigenous land title in Canada. In addition, the provision that the First Nations can only cede land to Britain (and by extension later to Canada as the embodiment of the Crown) leads to

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6 The Covenant Chain alliance was a military, political, social, and economic alliance that existed initially between the Dutch and the River Indians of the Hudson River region, but was later forged between the British and the Iroquois Confederacy, and then extended to include other Indigenous nations. The Treaty of Albany was the foundation of the Covenant Chain alliance (Borrows and Rotman 2012).

7 He further notes that the use of the expression "hunting grounds" does not restrict the use that the indigenous peoples may make of their territories.

Figure 3.2

Royal Proclamation
By the King, George R.
(abridged)

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds …

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid…

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and License for that Purpose first obtained.

…

And We do, strictly … require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony …

Given at our Court at St. James's the 7th Day of October 1763, in the Third Year of our Reign.

GOD SAVE THE KING

Source: INAC (2016).

the "nation-to-Crown" or "nation-to-nation" characteristic of the later treaties as well as to the manner in which most of the First Nations tend to view their relationship with Canada. Given this role as the guarantor of Indian land title, and the fact that this is embraced in section 25 of the Constitution Act, 1982 (elaborated later), the Royal Proclamation is often viewed as the "Indian Bill of Rights" and/or the "Indian Magna Carta."[8] Appropriately, in 2013 on occasion of its 250th anniversary, the Royal Proclamation was duly feted via a national conference at the Museum of Civilization in Ottawa replete with an address by Canada's representative of the Crown, His Excellency the Right Honourable David Johnston, Governor General of Canada.

The Treaty of Niagara (1764)

While John Borrows (1997, 161–62) views the Royal Proclamation as a fundamental document in First Nations and Canadian legal history, he also notes that it is only a part of a treaty between First Nations and the Crown that stands as a positive guarantee of First Nations self-government: the other part is contained in an agreement ratified at Niagara in 1764. In Borrows's words:

> Since the wording of the Proclamation is unclear about the autonomy and jurisdiction of First Nations, and since the Proclamation was drafted under the control and preference of the colonial power, the spirit and intent of the Royal Proclamation can best be discerned by reference to a treaty with First Nations representatives at Niagara in 1764. At this gathering a nation-to-nation relationship between settler and First Nation peoples was renewed and extended, and the Covenant Chain of Friendship, a multination alliance in which no member gave up their sovereignty, was affirmed. *The Royal Proclamation became a treaty at Niagara because it was presented by the colonialists for affirmation, and was accepted by the First Nations.* However, when presenting the Proclamation, both parties made representations and promises through methods other than the written word, such as oral statements and belts of wampum.

8 The Proclamation is also significant because it likely contributed to the outbreak of the American Revolution in 1775. This is so because it legally defined the North American interior west of the Appalachian Mountains as a vast Indigenous reserve, thus angering inhabitants of the Thirteen Colonies who desired western expansion (Royal Proclamation entry of the Canadian Encyclopedia 2013). Indeed, George Washington among other American leaders had land interests in this "vast Indigenous reserve."

In more detail, the treaty at Niagara was entered into over July/August 1764, and the occasion attracted what was arguably the most widely representative gathering of American Indians ever assembled, as approximately two thousand chiefs attended the negotiations. They came from more than twenty-four nations with representative nations as far east as Nova Scotia, and as far west as Mississippi, and as far north as Hudson Bay. At the end of the ceremony and the exchange of presents and wampum, a Two Row Wampum belt was employed by the First Nation peoples to reflect their understanding of the Treaty of Niagara and the words of the Royal Proclamation.

A final note: during the War of 1812, some of the Indigenous signatories to the treaty fought with the British since they believed the Treaty of Niagara bound them to the British cause.

The Jay Treaty of 1794

The 1794 Jay Treaty between England and the United States also qualifies under the peace, friendship, and trade banner. It involved the negotiation of limited trade relations across the border. England agreed to give up its forts in the northwestern frontier of the US and a joint commission was set up to settle border disputes. Of relevance to the present volume were the following provisions of the treaty:

> It is agreed that at all Times be free to His Majesty's Subjects, and to the Citizens of the United States, and also to the Indians dwelling on either side of said Boundary Line freely to pass and re-pass by Land, or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America.

and

> No Duty of Entry shall ever be levied by either Party on Peltries [pelts or furs] brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or re-passing with their own proper Goods and Effects of whatever nature, pay for the same any Import or Duty whatever.

A recent US clarification as a result of the Jay Treaty (Section 289 of the Immigration and Nationality Act of 1952 and as amended in 1995) reads: "Native Indians born in Canada are therefore entitled to enter the United States for the purpose of employment, study, retirement, investing, and/or immigration." This is obviously of critical importance

to the Akwesasne and to other First Nations peoples straddling the Canada-US border.

The Gradual Civilization Act (1857)

Passed by the Province of Canada in 1857, the Gradual Civilization Act was a forerunner of post-Confereration dirigiste legislation typical of the Indian Act and especially of the 1979 Trudeau-Chrétien White Paper, of which much more later. As the preamble of the Act noted, its purpose was "to encourage the progress of Civilization among the Indian Tribes in this Province, and the gradual removal of all legal distinctions between them and Her Majesty's other Canadian Subjects, and to facilitate the acquisition of property and of the rights accompanying it." To this end, the Act sought the enfranchisement of "any such Indian of the male sex, and not under twenty-one years of age, is able to speak, read and write either the English or the French language readily and well, and is sufficiently advanced in the elementary branches of education and is of good moral character and free from debt." Enfranchised Indians would "no longer be deemed an Indian," but would instead become a regular British subject and able to vote. Under the Act, enfranchised Indians would be entitled to "a piece of land not exceeding fifty acres out of the lands reserved or set apart for the use of his tribe." In addition, enfranchised Indians would be eligible for "a sum of money equal to the principal of his share of the annuities and other yearly revenues receivable by or for the use of such tribe."[9]

9 Statues of the Province of Canada, An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians, assented to 10 June 1857.

Part B:
From Confederation to the Constitution Act, 1982

Confederation

Section 91(24) of the Constitution Act, 1867 assigns jurisdiction over "Indians and Lands reserved for Indians" to the federal government. My oft-stated concern here is that Ottawa has tended to view 91(24) as "Indians ***on*** Land reserved for Indians" with the result that Indians moving off reserves have often found themselves falling into a constitutional limbo since the provinces tend to be reluctant to assume responsibility. Relatedy, and drawing again from Grammond (2013, 91):

> The use or the adjective "reserved" [in s. 91(24)] to describe the lands under federal jurisdiction could lead to the belief that it is a reference to "Indian Reserves"… The courts have rejected this interpretation. The Privy Council, and later the Supreme Court, concluded that section 91(24) was aimed not only at "reserves," but also at lands over which the indigenous peoples possess an Indigenous title.[10]

The Gradual Enfranchisement Act (1869)

Given that there was only one volunteer to become enfranchised under the earlier-referenced Gradual Civilization Act of 1857, the federal government replaced it with the Gradual Enfranchisement Act of 1869 (Indigenous Foundations 2009c) that established the elective band council system that remains in the Indian Act to this day.[11] *Inter alia*, this served to override the traditional Iroquois Longhouse governance model so admired by the US founding fathers.[12]

The Indian Act also granted the Superintendent General of Indian Affairs extreme control over status Indians. For example, the Superin-

10 As will become apparent later, these lands may be very large: for example, they can cover large parts of Quebec and British Columbia where there are no treaties that ceded land to Canada. This will also be noted in the later figure for Reserves.

11 A supplement to chapter 8 will assess the shortfalls associated with the Indian Act governance model.

12 The fascinating relationship between the Iroquois and the US Founding Fathers is detailed in a supplement to this chapter.

tendent had the power to determine who was of "good moral character" and therefore who deserved certain benefits, such as deciding if the widow of an enfranchised Indian "lives respectably" and could therefore keep her children in the event of the father's death. The Act also severely restricted the governing powers of band councils, regulated alcohol consumption, and determined who would be eligible for band and treaty benefits. (Indigenous Foundations 2009c

It also marked the beginning of gender-based restrictions to status, on which much more later.

1869–70 and 1885: The Métis and the Riel Rebellions

An obvious shortcoming of this monograph is that its principal focus is on First Nations and to a lesser degree on the Inuit. However, this ignores the Métis who, thanks to the 2016 *Daniels* Supreme Court decision, now have the same constitutional recognition as other Indigenous peoples and whose numbers (451,795 as of 2011) vastly outnumber the 59,440 Canadian Inuit, for example. Attention will be directed to this path-breaking *Daniels* decision in chapter 6.

In the present context attention focuses on the Métis and Riel rebellions. By way of some context, the Métis are descendents initially of unions between First Nations women and western European men. The Canadian Encyclopedia (2013) entry for the "Métis Nation" defines their homeland as the three Prairie provinces and parts of Ontario, British Columbia, the Northwest Territories and the northern United States. The Supreme Court has outlined the three necessary factors that identify Métis for constitutional purposes:

- self-identification as a Métis individual;
- ancestral connection to a historic Métis community; and
- acceptance by a Métis community.

The Royal Commission on Aboriginal Peoples (RCAP) noted that while many Canadians have mixed Indigenous/non-Indigenous ancestry this does not make them Métis … what distinguishes Métis people is that they associate themselves with a culture that is distinctively Métis. Two main groups speak for the Métis in Canada—the Congress of Indigenous Peoples and the Métis National Council.

Turning now to the 1869–70 Red River Rebellion, the Métis under Louis Riel became concerned over the transfer of Rupert's Land to the brand new nation of Canada, in part because Canada was re-surveying

the river-lot farms (long narrow lots abutting the rivers) and reorganizing them into the familiar English rectangular lots. In response, the Métis under Riel prevented Canada's appointed lieutenant-governor from entering the Red River colony, and they then established a provisional government in late 1869 with the intent of discussing the terms of entry into Canada. However, Ottawa beat them to the mark by enacting the Manitoba Act in 1870 that created the then-postage-stamp-size province of Manitoba. After suffering defeat and fleeing to the United States, Riel re-appeared in the mid-1880s to lead the Métis with Gabriel Dumont as the military commander and together they formed the Provisional Government of Saskatchewan in March of 1885. Later in the same month they were defeated by General Middleton in the 1885 Northwest Rebellion, the major battle occurring along the South Saskatchewan River near Batoche. Riel was tried and executed for high treason in November, 1885.

While Riel remains a controversial figure, his memory is much celebrated in many quarters. Foremost among these is the Parliament of Canada's resolution of March 1992 citing Louis Riel as the founder of Manitoba. The third Monday of February is Louis Riel Day in Manitoba (and Family Day elsewhere in Canada). And Riel is commemorated in the names of many streets, schools, and buildings in the Prairies. Lost in all of this is the name of General Middleton who defeated Riel in the Battle of Batoche.[13]

The Numbered Treaties: 1871–1922

Beginning in 1871 with Treaty 1 (in Manitoba) and Treaty 2 (in Manitoba and parts of southeastern Saskatchewan), and ending with Treaty 11 (in the Northwest Territories) in 1922, Canada embarked on negotiating the so-called "numbered treaties" for First Nations in the Prairie provinces (and parts of Ontario, British Columbia, and the Northwest Territories). The accompanying map (see Figure 3.3) reveals the lands ceded by the First Nations—almost all of the country from the Ontario-Quebec border to the Alberta-British Columbia border and much of the Northwest Territories (NWT). In return, Ottawa created several hundred reserves, all of them small and far too many devoid of resources. The logistics of this exercise must have been staggering—visiting

13 This was not always the case. Early last century, as a student in a one-room public school near Duck Lake, Saskatchewan, my mother recalled attending ceremonies celebrating the victory of General Middleton at Batoche.

("treating") with more than seventy First Nations in each of Saskatchewan and Alberta is ample evidence of the magnitude of the intent and extent of this exercise.

It is in this sense that the First Nations assert that in ceding their traditional lands to Canada they have contributed mightily to the prosperity of the federation and that they have not been rewarded accordingly in return.

Appendix A of this book is devoted to detailing each of these numbered treaties. Given the near-sacrosanct nature of these treaties to the First Nations and by extension to Canada, the Appendix will include the names of all of the individual First Nations who were signatories to these treaties. Appendix B then presents the text of one of the numbered treaties—Treaty 6—so that readers can obtain a better appreciation of the nature of these treaties. Readers should also take note of the fact that the treaty negotiations were conducted orally and then sent to Ottawa to provide the written texts. It is also likely the case that in most (perhaps the majority of) instances the Indians were not able to read, so that there was no way that they could verify if the Treaty text reflected the oral negotiations. Indeed, all of the First Nations signatories of Treaty 1, for example, signed the Treaty with an "X."

The associated Figure 3.5, Indian Reserves, describes the nature of these reserves. Of special note is the distinction between these reserves (i.e., lands reserved for Indians) and what the First Nations refer to as their "traditional lands."

There is also a second supplement to this chapter—namely a moving commemorative address in 1971 by Chief Dave Courchene O.C.,[14] president of the Manitoba Indian Brotherhood, on the occasion of the 100th anniversary of Treaty 1. Paraphrasing aspects of this commemorative address, the Chief notes that in return for surrendering traditional lands, the Manitoba Indians were assured of good, arable land, of implements for farming, of education, of good housing. But in return for the land they revered, they received muskeg, rock, and sand, useless tools and implements, and in return for the buffalo hide teepee which sustained them in health through a thousand prairie winters, they received nothing at all. Trapped on the reserves, with no buffalo left to hunt, they were forced to build shacks in which they died of diseases the "white man" had brought from the slums of a decadent civilization.

Nonetheless Chief Courchene concludes on an uplifting note:

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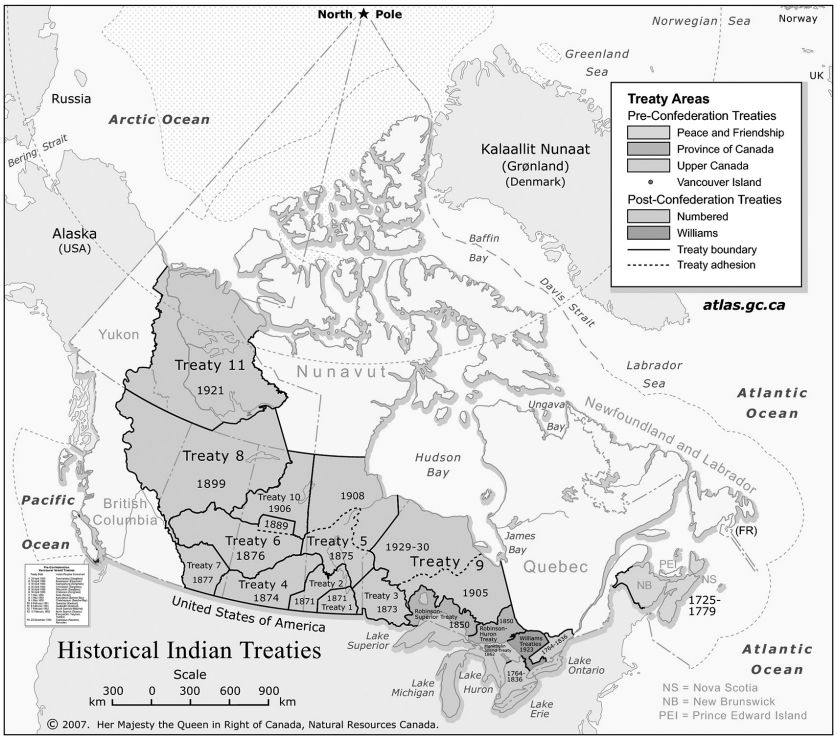
14 The author of this book, Thomas J. Courchene, is not related to Chief Dave Courchene.

Figure 3.3

Historical Indian Treaties



Source: http://geogratis.gc.ca/api/en/nrcan-rncan/ess-sst/7ac840d4-638c-575e-9b77-e44c02b5dbdc.html

Figure 3.4

First Nations Reserves

Source: Indian and Northern Affairs (reproduced from *A First Nations Province* (Courchene and Powell 1992).

> As President of the Manitoba Indian brotherhood I state that my people are prepared to work in honour and cooperation with the descendants of the white settlers of our lands. I also state that my people will never be prepared to lose that which is most precious to us.
>
> Our struggle will be over when we have in our own way found our place amongst the many peoples of the earth. And when that times comes, we will still be a people identifiable and independent and proud.
>
> We are gathered here with the spirits of our ancestors to commemorate one hundred years of struggle; to commemorate the tragedies in the lives of the victims; to celebrate our survival, to reaffirm our identity and to reassert that our treaties as fact and as symbol will be retained and respected and to honour our magnificent young people, who will assure that we will never be dishonoured.
>
> For in this way, we will reassert that God was right in making us Chipawyan, Cree, Ojibway and Sioux as part of the North American Indian nation and that man is wrong in trying to make us White.
>
> For in the ultimate end, we will stand before him and say proudly, but humbly, Lord, I am one of those red men you made in your world. I am an Indian.

The Indian Act (1876)

The 1876 Indian Act (formally An Act Respecting Indians) incorporated various pieces of colonial legislation pertaining to Indigenous peoples. It remains in force today, albeit in amended form.[15] The Act governs matters pertaining to Indian status, bands, and Indian reserves. Throughout its history the Act has been highly invasive and paternalistic, since to a large degree it authorizes the Canadian federal government to regulate and administer the affairs and day-to-day lives of registered Indians and reserve communities. For example, the Indian Act prohibited some of the traditional Indian religious ceremonies. Prominent here was the 1884 banning of the Potlatch ceremonies of West Coast Indians. In these Potlatch ceremonies, gifts (in the form of

15 Much of the remainder of this paragraph is from the Indigenous Foundations (2009a) entry for The Indian Act.

Figure 3.5

Indian Reserves

An Indian reserve is a tract of land set aside under the Indian Act and treaty agreements for the exclusive use of an Indian band. Band members possess the right to live on-reserve lands, and band administrative and political structures are frequently located there. Reserve lands are not strictly "owned" by bands but are held in trust for bands by the Crown. The Indian Act grants the minister of Indian Affairs authority over much of the activity on reserves. This overarching control is evident in the Indian Act's definition of Indian reserves.

Reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this act and to the terms of any treaty or surrender, the governor in council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

Precursors to the modern reserve system existed in Canada prior to Confederation and the Indian Act as products of the colonial drive to "civilize" Indigenous peoples by introducing them to agriculture, Christianity and a sedentary way of life based on private property.

Reserve acreage varied across the country. Treaties 1 and 2 allotted 160 acres per family of five, whereas Treaties 3 to 11 granted 640 acres per family of five. In British Columbia, reserves were considerably smaller, with an average of 20 acres granted per family. Methods for determining the location of a reserve also differed. Some treaties called for reserves near important waterways that were crucial to the survival of the band in question, and some bands were consulted about reserve location. Some reserves were created entirely outside a First Nation's traditional territory. Ultimately, many reserves are small and provide the respective bands with minimal resources or economic opportunities.

A reserve is not to be confused with a First Nation's traditional territory. Although reserve borders were imposed on First Nations, many First Nations have continued hunting, gathering, and fishing in off-reserve locations that they have used for many generations. In addition, important ceremonial sites may be located outside a reserve but continue to be significant for a band's cultural and spiritual practices. When a First Nation describes its traditional territory, it is describing this larger land base that it has occupied and utilized for many generations, before reserve borders were imposed and drawn on maps. … When issues of Indigenous title are discussed, this generally refers to the use and enjoyment of traditional territories. The reserve system undermined Indigenous peoples' relationship to their traditional territories but did not destroy it.

Source: http://indigenousfoundations.arts.ubc.ca/home/government-policy/reserves

utilitarian goods such as blankets, carved cedar boxes, food, canoes as well as prestige items) were bestowed on others with great ceremony. Potlatches were held to celebrate initiations, to mourn the dead, or to mark the investiture of chiefs in a continuing series of often-competitive exchanges between clans, lineages, and rival groups. In addition to the material exchange, the potlatch also maintained community and societal hierarchies, cultural rituals, and social harmony within and between individual bands and nations. It is astonishing that the Potlatch prohibition lasted until 1951.

The Prairie Indians were not exempt from a similar Indian Act prohibition: In 1885 the Sun Dance of the Plains Peoples was banned. The Sun Dance was a sacred and emotional experience and an opportunity to renew kinship ties, arrange marriages, and exchange property. As with the Potlatch ceremony the prohibition was not lifted until 1951.

At an individual level, a 1927 amendment (Section 141) of the Indian Act forbade any Indian or band from retaining a lawyer for the purpose of making a claim against Canada, and further forbade them from raising money to retain a lawyer, on punishment of imprisonment.

Not all of the provisions of the Indian Act were punitive. Sections 87 and 90 exempted Indians from paying taxes on two types of property: (a) the interest of an Indian or a band in reserve lands or surrendered lands, and (b) the personal property of an Indian or a band situated on a reserve. Specifically, status Indians do not pay federal or provincial taxes on their personal and real property that is on a reserve. Personal property includes goods, services, and income as defined under the Canada Revenue Agency policies. As income is considered personal property, status Indians who work on a reserve do not pay federal or provincial taxes on their employment income.

By way of a summary, and on an even darker note, the purpose of the Indian Act, as stated by its drafters, was to administer Indian affairs in such a way that Indian people would feel compelled, along the lines of the 1857 Gradual Civilization Act, to renounce Indian status and to join the Canadian family as full members. Indeed, Sir John A. Macdonald proclaimed that "the great aim of our legislation has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion, as speedily as they are fit for the change" (Canada 1887, 37) As noted earlier, the wording "to join Canadian civilization as full members" was referred to as "enfranchisement" because the Indians would earn the right to vote, whereas at that time, and indeed until 1960, First Nations citizens could not vote

in Canadian elections, even if they had served in the two world wars, as many Indians did.

Indeed, it was the recognition of the Indigenous peoples' contribution to Canada's war effort, along with the United Nations' Universal Declaration of Human Rights, that led to the revision in 1951 of the Indian Act, one of among more than twenty post-confederation amendments. This 1951 amendment (Indigenous Foundations 2009d) undid a number of troubling restrictions implemented in the earlier Indian Act amendments. These included removing the prohibition to practice their culture and customs on reserves; allowing Indians to enter pool halls and to gamble; allowing Indians to appear off-reserve in ceremonial dress without the permission of the Indian Agent, allowing them to access legal counsel and allowing women to vote in band council elections.

The existence of a ban on women's right to vote on reserve matters was in reality a minor issue compared to the pervasive discrimination against women embraced elsewhere in the Indian Act, as the following section elaborates.

Status Indians and Gender Discrimination

Only those on the official Indian Register maintained by the federal government qualified as status Indians and, therefore, were eligible for full benefits and were subject to the restrictions of the Indian Act. Excluded were Métis, Inuit, and those Indians who lost or did not qualify for status. Arguably, the most egregious aspect of the regulations with respect to losing status related to the treatment of Indian women.

Under the Indian Act a status woman who married a non-Indian man would lose her status and cease to be an Indian. And so would her children. This meant that she would lose the right to live on her reserve (and lose the associated treaty benefits and health benefits) and would not be able to inherit her family property nor be buried on the reserve of her ancestors. Indeed, if a status woman were widowed or abandoned by her husband, she would lose status.

In sharp contrast, were an Indian man to marry a non-status woman not only would he maintain all his rights but she would qualify for status! These provisions remained largely in place until Bill C-31 in 1985, about which more later.

I now turn to a truly dark story in the annals of Canada-Indigenous relations, namely the residential school system.

Residential Schools

While the original purpose of the Indian Act was, as the earlier quote from Sir John A. Macdonald reveals, to assimilate the Indians into Canadian society (i.e., to "enfranchise" them, in Ottawa-speak), the eventual chosen instrument, as it were, to implement this policy was the residential school system. Speaking before the Special Committee of the House of Commons examining the 1920 Indian Act amendments, Duncan Campbell Scott (deputy superintendent general of Indian Affairs) asserted:

> I want to get rid of the Indian problem. I do not think as a matter of fact that this country ought to continuously protect a class of people who are able to stand alone. … Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill.[16]

One of the principal amendments of the Bill in question was to make it mandatory for Indigenous parents to send their children to Indian residential schools if they were selected to do so. While some residential (boarding) schools were established well before Confederation, they became fully operative following the passage of the 1876 Indian Act.

In his recent book Sébastien Grammond (2013, 119) provides the following assessment of the residential school experience, then and now:

> The residential school experience has had devastating effects on indigenous peoples, to the point that some speak of genocide. While some former pupils underline the fact that the schools taught them useful knowledge and skills, most of them suffered a severe attack on their self-worth, pride, culture and language, in an environment where they were deprived of the emotional support of their families and communities. Their experience may have been the cause of later anti-social behaviour. It also deprived them of the experience of child rearing according to indigenous traditions, which would then make their role as indigenous parents more difficult. And sadly, those who were victim of physical or sexual abuse in the residential schools often became perpetrators of the same kind of abuse toward their children or other family members. Thus while most residential schools closed half a century ago, they still have profound effects on today's Indigenous peoples. It is impossible to

16 Reproduced from Cairns (2000, 17).

> understand the social condition of today's Indigenous communities without reference to the legacy of the residential schools.

While attention rightly focuses on the tragedy visited upon the residential school children, one should also focus on the trauma, even panic, facing families as their children neared five years old, at which time they could be taken away, forcibly if necessary, to residential school, sometimes without seeing their family again until their teens. More on residential schools in the later chapter on the Truth and Reconciliation Commission.

The Sixties Scoop

With the gradual phasing out of the residential school system, the provincial governments enhanced their role as placement agencies for Indigenous infants and children. Beginning in the 1960s, large numbers of First Nation/Métis children were adopted. Known as the "Sixties Scoop" (Johnston 1983), children were often literally scooped from their homes and their communities without the knowledge or consent of their families or bands. As Chief Marcia Brown Martel, Chief of the Beaverhouse First Nation, has noted, "many First Nations charged that in many cases where consent was not given, government authorities and social workers were acting under the colonialistic assumption that native people were culturally inferior and unable to adequately provide for the needs of the children. Many First Nations people believe that the forced removal of the children was a deliberate act of genocide."[17]

Statistics from the Department of Indian Affairs reveal a total of 11,132 status Indian children adopted between the years of 1960 and 1990. It is believed, however, that the actual numbers are much higher than that. While Indian Affairs recorded adoptions of "status" native children, many native children were not recorded as status in adoption or foster care records. Indeed, many status children were not recorded as status after adoption. Of those children who were adopted, 70 percent were adopted into non-native homes.

A class action lawsuit on behalf of those affected is in progress.

Thankfully, there has been significant progress on the Indigenous child welfare front. Canada now has a decentralized child welfare system that consists of thirteen Canadian provincial and territorial child

17 See http://www.originscanada.org/aboriginal-resources/the-stolen-generation/

welfare systems. In addition, there exist Métis, First Nations, and urban Aboriginal child and family service agencies that are, to varying degrees, affected by federal policies and funding models. Most commonly, Aboriginal child welfare agencies have signed agreements with either the federal, or both the federal and provincial governments, that authorizes them to provide the full range of child protection services and receive federal funding to do so.

Beyond this, the Truth and Reconciliation Commission's Calls to Action begin with recommendations with respect to Aboriginal child care agencies and standards:[18]

> 1. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by…
>
> ii. Providing adequate resources to enable Aboriginal communities and child-welfare organizations to keep Aboriginal families together.…
>
> iii. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the history and impacts of residential schools.…
>
> v. Requiring that all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers.…
>
> 4. We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases and includes principles that:
>
> i. Affirm the right of Aboriginal governments to establish and maintain their own child-welfare agencies.
>
> ii. Require all child-welfare agencies and courts to take the residential school legacy into account in their decision making.
>
> iii. Establish, as an important priority, a requirement that placements of Aboriginal children into temporary and permanent care be culturally appropriate.…

Immediately following the release of the Truth and Reconciliation

18 While chapter 5 is devoted to the TRC, it seemed appropriate to address the child care/adoption issue in the context of the aftermath of the Sixties Scoop.

Commission's summary report (June 2015), Prime Minister Trudeau stated that he was in agreement with all of the TRC's Calls to Action. The Truth and Reconciliation discussion in chapter 5 will focus in more detail on the residential school system.

The Hawthorn Reports (1966 and 1967)

Entitled *A Survey of the Contemporary Indians of Canada: Economic, Political, Educational Needs and Policies* (in two volumes), but typically referred to as the *Hawthorn Report* after its principal editor H. B. Hawthorn, these volumes embrace the "Canadian citizens" component of this monograph (i.e., of *Indigenous Nationals/Canadian Citizens*). Indeed, the *Hawthorn Report* introduced the concept of "citizens plus" into Indigenous terminology to replace the then status quo when their reality was "citizens minus." Since Alan Cairns was one of the other editors/authors of this report, his own words on its main thrusts merit quotation:

> "Citizens plus" could serve as the vehicle for a socio-political theory and as a label for public consumption that recognizes the Aboriginal difference fashioned by history and the continuing desire to resist submergence and also recognizes our need to feel that we belong to each other. The Hawthorn "citizens plus" suggestion, originally directed only to the status Indian population, but capable of extension to the Inuit and the Métis, was an … attempt to accommodate the apartness of Aboriginal peoples from, and their togetherness with, the non-Aboriginal majority. The "plus" dimension spoke to Aboriginals; the "citizens" [dimension] addressed togetherness in a way intended to underline our obligations to each other. (Cairns 2000, 9–10)

and, relatedly

> By "plus" we referred to ongoing entitlements, some of which flowed from existing treaties, while others were to be worked out in the political processes of the future, which would identify the Indian peoples as deserving possessors of an additional category of rights based on historical priority. In other words, we sought to preserve the Indian difference while simultaneously supporting a common citizenship as a basis for empathy and solidarity. (ibid., 12)

In addition the *Hawthorn Report* made hundreds of recommendations designed to offset the marginal economic, social, and health status of

Indigenous people. Most of these directed Ottawa (largely via the Indian Affairs department) and the provinces (including municipalities) to both design and fund appropriate programs for Aboriginals, and to encourage them to take more advantage of the availability of such programs. Motivating these recommendations was the report's assumption that the move to cities was inevitable given the Indians' aspirations for a North American standard of living and the limited possibilities that could be achieved on many reserves (ibid., 162).

In effect, the *Hawthorn Report* attempted to bridge two alternative futures for the First Nations—between a future that sees First Nations individuals as citizens of Canada and a future where First Nations are viewed as a collective with nation-to-nation relationship linkages to the Crown (i.e., to Canada). Indeed, as implied above, the *Hawthorn Report* captures the spirit of the title of the present monograph, namely *Indigenous Nationals/Canadian Citizens*.

The Trudeau/Chrétien 1969 White Paper

For those Canadians not familiar with the Indigenous file, it is likely to come as a shock that this 1969 White Paper recommended the dismantling of the Indian Act and the complete assimilation ("enfranchisement") of the First Nations, and indigeneity more generally, into Canadian society. The backdrop to this dramatic development was that Indigenous Canadians were faring very poorly compared to the rest of Canadians. Motivated by the concept of a "Just Society" and the vision of equality for all citizens, Prime Minister Pierre Trudeau along with the Minister of Indian Affairs Jean Chrétien issued the 1969 White Paper—Statement of the Government of Canada on Indian Policy. (See Figure 3.6 for the "preamble" to The White Paper.)

Arguing that the Indian Act was discriminatory because it applied only to Indigenous Canadians, the paper proposed to repeal the Indian Act to, in the words of the White Paper, "enable the Indian People to be free—free to develop Indian cultures in an environment of legal, social, and economic equality with other Canadians." In more detail, among the White Paper's proposals were the following:

- eliminate Indian status;
- dissolve the Department of Indian Affairs within five years;
- abolish the Indian Act;
- convert reserve land to private property that can be sold by the band or its members;

Figure 3.6

The 1969 White Paper
Statement of the Government of Canada on Indian Policy*

To be an Indian is to be a man, with all a man's needs and abilities. To be an Indian is also to be different. It is to speak different languages, draw different pictures, tell different tales and to rely on a set of values developed in a different world.

Canada is richer for its Indian component, although there have been times when diversity seemed of little value to many Canadians.

But to be a Canadian Indian today is to be someone different in another way. It is to be someone apart—apart in law, apart in the provision of government services and, too often, [a]part in social contacts.

To be an Indian is to lack power—the power to act as owner of your lands, the power to spend your own money and, too often, the power to change your own condition.

Not always, but too often, to be an Indian is to be without—without a job, a good house, or running water; without knowledge, training or technical skill and, above all, without those feelings of dignity and self-confidence that a man must have if he is to walk with his head held high.

All these conditions of the Indians are the product of history and have nothing to do with their abilities and capacities. Indian relations with other Canadians began with special treatment by government and society, and special treatment has been the rule since Europeans first settled in Canada. Special treatment has made of the Indians a community disadvantaged and apart.

Obviously, the course of history must be changed.

To be an Indian must be to be free—free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians.

*This is the preamble to The White Paper, 1969. The full document can be accessed at: http://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191

- transfer responsibility for Indian affairs from the federal government to the provinces and integrate these services into those provided to other Canadian citizens;
- provide funding for economic development; and
- appoint a commissioner to address outstanding land claims and to gradually terminate existing treaties.

Pushback: The Red Paper and the Brown Paper

The pushback was fast and furious, initially and most importantly in the form of Citizens Plus, the position paper of the Indian Association of Alberta (borrowing the title from the Hawthorn Report) under the direction of Harold Cardinal. Not surprisingly, this response came to be referred to as the "Red Paper." In effect, by passing the buck to the provinces, as it were, Canada was absolving itself of its responsibility for historical injustices and of its obligation to uphold treaty rights and to maintain Canada's special relationship with First Nations. Cardinal called the White Paper a "thinly disguised programme of extermination through assimilation" and a form of "cultural genocide." Citizens Plus quickly became the First Nations' national stance on the White Paper, embracing the clarion call of the Red paper: "There is nothing more important than our treaties, our lands and the well-being of our future generations."

In British Columbia the response to the White Paper led to the creation of the Union of British Columbia Indian Chiefs (UBCIC) whose initial activity was the publication in 1970 of *A Declaration of Indian Rights: The B.C. Indian Position Paper* (commonly referred to as the "Brown Paper"). The Brown Paper also rejected the White Paper's proposals, asserting instead that the Indigenous peoples continued to hold Indigenous title to the land. This was, and is, an important issue for UBCIC because most of the lands in the province were not covered by a treaty and, therefore, the First Nations did not formally cede any traditional Indigenous territory to Canada.

Alan Cairns, in his important book (also entitled *Citizens Plus*), notes that part of the pushback took the form of embracing the title of the present paper, namely that the terms Indigenous nationality and Canadian citizenship are fully and appropriately consistent. As Cairns (2000, 68) has noted:

> Although the language of nationhood was employed [in the pushback] so too was the language of Canadian citizenship. Dave

> Courchene, President of the Manitoba Indian Brotherhood, referred to Indians as "citizens of the province of Manitoba," with a consequent right to provincial services. The Manitoba Indian Brotherhood saw no incompatibility between being Indian and being Canadian; referred to Indians as contributing to the Canadian mosaic, and to themselves as "Indians of Canada," laid claim to full provincial citizenship, clearly stated in the following words: "our relationships with the federal government may be unique, but they in no way interfere with our rights as provincial citizens," and vigorously asserted their rights as Canadian citizens, as well as rights flowing from special status.

The Supreme Court's *Calder* Decision

One of the underlying tenets of the White Paper was that Indians should have rights that are identical to those of other Canadians. However the Supreme Court's path-breaking 1973 *Calder* decision (dealt with in detail in chapter 6) declared that Indigenous land rights and title continue to exist so that Indians do have rights different from other Canadians.

Abele, Graham, and Maslove (1999, 262–3) note that this Supreme Court decision triggered the modern era of treaty making when, in response to the *Calder* case, then Indian Affairs Minister Jean Chrétien issued the 1973 Statement on Claims of Indian and Inuit People: A Federal Native Claims Policy. Abele et al. (1999, 263) then adds:

> [The claims policy] recognized that there are parts of Canada where Indigenous land interests has not been surrendered or extinguished by treaty and that these interests must be settled. This would occur through establishment of a comprehensive claim process. Through a newly created Office of Native Claims [in what is now called INAC] the government would negotiate a quantity of land for Indigenous use, based on traditional occupancy, and a compensation package for traditional territory subject to other uses. Claims of this type were considered to be comprehensive, in that they could include land, hunting, fishing, and trapping rights, as well as other economic and social benefits. … [In return] the federal government insisted that Indigenous signatories to any agreement cede, release, and surrender all Indigenous rights in perpetuity.

The first of these land claims agreements was the 1975 James Bay and Northern Quebec Agreement signed by the governments of Quebec and Canada and by the Quebec Cree and Inuit. The details of the most important of these comprehensive land claims agreements (or modern

treaties) appear in chapter 8 for First Nations and chapter 9 for the Inuit.

The bottom line here is that in light of the SCC *Calder* decision as well as the several First Nations pushbacks, Trudeau and Chrétien abandoned the enfranchisement vision embraced by the White Paper and, in the broader context of enshrining the Canadian Charter of Rights and Freedoms, they engaged in lengthy negotiations with Indigenous leaders that has led ultimately to an exciting and ongong constitutional and socio-political future for Indigenous peoples within the Canadian family.

Entitled *A New Beginning,* the next chapter will continue the enumeration of the key milestones in Canada-Indigenous relations from the Constitution Act, 1982 through to the 2015 election of the Justin Trudeau Liberals and Canada's sesquicentennial[19]

19 Readers should note that the series of dramatic and remarkable Supreme Court of Canada decisions (beginning with *Calder*) that have dramatically advanced Indigenous rights and Indigenous title do not appear in the following chapter. Rather they appear in a chapter of their own—chapter 6.

Supplement 3.1

The Iroquois in North America

The Iroquois Confederacy will not feature prominently in the remainder of the analysis, in large measure because their reserves are at the same time more economically self-sufficient and more politically independent along Two Row Wampum lines. Nonetheless the Iroquois merit attention because of their size and their role in the evolution of both Canada and the United States. This supplement will elaborate on some of these roles as well as provide information on their reserves/settlements in Ontario and Quebec.

The Hiawatha Belt and the Flag of the Iroquois Confederacy

The Hiawatha Belt is the purple and white belt of the Haudenosaunee (Iroquois) Confederacy and according to Iroquois tradition is named after the confederacy's co-founder Hiawatha. In the centre of the belt is the Tree of Peace that represents the Onondaga Nation (where the Tree of Peace was planted by the Peacemaker). It was under this tree that the five Iroquois nations[1] buried their weapons of war. From left to right, the other symbols in the belt represent the four other original Iroquois nations—the Seneca (keepers of the western door of the longhouse), the Cayuga, the Oneida, and the Mohawks (keepers of the eastern door of the longhouse). This arrangement of nations coincides with upstate New York's Haudeno-

1 The Tuscarora Nation did not join the Iroquois Confederacy until much later so they are not represented in the belt.

Figure 3.7

Iroquois Flag

Source: The reproduction is from the author's office flag.

saunee geography. As you can see from Figure 3.8, the Mohawk nation is on the east, the Seneca on the west, etc.[2]

Figure 3.7 represents the official flag of the Iroquois confederacy. It is, effectively, a modern version of the Hiawatha Belt. The background is purple and the solid Tree of Peace and the rectangles are white (the typical colour of wampum beads). The horizontal white ribbon running through all five nations symbolized the Haudenosaunee Confederacy.

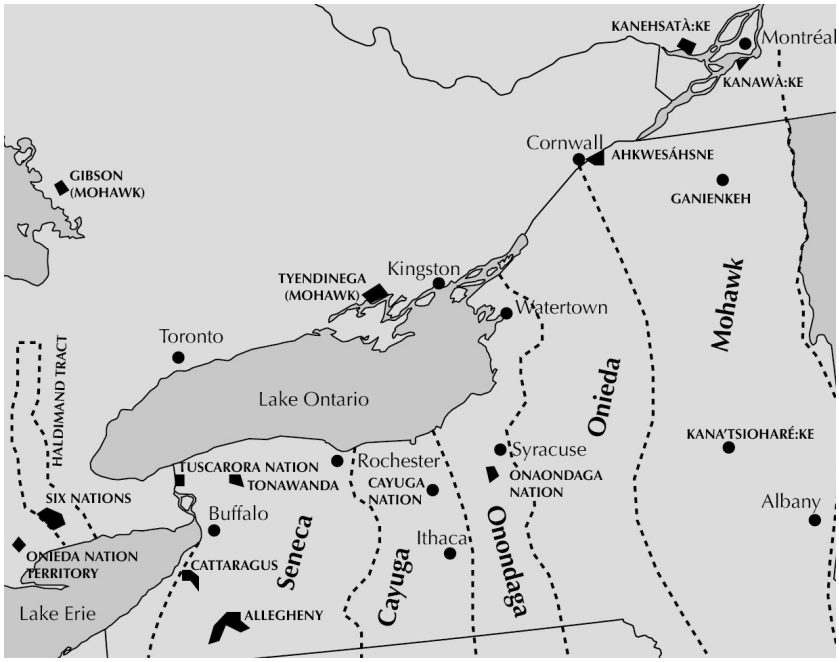
The Iroquois and the USA Constitution

Much has been made of the contribution of the Haudenosaunee Confederacy to the American Federation. At the most obvious level, the US Founding Fathers wanted the American government to be (i) democratic, (ii) a federal system, and (iii) a peaceful association of the thirteen

2 The Iroquois traditional territories in Figure 3.8 are written somewhat vertically. The current territories are in bold type.

Figure 3.8

Historic and Current Haudenosaunee Territory



Artwork: Mark Howes

colonies. Europe of the day did not provide models for any of these requirements. However, all three attributes were embodied and embedded in the Iroquois Confederacy and represented in the Hiawatha Belt.

In this important sense the US federal system embraced key features of the Iroquois Confederacy. Indeed, in 1988 on the occasion of the 200th anniversary of the signing of the US Constitution, the US Congress formally acknowledged the intellectual debt that the American Federation owed to the Iroquois Confederacy. In more detail, the Senate resolution of acknowledgement includes the following:[3]

> Whereas, the original framers of the Constitution, including most notably George Washington and Benjamin Franklin are known to have greatly admired the concepts, principles and practices of the Six Nations of the Iroquois Confederacy; and
>
> Whereas the Confederation of the original thirteen colonies into one Republic was explicitly modeled upon the Iroquois Confederacy as were many principles that were incorporated into the Constitution itself;
>
> …
>
> Now therefore be it resolved by the Senate and the House of Representatives of the United States in Congress assembled, that:
>
> 1) The Congress, on the occasion of the 200th anniversary of the signing of the United States Constitution, acknowledges the historical debt which this Republic of the United States of America owes to the Iroquois Confederacy and other Indian Nations for their demonstration of enlightened, democratic principles of government and their example of a free association of Independent Indian nations…

The George Washington Belt and the 1794 Canandaigua Treaty

The George Washington Belt or the Great Chain Belt was the belt that George Washington had made for, and presented to, the Haudenosaunee on the occasion of the 1794 Canandaigua Treaty (Onondaga Nation 2017). The belt[4] is six feet in length and features human figures and

3 http://www.senate.gov/reference/resources/pdf/hconres331.pdf

4 Readers are encouraged to consult http://vitacollectoins.ca/sixnationsarchive/2687019/data to see a photo of the belt.

a longhouse. The two figures on either side of the longhouse symbolize the Haudenosaunee—the Seneca (keepers of the western door) and the Mohawks (keepers of the eastern door). The thirteen other figures represent the thirteen original colonies. All figures are linked by a wampum belt to form a chain of friendship that represents the alliance between the United States and the Haudenosaunee Confederacy. George Washington had this belt made to ratify[5] and celebrate the treaty with the Haudenosaunee, which was to end the quarrels between them, and to indicate that together they shall forever live in peace and friendship. Among the treaty's provisions are "peace and friendship … shall be perpetual between the United States and the Six Nations… the United States will never claim [their property] nor disturb them … in the free use and employment thereof … the said reservations shall remain theirs, until they choose to sell the same to the people of the United States who have the rights to purchase."

From Article V: "…the Six Nations … will forever allow the people of the United States a free passage through their lands and free use of their harbors and rivers." The treaty also included a quantity of goods of the value of $10,000 as well as a yearly annuity of $4,500 for the purchase of clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances.

The Iroquois Communities in Canada

The location of the seven Iroquois nations in Canada, shown in Figure 3.8., and some related demographic information appears in Table 3.1. As already noted the United States territorial homelands of the Iroquois Confederacy in northern New York are also depicted on the map.

Table 3.1 presents the total population as well as the on-reserve population for each of the seven Iroquois communities. Overall, there are roughly 65,000 Iroquois nationals residing in Canada, with nearly 35,000 of them living on a reserve. What follows is a brief elaboration of these seven communities.

Oneida

In 1840 the 240 Oneida men, women, and children sold their lands in the United States and moved to territory they purchased (for $42 each)

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5 As noted earlier, since the Iroquois had no written language, the George Washington Belt *is the treaty* from the Iroquois perspective.

Table 3.1

Populations Data for Iroquois Reserves

Nation	Population	On Reserve
Oneida	5,209	2,030
Six Nations	26,203	12,606
Tyendinaga	9,551	2,162
Akwesasne	11,029	8,857
Kahnawake	11,000	8,000
Kanesatake	2,486	1,362
Wahta	742	175
Total	66,220	35,182

Source: Author's compilation.

along the banks of the Thames River near London, Ontario. As a result, the Oneida want their lands to be referred to as the Oneida Settlement rather than the Oneida Reserve since the lands were bought, not "reserved for them." The original settlers of the Oneida community were associated with two Christian denominations, Methodist and Anglican.

Six Nations

Six Nations is the largest First Nation reserve in Canada with a total of 26,203 members, with about 12,275 of them living on the reserve. It is the only Haudenosaunee reserve in North America that has all six Iroquois nations living together. After siding with the British in the American Revolution, Mohawk leaders Joseph Brant and John Deseronto met with the British officer Frederick Haldimand to discuss the loss of their lands in New York. In recognition of their loyalty to the British Crown during the American Revolution, the Iroquois were granted the Haldimand Tract, a strip of land that runs the length of the Grand River that extends inland 10 km from each side of the river. However, the current reserve of the Six Nations of the Grand River occupies only a small part (5 percent) of the original Haldimand Tract. Six Nations are continuing

with their longstanding claim for Canada to live up to the word and spirit of the original Haldimand Tract.

Tyendinaga

Following the American Revolution, the Mohawks, who were allies of the British Crown, lost their traditional homelands in the Mohawk Valley of what became New York State. The Crown offered them unsettled land in Upper Canada. Led by John Deseronto they selected a tract (12 by 13 miles) on the Bay of Quinte in Hastings County of then Upper Canada. The area was chosen in part because it was said to be the birthplace of Tekanawita, one of the founders of the Iroquois Confederacy in the 12th century. Tyendinaga is home to First Nations Technical Institute (FNTI) that has links with other community colleges as well as several universities including the First Nations University of Canada (located in Saskatchewan) and Queen's University. FNTI has its own airstrip and a pilot training program as well as programs for several other professions and trades.

Akwesasne

The Mohawk Nation at Akwesasne straddles the intersection of international borders (United States and Canada) as well as provincial borders (Ontario and Quebec) and the territory lies on both banks of the St. Lawrence River. Most of the land is in present-day United States. Although divided by an international border, the residents consider themselves to be one community. The name *Akwesasne* in the Mohawk language means "Land Where the Partridge Drums," referring to the rich wildlife in the area. In the state of New York, the territory of *Akwesasne* coincides with what is called the St. Regis Mohawk Reservation. In Canada, the territory within Ontario is called the Akwesasne 59 Indian Reserve, and the territory within Quebec is called the Akwesasne Indian Reserve. The 1794 Jay Treaty, described in chapter 3, is vital to the interests of Akwesasne since it allows the Mohawks to travel free and freely across the Canada-US boundary.

Kahnawake

The Kahnawake Mohawk Territory is a Mohawk reserve on the south shore of the St. Lawrence River in Quebec, across from Montreal. Kahnawake was created in what was known as the Seigneurie du Sault-Saint-

Louis, a 40,320-acre (163.2 km^2) territory that the French Crown granted in 1680 to the Jesuits to "protect" and "nurture" the Mohawks who were newly converted to Catholicism. An article posted by Bob Joseph (2013) notes that for over 100 years First Nation steel workers ("skywalkers") from Kahnawake have applied their skill and bravery to the famous skyline of New York City, including the Empire State Building and the Brooklyn Bridge. Joseph also notes that not only were they there to complete the Twin Towers in the early 1970s but as well to clean up after 9/11, and more recently to put in the final rivets of the 124 meter spire atop the One World Trade Centre built to replace the Twin Towers.[6]

Kanesatake

Kanesatake is a Mohawk settlement on the shore of Lake of Two Mountains in southwestern Quebec, at the confluence of the Ottawa and St. Lawrence rivers, about thirty miles northwest of Montreal. Referring to Table 3.1, slightly more than half of its 26,000 people live off the reserve. Kanesatake is, at the time of writing, in the news for waging a campaign against the Energy East pipeline. Some Canadians are probably familiar with Kanesatake because of the 1990 Oka crisis. The crisis developed from a local dispute between the town of Oka and the Mohawk community. The town of Oka was developing plans to expand a golf course on land that had traditionally been used by the Mohawk, including a burial ground marked by standing tombstones of their ancestors. The Mohawks had filed a land claim for the allegedly sacred grove and burial ground near Kanesatake, but their claim had been rejected in 1986 on technical grounds. When the city of Oka attempted to begin the development of the site, the Kanesatake Mohawks then barricaded a dirt road leading to the land. Acting in solidarity, the Mohawks in Kahnawake blockaded the approach to the Mercier Bridge over the St. Lawrence River. Non-Mohawk residents of the area became enraged about traffic delays in trying to get through this area and across the river. The Quebec provincial government requested support from the Canadian Army, which sent in 3,700 troops. The tense standoff lasted seventy-eight days and one person was killed.

6 These skywalkers are not limited to Kahnewake. For example, Six Nations people worked on the very top of the CN Tower as well as on Chicago's Sears tower.

Wahta Mohawk Territory

A small group of Mohawks relocated to the Muskoka area in 1881 from the Kanesatake reserve in Quebec. The Wahta Mohawk reserve remains small—approximately 742 members with 175 living on the territory. It is not shown on Figure 3.8.

Supplement 3.2

Address of Chief Dave Courchene on the Occasion of the Centenary of Treaty 1

Manitoba Indian Brotherhood
Address by Chief Dave Courchene
At Treaty Centennial Commemorations
Lower Fort Garry, Manitoba
August 2, 1971

Your excellency, distinguished colleagues, Mr. Premier, Mr. Minister, Ladies and Gentlemen:

What we are gathered here to commemorate is one hundred years of unremitting struggle.

What we are gathered here to celebrate is our survival against odds unimagined by our ancestors, our survival as a people, identifiable, and proud, and determined to remain both.

We have survived one hundred years of oppression in all its forms—social, economic, physical, psychological; overt or subtle, but always pernicious, always to lure us into ways that are not our own, to make us into caricatures, to bring us to our knees in gratitude to those who sought, and still seek to destroy us.

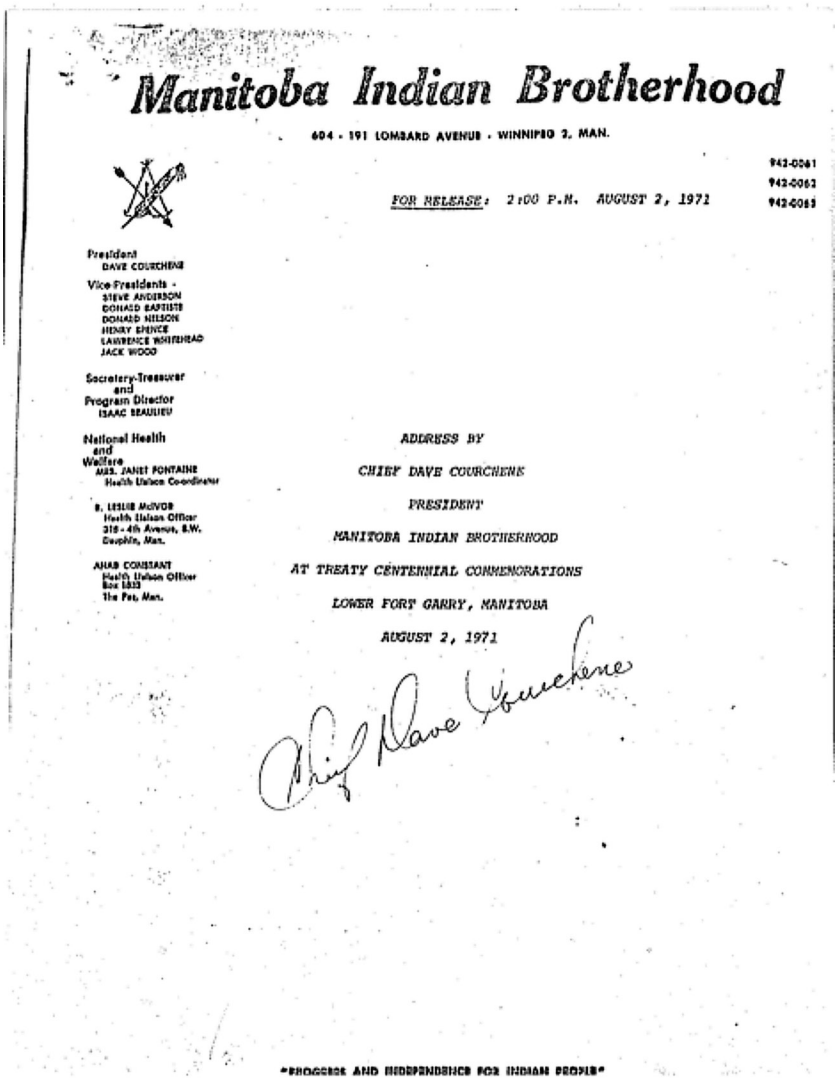
We commemorate that struggle, and the tragedies in the lives of those many thousands of our people who were and who are now the victims of it.

And we honour our young. Those whom the Whiteman arrogantly refers to as our educated young, as if education can only be found within the walls of his schools.

For if there is one single most impressive phenomenon amongst our people throughout this province, and throughout this country, and

Figure 3.11

Photocopy of a Signed Copy of the Cover of Chief David Courchene's Address



Manitoba Indian Brotherhood

604 - 191 LOMBARD AVENUE - WINNIPEG 2, MAN.

942-0061
942-0062
942-0063

FOR RELEASE: 2:00 P.M. AUGUST 2, 1971

President
DAVE COURCHENE

Vice-Presidents -
STEVE ANDERSON
DONALD BAPTISTE
DONALD NELSON
HENRY SPENCE
LAWRENCE WHITEHEAD
JACK WOOD

Secretary-Treasurer and Program Director
ISAAC BEAULIEU

National Health and Welfare
MRS. JANET FONTAINE
Health Liaison Coordinator

B. LESLIE McIVOR
Health Liaison Officer
218 - 4th Avenue, S.W.
Dauphin, Man.

AHAB CONSTANT
Health Liaison Officer
Box 1833
The Pas, Man.

ADDRESS BY

CHIEF DAVE COURCHENE

PRESIDENT

MANITOBA INDIAN BROTHERHOOD

AT TREATY CENTENNIAL COMMEMORATIONS

LOWER FORT GARRY, MANITOBA

AUGUST 2, 1971

Chief Dave Courchene

"PROGRESS AND INDEPENDENCE FOR INDIAN PEOPLE"

Source: Author's files.

throughout this continent, it is that our young are making the ways of their people an integral part, in fact the basis of, their lives.

Because our culture is creative. It has always been creative. Long before the Whiteman came, we were adapting our ways to adjust to our changing environment. For had we not, we would have died as people, many centuries ago.

But we adapt in our ways and not in anyone else's. We will make our own lives. And our young will assure us of that.

The struggle we commemorate today began one hundred years ago when our fathers—having been exploited by white traders for financial profit, having watched the incursion of the settlers and learned of their numbers and their greed, having noted that in time white farmers would conquer white traders the better to pillage our land—one hundred years ago, our fathers came together to negotiate the treaties by which at least a part of this land would always be set aside for us, their descendants, who view it as poets, not as plunderers.

When they came to treat with the Whiteman, they were promised an equitable settlement.

In return for the surrender of those lands to which our people held title—and these are the lands that are now called Manitoba—we were assured of the means by which we could become farmers.

We were assured of good, arable land to constitute our reserves.

We were assured of the implements used for farming.

We were assured of education.

We were assured of good houses.

And our fathers agreed to surrender title to the remaining lands in return for these solemn assurances, given in the name of the Queen.

They could accept the solemn word of other tribes. Could they not accept the solemn word of other peoples?

But in return for the land we revered, we received muskeg, rock, and sand.

In return for the depletion of the food we used to hunt, we received useless tools and implements; or even nothing at all with which to break the land, to reap the harvest.

In return for the wisdom of centuries, we were offered indoctrination in the perverse principles of what one white treaty talker called the Whiteman's cunning.

In return for the buffalo hide teepee which sustained us in health through a thousand prairie winters, we received—nothing at all. Trapped in our reserves, no buffalo left to hunt, we were forced to build

shacks in which we died of diseases the Whiteman had brought from the slums of a decadent civilization.

All this did not come because our way of life was dying out. It came about because of the ungovernable arrogance, the impulsive greed, the unparalleled treachery of the Whiteman who treated with us.

They had a distorted vision of this land, yet pretended omniscience.

They represented the drive not to develop the land, but to plunder it.

Where conscious of their ignorance and their crudely greedy motives, they fabricated lies. Not lies that were bold nor readily discernible, but lies that had their basis the Whiteman's inability to deal honestly within the framework of his own principles.

And these lies, in essence, were their negotiations.

When the Whiteman came to settle with the Indian, did he tell us he had already reserved the best lands for those most eager to exploit the new province?

Did he tell us we would receive our reservations only after Hudson's Bay received theirs? After the railways received theirs? After the white settlers received theirs? For the white homesteader did indeed receive his land, and very good land it was, and as much per family as we received and more, and his was free.

Did he dare tell the Indian that of all the land set aside in Manitoba, over 90 percent was reserved to the Whiteman or his corporation? That the remaining 10 percent, reserved for the Indian, was the worst land, the most unproductive land, the land with the least potential?

He did not dare so to do, and if he had, he would have had to take his troops from Europe or Africa or wherever in the world they might have been, because he would have had one hell of a time in the so-called taming of the Canadian west.

No, these facts were consciously hidden from us by the hucksters of an alleged civilization.

We were to face poverty and despair, but the real degradation is not ours.

Thus began these one hundred years.

But were these Whitemen who came to treat with our fathers not unfortunate exceptions, to be regretfully acknowledged and tactfully forgotten? Unfortunately, the deceptions, the greed, the arrogance did not end there.

For having taken care of our treaties, and thereby our economy, these Whiteman sent to us by the elected representatives of the other settlers of what had been our lands—they set about to create the means by

which such disgraces would be continued and perpetuated.

With all the cynicism and cruelty characterizing a peculiar desire to destroy whatever is alien to their beliefs, a desire made manifest not only on this continent but also in Africa, in Asia, in South America, even amongst those dissident groups within their own society, these Whiteman sent to us next tackled our children's education, our language, our medicine, our family life, our political systems, our laws, our faith and philosophy, our very souls. And still they expected us to view their "culture" with awesome respect.

They came to us with men who said they were of God. Perhaps they were. We accepted and respected all men of God. Perhaps unconsciously, perhaps not, but in any case in fact, they made themselves part of the forces oppressing us.

They brought us new laws, new rules and regulations. Our means of physical survival gone, they forced us to accept them. But unlike our own traditional laws— and were they so naïve as to expect that societies many thousands of years old would not have carefully developed, effective systems of laws and sanctions—unlike our own traditional laws, they were not based upon our ways and thus bound to fail.

They took our political systems—and they imposed their own upon us, and again these were not based upon our ways, and again were bound to fail.

They took our medicine which they peremptorily called primitive. We had truly sophisticated uses of what are now called drugs, we had forms of neurology, of caesarian section, we had knowledge of the power in healing of hypnosis and suggestion only now attaining the respect of the Whitemen's best medical minds. They replaced this for most of this past one hundred years with not medicine at all, or with medicine dispensed arbitrarily by untrained or badly trained personnel or by misfits or miscreants who could not have done their work anywhere else. Of course we recognize the exceptions. We recognize the exceptions and we remember the exceptions, precisely because they were the exceptions. Or we would be treated for some diseases but not, God forbid we should contract them, for others. We knew the fact, and the effect, but not until lately did we know that it had been written, I repeat written, policy in this century, that those of us so unfortunate as to develop pulmonary tuberculosis, were not to be treated, it being too expensive.

They took our language and ridiculed it, said it could not express abstract concepts, which is simply unfactual, and was therefore primitive,

but except for the missionaries who took what parts of it they found useful, even those Whiteman who came to live with us, surrounded by us, rarely bothered to learn our language.

They took our families, restructured our relationships, took our children away from their parents and did their best as a matter of policy, as clearly written policy, to teach our children at very tender ages that their heritage was inferior, that success in school meant the only chance for success in life, that success in school meant contempt for their parents, for their parents' ways, for their parents' language, for their parents' dress, for the colour of their parents' skin.

They sought the extinction of all that is uniquely Indian.

We stand here today as people identifiable and proud and there will be those, though perhaps not amongst our number, who will wonder what it is we commemorate.

We stand here with representatives of our young people, our truly educated young people who are searching out the bases of their parents' culture and from that, building their 21st century lives, and there will be those who will wonder why today we honour our young.

And there will probably always be those who will wonder why we are not consumed with awesome respect for the culture that others have so graciously presented to us.

And thus we continued the struggle. We struggled alone, unaware of the forces at work in the world far beyond our homes, far beyond the homes of the Whitemen around us. Unaware that in fact we were in our struggle a part of one of the major social forces of our times, unaware that we were much more a part of those forces than the Whiteman around us, sitting smugly in their towns.

We have lost many of our people, and we lose many still. Bitterness and frustration are parts of us now, and with the tragedies of lost and wasted human lives, and irrevocable part of the Indian heritage.

Today we commemorate the victims of this century of struggle.

And we struggle still. Now is the time of the liberal white "enlightenment," the time of expressed concern. Now, the Whiteman is faced with concrete results of self-destructiveness of his own ways. And now he begins to acquire some respect for ways he had sought to destroy.

We do not deny there are some who simply, genuinely, care. We do not even deny there are some willing to work with us to help us to attain our ends. But nor can we deny that the basis of this new enlightenment appears to be belief that if we work sufficiently hard, and listen sufficiently well, we may not only acquire the trappings of the

Whiteman's civilization, we may even become white men.

And this belief we categorically do deny.

As we commemorate the signing of our treaties, we remind ourselves that they are not only recognitions of our rights to our land: they are also the symbols of our determination, as strong today as one hundred years ago, to remain a people identifiable and proud.

For the first time, we have in the past few years negotiated with a federal government that has agreed to provide some funds to help representative Indian organizations.

For the first time, we have in Manitoba a provincial government that has indicated willingness to accept some share of its responsibility for those of its citizens who are registered Indian people, citizens who now pay and who always have paid all provincial taxes.

We acknowledge these facts amongst ourselves and in the presence of representatives of these governments here today. We say to them, we speak honestly and require no less in return: we negotiate in good faith, for to do otherwise would be to degrade ourselves. So long as they deal with us honourably and intelligently with respect, our doors will be open now and in the future.

But after one hundred years of unremitting struggle, are we being overly cynical to question whether in fact these governments truly comprehend the nature and extent, the complexity, the deep-rootedness of the problems with which we cope?

Are we or will we become simply a political fad? Is our despair, is our struggle, is their concern only a matter of passing intellectual fashion?

Do these governments not see that the image of Canada they want to project abroad, will be decided in the end, by how they have responded in Canada itself?

We note monies and programs for underdeveloped foreign nations.

We note millions of dollars for one summer for (mostly middle-class) students;

We note how we must battle with bureaucrats for months for every penny of every grant, all this after we have proved to any reasonable person's satisfaction and even in the Whiteman's ways—his financial accountability ways, his political, voting ways, by his performance criteria—proved we are in fact, representative, responsible, efficient and effective.

We note how our grants, when won, are announced with great publicity while in fact they are pitifully small, pitifully small in relation to the extent of our problems—our social, economic —our community

problems: while in fact they are short-term when our programs require extended support.

We note how our internal differences are used as excuses to avoid further commitments.

These differences they allow amongst themselves, these differences are far, far greater amongst themselves. But our differences we note are used against us.

Our differences we will encourage for we will not, I repeat will not, be paternalists ourselves. We will express our differences in every band, board of directors, and executive election. And we might remind those who would use our differences against us that we do, in the best sense of the Whiteman's political ideals, democratically elect our representatives.

These differences have never and will never break our basic bonds of unity, the bonds of Indian unity within the bands, within the tribes, within the provincial and national organizations. For the struggles we have gone through together, have given us more in common than ever drive us apart.

As president of the Manitoba Indian brotherhood I state that my people are prepared to work in honour and cooperation with the descendants of the white settlers of our lands. I also state that my people will never be prepared to lose that which is most precious to us.

Our struggle will be over when we have in our own way found our place amongst the many peoples of the earth. And when that time comes, we will still be a people identifiable and independent and proud.

We are gathered here with the spirits of our ancestors to commemorate one hundred years of struggle; to commemorate the tragedies in the lives of the victims; to celebrate our survival, to reaffirm our identity and to reassert that our treaties as fact and as symbol will be retained and respected: to honour our magnificent young people, who will assure that we will never be dishonoured.

For in this way, we will reassert that God was right in making us Chipawyan, Cree, Ojibway and Sioux as part of the North American Indian nation and that man is wrong in trying to make us white.

For in the ultimate end, we will stand before him and say proudly, but humbly, Lord, I am one of those red men you made in ***your world. I am an Indian.***

Chapter 4

A New Beginning: From the Constitution Act, 1982 to the Sesquicentennial

The Constitution Act, 1982

Section 25 of the Canadian Charter of Rights and Freedoms guarantees existing Aboriginal[1] rights:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any Aboriginal treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 35 of the Constitution Act, 1982, (but not a part of the Charter) enshrines some existing Indigenous rights:

1 Because the Constitution uses the term Aboriginal and not Indigenous, in this section of the chapter we will follow the constitutional usage. In the rest of the chapter we shall revert back to Indigenous except for direct quotations, e.g., from the Supreme Court.

> Rights of the Aboriginal Peoples of Canada
>
> Recognition of existing Aboriginal and treaty rights:
>
> 35(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "Aboriginal peoples of Canada":

> 35(2) In this Act, "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements:

> 35(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> Aboriginal and treaty rights are guaranteed equally to both sexes.

Equality provisions:

> 35(4) Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

In more detail Hogg (1985, 565) notes that Aboriginal rights "would refer to rights that originated in the fact that the native peoples were in possession of most of the lands now making up Canada … and recognizes that some of these rights survived the process of European settlement," whereas treaty rights "would refer to rights based on promises made to native peoples, often in return for the surrender of land rights, in agreements usually styled 'treaties.'" He also notes that section 35(3) makes it clear that modern treaties or "land claims agreements" have the same constitutional status as the original treaties.[2]

Another key provision affecting First Nations and Aboriginal peoples more generally is that the inherent right of self-government is deemed to be a Section 35 constitutional right. In more detail and drawing from AANDC (INAC 2010):

> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35

2 Chapters 8 and 9 elaborate on several of these land claims agreements.

> of the *Constitution Act, 1982*. … Recognition of the inherent right is based on the view the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions languages and institutions, and with respect to their special relationship to their land and their resources.

AANDC added the caveat that "the inherent right of self government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states." (ibid.)

These constitutional provisions represent giant steps forward both in terms of Aboriginal rights and Aboriginal title. Nowhere is this more evident than in terms of the dramatic and still ongoing series of Supreme Court decisions that will be articulated in chapter 6.

Bill C-31: Undoing Gender Inequality and Restoring Lost Status

Given that section 35(4) of the Constitution Act, 1982 guaranteed Indigenous and treaty rights equally to male and female persons, the Indian Act needed to be brought in line with this new reality. The federal response was Bill C-31 in 1985 that focused on removing gender discrimination and retroactively restoring status. In more detail, Bill C-31's amendments included:

- treating men and women equally;
- treating children equally whether they are born in or out of wedlock and whether they are natural or adopted;
- preventing anyone from gaining or losing status through marriage;
- restoring Indian status for those who lost it through discrimination or enfranchisement;
- allowing first-time registration of children (and in some cases descendants of subsequent generations) of those whose status is restored; and
- allowing for the registration of children born out of wedlock if either parent was a registered Indian, regardless of their date of birth.

Beyond this, several important matters dealing with aspects of funding were also included in the Bill:

- All status Indians including those newly registered as a result of

Bill C-31 are eligible to apply for post secondary education assistance through DIAND[3] and are eligible for selected non-insured health services through Health and Welfare Canada. This applies to both on-reserve and off-reserve Indians.

- The federal government will provide programs and services to Indians living on-reserve much as provincial and municipal governments provide programs and services for other residents. For people living on-reserve, the federal government provides funds for housing, elementary and secondary education, health services, and social assistance, most of which are delivered (or contracted out) by bands or tribal councils.
- DIAND (i.e., INAC) undertook to meet the additional cost of providing these programs and services to people who gained status as a result of the 1985 amendments.

Implicit in these new measures was that services for Indians living off their reserve would be provided by the relevant province or municipality. It is not obvious that the provinces were on side with this, although for taxation purposes off-reserve Indians are treated like other Canadians.

The results of Bill C-31 were truly dramatic and were well beyond the expectations of the Government of Canada. From Table 4.1, the C-31 registered Indian population growth (including descendants) went from zero in 1984 to over 100,000 in 2001, roughly one-sixth of the total registered Indian population in 2001.

However, gender discrimination still existed, as exemplified by the *McIvor* case (although here we have to temporarily jump ahead timewise in the historical evolution of Indigenous-Canada relations).

McIvor v. Registrar, INAC (SCC 2007)

Sharon McIvor was not registered as an Indian prior to 1985, but in any case she would have lost status because she married a non-Indian. She became entitled to registration after the passage of Bill C-31. However, Ms. McIvor contended that she and her son, Mr. Grismer, were not in the same position as they would have been if she had been a male. This was so because, unlike a male Indian in her situation, her ability to pass status to her grandchildren depended on her son parenting with

3 DIAND is the acronym for the Department of Indian Affairs and Northern Development

Table 4.1

Registered Indians and Indians Registered Under Bill C-31, Average Annual Growth Rates, Canada 1981–2001

	Registered Indians			Average Annual Growth (%)	
Year	Excluding Bill C-31	Bill C-31 Population	Total	Excluding Bill C-31	Including Bill C-31
1981	323,782	0	323,782		
				2.59	0.00
1982	332,178	0	332,178		
				2.95	0.00
1983	341,968	0	341,968		
				2.00	0.00
1984	348,809	0	348,809		
				2.82	3.28
1985[1]	358,636	1,605	360,241		
				3.16	7.66
1986	369,972	17,857	387,829		
				2.40	7.24
1987	378,842	37,056	415,898		
				2.71	6.73
1988	389,110	54,774	443,884		
				2.65	5.06
1989[2]	399,433	66,904	466,337		
				3.66	5.75
1991	429,178	92,282	521,460		
				1.99	1.91
1996	473,559	99,710	573,269		
				1.78	1.67
2001	517,226	105,675	622,901		

Notes

1 In 1985, the Indian Act was amended to allow, through Bill C-31, the restoration of Indian status to those who had lost it due to discriminatory clauses in the Indian Act. The reinstatement process is expected to be largely completed in 1900–91.

2 The high annual growth rate between 1989 and 1991 is due in part to the upward adjustments of the Indian Register for the purposes of the projections and to the Department's estimate of 86,000 Bill C-31 registrants in 1990–91 plus the growth due to natural increase.

Source: From Courchene and Powell (1992), Table 3.

a registered Indian. Children of a male counterpart had status prior to 1985, and so were registered under subsection 6(1) of the Indian Act. Any grandchild of this male Indian could be registered. Mr. Grismer, however, having only one registered Indian parent, was registered under subsection 6(2). According to the "second generation cut-off" rule, the fact that he had a child with a non-Indian meant that his child (Ms. McIvor's grandchild) could not be registered.

In June 2007, a judge of the Supreme Court of British Columbia essentially agreed with Ms. McIvor's contentions and ruled that section 6 of the Indian Act (the section that sets out the rules for registration) violates the Canadian Charter of Rights and Freedoms, and is therefore without effect insofar as it is discriminatory. The judge refused to grant Parliament time to address the issue, and issued an order calling for the immediate registration of all descendants of women who married non-Indians at any time prior to 1985, no matter how far in the past. Upon further negotiation with Ottawa the courts agreed to allow Parliament to come up with new legislation that would redress this issue. At the time of writing, this issue still remains unresolved!

The 1986 Sechelt Agreement

From Abele et al. (1999, 270–71):

> Beginning in 1986 the Mulroney government issued a series of policy statements on both comprehensive and specific claims … The government's approach to enhancing local control by Indian bands was articulated in a Community-based Self-government Policy announced in 1986. …That same year … Parliament passed the Sechelt Indian Band Self-government Act, which permits this British Columbia band to write its own constitution and govern its land base accordingly, with the support of a multi-year federal funding commitment. The Sechelt assumed delegated jurisdiction over non-band members residing in their territory, including the ability to tax for the provision of services to non-members. The Sechelt initiative in seeking this legislation was loudly criticized by Indian leaders on other parts of the country as selling out to a municipal model of government. …Nonetheless it does provide an important early example of enhanced governing authority, and anecdotal evidence suggests that a measure of success has been achieved in the promotion of overall community well-being.

Because the more recent and more far-reaching self-governing agree-

ments that embrace provincial-type powers will be dealt with in considerable detail in chapters 8 and 9 they will not be included in this chapter's remaining timeline of key Indigenous markers.

Elijah Harper and the Collapse of the Meech Lake Accord

Elijah Harper was a member of the Red Sucker Lake First Nation in northern Manitoba. Like many of his generation he was removed from his family as a young child and placed in the residential school system. When he returned to his community as an adult, he was resolved to enact change for First Nations. Elijah Harper was elected to the Manitoba legislature in 1981—becoming the first status Indian to be elected—and served until 1992.

It was Elijah Harper's actions during the federal government's attempt in 1990 to enact the Meech Lake Accord that thrust him into the history books. The Accord was a proposed constitutional amendment crafted in 1987 by the eleven first ministers in hopes of enticing Quebec to sign on to the Constitution Act, 1982. In order for the Accord to be ratified, it required passage within three years in all of the provincial legislatures. With only twelve days left before the 1990 ratification deadline for the Accord, Harper raised an eagle feather in the Manitoba legislature and began a filibuster that prevented the assembly from adopting the required motion, thereby spelling the end of the Meech Lake Accord. In his own words:

> Well, I was opposed to the Meech Lake Accord because we weren't included in the Constitution. We were to recognize Quebec as a distinct society, whereas we as Indigenous people were completely left out. We were the First Peoples here—First Nations of Canada—we were the ones that made treaties with the settlers that came from Europe. These settler people and their governments didn't recognize us as a Nation, as a government and that is why we opposed the Meech Lake Accord.[4]

For his actions, the Canadian Press voted him 1990 newsmaker of the year and he received the Stanley Knowles Humanitarian Award in 1991.

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4 See APTN/CBC, All Our Relations, episode 5: Elijah Harper, fall 2013, http://www.allourrelations.tv/#shows

The 1990–1992 Charlottetown Accord

Following closely on the heels of the failure of the Meech Lake Accord, Prime Minister Brian Mulroney's Progressive Conservative government tried a second time to resolve the dilemma of how to bring Quebec back into the Canadian constitutional family. This time the chosen instrument was the Charlottetown Accord. This was an amazingly complex-cum-comical exercise. There were four dedicated committees in play —the Allaire Committee and the Belanger-Campeau Committee within Quebec, and nationally the Beaudoin-Edwards Joint House/Senate Parliamentary Committee and the Spicer Commission (i.e., the Citizens Forum on Canada's Future). Thanks in large measure to Elijah Harper's rationale for triggering the demise of Meech, this time around there was full representation of Indigenous organizations in the negotiations—the Assembly of First Nations, the Native Council of Canada (now the Congress of Aboriginal Peoples), the Inuit Tapirisat of Canada and the Métis National Council. The federal government then produced a discussion paper entitled Shaping Canada's Future, the proposals of which were debated by Canadians at five national conferences including one in Winnipeg that focused in considerable detail on Indigenous issues. The conferences led to another federal report, *A Renewed Canada* that, in turn, led to the Charlottetown Accord that was unveiled in Charlottetown, Prince Edward Island, in August of 1992.

This was a remarkable spectacle to behold, driven as it was by intense political jockeying. The various governments and dozens of special-interest groups put forward their desires and demands for a renewed Constitution. Elsewhere I likened the process to decorating a Christmas tree— lest they be forgotten all groups wanted to ensure that there was an "ornament" associated with their special interests. And more surprising still, what was intended as a blueprint for bringing Quebec back into the constitutional fold ended up tilting the Accord in the direction of proposing a constitutional third order of government for Indigenous peoples.

Rather than reproduce the formal wording of the relevant sections of the Charlottetown Accord relating to Indigenous Canadians, I defer to Alan Cairns's (2000, 81–83) excellent summary-cum-commentary:

> The Accord proposed constitutionally entrenching a third order of Aboriginal government based on an inherent right of self-government. Aboriginal peoples, accordingly, would be removed from the jurisdiction of federal and provincial governments to the extent

they assumed jurisdiction over themselves.

Separate Aboriginal representation in the House of Commons was supported, with details to be proposed by a House of Commons committee reacting to the recommendations of the then ongoing Royal Commission on Electoral Reform and Party Financing.

Aboriginal peoples were to have guaranteed Senate representation. As their Senate seats were to be in addition to provincial seats, the clear implication was that Aboriginal peoples were not considered part of the provincial communities. Aboriginal senators might be given a "double majority power in relation to certain matters materially affecting Aboriginal peoples."

Aboriginal peoples were to have a limited role in the preparation of lists of candidates for Supreme Court appointment and could offer advice on candidates proposed by provincial and territorial governments. Consideration was to be given to a proposed Aboriginal Council of Elders that could make submissions to the Supreme Court when it considered Aboriginal issues. In general, the Aboriginal role relating to the Supreme Court was to be on the agenda of a future first ministers' conference and was to be recorded in a political accord.

Aboriginal consent would be required for constitutional amendments directly referring to Aboriginal peoples, by a mechanism to be determined.

Aboriginal representatives were entitled to participate on any agenda item at first ministers' conferences "that directly affects the Aboriginal peoples."

The Métis people were to be brought under the federal jurisdiction of s. 91(24), a goal for which they had long striven.

A Métis nation Nation Accord accord was being prepared by the federal government … and the Métis National Council, which would commit governments to negotiate various issues related to Métis self-government. Further, the Métis were to be defined and members of the Métis nation were to be enumerated and registered.

Aboriginal exemption from the Charter, already provided for in s. 25, was significantly extended by new language ensuring that nothing in the Charter "abrogates or derogates from … in particular any rights or freedoms relating to the exercise or protection of their languages, cultures or traditions."

> Aboriginal governments were specifically exempted from the Charter's democratic rights, which gave every citizen "the right to vote in an election of members … and to be qualified for membership" in federal and provincial legislatures, an exemption to allow Aboriginal practices of leadership selection for Aboriginal governments that would otherwise violate the Charter.

This was an exceptionally expansive and generous set of proposals. But as noted these were most peculiar times. In the process of attempting to bring all provinces, territories and Aboriginal groups on side with recognizing the special status of Quebec in the federation (the original rationale for the Accord) the Mulroney government had to cater to any and all comers. For example, and beyond the Indigenous provisions, under the Accord the Senate would become equal by province and elected either by the legislature of each province, or at large within each province; Quebec would be recognized as a distinct society and would never be allotted less than one-quarter of all the seats in the House of Commons, no matter what its population share would be; and it also increased the number of matters in the existing amending formula that would require unanimous consent of the provinces, along with many other contentious provisions.

Looking back, it is hard to believe that this actually happened. Not surprisingly, perhaps, and despite agreement of all the provincial, territorial, and Indigenous leaders, on 26 October 1992, the Charlottetown Accord was defeated in a national referendum (ten provinces and the two territories)—54.3 percent against and 45.7 percent in favour. Seven provinces voted against the Accord—the four westernmost provinces, Quebec, Nova Scotia, and Yukon. The overall turnout was relatively high with eight jurisdictions exceeding 70 percent and with Quebec leading the way with 82.8 percent.

Thus ended one of the most astounding, even bewildering, episodes in our already complicated political and constitutional evolution. While the Accord was chock-full of proposals, any one of which could trigger a negative vote, it was no doubt the case that the Indigenous component did find many detractors. Nonetheless the real importance of the Accord for present purposes was that Ottawa's vision of the future role of Indigenous issues in the federation was, as noted, surprisingly expansive and it embraced the view that First Nations interactions with Canada should be with the federal government.

This being the case, I think it is fair to assert that the expansive pro-

visions of the Charlottetown Accord, as they related to the Indigenous community, had a significant influence on the similarly expansive scope of the recommendations of the already ongoing Royal Commission on Aboriginal Peoples, on which more later.

The Oka Crisis, 1990

The Oka crisis occurred just days after the collapse of the Meech Lake Accord. A brief discussion of the crisis appeared in Supplement 3.1 in the context of the Mohawk Nation of Kanesatake in Quebec. Both Quebec police and the Canadian army were involved as were some Aboriginals from beyond Canada's borders.

Apart from its own significance, the Oka crisis played a role in triggering the Mulroney government to establish the Royal Commission on Aboriginal Peoples.

The Royal Commission On Aboriginal Peoples (RCAP)

Commissioned in 1991 and reporting in 1996, the RCAP report (RCAP 1999) was by far the largest and most expensive of our many royal commissions. The final report *(People to People, Nation to Nation)* consisted of five volumes with over 4,000 pages, 440 numbered recommendations (actually in the thousands when one takes account of the fact that many of the numbered recommendations incorporated substantial sub-recommendations), 80,000 pages of public hearings, and 250 commissioned research papers (100,000 pages). While the report remains an essential source for understanding the history and evolution of Indigenous Canadians and their relationship with Canada's governments and institutions, the sheer magnitude of the report and the seemingly limitless number of recommendations meant that no core message was able to surface. In part this was because the Chrétien government effectively buried, or at the very least ignored, the RCAP report. The small initial printing was soon exhausted. Indeed, it was only on its twentieth anniversary (2016) that the report became accessible to the public.

Thankfully, however, Mary Hurley and Jill Wherrett (1999) of the Parliamentary Research Branch of the Library of Parliament presented the following capsule summary of the major recommendations of RCAP:

- legislation, including a new Royal Proclamation stating Canada's commitment to a new relationship and companion legislation setting out a treaty process and recognition of Indigenous na-

tions and governments;
- recognition of an Indigenous order of government, subject to the Charter of Rights and Freedoms, with authority over matters related to the good government and welfare of Indigenous peoples and their territories;
- replacement of the federal Department of Indian Affairs with two departments, one to implement the new relationship with Indigenous nations and one to provide services for non-self-governing communities;
- creation of an Indigenous parliament;
- expansion of the Indigenous land and resource base;
- recognition of Métis self-government, provision of a land base, and recognition of Métis rights to hunt and fish on Crown land;
- initiatives to address social, education, health, and housing needs, including the training of 10,000 health professionals over a ten-year period, the establishment of an Indigenous peoples' university, and recognition of Indigenous nations' authority over child welfare.

What is missing from this summary is how RCAP views the transition to the underlying vision of the report, namely the rebuilding of Indigenous peoples and communities into nations, that is, as sizeable bodies of Indigenous people with a shared sense of national identity that constitute the predominant population in a certain territory or collection of territories. David Hawkes (1997), one of the two co-directors of research for RCAP, elaborates further on this and related key operational elements of RCAP's approach:

1. Principles for a new relationship:
- mutual recognition;
- mutual respect;
- sharing (from dependency to economic interdependence); and
- mutual responsibility.

2. Structural imperatives:
- engage in treaty making on a nation-to-nation basis; and
- recognize the inherent right of Indigenous self government (e.g., Indian bands and reserve governance are creations of the federal government not the creation of Indigenous nations).

3. Nation-to-nation representation:
   - with regard to the nation-to-nation relationship, RCAP proposed that the Crown recognize the 60 to 70 original Aboriginal nations (e.g., Mi'kmaq, Mohawk, Blackfoot, Haida); and
   - create a House of First Peoples (a third house on Parliament Hill) to represent Indigenous nations in federal decision-making processes.

These are far-reaching proposals that, in my view, were driven by the Assembly of First Nations (i.e., the First Nations chiefs). This was problematical because RCAP paid inadequate attention to urban Indians, given that off-reserve Indians often tend to outnumber those living on the reserve, especially if one includes non-status Indians (See Table 2.1 in chapter 2). Indeed RCAP commissioner Allan Blakeney, former Saskatchewan premier, resigned from the Commission, arguably over this extensive focus on reserve-based First Nations (and the corresponding neglect of off-reserve or urban Indians).

Moreover, and as will be evident in chapters 8 and 9, there were several self-government initiatives where the framework agreements were in place or being negotiated that should have merited highlighting in RCAP. This is especially the case for the Yukon First Nations Agreements where the Umbrella Final Agreement was in place prior to the beginning of RCAP's hearings. These should have been centre-stage in the RCAP report as examples of the way forward, rather than being largely ignored.

2016 was the twentieth anniversary of the RCAP and it was the occasion for several retrospectives on the report since RCAP adopted a twenty-year framework for its recommendations. Readers are encouraged to access the resulting conference proceedings that, one presumes, will view the RCAP in historical and current contexts. More importantly, as already noted, the intention is that the long-out-of-print RCAP report will be available online and the 200-plus research studies will also be made publicly available, many for the first time. Given the national discourse triggered by the Truth and Reconciliation Commission, this time around RCAP will surely attract much more attention. Indeed, access to RCAP and its associated research monographs will be a research bonanza for scholars studying Indigenous topics.

Ottawa's Response to RCAP

After prodding from the United Nations Committee on Economic, Social and Cultural Rights, the Canadian Human Rights Commission, and of course the Indigenous community to address the recommendations of the RCAP, the Chrétien government finally responded in 1998 with two initiatives: (i) a Statement of Reconciliation and (ii) Gathering Strength; Canada's Indigenous Action Plan.

Statement of Reconciliation

On 8 January 1998, the minister of Indian Affairs and Northern Development, Jane Stewart, read an official "statement of reconciliation" that officially acknowledged the damage done to aboriginal peoples by European settlers. "As a country, we are burdened by past actions that resulted in weakening the identity of aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices," Stewart said. The Liberal government of Jean Chrétien pledged $250 million for a "healing fund" for those who suffered physical and mental abuse at residential schools. Phil Fontaine, grand chief of the Assembly of First Nations, called it "the beginning of a new era" (Schneider 1998).

Gathering Strength: Canada's Indigenous Action Plan

The Chrétien Liberals' Action Plan in response to RCAP embraced four objectives:[5] (i) an initial statement of reconciliation (addressed above); (ii) strengthening Indigenous governance and in particular developing the capacity of Indigenous peoples to negotiate and implement self-government; (iii) developing a new fiscal relationship and in particular facilitating First Nations governments in achieving greater economic independence; and (iv) devoting resources for improving living standards across the board—water and sewer, housing, education. Beyond this, Gathering Strength did touch upon many issues that were, and still are, key to Indigenous Canada. What was missing, however, was a meaningful action plan.[6]

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5 This summary is again from Hurley and Wherritt (1999).

6 While Ottawa may have been dragging its heels in terms of responding to RCAP, during the period of RCAP's operations the federal government engaged in the negotiations that led to the impressive Yukon Indians self-government agreements. See chapter 8 for further details.

Creation of Nunavut

While the Chrétien government may have let the ball drop in terms of responding to the many hundreds of RCAP's recommendations, it can proudly take credit for overseeing the creation in 1999 of Nunavut. This was a result of negotiations among Ottawa, the Northwest Territories, and the Inuit. Covering 777,000 square miles (almost 20 percent of Canada), Nunavut was carved out of the then-existing land base of the Northwest Territories. Although Nunavut has a public government, like the other territories, there is an Inuit land claims agreement within Nunavut that will be elaborated upon in chapter 9.

The 2005 Kelowna Accord

While Gathering Strength may have been chock full of good intentions, many of which touched upon of shortcomings of the status quo as highlighted in RCAP, the reality was that there was little in terms of policy action under the Chrétien regime. However, soon after Paul Martin succeeded Jean Chrétien as prime minister (December, 2003), First Nations and more generally Indigenous issues rose to the top of his policy agenda. After eighteen months of federal-provincial-Indigenous roundtable consultations leading up to the first ministers' meeting in Kelowna, British Columbia in November 2005, the result was what has come to be called the Kelowna Accord. Formally entitled Strengthening Relationships and Closing the Gap, the parties (first ministers and Indigenous leaders) agreed to work together to set goals and to measure progress over ten years to achieve better results in the areas of relationships, education, health, housing, and economic opportunities with a view to raising the standard of living for Indigenous peoples to that of other Canadians by 2016. Overall, the financial commitment was $5.085 billion in spending over five years, allocated as follows:

- $1.8 billion for education, to create school systems, train more Indigenous teachers, and identify children with special needs;
- $1.6 billion for housing, including $400 million to address the need for clean water in many remote communities;
- $1.315 billion for health services;
- $170 million for relationships and accountability; and
- $200 million for economic development.

In the view of Phil Fontaine, the then National Chief of the Assembly of First Nations, all of these targets were achievable.

However, within a month of the Kelowna Accord, Prime Minister Martin called an election in which the Stephen Harper Conservatives rose to power (February, 2006) albeit with a minority government. Among the Harper government's first initiatives was to ignore (effectively, to shelve) the Kelowna Accord. Intriguingly, in June 2006, former Prime Minister Paul Martin introduced a private member's bill (Bill C-292, "An Act to Implement the Kelowna Accord") calling on the government to follow through on the agreements made in the Kelowna Accord. On 21 March 2007, this bill was actually passed by Liberal, Bloc Québécois, and New Democratic Party MPs, with the Conservatives voting against it. However, by virtue of section 54 of the Constitution Act, 1867, a private member's bill cannot trigger an expenditure of public funds. This effectively signalled the death knell for the Kelowna Accord. [7]

The Harper Government's 2008 Apology

In a dramatic about turn, after "shelving" the Kelowna Accord, Prime Minister Harper issued a formal Apology on behalf of the Government of Canada to the former students of the residential schools, to their families and to their communities. The formal Apology took place on 11 June 2008 in the House of Commons and in the presence of Indigenous leaders and residential school survivors. The prime minister concluded the Apology as follows:

> The treatment of children in Indian residential schools is a sad chapter in our history.
>
> For more than a century, Indian residential schools separated over 150,000 Indigenous children[8] from their families and communities.
>
> In the 1870s, the federal government, partly in order to meet its obligation to educate Indigenous children, began to play a role in the development and administration of these schools.
>
> Two primary objectives of the residential schools system were to remove and isolate children from the influence of their homes,

7 It should be also noted that as part of Finance Minister Paul Martin's acclaimed 1995 budget, the growth of expenditures on Aboriginal programs was capped at 2 percent (nominal, not real dollars). This cap remained in place until Trudeau's 2016 budget, the result of which was a very significant decline in annual per capita real dollars over the two decades. I am thankful to Harry Swain for pointing this out.

8 At the time of the Apology, there were as estimated 80,000 residential school survivors.

families, traditions and cultures, and to assimilate them into the dominant culture.

These objectives were based on the assumption that Indigenous cultures and spiritual beliefs were inferior and unequal.

Indeed, some sought, as it was infamously said, "to kill the Indian in the child."

Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

Most schools were operated as "joint ventures" with Anglican, Catholic, Presbyterian or United churches.

The Government of Canada built an educational system in which very young children were often forcibly removed from their homes, often taken far from their communities.

Many were inadequately fed, clothed and housed.
All were deprived of the care and nurturing of their parents, grandparents and communities.

First Nations, Inuit and Métis languages and cultural practices were prohibited in these schools.

Tragically, some of these children died[9] while attending residential schools and others never returned home. …

The Government of Canada sincerely apologizes and asks forgiveness of the Indigenous peoples of this country for failing them so profoundly.

Following the Apology, the Pope invited Assembly of First Nations' Chief Phil Fontaine to Rome where he apologized for the Catholic Church's role in the residential school tragedy. Earlier the United Church of Canada also issued a formal apology.

9 A minimum of 4,000 children (probably many times higher) died in these schools, some, perhaps many, from epidemics (e.g., tuberculosis, flu) that easily spread through these boarding schools. Many others suffered physical and sexual abuse. The pain and suffering visited upon the children lives still in the hearts and minds of most survivors.

The Indian Residential Schools Financial Settlement Agreement and the Creation of the Truth and Reconciliation Commission

Some months before the formal Apology, the Harper government launched the residential school compensation package, Canada's largest ever class-action settlement. As of the end of 2013 (the end of the program), roughly 80,000 applicants (surviving residential school attendees) qualified for an average compensation of $20,000 for an overall total of $1.6 billion.

An integral component of the healing and reconciliation process pursuant to the Apology and to the compensation arrangements noted in the previous paragraph was the striking of the Truth and Reconciliation Commission (TRC) in 2007 chaired by the Manitoba Associate Chief Justice Murray Sinclair. The goals of the TRC included:

- acknowledge residential school experiences, impacts, and consequences;
- provide a holistic, culturally appropriate, and safe setting for former students, their families, and communities as they come forward to the Commission;
- promote awareness and public education of Canadians about the Indian residential school (IRS) system and it impacts; and
- produce a final report on the history, purpose, and operation of the Indian residential school system and its consequences (including systemic harms, intergenerational consequences, and the impact on human dignity) as well as the ongoing legacy of the IRS system.

The work of the TRC got underway in 2008 with an initial six-year mandate and a $60 million budget. The mandate and budget were extended for a year or so and *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* was made public to much fanfare on 3 June 2015. The six volume final report of the TRC was published in 2016 and it is, or will be, published in several Indigenous languages—Mi'kmaq, Ojibwa, Inuktitut, Cree, and Dene. The TRC report is a veritable milestone in Indigenous-Canada relations and as such it will be addressed in more detail in the following chapter.

The Rise and Fall of the First Nations Education Act

The bleak socio-economic indicators contained in the introductory chapter point to the colossal failure on the part of all Canadians to create a better future for First Nations citizens. An important aspect of this failure is that the post-residential-school-system approach to educating First Peoples who live on a reserve is also inadequate as a response to the Indigenous education challenge. As Michael Mendelson (2006, 35) notes:[10]

> … everyone loses when Indigenous students fail to succeed. Breaking the cycle requires that Indigenous students get into postsecondary education [PSE] and graduate, but to do so it is usually necessary to complete high school. The failure to complete high school is the first impediment to increasing PSE attainment. A shocking number of Indigenous young adults are not completing high school. This is a gathering storm, which will have huge social and economic costs over the next decades.

In my own writings on First Nations I have often wondered why we provide language and skills training to our immigrants coming, say, to Toronto, but not to native Canadians moving there from reserves, especially since moving from a distant reserve to Toronto is a much larger cultural shock than that experienced by the bulk of our immigrants.

The good news is that the academic community and Canadians more generally have become much more interested in issues relating to First Nations education. For example, Drummond and Rosenbluth (2013, 20) note that while a narrow focus on federal funding levels may not be the proverbial silver bullet, it is nonetheless important to note that there are large per-student comparative funding deficits for on-reserve schools, much larger than Ottawa claims:

> It is meaningless to compare AANDC (now INAC) per student funding to provincial average spending. The provincial averages are heavily impacted by the relatively low cost of educating students in the large, urban areas where schools and school boards benefit from economies of scale and students on average display fewer special needs. A remote reserve school should be compared to a provincial school with similar characteristics in terms of remoteness, size, and the needs of the student population.

10 Mendelson (2006) and (2008) also provides copious empirical evidence on the under-performance of Indigenous Canadians on the education front.

This is exactly the calculation that Drummond and Rosenbluth undertake—calculating the average instructional-services dollars per FTE (full time equivalent) for 2009 between Indian Affairs districts and provincial districts by region for districts with less than 100 FTEs. The per-student results are as follows (with the provincial spending followed by Indian Affairs spending): Quebec ($13,000, $7,000); Ontario ($17,000, $9,000); Manitoba ($6,000, $7,000); Saskatchewan ($11,000, $7,000); Alberta ($9,000, $8,000) and British Columbia ($13,000, $11,000). Except for Manitoba, the per capita federal funding for First Nations schools falls short, often well short, of the provincial per student funding for schools with less than 100 full-time equivalents. Drummond and Rosenbluth hasten to add that achieving comparable funding should not be viewed as a goal but rather as an input into a comprehensive restructuring of the system in order to close the education gap. And closing the education gap is surely one of the keys to unwinding the Indigenous socio-economic gaps highlighted in chapter 2.

With tens of thousands First Nation's youth entering the labour force over the next decade or so, and with the education gap described above entering the policy debate, it made eminent sense in terms of both economic and social criteria for Prime Minister Harper in 2013 to send a proposal for discussion to all First Nations, namely Working Together for First Nation Students: A Proposal for a Bill on First Nations Education. Shawn Atleo, the then National Chief of the Assembly of First Nations, responded to this initiative via an open letter to the minister of Indigenous Affairs and Northern Development (Atleo, 2013). Included in the letter were five priorities for such an education initiative: (i) a central principle has to be First Nations control and the respect for inherent and treaty rights; (ii) a full statutory guarantee for stable, sustainable, and needs-based funding; (iii) First Nations children must be nurtured in an environment that affirms their dignity, rights, and their identity, including languages and cultures; (iv) rather than unilateral federal oversight, the oversight required must be jointly determined and fully respect First Nation rights and responsibilities; and (v) ensuring meaningful engagement via a commitment to co-development and shared oversight of the ongoing process.

This letter apparently led to closed-door negotiations between the prime minister and the national chief, and on 5 February, Shawn Atleo sent an email to the regional AFN chiefs to the effect that the Conservatives were about to agree to the above five conditions and he invited them to Alberta on 7 February 2014 to attend the announcement

and celebration. A few days later the agreement became an integral part of the 2014 federal budget (Economic Action Plan 2014): From the pre-budget release:

> Education is fundamental to ensuring full equality of opportunity and a share in Canada's prosperous future. The Government will work with its partners so that young First Nations people will have access to education systems on reserves comparable to provincial and territorial school systems. For this young and fast-growing population, this is a game-changer.
>
> The *First Nations Control of First Nations Education Act* will establish the structures and standards necessary to ensure stronger, more accountable education systems on reserves and will result in better outcomes for First Nations students.
>
> Economic Action Plan 2014 confirms core funding of $1.25 billion from 2016–17 to 2018–19 in support of the *First Nations Control of First Nations Education Act*. When implemented, the legislation will provide stable and predictable statutory funding consistent with provincial education funding models.
>
> In addition, Economic Action Plan 2014 confirms a new Enhanced Education Fund that will provide funding of $160 million over four years starting in 2015–16. This funding will help to develop the partnerships and institutional structures required to implement the proposed legislation, including support for new First Nations education authorities.
>
> New funding to build and renovate schools is also confirmed, with $500 million over seven years beginning in 2015–16 for a new Education Infrastructure Fund.
>
> Taken together, these investments totaling over $1.9 billion will support legislation to reform the on-reserve education system, providing First Nations children with access to a modern and accountable education regime that aligns with provincial education systems off reserve.

Almost immediately, however, the deal began to unravel, beginning with the same regional chiefs who earlier cheered Atleo at the Alberta announcement. In response to this, and to a growing call for a special assembly to address the education bill and the likelihood of the success of a non-confidence vote on his leadership, Shawn Atleo resigned as national chief of the Assembly of First Nations and the proposed education initiative was deleted from the budget. Part of the argument

appeared to be that the proposed bill would (contrary to my reading as well as to the revised title of the Bill) strip authority over education away from the First Nations. In the event Perry Bellegarde was elected as the new chief of the Assembly of First Nations.[11]

Stay Tuned

To round out this historical evolution of the initially devastating, but more recently improving, relationship between First Nations and their fellow Canadians it seems appropriate to highlight three of the issues that arose in the course of writing this book and that may well play an important role in the evolution of Indigenous-Canada relations: (i) the "Idle No More" movement, (ii) the heightened concern associated with "Murdered and Missing Indigenous Women" and (iii) the fallout arising from the First Nations Financial Transparency Act.

Idle No More[12]

The Idle No More movement arose, in part at least, as a response to the Harper government's passage of Bill C-45, an omnibus bill that from the First Nations' standpoint included (i) unwanted changes to the Indian Act, (ii) an erosion of existing environmental protections relating to navigable waterways (many on Indian lands), and (iii) unacceptable alterations to the Environmental Assessment Act. All of these measures were viewed as ignoring the First Nations constitutionally recognized and affirmed treaty and Indigenous rights, as well as the Crown's legal obligations to meaningfully consult and accommodate First Nations. Meaningful discussion and debate both in the House of Commons and in the country at large was effectively stymied by virtue of combining so many distinct pieces of legislation in an up-or-down "omnibus" bill. Roughly coincident with the launch of the Idle No More movement, and adding to its impact, was Attawapiskat First Nation Chief Theresa Spence's six week hunger strike (a liquid diet of sips of lemon water, medicinal teas, and fish broth) that culminated with a meeting with the prime minister replete with a willingness on his part to consult with First Nations on environmental issues and legislative matters that impact Indigenous territories.

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11 Chapter 10 will also focus on aspects of the Indigenous education challenge.

12 Ken Coates (2015) has written (in almost "real time") an excellent monograph of the Idle No More movement.

Missing and Murdered Indigenous Women

In 2013, the Commissioner of the RCMP initiated an RCMP-led study of reported incidents of missing and murdered Indigenous women across all police jurisdictions in Canada. Of the 1,181 investigations undertaken, 1,017 related to Indigenous female homicide victims between 1980 and 2012, and 164 of them related to women who were considered missing. In addition, there are currently 225 unsolved cases involving Indigenous women: 120 are homicides and an additional 105 relate to cases where women are assumed to be missing or where foul play is suspected.

The Indigenous groups' call for a national inquiry was seconded by many other Canadian and international organizations, foremost among the latter being Amnesty International who supported such a national public inquiry because this was likely the best way to hold the federal government to account. However, Prime Minister Harper initially rejected the call for a national inquiry because the issue was, in his words, at base "a crime—not a sociological phenomenon."

Jumping ahead in time, one of the first initiatives on the Indigenous front of the Trudeau government was to launch a *National Inquiry into Missing and Murdered indigenous Women.* The Inquiry encountered significant growing pains with many members, including the chair, resigning. Hopefully newly constituted Inquiry will deliver on its mandate and offer a way forward for addressing the ongoing tragic episode.

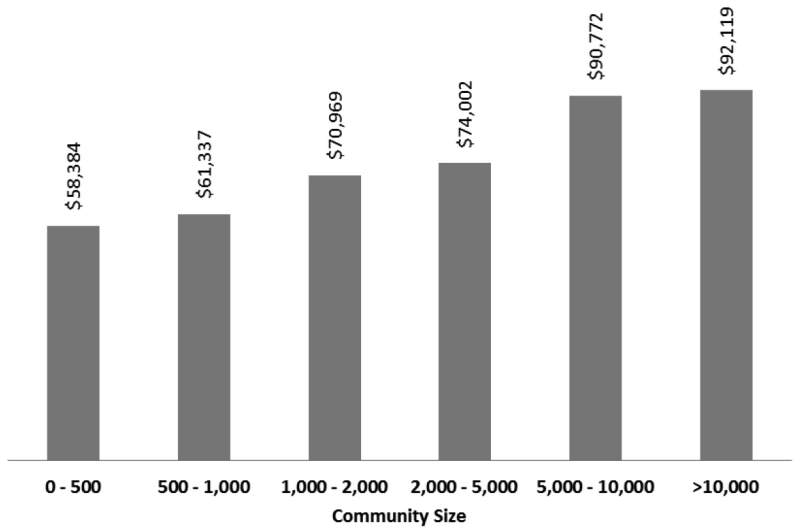
First Nations Financial Transparency Act

The *First Nations Transparency Act* came into effect on 1 April 2014 and requires the roughly 600 First Nations to provide a schedule of remuneration and expenses for their chiefs and councillors. When selective initial data for fiscal year 2013/14 were released, the results led to a flurry of criticism from various Canadian quarters given that the overall remuneration (from all sources) for several chiefs was in the several hundred thousand dollar range. The Assembly of First Nations countered this by noting that the initial published information was misleading because it focused on the top four salaries of First Nation chiefs. Drawing from the INAC data (see Figure 4.1), the First Nations chiefs note the median salary for chiefs across Canada was just under $65,000 (Assembly of First Nations 2013).

The detailed information in Figures 4.1 and 4.2 also shows that average salaries for First Nation chiefs increase with the size of the com-

Figure 4.1

Average Salaries for First Nation Chiefs, by Community Size, 2013–14



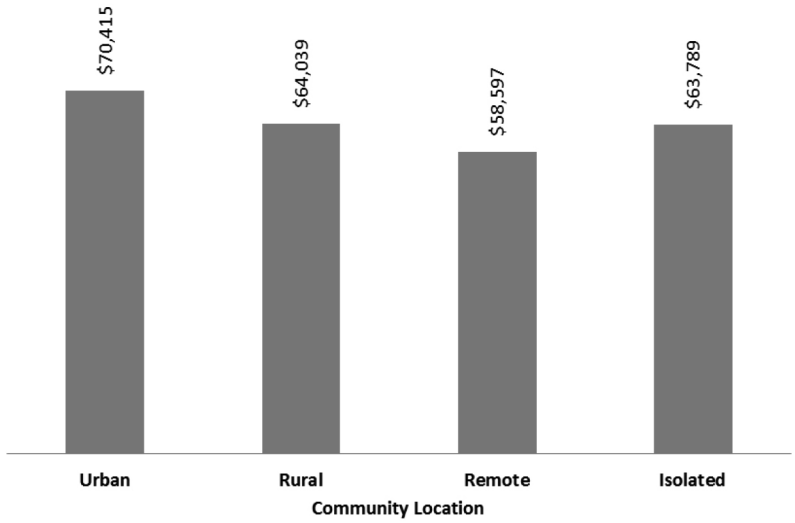
Note: Data excludes the top four outlier salaries above $200,000.
Source: Aboriginal Affairs and Northern Development Canada, 2014.

munity and vary by the location of the community, where chiefs responsible for more urban communities make larger salaries, and there are larger salaries for chiefs responsible for isolated (fly-in) communities, which is similar to doctors or teachers receiving a higher salary for working in these communities.

This episode has led the First Nations community to call for the scrapping of the Financial Transfer Act. While some tweaking of the Financial Transparency Act may be in order, my view is that financial transparency must be a necessary component of any reworking of First Nations governance in the directions of enhanced autonomy. However, the accountability must be to First Nations citizens, not to Ottawa, in the same way that the equalization-receiving provinces are accountable to their own citizens and not to Ottawa for the spending of their equalization dollars.

Figure 4.2

Average Salaries for First Nation Chiefs, by Community Location, 2013–14



Note: Data excludes the top four outlier salaries above $200,000.
Source: Aboriginal Affairs and Northern Development Canada, 2014.

Election 2015: A New Dawn?

On 19 October 2015, Justin Trudeau and the Liberals came from third place pre-election and swept into power with a majority government. The Liberals' first major promise of the election campaign was the commitment to invest a total of $2.6 billion in First Nations education over four years and $500 million over three years in infrastructure for First Nations schools. Beyond these specific promises, Prime Minister Trudeau has embraced the full slate of the TRC's Calls to Action articulated in the following chapter.

Arguably every bit as important for the Indigenous nationals/Canadian citizens theme of this book is that the 2015 federal election saw a record-breaking fifty-four indigenous candidates run for office, ten of whom were elected (eight Liberals, two NDP). Canada's new justice minister and attorney general is Jody Wilson-Raybould, a member

of the We Wai Kai Nation and a former provincial Crown prosecutor, and British Columbia treaty commissioner and regional chief of the BC Assembly of First Nations. Also in the initial Liberal cabinet was Hunter Tootoo, an MP from Nunavut and former member of the Nunavut legislature, who for a period was the new minister of Fisheries, Oceans and the Coast Guard.

Other initiatives of the Trudeau government on the Indigenous front are documented in chapter 6 and in particular its response to the TRC's Calls to Action as well as the government's approach to UNDRIP's principles relating to the necessity of "free, prior and informed consent" when dealing with Indigenous issues.

Conclusion

This chapter and the previous one have traced some key markers in the history of the relationship of Indigenous people with Canada and Canadians. It is of course most heartening that this relationship may see some dramatic improvement under the Trudeau government, however, one must view any positive developments in the context of the equally dramatic ongoing negative experiences, relatively and absolutely, of our First Peoples, as outlined in chapter 2. Moreover, the real driving force underpinning more favourable public policy may well be the role of the Charter and the series of dramatic and game-changing Supreme Court decisions. Elaborating, albeit rather briefly, on these groundbreaking rulings is the role of chapter 6.

Prior to this focus on the legal/constitutional evolution of Indigenous rights and Indigenous land title, it is important to devote more attention to the Truth and Reconciliation Commission. The TRC's report in 2015 is so pivotal to reconciling what has transpired in the past and to laying the foundation for what the future ought to entail that it merits more substantial treatment. Hence the TRC and its nearly 100 Calls to Action are the subject of the following chapter.

Part Three

Indigenous Rights and Reconciliation

Chapter 5

Honouring the Truth, Reconciling for the Future[1]

Summary of the Final Report of the Truth and Reconciliation Commission of Canada

Introduction

On 3 June 2015 the Truth and Reconciliation Commission (TRC 2015) issued its long-awaited report— *Honouring the Truth, Reconciling for the Future.* Even though the report runs to 382 pages, as the subtitle of this chapter indicates it is intended to be a summary of the eventual six-volume final report (published in 2016). The TRC was established in 2008 under the terms of the earlier-noted Indian Residential Schools Settlement Agreement. The Commission was mandated to reveal to Canadians the complex truth and the pathways to reconciliation with respect to the government-financed but largely church-run history of residential schools.

Toward this end, Commissioners (Honourable Justice Murray Sinclair as chair, Chief Wilton Littlechild, and Dr. Marie Wilson) held 238 days of hearings in seventy-seven communities across the country. All told, the Commission received over 6,750 statements from survivors of residential schools, members of their families, and other individuals

1 The previous chapter dealt with selected aspects of the Indian residential school system so there may be some repetition in this chapter. This is necessary in order to give the TRC report the overview it merits. Note that the TRC employs "Aboriginal" rather than "Indigenous" terminology. So will we.

who wished to share their knowledge of the residential school system and its legacy.

Inviting honorary witnesses to the Commission's major events served to lend import and legitimacy to these events and was in keeping with the traditions of many Aboriginal cultures. Her Excellency, the Right Honourable Michaëlle Jean, who was governor general of Canada at the start of the Commission's mandate, agreed to be the Commission's first honorary witness. She began her role by hosting a TRC special event called Witnessing the Future at Rideau Hall in Ottawa on 15 October 2009. In the following years, the then governor general of Canada, His Excellency the Right Honourable David Johnston, two former prime ministers (the Right Honourable Joe Clark and the Right Honourable Paul Martin), two former national Aboriginal leaders (Chief Phil Fontaine of the Assembly of First Nations and former Ambassador Mary Simon, the past president of ITK (Inuit Tapiriit Kanatami), and a host of other distinguished individuals all agreed to serve as honorary witnesses.

The Commission was mandated to create a National Centre for Truth and Reconciliation that would hold all the material created and received as part of its work. After reviewing a number of proposals the University of Manitoba was selected to become the permanent host of the National Centre for Truth and Reconciliation. This will ensure that:

- survivors and their families have access to their own history;
- educators can share the residential school history with new generations of students;
- researchers can delve more deeply into the residential school experience and legacy;
- the public can access historical records and other materials to help foster reconciliation and healing; and
- the history and legacy of the residential school system are never forgotten.

With this as preamble, attention is now directed to the analysis and conclusions in the TRC's report. This will begin with the TRC's view of "truth" and of "reconciliation," followed by a focus on brief aspects of the history and legacy of residential schools as well as a selection of the ninety-four recommendations (or in the TRC's terminology "Calls to Action"). Appended to this chapter are selected provisions of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP 2007) that the Trudeau government fully embraced in May of 2016, but then backed away somewhat in mid July.

The TRC's Verdict on "Truth"

The Commission minces no words nor wastes any time in assessing the rationale for residential schools. The first words of the report read as follows:

> For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as "cultural genocide."[2]
>
> *Physical genocide* is the mass killing of the members of a targeted group, and *biological genocide* is the destruction of the group's reproductive capacity. *Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next. In its dealing with Aboriginal people, Canada did all these things.

With this as the overarching backdrop, the TRC directs its attention to the tragedy that was the Indian residential school system (and still is for the survivors and their families) and then links this to no less a personage than our first Prime Minister:[3]

Canada separated children from their parents, sending them to residential schools. This was done not to educate them, but primarily to break their link to their culture and identity. In justifying the government's residential school policy, Canada's first prime minister, Sir John A. Macdonald, told the House of Commons in 1883:

> When the school is on the reserve the child lives with its parents,

2 On the weekend prior to the tabling of the TRC report, Chief Justice Beverly McLachlin in an address to the fourth annual Pluralism Lecture of the Global Centre for Pluralism also used the term "Cultural Genocide" to refer to Canada's treatment of First Nations.

3 This extended quotation draws selectively from pages 2–3 of the TRC report.

> who are savages; he is surrounded by savages, and though he may learn to read and write his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men.

These measures were part of a coherent policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will. Deputy Minister of Indian Affairs Duncan Campbell Scott outlined the goals of that policy in 1920, when he told a parliamentary committee that "our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic." These goals were reiterated in 1969 in the federal government's *Statement on Indian Policy* (more often referred to as the "White Paper"), which sought to end Indian status and terminate the treaties that the federal government had negotiated with First Nations:

> …Roman Catholic, Anglican, United, Methodist, and Presbyterian churches were the major denominations involved in the administration of the residential school system. The government's partnership with the churches remained in place until 1969, and, although most of the schools had closed by the 1980s, the last federally supported residential schools remained in operation until the late 1990s.[4]

The TRC's Vision of Reconciliation

Again from the Introduction of the TRC report (p. 16):

> To some people, *reconciliation* is the re-establishment of a conciliatory state. However, this is a state that many Aboriginal people assert never has existed between Aboriginal and non-Aboriginal people. To others, reconciliation, in the context of Indian residential schools, is similar to dealing with a situation of family violence. It's about coming to terms with events of the past in a manner that overcomes conflict and establishes a respectful and healthy rela-

4 The last residential school to close was St. Michael's Indian Residential School (Duck Lake Indian Residential School) in Saskatchewan in 1996.

> tionship among people, going forward. It is in the latter context that the Truth and Reconciliation Commission of Canada has approached the question of reconciliation.
>
> To the Commission, reconciliation is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. In order for that to happen, there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour. We are not there yet.

In terms of how federal, provincial and territorial governments might embrace reconciliation, the TRC recommends that an appropriate framework to use is the *United Nations Declaration on the Rights of Indigenous Peoples*, for reconciliation in Canada. The TRC is convinced that the United Nations Declaration provides the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada. Once again from the TRC (p. 21):

> A reconciliation framework is one in which Canada's political and legal systems, educational and religious institutions, the corporate sector and civic society function in ways that are consistent with the principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples*, which Canada has endorsed. Together, Canadians must do more than just *talk* about reconciliation; we must learn how to *practise* reconciliation in our everyday lives—within ourselves and families, and in our communities, governments, places of worship, schools, and workplaces. To do so constructively, Canadians must remain committed to the ongoing work of establishing and maintaining respectful relationships.
>
> For many Survivors and their families, this commitment is foremost about healing themselves, their communities, and nations, in ways that revitalize individuals as well as Indigenous cultures, languages, spirituality, laws, and governance systems. For governments, building a respectful relationship involves dismantling a centuries-old political and bureaucratic culture in which, all too often, policies and programs are still based on failed notions of assimilation. For churches, demonstrating long-term commitment requires atoning for actions within the residential schools, respecting Indigenous spirituality, and supporting Indigenous peoples' struggles for justice and equity. Schools must teach history in ways that foster mutual respect, empathy, and engagement. All Canadian children and youth deserve to know Canada's honest history, in-

> cluding what happened in the residential schools, and to appreciate the rich history and knowledge of Indigenous nations who continue to make such a strong contribution to Canada, including our very name and collective identity as a country. For Canadians from all walks of life, reconciliation offers a new way of living together.

Residential Schools: History

The TRC noted that the model for residential schools did not come from the private boarding schools to which members of the economic elites in Britain and Canada sent their children. Rather the model came from the reformatories and industrial schools that were being constructed in Europe and North America for the children of the urban poor. The British parliament adopted the Reformatory Schools Act in 1854 and the Industrial Schools Act in 1857 and by 1882 over 17,000 children were in Britain's industrial schools. In the United States the first in a series of large-scale, government-operated, boarding schools for Native Americans opened in 1879 in Pennsylvania. Canada's first industrial school for Aboriginals opened in Battleford in what is now Saskatchewan in 1883. It was placed under the administration of an Anglican minister. The following year, two more industrial schools opened: one in Qu'Appelle in what is now Saskatchewan, and one in High River in what is now Alberta. Both these schools were administered by principals nominated by the Roman Catholic Oblate order. The federal government not only built these schools, but it also assumed all the costs of operating them.

In justifying the investment in industrial schools to Parliament in 1883, Public Works Minister Hector Langevin argued that:

> if you wish to educate these children you must separate them from their parents during the time that they are being educated. If you leave them in the family they may know how to read and write, but they still remain savages, whereas by separating them in the way proposed, they acquire the habits and tastes … of civilized people. (TRC 2015, 116)

The transition from industrial schools to the residential school model coincided with the colonizing of Aboriginal lands in western Canada. The TRC reflects on this as follows:

> The government recognized that, through the Treaties, it had made

> commitments to provide Aboriginal people with relief in periods of economic distress. It also feared that as traditional Aboriginal economic pursuits were marginalized or eliminated by settlers, the government might be called upon to provide increased relief. In this context, the federal government chose to invest in residential schooling for a number of reasons. First, it would provide Aboriginal people with skills that would allow them to participate in the coming market-based economy. Second, it would further their political assimilation. It was hoped that students who were educated in residential schools would give up their status and not return to their reserve communities and families. Third, the schools were seen as engines of cultural and spiritual change: "savages" were to emerge as Christian "white men." There was also a national security element to the schools: Indian Affairs officials realized that it would be unlikely that any Tribe or Tribes would give trouble of a serious nature to the Government whose members had children completely under Government control. (TRC 2015, p. 61)

Arranging and Blocking Marriages[5]

Beyond the well-documented legacy of forced suppression of Aboriginal cultures, languages and religions, let alone systemic abusive treatment, the residential schools, Indian Affairs, and church officials sought to extend their control into the most intimate aspects of the lives of Aboriginal children. Indian Affairs officials believed that because the department had spent money educating students, it had gained the right to determine whom they married. Government officials feared that if students married someone who had not also been educated at a residential school, they would revert to traditional "uncivilized" ways. The control of marriage was part of the ongoing policy of forced assimilation. In 1890, Indian Commissioner Hayter Reed criticized Qu'Appelle principal Joseph Hugonnard for allowing female students from the Qu'Appelle school to marry boys who had not gone to school, without first getting Indian Affairs' approval. Reed argued: "the contention that the parents have the sole right to decide such matters cannot for one moment be admitted."

5 The following paragraph is largely verbatim from page 87 of the TRC report.

Underfunding

Part of the challenge faced by the residential schools was that they were woefully underfunded relative to comparable institutions in Canada and the United States that served the general population. The TRC report notes that in 1937, Indian Affairs was paying, on average, $180 a year per student. This was less than a third of the per capita costs at that time for the Manitoba School for the Deaf ($642) and the Manitoba School for Boys ($550). In the United States, the annual per capita cost at the Chilocco Indian Residential School in Oklahoma in 1937 was $350. According to the American Child Welfare League, the per capita costs for well-run institutions in that country ranged between $313 and $541. It would not be until the 1950s that changes were made in the funding system in Canada, which were intended to ensure that the schools could recruit qualified teachers and improve the student diets. Even these improvements did not end the inequity in residential school funding. In 1966, residential schools in Saskatchewan were spending between $694 and $1,193 a year per student. Comparable child-welfare institutions in Canada were spending between $3,300 and $9,855 a year.[6]

Scope of the Residential Schools

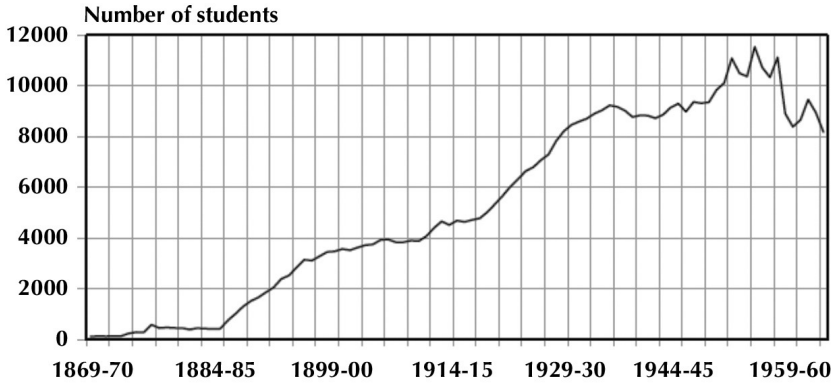
Although the Indian Act was amended in 1920 to allow the government to compel any First Nations child to attend residential school, attendance in residential schools was never compulsory for all First Nations children. In most years, there were more First Nations children attending Indian Affairs day schools than residential schools. During the early 1940s, this pattern was reversed. In the 1944–45 school year, there were 8,865 students in residential schools, and 7,573 students in Indian Affairs day schools. In that year there were reportedly 28,429 school-aged Aboriginal children. This meant that 31.1 percent of the school-aged Aboriginal children were in a residential school.

Figure 5.1 traces the growth of residential schools from 1869 to 1960 while Figure 5.2 records the rise and fall of residential schools. As already noted, the Duck Lake, Saskatchewan residential school was the last one to close (1996).

6 As highlighted in the previous chapter, federal underfunding of on-reserve schools continues to exist.

Figure 5.1

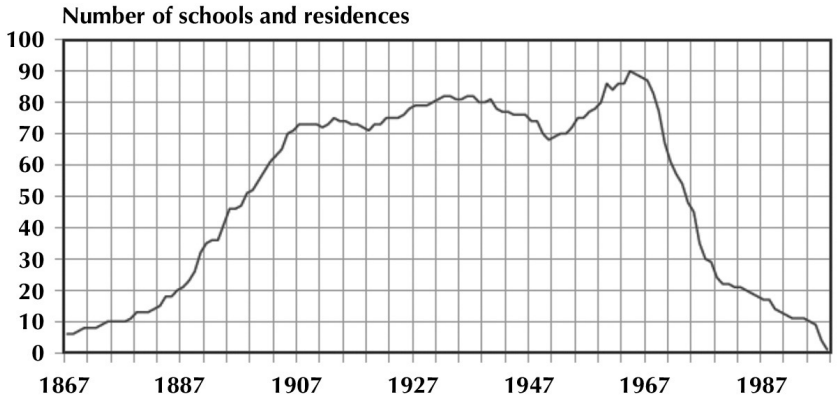
Residential School Enrolment, 1869–70 to 1965–66



Source: Indian Affairs and Northern Affairs annual reports. After the 1965–66 school year, Indian Affairs stopped reporting on annual residential school enrolment.

Figure 5.2

Number of Residential Schools and Residences, 1867–1998



Source: Indian and Northern Affairs Canada, Indian Residential Schools of the Indian Residential Schools Settlement Agreement 2011.

Residential Schools: Legacy[7]

The legacy of the residential schools is still with us. One can see the impact of a system that disrupted families in terms of the high number of Aboriginal children who continue to be removed from their families by child-welfare agencies. An educational system that degraded Aboriginal culture and subjected students to humiliating discipline must bear a portion of responsibility for the current gap between the educational success of Aboriginal and non-Aboriginal Canadians. The health of generations of Aboriginal children was undermined by inadequate diets, poor sanitation, overcrowded conditions, and a failure to address the tuberculosis crisis that was ravaging the country's Aboriginal community. There should be little wonder that Aboriginal health status remains far below that of the general population. The over-incarceration and over-victimization of Aboriginal people also have links to a system that subjected Aboriginal children to punitive discipline and exposed them to physical and sexual abuse.

The TRC report also notes (p. 100) "that death casts a long shadow over many residential school memories." This is clear from Figure 5.3. Some have said that a sure way to identify a residential school is that it will have a cemetery!

Fetal Alcohol Spectrum Disorder (FASD) and Incarceration

The TRC notes (p. 169–172) that the dramatic overrepresentation of Aboriginal people in Canada's prison system continues to expand. In 1995–1996, Aboriginal people made up 16 percent of all those sentenced to custody. By 2011–2012, that number had grown to 28 percent of all admissions to sentenced custody, even though Aboriginal people make up only 4 percent of the Canadian adult population. The situation for women is even more disproportionate: in 2011–2012, 43 percent of admissions of women to sentenced custody were Aboriginal.

While the TRC notes that the causes of the over-incarceration of Aboriginal people are many and complex, it focuses on one important determinant—FASD. From the TRC (p. 170):

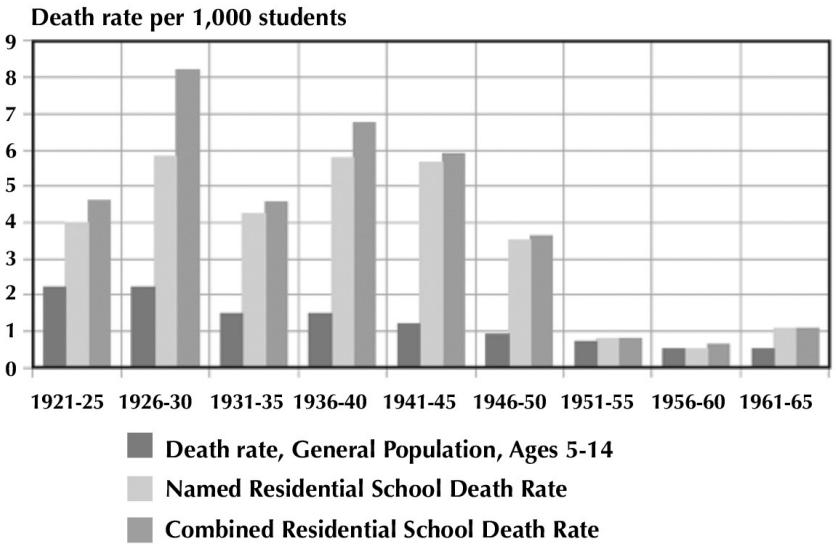
> There is another link between the substance abuse that has plagued many residential school Survivors and the over-incarceration of Aboriginal people. Fetal alcohol spectrum disorder (FASD) is a per-

7 Readers can also refer to the earlier assessment by Sébastien Grammond in chapter 3.

Figure 5.3

Comparative Death Rates per 1,000 Population, Residential Schools

(Names and Unnamed registers combined) and the general Canadian population of school-aged children, using five-year averages from 1921–1965



Source: Fraser, Vital Statistics and Health, Table B35–50. http://www.statcan.c.ca/pub/11-516-x/section-b/4147437-eng.htm; Rosenthal, "Statistical Analysis of Deaths," 13.

manent brain injury caused when a woman's consumption of alcohol during pregnancy affects her fetus. The disabilities associated with FASD include memory impairments, problems with judgment and abstract reasoning, and poor adaptive functioning. It is a debilitating cognitive impairment, which children must live with for the rest of their lives, through no fault of their own. A study done for the Aboriginal Healing Foundation drew links among the intergenerational trauma of residential schools, alcohol addictions, and FASD. The study concluded that the "residential school system contributed to the central risk factor involved, substance abuse, but also to factors shown to be linked to alcohol abuse, such as child and adult physical, emotional and sexual abuse, mental health

> problems and family dysfunction.
>
> About 1% of Canadian children are born with some form of disability related to prenatal alcohol consumption, but estimates from Canada and the United States suggest that 15% to 20% of prisoners have FASD. A recent Canadian study found that offenders with FASD had much higher rates of criminal involvement than those without FASD, including more juvenile and adult convictions. The Commission believes there is a need to take urgent measures both to prevent FASD and to better manage its harmful consequences. There is a clear need in Aboriginal communities for more programming that addresses the problems of addiction and FASD.

This led the TRC to devote two Calls to Action to FASD:

> 33. We call upon the federal, provincial, and territorial governments to recognize as a high priority the need to address and prevent Fetal Alcohol Spectrum Disorder, and to develop, in collaboration with Aboriginal people FASD preventive programs that can be delivered in a culturally appropriate manner;

and

> 34. We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD), including:
>
> i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.
>
> ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.
>
> iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.
>
> iv. Adopting appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.

Hopefully these Calls to Action will lead federal and provincial health and welfare departments to cooperate in mounting nationwide programs to combat FASD in vulnerable populations. This would be an especially important initiative since FASD is not only a life-long illness/handicap, but is often likely to become an intergenerational one.

Research is also needed in the area of early post-natal interventions in order to ascertain whether some of the impacts of FASD can be ameliorated.

Beyond Residential Schools: The Sixties Scoop[8]

From page 186 of the TRC Report:

> The residential school experience was followed by the "Sixties Scoop"—the wide-scale, national apprehension of Aboriginal children by the child welfare agencies. Child-welfare authorities removed thousands of Aboriginal children from their families and communities and placed them in non-aboriginal homes without taking steps to preserve their culture and identity. Children were placed in homes across Canada, in the United States, and even overseas. This practice actually extended well beyond the 1960s, until at least the mid-to-late 1980s. Today, the effects of the residential school experience and the Sixties Scoop have adversely affected parenting skills and the success of many Aboriginal families. These factors, combined with prejudicial attitudes toward Aboriginal parenting skills and a tendency to see Aboriginal poverty as a symptom of neglect, rather than as a consequence of failed government policies, have resulted in grossly disproportionate rates of child apprehension among Aboriginal people. A 2011 Statistics Canada study found that 14,225 or 3.6% of all First Nations children aged fourteen and under were in foster care, compared with 15,345 or 0.3% of non-Aboriginal children.

Poignantly, the TRC then adds; "As Old Crow Chief Norma Kassi said at the Northern National Event in Inuvik: The doors are closed at the residential schools but the foster homes are still existing and our children are still being taken away." The Commission agrees: Canada's child-welfare system has simply continued the assimilation that the residential school system started."

The Commission is convinced that genuine reconciliation will not be possible until the complex legacy of the residential schools is understood, acknowledged, and addressed. Thus far, Parliament and the Supreme Court have recognized that the legacy of residential schools should be considered when sentencing Aboriginal offenders. Although

8 While the Sixties Scoop was highlighted briefly in the previous chapter it is important to view this episode through the eyes of the TRC.

these are important measures, they have not been sufficient to address the grossly disproportionate imprisonment of Aboriginal people, which continues to grow, in part because of a lack of adequate funding and support for culturally appropriate alternatives to imprisonment.

By way of a final, but hardly exhaustive observation, the TRC report emphasizes that various sports and cultural activities provided important relief for many residential school students. For example, the TRC notes (p. 114):

> Despite the lack of financial support, hockey teams from a number of schools achieved considerable success in the 1940s and 1950s. Teams from Duck Lake and Qu'Appelle in Saskatchewan, in particular, established enviable records. The Duck Lake school team, the St. Michael's Indians, won the championship of an eight-team league in the Rosthern area in 1946. In 1948, the same team, coached by Father G.-M. Latour, won the northern Saskatchewan midget hockey championship. The following year, it won the provincial championship. … Among the players on the 1949 Duck Lake provincial championship team was Fred Sasakamoose, who went on to become the first status Indian to play in the National Hockey League [ironically, perhaps, with the Chicago Black Hawks—TJC].[9]

Calls To Action

The TRC analysis is interspersed with a series of Calls to Action. They all take the form of "We call upon (government, courts, educational institutions, businesses, bureaucracies and so on) to do X, Y, or Z. All told, the TRC has ninety-four of these requirements/demands—actually more like 150 if one includes the subcomponents of these Calls to Action. What follows is a selection of what seem to be the most relevant of these for present purposes. The internal headings are in the original. As noted in the previous chapter Prime Minister Justin Trudeau has indicated that he agrees with all of them. The last (94) merits attention in light of Canada's Sesquicentennial:

> 94. We call upon the Government of Canada to replace the Oath of Citizenship with the following:

9 The bracketed comment is mine. Fred Sasakamoose, now in his eighties, was a member of the Senate of the Federation of Saskatchewan Indian Nations (FSIN) and more recently participated in events associated with the release of the TRC report.

I swear (or affirm) that I will be faithful and bear true allegiance to her Majesty Queen Elizabeth II, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada including Treaties with Indigenous Peoples, and fulfill my duties as a Canadian Citizen.

What follows is a selection of these Calls to Action[10]

Legacy

Child welfare

1. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by: …

ii. Providing adequate resources to enable Aboriginal communities and child-welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside.

5. We call upon the federal, provincial, territorial, and Aboriginal governments to develop culturally appropriate parenting programs for Aboriginal families.

Education

7. We call upon the federal government to develop with Aboriginal groups a joint strategy to eliminate educational and employment gaps between Aboriginal and non-Aboriginal Canadians.

8. We call upon the federal government to eliminate the discrepancy in federal education funding for First Nations children being educated on reserves and those First Nations children being educated off reserves.

Language and culture

13. We call upon the federal government to acknowledge that Aboriginal rights include Aboriginal language rights.

17. We call upon all levels of government to enable residential school Survivors and their families to reclaim names changed by the residential school system by waiving administrative costs for a period of five years for the name-change process and the revision of official identity documents, such as birth certificates, passports,

10 By searching "TRC Calls to Action" all 94 of these can be read online.

driver's licenses, health cards, status cards, and social insurance numbers.

Health

18. We call upon the federal, provincial, territorial, and Aboriginal governments to acknowledge that the current state of Aboriginal health in Canada is a direct result of previous Canadian government policies, including residential schools, and to recognize and implement the health-care rights of Aboriginal people as identified in international law, constitutional law, and under the Treaties.

19. We call upon the federal government, in consultation with Aboriginal peoples, to establish measurable goals to identify and close the gaps in health outcomes between Aboriginal and non-Aboriginal communities, and to publish annual progress reports and assess long-term trends. Such efforts would focus on indicators such as: infant mortality, maternal health, suicide, mental health, addictions, life expectancy, birth rates, infant and child health issues, chronic diseases, illness and injury incidence, and the availability of appropriate health services.

22. We call upon those who can effect change within the Canadian health-care system to recognize the value of Aboriginal healing practices and use them in the treatment of Aboriginal patients in collaboration with Aboriginal healers and Elders where requested by Aboriginal patients.

Justice

25. We call upon the federal government to establish a written policy that reaffirms the independence of the Royal Canadian Mounted Police to investigate crimes in which the government has its own interest as a potential or real party in civil litigation.

28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

33. We call upon the federal, provincial, and territorial governments to recognize as a high priority the need to address and prevent Fetal Alcohol Spectrum Disorder (FASD), and to develop, in collaboration with Aboriginal people, FASD preventive programs

that can be delivered in a culturally appropriate manner.

34. We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD), including:

i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.

ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.

iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.

Reconciliation

Canadian governments and the United Nations Declaration on the Rights of Indigenous People

43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) as the framework for reconciliation.

Royal Proclamation and Covenant of Reconciliation

45. We call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown. The proclamation would include, but not be limited to, the following commitments:

i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius.

ii. Adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.

Equity for Aboriginal People in the Legal System

52. We call upon the Government of Canada, provincial and territorial governments, and the courts to adopt the following legal principles:

i. Aboriginal title claims are accepted once the Aboriginal claimant has established occupation over a particular territory at a particular point in time.

ii. Once Aboriginal title has been established, the burden of proving any limitation on any rights arising from the existence of that title shifts to the party asserting such a limitation.

National Council for Reconciliation

53. We call upon the Parliament of Canada, in consultation and collaboration with Aboriginal peoples, to enact legislation to establish a National Council for Reconciliation. The legislation would establish the council as an independent, national, oversight body with membership jointly appointed by the Government of Canada and national Aboriginal organizations, and consisting of Aboriginal and non-Aboriginal members.

55. We call upon all levels of government to provide annual reports or any current data requested by the National Council for Reconciliation so that it can report on the progress towards reconciliation. The reports or data would include, but not be limited to:

i. The number of Aboriginal children—including Métis and Inuit children—in care, compared with non-Aboriginal children, the reasons for apprehension, and the total spending on preventive and care services by child-welfare agencies.

ii. Comparative funding for the education of First Nations children on and off reserves.

iii. The educational and income attainments of Aboriginal peoples in Canada compared with non-Aboriginal people.

iv. Progress on closing the gaps between Aboriginal and non-Aboriginal communities in a number of health indicators…

Church Apologies and Reconciliation

58. We call upon the Pope to issue an apology to Survivors, their families, and communities for the Roman Catholic Church's role in the spiritual, cultural, emotional, physical, and sexual abuse of First Nations, Inuit, and Métis children in Catholic-run residential schools. We call for that apology to be similar to the 2010 apology issued to Irish victims of abuse and to occur within one year of the issuing of this Report and to be delivered by the Pope in Canada.

Education for Reconciliation

62. We call upon the federal, provincial, and territorial governments, in consultation and collaboration with Survivors, Aboriginal peoples, and educators, to:

i. Make age-appropriate curriculum on residential schools, Treaties, and Aboriginal peoples' historical and contemporary contributions to Canada a mandatory education requirement for Kindergarten to Grade Twelve students...

65. We call upon the federal government, through the Social Sciences and Humanities Research Council, and in collaboration with Aboriginal peoples, post-secondary institutions and educators, and the National Centre for Truth and Reconciliation and its partner institutions, to establish a national research program with multi-year funding to advance understanding of reconciliation.

Museums and Archives

67. We call upon the federal government to provide funding to the Canadian Museums Association to undertake, in collaboration with Aboriginal peoples, a national review of museum policies and best practices to determine the level of compliance with the *United Nations Declaration on the Rights of Indigenous Peoples* and to make recommendations.

Missing Children and Burial Information

71. We call upon all chief coroners and provincial vital statistics agencies that have not provided to the Truth and Reconciliation Commission of Canada their records on the deaths of Aboriginal children in the care of residential school authorities to make these documents available to the National Centre for Truth and Reconciliation.

72. We call upon the federal government to allocate sufficient resources to the National Centre for Truth and Reconciliation to allow it to develop and maintain the National Residential School Student Death Register established by the Truth and Reconciliation Commission of Canada.

73. We call upon the federal government to work with churches, Aboriginal communities, and former residential school students to establish and maintain an online registry of residential school cemeteries, including, where possible, plot maps showing the location of deceased residential school children.

Commemoration

79. We call upon the federal government, in collaboration with Survivors, Aboriginal organizations, and the arts community, to develop a reconciliation framework for Canadian heritage and commemoration.

80. We call upon the federal government, in collaboration with Aboriginal peoples, to establish, as a statutory holiday, a National Day for Truth and Reconciliation to honour Survivors, their families, and communities, and ensure that public commemoration of the history and legacy of residential schools remains a vital component of the reconciliation process.

81. We call upon the federal government, in collaboration with Survivors and their organizations, and other parties to the Settlement Agreement, to commission and install a publicly accessible, highly visible, Residential Schools National Monument in the city of Ottawa to honour Survivors and all the children who were lost to their families and communities.

Media and Reconciliation

84. We call upon the federal government to restore and increase funding to the CBC/Radio-Canada, to enable Canada's national public broadcaster to support reconciliation, and be properly reflective of the diverse cultures, languages, and perspectives of Aboriginal peoples,

Sports and Reconciliation

87. We call upon all levels of government, in collaboration with Aboriginal peoples, sports halls of fame, and other relevant organizations, to provide public education that tells the national story of Aboriginal athletes in history.

88. We call upon all levels of government to take action to ensure long-term Aboriginal athlete development and growth, and continued support for the North American Indigenous Games, including funding to host the games and for provincial and territorial team preparation and travel.

Business and Reconciliation

92. We call upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indig-

enous peoples and their lands and resources. This would include, but not be limited to, the following:

ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.

Newcomers to Canada

93. We call upon the federal government, in collaboration with the national Aboriginal organizations, to revise the information kit for newcomers to Canada and its citizenship test to reflect a more inclusive history of the diverse Aboriginal peoples of Canada, including information about the Treaties and the history of residential schools.

94. We call upon the Government of Canada to replace the Oath of Citizenship with the following:

> I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada including Treaties with Indigenous Peoples, and fulfill my duties as a Canadian citizen.

Conclusion

There is no way that the above summary of the TRC does justice to the emotive and comprehensive overview of this tragic period in Canadian history. Hopefully the TRC and its Calls to Action will be the turning point in Aboriginal-Canadian relations. Readers may be interested in a Queen's University public lecture on the history and implications of residential schools delivered by Justice Murray Sinclair just prior to the release of the Report. It is available at http://www.queensu.ca/sps/tom-courchene-speakers

Since there are many references in the TRC to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), appended to this chapter is a brief addendum relating to Canada's somewhat embarrassing approach to embracing UNDRIP.

Addendum: UNDRIP and the Principle of "Free Prior and Informed Consent"

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP; United Nations 2007) was adopted by the UN General Assembly in September, 2007 by a majority of 144 states in favour, four votes against (Australia, Canada, New Zealand and the United States) and eleven abstentions. Whereas the TRC's 94 Calls to Action all begin with "We call upon X or Y or Z to do A or B or C," the majority of the UNDRIP's 46 Articles begin with "Indigenous peoples have the right to do, to redress, to maintain … A or B or C". It is clear that the TRC was positively influenced by UNDRIP in its approach to reconciliation. For example, Call to Action #43 reads: "We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation." In its proposal for a *Proclamation and Covenant of Reconciliation* in Call to Action #45, the TRC again recommends that the Government of Canada "adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation." And Call to Action #92 (dealing with business and reconciliation) recommends that "corporate Canada adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources"…

As already noted, almost immediately after the release of the TRC's summary of its final report (June 2015) Prime Minister Trudeau stated that he agreed with all of the Calls to Action. More to the point in the current context, at the 36th general session of the Assembly of First Nations (July 2015) Trudeau stated "we will work with you to enact the recommendations of the Truth and Reconciliation Commission starting with the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*" (*National Post* 2016).

On 8 May 2016, Canada finally removed its "permanent objector status" to UNDRIP and declared its intent to fully implement UNDRIP both in its own right and as a framework to further the process and substance of reconciliation.

While this initiative was widely welcomed in many quarters it also led to considerable anxiety. Indeed this anxiety related to the same concerns that led to Canada's original refusal to embrace UNDRIP, namely

the potential interaction between the UNDRIP's commitments to ensuring Indigenous rights to land, territories, and resources that they have traditionally owned on the one hand and the concept of "free, prior and informed consent" on the other. The most troubling of these from the government's perspective (and especially from corporate Canada's perspective) is Article 28 that embraces the requirement of "free, prior and informed consent":

> Article 28
>
> 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their *free, prior and informed consent* [emphasis added].
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

While Indigenous and Northern Affairs Minister Carolyn Bennett's view was that "We see modern treaties and self-government agreements as the ultimate expression of free, prior and informed consent among partners," (Bennett 2016) others have dramatically different views. On the Aboriginal front there was an exciting this-changes-everything vision of the embracing of free, prior, and informed consent. This even generated excitement among some of the "numbered-treaty nations" since their traditional territories included much of Ontario, all of the Prairies, and parts of British Columbia and the Northwest Territories on the one hand, and it would be hard to argue that the written numbered treaties fell under free, prior, and informed consent especially since most of the chiefs could not read the treaties on the other hand.

As a result, the excitement in Indigenous Canada was somewhat offset by the concerns of corporate Canada. In the wake of the Supreme Court decision to return to the Tsilhqot'in Nation their traditional territories (elaborated in the next chapter), corporate Canada viewed free, prior, and informed consent as the equivalent of an Aboriginal veto power prospectively and retrospectively. And in the provincial capitals the fear was that their current and future royalties might be at stake, i.e., might flow instead to Indigenous Canada. Exaggerated or not,

these concerns led to Jody Wilson-Raybould, Canada's Minister of Justice, to inform the 37th general session of the Assembly of First Nations (July 2016) that legally embracing UNDRIP was not about "Simplistic approaches, such as adopting the United Nations declaration, as… Canadian laws are unworkable and, respectfully, a political distraction to undertaking the hard work actually required to implement it back home in communities."[11]

I interpret this to mean that Canada will do its best to respect, even implement, the principles of UNDRIP, but will not enshrine it (i.e., it would not become justiciable).[12]

Intriguingly, the *National Post* editorial concludes that the TRC's Calls to Action are likely to suffer the same fate:

> Trudeau has pledged to adopt the 94-plus recommendations in the TRC report, many of which make the UN declaration look like a stroll in the park. The best-intentioned government couldn't possibly deliver on it all. So the PM will have to send more ministers to explain that, sorry, we may have made the promise but we can't keep it, Or, even say so himself.

While writing this section of the monograph before the formal sesquicentennial celebration, my view is different: namely, that this occasion will be of such historical moment that it probably requires the Parliament of Canada to embrace/adopt the Calls to Action as a sub-

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11 This sentence and the next paragraph are from an editorial in the *National Post* (2016).

12 As this book was going to press, the Institute for Research on Public Policy (IRPP) published an insightful paper on free, prior and informed consent (FPIC) authored by Martin Papillon and Thierry Rodon (*Indigenous Consent and National Resource Extraction: Foundations for a Made-in-Canada Approach).* The IRPP summary reads, in part, as follows:

> The authors argue that the current focus on whether Indigenous peoples have a veto on resource extraction projects obscures more than it enlightens the debate on FPIC implementation. The key to FPIC, they argue, lies more in the recognition of a relationship between mutually self-determining partners. We need to combine collaborative decision-making, where Indigenous peoples are equal jurisdictional partners in the authorization process, with community-driven decision-making over the inherent value of a project. They note that there are experiments in some parts of the country that could serve as a guide for translating FPIC into practice. For example, Indigenous communities in British Columbia have created their own impact assessment procedures for resource projects, as well as collaborative negotiation practices with proponents and governments. Papillon and Rodon conclude that not only would the approach they propose contribute to eliminating political uncertainty, costly project delays and legal battles, it would also be consistent with emerging international standards.

The paper is available online at irpp.org http://irpp.org/research-studies/insight-no16/

stantive lens through which to view all future legislation pertaining to Indigenous peoples.

Attention now turns to an institution that has had, and continues to have, a path-breaking role in advancing Indigenous rights and title—the Supreme Court of Canada.

Chapter 6

The Supreme Court and the Evolution of Aboriginal Rights and Aboriginal Title

Constitutional Backdrop[1]

Aboriginal rights (Indigenous Foundations 2009a) are collective rights that flow from Aboriginal peoples' continued use and occupation of certain areas. They are *inherent rights* which Aboriginal peoples have practiced and enjoyed since before European contact. Because each First Nation has historically functioned as a distinct society, there is no one official overarching definition of what these rights are. Although these specific rights may vary across Aboriginal groups, in general they include rights to the land, rights to subsistence resources and activities, the right to self-determination and self-government, and the right to practice one's own culture and customs including language and religion. Aboriginal rights have not been granted from external sources, but are a result of Aboriginal peoples' own occupation of their home territories as well as their ongoing social structures and political and legal systems. As such, Aboriginal rights are separate from rights afford-

1 In order to make this chapter more self-contained, the initial section reproduces the relevant aspects of the Constitution Act, 1982 that appeared in chapter 4. Note also since the Act uses the term "Aboriginal" rather than "Indigenous," so do the courts and so will this chapter.

ed to non-Aboriginal Canadian citizens under Canadian common law.

Aboriginal title (Indigenous Foundations 2009a) refers to the inherent Aboriginal right to land or a territory. The Canadian legal system recognizes Aboriginal title as a *sui generis*, or unique *collective right* to the use of, and jurisdiction over, a group's ancestral territories. Along similar lines, and as was the case for Aboriginal rights, Aboriginal title is not granted from an external source but is a result of Aboriginal peoples' own occupation of, and relationship with, their home territories as well as their ongoing social structures and political and legal systems. As such, Aboriginal title is also separate from title afforded to non-Aboriginal Canadian citizens under Canadian common law.

With this definitional foreward as prelude, the role of this chapter is to trace the role of the Supreme Court in advancing the understanding and the substance of Aboriginal rights and Aboriginal title. The driving forces behind this evolution were, and are, the sections of the Constitution Act, 1982 relating specifically to Aboriginal Canadians, i.e., Section 25 of Part I— more commonly referred to as the Charter (i.e., Canadian Charter of Rights and Freedoms) and Section 35 of Part II (Rights of Aboriginal Peoples). Although described earlier, they merit repetition in the present context in part because of the manner in which these constitutional provisions evolved. Section 35 originally read as follows:

> The existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed.
>
> In this Act "Aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

In line with the requirements of Sections 37(1) and 37(2), Canada was committed to convene a constitutional conference comprising first ministers and representatives of Aboriginal peoples in order to review Section 35 as well as Section 25 (see below). As a result of this 1983 conference, the following two further provisions were added to Section 35:

> For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> Notwithstanding any other provision of this Act, the Aboriginal and treaty rights referred to in subsection (1) are guaranteed to male and female persons.

Section 25 of the Constitution Act, 1982 originally read as follows:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate from any aboriginal treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763.

Again, as a result of the 1983 constitutional conference, the following subsection was added to Section 25:

> any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Not only did Sections 25 and 35 enshrine existing Aboriginal rights (e.g., those flowing from the Royal Proclamation) but now they are to apply prospectively in the sense that new and enshrined Aboriginal rights and title will flow from future land claims agreements or from Supreme Court decisions. In this context, it is important to remember that, prior to the Charter, Aboriginal rights and title were viewed as limited to the reserves and as such were subject to parliamentary oversight—hence the 1969 Trudeau/Chrétien White Paper (Canada 1969) and its attempt to convert reserve lands into private property as part of the larger vision of enfranchisement and the elimination of reserves. As will be clear in what follows, it is increasingly the courts, not our parliaments, that are now defining (actually redefining) the rights of Aboriginal peoples within the Canadian constitutional framework. The remainder of this section will focus on some of the major Supreme Court of Canada cases that have significantly enhanced Aboriginal rights and title.

Supreme Court Decisions and the Evolution of Aboriginal Rights/Title

Calder *(SCC 1973): The Existence of Aboriginal Title*

The Supreme Court of Canada (SCC) *Calder* decision was of immense importance for the evolution of Aboriginal land title not only in Canada but in Australia and New Zealand as well. To lend perspective here it is important to recall the prevailing view of Aboriginal title. From Godlewska and Webber (2007, 1):

> Just four years prior to Calder, the Canadian prime minister, Pierre Elliot Trudeau, had categorically rejected the notion that Aboriginal peoples had rights different from those accorded to other Canadian citizens. [i.e., the 1969 Trudeau/Chrétien White Paper]. The

> government did not recognize Aboriginal title and, as a result, saw no need to enter into further treaties with Aboriginal peoples.

The *Calder* decision completely overturned this view. From the Indigenous Foundations (2009b) website:

> In 1967, Frank Calder and other Nisga'a elders sued the provincial government of British Columbia, declaring that Nisga'a title to their lands had never been lawfully extinguished through treaty or by any other means. While both the BC Supreme Court and the Court of Appeal rejected the claim, the Nisga'a appealed to the Supreme Court of Canada for recognition of their Aboriginal title to their traditional, ancestral and unceded lands. … What the Supreme Court concluded was groundbreaking. …While the [lower courts] had denied the existence of Aboriginal title, the Supreme Court ruled in 1973 that Aboriginal title had indeed existed at the time of the Royal Proclamation of 1763. The Supreme Court's 1973 decision was the first time that the Canadian legal system acknowledged the existence of Aboriginal title to land and that such title existed outside of, and was not simply derived from, colonial law. While the Nisga'a did not win their case and the ruling did not settle their land question, it did pave the way for the federal government's comprehensive land claims process, which sets up a process for Aboriginal groups to claim title to their territory. … As a landmark case, the Calder decision continues to be cited in modern Aboriginal land claims across Canada, as well as internationally in Australia and New Zealand.

A more straightforward view expressed in this decision is that based on the common law concept of prior occupation, namely that "when the settlers came, the Indians were already there, organized into societies and occupying land as their forefathers had done for centuries—this is what Indian title means."

Gordon Christie (2005, 106) reminds us just how important the *Calder* case was in historical perspective:

> When Europeans arrived on the shores of North America, various Aboriginal societies already occupied distinct territories that stretched from sea to sea. In its attempts to acquire jurisdiction and ownership over these territories, the Crown—in different settings, at different times, and in different ways—applied the doctrine of *terra nullius*. This doctrine has basically two forms: a literal sense, under which a colonizing power would lay claim to land it consid-

> ered physically uninhabited; and an "enlarged" sense under which a colonizing power would lay claim to inhabited land whose societies were considered too low on the scale of civilization to have native systems of laws and customs that were capable of sustaining native notions of "rights" that could be translated into rights demanding respect within the common law. … *This doctrine, in both forms, was repudiated in Canada in 1973 in* Calder v. British Columbia.[2]

The impact of *Calder* in Canada was immediate and far-reaching. Again from Godlewska and Webber (2007, 6–7):

> Prime Minister Pierre Elliott Trudeau "warmly embraced" the proposal by the Yukon Native Brotherhood for the negotiation of land claims in the Yukon, which was presented just two weeks after Calder. … And less than seven months after Calder was handed down, a new federal policy for the settlement of "comprehensive claims"—claims founded on Aboriginal title—was announced by then minister of Indian Affairs and Northern Development, Jean Chrétien. As expressed in a booklet later prepared by the Department of Indian Affairs and Northern Development, "Canada would now negotiate settlements with Aboriginal groups where rights of traditional use and occupancy had been neither extinguished by treaty nor superseded by law. Thus, the federal government began the long process of negotiating comprehensive settlements of Aboriginal title, eventually concluding modern-day treaties in northern Québec, the Yukon, the former Northwest Territories (including Nunavut), and, ultimately, with the Nisga'a nation itself.

This was, and is, the *Calder* legacy.

Guerin*: The Honour of the Crown (Fiduciary Responsibility)*

Chief Delbert Guerin (SCC 1984) of British Columbia's Musqueam Indian Band sued the federal Crown in 1975 for breach of trust concerning 163 acres of reserve land that had been leased to the Shaughnessy Golf Club in the late 1950s. The Musqueam band had been told that they would profit from the seventy-five-year lease, with rents being adjusted to fair market rates every decade. Unbeknownst to the band, however, the deal was re-negotiated to allow the golf club to only pay

2 The famous 1992 *Mabo* case in Australia, which overthrew *Terra Nullius,* drew heavily from *Calder*.

what amounted to 10 percent of the fair market rent for the land. The case was initially won in the lower courts but then lost on appeal. Guerin then appealed to the Supreme Court. In 1984 the Supreme Court of Canada ruled that the federal government, as trustee of the lands, had not provided the band with all the necessary information and had not leased the land on terms favourable to the band. Chief Justice Brian Dickson described First Nations' interests in their lands as a "pre-existing legal right not created by the Royal Proclamation…the Indian Act…or any other executive order or legislative provision." The ruling was especially significant because it recognized pre-existing aboriginal rights both on reserves and outside reserves. It also confirmed that the federal government has a "fiduciary responsibility" for aboriginal people—that is, a responsibility to safeguard Aboriginal interests.

Relatedly, the Indigenous Foundations website page for "Guerin" notes that the Indian Act specifies that reserves are held by the Crown "for the use and benefit of the respective bands for which they are set apart," and that "the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the *use and benefit of the band*" (emphasis added). The government demonstrated it did not act in the Musqueam band's best interest by not consulting them about the revised terms of the lease.

At this juncture, it is convenient to introduce a concept that is playing an increasingly important role in Aboriginal-government relations—the "honour of the Crown." From John Ralston Saul's *The Comeback* (2014, 33): "What is the Honour of the Crown? It is the obligation of the state to act ethically in its dealings with the people. Not just legally or legalistically. But ethically. The Honour of the Crown is the obligation of the state to act with respect to the citizen." As this relates to the First Nations, it is essential to note that their "treaties were signed not by the government but by the Crown, and therefore by the state, in the name of the people. And while our obligations [to Aboriginals] are legal, they are first of all ethical."

In short, the fiduciary aspect of *Calder* is all about the honour of the Crown.

Sioui *(SCC 1990a): Treaties Should Be Liberally Construed by the Courts*

Four Huron Indians (Conrad, Régent, Georges, and Hugues Sioui) were convicted by a lower court of cutting down trees, camping, and making fires in places not thus designated in Jacques-Cartier park, contrary to

Quebec park regulations. The respondents alleged that they were practicing certain ancestral customs and religious rites that were the subject of a treaty between the Hurons and the British, a treaty that brings s. 88 of the Indian Act into play and exempts them from compliance with the regulations. The treaty that the respondents relied on was a 1760 document signed by General Murray. This document guaranteed the Hurons, in exchange for their surrender, British protection and the free exercise of their religion, customs and trade with the English.

The Supreme Court of Canada reversed the lower court's decision, not only by recognizing the validity of the 1760 treaty but more importantly by asserting that "treaties and statutes relating to Indians should be liberally construed and uncertainties resolved in favour of the Indians." Specifically, the court introduced into Canadian jurisprudence a principle adopted from a nineteenth century ruling in the United States that such treaties "must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

Sparrow *(SCC 1990b): When is Infringement of Aboriginal Rights Acceptable?*

Ronald Edward Sparrow, a Musqueam Indian, was convicted of fishing with a longer drift net than that permitted by the band's license under British Columbia's Fisheries Act. He based his appeal on grounds that this was inconsistent with existing Aboriginal and treaty rights under section 35 of the Constitution Act, 1982. In overturning his conviction, the Supreme Court ruled that despite nearly a century of governmental regulations and restrictions on the Musqueam peoples' right to fish, their aboriginal right to fish had not been extinguished. Short of a valid reason to infringe on this right (e.g., a necessary measure of conservation), the court concluded, drawing on the words of section 35(1), that the "existing Aboriginal and treaty rights … are hereby recognized and affirmed." Moreover, the SCC noted that Aboriginal and treaty rights are capable of evolving over time and must be interpreted in a generous and liberal manner and that governments may regulate existing Aboriginal rights only for a compelling and substantial objective such as conservation and/or management of resources.

Further, along these lines, the SCC added: "Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The govern-

ment is required to bear the burden of justifying any legislation that has some negative effect on any Aboriginal right protected under s. 35(1)."

The Sparrow *Test*

As the *Sparrow* case notes, this decision has led to the "Sparrow test." The Sparrow test seeks first to define whether or not a right has been infringed upon. A government activity might infringe upon a right if it

- imposes undue hardship on the First Nation;
- is considered by the court to be unreasonable; and
- prevents the right-holder from exercising that right;

The *Sparrow* test then outlines what might justify an infringement upon an Aboriginal right. An infringement might be justified if

- the infringement serves a "valid legislative objective," (for example, the court suggested a valid legislative objective would be conservation of natural resources);
- there has been as little infringement as possible in order to effect the desired result;
- fair compensation was provided; and,
- Aboriginal groups were consulted, or, "at the least… informed."

The Supreme Court also acknowledged that other considerations may be taken into account, depending on the circumstances of the infringement.

Finally readers will note that *Sparrow* confirms and extends *Guerin* in that Canada's fiduciary responsibility for aboriginal people includes a responsibility to safeguard Aboriginal interests.

Delgamuukw[3] *(SCC 1997): Aboriginal Title/Oral History*

In 1984 the Gitxsan Nation and the Wet'suwet'en Nation launched a claim for 133 individual territories amounting to 58,000 square kilometres of northwestern British Columbia. The lower courts dismissed the claim, setting the stage for the important 1997 Supreme Court *Delgamuukw* decision.

The *Delgamuukw* case (1997) concerned the definition, the content and the extent of Aboriginal title. The Supreme Court observed that Aboriginal title constituted an ancestral right protected by section 35(1)

3 Delgamuukw is the native name for Earl Muldon of the Gitxsan First Nation.

of the Constitution Act, 1982. Aboriginal title is a right relating to land *sui generis*, held communally and distinct from other ancestral rights. Aboriginal title is, therefore, in substance, a right to territory and encompasses exclusive use and occupation. The native people concerned must tender evidence of the existence of Aboriginal title in respect of the following requirements: (i) they must have occupied the territory before the declaration of sovereignty; (ii) if present occupation is invoked as evidence of occupation before sovereignty, there must be a continuity between present occupation and occupation before the declaration of sovereignty; and (iii) at the time of the declaration of sovereignty, this occupation must have been exclusive. The SCC ruled that it is not necessary to prove a perfect continuity; the demonstration of a substantial maintenance of the bond between the people concerned and the territory is sufficient. In this respect the Supreme Court held that oral evidence could be admitted as proof.

The court also ruled that original lands could not be used in a manner that was inconsistent with Aboriginal title: If Aboriginals wished to use the lands in ways that Aboriginal title did not permit, then the lands must be surrendered. Aboriginal title cannot be transferred to anyone other than the Crown.[4]

Beyond the main thrust of the SCC ruling, what is of major importance here is that the courts must be willing to rely on oral history, including traditional stories and songs, in a way that until this point in time they have not.

Intriguingly, the Supreme Court did not render a decision with respect to the Gitxsan/Wet'suwet'en claim, but indicated that a new trial was needed in part because the original trial judge had not given enough consideration to the oral histories presented by the First Nations.

Readers will note that the Delgamuukw decision underpins the path-breaking Tsilhqot'in decision addressed later.

Haida Nation *(SCC 2004): The Duty to Consult and Accommodate*

In 1999 the British Columbia government unilaterally issued licenses to the Weyerhauser Company to harvest trees in the designated area of Haida Gwai. The Haida claimed an Aboriginal-nation right to harvest red cedar in this area and brought a suit against British Columbia re-

4 This provision was contained in the 1763 Royal Proclamation.

questing that the transfer to Weyerhauser be set aside. The Court sided with the Haida Nation and in the process elaborated on the "duty to consult" and the "honour of the Crown."

Chief Justice McLachlin, writing for a unanimous court, ruled as follows:[5]

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: [16]
>
> Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty**...**the duty's fulfillment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. [18]
>
> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. [27]
>
> Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right. [27]
>
> When precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. [35]
>
> However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate….the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated. [53]

5 Readers are encouraged to read the Chief Justice's excellent analysis of the duty to consult and accommodate since only brief snippets are reproduced above. The bracketed number at the end of the quotes indicates the paragraph number of the SCC decision.

> The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. [56]

Finally, but hardly exhaustively:

> The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument. The Province's argument rests on the *Constitution Act, 1867*, which provides that all Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada … at the Union … shall belong to the several Provinces." … The answer to this argument is that … the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that this deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). There is therefore no foundation to the Province's argument on this point. [57–59]

Sébastien Grammond (2013, 315) notes that the duty to consult and accommodate has transformed native law. In particular, "the focus of judicial inquiry has shifted away from the proof of Aboriginal rights, which is less and less contested, to the actual measures deployed by governments to consult and accommodate the native peoples" and, as a result, "Indigenous peoples are now routinely involved in the planning stage of many natural resource development projects."

But there was more to come…

Tsilhqot'in Nation *Decision (SCC 2014): A Game Changer!*

The Tsilhqot'in Nation is composed of six Indian Act bands representing roughly 3,000 status Indians. The Tsilhqot'in have used the Tsilhqot'in land for sustenance for hundreds of years, including for fishing, ceremonial events, and the gathering of roots, berries, and plants to

prepare traditional medicines essential for the maintenance of their way of life. In the early 1980s British Columbia granted forestry and cutting privileges to Carrier Lumber Company on Tsilhqot'in lands. When they were unable to revoke these permits, the Tsilhqot'in Nation issued a declaration that specifically prohibited certain resource development. The lower court found that the Tsilhqot'in held certain Aboriginal rights over the land even though they did not have Aboriginal title. The Appeal Court disagreed.

The Mandell Pinder LLP (n.d.) legal team summarized the decision succinctly:

> In a watershed decision the Supreme Court of Canada … allowed the Tsilhqot'in Nation's appeal and, *for the first time in Canadian history, granted a declaration of Aboriginal title* [emphasis added]. In doing so, the Court confirmed that the doctrine of terra nullius (that no one owned the land prior to Europeans asserting sovereignty) has never applied to Canada, affirmed the territorial nature of Aboriginal title, and rejected the legal test advanced by Canada and the provinces based on "small spots" or site-specific occupation. The SCC overturned the Court of Appeal's prior ruling that proof of Aboriginal title requires intensive use of definite tracts of land and it also granted a declaration that British Columbia breached its duty to consult the Tsilhqot'in with regard to its forestry authorizations. This case significantly alters the legal landscape in Canada relating to land and resource entitlements and their governance. … The Court reaffirmed and clarified the test that it had previously established in Delgamuukw for proof of Aboriginal title, underscoring that the three criteria of occupation: sufficiency, continuity (where present occupation is relied upon) and exclusivity were established by the evidence in this case.
>
> The implications of this Supreme Court decision are potentially enormous. As Chief Justice Beverly McLachlin noted in her ruling, "this is not merely a right of first refusal with respect to Crown land management or usage plans … rather it is a right to proactively use and manage the land." Hence those First Nations that have not ceded their territory have been massively empowered by this ruling. One should note, however, that this ruling applies only to *unceded territory*: those First Nations that have treaties are not affected by this judgment since the essence of a treaty was to cede claim to all territory except that "reserved" to them.[6] Thus the full impact

6 Obviously, they retain full control over the land associated with their reserves.

> will be felt in provinces like British Columbia and Quebec where there are few treaties. This is especially the case since the recent series of court rulings makes it much easier for First Nations to claim control over their traditional lands. Once Aboriginal title is established, the government can only go against a First Nation's wishes if it proves that it is justified to do so under the Constitution.

Arguably the most prominent of those that view *Tsilhqot'in* as ushering in a dramatic reorientation in Aboriginal-Canada relations, especially as this relates to renewable and non-renewable resource development, are Swain and Baillie (2015) and Swain (2016). Given that Aboriginal title now flows from sufficient, exclusive, and continuous occupation of land since pre-contact time, the Crown is left with a fiduciary duty and the right to encroach only if some broader public interest justifies it. Otherwise, the holders of Aboriginal title have full discretion about the use and benefits of this land: i.e., "fee simple plus" in Swain's view because it is also a collective title that can only be surrendered to the Crown, and cannot be "developed or misused in a way that would substantially deprive future generations of the benefit of the land" {SCC 2014, para. 74). Hence, governments and others seeking to use the land must obtain the consent of the Aboriginal titleholders. If consent is withheld, the government's only recourse is to justify its actions pursuant to the *Sparrow* test, which was described earlier.

In other words, there has arguably been a huge tilting of the negotiating table in favour of First Nations for resource project revenues and jobs. Ottawa now has to work toward developing a land use regime consistent with the recent Supreme Court decisions. Swain's important contribution is to emphasize that the recent Supreme Court decisions are creating a new legal/constitutional reality for Ottawa, for the provinces, and for Aboriginals that now needs equally creative institutional/governance models that can accommodate this new emerging reality.

Let me offer a different perspective on *Tsilhqot'in*. In effect, the *Tsilhqot'in* decision changes the landlord—from the province to the Indigenous nation. In other words the Indigenous nation now has title. As long as the Indigenous nation does not have self-government, it may still tend to inhibit development. As will become evident in chapters 8 and 9 however, if Indigenous nations have both self-government and a property-rights regime, they become very interested in economic development. Lacking both of these implies, among other things, that

the benefits of ownership will likely flow to the provincial government rather than to the Indigenous nation. It is hardly surprising that this might lead to an anti-development perspective. What the courts are telling Canadians is that the original transfer of landlord rights over resources to the provinces in areas that comprised the traditional territory of Indigenous peoples was wrong and it needs to be corrected.

Lest one think that the legally or constitutionally driven evolution has reached its end, welcome to another dramatic Supreme Court game changer—the *Daniels* decision.

Daniels, *(SCC 2016): Métis and Non-Status Indians; Another Game Changer*

The Congress of Aboriginal Peoples (CAP)[7] is an umbrella group that represents the Métis and non-status Indians. In 1999, the CAP and several individual Métis and non-status Indians took the federal government to federal court alleging discrimination because they are not treated as "Indians" under section 91(24) of the Constitution Act, 1867, namely "Indians and Lands reserved for Indians." It is surprising that it took so long for this lawsuit to appear since, as I have long argued[8] (and I presume others have as well), that the federal government has tended to interpret section 91(24) as "Indians *on* Lands reserved for Indians," thereby implicitly, if not explicitly, relegating responsibility for off-reserve Indians to the provinces. The Métis off-reserve and non-status Indians argued that they are entitled to some or all of the same rights and benefits as status First Nations members who live on reserves. These benefits could include access to the same health, education, and other benefits Ottawa provides to status Indians; that is, being able to hunt, trap, fish, and gather on public land, and the ability to negotiate and enter treaties with the federal government. For its part the federal government argued that there is insufficient evidence to prove that the Métis are historically considered "Indians." It also argued that the term "non-status Indian" is not a legal term and that all legal obligations of the Canadian government to Métis or other Native Canadians have been met.

In January of 2013 the Federal Court of Appeal ruled that the roughly 450,000 Métis and 215,000 non-status Indians in Canada are indeed "Indians" under the Constitution, and, therefore, fall under federal ju-

7 CAP is in the process of changing its name to the Indigenous Peoples' Assembly of Canada.

8 For example, Courchene and Powell (1992).

risdiction. The financial implications of this could be staggering since this new category of Indians would dramatically increase the number of Aboriginals covered by the current definition.

Not surprisingly, the federal government appealed this decision. Both the Métis National Council and the Congress of Aboriginal Peoples hailed the Federal Court of Appeal's 2014 decision upholding the lower court ruling that the federal government has jurisdiction (via s. 91[24]) over Métis and non-status Indians. However, in making its unanimous ruling the Court of Appeal said that non-status Indians were, unlike the Métis, not a distinct group of peoples and that their rights were already included with their existing bands.

Both sides appealed this part of the decision; Ottawa for reasons elaborated above, and the non-status and off-reserve Indians for fear that leaving their futures in the hands of their respective bands effectively erodes the larger decision that they fall under federal jurisdiction. In November, 2014 the Supreme Court accepted the application to hear these appeals.

Writing for the unanimous court, Justice Abella viewed the Supreme Court's role in this case as one of ruling on three declarations that were sought by the plaintiffs when the litigation was launched in 1999, namely:

1. that Métis and non-status Indians are "Indians" under s. 91(24);[9]
2. that the federal Crown owes a fiduciary duty to Métis and non-status Indians; and
3. that Métis and non-status Indians have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests, and needs as Aboriginal peoples.

In paragraph 50 of its decision, the SCC notes: "The first declaration should … be granted as requested. Non-status Indians and Métis are "Indians" under s. 91(24) and it is the federal government to whom they can turn." The SCC recognizes that this ruling redresses the uncertain position that the Métis and non-status Indians often found them-

9 To recall, s. 91(24) reads as follows: "… it is hereby declared that … the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated…(24) Indians, and Lands reserved for the Indians."

selves. From paragraphs 13 and 14:

> Both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. As the trial judge found, when Métis and non-status Indians have asked the federal government to assume legislative authority over them, it tended to respond that it was precluded from doing so by s. 91(24). And when Métis and non-status Indians turned to provincial governments, they were often refused on the basis that the issue was a federal one. This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences.

The SCC concludes that Métis and non-status Indians are indeed "Indians" under s. 91(24).

In an earlier SCC case, *R. v. Powley* (2003),[10] the court agreed on the following three-fold definition for the Métis, which are:

1. self-identification as Métis;
2. an ancestral connection to a historic Métis community; and
3. acceptance by the modern Métis community.

In the SCC's view the third criterion—community acceptance—raises particular concerns in the context of the *Daniels* case:

> The criteria in *Powley* were developed specifically for purposes of applying s. 35, which is about protecting historic community-held rights. That is why acceptance by the community was found to be, for purposes of who is included as Métis under s. 35, a prerequisite to holding those rights. Section 91(24) serves a very different constitutional purpose. It is about the federal government's relationship with Canada's Aboriginal peoples. This includes people who may no longer be accepted by their communities because they were separated from them as a result, for example, of government policies such as Indian Residential Schools. *There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test.*

10 The Indigenous Foundations website says, "*R. v. Powley* was the first major Aboriginal rights case concerning Métis peoples. The *Powley* decision resulted in 'the Powley Test,' which laid out a set of criteria to not only define what might constitute a Métis right, but also who is entitled to those rights. Although the *Powley* decision defined Métis rights as they relate to hunting, many legal experts and Métis leaders view the *Powley* case as potentially instrumental in the future of recognizing Métis rights."

Finally, in terms of the other two declarations to be addressed by the SCC, namely, if Métis and non-status Indians do fall under s. 91(24) then (i) does Canada have a fiduciary duty towards those people? and (ii) does Canada have a duty to negotiate with them? The court declined to rule on these, because they would merely be re-stating law that is already settled, namely that existing case law from the court establishes that *Aboriginal peoples do have a fiduciary relationship with the Crown* and that the *Crown has a duty to negotiate with Aboriginal people when their rights are affected by a Crown decision.* The SCC was also clear that its ruling does not make all provincial legislation relating to Métis and non-status Indians invalid unless it touches on the core of the federal powers. Indeed, whenever constitutionally admissible, the courts are to allow the operation of laws enacted by both levels of government.

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc. *(SCC 2017a), and* Hamlet of Clyde River v. Petroleum Geo-Services Inc. *(SCC 2017b): The Duty to Consult*

The focus of both of these SCC cases relates to the duty to consult, hence the rationale for issuing the decisions on the same day. The issue in the first case (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*) had to do with the fact that that the federal government delegated the duty to consult to the National Energy Board (NEB). On the appropriateness of this delegation the SCC reflected as follows:

> The Crown may rely on steps taken by an administrative body to fulfill its duty to consult so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances, and so long as it is made clear to the affected Indigenous group that the Crown is so relying. However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation prior to project approval. Otherwise, a regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed.

The SCC concluded in the Chippewa's case that the NEB did indeed satisfy the duty to consult (SCC 2017a):

> The NEB's statutory powers under s. 58 of the National Energy

> Board Act were capable of satisfying the Crown's constitutional obligations in this case. Furthermore, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, the NEB provided the Chippewas with an adequate opportunity to participate in the decision-making process. Second, the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, in order to mitigate potential risks, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

The issue in the second case was that the proponent (Petroleum Geo-Services Inc.) applied to the NEB to conduct offshore seismic testing for oil and gas in Nunavut. The Inuit of Clyde River opposed the testing because it could negatively affect their treaty rights, alleging that the duty to consult had not been fulfilled. The NEB granted the requested authorization. It concluded that the proponents made sufficient efforts to consult with Aboriginal groups and that Aboriginal groups had an adequate opportunity to participate in the NEB's process. The case eventually ended up in the Supreme Court where the decision was reversed because the duty to consult was deemed to be inadequate. In the SCC's words:

> While the Crown may rely on the NEB's process to fulfill its duty to consult, the consultation and accommodation efforts in this case were inadequate and fell short in several respects. First, the inquiry was misdirected. The consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right itself. No consideration was given in the NEB's environmental assessment to the source of the Inuit's treaty rights, nor to the impact of the proposed testing on those rights. Second, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct the deep consultation that was required here. Limited opportunities for participation and consultation were made available. There were no oral hearings and there was no participant funding. While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. As well, the proponents eventually responded to questions raised during the environmental assessment process in the form of a practically inaccessible document months after the questions were asked. There was no mutual understanding on the core issues—the potential impact on treaty rights, and

> possible accommodations. As well, the changes made to the project as a result of consultation were insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Therefore, the Crown breached its duty to consult in respect of the proposed testing.

There is one further issue concerning the duty to consult that was addressed in the *Chippewas* case, and one that arguably may have an influence well beyond these court cases. This is the Supreme Court's statement at paragraph 41 of the *Chippewas* case: *"the duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances.*

The SCC Decisions: Implications and Reflections

One wonders whether the architects of the Constitution Act, 1982 had any premonition of what the interaction among (i) the Royal Proclamation, (ii) sections 35(1)–35(4) of the Constitution Act, 1982, (iii) s. 25 of the Charter, and (iv) s. 91(24) of the original BNA Act would lead to in the hands of the legal system and, in particular, the Supreme Court of Canada. By any definition, the results, as they relate to Aboriginal rights and land title claims, have been truly remarkable. While these achievements are in the first instance due to the perseverance and creativity of the First Nations themselves, it is also the case that achieving these goals was aided and abetted by outside forces. For example, on the international front there is the twenty-five-year evolution in the United Nations from the 1982 Working Group on Indigenous Populations through to the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*[11].

These factors notwithstanding, the key player behind the achievement of the dramatic evolution of Aboriginal rights and title was the Supreme Court of Canada and its series of path-breaking decisions. Phrased differently, Ottawa enshrined the principles and the SCC turned these principles into rights and powers. Note that while the lower courts were clearly essential in this process, the imprimatur of the Supreme Court of Canada was required because most, if not all, of the above decisions were precedent-breaking and only the SCC can set precedent, i.e., overturn existing precedent.

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11 Some key aspects of the this United Nations Declaration (commonly referred to as UNDRIP) were reproduced as a Supplement to Chapter 5.

In terms of the potential consequences of the SCC decisions the focus will be limited to the two cases that are referred to above as game changers. Turning first to the *Daniels* decision, the numerical implications are clearly dramatic and the institutional implications are, at the very least, likely to be delicate, even disruptive. In terms of the former, from column 3 of Table 2.1 in chapter 2 the status Indian population on and off reserve in 2013 is 919,745. The population of non-status Indians from column 7 of Table 2.1 is 213,900. If one adds to this the Métis population (418,830), the sum of non-status Indians and Métis is 632,280, much larger than the on-reserve status Indians, namely 418,380. In turn sheer numbers suggest that the role and stature of the newly created IPAC, i.e., the Indigenous Peoples' Assembly of Canada (formerly the Congress of Aboriginal Peoples) will surely increase both in absolute terms and in relation to Aboriginal First Nations.

Beyond this shift in the relative positioning of these two predominant Aboriginal institutions, the major implication of the *Daniels* case may well be financial—what is Ottawa's likely fiduciary responsibility for, and to, IPAC? Currently non-status Indians and Métis are taxable as are off-reserve status Indians, whereas this is not the case for on-reserve status Indians. At the very least it will be difficult for Ottawa to continue to privilege status Indians when it comes to areas like health, education, funding, etc., if members of IPAC are ignored.

Whereas the *Daniels* decision has major implications for intra-Aboriginal relations as well as Aboriginal-Canadian government relations, the *Tsilhqot'in* ruling has the potential to reverberate throughout Canada's renewable and non-renewable surface and subsurface resource sectors. As noted above, this is especially the case where there are fewer treaties (e.g., in British Columbia, Quebec, and the Atlantic provinces) since First Nations may be able to claim surface and subsurface title and rights over their traditional territory and, therefore, able to exert more influence over resource decisions which include decisions relating to revenue allocation, including royalties.

Beyond the revenue issue, there seems to be much concern that the *Tsilhqot'in* model will slow down major resource projects. This is the theme of the paper by Swain and Baillie (2015). Perhaps it will. However, the on-going reality is that not much gets done now. Indeed, I think that a case can be made that once surface and subsurface rights are clarified, resource projects will be expedited. The oft-asserted counter to this is that Aboriginals are steadfastly against resource development. I do not believe this is the case. What is true is that under the current

regime where royalties from resource development/extraction on what Aboriginals believe are their traditional territories end up in provincial coffers and where they have little or no say in the development process, it will likely be the case that Aboriginal peoples will attempt to stall resource projects, often by playing the environmental card. However, under the Aboriginal Land Claims Agreements in Yukon, for example, where the First Nations have self-government and have embraced taxation and property rights, they are not anti-development. The underlying issue here may well be whether it was appropriate for Ottawa to allocate to the respective provinces the surface and sub-surface rights over all the territory in the province, including the traditional territory of the First peoples. This is where *Tsilhqot'in* may lead us.

The fundamental thesis of Harry Swain's 2016 paper is that the recent and ongoing pace of events is rapidly passing Ottawa by. The challenges arising from *Tsilhqot'in*, and *Daniels*, as well as the UNDRIP principle of free, prior, and informed consent are landing on governments that have little in the way of existing policies or frameworks to accommodate or incorporate them. Swain (2016) reflects (appropriately in my view) on the current situation as follows:

> There is a huge job for Parliament, hitherto ignored, in the defining details of a land use regime consistent with Supreme Court decisions, and possibly with UNDRIP. We don't have time to leave it to the courts. We are where we are because the respectful dialogue between Parliament and the Court has not taken place, with the result that the law in this area is increasingly judge-driven. We need to rebalance judicial and legislative roles in Canadian democracy in some areas if we are to maintain legitimacy. At the moment, we are distinctly not on the road to "peace, order, and good government."

At base this is a governance challenge and the remaining four chapters focus on alternative approaches to government and governance. Chapter 8 will elaborate on a range of existing self-government/land claims agreements for First Nations while chapter 9 will do the same for the Inuit. With these analytical and operational perspectives as backdrop, the final substantive chapter will then present a proposal for a First Nations political and institutional infrastructure. While the focus will be on the First Nations of Saskatchewan, the analysis is intended to be applicable elsewhere.

The role of the following chapter is to compare and contrast three alternative analytical approaches to the relationship between Indigenous

peoples and the Canadian federation: Indigenous nationals/Indigenous citizens, Canadian nationals/Canadian citizens, and Indigenous nationals/Canadian citizens. Over the period from first contact to the sesquicentennial, each has had its day in the sun, as it were, and has held sway as the dominant analytical paradigm, albeit for varying time frames. As the title of this monograph indicates, the chosen analytical framework will be Indigenous nationals/Canadian citizens. Indeed, this is the framework that characterizes the Yukon First Nations and Inuit land claims agreements that will be elaborated in chapters 8 and 9 respectively. Chapter 10 will then apply an expanded version of the Indigenous nationals/Canadian citizens model to the seventy-plus First Nations in Saskatchewan.

Part Four

Analytical Perspectives

Chapter 7

Embracing Indigenous Nationals/ Canadian Citizens

Introduction

In line with the title of this monograph, the final four substantive chapters are devoted to creating a political and institutional framework that will enable Canada's First Peoples to be at the same time Indigenous nationals and Canadian citizens. Indeed, a case will be made (in chapter 10) that the Indigenous nationals/Canadian citizens combination will have the potential to pave the way for Indigenous Canadians to make significant strides toward closing the socio-economic gap with their fellow Canadians. Arguably, the best way to understand what is implied by this terminology is to relate it to the position of Quebecers within the Canadian federation. Along the above lines, Quebecers would be Quebec nationals and Canadian citizens. My preferred way to express this is that, for Quebecers, Quebec is their nation and Canada is their state.[1] Carried over to the Six Nations individuals, for example, this would imply that Iroquois is their nation and Canada is their state.

Lest one view this characterization as self-evident, it is instructive to note that there are two competing polar alternatives that have held

1 Or in terms of the 22 November 2006 House of Commons proclamation—"this House recognizes that the Québécois form a nation within a united Canada."

sway at various times. The first of these is Canadian nationals/Canadian citizens; that is, Canadian citizenship without any remaining accoutrements of institutionalized Indigenous nationalism. As noted earlier the term for this is "enfranchisement" and it was the vision of the 1969 Trudeau-Chrétien White Paper and, more recently, to some degree, of Tom Flanagan's book, *First Nations? Second Thoughts* (2000). At the other end of the spectrum is a version of the RCAP model, namely Indigenous nationals/Indigenous citizens, namely a Crown-to-Crown relationship along the lines of the Iroquoian Two Row Wampum or what Flanagan has termed "institutionalized parallelism." Under this approach Indigenous citizens would acquire the trappings of an Indigenous nation and an Indigenous state. With this backdrop, the purpose of this chapter is to survey briefly the analytical literature as it relates to these three models.

Enfranchisement: Canadian Nationals/Canadian Citizens

The Trudeau/Chrétien and Flanagan models

As noted near the end of chapter 3, in 1969 Prime Minister Pierre Trudeau and Indian Affairs Minister Jean Chrétien unveiled a Government of Canada White Paper that proposed ending the special Crown-to-Crown relationship between Indigenous peoples and the Canadian state by dismantling the Indian Act. The federal government's intention was to achieve equality for all Canadians by eliminating *Indian* as a distinct legal status and by regarding Indigenous peoples as citizens with the same rights, opportunities, and responsibilities as other Canadians, i.e., in the vocabulary of that era the Indians would be "enfranchised." In keeping with Trudeau's vision of a "just society," the government proposed to repeal legislation that it considered discriminatory. From this perspective, the Indian Act was (and still is) discriminatory because it applied only to Indigenous peoples and not to Canadians in general. By removing the unique legal status established by the Indian Act the White Paper indicated that this would "enable the Indian people to be free—free to develop Indian cultures in an environment of legal, social and economic equality with other Canadians."

In terms of the above classification, this is a Canadian nationals/Canadian citizens model.

While Tom Flanagan, in his *First Nations? Second Thoughts* (2000) would presumably embrace the libertarian vision of the White Paper, his rationale would run, in part at least, in the other direction, name-

ly that maintaining, let alone expanding, the existing "institutionalized-parallelism model" would inevitably end up serving to further entrench the already deleterious and perverse consequences for First Nations citizens. For example, by encouraging Indians to remain on reserves (indeed, to return to reserves if RCAP held sway) that are typically too small and too isolated to have any realistic prospects for economic development, and by placing inordinate power in the hands of band councils that control land, housing, much of reserve-based employment, distribution of social assistance, schooling, etc., this would inevitably lead to a concentration of power and a threat to individual freedom and certainly would not be conducive to economic efficiency or individual economic enhancement. The on-reserve socio-economic data presented in chapter 2 provide ample support of Flanagan's views on the viability of many reserves.

While outright enfranchisement is highly unlikely to be the way of the future, especially in light of First Nations' empowerment arising from the series of path-breaking Supreme Court decisions, British Columbia's Gitxsan First Nation and its citizens have gone a considerable way along the enfranchisement route in order, intriguingly, to take more control of their individual and collective futures. Drawing from Gordon Gibson's excellent book, *A New Look at Canadian Indian Policy*, (2009, 197–8), the Gitxsan governing "principles" are as follows:[2]

1. *We come to the table as committed Canadians, paying our taxes and contributing to the country.* We seek no special status or parallel society. We wish to live as ordinary Canadians in our own way in a multicultural society. Further, we wish to pay our own way.
2. *While history has given us a special relationship with the Crown and the federal government, we wish to take our place as full citizens of British Columbia, paying for and receiving health, education and social services from the province in the same way as many others.* We believe that the federal government should transfer money formerly given to Band governments for these purposes to the provincial government upon acceptance by the province of these responsibilities.
3. *Our claim, and our only distinct claim, is to the inherited collective rights of our ancestors including those confirmed by the Supreme Court of Canada in the Delgamuukw decision (1997).* That interest entitles us to a shared decision making in the development of our ter-

2 Italics are in the original version.

ritory and a share of the wealth that it generates, as well as fair treatment by governments in all matters. *The details of this is what we wish to negotiate.*

4. The result should be far less complex than the standard Indian government model. *We have no wish to duplicate existing service organizations.* At the same time, we stand ready to perform local services for ourselves and our neighbours under contract and by agreement when that is the most logical way to proceed.
5. *We understand that this is different from the standard BC Treaty policy.* We have no views on what is right for others and wish all parties well according to their own needs. *Our approach is what is best for us and our neighbours.*

Gibson (2009, 198) then adds that anyone who has followed the progress of the standard treaty model will understand what a revolutionary approach this is. While this clearly falls into the "Canadian citizens" category (in that the Gitxsan will access public services in much the same way as other British Columbians) it does not go as far as the White Paper in that aspects of "Indigenous nationals" will still exist, e.g., the collectivity will own the Gitxsan resource base. In this sense it resembles aspects of the Yukon agreements highlighted in the following chapter.

Institutionalized Parallelism: Indigenous Nationals/Indigenous Citizens

As already noted, this is the traditional RCAP/AFN model—privileging and empowering the collective with the implication that the Indigenous institutional relationship would evolve into a third order of government with Indigenous citizens looking increasingly to their Indigenous, not Canadian, governments for the provision of socio-economic services. Obviously, the existence of a majority of Indians living off the reserve, and with better economic prospects than their on-reserve counterparts, represents an enormous challenge for this institutionalized parallelism model (see Table 2.2, chapter 2) As elaborated earlier, RCAP's solution was to ensure there would be roughly sixty reserves with sufficient land to accommodate 6,000 to 8,000 persons so that urban Indigenous people could and would move back to the reserves. Were this even possible it would seem to be a most unfortunate, indeed retrograde, recommendation—a proposal whereby urban Indians with "higher incomes, lower unemployment, superior education attainment, the highest life expectancy among Indigenous peoples and

a lesser incidence of social breakdown than in the on-reserve population" would or should under the RCAP vision move back to the reserves (Cairns 2000, 12).[3] Small wonder then that Ottawa let key aspects of the RCAP report collect dust.

To repeat, the essence of the RCAP institutionalized-parallelism model is "Indigenous nationals" and, to the extent possible, also "Indigenous citizens," not Canadian citizens. The good news is that the march of events has been such that this option is arguably no longer on the table.[4] To see this, one need only refer back to the many Calls to Action of the Truth and Reconciliation Commission's report (chapter 5). Many of these refer to all levels of Canadian society (federal/provincial/territorial and urban) and all governments and private institutions. While the issue at hand in the TRC's report is the need for reconciliation on the part of Canada and Canadians, these Calls to Action can also be viewed as a desire to ensure the First Nations people have the same opportunities and services as other Canadians. Indeed, Gibson (2009, 215) reminds us that although under the institutionalized parallelism vision it is the First Nations collective, and not the individual First Nation citizens, that should interact with Canada, this vision conveniently ignores the reality that under the numbered treaties there were annual payments from the Crown made directly to individual Indians and not indirectly through their respective chiefs.

Nonetheless, to see that aspects of the nation-to-nation vision is still alive at the highest level of First Nations governance, one needs only to recall the initial message of Perry Bellegarde, the grand chief of the Assembly of First Nations, during the 2015 election campaign. Presumably under pressure from First Nations peoples and organizations to take leadership in encouraging involvement in the electoral process in order to ensure that Indian concerns (murdered and missing Indigenous women, omnibus bills, environmental issues, etc.) would become part of the electoral campaign, Grand Chief Bellegarde did encourage participation in the electoral process. However, he then noted that he has never voted in a federal election and he might not vote this time around either. This is an example of institutionalized parallelism—Indigenous nationals/Indigenous citizens. Intriguingly, however, his comments triggered a major pushback from Indigenous voters, so much so that the grand chief, appearing later on TVO's *The Agenda*,

3 Largely documented in chapter 2.

4 Except, perhaps, for the Two Row Wampum vision of the Haudenosaunee.

assured his followers that he would be voting and he encouraged them to do the same. One presumes that this about-face reflected the reality that fifty Indigenous candidates, a record number, ran in the 2015 election and that, prior to the vote, an estimated fifty-one ridings could be determined by the Indigenous vote (*National Post* 2015).

Having now focused on the two polar-opposite visions of the Indigenous reality within Canada—Canadian nationals/Canadian citizens (e.g., Flanagan and the White Paper) and Indigenous nationals/Indigenous citizens (e.g., institutionalized parallelism and to a large degree RCAP), the analysis now turns to the institutional vision embodied in the title of this book, *Indigenous Nationals/Canadian Citizens*.

Indigenous Nationals/Canadian Citizens

The Indigenous nationals/Canadian citizens model should be familiar to Canadians since, as already noted, it is not all that different from the Quebec-Canada relationship. In my appearance as an expert witness before Quebec's post-Meech-Lake Belanger-Campeau Commission on the Political and Constitutional Future of Quebec, I asserted (and continue to believe) that, for Quebecers, Quebec will always be their nation while Canada will always be their state, i.e., Quebecers are Quebec nationals and Canadian citizens. For the rest of us, Canada will always be both our nation and our state (Bélanger-Campeau Commission 1991). Carried over to the issue at hand, the underlying vision in this monograph is that it is the birthright of a Cree, Blackfoot, Algonquin … to be an Indigenous national as well as a citizen of the Canadian state.

Intriguingly, Tom Flanagan's follow-up book *Beyond the Indian Act; Restoring Indigenous Property Rights,* co-authored with Christopher Alcantara and André Le Dressay (2011), recognizes that since reserves are unlikely to disappear, the fallback position is to ensure that they become more open to political and economic freedom.[5] And as the book's title indicates, the key requisite is to establish political and economic property rights. Leading the way here is Manny Jules, the former chief of the Kamloops Indian Band, the current chief (and founder) of the First Nations Tax Commission (henceforth FNTC) and a tireless advocate of establishing property rights on reserves. Appropriately, Manny was invited to write a "personal foreward" to *Beyond the Indian Act; Restoring Indigenous Property Rights* (Flanagan et al., 2011, viii–xiii), aspects

5 This describes the above Gitxsan model.

of which follow:

> I helped with the first Indian-led amendment to the Indian Act in Canada's history to give us authority over property taxes. In 1990 and again in 1995, we created provincial legislation in BC and Quebec to allow a seamless transition to our tax authority in those provinces. In 1998, with the backing of my community we implemented authority over the GST on our lands for fuel, alcohol and tobacco. We helped to expand this authority to all GST-eligible products and services in 2003. In 2005 I helped lead the First Nations Fiscal and Statistical Management Act, which created four national institutions to help our governments implement their powers in a manner that created a positive environment for markets.
>
> For me, the First Nations Property Ownership Act discussed in this book (i.e., Flanagan et al., 2011) is the next step. To fully realize the full value of our land we need a secure property-rights system. To restore our property rights we need first to protect our underlying or collective title. The little bit of land that we have can never be lost. The reversion and expropriation rights must always be held by us. Once our collective title is secure, we can issue the type of individual title that we choose. Some of us may choose fee simple and others may choose to implement leasehold. This title must be registered in a Torrens title system—the best system in the world.[6]

To be sure, a system of effective property rights is an essential requisite for successful Indigenous self government as will be clear from First Nations land-claims and self-government agreements in chapter 8. However, it is also necessary to marry Indigenous nationalism with Canadian citizenship. Among the analyses that embrace this Indigenous-nationals/Canadian-citizens model are those advanced in or by the Hawthorn report (Hawthorn 1966, 1967), the Alberta First Nations Red Paper (Indian Chiefs of Alberta 1970) and the writings of Alan Cairns and Gordon Gibson. These will be dealt with in turn. Prior to doing so, it is important to note that there is a substantial literature relevant to First Nations integration issues by Canada's world-class philosophers Charles Taylor (1993) and Will Kymlicka (1995). While selected implications arising from these authors' writings are addressed in some detail in the analyses by Cairns and Gibson, they are in the main left to the reader to pursue.

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6 Not surprisingly the book by Flanagan et al. makes a strong case for fee simple on-reserve property ownership to replace the Indian-Act model of inflexible control.

Hawthorn, Cairns and the Red Paper

From Cairns (2000, 97):

> … [W]e need a vocabulary and a constitutional theory that reduces the distance between Aboriginal nationhood and Canadian citizenship. The "nation" label and identity for Aboriginal people will not disappear in any future we need concern ourselves with. "Nation," however, is not enough. It needs to be blended and supplemented with the concept and identity of being a Canadian citizen.

Whereas Cairns's linkage is (in our terminology) Indigenous nation/Canadian citizenship, our chosen version also tilts the perspective toward the individual and away from the collective, namely Indigenous nationals/Canadian citizens. As will be elaborated below, this difference arises because we are following Gibson's view that the way forward here is to "respect the collective—promote the individual," on which more later.

The Hawthorn report concluded that Indigenous peoples were Canada's most disadvantaged and marginalized population. They were "citizens minus."[7] Hawthorn attributed this situation to years of failed government policy, particularly the residential school system, which left students unprepared for participation in the contemporary economy. Hawthorn recommended that Indigenous peoples be considered "citizens plus" and be provided with the opportunities and resources to choose their own lifestyles.

Citizens Plus (Indian Chiefs of Alberta 1970),[8] popularly referred to as the "Red Paper," was the Alberta Indian chiefs' response to the 1969 federal White Paper (discussed in chapter 3). Cairns (2000, 163) comments on, and quotes from, the Red Paper as follows:

> From the vantage point of the 1990s, the relative moderation of the Alberta presentation strikes the reader. The language of nationalism is weak. The Indian Chiefs of Alberta supported the Hawthorn recommendation that the Indian Affairs Branch had a continuing role to play as a national conscience on behalf of the Indian people. They advocated bringing "not just individual residents, but

7 In an intriguing sense the Trudeau/Chrétien White Paper can be viewed as a response to Hawthorn's reference to citizens minus since the White Paper would have treated all Canadians equally.

8 Prominent in terms of orchestrating the Red Paper, and the campaign against the White Paper, was Harold Cardinal, Chief of the Indian Association of Alberta.

> the entire community, into the mainstream of Canadian life." The "rightful place" for Indians of the future was to be "full-fledged participants in the mosaic of [Trudeau's] "Just Society"… meaningful and contributing citizens of Canada."[9]

In roughly the same time frame the Manitoba Indian Brotherthood also embraced the Indigenous-nationals/Canadian-citizens vision in *Wahbung: Our Tomorrows* (Courchene, D. 1971b), but then noted that First Nations also possess special rights (i.e., they are "citizens plus"). Yet again it is convenient to draw upon Alan Cairns's perspectives on *Wahbung*:[10]

> *Wahbung: Our Tomorrows* … commenced with a reminder that Indian rights come from "our sovereignty as a nation of people." However, *Wahbung* went on to define a complementary dual identity as Indians and Canadians, referred to the contribution of "Canadian Indian culture" to the Canadian mosaic in Manitoba, described Indians as "registered Indian Canadians," referred positively to their status as citizens of Canada and insisted on their status as "full provincial citizens" of Manitoba, a status entirely compatible with a unique relationship with the federal government.

One can presume that the First Nations pushback to the White Paper was part of the swift conversion of Trudeau and Chrétien; that is, from the enfranchisement of Indigenous Canadians in the White Paper to the enshrinement of the Indigenous reality in the Canadian Charter of Rights and Freedoms, as detailed in chapter 4.

Gibson: Respect the Collective—Promote the Individual

This is the subtitle of Gordon Gibson's 2009 Fraser Institute monograph—*A New Look at Canadian Indian Policy*. As I interpret Gibson, in an unconstrained environment he would consider abandoning institutionalized parallelism and generously integrating Indigenousness into Canadian society. However, he recognizes that this is no longer possible given the Supreme Court's Charter-driven rulings that dramatically advanced Indigenous rights and Indigenous title. Hence his approach is to respect the collective but to promote the individual. Some of this drives from the poverty and lack of opportunity that exists on reserves,

9 Internal quotes are from the Red Paper.

10 Cairns (2000, 164). Internal footnotes are omitted.

especially on the many small reserves. One further introductory comment relating to the need to promote the individual (and one that I have stressed on several occasions) merits quotation (Gibson 2009, 187–8):

> An Indian arriving in Regina from a remote reserve in northern Saskatchewan faces as many or more problems of adaptation as a Bengali arriving from Bangladesh. Yet the latter person will find available a wide range of "settlement" services—education, housing assistance in finding a job, and so on. The Indian, being just a Canadian, arrives and makes do … The key commitment in this area needs to be made by the federal government. The provinces have the established programs in all of these areas but they do not have the money. They all take the position that Indians, wherever situated, are Ottawa's problem. In return, Ottawa takes the position (with some exceptions) that once an Indian is off the Reserve, things are up to the provinces.[11] The only way to break this impasse is for the federal government to step up with the money: … [the federal government] does not have the programmatic expertise (nor do band governments) but the provinces do and will accept the responsibility if adequate cash is available.

In terms of promoting the individual Gibson asserts that the responsibility of mainstream society is conceptually very simple:

- underwrite a minimum social envelope;
- remove barriers to equality of opportunity; and
- actively foster equality of opportunity. (Gibson 2009, 207)

In this context he repeats that the real need is for provincial programs enhanced with federal money that are as generous to Indians as they would be to, say, an immigrant from Asia (ibid., 219). He recognizes that the more traditional chiefs feel very strongly that their ties are with the Queen and the federal government, but he reminds them that it is a constitutional reality that the Crown also acts through the provinces.

Conclusion

The purpose of this chapter was to elaborate on three alternative approaches to the relationship between Indigenous nations and the Ca-

11 This harkens back to my earlier observation that Ottawa interprets Section 91(24) of the Constitution as "Indians **on** Lands Reserved for the Indians" whereas the reality is that the wording is "Indians **and** Lands reserved for the Indians."

nadian state. The analysis favoured Indigenous nationals/Canadian citizens over the other two extremes—Indigenous nationals/Indigenous citizens and Canadian nationals/Canadian citizens. By way of providing a broader rationale for favouring this model, it is instructive to draw from a discussion paper prepared for Indian and Northern Affairs Canada by the Ginger Group Consultants (1995). Their analysis distinguishes between community-based benefits and individual-based benefits. Community-based benefits relate to identity, culture, language, values, goals, etc. The discussion paper notes that "the First Nations' right to design and administer the services/programs that deliver community-based services should be seen as flowing directly from the "inherent right to self government." This is the Indigenous nationals component of Indigenous nationals/Canadian citizens. On the other hand the primary goal of programs to produce individual-based benefits is to accommodate needs and to promote equality. Given that these are fundamental goals of the Canadian state, the discussion paper asserts that the First Nations' "rights to such individual benefits … should be seen as flowing though Canadian citizenship." This is the Canadian citizens component of Indigenous nationals/Canadian citizens.

Attention is now directed to a range of impressive recent Land Claims Agreements ("modern treaties") for First Nations (chapter 8) and the Inuit (chapter 9) that each in their own way implement the Indigenous nationals/Canadian citizens model.

Part Five

Voyages of Recovery

Chapter 8

First Nations Land Claims Agreements

Introduction

Having focused in the previous chapter on alternative analytical visions of the relationship of Aboriginal peoples to the Canadian federation, the role of this chapter is to elaborate on some of the recent and very creative "modern treaties" for First Nations. The modern treaties are typically a combination of self-government regimes and land claims agreements. Moreover, each of these modern treaties has some unique features, attesting to both the specific needs of the different First Nations communities on the one hand, and the flexibility on the part of Canada to accommodate varying governance regimes on the other. However, prior to addressing the rich variety of modern self-government arrangements, attention needs to be directed to the long-standing and dirigiste governance regime that regulates/controls almost all First Nations—the Indian Act.

Indian Act Governance

Most fortunately, Professor Shin Imai of Osgoode Law School has written an excellent research paper on selected aspects of Indian Act governance for the National Centre for First Nations Governance. More fortunate still, he has granted permission for this paper to be reproduced as a supplement to this chapter.

Professor Imai's conclusion is at the same time intriguing and important:

> … there [is] validity to two contradictory claims about the *Indian Act*. First the *Indian Act* did not give Chiefs and Councils enough power. Second, the *Indian Act* gave Chiefs and Councils too much power. We have seen through a discussion of the structure of the *Indian Act* that the problem is that the Minister of Indian Affairs had too much power to override decisions of Chief and Council and that the *Indian Act* did not require Chief and Councils to be accountable to the community. (Imai 2007)

By way of illustrating the overreach of the power of the minister of Indian Affairs under the Indian Act, Professor Imai notes:

> In order to "assimilate" Indians, the *Indian Act* gave the government the power to override traditional methods of governance. In the case of Six Nations in Ontario, for example, the government used its power to overthrow the traditional Haudenosaunee Council in 1924 and replace it with a Chief and Council elected under the *Indian Act*. This was against the wishes of the majority of the members of Six Nations. Even, today, the vast majority of the residents of Six Nations refuse to participate in *Indian Act* elections. Until the mid 1990s almost all the Bands in Canada had *Indian Act* elections. (ibid.)

By and large, Professor Imai's assessment of the Indian Act still holds today for the majority of First Nations. However, and as already noted, what has changed is the advent of some very creative self-government agreements, beginning with the James Bay and Northern Quebec Agreement (JBNQA). By way of a final introductory comment on the Indian Act, the time has surely come for Canada to allow the Iroquois nations to re-establish Longhouse governance—the longest-surviving and highly-celebrated federal governance regime in the upper half of North America.

The James Bay and Northern Quebec Agreement[1]

In the 1960s the Quebec government began developing the hydro-

1 Even though this chapter is intended to focus on First Nations agreements, the JBNQA is a hybrid agreement in that it also encompasses the Quebec Inuit, namely the territory of Nunavik. The discussion of the Quebec Inuit will be divided between this chapter and the following one.

electric potential of the province and in 1971 it created the James Bay Development Corporation that, without consulting the native people, ushered in the James Bay Hydroelectric Project. The Quebec Association of Indians opposed the project, and in 1973 won an injunction in the Quebec Superior Court blocking the James Bay development until the province negotiated an agreement with them. Over the course of the following year, the government of Quebec negotiated the required accord. On 15 November 1974—exactly a year after the Superior Court decision—an *agreement-in-principle* was signed among Canada, Quebec, Hydro-Québec, the Grand Council of the Crees (headed by Billy Diamond), and the Northern Quebec Inuit Association. The final accord—the James Bay And Northern Quebec Agreement (La Convention de la Baie James et du Nord québécois)—was signed on 11 November 1975. This agreement originally only covered claims made by Quebec Cree Indians and Inuit. However, in January of 1978, the Naskapi Indians of Quebec signed a parallel agreement—the Northeastern Quebec Agreement—and joined the institutions established under the 1975 accord.

The traditional lands of the signatories are divided in three categories:

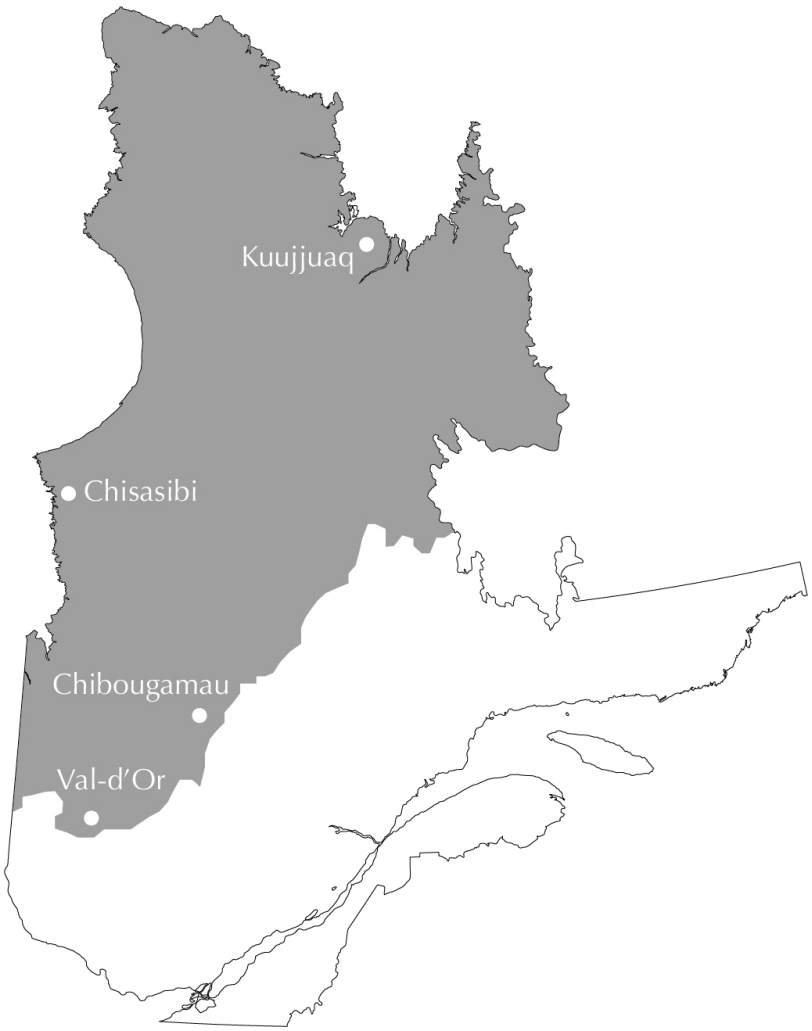
> **Category I**: Lands reserved exclusively for the use of Aboriginal Quebecers (roughly 14,000 km^2).
>
> **Category II**: Lands owned by the Crown-in-right-of-Quebec, but in which hunting, fishing, and trapping rights are reserved for natives and over which the development authority overseeing forestry, mining, and tourism is shared (500,000 km^2).
>
> **Category III**: Lands in which some specific hunting and harvesting rights are reserved for natives, but all other rights are shared subject to a joint regulatory scheme (900,000 km^2).

In return, the governments of Quebec and Canada as well as Hydro-Québec agreed to provide northern Quebec Aboriginals with $225 million to be used for native economic development through three native-owned development corporations: the Cree Board of Compensation, the Makivik Corporation, and the Naskapi Development Corporation.

Makivik Corporation, the legal representative of Quebec's Inuit people, was established in 1978 under the terms of JBNQA. Its principal responsibility is the administration of Inuit lands and the oversight of $120 million, which was its share of the compensation funds under the terms of the JBNQA. (As already noted, the more recent Nunavik In-

Figure 8.1

James Bay and Northern Quebec Agreement



Artwork: Mark Howes

Note: The upper half (roughly) of the area of the James Bay and Northern Quebec Agreeement became Nunavik as will be detailed in Chapter 9.

uit Land Claims Agreement came into effect in 2008.) Makivik had a mandate to use these funds to promote the economic and social development of Inuit society in Nunavik, (i.e., the Quebec-based Inuit population). Among Makivik's subsidiaries are Air Inuit (serving Nunavik) and First Air (serving the Arctic) as well as several joint ventures in shipping, fishing, and in logistics.

On the First Nations (Cree) side of JBNQA, La Paix des Braves (The Peace of the Braves), was signed in 2002 between the Quebec government, the Government of Canada and the Grand Council of the Cree. Following upon the recommendation of the Royal Commission on Aboriginal Peoples, and after decades of court battles, La Paix des Braves provided for the sharing of revenues and joint management by the Cree and the government of Quebec of the mining, forestry, and hydroelectric resources on traditional Cree lands. In return, the Cree consented to hydroelectric development by Hydro-Québec on the Eastmain and Rupert Rivers. Among the James Bay Cree holdings is Air Creebec with over 360 employees. Its takeover of Austin Airways was the largest commercial transaction to date ever completed by Canadian-based Aboriginals.

On the governance front, the Inuit/Cree gained control over local and regional governments, the creation of their own health and school boards, measures for economic and community development, special regimes for police and justice, and environmental protection. Although signed in 1978, the JBNQA is now constitutionally protected thanks to Section 35 of the Constitution Act, 1982.

Yukon First Nations (YFN) Agreements[2]

A Personal Aside

By way of a personal preamble to the YFN agreements, I published a *Globe and Mail* op-ed article—"How About Giving the Natives a Province of Their Own?" (Courchene 1990)—followed in 1992 by *A First Nations Province* (co-authored with Lisa Powell). As these titles indicate, the goal was to conceptualize a single, non-contiguous, First Nations province (FNP) comprising the 600-plus reserves across our

2 Doug McArthur's "The Changing Architecture of Governance in Yukon and the Northwest Territories" (McArthur 2009) presents an excellent analytical-cum-historical evolution of modern First Nations treaties in the north. McArthur was the chief land claims negotiator for the Yukon government in the Yukon First Nations agreements.

land. Readers familiar with federalism can readily fill in the relevant details—provincial powers for expenditures and revenues, an overarching FNP government perhaps with a second chamber composed of elders, election of MPs to the House of Commons in accordance with FNP's population (roughly 800,000 at that time), assignment of Senate seats, and so on. At the operational level the oversight/regulatory function of the Indian Act would devolve to the FNP along with the existing annual funding for First Nations. In effect, the FNP would constitute a third order of government (or, as the First Nations would prefer, one of the three orders of government) within the Canadian federation. And because the ultimate authority in Indian country rests with the chiefs, (i.e., with individual First Nations), a FNP would be a confederal government within federal Canada.

On the financial side I suggested that Ottawa should treat the FNP in a manner similar to the approach for the three territories. First, Ottawa would calculate a gross expenditure base (GEB) defined as the amount of funding needed to ensure that the FNP would have resources sufficient to provide public goods and services comparable to those available to other Canadians. Then, from this GEB total would be subtracted (i) any funds that the FNP received from elsewhere, (e.g., including other federal financial transfers), and (ii) any FNP own-source revenues. The difference would constitute the financial transfer from Ottawa to the FNP.

One delicate issue associated with the funding of First Nations was the immunity from federal taxation on reserves (section 87 of the Indian Act). In this context, the federal proposal by then federal Finance Minister Don Mazankowski merits attention. Speaking in 1991 on the topic of the section 87 tax exemption at a Whistler, BC conference on "Indian Government and Tax," Finance Minister Mazankowski (1991) noted:

> Up until now, the legislative regime has recognized only one type of tax power for Indian governments—municipal-like property taxes. But the status quo is unacceptable. For strong self-government to be a reality, Indian governments must have a wide range of tax powers—not just the authority to levy property taxes.

Toward this end, the finance minister offered to administer/collect taxes on Indian territory and, as I interpret the offer, to return *all* tax revenues thus derived to the First Nations, not just the provincial share as is the case with the provinces. In this sense, no non-Indian government would be accessing taxes on First Nations reserves. However, if

the resulting revenues were then to be become an offset to the funding otherwise provided (as was the case with the financing of the three territories) then this would constitute an indirect way of Ottawa levying taxes on First Nations. However, as will be evident in the detailed workings of the Yukon Indians agreements (outlined below), if the offset is less than 100 percent there would still be a financial incentive for the First Nations to levy taxes.

It is fair to assume that in the 1990–92 time frame, my FNP proposal was greeted more with passing interest than as a realistic blueprint for the future, Nonetheless, I was invited as an expert witness to present the FNP proposal before the recently created Royal Commission on Aboriginal Peoples. While I was unable to discern the overall response of the commissioners to my presentation, one of the commissioners noted that, to the extent that the FNP was a relevant model, there would have to be more than one of them across the land, perhaps along linguistic lines. This led me to think in terms of more than one FNP (or at least to confine the FNP to a more homogeneous area), an approach that will characterize the FNP proposal developed in chapter 10.

More importantly, and unbeknownst to me until *A First Nations Province* was in its final editing stages, the Council of Yukon Indians (now the Council of Yukon First Nations) was considerably advanced in negotiating (with Ottawa and Yukon) an Umbrella Framework Agreement pursuant to a land claims settlement for all fourteen Yukon First Nations as well as self-government agreements for four of the fourteen Yukon First Nations (YFNs). It was my great good fortune to be invited to serve as the fiscal adviser for these four initial self-government agreements.

Prior to highlighting the YFN agreements, one issue merits highlight. *A First Nations Province* was essentially a territorial model, indeed a reserve-based model. Phrased differently, it neglected off-reserve First Nations citizens. While the YFN models are also land based, the Yukon First Nations have some extraterritorial powers beyond their own lands but still in Yukon. *It is this citizen-based approach that makes the Yukon Indians agreements so important conceptually and operationally.* Indeed, this twinning of components of a territorial-based governance model with components of a citizen-based governance model will be a key feature of the model developed in the final substantive chapter of this monograph.

The YFN Umbrella Final Agreement (UFA)

The Umbrella Final Agreement was signed by all three parties (Ottawa, Yukon and each of the First Nations) in 1993. This is the overview framework document facilitating the creation of Yukon First Nations self-government agreements that twelve of the fourteen Yukon First Nations have now signed. The accompanying map (Figure 8.2) shows the fourteen Yukon First Nations. These First Nations are, in alphabetical order: Carcross/Tagish, Champagne Aishihik, Kluane, Kwanlin Dun, Liard, Little Salmon/Carmacks, Nacho Nyak Dun, Ross River, Selkirk, Ta'an Kwach'an, Teslin Tlingit, Tr'ondek Hwech'in, Vuntut Gwitchin, and White River. The First Nations that have remained outside the Agreement are Ross River and White River, perhaps because their nations include members living beyond Yukon borders.

The areas falling under the UFA are rather predictable—citizenship and enrollment, land allocation, financial compensation, own-source powers, as well as shared powers with Yukon with respect to surface rights, water management, renewable and non-renewable resources, taxation, fish and wildlife, and so on. In effect the UFA provides the blueprint for integrating the Yukon First Nations government into the existing framework of federal-provincial-territorial intergovernmental relations.

Prior to addressing the details of the Yukon First Nations self-government, two finance-related issues merit further attention. The first is the financial compensation package in the order of $250 million that, in return, requires the YFN to renounce all future claims against the federal government. The second relates to taxation immunity. Because the Yukon Indian lands include areas that do not qualify as reserves, which would exempt them from taxation under the Indian Act, and because YFN citizenship was not based solely on qualifying as a registered Indian, the Yukon First Nations were concerned that some of their citizens would be tax exempt, while others would not. In large measure in order to avoid the creation of two categories of citizens, the Yukon First Nations accepted an offer of $25 million from the federal government to buy out their right under the Indian Act to be federal-income-tax exempt on their settlement lands. These funds were in addition to the above-referenced financial compensation.

Figure 8.2

Yukon Traditional Territories

Source: http://www.env.gov.yk.ca/publications-maps/geomatics/data/images/tradterr.jpg

The Yukon Self Government Agreements

(i) Principles

In accordance with section 24 of the UFA, each Yukon First Nation would enter into a self-government agreement with Ottawa and the Yukon government. Among the principles embodied in these agreements are the following:

- the First Nations have traditional decision-making structures and will maintain these traditional structures, which will be integrated with contemporary forms of government;
- the parties are committed to promoting opportunities for the well-being of citizens equal to those of other Canadians, and to providing essential public services of reasonable quality to all citizens;
- the parties recognize and wish to protect a way of life that is based on an economic and spiritual relationship between the First Nations people and the land; and
- the parties wish to protect the cultural, political, and economic distinctiveness and social well-being of First Nations people.

By way of an aside, one wonders how Quebecers would have viewed these principles that effectively recognized the Yukon First Nations as "distinct societies" given that in roughly the same time frame the Quebec-as-a-distinct-society Meech Lake Accord went down to defeat.

(ii) Territorial and personal jurisdiction

As will become clear, one of the most creative and significant features of the YFN self-government agreements was the provision that allowed the First Nations to exercise some jurisdiction over citizens living off the settlement lands but still residing in Yukon. Arguably, this became possible in large measure because Tony Penikett, the then premier of Yukon, was a key driver of YFN self-government. In an insightful paper on First Nation self-government, and the YFN agreements in particular, authors Peter Hogg and Mary Ellen Turpel (1995) elaborate on what they refer to as "territorial jurisdiction powers" and "personal jurisdiction powers." Territorial powers "would be confined to the First Nation's land. The powers would not extend to Aboriginal people off First Nation land. However, the powers would apply to both non-Aboriginal and Aboriginal people on First Nation land." (p. 198).

The rationale for personal jurisdiction powers is that a First Nation may wish to provide a range of social services to its citizens, including those who are living off First Nation land. These personal jurisdiction powers would follow citizens wherever they go: personal jurisdiction will mean that Aboriginal citizens will "take the law with them" when they leave Aboriginal territories" (p. 199), but only within Yukon.

The concept of personal jurisdiction will be one of the centrepieces of the model developed in chapter 10. This follows the assumption made by Hogg and Turpel (ibid., 199):

> Other First Nations will require legislative powers that extend to their citizens regardless of residence. In the Yukon example … personal jurisdiction was confined to the boundaries of the Yukon, and for other First Nations this personal jurisdiction may also be confined to a province or territory, or it may apply throughout Canada.

A final comment, again from Hogg and Turpel (1995, 199–200) merits highlight:

> [Personal jurisdiction] is not a new concept as it is already a part of Canadian law in family law. We have a developed body of principles on conflicts of law to govern these situations. As well, agreements that now exist between provinces and foreign jurisdictions respecting the enforcement of maintenance and custody orders provide examples of the coordination of different legal regimes in the interests of effective governance. Similar devices will be available to Aboriginal governments. Moreover, in the Aboriginal context, we are already familiar with the notion of portability of rights, such as treaty rights to education, off a territorial base. Personal jurisdiction builds on these pre-existing concepts to ensure that Aboriginal governments will have effective governing powers to enable them to accomplish governmental policy objectives like cultural protection in the context of child welfare.

(iii) Yukon First Nations territorial jurisdiction powers

The YFN legislative powers on settlement land as outlined in the self-government agreements run to fourteen pages so that a brief summary must suffice. The efficient way to proceed is to note that the First Nations can exercise essentially the full complement of provincial and municipal powers on their territory, e.g., use, management, administration and control of settlement land, and of natural resources under their ownership, control, or jurisdiction of the YFN; administration of justice;

licensing and regulation of any business, trade, profession; control or prevention of pollution and protection of the environment, control of firearms, and many other powers including "matters coming under the good government of Citizens on Settlement Land."

In short, the Yukon First Nations essentially have the full range of provincial-cum-municipal regulatory powers.

Section 13.5.1 asserts that unless otherwise provided in the Agreement, all federal laws of general application shall continue to apply to the First Nations, to their citizens and to their settlement lands, with the proviso that, to the extent of any inconsistency or conflict, negotiations will take place between Canada and the First Nation to identify which, if any, First Nation laws might prevail over federal laws of general application.

On the taxation front, the First Nations also have provincial powers (income taxes and, more generally, direct taxes) as well as municipal taxes (property taxes and the full array of municipal levies). If the First Nation takes over areas formerly occupied by the Yukon government (e.g., property taxes, provision of public services) this must be coordinated with the Yukon government. First Nations Settlement Corporations (the equivalent of provincial Crown corporations) will not be subject to federal income taxation. This is a variant of section 125 of the Constitution Act 1867 (that essentially states that the federal Crown cannot tax the provincial Crown and vice versa) carried over to the First Nations level of government.

(iv) Yukon First Nations personal jurisdiction powers

Section 13.2 of the generic self-government agreement reads "The … First Nation shall have the power to enact laws in relation to the following matters in the Yukon: provision of programs and services for citizens in relation to their spiritual and cultural beliefs and practices and in relation to aboriginal languages." This power also applies to health, social, and welfare services with the proviso that the First Nation cannot license or regulate facility-based services off settlement land. Among the other areas coming under personal jurisdiction are adoption, custody, education programs, inheritance and wills, dispute resolution, solemnization of marriage of citizens among other activities.

In the model outlined in chapter 10, a similar personal jurisdiction provision for selected social and cultural services will prove to be a key instrument for bridging on-reserve and off-reserve Aboriginals under a single umbrella.

(v) Taxation

From the self-government agreement:

> 14.1 The "X" First Nation shall have the power to enact laws in relation to:
>
> 14.1.1: Taxation, for local purposes, of interests in Settlement Land and of occupants and tenants of Settlement Land in respect of their interests in those lands, including assessment, collection and enforcement procedures and appeals relating thereto;
>
> 14.1.2: Other modes of direct taxation of Citizens … within Settlement Land to raise revenue for "X" First Nation's purposes.

In effect, the individual YFNs will have a combination of provincial and municipal taxing powers. Indeed, and as already noted, were the First Nation to establish the equivalent of Crown corporations, these would not be subject to taxation by other levels of government, again along the provincial model.

(vi) Formula financing

The formula financing for the YFNs essentially follows the approach for the three Territories. Ottawa calculates a gross expenditure base (GEB) that is intended to provide a level of financing intended to allow the YFN to provide public goods and services to its citizens that are reasonably comparable to those available to other Canadians. In principle, the GEB would take account of the First Nations reality, e.g., fewer elderly but many more children, isolation, high food prices, etc. The resulting GEB will be adjusted annually to account for increases in the cost of living and in population growth.

From this GEB total, deductions will be made for other sources of income the YFN receives (e.g., federal social policy transfers) and own-source revenues. In order to encourage the YFN to levy taxes on its citizens, Ottawa will (after allowing for collection costs) reduce the financial transfer by 70 percent, not 100 percent, of the tax revenues collected by the YFN. To further encourage the YFNs to engage in taxation, there would be an implementation "grace period" where YFN tax revenues would not decrease the GEB.

The Umbrella Final Agreement and the individual self-government agreements need to be ratified (via a secret ballot) by each Yukon First Nation.

(vii) Conclusion

The Yukon First Nations agreements are not only path-breaking but have the obvious potential for replication elsewhere in Canada, as the final substantive chapter of this monograph will attest. Nonetheless there are some concerns associated with the YFN agreements. The most obvious of these is the economic inefficiency inherent in creating fourteen self-governing entities for an overall First Nations population in Yukon of approximately 7,000 citizens, a substantial proportion of whom reside in Whitehorse. To be sure, the presence of the then Council of Yukon Indians (now the Council of Yukon First Nations) as an overarching body allows for some of the YFN's powers and/or responsibilities to be rationalized by passing them upward. Presumably, some of these potential economies of scale have been realized. But it is likely that much more centralization should occur at the administrative level than has been achieved to date, especially in order to achieve scale economies in programs and in interacting with the many federal and provincial departments that the YFN deals with.

If there is a serious concern with the agreements from the First Nations' vantage point it relates to implementation. Specifically, AANDC (now INAC) as the administrator of the agreements leaves much to be desired. INAC has its own departmental interests to pursue in overseeing the Yukon Agreements. More to the point, INAC is only one component of the federal Crown. One presumes that the Yukon First Nations would much prefer that implementation of these agreements would come under the purview of a broader definition of the federal Crown. And in this they surely would be correct. At base, this is an honour of the Crown issue.

A further overview observation that merits comment is that Yukon was an ideal environment for implementing these land claims and self-government agreements. South of 60 degrees, the provinces would obviously be loath to transfer lands to First Nations. However, In the Yukon context, Ottawa has control over the lands so that the transfer of additional settlement lands to the First Nations under the Umbrella Final Agreement is much easier, especially since in the event of Yukon ever achieving provincial status, Ottawa would have to transfer its lands in Yukon to the new province.

Speaking at a June 2017 Queens' Institute of Intergovernmental Relations conference, Tony Penikett (2017) reflected on the YFN agreements

as follows:[3]

> While some Indian Act bands in the Far North remain impoverished, the lives of Yukon First Nation communities with self-government agreements have markedly improved in the twenty-some years since the parties achieved their agreements. Villages with self-government agreements now enjoy quasi-provincial powers and the economic benefits of those powers plus federal investment. Yet, important aspects of those agreements are not well understood and have not been replicated in BC. All provinces, BC included, naturally fear a loss of control but, of necessity, in some measure that's what a mature relationship with Aboriginal peoples requires.

Finally, it should be eminently clear that the YFN self-government agreements fall well within the Indigenous nationals/Canadian citizens model.

The Nisga'a Agreement

By way of an entrée to the Nisga'a treaty it is appropriate to draw upon Tony Penikett's *Reconciliation: First Nations Treaty Making in British Columbia* (2006, 185) where he notes that while the Yukon First Nations became the first to negotiate "third order" self-government agreements, the self-government provisions of the Nisga'a Treaty were the first to receive constitutional protection. In more detail, the 1999 Nisga'a Final Agreement, commonly referred to as the Nisga'a Treaty, is an agreement between the Nisga'a and the governments of Canada and British Columbia. It is the first formal treaty signed by a First Nation in BC since 1899.

Lands

> The Agreement effectively extinguishes all Aboriginal Title of the Nisga'a Nation in the entirety of their traditional territory, and converts Nisga'a Aboriginal title to "fee simple" title to a parcel of 1,930 square kilometers (plus, several smaller pieces of land equaling approximately 62 square kilometers) equaling approximately 8% of the Nisga'a original traditional territory (UBCIC 1998).

The Nisga'a land is along the Nass River in Northern British Columbia. See Figure 8.3 for the general area of the Nisga'a lands. Thus pro-

3 Tony Penikett was premier of Yukon during the YFN negotiations.

vincial Crown title is recognized over 100 percent of the remaining area of the Nisga'a traditional lands. Nisga'a agree that existing third party interests on Nisga'a Lands will continue, uninterrupted. These include privately owned fee simple lands, forest tenures, and public utility and road rights of way.

In addition, and in line with the earlier-noted views of Chief Manny Jules, the Nisga'a can apply to have the Provincial Torrens System apply to parcels of Nisga'a lands to register indefeasible title under the Land Title Act.

Laws and Legislation

Some of the areas in which Nisga'a governments can make laws are

- financial administration of Nisga'a governments and institutions;
- elections and referenda;
- creation or dissolution of Nisga'a villages or Nisga'a urban locals;
- Nisga'a citizenship;
- preservation and promotion of the Nisga'a language;
- planning and zoning of Nisga'a lands; and
- regulation and control of any activities on Nisga'a lands that constitute nuisance, trespass, or danger to public health and safety.

And at the overarching level (i) the Agreement does not alter the federal or provincial division of powers and (ii) the Canadian Charter of Rights and Freedoms applies to the Nisga'a government.

Mineral rights

> Nisga'a Government retains all mineral rights contained within the 8% parcel of Nisga'a settlement Lands. B.C. owns all of the mineral rights within the rest of the Nisga'a's former traditional territory (UBCIC 1998).

Water

The provincial water laws will apply to Nisga'a lands. While British Columbia owns all water within Nisga'a settlement lands, the province will reserve to Nisga'a a water allotment of 300,000 cubic decametres for domestic, industrial, and agricultural purposes. All existing senior

Figure 8.3

Nisga'a Nation, British Columbia

Artwork: Mark Howes

water licences (issued prior to 22 March 1996) must be filled before the Nisga'a will be allowed to take from their water allocation. Nisga'a must apply for licenses from BC in order to make use of the Nisga'a water reservation.

Forest resources

> Nisga'a Nation will own all forest resources upon Nisga'a Lands. However, existing forest tenures on Nisga'a Lands will continue for five years, subject to provincial laws. Nisga'a access to and use of the forestry resource will be phased in over five years.
>
> The Nisga'a may make laws regarding the harvest of timber, subject to meeting provincial forest standards, but have very little control over the manufacture or sale of timber. B.C. laws regarding timber scaling and timber marks will apply to timber harvested on Nisga'a lands. (UBCIC 1998)

Fisheries

> The overall fish entitlement is held by the Nisga'a Nation communally and they cannot sell or give away this entitlement, although they can allow non-Nisga'a to harvest their allocation.
>
> … An annual Harvest Agreement, approved by Canada, will set out the manner in which the fish are to be harvested, to what degree and whether fish harvested can be sold. Federal and provincial laws concerning the sale of fish will apply to the Nisga'a fish allocation. (UBCIC 1998)

Governance

> The Nisga'a Nation and Nisga'a Village are separate and distinct legal entities with the capacity and rights of a natural person, including the right to contract, buy and sell property, sue and be sued. (This is the legal description of a corporation, and the powers of a corporation.) Each level of Nisga'a government will be bound by the Agreement, the Nisga'a Constitution and Nisga'a laws.
>
> … Nisga'a Government can establish a court to administer Nisga'a laws, but B.C. must approve the Court's structure, procedures and method of selection of judges. The Nisga'a Court is bound by the same sentencing principles and can impose the same remedies as provincial courts, but it "may apply traditional Nisga'a methods and values, such as using Nisga'a elders to assist in adjudicating

> and sentencing, and emphasizing restitution."
>
> … Generally, the *Indian Act* no longer applies to the Nisga'a Nation or its citizens.
>
> Nisga'a Indian Bands are transformed into Village Governments [called Lisims] under the Agreement, and the former Indian Bands and Indian Reserve Lands will cease to exist.
>
> All rights, title, interests, assets, obligations and liabilities of the Nisga'a Tribal Council are transferred to the Nisga'a Nation and the Nisga'a Tribal Council ceases to exist. (UBCIC 1998)

Fiscal federalism

> … Every five years the parties will agree upon fiscal financing agreements by which Canada and B.C. will provide funds to enable Nisga'a to carry out agreed-upon public programs and services to Nisga'a and, where agreed, non-Nisga'a citizens. The levels of funding provided will be comparable to funding generally available in northwest B.C. (UBCIC 1998)

The funding for Nisga'a Nation and Villages "is a shared responsibility of the Parties and it is the shared objective of the Parties that, where feasible, the reliance of the Nisga'a Nation and Nisga'a Villages on transfers will be reduced over time."

The long-term goal is to have Nisga'a self-finance the programs and services that it delivers.

Own-source revenue agreements

> … A main goal of the Agreement is to ensure that the Nisga'a become "self sufficient" in providing the agreed upon federal and provincial programs and services. The Agreement sets out a formula for determining Nisga'a "own source revenue" to determine where revenue of the Nisga'a (gained through resource extraction, or taxes, for example) should be used to finance programs and services. Ultimately, Nisga'a own-source revenue will be used to reduce payments for programs and services received from the federal and provincial governments. (UBCIC 1998)

Revenues from the sale of Nisga'a lands, capital transfers, and selected other sources of capital will not be used to determine Nisga'a own-source revenue capacity.

Taxation

> Nisga'a Government can make laws to directly tax Nisga'a citizens on Nisga'a Lands to raise revenues for government purposes, but this does not limit Canada or B.C.'s powers to impose taxes. (UBCIC 1998)

The initial tax immunity granted by section 87 of the Indian Act will not apply to Nisga'a citizens over the longer term. Specifically, after eight years Nisga'a citizens will have to pay all transaction (sales) taxes, and after twelve years they will have to pay all other taxes (income and property taxes, for example). Nisga'a citizens will have no immunity from taxes levelled by Nisga'a governments on them.

Summary

Nisga'a is a very comprehensive modern treaty and deserving of all the attention it has received. Although it draws much from the Yukon Agreements, its powers are less expansive. However, it will surely serve as a potential model self-government agreement for those First Nations endowed with ample renewable and/or non-renewable resource endowments.

The Nisga'a agreement falls well within an Indigenous-nationals/Canadian-citizens model.

Conclusion

This completes the overview of selected First Nations modern treaties. Readers will note that many of the key characteristics of the proposed Gitxsan First Nation Agreement that appeared in chapter 7 also come well within the purview of the thrust of the above analysis. Attention now turns to the Inuit land claims agreements. A combined conclusion to both chapters 8 and 9 appears at the end of chapter 9.

Supplement 8.1

The Structure of the *Indian Act*: Accountability in Governance[1]

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A Research Paper for the National Centre for First Nations Governance

Introduction

The *Indian Act* has been criticized for giving the Chief and Council *too little power* to make their own decisions. The Royal Commission on Aboriginal Peoples counted nearly 90 provisions that give the Minister of Indian Affairs powers over the Band and Band Council.[2]

But the *Indian Act* has also been criticized for giving the Chief and Council *too much power* to make decisions. Some people point out that Chief and Council do not have enough accountability to members of the community. In sum, the *Indian Act* is criticized for giving Chief and Council too little authority *and* with giving Chief and Council too much authority.

The fact is, both criticisms are valid. We will see in the discussion on the following pages how the structure of the *Indian Act* creates this

1 This article is reprinted with the permission of the author. I am most grateful to Professor Shin Imai for granting this permission. Needless to say, however, he should not be associated with the ideas and conclusions contained in this book.

2 Canada, Report of the Royal Commission on Aboriginal Peoples, Volume 1, Part 2, Chapter 9 "The Indian Act," at p. 70 (http://www.ainc_inac.gc.ca/ch/rcap/)

Indigenous Nationals/Canadian Citizens, by Thomas J. Courchene. Montréal and Kingston: McGill-Queen's University Press, Institute of Intergovernmental Relations.

contradictory state of affairs. We will discuss how to avoid such contradictions when the First Nation moves out of the *Indian Act* to a more suitable First Nation designed government system.

It is impossible to analyze every section of the *Indian Act*. Instead, we will focus on the accountability structure in the *Indian Act* in three areas where the Chief and Council can exercise some authority: allocation of reserve land, First Nation law-making powers and custom elections.

These three areas affect the lives of members of the community very directly. Under the *Indian Act*, the federal government has the power to overrule decisions of Chief and Council. But Chief and Council also have powers that can be exercised without input from the community. By studying who has the power to do what in these areas we will be able to see the balance in the powers of Chief and Council, members of the community and the federal government.

One problem with the *Indian Act*:
power flows one way

Federal Government
↓
Chief and Council
↓
Community Members

A government system designed by First Nations will see a much reduced or eliminated role for the federal government. But this will not be enough. The First Nation government system should also deal with ways to ensure that Chief and Council use their powers in a good way. There are three ways to control the powers of Chief and Council.

First, Chief and Council should be accountable to the community members. This means that there should be some form of community participation in the making of laws. Of course, this cannot mean that every decision of Chief and Council must be approved at a community meeting. That would make it impossible to govern. But it does mean that Chief and Council should have a policy that distinguishes routine decisions, which do not require consultation, from important decisions that should involve the whole community.

Second, the decisions of Chief and Council should be consistent with core principles that are important to the community. In the mainstream community, these core principles are found in the *Charter of Rights and Freedoms*, which protects freedom religion, prohibits discrimination and guarantees fair trials. Aboriginal communities could develop other core principles, such as respect for culture, which could be set out in a First Nation constitution.

Third, there must be a tribunal that is independent of Chief and Council that can certify and interpret the laws and can hear appeals from decisions. This tribunal can determine whether the Chief and Council have authority to make the laws, whether there has been adequate community participation and whether the laws are consistent with the First Nation's core principles. Under the *Indian Act*, the Minister of Indian Affairs and the courts carry out this function. Under a First Nation governance regime, an independent tribunal made up of First Nation people could carry out this function.

In the next section, we will see how the three accountability mechanisms mentioned above operate in the *Indian Act*.

The Exercise of Power by the Federal Government and by Chief and Council

The Chief and Council have powers to make decisions that affect the lives of community members. In the parts of the *Indian Act* that are the oldest, the Chief and Council could make decisions without consulting with anyone. For example the *Indian Act* does not give any guidance on how the Chief and Council are to decide on how to give out certificates of possession on reserve. The older parts of the *Indian Act* also give the government very wide powers to override decisions of Chief and Council. For example, if the Chief and Council decide to give out a certificate of possession, the Minister of Indian Affairs can override that decision and refuse to approve the certificate of possession.

We will see in the discussion below that the newer parts of the *Indian Act* make some changes to increase community participation. For example, in order for the Band to take control of its own membership, there must be approval from the majority of the people who are allowed to vote. The newer parts of the *Indian Act* also reduce the power of the federal government. If the majority of the voters of a First Nation approve a membership code, for example, the federal government cannot override the decision.[3]

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3 This statement is a bit of a simplification. The First Nation membership code must conform to certain substantive requirements set out in the *Indian Act*. For example, the codes must allow Bill C-31 women to be members. If these requirements are met, the Minister cannot disallow the membership code. This is very different from the Minister's powers to disallow Band by-laws. For by-laws, the Minister does not even have to give reasons for deciding to disallow.

Allocation of land on reserve

The Chief and Council can make a variety of decisions under the *Indian Act*. These decisions are usually implemented through a B.C.R. (Band Council Resolution). Some decisions are administrative, such as signing routine contracts, while other decisions affect First Nation members and the First Nation as a whole. The *Indian Act* fails to provide guidance on how these decisions are to be made. To illustrate the issue, I will outline the accountability structure for decisions on allotment of land and allocation of Band housing.

Some reserve land is allotted to private individuals who are given certificates of possession (section 20). Once these certificates are issued, the owner has private property rights to the land and can sell it or leave it in a will to another Band member. In order to receive a certificate of possession, the Band member must receive approval from the Band Council and receive approval from the Minister of Indian Affairs.[4]There is nothing in the *Indian Act* that provides guidelines to the Chief and Council, nor to the Minister, on the basis for handing out certificates of possession.

The certificate of possession system was established in the last century as part of the campaign to "civilize" Indians by moving them away from their communal land sharing customs towards a private property regime. Many First Nations have resisted giving out certificates of possession and instead rely on their own laws and customs to allocate lands. For example, the Band will often determine who should live in Band housing. Most Bands have developed housing policies to ensure fairness. They will not allow an individual to rent out the housing or leave it empty if there are other people on the waiting list. However, there is nothing in the *Indian Act*, which recognizes this form of land allocation[5] so there is nothing in the *Indian Act* which makes it mandatory for Chief and Council to develop fair housing policies.

In dealing with possession of land on reserve, then, we see that Chief and Council have quite a lot of authority. They can decide who should get certificates of possession or who gets Band housing. There is nothing in the *Indian Act* that discusses the responsibility of Chief and

4 A vote of the Band is not required: *Joe v. Findlay*, [1987] 2C.N.L.R. 75 (B.C.S.C.)

5 Although the *Indian Act* does not explicitly give the Band Council power to allocate land on a temporary basis, courts have recognized that Bands have authority to do this: *McMillan v. Augustine*, [2004] 3 C.N.L.R. 170 (N.B.Q.B.) and *Seabird Island Indian Band v. McNeil-Bobb* [2000] B.C.J. No. 1133 (B.C.S.C.)

Council to the community or allowing community participation in the decisions.[6]

Band Council powers to make by-laws

The Band Council has authority to make four different types of by-laws. In each type, there is a different balance among the Chief and Council, the community and the federal government.

The general by-law making power (section 81) lists 22 subject areas ranging from a very broad power over "observance of law and order" to a very minor jurisdiction over the control of "noxious weeds." The Chief and Council can pass a by-law with a majority vote in a council meeting. There is no requirement to publish the proposed by-law in advance or to inform community members that a vote will be taking place. After the vote, the Band Council must send the by-law to the Minister who may disallow any by-law within forty days. In the past the disallowance rate was very high. The Minister is not required to give any reasons for disallowing the by-law.[7]

There is a slightly different method for making by-laws dealing with taxation and other financial matters (section 83). Under this section the Band Council can tax their own members and pay Band expenses out of Band moneys. There is no requirement that the Band Council consult its members. The Minister must approve these by-laws before they are effective.

A third method is set out for passing by-laws banning alcohol on reserves (section 85.1). To pass such a by-law, the Band Council needs to call a special meeting at which the majority of electors vote in favour of the by-law. The by-law is then sent to the Minister of Indian Affairs. The Minister does not have any power to disallow this by-law if the proper procedure was followed.

A fourth method is used for making Band membership codes (section 10). To pass its own membership code, a Band must give notice to its members that it intends to pass a code. The code requires the approval of the majority of the members who are qualified to vote—not just the majority of people who come out to vote. This means that half of the

6 Disputes have gone to court and judges have attempted to set out some guidelines. For a summary of the law, see the cases listed under s.20 in Shin Imai, *The Annotated Indian Act and Aboriginal Constitutional Provisions*, Toronto: Thomson Carswell.

7 Twinn v. Canada (Minister of Indian Affairs and Northern Development), [1987] 3 C.N.L.R. 188 (Fed. Ct.)

adult members of the Band must give their approval. This is a very high standard. If there are 1,000 eligible voters, you need 501 people to vote in favour. Let us say that 750 people decide to vote on the issue. If 450 vote in favour and 300 vote against, the code will not pass, because you need 501 people to vote in favour. Once the approvals are obtained, the Band must send the code to the Minister. If the Minister is satisfied that the process has been followed, the Minister declares that the Band has control of its membership.

Looking at these four methods for making by-laws we can see that there is a progression in the balance of power. The general by-law making power (section 81) and the money by-law making power (section 83) were enacted in 1951. They give the Minister wide powers to allow or disallow the by-law. They do not require the Band Council to inform or consult with their own members. New law-making provisions inserted in the 1980s introduced changes to the process. The alcohol control by-law and the membership code require greater participation by members of the First Nation and reduce the authority of the Minister of Indian Affairs to disallow these bylaws.

First Nation Custom Elections

The governance of reserve communities is very important and disputes about elections can be very bitter. Traditionally, First Nations chose their leaders in different ways—in some First Nations, it was hereditary, and in others there was a selection process. In order to "assimilate" Indians, the *Indian Act* gave the government the power to override traditional methods of governance. In the case of Six Nations in Ontario, for example, the government used its power to overthrow the traditional Haudenosaunee Council in 1924 and replace it with a Chief and Council elected under the *Indian Act*. This was against the wishes of the majority of the members of Six Nations. Even, today, the vast majority of the residents of Six Nations refuse to participate in *Indian Act* elections.

Until the mid 1990s almost all the Bands in Canada had *Indian Act* elections (sections 73–79).

In this system, each member casts a secret ballot and the candidates with the most votes are elected. They hold office for two years. Where there is a dispute about the election, the parties must approach the Minister who will then make a recommendation to the federal Cabinet. The Cabinet will decide whether to call another election. If a person is guilty of a corrupt practice or accepting a bribe, it is the Minister of Indian

Affairs who had the authority to declare that the councillor no longer holds office (section 78(2)(b)(iii)). Even in a case where a chief or councillor misses three consecutive meetings without authorization, it is the Minister who must declare that the person no longer holds office (section 78(2)(b)(ii)).[8] The members of Council do not have the authority to make these decisions.

In an effort to exert more community control over elections, many First Nations began approving their own election codes and holding "custom elections" (section 2(1)—"council of the Band").[9] In order to move from *Indian Act* elections to "custom elections" First Nations must satisfy certain conditions. According to the "Conversion to Community Elections Policy" of Indian Affairs, the First Nation's electoral code must be approved by members either through a referendum or some other sort of "community approval" process. Some First Nations organized door-to-door canvasses to have members sign their approval of the code. The Department has the power to determine whether an initial code is satisfactory and in practice, Department officials will comment on the custom codes and require changes before approval.

Each custom election code is different. In some cases, the codes make minor changes to the *Indian Act* elections, such as lengthening the term of the Chief and Council from two years to three years. In other cases, the changes can be significant. Courts have held that custom elections need not need not be in writing,[10]need not be by secret ballot and chiefs could be hereditary.[11] For example, the Saulteau First Nation Govern-

8 For court cases on this issue see under sections 78 and 79 of the *Indian Act* in Shin Imai, *The Annotated Indian Act and Aboriginal Constitutional Provisions*, Toronto: Thomson Carswell.

9 It should be noted that Chief and Council elected under "custom elections" are recognized under the *Indian Act* and by the government as the official administrators for the Band. Therefore, they have the powers to make decisions, pass by-laws and enter into funding arrangements. Chief and Council elected in custom elections can be different from traditional governance structures, which are not recognized by the government. For example, on the Six Nations reserve in Ontario there is a very strong following for the traditional government of the Haudenosaunee. The traditional Council was removed and the elected system imposed on Six Nations in 1924. The vast majority of the people at Six Nations continue to refuse to vote in federal elections and do not participate in votes for the Indian Act Chief and Council. The Haudenosaunee government is not recognized by the Federal government and does not hold any powers under the Indian Act.

10 *Salt River First Nation 195 v. Marie*, [2004] 1 C.N.L.R. 319 (F.C.A.); *Francis v. Mohawk Council of Kanesatake*, [2003] 3 C.N.L.R. 86 (Fed. Ct.)

11 *Crow v. Blood Indian Band Council*, [1997] 3 C.N.L.R. 76 (Fed.Ct.)

ment Law called for each of the five families on the reserve to elect a Headman by consensus. The five Headmen, in consultation with the Council of Elders, selects a Chief.[12] The Huron-Wendat First Nation instituted a similar scheme, based on nominations from family circles.[13] The Rousseau River Anishinabe First Nation split the governance between an elected Chief and Council and a "Custom Council" made up of representatives of family groupings.[14] In almost all cases, disputes about elections are dealt with, not by Indian Affairs, but rather by some sort of Election Appeal Board made up of Band members.

In the case of elections, we can see that there has been a bit of a shift. Under the *Indian Act* elections, Indian Affairs had the final say on how elections were conducted and whether the elections could be appealed. First Nations that converted to custom elections have much more control over the process and a First Nation appeal tribunal decides the disputes.

How to Create an Accountability Structure for Chief and Council

The provisions discussed above show that the Minister of Indian Affairs and officials of the Department still have a great deal of authority. As we have seen, the Minister of Indian Affairs has almost unlimited power to disallow general by-laws as well as by-laws dealing with money.

The Three Elements of an Accountability Structure

1. Community participation
2. Respect for core principles
3. Authority to certify and interpret laws and decisions

There is nothing in the *Indian Act* itself, which gives any guidance on how the power of the Minister is to be exercised. The danger is that the Minister could thwart the wishes of the community for inappropriate reasons. On the other hand, we can see that in making the by-laws, the Chief and Council are not given any guidance either. They are not required to consult the community or even give notice that they are going to pass a new by-law.

When looking at reforms in a First Nation governance regime, then,

12 *Napoleon v. Garbitt*, [1997] B.C.J. 1250 (B.C.S.C)

13 Gros-Louis v. Conseil de la Nation Huronne-Wendat, [2000] F.C.J. No. 1529 (Fed.Ct.)

14 Roseau River Anishnabe First Nation v. Roseau River Anishnabe First Nation, [2003] 2 C.N.L.R. 345 (Fed.Ct.).

the solution is not simply to take away the power of the federal government to disallow by-laws. Doing that will only address half the problem. The other half of the problem is to ensure accountability of Chief and Council to the members of the community.

The discussion above has shown that there is a movement in recent years to reduce the power of the Minister of Indian Affairs and to increase the participation of members of the community. If this trend continues what will a First Nation governance system look like?

Community Participation

Members of the community should be able to actively participate. They should be able to suggest new laws, comment on proposals and have a say in changing laws. Not all laws are of equal importance and the degree of community participation could vary depending on the law that is being proposed. An important law, such as banning alcohol, could require a community meeting. Something that was more routine, such as erecting a protective fence around a school, could simply require publication of a notice that the by-law was going to be voted on at a council meeting.

How could there be community participation in decisions about land use on reserve? While it may not be appropriate to have a community meeting before every decision, there are ways to build in community participation. For example, the community could be involved in developing a land use plan for the reserve and criteria for granting certificates of possession. For Band housing, many reserves already have Housing Committees made up of community members as well as representatives of Council. For a surrender of part of the reserve, the *Indian Act* already requires a community meeting and a vote (s. 39).

Under the *Indian Act*, some sections provide for no community participation or notice at all. In the previous section I pointed out that the general powers (s. 81) and the money powers (s. 83) merely require a vote of Chief and Council at a meeting—nothing more. Consequently, a Chief and Council could pass a by-law on taxation or land use without informing anyone. The by-law would not be effective until there was approval from the Minister. But the Minister is not required to consult with anyone either. Therefore, it is conceivable that a community could wake up one morning subject to a by-law that had never been made public.

As we have seen, since the 1980s new law-making powers in the *In-*

dian Act require a greater degree of community consultation. In the alcohol control by-laws (s. 85.1), there is a requirement that the by-law be approved by a vote of the majority of the people who attend a public meeting.

This improves accountability, by requiring prior notice of the by-law and a public debate. The Minister of Indian Affairs does not have the power to disallow this by-law. One potential weakness of this procedure is that it does not say that any particular number of people needs to attend the meeting. It is possible, therefore, that a small group of people could decide to vote down an alcohol restriction by-law. In this type of by-law approval procedure, the community members have a responsibility to participate in the decisions so that the law is a true reflection of community interests.

There are a variety of ways for getting community participation. Voting by secret ballot, community meetings and door-to-door canvassing are the most common. There are other alternatives available as well, such as discussions in family circles with representatives of families meeting to reach consensus. Or for routine matters an announcement over the community radio, the First Nation web site or community newsletter could be sufficient.

Respect for Core Principles

Law-making is not simply about making rules that have the support of the majority of the voters.

Accountability involves respect for core principles important to the cultural survival of the community. In mainstream Canadian society, many of these principles are embodied in the *Charter of Rights in Freedoms* in the Constitution. The main purpose of the *Charter* is to protect individual Canadians against the actions of governments. Values such as free speech, the rights to due process in criminal proceedings and freedom from discriminatory laws are included in the *Charter*. Since all federal legislation must conform to the *Charter*, by-laws made under the *Indian Act* must also conform to the *Charter.* This means that Band Councils cannot make bylaws that violate the *Charter*. For example, let us say that a Band Council passes a residency bylaw that discriminates against women. The women could challenge the by-law in Federal Court using the *Charter of Rights and Freedoms*.

The Federal Court has established another set of standards for the conduct of Chief and Council.

In the mainstream justice system, there are standards that are not written down in advance, but developed case by case by judges—a modified oral tradition—that is called the "common law" or "judge-made law." One of the major principles developed by courts to guide decision-makers is the duty of decision-makers to act fairly. This is the law that courts have applied to Chief and Council in the granting of possession of reserve lands. As we have seen, there are no guidelines in the *Indian Act* on how Chief and Council are to make their decisions on this issue, but courts have said that people who are asked to leave their lands have a right to know the reasons they are being asked to leave and a right to have an opportunity to respond.[15] In allotting lands for certificates of possession (s. 20 (1)), the Chief and Council also have a duty to keep the best interests of the Band in mind.

> … before making an allotment under s. 20(1), a council has a duty to consider the rights of other band members. That duty would require a balancing of the individual's request for the allotment, including the purpose for which the allotment would be used, with the best use the land could be put to for the band community.[16]

The question for First Nations as they move towards a First Nation governance regime is whether these standards are the most appropriate for the First Nation. The Charter of Rights and Freedoms, for example, has been criticized for being too "European" and too oriented to mainstream non-Aboriginal values, which stress individuality rather than community.17 Those First Nations who want to assert a right to self-government often argue that the Charter of Rights should not apply to their laws. Even if the Charter values are general enough to apply to the First Nation, are they the only standards that the Chief and Council should abide by?

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15 Sheard v.Chippewas of Rama First Nation, [1997] 2 C.N.L.R. 182 (Fed.Ct.)

16 Lower Nicola Indian Band v. Trans-Canada Displays Ltd., [2000] 4 C.N.L.R. 185 (B.C.S.C.), at para.155

17 Several First Nation writers have commented on this issue. See for example, Candace Metallic and Patricia Monture-Angus in borderlands e-journal,Volume 1 Number 2, 2002 (13). http://www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/metallic_angus.html). First Nations considering litigation under the Charter should be very careful to scrutinize the consequences embedded in that instrument. … The failure to do so may result in a potential misdirection of section 35(1) toward a rights paradigm driven by a culture that values individualism (versus some form of discussion about communal or collective rights). This dichotomy is not helpful.

Several First Nations have written their own constitutions to outline important principles for the conduct of both government and citizens. The Teslin Tlingit Constitution includes a principle for the protection of their Clans:

> The Clan is the primary unit of social organization and authority within the Teslin Tlingit Nation. The authority, responsibilities and traditions of the Clans must not be undermined or diminished.[18]

The Constitution of the Westbank First Nation begins with a set of principles for the interpretation of the constitution. One of the principles relates to culture.

> Westbank Members value the need to respect, protect and promote their heritage, culture and traditions understanding that their traditions and practices change and that they continue to develop contemporary expressions of those traditions and practices.[19]

The Ta'an Kwach'an Council has an objective for the Constitution, to "encourage personal healing for the unity and wellness of our community".[20]

A First Nation governance regime could allow members to challenge actions of Chief and Council that do not conform to the core principles set out in the First Nation constitution. But what body should hear the challenge: a non-Aboriginal court or an institution established by First Nations? That is the issue addressed in the next section.

Authority to Certify and Interpret Laws and Decisions

It is natural that there will be differences of opinion on whether the proper procedures have been followed in making laws or whether the laws are consistent with the core principles of the community. An important component of a governance structure is the mechanism for certifying and interpreting the laws.

Under the *Indian Act* the Minister of Indian Affairs enforces many of the standards and procedures. In the provisions on developing membership codes, for example, the Minister must determine whether the band fulfilled the procedural requirements by giving notice and getting

18 The Teslin Tlingit Constitution can be found at www.ttc-teslin.com/

19 The Westbank First Nation Constitution can be found at www.wfn.ca

20 The Ta'an Kwach'an Constitution can be found at dwww.taan.ca/constitution.html

approval of the majority of the electors. If these conditions have not been met, the Minister will not approve the code. Likewise, the Department of Indian Affairs retains the power to prevent a Band from going to custom elections if there has been no referendum or other process approving the change in the election procedure.

In the mainstream justice system, courts also play an important role in ensuring that laws are properly enacted and conform to the principles in the *Charter of Rights and Freedoms*. A court can strike down a law, even if it is validly passed and supported by the majority of Canadians, if the law violates the principles in the *Charter*. First Nations would also want to ensure that there is a mechanism for controlling the actions of Chief and Council. For example, there could be a requirement that First Nation laws have to be consistent with the cultural traditions of the First Nation. A law that failed to meet these principles, even if the majority of the voters approve it, could be challenged.

For First Nations however, a fundamental question is whether it is appropriate to have the Department of Indian Affairs or the Federal Court as the main mechanism for ensuring compliance with process and with core First Nation principles. Would it be possible to have First Nation tribunals perform these functions?

First Nations who have developed custom election codes have attempted to keep decision-making in the community by creating electoral officers or election appeal tribunals to settle disputes about elections. This has removed some of the power from the Minister of Indian Affairs and allowed respected members of the community to resolve election disputes. At Akwesasne, Wewaikai (Cape Mudge) and Westbank, these internal mechanisms have apparently been successful in gaining the respect of the community.[21]

However, experience shows that internal mechanisms also have their own problems. For example, there may be difficulties in selecting an appeal panel, which is "neutral".[22] One First Nation attempted to address this issue by requiring that one member of the Election Tribunal be a person from outside of the community. They appointed their lawyer, but even that lawyer was challenged for having a conflict of inter-

21 Personal communication from lawyer Micha Menczer

22 In *Lavallee v. Louison,* [1999] F.C.J. No. 1350 (Fed.Ct.) the court held that the size of the Band had to be taken into consideration in deciding whether there was a reasonable apprehension of bias. See also *Willier v. Sucker Creek Indian Band,* [2002] 4 C.N.L.R. 298 (Fed.C.A.) where the Electoral Officer could not find enough "neutral" members to make up an Appeal Tribunal.

est because of the work she performed for one of the candidates in the election.[23] In order to avoid conflicts of interest and bias, other mechanisms could be considered. Individual First Nations could agree to be bound by decisions of a regional or even national tribunal made up of respected First Nations individuals. Such a body could remove the power of the Department of Indian Affairs while ensuring that important functions related to accountability could be performed as a check on the power of individual Chiefs and Councils.

First Nations should also ensure that First Nation laws are well known. This could be done through keeping a record of all by-laws in the First Nation office or publishing them on the internet. If there are laws that are more appropriately recited orally, they could be recorded and made available at the First Nation office or placed on the internet.

Summary: First Nation Governance

In this paper, we have reviewed accountability mechanism found in the *Indian Act* for lessons on how to move toward a First Nation governance regime.

First, it is clear that there should be community involvement when laws are made.

- The degree of community participation could vary, depending on the importance of the law concerned. The participation may include consultation, community meetings and votes.
- The type of consultation could also vary. Communities could consider innovative ways to provide for participation, including meetings of family groupings and door-to-door consultations.

Second, communities could consider identifying their own core principles.

- All laws and decisions could be made conform to the core principles of the First Nation, such as the respect for the culture of the First Nation or respect for Elders.
- The *Charter of Rights and Freedoms* could also apply, depending on the structure of the First Nation governance regime. There are also decisions of the courts requiring that the Chief and Council act fairly that could also be made to apply.[24]

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23 *Sweetgrass First Nation v. Gollan*, 2006 CarswellNat 1657,2006 FC 778(Fed.Ct.)

24 In *Crow v. Blood Band* [1997] 3 C.N.L.R. 76 Crow claimed that there was a violation of

Third, communities should consider which body should interpret the laws and certify that laws have been validly enacted.

- Internal mechanisms such as an appeal tribunal made up of respected Elders or other members in the community, or of a regional body made up of representatives from other First Nations, could fulfill this function.
- Communities should decide whether they wish to continue to be able to appeal to a federal or provincial court. All self-government agreements provide for internal mechanisms with appeals to the courts but there are ways to limit court involvement if that is desired.

[Table 8.1] illustrates the degree to which the *Indian Act* regime and the First Nation governance regime fulfill the three components of accountability in law-making and decision-making.

Conclusion

This discussion began by observing that there was validity to two contradictory claims about the *Indian Act*. First, the *Indian Act* did not give Chiefs and Councils enough power. Second, that the *Indian Act* gave Chiefs and Councils too much power. We have seen through a discussion of the structure of the *Indian Act* that the problem is that the Minister of Indian Affairs had too much power to override decisions of Chief and Council and that the *Indian Act* did not require Chief and Council to be accountable to the community.

First Nations in Canada are already looking at ways of addressing these two problems. Many of the negotiated self-government agreements remove much of the power of the Department of Indian Affairs and require more accountability by Chief and Council to community members.

Even Bands under the *Indian Act* are moving in that direction. This is particularly true for First Nations that are creating their own custom

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the *Charter of Rights and Freedoms* in a custom election code. The Federal Court questioned whether the *Charter* applied to custom elections. In this case, it was not necessary to decide whether the *Charter* applied or not so no decision was made on that point. If custom elections are an expression of an inherent power of the First Nation., as was found in *Bone v. Sioux Valley Indian Band No. 290* [1996] 3 C.N.L.R. 54 (Fed.Ct.), the *Charter* may well not apply. See also Kent McNeil " Aboriginal Governments and the Charter: Lessons from the United States" (2002) 17 Can.J.Law and Soc.73-105.

… continued on page 219

Table 8.1

Structure of Accountability Table

	Community Participation *	Respect for Core Principles **	Authority to Certify and Interpret Laws ***
Indian Act Regime			
Allotment of certificates of possession (s. 20)	None required	Charter of Rights and Freedoms	Unlimited power of minister of Indian Affairs
Allocation of Band-owned housing	None required	Charter of Rights and Freedoms	minister not involved
General and money bylaws (sections 81 and 83)	None required	Charter of Rights and Freedoms	Unlimited power of minister of Indian Affairs
Alcohol by-law (s. 85.1)	Publication and community meeting	Charter of Rights and Freedoms	Limited power of minister
Membership code (s. 10)	Publication, community meetings and vote	Charter of Rights and Freedoms	Limited power of minister
Custom elections	Community consensus	Charter of Rights and Freedoms; First Nation core principles	First Nation Tribunal
Possible First Nations Regime			
First Nation laws	Appropriate community participation	First Nation core principles; Charter of Rights and Freedoms	First Nation Tribunal

Notes
* Community participation—There are different mechanisms available ranging from a simple general meeting to referenda with high approval requirements.

Table 8.1, continued

Structure of Accountability Table

** Respect for core principles—The Charter of Rights and Freedoms applies to all federal legislation. Whether it also applies in a First Nation regime depends on how that regime is constructed.
*** Authority to certify and interpret laws—In all cases under the Indian Act there is access to the Federal Court, whether or not the minister or Department of Indian Affairs also has powers to make decisions. Access to courts in a First Nations regime will depend on how that regime is constructed.

Structure of Accountability Table

	Community Participation *	Respect for Core Principles **	Authority to Certify and Interpret Laws ***
Indian Act Regime			
Allotment of certificates of possession (s. 20)	None required	Charter of Rights and Freedoms	Unlimited power of minister of Indian Affairs
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General and money bylaws (sections 81 and 83)	None required	Charter of Rights and Freedoms	Unlimited power of minister of Indian Affairs
Alcohol by-law (s. 85.1)	Publication and community meeting	Charter of Rights and Freedoms	Limited power of minister
Membership code (s. 10)	Publication, community meetings and vote	Charter of Rights and Freedoms	Limited power of minister

Table 8.1, continued

Structure of Accountability Table

Custom elections	Community consensus	Charter of Rights and Freedoms; First Nation core principles	First Nation Tribunal
Possible First Nations Regime			
First Nation laws	Appropriate community participation	First Nation core principles; Charter of Rights and Freedoms	First Nation Tribunal

Notes

* Community participation—There are different mechanisms available ranging from a simple general meeting to referenda with high approval requirements.

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*** Authority to certify and interpret laws—In all cases under the Indian Act there is access to the Federal Court, whether or not the minister or Department of Indian Affairs also has powers to make decisions. Access to courts in a First Nations regime will depend on how that regime is constructed.

Source: Author's compilation.

election codes. The creation of the Code requires a great deal of community participation and the monitoring of elections is taken away from Indian Affairs and placed in the hands of First Nation tribunals.

First Nations have developed tools for balancing the powers of Chief and Council, the community members and a First Nation tribunal. It now remains for each First Nation to determine the best balance for their community.

Chapter 9

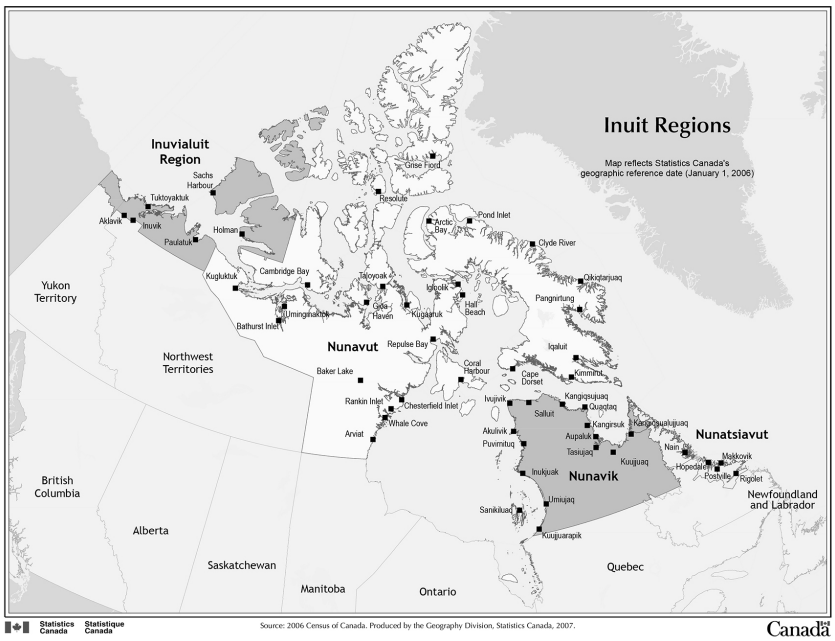
Inuit Land Claims Agreements

Introduction

While Canada's Inuit governments clearly fall under the umbrella Indigenous nationals/Canadian citizens model, emphasis in this book has largely been on First Nations rather than on all of Canada's Aboriginal peoples. However, in dealing with self-government agreements, it is important that attention also be directed to the creative Inuit land claims agreements or modern treaties. All told, there are roughly 50,000 Inuit in Canada's north. Figure 9.1 shows Canada's four Inuit regions: From west to east they are: Inuvialuit, Nunavut, Nunavik (in northern Quebec), and Nunatsiavut (in Newfoundland and Labrador). While over 85 percent of Nunavut's citizens are Inuit, Nunavut itself is a public government, like the two other territories (Yukon and Northwest Territories) and not an Inuit government. However, within Nunavut there is an Inuit political organization—*Nunavut Tunngavik Inc*. (henceforth NTI)—that does have a land claims agreement or a modern treaty. Readers are alerted in advance that the ensuing analyses of these modern treaties will not be as encompassing as some of the First Nations modern treaties dealt with in chapter 8. However, much more detail on these self-government regimes is available from the Institute for Research on Public Policy's excellent and wide-ranging analysis of northern Canada—*Northern Exposure: Peoples, Powers and Prospects in Canada's North* (Abele et al. 2009).

Figure 9.1

Map of Inuit Regions



The Inuvialuit Settlement Region (ISR)[1]

Inuvialuit is the shaded area on the top left side of Figure 9.1; that is, the areas attached to the top of Yukon and to the Northwest Territories as well as the shaded islands upward and to the right. The major settlements in Inuvialuit are Inuvik, Aklavik, Tuktoyaktuk, Sachs Harbour, and Fort McPherson. The Inuvialuit Final Agreement (IFA) with Canada came into effect in 1984 and it was the first comprehensive land claim settled in the then NWT and only the second in Canada after the James Bay and Northern Quebec Agreement (JBNQA). The basic goals of the IFA are to preserve Inuvialuit cultural identity and val-

1 For more details of the ISR, readers can consult Graham White's "Nunavut and the Inuvialuit Settlement Region; Differing Models of Northern Governance" (Abele et al. 2009, 283–316).

ues within a changing northern society; to enable the Inuvialuit people to be equal and meaningful participants in the northern and national economy and society; and to protect and preserve the Arctic wildlife, environment, and biological productivity. The Inuit of Inuvialuit have legal control over their land—13,000 square kilometers (5,000 square miles) with subsurface rights to oil, gas, and minerals. This is especially important since there are proven commercial quantities of natural gas, nickel, petroleum, and zinc. Furthermore, the ISR established the right to hunt and harvest anywhere in the claim area. This was also important since their lands are known to be rich in wildlife. The Inuvialuit people also secured the responsibility for ensuring good wildlife management, becoming part of a wildlife management team with the federal government. The IFA establishes and provides for Inuvialuit participation on various co-management boards within the Inuvialuit Settlement Region. These include the fisheries, wildlife management, and environmental impact screening.

In 2012 there were 5,777 people in the ISR with Inuit comprising almost 60 percent of the population.

Nellie Courneyea,[2] writing in *Northern Exposure: People, Powers, Prospects for Canada's North* (Abele et al. 2009, 391–92) remarked on ISR's economic prospects as follows:

> Today (our) communities are only marginally sustainable, and they are unable to keep their young people. This could change if there were a viable northern economy—and that would require northern resource development. Northern resource development—and at the moment that means a natural gas pipeline to southern markets—looks quite different from the perspective of the Arctic coast. Although the National Energy Board contends that there are plentiful gas resources here, these resources can create wealth for us only if they are marketed. The Mackenzie gas pipeline is therefore needed to open the basin: without it the resources of the ISR will be stranded. There is no other option, so we are faced with a very big project that carries big risks for companies and for the Aboriginal Pipeline Group and that could also have negative social impacts on our communities. Yet, as big as it is, the project is dependent on market forces far removed from the realities of northern communities.

Her message for Ottawa is that northern development needs to be

2 Nellie Cournoyea is a former premier of NWT and at the time of this comment she was the CEO of the Inuvialuit Regional Corporation.

taken more seriously and to be addressed at much higher levels in both the bureaucracy and the government. This is a message that would be welcomed right across Indigenous Canada.

Inuvialuit is in the process of negotiating a self-government agreement as a complement to the Inuvialuit Final Agreement (IFA).

Nunavut and Nunavut Tunngavik Inc. (NTI)[3]

The territory of Nunavut was separated from the Northwest Territories on 1 April 1999, the first major change to Canada's political map since Newfoundland joined Confederation in 1949. As Figure 9.2 reveals, it is a vast territory, comprising most of northern Canada and most of the Canadian Arctic archipelago. But the population of the territory is just 37,000, mostly Inuit.

Although the vast majority of Nunavut's citizens—approximately 85 percent—are Inuit, Nunavut opted to follow the other Canadian territories and be a public government rather than an Aboriginal government.

Nunavut has adopted all the characteristics of the Westminster model with one major exception—the absence of political parties so that the nineteen Nunavut parliamentarians all seek election to the legislative assembly as independents (as is also the case in the Northwest Territories). After the election, the members of the legislative assembly meet in a public forum to elect the speaker, the premier and the individual cabinet ministers from among themselves. The premier then assigns cabinet portfolios. There is no set number of cabinet seats, but cabinet cannot form a majority in the house.

Because Nunavut is not an Indigenous government, this book focuses on Nunavut Tunngavik Inc. (NTI), the association that represents the Inuit of Nunavut.

NTI and the 1993 Nunavut Land Claims Agreement

Nunavut Tunngavik Inc. (NTI) is the legal representative of the roughly 85 percent of Nunavut's population that is Inuit. NTI is one of the four regional members that make up the Inuit Tapiriit Kanatami.[4] The

3 For more information on Inuvialuit and Nunavut, see White (2009).

4 Inuit Tapiriit Kanatami (ITK), formerly Inuit Tapirisat of Canada, is the national voice of the 55,000 Inuit living in fifty-three communities across the Inuvialuit Settlement Region (Northwest Territories), Nunavut, Nunavik (Northern Quebec), and Nunatsiavut (Northern Labrador) land claims regions. Inuit call this vast region Inuit Nunangat. Founded in 1971 ITK represents and promotes the interests of Inuit on a wide variety

Figure 9.2

Nunavut Region

Artwork: Mark Howes

Nunavut Land Claims Agreement (NLCA) was signed in May 1993. The signatories to the NLCA were the Inuit,[5] the Government of Canada and the Government of the Northwest Territories. NTI continues to play a central role in Nunavut, even after the creation of the Government of Nunavut. It is responsible for ensuring that the Nunavut

of environmental, social, cultural, and political issues and challenges facing Inuit on the national level. ITK does not deliver or fund programs; rather, it is a pan-Inuit advocacy organization.

5 In that time frame the Inuit were represented by Tunngavik Federation of Nunavut that became NTI.

Land Claims Agreement is implemented fully by the Government of Canada and the Government of Nunavut and that all parties fulfill their obligations. NTI's mission is to strive toward "Inuit economic, social and cultural well-being through implementation of the Nunavut Land Claims Agreement."

In exchange for transferring Indigenous title to the Nunavut area to Canada, the Inuit (via NTI) were able to select 18 percent of the land (e.g., areas good for hunting/fishing, tourism, minerals/resources, business/industry, and history/culture). The territory of Nunavut itself owns little more than the areas occupied by its population centres with the remaining area, as noted, belonging to NTI or Canada. NTI will get 50 percent of the first $2 million of mineral royalties on lands owned by Canada and 5 percent of royalties above $2 million. However, NTI gets 100 percent of any royalties on the 18 percent of the land that it owns (some of which was chosen for its potential mineral wealth). Beyond this, the Inuit (NTI) will get $1.173 billion over fourteen years.

In effect, the role of the Government of Nunavut acts in the interests of all residents of Nunavut, whereas NTI acts in the interests of the Inuit residing in Nunavut.

However, this division of authority has not worked smoothly. In his 2009 paper "The Prince and the Pauper: Nunavut Tunngavik Incorporated and the Government of Nunavut" Michael Mifflin notes:

> In comparison [with NTI] the Nunavut government owns no lands outside of its municipalities' borders, receives no royalties from the development of its natural resources, and has no means of its own to fund its public services. Consequently, the Nunavut government has remained almost wholly dependent on federal transfers. It receives approximately $1.145 billion annually in transfer payments and targeted funding programs, representing a full 90 percent of Nunavut's total budget. In other words, the Nunavut Agreement gave NTI one of the most important means through which the Nunavut Government could ever hope to become financially independent from the federal government—resource development and resource revenue.

The position of NTI appears to be that it is under no obligation to provide funding to the Nunavut government to provide services, especially since some of it could be used to fund services for non-Inuit citizens.

The larger issue here is that while the provinces have the exclusive

power (thanks to s. 92A of the Constitution Act 1982), to make laws in relation to the raising of money in respect of non-renewable natural resources and of forestry resources and primary production therefrom, Nunavut has no such power. Ottawa duly collects revenues from its lands in Nunavut but does not transfer any of these royalties/revenues to the Nunavut government. However, most Canadians would be astonished by the level of the annual per-capita cash payments (transfers) that Ottawa sends to the three territories. For 2015–16, the amounts of the transfers were $24,401 for Yukon, $29,412 for the Northwest Territories, and $40,352 for Nunavut (Canada 2016). Yet, the revenues that would flow from devolving Canada's ownership of lands (replete with access to taxes/royalties) to Nunavut would soon dominate the existing transfer. Small wonder that surface and subsurface devolution of resource rights is the top priority for the government of Nunavut. It should be noted that the existing devolution of power over resources to the other territories is also quite limited, but nonetheless more generous than is the case for Nunavut.

In my view, the devolution of some meaningful version of s. 92A of the Canadian Constitution, which assigns to the provinces control over renewable and non-renewable resources, should be extended to the territories, and is long overdue.

Nunavik[6]

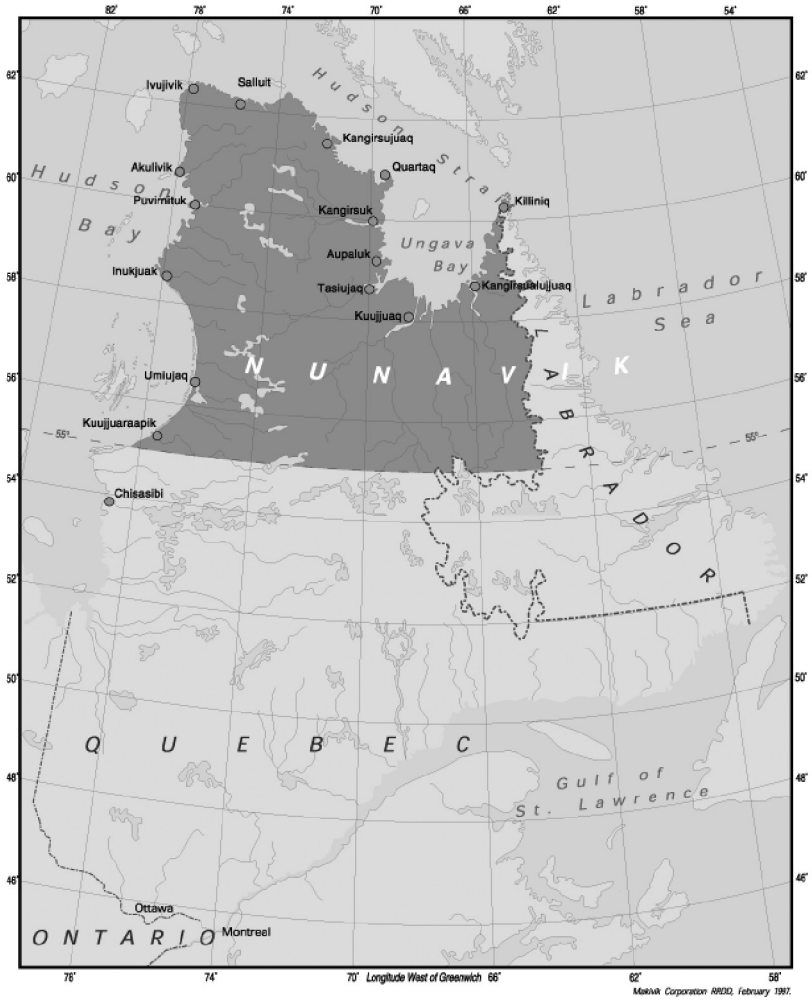
The land area of Nunavik (Figure 9.3) is the northernmost part of Quebec. It is the Inuit area of the earlier JBNQA (see Figure 8.1) leaving the lower part to the James Bay Cree. Nunavik comprises fourteen villages with the seat of government in Kuujjuak. As Rodon and Grey (2009, 318) point out, while Nunavik is part of the region where the earliest modern land claims treaty was signed, it will be one of the last to obtain some form of self-government. Larger than the state of California, and covering one-third of the territory of Quebec, Nunavik has roughly 12,000 inhabitants, 90 percent of whom are Inuit. However, like some other Inuit regions in the north it has opted for a public, rather than an ethnic, government so all persons residing in Nunavik can be full participants.

However, the government structure departs from the Westminster

6 This section as well as the following one on Nunatsiavut is adapted from Rodon and Grey (2009, 317–344).

Figure 9.3

Nunavik Land Area



Notes: Nunavik has a population of 11,000 people in 14 communities spread across almost 500,000 square kilometers, an area larger than the country of Germany. Note that Nunavik is entirely in the upper half of the province of Quebec.

Source: http://www.niehs.nih.gov/research/programs/geh/geh_newsletter/2014/8/articles/index.cfm Used with permission.

model, as Rodon and Grey (2009, 331) point out:

> Nunavik clearly falls outside the Westminster parliamentary model since its executive is directly elected; nor is it a presidential model, since the executive, including the president, is part of the legislative assembly—a feature of a parliamentary regime. …

They add that Nunavik's powers (initially over health, education, and regional affairs) do not stem from an act of the federal Parliament. Rather the powers come from an Act of the Quebec Legislative Assembly. In effect Nunavik is the creation of Quebec and it is the first regional government within, and of, a Canadian province, replete with a seat in l'Assemblée nationale du Québec.

Nunavik is potentially very rich in mineral deposits; the result of which has led recently to ongoing negotiations with respect to its desire for more autonomy over resource management and revenues.

Nunatsiavut

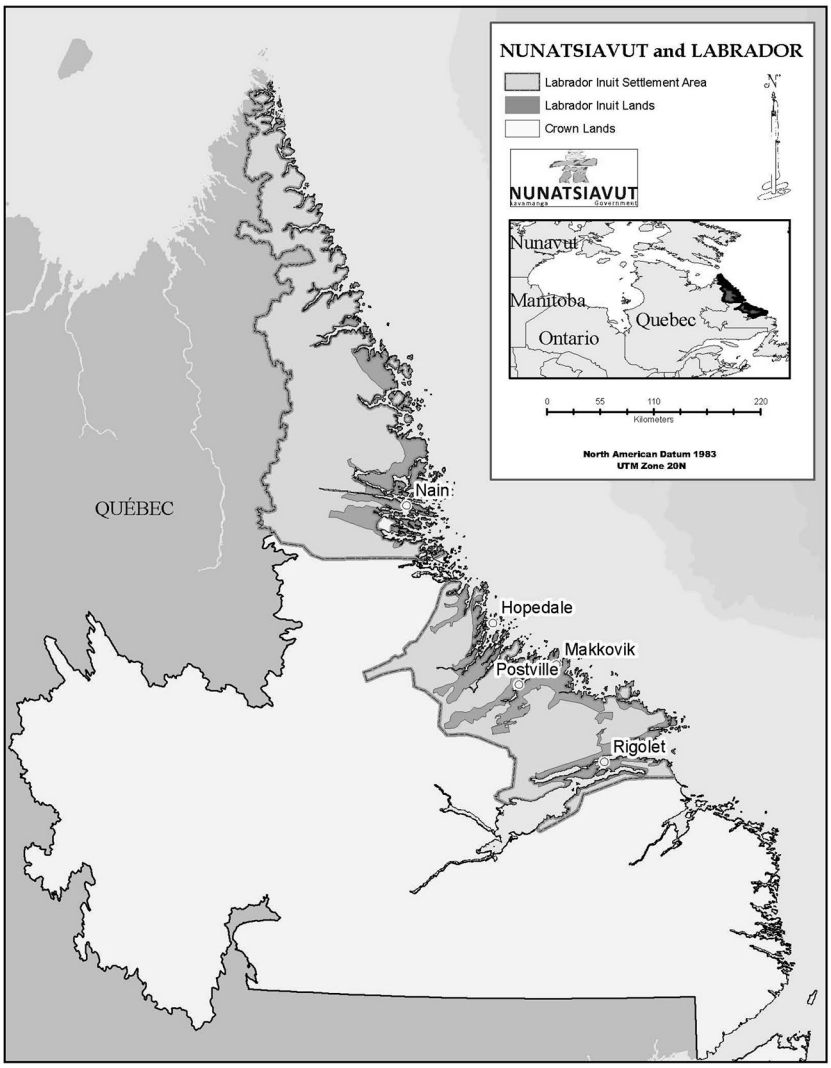
Located on the north salient of Labrador (Figure 9.4), Nunatsiavut was created in 2005 by the The Labrador Inuit Land Claims Agreement, a treaty among the Inuit of Labrador, the provincial government of Newfoundland and Labrador, and the Government of Canada. The Agreement is constitutionally protected under the Aboriginal and treaty rights granted by section 35 of the Constitution Act, 1982. Unlike other Inuit territories, Nunatsiavut chose to have an ethnic government rather than a public government because a public model would not guarantee the Inuit control of the new government. Moreover, as Rodon and Grey (2009, 334) point out, since an ethnic model allows for extraterritorial membership and since half of the Labrador Inuit live outside the settlement area, a public government was not practical.

Rodon and Grey (2009, 336) comment on the Nunatsiavut governance structure as follows:

> Nunatisiavut is divided into seven constituencies; each of the five villages in the settlement area and, outside the settlement area, Northwest River/Happy Valley-Goose Bay as well as a constituency for citizens residing in the "rest of Canada." Each constituency has one MLA for every 1,000 voters, up to a maximum of four. The five AngajukKâk (mayors) and the two Inuit community corporation chairmen are also members of the assembly… The president of Nunatsiavut is directly elected by all Nunatsiavutmut (citizens)

Figure 9.4

Nunatsiavut and Labrador Area



Source: http://www.actioncanada.ca/wp-content/uploads/2014/04/Land-Claims-Agreements_Labrador-Policy-Paper-EN-v0.5.pdf

> and has to speak Inuttitut, a condition that eliminates 73 percent of Nunatsiavutmut. The first minister is an ordinary member of the assembly and appointed by the president. … With a directly elected president, we are clearly outside the Westminster model. However, the assembly also has important powers, since it chooses the first minister as a way of avoiding an overly powerful executive.

The Nunatsiavut government oversees much of the social envelope as well as justice, with significant financing provided by a grant from Ottawa supplemented by property taxes, shared federal excise and personal income taxes, and royalties paid by the Voisey's Bay mine. As of 2009, Rodon and Grey note that the province of Newfoundland and Labrador was not contributing any funds toward the financing of Nunatsiavut, but they added that negotiations for a financial agreement with the province were underway.

Readers may view the above focus on the governance structure in the Inuit lands as somewhat excessive. It may well be. Nonetheless, what is refreshing is to see how indigenous governance structures can blend the Westminster model with on-the-ground realities. Indeed Nunatsiavut is idiosyncratic in yet another way—the legislative capital is in Hopedale, while the administrative capital is in Nain.

Conclusion

Canada's recent approach to Aboriginal self-government has much to commend it, especially in the Canadian north. This is particularly the case for the Inuit where Canada has largely devolved powers over natural resources to the Inuit—Inuvialuit, NTI in Nunavut, Nunavik, and Nunatsiavut. However, Ottawa holds a tight leash over resource devolution to the three territories. On the other side of the ledger, however, the presence of roughly a dozen constitutionalized territorial entities north of 60 degrees is serving to fragment the northern internal economic union. This calls for some version or variant of the cross-province Agreement on Internal Trade to apply north of 60 degrees.

While Ottawa has privileged the Nisga'a, for example, in terms of resource powers, the Yukon First Nations in terms of territorial and personal jurisdiction, and the Inuit in terms of self-government as elaborated above, this does not extend to most First Nations, e.g., the many hundreds of First Nations that fall under the numbered treaties. Now that the Supreme Court has extended these powers to the Tsilhqot'in and Nisga'a First Nations, it is increasingly difficult for Ottawa to con-

tinue to justify its imposition of Indian Act governance on the hundreds of First Nations south of 60 degrees.

What seems to be evolving is that those First Nations whose territory is rich in resources—fish, wildlife, forests, rivers, gas/oil, tourism, and the like—are able to broker a self-government deal with Ottawa, while those not so endowed must continue to labour under the provisions of the Indian Act. This even applies to huge reserves like Six Nations where, as noted, the Indian Act has mandated that an Ottawa-driven governance model must supersede the centuries-old traditional Longhouse model.

While it may not be the case that the Prairie numbered treaties are largely rock and sand and muskeg as Chief Dave Courchene has asserted, what is true is that far too many of them do not come anywhere near able to support a viable socio-economic community. This was patently obvious from the chapter 2 data on the socio-economic indicators for the Prairies.

Canada is fortunate that the rest of the world has not heaped more scorn on our treatment of our First Peoples given that the status quo is wholly unacceptable for a nation as rich as we are. A fresh approach is clearly essential, not only for the First Nations but for the rest of us as well.

Addressing this challenge is the role for the last substantive chapter of the book. Readers are alerted beforehand that the solutions proposed may well be viewed as going to considerable extremes. Perhaps they do, but if so, it behooves Canadians to provide alternative approaches to enabling First Nations to enjoy what Canada offers to the rest of its citizens. This is especially the case as we celebrate our sesquicentennial.

Part Six

A Pathway Forward for Treaty First Nations

Chapter 10

The Commonwealth of Sovereign Indigenous Nations (CSIN)

Introduction

Chapter 3 focused on the oft-troubling, even tragic, pre-Charter history of Indigenous peoples in Canada while chapter 5 dealt in some detail with the appalling and continuing nightmare that was the residential school system. The destructive effects of these legacies are with us still, as revealed in the socio-economic indicators presented in chapter 2. On the positive side of the ledger is the series of legislative/constitutional milestones that have laid the foundation for a brighter future for Indigenous peoples. The first of these was, of course, the 1763 Royal Proclamation elaborated in chapter 3. The second came from the Constitution Act, 1982 including the Canadian Charter of Rights and Freedoms and several other federal initiatives such as Bill C-31 as documented in chapter 4. The third followed rather directly from the first two, namely the series of Royal-Proclamation-and-Constitution-driven momentous Supreme Court of Canada decisions beginning with *R v. Calder* and still ongoing as documented in chapter 6.

On the political front the Residential School Apology and the striking of the Truth and Reconciliation Commission represented important markers of atonement. The TRC's near-100 Calls to Action that press for reconciliation across all aspects of Canadian society will hopefully be

embraced by business, government, and citizens alike and reflected in policies and programs. Every bit as positive, the 2015 Canadian election was arguably the first where Indigenous issues featured prominently in the campaign and, as a result, the Indigenous population responded by standing for office and voting in record numbers.

Chapters 8 and 9 contained more good news—north of the 60th parallel all of the First Nations in Yukon and most of those in the NWT have self-government agreements or are in the process of negotiating them. And the Inuit land claims agreements effectively cover the rest of Indigenous Northern Canada—Nunavut Tunngavik Inc., Nunavik, and Nunatsiavut have self-government agreements with Inuvialuit currently in the process of negotiating a self-government agreement as a complement to the 1984 Inuvialuit Final Agreement (IFA).

However, it is south of the 60th parallel, often in the "numbered-treaty" areas, where the institutional arrangements are dramatically failing First Nations citizens. The reserves associated with the numbered treaties may not be all rock and sand and muskeg as Chief Dave Courchene suggests, but on the Prairies they are often nowhere near prime agricultural land and they are usually bereft of other resources, unlike some of the BC First Nations, for example, where access to resources (forests, water, fishing, and ocean harvesting as well as non-renewable resources), or proximity to metropolitan areas enhances their economic viability. Presumably as a result, the Prairie reserve populations are often very small. For example, sixty-six of the seventy-four reserves in Saskatchewan have fewer than five hundred inhabitants. Not surprisingly, the result is that these reserves are neither economically viable nor of a scale that enables them to provide adequate social and educational services to their citizens. Arguably, this is reflected in terms of the range of socio-economic indicators in chapter 2, i.e., the large absolute gap between First Nations communities and non-Indigenous communities has not narrowed over the last thirty years. Indeed the gap between First Nations communities and Inuit communities in Figure 2.6 of chapter 2 has widened from five to eighteen points, arguably because the Inuit have benefitted from their self-government regimes elaborated in the previous chapter.

With the above as preamble, the role of this final substantive chapter is to outline the parameters of an alternative political and institutional infrastructure that hopefully will have the potential for ameliorating the range of socio-economic challenges facing First Nations. While focusing on an overarching framework for all of the seven-hundred-plus

First Nations may well be appropriate as the longer-term goal (e.g., along the lines of my 1990 proposal for a First Nations province) this would seem to be a bridge too far as a starting point. Accordingly, in what follows the focus will be on a smaller and more cohesive area.

Among the desirable features of the selected area would be the following: the First Nations territory should be embedded within in a province in order that its citizens can access aspects of the provincial social envelope, there should already exist a pan-provincial First Nations organization, and in order to realize scale economies it would be desirable if there were mid-level groupings of individual First Nations. While the Union of B. C. Indian Chiefs, the Assembly of Manitoba Chiefs, FSIN (the Federation of Saskatchewan Indian Nations), and the Treaty 8 First Nations in Alberta among others are potential candidates, for a variety of reasons that will become clear in what follows, I have opted to focus on the Indigenous Nations in Saskatchewan.

At this juncture a terminological note is in order. In late spring of 2016, the Assembly of the Federation of Saskatchewan Indian Nations voted to change its name from the *Federation of Saskatchewan Indian Nations* to the *Federation of Sovereign Indigenous Nations.* Readers will note that the acronym, namely FSIN, remains unchanged. This led me to label the model that follows as the *Commonwealth of Sovereign Indigenous Nations*, or CSIN for short. CSIN could apply to a province or a series of provinces. It could even become a pan-Canadian model along the lines of my *First Nation Province* booklet. In terms of the three-fold approach outlined in chapter 7, CSIN will clearly qualify as an Indigenous-nationals/Canadian-citizens model.[1]

As already noted when elaborating on the potential features of the proposed (and hypothetical) CSIN model, the analysis will focus on the province of Saskatchewan and its seventy-four First Nations. I hasten

1 In their excellent book *From Treaty Peoples to Treaty Nation* Greg Poelzer and Ken Coates (2015) recommend the creation of a Commonwealth of Aboriginal Peoples, or CAP. In their words: "The Commonwealth would entirely replace Aboriginal Affairs and would have a stronger mandate, but it would not be a province, nor would it be a nation. It would not exercise sovereignty, nor would it replace federal or provincial authority… Instead it would be a unique, Aboriginal-controlled…organization tasked with overseeing all Aboriginal programs and services." (p. 214). In contrast CSIN would have a land base, would in effect be a province-wide Indigenous nation, and would have many provincial-type powers that can be exercised on their own territories within the province of Saskatchewan. In other words the Poelzer-Coates notion of a commonwealth is similar to replacing INAC and would be consistent with the CSIN model. More on this below.

to add that I did not obtain, nor even seek, permission of the province nor of FSIN to do so. Hence it is entirely possible that one or more of Saskatchewan, Ottawa, and FSIN will be unwilling to embrace CSIN. Setting aside this possibility for purposes of the ensuing analysis, the selection of Saskatchewan was motivated in large measure because the Saskatchewan First Nations already have a comprehensive and sophisticated province-wide governance structure, i.e., FSIN. Moreover, and as will be documented below, FSIN has demonstrated impressive success in creating effective institutions in several important areas, especially in governance and higher education. A further reason for choosing Saskatchewan is that all of its First Nations are Treaty First Nations—Treaties 2, 4, 6, 8, and 10 cover the entire province and spill over into parts of Alberta, Manitoba, and the Northwest Territories (see Figure 3.3 in chapter 3). This creates a common bond across the seventy-four First Nations and is likely to facilitate cooperation and coordination. Finally, there is a personal reason for focusing on Saskatchewan because this is where I was born and where I lived until I graduated from the University of Saskatchewan, so I am more familiar with the province than I would be with Manitoba or Alberta as the chosen territorial area.

Given the thrust of the previous three chapters, it should come as no surprise that the CSIN model will embrace key aspects of the economic-efficiency, political-autonomy, and financial-responsibility features that characterize the recent land claims agreements and modern treaties that were elaborated in chapters 8 and 9. By way of a final introductory comment, while the model that follows may well be viewed as politically unacceptable, it is also the case that the chapter 2 reality for First Peoples is socio-economically unacceptable. Phrased differently, the status quo cannot hold.

FSIN: The Impressive Existing Institutional Status Quo

The Federation of Sovereign Indigenous Nations—formerly the Federation of Saskatchewan Indian Nations—is the representative body of the seventy-four First Nations in Saskatchewan. The governance structure of FSIN includes the Chiefs-in-Assembly, a Senate, an Elders Council, an Executive, an Executive Council, and an Indian Government Commission. The Federation maintains a Treasury Board and an Auditor General and major commissions for justice, lands and resources, economic and community development, education and training,

and health and social development.

Moreover, FSIN is, by definition, also a federation—nine tribal councils embracing the seventy-four chiefs of the First Nations reserves that encompass six political nations—Cree, Saulteaux, Assiniboine, Dakota/Sioux, Nakota/Lakota, and Dene.

This tribal-group level of aggregation (and integration) allows for the realization of some economies of scale in the delivery of social programs and services. There are additional scale economies on the important education front by virtue of the fact that the number of First Nations' school-age children represent 20 percent of all Saskatchewan school-age children, i.e., roughly double their population share as noted in chapter 2.

Saskatchewan also has a treaty commissioner whose office issued the *Statement of Treaty Issues: Treaties As A Bridge To The Future* (Office of the Treaty Commissioner 1998). The thesis therein is that the treaties are the building blocks for renewing the First Nations relationship with and within Canada.

While s. 91(24) of the Constitution Act, 1867 assigns to the federal government the exclusive power over "Indians and Lands reserved for the Indians" and while the Supreme Court has ruled (as noted in *Daniels v. Canada* in chapter 6) that Ottawa has a fiduciary responsibility for all Indigenous peoples, this does not require Ottawa to be responsible for the actual delivery of medicare, education, and other aspects of the social envelope. Indeed, given that the First Nations view treaties as agreements with the Crown, it is important to recall that both Ottawa and the provinces are part of the Crown in Canada (and both the governor general of Canada and the lieutenant governors of the provinces are the representatives of the Queen in Canada). As such there are two facets to this relationship that merit highlighting. On the one hand the First Nations must recognize that if aspects of the social envelope are delivered to them by the provinces they are nonetheless still interacting with the Crown. On the other hand, when interacting with the First Nations, the provinces need to be aware that they too must act in ways that uphold the "honour of the Crown."

By way of a final overview comment, the underlying rationale is to outline a new governing infrastructure model that will lead to an enhanced socio-economic future for First Nations citizens. In implementation terms, the operative approach will echo the subtitle of Gordon Gibson's book: namely to "respect the collective" but "promote the individual."

Prior to detailing the nature of the proposed model, it is important to elaborate further on FSIN's impressive existing infrastructure.

FSIN: Higher Education

In May, 1976, FSIN entered into an agreement with the University of Regina to establish the Saskatchewan Indian Federated College (SIFC). The agreement provided for an independently administered university-college, the mission of which was to serve the academic, cultural, and spiritual needs of First Nations students. (In June 2003, the Saskatchewan Indian Federated College officially changed its name to the First Nations University of Canada [FNUniv]). When SIFC first opened its doors in the fall of 1976, it had nine students and offered the following programs: Indian Studies, Indian Languages, Indian Teacher Education, Social Work, Fine Arts (Indian Art, Indian Art History), and Social Sciences. Since then, enrolment has steadily grown, and the First Nations University of Canada now maintains an average annual enrolment of more than 3,000 students.[2]

FNUniv offers programs and services on three campuses: Regina, Saskatoon, and Prince Albert. It has entered into more than twenty-five agreements with Indigenous peoples' institutions in Canada, South and Central America, and Asia and has signed agreements with academic institutions in Siberia (Russia), Inner Mongolia (China), and Tanzania. The university has been a member of the Association of Universities and Colleges of Canada (AUCC) since 1994.

Beyond this, more than 10 percent of the University of Regina's students are Indigenous. In addition, there are more than 2,100 self-declared First Nations, Métis, and Inuit students currently studying at the University of Saskatchewan in Saskatoon or at one of its four off-campus sites in the province. The Program of Legal Studies for Native People (PLSNP) is a popular eight-week summer course offered through the University of Saskatchewan's Native Law Centre that provides Indigenous students from across Canada an opportunity to study first-

2 While FNUniv merits celebration it should be noted that it experienced serious growing pains, including being put on probation in 2007 by the Association of Universities and Colleges of Canada. The probation was lifted in 2008 when, among other requirements, it established full independence from the Federation of Saskatchewan Indian Nations. Later, the Canadian Association of University Teachers voted unanimously to censure FNUniv until it made appropriate alterations to its approach to academic freedom, governance, and political autonomy.

year Property Law before beginning law school. Many students take this course as a condition of their acceptance to law school.

Equally impressive on the higher education front is the Saskatchewan Indian Institute of Technologies (SIIT). On 1 July 2000, the Saskatchewan government recognized SIIT as a fully functioning provincial post-secondary institution, with the ability to award its own certificates and diplomas and to be recognized by both Indian and non-Indian communities. This certification allows students to transfer their credits to other institutions and to have their certificates and diplomas recognized by all employers in the province. SIIT has campuses at nine different locations: Saskatoon, Regina, Fort Qu'Appelle, Prince Albert, Yorkton, Onion Lake, North Battleford, Meadow Lake, and La Ronge.

Implications of the Daniels *Decision*

While FSIN has, as noted, an excellent institutional base on which to mount a more sustainable socio-economic future for Saskatchewan First Nations, the reality is that FSIN will have to adapt to, or accommodate, a range of changes that flow from recent Supreme Court decisions. Arguably, the most challenging of these flows from the *Daniels* case, namely that off-reserve status Indians, as well as non-status Indians, are included under s. 91(24) of the Constitution Act, 1982 and that, as noted in chapter 6, existing case law from the SCC establishes that Aboriginal peoples have a fiduciary relationship with the Crown. From the Table 2.1 data for 2013 in chapter 2 this means that CSIN will oversee roughly 150,000 citizens.[3] Challenging as this may seem, it is appropriate to recall that Bill C-31 in 1985 allowed many tens of thousands of non-status Indians to gain or regain status, at least one of whom (Ovide Mercredi), as noted earlier, later became the National Chief of the AFN. While Bill C-31 may not be an exact parallel to the above recommendation for integrating status and non-status people under the CSIN umbrella, it does mean that there is a precedent of sorts to accomplish such integration. The alternative, namely mounting separate socio-economic institutions/programs for status and for non-status Indians, would lead to expensive duplication and scale diseconomies. Moreover, if non-status Indians do not receive comparable programs, the courts will surely be called upon to intervene again to ensure that the essence of

3 In comparison the population of the province of Prince Edward Island in 2016 was just under 150,000.

the *Daniels* decision is implemented.

Attention is now directed to the inner workings of the proposed CSIN under the assumption that it is assumed to be linked to, or integrated with, an overarching provincial-federal infrastructure similar to that of the existing FSIN-Saskatchewan relationship.

CSIN: Prerequisites for First Nations Economic Viability

In 2015, the Tulo Centre of Indigenous Economics published an on-line book, *Building a Competitive First Nation Investment Climate*. The thrust of the book is that most First Nations communities do not have anywhere near a balanced mixed economy. Generally, their public sectors are too large and their private sectors are too small. In other words, the creative balance between private and public sectors in the rest of Canada and the United States does not exist on reserves. There are very few privately held businesses on reserves and there is little retail presence. For example, at least 90 percent of all expenditures by on-reserve households in Canada are made off-reserve! (Tulo Centre 2015, 41). Part of the reason for this is that the transaction costs for investing on reserves are far too high. In large measure this is the direct result of the political-economic straightjacket called the Indian Act.

The Tulo Centre remedy is that First Nations must increase the role of the private sector and, in particular, must increase investment on reserves. Otherwise

> off-reserve migration will increase. The impact of not attracting investment is not just the lost investment itself; it is lost job opportunities as well. It is migration away from the community. It is poverty and all the health, housing and social problems associated with poverty. (Tulo Centre 2015, 42)

An important key to increasing the economic viability of reserves is an appropriate regime of property rights.

Property Rights

Arguably the most fundamental requirement of a well functioning economic system is a strong and secure system of property rights. There are three key characteristics of a well functioning set of property rights: (i) the exclusive authority to determine how the property right (say, of a resource) is exercised; (ii) the exclusive right to the services from, or the returns on, the resource; and (iii) the right to exchange the re-

source at mutually agreeable terms. Clarity of property rights dramatically reduces transactions costs and this, in turn, drives investment. The fact that reserve land is a common property resource under the control of the Indian Act is a huge deterrent to economic development on reserves. One aspect of this is the well-known "tragedy of the commons," so labelled to describe the English common grazing grounds. That is, when property rights to the grazing grounds are communally held, then overgrazing will occur leading to the destruction of the commons. Sadly, this is the story of Canada's "common-property/Ottawa-controlled" reserves. Yet Canadians tend to lay the blame for the dire straits of most of the reserves at the feet of the Indians rather than with federal policy. Arguably, even more problematic is that banks are most reticent in providing loans for capital investment or for mortgages because the Indian Act legally restricts banks from seizing and selling the asset in the event of default. *It is incomprehensible that Canada and Canadians have allowed this federal instrument of mass impoverishment to reign so long over the hundreds of Canada's First Nations reserves.*

By way of an interesting observation on the lack of property rights on reserves, the Tulo volume (2015, 27) reproduces a quotation from Ovide Mercredi, a former National Chief of the Assembly of First Nations:

> Almost every First Nations community [in Canada] is located on a reserve, which is a tract of land—usually the size of a postage-stamp—set aside by the federal government for specific bands of Indian people. No one particular Indian person "owns" the land; it is held by the Crown for the collective benefit of everyone in the Indian band. The notion that First Nations lands, which we have occupied since before contact, must now be held by the government on our behalf is both bizarre and insulting.

As Manny Jules has asserted on many occasions, what has always been missing under the Indian Act is a land-tenure system that restores First Nations property rights and at the same time protects the underlying or collective title. Readers will have noted that all of the land claims agreements documented in chapters 8 and 9 transferred property rights from Indian Act control to the First Nations collective and then these rights were often transferred to individual First Nation citizens.

While a secure property rights regime is necessary in order for transaction costs associated with investments to be competitive with surroundings jurisdictions, this is not sufficient. Also needed are an effective governance regime, an appropriate legal framework, and stable

fiscal arrangements. These attributes will be addressed in the context of elaborating further on the proposed CSIN, to which the analysis now returns.

Prospect and Retrospect

At long last the requisite backdrop has been set so that attention can now be directed to the raison d'être of this volume, namely to outline the key dimensions of a governance model capable of ameliorating the socio-economic challenges highlighted in chapter 2. To be sure, I have selected a test case that increases the chances of success. First, FSIN is, as already noted, a well functioning system in terms of the national status quo (especially for an area that does not have the resource potential of some First Nations in other provinces). Second, the seventy-four First Nations are within the province of Saskatchewan. This will be a major advantage since the CSIN will need a close relationship with the province. Third, given that the First Nations population in Saskatchewan is now greater than 150,000 and growing rapidly, the province of Saskatchewan will presumably want to become a partner in the process if there is any evidence that the model will succeed. This is so because an improved socio-economic future for First Nations will, in turn, increase the fortunes of the province.

However, there are some very significant counter-forces at play. From my perspective these can probably be lumped together into one omnibus challenging negative—namely that the proposed model will require all players (First Nations, Ottawa, the selected province, and Canadians) to accept provisions and conditions that (i) depart markedly from the status quo and/or (ii) may run contrary to their deemed existing interests. Yet the reality is that mere tinkering with the current arrangements will be inadequate in terms of addressing the socio-economic challenges facing First Nations and, ultimately, all Canadians.

Prior to embarking on the proposed governance model for CSIN, it is instructive to note that there was an earlier attempt circa the millennium to design a new governance framework for FSIN as well as a more integrated relationship between FSIN and the Government of Saskatchewan, as Figure 10.1 reveals. This was a multi-year negotiation process including some impressive research papers (on alternative federal financing options, for example). One of the probable reasons for the non-ratification of a new arrangement was that the role of the chiefs of the smaller reserves would likely have been downplayed. This may

Figure 10.1

First Nations Governance Within Saskatchewan

An Impressive But Never Enacted Model

For several years in the late 1990s and early 2000s there were tripartite (First Nations, Saskatchewan, and Canada) negotiations designed to create a socio-economic development strategy that would build on the treaty relationships. Details are hard to come by, but fortunately David Hawkes (who was the chief federal negotiator in the process and, earlier, one of the co-directors of research for RCAP) has authored a valuable paper—"Rebuilding the Relationship: The Made in Saskatchewan Approach to First Nations Governance" (Hawkes 2005). Motivating the proposed governance model were the bleak socio-economic indicators. Beyond those aired in Chapter 2, Hawkes points out that the incidence of tuberculosis in First Nations is twenty-five times the national average; that 30 percent of status Indians over the age of fifteen have never worked in their life and that in terms of the United Nations Human Development Index, Saskatchewan's First Nations ranked fifty-ninth, after Bahrain and just ahead of Fiji.

In the area of governance the proposal was to aggregate FNs into a single province-wide governance structure comprising about five regional governments. This would provide the scale economies to allow the creation of a professional public service to oversee internal matters as well as intergovernmental relations with Ottawa and the province.

A second key element of this "made in Saskatchewan" process was the First Nations' jurisdiction and authority off-reserve. In terms of education, First Nations parents might wish to have their children study at First Nations schools, using the same curriculum, both on- and off-reserve. This could mean that, in urban settings, First Nations parents would have a choice of where to send their children—to public schools (whether non-denominational, Catholic, or francophone) or to First Nations schools. Indeed, First Nations schools could be open to all provincial residents. Presumably, property taxes would be paid through a check-off to the appropriate school, and school boards of parents would oversee the administration of these schools. A province-wide First Nations school system could design a uniform school curriculum, certify First Nations teachers, provide for regional First Nations school boards, and directly address the low high school graduation rates of First Nations students.

In terms of the third of the key governance components—legitimacy, powers, and resources—for the time being, federal transfers would continue to provide the major share of resources for First Nations governments. Over time, however, First Nations' own-source revenues, together with taxation agreements with other governments, would increase their self-reliance.

In the end these multi-year negotiations collapsed.

To a significant degree CSIN is an attempt to resurrect selected aspects of this abandoned model, although its origins actually evolved from the challenges and choices presented in the previous nine chapters.

well also be a challenge for the CSIN, although some opt-out provisions will be incorporated in order to attempt to make the model more acceptable to all.

While CSIN would continue with the basics of the FSIN structure, e.g., embracing the seventy-four reserves, in addition it would include status and non-status off-reserve Indians living in Saskatchewan. The CSIN organization would have to be reconstituted to accommodate this change by formally bringing off-reserve Indians into its governance structure. CSIN would retain its internal federal structure but would ensure that the tribal (and city) groups are constructed (or reconstructed) with an eye toward ensuring that economies of scale (e.g., for education) are taken into account.

Rethinking and Reworking CSIN-INAC Relations

INAC (Indigenous and Northern Affairs Canada, n.d.) should be split into two organizations: (i) a regulatory branch dealing with Indigenous oversight including Indigenous registry, administration of the Indian Act (where relevant), overseeing the recent Financial Transparency Act (see chapter 4) and so on; and (ii) a separate advocacy branch. In part this separation was motivated by the concerns expressed by Stephanie Irbacher-Fox and Stephen Mills (2009; in chapter 8) to the effect that since INAC is responsible for *financing* the Yukon First Nations, it is in a conflict of interest if it is also responsible for *implementing* the YFN Agreement. More generally, the advocacy branch would be responsible for representing Indigenous interests to the relevant policy departments of the federal government. RCAP embraced a similar recommendation.

CSIN and the Indian Act

As is the case with the modern land claims agreements, CSIN would become self-governing (thereby replacing the Indian Act) and would henceforth be responsible for, and accountable to, its own citizens, and not to Ottawa, i.e., in the same way that the provinces are accountable to their citizens and not to Ottawa. Perhaps a jointly nominated third party could be made responsible for developing appropriate protocols for transparency, accountability, etc. This would require developing a First Nations professional civil service and the accompanying governance structures that would be required to replicate the functions of INAC. Obviously, this transition will be complex since CSIN will have to establish linkages with several federal departments for actions/

dealings that formerly were handled through INAC. Complicating the transition is that CSIN will have to forge linkages with selective provincial departments as well. One presumes that INAC (and the relevant provincial government) will be most cooperative during the transition. Were there to be more than one provincial version of CSIN, the opportunity for generating economies of scale in dealings with Ottawa should be pursued.

CSIN: Territorial Powers

Spending Powers

CSIN would have the same spending powers on its own lands (i.e., on its reserves and on other lands CSIN may purchase) as those now available to the Yukon First Nations, i.e., provincial as well as municipal powers. This means that CSIN would have much more pervasive interactions with Saskatchewan (and relatively fewer with Ottawa) than it currently has. This is important since it is the provinces (not Ottawa) that are responsible for delivering the social envelope. Looked at from the other perspective, CSIN will benefit from greater linkages to provincial policies, standards, and programs in areas like health, welfare, and education as outlined later.

Natural Resources Powers (surface and subsurface)

It is most important that CSIN be granted the same s. 92A constitutional powers on its own lands that the provinces have with respect to non-renewable natural resources, forestry revenues and electrical energy. This includes the exploration, development, and management of surface and subsurface non-renewable natural resources and forestry and the collection of revenues therefrom. By way of some backdrop here, the 1930 Natural Resources Acts were a series of Acts passed by the Parliament of Canada and the provinces of Alberta, British Columbia, Manitoba and Saskatchewan to transfer control over Crown lands and natural resources within these provinces from the federal government to the provincial governments. Among the rationales for this 1930 legislation were that Alberta and Saskatchewan, for example. had not been given control over their subsurface natural resources when they entered Confederation in 1905, unlike the other Canadian provinces.[4]

4 At Confederation, Ontario, for example, received surface and sub-surface proper-

This 1930 legislation did not transfer subsurface rights on the reserves to the provinces. This being the case, the proposal as part of CSIN is that Ottawa would transfer the relevant subsurface rights to CSIN. This is what Ottawa has done for Yukon First Nations agreements (chapter 8) as well as for the Inuit land claims agreements (chapter 9) and this is what the Supreme Court has done in the *Tsilhqot'in* decision (chapter 6). The bottom line here is that there would seem to be no defensible reason for not transferring s. 92A powers to CSIN.

A further observation is warranted here. With Canada's initial embracing of UNDRIP (see chapter 5), the First Nations coming under the numbered treaties (which includes all Saskatchewan First Nations) were no doubt excited because of the potential reach of Article 28.1 of UNDRIP that reads as follows:

> Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. (United Nations 2007)

The view among some is that the "traditional lands" of the seventy-four Saskatchewan First Nations encompassed the whole province. To be sure, Ottawa later withdrew its legal embracing of UNDRIP, arguably in large measure because of the potential implications of Article 28.1, especially the assumption that the numbered treaties were characterized by free, prior, and informed consent on the part of the First Nations. However, in light of the *Tsilhqot'in* decision, this issue will likely remain in play.

CSIN: Personal Jurisdiction Powers

CSIN should have personal jurisdiction over its citizens on and off its lands in the province in respect of a range of programs and services relating to First Nations spiritual and cultural beliefs and practices. How-

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ty rights, both of which were passed on to the private owners of the land. Hence any royalties (for oil for example) will go to the owner of the land. However when Ottawa transferred the sub-surface rights in 1930 to Alberta, for example, the province did not pass these sub-surface rights to the owners of the surface rights. Rather it kept them in provincial hands. Then came Leduc…

ever, one presumes that, as is the case for the Yukon First Nations, CSIN will not be able (or may not be able) to license or regulate facility-based services off their lands. Among the areas that might come under personal jurisdiction are policies related to adoption, custody, incarceration and sentencing, educational programs, Indigenous languages, inheritance and wills, dispute resolution, solemnization of marriage of citizens among other activities.

Beyond these examples, several existing federal programs for Indigenous persons also fall under personal jurisdiction in that they are available to Indians on and off reserves across the country. These include selected health services beyond provincial medicare coverage as well as financial support for Indigenous persons attending post-secondary education no matter where they reside.

Somewhat related to the concept of personal jurisdiction are many of the TRC's Calls to Action because they call upon governments, businesses, and institutions, when exercising their own powers, to take into consideration, or to reconcile them with, the interests of Indigenous peoples. In my view these Calls to Action will play a major role in empowering Indigenous peoples in their actions and their relations with governments, businesses, and their fellow Canadians.

CSIN Financing: The Gross Expenditure Base

Financing CSIN would follow the pattern in the territorial and Yukon First Nations models. As elaborated earlier this would entail estimating a so-called gross expenditure base (GEB) that would be sufficient to ensure that First Nations would have access to public goods and services comparable to those available to other Canadians. From this GEB would be deducted any own-source revenues (taxes, fees, etc.) accruing to CSIN. Obviously these own-source revenues should not result in a dollar-for-dollar reduction in the GEB because there would be no incentive for CSIN to collect revenues. The YFN model has no deduction at all for an initial grace period but then the offset rises to 70 percent (net of collection costs) so that raising own-source revenues always increases their overall revenues. Note that Ottawa collects the provincial share of the income tax free of charge so one would assume that this would also carry over to CSIN.

As is the usual case in these financial arrangements for the territories, the GEB would be escalated annually by population growth and by the rate of inflation so that this would also apply for CSIN.

CSIN citizens would be encouraged to access provincial services (e.g., health) where this would be more efficient. If these services are covered by Ottawa, the province could be compensated by direct payments from Ottawa (as is the case under the Gitxsan agreement elaborated in chapter 7) or by indirect payments that pass through CSIN en route to the province. The latter avenue would have the additional benefit that CSIN may be able to influence the province to provide the services in question in ways that are more tailored to CSIN's needs.

The Canada Health and Canada Social Transfers (CHT/CST)

Ottawa's equal per capita transfers to the provinces (essentially the Canada Health Transfer and the Canada Social Transfer) are in the $1,400 per capita range. CSIN should receive its population share of the overall CHT/CST to Saskatchewan or else receive documentation from the province on how and where these monies have been expended on their behalf.

CSIN Taxation: Part I

CSIN would have provincial and municipal taxation powers on their own lands, again similar to the taxation powers of the Yukon First Nations. The popular conception is that First Nations do not tax themselves. Increasingly, however, this is no longer the case as Table 10.1 indicates—170 First Nations are collecting property taxes under the Fiscal Management Act and over forty FNs collect the GST under the authority of the First Nations Goods and Services Tax Act. Moreover, the Nisga'a and the Yukon First Nations collect income taxes. And as the table also reveals many Saskatchewan and Alberta FNs also collect resource royalties under Indian Act First Nation Oil and Gas and Moneys Management Act.

As already noted, non-status Indians and off-reserve status Indians are currently subject to income taxation. Presumably, the traditional provincial portion of these tax revenues would now go to CSIN. While the Yukon First Nations are taxable on their own land as are the Nisga'a, few, if any, of the treaty First Nations south of 60 degrees latitude are subject to income taxation on their reserves. However, the recommendation for the CSIN model is that *all CSIN citizens would be subject to income taxation whether living on or off reserves.* This is italicized because removing the existing income tax exemption on reserves will likely be the major stumbling block to the introduction of CSIN since

Table 10.1

Jurisdictional Revenue Sources Available to First Nation Governments

Revenue	Authority	Administration	Favourable Circumstances	Examples
Property Tax	Fiscal Management Act (FMA)	First Nation	Commercial, residential or industrial development	170 FNs collecting property taxes
Federal Sales Tax	First Nation Goods and Services Tax Act (FNGST)	Tax Collection Agreements	All circumstances favourable	40 First Nations collecting FNGST
Provincial Sales Tax		Tax Collection Agreements	Sales of goods on First Nation lands	Alcohol tax in Saskatchewan; Sales tax in New Brunswick
Income Tax	Yukon Agreement Nisga'a	Tax Collection Agreement	Comprehensive Agreement	14 Yukon Self-Governing First Nations Nisga'a Nation
Tax for services	FMA	First Nation	Sale of local services (water, sewer, etc.)	Shuswap Nation in BC
Development Cost Charges	FMA	First Nation	Pending development	Tk'emlúps te Secwepemc, Tsawout
Royalties	Indian Act First Nation Oil and Gas and Moneys Management Act	Indian Affairs; First Nation	Oil, gas, or mining on First Nation lands	Many First Nations in Alberta and Saskatchewan
Business Activity Taxes	FMA	First Nation or Tax Collection Agreement	Commercial developments	Some First Nations in BC

Source: Tulo Centre (2015, 157). Used with permission.

this exemption is viewed as a treaty right. However, if the reserves remain tax-exempt zones this will surely be a major stumbling block to improving First Nations' socio-economic futures.

Among the many factors/issues/proposals at play in relation to the income-tax issue are the following:

(i) The New Canada Child Benefit:

Beginning in August 2016, the new Canada Child Benefit (CCB) will transfer $6,400 per year ($533 per month) for each child under 6 years of age and $5,400 per year ($450 per month) for each child between 6 and 17 years of age. These benefits will begin to be reduced (clawed back) for family net income beyond $30,000. The $30,000 threshold is based on family net income. The Canada Revenue Agency will calculate a family's actual entitlement to the new Canada Child Benefit based on the definition of adjusted family net income in the Income Tax Act. Hence even tax-exempt First Nations citizens living on reserves must fill out a tax form with Revenue Canada in order to qualify for the CCB program. However, given that Ottawa allows on-reserve Indians to remain tax exempt and still receive the full CCB, no matter what their income level, the federal government should ensure that all on-reserve First Nations families are actually receiving the CCB. It is clear that the new CCB will play an extremely important income-support role for First Nations families and their communities.

In hindsight, Ottawa might have attempted to use the CCB as a carrot to entice the on-reserve Indigenous citizens to embrace income taxation. Under the current system, the CCB is in effect a children's demogrant for reserve-based citizens.

CSIN Taxation: Part II

There is an alternative approach to taxation, one that is more consistent with the thrust of this monograph as well as more in line with the approach enshrined in the modern treaties elaborated in the previous two chapters. This would resemble the YFN agreements. Specifically, Ottawa would negotiate to "buy out" the First Nations tax exemption on reserves. The resulting funds would presumably be invested in capital markets. Both the principal and any earnings associated with the buyout would, as in the YFN agreements, be tax exempt, nor would they constitute an offset to the gross expenditure base. As is the case with the provinces, CSIN would receive the equivalent to the provincial

share of both the personal and corporate income tax revenues. If this is not sufficient to trigger CSIN on-reserve taxation, then I would recommend the approach suggested in *A First Nations Province* (Courchene and Powell 1992), namely why not return *all* of any CSIN-based on-reserve income taxes to CSIN? Moreover, these taxes would not reduce the gross expenditure base for an initial grace period but then would become a partial source of revenue to the GEB beyond some negotiated level of tax revenue.

Readers may well note that these approaches to ensuring taxation are going to extremes. They would be right, but the rationale for this is clear—without the combination of property rights and taxation the prospects for a viable economic future for CSIN would be minimal indeed.

Education: On Reserve

Education is also one of the principal keys to unlocking the potential for brighter futures for First Nations peoples.[5] This is patently clear from the chapter 2 data. Public school and early childhood education on CSIN land would need to be rationalized so that the numbers of children are such as to allow for meaningful scale economies. For example, and focusing on Saskatchewan, this may require a reworking of the existing FN geographical composition of the tribal councils in order to achieve these requisite scale economies, especially since non-status Indians would now be included. In turn, children graduating from primary education should be able to be accommodated in regional secondary schools, again achieving scale economies so that quality education can be delivered. It will no doubt be the case that in some areas of CSIN lands this will not be possible, so that will likely call for some version of tele-education.

In terms of monies allocated by Ottawa to Indigenous education, as noted earlier, Don Drummond and Ellen Kachuck Rosenbluth (2013) have authored an important paper—"The Debate on First Nations Education Funding: Mind the Gap." This is a wide-ranging analysis on the challenges facing First Nations education, and especially on the per capita funding gap between comparable provincially funded schools and those funded by INAC for schools with fewer than 100 full-time

5 It is a pleasure to recognize the many contributions of Simon Fraser's John Richards (2008, 2014, and with M. Scott 2009) to the Indigenous education literature.

equivalent students. The relevant data are reproduced as Figure 10.2. The per capita spending levels on their own schools by Quebec and Ontario are 85 percent and 90 percent above INAC per capita spending. Only in Manitoba and Alberta is the funding reasonably comparable. This is wholly unacceptable.

In roughly the same time frame, former Prime Minister Paul Martin embarked on his *Indigenous Education Initiative* designed to challenge the growing view that First Nations children on a reserve are unable to perform as well as other Canadian children.

When the project was launched, only 13 percent of Grade 3 students at the two schools met or exceeded Ontario's target for reading proficiency when they took the province's standardized Education Quality and Accountability Office (EQAO) test. By 2014, 67 percent met or bettered that EQAO standard, just a shade below the 70 percent of students who succeeded province-wide at public schools. Similar steady progress was tracked in the EQAO tests for Grade 6 students at the two schools.

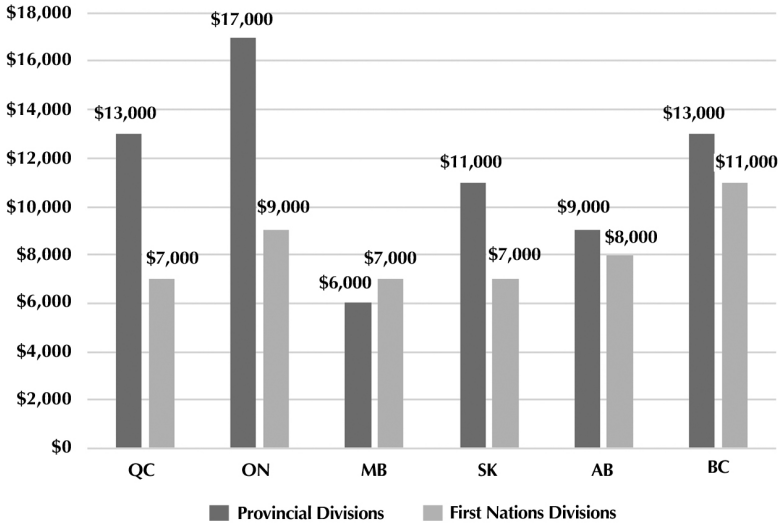
Despite the documented collapse detailed in chapter 4 of an earlier attempt to create a national First Nations Education Act, the time seems right and ripe for another attempt. Indeed, the Truth and Reconciliation Commission's Calls to Action numbers 7 and 8 call upon Ottawa to work toward eliminating the education gap between Aboriginal and non-Aboriginal Canadians (#7) and to eliminate the funding discrepancy between children educated on and off reserves (#8).

Education: Off Reserve

The province of Saskatchewan already oversees a public school system, a denominational system complemented by K–12 French-language programs. However, given (i) that Statistics Canada forecasts that 24 percent of the Saskatchewan population will be of Indigenous descent by 2031, up from 16 percent in 2006 (Lewington 2014), (ii) that some Saskatchewan cities already have large Indigenous population shares (Figure 2.2 in chapter 2), and (iii) that the share of the education-age proportion of the Indigenous population is roughly double that of the non-Indigenous population (again cited in chapter 2) it seems inevitable that urban Indigenous schools will emerge under the auspices of CSIN. The financing would come, in part, from the First Nations/Indigenous share of the province's education-related property tax system as well as revenues from federal contributions. While there already ex-

Figure 10.2

2009 Average Instructional Service Dollars per FTE Between AANDC and Provincial Districts, by Region for Districts With Fewer Than 100 FTEs



Source: Drummond and Rosenbluth, (2013, 10).

ists considerable cooperation between First Nations school authorities and the other education oversight boards in the province on a wide range of organizational, personnel, and curriculum issues, the Indigenous population in some northern cities (e.g., Prince Albert and North Battleford) may be sufficient to create a CSIN K-to-12 system. Since Saskatchewan already has a complex school system, the way forward will need negotiation among the several parties. The main point here is that there exist opportunities to reap horizontal and vertical economies of scale and scope in mounting an Indigenous CSIN school system.

Political Federalism

With more than 150,000 citizens CSIN may well merit a House of Commons seat. However, CSIN, as part of the AFN and Indigenous peoples more generally, might prefer the status quo, especially after the 2015 election where as noted earlier there were over fifty Indigenous candi-

dates, ten of whom were elected with two becoming cabinet ministers.

However, Canada's Indigenous peoples certainly merit Senate seats. Only four provinces have populations larger than Canada's Indigenous population! Moreover, each of the three northern territories has a Senate seat. Senate seats would recognize both the Indigenous nationals and Canadian citizens reality of Canada's First Nations.

Urban Reserves

The thrust of this chapter is to focus on how First Nations can reposition themselves in ways that will increase their individual and collective economic and social well-being by marrying some of the key attributes of successful market economies with key aspects of their traditional value systems. Surprisingly, however, there is one recent development that is driving change dramatically in the opposite direction, namely urban reserves.

Figure 10.3 elaborates the evolution of (and rationale for) urban reserves. It seems to be the case that all parties (First Nations, cities, and Ottawa) are on side with this development. While the rationale for urban reserves is cast in economic terms, what is really happening is that urban reserves are transferring the economic-and-transfer-dependency syndrome of the reserve system to our cities. Once the way is cleared for cities in all provinces to embrace urban reserves they will surely proliferate across Canada. In other words, whereas the proposed CSIN model would recommend removing the income tax exemption on reserves, the urban reserve model would transfer the existing income and sales tax exemption from the reserves to the cities.

It seems clear that these urban reserves may provide some immediate economic gain for cities as well as for Indigenous people residing within the territory of the urban reserve. However, what is far from clear is why INAC, in the name of the Government of Canada, is so eager to export the disincentives associated with the on-reserve economic model and the resulting transfer-dependency culture to urban Canada. By all means the First Nations should be able to purchase urban land under the Treaty Land Entitlement (TLE) Framework Agreement claims (see Figure 10.3) and develop it in ways that they see fit, subject to the laws and codes of the city/province. Were CSIN to purchase city land, whether or not under the umbrella of a reserve, the taxation regime should be the same as it currently is for status Indians off reserve, i.e., essentially the tax regime of the associated province.

This leads to a related issue. It is unclear how the *Daniels* SCC decision—that Métis and non-status Indians are "Indians" under s. 91(24) and, as such, that they have a fiduciary relationship with the Crown—will play out if Canada, via urban reserves, creates special privileges in cities for status Indians but not for "*Daniels* Indians."

In summary, the creation of urban reserves, replete with on-reserve privileges, runs counter to the rationale for, and the analytical underpinnings of, CSIN; that is, rather than introducing to the reserves the principles that drive the success of the Canadian economy, the creation of urban reserves transfers the dysfunctional reserve model to urban Canada. If urban reserves are to be part of the future, then there is even more reason to introduce pro-development initiatives and incentives.

However, there is a better model.

The Whitecap Dakota First Nation: A Better Way Forward[6]

The Whitecap Dakota First Nation, located twenty-six kilometers south of Saskatoon, is a remarkable success story. It is part of the larger Dakota-Nakota-Lakota Nation whose territories span both Canada and the United States. The Dakota Nation had a longstanding relationship with the British Crown—they signed a treaty with the British in 1787 and were military allies with the British Crown in the American Revolution and the War of 1812. When they moved north to what is now Canada, the British allotted them what has become the Whitecap Dakota First Nation.

Under the acclaimed leadership of Chief Darcy Bear, the Whitecap Dakota First Nation (henceforth WDFN) signed a Financial Transfer Agreement with INAC in 1997, followed by a Framework Agreement for Self Governance in 2012. In addition, under the First Nations Land Management Act, WDFN ratified the Whitecap Land Code to assert its control over its lands and resources that, in turn, secures investor certainty.

Then, with a population of only 629 citizens with just over one-half of them (330) living on the reserve, the Whitecap Dakota First Nation

- developed the Dakota Dunes Golf Links, a championship golf course ranked 15th out of the roughly 3,500 golf courses in Canada, and has been host to a web.com tournament;

6 The information that follows is adapted from the Whitecap Dakota Government website and associated websites.

… continued on page 260

Figure 10.3

Urban Reserves

One of the most recent and important initiatives relating to First Nations has been the growth of "urban reserves." Some of the urban reserves emerged rather naturally when a rural reserve located near a city became surrounded by urban growth. The oft-mentioned example is the Musqueam reserve in Vancouver. However, the term *urban reserves* in the present context relates to existing reserves establishing offshoots in an urban setting.

Some, perhaps most, of the surge in the number of urban reserves (now well over one hundred) relates to Treaty Land Entitlement (TLE) claims. These TLE claims are intended to settle the land debt owed to those First Nations who did not receive all the land they were entitled to under historical treaties signed by the Crown and First Nations.

Once an agreement has been negotiated, a specified amount of Crown lands is identified and/or a cash settlement is provided so that a First Nation may purchase federal, provincial/territorial, or private land to settle the land debt. Currently, approximately 90 percent of TLE transactions take place in Manitoba and Saskatchewan. These TLE framework agreements have been signed by the federal and provincial governments and the majority of the First Nations with valid TLE claims.

When such land has been purchased, the First Nation may request that Ottawa define this land to have the status of reserve land, i.e., that it may be an "addition to reserve" (ATR), namely a parcel of land that has been added to an existing reserve. Upon being added, the legal title also becomes vested in Her Majesty and is set apart by Her Majesty for the use and benefit of the Indian band that made the application.

In this case the same sales tax exemptions that apply to reserves in rural areas would also apply to urban reserves. Under current tax law, First Nations businesses located on reserves are required to collect provincial and federal sales tax and are subject to all the applicable taxes outlined by law or the servicing agreement negotiated with the municipality. Only registered status Indians can take advantage of the sales tax exemption when purchasing goods and services on reserve land. Presumably, incomes earned by status Indians living and working in these urban reserves would qualify for income-tax-free treatment.

Not all additions to reserves are urban reserves. Indeed most are not. The most recent data on ATRs indicate that the majority of the reserve additions are rural reserves.

Figure 10.3

Urban Reserves, continued

Urban reserves offer First Nation citizens economic opportunities that are generally unavailable in more remote areas. They can also be a stepping stone for the development of new Indigenous businesses and a way into the mainstream job market for many First Nations people. With increased economic development comes increased self-sufficiency. Stronger First Nations mean a stronger Canada. The benefits of urban reserves also extend to neighbouring local governments. Urban reserves can contribute to the revitalization of a local government by providing much-needed economic stimulus to urban centres. In addition to the revenue derived from local government service agreements, urban centres also benefit from job creation and new taxation revenue generated from off-reserve spin-offs of First Nations businesses.

The Muskeg Lake Cree Nations Cattail Centre on the east side of Saskatoon, Saskatchewan was the first Canadian urban reserve to be built on land previously set aside for city development. Established in 1988 it is generally accepted that it has breathed new life into a part of Saskatoon that once had been home to an active railway and it has become an important commercial hub in southeast Saskatoon. Thus, the message here is that while some urban reserves have been successful, this does not mean that First Nation ownership of urban land on a level-playing-field basis would not also be successful.

Sources: Website for INAC: Frequently Asked Questions—Additions to Reserves; and for INAC: *Backgrounder—Urban Reserves: A Quiet Success Story*. For an excellent and thorough analysis of urban reserves, see Evelyn Peters (2007).

- established the Dakota Dunes Casino replete with an agreement with Saskatchewan to introduce a Liquor Consumption tax;
- introduced full GST on the reserve via an agreement with the Canada Revenue Agency;
- signed a real property tax bylaw;
- extended its footprint to Saskatoon by purchasing tracts of land in the city;
- consistently reported operating budget surpluses;
- partnered with companies across a wide range of industrial, resource, and service sectors; and finally but not exhautively
- devoted very substantial resources ensuring that their youth have access to a state-of-the-art education system.

The result is that with roughly 350 citizens living on the reserve, the Whitecap Dakota First Nation employs 700 persons (many commuting daily from Saskatoon) and to date has attracted more than $100 million in investments to the community.

How did this occur? A very large part of the answer is due to the diligence and vision of Chief Darcy Bear for which he has appropriately received a host of honours and distinctions. But then the question is: How was Darcy Bear able to do all this? The answer is straightforward: the Whitecap Dakota First Nation is a *non-treaty First Nation* that was able to escape the clutches of the dirigiste Indian Act!

Duelling Economic Models

The juxtaposition of the willingness of INAC to transfer the failed reserve-based economic model across urban Canada on the one hand, and INAC's refusal to allow the hundreds of reserves to embrace property rights and self government on the other hand, is exceedingly hard to fathom. While it is probably the case that the Whitecap Dakota's dramatic success is an outlier, it is nonetheless demonstrable that self-government and property rights can facilitate economic growth and that their absence severely inhibits it. The federal government has cooperated successfully with First Nations, Inuit, provincial and territorial governments in creating land claims and self-government agreements from the James Bay and Northern Quebec onward and with more on the horizon. All of these initiatives embody the transfer of property rights to the Indigenous government and many have embraced taxation. Surely, now is not the time to turn back the clock and extend the traditional reserve-based model to urban Canada.

Conclusion

Is a model similar to the Commonwealth of Sovereign Indigenous Nations described above achievable? If Saskatchewan or Alberta or Manitoba were to embrace the essence and spirit of the CSIN model, then my view would be that the answer is clearly "yes." Ottawa could hardly prevent the transfer of Indian Act oversight to CSIN since it has done exactly this for numerous land claims agreements as documented in chapters 8 and 9. And Ottawa would certainly also welcome a decision by CSIN to tax its own citizens. Moreover, with Ottawa on side, why would a province not provide the requisite organizational expertise and accommodation in order to enable CSIN to mount a more effective education system on and off the reserves? Provincial governments would have much to gain from an improved social and economic future for a population grouping that in some provinces accounts for 20 percent (and growing) of the province's youth. Indeed, it is hard to imagine any policy of any dimension that would trump CSIN in terms of a dramatic improvement in the social and economic well-being of Indigenous Canadians.

One intriguing feature is that the Indigenous nationals and the Canadian citizens components of the title of this monograph become mutually reinforcing in the context of the CSIN model: It is much easier to be an Indigenous national if one also has all the privileges of Canadian citizenship on the one hand and, likewise, it is much easier for Indigenous peoples to be willing to access the same programs as other Canadians when their Indigenous nation and nationhood are recognized by all.

Therefore CSIN will likely fail only if the First Nations themselves are not on side. This may occur if, for example, First Nations believe that under CSIN their treaty rights will somehow be compromised by the inclusion of non-status and off-reserve Indians. However, this may be a Pyrrhic victory since, pursuant to the *Daniels* decision, Ottawa will have to move in the direction of privileging non-status and off-reserve Indians as well as the Métis irrespective of what the treaty First Nations do. However, if it actually were the case that the reason for the failure of the 1990s/2000s negotiations in Saskatchewan was due to one or more small reserves not being on side, then the solution in the context of CSIN ought to be that they could opt out and fall back on the status quo while the rest of the First Nations could embrace CSIN.

However, there may well be an excellent reason to take a pass on CSIN, namely that there are alternative models that can better achieve

the goals underpinning CSIN. Phrased differently, CSIN is intended to be an *instrument*, not a *goal*. The overriding *goal* is to implement policies that will ensure a better and brighter socio-economic future for Indigenous Peoples. If there is an alternative proposal or model that is at the same time more effective and more acceptable, then it should have pride of place.

Chapter 11

Conclusion

Canada regularly ranks very high in the global indices for well-being, happiness, and other measures of social and economic performance. Indeed, I recall that for several years near the turn of the century Canada topped the global rankings for the "most livable nation." Yet, one glance at the socio-economic comparisons in chapter 2 suggests that Indigenous Canada is clearly a world apart from mainstream Canada. Confirmation of this comes from Figure 10.1 in chapter 10, which reports that in terms of the United Nations Human Development Index, Saskatchewan First Nations would rank fifty-ninth, after Bahrain and just above Fiji. As we celebrate our nation's many achievements on the occasion of Canada 150, we need to commit ourselves to ensuring that Indigenous citizens are able, should they so wish, to access to the societal benefits available to other Canadians.

Accordingly, the role of the latter half of this monograph was to elaborate on alternative (and existing) models that would, in varying degrees, ensure that it will be the birthright of Indigenous peoples to be both Indigenous nationals and Canadian citizens. From this it follows that it is the responsibility of Canadian society to foster Aboriginal nationality and to make it possible for First Peoples to have access to all the rights and privileges of Canadian citizenship.

There have been impressive advances toward this goal. Leading the way has been, and continues to be, the series of Supreme Court decisions as elaborated in chapter 6. At the citizen level, the TRC's Calls to Action have energized Canadians. This is especially the case in the

academy where students in Indigenous courses are finding that assessing one or another of the Calls to Action make ideal essay topics. This will carry over to society generally and lend pressure to ensure that public and private corporations/institutions will develop procedures/protocols that embrace the relevant Calls to Action.

While these are very encouraging and important developments, their focus is on what Canadians can do to advance Indigenous nationalism/Canadian citizenship. However, the larger thrust of this book is that the way forward should also, and primarily, be to empower Indigenous nationals so they can embrace the rights and privileges of Canadian citizenship in ways that are consistent with their particular nation's version of Aboriginal nationalism.

Toward this end, the analysis focused on the (typically constitutionalized) land claims and self-government agreements in Canada's north as well as the Nisga'a and Gitxsan agreements in British Columbia. Among the key features of these agreements are (i) after nearly 150 years under the yoke of the dirigiste Indian Act, Indigenous peoples have now become self-governing nations and peoples, and (ii) the embracing of property rights allows them to escape the economically crippling "tragedy of the commons." Intriguingly, and contrary to the prevailing view in many quarters, while Indigenous peoples will always be environmentally sensitive, the evidence suggests that Indigenous communities with the tandem of self-government and property rights are very much interested in economic development. The new reality for corporate Canada is to recognize that they may now be dealing with an Indigenous landlord and no longer with a provincial/territorial-government landlord.

Unfortunately, far too often the typical First Nation falling under the so-called "numbered treaties" is both too small and too bereft of resources to benefit by itself from self-government and property rights regimes. Hence a different model is needed. Enter the Commonwealth of Sovereign Indigenous Nations (CSIN) in chapter 10. CSIN is an Indigenous nationals/Canadian citizens model designed to ensure a level of scale economies that will allow Saskatchewan First Nations to replicate key aspects of the successful northern agreements as well as to incorporate aspects of the *Daniels* Supreme Court decision. The First Nations/provincial/federal nexus embraced by CSIN admittedly alters the political, even constitutional, dimensions of the status quo. However, since CSIN would be a land claims agreement, s. 35(3) of the Constitution Act, 1982 ensures that CSIN will also be constitutionalized

and, therefore, qualifies as a treaty.[1]

Finally, it needs repeating that the CSIN model was not cleared with either Saskatchewan or FSIN prior to publication. Hence there should be no presumption that they would view the model in a favourable light. What is clear, however, is that a similar model (i.e., one that embraces self government and property rights-cum-taxation) has been successfully embraced by First Nations above and below the 60th parallel. Phrased differently, the Commonwealth of Sovereign Indigenous Nations will be able to deliver on the challenge of ensuring that First Peoples can marry Indigenous nationhood with Canadian citizenship.

1 Section 35(3) reads: For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Appendix A

The Numbered Treaties: Making Way for the White Man

Introduction

The Government of Canada and the courts understand treaties between the Crown and Indigenous peoples to be solemn agreements that set out promises, obligations, and benefits for both parties. Starting in 1701, in what was to eventually become Canada, the British Crown entered into treaties to encourage peaceful relations between First Nations and non-Indigenous peoples. Some of these were discussed in chapter 3. Modern-day treaties, typically referred to as comprehensive land claims/self-government agreements, were detailed in chapters 8 and 9. The principal focus in this appendix is on the eleven so-called "numbered treaties" made between 1871 and 1921. The intended role of these numbered treaties was, as Chief Dave Courchene suggests (see Supplement 3.2), to clear the lands/territories traditionally occupied by First Nations in order to make way for the White man in pursuit of Canadian sea-to-sea nation building. In recognition of their pivotal and enabling contribution to the development of the Canadian nation, the focus on each of the numbered treaties will include an enumeration of the individual First Nations that were signatories to the treaty and whose traditional lands became the Prairie provinces and parts of Ontario and the Northwest Territories.

Prior to the focus on these numbered treaties the analysis will begin by elaborating briefly on a few pre-confederation treaties that also were land-cession agreements.

Pre-Confederation Treaties

The 1827 Chippewa Treaty and the Huron Tract

The typical pre-confederation treaty involved the First Nations surrendering valuable territory in return for an initial compensation (and often a promise of annual payments) as well as rights to hunt and fish in the surrendered territory. These included the Upper Canada Treaties (1764 to 1862) and the Vancouver Island Treaties (1850 to 1854). Under these treaties, the First Nations surrendered interests in lands in areas of what are now Ontario and British Columbia, respectively.

The first of these treaties selected for review is the 1827 Chippewa Treaty. The Chippewa ceded 2.7 million acres of the finest agricultural land in Canada, retaining less than 1 percent of the land in four reserves—Kettle and Stoney Point, Walpole Island, and the Sarnia Reserve. By way of compensation, the eighteen Chippewa chiefs received a perpetual annuity of £1,100 (about $4,400 or $10 per person per year). These reserves would be reduced in size over the next 150 years, in large part through illegal sales of land by Indian agents employed by the Government of Canada. Some lands would be seized by the government illegally. At the end of the twentieth century, the land issue would erupt at Ipperwash in Ontario, when the Ontario Provincial Police killed a protestor who had occupied land expropriated during the Second World War.

The Robinson Treaties, 1850

The idea of reserves became firmly entrenched when the Robinson-Huron and Robinson-Superior Treaties were negotiated to allow for the expansion of mining north of the Great Lakes. William Benjamin Robinson, who had negotiated the Chippewa treaty in the 1840s, was appointed by the Crown to negotiate two treaties that secured 130,000 square kilometres north of the Upper Great Lakes. The treaties created twenty-one new reserves to be held by the Crown "for the use and benefit" of Aboriginal peoples, who would have the right to hunt and fish in perpetuity.

The Saugeen Peninsula (1854) and Manitoulin Island (1862) Treaties

The Saugeen Treaty (1836) No. 45½ was designed to reserve and protect the Saugeen peninsula around Owen Sound as Native territory. However, under the Saugeen Peninsula Treaty (1854) No. 72 (AANDC 2016), First Nations sold this land to the Crown in the expectation that they would receive regular interest payments on the sale price, but these funds disappeared.

Likewise, the Manitoulin Island Treaty (1862) No. 94 (AANDC 2016) had substantially the same terms of the Saugeen Peninsula Treaty. However, not all the members of the Odawa First Nation involved in the negotiations signed the treaty, with the result that the land in the area remains unceded.

The Post-Confederation Numbered Treaties

Section 91(24) of the Constitution Act, 1867 assigns federal jurisdiction over "Indians and Lands reserved for Indians." Following Grammond (2013, 91), and as noted earlier, the "lands reserved for Indians" are not what today we would call Indian reserves. Rather the term refers to the lands over which the Indigenous peoples possessed an Aboriginal title in the time frame of Confederation. Essentially title for these lands flowed from the 1763 Royal Proclamation. A better term for these lands would be "traditional territories." It is these traditional lands that were ceded under the provisions of the numbered treaties. It is clear from the Supreme Court's *Tsilhqot'in* decision (in chapter 6) that in areas where there are no treaties these traditional territories not only still exist but can be very large.

Figure 3.3 in chapter 3 presents a map showing the dates and location of Canada's numbered treaties—Treaties 1 and 2 in Manitoba in 1871 through to Treaty 11 in 1921 in the Northwest Territories.

When the Dominion of Canada was formed in 1867 most of these regions were part of Rupert's Land and the North-Western Territory and were controlled by the Hudson's Bay Company. This territory was transferred to Canada in 1869. Given that John A. Macdonald's "National Dream" was to create a nation from sea to sea bound together by the Canadian Pacific Railway, Canada needed to open up these lands for settlement.

However, Canadian law recognized that the First Nations who inhabited these lands prior to European contact had title to these lands. The settlement of what was then called the Northwest Territories would not

be possible if title to the land remained with the First Nations. Therefore, it was vital to the National Dream to obtain title to the lands from First Nations. In order to do so, the Canadian government proceeded with the series of numbered treaties. Typically each First Nation that is party to the treaty is granted a small tract of land that is often carved out from the vastly larger overall area to be ceded that becomes the First Nation's "reserve." In addition the First Nations maintain the right to continue to hunt, trap, and fish on the tract surrendered. In return, the First Nations surrenders their rights and title to their traditional lands.

Of special significance is the reference to a "Medicine Chest" in Treaty 6 that over time has become a commitment to all First Nations peoples to obtain free medical care beyond that provided by the provincial programs.

Given that the plains First Nation peoples had been decimated by disease outbreaks, by the near-extinction of the plains bison, and by whisky traders, many First Nations were eager to receive food aid and other assistance from the government. When the government asked for the land in return, they were hardly in a position to refuse.

Over time these treaties have come to be viewed as near-sacrosanct documents by First Nations since they establish a direct linkage with the Crown, and hence they embrace a nation-to-nation relationship with Canada in right of the Crown. Moreover, treaties provide a direct link to the 1763 Royal Proclamation replete with its assignment of land title to the Indians. And since the individual First Nations are party to these signed treaties, it is in these individual First Nations (via their chiefs) where power resides in First Nations country. This is the reason why the Assembly of First Nations is a confederal, not a federal, body.

The most convenient source for the numbered treaties is the Indigenous and Northern Affairs Canada website, which contains the texts of all treaties: the numbered treaties (1–11) are indexed at https://www.aadnc-aandc.gc.ca/eng/1370373165583/1370373202340. The discussion that follows draws from those texts. This is a most convenient source since it lists the First Nations that are the signatories for each of the numbered treaties.

Even a cursory glance at Figure 3.3 in chapter 3 reveals, in ways that words cannot, the vast amount of traditional territory that was ceded to Canada on the one hand, and in turn the enormous contribution of the First Nations to Canada on the other. It is in recognition of this nation-building contribution that I am recording the names of each of the hundreds of the First Nations that are signatories of these numbered treaties.

Treaties 1 and 2

Treaty 1 was concluded in August of 1871 between Queen Victoria and seven First Nations in Manitoba as it then existed. Treaty 2 was an agreement signed a few weeks later involving First Nations in southwest Manitoba and a small part of southeast Saskatchewan. These treaties covered areas needed for expansion and settlement in the west and north of the then province of Manitoba. While the names of the First Nations' signatories are listed; typically an "X" is used to indicate their agreement. This is very significant because while the negotiations were conducted orally, the information was then sent to Ottawa where the written version of the treaty was created. While there were translators (often missionaries) available this led, not surprisingly, to concerns that the oral commitments were not honoured fully in the written text.

Readers will recall that Supplement 3.2 to chapter 3 reproduced the address of Manitoba Chief Dave Courchene on the occasion of the centenary of Treaties 1 and 2. Chief Courchene has a very different perspective on the outcomes of the treaty process!

First Nations Signatories (Treaty 1)

Brokenhead Ojibway Nation
Fort Alexander (Sagkeeng First Nation)
Long Plain First Nation
Peguis First Nation
Roseau River Anishinabe First Nation
Sandy Bay First Nation
Swan Lake First Nation

First Nations Signatories (Treaty 2)

Dauphin River First Nation
Ebb and Flow First Nation
Keeseekoowenin Ojibway First Nation
Lake Manitoba First Nation
Lake St. Martin First Nation
Little Saskatchewan First Nation
O-Chi-Chak-Ko-Sipi First Nation (Crane River)
Pinaymootang First Nation (Fairford)
Skownan First Nation (formerly Waterhen First Nation)

Treaty 3

Treaty 3 was signed in 1873 by twenty-eight First Nations and Queen Victoria. As Figure 3.3 reveals, Treaty 3 ceded a vast tract of Ojibway territory to Canada including large parts of what is now northwestern Ontario and a small part of eastern Manitoba. Despite being the third of these treaties, it is in fact more historically significant in that its text and terms served as the model for the remainder of the numbered treaties.

Treaty 3 also has particular historical significance because of the court case (*The Dominion of Canada v. The Province of Ontario*) that dealt with the question of whether or not Ontario had to indemnify Canada for the expenses incurred in negotiating the treaty and the ongoing costs of fulfilling the treaty obligations. Canada lost the case with the Judicial Committee of the Privy Council[1] holding that Canada was responsible for Indian affairs and the welfare of Indians and that the treaty had been negotiated to achieve broad national purposes (such as the building of the transcontinental railway) rather than to benefit Ontario.

First Nations Signatories (Treaty 3)

- Anishinabeg of Kabapikotawangag Resource Council
  - Big Grassy First Nation
  - Anishnaabeg of Naongashiing (Big Island First Nation)
  - Northwest Angle 33 First Nation
  - Northwest Angle 37 First Nation
  - Ojibways of Onigaming First Nation
  - Anishinabe of Wauzhushk Onigum
- Bimose Tribal Council
  - Grassy Narrows First Nation
  - Eagle Lake First Nation
  - Iskatewizaagegan 39 Independent First Nation
  - Lac des Mille Lacs First Nation
  - Naotkamegwanning First Nation
  - Obashkaandagaang Bay First Nation
  - Ochiichagwe 'Babigo' Ining Ojibway Nation
  - Shoal Lake 40 First Nation
  - Wabaseemoong Independent Nations
  - Wabauskang First Nation

1 The Judicial Committee of the Privy Council was Canada's highest court of appeal until 1949.

Wabigoon Lake Ojibway Nation
Pwi-Di-Goo-Zing Ne-Yaa-Zhing Advisory Services
Couchiching First Nation
Lac La Croix First Nation
Mitaanjigamiing First Nation
Naicatchewenin First Nation
Nigigoonsiminikaaning First Nation
Rainy River First Nation
Seine River First Nation
Stanjikoming First Nation
Independent First Nations Alliance
Lac Seul First Nation
Unaffiliated
Ojibway Nation of Saugeen First Nation

Treaty 4

Treaty 4 signed in 1874 between Queen Victoria and the Cree and Saulteaux First Nations covers most of current day southern Saskatchewan, plus small portions of what are today western Manitoba and southeastern Alberta. This treaty is also called the "Qu'appelle Treaty," as its first signings were conducted at Fort Qu'Appelle, Saskatchewan in September on 1874. Additional signings or "adhesions" would continue until September 1877. All told, thirty-three First Nations, in what is now Saskatchewan, were signatories along with seventeen Manitoba First Nations. According to the treaty, each family would receive one square mile of land, which they could sell back to the government. Each person received $5 per year and a gift of clothing, and the people were also to be given a range of farming tools, seed, and farm animals for agriculture. Schools were to be established for each reserve.

It should also be noted that Prime Minister John A. Macdonald saw the ceded land as necessary to complete a transcontinental railway, which would run through the cities of Regina, Moose Jaw, and Swift Current in southern Saskatchewan.

First Nations Signatories (Treaty 4):

Manitoba
Swampy Cree Tribal Council
Chemawawin Cree Nation
Grand Rapids First Nation

Marcel Colomb First Nation
Mathias Colomb First Nation
Mosakahiken Cree Nation
Opaskwayak Cree Nation
Sapotaweyak Cree Nation
Wuskwi Sipihk First Nation
West Region Tribal Council
Ebb and Flow First Nation—*Treaty 2 signatory council member*
Gamblers First Nation
Keeseekoowenin Ojibway First Nation—*Treaty 2 signatory council member*
O-Chi-Chak-Ko-Sipi First Nation—*Treaty 2 signatory council member*
Pine Creek First Nation
Rolling River First Nation
Skownan First Nation—*Treaty 2 signatory council member*
Tootinaowaziibeeng Treaty Reserve First Nation
Waywayseecappo First Nation

Saskatchewan
File Hills Qu'Appelle Tribal Council
Carry The Kettle First Nation
Little Black Bear First Nation
Muscowpetung First Nation
Nekaneet First Nation
Okanese First Nation
Pasqua First Nation
Peepeekisis First Nation
Piapot First Nation
Standing Buffalo First Nation
Star Blanket Cree Nation
Wood Mountain First Nation
Saskatoon Tribal Council
Kinistin Saulteaux Nation
Mistawasis First Nation
Muskeg Lake First Nation
Muskoday First Nation
One Arrow First Nation
Yellow Quill First Nation
Touchwood Agency Tribal Council

Day Star First Nation
Fishing Lake First Nation
Gordon First Nation
Kawacatoose First Nation
Muskowekwan First Nation
Yorkton Tribal Administration
Coté First Nation
Kahkewistahaw First Nation
Keeseekoose First Nation
Ocean Man First NationThe Key First Nation
Independent
Cowessess First Nation
Ochapowace First Nation
Pheasant Rump Nakota First Nation
White Bear First Nation

Treaty 5

Treaty 5 was first negotiated in September 1875 between Queen Victoria and Saulteaux and Swampy Cree non-treaty tribes and peoples around Lake Winnipeg in the District of Keewatin. As is clear from Figure 3.3, much of what is today central and northern Manitoba was covered by the treaty, as were a few small adjoining portions of the present-day provinces of Saskatchewan and Ontario. The Treaty was completed in two rounds. The first was from September 1875 to September 1876. Additional peoples and groups signed on between 1908 and 1910. In total, there were thirty-seven First Nations signatories—twenty-nine from Manitoba, five from Ontario and three from Saskatchewan.

Treaty 5 First Nations/Peoples

Manitoba
Berens River First Nation
Bloodvein First Nation
Bunibonibee Cree Nation
Chemawawin Cree Nation
Fisher River Cree Nation
Fox Lake Cree Nation
Garden Hill First Nations
God's Lake First Nation
Grand Rapids First Nation

Hollow Water First Nation
Kinonjeoshtegon First Nation
Black River First Nation
Little Grand Rapids First Nation
Manto Sipi Cree Nation
Mosakahiken Cree Nation
Nisichawayasihk Cree Nation
Norway House Cree Nation
Opaskwayak Cree Nation
Pauingassi First Nation
Pimicikamak
Poplar River First Nation
Red Sucker Lake First Nation
St. Theresa Point First Nation
Sayisi Dene First Nation
Shamattawa First Nation
Tataskweyak Cree Nation
War Lake First Nation
Wasagamack First Nation
York Factory First Nation

Ontario
Deer Lake First Nation
North Spirit Lake First Nation
Pikangikum First Nation
Poplar Hill First Nation
Sandy Lake First Nation

Saskatchewan
Cumberland House First Nation
Red Earth First Nation
Shoal Lake First Nation

Treaty 6

Treaty 6 is an agreement between the Canadian monarch and the Plains and Wood Cree, the Assiniboine, and other tribes of Indians signed in 1876 at Fort Carlton, Fort Pitt, and Battle River. The area agreed upon to be ceded by the Plains and Wood Cree represents most of the central area of the current provinces of Saskatchewan and Alberta (see Figure

3.3) At this time, the buffalo, the staple of the people who lived on the plains, were disappearing at an alarming rate. The chiefs realized that if they did not sign a treaty with the Crown they might starve. A second major reason for the signing of the treaty was that a smallpox epidemic had recently gone through the area, killing many of the Cree.

The provision in Treaty 6 relating to the ceding of the 121,000 square miles in the designated area in Figure 3.3 reads as follows:

> The Plain and Wood Cree Tribes of Indians, and all other Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits… [what follows is a long paragraph outlining the area of Treaty 6 as shown in Appendix B].

In exchange for this ceded land certain areas were "reserved" (i.e., protected from encroachment by white settlers). However, these lands can be taken or sold by the government, but only with the consent of the native peoples or with compensation. In addition to providing the First Nations with provisions that were more generous than those listed under Treaty 4, the government promised to restrict the sale of alcohol on reserves and to open schools for Indian children. Note that although some residential schools were established before Confederation, it was in 1886 that the infamous residential school system became fully operative.

On a more positive note, the inclusion of the "medicine chest" clause in Treaty 6 has been interpreted by native leaders to mean that the federal government has an obligation to provide all forms of health care to First Nations peoples on an ongoing basis. While First Nations qualify for provincial medical coverage, the "Non-Insured Health Benefits Program" is Health Canada's national, medically necessary, health benefit program that provides additional coverage to First Nations for benefit claims for a specified range of drugs, dental care, vision care, medical supplies and equipment, short-term crisis intervention, mental health counselling, etc.

Appendix B contains the text of Treaty Six. It should be noted again that the treaties were initially oral agreements, with the text created later—a text that typically could not be verified by the First Nations since their literary skills were wanting.

First Nations Signatories (Treaty 6):

Alberta
Alexander First Nation
Alexis First Nation
Beaver Lake Cree Nation
Cold Lake First Nation
Enoch Cree Nation
Ermineskin Tribe
Frog Lake First Nation
Heart Lake First Nation
Kehewin Cree Nation
Louis Bull First Nation
Michel First Nation
Montana First Nation
O'Chiese First Nation
Paul First Nation
Saddle Lake Cree Nation
Samson First Nation
Sunchild First Nation
Saddle Lake Cree Nation

Manitoba
Marcel Colomb First Nation
Mathias Colomb First Nation

Saskatchewan
Ahtahkakoop First Nation
Beardy's and Okemasis First Nation
Big Island Lake Cree Nation
Big River First Nation
Chakastaypasin First Nation
Flying Dust First Nation
Island Lake First Nation
James Smith First Nation
Lac La Ronge First Nation
Little Pine First Nation
Lucky Man First Nation

Makwa Sahgaiehcan First Nation
Mistawasis First Nation
Montreal Lake Cree Nation
Moosomin First Nation
Mosquito/Grizzly Bear's Head
Muskeg Lake Cree Nation
Muskoday First Nation
One Arrow First Nation
Onion Lake Cree Nation
Pelican Lake First Nation
Peter Ballantyne Cree Nation
Poundmaker Cree Nation
Red Pheasant First Nation
Whitefish Lake First Nation
Saulteaux First Nation
Sweetgrass First Nation
Sturgeon Lake First Nation
Thunderchild First Nation
Waterhen Lake First Nation
Witchekan Lake First Nation

Treaty 7

Treaty 7 was an 1877 agreement between Queen Victoria and several (mainly Blackfoot) tribes in what is today the southern portion of Alberta. The agreement was signed at the Blackfoot Crossing of the Bow River, on the present-day Siksika Nation reserve. The treaty established a delimited area of land for the tribes (i.e., a reserve), promised annual payments and/or provisions from the Queen to the tribes and promised continued hunting and trapping rights on the "tract surrendered." In exchange, the tribes ceded their rights to their traditional territory, of which they had earlier been recognized as the owners. Seven First Nations were signatories of the treaty.

First Nations Signatories (Treaty 7):

Bearspaw First Nation (Nakoda)
Chiniki First Nation (Nakoda)
Piikani Nation (Blackfoot)
Siksika Nation (Blackfoot)
Tsuu T'ina Nation (Sarcee)
Wesley First Nation (Nakoda)

Treaty 8

Treaty 8 was an agreement signed in 1899, between Queen Victoria and various First Nations of the Lesser Slave Lake area. As documented above, the Government of Canada had signed Treaties 1 to 7 between 1871 and 1877 that covered the southern portions of what was then the Northwest Territories. At that time, the Canadian government had not considered it necessary to have a treaty covering what became Treaty 8 territory because it deemed the conditions in the north to be not conducive to settlement. However, in the mid-1890s, the Klondike Gold Rush began to draw Europeans northward into the previously undisturbed territory. The increased contact and conflict between First Nations of the region and Europeans prompted the Government of Canada to enter into Treaty 8. In September 1899, the Treaty and Half Breed Commissioners finally concluded the treaty process, with 2,217 people accepting the treaty, and another 1,234 people opting for scrip.

As is evident from Figure 3.3 the ceded land covered by Treaty 8 was truly huge—840,000 square kilometers (larger than France) and includes northern Alberta, northeastern British Columbia, northwestern Saskatchewan and a southernmost portion of the Northwest Territories. With adhesions, twenty-two First Nations were parties to the treaty. The elements of Treaty 8 included provisions to maintain the livelihood of the native populations, such as entitlements to land, ongoing financial support, annual shipments of hunting supplies, and hunting rights on ceded lands, unless those ceded lands were used for forestry, mining, settlement, or other purposes.

Treaty 8 First Nations

Athabasca Chipewyan
Chipewyan Prairie
Fort McKay
Fort McMurray #486
Mikisew Cree
Bigstone Cree Nation (independent nation)
Kee Tas Kee Now
Tribal Council
Loon River
Lubicon Lake
Whitefish Lake
Woodland Cree

Peerless Trout
First Nation #478
Lesser Slave Lake Indian Regional Council
  Sawridge
  Sucker Creek
  Swan River
North Peace Tribal Council
  Beaver
  Dene Tha
  Little Red River
  Tallcree
Smith's Landing First Nation (independent nation)
Western Cree Tribal Council
  Duncan's
  Horse Lake
  Sturgeon Lake
Driftpile

Treaty 9

Treaty 9 was an agreement established in 1905 between the Government of Canada in the name of King Edward VII and eventually thirty-seven First Nations in northern Ontario and one in Quebec. It was also known as the "James Bay Treaty," since the eastern end of the affected treaty territory was at the shore of James Bay. Additional adhesions to the treaty involving the Ojibway and Swampy Cree tribes occurred as late as 1929–1930 (see Figure 3.3).

Readers may be interested in a documentary feature film by celebrated Indigenous filmmaker Alanis Obomsawin (2014) entitled *Trick or Treaty,* which deals with Treaty 9. Among the issues addressed is whether the First Nations signatories were deceived by treaty commissioners who offered oral promises that were not included in the final written agreement. *Trick or Treaty* is the first film by an Indigenous filmmaker to be selected for the Masters Program at the Toronto International Film Festival.

First Nations Signatories:

Abitibiwinni First Nation (Quebec)
Albany First Nation
Aroland First Nation

Attawapiskat First Nation
Bearskin Lake First Nation
Brunswick House First Nation
Cat Lake First Nation
Chapleau Cree First Nation
Chapleau Ojibway First Nation
Constance Lake First Nation
Eabametoong First Nation
Flying Post First Nation
Fort Severn First Nation
Ginoogaming First Nation
Kasabonika Lake First Nation
Keewaywin First Nation
Kingfisher First Nation
Kitchenuhmaykoosib Inninuwu
First Nation
Matachewan First Nation
Mishkeegogamang First Nation
Missanabie Cree First Nation
Neskantaga First Nation
Nibinamik First Nation
Mattagami First Nation
Muskrat Dam Lake First Nation
Marten Falls First Nation
McDowell Lake First Nation
Moose Cree First Nation
North Caribou Lake First Nation
Sachigo Lake First Nation
Slate Falls Nation
Taykwa Tagamou Nation
Wahgoshig First Nation
Wapekeka First Nation
Wawakapewin First Nation
Webequie First Nation
Weenusk First Nation
Wunnumin Lake First Nation

Treaty 10

Treaty 10 was an agreement established in August 1906 between King Edward VII and various First Nations in northern Saskatchewan and a small portion of eastern Alberta. There were no Alberta-based First Nations groups signing on, but joining the six Saskatchewan First Nations were two First Nation bands from Manitoba, despite their location outside the designated treaty area. The agreement was drafted based on the Treaty 8 text. In effect the treaty covered areas that were not included in Treaties 6 or 8. In response to the requests of the First Nations, the federal negotiators offered medical and educational incentives to the affected First Nations, with commitments that their traditional food gathering practices would not be impaired by the reserve system.

Treaty 10 First Nations

Manitoba
Barren Lands First Nation
Northlands First Nation

Saskatchewan
Birch Narrows First Nation
Buffalo River Dene Nation
Canoe Lake Cree First Nation
English River Dene Nation
Hatchet Lake First Nation
Birch Narrows First Nation

Treaty 11

The last of the Numbered Treaties was an agreement established during the 1911–1922 period between King George V and twenty-two First Nations in what is today the Northwest Territories and covering most of the Mackenzie District. The land in the area was deemed unsuitable for agriculture, so the federal government was reluctant to conclude treaties. However, immediately following the discovery of oil at Fort Norman in 1921 the government moved to begin treaty negotiations.

Treaty 11 First Nations

Acho Dene Koe First Nation
Aklavik First Nation

Behdzi Ahda First Nation
Dechi Laoti' First Nation
Deh Gah Gotie Dene Council
Deline First Nation
Dog Rib Rae First Nation
Fort Good Hope First Nation
Gameti First Nation
Gwicha Gwich'in First Nation
Inuvik Native First Nation
Jean Marie River First Nation
Ka'a'gee Tu First Nation
Liidli Kue First Nation
Nahanni Butte First Nation
Pehdzeh Ki First Nation
Sambaa K'e (Trout Lake) Dene First Nation
Tetlit Gwich'in First Nation
Tulita Dene First Nation
West Point First Nation
Wha Ti First Nation

The Geopolitics of the Pre-Confederation and Numbered Treaties

Among the striking features one can draw from Figures 3.3 and 3.4 is just how much of Canada was ceded by the First Nations in exchange for their small, often out-of-the-way, parcels of land. And as has become very clear, most of these reserves are not economically viable, and by extension, are not likely to be socially viable with the result that many individuals move off the reserve (as was highlighted earlier). What is also clear from the treaty map is that First Nations in British Columbia and in much of Quebec have not ceded land to Canada via the numbered treaties.[2] In dramatic contrast with treaty First Nations, the non-treaty First Nations in, say, British Columbia will, given the evolution of the Supreme Court rulings in chapter 6 relating to traditional title, likely be able to exert claims over their original territory/hunting grounds. Beyond this, the fact that British Columbia has about 18 percent of First Nations people (Table 2.1 of chapter 2) but roughly one-third of the First Nations means that they are over-represented in

2 The modern treaties dealt with in chapters 8 and 9 (e.g., the James Bay and Northern Quebec Agreement) are land claims/self-government agreements and not cession agreements along the lines of the numbered treaties.

the confederal Assembly of First Nations.

By way of a final comment, and setting value judgments aside, in an age when access to distant areas was surely difficult and communications were likewise difficult and slow, the process of treaty making with the hundreds of First Nations and their chiefs (and/or representatives) across the vast Ontario-to-Alberta area and even extending well into the Northwest Territories must have been a formidable physical challenge indeed.

Appendix B

Text of Treaty 6

ARTICLES OF A TREATY made and concluded near Carlton on the 23rd day of August and on the 28th day of said month, respectively, and near Fort Pitt on the 9th day of September, in the year of Our Lord one thousand eight hundred and seventy-six, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honourable Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-west Territories, and the Honourable James McKay, and the Honourable William Joseph Christie, of the one part, and the Plain and Wood Cree and the other Tribes of Indians, inhabitants of the country within the limits hereinafter defined and described by their Chiefs, chosen and named as hereinafter mentioned, of the other part.

Whereas the Indians inhabiting the said country have, pursuant to an appointment made by the said Commissioners, been convened at meetings at Fort Carlton, Fort Pitt and Battle River, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them, so that there may be peace and good will between them and Her

Indigenous Nationals/Canadian Citizens, by Thomas J. Courchene. Montréal and Kingston: McGill-Queen's University Press, Institute of Intergovernmental Relations.

Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.

And whereas the Indians of the said tract, duly convened in council, as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and Headmen, who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective Bands of such obligations as shall be assumed by them, the said Indians have thereupon named for that purpose, that is to say, representing the Indians who make the treaty at Carlton, the several Chiefs and Councillors who have subscribed hereto, and representing the Indians who make the treaty at Fort Pitt, the several Chiefs and Councillors who have subscribed hereto.

And thereupon, in open council, the different Bands having presented their Chiefs to the said Commissioners as the Chiefs and Headmen, for the purposes aforesaid, of the respective Bands of Indians inhabiting the said district hereinafter described.

And whereas, the said Commissioners then and there received and acknowledged the persons so presented as Chiefs and Headmen, for the purposes aforesaid, of the respective Bands of Indians inhabiting the said district hereinafter described.

And whereas, the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded, as follows, that is to say:

The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits, that is to say:

Commencing at the mouth of the river emptying into the north-west angle of Cumberland Lake; thence westerly up the said river to its source; thence on a straight line in a westerly direction to the head of Green Lake; thence northerly to the elbow in the Beaver River; thence down the said river northerly to a point twenty miles from the said elbow; thence in a westerly direction, keeping on a line generally parallel with the said Beaver River (above the elbow), and about twenty miles distant therefrom, to the source of the said river; thence northerly to the north-easterly point of the south shore of Red Deer Lake, continuing

westerly along the said shore to the western limit thereof; and thence due west to the Athabasca River; thence up the said river, against the stream, to the Jaspar House, in the Rocky Mountains; thence on a course south-easterly, following the easterly range of the mountains, to the source of the main branch of the Red Deer River; thence down the said river, with the stream, to the junction therewith of the outlet of the river, being the outlet of the Buffalo Lake; thence due east twenty miles; thence on a straight line south-eastwardly to the mouth of the said Red Deer River on the south branch of the Saskatchewan River; thence eastwardly and northwardly, following on the boundaries of the tracts conceded by the several treaties numbered four and five to the place of beginning.

And also, all their rights, titles and privileges whatsoever to all other lands wherever situated in the North-west Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada.

The tract comprised within the lines above described embracing an area of 121,000 square miles, be the same more or less.

To have and to hold the same to Her Majesty the Queen and Her successors forever.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; and with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, She hereby, through Her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to

the Bands here represented, in extinguishment of all claims heretofore preferred.

And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to Her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.

Her Majesty further agrees with Her said Indians that within the boundary of Indian reserves, until otherwise determined by Her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force, or hereafter to be enacted, to preserve Her Indian subjects inhabiting the reserves or living elsewhere within Her North-west Territories from the evil influence of the use of intoxicating liquors, shall be strictly enforced.

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

It is further agreed between Her Majesty and Her said Indians, that such sections of the reserves above indicated as may at any time be required for public works or buildings, of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.

And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall, in every year ensuing the date hereof, at some period in each year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of $5 per head yearly.

It is further agreed between Her Majesty and the said Indians, that the sum of $1,500.00 per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition, and twine for nets, for the use of the said Indians, in manner following, that is to say: In the reasonable discretion, as regards the distribution thereof among the

Indians inhabiting the several reserves, or otherwise, included herein, of Her Majesty's Indian Agent having the supervision of this treaty.

It is further agreed between Her Majesty and the said Indians, that the following articles shall be supplied to any Band of the said Indians who are now cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say: Four hoes for every family actually cultivating; also, two spades per family as aforesaid: one plough for every three families, as aforesaid; one harrow for every three families, as aforesaid; two scythes and one whetstone, and two hay forks and two reaping hooks, for every family as aforesaid, and also two axes; and also one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grindstone and one auger for each Band; and also for each Chief for the use of his Band, one chest of ordinary carpenter's tools; also, for each Band, enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such Band; also for each Band four oxen, one bull and six cows; also, one boar and two sows, and one hand-mill when any Band shall raise sufficient grain therefor. All the aforesaid articles to be given once and for all for the encouragement of the practice of agriculture among the Indians.

It is further agreed between Her Majesty and the said Indians, that each Chief, duly recognized as such, shall receive an annual salary of twenty-five dollars per annum; and each subordinate officer, not exceeding four for each Band, shall receive fifteen dollars per annum; and each such Chief and subordinate officer, as aforesaid, shall also receive once every year, a suitable suit of clothing, and each Chief shall receive, in recognition of the closing of the treaty, a suitable flag and medal, and also as soon as convenient, one horse, harness and wagon.

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

That during the next three years, after two or more of the reserves hereby agreed to be set apart to the Indians shall have been agreed upon and surveyed, there shall be granted to the Indians included under the Chiefs adhering to the treaty at Carlton, each spring, the sum of one thousand dollars, to be expended for them by Her Majesty's Indian Agents, in the purchase of provisions for the use of such of the Band as

are actually settled on the reserves and are engaged in cultivating the soil, to assist them in such cultivation.

That a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the direction of such agent.

That with regard to the Indians included under the Chiefs adhering to the treaty at Fort Pitt, and to those under Chiefs within the treaty limits who may hereafter give their adhesion thereto (exclusively, however, of the Indians of the Carlton region), there shall, during three years, after two or more reserves shall have been agreed upon and surveyed be distributed each spring among the Bands cultivating the soil on such reserves, by Her Majesty's Chief Indian Agent for this treaty, in his discretion, a sum not exceeding one thousand dollars, in the purchase of provisions for the use of such members of the Band as are actually settled on the reserves and engaged in the cultivation of the soil, to assist and encourage them in such cultivation.

That in lieu of wagons, if they desire it and declare their option to that effect, there shall be given to each of the Chiefs adhering hereto at Fort Pitt or elsewhere hereafter (exclusively of those in the Carlton district), in recognition of this treaty, as soon as the same can be conveniently transported, two carts with iron bushings and tires.

And the undersigned Chiefs on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

They promise and engage that they will in all respects obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tracts, and that they will not molest the person or property of any inhabitant of such ceded tracts, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tracts, or any part thereof, and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

IN WITNESS WHEREOF, Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands at or near Fort Carlton, on the days and year aforesaid, and near Fort Pitt on

the day above aforesaid. (AADNC 2013)

Commentary

Among the treaty articles that stand out is how carefully delineated are the lands that are to be transferred to Her Majesty. In sharp contrast Treaty 6 remains silent in terms of the lands that will become the reserves, except to indicate that "the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them." Contrast this with the view of Chief Dave Courchene (Supplement 3.2) that "in the return for the land that we revered, we received muskeg, rock and sand."

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