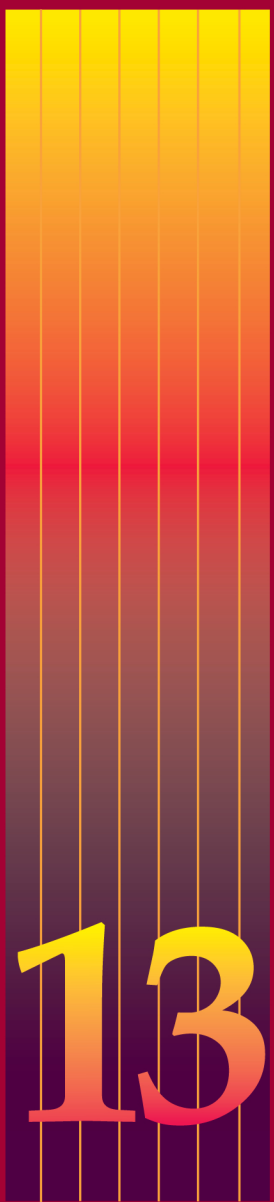
Canada: The State of the Federation 2013

Aboriginal Multilevel Governance



Edited by
Martin Papillon and André Juneau

Institute of Intergovernmental Relations

Institut des relations intergouvernementales

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PREFACE

In 2003, the State of the Federation conference focused on the reconfiguration of Aboriginal-state relations in the federation and examined their adequacy. The conference organizer and editor of the resulting proceedings, Dr Michael Murphy, was concerned with the many challenges confronting Canadian federalism as a result of the disjuncture between the institutions and policies that governed these relations and what one of the editors of the present volume describes as "the rapidly changing Aboriginal reality on the ground." In the subsequent decade, the reality on the ground continued to evolve as the Aboriginal population grew more rapidly than that of other Canadians and changed both socially and economically. Also, the resource boom experienced during those years exacerbated conflicts over land tenure and ownership, while a series of Supreme Court decisions affirmed both the duty to consult and the recognition of Aboriginal title. Clearly, in the decade since our last conference on reconfiguring Aboriginal-state relations, the pressures on the institutions and policies governing those relations have continued unabated. The issue is how, and to what extent, they have adapted.

It was not difficult, therefore, when then-IIGR-director André Juneau was considering possible topics for the 2013 State of the Federation conference, to conclude that a renewed discussion focusing on Aboriginal-state relationships was required. Moreover, it was a necessity given additional urgency in late 2012 and early 2013 by the activities of the "Idle No More" movement, which evidenced the growing impatience, especially among younger Aboriginal people, with the slow pace of change.

André Juneau consulted with Martin Papillon, then at the University of Ottawa, and a leading expert on Aboriginal governments and their relations with other governments. Professor Papillon not only agreed on the need and timeliness of such a conference but also agreed with André's suggestion that he take the lead in organizing the 2013 State of the Federation conference and co-editing the resulting volume. Both André and I would like to say how very much we appreciate the excellent job he has done both as organizer and editor. I would also like to express my appreciation for the contributions that André continues to make to the institute in his new role as fellow.

John R. Allan
Interim director, IIGR

State of the Federation 2013
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I

Introduction

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INTRODUCTION: THE PROMISES AND PITFALLS OF ABORIGINAL MULTILEVEL GOVERNANCE

Martin Papillon

In 2003, the Institute of Intergovernmental Relations held its annual State of the Federation conference on the theme of Aboriginal-federal-provincial relations. The resulting volume highlighted the many challenges in reconfiguring Canadian federalism in response to the legitimate claims and expectations of Indigenous peoples.[1] In his introductory chapter, Michael Murphy (2005, 4) noted the growing disjuncture between the institutions and policies governing our relationships and a rapidly changing Aboriginal reality on the ground. Ten years later, it is safe to argue this disjuncture remains just as significant. The United Nation's special rapporteur on Indigenous rights recently reminded Canada of its limited success in addressing Aboriginal rights and land claims, not to mention the ongoing socio-economic challenges facing First Nations, Métis, and Inuit communities (Anaya 2014). The emergence and resonance of the Idle No More movement in 2013 confirmed the intensifying frustration of the younger generation with the status quo.

To some, it may appear that Aboriginal-settler relations in Canada remain somewhat frozen in time. That being said, as Ken Coates underlines in his contribution to the present volume, significant changes have taken place in the social, economic, and legal context of these relations. The growing demographic weight of Aboriginal

[1] Following the practice in Canada, the term "Aboriginal peoples" is used in this text interchangeably with the internationally recognized term "Indigenous peoples" to refer to the descendants of the original inhabitants of the continent. The Canadian Constitution recognizes three groups of Aboriginal peoples: American Indians (First Nations), Métis, and Inuit. Distinctions between these groups are made in this text when necessary. Authors in the remainder of this volume may have chosen to use different terms.

peoples, notably in the Prairies, means that their economic impact can no longer be ignored. The natural resources boom of the past ten years has escalated conflicts over land tenure and ownership, giving Aboriginal peoples new prominence in our economic debates. The resulting string of Supreme Court decisions on the duty to consult and, more recently, on the recognition of the Aboriginal title is effectively transforming the political economy of natural resource extraction in Canada. The emergence of an international regime of Indigenous rights is also having increasing impact on the Canadian conversation concerning the place of Aboriginal peoples in the governance of land and resources (CIGI 2014).

This changed landscape is reflected in practices of governance. Aboriginal peoples have become more assertive in protecting their traditional lands and in seeking a more direct role in decisions affecting their communities. The Idle No More movement was triggered by the sense among First Nations that they were not adequately consulted on key elements of the 2012 federal budget implementation bill.[2] In September 2014, the Atikamekw of central Quebec also made headlines when they declared their sovereignty over an 80,000 square kilometre territory, claiming that resource extraction could no longer take place on their traditional lands without their consent.[3] Local activists and economic entrepreneurs are contributing as well to a quiet but increasingly visible revolution in the social, political, and economic life of First Nations, Inuit, and Métis communities. Whether this new assertiveness will lead to significant change remains an open question, but it certainly forces Canadians from all political stripes to question the very foundations of our relationships.

As numerous chapters in the present volume underline, provincial and territorial governments have also seen their role grow in Aboriginal policy and politics. Reforms to provincial mining regimes to account for consultation obligations (Theriault, chapter 9, this volume), the development of participatory models in forestry (Wyatt and Nelson, chapter 8) and other forms of benefit sharing agreements (Irlbacher-Fox, chapter 4; Slowey, chapter 11) testify to the growing importance of Aboriginal, provincial, and territorial interactions in the context of resource governance.

Beyond the resource economy, the somewhat artificial divide between federal and provincial responsibilities on matters such as on- and off-reserve education, child welfare, housing, and other social programs is becoming highly problematic. Aboriginal peoples are increasingly mobile, and the challenges they face call for coordinated action at multiple levels. Belanger's analysis of housing policy in chapter

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[2] Bill C-45, tabled in October 2012, was a 428-page omnibus bill that notably included amendments to the Navigable Waters Protection Act and to the Indian Act. See Wotherspoon and Hansen (2013) for an analysis of the movement and its origins.

[3] See the declaration at http://www.atikamekwsipi.com/fichiers/File/declaration_souverainete_signe.pdf (accessed 2 March 2015).

15 perfectly illustrates this point. As Laroque and Noël reveal in their comparative analysis of provincial anti-poverty strategies in chapter 14, there remain considerable variations in how provincial governments tackle these complex issues. While some provinces still rely on federal initiatives, others have developed comprehensive strategies to address the unique set of challenges facing their Aboriginal citizens. The latter tend to engage more proactively in developing pragmatic governance arrangements with their Aboriginal counterparts.

The private sector is also acknowledging the need to include Aboriginal peoples in resource extraction projects. The negotiation of Impact and Benefit Agreements (IBAs) with Aboriginal communities is an increasingly important aspect of mining and oil and gas development (Slowey, chapter 11). The jury is still out on these private agreements designed to compensate Aboriginal communities for the negative impact of projects on their traditional lands, but they are certainly reshaping natural resource governance in many parts of the country. In British Columbia for example, the Lax Kw'alaams First Nation recently rejected a $1 billion deal over 40 years for the construction of a liquefied gas terminal on their traditional territory (Jang 2015).

Aboriginal governance is therefore an increasingly multilevel and multi-party reality. This shift is reflected in the growing number of bilateral and trilateral governance arrangements that have emerged in recent years, not only in land and resources management but also in areas as diverse as training, education, health care, child welfare, infrastructure, and housing, to name just a few. These agreements vary considerably in scope and nature, and not all are equally successful, as this volume documents. But in the long run, their cumulative effects on Canadian federalism and on the future of Aboriginal governance may well be as significant as comprehensive land claims and self-government agreements, if not more.

The 2013 State of the Federation volume focuses on the implications, the limits, and the transformative potential of this new multilevel reality. Can Aboriginal, provincial, territorial, and federal governments work together in developing pragmatic yet innovative approaches to governance in resources management or social policy development? Do existing arrangements resulting from treaties or more limited sector-specific administrative or public-private agreements create opportunities for substantive Aboriginal participation in decision-making? And what are the implications of these multilevel arrangements for Aboriginal rights and political aspirations, as well as for Canadian federalism? Can they be conducive to fundamental changes in our relationships?

As Michael Murphy (2005, 8) astutely noted in his introduction to the 2003 State of the Federation volume, our assessment of these developments is necessarily dependent on our understanding of what change means and of what the endpoint of ongoing reforms should be. While some of our authors see greater Aboriginal multilevel governance as a positive sign of reconciliation, others are more sceptical. These pragmatic governance arrangements rarely alter how formal authority and resources are allocated in the Canadian federation. Those who call for a more

principle-based type of politics, notably through the reassertion of Indigenous forms of sovereignty on lands, resources, and communities, tend to view this kind of incrementalism with suspicion.

The chapters in this book suggest both views are supported by recent developments. Multilevel governance (MLG) arrangements can be both a space for substantial Aboriginal participation in decision-making processes and an iron cage, trapping Aboriginal communities in a logic of constant negotiation, under rules that are not of their choosing. This is perhaps the main conclusion to draw from the analyses presented in this volume. The promises (and pitfalls) of MLG depend on the circumstances and the specific nature of the arrangements, who is involved, and how. The transformative potential of MLG is, in other words, an empirical question.

In order to properly assess the emerging dynamics of MLG and draw some lessons for Aboriginal-state relations, it is important to locate current developments in their broader historical context. What is multilevel governance and why is it becoming such an important feature of Aboriginal policy? In the remainder of this introductory chapter, I propose a framework to understand MLG and discuss its origins in the context of Aboriginal politics and policy. I then build from the various contributions to the present volume to provide a critical assessment of current multilevel practices and their potential impact for Canadian federalism and Aboriginal self-determination.

WHAT IS MULTILEVEL GOVERNANCE?

MLG was first used in the context of debates over European integration in the 1990s to capture some of the unique characteristics of policy-making in the European Union (Marks 1993). While state sovereignty remains a central feature of the EU system, decision-making in practice is increasingly diffused vertically across territorial scales, and horizontally between interdependent partners. As a result, classic state-centric modes of decision-making are replaced by negotiated multilevel coordination mechanisms. The EU level, where this coordination is taking place, is also becoming in and of itself a distinctive political space where governmental and non-governmental actors interact and shape policy decisions. It is this double horizontal and vertical dynamic that the concept of MLG initially sought to capture (see also Bache and Flinders 2004; Piattoni 2010).

In a global context where the traditional boundaries of state authority are reconfigured from above and from below, multilevel governance has become an umbrella concept to capture a whole range of horizontal and vertical governance arrangements well beyond the EU. The concept is used to describe intergovernmental cooperation in federal systems (Painter 2001; Stein and Turkewitsch 2010), the development of collaborative governance mechanisms at the local level (Lazar and Leuprecht 2007; Horak and Young 2012), and a spectrum of governing structures involving

state and non-state actors across levels of decision-making (see Hooghe and Marks 2003 for an overview).

This rapid expansion of the concept beyond its original EU setting has led to some confusion as to what exactly MLG is. Recent analyses taking stock of the concept have lamented its lack of coherence and clear analytical focus (Piattoni 2010; Rouillard and Nadeau 2013; Alcantara, Broschek, and Nelles 2015). My goal here is less to argue for a specific definition of MLG than to point to its analytical value in the context of Aboriginal-state relations. At the risk of oversimplifying, I suggest there are at least three useful ways of considering multilevel governance.

To start, the term broadly describes an empirical phenomenon. It points to the horizontal and vertical deconcentration of the policy-making process above, below, and beyond state boundaries. Putting it simply, there are more actors and more levels involved in the process of deciding on policy priorities and in the process of implementing these policies. Certainly, this is true in the EU context, but it also resonates with Aboriginal-state relations. Federal and provincial authorities are increasingly (but not always) engaged with Aboriginal governments and organizations, as well as private actors, in defining priorities, coordinating actions, and allocating responsibilities. But the concept of MLG also suggests something more than a descriptive statement about levels and actors. It points to something *qualitatively different* in the way actors and levels interact in the policy process.

A second approach to MLG focuses on the specific nature of these interactions. In its original conceptualization in the context of European integration, it was seen as a pragmatic outcome of growing interdependence across levels of decision-making. Faced with multiple veto points and coordination gaps, European governments developed alternative models of governance in which formal authority is set aside and replaced with joint or collaborative intergovernmental processes (Bache and Flinders 2004). From this perspective, MLG is a specific type of collaborative decision-making process that results from growing interdependence between actors located at different scales (Piattoni 2010). Adopting a similar perspective, Alcantara and Nelles (2014, 4) define MLG as an instance of "collaborative, non-hierarchical, decision-making, where governmental and non-governmental actors located at multiple territorial scales pursue joint solutions to complex problems" (see also Wilson, Alcantara, and Rodon, chapter 3, this volume).

This process-oriented definition is helpful as it focuses on the actual role of various actors in multilevel policy-making. Because power and legitimacy are more dispersed, actors depend on each other to pursue their goals. That interdependence results in greater incentives for horizontal cooperation, coordination, and negotiation than in typical hierarchical settings. The key to MLG is therefore less in the formal allocation of authority than in the practical interdependence that emerges out of a diffusion of policy capacity and legitimacy (Bache and Flinders 2004). Such collaborative, multilevel policy-making can take various forms. While some authors limit MLG to joint decision-making exercises (Alcantara and Nelles 2014; but see also Alcantara, Broschek, and Nelles 2015), others take a more

open-ended approach to the kind of arrangements that can result from multilevel interdependencies. In their seminal work on MLG, Hooghe and Marks (2003) make the point that there are in fact multiple ways of coordinating decision-making in complex, cross-jurisdictional policy systems. In the European Union, for instance, interdependence across levels is managed less through joint decision-making than through mechanisms of differentiation, where specific policy functions are diffused along nested but interdependent territorial scales (Benz 2003). As the chapters here demonstrate, Aboriginal multilevel governance in Canada arguably operates through a spectrum of more or less formal mechanisms, from co-management boards to the negotiation of multi-party agreements for the delivery of services or the management of lands and resources.

No matter how strictly we define MLG, this process-oriented approach adds clarity by focusing on the "who, what, and how" of decision-making. What is more, it clearly distinguishes MLG as a process from its institutional settings (Alcantara, Broschek, and Nelles 2015). MLG can thus occur in a federal system, in urban governance, in international contexts. The formal institutional system is less relevant than the practices that emerge to coordinate multilevel interdependencies. One has to be careful, however, not to assume that growing interdependencies necessarily lead to greater equality in the policy process (Peters and Pierre 2004). MLG, especially in the context of Aboriginal-settler relations, does not operate in a vacuum. It is traversed by politics and located in an institutional, political, and economic context that very much structures how actors interact. As many chapters in the present volume conclude, MLG is rarely a partnership between equally influential actors engaged in the purest form of co-decision.

A third approach to MLG focuses on the structural implications of these patterns of multilevel policy-making. Without rejecting the idea that MLG refers to specific instances of decision-making, a structural approach focuses less on the process than on its repercussions for the political system. It situates MLG within broader transformations in relations between states, markets, and communities (Jessop 2004). Here again, the original discussion of MLG in the EU context is useful. MLG emerged in Europe as part of what was largely a market-driven integration process. European states initially negotiated agreements to facilitate the circulation of goods and peoples, and then required mechanisms to coordinate their policies along common economic objectives. In the process, states themselves were slowly transformed, reconfigured from above and below, thereby creating a new type of political structure where authority was inherently more diffused (Peters and Pierre 2004; Jessop 2004).

From a more structural perspective, then, MLG is a distinctive system of governance that has emerged as an alternative to the mechanisms associated with classic federalism or decentralization. In the context of Aboriginal-state relations in Canada, MLG can be defined as a distinctive institutional form that has incrementally emerged out of the limited capacity of federal institutions to adapt to the re-emergence of Aboriginal peoples as rights-bearing and self-governing collective

agents (Papillon 2012b). While a process-oriented approach looks at specific interactions between actors in the policy process, the value added of a structural approach is therefore to focus our attention both on the origins of MLG and on its potential consequences for the political system as a whole.[4]

Aboriginal multilevel governance can be thus approached from three different perspectives. Descriptively, we can make the case that there are now more actors and levels involved in policy-making processes affecting the lives of Aboriginal peoples. We can also unpack the specific dynamics of these policy processes and assess who does what, and how, in shaping policy outcomes. Finally, we can adopt a more structural approach that focuses on the origins and potential systemic consequences of multilevel governance as it becomes institutionalized. These three levels of analyses are distinct but not necessarily mutually exclusive. In the EU context, for example, MLG simultaneously refers to an institutional reconfiguration of the polity and a corresponding shift in the policy process to manage the resulting complexity of decision-making (Piattoni 2010).

MLG therefore invites us to move beyond a strict focus on rights-based status, jurisdictions, fiscal capacity, or formal models of decision-making and to consider the various mechanisms, agreements, and networks that have de facto emerged to mediate and manage the growing interdependence between federal, provincial, Aboriginal, and private actors. While not all provide an equal measure of control for Aboriginal peoples, they nevertheless create new venues for negotiating and influencing policy directions. All the authors here ask how Aboriginal and non-Aboriginal actors interact in multilevel settings, what kinds of decision-making structures and practices have emerged as a result of these interactions, and, more broadly, how these structures reshape Aboriginal-settler relations.

MULTILEVEL GOVERNANCE AND INDIGENOUS-SETTLER RELATIONS IN CANADA

Multilevel governance is not a phenomenon unique to Aboriginal politics. Nonetheless, there are unique circumstances that have contributed to the development of *sui generis* forms of multilevel governance in the context of Aboriginal-settler relations in Canada. I outline some of these contributing factors here.

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[4] In a recent contribution to this conceptual debate, Alcantara, Broschek, and Nelles (2015) adopt a slightly different distinction between MLG as a system and as a process. They make a valuable case for an analytical focus on MLG as a specific instance of policy-making rather than as a system of governance.

Agency

The first and arguably most important factor to consider is Aboriginal peoples themselves and the agency they have gained through successful mobilizations, from local community activism to engagement at the international level. A common trait of Aboriginal peoples' activism around the world is the framing of their political struggles in the language of self-determination; that is, the capacity of a political community to collectively decide its own cultural, economic, and political future without external constraints (see Murphy 2005, for a more developed conceptualization of self-determination). As self-determining agents, Aboriginal peoples challenge the legitimacy of state authority and the conditions of their inclusion in the constitutional regime of settler' states (Alfred 2008; Niezen 2003; Tully 2000; Bruyneel 2007).

In Canada, Aboriginal peoples have put to test the legitimacy of the settler state through numerous court battles and, notably in the 1980s and early 1990s, as key actors in constitutional negotiations (Brock 1991). But they have also engaged in more direct and less institutionalized forms of political affirmation. Road blockades, occupations, and other types of protests are perhaps the most visible aspects of Aboriginal activism (Belanger and Lackenbauer 2015). Through such actions, Aboriginal peoples generally oppose economic activities that affect their traditional lands, while also more fundamentally challenging the legitimacy of the legal and political order under which decisions regarding these activities take place (Borrows 2005; Ladner and Simpson 2010). It is often less the economic activity that is at stake than the fact that Aboriginal peoples have no say in the decision to authorize or not such activities on their traditional lands. Less visible but perhaps just as significant is the concomitant resurgence and rearticulation of Aboriginal worldviews and traditional governance practices and norms at the local level, thereby recasting the relationship with state authority as one of coexisting (and competing) legal and political orders (Borrows 2010; Simpson 2011; Alfred and Corntassel 2005). This discursive and practical repositioning, from subordinate communities to self-determining agents, is increasingly hard for governments and private actors alike to ignore.

Decentralization

Governments have responded to this challenge to their legitimacy in various ways, ranging from outright resistance to the negotiation of new governance arrangements purportedly designed to create greater Aboriginal control over their own affairs. While self-government and consultation processes have received considerable attention, mostly for their limited success (Papillon 2014; Belanger and Newhouse 2008), other developments are worth noting. Aboriginal Affairs and

Northern Development Canada, the federal department responsible for the Indian Act, has evolved into what is today essentially a funding agency for services that are delivered by Aboriginal organizations and local authorities. In 1983, the federal government directly managed nearly 50 percent of the budget directed towards services to Aboriginal peoples. By 2008, this proportion was reduced to 8 percent and since has remained stable (Papillon 2012a). Band councils and other Aboriginal organizations now run programs as diverse as education and child-care, social assistance and training, not to mention policing and other local matters.

As the Office of the Auditor General routinely reminds us in its annual reports, one consequence of this massive decentralization of service delivery is the explosion of reporting and accounting mechanisms that are creating an unreasonable burden on small Aboriginal governments and organizations (Auditor General of Canada 2002). Part of the problem is structural: the minister of Aboriginal affairs remains ultimately accountable for the funds and programs to Parliament. Band councils and other Aboriginal organizations managing those funds and programs essentially operate as its subsidiaries rather than as autonomous entities accountable directly to their populations. While the legislative basis is different under self-government arrangements, the logic remains largely similar (Abele and Prince 2007).

The flexibility of this type of arrangements is obviously limited, but they have nonetheless created spaces for Aboriginal organizations to develop their expertise and policy capacity in a number of sectors. They have also created growing de facto interdependencies in what remains formally a hierarchical structure. The federal government increasingly depends on Aboriginal organizations to fulfill its mandate, and the latter depend on federal funding to deliver services. While limited in its potential to enhance Aboriginal autonomy, decentralization has paradoxically created more, not less, need for coordination and negotiation.

Rights-Based Governance

The Canadian courts are another key driving force behind MLG. There is no space here for a detailed review the Supreme Court's jurisprudence on Aboriginal rights (see Grammond 2013 for an excellent overview). The key here is the growing emphasis in recent court decisions on the need for dialogue and negotiations as a mean to translate Aboriginal rights into concrete governance practices. The purpose of section 35 rights, the court insists, is to "reconcile the rights of pre-existence of aboriginal societies with the sovereignty of the Crown."[5] This invitation to reconcile conflicting rights and interests is central to the court's duty to consult doctrine, which establishes an obligation to "consult in good faith" and, when necessary, to accommodate Aboriginal peoples when the exercise of their rights might be affected

[5] *Delgamuukw v. British Columbia (1997) 3 S.C.R. 1010* at 186.

by government decisions (see also Thériault, chapter 9, for a more detailed discussion of the practical implications of the duty to consult). In its recent decision on the scope of the Aboriginal title, the court reinforces this push for dialogue and negotiated governance arrangements in land and resources management.[6]

The impact of this new legal regime is becoming increasingly apparent for land and resources governance, especially in areas like British Columbia and parts of Quebec, where no historic treaties have settled Aboriginal title claims. Even if Aboriginal peoples have no final veto on development proposals, it gives their demands for a say in the politics of resources extraction a concrete legal anchor. Faced with the potential economic costs of protracted legal challenges, governments (especially provinces) and private promoters are now forced to establish mechanisms to consult, accommodate, and in some cases negotiate with Aboriginal peoples over the environmental and social impact of projects, as well as the sharing of economic benefits (Gottfred, chapter 18).

The development of more direct relations between industry actors and Aboriginal communities, including the negotiation of Impact and Benefits Agreements (IBAs) through which project proponents seek the consent of Aboriginal communities (O'Faircheallaigh 2010; Slowey, chapter 11), is another direct outcome of these developments. Governments and project proponents who discount Aboriginal opposition to projects do so at their own risk, as the ongoing controversy over Northern Gateway and other pipeline projects in British Columbia and across the country demonstrate.[7]

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[6] Infringement of the Aboriginal title, the court argues in *Tsilhqot'in*, requires consent of the concerned Aboriginal group, unless the government demonstrates a "compelling and substantial public purpose" that justifies overriding the will of the titleholders. Even in such cases, the government must also demonstrate genuine engagement to seek consent before proceeding. The decision is effectively an invitation to develop joint decision-making mechanisms for land and resources management in non-treaty areas. See *Tsilhqot'in Nation v. British Columbia* (2014) SCC 44.

[7] Project proponents are quickly adapting to this new legal environment. They are increasingly willing to negotiate substantive deals with Aboriginal peoples to ensure their consent and limit the legal and political uncertainty associated with potential conflicts. The Lax Kw'alaams First Nation in northern BC recently voted by referendum against a $1.15 billon deal over 40 years for the construction of a liquefied gas terminal at the head of the Skeena river, on their traditional territory. See ATPN News (2015).

Treaty Governance

Rights-based governance is partly the result of legal uncertainties pertaining to the nature of Aboriginal rights in areas of the country where no historic treaties were signed. However, once land claims are settled, the need for multilevel coordination does not disappear. Nowhere is this more obvious than in the northern territories, where self-government structures, co-management boards, and other mechanisms for implementing land claims settlements have created a complex web of nested and overlapping governance processes and structures (White 2002; Wilson 2008).

As Wilson, Alcantara, and Rodon suggest in their analysis of housing and education in Inuit regions in this volume, treaty-based governance and the role of Aboriginal peoples in such structures vary considerably. Not all lead to collaborative governance or joint-decision making, but the more successful examples tend to point in that direction. As Brian Craik (chapter 6) and John B. Zoe (chapter 7) similarly underline in their respective accounts of treaty implementation in Eeyou Istchee (James Bay and Northern Quebec) and in Tlicho territory, successful treaty governance requires a high level of coordination and collaboration between signatories. Diverging interpretations of treaty principles or changing circumstances can easily result in conflicts if appropriate intergovernmental coordination mechanisms are not put in place. This lesson is also central to Stephanie Irlbacher-Fox's analysis (chapter 4) of the negotiation process leading to the recent devolution and revenue-sharing agreement in the Northwest Territories. Her analysis suggests that MLG can fail to deliver on collaborative governance if the underlying principles of treaties are not translated in concrete governance practices.

Coordination Challenges

A fourth factor that contributes to the development of MLG in Aboriginal policy has less to do with Aboriginal agency and rights-based mobilizations per se than with Canadian federalism itself. Under section 91(24) of the Constitution Act, 1867, the federal government has exclusive responsibility for "Indians and the Lands reserved for the Indians." The exact meaning and extent of federal obligations under section 91(24) has always been contentious, especially in policy areas generally associated with provincial jurisdiction, such as health, education, and other social programs. While courts have established some guiding principles over time (see Bell, chapter 13), disentangling policy responsibilities remains an almost intractable challenge. Federal authorities tend to interpret their obligations as restrictively as possible and consider their role in many social policy areas as a matter of policy only. Provinces, on the other hand, have historically been reluctant to extend provincial services to Status Indians under federal jurisdiction (Long, Boldt, and Little Bear 1988).

The result is a complex web of federal, provincial, territorial, and (increasingly) Aboriginal-driven policies and programs that create significant challenges for the delivery of basic services, especially for Status Indians. In health-care, for example, the federal government directly provides primary and emergency care on isolated reserves. It also provides non-insured health benefits to Status Indians and Inuit (prescription drugs, vision care, dental services, medical supplies, etc.). Provinces provide all other services, including primary and specialized care in Aboriginal communities not covered by existing federal programs. This situation produces a largely ineffective division of responsibilities based on the status of the beneficiaries and their geographic location rather than on the nature of the services. Similar dynamics are at play in education, child welfare, social assistance, and many other basic services (Abele 2004; Lemchuk-Favel and Jock 2004).

This complex jurisdictional maze creates blurry accountability structures and a tendency for blame avoidance.[8] The lack of clarity over responsibilities has become a significant issue given the needs of a growing, increasingly urban, and mobile Aboriginal population with comparatively lower educational attainment, higher unemployment, lower income, lower life expectancy, and significant health challenges. Coordinating federal, provincial, territorial, and Aboriginal strategies to address the many challenges facing the Aboriginal population have become imperative, as an ever-growing number of studies confirm (see, for example, Orsini 2009; Papillon 2015; Richards, chapter 16, this volume).

The Kelowna Accord of 2005, negotiated under the leadership of Prime Minister Paul Martin, was perhaps the most comprehensive and high-profile attempt at intergovernmental cooperation in Aboriginal social policy. While the accord did produce some initiatives at the provincial level (Laroque and Noël, chapter 14), the newly elected Conservative government of Stephen Harper chose to ignore the commitments made by its predecessor. The Kelowna process did nonetheless contribute to a greater awareness amongst politicians and civil servants of the necessity to establish better coordination mechanisms across jurisdictions. One outcome of the Kelowna process was the development of intergovernmental tables under the leadership of the Aboriginal Intergovernmental Working Group. While federal participation remains limited, the working group and its thematic tables have contributed to the development of common objectives and agenda-setting, notably on the complex issue of violence against Aboriginal women.[9]

The most significant change in intergovernmental dynamics since Kelowna, however, is less in multilateral processes than in the growing use of sector-specific trilateral agreements between the federal government, a province or territory, and provincial Aboriginal organizations. These agreements vary in nature and scope.

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[8] See Blackstock (2012) for an analysis of the dramatic consequences of federal-provincial jurisdictional disputes in First Nations health care and child and family services.

[9] See, for example, Aboriginal Affairs Working Group (2013).

Some are simply a broad statement of intent to establish communication channels; others establish a common policy agenda or a set of shared objectives; others yet are more substantial agreements for the coordination of service delivery. A number of such agreements were negotiated in recent years in areas as diverse as education, social assistance, health care, policing, and child care. While these accords are at varying stages of implementation and it is as yet too early to assess their success, they exemplify the transformative potential of MLG in policy areas characterized by complex, overlapping, jurisdictional settings.

A Spectrum of Multilevel Governance Relationships

Aboriginal multilevel governance has multiple roots. No single process, force, or event can single-handedly explain its emergence as a key aspect of Aboriginal politics and policy in Canada. While federal systems are by their nature amenable to multilevel policy-making, federations also tend to be resistant to radical changes or alternations to their constitutional fabric. The development of Aboriginal multilevel governance mechanisms can perhaps best be understood as a process of incremental adaptation in response to growing tensions in the federal system (Papillon 2012a). These tensions are the result of Aboriginal mobilizations and of the emergence of Aboriginal rights as a key component of the relationship, but they are also a pragmatic response to the increasingly hard-to-justify inefficiency of the federal system in addressing the many pressing challenges facing the Aboriginal population.

The result is less a coherent system than a spectrum of more or less formal governance mechanisms and processes that vary considerably in scope, intensity, and transformative potential. Producing a comprehensive and accurate portrait of these mechanisms and processes is an almost impossible task. A systematic search limited to provincial websites reveals at least 805 bilateral, trilateral, or multilateral political and administrative governance agreements dealing with land and resources management, social policy, infrastructure, public safety, and other sectors were negotiated with Aboriginal governments and organizations between 1995 and 2014.[10]

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[10] Data were collected according to two criteria: the agreements must involve at least one governmental and one Aboriginal partner, and they must result in the creation of governance mechanisms. These criteria therefore exclude agreements limited to funding for program administration. Comprehensive and specific land claims agreements are also excluded, although governance agreements negotiated in the context of treaty implementation are included. The search was limited to provincial websites. Agreements involving only the federal government, as well as those involving municipal authorities and territories, are therefore not included. Many administrative agreements are also simply not listed on official websites.

Table 1 provides some details on the main policy sectors and geographic distribution of these agreements. Social policy includes health, education, social assistance, training, and child welfare. Infrastructure includes housing, and public safety includes policing agreements. Land and natural resources management includes co-management of public parks and environmental stewardship agreements, consultation protocols, revenue sharing, and economic partnership agreements. Relationship agreements are generally broad statements establishing formal coordination channels or joint multi-sectorial tables at the political or administrative levels. The uneven distribution of agreements is particularly striking. Demographics matter here – provinces with a larger Aboriginal population tend to have more agreements – but it is not a perfect match. Ontario would otherwise be the most active province. In fact, British Columbia is by far the most active province in negotiating agreements pertaining to land and resources management. This fact confirms the importance of legal uncertainties created by unsettled land claims in driving provincial policy towards Aboriginal peoples.

Table 1: Bilateral and Trilateral Agreements Involving Provinces and Aboriginal Organizations and Governments

	BC	*AB*	*SK*	*MAN*	*ON*	*QUE*	*NB*	*NS*	*PEI*	*NL*	*Total*
Social policy, public security, infrastructures	26	17	39	22	26	46	8	7	6	2	199
Resources, land, and economic development	347	11	15	31	28	31	6	5	2	14	490
Relationship agreements	36	8	8	7	12	33	5	4	2	1	116
Total	**409**	**36**	**62**	**60**	**66**	**110**	**19**	**16**	**10**	**17**	**805**

Source: Author's compilation.

Not all these agreements are equivalent in scope, nature, and impact. Some are simply joint statements of intent, establishing the groundwork for future arrangements, while others create more substantial responsibilities. Even in the case of more substantial agreements, the status of Aboriginal partners in resulting governance arrangements and decision-making processes can vary considerably, from a relatively limited consultative role to a central position in what are essentially joint

decision-making processes. Many of these sectorial agreements are the result of pre-established policy frameworks in which provincial (and federal) authorities set strict conditions on what can and cannot be negotiated. Aboriginal partners therefore have limited leeway in establishing their own conditions. This is often the case in agreements pertaining to land and resources management, notably in the case of revenue-sharing agreements in British Columbia. Other cases display stronger forms of MLG in which Aboriginal participants are more fully engaged as co-equal partners in negotiations and have a clear input on the scope and nature of the agreements. The Paix des Braves, a multifaceted agreement between Quebec and the James Bay Cree negotiated in 2002 (see Craik, chapter 6) is a clear example of this type of joint decision-making exercise. Building on the chapters in this volume, I next discuss the transformative potential of these multilevel governance exercises.

ASSESSING MLG

Contemporary Aboriginal policy-making has become a multilevel and multi-party affair. While there is little doubt that this new reality is changing how Aboriginal governments, organizations, and communities interact with settlers' institutions, the impact of this change remains to be seen. Is MLG a more effective way of navigating the complex field of Aboriginal policy-making? Is it conducive to more legitimate processes and outcomes in developing strategies for improving the quality of life and economic opportunities in Aboriginal communities? Finally, to what extent are these emerging patterns of MLG consistent with Aboriginal peoples' political aspirations as self-determining communities?

A Better Way to Govern?

Negotiated, networked, or joined decision-making processes are generally considered in the MLG literature as functional responses to the coordination challenges resulting from the complexity of policy-making above, below, and beyond the state. For Gary Marks and Liesbet Hooghe, MLG is the logical outcome of a process of institutional adaptation to maximize the efficiency of decision-making in compounded political systems: "A common element across the (MLG) literature is that the dispersion of governance across multiple jurisdictions is both more efficient than and normatively superior to the central state monopoly … Governance must operate at multiple scales in order to capture variations in the territorial reach of policy externalities" (2004,16). MLG is therefore assumed to be a better, more efficient way to govern in complex settings, designed to "limit the transaction costs of interjurisdictional coordination" (Hooghe and Marks 2003, 240). As mentioned, this is arguably one of the driving factors explaining the emergence of MLG in the

context of Aboriginal policy-making in Canada, as federal and provincial authorities struggle to establish some clarity over their respective responsibilities.

That being said, the chapters in this volume suggest the jury is out on the potential of multilevel processes as mechanisms to achieve greater efficiency, let alone equity, in Aboriginal policy-making. Yale Belanger (chapter 15) and John Richards (chapter 6) suggest trilateral agreements are indeed effective pragmatic means to disentangle responsibilities in housing and education and ensure Aboriginal participation in decision-making, but others are more sceptical. In her chapter on the negotiation of resource revenue sharing in the Northwest Territory, Stephanie Irlbacher-Fox is critical of both the process and the content of the agreement, in part because concerns over efficiency and timing have trumped substantive engagement with the Aboriginal treaty and non-treaty partners, therefore leading to more, not less, conflicts. While concerns over efficiency are important, the unique history of Aboriginal-settler relations suggests the legitimacy of the process is at least as important, if not more. The best agreement can also turn out to be highly ineffective in the absence of clear implementation strategy, a point underlined by John B. Zoe in chapter 7.

MLG and Indigenous Self-Determination

MLG participates in a profound reconfiguration of the state and its role in democratic societies. A close cousin of governance, another normatively charged term that suggests a displacement of the state as the core space of collective decision-making, MLG also starts with the premise that the state is no longer *capable* of producing effective, legitimate, and relevant policies without greater involvement of market and community-based actors (Jessop 2004).

This discourse about the declining capacity and legitimacy of the state resonates in the context of Aboriginal politics, where claims of self-determination are also often couched in a critique of the overreaching state (Papillon 2014). The "less state is better" approach is particularly evident in the context of natural resources management, where Aboriginal communities sometimes prefer dealing directly with private project proponents through negotiated IBAs rather than being submitted to state-driven regulatory processes (Slowey, chapter 11; Fidler and Hitch 2007; O'Faircheallaigh 2010).

However, less state is not always better. Actors engaged in multilevel governance can sometimes operate on the basis of pragmatic arrangements that are not subject to the democratic checks and balances inherent to more institutionalized modes of decision-making (Peters and Pierre 2004). The displacement of the policy process outside of formal, hierarchical decision-making structures means that democratically elected assemblies, let alone citizens themselves, have more limited power

of oversight on the conditions and terms of these negotiated arrangements. This limitation can be a real challenge in implementing new modes of coordinated governance in the context of Aboriginal-state relations. Fundamental decisions affecting communities are made in the context of negotiations conducted by a small group of experts and lawyers, sometimes with limited input from elected Aboriginal representatives, let alone traditional leaders. A number of analyses in the present volume point to the importance of community-based participation and attention to traditional modes of governance in multilevel arrangements (see, for example, Wyatt and Nelson, chapter 8; King, chapter 5).

The democratic legitimacy of these arrangements rests on the capacity of the involved parties to adopt transparent accountability mechanisms that correspond to Aboriginal and non-Aboriginal expectations, standards, and traditions. Transparency is a major issue in the negotiation of private IBAs with the extractive industry (Fidler and Hitch 2007), but it is also a challenge when negotiating complex policy reforms. The collapse of the negotiations between the Assembly of First Nations (AFN) and the federal government over First Nation education reform in 2014 is a case in point. The grand chief of the AFN, Shawn Atleo, was eventually forced to resign over what critics considered a lack of transparency and input from First Nation communities in both the process and the content of Bill C-33 (Galloway 2014).

It is also not at all clear that MLG in the context of Aboriginal policy actually means less state. As Fiona MacDonald reminds us in her analysis of First Nations Child Welfare decentralization in Manitoba, decentralized governance arrangements can "hand off large areas of responsibility to Indigenous peoples without passing on the actual decision-making power necessary to truly transform these policy areas" (2011, 357). The diffusion of decision-making processes above, below, and beyond the usual confines of formal state institutions does not necessarily mean that the state is disappearing or losing its capacity to shape these processes. It may simply mean that the state is governing differently, through indirect steering mechanisms rather than through constitutional authority (Peters and Pierre 2004). This is what Bob Jessop calls "metagovernance" (2004, 65), the indirect control of multilevel processes and outcomes through the production of regulatory frameworks, norms, and accountability regimes that shape the conditions under which actors interact.

Metagovernance is particularly relevant in the context of Aboriginal-settler relations, given the long history of direct and indirect state control of the lives of individuals and communities. As many chapters here point out, governance arrangements with Aboriginal peoples are often conditioned upon certain rules unilaterally set by federal or provincial authorities as a precondition for negotiating. This is notably the case of land claims settlement and self-government negotiations, but as Stephanie Irlbacher-Fox (chapter 4) argues, it was also the case in the negotiation that led to revenue-sharing arrangements in the Northwest Territories. This type of metagovernance is also present in land management regimes (King, chapter 5) and provincial consultation frameworks (Thériault, chapter 9), to use other examples.

Privatized governance arrangements such as IBAs (Slowey, chapter 11) are also clearly negotiated under what Héritier and Lehmkuhl (2008) call, in the European context, the "shadow of hierarchy" – that is, the indirect influence of state norms and preferences through the threat of legislative intervention. In other words, growing interdependencies between actors and levels do not necessarily lead to a more equal decision-making process, let alone Aboriginal self-determination.

Even when rules are jointly decided and decisions jointly made, the actors may not have equivalent influence in the process and its outcome. The chapters looking at specific governance arrangements provide some lessons in this respect (see especially Wilson, Alcantara, and Rodon, chapter 3; Wyatt and Nelson, chapter 8). As in all negotiation process, less tangible contextual aspects such as knowledge, expertise, and institutional capacity also matter. For example, Aboriginal nations operating under a modern treaty have significantly more institutional resources than those under more limited historic treaties. Those with a reasonable claim to an Aboriginal title are also better positioned in natural resources negotiation with private proponents and governments than those with limited legal or political levers. Experience certainly matters too: nations with a long expertise in the negotiation of governance agreements, such as the James Bay Cree, know how to navigate the waters of government relations (Craik, chapter 6).

MLG arrangements can therefore be an important vehicle for Aboriginal peoples to assert their status and their autonomy in relation to governments and private actors. But they can also be frustrating procedural exercises for those looking for stronger forms of self-determination or co-decision. It is clear from the chapters that the transformative potential of MLG depends on the circumstances and specific nature of the arrangements, who is involved and how. That being said, further empirical – and comparative – research into the specific conditions for success and failure is clearly needed.

MLG and Canadian Federalism

If the transformative potential of MLG for Aboriginal self-determination is uncertain, it nonetheless offers a clear example of incremental change in the everyday workings of Canadian federalism (Papillon 2012b). The negotiation of governance agreements with Aboriginal governments or organizations rarely alters the allocation of formal authority within the federal system. With the exception of a few recent land-claims settlements, federal and provincial authorities remain reluctant to engage in formal power-sharing agreements with their Aboriginal counterparts. That being said, MLG creates sites for coordinating policy and developing common agendas with Aboriginal organizations and governments. If de jure changes are limited, Aboriginal peoples are increasingly recognized de facto as partners in the federation, with all the caveats already mentioned.

Part of the challenges in assessing the impact of these pragmatic arrangements on Canadian federalism is that they are by their very nature unstable. With the exception of treaties and self-government agreements, negotiated governance arrangements are rarely protected under a legislative framework. They may be politically binding, but they certainly are not legally binding.[11] A change in policy or a change in government at the federal or provincial level, or even a change of leadership at the Aboriginal level, can radically alter their faith. The Kelowna Accord, negotiated under the leadership of Prime Minister Paul Martin, was swiftly ignored by his successor Stephen Harper (see Laroque and Noël, chapter 14). As this type of arrangement becomes more prominent, it is conceivable that their status will also be enhanced, therefore providing some stability and predictability in their implementation.

The impact of these changes on provincial governments and their relations with Aboriginal peoples is another often-overlooked aspect. The level of provincial engagement with Aboriginal peoples has grown exponentially in the past decade. As Table 1 suggests, some provinces are more proactive than others. While it has gone furthest in formalizing its ties with Aboriginal peoples, British Columbia is not alone; other provinces have in recent years established strategic orientations, defined policy priorities, and created mechanisms to facilitate relations with Aboriginal organizations (see Laroque and Noël, chapter 14, for a clear example). Provinces see more substantive relations with Aboriginal peoples not only as a legal obligation resulting from their consultation requirements but also, and more importantly, as a strategic necessity (see de Launay, chapter 17, and Gottfred, chapter 18). The cost of legal uncertainties and lingering social and economic disparities has become simply too high. While relations are certainly not always positive, a more proactive outlook in developing stable, constructive, Aboriginal-provincial relations increasingly replaces the passive and reluctant attitude of the past.

The implications of growing provincial engagement with Aboriginal peoples should not be underestimated. The centre of gravity of Aboriginal policy-making may well be shifting from Ottawa to provincial (and territorial) capitals. Some view these changes with suspicion. Engagement with provincial authorities, First Nation leaders have long argued, is a step towards assimilation (Cardinal 1970). Section 91(24) of the Constitution Act, 1867, is in the view of many the expression of a special relationship with the federal Crown. Inuit, Métis, and off-reserve members of First Nations are much less reluctant to engage with provincial governments, but they also insist on the federal role in protecting their rights and status.

Aboriginal organizations and governments can resist this change, but they can also capitalize on it. Provincial Aboriginal policy doesn't necessarily come with all the institutional baggage of the Indian Act and its complex legacy in shaping

[11] However, contractual-type agreements like IBAs are arguably legally binding and can be subject to breach of contract court procedures.

relations along principles grounded in a distant past. Policy innovations in one province regarding natural resources revenue sharing or governance arrangements in education or land management, for example, can be emulated elsewhere as well.

A more proactive provincial role also opens the door to a more integrated approach to the multiple challenges facing Aboriginal peoples. It is increasingly clear that Aboriginal land rights, economic development, and education, as well as physical, psychological, and cultural well-being, are intimately connected (Alfred 2009). While Aboriginal peoples themselves are best positioned to tackle these interrelated issues, provinces have a key role to play in facilitating innovative practices and removing obstacles to community regeneration, given their areas of jurisdiction.

The following chapters provide examples of these shifts in modes of governance in a number of policy sectors. While some chapters adopt a descriptive stance, others are more critical or explanatory in nature. The objective is to provide a balanced and nuanced overview of the state of the research in this complex, rapidly changing area.

In chapter 2, Ken Coates pushes further the reflection on the changes mentioned here and their possible implications for Canadian federalism. He is cautiously optimistic about the transformative potential of current developments. Section 2 then looks at MLG in the context of land claims settlement implementation. Garry Wilson, Christopher Alcantara, and Thierry Rodon compare Inuit governance arrangements in housing and education, while Brian Craik and John B. Zoe consider the challenges in implementing modern treaties. Both insist on the evolving and organic nature of these comprehensive agreements. Stephanie Irlbacher-Fox and Hayden King focus on treaty-based governance over lands and resources. They both underline some of the limitations of MLG processes in cases where the rules of the game are unilaterally established by federal (or territorial) authorities.

The following section looks more closely at Aboriginal participation in the natural resources economy. Wyatt and Nelson compare different models of collaborative forestry management, while Sophie Thériault and Bruno Steinke provide reflections on the challenges of implementing the duty to consult. Gabrielle Slowey examines the differing paths taken in Alberta and Ontario regarding engagement with Aboriginal peoples in natural resources management and benefit sharing.

Sections 4 and 5 look at specific developments in Métis governance and in various social policy sectors. Janique Dubois illustrates the potential of an incremental approach to self-determination through MLG for Métis while Catherine Bell analyzes the many implications of recent Supreme Court decisions, notably *R. v. Daniels*, on federal and provincial obligations towards Métis and non-status Indians. Florence Laroque and Alain Noël then present an original analysis of provincial approaches to Aboriginal social policy through the lenses of the Kelowna Accord and its repercussion on provincial policy agendas. Yale Belanger and John Richards offer their take on the challenges in developing effective and coherent policies in tackling two of the most pressing issues facing Aboriginal communities, housing and education.

We have then asked David de Launay, at the time deputy minister for Aboriginal affairs in Ontario, and Jan Gottfred, then director of Intergovernmental and Community Relations in the Ministry of Aboriginal Relations and Reconciliation in British Columbia, to share some thoughts on their respective province's approach to relations with Aboriginal peoples. While both are optimistic, they identify a number of challenges going ahead.

The concluding chapter is a transcription of a speech from Jody Wilson-Raybould, the former regional chief of the British Columbia Assembly of First Nations and recently appointed federal minister of Justice in the Trudeau government. Her approach to First Nations governance and to relations with federal and provincial authorities is both refreshing and sobering. If we do it right, she argues, MLG may well provide a path ahead towards better, more equitable, and just relationships.

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2

REBUILDING CANADA: REFLECTIONS ON INDIGENOUS PEOPLES AND THE RESTRUCTURING OF GOVERNMENT

Ken Coates

Canada is in the midst of one of its many somewhat noisy but always peaceful political transformations. Over the past century, the country has managed to transform the role of Quebec in national affairs and deal with the prospect of Quebec separation, develop regional economic distribution arrangements, draw the resource-rich West back into national governance, incorporate the voices and votes of new Canadians, and otherwise continue the country's impressive track record for governance innovation and calm, reflective problem solving. Now, perhaps the biggest political challenge in a century remains: finding an appropriate and sustainable place for Indigenous peoples within the Canadian governance system. The process has certainly been noisy, as the Idle No More movement of 2012–13 attests, but it also holds considerable promise for the reconfiguring of both political power and the Indigenous-newcomer relationship in Canada.

Political scientists and other scholars have monitored and analyzed the development of Aboriginal governance and Indigenous-government relations extensively over the past 30 years. Academic inquiry into the progress and challenges of Aboriginal affairs remains one of the most prominent fields in Canadian scholarship. What follows is a personal reflection, based on some 30 years of professional experience in the area, on the achievements and shortcomings of Canada's efforts to come to terms with the re-empowerment of Indigenous peoples. The story is incomplete, in large part because it remains a work that is very much still underway. The achievements are significant; despite the complaints and the ongoing issues and crises, the country is a world leader in Aboriginal law, constitutional relations, and political change. It is a sign of the depth of the problems and the

complex nature of the issues at hand that, even with more than four decades of sustained attention and considerable innovation, so much remains to be done and so much remains uncertain.

LOOKING BACK AT 50 YEARS OF CHANGE

Over the past 50 years, Indigenous peoples have driven and insisted upon a comprehensive process of re-empowerment. After more than a century on the political margins, constrained by colonial administrative systems and denied most significant legal powers, Indigenous people in Canada gradually secured the recognition of their rights under British and Canadian law. While the political and legal achievements fell far short of what Indigenous sovereigntists hoped to achieve, the accumulation of rights and powers has proven to be transformational. The reality is that the political, administrative, and legal authority of Indigenous peoples has expanded dramatically, with as yet unrealized implications for the country as a whole.

The new powers accruing to Indigenous people in Canada require that the country's governance and economic systems change, but resistance remains substantial. Nonetheless, the imperatives are significant. First, governments have to recognize – as the Supreme Court has pointed out several times – that previous administrations did not honour their legal and political obligations to Indigenous peoples. The lack of respect for Aboriginal communities magnified the effects of colonialism that, primarily through the Department of Indian Affairs, submerged Indigenous societies in a system that refused to acknowledge any specific Aboriginal rights or privileges, limited personal freedoms, and imposed separation from the non-Indigenous societies. "Indian Act thinking" pervaded the Government of Canada, the churches, and other agencies, portraying Indigenous peoples as "child-like" and lacking the rights of full citizens. That government took this approach reinforced societal notions that Aboriginal people were not capable of independent action and could not look after their own affairs. Provincial governments paid scant attention to Aboriginal needs and interests, accepting with little question that the responsibility rested with the Government of Canada, a position that the federal government did little to discourage.

Indigenous peoples were far from quiet about their circumstances. From the end of the era of alliances in the nineteenth century, when government officials relegated Indigenous issues to the administrative background, they regularly complained about their treatment, sought respect for their rights, and defended their interests, only to run up against stiff resistance from government and the public at large. Many of the complaints focused on the flawed implementation of treaties, particularly those signed in Upper Canada in the 1850s and in Western Canada after 1870. Indigenous leaders expected that the treaty agreements would smooth their transition to the new economy and the growing non-Aboriginal population,

only to discover that the government did not implement the treaties consistently and reliably.

The protests took hold in the 1960s and after, when the social ferment of the postwar era connected with judicial interpretations that meshed with Aboriginal expectations. This was also a time when there was greater concern among federal, provincial, and territorial governments about the socio-economic conditions facing the poorest citizens in the country. Indigenous activism played a major role, as Aboriginal groups organized and challenged the governments politically and through the courts, and launched public protests and demonstrations that drew national and international attention to the challenges facing Indigenous peoples. The Government of Canada responded through incremental funding, new programs, and the interventionist agenda of an activist and notionally compassionate state. By the 1970s, it was quite clear that Aboriginal aspirations were well in advance of government priorities and intentions and increasingly ahead of the general public as well. As Indigenous peoples pressed for the resources, power, and autonomy that they felt their communities needed, they took the country down a path quite different from what the nation intended.

The result – now well known – has been a major shift in Aboriginal legal and political rights and arrangements across the country (see Table 1). In the 1960s, Aboriginal people focused on resistance and attracting the attention of government and support from non-Aboriginal people. Through the 1970s and 1980s, they fought for legal recognition, gaining direct reference in the Constitution Act, 1982 and participation in major government events, including First Ministers' Conferences. Continuing protests and strident Aboriginal demands resulted in the Royal Commission on Aboriginal Peoples and the production of a major report on the future place of Indigenous people within Canada. Continued efforts to attract the attention of the provincial governments led, over time, to the negotiation and acceptance of the Kelowna Accord in 2005, an agreement brokered by Prime Minister Paul Martin in the last weeks of his Liberal government. Over a period of less than 50 years, Indigenous peoples assumed a major place in Canadian public affairs and attracted the attention of both federal and provincial governments.

Table 1: Major Aboriginal Legal and Political Changes

- Modern treaties, especially in Northern Canada
- Treaty land entitlement settlements, Western Canada
- Recognition of the contemporary relevance of eighteenth-century maritime treaties
- Constitutional protection of Aboriginal and treaty rights
- Acceptance and protection of Aboriginal self-government
- "Duty to consult and accommodate" on resource development
- Recognition of Aboriginal title in non-treaty areas
- Recognition of Aboriginal resource and harvesting rights

These significant changes, ranging from constitutional inclusion to a lengthy series of Supreme Court decisions that in the main have been favourable to Aboriginal interests, have altered the nature of governance in Canada. While the most obvious effects have been seen in the management of Aboriginal affairs, their impact is spreading across Canadian governance systems. The management of Indigenous issues has extended beyond Indian Affairs/Aboriginal Affairs and now engages other departments and agencies. The Department of Justice was the first to become heavily involved in Aboriginal issues, largely due to the number of legal challenges directed at the Government of Canada. Over the past decade, departments and agencies associated with natural resource development have had to engage more extensively with Indigenous communities. Some jurisdictions, starting with the Yukon, Northwest Territories, and Nunavut, adopted "whole of government" approaches to Indigenous affairs. The Government of Canada has not reached this level of engagement, save on individual issues of broad application, but it is informally moving in that direction.

At the opposite extreme, Aboriginal autonomy has grown dramatically, ranging from Inuit control of the public government in Nunavut to the signing of numerous self-government agreements with individual First Nations. More broadly, a dramatic shift has occurred over the past 30 years from Department of Indian Affairs management to Aboriginal self-administration. In the past, Ottawa-based officials and regional offices made both major and minor decisions on financial allocations, in classic colonial fashion. Local governments had limited authority and minimal control over their budgets. By the early twenty-first century, most of the funds spent through the Department of Aboriginal Affairs were allocated to local Aboriginal governments. While a good portion of the control focused on the self-administration of Indigenous poverty – social welfare, child welfare, social housing, job training programs – the reality is that the fiscal responsibility and expenditure control had shifted from the federal civil services to local Indigenous governments, albeit operating under the constraints of federal legislation, policy directives, and government regulations.

The change is more than a question of shifting government masters. The very nature of Aboriginal governance has been transformed, in some instances dramatically. The old order – what are typically called Indian Act governments – was based on Department of Indian Affairs electoral systems, band and councillor governments, and standard administrative structures. In a small but growing number of Indigenous communities, led by those areas covered by modern treaties, Aboriginal peoples have re-established governments based on cultural traditions and long-standing protocols. The Nisga'a Lisims government, for example, reintroduced Nisga'a cultural practices and social relationships as the centrepiece of Nisga'a governance, an achievement of major significance to First Nations across the country. The greatest changes have occurred in the North, led by Nunavut's work-in-progress implementation of Inuit autonomy, the successful integration of Aboriginal issues with the work of the Government of the Northwest Territories,

and the less extensive collaboration between First Nations and the Government of the Yukon. As Wilson, Alcantara, and Rodon demonstrate in this volume, there have been significant advances in Northern Quebec and Labrador as well, reflecting the resolve of northern Indigenous peoples and the easier path toward Aboriginal autonomy in areas with fewer third-party interests at play.

The governance innovations have not all been towards greater separation of administrative and political functions. In certain areas, particularly in the territorial North, there has been much greater engagement between Indigenous and non-Indigenous representatives and officials. This pattern shows up, again particularly in modern treaty areas, through the development of collaborative and joint management systems. Such initiatives as the co-management of natural resources, the evaluation of resource development projects, and environmental assessment and remediation measures have become increasingly common in a growing number of jurisdictions. Although not all of these initiatives are successful, as some of the chapters in this volume clearly suggest, they nonetheless offer promising ways forward in developing mechanisms of joint governance. The complexity of Aboriginal territorial claims, which often span provincial, provincial-territorial, or Canadian-American boundaries, has also required greater cooperation, often with Aboriginal issues at the forefront. The empowerment of Indigenous communities and governments does not automatically mean separation and isolation but can actually create opportunities for sustainable, multilevel collaboration.

The transformation is also evident at both the political and structural levels. Political parties have increased their efforts to recruit Aboriginal candidates and to draw them into prominent party positions. While Indigenous engagement is commonplace in the territorial North, it has expanded nationally in recent years. For example, the Hon. Leona Aglukkaq was the first Inuk appointed to the federal cabinet when Prime Minister Stephen Harper named her as minister of health in 2008. She has also served as chair of the Arctic Council, and in 2013 was named minister of the environment. One of Justin Trudeau's key recruits for the 2015 election, Jody Wilson-Raybould, is regional vice-chief of the Assembly of First Nations. Her nuanced yet forceful contribution to the present volume illustrates why many see in her one of the most accomplished politicians in the country. The federal government has had an Aboriginal-focused administrative unit, initially within the Ministry of the Interior but later as a combined department with Indian Affairs and Northern Development, since Confederation. More recently, the provinces have added comparable Aboriginal-focused units. British Columbia, a long-time holdout on Aboriginal affairs, now has a Ministry of Aboriginal Affairs and Reconciliation. Alberta hosts a Ministry of Aboriginal Relations (and newly selected premier Jim Prentice assumed the portfolio himself in 2014), and Ontario has a Ministry of Aboriginal Affairs. Several cities across the country have set up administrative units responsible for Aboriginal relations or have created initiatives, like the City of Vancouver's Dialogues Project or the Saskatoon police force's outreach effort, to improve conversations between Aboriginal and civil officials.

In no area of government is the attention to Aboriginal issues more acute than with regards to natural resource development. Supreme Court rulings requiring governments and companies to "consult and accommodate" Indigenous peoples coincided with a period of intense resource development across the country. Governments eager for rapid economic growth, particularly in Quebec, Ontario, and British Columbia, have had to develop new approaches to responding to Aboriginal interests (see Thériault, this volume). There is greater awareness of Aboriginal issues at the provincial level; governments recognize that they need to engage with communities, expand their consultation activities, and collaborate with Aboriginal organizations, although the intensity and level of commitment varies dramatically from province to province. This effort puts great pressure on Aboriginal organizations but also forces governments to adapt their operations to accommodate Aboriginal interests. In 2013, the Province of New Brunswick expanded efforts to develop shale gas, only to run into conflict with First Nations. The government of Premier David Alward had to adjust its approach with Aboriginal communities, but discovered, as other provincial governments learned in their areas, that there were no established or clear processes for negotiation and consultation. Nonetheless, between 2012 and 2014, relationships with First Nations emerged as a significant provincial issue.

Much less is known about the growing number of Aboriginal public servants at the federal, provincial, territorial, and municipal levels, but the ability to find and retain talented individuals in key administrative roles is clearly crucial to the development of long-term relationships. In one of the most important policy statements on Aboriginal affairs in recent years, Mary-Ellen Turpel-Lafond, representative for Children and Youth in British Columbia, issued a striking indictment, published in 2014 as *When Talk Trumped Service*, of Aboriginal and non-Aboriginal delays with the implementation of child protection measures. Her excellent credentials as a First Nations lawyer, former judge, and well-known commentator on Aboriginal affairs gave her report great credibility and impact. While far less prominent than the actions of elected officials, the administrative engagement of Aboriginal civil servants, in both Aboriginal and public governments, is likely to have a significant long-term impact on government-Indigenous relations. That Nunavut, which has clear commitments to indigenization, has had difficulty securing a critical mass of senior Inuit civil servants suggests that many challenges remain in developing a more representative bureaucracy.

The rise of Aboriginal development corporations has attracted even less attention but has considerable capacity to transform Aboriginal governance. The development corporations hold community assets, including funds received through land claims settlements, agreements with resource companies, resource revenues, and other major income sources. These resources are in turn reinvested in various businesses and other instruments, with the goal of protecting the community's asset base and improving the local economy. The expansion of assets under direct and exclusive Aboriginal control – no federal or provincial authority manages these development corporations – enhances Indigenous autonomy and provides an additional

and substantial level of freedom from government influence. That the combined assets of the development corporations are now counted in the several billions of dollars, with increased revenues adding to the resources annually, makes them a potentially significant force in liberating Aboriginal communities from government direction and control.

There is a tendency, as well, to overlook crucial efforts being made at the municipal level to improve relations with Aboriginal people. Successful collaborations with First Nations in West and North Vancouver, Kelowna/Westbank, and Kamloops are but the best-known examples of a national trend toward municipal innovation and participation. The development of urban Aboriginal reserves, particularly in Saskatchewan where the process has unfolded with considerable success, has brought Indigenous peoples into urban planning and local economic development. These partnerships, which are also resulting in major Indigenous urban investments in communities as diverse as Whitehorse and Saskatoon, bring Aboriginal peoples into direct engagement with non-Aboriginal officials and businesses. While constitutional relations with the Government of Canada and resource revenue sharing arrangements with provincial governments attract more attention, these local collaborations at the municipal and regional levels may prove to be of equal importance in shaping the trajectory of Aboriginal-newcomer relations in Canada.

BARRIERS TO PROGRESS

Although the past four decades have seen major changes in relations, the work is far from over, as a number of chapters in this volume suggest. Indeed, there are a series of major barriers to progress in the continued evolution of Aboriginal–non-Aboriginal governance arrangements. While the overall trajectory is positive, particularly in terms of the re-empowerment of Indigenous peoples, significant challenges have yet to be addressed. Consider the following major issues that stand in the way of an otherwise promising path toward reconciliation.

- Governments are uncertain about how best to deal with Aboriginal protests. The lessons from Oka and Ipperwash have been learned, and governments have been reluctant to press their legal advantage when faced with significant on-the-ground Indigenous resistance. This restraint is clearly shown in the case of the Caledonia stand-off, which started in 2006 and remained unresolved in 2014. The reluctance to use police intervention and force has produced a strong non-Aboriginal backlash against the "special" treatment of Aboriginal people and reinforces the idea, which is gaining currency, that governments are afraid to stand up to Indigenous protestors and governments. As the Ipperwash Inquiry and the review of other First Nations conflicts show, governments have realized that the major challenge is to avoid crises by developing mechanisms for responding to Aboriginal complaints about legal and treaty rights and to

resolve conflicts before they explode into violence. The greater emphasis on crisis-avoiding and problem-solving dispute resolution mechanisms is an outgrowth of this reality.

- The response of the general public to protests is an exaggerated example of a general non-Indigenous resistance to Aboriginal re-empowerment. It appears that support for Aboriginal rights was strongest when Indigenous peoples had few recognized legal rights. As re-empowerment has expanded, public support appears to have declined. For Aboriginal governments, their authority comes from recognized political and legal rights and not from public approval ratings. Elected politicians, however, are aware of the shifts in public opinion and are reluctant to push a supportive Aboriginal agenda aggressively. Saskatchewan provides strong evidence of this, particularly in the response of non-Aboriginal people to First Nations proposals for resource revenue sharing, a concept roundly rejected by the public at large. Of course, the nationwide emphasis on natural resource development also places governments on a collision course with Indigenous peoples, exacerbating the tensions.

- Indigenous engagement in the international arena has produced some important results. Canada was reluctant to ratify the United Nations Draft Declaration on the Rights of Indigenous Peoples. It finally did so three years after it was adopted by the General Assembly of the United Nations. But when the special rapporteur on Indigenous peoples visits Canada and issues a predictable and appropriate indictment of Canadian socio-economic and cultural outcomes, the official response is quite negative. The Government of Canada, particularly under the Conservatives, has been somewhat dismissive of these interventions.

- The Government of Canada has been similarly reluctant to respond to domestic Indigenous criticism, a pattern that has been in place for quite some time. When Chief Teresa Spence held her Ottawa fast in December 2012, the Harper government was largely unmoved and very reluctant to respond to her demands. This is not a new phenomenon. The Liberal government was similarly upset when Chief Matthew Coon Come of the Assembly of First Nations issued a public indictment of the Government of Canada's policies at an anti-racism conference in Durban, South Africa, in 2002.

- The focus on the high-level relationships between the Government of Canada, provincial governments, and Indigenous communities continues to obscure the crucial role of municipal governments in their work with Aboriginal authorities. The practical issues, from urban reserves to access to libraries and swimming pools, water services, and roads, are crucial points of contact. Conflict on these matters can derail reconciliation. Successful handling of these affairs – and local governments across the country are doing better than most people appreciate – will improve the relationships significantly.

- The capacity of Indigenous communities to manage their affairs and to deal with the challenges of multilevel governance has not expanded as quickly as the rights and responsibilities of Aboriginal governments. Indigenous communities have struggled to keep up with the demands associated with working closely with Aboriginal Affairs and other federal departments. The greater engagement of provincial governments and municipal/regional authorities has added to the capacity challenges. The communities and governments are in the main quite small, and the number of trained and qualified administrators and political leaders is likewise small. Few Indigenous governments have the capacity and resources to meet all their governance needs. This is a particular challenge in the provincial North, where the rapidly expanding resource economy can place demands on often remote and tiny Indigenous communities that they simply do not have the resources to meet.
- On a completely different level, the Aboriginal achievement of significant governmental powers has come in an era when general public confidence in government is at low ebb. While Canadian society as a whole does not look to government for leadership or for new social initiatives – the days of intense government intervention have receded – Aboriginal people are embracing governments, particularly their own, but with major federal funding, as a major solution to their social and economic challenges. This disconnect is potentially important in explaining in part the difficulties that Aboriginal communities are having in pursuing their agendas, particularly with the federal government.
- At the same time, the rapid expansion of the new Canadian population (recent immigrants and their families) has created additional challenges for Indigenous peoples. European Canadians have, to a greater or less degree, some association with historical and collective responsibility for the challenges facing Aboriginal peoples. Immigrants from South Asia, the Caribbean, Africa, or East Asia have much less reason, historically and culturally, to feel responsible for Indigenous distress. The self-help mentality of many new Canadians in fact runs counter to the collectivist and government-focused mindset of Aboriginal Canadians. Given the growing political role of new Canadians and what appears to be their different take on historical issues in Canada, this uncertain relationship could prove to be important.
- Of course, bringing about major and systematic change in a country as administratively and politically diverse as Canada is no easy task. While Aboriginal rights have certainly expanded, and while there is greater political recognition of the legitimate authority of Indigenous peoples, institutional and structural change has been slow in coming. Indeed, the number of major administrative transformations, outside the three northern territories, has been quite small, with most of the shifts occurring within Aboriginal governments and authorities themselves. It will take a long time for the political and administrative

systems in Canada to catch up with the requirements of working easily with Indigenous governments. Those requirements could range from ceremonial initiatives, such as including Indigenous culture in Parliamentary activities, to formalized planning meetings between senior civil servants and First Nations leaders, much greater coordination of federal-provincial-Indigenous governance, a substantial change in the attitudes of politicians and the bureaucracy towards dealing with Aboriginal issues, greater Indigenous understanding of the structures and processes of government, and, among other things, a redrafting of governmental administrative requirements around reporting and oversight. This last element – a central point of conflict between the Government of Canada and First Nations – also requires greater acceptance by Indigenous governments of the accountability expectations of the federal government and the public.

- Perhaps the major issue facing Aboriginal peoples as they develop and expand their ties with federal, provincial/territorial, and municipal/regional governments is what folks in northern Saskatchewan describe as "jurisdictional chaos." The reality is that Canadian federalism is a messy place, with few really sharp lines of demarcation between the responsibilities of the various levels of government. It is often unclear who has the duty, or the money, to respond to a specific administrative or political challenge. The rapid emergence of influential Aboriginal governments, particularly given the clearly dominant role of the Government of Canada and the insistence by many First Nations on federal responsibilities, adds to the complexity of the jurisdictional web. Yale Belanger's discussion of housing in this volume provides a concrete illustration of the coordination challenges we collectively face. As provincial governments enter the scene, as they have in recent years, they struggle to determine where their responsibilities begin and end. Aboriginal authorities, eager to identify the resources needed to address many responsibilities, look for funding and support wherever they can find it. The result has been jurisdictional uncertainty and unevenness across the country.

The point of the above list of issues is simple: the achievement of constitutional, political, and legal rights by Aboriginal people is no assurance of a rapid or wise transition in governance and administrative arrangements. There are substantial challenges involved with converting technical and legal achievements into practical, programmatic changes in Aboriginal governance.

CONCERNS ABOUT THE FUTURE

For more than a generation, Aboriginal leaders have – it might be surprising to recall – worked closely with Canada. Despite the claims and rhetoric of sovereigntists, most Indigenous leaders understand that the Canadian system, warts and all, presents the best chance for substantial and positive change. In constitutional,

legal, and political terms, they have succeeded remarkably well. The problem, of course, is that these victories do not translate immediately or even easily into substantial change on the ground. While there are marked improvements in some areas – post-secondary participation rates, educational attainment generally, Aboriginal business development, and employment in the resource sector – many of the socio-economic indicators are still markedly unfavourable. On many metrics – availability of housing, suicide rates, incarceration rates, incidence of diabetes, unemployment in remote communities – Aboriginal communities rank way below the Canadian mainstream. Significant tensions exist within Aboriginal polities between the reserve and off-reserve communities, and the differences of opinion about the relative importance of reserve development challenge many Indigenous peoples. Put simply, in many important ways the political and legal victories have not changed the realities on the ground in a substantial and sustained manner. The victories, while considerable in legal terms, have not changed the structure of government-Indigenous relationships, have not really rebalanced power, and have not altered the governance and political structures of the country in a way that fully recognizes Indigenous expectations and needs.

A simple belief propped up the decades-long battle for Aboriginal legal and political rights: that gaining political and administrative control would bring major changes and improvements in the living conditions and life opportunities for Indigenous peoples. There are places, particularly in the Canadian North, where this is true and where the benefits of the political battles can be seen. Across the country, however, the improvements have been unevenly distributed. The underlying social, economic, and cultural problems have not been systematically addressed, and Aboriginal people continue to shoulder the largest share of the burden from Canada's historical mistreatment of their communities. Indeed, as the debate over the First Nations Education Act in 2013–14 demonstrated, even the most fundamental battles – in this case equal (if not equitable) funding for reserve-based education – remain unresolved.

As the process unfolds, significant questions have emerged. Some argue that the focus on Aboriginal governance and legal rights has resulted in limited attention being paid to Aboriginal cultural and economic matters. Supreme Court decisions simply do not solve poverty or arrest the loss of Indigenous languages, at least in the short term. At the same time, the intensely localized focus of Aboriginal politics, with the insistence on the authority of individual First Nations, chiefs, and councils, have imposed cost structures and administrative burdens that are too heavy and too complicated to allow for quick attention to nationwide issues (see Richards, this volume). Where there are regional approaches, with northern Quebec and, increasingly, Labrador, being the best examples, economies of scale and administrative efficiencies have emerged with promising results. In contrast, the community-by-community approaches favoured by most First Nations leaders are too costly, too slow, and too cumbersome for governments to embrace. Not surprisingly, the difficulties involved in the transition from rights to community-level improvement

are causing problems. At the community level, the debates have sometimes turned inward, into difficult and often tense conversations about accepting resource development projects, negotiating and ratifying treaties and self-government agreements, and accepting or rejecting the downloading of government responsibilities to the local government. The delays and costs in implementing Aboriginal rights appear at the same time to be eroding public sympathy, not generating additional support. The scenario has been unpleasant in some parts of the country, with internal tensions adding to community problems and with general public and even political support declining at a time when there are many urgent Aboriginal needs.

THE LEGACY OF ABORIGINAL ACTIVISM AND CHALLENGES TO CANADIAN GOVERNANCE

In the second decade of the twenty-first century, Canada finds itself in an interesting and challenging place with regards to the governance relations with Indigenous peoples and communities. Changes have occurred and, from a century-long perspective, some of them are transformational. There has been grudging recognition of the failures of the Canadian state, Canadian values, and Canadian governance on Aboriginal issues. From residential schools to improper implementation of treaties and the failure to heed British colonial and Canadian obligations to Indigenous peoples, successive Canadian governments failed First Nations, Inuit, and Métis people. On this account, there is little doubt. Governments have moved, slowly and cautiously, to address Indigenous aspirations, rights, and needs, and in the process, Canadian governments have carved out new space to Aboriginal governments and political action. But they have done so reluctantly, and with many formal and informal impediments to sustained and substantial transformation.

Significantly, the re-empowerment of Aboriginal governments has occurred at a time when the general public has become increasing sceptical about the long-term efficacy of government intervention. National solutions to First Nations challenges have never worked as intended, and there is a general reluctance to make major investments in the belief that government can identify, fund, and implement appropriate solutions. A few months after Prime Minister Martin, provincial premiers, and Aboriginal leaders negotiated the Kelowna Accord, Canadians elected a minority Conservative government that openly campaigned on a small government platform. The Kelowna Accord, with its massive injection of funds towards social and economic development in Indigenous communities, was one of the first victims of the change in government. Ironically, there is probably greater appetite in Ottawa for major investment in Aboriginal issues than there is in the public at large. In other words, the case has still not been made effectively that a major commitment to new social and economic programs by all levels of government is needed to address Aboriginal needs and aspirations – at least not in the minds of non-Aboriginal peoples.

It needs to be said, as well, that the current interest in Aboriginal affairs rests significantly on a desire to gain access to natural resources. Poverty, social and cultural crises, language loss, and community-based struggles did not generate the recent groundswell in government support. The impetus has arisen out of the legal victories before the Supreme Court and the imperatives of the Canadian resource frontier. Civil servants are aware of the social situation and are, in fact, systematically sympathetic to the deep challenges facing many Indigenous communities. But few Canadians have direct experience with Aboriginal peoples and villages and therefore approach these issues with limited urgency or commitment.

Changes have occurred. Responsibility for dealing with Aboriginal issues has spread from the federal government to territorial and provincial governments. Municipal authorities are becoming much more responsive than in the past. Centralized government agencies, particularly the federal Department of Aboriginal Affairs, have started to share more responsibility for addressing Indigenous needs with other departments and organizations. There is, in fact, an emerging sense that all government departments, at all levels, are responsible for responding to Indigenous issues, the first step toward a "whole of government" approach that holds considerable promise for developing sustainable responses to Aboriginal conditions.

The changes are occurring, first and arguably best, in the Canadian North. For generations, the opposite was the case. The North simply received Ottawa-generated policies and lacked the power and capacity to respond to local realities. The advent of territorial autonomy altered the process dramatically, with the Yukon, Northwest Territories, and Nunavut emerging as three of the most innovative jurisdictions in the world in terms of Aboriginal policy. The same holds for northern Quebec, where policy developments are significantly ahead of most southern regions, as Brian Craik's chapter in this volume on the new Cree-Quebec regional governance structure suggests. Increasingly, Aboriginal peoples and governments in the South are looking North for best practices and for new ideas on how to approach relationship-building with Indigenous communities. The favourable financial situation of the three territories supports this engagement, however, making it difficult for most southern governments to replicate the processes and structures that have worked in the North.

Canadians must also be wary of Aboriginal policy fatigue. Indigenous political leaders and governments have been working at a ferocious pace for several decades in an attempt to overcome generations of colonial administration. Non-Aboriginal people have been engaged with this effort less fulsomely and for a much shorter time, but there are signs that resistance to doing more is growing. Among non-Aboriginal observers, there is a sense that the legal and political victories have provided Indigenous communities with the tools and resources that they need – which is far from true – and that the responsibility now rests at the local level. Aboriginal people generally believe that only the basic elements are in place and that greater funding, more support, and increased local independence are required. These different views of the administrative and political situation represent a

significant disconnect and could derail forward progress. Aboriginal people want to push forward and build on legal and political successes. Non-Aboriginal folks appear to feel that it is time for Indigenous communities to consolidate and realize their gains. These are not compatible views of the way forward.

The coming decades will show whether the changes in institutions, governance, regulation, and other legal and political developments have actually changed Aboriginal conditions for the better. To date, the results are promising but far from complete. Multilevel governance is a crucial part of the achievement. Provincial governments are increasingly on board, as are a growing number of cities, municipalities, and regional administrations. Aboriginal peoples are clearly determined to push the barriers and to ensure that the constitutional, legal, and political achievements become fully established in administrative practice. The Indigenous commitment has not wavered. There are, however, worrying signs that the non-Aboriginal enthusiasm for Aboriginal rights and re-empowerment is fading and that criticism of Indigenous governance is mounting. The future, as always, is an uncertain place, with no assurance for progress or continued evolution. In the case of Aboriginal governance and Indigenous engagement with all levels of the nation state, it is vital to recognize the impressive Aboriginal achievements of the past 40 years, the real challenges of the twenty-first century, and potential barriers to continued efforts to improve the social, economic, and cultural circumstances of Indigenous peoples in Canada.

II

Treaty Governance in the North

3

MULTILEVEL GOVERNANCE IN THE INUIT REGIONS OF THE TERRITORIAL AND PROVINCIAL NORTH

Gary N. Wilson, Christopher Alcantara, and Thierry Rodon

The Inuit peoples of the territorial and provincial North have made significant progress in terms of institutionalizing regional self-government and establishing multilevel linkages with other governments within Canada's federal system. In addition to Nunavut, which became Canada's third territory in 1999, there are three other autonomous Inuit regions in the Canadian Arctic that are moving towards greater self-government: Nunatsiavut in Northern Labrador, Nunavik in Northern Quebec, and the Inuvialuit Settlement Region (ISR) in the Northwest Territories. All of these Inuit regions share common historical and cultural ties. What differentiates Nunatsiavut, Nunavik, and the ISR from Nunavut is that they are politically and administratively nested within existing constituent units of the federation (Wilson 2008).

Although these regions have negotiated and signed comprehensive land claims agreements with the federal government and their respective provincial/

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territorial governments, they are at different stages in their political development (Alcantara and Wilson 2013). In 2005, the Inuit of Nunatsiavut, the Government of Newfoundland and Labrador, and the Government of Canada signed the Labrador Inuit Land Claims Agreement. In addition to establishing land rights and providing funding, this agreement laid out a new system of regional self-government. The Inuit of Nunavik and the ISR signed comprehensive land claims agreements well before Nunatsiavut, in 1975 and 1984, respectively, but their agreements did not provide for self-government. Instead, these regions are administered by various regional public and Aboriginal agencies and bodies, including development corporations that manage the land claims agreements on behalf of Inuit beneficiaries (Wilson and Alcantara 2012; Rodon and Grey 2009).

The emergence of these new regional governance actors necessitates a re-evaluation of the traditional federal structures and intergovernmental processes that have been used to explain the administration of the Canadian Arctic. The proliferation of non-traditional governance actors involved in the policy process, broadly defined, is certainly consistent with similar developments in other parts of Canada and in other federal systems. This increase also suggests that federal states such as Canada are gradually moving away from the governance model of federalism, with its focus on intergovernmental relations between the federal and provincial/territorial governments, towards a model that features a much more diverse, multilevel set of governance structures and actors.

The literature on Aboriginal multilevel governance in Canada has provided a basic overview of Aboriginal organizations and their evolving relationships with each other and with the Canadian state (Rodon 2015; Papillon 2012; Rodon 2013; Wilson 2008). More recently, Alcantara and Nelles (2014) have tried to develop this concept in a theoretical sense by assessing its explanatory value (see also Alcantara, Broschek, and Nelles 2015). On the surface, Canada is undoubtedly witnessing the emergence of a new pattern or configuration of multilevel governance. The establishment of new governments and the involvement of non-state actors such as development corporations in the administration of regions such as Nunavik, Nunatsiavut, and the ISR illustrate both the vertical and the horizontal dimensions of this multilevel system. These regional bodies, together with national and transnational Inuit organizations, regularly interact with the federal and provincial/territorial governments (vertical multilevel governance) and non-state actors (horizontal multilevel governance) in pursuit of policies that will improve the lives of the people living in their regions.

In terms of actual decision-making authority, however, can multilevel governance be characterized as a new model of decision-making that disperses real authority to non-traditional governance actors? Or is it simply an extension of federalism and intergovernmental relations as it has been traditionally practised in Canada? Moreover, is the concept of multilevel governance applicable to all interactions between Aboriginal and non-Aboriginal actors? This chapter explores these questions in Nunatsiavut, Nunavik, and the ISR by examining multilevel and

intergovernmental relations in two key policy areas: education and housing. Both of these areas feature a series of pressing and complex challenges for governments at all levels. More importantly, for the purposes of this chapter, they involve a variety of governance actors in policy-making and policy administration processes and highlight some interesting similarities and differences across regions and policy fields.

The first part of this chapter examines the theoretical and conceptual dimensions of the term *multilevel governance* in order to provide an analytical framework for outlining the three regional cases studies in the second part. The third part of the chapter discusses the similarities and differences across the cases and policy areas and draws some general conclusions about the utility and relevance of the concept of multilevel governance in the Canadian Arctic.

ABORIGINAL MULTILEVEL GOVERNANCE: SOME CONCEPTUAL CONSIDERATIONS

Over the past decade, multilevel governance has become a popular phrase to describe a number of trends in Canadian federalism and public policy. Researchers studying Aboriginal-settler relations (Papillon 2012), municipal government (Horak and Young 2012), and a range of other policy and public administration topics such as innovation, banking, finance, and environmental policy (Greitens, Strachan, and Welton 2013) have used the term to describe a particular trend involving the emergence of non-traditional governmental actors, embedded in different territorial levels beyond the traditional federal and provincial ones, gaining more influence over decision-making and policy implementation. In the field of Aboriginal politics, for instance, Martin Papillon's research (2012, 2008) has found that multilevel governance is useful for describing how Aboriginal peoples in Canada have been able to alter their relationships with the federal and provincial governments. Rather than power and jurisdiction being concentrated in the hands of federal and provincial governments through formal mechanisms such as the Constitution, Aboriginal peoples have found innovative ways to create formal and informal spaces in which power and authority over issues relating to their interests are shared with the Crown. These new institutions do not necessarily exist within the formal structures of the federation but instead frequently sit alongside existing structures (Papillon 2012). In many ways, then, multilevel governance, conceived in this broad manner, is a useful term for describing many of the recent trends in Aboriginal politics because it emphasizes the emergence of new processes, structures, actors, and rules that privilege the participation, authority, and power of Aboriginal governments and organizations within the Canadian political system.

Others, however, have expressed some discomfort with this broad definition and approach. They argue that such a definition does not provide a useful way for distinguishing multilevel governance from federalism (Rouillard and Nadeau

2013, 187). These critics suggest that more work needs to be done to sort out what multilevel governance actually entails and whether it offers any new insights. According to Rouillard and Nadeau (2013, 199), "labeling is always a difficult and, at times, sterile thing to do. But it is also important in order to make sense of the academic literature in any field … Labeling and its corollary, classification, are needed to distinguish true contributions to knowledge from rhetorical innovation."

Given these concerns, and building on the work of Papillon (2012, 2008) and others, Alcantara and Nelles (2014) have suggested a more bounded definition of the term. They argue that at its core, multilevel governance "is a process of political decision making in which governments engage with a broad range of actors embedded in different territorial scales to pursue collaborative solutions to complex problems" (Alcantara and Nelles 2014; see also Piattoni 2010; Alcantara, Broschek, and Nelles 2015). These instances of decision-making emerge because the diverse sets of actors involved in decisions share a set of "tangled hierarchies and complex interdependencies" (Jessop 2004, 58). More specifically, groups engage in multilevel governance processes because they are concerned with generating legitimacy for a decision, they collectively control the necessary capacities to address the issue, and/or multilevel governance is the most effective tool for addressing a particular issue.

For Alcantara and Nelles (2014), therefore, multilevel governance can be defined more narrowly according to three criteria: actors, scales, and the nature of the decision-making process. Very briefly, in terms of the first criterion, a multilevel governance process involves at least one constitutionally recognized government actor working with one or more non-governmental and/or quasi-governmental actors. Second, it must involve actors that are embedded in at least two different territorial scales. Finally, and most importantly, multilevel governance involves a decision-making process that is more consensual and non-hierarchical than intergovernmental processes (Bache 2010; Piattoni 2010; Peters and Pierre 2004). This is because "none of the participants possess the authority or capacity to undertake the issue alone" (Alcantara and Nelles 2014). Although constitutionally embedded governments might take the lead in bringing together the various governmental, non-governmental, and quasi-governmental actors and ultimately have decision-making authority, the decision-making process is informed by a variety of actors who work together in a more consensual and non-hierarchical manner to reach a decision on the issue at hand.

Given that the literature on Aboriginal multilevel governance is still in its infancy and that a consensus has yet to emerge regarding what Aboriginal multilevel governance actually entails, in this chapter we adopt a more flexible definition that sits somewhere between the two approaches discussed above. For our purposes, Aboriginal multilevel governance exists when new Aboriginal actors such as Aboriginal governments, land claims organizations, economic development organizations, and other similar bodies emerge and are able to engage meaningfully in intergovernmental policy-making with governments at the federal, provincial,

territorial, and/or local levels. In the case of the nested Inuit regions examined in this chapter, meaningful participation implies that Aboriginal actors have regular, albeit varied, input into the policy-making process through formal and informal means and in some instances are able to tailor policies adopted by other levels of government to fit with their particular regional circumstances. By using this definition of multilevel governance, we are able to assess whether the new arrangements emerging in Nunatsiavut, the ISR, and Nunavik in important policy areas such as housing and education are in fact something new or whether they are simply a reproduction of the status quo in which the federal, provincial, and/or territorial governments dominate the policy process. At a theoretical level, multilevel governance may contain the ingredients for a more just and equitable relationship between Indigenous and non-Indigenous peoples. Uncovering the extent to which multilevel governance relationships exist in these regions will allow future researchers to more systematically evaluate the normative appeal of multilevel governance as a potentially new model for characterizing Indigenous-settler relations in Canada.

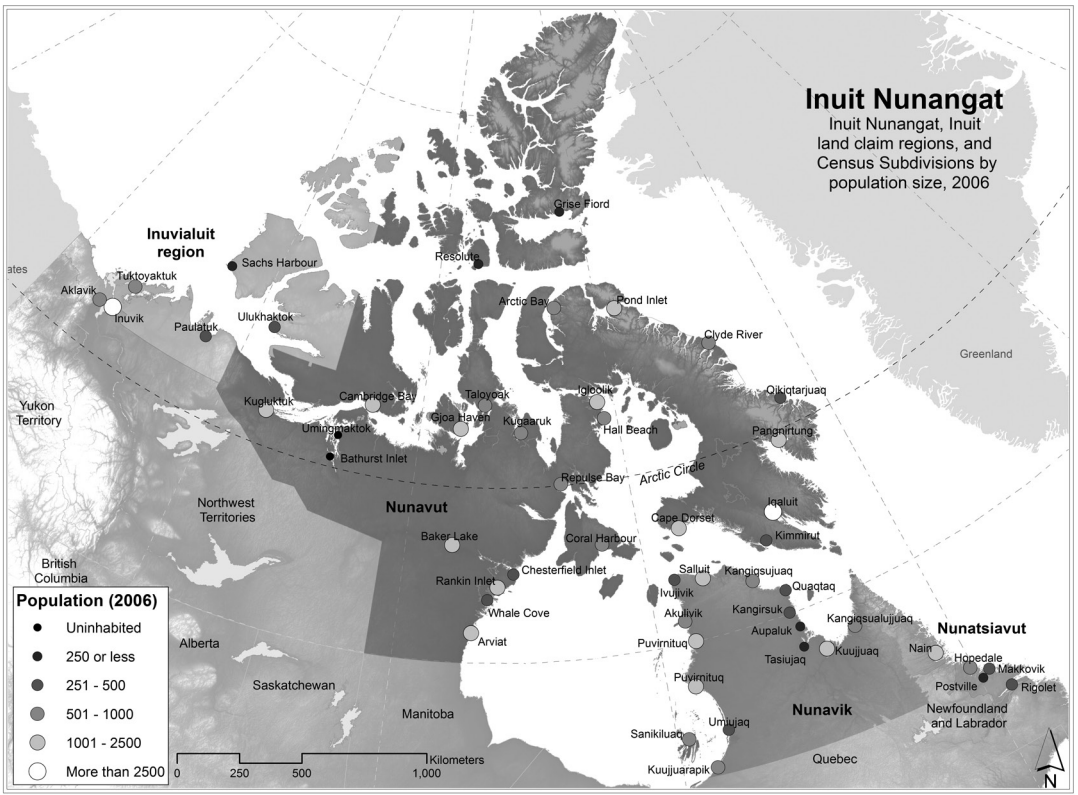
INUVIALUIT SETTLEMENT REGION

Background Considerations

The Inuvialuit were one of the first Aboriginal groups to sign a comprehensive land claims agreement, called the Inuvialuit Final Agreement, in 1984. By signing this treaty, the Inuvialuit received 435,000 square kilometres of land in the Northwest Territories and Yukon Territory. Within this settlement area, they received 13,000 square kilometres of mineral rights and a range of responsibilities and jurisdictions over things like environmental protection, wildlife management, and fishing. Absent from the treaty, however, was a self-government chapter, which the federal government at the time had refused to negotiate with any and all Aboriginal groups. This policy has since changed, and many groups have negotiated or are negotiating self-government agreements separately or concurrently with their land claims agreements (Alcantara 2013).

As a result, the Inuvialuit do not have a form of Aboriginal self-government akin to what exists in Labrador (e.g., Nunatsiavut Government), British Columbia (e.g., Nisga'a Lisims), or Yukon Territory (e.g., Kwanlin Dün First Nations). Instead, the territorial government, and to a lesser degree the federal government, remain the dominant government actors in the region. Nonetheless, the land claims agreement has empowered the Inuvialuit to establish a form of self-governance that Wilson and Alcantara (2012) call Inuit Corporate Governance. At the core of this structure are two land claims organizations, the Inuvialuit Game Council (IGC) and the Inuvialuit Regional Corporation (IRC), which were created primarily to administer the funds and powers flowing out of the Inuvialuit Final Agreement. Through

Figure 1: Inuit Nunangat



Source: Statistics Canada (2015).

these two bodies, the Inuvialuit have been able to engage in a range of important governance activities, including political representation, the creation and administration of programs and services for Inuvialuit beneficiaries, and input into the decision-making processes of regional regulatory regimes such as co-management boards (Notzke 1995; White 2009).

In short, the ingredients for Aboriginal multilevel governance arrangements exist in the region. The modern treaty created two powerful land claims organizations to represent the Inuvialuit in the region, and they have for many years engaged in a variety of self-governing activities (Wilson and Alcantara 2012). Yet many of the jurisdictions typically associated with Aboriginal self-government remain with the federal and territorial governments. In the section below, we assess whether the emergence of the land claims organizations have altered how education and housing policies in the Inuvialuit Settlement Region are created and/or implemented.

Education

Much like in other Inuit and Aboriginal communities, education in the ISR remains a challenging issue. In 2009, approximately 58 percent of residents above the age of 15 held a high school diploma or more. This percentage was significantly below the territorial average of approximately 70 percent, and the Canadian average of 76 percent. Within the ISR, the population of Inuvik is the most highly educated, with 68 percent of residents holding a high school diploma or more. Only in Inuvik and Sachs Harbour is this true for a majority of residents; in all of the other communities, fewer than half of residents hold diplomas (Salokangas and Parlee 2009, 194).

Formal jurisdiction over primary and secondary education in the ISR falls exclusively to the Government of the Northwest Territories (GNWT), which gained full control over education from the federal government in the 1960s through devolution (Clancy 1990, 28). As a result, the GNWT Department of Education, Culture, and Employment oversees primary and secondary education in the Inuvialuit Settlement Region and has delegated much of that responsibility to the Beaufort Delta Education Council (BDEC). The BDEC administers educational infrastructure, resources, and programming for all of the Inuvialuit communities and a number of non-Inuvialuit communities in the northern part of the NWT. Underneath the BDEC are individual district education authorities (DEAs) such as those that exist in Sachs Harbour, Inuvik, Aklavik, Tuktoyaktuk, Paulatuk, and Ulukhaktok. These district education authorities are staffed by elected representatives from the community and are responsible for a number of things in their individual communities, such as appointing hiring committees for schools, establishing local-level priorities that are consistent with regional and territorial priorities, adjudicating disputes relating to student discipline, and developing culturally appropriate school activities (Canada 2010). The chairpersons of each DEA also serve as members of the BDEC.

Within this broad educational architecture in the ISR, the role of the Inuvialuit land claims organizations is fairly limited. The IRC appoints one representative to the 11-member BDEC. It also participates sporadically as a stakeholder by providing advice and information to the GNWT during various consultation exercises and initiatives. The IRC's primary activities in the area of education are at the post-secondary level. It offers some financial assistance to beneficiaries enrolled in college and university. It also works in partnership with district education authorities to offer tutoring, summer camps, and other programs intended to expose secondary-level students to post-secondary opportunities.

Overall, there is little evidence of multilevel governance in the area of primary and secondary education. The Inuvialuit land claims organizations are rarely involved in the development and administration of primary and secondary education in the region in any meaningful way. For the most part, its activities are limited to sporadic public consultations and administering programs geared towards beneficiaries who are pursuing post-secondary education.

Housing

Similar to education, housing is a major challenge for the Inuvialuit. Rates of home ownership are low in the region, reflecting a very small private housing market and a heavy reliance on public housing. As of 2009, approximately 32 percent of houses in the ISR were owned by their inhabitants, compared to an average of 53 percent in the Northwest Territories. Approximately 34 percent of households resided in public housing, which is roughly double the levels in the rest of the territory. There is clear variance on this indicator within the ISR. In Inuvik, where the wage economy is strongest, rates of public housing are low (around 20 percent) and home ownership is high. All of the outlying communities are around or above 50 percent public housing. Compared with other Inuit jurisdictions, the Inuvialuit rate is lower than that of Nunavut but higher than Nunatsiavut (Minich et al. 2011).

Housing conditions do not appear to be significantly worse in the ISR compared to the rest of the North. Only about 18 percent of housing was "in need of major repair" in 2009, which is similar to the territorial average but lower than in other Inuit jurisdictions. Overcrowding has been reduced dramatically since the creation of the ISR. Prior to the Final Agreement, almost 19 percent of households had six or more people, compared with 14 percent in the rest of the NWT and 5.5 percent in Canada. By 2009, that number had declined to 7 percent, basically on par with the territorial average. The most crowded settlement by this measure is Paulatuk.

The first public housing policy for the North was implemented in 1959, in response to the permanent settlements that were becoming established as a result of wage labour associated with the Distant Early Warning Line (Knotsch and Kinnon 2011, 31). Up until the early 1970s, the federal government took primary

responsibility for housing in the territory, appointing local housing organizations to administer a variety of housing programs. In 1974, the GNWT took on this responsibility by creating a Crown corporation, the Northwest Territories Housing Corporation (NWTHC), to manage the 23 local housing organizations and the various programs and services they offer to their communities. Funding for the NWTHC comes mainly from the GNWT, with some additional support offered by the federal government through the Canada Mortgage and Housing Corporation and sporadic infusions of special funds; for example, in 2005, the federal government transferred $50 million to the GNWT to address social housing issues in the territory (Christensen 2011, 89, 91).

As was the case with education policy in the ISR, there does not seem to be any strong evidence of multilevel governance in the field of housing. Although each Inuvialuit community has a local housing organization, none of them report to or are appointed by an Inuvialuit land claims organization. Instead, they report directly to the NWTHC. Each of these local housing organizations does seem to have a local advisory board, and it is possible that Inuvialuit representatives serve on these boards, but there is no publicly available information on them. There is also some mention of a universal partnership agreement on the NWTHC website, which purports to provide "the community or aboriginal group with increased flexibility and decision-making at the local level," but public information about this agreement and its negotiation is limited (NWTHC 2014).

NUNAVIK

Background Considerations

Nunavik covers all of the Quebec territory above the 55th parallel, an area of 500,000 square kilometres, with approximately 11,000 people living in 14 communities ranging in population from 195 to 2,375 (Census 2011). In 1975 the Inuit of Nunavik signed the James Bay and Northern Quebec Agreement (JBNQA), the first modern treaty in Canada. It is an atypical agreement because at the time of its negotiation Canadian land claims policy had not yet been established.

The JBNQA has created a complex governance system centred on three regional public bodies: the Kativik School Board (KSB), the Nunavik Regional Board of Health and Social Services (NRBHSS), and the Kativik Regional Government (KRG). These administrative bodies operate independently. Each has its own board of directors and is responsible to its parent provincial department. The KRG has the most important jurisdictions; it is in fact a supra-municipal government in charge of economic development, employment, and training, public security, renewable resources, scientific research, public works, transportation, telecommunications, and parks and recreation. The KSB administers the education system north of the

55th parallel and finally, the NRBHSS is responsible for health-care and supervises the two regional hospitals.

Each regional body is funded through a series of transfer agreements with its parent department and also receives financial support through special programs. For example, the KRG gets some block funding from the Quebec Ministry of Municipal Affairs, Regions and Land Occupancy, but it finances its activities through multiple funding agreements with various Quebec and federal departments, each with its own reporting requirements.

Finally, the Makivik Corporation represents the Inuit of Nunavik, manages the settlement money, and protects the rights and interests of Nunavik Inuit. It also acts as an economic development agency and owns two northern airlines. In Nunavik, Makivik is a very powerful actor, politically as well as economically (Rodon 2015). It is also a good example of the breadth and scope of political relationships in the region. Indeed, the institutional complexity of Nunavik in areas such as education and housing lends itself well to a multilevel governance framework.

Education

Nunavik is the Inuit region with one of the lowest educational attainments (58 percent without high school diploma), but it is also the region where Inuktitut is the strongest (99 percent with a knowledge of Inuktitut) (Statistics Canada 2008). The main actor in education is the Kativik School Board (KSB), which was created in 1976 pursuant to the JBNQA and has been operating since 1978. The KSB has exclusive jurisdiction in Nunavik to provide pre-school, elementary, secondary, and adult education, as well as the responsibility to develop programs and teaching materials in Inuktitut, English, and French, train Inuit teachers to meet provincial standards, and encourage, arrange, and supervise post-secondary education.

The KSB is funded by Quebec (75 percent) and Canada (25 percent) and is overseen by the Quebec Ministry of Education, Recreation and Sport. It is loosely modelled on the Quebec School Board structure, but in Nunavik, each of the 14 communities elects a commissioner. The Commissioner's Council appoints the executive committee, and a representative is also appointed by the KRG.

While the board currently has a fair amount of autonomy over curriculum development and language instruction, this autonomy has not been acquired without a struggle. For example, when Bill 101 was passed in 1977, demonstrations organized by the Northern Quebec Inuit Association (NQIA)[1] in the Nunavik communities forced Quebec government offices and schools to close (Callaghan 1992). Finally,

[1] NQIA was the Inuit organization that negotiated the JBNQA; it became, after incorporation, the Makivik Corporation.

after some negotiations with the Quebec government, the Nunavik education system was exempted from the application of Bill 101 (Callaghan 1992).

Education in Nunavik is an example of a fairly classical administrative devolution pattern, with a significant level of regional autonomy. At times, multilevel governance patterns predominate, as was the case in the Bill 101 confrontation and the multilateral negotiations that occurred between the Quebec government, the NQIA, and the KSB. However, most of the time this is an administrative relationship with only two actors, the KSB and the Quebec Education Department, and no real collaborative pattern of decision-making exists.

Housing

Housing is a highly complex policy field in Nunavik, with a multiplicity of governmental, quasi-governmental, and non-governmental actors. It is also a serious policy issue for the region, which has some of the highest rates of residential overcrowding in Canada (49 percent) and where 90 percent of Nunavik Inuit live in social housing (Statistics Canada 2008). Furthermore, the JBNQA explicitly mentions housing, which has led to disagreement and confusion over the extent of the responsibilities that the different levels of government have in this area:

> 29.0.40 The existing provision of housing, electricity, water, sanitation and related municipal services to Inuit shall continue, taking into account population trends, until a unified system, including the transfer of property and housing management to the municipalities, can be arranged between the Regional Government, the municipalities and Canada and Québec.

The federal government interpreted this section of the JBNQA as a delegation of its responsibility, and in 1981 transferred all of its housing responsibilities to the Quebec government (SHQ 2001). In 1993, the federal government announced that it would stop funding social housing in Nunavik (SHQ 2001).

In 1998, Quebec signed a framework agreement with the KRG to revise the social housing programs and their management in Nunavik. This agreement was the first step towards the creation of regional and local housing management structures and programs, under the auspices of the Kativik Municipal Housing Bureau (KMHB). The KMHB was created under the Act Respecting the Société d'habitation du Québec (R.S.Q., s. S-8, section 57) following a resolution of the KRG (SHQ 2001). The KMHB is governed by a board of directors composed of three representatives appointed by the KRG: two elected by Nunavik social housing tenants and two appointed by the SHQ.

In order to convince the federal government to reinvest in social housing in Nunavik, Makivik, supported by Quebec, successfully invoked the JBNQA dispute settlement mechanism, which brought the federal government back to the negotiation table. In 2000, the Agreement Respecting the Implementation of the James Bay

and Northern Quebec Agreement Related to Housing in Nunavik was signed by all the housing actors in Nunavik (Canada, Quebec, Makivik, KRG, and KMHB). This multilateral agreement is clearly an instance of multilevel governance. However, the agreement focuses on producing more social housing units and the maximization of local benefits, so it is more of a housing construction and management policy than a comprehensive or overarching policy.

In the agreement, Quebec and Canada agreed to contribute financially to a five-year[2] social housing development program in Nunavik, with the federal government providing $10 million per year for capital costs and Quebec covering the operating deficit of the units for a 20-year period. In order to maximize local benefits, the Makivik Corporation is responsible for the construction of housing units. The new units are owned and managed by the KMHB and, finally, the KRG must provide technical assistance for land use planning to the 14 northern villages. The implementation of the agreement is overseen by the Nunavik Housing Committee where all the agreement signatories are present (Canada, Quebec, Makivik, KRG, and KMHB).

Figure 2 illustrates the multilevel governance structure in the field of housing, with governments (Canada and Quebec), public institutions (KRG, KMHB), and non-governmental actors (Makivik) embedded in vertical and horizontal levels. In terms of collaborative decision-making, there is some evidence of collaboration with the agreement; however, this collaboration is quite limited since it only concerns social housing unit construction.

The SHQ has other housing programs that are conducted with the KHMB and the KRG: a plan to raise tenant awareness for social housing maintenance (Pivallianiq); a program to improve access to private property to diversify housing choice; and finally, a program that tries to limit the rental deficit incurred by the housing program in Nunavik. All of these programs are created and funded by the Quebec government, but always in close consultation with Nunavik actors (Therrien 2013).

Housing policies in Nunavik offer a good example of multilevel governance processes that are developed in land claims settlement regions. In fact, the JBNQA dispute settlement mechanism did force the federal government to enter into a multilevel agreement with Quebec and Nunavik institutions and organizations. As a result, there is significant involvement from governmental, quasi-governmental, and non-governmental actors in policy development and implementation. The evidence for collaborative decision-making is not as strong because the provincial and federal governments are still the official decision-makers. Nevertheless, consultation processes and dispute settlement mechanisms do give Nunavik actors some influence over decision-making processes in the area of housing.

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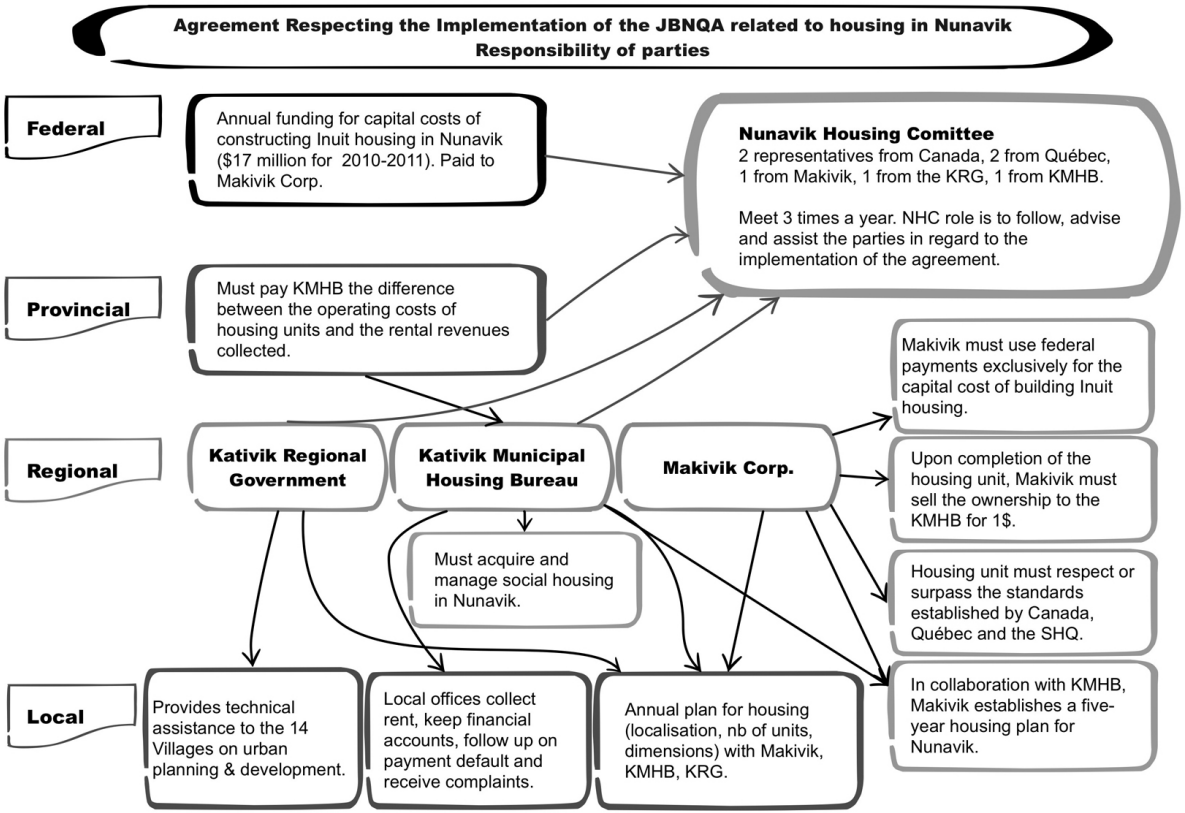
[2] This commitment was renewed for five years in 2005 and again in 2010. Negotiations are currently being held to renew the agreement, but as of July 2015 no agreement has been reached.

Figure 2: Multilevel Governance Structure for Housing in Nunavik



Source: Original figure based on data compiled by Maxime Thibault and Thierry Rodon for this research. See also Therrien (2013).

NUNATSIAVUT

Background Considerations

The Labrador Inuit Land Claims Agreement (LILCA) came into force in 2005, making the Inuit of Nunatsiavut the last Inuit group in Canada to complete a comprehensive land claims agreement. The LILCA is similar to agreements signed in Nunavut, the Inuvialuit Settlement Region, and Nunavik in that it outlines the rights that the approximately 7,000 beneficiaries have to land and resources in the Labrador Inuit Settlement Area (72,500 square kilometres, land; 48,690 square kilometres, sea) and designated Labrador Inuit lands (15,800 square kilometres). However, unlike the agreements that were negotiated and signed in the Inuvialuit Settlement Region and Nunavik, the LILCA included a chapter on self-government. The structures and powers of the new regional government of Nunatsiavut outlined in this chapter were based on the Labrador Inuit Constitution, ratified by referendum in 2002 and formally adopted in December 2005.

It is also important to note that Nunatsiavut adopted an "ethnically based" form of government in which only beneficiaries are able to fully participate (Rodon and Grey 2009). This structure distinguishes Nunatsiavut from other Inuit regions, such as Nunavut and Nunavik, which have public governance structures. The Nunatsiavut Government consists of two levels: regional and community. The regional government has seven departments, including the Nunatsiavut Secretariat; Nunatsiavut Affairs (which has responsibilities in the area of housing); Lands and Natural Resources; Health and Social Development; Culture Recreation and Tourism; Finance, Human Resources and Information Technology; and Education and Economic Development. There are five Inuit Community Governments, one in each of the five communities (Nain, Hopedale, Postville, Makkovik, and Rigolet). Each Community Government is headed by an AngajukKâk, which, according to the LILCA, is the equivalent of a mayor and chief executive officer. The Nunatsiavut Assembly, a regional legislature, consists of elected representatives from constituencies both inside and outside Nunatsiavut, as well as the five AngajukKâks and the chairpersons of the two Inuit Community Corporations.

Nunatsiavut's relations with other governments and external organizations are overseen by the Nunatsiavut Secretariat. The secretariat is responsible for ensuring that the terms of the LILCA are respected by the two other signatories to the agreement, the federal government and the Government of Newfoundland and Labrador. The secretariat also represents Nunatsiavut in relations with these governments, as well as with other Inuit regions and the Inuit Tapiriit Kanatami, the national Inuit organization (Nunatsiavut Government 2014a).

Education

Although Nunatsiavut has the highest graduation rate among all of the Inuit regions (Lane 2013), graduation rates in the Labrador School District are still below the provincial average. High school and post-secondary completion rates for 2011 differ from community to community with no discernable patterns, other than the fact that Nain (the administrative capital) and Hopedale (the legislative capital) do not necessarily have higher completion rates compared to other communities.

According to Part 17.12.1 of the LILCA, the Nunatsiavut Government "may make laws in Labrador Inuit Lands and the Inuit Communities in relation to the following matters respecting education of Inuit: early childhood development and education; primary, elementary and secondary education; adult basic education; vocational and post-secondary education, training and certification" (LILCA 2005). Until now, the Nunatsiavut Department of Education and Economic Development has focused on programs and services in post-secondary education and labour market training.

Unlike Nunavik, which has its own school board, primary and secondary education in Nunatsiavut is provided by the Labrador School Board (LSB). The LSB operates six schools in Nunatsiavut and receives direction and funding from the provincial Department of Education. The Nunatsiavut Government also contributes money to the LSB; in 2012, it provided $2.5 million of the LSB's $14.7 million annual budget (Labrador School Board Annual Report 2012). Currently, three out of 14 members of the LSB's board of trustees are based in Nunatsiavut communities. Although the Nunatsiavut Government has yet to assume the formal responsibilities for primary and secondary education in the region, various government departments, such as Education and Economic Development, Nunatsiavut Affairs, and Health and Social Development, work collaboratively to address several areas of concern in primary and secondary education (Nunatsiavut Government 2014b).

Apart from skills and employment training programs, there seems to be little or no federal government involvement in education. Decision-making falls clearly in the jurisdiction of the provincial government, with the Department of Education being the main policy actor. While the LILCA certainly expanded the vertical range of actors involved in education by creating the legal-constitutional basis for a regional education authority, the Nunatsiavut Government has not yet occupied that jurisdictional space. The regional government, however, does contribute a significant amount of funding to the annual budget of the Labrador School Board, and the involvement on the board of community members from Nunatsiavut offers a conduit for community and regional input on matters relating to primary and secondary education.

Housing

As is the case in many Canadian Aboriginal communities, the quality and quantity of housing is a key public policy issue facing Nunatsiavut. According to statistics from 2006–08, 12 percent of houses had problems with mould, and upwards of 22 percent required major repairs (Inuit Health Survey 2007–08). Minich et al. (2011) have since observed that Nunatsiavut is the only jurisdiction where the percentage of homes requiring major repairs has not risen. Overcrowding is another important issue, especially in homes with children (Egelund 2010). Collectively, these problems pose significant health, social, and safety threats to the population of the region. In response to questions about housing in a recent speech in the Nunatsiavut Assembly, the president of Nunatsiavut, Sarah Leo, commented: "As you may recall in the last spring [2013] budget, we budgeted 2.7 million [dollars] for [a] housing strategy. We're committed to developing that strategy … as we've always said, housing is probably the number one priority of this government" (Nunatsiavut Government 2013b, 115-16).

According to Part 17.19.1 of the LILCA, "the Nunatsiavut Government may make laws with respect to the development of Labrador Inuit Lands for housing purposes and for the construction, maintenance, allocation, control, improvement, renovation and removal of housing in Labrador Inuit Lands and housing owned by an Inuit Government in the Inuit Communities" (LILCA 2005). Such housing, however, must comply with or exceed the standards established by federal and provincial building codes (LILCA 2005). Housing falls under the jurisdiction of Nunatsiavut Affairs, the department that is also responsible for ensuring the implementation of the LILCA.

Although it has legal jurisdiction over housing, the Nunatsiavut Government has yet to create its own housing corporation or association. As in education, it relies for its housing programs on a broader regional body, the Torngat Regional Housing Association (TRHA), a non-profit organization that is connected to the Newfoundland and Labrador Housing Corporation (NLHC) and has representation from the Nunatsiavut Government. In fact, as recently as January 2013, President Leo publicly stated that "right now, [the] Torngat [Regional] Housing [Association] runs the housing programs within Nunatsiavut and the NLHC has homes for rent within Nunatsiavut. But we, as a government, have no mandate. We have no policy. We have nothing with regards to housing" (Nunatsiavut Government 2013a, 51-2).

In the past, the TRHA and the NLHC have collaborated with community governments in Nunatsiavut: the province builds housing on land provided by the community governments, and loan backing is provided by the TRHA.[3] In 2000, the provincial government announced funding of $23 million over three years for

[3] Approximately 60 percent of residents of Nunatsiavut live in private homes and only 29 percent rent, the lowest rate among Inuit in Canada.

infrastructure development in Nunatsiavut. Included within this funding envelope was $7.7 million specifically earmarked for work on major repairs and the construction of new housing. This funding allocation may explain why the percentage of homes requiring major repairs has not risen. In 2008, the Nunatsiavut Government received $2 million from the provincial government for housing construction in the communities of Nain, Hopedale, Makkovik, Postville, and Rigolet (Government of Newfoundland and Labrador 2008).

Clearly, the provincial government plays a very important role in housing by providing funding directly to the Nunatsiavut Government or through organizations such as the NLHC and the TRHA. A housing needs assessment was recently conducted which highlights the pressing housing issues facing the region (Newfoundland and Labrador 2014). The provincial and regional governments are currently developing a comprehensive strategy to address these issues.

As for the involvement of the federal government, there is little evidence that the federal government plays a significant role in the area of housing. In a recent sitting of the Nunatsiavut Assembly, President Leo lamented: "Nunatsiavut gets actually no money from the federal government" (Nunatsiavut Government 2013b, 8). Nonetheless, regional officials do look to the federal government for action on housing issues. Recently, Toby Andersen, the deputy minister for Nunatsiavut Affairs, stated that "[Aboriginal housing] is the responsibility of the federal government," echoing the frustrations of other regional officials at the lack of action by the federal government in this important policy area (Nunatsiavut Government 2013a, 62).

In terms of multilevel governance, housing in Nunatsiavut provides evidence of the involvement of new horizontal actors such as the TRHA, as well as some limited involvement on the part of governments at the regional and community levels. As with education, the LILCA also contains the legal framework to expand governance at the regional level, once the Nunatsiavut Government has the capacity to take on this area of jurisdiction. For the time being, however, multilevel governance in this policy area is characterized by a lack of clarity about which level of government is responsible for the region's pressing housing needs.

CONCLUSIONS

Over the past four decades, the institutional structures put in place by comprehensive land claims agreements in Nunatsiavut, Nunavik, and the Inuvialuit Settlement Region have allowed for the development of a variety of different multilevel relationships between political actors at federal, provincial/territorial, regional, and local levels. Although the emergence of new processes, structures, actors, and rules that facilitate the interaction of governments and organizations in these regions and within the broader political system is certainly consistent with developments

in other parts of Canada, the Inuit regions have played an instrumental role in the expansion of governance in Canada, both vertically and horizontally. In terms of vertical multilevel governance, regionally based institutions and organizations have become important political actors, interacting regularly with senior governments at the provincial/territorial and federal levels in the development, implementation, and administration of policy. On a horizontal level, non-state actors such as development corporations have become significant players, not only in their respective regions but also with respect to intergovernmental relations with senior governments (Wilson and Alcantara 2012; Rodon and Gray 2009).

While the existence of new regional actors certainly provides evidence that multilevel governance has become a permanent feature of the Canadian political landscape, the question of whether these actors are able to engage meaningfully in intergovernmental policy-making remains unanswered in the literature. In an effort to answer this question, this chapter has examined two important policy fields, education and housing, and compared these fields across the regions. In all three regions, it appears that decision-making in both policy fields is still dominated by the provincial and territorial governments.

There are, however, important distinctions to note. Despite the fact that Nunatsiavut is the only region to have achieved regional self-government alongside a comprehensive land claims agreement, governance actors in Nunavik seem to have the most meaningful and authoritative voices in both education and housing. The institutional complexity of Nunavik, namely the existence of a powerful development corporation alongside firmly entrenched and regionally specific governance bodies, provides an interesting context in which to examine multilevel governance (see Rodon 2015). In terms of decision-making, the Quebec government is still the dominant actor; however, regional bodies have considerable input and influence, especially in areas such as housing. In part this can be explained by the capacity of regional actors to engage in meaningful participation in the policy-making process. It has been almost 40 years since the Inuit of Nunavik signed the James Bay and Northern Quebec Agreement, and during that time its leaders have gained considerable experience in the processes of multilevel governance. The recognition of Nunavik as a distinct political entity and participant in the policy-making process has also been facilitated by the unique political context in which the region is embedded. The struggle for self-determination within and without the Canadian federation has made Quebec politicians across the political spectrum more sympathetic to the desires of Nunavimmiut to be more autonomous.

Another important distinction can be found between the two policy areas. In Nunatsiavut and the Inuvialuit Settlement Region, education follows a typical intergovernmental model in which the provincial or territorial governments exercise political authority through a hierarchical chain of control that extends down into the regions. In Nunavik, on the other hand, the KSB is formally under the jurisdiction of the Quebec Ministry of Education, Recreation and Sport, but it also has a significant autonomy and decision-making influence. It is also the only region that

has its own regionally exclusive school board. In housing, however, the pattern is somewhat different. A number of non-state actors, such as the Makivik Corporation in Nunavik and the Torngat Regional Housing Association in Nunatsiavut, play important roles alongside provincial and regional bodies in addressing the housing needs of their respective regions. Such distinctions are indicative of the level of federal and provincial involvement in these policy areas. Historically, provincial and territorial governments have been much more guarded about education, whereas housing has tended to involve both federal and provincial governments (Carroll and Jones 2000). Consequently, as these cases demonstrate, we would expect to see a narrower multilevel framework in the area of education.

Comprehensive lands claims and self-government agreements represent a first step rather than a final chapter in the development of multilevel governance structures that involve Aboriginal peoples in a meaningful and authoritative manner. These agreements provide the legal foundation for multilevel governance to emerge; however, in order for it to develop further, senior governments must be willing to relinquish control to the new Aboriginal state and non-state actors, or at least share decision-making authority with them. Moreover, in the case of the newer land claim settlements such as Nunatsiavut, capacity should first be built at the regional level before regions are ready to take on formal legal authority. As a result of the sequencing of their land claims and self-government processes, regions such as Nunavik and the Inuvialuit Settlement Region have already developed significant capacity (Rodon and Grey 2009; Alcantara and Wilson 2013). These regions have not yet achieved self-government, but when they do, they will have the advantage of decades of capacity development as they seek to make self-government work within complex and emerging systems of multilevel governance.

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4

A PARTNERSHIP OPPORTUNITY MISSED: THE NORTHWEST TERRITORIES DEVOLUTION AND RESOURCE REVENUE SHARING AGREEMENT

Stephanie Irlbacher-Fox

The Northwest Territories Lands and Resources Devolution Agreement was signed in 2013 and scheduled to take effect on 1 April 2014.[1] It is a significant agreement that received scant attention in Canadian media. The centrepiece of the devolution agreement is a new repartition of resource royalties generated in the territory, to date jealously guarded by the federal government. Resource revenues in the Northwest Territories (NWT) are a controversial topic for Indigenous peoples. In a territory with a small tax base (population 41,000), and where Canada takes the lion's share of resource revenues, new money is hard fought for and jealously guarded. So too are the decision-making powers that determine the type – and pace – of development that will take place. These things are the substance of the NWT Devolution Agreement. They are also at the heart of land claims and self-government negotiations between Indigenous peoples and Canada.

While the interests of Indigenous peoples and the GNWT over lands and resources often collide, it doesn't have to be this way. To many observers, Indigenous governments and the Government of the Northwest Territories (GNWT) missed a major opportunity to fight together for both a greater share of resource royalties and more decision-making power to be brought to the North and shared by all of its governments. Yet in its last three years of negotiation, the process hallmark

[1] The agreement is available at http://devolution.gov.nt.ca/wp-content/uploads/2013/09/Final-Devolution-Agreement.pdf.

was one of division, Indigenous exclusion, and the consequent ability of Canada to stand firm against demands for greater share of power and money. But perhaps more importantly, the deal, which should have been a vehicle for cementing a new multilevel government-to-government-to-government partnership between Canada, the GNWT, and Indigenous peoples, has become a textbook case study of how not to engage in nation-to-nation governance.

This paper provides a critical account of both the substance and the process that led to the devolution and resource revenue sharing agreement and situates the agreement in the broader context of NWT politics, notably the growing importance of Indigenous land claims and self-government agreements. The observations here are in part ethnographic, as I was an intermittent participant in devolution negotiations on behalf of Indigenous governments between 2001 and 2011. They are also based on media reports and my own observation as a resident of Yellowknife of GNWT public information sessions; these sessions took place between 2012 and 2014.

I argue that three distinct sources of tension plagued the multilevel negotiations after 2007. The first was that the partnership principles among the governments, initially described in a 2002 Memorandum of Intent establishing an intergovernmental process inclusive of Indigenous governments, was later abandoned by the federal and NWT leadership. This lack of mutually agreed principles to create a measure of recognition and respect among the parties was at the foundation of Indigenous alienation from the process between 2008 and 2011. The lack of clear mutual recognition and respect bled into the second source of tension: the lack of inclusiveness of the negotiations process, particularly between 2008 and 2011. While the GNWT argued that Indigenous governments were being consulted or involved in devolution negotiations during that period, their involvement was de facto lesser than what it had been – despite the stakes being the same. Indigenous governments suddenly found themselves seated around the perimeter of the room rather than at the negotiating table. The third source of tension emerged from the content of the agreement. Indigenous governments were wary throughout devolution negotiations of the potential for the agreement to negatively impact both their existing treaty rights and future negotiations over land claims and self-government. Their lack of involvement in the latter stages of the devolution negotiations only increased these suspicions and created a wider gulf between them and the GNWT. By the time the devolution agreement was signed by Canada, the GNWT, and the remaining Indigenous partners, some of the Dene governments, feeling unheard, disrespected, and newly vulnerable to rights abrogation and violations, were reduced to protesting outside the NWT Legislature where the signing was taking place. It was certainly one of the lowest points in GNWT-Aboriginal relations in the territory since the 1970s, when the formation of the Dene Nation was a political bomb in the face of colonial privilege and complacency, a bomb that changed everything.

DEVOLUTION AND RESOURCE REVENUE SHARING NEGOTIATIONS

Little scholarly attention has been devoted to the on-and-off negotiations between the GNWT and the federal government over devolution and revenue sharing (Malone 1986; Dacks 1990; Dickerson 1992; Irlbacher-Fox and Mills 2007; Alcantara 2013). Unlike the Canadian provinces, which secured ownership and control of lands and resources within their boundaries at the time of Confederation in 1867, or later through Natural Resource Transfer Agreements (NRTAs), Canadian territories are creatures of the federal government, with their governance powers and authorities delegated by the federal government through legislation. Canada retains ownership of the lands and resources within the territories' boundaries. As a result, the resource revenues flowing from resource extraction in the three Canadian territories go directly to the federal government, bypassing territorial and Indigenous governments. In an economy where resource extraction investments are valued at approximately one-third of Canada's GDP (GNWT 2013a), resource revenues have, not surprisingly, been an intergovernmental bone of contention. The wealth generated by oil, gas, and mining projects is coveted by the GNWT, and revenue sharing has been the subject of negotiation between the GNWT and Canada since the 1970s (Dickerson 1992; Dacks 1990).[2]

Resource revenue sharing is also fundamental to the rapidly developing Indigenous governments in the NWT. Scholars have agreed that in order for self-government to be implemented effectively, own-sources revenues are necessary and are likely to include a better approach to resource revenue sharing between Canada and Indigenous governments (Irlbacher-Fox 2009; Abele and Prince 2008). While Dene land claims include provisions for Dene signatories to receive small percentages of resource revenues generated in the Mackenzie Valley, the Inuvialuit have no such provisions in their treaty. In unsettled claim areas, Indigenous peoples do not benefit from resource revenues, despite significant amounts being generated from their lands. (See the table below for details of the revenue sharing content of various land claims settlements.)

Discussions about devolution of powers and the sharing of resource revenues between Canada and the territorial government are therefore inextricably tied to similar discussions taking place between Indigenous governments, Canada, and the territorial government in the context of self-government and land claims negotiations (Irlbacher-Fox 2009). This link was clearly underscored when a new round

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[2] In addition, Canada owns a one-third share of the Norman Wells oil field, reaping both profits and royalties from a productive field since the 1920s, a stake that was not open for discussion at NWT resource revenue sharing negotiations (Nassichuk 1987).

of negotiations over devolution and resource revenue sharing in the NWT began in earnest in the early 2000s. A Memorandum of Intent was reached in 2002 with the NWT Aboriginal Summit, which represented some of the Indigenous governments of the NWT, in order to establish the guiding principles and objectives of tripartite negotiations over devolution and revenue sharing.[3] That tripartite forum arose as a result of key factors: a federal government that sought an approach to evolution premised on consensus; a recognition by the GNWT premier at the time that governments, working together, were likely to obtain a greater share of resource revenues and other funding to undertake shared responsibilities; and a critical mass of Indigenous governments that, having achieved or engaged in land claims and governance agreements, had a capacity enabling them to work cooperatively as a party to the devolution negotiations under the aegis of the NWT Aboriginal Summit.

A Devolution Framework Agreement was reached in 2004 on the broad outlines of devolution, but by 2007 negotiations had begun to falter. At the time, GNWT negotiators believed that the amount being offered by Canada with respect to resource revenue sharing was too low.[4] An Agreement-in-Principle pushed by GNWT and supported by some but not all members of the Aboriginal Summit was ultimately rejected by the federal government, leading to a pause in negotiations.

By the time negotiations resumed in 2010, Indigenous governments were no longer united under a common umbrella, largely because of fears that devolution and revenue sharing talks with the GNWT would impact ongoing land claims and self-government negotiations. As the power structure shifted, what began as a trilateral government-to-government-to-government process morphed into a bilateral negotiation, with Indigenous governments increasingly on the sidelines. Indigenous representatives were invited to the negotiations, but whereas before they sat at the table as engaged partners led by the Aboriginal Summit chief negotiator Jean Yves Assiniwe, at these meetings Indigenous representatives did not literally sit at the table. Attendees I spoke with said that they were provided with chairs placed around the perimeter of the room. The concerns they raised over this arrangement were not added as agenda items to the discussions and did not result in any changes to the working draft agreement. It was clear to many observers that then-Premier Floyd Roland was intent on achieving an agreement with or without Indigenous support. At a Dene Nation Annual Assembly in July 2011, the premier stood before the Dene chiefs and promised that he would not sign the devolution agreement without their support.[5] Sadly, this would not be the case.

During 2010, aware that the GNWT intended to sign the agreement, Indigenous governments had their senior technical officials engage in a coordinated, intense

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[3] The Dehcho chose not to participate in the IGF for reasons explained below. See GNWT (2014b).

[4] Meeting notes, devolution negotiations, summer 2007.

[5] Personal communication with Bill Erasmus, Dene national chief.

effort to develop a new protocol agreement on the government-to-government relationship with the GNWT. I attended these sessions as an official working for a community from the Sahtu Nation. Over a series of meetings, officials discussed their interests and drafted a protocol, which was submitted to the GNWT in January 2011. The meetings were intense and highly productive, and they were also unique as they involved participants from all Indigenous governments in the Northwest Territories. A final draft was provided to the GNWT on 13 January 2011. The response from the GNWT four days later was in the form of a letter to regional leaders, with an appended proposed alternative version of the protocol, largely gutted of the hard-won compromises among Indigenous governments contained in the 13 January draft. The harsh response, prefaced with a letter that stated that the devolution agreement signing was scheduled to go ahead within a week, was a missed diplomatic opportunity, sending a clear message that the GNWT was uninterested in either the Indigenous governments' views or their involvement.

Then, on 26 January 2011, over the objections of Indigenous governments except for the Inuvialuit Regional Corporation and the Northwest Territory Métis Nation,[6] the federal government and the NWT premier signed a Devolution Agreement in Principle with Canada. Clearly rattled by a group of demonstrators led by Dene Nation National Chief Bill Erasmus, who were standing behind rows of GNWT bureaucrats seated in the Legislative Assembly's Great Hall to witness the contentious signing, the NWT premier gave an impassioned plea for other Aboriginal leaders to "join us in the tent" and sign on to devolution.[7] It was a hollow plea. For months, Indigenous government officials had worked on a protocol as a basis for working with the GNWT to reach a devolution agreement workable for all parties. It was rejected; Indigenous leaders were told that the GNWT was signing the deal over their objections.[8]

As part of the new revenue sharing deal, the GNWT would receive up to 50 percent of the revenues from resource extraction within the territory (excluding offshore resources) to a maximum of 5 percent of its Gross Expenditure Base (the total amount of the GNWT yearly budget). Currently that yearly budget is about $1 billion. The GNWT has provided public information indicating that a significant

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[6] The Northwest Territory Métis Nation was formerly the South Slave Métis Tribal Council. Despite the name change, it did not expand to encompass any Métis beyond the South Slave or Akaitcho territory.

[7] See http://www.nnsl.com/frames/newspapers/2011-01/jan28_11agree.html; personal notes of participation in protest at the NWT Legislative Assembly during devolution agreement signing, 28 January 2011.

[8] Meeting notes, Senior Aboriginal Officials caucus January 2011, accessed 12 July 2014 at http://www.cbc.ca/news/canada/north/n-w-t-aboriginal-leaders-seek-devolution-delay-1.1008721.

level of resource development would have to take place for this cap to be reached. Between the years 1999 and 2011, the cap was only reached four times.[9]

In dollar terms, the size of this windfall is currently up to an extra $65 million per year. Given that 25 percent of that amount will flow to Aboriginal governments as part of the agreement, the GNWT will receive approximately $45 million per year if resource revenue generation is maximized. Those revenues began flowing to the GNWT, and to the Aboriginal governments who have signed on to a resource revenue sharing deal, starting in April 2014.

How this additional input of money would be used by the GNWT became a recurring question during public consultations on devolution. The GNWT minister of finance advocated using the money to pay down debt and to finance infrastructure investment, with 5 percent of the money to be saved in a Heritage Fund. However, at public consultations held throughout the territory during 2013, citizens overwhelmingly urged the GNWT to invest most of the funds in a Heritage or Permanent Fund for the benefit of future generations (GNWT 2013b). Ultimately, the GNWT committed to putting 25 percent of its share of the resource revenues into the NWT Heritage Fund. The purpose of the fund is broadly to save for "future generations" (GNWT 2012); however, recent research and analysis related to this fund show that it is vulnerable to use for other purposes (Briones et al. 2014).

WHY THE GNWT AND INDIGENOUS GOVERNMENTS FAILED TO REACH A COMMON POSITION

The paradoxical outcome of the GNWT's approach to devolution and revenue sharing negotiation, which was to push a deal despite major Indigenous opposition, is that the deal reached in 2013 is not significantly better than what the federal government offered in 2007 when the negotiations first collapsed.[10] As Dean (1981) noted a long time ago, the GNWT alone has limited bargaining power with the federal government; it is fiscally and legislatively dependent on federal goodwill. Indigenous governments, on the other hand, negotiate from a strong legal basis, especially since the recognition of Aboriginal and treaty rights in the Constitution Act, 1982. Between 2001 and 2013, observers of devolution negotiations noted that the GNWT's inability to form a united front with Indigenous governments weakened its position on revenue sharing. Canada was therefore able to maintain its limited financial offer.

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[9] Public presentation by GNWT on NWT Devolution Agreement, accessed 29 August 2014 at http://devolution.gov.nt.ca/wp-content/uploads/2013/04/FINAL-PRESENTATION-all-communities.pdf.

[10] http://www.cbc.ca/news/canada/north/n-w-t-premier-defends-devolution-deal-1.870606, accessed 12 July 2014.

Tensions between Indigenous governments and the GNWT predate the negotiation of the devolution and revenue sharing deal, and a little contextualization is in order here. The demographics in the NWT mean that politics happens differently here from the rest of Canada. In the NWT, Indigenous peoples (Dene, Métis, and Inuvialuit) are a slight majority.[11] However, population distribution geographically and within various occupational sectors skews Indigenous influence over public policy and decision-making. In particular, the vast majority of the NWT's non-Indigenous population lives in the capital of Yellowknife and in regional centres, many of them moving there for work, particularly in policy-making and decision-making roles with the territorial and federal governments. In the legislature itself, on the other hand, the majority of MLAs are Indigenous, elected as independents in a legislature that prides itself on a "consensus" versus a party system – where a cabinet functions as government, and ordinary members act as a loyal – if somewhat disorganized – opposition.

The influence of the Indigenous majority in the NWT is felt more keenly outside of Yellowknife, where Indigenous governments steward land claim agreement responsibilities relating to land and resource management as well as business and economic development. In many of the communities outside Yellowknife, a majority of residents are Indigenous. That majority often feels that Indigenous organizations legitimately represent its aspirations, in contrast to the GNWT. This resentment was starkly portrayed during discussions on the NWT capital plan in October 2013, when Kevin Menicoche, a Dene MLA representing small Indigenous communities from the southern NWT, remarked, "The media was quick to pick up in the capital plan that there's nothing for Yellowknife, and I'm glad" (Busch 2014).

Viewed by at least one Yellowknife member of the Legislative Assembly as an open insult aimed at half of the territory's residents, the comment perhaps crystallized the feelings of resentment toward Yellowknife felt by residents (both Indigenous and non-Indigenous) of small communities while simultaneously underlining the fundamental power imbalance that is perceived to economically disadvantage small NWT communities in relation to Yellowknife.

In the regions outside of Yellowknife, Indigenous governments play a key role as bulwarks against Yellowknife's domination, and the potential domination of regional interests by outsiders such as resource extraction companies looking to operate on Indigenous lands. Indigenous governments with settled land claims have generally oriented land claims capital towards growth investments through trust funds, while using revenue streams – such as resource revenues – and preferential economic provisions in land claims to build political and economic opportunity and influence in their respective regions. Indigenous governments responsible for stewarding and protecting the political rights of their members are often at odds with the GNWT. This conflict has been expressed in a range of ways – from press releases

[11] GNWT Bureau of Statistics (2014).

on issues made by different Indigenous governments, to the launching of court cases seeking rulings overturning GNWT decisions or legislation. For example, the Gwich'in Tribal Council launched a lawsuit against the GNWT and Canada the month after the devolution agreement was signed, on the basis that Gwich'in Aboriginal rights were abrogated by the agreement (Wilson 2012). Other examples of this often tense relationship include a protracted public disagreement between the GNWT and affected Indigenous governments when the GNWT banned hunting of the Bathurst caribou herd by both Indigenous and non-Indigenous hunters,[12] and the Tlicho government's recent court action against Canada over co-management board reform supported by the GNWT.[13]

Devolution and revenue sharing negotiations played out over this tense background. Many Indigenous governments were supportive of the principle of devolution – that is, bringing from Ottawa to the North additional decision-making control over lands – but balked at the GNWT's approach to doing so (Edwards 2011; Wilson 2012). Indigenous governments believed that their concerns with respect to rights protection and decision-making participation were not reflected in the devolution agreement, and that the process for securing a deal was not inclusive. In particular, for Indigenous peoples reluctant to sign on to the resource revenue sharing agreement, there was resentment that access to resource revenues was held hostage to their signing on to a deal that they did not agree with. For example, the Lutsel K'e Dene First Nation (part of Akaitcho) had this to say:

> The Lutsel K'e Dene First Nation is demanding a fair share of resource revenues for the community regardless of whether or not it signs on to devolution.
>
> Chief Dora Enzoe sent a letter to NWT Premier Bob McLeod last week accusing the government of using the promise of resource revenues as a "weapon to inflict political pressure and influence" over First Nations in the territory.
>
> … As it stands, only Aboriginal governments party to the devolution agreement are allowed to access a piece of the 25 per cent of resource revenues promised to them and be part of the forum.
>
> Enzoe said the First Nation is worried that revenues due to their membership for developments on their lands will be withheld or given away to others instead, which she called "wrong and unethical."
>
> "The Lutsel K'e Dene First Nation will not be pressured into supporting the Devolution Agreement. We fundamentally object to the manner in which devolution and resource revenue sharing is being implemented, and to the pressure which is being brought to

[12] See http://www.cbc.ca/news/canada/north/debate-over-n-w-t-caribou-hunting-ban-goes-public-1.893827 (February 2010); Canada (2014).

[13] See http://www.cbc.ca/news/canada/north/tlicho-sue-ottawa-over-n-w-t-superboard-legislation-1.2637747 (May 2014).

> bear on us to either 'sign on' or 'step aside' as these fundamental changes occur," she wrote in the letter to McLeod.
>
> "Resource revenues should not be deployed as a weapon to inflict political pressure and influence. They are not your government's to hand out according to your whim, rewarding those who agree with you and punishing those who do not.
>
> "These revenues are largely derived from developments on our lands, and your government must be accountable for their fair distribution to our people. We demand our fair share." (Wohlberg 2012)

Indigenous objections to the devolution agreement are also grounded in a more fundamental resistance to the growing authority and legitimacy of the GNWT. The Dene Nation's resistance to the GNWT being granted additional governing powers is very consistent since the Indian Brotherhood (the Dene Nation's precursor) was founded in 1969.[14] For the Dene, the GNWT is an alien government that has no authority or legitimacy with respect to governing Dene peoples. The Dehcho and Akaitcho peoples are perhaps most resolutely committed to this view, not having signed land claims and frequently pointing to the GNWT's lack of legitimacy to govern Dene people or Dene lands. Not surprisingly, at the time of writing, the Akaitcho and Dehcho regions still had not signed on to the devolution agreement or resource revenue sharing deal.[15]

For the Dene, the GNWT is in direct competition with their own political authority with respect to seeking greater control over lands and resources. Some sarcastically refer to the devolution agreement as "the GNWT's land claim," where Canada recognizes GNWT control and authorities over lands and resources to the detriment of similar Dene claims. When the Senate Committee hearings held a meeting in Yellowknife during 2014 to hear stakeholders' views on the devolution agreement, the audience watched as Dene National Chief Bill Erasmus used his speaking time in part to talk about the GNWT's lack of authority over the Dene and about the extent of Canada's authority under Treaties 8 and 11.[16]

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[14] I provide a full explanation of the Dene Nation perspective of the GNWT's political illegitimacy in Irlbacher-Fox (2009), introductory chapter. See also Dene Nation (1984).

[15] However, one community from each of those regions did sign onto the agreements, namely, Fort Liard First Nation and Salt River First Nation. As I have discussed elsewhere (Irlbacher-Fox 2009), decades of grinding poverty and its attendant social ills and lack of opportunity have led to fractures in regional unity, particularly in the unsettled land claims regions, as is the case here. Another factor likely at play in these cases is geographical proximity to other Indigenous peoples that have signed on to the revenue sharing deal – in this case, the NWT Métis Nation, headquartered in Fort Smith, as are Salt River First Nation.

[16] See Evidence at the Senate Committee Hearings on Aboriginal Affairs, Bill C-14, January 2013, http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=2&DocId=6392349&File=0

Finding common ground under these premises can be difficult, but the GNWT also contributed to the conflict by pushing through negotiations despite the lack of support from a significant proportion of Indigenous governments, thereby undermining the principle of government-to-government negotiations. During public information sessions about the devolution agreement in 2013, the GNWT also emphasized that Dene peoples with land claim agreements in the NWT already shared in resource revenues.[17] While factually accurate, this polarizing statement conflates the compensation that Dene negotiated in exchange for the surrender of their Aboriginal rights and title under land claims with the sharing of public government revenues for the purpose of providing services to the population. Through this conflation, the GNWT characterized Indigenous governments as somehow getting more than their fair share of what the GNWT calls "revenues from public lands."[18] The GNWT neglected to mention in their information materials that the resource revenue shares secured in the Dene claims amounted to, at best, a few hundred thousand dollars per year. More importantly, these revenues were secured in exchange for what the Dene had relinquished as part of an overall land claims deal. Instead, the informational subtext was that the Dene were simply greedy. This type of discourse mischaracterizes settlements negotiated as part of land claims and conflates Indigenous peoples' status and rights with general public interest. It also undermines the very principles of mutual recognition that should underpin complex multilevel negotiations with Indigenous peoples.

SITUATING RESOURCE REVENUE SHARING IN THE CONTEXT OF LAND CLAIMS

The view of Indigenous land claim signatories is that land claim agreements are "private deals" between the land claim members and Canada in the sense that land claim compensations and assets are managed for the sole benefit of members, including all future generations. In contrast, resource revenues flowing to the territorial and Indigenous governments under the revenue sharing agreement are intended for governance (e.g., services provided by public and self government) and capacity building purposes (Eglington and Voytilla 2011, 73). This distinction is especially important in the context of the NWT, where Canada encourages a broad approach

[17] The Inuvialuit do not have resource revenue sharing provisions in their land claim agreement.

[18] See, for example, the GNWT information website on devolution (accessed 12 July 2014) at http://devolution.gov.nt.ca/about-devolution/faq/frequently-asked-questions-about-resource-revenue-sharing.

to self-government whereby Indigenous governments in small communities with an overwhelming majority of Indigenous peoples should serve all residents as a public government. In those cases, land claim assets and revenues cannot be used to support governance and services. As per these agreements, land claim assets and revenues can only be used for the benefit of land claim beneficiaries, not the public, either through self-government institutions or other mechanisms.

Since the GNWT began conflating the two types of revenues in its public information on devolution, Indigenous governments have expressed their annoyance at the confusion and inaccurate characterization of the resources available to Indigenous governments as a result of land claims.[19] At time of writing, the inaccurate and misleading characterization of land claim revenues remains on the GNWT devolution website (2014a).

This conflation highlights a significant issue with respect to the sharing formula under the Resource Revenue Sharing Agreement: the GNWT will retain 75 percent or more of the resource revenues, and the Indigenous governments who sign on to the devolution agreement will share up to 25 percent of those revenues among themselves. This formula is not tied to the responsibilities of each government. So in a scenario where all Indigenous governments in the NWT have self-government agreements, and are providing programs and services to 50 percent plus of the NWT population, the GNWT will continue to retain 75 percent of the resource revenues under the deal.

Indigenous governments in the NWT who have signed on to devolution must come to an agreement amongst themselves about how the 25 percent of resource revenues will be shared. Discussions on this issue remained unresolved and somewhat heated beyond the 1 April 2014 effective date for the devolution and resource revenue sharing deals. A comprehensive economic analysis of the RRS, completed for the Gwich'in Tribal Council by consultants Dr Peter Eglington and a former head of the GNWT's Finance Department, Lew Voytilla, suggests that the two most viable options appeared to be either 1) a straight seven-way split of the 25 percent Aboriginal share (on the assumption that each of the seven regional Indigenous organizations would be recipients of the funds); or 2) a split between the seven Indigenous governments based on a formula taking into account population levels and the cost of living index where their populations are resident (Eglington and Voytilla 2011, 74). Option 2 would take into account costs such as those experienced by the Inuvialuit and Sahtu regions, with several fly-in communities with high cost of living indexes; it would likely see a smaller share of the funds going to communities such as the Northwest Territory Métis whose members are located in the southern NWT in communities accessible by road with a lower cost of living.

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[19] Meeting notes, devolution and RRS discussions between GNWT and Indigenous governments, 2012.

The Eglington and Voytilla analysis also raised questions about the overall fairness of the resource revenue sharing deal being offered by Canada to the GNWT and Indigenous signatories. According to the GNWT and Canada, the revenue sharing deal for the NWT is based on the equalization principle shaping the fiscal relationship between Canada and the provinces generally. Eglington and Voytilla dispute that rationale:

> With respect to Territorial Formula Financing (TFF), the first conclusion of the O'Brien report was that "The situation in Canada's territories is vastly different from the challenges faced by the provinces ..." and the second conclusion was that "Although the three territories share common aspirations and dreams for the north, there are substantial differences among the three territories that call into question the effectiveness of one-size-fits-all solutions" and the fifth conclusion was "There is great potential for economic development from natural resources in the territories; however there are significant financial and social costs involved. Additional investment is needed to address these costs and achieve the territories' fiscal, economic and social potential" and finally the report says that the foregoing points "underscore the reason why TFF is distinctly different from the Equalization program in approach, in objectives, and in design."
>
> We can only underline these conclusions. Even in the context of devolution the O'Brien report recommended that resource revenues should be fully excluded from Territorial Formula Financing. That means, of course, that after devolution, none of NWT resource revenues should be clawed back by the federal government – neither directly nor indirectly, nor through a cap.
>
> [Note:] The draft GNWT Devolution AIP, Chapter 12, states that 50 percent of resource revenues should be offset against the formula financing annual grant, and that the Net Fiscal Benefit from resource revenues should be capped at 5 percent of the GNWT Gross Expenditure Base (GEB). (Eglington and Voytilla 2011, 13)

Identifying the principles that should guide the determination of resource revenue sharing thresholds with Indigenous peoples in Northern Canada is a complex task. It is even more complex in light of comparisons with resource revenues provisions included in northern land claim agreements. The table below provides specific details about provisions in NWT agreements contrasted with agreements of other northern Indigenous peoples. Of course, treaties are negotiated within a specific social, economic, and political context, and what may appear to be far more proportionately advantageous for some Indigenous peoples may not be of a higher dollar value, or may be distributed differently, or to a larger population. Similarly as Eglington and Voytilla note in their research, even the federal approach to equalization is vulnerable to "side deals" that take into account the different circumstances faced by different provinces in Canada (Eglington and Voytilla 2011, 8).

Table 1: Comparisons of Resource Revenue Sharing Provisions in Northern Land Claim Agreements

Agreement	*Initial Share for Aboriginal Signatories*	*Secondary Share for Aboriginal Signatories*	*Threshold for Taxable Royalties*
Umbrella Final Agreement with Yukon First Nations	50 percent of first $2 million in royalties	10 percent of additional royalties	–
Labrador, Nunavut and Nunavik Inuit final agreements	10.429 percent of first $2 million in royalties	5 percent of additional royalties	–
Inuvialuit	No provisions	No provisions	N/A
Gwich'in and Sahtu final agreements	7.5 percent of first $2 million in royalties	1.5 percent of additional royalties	Above $3 million
Tlicho final agreement	10.429 percent of first $2 million in royalties	2.086 percent of additional royalties	Above $4.172 million
Dehcho Interim Resource Development Agreement (2003)	12.25 percent of first $2 million in royalties Payable on completion of a final land claim agreement; can access up to 50 percent or maximum of $1M per year before final agreement reached.	2.45 percent of any additional royalties	N/A
Akaitcho, NWT Métis Nation	N/A	N/A	N/A

Source: Adapted from Simeone (2014).

CONCLUSION

As I have noted elsewhere,[20] revenue sharing provisions for Indigenous peoples in the context of land claims or other mechanisms designed to provide Indigenous peoples with part of the value of resources being extracted from their traditional lands are contentious. The Northwest Territories case study in achieving a revenue sharing deal in the context of a devolution agreement shows how resource revenue sharing can hold as much promise as it does threat. For governments, always in need of more revenue, resource revenues are jealously guarded as they do not just magically result from the wealth hidden in the ground. Rather, they materialize through a complex set of financial rules, resource extraction decision-making frameworks, policies, and laws that, taken together, are able to attract global investment dollars – in their turn, influenced by global commodity markets and economic trends. In other words, getting a major resource extraction project is significant, taking a great deal of work and collaboration among many players. The end game for governments is to create jobs, stimulate the economy, and expand and deepen the potential tax base that will enable the government to do the work of both governing and continuing to create conditions under which investment will continue to materialize.

Within this big picture, Indigenous peoples and their rights and aspirations seem to be perceived as at best an irritant and at worst a roadblock to prosperity that must be either removed or overcome. In the Northwest Territories, given its population size, the unique configuration of the division of governance responsibilities, and a population evenly divided between Indigenous and non-Indigenous people, the situation is rather more complicated, and the potential is rife for political fragmentation that can effectively undermine economic stability. Missing an opportunity for a devolution and revenue sharing agreement that could have bound these governments more closely and cooperatively together will likely be felt socially, politically, and economically for years to come.

Indigenous peoples often experience resource extraction projects as a gateway to the destruction of their homelands, with consequent negative social impacts and scarcity of subsistence animal populations. Along with these tribulations comes a potential influx of outsiders, and erosion of their influence and respect for their rights and use of their lands and resources. Since gold, oil, and other minerals

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[20] In Irlbacher-Fox (2009) I devote a chapter to analyzing Dehcho negotiations regarding resource revenue sharing and other financial elements of the Dehcho land claim negotiating process. That chapter turns on Canada's refusal to either justify or negotiate their position with respect to the Dehcho revenue share, cautioning the Dehcho that "no one should expect to get rich" from resource revenue shares.

and resources were discovered in the Northwest Territories in the early twentieth century, Indigenous peoples have not benefited significantly from resource revenues. Moreover, places like Deline, Dettah, and N'dilo have felt far too keenly the environmental destruction and damage to human health that arsenic-based gold mining and radiation impacts of uranium mining have brought.[21] The City of Yellowknife is currently feeling the impacts of the perpetual care required by the Giant Yellowknife gold mine, an environmental disaster requiring a $1 billion perpetual care plan (Taylor and Kenyon 2012), necessitating the rerouting of roadways due to the human health hazards, and turning part of the Yellowknives Dene traditional territory into a dead zone (Yellowknives Dene 1997; AANDC 2014).

Considering this scenario, no reasonable person could deny that Indigenous peoples should receive a fair share of resource royalties in exchange for the inevitable negative environmental, health, cultural, social, and psychological impacts of resource extraction. Clearly Canada has recognized that principle with respect to land claims, and the GNWT has acknowledged it as well with the offer to share up to 25 percent of the resource revenues provided to it by Canada under the Resource Revenue Sharing deal.

The next chapter in the devolution story is one highly anticipated by NWT political observers: by sharing in a percentage of resource revenues generated, Indigenous peoples will also become oriented toward seeing a greater monetary benefit tied to increasing resource development in their traditional territories. This prospect promises to become a significant factor in the decades to come, as Indigenous governments gain greater control over programs and services through self-government agreements; new revenues will be required to support what are likely to be growing demands on their governance resources. In this context, the GNWT, Canada, and the Indigenous governments have their work cut out for them in terms of trying to rebalance and re-establish a government-to-government-to-government relationship that has been damaged by the squandering of the potential offered by the devolution negotiations, and which will likely be essential to the stable growth and development of the NWT into the future.

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[21] For an account of the community of Deline being impacted by the Port Radium mine, see Irlbacher-Fox (2009); for an account of the Yellowknives Dene experience of negative impact of the Giant Yellowknife Gold Mine, see Yellowknives Dene (1997).

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5

NEW TREATIES, SAME OLD DISPOSSESSION: A CRITICAL ASSESSMENT OF LAND AND RESOURCE MANAGEMENT REGIMES IN THE NORTH

Hayden King

For most presenters at Queen University's Institute of Intergovernmental Relations conference on Aboriginal multilevel governance, land claim negotiations, agreements, and settlements were examples of a relatively new and unique institution in Canadian politics, a progressive framework for multilevel governance involving federal, provincial/territorial and Indigenous participants – an imperfect but generally positive development in Indigenous-state relations. Counting myself among the critics, I do not view land claims agreements as new or progressive. Rather, a close analysis of the text of modern treaties in each of the three Canadian territories combined with efforts at implementation reveals that the philosophy and consequences of land claims agreements reflect a very old phenomenon: that is, the marginalization and even dispossession of Indigenous peoples. This state of affairs is most clearly reflected in land and resource management governance regimes embedded in claims agreements across the North. These regimes are the vehicles through which we are meant to collectively make decisions about the land and our relationship to it. Yet too often, Indigenous peoples find themselves alienated by this new form of governance and subsequently unbound from their territories.

The two processes, claims agreements and formal land management policy, are intertwined. With Indigenous people finally gaining access to Canadian courts in the 1960s and the recognition of rights to unsurrendered land (first in the 1973 *Calder*

decision), Canada was compelled to negotiate modern treaties. The first of these, negotiated between the federal government, the province of Quebec, the Eeyou Istchee, and the Inuit of northern Quebec, would become the 1975 James Bay and Northern Quebec Agreement (JBQNA). In exchange for surrendering title to most of their territories, the Eeyou Istchee and Inuit received financial compensations distributed over a number of years, "ownership" to a fraction of their traditional territories, and some degree of management authority over both Indigenous-owned lands and newly created categories of Crown lands.

The co-management regime set out in the JBQNA would be the first of many. In 1996, the Royal Commission on Aboriginal Peoples defined these "claims-based co-management regimes" as "collaborative institutional arrangements whereby governments and Aboriginal parties enter into formal agreements specifying their respective rights, powers and obligations with reference to the management and allocation of resources within a particular area" (Royal Commission on Aboriginal Peoples [RCAP] 1996, 2.4). Claims-based co-management is a feature of nearly every comprehensive land claims agreement since 1975.

The subsequent evolution of these regimes depends on the regional and legal context and so differs in shape and content; that being said, there are common trends. In land claims agreements (or in federal legislation that accompanies agreements), a planning commission is established, and the now-surrendered territory is divided into regions, in some cases corresponding to traditional territories of the Indigenous nations involved, with corresponding regional regulatory boards (nearly ten in each of Canada's northern territories). These boards consider interim land use strategies and work in conjunction with the territory-wide planning commissions to create long-term regional land use plans. The plans ultimately become the formal system to designate land use and allot resources (it is important to note that land use plans do not inform co-management in all cases). Most often, this designation and allotment aim at accommodating conservation, development, subsistence hunting, and a general notion of sustainability (INAC 2003). Once the land-use plans are in place, they are used to guide decisions and inform the regulatory system generally (whether the resource is water, minerals, caribou, or timber, etc.). This model allows Indigenous participation via representation. In other words, Dene and Gwich'in peoples, among others, have guaranteed seats on planning boards, most often 50 percent. Despite formal parity in boards representation, territorial/provincial governments often maintain ultimate authority by reserving a ministerial veto over decisions. So while this structure allows input about land use and also provides a voice in the creation of regional land use plans, the influence can be reduced to mere consultation. This pattern is seen throughout modern treaties.

Expanding on the premise that land claims agreements require critical scrutiny, this chapter considers co-management regimes in the three territories across

the Canadian North, Nunavut, Yukon, and Northwest Territories, during a time of conflict – a moment in the evolution of these regimes that reveals tensions and corresponding exercise of power by various parties to assert their interests. Guiding a close reading of the institutional co-management frameworks of the three agreements in crisis is a relatively straightforward theoretical framework that suggests that co-management regimes are one of many facets of disempowerment. At the outset, according to Alfred and Corntassel (2005), land claims and self-government regimes are examples of "post-modern imperialism" whereby the state co-opts Indigenous resistance into legal discourses that reinforce Canadian sovereignty at the expense of (authentic) Indigenous alternatives. Russell Diabo builds on this idea, calling land claim and self-government negotiations "termination tables" as Indigenous peoples forfeit "pre-existing sovereign status" for modified rights that take the shape of municipality-like stakeholder status (Diabo 2013, 1). Taken together, the threats posed by modern treaties are threefold: a sapping of resistance to Canadian settler-colonialism, the potential assimilation (or at least surrendering) of Indigenous perspectives on the land, and finally, a truncation of sovereignty, which dramatically reduces the power of Indigenous peoples to affect decisions on lands and resources in their territories.

The image I am presenting here is of a Canadian state interested primarily in land and resources, willing to engage in multilevel governance but in limited (and potentially harmful) ways. I use three case studies to test this assessment, one in each of the territorial jurisdictions. It is also important to note that each case is reviewed in a context of crisis. At the time of writing, the co-management regimes in Yukon, Nunavut, and the NWT are the subject of rigorous and contentious debate. These debates revolve around the use by federal and territorial representatives of the institutional control embedded in claims agreements to influence outcomes of decisions of land and resources. The Nunavut example starts the trend. Inuit input was considered in the territory's first land use planning regime, but when plans became operational, the core institution tasked with implementing plans, the Nunavut Planning Commission, violated the land use plans and effectively excused the values that Inuit expected to inspire decisions on land use to promote economic goals. In the Yukon case, Na-Cho Nyak Dun and Gwich'in communities have discovered that with the recently implemented Peel Watershed Land Use Plan, the territorial government can make decisions on their lands without considering their perspectives at all. This realization has led all parties involved back to court. Finally, in the NWT example, as the territory moves towards devolution, a federal proposal for a "superboard" to oversee most of the land and resource decisions could seriously limit the participation of Dene, Metis, and Tlicho, among others, in land use planning boards. Each of these cases confirms the limited degree of self-determination afforded to Indigenous peoples in modern treaty governance, and they should serve as a caution for others considering this path.

NUNAVUT: PLANNING TO ACCOMMODATE INDUSTRY[1]

Nunavut was the first northern jurisdiction to undertake comprehensive regional land use planning. In many ways it can be considered a test case for the other territories. Soon after the Nunavut Land Claims Agreement (NCLA), and flowing from the agreement, was the creation of the Nunavut Planning Commission (NPC). The NPC completed two regional land use plans, with input from Inuit, but ended up violating both so profoundly that people lost faith in the regime. As a *Nunatsiaq News* editorial put it, "Because of a long series of foolish blunders … no reasonable person can now claim that the environmental protection system laid out within the land claims agreement is capable of inspiring public confidence" (2008). It appears that the NPC compromised the values and interests of Nunavummiut to favour industry, specifically two large-scale resource plans. While there is little evidence to indicate that direct industry influence corrupted the proper process, the failures of the Nunavut Planning Commission certainly helped facilitate the largest development project in Nunavut's history.

Over 20 years old, the Nunavut Land Claims Agreement (AANDC 1993a) is not without challenges. Inuit have faced resistance from the federal government in implementing basic elements of the settlement. The territorial government has also struggled to gain control over its own institutions, like the Nunavut Planning Commission (NPC), and to ensure that they abide by their original mandate. This key element of the NCLA, the NPC, is a public institution with members appointed by the Government of Nunavut and by the federal government. The NPC was originally given a critical responsibility to oversee comprehensive land use plans for the new territory. The organization describes itself as a "co-management organization with distinct authority and decision-making responsibilities protected under the NLCA. The NPC consults with government, Inuit organizations … but it is the Commission's responsibility to make the final decisions on how land use plans will be developed and how the plans will manage the land in Nunavut" (NPC 2014).

Almost immediately after the NLCA was signed, the NPC began dividing the territory into six regions and developing comprehensive land use plans for each. By 2000, two of the six plans had been completed: North Baffin and Keewatin**.** But in the nearly 15 years since, they have remained the only completed regional land use plans.

Aside from small-scale development,[2] any and all project proposals must be reviewed by the NPC. This process is described in Section 11.5 of the NLCA: "Upon

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[1] Elements of this section were previously published in "Land and Resource Management in the Canadian North: Illusions of Indigenous Inclusion and Participation," in Berger, Kennett, and King (2010).

[2] Section 21-1 of the NLCA defines small-scale development. It is essentially anything not requiring a permit or authorization. It might include mineral staking, construction within a

receipt and review of a project proposal, the NPC … shall: (a) determine whether the project proposals are in conformity with land use plans; and (b) forward the project proposals with its determination and any recommendations to the appropriate federal and territorial agencies."

Effectively, the NPC reviews the project, looks at existing regional plans (if relevant), determines whether the project conforms to those plans, and then issues a positive or negative conformity determination to the federal and territorial agencies. For instance, development that might negatively affect caribou calving grounds is discouraged in existing land use plans. Other conformity requirements include commitments to sustainable development, inclusion of Inuit knowledge, and wildlife conservation. The NPC plays a crucial role as an arbiter of development – effectively, a gatekeeper. However, since its creation, the commission has seemingly lost its way, approving a number of extremely controversial projects that blatantly deviate from the land use plans in place. Two particular cases demonstrate the NPC's negligence: Areva Uranium's Kiggavik Project and Baffinland Iron Mines' Mary River Project.

In the Keewatin Regional Land Use Plan (KRLUP), Section 3.5 states, "any review of uranium exploration and mining shall pay particular attention to questions concerning health and environmental protection." Section 3.6 follows that up by specifying that "any future proposal to mine uranium must be approved by the people of the region" (NPC 2000a). Yet, in late 2008, Areva Uranium's Kiggavik Project, a plan to extract 3,000 tonnes of concentrated yellowcake uranium annually for 17 years at multiple open-pit and underground mining sites 80 kilometres west of Baker Lake, received a positive conformity determination, even though the potential ecological or social consequences of the project were never reviewed. In addition, consultation on the project to satisfy the Inuit approval clause was limited to a single two-day workshop (*CBC News North* 2009). Remarkably, Brian Aglukark, regional director for the NPC, wrote, "With respect to sections 3.5 and 3.6 of the KLRUP, which require review of all issues relevant to uranium exploration and mining by the NPC, as well as approval of the people of the region, the NPC has concluded that these requirements have been met" (NPC 2009).

A starkly similar case occurred with another project in another region, Baffinland Iron Mines' Mary River Project under the North Baffin Land Use Plan (NBLUP). Section 3.5 of that plan states, "any party wishing to develop a transportation corridor shall submit to the NPC a detailed application for an amendment [to the land use plan]" (NPC 2000b). Yet Baffinland's project, a plan to extract 18,000 tonnes of high-grade iron ore annually for 21 years, 160 kilometres south of Pond Inlet, also received a positive conformity determination despite a proposal for two shipping corridors. As the company notes, "a railway system will transport (after its construction) the ore from the mine area to an all-season deep-water port and

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municipality, or hotels with fewer than 20 beds, for example.

ship loading facility at Steensby Inlet where the ore will be loaded into ore carriers for overseas shipment through Foxe Basin. A dedicated fleet of cape-sized ore carriers, capable of breaking ice will be chartered by Baffinland" (Baffinland Iron Mines Corporation 2008, 1).

This proposal would have created the largest development project in Nunavut history with tremendous ecological and social impacts. It is a project that should have garnered significant scrutiny from the NPC, especially given the NBLUP restriction on shipping corridors. Like the Kiggavik Project, the Baffinland proposal explicitly violated the land use plan and was allowed to proceed. It should be noted that Baffinland's proposal would later be amended to reduce the scale of the project. Nonetheless, work on the project continues.

Inuit have surrendered the majority of their territory and subsurface rights for input on these plans. Yet in the end they are still alienated from decisions about development that will significantly affect them. It seems clear that land use planning in Nunavut is neither empowering Inuit nor offering decision-making authority. Certainly Inuit serve on the NPC, but they have only half of the positions and the director of policy for the organization continues to live in Yellowknife, Northwest Territories (NPC 2014a). In addition, if the NPC ever makes a negative conformity determination, the minister has the power to exempt whichever proposals he deems important enough to do so, despite Inuit objections. (This is the nature of all land use plans emerging from land claim agreements in any jurisdiction.) In this case it is unclear why the NPC has violated the plans so grossly, but just a decade after its creation, the commission has certainly become dysfunctional. At least they too recognize as much: the NPC announced plans to overhaul land use planning in the territory by starting over with a new, Nunavut-wide plan covering two million square kilometres (NPC 2014b).

Work on the draft Nunavut land use plan (DNLUP) over the past seven years has led to the development of new rules and policy for each of Nunavut's regions. The DNLUP is now awaiting public consumption and feedback, yet there is renewed debate. In mid-2014 the Nunavut Planning Commission was forced to suspend the public hearing on the DNLUP and actually resorted to issuing a press release critical of Aboriginal Affairs and Northern Development Canada (AANDC), citing its "astonishment" that federal government representatives refused to provide the resources to ensure adequate consultation. They noted in the release that this decision was representative of an historic pattern of AANDC's underfunding regulatory boards in northern Canada and that the hearing, and perhaps the DNLUP itself, was in jeopardy (*Nunatsiaq News* 2014). At the time of writing, AANDC has not responded. And while the NPC awaits the resources to complete the territory-wide plan, they are still making decisions on land use plan conformity. With an unfavourable decision on Baffinland's recent expansion plans, the company asked the minister to intervene and grant an exemption from the land use plan. He has agreed (*Nunatsiaq News* 2015). This decision allows Baffinland permission to ignore a critical feature of the local regulatory regime, but more importantly, it

reveals ongoing power disparity between the federal government and Indigenous land use planners in Nunavut.

YUKON: CO-MANAGEMENT AS CONSULTATION

On 22 January 2014 the Yukon government released the regional land use plan for the Peel Watershed. The reception by Northerners, and Indigenous peoples in particular, was hostile. The Yukon legislature became the site of demonstrations in late January 2014 and Gwich'in in Fort MacPherson and Whitehorse as well as Inuvik, NWT, organized protest walks (*CBC News North* 2014a). Tr'ondek Hwech'in Chief Eddie Taylor proclaimed the release of the plan as "a sad day for all Yukon First Nations and all Yukoners" (Ronson 2014). His comments preceded an announcement that the Tr'ondek Hwech'in, along with the Nacho Nyak Dun and two conservation organizations, Canadian Parks and Wilderness Society Yukon Chapter (CPAWS Yukon) and the Yukon Conservation Society, were taking the Yukon government to court to, according to their lawyer Thomas Berger, defend "First Nations and environmental values in Yukon, but also to uphold principles entrenched in the Constitution" (CPAWS 2014). The cause of this angry reaction was primarily the Yukon government's decision to rewrite a previously widely accepted version of the long-debated Peel Watershed Land Use Plan.

The original recommended plan produced by the Peel Watershed Planning Commission (PWPC) in July 2013 was viewed favourably by many and considered "consistent with the spirit and intent of the UFA … uphold[ing] the principles of Sustainable Development," according to the planning commission that created it (PWPC 2011a). That plan sought to protect the vast majority of the Peel, excluding new oil, gas, or mineral staking claims and prohibiting new road or trail construction in 80 percent of the territory. The remaining 20 percent would allow resource development and infrastructure in varying degrees (PWPC 2011b). Final consultation on the plan revealed that over 80 percent of Yukoners were supportive (*Yukon News* 2013). In contrast, the plan drafted by the Yukon government, and ultimately adopted, rejected the philosophy of the PWPC and instead reversed the protection-to-development ratio. The government's plan would protect just 29 percent of the Peel, turn 27 percent into "a working landscape" and in the remaining 44 percent would allow development but within yet-to-be established "cumulative effects" thresholds. Industry would be permitted to operate but could be limited depending on the scope of plans and corresponding eco-system sensitivity (Government of Yukon 2014).

Despite the widespread opposition to the final Peel Watershed Land Use Plan, it became public policy on the day it was announced. And while there is much hope that First Nations with some degree of perceived power can stop the government's plan in court, that outcome is uncertain. The authority that land claims agreements provide the Na-Cho Nyak Dun, Vuntut Gwich'in, Tr'ondek Hwech'in, and Gwich'in

Tribal Council may be illusory with their contribution to the management of lands and resources in the territory limited to consultation. This pattern is reflected in the Yukon Umbrella Final Agreement (YUFA), the framework guiding land claims settlements in the territory, as well as each of the four specific land claims agreements of the above-mentioned nations. The agreements unfold like the rest of Canada's modern treaties: in most cases communities surrender 90 percent of their lands, extinguishing their title in the process – all this in exchange for tens of millions, even hundreds of millions in cash, jurisdiction on their remaining territory, and a formal say in the management of their formerly surrendered lands.

In the Yukon, co-management in land use planning means a seat on the Yukon Land Use Planning Council (the territorial government has the remaining two seats) with the power to make recommendations to the government and affected First Nations on planning decisions (AANDC 1993b, Yukon Umbrella Final Agreement [YUFA], 11.3). In addition to the territory-wide body, there are seven active or proposed regional land use planning areas/councils (of which Peel is one). Yukon First Nations also have YUFA-mandated seats on these, the number depending on the demographics of the planning region (YUFA, 11.4). While this membership comprises a minority in both cases, the real problems with YUFA's land use planning regime are embedded in the process set out for approvals. Chapter 11, sec. 6 states,

> A Regional Land Use Planning Commission shall forward its recommended regional land use plan to Government and each affected Yukon First Nation. Government, after Consultation with any affected Yukon First Nation and any affected Yukon community, shall approve, reject or propose modifications to that part of the recommended regional land use plan applying on Non-Settlement Land. If Government rejects or proposes modifications to the recommended plan, it shall forward either the proposed modifications with written reasons, or written reasons for rejecting the recommended plan to the Regional Land Use Planning Commission, and thereupon; the Regional Land Use Planning Commission shall reconsider the plan and make a final recommendation for a regional land use plan to Government, with written reasons; and Government shall then approve, reject or modify that part of the plan recommended. (YUFA 11.6.1–11.6.4)

The Yukon government can accept or reject planning proposals and is only required to provide written reasons for rejection, by any measure a limited test of accountability to the Indigenous claim signatories. Section11.6 represents an apparent legitimate backdoor out of the YUFA. That being said, First Nations do have some influence outside of planning commission membership in the form of jurisdiction over settlement lands:

> Each affected Yukon First Nation, after Consultation with Government, shall approve, reject or propose modifications to that part of the recommended regional land use plan applying to the Settlement Land of that Yukon First Nation … If an affected Yukon

> First Nation rejects or proposes modifications to the recommended plan, it shall forward either the proposed modifications with written reasons or written reasons for rejecting the recommended plan to the Regional Land Use Planning Commission, and thereupon: the Regional Land Use Planning Commission shall reconsider the plan and make a final recommendation for a regional land use plan to that affected Yukon First Nation, with written reasons; and the affected Yukon First Nation shall then approve, reject or modify the plan recommended under 11.6.5.1, after Consultation with Government. (YUFA 11.6.4–11.6.5.2)

The key distinction between the two passages is non-settlement versus settlement lands, the territorial government having ultimate jurisdiction over the former and the First Nations over the latter. If First Nations reject a recommended plan (and presumably a plan created by the Yukon government independent of a planning commission), they are able to remove their so-called "settlement" lands from the plan's applicability. But in the case of the Peel, because they surrendered title to the vast majority of their territory, their combined lands excluded from the plan would equal just 3 percent of the planning region (PWPC 2011b).

In the recent Supreme Court of Yukon decision (Supreme Court of Yukon 2014) on the legality of the territorial government's Peel Watershed land use plan, Justice Veale argued that this distinction between settlement and non-settlement land should be less rigid than the text prescribes. Rather, Indigenous peoples in the territory should also have significant input on what happens in non-settlement lands even if they have extinguished title. This interpretation of the modern treaties is in line with recent Supreme Court decisions made in "a manner that furthers the objective of reconciliation" (Supreme Court of Yukon 2014). Justice Veale (para. 145) then ordered the government's much-opposed Peel Watershed plan back to the consultation phase of the process (*CBC News North* 2014b). This was a major victory, not only for those campaigning to protect the Peel but also for those hoping for a broad interpretation of modern treaties. The parties now wait for the Yukon Court of Appeal to hear the case.

The Na-Cho Nyak Dun, Vuntut Gwich'in, Tr'ondek Hwech'in, and Gwich'in Tribal Council Final Agreements offer little other recourse since their language is identical to that of the YUFA. When Na-cho Nyak elder Jimmy Johnny proclaimed that "every trickle of water that runs into the Peel watershed should be protected" (Clynes 2014), he no doubt expected to act on that commitment. I suppose this is a fundamental problem with treaties generally; Native peoples expect one thing and provincial, territorial, and federal governments another. So while they may start out as promising frameworks for collaborative governance, treaties quickly devolve into sites of conflict. Instead of deliberating and resolving conflicts, the discussion is moved to the courts with imperfect, drawn-out, temporary, ad hoc solutions. This situation resembles the now-entrenched process with Confederation-era treaties. So we have new institutions but the same old problems.

NWT: DEVOLUTION AND THE DEMISE OF LOCAL LAND-USE PLANNING

Similar to the current contentious experiences of stakeholders in the Yukon in relation to the Peel Watershed Land Use Plan, there are antagonisms in the NWT. In the case of the NWT, concerns coalesce around devolution (see Irlbacher-Fox's chapter in this volume). Devolution will allow the NWT to keep a percentage of the royalties from resource extraction and increase territorial responsibility for the land and resource management regime. But in the process, some Dene First Nations argue, they will correspondingly lose jurisdiction.

In advance of "D-Day" on 1 April 2014, the Tlicho took the NWT to court; their argument was that the regulatory changes proposed to accompany devolution would truncate land use planning stipulations embedded in land claims agreements. Grand Chief Eddie Erasmus suggested that the "decisions about development in the heart of our territory, Wek'eezhii, will be made with no Tlicho input whatsoever. This is devastating to our ability to protect our way of life. Our voice is being silenced. It is contrary to our agreement" (*Hq Yellowknife* 2014). The final case study in this chapter, the NWT example, illustrates the power of the federal government to manipulate land claims agreements in ways that do not fulfill their spirit and intent, and that Indigenous signatories argue do not fulfill legal obligations either, resulting in an erosion of Indigenous rights and a silencing of their interests.

These concerns around devolution and the loss of Tlicho (and Sahtu, Gwich'in, Dehcho, Akaitcho Dene, and Métis) input revolve around upcoming amendments to the MacKenzie Valley Resource Management Act (MVRMA) contained in Bill C-15 (see Parliament of Canada 1998, 2013–14). The MVMRA was introduced in 1998, the result of more than 25 years of land claims negotiations and agreements, which required the MVRMA federal legislation to implement the land use planning provisions within the land claim agreements. Except for the Inuvialuit Settlement Region, the MVRMA would ultimately shape the regulatory regime for the whole of the NWT while also providing a critical degree of power to Indigenous communities through robust co-management arrangements (reinforcing land claims, and independent of them for areas without agreements). A key feature of the MVRMA is the establishment of independent land and water, land use, and renewable resource management boards in each Dene region, responsible for planning and overseeing decision-making. In addition, the Mackenzie Valley Land and Water Board and the Mackenzie Valley Impact Review Board were established to serve territory-wide decision-making and, in particular, to provide a process for those regions without land claims.

Each board has authority to consider development and the management of development (creating land use plans, issuing permits, leases, etc.). Three of these boards are regional, required by land claim agreements, and span Gwitchin, Sahtu, and Wek'èezhìi traditional territories. They allow 50 percent Indigenous

representation and are seen as permitting local control over development. While I have written about the problems with this type of arrangement (King 2010), Dene and Métis communities in the NWT seem to have a relative degree of confidence in the system as they now fight to maintain it in the face of change. As with so much federal legislation and policy affecting Indigenous peoples, fighting for the unsatisfactory status quo is preferable to future disempowerment.

The shape of the alternative now proposed by the territorial and federal governments is consolidation: elimination of regional land management boards in favour of a territory-wide MacKenzie Valley Land and Water Board – a "superboard." The proposal for the superboard emerged in 2008 from the "Review of the Regulatory Systems across the North," a study commissioned by AANDC. That report suggested that the system could not "consistently perform its role in a responsible, consistent manner" due in part to the complexity of the system: "The number of boards and regulatory authorities are a result of the comprehensive land claim agreements. The system was created to meet multiple objectives, but, in doing so a very complex regulatory system, that is not very well understood, was developed" (McCrank 2008, 12). The common-sense solution then was to simplify the regulatory framework. The report calls it "restructuring": it would entail a number of hurdles including restructuring regional land use plans as well as making amendments to the three land claims agreements in the territories.

But interestingly, the governments of the NWT and Canada are proceeding with the superboard proposal without meeting these requirements. Bill C-15 will simply override constitutionally protected land claims. The original MVRMA text corresponding to land claims agreements stipulated that "the Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene and Metis Comprehensive Land Claim Agreement require the establishment of land use planning boards for the settlement areas referred to in those Agreements and the establishment of an environmental impact review board for the Mackenzie Valley, and provide as well for the establishment of a land and water board for an area extending beyond those settlement areas" (Parliament of Canada 1998, 1).

However, Bill C-15 replaces this text, and specifically the final sentence, with "provide as well for the establishment of a land and water board for an area that includes those settlement areas" (Parliament of Canada 2013–14, C-15, Part 4; 112). The distinction between the two passages is that the former stipulates boards for regions and an additional territory-wide board; the latter requires only the territorial-wide board and incorporating regions. (It is important to reiterate that a MacKenzie Valley Land and Water Board existed pre-devolution and deals with non-settlement lands and lands not yet covered by claims.) While it seems that this is an apparent violation of the land use planning provisions of the land claims agreements in the territory, the federal government seems to see an exemption of sorts through the membership provisions.

On AANDC's website, a "Myths & Facts" document on devolution argues that it is a myth that "restructuring of the Mackenzie Valley Land and Water Board will

significantly reduce Aboriginal input." Instead, the department asserts, "as is currently the case, the proposed new Board would be made up of equal membership from Aboriginal and government nominees … This approach is consistent with settled land claim agreements in the Mackenzie Valley (AANDC 2014). The document's focus is on proportional representation. In the Gwich'in Final Agreement, the "Planning Board shall have equal membership from nominees of the Gwich'in Tribal Council and of government, not including the chairperson" (24.2.2). Language in the Sahtu Dene and Metis Agreement is identical (INAC 1993). The Tlicho agreement is slightly different but still emphasizes 50 percent representation in the land and water board for the settlement area as well as 50 percent representation in the "larger board" (INAC 2003, Tlicho Agreement, 187-192). In the amendments to the MVRMA, the super-board will comprise 11 members, six of whom will be appointed via nomination by First Nations or Métis governments. This proportion ensures 50 percent representation. Moreover, the act stipulates that if the superboard is considering development applications in settlement areas, the affected nation's representative on the board should deliberate on that application (MVRB 2012).

In many ways this situation is worse than that in the Yukon. At least there, Indigenous peoples still have jurisdiction in their settlement areas and can exempt those lands from development they disapprove of. This is not the case in the NWT, where Tlicho, Dene, and Gwitchin will have stakeholder status in their settlement areas and even less input in their traditional (now "surrendered") territories. This loss of power is reinforced by another piece of legislation, the NWT Surface Rights Board Act, which becomes law in 2015. The Surface Rights Board allows industry to appeal the decisions of land use planning boards, potentially overturning community desires and reducing further any control Indigenous peoples have in their own territories (Wohlberg 2013). Through the process of regulatory restructuring, the NWT and the federal government have been able to manipulate and reinterpret agreements in ways that will result in divesting power from Indigenous communities in the management of their lands and resources. While this process may be a case of violating conventions and land use planning norms – a violation of process – it does not appear that land claims agreements are powerful enough to compel a reconsidering of devolution and the superboard proposal. As the Gwitchin Agreement notes, "government shall retain the ultimate jurisdiction for the regulation of land and water" (INAC 1992, Gwitchin FA 24.1.1 (c)).

RECONSIDERING CLAIMS-BASED CO-MANAGEMENT AND TREATY INERTIA

The concept of land use planning or "managing" land is not foreign to Indigenous peoples. Anishinaabe, Mushkego, and Lakota communities, among others, have long practised sophisticated relationships with the land and the creatures we share it with.

Whether these relationships are governed by very old treaties or more contemporary codified and institutional models, such as Grant Council Treaty #3's "Great Law of the Earth" or the Haida "Yah'guudang," Indigenous values can and do underlie management regimes. That being said, these examples often exist independent of land claims agreements where Indigenous peoples find themselves required to rearticulate or translate values in unfamiliar terms and then attempt to implement those values in a setting that privileges non-Indigenous notions of land management. In the new models of governance structured by land claims, the powers that Indigenous peoples are able to exercise seem insufficient to execute responsibility and obligations to the land. In other words, the land management traditions that have sustained Indigenous peoples for thousands of years are simply not possible under these institutional arrangements because of the significant restraints placed on jurisdiction. While communities certainly have consultative powers (and are no longer barred from speaking in public), they are finding that they cannot protect the land from decisions that may lead to irreversible damage, except by resorting to adversarial court proceedings. And even then the results are not yet clear.

While now focusing on a renewed land use planning initiative, the Nunavut example is a case of the corruptibility of the planning process under land claims agreements. Even in cases where Inuit input is considered and plans are created that seem to satisfy all involved, the quasi-independent Nunavut Planning Commission was able to violate these plans, leading to a compromise that favoured industry. Fortunately, the process-violation was exposed with significant implications for planning in the region, leading to a new draft territory-wide land use plan. Time will tell if the new land use plans can remedy the situation, but a new challenge has already emerged in a conflict over decision-making between the NPC and AANDC whereby the latter is invoking a provision in the NCLA to support industry while truncating local decision-making. In Yukon, Indigenous peoples simply believed that the land claims and self-government process gave them more power than they actually have in Canadian federal and territorial law. They are the best example of what Diabo (2013) calls "termination," voluntarily entering into agreements to modify Indigenous rights from something resembling sovereignty to municipal-like status. Termination in this case has left the Dene and Métis with limited powers to protect sacred lands and forced them back into court where they have accrued a significant victory but still wait the outcome of the government's appeal. Finally, the NWT case reveals how in times of conflict, the federal and territorial governments can manipulate the meaning of claims agreements in pursuit of their own interests. It reflects the dangers of reinforcing state power via land claims agreements, an example of what Alfred and Corntassel (2005) call postmodern imperialism. Devolution will erode what little institutional power Indigenous peoples still wield and very likely prevent the creation of parallel land management models.

A few northern Indigenous nations are still outside the land claims process. Most of those without modern treaties are participating in framework agreements that will eventually lead to agreements. They should be aware of the troubling

implications of existing agreements as they relate to land and resource regimes. It is unclear whether land claims agreements can ever actually produce models of land and resource management that allow Indigenous peoples to maintain power to affect their decisions on their own terms. A corollary problem is that alternatives are equally unclear. What power can Indigenous peoples exercise independent of treaties? Here, they lack resources and often face state encroachment and even violence (the experience of Lubicon Lake Cree and Barriere Lake Algonquians, among others, confirms this). The recent Supreme Court decision in *Tsilhqot'in* has emboldened some by recognizing Aboriginal title to unsurrendered lands, but it also left underlying provincial jurisdiction unchallenged. Ultimately, until there are attempts by various levels of the Canadian government to take Indigenous conceptions of their relationships with the land seriously and share power in meaningful ways, neither land claim agreements nor ad hoc arrangements among nations without treaties seem to offer happy solutions. Perhaps this is the fundamental tragedy of claims based co-management (or any institutional power-sharing arrangement for that matter).

While sceptical, this chapter is not an implicit endorsement of paralysis or the status quo. Rather, it is a call for us to reflect critically on these modern treaties and question if they are really the best we can come up with, to imagine alternatives to this fundamentally unjust relationship, and then to act in unique, creative ways upon those alternatives.

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6

MULTILEVEL REGIONAL GOVERNANCE IN THE EEYOU ISTCHEE JAMES BAY TERRITORY

Brian Craik

As of 1 January 2014, a new regional government composed equally of Cree and "Jamésiens" (non-Aboriginal occupants of the territory) replaced the old municipal governing structure for the Eeyou Istchee/James Bay region, an area covering 17 percent of Quebec. Named Eeyou Istchee James Bay Regional Government in English and Gouvernement regionale d'Eeyou Ischee Baie-James in French, this new joint structure is a unique example of multilevel governance, bringing Aboriginal and non-Aboriginal partners together in defining common goals for a region and a territory they share.

This new governance structure has its origins in the James Bay and Northern Quebec Agreement (JBNQA), but it goes beyond the JBNQA in responding to the evolving needs and challenges of the region and its inhabitants. With growing pressures from natural resources development and the ever-changing reality of Cree communities, it became clear that a new governance model was necessary to coordinate action on land planning, resources management, and environmental protection. In 2012, the Quebec government and the Crees therefore signed an agreement that led to the creation of this new regional government. I will shortly discuss the potential of this new regional structure, but before I do so, let us look at the history and the context that led to the creation of this unique model of multilevel governance.

Thanks to Adrienne Davidson for the transcription of Brian Craik's presentation to the State of the Federation conference.

REGIONAL GOVERNANCE UNDER THE JAMES BAY AND NORTHERN QUEBEC AGREEMENT

The James Bay and Northern Quebec Agreement (JBNQA) is the oldest of the modern land claim agreements. In many respects, the agreement, which settled Eeyou and Inuit rights, was a trailblazer, clarifying Aboriginal rights with respect to the jurisdictions of Quebec and Canada and their plans to develop the northern part of Quebec. In particular, the agreement was developed to legitimize the completion of the La Grande hydroelectric complex, which had begun under dubious legal circumstances. From a Cree perspective, though, the agreement was supposed to be the foundation for a new model of governance in the territory.

Hydroelectric development came to our region in 1972, bringing with it the dynamics that ultimately led to the signing of the JBNQA. Large-scale development requires that investors are able to concretely lease or own the land on which they operate; certainty is achieved when title over land is clear, as it guarantees investors' safety and (in the case of hydro development) the continued and uninterrupted production of electricity. However, in Northern Quebec, the Crees and the Inuit had challenged the clarity of Quebec's title over the region. In 1972, the Crees and the Inuit successfully sought an injunction from the Quebec Superior Court to halt work on the James Bay hydroelectric project. Justice Albert Malouf decided in favour of the Crees and Inuit and ordered that work on the project be halted. And though the Quebec Court of Appeal quickly overturned the decision, the Malouf decision nonetheless introduced some measure of uncertainty into the equation and forced Quebec's hand.

The Government of Quebec put together an offer to begin negotiations. The Cree read and promptly burned the offer, countering with a Cree version entitled "Our Land, Our Demand" (unpublished document, 1974). Quebec wanted to seal its title to the land so that it could develop hydroelectric capacity and exploit the minerals and forests on the territory. The Crees wanted into Canada and Quebec on terms that gave them a head start: they wanted into the Quebec economy by training their people to work in modern industry and administration; they wanted good housing, water, and sewer facilities; they wanted control over the education of their children; and they wanted control over health services. More than anything, they wanted a say in the governance of their traditional lands.

The Crees had seen what other Aboriginal peoples had been offered and how they had been treated under older treaties, and they wanted none of it. They wanted a certain amount of control over regional development on their traditional territories and wanted to be able to continue their way of life – hunting, fishing, and trapping; they wanted greater environmental protection. Though it probably seems a bit dated now, John Ciaccia, at that time minister of Indian affairs in Quebec, underlined how important it was for the Crees to participate in the governance of the territory when he submitted the 1975 agreement to Quebec's National Assembly:

> The native communities will have local administrations, substantially in the manner of local communities throughout Quebec, and regional administrations will exercise municipal functions in areas beyond the old established communities. In districts inhabited by both native and non-native populations, Cree representatives and representatives of the Municipality of James Bay will form a joint administration to be known as the Zone Council ... Why do we want to do all this? Simply because there are people living in the North, who need public services, who are counting on good administration of their affairs, and who have a right to participate in that administration ... The Government proposes to deal with the native peoples as full-fledged citizens. I think it is fair to say that great care has been taken in the negotiation of this Agreement to see that nothing prejudices their rights as citizens.[1]

The James Bay and Northern Quebec Agreement is a complex document with 31 chapters that set out measures for a Cree land regime as well as for social and economic development in the communities. There are parallel but different rights for the Inuit of Northern Quebec. The Cree and Inuit rights in the agreement were ratified and subsequently protected under section 35 of the Constitution as part of the package for the repatriation of the Constitution of Canada in 1982. The treaty has been amended 24 times since its signature in 1975; about 20 of the amendments involved the Crees.

In the JBNQA, the lands are split into three categories. Category I lands, about 5,000 km^2, are roughly equivalent to reserve lands. On these lands, the federal government maintained the fiduciary legal obligation of care for the Crees as Indians under the Indian Act, an obligation that was minimally carried out, if at all. It was also on these lands that the Crees were expected to have a strong right of governance. Category II lands, 70,000 km^2, are special lands set aside in which the Crees only can hunt, fish, and trap, and over which the Crees have some other rights to land replacement and other things (though these lands are more public, and mining companies can conduct exploration). Category III lands, 300,000 km^2, were thought by many in Quebec to be the same as public lands. This, however, was (and is) not the case; the Crees have special hunting and fishing rights in these lands. Although denied by some in Quebec, the fact is that what was referred to as a trapline in the JBNQA was defined in the same book as "an area where harvesting activities are by tradition carried on under the supervision of a Cree tallyman." In the way the Crees saw it, Cree use of the traditional land would continue to be recognized and protected.

In implementing the JBNQA, tripartite bodies – with the Crees, Quebec, and Canada – have been set up. Similarly, the Crees sit on bilateral bodies with Quebec and with Canada. The agreement also established an environmental and social protection regime involving representatives from the Crees, Quebec, and Canada – the first such process in Canada. It provided Cree local governments with certain

[1] http://www.gcc.ca/newsarticle.php?id=313.

regulatory powers on Category I and II lands. It also set up a Hunting, Fishing and Trapping Coordinating Committee – composed of representatives of the Crees, Inuit, Naskapis, Quebec, and Canada – to oversee the management and regulation of wildlife and Aboriginal and non-Aboriginal hunting, trapping, and fishing. The JBNQA was arguably one of the first models of multilevel governance involving Aboriginal, federal, and provincial partners. Indeed, the level of complexity of the JBNQA is (in some regards) quite beyond what is found in agreements signed since.

However, the promise of partnership contained in the James Bay Agreement did not materialize after its signature. The 1980s and '90s were difficult times for the Crees. The Cree School Board, the Income Security Program, and certain aspects of the Cree Board of Health and Social Services were being implemented by Quebec, but some key elements of the James Bay Agreement pertaining to land, wildlife, and resource management were being ignored by Canada and Quebec. Cree unemployment was high, and promises of economic and social development never materialized. The Crees filed legal proceedings that questioned the whole regime set up under the JBNQA and rejected any new hydroelectric development on their lands as long as their rights were not respected.

The implementation of the JBNQA was especially disappointing at the level of regional governance of category II and III lands. The Zone Council that was created to co-manage category II lands had a very limited mandate, and Quebec appointed most of the members. The council's role was limited to municipal-type governance – which the Crees were not very interested in. Lacking legitimacy and real authority, it became somewhat moribund over time. The Crees had even less to say in the administration of category III lands, which were under the authority of the Municipalité de la Baie-James, a non-democratic body controlled by James Bay Development Corporation, a regional economic development arm of the provincial government. The Jamésians (non-Aboriginal group) in the region were also dissatisfied with the way the territory was governed; key decisions were largely in the hands of corporate bodies such as the James Bay Development Corporation and Hydro Québec, as well as some treaty instruments that were largely operated out of Quebec City. Both the Crees and the Jamésians wanted to have more involvement in the management of the territory.

RENEWING OUR TREATY: THE PAIX DES BRAVES AND BEYOND

The renegotiation over the management of the territory came up at a time when Quebec and the Crees were trying to make peace. We had just gone through a fairly long fight over the Great Whale River project; at the same time, the Crees had concerns regarding Quebec's fight for independence, and the status of their rights within that scenario. In the early 1990s, with Cree unemployment high and

the communities receiving few of the benefits promised in 1975 agreement, two newly proposed hydroelectric projects (the Nottaway, Broadback, and Rupert Rivers [NBR] project and the Great Whale River project) were at issue; both were potentially too damaging to the environment and they were progressing in a way that did not respect the JBNQA. In response, the Crees filed legal proceedings and undertook a three-year fight to stop the projects. Ultimately, Premier Parizeau pulled the plug on the developments so as to focus on Quebec sovereignty. It was Premier Landry who later took up the initiative to open the door to a new approach to relationships with the Crees. After years of unsettled relations and legal fights, the Crees and Quebec agreed to "reset" the relationship. In 2001 they created a new partnership through the New Relationship Agreement. Signed on 7 February 2002, it has come to be known as the Paix des Braves.

The Paix des Braves marked a turning point in relations between the Crees and the Quebec government and made way for a true partnership in the development of the resource wealth of Eeyou Istchee. Under this new agreement, Quebec transferred to the Crees parts of its responsibilities under the JBNQA regarding economic development. The agreement also transfers $70 million per year to the Crees for this purpose. The funding is indexed by the increased value over time of the electricity, minerals, and forest products taken from the territory, a form of revenue-sharing on natural resources extraction. Secondly, the agreement provides for Cree consent for the Eastmain 1 and Eastmain 1A hydroelectric projects. As a condition of this consent, these projects provided for contracts and employment of Cree workers. In addition, deals were signed on training, mercury contamination, forestry, mineral resource development, protected areas, electrification of the communities by transmission lines, and other matters. As Matthew Coon Come, the Cree grand chief, notes, the Paix des Braves pressed the restart button on this bilateral relationship.[2] And from what I have seen, it has been a much-improved relationship between the Crees and the Quebec government since.

With growing interest in the development of northern infrastructures to facilitate access to natural resources, the Government of Quebec defined a new economic strategy for the North (Plan Nord) in the late 2000s. This development strategy, renamed Le Nord pour Tous under the newly elected government of the Parti québécois in 2012, underlines the ongoing importance of northern resources and the intention of Quebec to seek prosperity through its development. In reaction to these plans, the Crees have created a working group to establish their own priorities and expectations for northern development. The Cree Vision of Plan Nord establishes a number of key priorities, including social housing, energy, transportation infrastructure, tourism, and protected areas. In particular, the Cree Vision sets out

[2] Speaking Points for Grand Chief Dr Matthew Coon Come, Governance in the Eeyou Istchee James Bay Territory, University of Québec Abitibi-Témiscamingue, Val D'or, 13 February 2013.

certain key principles regarding regional governance as they pertain to respect for Cree rights, consultation and accommodation, meaningful participation and benefits through direct investments, partnerships, contracting, and employment. Also highlighted is the goal that development continues to meet measures of environmental and social acceptability and compliance with the environmental and social protection regime of the JBNQA.

In working together to meet these goals, the Government of Quebec has committed to setting aside 50 percent of the territory of Plan Nord by 2035 as environmentally protected areas. These would include a network of protected areas equalling 12 percent of the territory by 2015, and the remaining 38 percent would be protected through the development of non-industrial activities such as tourism and biodiversity protection to be implemented over the whole territory. The Crees have also partnered with Quebec in the creation of the Assinica National Park Reserve and are working with Quebec regarding the establishment and management of the Albanel-Témiscamie-Otish National Park.

THE PATH TO REGIONAL GOVERNANCE IN EEYOU ISTCHEE JAMES BAY

While the Paix des Braves signalled substantive movement forward with respect to partnerships over resources and lands, significant issues still remained with the governance of the region. Local imbalance of representation between the Jamésian and the Cree populations was a big concern. Moreover, in 2001, Quebec passed Bill 40, An Act to Amend the James Bay Region Development Act and Other Legislative Provisions. The act reorganized the territory, transformed the Municipalité de la Baie-James (MBJ) into a real regional government for category III lands, and got rid of the Zone Council – all without Cree consent, in a manner reminiscent of the old days. The Crees protested that the act violated the JBNQA, which promised (in the words of John Ciaccia) that "in districts inhabited by both native and non-native populations, Cree representatives and representatives of the Municipality of James Bay will form a joint administration."[3]

The Crees opposed the 2001 move to a new regional government because it was done without consultation. Most significantly, the new governing structure for category III lands did not include Cree representatives, even if they formed a significant proportion of the population and held specific rights on the land. The board of the reformed MBJ was instead composed of representatives from the surrounding non-Aboriginal municipalities. Not surprisingly, the new MBJ faced major implementation challenges; official documents and maps posted by the new regional government included Cree communities within their jurisdiction, when

[3] http://www.gcc.ca/archive/article.php?id=344.

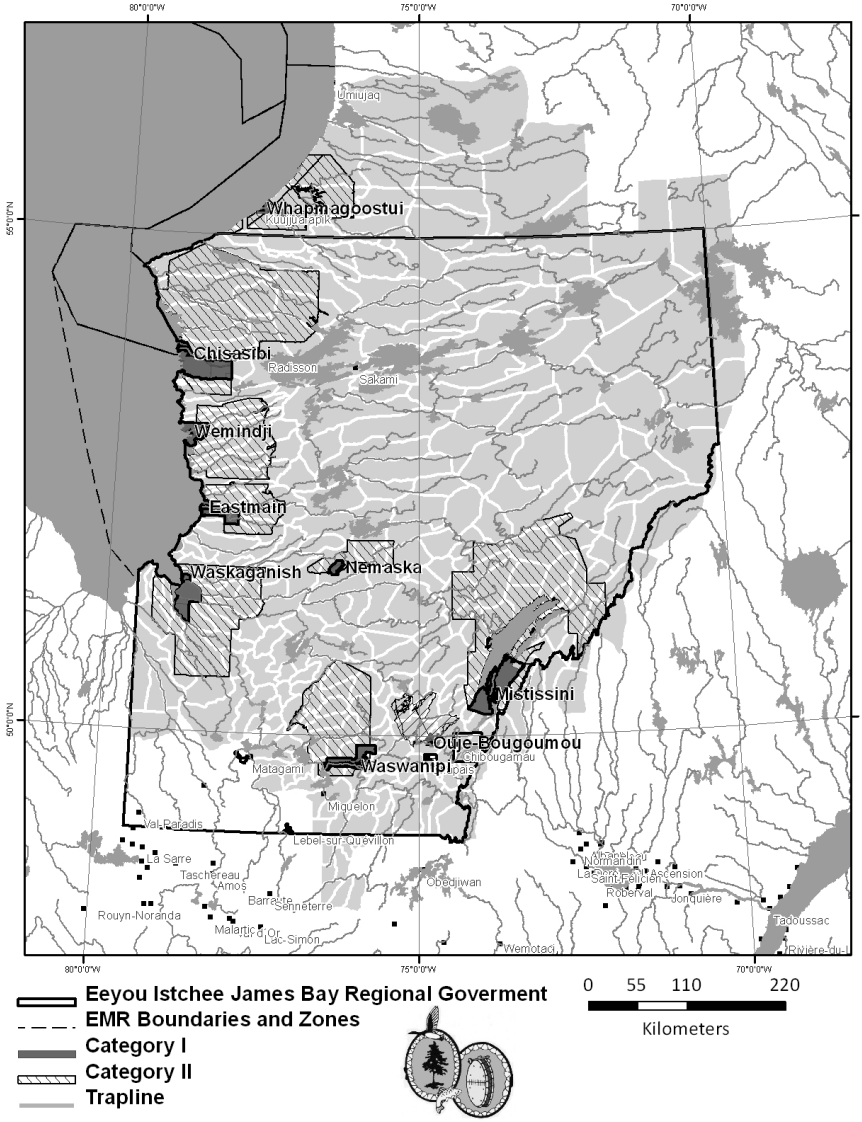
in fact the Crees had nothing to do with the MBJ. The Crees did not participate in electing people to the board, nor were they well served by the MBJ (except for public roads), and a real sense of paternalism started to reign in the area. The Cree population became very upset as the MBJ started to pass zoning bylaws with respect to (for example) what structures were built on the territory or where cars could be parked on the road. A prime example of the problematic nature of the MBJ arose with an application to build a tourism attraction in the territory on the road between Radisson and Chisasibi. A Cree individual had built a *shaputuan*, a large tepee with doors at each end. However, the MBJ said that the *shaputuan* could not act as a tourist attraction because it did not meet local building standards (as one can imagine it would not).

With issues continuing to emerge with the implementation of the MBJ, and regional demographics changing rapidly, the Government of Quebec, along with the Crees and Jamésians, began to renegotiate regional governance. The Cree population on the territory today numbers over 17,000 people, just slightly more than the Jamésian population. This is a significant change from 1975, when there were just slightly more than 6,000 Crees and the Jamésien community was larger and growing. Regional governance had to reflect this changing reality, while building on the JBNQA and the Paix des Braves.

The Governance Agreement signed in 2012 creates a unique hybrid regime for regional governance. It provides for the creation of a new public regional government on category III lands, which form 80 percent of the territory, and for a Cree Nation Government on category II lands. The regional government for category III lands will be composed of Crees and Jamésians in equal numbers and will merge into a single authority functions equivalent to existing regional administrative structures in Quebec. It will exercise powers in key areas such as land management, economic development, and resource planning. Importantly, as of January 2014, this new regional government replaces the old Municipalité de la Baie-James.

There are 11 Cree representatives on the new regional government, including the grand chief, the deputy grand chief, and nine Crees. The non-Aboriginal municipalities also have 11 representatives in the regional government, and Quebec has one non-voting member. In ten years the governance structure will be reviewed with respect to changes in the resident population of the territory, to decide whether there need to be any changes to the composition of the regional government. The government will be run according to democratic principles (quorum will be constituted by having both a majority of Crees and of Jamésian representatives), meetings will be held approximately once a month, and these meetings will be public. Citizens will be able to communicate with the government in Cree, French, or English; employees of the government will work in either French or English; and the regional government will translate certain texts that might come from the Quebec government so that non-French-speaking members of the regional government can engage with them.

Figure 1: The James Bay and Northern Quebec Land Regime



Source: Reproduced with permission from the Cree Nation Government.

The regional government will exercise its powers under the Cities and Towns Act, the Municipal Powers Act, An Act Respecting Land Use Planning and Development, An Act Respecting Municipal Taxation, and other relevant Quebec legislation. It can therefore play a leading role in areas such as regional economic development, support for the development of land or forest resources, the management of watercourses and lakes, the establishment and management of regional parks, energy, and waste disposal. The regional government may also expand its jurisdiction to take on some of the functions associated in Quebec with a Municipalité Régionale de Comté (MRC) in order to establish a long-term global strategy for regional development. It will also be the primary regional interlocutor to Quebec regarding resource development.

The second element of the Governance Agreement provides for greater Cree autonomy on category II lands. These are the lands over which the Crees have exclusive rights of hunting, fishing, and trapping under the 1975 JBNQA.[4] On those lands, regional governance will effectively be exercised through an exclusively Cree body, the newly created Cree Nation Government, with jurisdictions, functions, and powers over category II lands under Quebec laws with respect to, among other apects, land and natural resource planning and management, regional development, and municipal management.

With regard to land and natural resource planning, the Cree Nation Government will establish an Eeyou Planning Commission. This commission will, in consultation with the Cree communities and Quebec, prepare a Regional Land and Resource Use Plan for category II lands. The plan will involve economic, environmental, and cultural usages as well as plans for urban zoning when required. With regard to land and resource management, the Governance Agreement provides that the Cree Nation Government may exercise land and forestry management powers on category II lands, subject to negotiation of specific agreements with Quebec. The Cree Nation Government effectively extends the powers of the existing Cree Regional Authority for category II lands and will therefore maintain a similar executive structure.

CONCLUSION

The James Bay and Northern Quebec Agreement of 1975 laid the foundation for the treaty relationship between the Crees and Quebec. They later became partners

[4] Additionally, there is the possibility of expanding the region into the Kativik area north of 50°. However, this would require an agreement with the Inuit and with Quebec, of course. There are also other lands along the eastern border of the region where the Crees claim traditional rights, but these have not yet been settled; there may be some expansion of the territory in those directions in the future.

in the economic development of the territory with the Paix des Braves of 2002. The new governance agreement builds upon these two earlier agreements to establish a partnership between the Crees, Quebec, and the Québécois living in the territory for the governance of the land.

This kind of multilayered jurisdictional arrangement for regional land management is a first in a Canadian province. As former Premier Charest stated at the signing in July 2012, "We've searched and looked for precedents and have found none. It is a first. There are no precedents; I'm convinced that leaders of First Nations in Quebec and in Canada will want to look very closely at this agreement today. We would be flattered if they thought that through this agreement and the work we have accomplished together, that there is some source of inspiration of what they may choose as a common path."[5]

Ultimately, the test of the Governance Agreement will be in its implementation. The agreement has many moving parts, and will require new structures and processes to be put in place. We are under no illusions as to the scale of the task. But we are confident that, with determination and good faith from all the partners, we will be successful.

This partnership on territorial governance between the Crees, Quebec, and the non-Aboriginal residents living in the region translates the principles of inclusiveness and shared governance into practical mechanisms. For the first time, it gives the Crees the sense that they are partners in the governance and the development of the territory. None of this has been easy to do, but it is the right thing. As Grand Chief Matthew Coon Come has said, "Cree participation in governance and in responsible and sustainable development is the key. This is why we negotiated with such determination the Governance Agreement with Quebec, for it provides us with the tools to assume our rightful place in the governance of our homeland, and to build new governance and economic partnerships with our neighbours, the Jamésians, and with Quebec."[6]

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[5] http://www.cbc.ca/m/news/canada/montreal/quebec-cree-sign-historic-pact-to-create-new-regional-government-1.1246133.

[6] Speaking Points, Matthew Coon Come.

7

IMPLEMENTING THE TŁĮCHǪ FINAL AGREEMENT

John B. Zoe

The Tłı̨chǫ are Aboriginal peoples who inhabit the area northeast of Great Slave Lake, living in four communities in the Northwest Territories. Our leader, Monfwi, signed on to Treaty 11 in 1921; his words back then became the basis and mandate for our contemporary land claims negotiations: "We will not be restricted from our way of life ... As long as this land shall last, it will be exactly as I have said."

The process of modern land claims negotiations for the Tłı̨chǫ Government began with the negotiation of the Dene-Metis umbrella agreement with the Government of the Northwest Territories (GNWT) and the Government of Canada. That agreement fell apart in 1990 when the federal government pulled the rug out from under it, but land claims moved forward in the NWT, and negotiations focused on regional claims. Of those involved in the umbrella agreement, it was the Gwich'in and Sahtu who went first and second, settling their land and resource agreements; the Tłı̨chǫ came on as the third agreement.

The Tłı̨chǫ process commenced in 1992 under the comprehensive land claims policy, though we did not actually sit down together until late 1993. In those early days we were negotiating only a lands and resources agreement. However, when the federal policy on the inherent right to self-government came into place in 1995, we included self-government in our negotiations and built an agreement that tied the two together. An Agreement-in-Principle (AiP) was completed in 1999, and after 11 years of negotiations, we concluded the Final Agreement in 2003. The Tłı̨chǫ endorsed the agreement, with 97 percent of eligible Tłı̨chǫ voters approving it. Following its ratification at the community level, the negotiated agreement went

We would like to thank Adrienne Davidson for the transcription of this presentation to the State of the Federation conference.

to the Territorial government for approval in the legislature and then to Ottawa for approval in Parliament.

When this agreement went through in 2005, it was the only agreement that I am aware of – though perhaps this is because it is the only agreement that I have been involved with – that had to go through the process of public consultation *twice*. During negotiations, there was pressure from the public to have greater say in the process. Nonetheless, we moved forward and cleared that additional hurdle; it was unheard of at the time and probably still is.

The Tłı̨chǫ Final Agreement's self-government provisions recognize the ability of our government to make decisions in areas directly related to our well-being. Through the agreement, the Tłı̨chǫ Government has the power to make laws within a wide range of matters, including membership, culture, and language. The government can also design and manage programs to enhance our ability to protect and promote Tłı̨chǫ culture, heritage, language, lands, and resources. Chapter 7 of the agreement calls for the creation of a Tłı̨chǫ Constitution. This was overseen and developed during the negotiation process, and the constitution was ratified unanimously on 13 August 2000 (prior to the completion of self-government negotiations). The constitution now forms the highest law of the Tłı̨chǫ Government and sets out the structure and responsibilities of our government.

With the completed final agreement and our constitution in place, we had a self-government that inherited all the assets of the former band councils, including all the corporate assets. We got everything, lock, stock, and barrel. On the effective date of 4 August 2005, all of those assets were moved over to the new government. Also on that day, we held a pre-election of all the leaders of government who were going to be in place at the time of the transition. On the ceremonial effective date (the day of the signing) the pre-elected leaders were then able to go into the assembly to pass the laws of the administration – the banking, the receiving of the assets, the appointment of directors, setting up the governance structure, etc. – in a single sitting. A lot of preparatory work had to take place for all this to happen smoothly; in this first sitting, bills were passed using the omnibus laws of the assembly that allowed for everything to be done at the same time. The assembly created departments, set the executive and legislative functions, and placed a moratorium on development until such time that our land use policy was created and in place.

To understand the law-making authority of the Tłı̨chǫ Government, it is best to compare it with the jurisdictional level of provincial and territorial governments. In the event that a Tłı̨chǫ law is inconsistent with an act passed by the GNWT (which similarly governs over the same jurisdiction), Tłı̨chǫ laws will ultimately prevail to the extent of that inconsistency; paramountcy of our laws in our lands is clearly laid out in the agreement. As such, our law-making authority is similar to that of a provincial or territorial legislature. Over time, the Tłı̨chǫ Government has taken over more policy responsibility and program delivery. Most of the social programs – for example, health and education – fall under the jurisdiction of the

GNWT. But through the development of a Tłı̨chǫ agency, and the negotiation of Intergovernmental Service Agreements (ISAs) with the GNWT, the Tłı̨chǫ have begun to deliver education, health, and income support in our region. The Tłı̨chǫ Government works closely with the agency to ensure that residents in our communities are well serviced. The government also works closely with the Territorial Government to address ongoing concerns in housing, education, income support, and harvesting, among others.

Additionally, through our negotiated agreement the Indian Act no longer applies to us; we are a self-governing group. With this in mind, one of the first things we did was to focus on establishing a government that has an effective structure that is organized, operational, and functional, and this meant focusing on and building the capacity of our workers. The transition to self-governance required a lot of work. Since the establishment of our government, and especially between 2005 and 2009, we have put great effort into ensuring that our government workforce has been brought up to par. We inherited most of our workforce from the band councils as well as from local corporate bodies, but in the move to a new government we were dealing with no job descriptions and no work plans. Prior to self-government, band councils tended to deal only with contribution agreements with the federal government. In this relationship, reports get filed and money flows back and forth, but band councils were very limited as to what they could do. Consequently, the contribution agreements did not do much to build a workforce for government.

A lot of work has gone into solidifying our government. Today, we have a workforce that is evaluated at least twice a year, which allows us to identify any shortcomings in performance. Workplace training is tailored to ensure that our employees move up the ladder, and there is a pay grid in place. We even have a dental plan for our employees, so that it is no longer necessary for us to rely on the Indian Affairs dental plan. It is nice to be able to go to a dental office and not have to be told you have to wait six months for approvals. These things happen because our government prioritizes our employees and pays for the plan for the workers.

TŁĮCHǪ LANDS AND RESOURCES

In addition to the establishment of our government, the negotiation process also allowed our government to gain the tools and resources needed to strengthen our economy through greater participation in the regional and territorial economy. Chapter 26 of the agreement (the Economic Measures chapter) committed Canada and the GNWT to supporting the economic interests of the Tłı̨chǫ, which includes providing support for our traditional economy, assisting with the development of commercially viable businesses, and providing business and economic training and educational assistance.

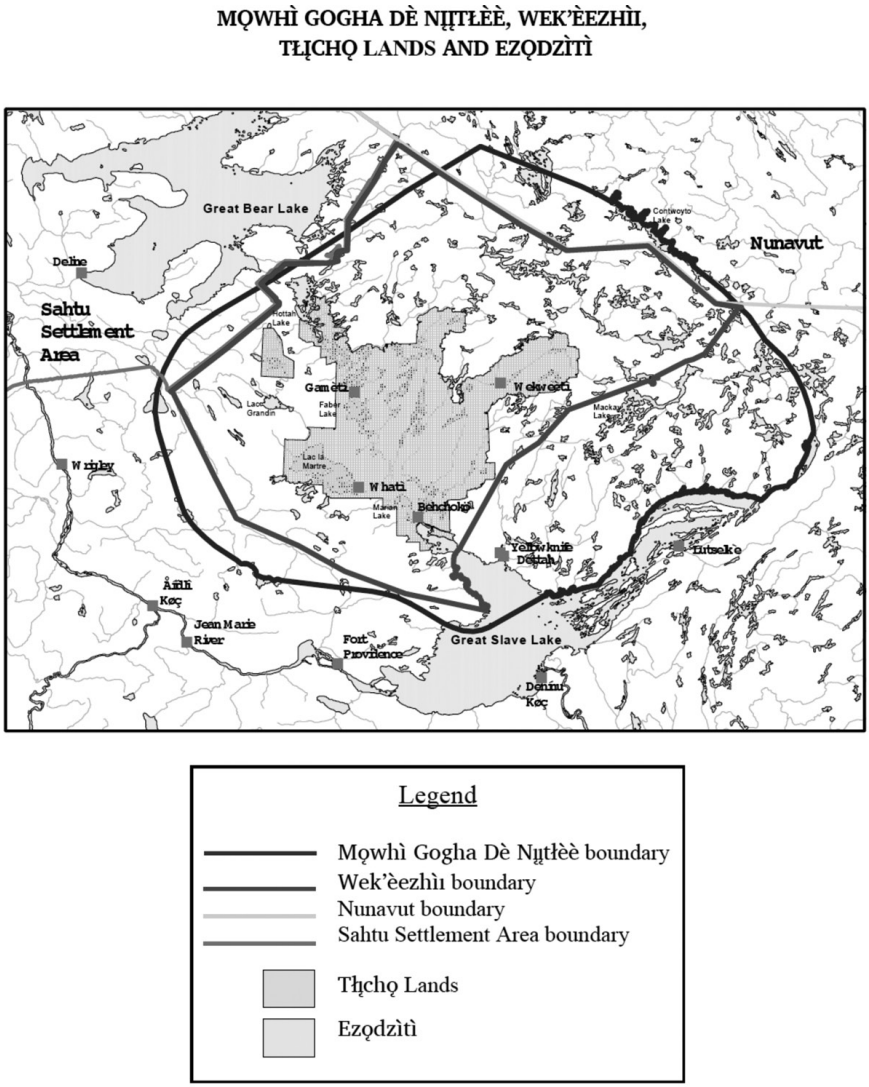
Part of enabling the oversight over our local economy comes with settling the transfer of a large tract of land that belongs to the Tłı̨chǫ. The Tłı̨chǫ Agreement applies to four distinct geographical areas: the largest, Môwhì Gogha Dè Nı̨ı̨tłèè, is the traditional territory of the Tłı̨chǫ and includes all four of the Tłı̨chǫ communities. The Tłı̨chǫ are able to exercise most of their Aboriginal rights set out in the agreement in this area, such as continual harvesting rights. Within the Môwhì Gogha Dè Nı̨ı̨tłèè is a second area – a resource management area – called "Wek'èezhìi" – the management area for wildlife presently under the jurisdiction of the GNT. The agreement provided for the establishment of two bodies to co-manage wildlife and the environment: (1) The Wek'èezhìi Land and Water Board (WLWB) has a mandate to regulate the use of land and water and the deposit of waste throughout the area, and (2) the Wek'èezhìi Renewable Resources Board (WRRB) oversees the management of wildlife and habitat and makes recommendations about wildlife, forest, and plant resources and commercial activities. The agreement also provides for Tłı̨chǫ representation on the Mackenzie Valley Environmental Impact Review Board (MVEIRB), which conducts environmental assessments and reviews of development projects in the Mackenzie Valley. This area is bordered by land claims settlement areas and traditional areas of neighbouring Aboriginal groups. The third area, which looks like a landing eagle, also falls entirely within Môwhì Gogha Dè Nı̨ı̨tłèè. These are the 39,000km^2 of land that the Tłı̨chǫ owns and holds both surface and subsurface rights to. It is approximately the size of Switzerland (minus the bank), or half the size of Nova Scotia. A fourth area, "Ezôdzìtì," is an area of historical and cultural importance to the Tłı̨chǫ. The Tłı̨chǫ do not own the land in the Ezôdzìtì area, nor do they have any additional harvesting or management rights. However, the area has been protected in the interest of preserving its historical and cultural importance to the Tłı̨chǫ people.

Most of the resources found within these lands have not yet been developed. Broadly speaking, there are no lands within the Tłı̨chǫ region that belong to anyone else, except for excluded areas that are contaminated or those that were grandfathered in as Crown lands due to advanced exploration occurring on them. The four small squares (seen below in the map) are community lands, which are owned by community corporations (those being Behchokö. Whatì, Gamètì, and Wekweètì). So with few exceptions, there is no land within our region that is owned by any government other than our own.

TŁı̨CHǪ GOVERNANCE

We have had three elections since we set up the governance structure of the region. Our first election was in 2005, the second was in 2009, and the third in the summer of 2013. The current Tłı̨chǫ Assembly will hold office for four years, and they held a workshop to determine the priorities for this government. The assembly will

Figure 1: Tłı̨chǫ Lands in the Northwest Territories, Canada



Source: Aboriginal Affairs and Intergovernmental Relations, Government of the Northwest Territories, "Tlicho Land Claims and Self-Government Agreement" (http://www.daair.gov.nt.ca/_live/pages/wpPages/Tlicho.aspx).

focus on rebuilding our communities and on delivering programs and services so as to improve the lives of Tłı̨chǫ citizens. These four-year terms add stability to our governance structure – members cannot be removed at whim (it is also difficult to remove a leader), but rather there has to be a good reason for removal. Leaders have to make tough decisions; they are dealing with a large budget, and they are dealing with decision-making authority and law-making authority over the region. Some of these decisions that are for the benefit of the region may not always be universally popular, but we cannot have these being overturned by a public meeting or by ruling by the Department of Indian Affairs.

Our government has a full mandate and has the tools necessary to effectively govern the affairs of the Tłı̨chǫ and provide the means to achieve the priorities of the Tłı̨chǫ today, and also for the Tłı̨chǫ yet to come. We recently completed a land use plan commissioned and financed by our government; it plans which parts of our landscape (that is, owned by the Tłı̨chǫ Government) are open to development and which ones are not. The plan sets the level of authority that the Land and Water Board can regulate. If the land use plan says that some areas are off-limit for development, then of course there is nothing to advance to the board. Moreover, this plan is the first of its kind where an Aboriginal government established the land use plan without government involvement; elders did the work.

CONTEMPORARY CHALLENGES

One issue that is top of mind in the North is devolution, which will see the management of lands and resources is transferred to the Government of the Northwest Territories. The Tłı̨chǫ Government is one of the signatories on the agreement in favour of devolution. Even though everything we want may not be reflected in the agreement, our concerns have been considered and discussed, and devolution has broad approval in the North. After a while you learn how to play the game: if the majority wants to jump in, then jump in with them. Certainly, it is complex, and a number of other things are tied in to the transfer. It is not just a question of only the management of lands and resources; there is also the question of the management regime that our land claim created.

Managing intergovernmental relations between treaty partners is crucial. There have been a number of challenges to implementation, and our treaty partners often take very literal translations of the chapters in the agreement, applying them narrowly to government initiatives. A good example of this is the proposed changes to the Mackenzie Valley Resource Management Act (MVRMA). Part of devolution – the transfer of natural resources on the golden platter – recommends a rejigging of this act (MVRMA) to get rid of the regional boards (including the Gwich'in, Sahtu, Wek'èezhìi, and Mackenzie Valley Land and Water Boards) in favour of a single larger board. However, our Tłı̨chǫ Agreement creates the Wek'èezhìi Land and

Water Board (mentioned earlier), and in our view, the amendment to the MVRMA to create a superboard in the Mackenzie Valley reflects a fundamental change to our agreement. The Tłı̨chǫ and other Aboriginal governments in the NWT are opposed to the amendments to the MVRMA, as our treaty negotiations were based on the fundamental constitutional promise that not only would the Tłı̨chǫ have control over the lands that we own but we would also play an important decision-making role in relation to Wek'èezhìi, which is the core of our traditional territory. As such, presently this is where many of the intergovernmental conflicts and issues are found. The MVRMA amendments are being introduced in Parliament soon, so we will be spending a lot of time on this issue.

This rejigging brings us to the issue of the lack of clarity in the implementation of modern treaties. Implementation is crucial to land claims agreements. It is said that negotiation is the easy part, and implementation is where the real work begins. The Tłı̨chǫ have a modern treaty; we have a land, we have a governance structure with jurisdiction over certain policy area, but there is no real implementation plan or a way of ensuring that these different levels of government are operational in a way that harmonizes their decision-making authority. In the absence of such clarity, the only way implementation is done is through confrontation. In many ways, the Government of Canada continues to operate the way it did before the claims were in place. That is, whenever the federal government decides to amend existing legislation within its jurisdiction, the onus is on us to look for new initiatives, legislation, or amendments to ensure that it does not affect our own governing authority, or how that authority is or should be harmonized with the different levels of government. If we see conflict, then it is up to us to raise it through the consultations that governments do to try to ensure that there is recognition for our claim and the rights embedded within our claim. To help address this issue, we have also been working with other land claims groups in Canada and have formed a coalition, the Land Claims Agreement Coalition (LCAC). The implementation of our agreement remains a large concern, and the LCAC has been encouraging the federal government to develop an implementation policy, though to date this has not been successful.

Overall, we do fairly well with the Territorial government because they are closer to us; they are more sensitive, and we are part of their voting bloc. This makes a difference in the North. You may not necessarily get everything you want, but at least you have a good listening ear. However, with the federal government, our voice is not nearly so strong. In the North, we only have a population of 60,000 northerners. Even though we have a large block of land, there is only one member of Parliament in Ottawa. So it is much easier for the federal government to railroad new processes, and do what they can, whether it works or not. And it is not as though things are not working up here. Take, for example, the regional Land and Water Boards we set have up in the North. They have not yet turned down a project (so their regulatory burden is not onerous), and their decision-making time frames

are always within acceptable limits. Where most of the slowdown occurs is when the completed processes end up sitting in Ottawa, waiting for a final decision. So if the problem Ottawa sees is one of long time frames on project approvals, the solution is not in changing the regulatory framework to a superboard (through the Mackenzie Valley Resource Management Act). More than anything, it seems like a way to change the perception of the South. What news story can be told to raise monies for development? But that is going to happen anyway. Whatever was going to be developed in the North is already in development, and whatever is going to be developed in the future is being thought about now.

III

Participatory Governance in the Natural Resources Economy and Its Limits

8

ABORIGINAL ENGAGEMENT IN CANADA'S FOREST SECTOR: THE BENEFITS AND CHALLENGES OF MULTILEVEL AND MULTI-PARTY GOVERNANCE

Stephen Wyatt and Harry Nelson

Aboriginal peoples and forests are two of Canada's enduring characteristics. The historical record shows that as the glaciers retreated 10,000 to 15,000 years ago, both forests and people moved into this land. By the time European traders and settlers arrived in the 1600s, Aboriginal peoples had long occupied forestlands, developing their own knowledge and systems for managing access to and use of forest and land resources. Colonization, expanding settlement, and commercial exploitation of the land had significant impacts upon Aboriginal populations, reducing their occupation of forestlands and their ability to apply traditional management systems. Loss of access limited the cultural and material benefits available to Aboriginal peoples, while also excluding them from economic benefits associated with the commercial exploitation of forests.

Despite colonization and dispossession, forestlands have retained their importance for Aboriginal peoples: four-fifths of Canada's 600 First Nation communities are located in forested areas, and nearly half of Canada's Aboriginal population live in rural areas. The relationship between Aboriginal peoples, their culture, and the land endures, often characterized in terms of respect and reciprocal relationship (Berkes and Folke 1998; O'Flaherty et al. 2008; Trosper 2009). This long-term occupation and unique relationship give rise to Aboriginal rights, variously described in the Canadian Constitution, in historical and recent treaties, and through judgments of the Supreme Court of Canada and other courts (Morse 1999, 41; Newman 2009).

Over the past 30 years, evolution in the definition and understanding of Aboriginal rights has led to Aboriginal peoples asserting and obtaining an ever-increasing role in the management and economic development of forest resources, typically in association with industry or governments (Wyatt 2008; Fortier et al. 2013). This greater role has also been acknowledged both in the 2003 National Forest Strategy (NFSC 2003), which sets out the goal of sustainable forest management and recognizes the importance of forests to Aboriginal peoples, and in criteria and indicator frameworks that are used to monitor forest sustainability (CCFM 2006). However, it should also be acknowledged that the 2008 strategy makes no mention of Aboriginal and treaty rights (McGregor 2011).

Aboriginal governance is sometimes seen principally as a responsibility of the federal government, expressed through the Canadian Constitution, treaties, and the fiduciary duty and the honour of the Crown, and through the principle of "nation to nation" negotiations. However, a closer look at the forest sector reveals a much more complex set of relationships as Aboriginal peoples take advantage of opportunities created by evolution in rights, governance arrangements, and commercial interests. This process expands the number of actors and relationships in the governance of the resource. While the federal government maintains an important role in negotiating and implementing treaty-type arrangements, provincial governments hold primary responsibility for managing forestlands and regulating access to these lands for industrial and other uses, and are developing their own policies and programs to respect Aboriginal rights and aspirations. The forest industry has long held extensive rights and responsibilities for forest management and so has needed to adjust practices and operations in response to these changes, with some forest companies seeing mutual economic advantage in direct engagement with Aboriginal communities or businesses. Aboriginal peoples are also increasingly making arrangements with each other, including collectively owned forestry licenses and businesses, as a means of increasing their resources or their influence. Alliances may also extend to civil society groups that can provide means of meeting mutual objectives related to conservation, cultural values, or economic development. Finally, municipalities and regional governments are becoming more involved in resource management and development, especially as an arena for resolving competing demands, and so are being called upon to engage with Aboriginal peoples. The interplay between these various actors makes forestry management an increasingly complex field, leading to the development of new governance models that operate at various scales and through different logics.

This chapter seeks to review these new multilevel institutional arrangements and explore their implications. We begin by considering the various sources of authority for Aboriginal engagement in forest governance. Building upon this, we propose an analytical framework based on three decision-making spaces: political, strategic/tactical, and operational. We then provide a number of case studies to illustrate the variety of ways that Aboriginal peoples are engaging in forest governance in Canada.

Finally, we consider some of the issues that are to be found across these case studies and the implications of these for multilevel governance and Aboriginal peoples.

AUTHORITY FOR GOVERNING FORESTLANDS

In order to understand Aboriginal peoples' roles in the governance of forestlands, it is useful to recognize different sources of authority over forests. Firstly, the structure of the relationship between Aboriginal peoples, Canada's governments, and forest lands is established through treaties and the Constitution. Secondly, provinces hold constitutional responsibility for most lands and resources and administer the more focused arrangements for governing forestlands and controlling access to forest resources. Finally, Aboriginal peoples themselves assert their authority, their rights, and their identity through their own governments, goals, institutions, and rules.

The formal institutional relationship between Aboriginal peoples and Canada's governments (both federal and provincial) is obviously complex, and there is no space here to discuss its various aspects in details. It is nonetheless important to underline how Aboriginal and treaty rights, self-government, and other formal arrangements are increasingly reshaping how governments interact with Aboriginal peoples, including in the forestry sector. Recognizing that this relationship is expressed in a variety of ways, especially in a federal state such as Canada, has led some to characterize it in terms of multilevel governance (Papillon 2012; Alcantara and Nelles 2013). There is an extensive literature that distinguishes between government and governance, with Howlett, Rayner, and Tollefson (2009, 385) stating succinctly that "governing is what governments do," while governance is about establishing specific types of relationship between the government and other social actors. For Cornell, Curtis, and Jorgensen (2004, 3), governance is not solely for governments but is "establishing rules we can depend on to coordinate our actions and achieve our goals ... making decisions and establishing policies and getting things done." Multilevel governance (MLG), then, is fundamentally about coordinating actions at multiple levels of decision-making in processes that engage multiple actors. Alcantara and Nelles (2013) propose three core characteristics of MLG: it is a process that 1) engages at least one constitutional government along with other actors; 2) is unfolding at multiple political/territorial scales; and 3) is characterized by negotiated decision-making rather than hierarchical authority. This definition appears applicable in many domains of Aboriginal-state relations, including forestry, where federal, provincial, and Aboriginal representatives negotiate governing rights, roles, and responsibilities for land and resources.

The responsibility for managing Canadian forestlands and controlling access and exploitation typically falls to provincial governments, as the majority of commercial forestland in Canada is provincially owned. In order to foster commercial forestry (harvesting forest resources for socio-economic benefits), provincial governments

across Canada have adopted a fairly similar model, providing private forestry firms with access to Crown timber through long-term lease or tenure arrangements (Haley and Nelson 2007). Investment from firms in timber harvesting and manufacturing activities is expected to generate socio-economic benefits such as employment, payments to the Crown from timber harvesting, and tax revenues. Tenure holders are generally required to undertake forest management responsibilities, with provincial governments effectively delegating certain decision-making rights to the leaseholder (subject to government approval). Depending upon the province and the lease type, these rights could range from strategic decisions for long-term forest management (showing how different forest values will be maintained) to short-term operational matters such as how harvesting, regeneration, and road-building activities will be carried out. In some cases, more limited rights may only provide access for those operational activities, without any strategic linkages. Hence, forest governance demonstrates the three core characteristics of MLG, with governments, industry, and other actors negotiating decisions for access and management of forest resources and land at multiple levels or scales. However, the delegation of decision-making powers to private firms means that Aboriginal peoples are increasingly negotiating access and forest practices directly with non-government actors, thereby creating a fundamentally different type of privatized governance (NAFA-IOG 2000).

While constitutional rules, government policies, and private-sector practices all shape forestry governance, Aboriginal peoples also have their own goals, institutions, and rules and their own desires to expand their autonomy and authority in managing the land. Court rulings, treaties, negotiations, and policy changes over the past four decades have provided greater opportunities for Aboriginal communities to exercise their authority, to address their socio-economic needs, and to expand their decision-making role in the forest sector. Aboriginal communities across Canada have formal government structures, and many communities have established internal governance regimes for specific functions including education boards, economic development corporations, and forestry companies. In the United States, the Harvard Project on American Indian Economic Development identified three key factors for successful Aboriginal development (Cornell, Curtis, and Jorgensen 2004): 1) *sovereignty* and practical decision-making powers; 2) *capable governing institutions* that encourage members to contribute; and 3) a *cultural match* between those institutions and indigenous ideas about authority and governance. In Canada, the majority of forestlands are under provincial ownership and control (very few Aboriginal nations own commercially valuable forestland), limiting the ability of Aboriginal communities to exercise sovereignty or engage in practical decision-making. Negotiating access to and asserting control of forest resources clearly put Aboriginal governing institutions in contact with federal and provincial governments and private firms. Indeed, there are many examples of Aboriginal communities acquiring capacity and expertise through forestry activities and developing governance structures that allow them to more effectively achieve

their objectives, consistent with the findings of the Harvard Project (Trosper et al. 2008). However, Aboriginal objectives for forest management and cultural values and practices can cause tension with non-Aboriginal actors, requiring renegotiation of the roles and relationships between the various parties.

DECISION-MAKING SPACES AVAILABLE FOR ABORIGINAL FOREST GOVERNANCE

The existence of different sources of authority, with a resulting diversity of actors, creates a complex multilevel and multiparty environment for Aboriginal governance in forestry. Broad questions of who establishes the rules, sets objectives, and grants access are followed by more focused arrangements around what is to be done and by whom, and also need to take account of Aboriginal peoples' own aspirations and actions. This process results in a wide variety of different mechanisms being used by Aboriginal people in different parts of Canada (Wyatt et al. 2013). In order to facilitate analysis of Aboriginal influence in forestry governance, we propose three levels of decision-making space: 1) political agreements over allocation of lands and authorities; 2) strategic/tactic decision-making over lands and resources planning; and 3) operational decisions regarding feasibility and technical aspects.

This structure is inspired by both the governance literature and forestry practices. Howlett (2009) proposes three levels for making choices in public policy: the broad governance arrangements that set goals and preferences; regime logic that determines objectives and mechanisms; and technical design that focuses on operationalizing policy. Alcantara and Nelles (2013) include multiple political/territorial scales as one of the core characteristics of MLG, implicitly recognizing that the specific scales would depend upon context. Within forestry, managers typically prepare management plans on three nested territorial/temporal scales: a strategic plan for 20 to 30 years; a tactical plan for five years; and an operational plan for activities in a single year (e.g., Raulier et al. 2009, 658). Interactions between Aboriginal peoples and the forestry sector can also be examined within this framework, but a higher political level needs to be added to capture fundamental decisions around objectives and access to resources. Essential characteristics of our three decision-making spaces are presented in Table 1.

The *political decision-making space* is where rights and authorities are negotiated, broad objectives are set, and institutional resources are allocated. Critically, this is where the formal transfer of decision-making authority for lands, forests, and/or other resources to Aboriginal communities can occur. As noted above, the Canadian Constitution provides for provincial control of forest resources (with some exceptions) and for federal responsibility for Aboriginal peoples, and so transfer of lands will often require a tripartite agreement, possibly taking the form of a treaty between an Aboriginal nation and the Crown or a transfer of land from

Table 1: Characteristics of Decision-Making Spaces in Aboriginal Forest Governance

	Political	*Strategic/Tactical*	*Operational*
Sources of authority	Constitution, treaties, relationship between First Nations and state	Provincial administrations, First Nation governments	Regional administrations under provincial authority, First Nations and communities
Political scale	Political/elected leaders	Administrations and professional managers	Professional managers and resource users.
Territorial scale	Traditional territory of a First Nation, thousands of square kilometres	Forest planning unit, hundreds of square kilometres	Specific sites and interventions, less than ten square kilometres
Temporal scale	"Finality" or indefinite	5–25 years	1–2 years
Actors	National and provincial governments, Aboriginal nations and associations, Supreme Court	Provincial agencies, Aboriginal nations/ communities, forest industries, forest stakeholder groups, municipal/local governments	Regional offices of provincial agencies, Aboriginal nations/ communities & families, forest industries, forest stakeholder groups, municipal/local governments
Common issues and activities	Recognizing and allocating rights Establishing institutions and processes Fixing broad goals	Setting objectives Determining regulations and control mechanisms Establishing management systems and guidelines Building partnerships	Implementation and control on the ground Delivering benefits to users and stakeholders Resolving conflicts between users
Typical instruments	Treaties, land claims, and self-government agreements	Sectorial agreements Management plans Forest tenures and licences Business partnerships	Forest tenures and licences Operational plans Contracts and business agreements

Source: Authors' compilation.

the state to an Aboriginal government. However, other models exist. Provincial governments may agree to share or delegate part of their authority, through formal protocols or through more ad hoc agreements. Non-governmental organizations are also engaged in this political space, seeking to redefine existing rights and management arrangements for natural resources, as in the Great Bear Rainforest in British Columbia (Howlett, Rayner, and Tollefson 2009) and the Canadian Boreal Initiative (Burlando 2012). Treaty-based settlements between Aboriginal peoples and Canadian governments nonetheless remain the main vehicle for renegotiating rights and authorities over forestry lands. Arrangements negotiated with the James Bay Cree in Quebec and the Nisga'a in British Columbia can illustrate how treaties can lead to a reconfigured forestry.

The strategic and tactical space is located below these high-profile political arrangements but enables Aboriginal peoples to be involved in decisions around how lands and resources will be used and managed. Within forestry, decisions at this level have often been made by professional foresters trained in universities and employed by provincial governments or by private companies. Such decisions will typically address issues such as harvesting techniques, environmental protection measures, forward planning for periods of 25 to 100 years and construction of access routes ("opening up the territory"). Increasingly, provincial governments are recognizing that strategic planning needs to integrate alternative views, establishing participation processes for both Aboriginal and non-Aboriginal publics that can influence forest management objectives – although governments still retain the authority (McGregor 2011). Most provinces also encourage Aboriginal communities to accept tenure agreements, typically providing management rights over a certain area or granting rights to harvest a defined volume in accordance with a forestry plan prepared under provincial guidelines. Communities then work within the existing framework, similar to any other tenure holder (Brubacher 2007). This space is also where Aboriginal communities will enter into business arrangements with private forest companies, whether through jointly held tenures, contracting arrangements, or even joint ventures in timber processing.

In the operational space, Aboriginal communities can often determine exactly how an activity is undertaken, which parties obtain certain benefits, what targets are achieved, and when this occurs. Decisions at the operational level are constrained by guidelines set at strategic level and by political decisions about objectives and access. Nevertheless, at the operational level, parties have significant ability to determine the feasibility of actions, the technical means, and the capacity of parties to implement planned development. Studies that examine Aboriginal engagement in forestry frequently identify barriers that originate in operational decisions: consultation processes, funding availability, business partners, access to necessary skills, complex administrative procedures, and so on (Beaudoin, LeBel, and Bouthillier 2009; Kant and Brubacher 2008; Kessells and Wyatt 2012; NAFA-IOG 2000). While most governance research concentrates on higher level arrangements, we consider that operational arrangements are equally important as

this is where the implementation of policies and strategies are negotiated – transforming aspirations and statements of intent into practical measures that deliver socio-economic benefits or that enable Aboriginal people to control or influence the ways that other parties use their lands. In the forest sector, Aboriginal organizations – either as community governments, communally owned enterprises, or individual entrepreneurs – are increasingly negotiating agreements with forestry companies to provide services under contract, such as harvesting, silviculture, road building, or log hauling. Provinces may grant or create harvesting rights or agreements that allow Aboriginal communities to engage directly in operational activities, without the management responsibilities usually associated with harvesting rights held by industrial forestry companies (notably planning). This practice is being encouraged by provincial government programs to provide access to timber resources for Aboriginal communities to directly engage in forestry operations.

CASE STUDIES

Nisga'a Nation, British Columbia

In northern British Columbia, the Nisga'a people are an example of a First Nation that has worked within the political decision-making space to negotiate a new forest governance model. The Nisga'a visited Victoria and Ottawa soon after Indian reserves were developed in 1887, demanding that a public inquiry be held on the land issue and recognition of their traditional land rights (Tennant 1990; Rynard 2000). In 1973, the Calder case, as it became known, resulted in the Supreme Court of Canada ruling that Aboriginal title was a real common law right. Nevertheless, it was not until 2000 that the Nisga'a Final Agreement (NFA) with the federal and provincial governments finally came into effect. The NFA transferred ownership of just over 2,000 square kilometres, 8 percent of the Nisga'a traditional territory, of Crown land (much of it forested) to the Nisga'a people and also established the Nisga'a Lisims government (Rynard 2000). Through the NFA, the Nisga'a gained "fee simple" title to the land (common private property) – effectively implying that their rights to the land are defined by the Canadian legal system.

Under the NFA, the Nisga'a developed the Nisga'a Constitution, Nisga'a Forest Act, a land use plan, and a Directorate of Lands and Resources with professional forestry staff, both Nisga'a and non-Aboriginal. While negotiating the NFA, the Nisga'a agreed that controls under the Nisga'a Forest Act were to equal or exceed existing provincial standards. The NFA also provided that ongoing forestry leases and operations would be maintained for five years before being subjected to Nisga'a authority, but in fact leaseholders actually abandoned leases before the end of this period due to financial difficulties. (An economic crisis in Canada's forest sector caused numerous closures from 2004 to 2010.) The Nisga'a have established

two forestry companies: Lisims Forest Resources LLP (with Nisga'a managers), which is responsible for management of forest resources on Nisga'a lands with an allowable harvest of 130,000 m3/yr; and Laxgalts'ap Forest Corporation, which is responsible for harvesting a proportion of this volume (NCG 2013). The Nisga'a Land Use Plan has maintained allowable harvesting volume at similar levels (although actual logging has been lower) but has also integrated other values and objectives including cultural sites, carbon sequestration, salmon streams, mushroom harvesting, and mountain goat habitat. Overall, the Nisga'a have seen the treaty as a success in enabling them to implement forest-based activities consistent with their overall land use objectives, including economic development (NCG 2013).

Meadow Lake Tribal Council, NorSask Forest Products, and Mistik Management, Saskatchewan

Meadow Lake Tribal Council (MLTC, representing nine First Nations) in Saskatchewan provides one of the longest-running examples of Aboriginal involvement in forest products transformation in Canada, affording opportunities in both the strategic and operational decision-making spaces. MLTC is involved in two distinct but related companies: NorSask Forest Products, which is a large sawmill (using about 500,000 m3 of softwood each year), and Mistik Management, which holds a long-term forest management tenure for 1.9 million hectares of public forests. NorSask was established in 1987 as a partnership between MLTC and the managers and workers of an existing sawmill, with MLTC becoming full owners in 1998 (Chambers 1999; Varghese et al. 2006). Mistik Management is owned in equal shares by NorSask and Meadow Lake Mechanical Pulp Inc. (owned by an Indonesian conglomerate), a large pulp mill that uses nearly 1 million m3 of hardwood each year (Mistik 2013; Brubacher 2007). Ownership of NorSask and part-ownership of Mistik provide MLTC with important economic benefits through employment, business opportunities, and revenue from company operations. Community members are able to receive training and to exercise responsibility in both forest management and manufacturing. Partial ownership of Mistik also provides the Meadow Lake First Nations with a significant capacity to influence forest-management practices, although their interests must be negotiated along with those of the province and their Indonesian-owned partners.

Meadow Lake was one of six examples of community-owned forestry companies studied by Varghese et al. (2006), who concluded that local ownership of a coupled mill and forest tenure was associated with greater community resilience. However, Mistik faced a crisis in 1992–93 when communities – members of MLTC – blockaded roads in protest against the forestry activities of their own company, leading to the establishment of a series of co-management arrangements between the company and communities. Chambers (1999) studied arrangements

with various communities, noting differences that reflected the interests of each community but also concluding that they did not provide the equality usually associated with "co-management." While Mistik's co-management process helped build trust and relationships among the parties and made it easier to incorporate traditional knowledge into forest planning, Chambers also noted problems such as the complexity of the process, lack of involvement by elders, and difficulty in ensuring adequate financial support. Overall, the Meadow Lake case illustrates a governance arrangement that enables Aboriginal people in a group of communities to set strategic and tactical directions for both economic development and forest management, while also delivering employment and financial benefits from operational engagement. However, we do not see Meadow Lake as a political arrangement, because it operates within the framework established by provincial legislation and by Treaty 6 signed in 1878.

Pikangikum First Nation and the Whitefeather Forest Initiative, Ontario

Pikangikum First Nation, an Anishinaabe community in Western Ontario, provides an example of a different approach to establishing strategic and tactical governance of traditional forestlands. This area was long considered to be too far north for commercial forestry operations, but forestry operations have moved steadily northwards. In 1996, Pikangikum launched the Whitefeather Forestry Initiative to develop resource-based economic development consistent with their vision for their land, encompassing an area of 1.2 million hectares (O'Flaherty, Davidson-Hunt, and Manseau 2008). As part of this initiative, Pikangikum elders, local managers, and university researchers collaborated to establish a process to develop a planning and management framework that would guide use and management of the land in ways grounded in Pikangikum values and institutions and the vision of the elders (McGregor 2009). This process included partnerships with non-government organizations, university researchers, and the Ontario Ministry of Natural Resources, leading notably to the preparation of a land use strategy, Keeping the Land, in 2006. This strategy includes a monitoring framework structured around four key Anishinaabe principles: "everything is good"; "good relationships"; "putting things in order"; and "the Pikangikum way of life" (Shearer, Peters, and Davidson-Hunt 2009). McGregor (2009) observes that the Pikangikum community has remained "in the driver's seat" throughout this process, maintaining control of the decision-making and ensuring that it remains rooted in Ojibway culture.

Following the Keeping the Land strategy, Whitefeather moved on to operational governance, preparing a forest management plan in conjunction with forest planners from the Ontario Ministry of Natural Resources, paying particular attention to the integration of Anishinaabe knowledge and to respecting the elders' vision. This plan was finalized in 2012 (Bowie 2013) and has since paved the way for the Ontario

government to grant a Sustainable Forestry Licence to the Whitefeather Forest Initiative in June 2013. Since 1996, the Pikangikum community has maintained an interest in the commercial harvesting of their traditional lands, and the Forest Management Plan and the Sustainable Forestry Licence are key elements in this. The planned commercial activities have not yet eventuated, although it is possible that the current upturn in Canada's forest sector after several years of economic difficulties will result in harvesting in the near future. Commercial activities will be an important means of delivering economic and employment benefits to the community, but the effects of the forest industry crisis also illustrate the impacts of market and international factors beyond the control of any of the actors. The Pikangikum case demonstrates that flexibility in governance arrangements can allow Aboriginal communities to develop a strategic approach to reconciling cultural values with commercial interests. This flexibility has also benefited from a long collaborative relationship with the provincial government (McGregor 2009; Burlando 2012), which may be regarded as an informal arrangement in the political decision-making space. Relationships with researchers and non-governmental environmental groups were also important, although it should also be noted that early relationships with the latter broke down as Pikangikum maintained its interests in control and in commercial harvesting (Burlando 2012). The Pikangikum case study also underlines the importance of negotiating governance arrangements at strategic and operational levels and the fact that these can occur within the framework of provincial legislation and a historical treaty.

Forest Tenures

Tenure arrangements have long been a key characteristic of Canadian forest governance, enabling governments to establish strategic goals for forest management while allocating operational responsibilities and harvesting rights to the private sector (Brubacher 2007). Types of tenure vary between provinces, ranging from limited rights to harvest a volume of a thousand cubic metres in a single year through to 25-year licences granting extensive management powers over thousands of square kilometres. For Aboriginal peoples, these arrangements are a strategic tool that can provide recognition of rights and responsibilities over forest lands in the absence of a political or legal settlement, while also determining how these lands are to be managed. Within the operational space, tenures can give Aboriginal communities the authority to control how activities are carried out on the ground and a share in the social and economic benefits and revenue opportunities associated with the forest industry. In a review of Aboriginal-held forest tenures across Canada, Brubacher (2007) found that First Nations held 6.4 percent (by volume) of allocated tenures across the country, and that this proportion had risen from 4.7 percent in 2003. However, Brubacher observed that the majority of these tenures were for smaller volume allocations without long-term management responsibilities.

It is also important to note that tenures are typically allocated within the authority of provincial forestry acts, and so accepting tenure arrangements contributes to reinforcing non-Aboriginal dominance and control over traditional Aboriginal lands.

Provinces have granted forestry tenures to some First Nations since at least the late 1980s (Ross and Smith 2002), and almost all provinces have now done so. However, in 1997 New Brunswick made the decision to grant tenure to all First Nations in that province (the only province, so far as we are aware, to take this action), after a series of decisions in the provincial courts about Aboriginal rights under historical treaties to cut trees on Crown land (Blakeney 2003). This arrangement was relatively innovative at the time, reallocating about 5 percent of the Crown volume from existing private firms to Aboriginal (Maliseet and Mi'kmaq) communities, who were then able to log and sell the timber to processing companies. Under these harvesting agreements, the communities receive timber royalties that would otherwise be paid to the province, the chance to establish and operate a logging business, and employment opportunities. In 2010–11, these benefits amounted to about $1.7 million in royalties, eight communities engaged in harvesting operations, and about 65 jobs for Aboriginal individuals – of which half were part-time (Wyatt, Kessels, and van Laerhoven 2015). Although these agreements were negotiated with the provincial government, the private companies holding forest management tenures are responsible for planning and operations and so have significant power over First Nation harvesting. While royalties and employment opportunities are appreciated by the Maliseet and Mi'kmaq, the agreements fail to meet their expectations concerning equitable participation in forestry. In particular, they simply provide an annual volume to be logged in accordance with industry practices, without providing any role in forest management or decision-making. Volumes were allocated to communities on the basis of their population, with the smallest communities receiving 2,000 m^3 per year (too small for a viable commercial operation) and the largest receiving 37,000 m^3 per year. Community members interviewed by Wyatt, Kessels and van Laerhoven (2015) believed that the agreements were not an appropriate means of respecting Aboriginal rights, particularly as the groups were obliged to comply with plan and procedures determined by the industry. Furthermore, although the agreements have been renegotiated at five-yearly intervals since 1997, no significant changes have been made to correct problems, acknowledge Supreme Court rulings on Aboriginal rights, or respond to changing aspirations. The New Brunswick experience demonstrates that arrangements within the operational decision-making space can be useful in providing tangible benefits to Aboriginal peoples, but that broader issues of rights and governance cannot be overlooked.

The greatest number and variety of Aboriginal-held forest tenures are to be found in British Columbia (Fortier et al. 2013). Forest and Range Agreements (subsequently renamed Forest and Range Opportunities, or FROs, and now known as Forest Consultation and Revenue Sharing Agreements, or FCRSAs) were first introduced in 2003. These agreements provide Aboriginal communities or businesses

with short-term access (typically five years but up to ten years) to timber volumes, but without management responsibilities beyond ensuring compliance with forest practices during harvesting activities. Stu'wix Resources in the southern interior of BC was established by seven different First Nations who collaborated to pool enough timber volume to build and sustain their own management and harvesting operations. While some Aboriginal communities in BC have seen short-term benefits, overall these agreements have not met expectations because their short duration and small size affects the economic viability of forestry operations based on only those volumes (Nikolakis and Nelson 2014). Other options for First Nations include Community Forest Agreements (CFAs), which may be jointly held with other communities or municipalities, and most recently, First Nations Woodland Licenses. Examples of jointly held CFAs include Soda Creek First Nation and the non-Aboriginal village of Likely, which joined forces to establish the 12,000 hectare Likely-Xatsull Community Forest, and Cheakamus Community Forest, involving the municipality of Whistler, and the Squamish and Lil'wat First Nation Nations.

DISCUSSION

These examples illustrate the diversity of possible arrangements within this multilevel and multiparty space. Comparing the experiences of different communities also enables us to identify some commonalities and to consider their implications for a deeper understanding of multilevel governance.

Linkages across Decision-Making Spaces

Although we proposed the existence of three distinct decision-making spaces for Aboriginal forest governance, our case studies demonstrate that linkages across these spaces are the norm. While an initiative will typically be located within a certain space, its effectiveness in delivering the outcomes expected by Aboriginal peoples may depend equally upon actions in other spaces. As an arrangement at the political level, the NFA established the Nisga'a Lisims government and transferred decision-making authority to this new entity, empowering the Nisga'a to determine where and how forestry activities will be carried out within a given territory, while also ensuring consistency with provincial and federal laws. However, exercising this power and ensuring that forestland management meets the needs of the Nisga'a people also requires actions at the strategic and operational levels as Nisga'a forestry staff work with forestry companies to prepare and implement plans. Meadow Lake's engagement in NorSask and Mistik requires not only strategic level negotiations with the provincial government (for the licences), with the industry (as partners and customers), and among communities and individuals but also a multitude of operational negotiations that determine the protection of certain sites

and values, the economic feasibility of operations, and the distribution of benefits. Failure to pay adequate attention to these details can contribute to problems such as the Meadow Lake blockade in 1992–93, harming a relationship that is necessary for successful arrangements at other levels. The actions of the Whitefeather Forest Initiative have been primarily located in the strategic decision-making space, but are now moving into the operational space with the granting of a tenure and the potential commencement of commercial harvesting. Transitioning from the strategic to the operational space will almost certainly present new challenges for the Pikangikum nation and their partners, and problems in obtaining operational benefits could impact the continuing success of strategic arrangements undertaken so far. Tenures can bridge strategic and operational spaces, depending upon the responsibilities granted by the tenure. The dissatisfaction of New Brunswick First Nations with an arrangement that is restricted to the operational decision-making space highlights the importance of linking initiatives at this level to arrangements in the strategic or political spaces.

Theories of multilevel governance emphasize negotiated decision-making between actors from different levels at multiple political/territorial scales (Alcantara and Nelles 2013) while O'Flaherty, Davidson-Hunt, and Manseau (2008) recognize the importance of cross-scale planning in the Whitefeather initiative. The decision-making spaces proposed here contribute to refining the importance of scale, recognizing the different types of issues and outcomes that may be appropriate at various scales and the need for actors/negotiators who are familiar with these issues and who possess both competence and authority for that scale. Wyatt et al. (2013) found that Aboriginal peoples across Canada engaged in a wide variety of collaborative arrangements and proposed a typology of five principal approaches and more than 30 variants, while Fortier et al. (2013) used this same typology to show that nearly half of the 474 Aboriginal communities in the study were using at least three of these five approaches. Entering into governance arrangements at different levels and with a variety of actors, and establishing linkages between these, helps Aboriginal peoples to provide a variety of outcomes to meet their expectations. Conversely, governance arrangements limited to a single space, such as tenures in New Brunswick, may deliver certain desired benefits but fail to meet expectations in other ways.

Beyond Nation to Nation Approaches to Governance

Aboriginal peoples often assert that governance arrangements in Canada should be negotiated "nation to nation," emphasizing their role as sovereign Aboriginal nations with particular rights (recognized in the Canadian Constitution) and identity, and not simply as one stakeholder among others whose interests can be dealt with administratively through multi-party processes. For its part, the Canadian Crown

(both federal and provincial) recognizes Aboriginal rights but not the principle of sovereign Aboriginal nations, and so relatively few governance arrangements actually reflect the nation to nation principle – the Nisga'a Final Agreement is one of these, as are the agreements with the James Bay Cree in Quebec. Instead, many forestry arrangements are negotiated with actors at other levels, such as provincial agencies, regional authorities, the private sector, and even non-governmental organizations (Howlett, Rayner, and Tollefson 2009; Burlando 2012) and universities (Karjala and Dewhurst 2003). These organizations will usually have a mandate and specialized resources in a domain that is of interest and importance to Aboriginal groups, along with particular objectives that may or may not be compatible. Negotiations in such a situation will often involve complex professional or technical issues, but they may also lead to effective agreements on targeted measures that can be readily implemented to provide tangible benefits – agreements that would be neither possible nor feasible if discussed at the political level by negotiators who lack knowledge or mandate to address specific issues or implementation measures. Nevertheless, as Feit and Beaulieu (2001) noted in the case of the James Bay Cree, expert consultation processes within a sector such as forestry can also become a means for the government to accommodate some Aboriginal interests or concerns, while at the same time reinforcing the overall structure of non-Aboriginal governance of land and resources.

The solution may lie in maintaining nation to nation negotiations to resolve fundamental issues such as rights and to establish a broad framework for relations, while simultaneously encouraging negotiations and relationships at other levels and engaging other parties. MLG involves actors at different territorial scales, along with negotiated rather than hierarchical decision-making. Governments and Aboriginal groups often have multi-scale capacity: the federal government works at scales from political negotiations all the way through to on-the-ground program delivery, while most Aboriginal communities also have skilled negotiators and professionals providing services or managing activities. O'Flaherty, Davidson-Hunt, and Manseau (2008) used the Pikangikum case to explore cross-scale issues, specifically situating the community-level planning processes within the contexts established by federal and provincial institutions. Salée and Levesque (2010) also note that while some Aboriginal peoples seek full self-determination, others may find that a work-within-existing-institutions approach is sufficient. In their view, the success of the James Bay Cree can be attributed (at least partly) to a strategy of combining both approaches.

Treaties as a Step in a Process Rather Than a Finality

Treaties and agreements between Aboriginal peoples and the Crown or the state are often assumed to be "final," representing either full resolution of all issues or the establishment of a framework that will be capable of addressing issues that may

arrive in the future. Some (but not all) recent agreements and treaties specifically make this claim in their title, including the Nisga'a Final Agreement[1] in British Columbia and the Kluane First Nation Final Agreement in the Yukon.[2] However, for the James Bay Cree, neither the James Bay and Northern Quebec Agreement (JBNQA) in 1975 nor the Paix des Braves, signed in 2002, represent "final" settlements of Cree claims or an acceptable and durable model of Cree governance. Salée and Levesque (2010) describe an ongoing process whereby the Cree have used arising opportunities and existing institutions to expand their control, build their governance capacity, and develop economically. They also acknowledge that the experience of the Cree may be exceptional and that many other First Nations lack equivalent leverage and have not been successful in reversing a power disadvantage.

Palmer and Tehan (2006, 20) consider that the JBNQA "is only a very first step – it is the ensuing relationship that drives the outcomes and influences sustainability of the agreement." They stress the importance of the relationship between the parties and of process and capacity in building this relationship. Natcher, Davis, and Hickey (2005) draw similar conclusions about co-management, emphasizing the importance of processes that could enable the parties to overcome conflicts based in cultural and knowledge differences and in colonial histories. Work on MLG (Papillon 2012; Alcantara and Nelles 2013) also emphasizes the multiplication of decision-making spaces and processes in place of hierarchical lines of authority, and so would appear to favour a view of treaties as a work-in-progress rather than a final arrangement. Similarly, as our analysis shows, Aboriginal peoples are able to negotiate forest governance arrangements in several decision-making spaces, and so it is difficult to conceive of a treaty in the political space that could cover all possible arrangements in other spaces. Nevertheless, there is a risk that such a view reduces Aboriginal peoples to one actor among many in governance processes that are constantly reinvented based on the needs of the moment. Rights and treaty arrangements are the product of a different kind of negotiations that should not easily be superseded. Recognizing the complexity of relations between Aboriginal peoples and non-Aboriginal society, we consider that negotiating treaties that cover all possibilities, both now and for the future, seems unlikely to deliver stability or finality. Instead, arrangements that recognize fundamental rights, establish appropriate governance for priority issues, and provide for regular review and modification may be more durable.

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[1] See http://www.nnkn.ca/files/u28/nis-eng.pdf.

[2] See http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_ykn_klu_fia_1330357096505_eng.pdf.

The Complementary Role of Private Enterprise in Aboriginal Governance

The multilevel governance model proposed by Papillon (2012) and Alcantara and Nelles (2013) concentrates on relations between constitutional governments and non-government or quasi-governmental actors negotiating processes and outcomes across territorial scales. The examples provided by these authors, along with the theoretical underpinnings, typically frame MLG in terms of relationship, examining relations between an Indigenous group seeking self-government and various levels of government (federal, provincial ministries, departments, and agencies). Experience in forestry, where the private sector has long benefited from delegation of extensive responsibilities for forest management (Haley and Nelson 2007), suggests that it is also appropriate to consider the place of private firms within this model. Private firms have affected Aboriginal peoples in two particular areas, economic development and occupation of the land.

As our case studies of forest tenures in Meadow Lake, British Columbia, and New Brunswick show, Aboriginal peoples are increasingly participating in forest harvesting and the transformation of wood products, yet the outcomes are uneven. Individual and community revenues, employment, and incentives for young people to stay in communities are often cited as drivers for forestry engagement (NAFA-IOG 2000; Beaudoin, St-Georges, and Wyatt 2012). The private sector can be an important source of financial capital, skills, training, and experience in supporting Aboriginal efforts to gain a share of the economic benefits of forestry. Effective governance is strongly correlated with successful economic development (Cornell and Kalt 2000; Jorgenson 2007), and successful businesses help support capacity and expectations for governance. Within an MLG model, negotiating partnership conditions and desired outcomes with the private sector and exercising management authority can be an important element of Aboriginal autonomy – as illustrated by the success of Meadow Lake and the relative failure in New Brunswick. However, individual success stories may be the exception rather than the norm, with Parkins et al. (2006) finding that federal policies to promote Aboriginal participation in forestry appear to have little impact on socio-economic conditions as reported by the 2001 national census.

Recognizing that the private sector holds significant management responsibilities over traditional lands, many Aboriginal communities have chosen to engage with forestry companies. Various mechanisms are available (Wyatt et al. 2013), including obligatory consultation processes in most provinces, forest certification standards, partnerships for management tenures as in Meadow Lake, and Aboriginal forest planning/management initiatives such as that of Pikangikum. While such mechanisms certainly enable Aboriginal peoples to gain a measure of responsibility and control over their traditional land, most research concludes that multiple

barriers exist, causing initiatives to fall short of Aboriginal expectations (Ribot and Peluso 2003; Kant and Brubacher 2008; McGregor 2011). Coombes, Johnson, and Howitt (2012) stress that indigenous land claims are not simply conflicts about use of resources that can be resolved through better communication and practices, but instead reflect deep differences in views about the environment, knowledge, property, and management; they require negotiation and the development of new approaches. Hence, Aboriginal engagement with private-sector forest managers is not simply a business or technical arrangement but extends the space in which Aboriginal peoples, governments, and private-sector actors are establishing new governance arrangements.

Ensuring Governance Improves Access to Benefits for Aboriginal Peoples

The extensive protests and actions associated with the Idle No More movement in 2012–13 highlighted the dissatisfaction of Aboriginal peoples across Canada, drawing attention to their concerns about poverty, education, health, employment, and living conditions, all of which are at levels below those of other Canadians (Palmater 2011). Aboriginal leaders have criticized the slow progress by governments in resolving long-standing claims for recognition of their traditional rights and have called for a new relationship between Aboriginal peoples and the government (Atleo 2013). Extraction and development of natural resources, including forests, may provide Aboriginal peoples with employment and revenue opportunities that could address these concerns (Coates and Crowley 2013). Unfortunately, the conventional economic development model is not always effective for Aboriginal peoples, and Aboriginal engagement in forestry has not delivered as many benefits as expected or desired (Parkins et al. 2006; Kant and Brubacher 2008).

If advances in Aboriginal governance of forestlands and resources are to be truly successful, they will need to provide benefits for the people in ways that respect their values and goals. Ribot and Peluso (2003) distinguish between the "right to benefit from a thing" and the "ability to derive benefit from a thing," noting that holding legal rights to a resource does not necessarily mean that people are able to gain benefits from the resource. They consider that closer attention needs to be paid to determining how benefits flow to different actors, how these actors control this flow, and what power relations underlie mechanisms and systems. MLG may provide new opportunities for Aboriginal people to share in the benefits of forest management, but complex governance arrangements also risk creating new barriers and reinforcing old ones – and a failure to address the underlying causes of Idle No More.

Integration of Traditional Institutions into Contemporary Governance

Aboriginal interest in self-governance lies not only in the opportunity to exercise rights but also in applying knowledge, maintaining culture, and ensuring that land and resources are used in ways consistent with their values. Research across Canada (Berkes and Folke 1998; Trosper 2009) and elsewhere has linked knowledge, culture, and values to social systems and traditional governance institutions but has also highlighted differences between these and Euro-Canadian or bureaucratic approaches to governance. Pikangikum First Nation has attempted to integrate their traditional principles and institutions into a contemporary management framework, while the Nisga'a Lisims government also builds upon customary systems and values (Rynard 2000). Other examples are to be found elsewhere in Canada, but research highlights both the innovative characteristics of these models and the practical difficulties of implementation. Reviewing the experience of northern land claims boards, White (2006) compared the century-old Weberian understanding of bureaucracies (focused on hierarchies and precise written rules and procedures) with the values and practices of Aboriginal cultures in the North, concluding that the boards remained firmly rooted in a Euro-Canadian structure despite their co-management aim.

Nevertheless, Aboriginal systems and institutions should not necessarily be preferred over non-Aboriginal governance structures. The Harvard Project (Jorgenson 2007) emphasized the importance of separating political and business management in effective economic development, conclusions supported by research with BC First Nations (Trosper et al. 2008). Following on from the Harvard Project, Cornell (in Jorgenson 2007) stresses that the legitimacy of Aboriginal governments will depend upon both their effectiveness and the cultural match, suggesting that "appropriate" governance arrangements will vary for different Aboriginal groups and communities. Determining what is "appropriate" is also likely to become increasingly problematic, especially with an ever-increasing proportion of the Aboriginal population no longer living in communities situated on reserves (Statistics Canada 2008).

CONCLUSIONS

Aboriginal participation in forestry reveals how governance is expanding to include multiple actors at different scales with civil interest groups, forest sector firms, and provincial and local governments, among others. While this increasing complexity can add to the challenges facing Aboriginal communities, it also creates new opportunities. The experience from forestry shows that treaties are not the only way in

which Aboriginal communities can expand and reassert their roles in managing and benefiting from forestlands. Indeed, successes suggest that existing institutions are flexible enough (at least in some cases) to accommodate Aboriginal participation in forest governance, depending upon community priorities. Such flexibility allows, and actually requires, negotiation – as such, it contrasts with the assumed finality of treaties. We observe that participation in forestry activities has expanded more quickly in BC and Quebec, a situation possibly related to the absence of historical treaties that extinguished Aboriginal title (although BC First Nations have also benefited from increased harvesting activities associated with the Mountain pine beetle epidemic).

Within this broader governance system, Aboriginal communities seek a range of objectives, including gaining access to decision-making authority, influencing forestry practices and management goals, and obtaining tangible socio-economic benefits from forestry activities. These objectives are being negotiated with both governments and private actors, and while opinions diverge and conflicts arise in some situations, there are also shared interests such as increasing socio-economic benefits from commercial forestry. Here, partnerships and arrangements with the private sector play an important role, providing access to resources and expertise that allow Aboriginal communities to develop their own skills and capacity.

In some cases Aboriginal communities may obtain exclusive decision-making authority, perhaps under a new treaty. Others may hold tenure issued by provincial government and work within existing forest management frameworks, possibly sharing that decision-making space with others through partnerships or political agreements. The evidence shows that some of these paths lead to positive outcomes, but not all do so. In forestry, linkages between the different decision-making spaces can be critical in enabling Aboriginal communities to realize their broader objectives, creating space in which they can integrate and balance their traditional and cultural values while also providing socio-economic benefits. What MLG then offers is a way to evaluate the institutions and actors within these different decision-making spaces and to assess how these interactions shape the spaces within which Aboriginal communities strive to realize their objectives for the opportunities that forestry can provide.

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9

ABORIGINAL PEOPLES' CONSULTATIONS IN THE MINING SECTOR: A CRITICAL APPRAISAL OF RECENT REFORMS IN QUEBEC AND ONTARIO

Sophie Thériault

The intensification of mining activities during the past decade in many Canadian provinces and territories, including Quebec and Ontario, has brought to the forefront the shortcomings of contemporary mining governance regimes. In Canada as in other former British colonies, the "free-entry mining" principle upon which most mining regimes are based finds its direct origins in the practices and customs established by miners in the context of the nineteenth century's gold rushes (Barton 1993, 116; Lacasse 1976, 39-40). If this principle, which entails a prioritization of mining activities over other uses of the land, may be fathomable in its historical context, there is a growing consensus that it has become at odds with competing priorities and values regarding environmental protection, social acceptability, and respect for Aboriginal rights (Bankes 2004; Campbell 2004; Laforce, Lapointe, and Lebuis 2009).

This chapter analyzes the degree to which Aboriginal peoples' constitutional rights have influenced recent mining governance reforms in Quebec and Ontario, with a particular focus on the duty to consult and to accommodate Aboriginal peoples.[1] It first outlines the shared foundations of both provinces' mining govern-

[1] It should be noted that the chapter focuses on the regimes regulating hard rock mining and does not address issues related to the oil and gas sector or the exploitation of surface mineral substances. Moreover, it does not discuss the set of institutions created in the northernmost regions of Ontario and Quebec to guarantee Aboriginal peoples' participation in the

ance regimes, as well as the parameters of the constitutional duty of the Crown to consult and accommodate Aboriginal peoples. It then critically analyzes the recent mining governance reforms in Quebec and Ontario as they pertain to Aboriginal consultations. While some elements of the recent reforms suggest a greater opening to Aboriginal participation in the governance of mining, especially in Ontario, I argue that both fall short of the standard set by the Supreme Court pertaining to the duty to consult and accommodate. They also fall short of Aboriginal expectations regarding a truly multilevel approach to mining.

FREE MINING REGIMES IN TIMES OF INCREASED RECOGNITION FOR ABORIGINAL PEOPLE'S RIGHTS

The foundations of both the Quebec and Ontario mining governance regimes were laid in the second half of the nineteenth century in the context of the gold rushes that swept California in 1849 and then many other places in the western world, including Australia in 1851, New Zealand in 1857, British Columbia and Colorado in 1858, Quebec (Beauce) in 1863, the Klondike in 1898, and Northern Ontario in 1903 (Barton 1993, 115-16). The 1848 Californian gold discovery, in particular, happened at a time when no state or federal laws or authorities were yet in place to regulate the activities of the nearly 40,000 miners who hurried to the promised Eldorado (Lacasse 1976, 39-40). The lack of formal rules and institutions created a fertile ground for the miners to adopt their own codes setting out the rules pertaining to prospecting, claims staking, and discovery rights and duties (Barton 1993, 116; Lacasse 1976, 40-1).

As they migrated from rush to rush, the miners carried with them the practices and customs of the mining camps. These vernacular practices and customs, often subsumed under the overarching "free mining" principle, proved influential in the development of formal mining regimes such as the one established in 1864 by the United Provinces of Canada under the Gold Mining Act, and the post-Confederation mining regimes of a majority of Canadian provinces and territories, including Ontario, Quebec, British Columbia, and Yukon (Barton 1993, 117; Laforce, Lapointe, and Lebuis 2009, 56-8). At a general level, the free mining principle provides "(i) a right of free access to lands in which the minerals are in public ownership; (ii) a right to take possession of them and acquire title by one's own

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governance of lands and natural resources, including those recently created by Ontario's Far North Act (2010), the Act Establishing the Eeyou Istchee James Bay Regional Government (2013), and the Act Respecting the Cree Nation Government (2013). Finally, it does not address the potential overlaps between provincial and federal Aboriginal consultations in the mining context, notably through the application of the Canadian Environmental Assessment Act (2012).

act of staking a claim; and (iii) a right to proceed to develop and mine the minerals discovered" (Barton 1993, 115).[2] In its most orthodox expression, this principle promotes minimal state intervention in mining prospection and exploration activities while affirming the priority of mining interests over other interests in lands and natural resources, including those of surface owners and Aboriginal peoples (Bankes 2004, 318; Laforce, Lapointe, and Lebuis 2009, 58-9; Thériault 2010, 224).

Most free-entry mining systems, including those of Quebec and Ontario, provide for the right of the miner to stake a "claim" in order to secure prior and exclusive access to a definite track of land for researching publicly owned minerals (Barton 1993, 155; Mining Act [Quebec], secs. 8, 40, 64, 65; Mining Act [Ontario], secs. 27, 28, 38, 50). Such claims can usually be renewed in accordance with the conditions set forth by law, in particular that the claim-holder has performed the minimal work required by regulation (Mining Act [Quebec], secs. 61, 72; Mining Act [Ontario], secs. 65, 73).

It is remarkable that the claim is acquired unilaterally by the miner, without any prior exercise of governmental discretionary power.[3] The miner has a *right* to acquire a claim once all legal requirements pertaining to staking are met. In Barton's words, "The claim comes into existence when the miner completes the staking; the act of recording is a mere formality in comparison, although an indispensable one" (1993, 156). Hence, the state, essentially playing a passive role in the mining claims acquisition process, cannot use its discretion to prefer, over the first staker, the miner who, for instance, demonstrates the strongest will and capacity to exercise exploration activities in ways that foster good relationships with affected Aboriginal communities.

This feature of the claim system is even more significant since the claim-holder who discovers a "workable deposit" is *entitled* to a mining lease, provided that all other legal requirements have been met (Mining Act [Quebec], sec. 101; Mining Act [Ontario], sec. 81). The lease provides its holder the exclusive right, generally for at least two decades with possibility of renewal, to access the concerned land for mineral extraction.

Those features of free-entry mining have sparked heated debates in Canada in the past few decades. While actors from the mining sector insist that broad, unencumbered, and secure access to publicly held minerals is vital to sustain their high-risk industry, a growing number of commentators decry the ecological impact of mining activities, the precedence of mining activities over other uses of the

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[2] The implementation of the free mining principle is facilitated by the principle of the Crown's ownership of mineral rights, even where the land surface has been transferred to private ownership (Barton 1993, 65).

[3] In many jurisdictions, the state may, however, withdraw some land from staking, for instance, in protected areas (see, for example, Mining Act [Quebec), sec. 304; Mining Act [Ontario], secs. 29-35).

land and, more recently, the incompatibility between mining rights and Aboriginal peoples' constitutional rights (Bankes 2004; Bankes and Sharvit 1998; Campbell 2004; Drake [forthcoming]; Laforce, Lapointe, and Lebuis 2009; Thériault 2010).

In particular, the duty of the Crown to consult with Aboriginal peoples has led to several conflicts opposing Canadian provinces and territories, mining companies, and Aboriginal communities, which have been instrumental in triggering and shaping mining governance reforms, especially in Yukon and Ontario (Ariss and Cutfeet 2011; Simons and Collins 2010; Thériault 2010). The next section outlines parameters of that duty and assesses the extent to which it influenced the recent mining reforms in Quebec and Ontario.

The Duty of the Crown to Consult and Accommodate Aboriginal Peoples

The duty of the Crown to consult and, if appropriate, to accommodate Aboriginal peoples was initially recognized in the context of the justification test elaborated by the Supreme Court of Canada for infringements of Aboriginal and treaty rights protected under section 35 of the Constitution Act, 1982. More precisely, in order to justify an infringement to a constitutionally protected Aboriginal or treaty right, the Crown, after having established that the contested measure aims at a compelling and substantial legislative objective, has to demonstrate that it has, in doing so, upheld its fiduciary responsibility toward Aboriginal peoples. Such responsibility, among other duties, requires the Crown to consult affected Aboriginal communities in good faith prior to the adoption of the measure infringing upon their constitutional rights (*R v. Sparrow* 1990; see also *Delgamuukw v. British Columbia* 1997; *Tsilhqot'in Nation v. British Columbia* 2014).

In the 2004 *Haïda Nation* case, the Supreme Court of Canada confirmed that the Crown's duty to consult and, if appropriate, accommodate Aboriginal peoples exists before authorizing activities that could have an adverse impact on their constitutionally protected rights, even where such rights have yet to be formally recognized (Grammond 2013, 315; Newman 2014, 16-18). Such duty, grounded in the principle of the "honour of the Crown," 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" (*Haïda Nation* 2004, para. 35; *Rio Tinto Alcan* 2010, para. 31; *Tsilhqot'in Nation v. British Columbia* 2014, para. 78). The threshold for triggering the duty to consult is easily met, the court even admitting that "a credible but unproven claim," or even a "dubious or peripheral claim," suffices to give rise to a duty to consult (*Haïda Nation* 2004, para. 37; Newman 2014, 45).

However, the relative credibility of the claim may impact on the intensity of the duty to consult, since the scope of that duty is "proportionate to a preliminary

assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (*Haïda Nation* 2004, para. 39; *Tsilhqot'in Nation v. British Columbia* 2014, para. 79). Where the claim to Aboriginal right is weak, or the potential for infringement minor, the Crown's duties could be limited "to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haïda Nation* 2004, para. 43). However, where "a strong prima facie case for the claim is established, the potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high," the Crown may have to undertake "deep consultation" with affected Aboriginal groups, "aimed at finding a satisfactory interim solution" (*Haïda Nation* 2004, para. 44). Such consultation could entail "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haïda* Nation 2004, para. 44).

Meaningful consultation may trigger a duty to accommodate, which, for instance, could require modifying even substantially the parameters of a project to avoid irreparable harm or minimize the effects of infringement on Aboriginal peoples' rights (*West Moberly First Nations* 2011, paras. 141-65; *Haïda Nation* 2004, paras. 47-50). However, the Crown is not legally required to secure Aboriginal consent (*Haïda Nation* 2004, para. 48). It is worth noting that where an Aboriginal title to the land has been established, "the Crown must seek the consent of the title-holding Aboriginal group to developments on the land" (*Tsilhquot'in Nation v. British Columbia* 2014, paras. 76, 83-7, 90). If Aboriginal consent cannot be obtained, the Crown may nevertheless justify its incursion on Aboriginal title land, provided that it meets applicable justification standards.[4] Hence, an economic development project, such as the exploitation of a mine, may be authorized even where it would infringe upon constitutionally protected Aboriginal rights, and against the affected communities' opposition to the project (Christie 2006, 181). The consultation and accommodation process rather aims at "seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation" (*Haïda Nation* 2004, para. 49; *Tsilhqot'in Nation v. British Columbia* 2014, para. 82).

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[4] In order to justify an infringement to Aboriginal title, the state must establish: (1) that it discharged its duty to consult and accommodate; (2) that its actions were motivated by a compelling and substantial objective; (3) that the governmental action is consistent with the Crown's fiduciary obligations, which involves (a) rational connection between state's actions and objectives; (b) minimal impairment to Aboriginal title; (c) "that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact)" (*Tsilhqot'in Nation v. British Columbia*, paras. 77-87).

In all circumstances, consultations must be conducted in good faith, with the view of substantially addressing the concerns raised by Aboriginal peoples (*Haïda Nation* 2004, para. 42). Consultations should also be undertaken at the early stage of strategic planning, when it is still possible to bring substantial modifications to the project (*Haïda Nation* 2004, para. 76). In return, the Aboriginal community affected by a project "must not frustrate the Crown's reasonable good faith attempts [at consultation], nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached" (*Haïda Nation* 2004, para. 42).

Finally, it should be noted that the "honour of the Crown," and with it the duty to consult and accommodate, cannot be delegated to third parties, such as project proponents (Haïda Nation 2004, par. 53). However, while remaining "legally responsible for the consequences of its actions and interactions with third parties that affect Aboriginal interests," the Crown "may delegate procedural aspects of consultation to industry proponents seeking particular development" (*Haïda Nation* 2004, para. 53).

In *R v. Adams*, the Supreme Court of Canada stated that "Parliament may not simply adopt an unstructured discretionary administrative regime which [risks] infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance" (1996, para. 54). With regard to the duty to consult, governments may circumscribe their discretion by adopting either regulatory schemes or operational policies "to address the procedural requirements appropriate to different problems at different stages" (*Haïda Nation* 2004, para. 51).

The next part of this chapter analyzes the statutory, regulatory, and policy schemes adopted by the provinces of Quebec and Ontario to address the implementation of the duty to consult in the mining sector.

THE RELATIVE INFLUENCE OF THE DUTY TO CONSULT AND ACCOMMODATE ABORIGINAL PEOPLES ON THE RECENT MINING GOVERNANCE REFORMS IN QUEBEC AND ONTARIO

Aboriginal Peoples as "Stakeholders": The Limited Recognition of the Duty to Consult in Quebec's Recently Amended Mining Act

Quebec's Mining Act, first adopted in 1880, has been replaced and modified several times since, notably in 1988, and more recently in December 2013 (Lacasse 1976, 53; Lacasse 1989). From its inception, this mining regime has remained largely anchored in the assumptions and values associated with the free-mining principle (Lapointe 2010, 14-15). Until the adoption of Bill 70 in December 2013, the act

did not contain any reference to Aboriginal peoples' constitutional rights and to related Crown duties. We will see that the recent amendments to the Mining Act, in addition to providing a very partial recognition of the duty to consult Aboriginal peoples, do not restructure decision-making processes in the mining sector in a way that would allow for the implementation of the Crown's constitutional duty.

The urgency of reforming Quebec's Mining Act came to the forefront with the debates spurred by Premier Jean Charest's Plan Nord,[5] and with a series of events that revealed the archaism the mining regime, especially Osisko's open-pit gold mine project in the town of Malartic in 2009, which led to the displacement of a whole neighbourhood even before public hearings were held and governmental authorizations granted (BAPE 2009). The publication of Quebec's Sustainable Development Commissioner's 2009 report formulated harsh critiques of the mining regime, notably with regard to mine closure and reclamation, royalties, and environmental protection (Auditor General of Quebec 2009).

Four bills to amend the Mining Act were introduced before the Quebec National Assembly in almost as many years. The Liberals of Jean Charest made the first attempt to amend the statute by introducing Bill 79 in December 2009. This bill, which died on the Order Paper, initially did not contain any reference to Aboriginal rights. The amendment brought to this bill in parliamentary committee, which would have recognized in general terms that the act must be construed in a manner consistent with the Crown's duty to consult Aboriginal communities, was integrated in the second bill introduced by the Liberal government in May 2012. This bill failed to be adopted before the general election that brought to power the minority government of the Parti Québécois in September 2012.

However, Bill 14's provision on Aboriginal consultation survived the election and was integrally reproduced in Bill 43, introduced by Parti Québécois's minister of natural resources, Martine Ouellet, in September 2013. This bill, voted down on principle, was quickly replaced by Bill 70, which was adopted on 10 December 2013, after the minority Parti Québécois government and one of the opposition party, the Coalition Avenir Québec, agreed to a special parliamentary closure rule to fast-track the debates.

The Mining Act, as amended, retains the general Aboriginal consultation clause found in previous bills, which states that the act "must be construed in a manner consistent with the obligation to consult Native communities" and provides that the government "shall consult Native communities separately if the circumstances so warrant" (Mining Act [Quebec], sec. 2.1). This provision is completed by the obligation imposed on the minister to draw up, make public, and keep up to date

[5] Although the Plan Nord was officially announced on 9 May 2011, it was publicly discussed and debated since at least 2009. The Plan Nord is an ambitious development program aimed at exploiting the energetic, mineral, forest, and tourism potentials of the territories located north of the 49th parallel (Farget and Fullum-Lavery 2013).

"a Native community consultation policy specific to the mining sector" (Mining Act [Quebec], sec. 2.3).[6] Finally, the act affirms in broad terms that "[t]aking into account the rights and interests of Native communities is an integral part of reconciling mining activities with other possible uses of the territory" (Mining Act [Quebec], art. 2.2).

It is interesting to note that the Liberal Party of Quebec (PLQ) proposed during the debates to modify section 2.1 to add, after providing that the "Government shall consult Native communities separately if the circumstances so warrant," that such consultation should be done according to the requirements provided for by regulation, which was to be adopted 90 days following the adoption of the act (Quebec National Assembly 2013). If adopted, this amendment would have guaranteed the timely implementation of a legally binding Aboriginal consultation process. Another amendment, also proposed by the PLQ and voted down by a majority of deputies, would have provided that the consultation policy to be adopted according to sec. 2.3 should be elaborated in collaboration with representatives from Aboriginal communities (Quebec National Assembly 2013).[7]

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[6] For more precision, in 2006, Quebec adopted the *Interim Guide for Consulting the Aboriginal Communities*, which was updated in 2008. This guide, however, remains very general and essentially restates the principles elaborated by the Supreme Court of Canada. It is significant that it invites government departments and agencies "to draw inspiration from the guideposts set by the guide to define their own sectorial guidelines in the consultation field, according to the nature of their activities and their intervention sector" (Quebec 2008, 2). The consultation policy provided for in section 2.3 of the act has yet to be adopted. In the meantime, the Quebec government has published a document entitled *Information for Developers and General Information Regarding Relations with Aboriginal Communities in Natural Resource Development Projects* (2015). This document, which does not refer to section 2.3 of the Mining Act, contains some indications regarding the consultation of Aboriginal communities at the different stages of a development project (using mining as one example). However, it is too general to provide sufficient guidance in order to fulfill the duty to consult specifically in the mining sector. In particular, the document, which aims at providing information to developers, does not frame governmental consultation processes at the different stages of a mining development project.

[7] It should be noted that Quebec's former minister of natural resources, Martine Ouellet, committed during the debates to involve Aboriginal communities in the elaboration of the consultation policy. Such involvement, however, is not guaranteed by law. It is still too early to say if the Liberal party of Philippe Couillard will hold to this promise. However, it is interesting to note that the document *Information for Developers and General Information Regarding Relations with Aboriginal Communities in Natural Resource Development Projects* (2015) (see note 6) was elaborated by an inter-ministerial group without the participation of Aboriginal peoples.

In response to the demands of opposition parties to increase the guarantees offered to Aboriginal peoples, Minister Ouellet repeatedly affirmed that her bill achieves a balance between the multiple and competing demands of Aboriginal communities, environmental groups, the mining industry, and municipal governments (Quebec National Assembly 2013). In deciding on modifications to be brought to the Mining Act, Aboriginal peoples were thus considered as "stakeholders" on par with other interest groups rather than as holders of constitutional rights.[8]

Without further changes to the mechanisms governing the acquisition of mining claims and the performance of exploration work, the provisions introduced in the Mining Act to acknowledge the duty to consult are likely to be insufficient for the province to uphold its constitutional duties toward Aboriginal peoples. In particular, prospectors can still unilaterally acquire claims on lands potentially held under an Aboriginal title[9] without any requirements for Aboriginal consultation. Following the Yukon Court of Appeal ruling in *Ross River Dena Council v. Government of Yukon*, which could persuade courts in other jurisdictions, for the Crown to record mining claims on lands held under Aboriginal title without prior consultation would not sustain a constitutional challenge under sec. 35 of the Constitution Act, 1982 (2012, para. 32-37).[10]

Moreover, Quebec's Mining Act and its regulations do not systematically provide for state intervention prior to the performance of exploration work. Hence, the state may not be aware from the outset of the exact location and nature of

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[8] The deputy of Jacques-Cartier, Geoffrey Kelley, now minister of Aboriginal affairs, intervened in the debates, saying "Je vais toujours réagir quand on compare les droits, enchases dans la Constitution, des peuples autochtones avec les intérêts dans notre société. Et, oui, les compagnies minières ont des intérêts, mais elles n'ont pas de de droits constitutionnels comme les Premières Nations" (Quebec National Assembly 2013).

[9] An Aboriginal title is a specific category of Aboriginal rights protected under sec. 35 of the Constitution Act, 1982. It includes the right for an Aboriginal group "to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land" (*Tsilhqot'in Nation v. British Columbia* 2014, para. 73. See also *Delgamuukw v. British Columbia* 1997).

[10] Since Aboriginal title includes mineral rights, for the Crown to transfer mineral rights under such land would constitute an infringement of Aboriginal constitutional rights (see *Tsilhqot'in Nation v. British Columbia* 2014, para. 124). In the words of the Court of Appeal for Yukon, "Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist" (para. 37). Leave to appeal at the Supreme Court of Canada was dismissed in September 2013. See, however, the decision of the Ontario Superior Court of Justice (Wilton-Siegel J), in *Wahgoshig First Nation v. Solid Gold Resources Corp* 2012, at para. 45 seq.

exploration work performed in the province, and accordingly of potential conflicts with surrounding Aboriginal communities (Lapointe 2010, 15).[11] Without prior governmental intervention, which could, for example, take the form of a permit system, implementing the act in a manner consistent with the obligation to consult Aboriginal people may prove materially unfeasible (Thériault 2010, 237).

Better but Still Imperfect: The Revised Ontario Mining Regime and the Constitutional Duty to Consult Aboriginal Peoples

The weaknesses of Quebec's amendments to its Mining Act pertaining to Aboriginal consultations are even more difficult to justify considering that the province of Ontario addressed these issues in a still imperfect but definitely more ambitious manner in the mining reform it achieved only six years ago.

Ontario's modern mining law draws its origins from the Mines Act of 1906, which substantially amended the 1869 General Mining Act in order to introduce a free mining system in the province. The 1906 statute, as Simons and Collins observe, "was systematically designed to encourage and facilitate mining, and conversely, to avoid and/or preclude any significant opposition to this economic activity" (2010, 183).

This statute was subject to major amendments in 1990 in order to strengthen the regulatory requirements for mine closure and reclamation. Interestingly, in 2000, the implementing regulations were amended to require Aboriginal consultation on mine closure plans (Mine Development and Closure under Part VII of the Act, sec. 12). However, until the 2009 amendments to the Mining Act, the Ontario mining regime did not provide any requirements with regard to public or Aboriginal consultations at the exploration stage.

Litigations over Aboriginal peoples' rights, and particularly the duty to consult, played a key role in setting the context for the last reform of the mining regime (Mayeda 2010; Ariss and Cutfeet 2011). In July 2006, the Kitchenuhmayoosib Inninuwug First Nation (KI), a small community located in a remote location of Northern Ontario, was granted an interim injunction against Platinex Inc., a

[11] The Mining Act, as modified, provides that the "claim holder shall, on each anniversary date of the registration of the claim, submit to the Minister a report on the work performed in the year" (sec. 71.1). The minister is thus informed of exploration work performed on claims after the fact. It is interesting to note that section 81 of Bill 43 would have obliged prospectors to submit a plan of the work to be performed in the coming year when filing a staking or map designation notice, and thereafter on each anniversary of the registration of the claim. This provision was not retained in Bill 70. Exploration work is still generally exempted from prior environmental authorizations (see the Regulation Respecting the Application of the Environment Quality Act, secs. 1(2), 2(5)(6), 3(3).

junior exploration company, ordering the suspension of exploratory drilling on KI's traditional lands for a period of five months. The grant of the injunction was notably conditional upon KI's setting up a consultation committee charged with the responsibility of developing an agreement involving both Platinex and the province in order for Platinex to complete its exploratory program (*Platinex Inc. v. KI* 2006).[12] Moreover, in assessing the "balance of convenience" prong of the interlocutory injunction test, the Ontario Superior Court concluded that the province had failed to fulfill its duty to consult KI regarding Platinex's exploratory program, remarking bluntly that Ontario "has been almost entirely absent from the consultation process with KI and has abdicated its responsibility and delegated its duty to consult to Platinex" (at para. 92).

In May 2007, the Superior Court, after finding that the Crown had finally discharged its duty to consult in the months following its previous ruling, dismissed KI's motion for another interlocutory injunction, ordering the parties to sustain consultation and to reach a Memorandum of Understanding, which was later that month imposed by the court on the parties as they failed to reach a negotiated agreement (*Platinex Inc. v. KI*, 2007). Following this order, in reaction to KI's refusal to allow the resumption of exploration work, Platinex obtained from the court an order prohibiting KI from "impeding, obstructing or interfering with … access to the Exploration Property," and directing the police to remove any person from that property. On December 2007, several members of the KI community who defied the court order were found in contempt of court and jailed (*Platinex Inc. V. KI* 2007).

In a parallel case, members of the Ardoch Algonquin First Nation, protesting against uranium exploration activities by Frontenac Ventures Corporation on their traditional lands, were found in contempt of court and also placed in jail after defying an interim injunction restraining them from interfering with, disrupting, or hindering their access to Frontenac Ventures' mining site (*Frontenac Venture Corp. v. Ardoch Algonquin First* 2007, 2008).

Although the accuseds' sentences were set aside in appeal (*Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* 2008; *Platinex Inc. v. KI* 2008), these highly mediatized cases, combined with the multiplication of land-use conflicts involving mining activities, private surface owners, or Aboriginal communities, and more

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[12] The lawsuit was introduced by Platinex Inc. in reaction to the protests led by members of KI on its drilling camp. KI was protesting that the camp had been set up on their traditional lands without their consent. Platinex, after leaving the drilling site, sued KI for an interim injunction to resume its exploratory program, in addition to claiming $10 billion in compensatory and punitive damages. KI counterclaimed by seeking an injunctive relief against Platinex to stop exploratory drilling on its traditional territory, which was granted by the court. KI is signatory to the 1929 adhesion to Treaty 9. In addition, the community submitted to the federal and Ontario governments a Treaty Land Entitlement Claim in 2000, which covers the area of land on which Platinex was conducting its exploratory activities.

generally the increased awareness by the public of the incompatibility of free entry mining with contemporary ecological and social values, were instrumental in triggering and shaping the recent reform of the province's mining regime (CIELAP and Ecojustice 2008; Environmental Commissioner of Ontario 2006–07).

Ontario's Mining Act was reformed in 2009 following a public consultation process. Among the elements targeted by the Ministry of Northern Development and Mines (MNDM) for consultation and review were Aboriginal rights and interests related to mining development (MNDM 2008). This consultation had been preceded by another consultation process initiated in 2007 by the MNDM with Aboriginal communities and organizations in Ontario, with the aim of developing an Aboriginal consultation approach for the mining sector (MNDM 2007). These consultations resulted in the adoption of statutory, regulatory, and policy measures providing for Aboriginal consultations at different stages of the mining process.

The purpose of Ontario's Mining Act, as modified, "is to encourage prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982, including the duty to consult, and to minimize the impact of these activities on public health and safety and the environment" (Mining Act [Ontario], sec. 2). This general statement of purpose is further defined in the act by several provisions pertaining to the recognition of Aboriginal rights and the duty to consult, which were to be implemented progressively through regulations and policies. The regulatory provisions pertaining to Aboriginal consultations, mandatory since 1 April 2013, should be implemented through the guidance of applicable operational policies, notably the MNDM policy Consultation and Arrangements with Aboriginal Communities at Early Exploration.

Proponents' obligations at the early exploration stage vary according to the nature and potential impact of planned activities. "Low impact" exploration activities require the proponent to first submit an exploration plan, whereas "moderate impact" activities must first be approved by a permit issued by a director of exploration (Mining Act [Ontario], secs. 78.2, 78.3); Exploration Plans and Exploration Permits (EPEP), secs. 4-5, 11-12, and scheds. 2-3).[13] Directors may also, at their discretion, require a permit for any other early exploration activities where in their opinion such permit "may be necessary to address issues pertaining to existing or

[13] Activities prescribed for the purposes of section 78.2 of Ontario's Mining Act ("exploration plan activities") are enumerated in schedule 2 of the Exploration Plans and Exploration Permits regulation, and include, among other activities, mechanized drilling for the purpose of obtaining rock or mineral samples weighing less than 150 kilograms. Activities prescribed for the purposes of section 78.3 of Ontario's Mining Act ("Permit activities"), for their part, are enumerated in schedule 3 of the Exploration Plans and Exploration Permits regulation, and include, for instance, mechanized drilling for the purpose of obtaining rock or mineral samples, where the weight of the equipment exceeds 150 kilograms.

asserted Aboriginal or treaty rights" (EPEP, sec. 18 (1)(a). The intensity of the duty to consult thus varies according to the nature of the proposed exploration program, and the type of administrative authorization required.

Proponents *may* elect to notify potentially affected Aboriginal communities of their intention to submit an exploration plan or a permit application. In such circumstances, proponents should include with their exploration plan or permit application a consultation report "detailing how comments received by Aboriginal communities, if any, have been considered" (EPEP, secs. 6(3)-(4); 13(3)-(4). It should be noted that such early notice, mandatory where an exploration program is executed on privately owned lands (EPEP, sec. 6(1) and (2)), is elective where the rights at stake are those of Aboriginal peoples. With the Supreme Court of Canada insisting that the duty to consult must be fulfilled at the earliest stage of a project, such preliminary notice *should* be required everywhere exploration activities are planned on Aboriginal traditional lands (*Haïda Nation* 2004, para. 76).[14]

In any case, once an exploratory plan or permit application has been submitted, the director notifies potentially affected Aboriginal communities by sending them a copy of the plan or of the permit application (EPEP, sec. 7(1), 14(1); MNDM Policy 2012, 7). Notified communities may within three weeks of notification provide written comments to the director regarding any adverse effects the proposed exploration activities may have on their existing or asserted Aboriginal or treaty rights (EPEP, secs. 7(2), 14(2); MNDM Policy 2012, 7).

With regard to exploration plan activities, the director "may require the early exploration proponent to consult with the community as directed" (EPEP, sec. 7(3)). In response to comments made by an Aboriginal community, the proponent *may* withdraw or make adjustments to a submitted exploration plan (EPEP, sec. 8(1)). Hence, in such circumstances, the regulation does not require the proponent to demonstrate that good faith efforts have been made to accommodate the preoccupations of Aboriginal communities for an exploration plan to be approved. However, the proponents should conduct their exploration activities "in a manner consistent with the protection provided for existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982" (EPEP, sec. 10(4)).

As for "exploration permit activities," proponents have the formal obligation to "consult with Aboriginal communities pursuant to any direction provided by the Director" (EPEP, sec. 14(2)). The director may "require the early exploration

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[14] The MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration, provides that "while MNDM's specific expectations are outlined in Part II of this Policy, early efforts to engage with one another, beyond the minimum processes required pursuant to the *Mining Act* and this Policy, will lead to more effective and timely results later" (2012, at 2). Considering the multiplicity of past and current conflicts opposing mining exploration companies and Aboriginal peoples in the province of Ontario, simply suggesting "best practices" in a policy instrument may prove insufficient.

proponent to file a consultation report in the approved form regarding any consultation process that has been conducted, including with any arrangement reached with an Aboriginal community or the efforts made to reach such an arrangement, before deciding whether to issue an exploration permit" (EPEP, sec. 14(3), 15; Mining Act [Ontario], art. 78.3 (2) (b)). The director may also decide to put a temporary hold on the process of obtaining an exploration permit if there are "concerns raised by an Aboriginal community whose existing or asserted Aboriginal or treaty rights are potentially affected by the proposed exploration activity which, in the opinion of the Director, warrant additional time to adequately consider" (EPEP, sec. 16 (1)(1)).

Once satisfied that appropriate Aboriginal consultation has been carried out, notably with regard to "any arrangement reached with an Aboriginal community or the efforts made to reach such arrangements," the director may issue the permit with conditions to minimize impact on affected Aboriginal communities (EPEP, sec. 15(1)(a), 15(2), 17(2)). Notwithstanding such conditions, the permit-holder should conduct its activities "in a manner consistent with the protection provided for existing Aboriginal and treaty rights in section 35 of the Constitution Act, 1982" (EPEP, sec. 17(1)).

The Mining Act and its regulations also provide for consultation at the stages of advanced exploration,[15] mine production and closure, and land rehabilitation (Mining Act [Ontario], art.139.2 (4.1), 140(1)(c), 141(1)(c); Mine Development and Closure under Part VII of the Act (MDC), art. 8.1). In short, before filing the certified closure plan required prior to undertaking advanced exploration or mining production activities, or before applying to rehabilitate a mine hazard, the proponent or applicant should conduct consultation with Aboriginal communities as directed by the director of mine rehabilitation, and/or according to a consultation plan adopted in consultation with affected Aboriginal communities, as reviewed by the director (Mining Act [Ontario], secs. 139.2, 140 (1)(c), 141(1)(c); MDC, sec. 8.1(1)-(4)).[16] The proponent should submit to the director, with the closure plan, a consultation report including information regarding "any arrangement reached with an Aboriginal community or the efforts made to reach such an arrangement"

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[15] "Advanced exploration" activities are defined by the Mining Act, sec. 139(1), and the Mine Development and Closure under Part VII of the Act regulation, sec. 3(1). For example, such activities constitute "advanced exploration" work carried out underground involving the construction of new mine workings, excavation of material in excess of 1,000 tonnes, and surface stripping meeting pre-set parameters.

[16] Proponents or applicants, at their discretion, may consult with Aboriginal communities earlier in the process, before notifying the director of their intention to submit a certified closure plan or apply to rehabilitate a mine hazard, provided that the director first identifies communities to be consulted, and that a consultation report "detailing how comments from Aboriginal communities, if any, have been considered" is submitted with the project or application (MDC, sec. 8.1 (5)(6).

(MDC, sec. 8.1 (9)). The director may also require a consultation report before approving the rehabilitation of a mine hazard, although in such circumstances information pertaining to accommodation or efforts to accommodate are not mandatory (MDC, sec. 8.1 (10)).

Finally, the Mining Act provides for a dispute resolution process applicable to disputes related "to consultation with Aboriginal communities, Aboriginal and treaty rights or to the assertion of Aboriginal and treaty rights," including those that may occur in relation to exploration permits, advanced exploration, or mine closure or rehabilitation (sec. 170.1). Rather than constituting an appeal or an arbitration, this process aims at facilitating consultation among the proponent, Aboriginal communities, and the director (MDC, sec. 8.2 (3)).

Ontario's Mining Act, as amended in 2009, has significantly modified decision-making processes in the mining sector by requiring Aboriginal consultation at different stages of the mining development process, from early exploration to the mine's closure and rehabilitation. Those modifications are especially remarkable at the exploration stage, considering the widely held assumption that mining exploration activities do not have significant impact on the environment and surrounding communities (Ariss and Cutfeet 2011, para. 21; Bankes and Sharvit, 6-11). However, the modification may fall short of the constitutional requirements pertaining to the duty to consult Aboriginal peoples under several aspects.

First, as under Quebec's amended Mining Act, prospectors can still unilaterally acquire claims on Aboriginal traditional lands without prior consultation.[17] The province, in its operational policy, affirms that it will "continue to provide written notification to Aboriginal communities of claims that have been recorded in their known area of interest," while encouraging proponents "to notify communities and address their concerns or questions prior to submitting an exploration plan to avoid unexpected delay or objections" (MNDM 2012, 6-7).

However, the province's notification and the "expected" proponent's consultation, if any, would occur only once the claim has been crystallized through recording, preventing Aboriginal communities from intervening at the early strategic level of land-use planning. Such a possibility, as we have seen with the Quebec

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[17] It should be noted, however, that the minister may withdraw lands from prospecting and staking, including sites of "Aboriginal Cultural Significance" (Mining Act [Ontario], secs. 35(1)(2), 51(4)). Such sites must not exceed 25 hectares and must meet the following criteria: "1. It is strongly associated with an Aboriginal community for social, cultural, sacred or ceremonial reasons, including because of its traditional use by that community, according to Aboriginal traditions, observances, customs or beliefs; 2. It is in a fixed location, subject to clear geographic description or delineation on a map; 3. Its identification is supported by the community, as evidenced by appropriate documentation" (Ontario Regulation 45/11, sec. 9.10). However, such withdrawal does not affect existing mining rights (Mining Act [Ontario], sec. 35(3)).

mining regime, could raise constitutional issues where Aboriginal communities have a claim to Aboriginal title (*Ross River Dena Council v. Government of Yukon* 2012). Although Aboriginal title may have been surrendered on vast areas of land in Ontario through historical treaties (assuming that the cession clauses of those treaties are legally valid),[18] such title is still at least claimed by the Algonquin people on a vast territory in Southern (and part of Northern) Ontario, and potentially by communities whose ancestors have not signed up to one of the cession treaties.[19]

Moreover, the Mining Act, and its regulations and operational policy, delegate to project proponents key responsibilities for consulting Aboriginal communities, essentially reserving to the MNDM the task of monitoring the process. While the Supreme Court of Canada has recognized that the state may delegate the operational aspects of the duty to consult to private actors (*Haïda Nation* 2004, para. 53), it remains to be seen if such levels of delegation would sustain judicial scrutiny. Suffice it here to say that the success of consultation processes will rest on a clear understanding by all implicated actors of their respective responsibilities in implementing the duty to consult, and on the willingness of mining companies to undertake those responsibilities with the view of constructing respectful and long-lasting relationships with Aboriginal communities. However, as shown by recent litigations opposing the province, Aboriginal communities, and mining companies, these conditions should not be taken for granted (e.g., *Wahgoshig First Nation v. Ontario* 2012).

Finally, the consultation procedure set by the regulations, especially with regard to the short delays imposed on concerned Aboriginal communities to react to an exploratory plan or permit application, may fail to satisfy both constitutional and Aboriginal law requirements (Drake [forthcoming]).[20]

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[18] Among the treaties concluded between Canada and Aboriginal communities located in Ontario are Treaty 9 (1905) and Treaty 3 (1873), the Robinson-Superior Treaty (1850), the Robinson Huron Treaty (1850), and the Manitoulin Island Treaty (1862). For an argument on the incompatibility of the Ontario mining regime (as revised) with treaty rights, see Drake (forthcoming).

[19] The Algonquin land claim territory covers the Ontario portions of the Ottawa and Mattawa River watersheds. Canada, Ontario, and the Algonquin people have been negotiating a land claim since 1991. On other potential land claims in Ontario, see Coyle (2005–06).

[20] As Drake notes, "The probability that an Anishinaabek community will be able to collect all relevant information from both the proponent and its own members, retain experts, obtain report from their experts, hold a community meeting, and then come to a decision together within three weeks is extremely low" (forthcoming, 48). Drawing on Borrow's work (Borrows 2010), she argues that the "*Mining Act*'s consultation procedures run afoul of at least two interrelated Anishinaabek legal principles: (i) the obligation to wait, make observations and gather information prior to making a decision, and (ii) the obligation to engage in collective, rather than individual, decision-making" (Drake [forthcoming] 46).

CONCLUSION

The constitutional duty of the Crown to consult and accommodate Aboriginal peoples has been subject to considerable judicial attention since the Supreme Court of Canada rendered its landmark decision in *Haïda Nation* in 2004. In response to the ever-growing body of jurisprudence detailing the legal obligations attached to that duty, most governments in Canada have adopted Aboriginal consultation policies. In addition, many Aboriginal communities, as well as corporate actors, have developed their own consultation policies with the view to completing or supplanting governmental policies (Newman 2014, 115-41).

While many authors have commented on the scope and content of the duty to consult, there is only limited research about the extent to which this duty has shaped governance models in specific sectors of extractive industries. This chapter has analyzed the degree to which the duty to consult Aboriginal peoples has influenced recent mining reforms in Quebec and Ontario. In Ontario, where Aboriginal protests and litigations pertaining to mineral exploration activities were instrumental in sparking the debates that led to the 2009 mining reform, the duty to consult has been formally integrated at different stages of mining decision-making processes, from early exploration to the mine's closure and rehabilitation. While aspects of the regime may still fall short in some requirements of the duty to consult and in light of stronger views of Aboriginal multilevel governance (see the introduction to this volume), it is a good first step towards fulfilling the province's constitutional obligations.

In contrast, the recent modifications brought to the Quebec mining regime provide for a much more limited recognition of Aboriginal rights and related state duties. Without further modifications to its Mining Act to require the exercise of governmental discretionary power prior to the acquisition of mining claims and the performance of exploration activities, the Quebec mining regime, as modified, remains structurally incompatible with the fulfillment by the province of its duty to consult, at least everywhere Aboriginal land claims are outstanding.[21] The new governance regime also has little to do with multilevel governance since Aboriginal peoples have only limited access to the decision-making process.

In any event, the formal restructuring of decision-making processes with the limited perspective of implementing the Supreme Court of Canada's jurisprudence on the duty to consult will likely not suffice to improve the relationship between Aboriginal communities and the mining industry. Achieving such an objective requires deeper changes in values, including the acknowledgement that mining is not necessarily the most desirable use of the land, in particular where it conflicts with

[21] The Innu and the Algonquin, for instance, have outstanding land claims on vast territories in the Abitibi, Outaouais, and northern coast regions of Quebec, coveted for their mining potential.

an Aboriginal community's priorities, values, and responsibilities towards the land. It would also require far deeper engagement with multilevel governance, through mechanisms of shared decision-making and joint policy development and strategic planning. Both Quebec and Ontario's mining regimes fall short in this respect.

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Ontario Regulation 45/11, OReg 306/12.
Regulation Respecting the Application of the Environment Quality Act, ch. Q-2, r 3.

10

THE LEGAL DUTY TO CONSULT AND CANADA'S APPROACH TO ABORIGINAL CONSULTATION AND ACCOMMODATION

Bruno Steinke

From a federal government perspective, multilevel coordination with our provincial, Aboriginal, and private sector partners is currently one of our greater challenges – and opportunities. In focusing here on the legal duty to consult and how it is applied, I offer my perspective on the way things are evolving in Canada, what we have learned so far, and some of the issues we face. I also provide a portrait of the various tools we have developed to facilitate implementing our approach to consultation, including the use of Memoranda of Understanding, consultation protocols, and other mechanisms available for strengthening partnerships between the federal government, provincial governments, and Aboriginal groups.

EVOLUTION OF THE LEGAL DUTY TO CONSULT

The legal duty to consult is rooted in Canada's Constitution Act of 1982 and in successive Supreme Court decisions interpreting section 35, Aboriginal and Treaty Rights, from *Sparrow* (1990) to *Delgamuukw* (1997). The big shift, however, came with the *Haida Nation* and *Taku River* decisions of 2004. These decisions fundamentally changed the consultation landscape, expanding our legal duty to consult

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to all activities that could *potentially* infringe on Aboriginal and treaty rights. The Supreme Court of Canada affirmed that the Crown has a duty to consult when three elements are present: when there is a contemplated Crown action or decision (e.g., permitting and licensing for resource projects); when there are potential or established Aboriginal or Treaty rights (e.g., hunting, fishing, trapping, and other cultural practices related to land, water, air); and when the contemplated activities could have potential adverse impacts (e.g., limitations on Aboriginal groups' ability to exercise various rights and cultural practices). Where the duty arises, the Crown is required to carry out a fair and reasonable process for consultations and demonstrate reasonable efforts to respond and accommodate Aboriginal concerns.[1]

In recent years, the legal duty to consult has expanded its reach geographically. The evolution of the interpretation of this legal duty started in British Columbia, where Aboriginal rights, titles, and treaties had not been formally recognized. The *Haida* and *Taku* decisions focus on such contexts. In the *Mikisew Cree* decision a year later, the court determined that the legal duty to consult also applies in the context of historical treaties. And then came the *Little Salmon Carmacks* decision (2010) recognizing that in modern treaties the Crown needs to first look at the treaty; should the treaty be silent, the legal duty to consult may then apply. Today the legal duty to consult is relevant and could apply in any part of Canada.

The expansion of the duty to consult continued with the *Rio Tinto* decision (2010), which further clarified who has responsibilities in consultation processes and for what kind of government decisions. In addition to the federal and provincial governments, the court confirmed that other government bodies, such as municipal governments, boards, commissions, and tribunals, may also have a legal duty to consult when their decisions may infringe on Aboriginal and treaty rights. In other words, looking across government, most entities potentially have to consult with Aboriginal groups. To me, this is not a bad thing. In fact, it is a great thing. Of course, the challenge for all of us is to implement this duty and make sure that different parts of the various bureaucracies understand these concepts.

The *Rio Tinto* decision also clarified the kind of activities or decisions that can trigger the duty to consult. Initially, with the *Haida* and *Taku* decisions, many people thought the legal duty to consult applied for "shovel in the ground" activities – environmental assessments related to pipelines, mines, or oil and gas development, all activities that can directly affect Aboriginal rights. With the *Rio Tinto* decision, the court went beyond that view and said that the legal duty to consult also applies to "strategic high-level decisions" that could impact Aboriginal rights, such

[1] For a detailed analysis of the Supreme Court's interpretation of the legal duty to consult, see Annex B of the federal government's "Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult – March 2011," http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf.

as land-planning exercises or the allocation of forestry licences. So what does that mean? What are the parameters? What are the limits? If the decision can be linked directly to an impact on a First Nation – for example, if a decision is made that you can't fish in the area, then there may be a direct impact. That aspect is easy. However, when we start looking at all decisions that governments make, at the federal, provincial, and territorial levels, many things that we do can have an impact, direct or indirect, on Aboriginal communities. The challenge we face right now is to establish clear and consistent guidelines as to the kinds of decisions that will trigger the duty to consult.

In order to find this type of clarity, some people have argued that we should have defined the legal duty in legislation. I'm not convinced that is so. We need a consultation process that is flexible; grounding a relationship in legislation, which is what this is really about, may not be the right answer. I think we can write certain concepts into legislation, but the legal duty to consult is evolving and will vary by situation and by relationship. For example, what the Haida want is not what the Mi'kmaq want; therefore, developing national legislation may in fact be impossible.

WHY DOES THE CROWN CONSULT?

So, why do we consult? The Supreme Court gave us a good reason: we have a legal duty to do so. But it is not just for legal reasons. Federal-Aboriginal relationships are important; we should be consulting because we have to build those relationships. If we are only talking to communities about legal issues and specific projects and we don't have a broader relationship, I think we will have missed the boat. We should be building consultation with Aboriginal nations into our day-to-day government activities. Courts have stated that the legal duty to consult is about our reconciliation objectives. It is about balancing larger societal interests with Aboriginal interests. It is about working together on these broader objectives, as well as on the recognition of specific rights and interests. In other words, in Canada we put consultation into two categories: there are legal reasons why we consult with communities, but there are also good governance policy reasons for doing so.

On 17 April 2012, the Government of Canada announced its plan for Responsible Resource Development,[2] which streamlines the review process for major economic projects while enhancing consultations with Aboriginal groups. Increased resource development activities can offer new opportunities to Aboriginal businesses and can generate well-paying jobs for Aboriginal people near their communities. The government's plan for Responsible Resource Development will further integrate Aboriginal consultations into project reviews, ensuring that consultations are consistent, accountable, meaningful, and timely.

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[2] See http://actionplan.gc.ca/en/content/r2d-dr2.

KEY ISSUES AND CHALLENGES

Insufficient coordination leads to an additional burden on communities. The volume of consultations is a major issue, to say the least. In Alberta, some communities enter into consultations over 1,000 times in a year, sometimes up to 2,000 times a year. Think of a band of 500 people and do the math. That's five to six requests a day coming in, asking, "What do you think of this project? What do you think about that project?" We have to begin to look at the process from a national perspective, keeping in mind how Aboriginal groups look at it and experience it. From a community's perspective, this level of demand is daunting. Even from a government's perspective, it is daunting. We recognize that we have a lack of capacity, which serves to emphasize the importance of having officials in all areas of the government understand the legal duty to consult and the ability to manage accordingly.

Lack of capacity also introduces the issue of coordination. One of the key comments we have heard from communities over the years is how frustrating the lack of coordination among government departments is. Communities see a person from one department, then another person from another department and another person from another department, all on the same project. When communities are experiencing thousands of consultations annually and seeing this kind of duplication from the federal government, it not surprising that they ask us to work on streamlining our services and clarifying who is the Crown. So we are looking at how we organize our services within the federal government, and we are making progress. However, another area still needing improvement is federal coordination with the provinces and territories. With a major project, generally there are federal regulatory decisions to be made, as well as provincial or territorial regulatory decisions. We need to work on developing a joint process and using consistent approaches and practices between all levels of government.

I have talked about capacity and the volume of consultations. However, one issue that always comes up is funding for Aboriginal groups to manage these consultations. Communities consistently tell us, "We need more money to keep on top of all the demands placed on the community by government consultations." Although money is not the only solution, it is important to recognize that more support is needed in this area. These concerns raised by communities are something that all governments are looking at and trying to find ways to address.

First Nations are also very concerned about the protection of their rights; they want to be sure that they can maintain their rights. Protection of the environment is another very important issue for many communities. When governments are in discussions with First Nations, they must understand these concerns. They must be able to listen to them and develop models to address them.

There are different views across the country about the role of industry. Some provinces have adopted models for consultation that involve a high level of delegation to industry, while other provinces choose to maintain more control. Federally,

the approach has been varied; some departments rely on industry for procedural aspects of the consultation, while others do not. This diversity of approaches creates challenges. For example, if you are involved in consultations with Transport Canada or Fisheries and Oceans, the consultation approach may in fact depend on which department is involved in the specific project.

Some communities also have agreements directly with industry – that is, in some places, industry is going out and building strong relationships with First Nations. In the mining sector alone, there are over 200 agreements between specific First Nations and mining companies. Some people refer to these arrangements as "impact benefit agreements." I like to call them "partnership agreements" because they are evolving and can be designed to address various issues, including protection of rights and social and environmental issues, as well as job and skills training.

The challenge of these types of agreements for the federal government is that we do not always know what is in them. For example, a pipeline company wanting to build pipelines near First Nations communities may have discussions with these communities and enter into agreements that address their concerns. However, these are often private agreements between industry and the community; consequently, we may not be able to meet our legal duties because we do not know how First Nations' concerns have been addressed by industry. So we need to explore how we can ensure that the government meets its legal obligations in these types of situations – perhaps through greater transparency regarding the content of such agreements.

In considering the evolving nature of the legal duty to consult, one place we have not seen a lot of jurisprudence is regarding accommodation. Federally, the approach to accommodation is to begin by trying to avoid an impact. If an impact cannot be avoided, the federal government will try to identify some form of mitigation to reduce it. For example, is there a different technology that can be used to avoid or reduce the impact of a particular project on a community, wildlife, flora, and so on? The final option is offsets: if a certain area is affected and that impact cannot be sufficiently mitigated, improving the situation in another area may be the only way to address the concern (for example, improving the fish habitat in an adjacent area). However, when considering offsets, it can be quite challenging to balance all the interests involved because you may be affecting another community's area of interest. This complexity begins to give you a sense of some of the policy issues that we are currently working on related to accommodation.

KEY AREAS CANADA IS WORKING ON

I have an interesting job because I give advice to various federal departments and agencies on consultation. The government has developed two sets of guidelines for federal officials, and shortly we will be launching a process to seek input on

updating the existing guidelines. We also provide training to federal officials on the legal duty to consult – this involves 50 to 60 entities across the federal government, including all departments, agencies, commissions, boards, and ports. We started out by explaining to officials the legal duty to consult; now we are talking about how to do consultations with Aboriginal groups.

We have also created tools that are useful for a variety of organizations involved in these consultations. For example, the Aboriginal and Treaty Rights Information System (ATRIS) is a web-based tool now available through the Aboriginal Affairs and Northern Development Canada website. This tool was originally created following the *Haida* and *Taku* decisions. In these decisions, the court noted that federal government departments are known to say, "I didn't know. That was the other department that knew." Consequently, the court talked about real and constructive knowledge – in other words, if one department knows that a community has particular interests in an area, it is deemed that the Crown knows.

As a result, we designed the Google Maps-based ATRIS. You can do searches by community, by names, or by a location in Canada. A lot of researchers are now using it. You can pick an area on the map and it will give you a list of communities that have an interest in it. Industry is also using it for their developments. They used to write letters to us continuously saying, "We have a project here – who in that area should we be consulting?" This was a key reason why this tool was made publicly available.

I now move on briefly to the partnership aspect of our work, which aligns with the conference theme of multilevel governance. I mentioned above that communities complained about seeing a lot of federal officials on the same project; however, they were also seeing provincial officials. Given such overlaps, we have begun to develop federal-provincial memorandums of understanding (MoUs). Currently one is in place with Nova Scotia, and we are in discussions with other jurisdictions. A key feature of these MoUs is to facilitate coordinated consultations and avoid duplication in the consultation process. We also share information that can be linked to ATRIS. What does a province know? What does the federal government know? Can this information be shared? We are trying as well to use MoUs to create more consistency in our approaches to consultation. I have been working in this area for over five years, and in that time we have had some differing views as jurisdictions; however, I think we are seeing a growing convergence of perspectives. We are also looking at opportunities for joint training to facilitate a common understanding of the legal duty to consult.

Federally, we see the development of protocols as an exciting new horizon for our work. Protocols are being tailored to the Aboriginal groups and the government jurisdictions involved. This new tool is seen as a mechanism to set out the roles and responsibilities of all parties in a consultation. Protocols basically set out a reasonable process for consultations and identify primary points of contact for each party. A number of protocols have been established in Atlantic Canada, and we are also in discussions and looking at options in other parts of the country.

The protocol in Nova Scotia has been in place the longest. Before the protocol, if you as a federal official were planning a project in Nova Scotia, you would have to talk with 13 First Nation communities. Now that the protocol is in place, these communities have identified a central point of entry for consultations. They have established their structure, and it works for them; it is not the government imposing it. The communities decide how to organize themselves, and they facilitate the consultation on their side. This protocol enhances consistency and capacity within the organization coordinating consultations, which means that there is more expertise growing in the communities.

MOVING FORWARD

I see more opportunities to work on protocols and partnerships with Aboriginal groups, as well as with provincial and territorial colleagues. We need to continue building closer relationships with industry, and we need to clarify industry's role in consultations with First Nations. We will also continue our work updating our guidelines, as well as further developing and building ATRIS. Communities and other jurisdictions are now contacting us saying that we need to add this feature or add this additional information, so the tool will evolve.

The federal government needs to be ready for things to continue to evolve. There will be more jurisprudence. The need to consult First Nations is not going to go away, and it is not just about checking boxes. To me, the legal duty to consult is one aspect, but it is really grounded in the need for reconciliation and building longer-term relationships. The legal duty to consult is one part of a larger partnership that needs to be established.

11

GAME CHANGER? RESOURCE DEVELOPMENT AND FIRST NATIONS IN ALBERTA AND ONTARIO

Gabrielle Slowey

Canada has long been conceived of as a staple-producing nation; this is truer today than ever before, given our intensified focus on resource exploration, development, and exporting (Innis 1999; Watkins 1963; McNally 1981; Stanford 2014; Pratt 1976; Howlett and Brownsey 2008; Haley 2012; Hayter and Barnes 2001). Long after the fur trade has ceased to be a major economic factor in the North, the search for resources continues to dominate the landscape and intensify across the country. Most notably, since the late 1970s Canada's oil and gas industry has centred on the development and exploitation of the Alberta oil sands, and the extraction of bitumen from the sand to produce crude oil. With more than 170 billion barrels of recoverable oil, it represents Canada's biggest resource (McCarthy 2014).

More recently, in a northern region of Ontario approximately 540 kilometres northeast of Thunder Bay, one of the most significant mineral discoveries in the province has been uncovered. The Ring of Fire region (as it is known) has a projected mineral potential estimated to be worth $60 billion and includes the largest deposit of chromite ever discovered in North America.[1] The Ring of Fire also holds the potential for significant production of nickel, copper, and platinum. The region has thus been lauded by representatives of the federal government as the next oil sands-like development in Canada, bringing much-needed jobs and development to the region (Tencer 2013).

The author wishes to thank Martin Papillion for his excellent editorial suggestions and the anonymous reviewers for their thoughtful comments.

[1] Chromite is a key ingredient in the fabrication of steel.

As one might expect, First Nations in Northern Ontario want to make sure they are in a position to benefit from resource development because, as federal minister and Treasury Board president Tony Clement has gone on record saying, the Ring of Fire "has the potential to transform what was hitherto a very poor, underdeveloped area of Ontario and give people who live there, particularly First Nations people, a chance for a decent life" (Tencer 2013).

As First Nations in Northern Ontario try to figure out how to maximize the benefits from mining development, one suggestion is that they look west for business advice and capital suggestions. As J.P. Gladu, the president and CEO of the Canadian Council for Aboriginal Business, puts it: "A lot of our cousins to the west were where our communities are now … struggling with resource development, struggling with our relationships (with industry and non-Aboriginal governments), struggling with unemployment, struggling with lack of infrastructure" (Phelan 2014). But should Ontario First Nations be so quick to look west? While many First Nations in Alberta have successfully negotiated Impact and Benefits Agreements with industry, this chapter asks: do negotiated agreements between industry and First Nations represent a viable solution for First Nations seeking not only to benefit from development but also to participate in the decision-making process related to the kind of development that is occurring on their traditional lands? To use the conceptual framework proposed in the introductory chapter of this volume, do these shifts in resource governance constitute a new form of multilevel and multiparty approach to decision-making in resources development? And more broadly, to what extent do these new governance arrangements change the political and economic conditions of First Nations?

This chapter considers whether or not negotiated agreements in the resource sector in Alberta provide First Nations with a degree of decision-making power when formal political authority is not available. As Ontario First Nations look west for inspiration and guidance, it is important for them to explore what kinds of arrangements provide First Nations with the tools that enable them to meet their goals over the long term. This chapter concludes that, when looking west, one should be cautious, because although the material condition of the Alberta First Nations has improved substantially, important political and social gaps remain. Instead of mimicking Alberta's privatized model of resources governance, Ontario should consider its own experience in developing more holistic frameworks for First Nation participation in both the economic benefit and the governance of natural resources.

IS ALBERTA A MODEL?

In Alberta, the reason for the almost singular focus on oil sands extraction is simple: "The economic benefits are so significant that despite the social and environmental impacts [of oil sands development] the positive aspects of the project[s] outweigh

the negative impacts" (Cryderman 2013). To a large extent that sentiment resonates beyond provincial borders. The Alberta government says the sector supports the jobs of 112,000 Canadians outside the province, a figure it says will grow to 500,000 in 25 years. In a 2012 report, the Conference Board of Canada forecast that the oil sands sector would generate $79.4 billion in federal and provincial revenues from 2012 to 2035 (McCarthy 2014). Consequently, the economy of Alberta, and to a certain extent Canada, is largely driven by and dependent upon the oil sands industry.

For many First Nations in the province, the oil sands development has dramatically transformed their socio-economic condition, making them less dependent on government and more self-sufficient. Since 2012, the Athabasca Chipewyan First Nation (ACFN) has refused federal funding in the form of previous contribution agreements. For its part, the Fort McKay First Nation (FMFN) only draws 4 percent of its revenue from the federal government. As ACFN spokesperson Eriel Deranger explains, "Yes, we are receiving money from industry, from contracts with them, but we are not in there saying, 'Dig, drill, baby, drill!' We are providing services from multiple sectors" (Sterritt 2014). The ACFN, unlike the Alberta government, does not receive royalties from resource extraction, nor do they have access to tax-revenue sharing. Instead, these First Nations have negotiated Impact Benefit Agreements (IBAs).

In essence, IBAs are private, confidential contracts negotiated between a proponent and an Aboriginal group. Despite years of experience with these agreements in Canada, the corresponding literature is limited and fairly recent. There is little analysis of the factors that determine their success or failure, or the extent to which they are implemented (O'Faircheallaigh 2013; O'Faircheallaigh and Corbett 2005; O'Faircheallaigh 2004; Langton et al. 2004; Caine and Krogman 2010; Galbraith, Bradshaw, and Rutherford 2007). This dearth is largely due to these agreements being confidential. In addition, much of the literature available focuses on the Yukon and the Northwest Territories and therefore may not reflect the reality of First Nations in provinces like Alberta and Ontario where natural resource issues are framed in a different political and legal context (Sosa and Keenan 2001). In general terms, IBAs are agreements that address and deal with the impacts of a project on a community. With no consistent definition or regulated framework, an IBA can take the form of an agreement or joint venture or joint ownership. It can contain provisions that address matters of economic and educational initiatives, including job training and employment opportunities and financial compensation. Typically, the benefit of an IBA is that it means a project is taking place. For a First Nation, it can be viewed as a source of development of wealth, leverage for power, and means to create opportunity. To be clear, however, the provisions of an IBA with industry "do not represent resource revenue sharing" because industry does not have the jurisdictional capacity to share resource revenues (Shanks 2006). Rather, it is only through government-to-government transfers that revenues can

be shared. Hence the aim of the First Nation involved in an IBA is to maximize its benefits from development, and the incentive for the proponent is to ensure a stable operating environment as well as to demonstrate to the provincial regulator First Nations support for the project.

Fidler writes that, as negotiated or bilateral agreements, these agreements can provide potential avenues for, or open up space for, First Nations governments to influence the social licence of development (Fidler 2010). That is, even though formal decision-making remains the exclusive purview of the federal and provincial governments, there remains a significant amount of de facto power in the hands of First Nations governments through their refusal or acceptance of negotiated IBAs. Fidler suggests that through negotiated agreements and the environmental impact assessment (EIA) process, First Nations peoples are maximizing their benefits and minimizing adverse impacts of projects (Fidler 2010). She notes how the evolving participatory framework of agreements and environmental impact processes "incorporate the local concerns Aboriginal communities have into decision-making" (Fidler 2010, 235-6). At the same time, "in many instances First Nations are being forced to use IBA processes to deal with issues well beyond project impacts and benefits because they do not have access to government through parallel processes" (Shanks 2006). Put simply, First Nations put all their energy into IBAs because they are the "only show in town."

While First Nations concerns may indeed be taken into account through IBAs, Fidler nonetheless concedes that the Crown retains sovereign authority in all matters of resource development. Decision-making ultimately follows a classic top-down perspective, where the Crown establishes the rules of the game through its regulatory framework and makes the ultimate decision on whether to authorize development or not. IBAs and similar forms of First Nations–industry partnerships are not a case of shared decision-making. (See this volume's introductory chapter.)

First Nations' access point to the decision-making process on resources development is generally less through private IBAs than through environmental assessment and consultation mechanisms associated with the duty to consult. Part of the problem, in Alberta as elsewhere, is that while the duty to consult is the responsibility of the Crown, the consultation process itself can be delegated to project proponents according to the Supreme Court (ref. to *Haida Nation* and *Taku River*). What this means is that while the Crown is ultimately responsible, proponents tend to do the groundwork of consultations on behalf of the Crown. The government of Alberta has opted to delegate most procedural aspects of consultation to its industrial partners. Concretely, this means that project proponents and First Nations are simultaneously negotiating private economic benefit agreements *and* engaging in legally mandated consultations over the potential social and environmental impacts of the project.

As Gibson and O'Fairchellaigh note, "Herein lies the link between the duty to consult and the negotiation of IBAs. If a developer cannot demonstrate that it has consulted, it faces the possibility that the Crown will refuse to issue or will revoke permits under challenge by Aboriginal peoples (as happened in the case of Taku

River Tlingit v. British Columbia)" (2010, 30). The project proponent therefore has an incentive to merge the two processes. The problem is that both obey different logics. IBAs are economic licences for projects, whereas consultations aim at assessing their impact on Aboriginal and treaty rights.

This merging of consultation with the negotiation of IBAs is most prevalent in a province like Alberta, where the practice of some corporations has been to reduce the risk of challenges by proactively negotiating this type of agreement with Aboriginal groups. IBAs are in fact encouraged by the provincial government, including in its consultation policy (Government of Alberta 2014). This approach is evidenced by efforts made by industry in Alberta to work with First Nations peoples. Headlines like: "Ivanhoe Energy, Mikisew Cree Negotiate Letter of Non-Objection for Oilsands Project" or "Brion Energy Corporation and the Community of Fort McKay Reach Agreement on Dover Commercial Project" reflect the degree of engagement of heavy oil development project proponents in addressing First Nations concerns as part of the regulatory approval process.

The process to address First Nations rights to lands and resources therefore exists within a dynamic, evolving relationship with many actors interacting on many levels. However, the merging of consultations and IBA negotiations is not necessarily indicative of any new governance relationship. So long as the focus of IBAs remains centred on employment, training, and business and/or even on environmental concerns along with fixed payments, at the end of the day the process does not provide the First Nations with any new decision-making authority on the development itself. At the end of the day, IBAs are simply private agreements based on the assumption that development will take place. They are not about deciding whether this development should take place and under what conditions. By merging IBAs and consultations, the government effectively privatizes the governance of resources and removes a site for First Nations to engage over the actual value and opportunity of the development itself. This arrangement is in contrast to a more holistic development agreement where First Nations negotiate IBAs with industry but also participate in the actual approval of the project, not just as economic beneficiaries.

Like the oil sands themselves, IBAs have significantly transformed the landscape in Alberta. The ACFN first signed IBAs with major oil sands producers in the early 1990s and have since signed a new IBA in 2011 with French company Total that promises a modest cash flow. Creating a "Community Sustainability Fund," the First Nations intend to negotiate similar agreements with other producers with the intention to put the funds in a trust that will benefit future generations. According to band employee John Rigney, "When the trust is operating, the intent is to flow about half ACFN's share of corporate profits directly into the trust and flow about half to the ACFN government" (Sterritt 2014). Rigney adds that the trust will also collect half the proceeds of the various IBAs currently being negotiated with the intention being that the trust will be valued at $200 million in 20 years (Sterritt 2014). This is a lofty ambition and one that First Nations across Canada seek to

emulate. At the same time, some may view the position of the ACFN to be hypocritical – publicly decrying and challenging oil sands development on one hand and taking funds from which to build a community trust on the other. Spokesperson Eriel Deranger cautions: "We have to make the best of situations that are not always ideal" (Sterritt 2014). In many cases, these agreements reflect a lot of time and hard work, long-term relationships, and ongoing consultation. While companies concede that their projects are not always met with great interest, a negotiated agreement reflects a commitment by industry to support these communities. But when it comes to the future development of the oil sands, there is increasing concern over the environmental toll that development is taking. As the canaries in the mine, First Nations in Alberta are in conflict not only with proponents seeking expansion opportunities or with the state but also with other First Nations who benefit differently from industry and from within, as communities struggle to strike a balance between cultural tradition and economic prosperity.

Communities close to the oil sands, like Fort McKay First Nation (FMFN) or, just downstream, the Athabasca Chipewyan First Nation in Fort Chipewyan, are engaged with the industry in a way that is, arguably, raising the standard of living. The reason for this engagement is clear: "We don't want handouts and dependency. We just want some of the wealth of the land. We don't want expensive social programs for the young. Hunting and fishing are our social programs" (Strauss 2005). Indeed, although they benefit economically from oil sands development, communities like the ACFN have strongly voiced their environmental concerns over oil sands expansion. At the heart of the concern is the deterioration of traditional ways of life. As Athabasca Dene youth leader Mike Mercredi explains, as recently as 40 years ago, trapping was a livelihood that sustained the Dene people. His concern is that there has been a shift in focus away from a traditional way of life and that this shift will lead to the demise of his culture. As he puts it, "If we are not focusing on the culture and way of life, then you might as well say we are ghosts. We are dead" (Sterritt 2014). Although he used to work for a large oil sands company, today Mercredi works for his First Nation running a youth and elder program called the Experiential Learning Initiative. However, the program is funded by the industry he now opposes. According to Mercredi, six large oil companies have given funding to his project through a fund allocated for youth and community programs in Fort Chipewyan. As one journalist notes, "It's one example of the many complexities present in a community struggling in a rapidly changing world" (Sterritt 2014).

According to Fidler, a negotiated agreement like an IBA can help map out how regulatory approval can be achieved with the support of a First Nation. She concludes that negotiated agreements have become mainstream mechanisms for First Nations peoples "to regain control and integrate local decision-making into project design and planning" (Fidler 2010, 241). The emergence of this type of participatory governance practices (like co-management regimes in the North) have arguably significantly enhanced Aboriginal peoples' influence over land, wildlife,

and resource decisions (White 2002). That being said, if First Nations are increasing their influence in the development process, the ultimate authority to regulate how this process unfolds remains with the Crown. Whether it be provincial dismissal of First Nations' environmental concerns about pollution in the Athabasca Delta or First Nations' health concerns about increasing numbers of rare cancers, the relationship between the province and First Nations remains, as Fidler puts it, intractable and unilateral.

To sum up, IBAs do represent good-faith efforts to establish good community relations designed to establish an arrangement where the parties involved are comfortable. Ultimately, in Alberta, these relationships occur without a lot of help from the government. For its part, industry believes it is good business to take First Nations concerns seriously and, to that end, take positive steps to resolve problems that may arise. Yet the federal and provincial governments continue to assert their positions as sovereign on First Nations territory and ultimately decide unilaterally whether development will take place or not.

ONTARIO: A NEW WAY FORWARD?

The potential for resource development to transform the Ontario North comes at an important time, given the dire condition of many communities. Indeed, there is a great sense of optimism and hope attached to the development of the Ring of Fire. As Brian Davey, executive director of the Nishnawbe Aski Development Fund, puts it: "Resource development, if it is done right and respects the land, can be a contributing factor in achieving for our communities all four elements (healthy, happy, loving and fulfilled)" (Davey 2014). For many years the communities of Northern Ontario have dominated the national news headlines with annual floods, evacuations, and calls for relocation. Given the lack of industry in the region, there is high unemployment and, consequently, state dependence. Hence, the desire to benefit from resource development is significant as a vehicle to transform not only the material condition of the communities but also the mentality of the residents. As George Hunter, former chief of Kashechewan, has said, "It's the same problem in Kashechewan. They've got a welfare mentality. The province takes in $400 million a year from licenses. If we just had some of that money, we could look after ourselves" (Strauss 2005). Indeed, as is the case across the country, the prospect for development means the potential for IBAs to be signed. Already in Ontario at least 28 IBAs exist, albeit only seven on producing mine sites and two in the development stage. In fact, the new provincial mining act encourages them. Hence the potential development of the Ring of Fire could be viewed as a boon to a host of First Nations across Northern Ontario. A key difference in Ontario therefore is not the absence of IBAs but that IBAs are only one piece of the puzzle, as the provincial government under Premier Kathleen Wynne appears poised to play a more proactive role in bringing First Nations into the decision-making process.

The proposed development covers 5,000 square kilometres and has a potential to generate $120 billion dollars. It also impacts more than nine First Nations. The Matawa First Nations is a tribal council of nine Northern Ontario First Nations part of the Nishnawbe Aski Nation (NAN). These include the communities impacted by the project: Marten Falls First Nation, Webequie First Nation, and Neskantaga First Nation – and others on the edge include Niminamik First Nation, Aroland First Nation, Long Lake 58 First Nation, Ginnogaming First Nation, Eabametoong First Nation, Miskheegogamang First Nation, and Constance Lake First Nation. Five of these communities are not yet accessible by road.

In 2012 there were 30,000 claims and two major developments in the Ring of Fire. But challenges include a lack of access to the remote region, infrastructure such as roads, railways, electricity, First Nations land rights, and environmental issues. For his part, federal Minister Tony Clement clarified that the only way any extraction project can work is if First Nations people in the region are included as partners. Although Clement promised that the federal government would consult with local communities and develop plans allowing them to participate in the economic activity that this project is going to generate, it stopped short of committing funds to that end. In May 2014, the Ontario government announced that it was recommitted to spending $1 billion to build a highway to the province's remote northern Ring of Fire region, with or without a federal government commitment to spending.

However, on 13 June 2013, Cliffs Natural Resources had put its $3.3 billion project on hold pending further negotiations between First Nations and Queen's Park. Cliffs claimed that the provincial government had not consulted with First Nations, nor was it developing the necessary infrastructure required to extract the resource (e.g., roads, airstrips, etc.).[2] Since then, the company has announced that it will close down its operations. Still another company, Northern Superior Resources Inc., filed a lawsuit in November 2013 against the Government of Ontario, also charging it with failure to consult with First Nations even though First Nations groups had announced that they were ready and willing to enter bilateral negotiations (Morris 2013).

According to Minister Tony Clement, the federal government is looking to industry to invest in the region to develop the deposit. However, when it comes to investment in infrastructure required to transport the resource, industry is looking to the province and the province is looking to Ottawa. To wit, as former Ontario premier Dalton McGinty put it, "Canada needs to deal with the acknowledged and widespread problems of inadequate First Nations' social and community infrastructure. To this end there needs to be immediate investment in the First

[2] To be fair, it is possible that, unlike companies operating in northern Alberta, Cliffs, an Ohio-based company, has no history of working with First Nations and is unfamiliar with working with the expectations, protocols, and requirements for building these relationships.

Nations communities located in the Ring of Fire area so that a healthy and skilled First Nations workforce will be ready to participate fully in the many opportunities presented by this development" (Murray 2012). The situation is what Bob Rae once called playing "constitutional ping pong" (Cassidy 1991). As Rae correctly pointed out, the federal and provincial governments put up roadblocks that shut out First Nations governments, but this is not necessary and what is required is political will and creativity to find space for First Nations. That is, as the federal and provincial governments debate matters of jurisdiction over First Nations peoples, they each refuse to take ownership of the issue instead of engaging with First Nations in the area – all this despite the fact that Ontario, unlike Alberta, has a history of engaging with First Nations in the region.

Indeed, it was under the Rae government leadership that a future partnership between the Moose Cree First Nation (MCFN) and the Ontario government first took root. More specifically, as early as 1994 the Rae government gave the go-ahead for the Ontario Power Generation to refurbish three hydroelectric stations and replace a fourth in Smoky Falls, Ontario. Although the project involved negotiations with the MCFN, the community initially walked away from the deal. As Chief Hardisty explains, "We didn't really know each other well at the time" (O'Kane 2013) . While the utility did try to get the band's consent, Hardisty explains that "we were given an offer and we said no" (O'Kane 2013). That is, the MCFN refused to give their consent to the project.

So what changed? In 2005, after restructuring, the province and the utility returned to the community and over time the two sides worked together to achieve a deal that saw the MCFN get a 25 percent stake in the project that will see them share in its revenue generations along with employment and training opportunities and agreement on environment impact goals. For the community, the stake is a "central part of the reconciliation for past harm done" to the First Nations because the dams were originally built on their traditional territory without consultation and their treaty rights were ignored. What this deal reveals is how important relationship-building is to the development of negotiated agreements and the role that First Nations governments play in the realization of resource projects.

When it comes to the Ring of Fire project, as early as May 2011, Matawa chiefs and their communities called for a Joint Environmental Assessment (EA) Review Panel. On 13 October 2011, the Canadian Environmental Assessment Agency (CEAA) proceeded with a Comprehensive Study Environmental Assessment that favoured the mining industry and that did not invite local First Nations to participate. Only seven days later, on 20 October 2011, Matawa First Nations removed its support for the Ring of Fire development unless the federal government agreed to a joint review panel EA process that would allow First Nations communities in the area to have a voice (Smith 2011). The Matawa chiefs also announced that, from then on, they would live by the oral treaty because they objected to what is known as the "Take It Up" clause in Treaty 9 that permits the province to reclaim any land set aside for Treaty 9 for purposes of mining or forestry (Kornacki 2011).

So Matawa communities asserted their inherent and treaty rights and refused to acknowledge impositions created by others. They were seeking to ensure that any development that occurred on their traditional homelands occurred only with their free, informed, prior consent. At the same time, the province was claiming it could proceed with development despite Matawa objections. Given the withdrawal of Cliffs and the lawsuit by Northern Resources, the province became the focus of blame for failing to strike a deal. Headlines like: "Their Bungling Has Snuffed Out an Amazing Opportunity" or "Ontario Fails to Seal Lucrative Mining Deal" firmly assigned blame to the provincial government for the collapse of the project.

Then, in March 2014, a Regional Framework Agreement was signed between the Matawa First Nations and the Ontario government giving First Nations in the area a stake in how the Ring of Fire will be developed. The agreement outlines how the nine First Nations that comprise the Matawa First Nations will work with the province on the environmental assessment process and monitoring; it also addresses matters pertaining to resource revenue sharing and developing regional and community infrastructure. This is an important agreement because economic, social, and governance issues (and their interrelationship) are given equal consideration. The framework calls for mutual respect, understanding, participation, and accountability. Indeed, the commitment of the province to a new process and a new relationship was reflected in its choice of former Supreme Court justice Frank Iaccobucci as the lead provincial negotiator, and Bob Rae as Matawa negotiator, both of whom as high-profile public officials lent significant gravitas to the negotiations. For his part, Rae, as the chief negotiator for the nine Matawa leaders, suggested the agreement in Ontario is a "game changer" for the First Nations people in the region. According to Rae, the agreement reflected a government-to-government approach to negotiations and respected First Nations' desire to participate directly in projects in much the same way as they do in other jurisdictions including British Columbia, Quebec, and the Northwest Territories. This perspective is articulated in the First Nations' take on the importance of a framework agreement: as Webequie First Nation chief Cornelius Wabasse put it, "We just want a proper consultation … and also to work with government side-by-side on how we're going to alleviate some of these issues that will arise from the development in our area" (Smith 2011).

Negotiated agreements are increasingly emerging in situations where the stakes for the potential economic benefits are high. That is, in terms of cost-effectiveness, it is important for governments and industry to engage with First Nations governments to avoid project development delays. Overall there is a sense that First Nations need to be engaged to some degree in resource development. When it comes to working with industry, First Nations communities across Canada face increasing and multiple pressures as companies seek their support to fast-track the environmental review process to demonstrate the feasibility of their projects and get them going.

In many cases, companies themselves are bearing the costs for studies and providing tribal councils or First Nations with funding to support their process to

critically review the proposed projects. But dealing with the proponents, for some First Nations, should not be the first step. As Teegee puts it, "Essentially for us, as First Nations, we should be dealing with governments first, really considering if we want these projects in the first place" (Narine 2013).

What is at stake therefore is finding a meaningful way to work with provincial and federal governments in terms of a more comprehensive approach to resource development. For the most part, what is also at stake is development itself. But as has been stated time and time again, and is certainly the case in many places across Canada, First Nations are not necessarily opposed to development; neither, however, are they willing to support it at any cost, most of which they bear in terms of social ills (increased drug use, abuse, alcoholism, and the like) and environmental degradation. The key is to find a balance between economic development and the protection of lands for future generations (Slowey 2009).

Clearly, federal and provincial governments' role is to support First Nations in rebuilding their systems of governance and to include them in the decision-making process. As Elijah K. Moonias, Marten Falls First Nation chief, explains: "Currently there is no instrument to conduct tri-level talks, but there is no question about the need for trilateral discussions for development in the Ring of Fire. I believe our local MOU [memorandum of understanding] and the Regional Framework provide the window for that" (Office of the Premier 2014). Indeed, the Regional Framework is cause for optimism that First Nations claims in Ontario will in future receive the provincial and federal attention and prioritizing that can lead to lasting and meaningful change. As John Long puts it, the question is not whether Canada can afford the cost of one or more modern, negotiated land-claim agreements in Northern Ontario but whether we can afford the cost of not resolving the simmering conflicts that exist (Long 2010).

CONCLUSION

First Nations all across Canada are struggling with development pressures. At the same time, the development of natural resources is increasingly setting the agenda for many First Nations leaders. As new agreements between First Nations communities, industry, and some provinces have emerged and are transforming the development landscape, the change in negotiating platforms reflects a new reality and a new mantra for both industry and governments to heed: "Development will not occur unless Aboriginal people have been engaged" (McCarthy 2013). Governments and industry increasingly consult and negotiate with First Nations, and no longer are these interactions optional. They now form an essential part of conducting business, necessary to secure social licences. How this engagement occurs, and when, varies across jurisdictions and regions. In the case of Alberta, the negotiation of IBAs concomitant with consultation suggests that First Nations'

opportunities are restricted to their role as stakeholders. Hence, the power of IBAs to transform the political condition of First Nations is negligible. In contrast, in Ontario it would appear that while industry negotiates IBAs with communities, the province is also engaged in a multilevel process that guides how the development will unfold. As Premier Kathleen Wynne put it, with "this [Regional Framework] agreement, we have taken an important step forward together – we have adopted a different kind of negotiating process that is based on respect. We now have a framework to guide our discussions as we work toward achieving our common goals, and ensuring that everyone benefits from development in the Ring of Fire" (Office of the Premier 2014). Clearly, the leadership in the province has a vision of how to move development forward, in a manner that may prove more meaningful for First Nations.

While the decision by First Nations to support new development projects is not an easy one, as Terry Teegeee, Carrier Sekani tribal council chief, pragmatically puts it: "We're in the game, whether we like it or not" (Narine 2013). At the same time, it is clear that First Nations that engage in resource development can expect to receive both financial and non-financial benefits. No longer just stakeholders, First Nations groups are now turning to negotiated agreements as a path to reconciliation. What this chapter reveals, therefore, is the increasingly complex relationship that exists between levels of government and development proponents, where synergies cannot be assumed to exist but where solutions must be found.

Given the West's rich and enduring experience with development, it may be tempting to look there for guidance. However, to do so might not be in the best interest of eastern First Nations who may in fact be further ahead in terms of working with the provincial government. If experience elsewhere in the country is any indication, like that of the First Nations in the oil sands region who have a long history of working with industry and negotiating IBAs, there is indeed the potential to benefit materially from development taking place. However, even in Alberta, First Nations are conflicted. This chapter shows that these agreements do form part of a new multilevel governance model but that this model does not really transform First Nations into decision-makers. The nuance is important because what this means is that multilevel governance can be in fact quite constraining for First Nations. Hence this chapter reinforces the point that multilevel and multiparty governance does not necessarily mean that First Nations have more say in the ultimate decision to go ahead or not with development.

While IBAs are important in terms of ensuring that First Nations receive economic benefits emerging from development, they remain limited in terms of improving or enhancing First Nations governance abilities. Instead, the move towards a more holistic approach, as is the case in Ontario, signals an important move towards improving First Nations economic prospects *and* respecting First Nations governance. Today, the reality is that resource development must include and involve First Nations peoples and engage with First Nations governments, given new legal realities, First Nations mobilization, and changing norms and

values. As one of the Northern Ontario chiefs, Neskantaga[3] chief Peter Moonias puts it: "First Nation rights and inherent responsibilities to the land demand that we are full partners in discussions about exploration, ownership, participation in production and long-term sustainability of our environment, our communities and our futures" (Bell 2013). As provinces like Ontario make steps towards including First Nations in regional agreements, it is important to move beyond IBAs to ensure that the Crown effectively engages indigenous governments to ensure that resource development projects become "game changers" for all parties involved.

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IV

The Changing Landscape of Métis Governance

12

MÉTIS-PROVINCIAL-FEDERAL RELATIONS: BUILDING MULTILEVEL GOVERNANCE FROM THE BOTTOM UP

Janique Dubois

Métis aspirations for self-determination have never fit comfortably with the goals of the Canadian state. Born from the union of Europeans and First Nations during the fur trade, the Métis developed a distinct way of life in the early nineteenth century that revolved around the Buffalo Hunt (Stanley 1965; Dickason 1985; Morton 1978; O'Toole 2013; Barkwell 2010). Through complex governance practices that regulated the hunt and trade, the Métis emerged as a highly organized "new nation" in the mid-1800s (Stanley 1963). The Métis' sustained desire to govern their social, political, and economic future led them to establish a democratic and representative government in the late 1860s to negotiate their peaceful entry into Confederation as an independent province. Under the leadership of Louis Riel, the Métis secured their perpetual right to self-determination through land grants and related protections in the Manitoba Act, 1870 (Stanley 1972).

Reneging on the constitutional promises enshrined in the Manitoba Act, Canada used military and political force to quash Métis aspirations for self-determination after Confederation.[1] Military confrontations culminated with Canada's victory over

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[1] Consistent with arguments that have long been made by Métis leaders and scholars that the protections outlined in the Manitoba Act, 1870 were not respected, the Supreme Court of Canada acknowledged Canada's failure to live up to the promises made more than 125 years ago in *Manitoba Metis Federation Inc. v. Canada* (Attorney General), 2013 SCC 14.

the Métis during the 1885 Battle of Batoche. In the aftermath of the battle, Louis Riel was sentenced to hang for treason, affirming the primacy of Canada's political goals over those of the Métis. The Métis – whose political and territorial integrity was undermined by Canada's colonial ambitions – became largely invisible in the country's post-Confederation legislative and political agenda. Despite state efforts to cast them as "Canada's forgotten people," they have never abandoned their commitment to govern their social, political, and economic future. Over the past quarter century, in an effort to fulfill this long-standing goal, the Métis have built a network of organizations through which to negotiate their place as a legitimate self-governing nation alongside provincial and federal governments.

In this chapter, I assess the state of contemporary Métis-provincial-federal relations. I advance the empirical claim that the Métis have inserted themselves in Canada's formal and informal governance processes through a bottom-up approach centred on meeting the everyday needs of Métis citizens. The chapter begins with an overview of the contemporary network of governance bodies created by the Métis to address their socio-economic needs and pursue their rights. In a second section, I demonstrate that, through the democratization of their governing bodies, the Métis have increasingly positioned themselves as equal partners in the everyday governance of various sectors. While this section focuses on how the Métis exercise agency to assert their rights from the bottom up, the third section examines the extent to which state institutions and processes have adapted to accommodate Métis aspirations for self-determination from above. The story that unfolds throughout the chapter reveals that, although the Métis have made strides in advancing their self-determination agenda, their aspiration to participate as equal self-governing partners in Canada continues to be constrained by the legislative and political framework currently guiding Métis-state relations. In short, the challenge that emerged in the nineteenth century of reconciling Métis aspirations for self-determination with Canada's political objectives has yet to be resolved.

UNDERSTANDING THE MULTILEVEL STRUCTURES OF MÉTIS GOVERNANCE

Today, the Métis are represented by a number of local, regional, provincial, and national organizations that have the dual purpose of meeting their socio-economic needs and pursuing their rights.[2] Although contemporary Métis organizations differ in scope and style, they share two key principles: community participation and direct

[2] This chapter adopts the definition of the Métis Nation outlined by the Métis National Council (2002) and upheld in principle by the Supreme Court of Canada in *R. v. Powley,* 2003 SCC 43, [2003] 2 SCR 2007. It also focuses on the network of organizations that accept this definition and that work under the larger umbrella of the Métis National Council. As such, it does not discuss the unique governance relationships of the Alberta settlements, which are discussed in Bell (1994).

democracy (Barkwell 1991; Saunders 2013a; Chartrand 2004). These principles can be traced back to the practices of the Buffalo Hunt, whereby the Métis would gather each fall and spring to collectively adopt laws and elect leaders to oversee the activities related to the hunt (Gaudry 2014; Chartrand 2008). These principles were also represented in the structure of the provisional government of 1869 that negotiated Manitoba's entry into Confederation (Saunders 2013a; Stanley 1972; Weinstein 2007; Hall, Hall, and Verrier 2014). Passed down from one generation to the next, the commitment to community participation and direct democracy continues to inform Métis governance practices.

Community-Level Governance

Métis governance begins with community-level associations (Dubois 2013; Saunders 2013a; Dobbin 1981; Sawchuk 1998). Created through grassroots mobilization throughout the twentieth century, these associations are called "communities" in British Columbia, "locals" in Alberta, Saskatchewan, and Manitoba, and "chartered community councils" in Ontario. Approximately 400 of these community-level associations across the Métis Nation serve as the primary units of decision-making for Métis communities.[3] Testifying to this fact, the constitution of the Métis Nation British Columbia explicitly states: "Communities shall be the basic unit of the Métis Government" (MNBC 2013, Art. 55).

Community-level associations vary in size and capacity.[4] Governed by an elected board – generally a president/chair, vice-president/chair, and secretary-treasurer – they serve as the first point of contact for Métis citizens. Each local is incorporated separately and can determine its own priorities.[5] Some are involved in the delivery of programs and services, while others play a more civic role, organizing community events. For example, the Central Urban Métis Federation Incorporated in Saskatoon runs various programs related to housing in partnership with municipal

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[3] Although the number of local organizations varies, the breakdown is currently as follows: Ontario, 36; Manitoba, 134; Saskatchewan, 105; Alberta, 67; British Columbia, 34.

[4] The requirements for forming a community-level organization vary by province. For example, the MMF and the MN-S require a minimum of nine members, the MNA requires ten members, and the MNBC requires 25 (MMF 2012, Art. 5; MN-S 2013, Art. 7; MNA 2013, Art. 4.8; MNBC 2013, Art. 56).

[5] The process through which community-level associations are incorporated varies across provinces. For example, locals in Alberta are incorporated under the Societies Act of Alberta, whereas community associations in Ontario are incorporated under the MNO's Community Charter Agreement and therefore use the MNO's incorporation number (MNA 2013, Art. 4.8; MNO 2013, Art. 2.5; Madden, Graham, and Wilson 2005; Lipinski 2013).

and provincial governments, whereas the Niagara Region Métis Council primarily organizes workshops and community events.

These various community-level organizations are grouped into regions that are represented at the provincial level by five governing bodies: the Métis Nation British Columbia (MNBC), the Métis Nation of Alberta (MNA), the Métis Nation-Saskatchewan (MN-S), the Manitoba Métis Federation (MMF), and the Métis Nation of Ontario (MNO).[6] Together, these bodies make up the Métis National Council (MNC), which represents the Métis Nation nationally and internationally.

Provincial Métis Governments

Provincial Métis governing bodies hold competing identities. On the one hand, they are incorporated as not-for-profit corporations accountable to provincial/federal governments.[7] On the other, the Métis have structured some of their provincial governing bodies as democratically accountable governments. The simultaneous existence of provincial governing bodies as not-for-profit service delivery organizations and as democratically accountable governments results from the Métis' ambiguous position in Canada's legislative and political framework. To make sense of how these organizations have evolved to hold competing identities, the discussion below briefly contextualizes the legislative and political background within which Métis political mobilization has taken shape in recent decades.

The Métis' decision to incorporate their provincial governing bodies under not-for-profit or societies legislation can be explained in large part by the federal government's refusal to recognize the Métis as a distinct rights-bearing Aboriginal nation (Dubois and Saunders 2013; Sealy and Lussier 1975; Grammond 2009; Sawchuk 1998). Caught in a game of jurisdictional football between provincial and federal governments, the Métis have been historically sidelined in federal and provincial policy. In this respect, they differ from First Nations and the Inuit, who have long been recognized as falling within federal jurisdiction as "Indians" under section 91(24) of the Constitution Act, 1867 and who therefore communicate with the federal government through this established policy channel. The federal government's historical position – which was invalidated by a 2014 Federal Court of Appeal ruling to the contrary – is that the Métis do not fall within the meaning

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[6] The number of regions per province is as follows: British Columbia, 7; Alberta, 6; Saskatchewan, 12; Manitoba, 7; Ontario, 9 (Deloitte 2013).

[7] Provincial/federal governments have incorporation registries that outline the legal framework within which businesses, not-for-profit societies, cooperative associations, and financial institutions must operate. Depending on the nature of the activity conducted, an organization can register either at the provincial or federal level and can choose to register as a not-for-profit or a business.

of "Indians" in section 91(24) of the Constitution Act, 1867.[8] This long-standing position has meant that historically the Métis have not had established processes through which to negotiate with the federal (or provincial) government.

Instead, Métis relationships with provincial and federal governments have largely been mediated by their respective incorporation legislation. This pattern became especially the case in the second half of the twentieth century as governments made funding available to Aboriginal service-delivery organizations and as the Métis pursued the legal recognition of land rights. Under Canadian law, organizations are obligated to incorporate under provincial or federal legislation in order to access government funding or to claim title to land – unless defined otherwise in alternative legislation such as the Indian Act (Dubois 2013; Madden, Graham, and Wilson 2005). Through their incorporation under provincial/federal legislation, Métis organizations agree to abide by rules intended for not-for-profit or business corporations and are consequently accountable to the provincial/federal government that determines these rules. By contrast, First Nations' relationships with the federal government are primarily negotiated through the Indian Act, while Inuit relationships with the federal government are generally defined through legislation that accompanies land claims and self-government agreements.[9]

The policy framework within which the Métis interact with provincial/federal governments as not-for-profit corporations – which Joe Sawchuk (1998) describes as a client-patron relationship – is fundamentally at odds with Métis aspirations for self-determination. While they are incorporated as not-for-profit organizations primarily for funding purposes, Métis provincial governing bodies are largely structured as democratically accountable governments. In keeping with principles of direct democracy and community participation, Métis citizens directly elect a president to lead their respective provincial governing bodies. Unlike provincial premiers or Canada's prime minister, Métis presidents answer directly to Métis citizens through province-wide elections. Métis citizens also elect local and regional representatives who work alongside their respective presidents as part of a central decision-making body, which acts as the executive body for Métis citizens.[10]

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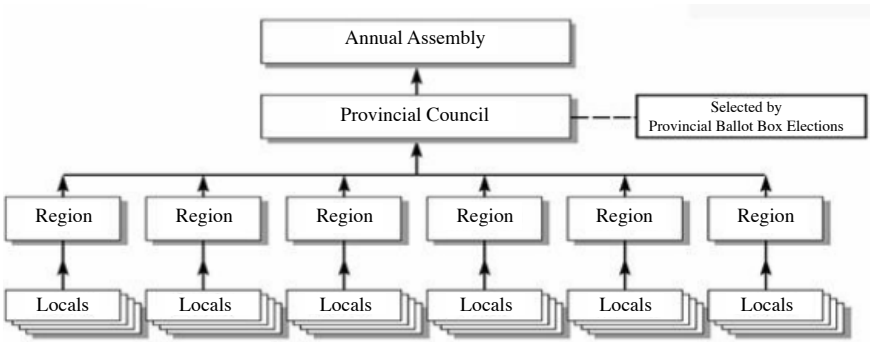
[8] In April 2014, the Federal Court of Appeal upheld the decision in *Daniels v. Canada* [2013] F.C.R. 6 that the Métis fall within the meaning of "Indians" in section 91(24) of the Constitution Act, 1867. The Supreme Court of Canada granted leave to appeal the decision but had not yet issued its ruling at the time of publication.

[9] It is interesting to note that some First Nations rely on corporate-led governance structures such as capital corporations to negotiate their relationship with the state. Similarly, Wilson and Alcantara (2012) argue that Inuit economic development corporations have become powerful and influential organizations in Inuit-state negotiations.

[10] These decision-making bodies have different names: Provisional Council in Ontario, Board of Directors in Manitoba, Provincial Métis Council in Saskatchewan, Provincial Council in Alberta, and Métis Provincial Council in BC.

The participatory and democratic involvement of Métis citizens does not stop with elections. They also set the political agenda of their respective provincial governing bodies through regular general assemblies (Saunders 2013a). In fact, substantive policy decisions must be ratified by the general membership of each provincial governing body. Moreover, members and elected officials have the equal opportunity to submit motions during assemblies. Whether proposed by an individual member or by the executive, all major initiatives, programs, and laws pursued by Métis governing bodies must be ratified by the general membership through a majority vote. These mechanisms allow for Métis policy to emerge from below. While grassroots participation in setting the Métis political agenda is not without challenges, it has remained a key feature of Métis governance for over 200 years.[11]

Figure 1: Overview of the Structure of Métis Governance



Source: Madden, Graham, and Wilson (2005, 17).

Once Métis citizens have outlined a clear mandate, elected officials who make up the central decision-making bodies in each province are tasked with its implementation. To this end, elected representatives are assigned responsibility for a ministry. For example, the MNA minister of housing, who is also the elected president of Region 6 (northwest Alberta), manages a number of housing-related files with a

[11] While general assemblies are a key feature of Métis governance, their role has been a source of debate. One of the key challenges is to ensure that the executive continues to deliver services and programs according to its democratic mandate while also receiving ongoing direction from the membership. This issue has been especially contentious in Saskatchewan as disputes over the roles, responsibilities, and power of the executive body has led to the political standstill of the organization in recent years. For a discussion of the ways in which the MN-S has sought to address the challenge of maintaining democratic accountability within a renewed governance structure, see Dubois (2013); MECP (2005); Poitras (2001).

variety of affiliates such as the Métis Urban Housing Corporation (MNA 2012). While provincial governing bodies differ from one another in their internal governance structure, each is built from the community level and is accountable to Métis citizens through elections as well as through general assemblies. The overview of the structure of provincial Métis governing bodies is represented in the above figure.

Métis Affiliates

In addition to representing the interests of Métis citizens in each province through elected representatives, provincial governing bodies contribute to the delivery of programs and services through various organizations that act as affiliates. The latter include post-secondary educational institutions like the Gabriel Dumont Institute in Saskatchewan, economic development agencies such as Apeetogosan (Métis) Development Incorporated in Alberta, and service-delivery organizations such as Métis Child and Family Services in Manitoba. Affiliates function largely independently from provincial governing bodies in their day-to-day activities. There is a notable tension in the fact that although many affiliates have the mandate to serve Métis citizens, they ultimately report to the provincial or federal government under which they are incorporated.

One of the key reasons that affiliates are set up as independent organizations lies in the fact that the legislation under which Métis governing bodies are incorporated prohibits them from being directly involved in some of the activities carried out by affiliates. For example, the MNA is incorporated under the Alberta Societies Act and therefore cannot pursue for-profit activities. To foster economic development, the MNA therefore works with Apeetogosan (Métis) Development Inc., which is incorporated independently as a business and, as such, can participate in profit-seeking activities. While Apeetogosan was created as an initiative of the MNA in 1984 and reserves seats on its board of directors for elected MNA officials, it ultimately reports to the Government of Alberta according to its bylaws. This is also the case with the Métis Child and Family Services Authority, which serves Métis citizens in Manitoba but is governed by provincial statute (the Child and Family Services Act). The minister of the Métis Child and Family Services Authority sits on the MMF board of directors and is thus answerable to the board and its president, all the while being legally responsible to the province of Manitoba (MCFS 2015).

Insofar as affiliates function as distinct entities, they are protected – to some degree – from direct political interference by Métis governing bodies. At the same time, this distance makes it difficult to have uniform decision-making or accountability across affiliates and Métis provincial governing bodies (Madden, Graham, and Wilson 2005). Unlike non-Aboriginal service delivery organizations that are created to carry out mandates determined by provincial and federal governments, Métis service delivery organizations have the mandate to serve Métis citizens but report to provincial/federal governments.

In an effort to foster democratic accountability towards Métis citizens, many affiliates like Apeetogosan have integrated Métis provincial governing bodies within their governance structures. For example, the bylaws of the Gabriel Dumont Institute require that the MN-S minister of education sit as the chair of its board of governors (GDI 2014). Similarly, the Métis Capital Housing Corporation, which is an affiliate that provides affordable quality homes to Alberta's Métis, has representatives from each region of the MNA on its board of directors (MCHC 2013). While many affiliates choose to work with provincial governing bodies to increase their accountability to Métis citizens, it is ultimately up to each affiliate to determine the terms of its relationship with Métis governing bodies under its bylaws.[12]

Despite the complexity created by the incorporation legislation that governs the interaction between Métis governing bodies, affiliates, and provincial/federal governments, the Métis have found innovative ways to build relationships of accountability between the various organizations that serve their socio-economic needs as well as their political interests. As part of this process, Métis provincial governing bodies have sought to build capacity and increase legitimacy through direct and indirect partnerships with affiliates. As the next section illustrates, the Métis have also sought to increase their governance functions and position themselves as partners with private and public actors by democratizing provincial governing bodies.

EXERCISING MÉTIS GOVERNANCE

Over the past quarter century, the Métis have restructured their provincial governing bodies in order to more effectively act as democratically accountable governments. This push is reflected in the resurgence of the government-based discourse that was used by Métis leaders in the nineteenth century. For example, the Métis Nation-Saskatchewan – through the Métis Nation Legislative Assembly – has adopted laws such as the Métis Wildlife Act that were implemented by elected ministers through their respective departments. While the Métis have a long tradition of pursuing rights through their elected governments and passing laws such as the 1869 Bill of Rights, they also have traditionally incorporated Indigenous practices such as relying on elders' councils and the participation of women to guide their political activities.

The blending of these approaches is a unique feature of Métis political tradition that continues to be present in contemporary Métis governance practices. Concretely, it means that the laws championed by Métis ministers in Saskatchewan must be approved by an elected assembly that includes women and youth representatives and

[12] It is important to note that the political instability of some provincial governing bodies has contributed to the reluctance on the part of certain affiliates to establish formal mechanisms of accountability to these bodies. See Ekos Research Associates (2008).

are subject to the scrutiny of a senate of elders. It is by simultaneously emphasizing the governmental capacity and democratic legitimacy of their governing bodies that Métis leaders argue for a seat at the table alongside private and public partners. In order to give more weight to these demands, the Métis have made conscious efforts to distance themselves from the legislative requirements imposed by provincial/federal governments and to instead reinvigorate the democratic and participatory characteristics that have long informed Métis governance. I draw attention to the promise and the challenges of this task through a brief discussion of the transformation of the Métis Nation-Saskatchewan in recent decades.

Establishing the Legitimacy of Métis Governments

Following their inclusion as a distinct rights-bearing Aboriginal people in the Constitution Act, 1982, the Métis recognized the need to democratically empower their governing bodies (Weinstein 2007; Chartier 2011). The MN-S was the first provincial governing body to embark on this process. The objective was to abandon the legislative framework under which the MN-S had come to exist as a not-for-profit corporation and instead establish the MN-S as a government accountable to Métis citizens. The first step in this transformative process was the adoption of a constitution in 1993 that asserted the Métis right to self-government and outlined the structure of a government capable of exercising this right (MN-S 2013). In particular, the constitution established the MN-S as a democratic government accountable to Métis citizens through a legislative assembly of elected representatives alongside an administrative secretariat that would continue to act as a liaison between Métis service-delivery organizations and provincial/federal governments.[13]

Charting a new course for contemporary Métis governance, the MN-S began adopting legislation such as the Citizenship Act and working with affiliates to meet the needs of Métis citizens across the province (Dubois 2013). Faced with this new political reality, the Government of Saskatchewan acknowledged the need to abandon the not-for-profit legislative framework through which it historically interacted with Métis organizations, and to instead develop new legislation – the Métis Act – that defines its relationship with the MN-S and Métis affiliates. The only provincial legislation of its kind, the Métis Act provides guidelines of accountability similar to not-for-profit legislation, but within a framework that respects Métis self-government objectives (Dubois 2013). By adopting this legislation in 2002, the provincial government acknowledged that it could no longer purport to dictate from the top down – through rules destined for not-for-profit corporations – how the

[13] Prior to 1993, the MN-S was called the Métis Society of Saskatchewan. For a discussion of its history, see Dubois (2013).

MN-S can operate. Instead, the province modified its legislative landscape to create space for Métis self-determination and accommodate Métis governance practices.

By establishing a democratically accountable Métis government outside of the confines of provincial legislation, the Métis in Saskatchewan asserted their right to govern themselves and, in so doing, carved out space for themselves within provincial legislation. Building on the entrepreneurial spirit of the MN-S, other Métis governing bodies are in various stages of developing their own constitutions and reinforcing democratic aspects of their governance structures.[14] While the path taken differs from one province to the next, the goal of creating democratically accountable governing bodies that can work in government-to-government relationships to meet the needs of their citizens is shared across the Métis Nation (MNC 2011).

This goal has, however, been difficult to achieve. In addition to the constraints imposed by Canada's legislative and political framework, Métis governing bodies' dependence on federal and provincial funding has made it a struggle for them to realize their political objectives. The impact of these combined factors on the day-to-day activities and on the long-term objectives of Métis governing bodies has been especially evident in Saskatchewan. As it sought to build capacity and implement its constitution, the MN-S encountered practical challenges related to funding and capacity as well as political challenges within and outside of the Métis Nation. An impasse amongst the executive leadership over a number of issues including amending the constitution effectively paralyzed the MN-S in recent years (Dubois 2013). In November 2014, the federal government withdrew funding to the MN-S, noting that it had failed to hold a meeting of the executive leadership, which is required in their funding agreement as well as in the MN-S constitution (Canada 2014). The once rising organization officially closed its doors in March 2015, leaving its future uncertain (MN-S 2015).

The recent closure of the MN-S has raised significant questions about the viability of Métis governing bodies in the current political and legal environment. At the MNC Annual General Assembly in June 2015, leaders from all Métis governing bodies engaged in conversation about the future of governance across the Métis Nation. These ongoing discussions are taking place in the midst of a larger conversation unfolding in the courts and in policy circles about the place of the Métis within the Canadian federation (see Bell, this volume).

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[14] While the goal of self-government pursued by the MNC is shared across the Métis Nation, there is much disagreement about how to achieve this goal. On a philosophical level, there are different views regarding the territorial boundaries of the Métis homeland and membership in the Métis Nation. On a practical level, questions are also raised about the economic feasibility of self-government, the capacity of Métis governing bodies, and the role of local, regional, and provincial bodies in this project. Some members of the Métis Nation hope to resolve some of these debates through the development of a national constitution (MNC 2013).

A NEEDS-BASED APPROACH TO GOVERNANCE

Notwithstanding challenges, the Métis have sought to empower their provincial governing bodies to act as democratically accountable governments by developing relationships with organizations that address the needs of Métis citizens. Through their day-to-day activities, these organizations have come to play a meaningful role in the governance of various sectors including health, housing, harvesting, education, and economic development. To illustrate how the Métis have inserted themselves in everyday processes of governance through this web of organizations, I focus on two sectors that have been at the heart of the Métis' needs-based approach to governance: health and economic development.

Health

Improving health-related outcomes is a key priority across the Métis Nation as well as for provincial and federal governments. Each provincial Métis governing body has a dedicated department that addresses the health and wellness of Métis citizens.[15] The activities of these departments have been largely influenced by partnerships with governments as well as with community, private, and public actors. Health-related partnerships have led to notable developments in data collection as well as program and service delivery.

In particular, each Métis governing body participates in data-collection projects such as the National Collaborative Métis Information Collection Initiative in order to improve Métis health outcomes. Launched by the National Aboriginal Health Organization (NAHO) in partnership with Statistics Canada in 2010, this initiative brought experts, analysts, and stakeholders together to discuss strategies for the collection of useful, timely, Métis-specific data.[16] In some provinces, Métis provincial governing bodies work directly with research partners to collect data. This is the case in Saskatchewan, where the MN-S partnered with the First Nations University of Canada to develop a research project that examined the status of Métis socio-economic and self-reported health.[17] Similar initiatives have been undertaken in other provinces like Manitoba where the MMF is collaborating with academic

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[15] The MNBC has a Ministry of Health, the MNA a Ministry of Health and Wellness, the MN-S a Department of Health, the MMF a Health and Wellness Department, and the MNO a Healing and Wellness Branch.

[16] Although this initiative came to an end when the federal government eliminated NAHO's funding in 2012, it generated a repository of health information for Métis organizations, community members, scholars, and other stakeholders (NAHO 2010).

[17] The collaborative character of the study is captured in its title "Community Based Participatory Project: Engaging Individuals/Families in the Development of Programs to

partners to produce an atlas-style report on the status of Métis health in the province (MCHP 2012). To ensure the responsible and fruitful management of this information, Métis governing bodies have entered into a number of information-sharing agreements amongst one another and with provincial/federal governments.[18]

In addition to collecting information about their citizens, Métis governing bodies are also partnering with various organizations to deliver health programs. For example, the MNBC partnered with the National Collaborating Centre for Aboriginal Health – housed at the University of Northern British Columbia – as part of the ActNow BC initiative, a province-wide program that aims to improve the health of British Columbians. This agreement has enabled Métis Chartered Communities to deliver health promotion programs and services to members through partnerships with provincial and national organizations such as the Heart and Stroke Foundation (MNBC 2012–13). In Manitoba, the MMF has taken health service delivery to a new level with the creation of a Métis-run pharmacy. Established with the financial support of the MMF's economic development arm, the Métis Economic Development Organization, the pharmacy generates profits that are subsequently invested in Métis programs and services (MMF 2013a). Attesting to the success of this initiative, the MMF president, David Chartrand, announced in 2013 that the MMF will begin to cover the costs of certain health benefits, such as prescription glasses, for senior Métis citizens (MMF 2013b).

The shared commitment of Métis, provincial, and federal governments to improve the health outcomes of Métis citizens has created the conditions for fruitful collaborations between community, public, and private partners across the Métis homeland. Through a growing number of health-related initiatives, Métis governing bodies are demonstrating that they not only have a growing capacity to act as governments but also share a desire to play a more robust role in governing the health and wellness of their citizens through a variety of formal and informal partnerships.

Economic Development

In order to play a more active role in providing health and other services to their citizens, Métis provincial governing bodies seek to increase their economic prosperity. As the only Aboriginal group without a recognized land base (with the exception of the Alberta Métis Settlements), the Métis are looking for creative ways of achieving greater self-sufficiency (Dubois and Saunders 2013). Given

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Enhance Health and Well-Being," which collected data from more than 1,500 Métis citizens through funding from Health Canada's Aboriginal Health Transition Fund (MN-S 2010).

[18] For example, the MNA and the MNO have agreed to share best practices with one another, and the MMF and MNBC have signed information-sharing agreements with their respective provincial governments.

the constraints in their ability to meet this goal within the legislative framework in which they operate as not-for-profit corporations, Métis governing bodies have taken strategic actions to grow capital, build relationships, and find new avenues of revenue generation.

To generate capital that can be reinvested in the community, Métis provincial governing bodies work primarily with their respective capital corporations. Endowed through provincial, federal, or joint provincial-federal funding, they include Apeetogosan (Métis) Development Inc. in Alberta, the Clarence Campeau Development Fund in Saskatchewan, the Louis Riel Capital Corporation in Manitoba, and the Métis Voyageur Development Fund in Ontario.[19] One of the primary goals of Métis capital corporations is to provide loans to businesses. For example, Apeetogosan has lent out over $50 million since it received an initial $8 million endowment from the federal government in 1988, which has helped create over 800 Métis-owned businesses throughout Alberta (MNA 2012, 59). In 2014 alone, the Clarence Campeau Development Fund in Saskatchewan awarded more than $4 million to over 40 businesses, helping to create more than 100 jobs (CCDF 2014, 5).

In addition to capital investments, the Métis have sought to further their economic objectives through industry partnerships. In Manitoba, the provincial government issued an apology in January 2015 acknowledging its failure to take the interests of the Métis into consideration in past hydro-electric development (Manitoba 2015). As a testament to their commitment to include the Métis in future hydro-electric development, the province and Manitoba Hydro entered into the Kwaysh-kin-na-mihk la paazh (Turning the Page) Agreement with the MMF in November 2014, worth $21 million over 20 years (MMF, Manitoba, and Manitoba Hydro 2014).

Industry partnerships have been multiplying in the wake of the Supreme Court of Canada's recognition of the legal duty to consult and accommodate Aboriginal peoples in *Haida* (2004), *Taku River* (2004), and *Mikisew Cree* (2005).[20] To guide these burgeoning relations, provincial governing bodies have developed consultation policies and, in some instances, have formalized partnerships through Memorandums of Understanding (MOUs).[21] For example, an MOU signed by the MNO and Detour Gold in 2010 led to a joint Impact Benefit Agreement guaranteeing employment and business opportunities and training and education, as well as financial participation for the Métis (MNO 2012). Such relationships are expected to evolve as business leaders increasingly acknowledge the value of engaging with Métis governments in resource development.

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[19] MNBC is the only provincial Métis body without a capital corporation.

[20] For a discussion on Canada's approach on the duty to consult and accommodate, see Steinke, this volume.

[21] Each provincial governing body has approved consultation guidelines (MNBC 2009; MNA 2009; MMF 2014; MNO 2014; MN-S 2014).

One consequence of increased Métis participation in industry partnerships has been the exacerbation of tensions between Métis and First Nations. Federal and provincial governments add fuel to fire by fostering a climate of competition between Métis and First Nation communities that perpetuates the perception that the expansion of one group's rights is a parallel threat to the other. MMF President Chartrand has publicly called on Aboriginal leaders to reject the politics of divide and conquer: "We need to create a system where we can talk as First Nation and Métis governments and show the world we can take care of ourselves" (MMF 2013b). Some provincial governing bodies acknowledge the need to engage with First Nation leaders and have signed MOUs with First Nation communities. Yet the call for a joint strategy to protect their mutual interests has been largely overshadowed by the climate of uncertainty surrounding land and title rights, which has detracted from such collaboration.

On the whole, recent developments across the Métis Nation suggest that the politics of old, whereby state governments determine the fate of Métis communities from the top down through legislation and funding, is fading. Instead, Métis provincial governing bodies are emerging as democratically accountable governments with the ability to develop their own policies and to work with public and private actors to advance the needs of their citizens. By building capacity, expertise, and legitimacy in a variety of sectors, the Métis have advanced their economic, social, and political agenda. The extent to which this shift will continue to take place will depend in large part on the continued accountability and success of Métis governing bodies as well as on the positive response from public and private actors.[22]

GOVERNMENT-TO-GOVERNMENT RELATIONSHIPS

By engaging in the social, political, and economic life of communities, Métis governing bodies participate in various governance processes within and outside of the formal mechanisms of intergovernmental relations. While the form and the depth of Métis participation in what Martin Papillon (2011, 2012) characterizes as "Canada's multilevel governance regime" is evolving, it has become increasingly clear that the Métis can no longer be ignored by state actors or treated as mere not-for-profit corporations. Challenging their historical status as "Canada's forgotten people," the Métis are configuring a new political reality in which Métis governing bodies increasingly stand on an equal footing as legitimate governments alongside public and private partners. While evidence from below shows that the

[22] Despite efforts to increase the democratic accountability of provincial Métis governing bodies, they continue to face challenges in light of their financial and political vulnerability. For a discussion, see OFI (2008); MECP (2005).

Métis Nation is emerging as an indispensable governance partner across various sectors, the final section of this chapter considers the extent to which this change is visible from above in the federal and provincial legislative and political framework that governs Métis-state relations.

Métis-Federal Relations

The Métis have made concerted efforts to assert their place as a legitimate partner in the Canadian federation over the past quarter century (Dubois and Saunders 2013). Their actions notably led to their constitutional recognition as a rights-bearing Aboriginal group – alongside Indians and the Inuit – in the Constitution Act, 1982 (Weinstein 2007; Sawchuk 2000). Métis struggles for the recognition of their rights during the mega-constitutional processes of the 1980s culminated with the draft Métis Nation Accord that accompanied the 1992 Charlottetown Accord (Weinstein 2007). In addition to providing a framework for the transition of Métis organizations into Métis governments, the Métis Nation Accord committed federal and provincial governments to enter into negotiations with the Métis on questions of self-government and land. However, the defeat of the Charlottetown Accord – and by extension, the Métis Nation Accord – in a national referendum in 1992 left the question of the Métis' place within Canada's political framework unaddressed.

This question resurfaced in the context of the Kelowna Accord negotiations in the early 2000s. Sowing the seeds for a Métis-Canada partnership based on mutual respect, responsibility, and sharing, the MNC and the federal government signed the Métis Nation Framework Agreement in 2005 (AANCD 2010). Three years later, the federal government and the MNC formally committed to these principles in the 2008 Métis Nation Protocol. The first of its kind, the protocol establishes a bilateral process to address jurisdictional issues including land and harvesting rights as well as economic development. Moreover, it commits the federal government to enter into multilateral discussions with the provinces and the Métis Nation on matters of joint interest such as health and justice. The protocol was renewed in 2013 with added provisions for Métis participation in intergovernmental processes at a political and policy level, along with increased provisions for fiscal accountability, which are outlined in the accompanying Governance and Financial Accountability Accord (AANDC 2013). Importantly, this accord promises block funding to give the MNC more fiscal flexibility and reduce its administrative burden (Canada and MNC 2013, 3.4). While the accord marks a significant contrast with the conditional, program-specific, and unstable funding with which Métis governing bodies have had to contend, it has yet to be fully implemented (MNC 2015).

Efforts to formalize the terms of fiscal accountability within the framework of the protocol fit into a larger objective of improving the economic relationship between the federal government and the Métis Nation. Over the past decade,

both parties have been collaborating with non-government actors to develop a long-term Métis economic renewal strategy, notably through the Métis Economic Development Symposiums (AANDC 2011a). In March 2015, the MNC and the federal government clarified the terms of their economic relationship through the Métis Economic Development Accord, which is now annexed to the Métis Nation Protocol. In an effort to move beyond piecemeal, project-specific development, the accord proposes a whole-of-government approach to support Métis economic development (Canada and MNC 2015, 3).

With its added provisions, the Métis Nation Protocol provides a general framework for the Métis to participate within the formal mechanisms of intergovernmental relations at the level of policy and politics. Unlike Aboriginal groups that have a legislatively defined relationship with the state, the Métis are still in the process of negotiating this relationship. To date, negotiations have primarily led to ad hoc, interest-based agreements like the Governance and Financial Accountability Accord. This pragmatic approach has resulted in incremental gains for the Métis by opening up spaces for Métis leaders and bureaucrats to interact directly with their federal counterparts (Chartier 2013a). However, the approach is limited insofar as it does not provide a means for the Métis to advance those interests that are not shared by the state.

Contemporary Métis leaders – like those who have preceded them – have sought to find a balance between the pragmatic and the principled pursuit of their rights (Martin 1989). While Métis leaders are keen to make the most of opportunities to advance their interests, they recognize that this strategy will not secure their full participation in policy-making alongside state actors (Chartier 2011). Ultimately, ad hoc bilateral relationships fail to displace established hierarchies of power and thereby fall short of providing the conditions for the Métis to achieve their self-determination objectives. For this reason, MNC President Chartier (2013a) argues that recent agreements like the Métis Nation Protocol will continue to be limited in the absence of a more robust framework that recognizes the Métis' right to govern themselves.[23] In practice, such a framework would entail moving away from the devolution of funding and programs from provincial/federal governments to Métis *organizations* and instead creating space for the Métis to generate their own revenues (for example, through resource-revenue agreements and the recognition of land title) and to develop their own programs as democratically accountable *governments*. To be sure, this shift would give rise to a host of challenges with which Métis

[23] While the federal government recognizes the Métis' right to self-government in its 1995 Inherent Rights Policy, it has not yet created much political or bureaucratic space to implement this right (AANDC 2011b). Although it is too early to speculate on the outcome of the ministerial special representative's report (discussed below), part of his mandate involves engaging in dialogue to create such a space.

and state governments would have to contend. Yet without it Métis organizations remain vulnerable to the political and financial volatility of the state (OFI 2008).

Without a doubt, the Métis push to participate within the formal channels of intergovernmental relations has engendered new governance practices that make it increasingly difficult for the state to deny space for Métis self-government. However, the absence of a framework within which Métis organizations can exist as governments with a legitimately recognized claim to land and with established sources of funding fundamentally limits the Métis Nation's ability to develop robust governance structures with clear accountability mechanisms. While the Métis have long sought to negotiate their relationship with the state through political agreements like the Manitoba Act and the Métis Nation Accord, the federal government's unwillingness to formally engage in government-to-government relationships with the Métis stands as a recurring – and significant – obstacle to Métis self-government.

The federal government showed openness towards engaging with the Métis with the appointment of Tom Isaac as "Ministerial Special Representative to Lead Engagement with the Métis" in June 2015 (Canada 2015). The mandate of the ministerial special representative is to build a process for dialogue to support the potential development of a Section 35 Métis Rights Framework. Reasserting the Métis' long-standing commitment to enter into negotiations on issues related to land and self-government, President Chartier stated that the MNC will use the Métis Nation Accord that accompanied the Charlottetown Accord as the framework for negotiations with the ministerial special representative (MNC 2015). While the promise of engagement with the Métis comes largely in response to the Supreme Court of Canada's 2013 *Manitoba Metis Federation Inc. v. Canada*, the establishment of a Section 35 rights framework has the potential to significantly advance Métis rights at the macro level. It is too early to know whether the recommendations of the ministerial special representative, expected in December 2015, will have an impact on the federal government's relationship with the Métis – especially in view of the upcoming federal election in October 2015.

In the absence of a commitment from state governments to formalize their legislative and political relationships with the Métis Nation, President Chartier (2011) argues that the MNC will continue to develop mutually beneficial bilateral agreements as evidence of good faith to build a more robust relationship with state actors. Although it falls short of cementing their place as a full-fledged self-governing partner in the Canadian federation, this piecemeal approach enables the Métis to continue to carve out a space for themselves at the level of everyday policy and politics.

Provincial-Métis Relations

While Métis leaders from Louis Riel to Clément Chartier have sought to foster government-to-government relationships at the federal level, they have also worked

alongside provinces to achieve their self-government objectives. This strategy is in large part due to the greater willingness of provincial governments – in light of their constitutional responsibilities for health and welfare – to engage with the Métis on socio-economic issues. Evoking the need to move beyond issue-based partnerships, President Chartier (2013b) has called on provincial premiers to deepen their relationships and engage with the Métis on governance initiatives in their respective jurisdictions. As the brief survey of Métis-provincial relations in British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario demonstrates, these provinces acknowledge the need to work with Métis governing bodies, albeit according to their own legislative and political frameworks.

Provinces – which have long maintained that the Métis fall within the jurisdictional responsibility of the federal government – have been reluctant to formally engage in government-to-government relations with the Métis. This attitude shifted to a degree in the aftermath of the Supreme Court of Canada's 2003 *Powley* decision, which affirmed for the first time that the Métis have a constitutionally protected Aboriginal right to harvest.[24] This ruling led the governments of Alberta, Saskatchewan, Manitoba, and Ontario to re-examine provincial laws and enter into bilateral discussions with their respective Métis governing bodies on harvesting rights. The initial promise of these bilateral discussions – captured in agreements like the 2004 Interim Harvesting Agreements in Ontario and Alberta – has receded in the face of disputes over jurisdiction, funding, and land.[25] Despite ongoing challenges, the relationships established in the aftermath of *Powley* nevertheless created an opportunity for Métis governing bodies to engage with provinces on issues that extend beyond the hunt and harvest.

Significantly, debates about Métis harvesting rights led the parties to acknowledge the need for more comprehensive frameworks to guide Métis-provincial relations. To this end, several provinces have entered into formal political relationships with their respective Métis governing bodies. For example, the MNBC and the Government of British Columbia formalized their commitment to close the gap between Métis citizens and other British Columbians in the 2006 Métis Nation Relationship Accord (BC 2006).[26] Similarly, MNO President Gary Lipinski argues that the 2008 Framework Agreement between the MNO and the Government of

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[24] For a comprehensive overview of case law related to harvesting, see Teillet (2013).

[25] The MMF and Manitoba signed a harvesting agreement in 2012; MN-S signed an MOU with Saskatchewan on harvesting in 2010; Alberta signed an Interim Métis Harvesting Agreement in 2004 that has since been replaced by a controversial harvesting policy. The BC government does not currently recognize Métis harvesting rights. For a discussion of Métis harvesting rights, see Saunders (2011, 2013b).

[26] The accord, which was signed in the wake of political developments with First Nations, is limited to six key areas: health, housing, education, economic opportunities, collaborative renewal of the tripartite processes, Métis identification, and data collection. At the time

Ontario (which was renewed in 2014) has allowed the parties to make headway on a number of files including the recent creation of a capital corporation, the Métis Voyageur Development Fund (Lipinski 2013; MNO and Ontario 2014). In Alberta, a series of accords – including ministry-specific agreements to deliver programs and services – have been reached within the province's Aboriginal Policy Framework (Alberta 2008, 2013).[27] In a general sense, these types of agreements have helped to clarify the terms of Métis-provincial relations. However, the depth of their impact remains limited by the willingness of provinces to devote human and financial resources to give life to the principles of these agreements across various departments.

While some provinces have opted to formalize their relationship with the Métis through agreements, others have focused on clarifying this relationship through policy. The latter is the case in Saskatchewan where the province created an alternative legislative framework that establishes bilateral processes through which the MN-S can negotiate with the province as an equal partner on matters related to capacity building, land and resources, harvesting, and governance (Saskatchewan 2002). Relatedly, Manitoba adopted a Métis Policy in 2010. Developed in collaboration with the MMF, this policy builds on a series of initiatives to empower the Métis to deliver programs and services in order to close the gap in quality-of-life outcomes and promote excellence for Métis people (Manitoba 2010).[28] Despite the promise of these policies, the extent to which they foster joint governance on matters affecting Métis citizens has been limited to date.[29]

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of signing in 2006, the province had not identified specific funding or resources for its implementation (Parenteau 2014).

[27] In order to more effectively participate in ongoing delivery of programs and services as an accountable governance body, the MNA has made a number of changes to its internal governance in the past decade (MNA 2007).

[28] The relationship between the MMF and the Government of Manitoba has largely evolved in response to concerns over the treatment of Aboriginal peoples in the province's justice system (Dubois and Saunders 2013). The province established the Aboriginal Justice Inquiry (AJI) in 1988 to investigate and make recommendations on the relationship between Aboriginal peoples and the Government of Manitoba. The recommendations of the AJI led the MMF and the province to sign an MOU in 2000 that laid the foundation for the MMF to become a partner in the management and delivery of child and family services (Bostrum, Rogan, and Asselin 2008; Dubois and Saunders 2013).

[29] The MMF and the province have yet to engage in meaningful discussions about the implementation of the Manitoba Métis Policy. In the case of Saskatchewan, where legislation has been in place since 2002, it has become clear that more robust accountability guidelines are needed to clarify the roles and responsibilities of the parties in areas of joint governance. Efforts to address this lacuna have been stalled by ongoing political struggles within the MN-S and controversial proposals to reform its constitution. Despite recent political instability,

Métis engagement with provinces has been made possible in large part because of the pragmatic needs-based approach adopted by Métis leaders. By focusing on pressing concerns for health, economic development, and justice, Métis leaders effectively captured the attention of provincial governments. At the same time, provinces have become more responsive to Métis demands in light of court directives like the Supreme Court of Canada's *Powley* (2003) decision that calls on them to jointly manage the application of harvesting rights with the Métis.[30] The interaction between these contextual changes and Métis assertion of rights has created a legislative and political environment more amenable to Métis demands for self-determination.

Historically excluded from interacting with the state through formal legislative and political channels, the Métis have pushed provincial and federal governments to develop new sets of rules through ad hoc agreements and policies that increasingly define their relationship. By fostering Indigenous participation in the formal and informal channels of intergovernmental relations, federal states like Canada develop multilevel governance regimes that effectively adapt to Indigenous demands for self-determination (Papillon 2011). While the interplay between Métis agency and state responsiveness has created space for the Métis to assert their place as a legitimate governance partner on a sector-by-sector basis, it falls short of creating the conditions for the Métis to fully achieve their social, political, and economic agenda. As Métis leaders argue, their self-government objectives will continue to be relegated to the margins of state processes and structures without a legislative and political framework that clarifies the nature of Métis-state relations and that meaningfully recognizes the Métis' right to govern themselves across provincial-federal jurisdictions (Chartier 2011; Lipinski 2013).

CONCLUSION: FULFILLING THE VISION OF A SELF-GOVERNING MÉTIS NATION

The innovations in governance demonstrated by the Métis in the past quarter-century are consistent with the Métis' historical efforts to govern their social, political, and economic future. Since the emergence of the Métis Nation, Métis leaders have engaged in pragmatic and principled actions to safeguard their way of life. The creation of governing bodies grounded in the democratic legitimacy of

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the Métis have continued to make progress on a number of files, such as health, child and family services, and education through the work of various affiliates. See Dubois (2013).

[30] Similarly, spurred by events ranging from the patriation of the constitution to Manitoba's Aboriginal Justice Inquiry, changes in public opinion regarding the place of Aboriginal peoples within Canada's political framework have also created a political climate more amenable to Métis demands.

individual communities has played a key role in helping the Métis to sustain and achieve this goal. This chapter provides evidence that the Métis increasingly govern themselves in the everyday interactions of community-level associations, affiliates, provincial governing bodies, and public and private actors. Despite the gains made through Métis participation in formal and informal governance processes, Métis self-government aspirations continue to be limited by the ambiguous position they occupy within Canada's political and legislative framework.

In the face of uncertainty, the Métis have taken a pragmatic approach to build relationships of mutual benefit on a sector-by-sector basis. While this strategy has helped the Métis to build a thriving network of organizations through which to pursue social, political, and economic rights, it has failed to secure the two key objectives identified by the provisional government of 1869: self-government and land. In order to fulfill the vision of a self-governing Métis Nation expressed by leaders from Louis Riel to Clément Chartier, the fundamental challenge – then and now – lies in reconciling these objectives with the goals of the Canadian state.

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13

R V. DANIELS: JURISDICTION AND GOVERNMENT OBLIGATIONS TO NON-STATUS INDIANS AND MÉTIS

Catherine Bell

In April 2014 the Federal Court of Appeal (FCA) confirmed in *R. v. Daniels* that Métis and non-status Indians are included in federal jurisdiction for "Indians and lands reserved for Indians" under sec. 91(24) of the *Constitution Act, 1867*. Recent federal governments have interpreted the word "Indian" narrowly to include status Indians living on reserves and exclude Métis living within provincial boundaries and individuals of First Nations ancestry who have lost, or have not been granted, federal Indian status. As a consequence, Métis and non-status Indians have been deprived of many federal services available to status Indians, denied access to national treaty negotiation and dispute resolution processes, and treated differently from province to province. *Daniels* is an important decision because it rejects the federal government's interpretation of its constitutional authority. The decision also has implications for federal and provincial responsibilities for rights implementation and the well-being of Métis and non-status Indians. However, it does not say Métis and non-status Indians have the same legal rights as as other Aboriginal people, nor does it say the federal government is obliged to provide the same benefits, programs, and services to them.

So what then is the practical utility of a declaration clarifying that Métis and non-status Indians are in federal sec. 91(24) jurisdiction? With respect to non-status Indians, the FCA held that it had no practical utility. Non-status Indians

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are in sec. 91(24) by definition as "Indians without status under the *Indian Act*."[1] There was also no practical purpose in granting a "generic" (*Daniels* 2014, para. 79) declaration because the reasons for excluding people from status and resulting federal programs and services are "complex, far ranging and often unrelated to one another" (*Daniels* 2014, para. 77).

Unlike non-status Indians, Métis have a distinctive constitutional identity recognized in sec. 35 of the Constitution Act, 1982. The reasons for federal denial of jurisdiction, refusal to negotiate, and exclusion of Métis from national program initiatives are related. Ironically, they have shifted from refusal to acknowledge the distinctive collective identity and constitutional rights of Métis as an Aboriginal people, to emphasis on their constitutional and cultural distinctiveness from "Indians" – taking them outside the scope of sec. 91(24) jurisdiction over "Indians." Denial of jurisdiction has resulted in financial disputes with provinces, failure to provide Métis and non-status Indians with many programs and enhanced services "all governments recognize as needed" (*Daniels* 2013, para. 108), and both levels of government refusing to negotiate or enact legislation for the purpose of recognizing and implementing Métis Aboriginal constitutional rights. A declaration that Métis are in sec. 91(24) therefore has practical utility. It resolves a constitutional debate, removes one argument used to avoid financing and providing services, and clarifies that the federal government has the authority to negotiate with and legislate on Métis issues at a national level.

While the decision clears up some of the jurisdictional ambiguity at the source of important gaps in federal and provincial policies towards non-status Indians and Métis, it does not give further direction on the relationship between this constitutional authority and specific government obligations and policies. I suggest here that because Métis are a distinctive Aboriginal people, this relationship can only be understood when *Daniels* is read together with other decisions on Aboriginal constitutional rights and federal provincial constitutional powers. Of particular significance are *R. v. Powley*, *Manitoba Metis Federation Inc. v. Canada* (*MMF*), and the most recent discussion of core federal sec. 91(24) jurisdiction by the Supreme Court of Canada (SCC) in *Tsilhqot'in Nation v. British Columbia* and *Grassy Narrows First Nation v. Ontario (Natural Resources) (Grassy Narrows)*. Together these decisions provide deeper insight into issues such as:

1. Is there a federal duty to negotiate Métis Aboriginal rights or breach of Crown promises aimed at reconciling "Métis Aboriginal interests … with the assertion of Crown sovereignty" (*MMF* 2013, para. 9)?

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[1] The federal government conceded in oral argument that non-status Indians are "broadly speaking, Indians without status under the *Indian Act*," not a distinctive people from status Indians, and "to whom status could be granted by federal legislation" (*Daniels* 2014, para. 75). The court therefore considered that "a declaration that non-status Indians who could be granted status through section 91(24) are Indians for the purpose of that section is redundant and lacks practical utility" (*Daniels* 2014, para. 76).

2. When do governments have enforceable fiduciary obligations to the Métis? Does inclusion in sec. 91(24) give rise to a general fiduciary duty to act in the best interest of Aboriginal peoples?
3. Does Métis inclusion in sec. 91(24) generate legal arguments to extend or provide federal programs and services aimed at Aboriginal rights or socio-economic needs?
4. Does Métis inclusion in sec. 91(24) impact the constitutional authority of provincial governments to negotiate claims or enact laws directed at Métis as a people or their Aboriginal rights (e.g., Alberta's Métis Settlements Act)?
5. If Métis are in sec. 91(24), do provincial laws of general application (to all citizens within a province) that interfere with the exercise of Métis constitutional rights continue to apply to the Métis (e.g., hunting laws)?

On 16 June 2014, the Congress of Aboriginal Peoples (CAP) filed leave to appeal *Daniels* to the Supreme Court of Canada on the grounds that the FCA erred in excluding non-status Indians from the initial declaration on the scope of sec. 91(24) and erred in failing to grant ancillary declarations sought and refused at trial.[2] CAP also argued that the FCA erred in emphasizing the test for sec. 35 Métis identity in *Powley,* thereby adopting a "more restrictive approach to the meaning of Métis" than intended by Justice Phelan and one "unsuited to the division of powers context" (Memorandum of Argument, paras. 8, 35). Although issues raised by CAP are discussed, the focus of this chapter is on the impact and practical utility of the declaration in *Daniels* as it applies to the Métis. The combined message of the decisions reviewed is that the Métis of the Northwest are a distinctive Aboriginal people, under federal jurisdiction, with similar constitutional rights to First Nations and Inuit, and with whom reconciliation is to be negotiated – a process which by necessity involves federal and provincial governments because both have the constitutional authority to regulate and engage in activities that impact Aboriginal rights, lands, and resources.

R. V. DANIELS: ISSUES ON TRIAL

Although sec. 91(24) is at the heart of *Daniels*, the case is about much more than constitutional interpretation and jurisdiction. It is fundamentally about discrimination

[2] CAP argues the FCA erred in law by relying on a concession that is meaningless and "has no legal effect unless incorporated into a court order" and by failing to give adequate consideration to findings at trial on the practical harms of jurisdictional avoidance to non-status Indians (Memorandum of Argument, para. 28). It also argues the FCA erred in emphasizing the test for sec. 35 Métis identity in *Powley*.

arising from Indian policy that "divided families and communities according to externally created categories, and destabilized social structures necessary for communities to function" (Lavallee 2013, 16). *Daniels* is also about racial categories of constitutional power and denial of the existence of Métis as a distinctive Aboriginal people with Aboriginal constitutional rights. Since recognition of Aboriginal constitutional rights in sec. 35 of the Constitution Act, 1982, the federal government has interpreted sec. 91(24) to exclude Métis who live south of the 60th parallel. However, historical evidence accepted at trial and on appeal in *Daniels* demonstrates that the term "Indian" was understood at the time of Confederation to include "'half-breeds' and one did not have to live on a reserve or in an Indian community to be an 'Indian'" (*Daniels* 2014, para. 31). Following Confederation, part of creating an "environment of safety and security for settlers" was the extinguishment of Indian and Métis claims (*Daniels* 2014, para. 38). The federal government used "Indian power like methods" (*Daniels* 2014, para. 40) invoking sec. 91(24) and its control over Dominion lands to further these objectives including through legislated prohibition of sales of liquor to Métis, negotiation, distribution of individual scrip exchangeable for land or money, treaty, and the creation of "half-breed reserves" such as St Paul-de-Métis (*Daniels* 2014, paras. 38-51).

Concern about "financial consequences" of jurisdiction over Métis after recognition of their Métis Aboriginal rights and inclusion in sec. 35 of the Constitution Act, 1982 resulted in a shift in federal policy (*Daniels* 2013, para. 501) to the position that sec. 91(24) does "not confer jurisdiction to legislate in respect of Métis and non-status Indians" (*Daniels* 2014, para. 49). Since then, provinces have undertaken initiatives for non-status Indians and Métis out of necessity, sometimes invoking constitutional authority under sec. 92 (e.g., property and civil rights). However, the provinces deny jurisdiction to negotiate Métis Aboriginal rights claims and, with a few notable exceptions, have refused to negotiate or implement through provincial legislation land and governance agreements with the Métis (for exceptions, see Alberta's Métis Settlements Act [MSA] and Saskatchewan's Métis Act). Since the recognition of Métis Aboriginal rights to hunt, fish, gather, and trap for food by the SCC in *Powley*, some provinces have also negotiated agreements and amended provincial laws to accommodate these rights. The geographical scope of these rights and entitlement of contemporary self-identifying Métis communities such as Alberta's Métis settlements to exercise them continues to be debated and litigated (see, for example, *Hirsekorn* 2011; *L'Hirondelle* 2013).[3]

[3] There are many arguments why such a strict application of *Powley* to the Métis settlements is inequitable, contrary to the intent of the SCC, and gives rise to arguments of breach of honourable conduct. Significantly *Powley* did not purport to "enumerate the various Métis peoples that may exist" or "set down a comprehensive definition of who is Métis" for all purposes (*Powley* 2003, para. 12, 30), and as elaborated in this chapter, the Métis settle-

Federal and provincial governments also deny that Métis people south of the 60th parallel have Aboriginal title or other Aboriginal land interests. They maintain that to the extent that such rights existed, they were terminated through valid federal scrip distribution to Métis living in what is now Manitoba, Alberta, and Saskatchewan (see Manitoba Act, 1870, sec. 31; Dominion Lands Act (1879), sec. 125(e); Dominion Lands Act (1883), secs. 81(e), 83). One reason that *MMF* is important is because it says that this assumption is wrong: the Crown did not act honourably in pursuit of its land promises to the Métis, and the national process and goal of reconciliation for asserting Crown sovereignty over Métis people and their land is not complete (*MMF* 2013, paras. 9, 110). As argued below, a practical consequence of clarifying federal jurisdiction may be a corresponding duty for the federal government to participate in good faith in negotiation aimed at resolving claims arising from historical promises to Métis as an Aboriginal people.

This history, lack of jurisdictional clarity, and "political policy wrangling" between the federal and provincial governments has produced what Justice Phelan described at trial as "a large population of collaterally damaged" (*Daniels* 2013, para. 108) people and has exposed Métis and non-status Indians to discrimination and suffering as "the most disadvantaged of all Canadian citizens" (*Daniels* 2013, paras. 26, 84). Other ramifications include: (1) unequal access to programs and services in areas such as health, housing, social services, and economic development (*Daniels* 2013, para. 108); (2) federal reluctance to negotiate treaty or treaty-like arrangements or develop national socio-economic programs aimed at the impact of colonization on Métis people; (3) differential provincial treatment; and (4) exclusion from federal programs and processes designed to address Aboriginal land claims (e.g., test case funding, specific and comprehensive claims resolution processes).

It is this experience and the death of the Charlottetown Accord (which would have clarified that sec. 91(24) includes Métis) that ultimately led Harry Daniels, the CAP, and Leah Gardiner, a non-status Indian from Wabigoon, Ontario, to bring the *Daniels* case against Canada.[4] They asked the court to grant three declarations (*Daniels* 2013, para. 3):

(a) that Métis and non-status Indians are "Indians" within the meaning of the expression "Indians and lands reserved for Indians" in s. 91(24) of the Constitution Act, 1867;

(b) that the Queen (in right of Canada) owes a fiduciary duty to Métis and non-status Indians as Aboriginal people;

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ment regime is a negotiated constitutionalized promise to an Aboriginal people engaging the honour of the Crown and attracting the duties that flow therefrom.

[4] The Charlottetown Accord would have also provided that the Constitution be amended as necessary to safeguard the legislative authority of the Government of Alberta for Métis and Métis Settlement Lands, discussed further below.

(c) that the Métis and non-status Indian peoples of Canada 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.

Justice Phelan granted the first declaration and confirmed that a fiduciary relationship engaging "the honour of the Crown" exists between the federal government and the Métis "as a matter of law flowing from the declaration" (*Daniels* 2013, para. 607). However, he did not grant the second and third declarations on the basis that these issues can only be resolved within a specific factual context and in relation to a specific interest. Nevertheless, to the extent that lack of jurisdictional clarity operated as a barrier to consultation and negotiation, he anticipated that a declaration clarifying sec. 91(24) jurisdiction would remove this impediment.

In determining the scope of sec. 91(24), Justice Phelan rejected the argument that constitutional provisions must be interpreted according to original historical intent and that the Métis of Manitoba and the wider Northwest were not considered Indians in 1867.[5] Justice Phelan reasoned (*Daniels* 2013, paras. 538-539):

> [T]he "living tree" doctrine – is the appropriate approach. History helps to understand perspectives on the purpose but does not necessarily determine the purpose for all time. This is particularly the case with a constitution power which has, at some level, racial tones and which involved people who were seen in a light which today we would find offensive. Racial stereotyping is not a proper basis for constitutional interpretation.
>
> The Defendants' argument that the purpose of s. 91(24) was to allow the federal government the power to protect Indians and their lands because Indians were viewed as childlike uncivilized people (the Defendants were clear that it did not endorse that view of the natives) ignores the far broader and more acceptable purposes for the s. 91(24) power. These include the acceptance of the Crown's responsibilities to natives, obligations under the Royal Proclamation of 1763, the need for coordinated approach to natives rather than the balkanized colonial regimes and the need to deal with the rapid and forcible expansion into the West including Euro-Canadian settlement and the building of the national railway.

[5] In *Blais,* the SCC directed that purposive analysis of constitutional provisions be "anchored in historical context" and held that the objectives of paragraph 13 of the Manitoba Natural Resources Transfer Act (Manitoba NRTA) to protect and assist Indians was inconsistent with including Manitoba Métis in the definition of "Indians" under that paragraph (*Blais* 2003, para. 17). Because the Métis of the Red River identified as a distinctive people, claimed a different political status, and were "its negotiating partners in the entry of Manitoba into Confederation," the Crown viewed its obligations to Métis to be different from Indians, whom it considered its wards (*Blais* 2003, para. 33).

As several Métis scholars have commented, given the role of constitutional law in reflecting and shaping national values to guide Canadian society, race-based analysis grounded in colonial relationships and objectives of assimilation should no longer play a role in progressive and purposive interpretation of sec. 91(24).[6] Nevertheless, drawing on historical evidence and the 1976 SCC decision *Canada v. Canard*, Justice Phelan held that sec. 91(24) was a "race-based power" (*Daniels* 2013, para. 568) and that non-status and Métis were part of the racial classification of "Indians" through intermarriage and descent. He defined non-status Indians as having "two essential qualities by definition: they have no status under the *Indian Act* and they are Indians" (*Daniels* 2013, para. 16). He also said that for the purpose of sec. 91(24), "the single most distinguishing feature of non-status and Métis is that of 'Indianness', not language, religion or connection to European heritage" (*Daniels* 2013, para. 532). Justice Phelan reasoned that like the Inuit, Métis are a distinctive Aboriginal people under sec. 35 of the Constitution Act, 1982, which is aimed at enhancing survival of cultures of distinctive peoples who must identify as only one of First Nations, Inuit, or Métis (*Daniels* 2013, para. 592-593 citing *Re Eskimo* (1939) and *R v. Powley* (2003)). Such recognition, he stated, does not exclude them from federal jurisdiction over "Indians" under sec. 91(24) of the Constitution Act, 1867, which is aimed at a different purpose.

ISSUES ON APPEAL

The questions on appeal to the FCA were whether Justice Phelan erred in: (1) issuing the declaration that Métis and non-status Indians are in sec. 91(24); (2) his approach to constitutional interpretation and application of sec. 91(24) to the Métis; and (3) failing to order the second and third declarations concerning fiduciary duty, consultation, and negotiation. The FCA upheld the declaration that Métis are in sec. 91(24) and upheld Justice Phelan's refusal to grant the second and third declarations. However, it also held that Justice Phelan erred in issuing a declaration that non-status Indians are in sec. 91(24) for the reasons stated earlier.

Justice Phelan's approach to constitutional interpretation was challenged for two reasons – how he defined Métis and his application of the "living tree" doctrine to include them. The former arose from inconsistency with the definition and recognition of Métis as a distinctive Aboriginal people. In *Powley*, the SCC defined Métis as "distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life and recognizable group identity separate from their Indian or Inuit and European forbearers" (*Powley* 2003, para. 87). The federal government argued that this distinctiveness took Métis outside the scope of sec. 91(24), while the

[6] For a critique of this aspect of *Daniels*, see, for example, L. Chartrand (2013); P. Chartrand (2014); Teillet and Teillet (2015).

Métis National Council of Canada and the Métis Nation of Ontario argued that this distinctiveness must be read into a contemporary understanding of Métis inclusion. Although *Powley* did not exhaustively define who is a Métis for all purposes, it rejected a definition that is based on mixed heritage and Aboriginal ancestry alone. They also argued that sec. 91(24) is concerned with collectivities and is aimed at facilitating reconciliation of the assertion of sovereignty over Aboriginal peoples, not individuals of a particular race (Teillet and Madden 2013, 6-7).

The FCA agreed that Justice Phelan's approach to defining Métis was problematic and open to at least three different interpretations. By defining Métis in terms of Indian heritage, Justice Phelan may have meant that they are descended "from members of the 'Indian' race," that their heritage is the same as that of First Nations (a view contrary to history and the SCC), or that they share an "indigenousness or Aboriginal heritage" (*Daniels* 2014, paras. 89-91). However, aspects of Justice Phelan's reasoning convinced the FCA that he was not ignoring *Powley* by equating Métis with First Nations people. The FCA agreed that the distinctiveness of Métis identity must inform an understanding of who the Métis are for the purpose of sec. 91(24), but does not exclude them from its application (*Daniels* 2014, paras. 98, 99).

The federal government also argued that progressive statutory interpretation requires identification of "what changes require a new view" of who is included in sec. 91(24) beyond those originally intended (*Daniels* 2014, para. 127). The FCA disagreed and held that, in any event, it was not necessary to apply the "living tree" approach since factual findings at trial demonstrated that at Confederation in 1867 the intent was to adopt a definition of Indians broad enough to include Métis of the Northwest (*Daniels* 2014, paras. 133-143).

Several other arguments against granting the declaration were raised by the federal government, including: (1) declarations on matters of jurisdiction should only be granted when the validity of legislation is being challenged; (2) the declaration lacks practical utility because it does not compel legal obligations or address the more fundamental issues of exclusion from federal programs and services that motivated the litigation; and (3) the federal government can extend programs and services to Métis and non-status Indians regardless of jurisdiction by using its spending power. Relying on *MMF*, the FCA held that declarations can be made in aid of "extra-judicial negotiations with the Crown" (*Daniels* 2014, para. 68). It also decided that clarifying federal jurisdiction had real practical consequences for Métis, especially given the role that jurisdictional avoidance has played in the failure of both levels of government to provide services and engage in meaningful negotiation of Métis Aboriginal interests.

Nevertheless, the practical utility of the declaration may be limited to its political force if no legal obligations arise from sec. 91(24) jurisdiction. Such force can be significant. For example, a declaration in *Calder et al. v. Attorney-General of British Columbia* that Aboriginal title exists in Canada resulted in the federal government initiating the comprehensive land claim and modern treaty negotiation processes for First Nations. Other practical consequences emerge when *Daniels* is

read within a broader framework of Métis and Aboriginal constitutional rights. Here the Supreme Court decision in *Manitoba Metis Federation Inc. v. Canada* (*MMF*) is of particular significance in what it says about fiduciary obligations, honour of the Crown, and the duty of the Crown to act with diligence in purposeful fulfillment of solemn promises aimed at reconciliation of Métis Aboriginal interests.

THE PRACTICAL IMPLICATIONS OF A DECLARATION OF FEDERAL JURISDICTION: READING *DANIELS* WITH *MMF*

The *MMF* case concerned the interpretation and implementation of sec. 31 of the Manitoba Act, 1870. The Métis negotiated, as part of the creation of Manitoba, allocation of 1.4 million acres of land to Métis children "towards the extinguishment of Indian title," as well as land grants to Métis and other settlers in possession of land through a separate series of land grants. Errors and delays in implementing these sections along with underestimating eligible recipients, insufficient legislative response, instances of federal facilitation of land scrip speculation, and other frauds and abuses resulted in many Métis not receiving the land grants promised (*MMF* 2013, paras. 14, 32-39).

The Manitoba Métis Federation sought three declarations to bring federal and provincial governments to the negotiation table. These were that (*MMF* 2013, para. 7): (1) in implementing the Manitoba Act, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the Manitoba Act in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the Manitoba Act was *ultra vires*. Regarding sec. 31 of the act, the SCC held (*MMF* 2013, para. 9):

> The immediate purpose of the obligation was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. The obligation enshrined in s. 31 of the *Manitoba Act* did not impose a fiduciary or trust duty on the government. However, as a solemn constitutional obligation to the Métis people of Manitoba aimed at reconciling their Aboriginal interests with sovereignty, it engaged the honour of the Crown. This required the government to act with diligence in pursuit of the fulfillment of the promise. On the findings of the trial judge, the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled.

The SCC held that the relationship between the Métis and the Crown is fiduciary in nature, but that not all dealings between them give rise to enforceable federal fiduciary duties (*Daniels* 2013, paras. 604-607). Fiduciary duties grounded on Aboriginal title arise from two distinct sources: (1) where the Crown assumes

discretionary control over specific communal cognizable Aboriginal interests, and (2) where there is an undertaking by an "alleged fiduciary to act in the best interests of the alleged beneficiary" (*MMF* 2013, paras. 50, 60 citing *Alberta v. Elder Advocates of Alberta Society* 2011, para. 36).[7] The SCC concluded that sec. 31 of the Manitoba Act is not a source of federal fiduciary duty to Métis as it does not show an intention to act in the best interests of Métis children "in priority to other legitimate concerns, such as ensuring land was available for the construction of the railway and opening Manitoba for broader settlement" (*MMF* 2013, para. 62). Further, the alleged Crown practice of dealing with Métis as an Aboriginal people at the time of Confederation was insufficient to establish "that the Métis held either Aboriginal title or some other Aboriginal interest in specific lands as a group" (*MMF* 2013, para. 58) giving rise to a fiduciary obligation.[8]

Honour, Jurisdiction, and Government Responsibility

The analysis of Crown fiduciary duty in *MMF* supports Justice Phelan's decision not to declare that the federal government has a general fiduciary duty to Métis to act in their best interest flowing from sec. 91(24). However, this does not mean that federal jurisdiction exists free from corresponding government obligations to Métis. The honour of the Crown is engaged by the fiduciary relationship confirmed by sec. 91(24) and gives rise to various other duties, including to negotiate resolution of credibly asserted Aboriginal claims (*Haida* 2004, para. 25; *Tsilhqot'in* 2014, para. 18) and diligently and purposively fulfill constitutional, statutory, treaty, and other solemn promises to Aboriginal peoples aimed at reconciliation (*MMF* 2013, paras. 73, 78, 79).

The honour of the Crown "refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign" (*MMF* 2013, para. 65). It is "a core precept that finds its application in concrete practices" (*Haida* 2004, para. 16) and "gives rise to different duties in different circumstances" (*Haida* 2004, paras. 18). As a constitutional principle, its purpose is linked to the process and goal of reconciliation "of pre-existing Aboriginal

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[7] The requirement that Aboriginal title be communal is sourced in First Nation jurisprudence. However, the SCC also held (*Delgamuukw* 1997, para. 126) that the source of Aboriginal title is the "relationship between common law and pre-existing systems of aboriginal law." An alternative argument is that Métis Aboriginal title should be determined by the nature, laws, and landholding patterns integral to the distinctive culture of a Métis people at the date of effective European control. For a comment on this case, see O'Toole (2014).

[8] If *MMF* is interpreted to restrict the foundation of federal fiduciary obligations to Aboriginal interests in land recognized at common law, this is a narrower understanding than the case law upon which it relies (see *NTI* 2014, paras. 195-203, per Hunt J. dissenting).

societies with the assertion of Crown sovereignty" (*MMF* 2013, para. 66). Given this, it is owed to an Aboriginal group and will not be engaged, for example, "by a constitutional obligation owed to a group partially composed of Aboriginal peoples" (*MMF* 2013, para. 72).

The SCC emphasized in *MMF* that Canada engaged the Métis of Manitoba collectively as an Aboriginal people in national processes for western expansion and reconciliation of Aboriginal interests. Section 31 was part of that process and represented the terms "under which the Métis people agreed to surrender their claims to govern themselves and their territory, and become part of the new nation of Canada" (*MMF* 2013, para. 5). This promise engaged the honour of the Crown and the "duty of diligent, purposive fulfillment" (*MMF* 2013, para. 94) because it was "made to the Métis people collectively, in recognition of their distinct community" (*MMF* 2013, para. 91).

Not every act of negligence or mistake in implementation will give rise to a declaration that brings dishonour to the Crown. What is required is "a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise" (*MMF* 2013, para. 82). Applied to sec. 31 of the Manitoba Act, the SCC held:

> The Métis were promised implementation of the s. 31 land grants in "the most effectual and equitable manner." Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better. (*MMF* 2013, para. 128)

As a consequence, national obligations to Métis in Manitoba aimed at reconciling their Aboriginal interests with sovereignty remain unfulfilled. Following *MMF* and *Daniels*, one can argue that the federal government has both the constitutional authority under sec. 91(24) and the duty to diligently pursue such unfulfilled obligations to Métis and engage in processes for honourable reconciliation of Crown and Métis interests. A persistent pattern of indifference and refusal to negotiate frustrates not only one of the original purposes of sec. 91(24) – to settle claims with Aboriginal peoples in possession of the land – but also the promise and purpose of reconciliation in sec. 35. Other decisions of the SCC suggest the federal Crown has as well a moral and legal duty to negotiate in good faith to resolve claims arising from credibly asserted Aboriginal rights or title (*Haida* 2004, para. 25; *Tsilhqot'in* 2014, para. 18). *MMF* and *Daniels* confirm Métis are in a fiduciary relationship with the federal government, were part of a national process for reconciliation, and are subject to the exercise of federal discretion and regulation. As such, the moral and legal duty to negotiate should extend by analogy to the federal Métis relationship.

As elaborated below, *Tsilhqot'in* held that provincial governments also have a duty to consult and negotiate in good faith to resolve Aboriginal claims connected with the actual and potential exercise of provincial constitutional authority over

Aboriginal lands and resources, for example, through enactment of forestry laws. Similarly, in *Grassy Narrows,* the SCC held that federal and provincial governments are responsible for fulfilling the treaty promises within their respective contemporary constitutional spheres in conformity with duties flowing from honour of the Crown. If governments fail to discharge these duties, remedies analogous to those attracted to the duty to consult, also derived from honour of the Crown, should be available, including damages, injunctive relief, or an order that negotiations be carried out (*Tsilhqot'in* 2014, para. 89 citing *Rio Tinto*).

Significantly, the reasoning in *MMF* extends the federal duties of purposive fulfillment and negotiation beyond the Manitoba border. The prevailing assumption that Canadian governments have fulfilled all of their obligations, to the extent that they existed, in satisfying Métis land interests in Canada through land grants and scrip distribution is clearly rejected (*MMF* 2013, para. 123). In Alberta and Saskatchewan Half-Breed Commissions and joint scrip and treaty commissions were established by federal land legislation and Orders in Council to "satisfy any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds resident in the North-West Territories outside of the limits of Manitoba" and born in the Northwest Territories July 1870 and 1885 (Dominion Lands Acts 1872–1889 sec. 81(e)). Even if not constitutional instruments *per se*, these statutory promises to satisfy claims are arguably cloaked with the same honour as sec. 31 of the Manitoba Act and give rise to a duty of diligent purposive fulfillment. They are part of a larger process of reconciliation and nation building, but also linked to sec. 31 directly. For example, there are references in the commissioners' reports on scrip distribution outside of Manitoba in the House of Commons Debates that directly tie Métis entitlement to Dominion Land Act (DLA) scrip to what was promised in Manitoba.[9] Métis land claims litigation filed by the Métis National Council and Métis Nation of Saskatchewan and ongoing research conducted on scrip distribution by Dr Frank Tough and others demonstrate similar issues of delay, fraud, and abuse. Indeed, many authors have written on this point and in *Blais* the SCC notes how scrip was a "sorry chapter in our nation's history" (2003, para. 34).

It is beyond the scope of this chapter to examine in detail the basis of a claim by Métis to a declaration concerning the constitutional duty of diligent purposive fulfillment of scrip obligations outside Manitoba. The point is that *MMF*, *Daniels*, and *Haida* call for federal participation in negotiation and settlement of these claims. But does Métis inclusion in sec. 91(24) mean the federal government has an obligation to do more than negotiate claims in good faith with a view to resolution?

[9] See, e.g., *House of Commons*, 37th Parl 1st Sess, No 64 (17 May 2001) at 4175 (Hon Elinor Caplan).

Access to Programs and Services

MMF supports the conclusion there is no generic fiduciary duty for the federal government to act in any particular way flowing from sec. 91(24). However, Métis inclusion in sec. 91(24) is relevant to the issue of government obligations to deliver programs and services in a different way; it bolsters claims to equal access to federal ameliorative programs and services available to other Aboriginal peoples or those aimed at reconciling Aboriginal interests. *Daniels* and *MMF* together situate Métis with Inuit and First Nations under federal jurisdiction and in the national process of reconciliation. Section 15 equality principles suggest that they should be treated in similar ways – for example, by including Métis in federal comprehensive and specific land-claims resolution processes. Findings of fact in *Daniels* that Métis are among the most discriminated against and disadvantaged Canadian citizens also support the creation of programs and legislation aimed at ameliorating socio-economic hardship analogous to those extended to status Indians and Inuit. This reasoning is consistent with the recent ruling of the SCC in *Cunningham*, in which membership provisions of Alberta's Métis settlement legislation withstood sec. 15 challenges that they discriminated against Indians by excluding them because of the legislation's ameliorative purpose to establish "a Métis land base to preserve and enhance Métis identity, culture and self-governance, as distinct from surrounding Indian cultures and from other cultures in the province" (*Cunningham* 2011, para. 62).

THE PRACTICAL IMPLICATIONS OF FEDERAL JURISDICTION FOR PROVINCIAL GOVERNMENTS

Daniels also raises questions about the role of provinces in negotiating and implementing Métis Aboriginal rights claims given federal sec. 91(24) jurisdiction. Provincial governments must be involved in negotiations by practical necessity because they own and have the constitutional ability to regulate lands and resources that may be affected (see, for example, *Tsilhqot'in* and *Grassy Narrows*). Provincial governments also regulate various other aspects of Aboriginal life through laws of general application such as education and child welfare. For these reasons the duties flowing from honour discussed above also flow to provincial governments. More complicated is the constitutional validity of provincial laws that are not of general application but directed at Métis as an Aboriginal people, or at their Aboriginal rights. If singling out Aboriginal peoples or their rights is a core federal jurisdiction, a strict application of the division of constitutional powers could invalidate such laws.

The federal government argued in *Daniels* that a consequence of federal sec. 91(24) jurisdiction could be to leave provincial legislation, such as Alberta's Metis Settlements Act (MSA), open to challenge because of the doctrine of

interjurisdictional immunity. The idea is that Aboriginal peoples and their lands are immune from provincial laws relating to matters that fall within core exclusive federal regulatory power. Section 91(24) protects Aboriginal people from provincial laws in relation to "lands reserved for Indians" and matters that go to the "the core of Indianness" – a concept that has been interpreted by the SCC to include sec. 35 Aboriginal constitutional rights (*Delgamuukw* 1997, para. 178). The only way a provincial law that impairs these core areas can withstand challenges to constitutional validity is if (1) it is of general application, and (2) the provincial power to regulate is found in another source outside the division of constitutional powers, such as sec. 88 of the Indian Act or the delegation of federal regulatory power over Indian hunting, fishing, and trapping on unoccupied Crown land under the Natural Resource Transfer Agreements. Neither of these extends to Métis nor enables provincial regulation in relation to "lands reserved for the Indians."

Dale Gibson argues that the proper way to understand the idea of core federal sec. 91(24) jurisdiction in relation to Métis is a concept of "Métisness" – that which is "vital, essential or integral" to distinctive identity and cultural survival of Métis people (Gibson 2008, 18-219). It includes matters such as laws relating to membership; connection with and protection of Métis families; Métis institutions of community and governance; Métis Aboriginal rights; and economic enterprises that bring communities together and are aimed at the perpetuation of the distinctive Métis culture (Gibson 2008, 219). A law that singles out Métis for special treatment from other provincial citizens could go to the "Métis Aboriginal core" and fall outside provincial legislative jurisdiction. Negotiated settlements between a province and a Métis group, such as the MSA, could potentially be considered *ultra vires*. To determine if this is the case, three fundamental questions must be asked: (1) What is the main purpose of the legislation? (2) Does the legislation bestow special entitlements not enjoyed by all residents in the province? (3) Does the legislation have a dual aspect such that it can be characterized as a provincial matter and a federal matter?

Some have argued that the MSA does not single out Métis and falls within provincial sec. 92 jurisdiction because it deals with aspects of property and local government common to all citizens of Alberta, such as elections, transmission of interests in property, and resource rights (e.g., Gibson 2008, 227). Further, its purpose is not directed at the status of Métis as an Aboriginal people or at their Aboriginal rights. This is clear in the preamble to the Constitution of Alberta Amendment Act, 1990 which provides that "nothing in this Act, the Metis Settlements Land Protection Act, the Metis Settlements Accord Implementation Act or the Metis Settlements Act is to be construed so as to abrogate or derogate from any Aboriginal rights referred to in section 35 of the Constitution Act, 1982." However, a closer examination of the legislation reveals extensive powers of self-government and control over land access and participation in surface and subsurface resource rights not enjoyed by other Albertans or municipalities, and control over Aboriginal aspects of Métis life and culture (Bell and Robinson 2008). The MSA is also "designed to enhance and

preserve the identity, culture and self-governance of a constitutionally recognized group … that is identified as one of the groups that make up the 'aboriginal peoples of Canada' in sec. 35 of the *Constitution Act, 1982*" (*Cunningham* 2011, para. 54). These matters go to "Métisness" arguably within core federal sec. 91(24) jurisdiction. Thus the legislation has dual aspects to it.

Gibson and others argue that this dual federal provincial aspect to the Métis settlements legislation takes it outside potential exclusive federal regulatory domain. The FCA agrees with this analysis in *Daniels*. It held: "In *Reference re Employment Insurance Act* (*Canada),* the Supreme Court observed that the power of one level of government to legislate in relation to one aspect of a matter takes nothing away from the power of the other level to control another aspect within its own jurisdiction … [T]his is a complete answer to the appellants' argument" that a declaration Métis are sec. 91(24) Indians could make provincial legislation like the MSA vulnerable (*Daniels* 2014, para. 150). But is *Reference re Employment* the complete answer?

At the time *Daniels* was argued, counsel and the FCA did not have the benefit of the recent *Tsilhqot'in* decision, which changed the law of interjurisdictional immunity. In the latter case, the SCC held that (1) the doctrine of interjurisdictional immunity has "no role whatsoever to play in relation to aboriginal title lands" and potentially more broadly to all sec. 35 Aboriginal rights (*Tsilhqot'in* 2014, paras. 140, 150); (2) the proper test to determine the constitutionality of provincial laws of general application that implicate sec. 91(24) jurisdiction over Aboriginal rights and title is the sec. 35 justification test; and (3) the application of the doctrine of interjurisdictional immunity should be limited to contexts where the conflict is between federal and provincial governments.

One of the issues in *Tsilhqot'in* was whether the British Columbia Forest Act applied to Aboriginal title lands. The trial judge held it did not because "provisions authorizing management, acquisition, removal and sale of timber" on Aboriginal title lands affect "the core of federal power" over Aboriginal rights (*Tsilhqot'in* 2014, para. 132). The SCC disagreed. It said the law is unclear and characterized earlier SCC discussions about core sec. 91(24) jurisdiction over Aboriginal rights as *obiter* and therefore nor determinative. The SCC also pointed to conflicting decisions that assume "provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified" (*Tsilhqot'in* 2014, para. 135). A strict application of the doctrine of interjurisdictional immunity and core jurisdiction would mean that provincial laws that impair an Aboriginal right would be unconstitutional even if such a limitation passed the sec. 35 justification tests.

When the issue is how far a province can go in regulating Aboriginal rights, the SCC held that the "appropriate constitutional lens" is sec. 35 (*Tsilhqot'in* 2014, para. 152). The question is not whether the law enacted by the province interferes with core areas of federal constitutional authority under sec. 91(24). The same reasoning applies by analogy to Métis. Even though *Daniels* clarifies federal constitutional authority, it is likely no longer open to argue that provincial laws of

general application, such as hunting laws, are unconstitutional because they impair Métis or other Aboriginal rights that are within core federal jurisdiction (*Tsilhqot'in* 2014, para. 140; see, for example, Bell and Leonard 2004,1077-83). Rather, the issue is whether the province complied with its fiduciary and other obligations as honour of the Crown demands.

The likelihood of this outcome is bolstered by the most recent consideration of interjurisdictional immunity by the SCC in July 2014 in *Grassy Narrows*. The SCC held that Ontario had the right to take up Treaty 3 land based on an analysis of sections 109, 92(5), and 92A of the Constitution Act, 1867, which established provincial beneficial interest in the lands in dispute and constitutional authority to manage, sell, and make laws in relation to them (*Grassy Narrows* 2014, para. 50). The "text of Treaty 3 and legislation dealing with Treaty 3 lands" (*Grassy Narrows* 2014, para. 50) also supported the view that "the right to take up land rests with the level of government that has jurisdiction under the Constitution" at the time (*Grassy Narrows* para. 35). Citing *Tsilhqot'in*, the SCC ultimately concluded that "interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights (*Grassy Narrows* 2014, para. 53). The appropriate test to determine the constitutionality of provincial laws falling within a provincial head of power that affect treaty rights is the sec. 35 justification test (*Grassy Narrows* 2014, para. 53).

Together *Tsilhqot'in* and *Grassy Narrows* change the law on interjurisdictional immunity and eliminate the use of core exclusive sec. 91(24) jurisdiction to invalidate otherwise valid provincial laws of general application regulating Aboriginal and treaty rights. The question remains whether interjurisdictional immunity continues to preclude enactment of provincial laws that allegedly single out Aboriginal people or their rights for special treatment, such as the MSA. Arguably, it does not.

In *Tsilhqot'in*, the SCC adopted a restrictive approach to interjurisdictional immunity limiting it to conflicts between federal and provincial governments, favouring the "operation of statutes enacted by both levels of government" (*Tsilhqot'in* 2014, para. 149) and moving away from "the notion that regulatory environments can be divided into water tight compartments" (*Tsilhqot'in* 2014, para. 148). It held that interjurisdictional immunity is only invoked where the "application of the provincial laws significantly trammel or impair the federal power" (*Tsilhqot'in* 2014, para. 131 citing *Quebec v. Canadian Auto Pilots*). The court also considered the practical consequences of strict application of interjurisdictional immunity, such as creation of a legislative vacuum – an analysis that assumed two levels of government and failed to consider the role of Indigenous laws despite some limited attention being given to them in analyzing the nature, content, and proof of Aboriginal title. This reasoning suggests that the constitutionality of provincial law affecting or directed at the Métis will not turn on the division of powers or whether a law is characterized as one of general application, but whether the law can be justified under sec. 35. However, even if the MSA is characterized as singling out

and *Tsilhqot'in* limited to laws of general application, there are numerous other ways to argue in support of constitutional validity.[10]

CONCLUSION

Since commencement of the *Daniels* litigation in 1999, the federal government has maintained that a declaration stating Métis and non-status Indians are in sec. 91(24) has no practical utility. The Federal Court of Appeal agreed concerning non-status Indians, but disagreed with respect to the Métis. In addition to clarifying federal constitutional authority and removing an excuse used to avoid negotiation and provision of services, the practical utility of the declaration to Métis is best understood when considered within the broader legal framework of Aboriginal rights. This approach links federal constitutional authority and responsibility to diligently fulfill national promises aimed at reconciliation of Métis interests and participation in good faith negotiation of Métis Aboriginal rights claims. *Daniels* also lends support to legal and moral arguments to open federal claims resolution processes and extend needed services to Métis, particularly those aimed at the socio-economic impact of colonization or reconciling Métis Aboriginal interests.

Although *Daniels* creates some uncertainty about the jurisdiction of provincial legislatures to enact laws directed at Métis, there is clear movement by the SCC away from a strict application of the doctrine of interjurisdictional immunity to invalidate provincial laws. Cases such as *Tsilhqot'in* and *Grassy Narrows* suggest that provincial laws affecting or directed at Métis as an Aboriginal people will withstand constitutional challenge as long as they can be characterized as within a provincial head of power and justified on the basis of a compelling and substantial purpose and compliance with duties flowing from honour of the Crown.

Overall, the combined messages of *Daniels* and the decisions reviewed are that the Métis are a distinctive Aboriginal people, under federal jurisdiction, with similar constitutional rights to First Nations and Inuit and with whom reconciliation is to be negotiated. This process by necessity involves federal and provincial governments because the SCC has recognized the constitutional authority of both to regulate Aboriginal people, rights, lands, and resources subject to meeting the

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[10] One argument is that ameliorative provincial laws are valid if they can be characterized as a relating to a provincial matter (e.g., personal property). In *Daniels,* Justice Phelan says *Cunningham* is relevant on this point because the SCC found the Métis settlements regime ameliorative (*Daniels* 2013, paras. 596-597). Provincial legislation implementing negotiated agreements may also attract the duty of diligent, purposeful fulfillment. Inclusion of Métis under s. 91(24) and the exercise of provincial jurisdiction under s. 92 suggests both Alberta and Canada have a duty to do what is necessary to uphold these obligations.

sec. 35 justification tests. With constitutional power come legal obligations flowing from honour of the Crown and the Aboriginal-Crown fiduciary relationship including the duty to negotiate in good faith to resolve Métis claims.

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V

Social Policy Governance: Moving Beyond Jurisdictional Boundaries?

14

KELOWNA'S UNEVEN LEGACY: ABORIGINAL POVERTY AND MULTILEVEL GOVERNANCE IN CANADA

Florence Larocque and Alain Noël

Canadian federalism empowers two orders of government that are both susceptible to playing a role in Aboriginal policy-making. From the beginning, the federal government stood as the main protagonist on Aboriginal issues, but the role of provincial governments has increased significantly since the 1980s. With the constitutional negotiations of the 1980s and early '90s and the contentious politics of natural resources development, a space has opened for more complex patterns of multilevel governance in which Indigenous peoples can be involved. As this volume suggests, such multilevel governance patterns can be characterized by the inclusion at different territorial scales of non-governmental actors in policy dialogues and by a decision-making process that is negotiated rather than hierarchical (see also Papillon 2008, 2012a; Alcantara and Nelles 2014; Sutcliffe 2012).

The purpose of this chapter is to uncover the effects of multilevel governance on public policies regarding Indigenous peoples, a state of affairs poorly understood (Alcantara and Nelles 2014). We achieve this purpose through the analysis of the implementation at the provincial level of the 2005 Kelowna Accord, a key development of tripartite, multilevel governance practice in Canada.[1] The accord, which addressed socio-economic disparities between Aboriginal and

[1] Our analysis does not include the three northern territories, because they are far less autonomous and raise distinct issues regarding Aboriginal peoples. Territorial governments signed the accord and shared its objectives, but mostly counted on Ottawa for its implementation (see, for instance, Meekitjuk Hanson 2005).

non-Aboriginal individuals in Canada, was the most remarkable outcome of the inclusion of Aboriginal representatives in First Ministers' Conferences and Meetings (Alcantara and Nelles 2014; Papillon 2012b). The federal government withdrew from this agreement with the shift of governing party in January 2006, but the other signatories reaffirmed their commitment. We aim to determine whether the objectives of an agreement meant to last ten years were pursued by the remaining provincial partners.

Our results suggest that this multilevel governance process had an impact on provincial policy agendas but left an uneven legacy. On one hand, the shared "closing the gap" commitment was largely integrated in provincial policy objectives, except for the two provinces governed by Conservative governments from 2005 to 2014. On the other hand, the accord's impact on policies rarely proved determinant and did not have a uniform effect across provinces, even though it gave an impulse and shaped provincial poverty-reduction strategies and policies regarding Aboriginal peoples. Some provinces clearly went further than others, as they institutionalized the general commitment, introduced monitoring and benchmarking instruments, and created participation mechanisms for Aboriginal peoples in the four designated priority policy areas. The most active provinces in this respect were British Columbia, Manitoba, Ontario, and Quebec.

The first section discusses the context of the progressive integration of Aboriginal peoples in Canadian intergovernmental relations, and the second describes briefly the Kelowna Accord. The third presents the analysis of relevant provincial policies following 2005.

INTERGOVERNMENTAL RELATIONS AND ABORIGINAL PEOPLES IN CANADA

In Canada, intergovernmental relations (typically federal-provincial) are weakly institutionalized compared to other federations (Bolleyer and Bytzek 2009; Bolleyer 2006; Cameron and Simeon 2002, 64). Formal agreements between the two orders of government are relatively rare and have commonly been undermined by a lack of compliance and by fluctuations in the ideologies or partisan ties of changing governments (Wiltshire 1980; Bolleyer 2006, 472-3; Esselment 2013). As Cameron and Simeon explain, "The process has no constitutional or legislative base, little backup by bureaucrats linked to the success of the process rather than to individual governments, no formal decision-rules, and no capacity for authoritative decision-making" (2002, 64). This failure of institutionalization has left fragile foundations and magnified the role of the prime minister and provincial premiers.

Before the 1980s, Aboriginal peoples were rarely at the core of Canada's intergovernmental system. Aboriginal affairs were seen as a primary federal domain. Provincial governments themselves often argued that Ottawa had full authority

over Aboriginal peoples, and they were joined in this by most native leaders, who distrusted the provinces and preferred to emphasize an exclusive relationship with the federal government – even for social policy – for fear of jeopardizing their treaty or inherent rights (Long and Boldt 1988, 4-6; RCAP 1996, vol. 3, ch. 2, sec. 2.4; Shewell 2004, 320; Frideres and Gadazc 2008, 368; Abele and Graham 1989, 152-4).

In fact, the division of powers between the two orders of government never was as watertight as assumed. Section 91(24) of the Constitution Act, 1867 did grant the federal government exclusive authority over "Indians and Lands reserved for Indians," and this authority was extended to the Inuit by the Supreme Court in 1939 (Leslie 2008, 214). But section 88 of the Indian Act also subjected Indians to provincial laws of "general application," unless these laws affected "their Indianness" (Pratt 1989, 32). With the expansion of the welfare state after World War II, provincial governments became increasingly involved in the delivery of education, health care, and social services to Aboriginal peoples, especially for Indians living outside reserves, the Métis, and sometimes the Inuit, often with some financial support from the federal government (Long and Boldt 1988; Morse 1989, 71). The provincial government influence even extended on reserves, where the federal government tailored its programs according to provincial norms (Moscovitch and Webster 1995, sec. 3.4; Shewell 2004, 314-20).

Gradually acknowledging this evolution, in the 1980s Aboriginal leaders became increasingly ready "to deal with the Crown as a whole – that is, to deal with both federal and provincial governments" (Hawkes 1989, 361). The constitutional negotiations of the 1980s and early '90s and the contentious politics of natural resources development reinforced this trend, and Aboriginal organizations were gradually integrated in existing intergovernmental mechanisms (Papillon 2012b).

The inclusion of Aboriginal organizations in intergovernmental relations led to a number of tripartite agreements. In principle, these agreements could display the same characteristics as provincial-federal ones, but the introduction of a third party could also contribute to better institutionalize and enforce agreements (Bolleyer and Bytzek 2009, 373). Papillon (2012b) argues that with "the emerging dynamics of multilevel governance … Aboriginal governments now play a growing role in the development and implementation of policies, and as a result consolidate their capacity and legitimacy." As Alcantara and Nelles note, however, more research is needed to move beyond defining or using the concept of multilevel governance and to address its impact on relationships and on public policies (2014).

The case of the Kelowna Accord may be telling in this respect. Indeed, as the Conservative government elected a few months later decided to deny the agreement, the process fell entirely in the hands of provincial governments and Aboriginal organizations. To what extent did Aboriginal organizations' signatures and involvement bring provinces to move forward to close the important socio-economic gap between Aboriginal and non-Aboriginal people?

ABORIGINAL POVERTY AND THE KELOWNA ACCORD

In Canada, as in many countries, being Aboriginal often means being poor, even very poor. In 2005, 3.8 percent of the country's population identified as Aboriginal, either as North American Indians/First Nations peoples (60 percent of the total), Métis (33 percent), or Inuit (4 percent).[2] Of these, according to census data that unfortunately excludes persons living in the three territories and on reserves, 21.7 percent had incomes below Statistics Canada's low-income cut-off after tax, compared to 11.1 percent for the non-Aboriginal identity population (Statistics Canada 2006).[3] Various factors combined to make Aboriginal persons more vulnerable to poverty, notably bad living and health conditions, insufficient levels of formal education, and lower employment rates (Statistics Canada 2006). But whatever the cause, the gap remained large.

On 25 November 2005 in Kelowna, BC, the federal, provincial, and territorial governments and representatives from all the major Aboriginal organizations in the country concluded an 18-month negotiation process with a consensus on a ten-year approach to close this standard of living gap between Aboriginal and non-Aboriginal Canadians (Patterson 2006; First Ministers and National Aboriginal Leaders 2005a). The agreement included three types of instruments for the implementation of this objective: first, policy initiatives to enhance access to education, health services, housing, and economic opportunities; second, the development of general and regional indicators to measure progress and facilitate benchmarking; and third, annual regional multilateral processes and forums to strengthen participation and foster constructive relationships. Many leaders spoke of the agreement as an historic turn that would at last contribute to reduce Aboriginal poverty (First Ministers and National Aboriginal Leaders 2005a, 2005b).

The federal government, led by Liberal Prime Minister Paul Martin, promised to devote $5.1 billion over five years to fulfill its part of the agreement (First Ministers and National Aboriginal Leaders 2005b). But a few months after the accord was signed, Paul Martin's minority government was defeated, and a new minority government headed by Conservative Stephen Harper took power. The new government soon made clear that it would not spend at the level pledged in Kelowna, and its Indian Affairs minister reduced the November consensus to a last-minute pre-election deal that amounted to little more than a "one-page press release" (Webster 2006). Over the years, the Harper government has implemented some measures included in the agreement, "but the funding commitments and the

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[2] The remaining 3 percent identified to more than one subgroup or did not identify as Aboriginal but were registered Indians/First Nation members (Statistics Canada 2008, 9).

[3] To compute these percentages, we added persons in economic families and not in economic families, and then divided by the total number of persons in private households.

implementation model involving provincial and Aboriginal partners were set aside for good" (Papillon 2012b).[4]

The Kelowna process, however, also involved provincial and territorial governments, as well as Aboriginal organizations, which stood unanimously behind the new consensus and pledged to take part in the joint effort to close the gap. In October 2009, an Aboriginal Affairs Working Group (AAWG) was created, composed of Aboriginal leaders and Aboriginal Affairs ministers from all provinces and territories, and designed to support joint efforts to close the socio-economic gap between Aboriginal peoples and other Canadians (CICS 2009). Repeatedly, the AAWG has reaffirmed the Kelowna consensus and called "on the federal government to join" as a partner (CICS 2012). Little is known, however, about the extent to which provincial governments have effectively respected the commitments agreed upon in Kelowna.

PROVINCIAL GOVERNMENTS AND THE KELOWNA ACCORD

The accord covered a ten-year period ending in November 2015. In this chapter, completed in 2014, we assess whether provincial actions relevant for Aboriginal socio-economic conditions followed the Kelowna Accord on the basis of its four main dimensions:

1. adoption of the "closing the gap" objective (in stronger terms than improving socio-economic conditions)
2. presence of policy initiatives in the four expected areas: education, health, housing, and economic opportunities
3. implementation of a monitoring and benchmarking process, with indicators to measure progress
4. institutionalization of partnership and participation for Aboriginal peoples

Our analysis focuses on the official discourse adopted by governments following the Kelowna Accord and relies largely on official documents. The analysis is based on a systematic review and qualitative codification of the content of annual reports,

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[4] In June 2008, the Parliament of Canada adopted An Act to Implement the Kelowna Accord (C-292), a private member's bill sponsored by Paul Martin. This law forced the federal government to report on progress made in implementing the accord, in four annual reports that studiously avoided referring to a "gap" and simply listed measures adopted to implement the government's own "practical and results-driven approach to Aboriginal issues" (Government of Canada 2012, 43).

briefing books, and plans produced by provincial Aboriginal Affairs ministries or departments or secretariats between 2004 and 2013 (except for Prince Edward Island, where the Aboriginal Affairs Secretariat does not produce such reports). The analysis also relies on a thorough review of the laws, bilateral or trilateral specific agreements, memorandums of understanding, governmental reports, and plans that address Aboriginal socio-economic issues and have been released between 2000 and 2013. The documents that were systematically reviewed are listed in the appendix. Finally, the analysis is also informed by secondary sources and specific clarification questions raised with provincial officials.

We first describe the panorama of provincial policies addressing Aboriginal poverty and then analyze the extent to which provincial policies have integrated the "closing the gap" objective and implemented the expected measures.

Panorama of Recent Provincial Policies Addressing Aboriginal Poverty[5]

Post-Kelowna provincial policies cannot be understood without considering the large spectrum of provincial actions addressing Aboriginal poverty, including the initiatives developed "in the spirit of Kelowna," other Aboriginal-specific social policy developments, and the poverty reduction strategies for the general population that have sometimes included a specific focus on Aboriginal peoples. The orientations adopted by the provinces may not have been exclusively "caused" by the accord, but we intend, in light of the multilevel governance perspective, to see whether or not they were consistent with an accord all governments signed.

In 2005–06, when the accord was being discussed or launched, four provinces made statements or took actions in the spirit of Kelowna: British Columbia, Ontario, Quebec, and Manitoba. The very day the Kelowna consensus was announced, the government of British Columbia unveiled its own Transformative Change Accord, signed with Ottawa and the province's First Nations, with the explicit objective of closing "the social and economic gap between First Nations and other British Columbians over the next 10 years." A similar agreement was signed in May 2006 with the Métis. This new approach generated an array of tangible policy innovations (see Gottfred's chapter for an insider's view of these developments). In the following years, for instance, the government launched a Tripartite First Nations Health Plan, an Aboriginal Post-Secondary Education Strategy and Action Plan, an Aboriginal Housing Initiative, and an Aboriginal Homeless Outreach Program. A tripartite First Nations Housing Memorandum of Understanding was also signed

[5] The following three sections are based on a systematic analysis of the documents presented in the appendix. Only references to additional material are noted in the text.

in 2008, and in 2009, the province agreed with Aboriginal leaders on a Recognition and Reconciliation Protocol on First Nations Children, Youth and Families, a thorny issue. The Ontario government announced its New Approach to Aboriginal Affairs in 2005 (in June, while the Kelowna Accord was still under negotiation). The New Approach emphasized collaboration on social policies and on land claims negotiations and led to two bilateral agreements: in 2008 with the Métis Nation, and in 2009 with Treaty 3 First Nations (Dalton 2009, 26). In 2012, the agreement with Treaty 3 First Nations was renewed, and a working plan was developed but not made public. Specific strategies have also been developed in the area of education with the Ontario First Nation, Métis and Inuit Education Policy Framework (2007). In Quebec, the Mashteuiatsh First Nations Socioeconomic Forum was held in October 2006, bringing together 250 Aboriginal representatives and the provincial and federal governments, as well as political and civil society leaders. A detailed and ambitious action plan came out of the forum, but doubts have been raised about its implementation, which was not transparent (AFNQL 2006; Quebec 2009). A similar meeting (the Katimajiit Conference) also took place with Quebec's Inuit in 2007. In Manitoba, a Closing the Gap implementation plan was adopted in April 2006 and led to the formation of working groups (Bostrom 2010). The approach remained modest and incremental, as indicated by the concrete measures listed under the heading "Closing the Gap" in the 2007 budget (Manitoba 2007, E6-E7). In 2009, this approach was integrated in the overall poverty reduction strategy of the province (discussed below).

In the years before, in the late 1990s or the 2000s, other provincial initiatives had been put forward to address Aboriginal socio-economic conditions independently of the Kelowna process. An important one was the Mi'kmaq–Nova Scotia–Canada Tripartite Forum created in 1997, which facilitated collaboration on social development (Saulnier 2009, 8). Another major initiative was the Government of Alberta's Aboriginal Policy Framework, released in 2000 and pursued up to 2006–07, which focused on improving the well-being and self-reliance of Aboriginal individuals and communities, as did its successor, Aboriginal Economic Partnerships. Other sectorial provincial initiatives were introduced, such as tripartite Memorandums of Understanding and bilateral agreements on First Nations education (in Saskatchewan, New Brunswick, and Alberta), health (in Saskatchewan), and improved relations (in Saskatchewan and New Brunswick).

In recent years most provincial governments adopted a poverty-reduction plan or strategy for the general population, sometimes acknowledging the specific situation of Aboriginal peoples. This was the case, chronologically, in Quebec (2004 and 2010), Newfoundland and Labrador (2006), Ontario (2008), Nova Scotia (2009), Manitoba (2009 and 2012), New Brunswick (2009), PEI (2012), and Saskatchewan (in preparation; announced October 2014). Only British Columbia and Alberta (up to May 2015) have resisted adopting an overall poverty reduction strategy (Canada Without Poverty 2012a, 2012b, 2012c; Faid 2009; Graham et al. 2009; Holden et al. 2009). New Brunswick and PEI's recent economic and social inclusion plans did

not include any Aboriginal dimension or reference. The two governments insisted on the role of Aboriginal organizations and of the federal government, but never defined their own potential contribution (CICS 2009). Newfoundland and Labrador, Nova Scotia, Ontario, and Manitoba (in its 2009 strategy) all identified Aboriginal peoples as one vulnerable group among others and emphasized the major role of the federal government. Additionally, Ontario pointed to the need for bilateral dialogues with Aboriginal communities. In Quebec's first overall poverty reduction action plan (released in 2004), Aboriginal peoples were also presented as a vulnerable group, but Ottawa was only expected to make its normal financial contribution within the bounds of the division of powers. The privileged approach relied on nation-to-nation dialogues, and the Quebec government specified in the plan that it wished to "develop and implement policies against poverty in collaboration with Aboriginal communities, in a manner respectful of their culture." Quebec's second action plan against poverty (launched in 2010) went further, as it brought Aboriginal leaders to participate in the governance of the general poverty-reduction strategy. In Manitoba too, the general poverty reduction strategy in its second version (in 2012) addressed Aboriginal poverty more directly. Closing the gaps in well-being between Aboriginal and non-Aboriginal Manitobans became a key priority that had to be addressed and monitored. The province also acknowledged in the 2012–13 annual report of its strategy that Aboriginal poverty was "a multifaceted problem rooted in colonialism, discrimination and deprivation of opportunity."

"Closing the Gap" as an Objective

The "closing the gap" objective was central to the Kelowna Accord, both symbolically and concretely (for instance, when indicators came into play), and it seems to have influenced provincial policies. Seven provinces integrated closing the gap or eliminating disparity in their policy objectives following the accord, whereas no such objective was part of their policies before (see Table 1).

The only two provinces (excluding PEI, for which not enough information was available) in which there was no change in policy objectives were Newfoundland and Labrador and Alberta. These two provinces were the only ones governed by majority Conservative governments from 2005 until 2014. This outcome suggests that, at least for discourse and policy objectives, partisanship was determinant. The case of New Brunswick confirmed this impact of partisanship: following the transition from a Liberal to a Conservative government in 2010, the policy objective shifted from "closing the gap" back to "contributing to a better quality of life." A similar shift in objectives (but progressively over one or two years) occurred when the Saskatchewan Party replaced the NDP at the end of 2007.

Although most provinces stated, following Kelowna, that they wanted to close the gap or eliminate the disparity between the socio-economic conditions of Aboriginal

Table 1: Summary of Objectives Set by Provinces Pre- and Post-Kelowna Regarding the Socio-Economic Conditions of Aboriginal Peoples

Province	*Policy Objective Regarding Aboriginal Socio-Economic Conditions*	
	Prior to Kelowna	*Post-Kelowna*
NL	Social and economic well-being/ development	Social and economic well-being/ development (no change)
PEI	N/A	N/A
NS	Close gaps in health-care delivery (the only area mentioned)	Close the socio-economic gap/ reduce social and economic disparity
NB	Contribute to better quality of life	Close the gap (up to 2010)/ contribute to better quality of life (after 2010)
QC	Economic development and development of community infrastructures	Taking into account needs/improve socio-economic conditions, parity in employment rates and health conditions, reducing school dropouts
ON	Undefined	From 2007 on: improve the quality of life/well-being; close the gap in education
MB	Support mental, emotional, physical, and spiritual well-being/ health	Closing the gap in the quality of life
SK	Increase participation in social and economic life	Close the socio-economic gap (until 2009)/eliminate health, education, employment gaps (until 2011)/improve the well-being (after 2011)
AB	Well-being, self-reliance, development	Well-being, self-reliance, development (no change)
BC	Improve quality of life/improving social and economic outcomes	Elimination of socio-economic disparity

Source: Authors' elaboration based on systematic review of documents listed in the appendix.

and non-Aboriginal people, the expression of this objective was more or less strong depending on the province. Only British Columbia and Ontario formally institutionalized an encompassing commitment; and only British Columbia and Quebec detailed their commitment and fixed a year for its achievement (respectively, 2015 and 2016). These differences suggested that, even though partisanship seemed influential for policy discourses, it was not sufficient to explain the more specific variations between provincial responses. Among those engaged, larger provinces with more institutional capacity were more likely to make explicit commitments.

The Implementation of the Kelowna Accord by Provincial Governments

The Kelowna Accord specified a clear timeline (ten years) and encompassed four policy areas (education, health, housing, and economic opportunities). Progress was also to be monitored in all of these areas, with results-based indicators, and the participation of Aboriginal peoples was to be institutionalized in these same policy areas.

We have systematically analyzed the extent to which these aspects of the Kelowna Accord have been implemented by provinces. The results of this analysis are summarized in Table 2.

The analysis summarized in Table 2 showed that the four Atlantic provinces have not institutionalized their commitment to close the socio-economic gap, even though some of them have expressed it publicly. Neither did they report results-based indicators nor ones specific to the policy areas covered by Kelowna. As for participation, only New Brunswick and Nova Scotia institutionalized the relationships between Aboriginal peoples and the provincial government regarding social issues, New Brunswick in very general terms and Nova Scotia around various social policy areas (including the four of Kelowna). This latter feature made Nova Scotia stand apart within the Maritimes, but this distinctiveness built on the Mi'kmaq–Nova Scotia–Canada Tripartite Forum, created in 1997. The Kelowna Accord apparently gave an impulse to strengthening these existing structures but certainly did not initiate them. Overall, the Atlantic provinces have acknowledged the need to address Aboriginal poverty but have tended to downplay their obligations and emphasize Ottawa's role.

For the Prairie provinces, our analysis shows that the institutionalization of their commitment and the monitoring through indicators were oriented toward specific areas of social policy, mostly education and employment/economic development. Indeed, at the 2009 meeting of Aboriginal Affairs ministers and Aboriginal leaders, the Saskatchewan minister only talked about "the gaps in educational, employment and entrepreneurial outcomes"; the Manitoba minister focused on "the challenges facing Aboriginal people in education and economic development"; and the

Table 2: Summary of Analysis of Provincial Policies Post-Kelowna, According to the Main Aspects of the Accord

Province	*Commitment to Close the Socio-Economic Gap*		*Monitoring and Benchmarking*		*Participation of Aboriginal Peoples*	
	Institutionalized	*Policy Areas of Commitment*	*Inclusion of Results-Based Indicators*	*Policy Areas of Indicators*	*Institutionalized*	*Policy Areas of Participation*
NL	No	General	No	General	No	General
PEI	No	General	No	General	No	General
NS	No	Various	No	General	Yes	Various and precise
NB	No	General	No	General	Yes	General
QC	Partly, with specific year	Various	No	Various	Yes	Various
ON	Yes	Various	No	General	Yes	General and education
MB	Partly, but later (2012)	Various	Yes	Employment, education, income, water until 2012; then also housing	Yes	Limited (health)
SK	Yes	Limited (education, employment and health)	Yes	Limited (employment)	Yes	Limited (education, employment, and health)
AB	Yes	Limited (education)	No (only prior to 2006–07)	Limited (economic development)	Yes	Limited (education)
BC	Yes, with specific year	Various	Yes	Various	Yes	Various

Characterization of the social policy areas covered: General = not mentioning specific policy areas; Limited = referring to up to three policy areas; Various = including more than three distinct policy areas.
Source: Authors' elaboration based on the systematic review of documents listed in the appendix.

Alberta minister spoke of "our ongoing collaboration with First Nation and Métis organizations" (CICS 2009). The institutionalization of participation mechanisms has followed a similar pattern, except for the institutionalization of a mechanism for health policy in Manitoba and Saskatchewan. Whereas in Manitoba the institutionalization of participation for health issues occurred prior to Kelowna, in Saskatchewan it was created as part of the tripartite Memorandum of Understanding on First Nations Health and Well-Being signed in 2008.

Starting in 2012, however, Manitoba distinguished itself from the other two Prairie provinces and moved away from a strict focus on employment, economic development, and education. It certainly had already in 2006 committed to address the socio-economic gap around the four policy areas prioritized in Kelowna, but this commitment had not been institutionalized, and until 2011 it had only led to the production of internal discussion documents: words were not converting into actions. This changed with the second All Aboard poverty reduction strategy released by the province in 2012, which was more developed and structured than the rather short and cursory 2009 All Aboard strategy (MacKinnon 2009) and which stated that closing the gap between Aboriginal and non-Aboriginal people was a clear priority. The first annual report of this strategy indeed documents the evolution of this gap in housing, income, employment, education, and income.

Finally, the three largest provinces (Ontario, Quebec, and British Columbia) have all institutionalized in some way their commitment to address Aboriginal poverty, and this commitment included social policy areas prioritized in Kelowna. For the measurement of progress through indicators and the establishment of participation mechanisms for Aboriginal peoples, however, they have more or less implemented the Kelowna Accord. Of the three provinces, Ontario is the one that apparently remained most evasive. The indicators it reported only referred to processes (such as the number of relationship initiatives) and not to the implementation of policies, and even less to results. While relationships were built on an institutionalized basis, the focus was on social issues in general, except for a specific agreement around education and employment.

Quebec went further than Ontario in terms of institutionalizing mechanisms of participation, through the mechanisms established at Mashteuiatsh and Katimajiit and the second action plan of its strategy to fight poverty and social exclusion in Quebec (with the establishment of a Group of Partners for Solidarity, including two Aboriginal representatives as well as additional concertation committees). As for monitoring, Quebec has set detailed indicators covering the spectrum of social policy areas at Mashteuiatsh, but it did not report publicly on the progress of these indicators, only on the number of targets reached; there was an obvious lack of transparency in this respect. In comparison, progress reports on the province's general poverty reduction strategy were published regularly. Clearly, this provincial strategy (more than the Kelowna Accord) was oriented on the institutionalization of monitoring and participation for Aboriginal peoples.

No province did more than British Columbia to implement the Kelowna Accord, which the province had reinforced by signing the tripartite Transformative Change Accord on the same day (with the federal and BC First Nations) and a similar bilateral agreement with the Métis a year after. In line with these agreements, progress was measured with results-based indicators in the four social policy areas prioritized in Kelowna, and the relationships between the province and First Nations around social issues were strongly institutionalized. The engagement of the government was undeniable. The province's premier from 2001 to 2011, Gordon Campbell, who started his first mandate with a referendum on treaty negotiations deemed "immoral" by Aboriginal leaders, ended up receiving two First Nations names in recognition for his government's efforts (British Columbia 2010; Wood and Rossiter 2011).

Overall, as the federal government withdrew from Kelowna, the implementation of the agreement ended up in the provinces' hands, and they responded differently. As suggested above, multilevel governance allowed action in the absence of a federal engagement, but it also yielded uneven results. The Kelowna Accord led many, but not all, provincial governments to redefine their objectives, and it influenced in different ways provincial poverty reduction strategies and policies regarding Aboriginal peoples. Four provinces clearly went further in implementing Kelowna: British Columbia, Manitoba, Ontario, and Quebec.

CONCLUSION

Long associated solely with the federal government, the issue of Aboriginal poverty has become the object of a more complex multilevel game in which provincial governments stand as genuine and sometimes committed participants. Over the long run, these developments were encouraged by the inaction of the federal government, the emergence of provincial welfare states, the politics of natural resources development, and the growing capacity of Aboriginal organizations. As the analysis of the implementation of the Kelowna Accord indicates, however, multilevel governance may not be sufficient to enforce policy agreements, and it can lead to rather disparate results.

In 2006, the federal Conservative government did not simply withdraw from the accord: it also discredited and downplayed the value of the agreement reached a few months earlier. As it did, it downgraded the federal contribution, but it also contributed to lowering the engagement of provincial governments headed by partisan siblings. Indeed, starting in 2006, most provinces integrated the "closing the gap" objective into their policy discourse, except for those provinces with Conservative governments.

On the implementation side, the Kelowna Accord gave an impulse and shaped provincial reduction poverty policies for the whole population as well as provincial Aboriginal policies but unevenly, suggesting other factors were determinant.

A full explanation of provincial differences clearly calls for further research, but five hypotheses stand at this stage. First, Aboriginal mobilization and activism may have been a driving force for provincial policy change, considering that British Columbia, Ontario, and Quebec all witnessed strong Aboriginal protests and claims in the 1990s. Second, the politics of land claims, as it transformed the relationship between provincial governments and Aboriginal peoples, could have shaped provincial responses to Kelowna (Alcantara 2008). Third, party politics may have been influential, given that provinces that were the most active in implementing Kelowna were the ones in which Conservative provincial siblings never governed between 2005 and 2013.[6] Fourth, the racial diversity hypothesis suggests that provincial governments could have been less likely to address the living standards gap positively in provinces with an important Aboriginal minority, in this case the Prairie provinces (Hero 1998, 2007). And, finally, provincial institutional capacity may also explain the lower extent of the Maritimes' commitments to implement the Kelowna Agreement. The analysis presented here cannot fully address these causal hypotheses, but it helps specify the dependent variable, as it establishes that multilevel governance did lead to different provincial orientations.

Whether these orientations resulted in concrete, tangible outcomes for Aboriginal peoples is another question. Given the delay in obtaining reliable census data and the lack of commitment of Ottawa and the provinces (except British Columbia) to develop social results indicators as promised in Kelowna, we cannot tell yet if Kelowna's uneven legacy truly made a difference for those most directly concerned.

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[6] This hypothesis requires an explanatory note to specify that "party politics" refers to partisan loyalties and ties but *not* to partisan ideology (Esselment 2013). While Conservative siblings are provincial Conservative parties in most provinces, the cases of Saskatchewan, British Columbia, and Quebec are less straightforward. In Saskatchewan, the Conservative Party is now marginal and did not hold power. But the Saskatchewan Party, in power since 2007, has become the centre-right equivalent of a provincial Conservative party, with close ties at the local level to the Conservative Party of Canada (CPC). By comparison, the centre-right British Columbia Liberal Party is more of a coalition, with few connections to federal parties (Esselment 2010; Koop 2011). A similar situation prevails with the Quebec Liberal Party, a party long led by a former (Progressive) Conservative, Jean Charest, but with little ties, formal or informal, to the CPC. We therefore consider the Saskatchewan Party to be a Conservative sibling, but not the BC or the Quebec Liberal parties.

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APPENDIX
LIST OF DOCUMENTS SYSTEMATICALLY ANALYZED, BY PROVINCE

* Asterisks indicate documents used as the first basis of the systematic analysis.

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15

CAN AN EMERGENCY RESPONSE TRANSLATE INTO PRACTICABLE POLICY? POST-FLOOD PROVINCIAL–FIRST NATIONS HOUSING IN ALBERTA

Yale D. Belanger

> Treat the housing situation on First Nations reserves and Inuit communities with the urgency it deserves. It simply cannot be acceptable that these conditions persist in the midst of a country with such great wealth.
>
> – James Anaya, United Nations' special rapporteur on the rights of Indigenous people, October 2013[1]

In November 2011 the housing crisis that had long plagued the Attawapiskat First Nation exploded onto the public stage.[2] Following a national broadcast of images showing decrepit clapboard homes and impoverished living conditions, the media

[1] As reported in *Nunatsiaq News*, www.nunatsiaqonline.ca/stories/article/65674canada_and_its_aboriginal_population_face_a_crisis_un_special_rapporte/.

[2] The term "Aboriginal peoples" indicates any one of the three legally defined culture groups that form what are known as Aboriginal peoples in Canada (Métis, Inuit, and Indian) and who self-identify as such. "First Nation" is used here to denote a reserve community or band. The term "Indian," as used in legislation or policy, also appears in discussions concerning such legislation or policy. "Indigenous" as used here does not represent a legal category; rather, it is used to describe the descendants of groups in a territory at the time when other groups of different cultures or ethnic origin arrived there, groups that have almost preserved intact the customs and traditions of their ancestors similar to those characterized

descended on the community of 1,900, a two-hour flight north of Timmins, Ontario. Stories soon emerged describing overcrowding, severe health issues, and a temporary shelter filled to capacity due to an endemic shortage of livable houses. For many, including James Anaya, the United Nations' special rapporteur on the rights of Indigenous people, this situation was unfathomable, especially in a country that boasts low poverty levels and prides itself on aggressively challenging the root causes of homelessness. And so the finger-pointing began. Aboriginal Affairs and Northern Development Canada (AANDC) Minister John Duncan cited the band's debt, which, he declared, was "getting in the way of a lot of other progress that could be made" (Campion-Smith 2011). Chief Teresa Spence countered that the federal government had $2 million available for housing in the community but was deliberately withholding the funds.

As the housing crisis lingered and resentment grew in Ontario, provincial officials in Alberta chose a different strategy for dealing with a reserve-housing crisis resulting from a devastating flood in June 2013. Rather than abandon First Nations to the federal trust, provincial officials acknowledged First Nations as vital Alberta communities. They signed two memoranda of understanding and directed more than $180 million to the Siksika ($83 million) and Stoney Nakoda ($98 million) First Nations for rebuilding reserve homes and infrastructure (Gandia 2013; Seewalt 2013).[3]

Each instance provides insights regarding the growing concern for First Nations housing issues nationally, while hinting at the inherent complexity of reserve housing policy. In Ontario, for example, provincial officials advocating improved reserve housing did not provide the Attawapiskat First Nation with financial support. Instead, they tended towards publicly imploring federal officials to intervene on behalf of their charges. In Alberta, prior to the flooding, provincial officials as a rule deferred to the federal government on Aboriginal housing matters. Within days of the flood however, First Nations were notified that the Alberta flood response would include affected reserves, and Premier Alison Redford and Aboriginal Affairs Minister Bernard Valcourt both publicly confirmed that First Nations would be considered for provincial funding. Alberta was therefore willing to buck a trend dating to the 1950s: the general provincial reluctance to accept responsibility for improving First Nations housing. Of course, Ottawa too has been less than substantially engaged with First Nations on the issue of housing, according to the Assembly of First Nations (AFN). In 2008 the AFN called for "a direct and inclusive role for First Nations in the evaluation of the 1996 On-Reserve Housing Policy" after concluding that "the housing programs, activities and initiatives were developed

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as Indigenous, and those that have been placed under a state structure that incorporates national, social, and cultural characteristics distinct from their own.

[3] As of July 2015, only 130 Stoney homes had been fully repaired, with the end of 2016 given as the final restoration date (Hudes 2015).

outside of the scope of First Nation needs and priorities and had no meaningful First Nations input" (AFN 2013). Federal officials all the same continue to advocate for First Nations to take "charge of their housing, build new and improve existing housing, and … develop capacity to manage and maintain all aspects of their housing portfolio" (CMHC 2014).

What all parties do generally agree upon are the challenges associated with concentrating the responsibility for First Nations housing with the federal government while inadequate reserve housing continues to deteriorate. The respective parties also tend to agree that First Nations leaders should play a role in housing development and implementation. How large a role First Nations leaders should play or what that role will look like remain sticking points. For the federal government, Aboriginal participation is often interpreted to mean that First Nations leaders will be offered an opportunity to appraise and comment on prefabricated policies struck by AANDC officials in Ottawa. By contrast, First Nations leaders hope for a new multilevel governance relationship that would encourage joint decision-making and would produce, as Natcher, Davis, and Hickey (2005) suggest, a diverse set of solutions based on group heterogeneity. To date, two important features are missing for developing a truly multilevel approach to First Nations housing policy: negotiation and non-hierarchical exchanges between levels of government and horizontal relationships (Peters and Pierre 2004). As this chapter demonstrates, the post-flooding events in Alberta could offer a new model for developing policies based on collaborative negotiations for the purposes of improving reserve housing.

This chapter proceeds as follows. An overview of First Nations housing policy highlights Canada's reluctance to acknowledge or accept responsibility for improved First Nations housing conditions, despite an acknowledged fiduciary obligation for "Indians, and lands reserved for the Indians" under the British North America Act, 1867. This discussion reviews the policy environment to improve on-reserve housing dating to the 1970s. In all instances the federal government centred its policy development in Ottawa, specifically with the Department of Indian Affairs and Northern Development (DIAND). First Nations leaders played a minor role in formulating the policies impacting their communities. Instead they were expected to await word from Ottawa on the new housing policies that they would then administer, an approach that drew criticism. As suggested above, those involved with First Nations housing policy acknowledge its deficiencies – deficiencies in many ways attributable to (1) policy reforms imposed from the top without appropriate consultation and substantive community participation, and (2) provincial reluctance to engage on-reserve First Nations due to jurisdictional concerns. It is with these ideas in mind that this chapter surveys the recently announced Siksika-Alberta and Stoney Nakoda-Alberta agreements and presents them as a new provincial–First Nations multilevel governance model for consideration. Moving beyond its self-assigned jurisdictional boundaries, Alberta stepped up to acknowledge First Nations as provincial communities, as opposed to federal jurisdictional islands, and it recognized that assistance with housing – a provincial constitutional responsibility

– was greatly needed. The subsequent sections examine and situate the context leading up to these relationships.

FIRST NATIONS HOUSING POLICY IN CANADA

Aboriginal housing issues nationally have generated a strikingly low level of attention, and existing Canadian policies by and large have had a narrow impact on reserve and urban Aboriginal housing (Miron 1988; Rose 1980). This situation has long concerned advocates (i.e., politicians, academics, field workers) working on Aboriginal housing and homeless issues, who endeavor to remind federal officials of Canada's historic relationship with Aboriginal peoples, and its ongoing responsibility to establish progressive and inclusive Aboriginal programming and policies (NAH Association 2004, 2009; Graham and Peters 2002; Walker 2003, 2006). First Nations and Aboriginal leaders have historically complained about this inequity, particularly Canada's assumption of control for policy-making, notwithstanding the long held aspirations of Aboriginal peoples for a partnership guided by mutual respect and recognition, treaty relationships, constitutional arrangements, and continuing group rights (Henderson 2007; Macklem 2001). Consequently, any approach to reserve or urban Aboriginal housing requires the coordination of multiple partners in terms of policy development and implementation. This coordination, however, has rarely occurred due in part to the federal obsession with administering Aboriginal people as wards of the state (Belanger 2013).

The AFN, the organization of First Nations chiefs representing all Status Indian bands in Canada, argues somewhat ambiguously that Canada is bound by treaty rights to ensure First Nations have shelter (AFN 2013). Treaty rights in this instance remain undefined. Nor is it clear whether this particular responsibility is considered specifically to be a treaty right or part of the fiduciary responsibility. Irrespective of the AFN's policy assertions, the federal government counters that all housing issues – be they Aboriginal or non-Aboriginal – are strictly a matter of policy. It is not a right or an entitlement derived from treaties or constitutional status. Housing is a social policy, and Aboriginal housing policy, generally speaking, is based on this premise. Support is therefore based on "need" (Canada 1996). Heightened national awareness of poor Aboriginal housing and consequent higher rates of Aboriginal homelessness has not led to further clarity on jurisdictional issues. Hence it is not unusual for critics to reference lackluster federal policies as the key barrier to improving Aboriginal housing conditions. In truth, Aboriginal housing in Canada is an infinitely complex process that involves various configurations of First Nations, Métis, and Inuit communities, urban Aboriginal people, and federal, provincial, territorial, and, increasingly, municipal governments. An existing disconnect is evident between those whose responsibility it is to craft Aboriginal housing policy, those who desire improved reserve housing, and those who currently live in

impoverished housing with limited input concerning improvement strategies. This disconnect not only weakens any attempts at establishing positive First Nation-federal relationships needed to address housing but has also allowed the provinces to avoid any responsibility for First Nations housing. The lack of clarity concerning where First Nations people fall in the overarching housing policy matrix makes it extremely difficult to develop a coordinated policy response.

Federal Reserve Housing Policy

Federal First Nations (reserve) housing is under the responsibility of the Canada Mortgage and Housing Corporation (CMHC). The policy guiding the CMHC's programming dates from 1996. It was "designed to put more emphasis on future planning and community control of reserve housing decisions and to gradually relieve the reserve housing crisis" (Olthius et al. 2008, p. 274). First Nations are responsible for the governance of reserve housing through by-laws, the creation of community plans, zoning, and regulations. The communities own, administer, and manage the majority of the reserve housing stock. The CMHC provides housing assistance to support new housing construction, the purchase and/or renovation of existing housing, and AANDC-supported development of housing capacity. These monies can be used at the First Nations' discretion for construction, renovation, maintenance, insurance, capacity building, debt servicing, and the planning and management of their housing portfolio. The CMHC claims to work "in partnership with First Nation communities, through its housing programs and capacity development initiatives, to help them attain their housing goals and improve their overall living conditions" (CMHC 2014).

A scan of early Indian Agent reports produced from the 1870s into the mid-1900s highlights a bureaucratic enthusiasm for Aboriginal people to adopt western-style housing, thus ensuring sanitary conditions and ultimately civility.[4] Perry (2003) has explored this link between the desire to improve Aboriginal housing and the corresponding societal diffusion of housing, gender, and family-related ideals, noting, however, that limited federal resources were assigned to facilitate this transition. The lack of resources had a negative impact on reserve housing as the Special Joint Senate-Parliamentary Committee (SJC, 1946–48) investigating the Indian Act heard (Shewell 2004). Despite shocking testimonies, the Indian Affairs

[4] Indian agents were responsible for implementing federal Indian policy. The Canadian government's representatives on reserves, they wielded great power over Aboriginal peoples. This power involved usurping their traditional political authority, suppressing religious practices, and transforming social roles. Housing was one such mandate, and Indian agents were instructed to aid Aboriginal people in transitioning from substandard, uncivilized domiciles into modern, European-modelled homes.

Branch (IAB), which was responsible for housing on reserves, was slow to respond (Cairns, Jamieson, and Lysyk 1966). By 1958, a federally sponsored survey of reserve housing conditions indicated that 24 percent of reserve families required new housing, for a total of 6,999 new houses costing roughly $16,796,000.[5] In 1966, media reports publicized a full-blown national reserve-housing crisis, and a desperate need for "12,000 new homes over a five-year period to meet a backlog of approximately 6,000 units and to take care of new family formation of about 1,250 a year" (Canada 1966, 59). These reports corresponded with the findings of Harry Hawthorn's extensive study of First Nations social, economic, and political conditions, which portrayed reserve housing as "generally over-crowded; child sleeps with siblings in same bed; little or no privacy; scarcity of furniture; sometimes dirty house; often un-attractive, unpainted and uncared for" (Tremblay, Vallee, and Ryan 1967, 111).

Arthur Laing, the minister of Northern Affairs and National Resources in 1966, announced later that year what at this point amounted to the largest post-Confederation infusion of capital aimed to improve on-reserve housing: an $84.5 million federal expenditure (Canada 1966).[6] Reserve housing appears then to have fallen off the media's radar until the early 1970s, when several First Nations nationally highlighted the ongoing poor state of reserve housing. Canada responded in 1974 by establishing the Rural and Native Housing Program, which during the next two decades moderately improved reserve-housing conditions.[7] First Nations leaders sought more than minor improvements, and by 1996 the poor state of reserve housing was front-page news following the Royal Commission on Aboriginal Peoples (RCAP) release. The report concluded that the previous programs failed not only because federal officials refused to engage in any constructive dialogue with First Nations leaders but also because of a devolution program that was slowly transferring responsibility for reserve housing to the CMHC. First Nations leaders and federal officials met later that year and agreed that the issue was an existing deficit of reserve housing stock and prioritized improved housing based on a projected 25-year population growth rate roughly twice that of the non-Aboriginal population (Canada 2011). The On-Reserve Housing Policy was subsequently introduced, which required that First Nations establish a set of housing policies and housing programs and create a multi-year housing plan. A recurring $161 million was allocated to improve reserve housing. That amount would reach a high of $198 million in 1998–99, only to bottom out at $136 million in 2003–04 (Canada 2011).

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[5] This would be $139,818,357.62 in current dollars (September 2014), adjusted for inflation. Figures generated by using the online Bank of Canada Inflation Calculator (www.bankofcanada.ca/rates/related/inflation-calculator/).

[6] This would be $606,951,428.57 in current dollars (September 2014), adjusted for inflation.

[7] This determination is made based on the lack of media attention being directed at the issue, which in part reflects minimal First Nations criticism of the federal response.

The cash infusion did little to mitigate poor reserve housing: the federal government confirmed this in 2001 by acknowledging that there was a shortage of roughly 8,500 houses on reserves and that 44 percent of the existing stock of 89,000 houses required renovations. The auditor general's 2003 report dedicated an entire chapter to First Nations housing and concluded that regardless of signs of "improvement in some First Nations communities, there is still a critical shortage of adequate housing to accommodate a young and growing population" (Canada 2003). The auditor general once again underscored inadequate federal funding and programming, specifically the lack of clearly defined policy outcomes or timeframes. In February 2011, INAC's *On-Reserve Housing Support* report indicated that between 20,000 and 35,000 new units were required to meet current demand (i.e., people on waiting lists); 16,900 housing units needed repairs; 5,200 units needed to be replaced (Canada 2011). The AFN suggested that the real number of new units needed was closer to 85,000, and that an estimated backlog of 130,000 units would develop between 2010 and 2031 (AFN 2012). In all, between 2006 and 2013, the Government of Canada provided a total of $2.3 billion in on-reserve housing support to First Nations, which contributed to an annual average of 1,750 new units and 3,100 renovations (Canada 2013).

A statistical trend dating back to the 1940s is evident: the spectre of poor on-reserve housing surfaces every decade or so (e.g., Canada 2003), confirming the existence of a chronic reserve housing crisis. The second recurring historical trend is a federal (and provincial) reluctance to accept full responsibility for improving reserve housing. Reserve housing is undeniably in need of vast improvement (Belanger, Weaselhead, and Awosoga 2012), and part of the problem lies with the federal government's delegated approach to housing management. In essence, federal housing policy amounts to the yearly allocation of funds that are distributed to local band councils, who are ultimately responsible for managing the ongoing crisis. AANDC's Karl Carisse, senior director of the Innovation and Major Policy Transformation Directorate, confirmed as much during his testimony before the Standing Senate Committee on Aboriginal Housing, on November 2013:

> First Nations are the owners and operators for infrastructure on reserve. Aboriginal Affairs and Northern Development Canada provides financial support and advisory assistance to First Nations in acquiring, constructing, operating and maintaining community infrastructure including: water and waste water systems, schools, roads and bridges, electrification, community buildings and housing, and funding for capacity building for water and waste water operator training. (Canada 2013)

Carisse added, "Aboriginal Affairs currently provides First Nations with up to 100 per cent of the capital funding for the construction of most community infrastructure projects, mainly schools and water projects," while stressing that "*First Nations own their infrastructure assets and are responsible for their daily operation and management*" (Canada 2013, emphasis mine). The federal government therefore sees itself less as a policy leader on the matter of on-reserve housing than as a

funding agency for what are ultimately deemed local problems, to be dealt with by the communities.

As reserve-housing stock deteriorates, federal officials remain distant in their commitment to its improvement through additional funding, extended program lengths, or most importantly, consultation with First Nations leaders. This was the auditor general's key message in 2003 and it continues to resonate loudly. The lack of provincial participation is also a concern, especially considering that the provinces are provided with responsibility for many areas critical to the operation of Canada's housing system (Lampert 2012). As discussed below, provincial reticence to engage First Nations leaders on reserve housing issues that is informed by historic federal-provincial animosities suggests that immediate change is unlikely.

Provincial Perspectives on Aboriginal Housing

Prior to the 1970s, national Indian housing policy focused exclusively on reserve communities. The heightened attention on Indian urbanization associated with the founding of the Ministry of Housing and Urban Affairs in 1971 led to $200 million in funding for several demonstration-housing projects (Walker 2004, 2008).[8] This funding stimulated the creation of six urban Aboriginal non-profit housing societies across Canada between 1972 and 1975. These would become the prototypes for more than 100 corporations currently operating nationally while notably prompting provincial involvement with the nascent Aboriginal housing societies. With few exceptions, provincial participation did not extend to direct involvement with First Nations housing, due in part to a half-century long debate concerning precise responsibility for reserve residents. This debate dates back to the Dominion-Provincial Conference on Indian Affairs in 1964, after a federal proposal to devolve Native health care and its costs to the provinces was rebuffed as an overt attempt to offload a federal responsibility for Native people to the provinces (Belanger 2014). Provincial offence at what was described during the health discussion as a blatant attempt at devolution would spill over into general jurisdictional deliberations. The provinces declared their certainty of the federal government's responsibility for "Indians, and lands reserved for the Indians" under section 91(24) of the BNA Act, which included reserve housing.

In this regard, only two provinces – British Columbia and Nova Scotia – have implemented policies that directly involve First Nations housing. The most

[8] A demonstration project is conducted under government supervision, to better understand the issues and solutions associated with (in this case) rental housing. The goal is to review the project's operations for the purposes of devising best practices, and to then develop processes that result in improved levels of housing capacity and access to adequate and affordable housing.

comprehensive to date is the BC model, which is a Tripartite First Nations Housing Memorandum of Understanding that BC signed with the First Nations Leadership Council and the Government of Canada in 2008, committing each party to develop an inclusive approach to improve housing for First Nations communities, individuals, and families living on and off reserve (BC 2014). Provincial participation in Nova Scotia's Tawaak Housing Association (est. 1981), a private, non-profit housing corporation, is restricted to partially funding the organization (Tawaak Housing Association 2014). Most provincial governments in the absence of a national housing strategy have, however, begun to develop social housing plans and housing and homelessness frameworks that increasingly identify the need to engage non-reserve Aboriginal peoples, but none focus on reserve housing. In this vein, each province has highlighted a need to increase affordable housing supply and access, to improve the adequacy of housing, to contribute to the prevention and reduction of homelessness, and to amplify opportunities for homeownership that recognize the distinct needs of the off-reserve Aboriginal populations.

The language used in most cases does not commit a province to resource provision but, as the New Brunswick government example demonstrates, speaks of the importance of helping to improve partnerships "with private sector, municipalities, non-profit associations, Aboriginal organizations and other stakeholders to develop innovative solutions to housing challenges and expand the stock of affordable housing" (NBHC 2014). In each case the key themes are the provincial desire to contribute limited financial capital to urban Aboriginal housing issues and to facilitate new, less costly partnerships with and between stakeholders, all the while avoiding any commitment to reserve housing and what has historically been portrayed as exclusively federal jurisdiction.

AN INNOVATIVE APPROACH TO MULTILEVEL COORDINATION

When Ottawa began directing money at First Nations communities in the 1960s, the goal was straightforward: to improve poor housing. It was expected that local officials would be able to translate federal largesse into tangible policy outcomes on the ground. This approach has proven ineffective for several reasons, the key one being that the federal funding allocated was inadequate to the task at hand. Ottawa's ongoing attempt to distance itself from First Nations housing concerns has not helped matters, nor has its insistence on developing programs without consulting the Aboriginal leadership. A better coordination strategy to align First Nations needs with programs is an essential component of any future reform of housing policy. Perhaps as significantly, while Ottawa retains (or, so provincial officials insist, has willingly accepted) responsibility for reserve issues, including housing, provinces must be brought to the table. That being said, there appears

to be little room for major change in policy direction at the federal level. First Nations leaders have responded by devising localized strategies that are frequently undermined by a lack of resources. It is with these ideas in mind that the chapter now turns to a detailed discussion of recent policy developments in Alberta. We can learn important lessons from an approach that seeks to bring partners to the table to devise appropriate responses while moving beyond rigid conceptions of federal provincial and Aboriginal responsibilities.

The Setting: Stoney and Siksika First Nations

The Stoney Nakoda and Siksika Nations are Treaty 7 signatories whose leaders agreed to a Crown request for treaty negotiations that concluded in September 1877 (Elders and Tribal Council et al. 1996). In return for annuities, promises of protection for the last buffalo herds, and the creation of sheltered reserves, the nations agreed (with the Kainai, Piikani, and Tsuu T'ina) to cede more than 40,000 square kilometres of land in what is today known as Southern Alberta to facilitate settler migration. Stoney Nakoda and Sikiska leaders considered the treaties to be nation-to-nation agreements establishing the interactive protocols required to mitigate intercultural disputes that importantly included territory-sharing provisions (Daniel 1980). As an aspect of the treaty, Stoney Nakoda and Siksika leaders selected their individual reserve sites. This in turn should have resulted in proper dwellings being constructed to facilitate the transition to the new settlements.

The original Stoney Nakoda reserve, located along the Bow River at Morleyville between the Kananaskis and Ghost Rivers, was 175.5 square kilometres. Several separate land allocations added to the reserve land base, and by the 1960s local officials began to utilize natural resource revenues from the burgeoning oil and gas industries to purchase nearby ranch lands. By the 1970s, the Stoneys expanded their business enterprises by opening a wilderness park and by taking advantage of their location (see Belanger 2006, 134-5). A modestly successful casino followed in 2006 (Williams, Belanger, and Arthur 2011), and in 2014 Stoney Nakoda leaders announced a joint venture agreement with a Chinese company (Huatong Petrochemical Holdings) to explore and develop oil and natural gas on reserve lands (Yedlin 2014). Similarly the 696.5 square kilometre Siksika reserve located at the site of the signing of Treaty 7, which was designated a national heritage site in 1925, is split by the Bow River. Early farming success in the late nineteenth and early twentieth century had dissipated by the 1950s (Jobson 1990). Starting in the 1980s, oil and gas extraction resulted in moderate development that led then-chief Strater Crowfoot (1999, 299) to describe Siksika as "relatively prosperous." Growing economic security aside, housing was a concern in both communities, as Crowfoot admitted in 2005: "My people need housing. It's a big issue for us" (Knapp 2005). In 2009 Siksika Chief Leroy Good Eagle said that more than 400

families were on a waiting list for housing (Komarnicki 2009). Similar trends, while less publicized, are evident at Stoney Nakoda (Krugel 2014).

The key message in each case is that despite steady economic development, the housing in each community remains substandard and a key concern. The 2013 flood exacerbated an already dire situation in both communities. Siksika was hit especially hard: roughly 1,000 of the community's 6,000 residents were evacuated from low-lying areas where 170 homes were rendered uninhabitable (Ho 2014). Within days, 1,300 community members were living in emergency shelter. Similarly at Stoney Nakoda, 510 homes were damaged, and the original 300 evacuees from the Morley community (Ho 2014) promptly grew to 700 people seeking aid (Narine 2013). Within days thousands of evacuees were sleeping on stretchers in schools and sports arenas and outside in tents.

During this time various branches of government were mobilized. While the Canadian Forces were directed to sweep houses looking for survivors, what caught most people by surprise was the statement of the provincial Aboriginal affairs minister, Bernard Valcourt, indicating that the province would support flood-affected First Nations (Graveland and Graham 2013). Until then, any and all discussion concerning Alberta's role for reserve housing tended to end quickly.[9] When Alberta's premier Alison Redford confirmed that First Nations communities would be considered for the $1 billion flood recovery program, Siksika Chief Fred Rabbit Carrier noted that he was "very humbled that the Alberta government has stepped forward to help," adding "the Alberta government has treated Siksika and Stoney Nakoda as Albertans" (Chrapko 2013). By contrast, First Nations leaders expressed their disappointment at Ottawa's slow response. As Carrier would later state, his requests directed to Ottawa for aid generated a vague response. Specifically, "the message is they are aware of our situation and they will be providing us with resources, but no definite date" (Tait 2013). Any anxiety about Alberta's commitment to helping First Nations was assuaged when Redford toured Siksika and reaffirmed provincial support to reserve flood recovery. Immediately the evacuees were informed that they were eligible for the disaster recovery funding, which covered uninsurable property damage and losses. They were also immediately presented with pre-loaded debit cards (Stark 2013).

Provincial officials took the opportunity to publicly chastise federal inaction. Specifically, in November, Alberta's newly appointed Aboriginal relations minister

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[9] The author has served on various provincial and municipal housing committees during the past decade and has been privy to heated debates concerning the Province of Alberta's responsibility for housing both on reserve and to urban Aboriginal peoples. Provincial officials have until recent years denied outright responsibility while acknowledging the increasingly interconnected nature of federal Indian policies and provincial policy developments as they relate to both reserve and urban Aboriginal populations (i.e., heightened provincial roles in terms of housing are now being considered).

Robin Campbell observed that the agreement with the First Nations was unusual as reserve housing is a federal responsibility: "We just felt it's the right thing to do. We had people that were in dire straits and, as a government, we had to show leadership and move forward to help them out" (Varcoe 2013). Campbell added, "This is unprecedented in the sense a provincial government is working with a First Nation and actually going on the reserve to help rebuild the community, so we're learning as we go." It is important to note that the provincial response did not tie the First Nations exclusively to an Alberta plan developed without consultation. In fact the announcement suggested that any agreement between First Nations and the province would be forged based on a collaborative and horizontal negotiation strategy.

Stoney Nakoda-Alberta and Siksika-Alberta Agreements

On 6 November 2013, the Province of Alberta announced that it had entered into a memorandum of understanding (MoU) with the Siksika Nation leadership (Alberta 2013a). Six weeks later on 18 December, a second MoU was signed with the Stoney Nakoda Nation (Alberta 2013b). The MoUs are government-to-government, non-legally binding agreements between the province and the Stoney Nakoda and Siksika First Nations whereby all parties wish to improve living conditions through the flood recovery response. Each MoU's amount was based on professional engineering assessments and included temporary housing during the rebuild, repair of homes, removal and disposal of destroyed homes, and rebuild and associated infrastructure costs such as roads, gas, water, and sewer systems.

The MoUs were intended to ensure a timely response to make certain that the Stoney Nakoda and Siksika Nations were able to facilitate flood recovery. Rather than being a one-time emergency expenditure, the agreements indicated that an effective flood recovery response must address long-term housing needs, including meaningful opportunities for First Nations to participate in community and economic development. The previous dismal state of reserve housing led to an accord ensuring enhanced housing, building, health, safety, and construction and infrastructure standards meeting provincial standards. Provincial and First Nations officials agreed: (1) to identify reserve lands that are at risk to repeat flooding; and (2) to jointly develop and implement a plan to avoid damages from future flooding. Flood recovery was defined to ensure a broader response from the province beyond replacing buildings and improving infrastructure; mental health and social well-being were integrated into the equation. The recognition of the potential cultural impact of the flood was a key element of the agreements, which considered that distinctive mechanisms and solutions might be required to respond to complex circumstances unique to the reserves. Clarity of vision would be aided by joint steering committees established to oversee the MoUs' implementation.

The province agreed to oversee project delivery, including project management, contract administration, and project reporting, as it was accountable to the Alberta Legislature for the provincial flood recovery plan's financial expenditures. All oversight involved pre-determined flood recovery housing plans that the Stoney Nakoda and Siksika Nations would assist in implementing. The two First Nations would manage resident and reserve land management issues and relationships and direct communications needed to satisfy all requirements of relevant and necessary federal ministries, agencies, and authorities. Alberta would ensure that flood recovery repair efforts were completed to provincial standards, while also guaranteeing that qualified professionals determined suitability of habitation and repairs. If necessary, provincial officials would inspect all properties damaged by the 2013 flood.

In cases where the province determined that a residence was in a flood zone, the residence in question should be replaced in a non-flood zone area. In turn, each First Nation agreed to identify those residences within the flood zone that would not be rebuilt. In certain cases the province and the First Nations would jointly establish a process to satisfy criteria, thus allowing residences in the flood zone to remain without being destroyed and rebuilt. Local capacity-building efforts would also be enhanced through the creation of a skills training strategy for First Nations members through existing Government of Alberta programs, and the parties agreed to integrate that strategy into the flood recovery efforts at each reserve. The respective strategies would be established to facilitate opportunities for First Nations businesses and member businesses to participate in the supply of goods and services needed. Finally, the province would provide a final report on the recovery response provided under the MoU to the Siksika and Stoney Nakoda Nations.

DISCUSSION

The November and December provincial announcements detailing this unique form of First Nations–Alberta collaboration were met with a combined sense of surprise from non-Aboriginal quarters and satisfaction from First Nations leaders. That a province historically reticent to engage on-reserve First Nations willingly took up the leadership mantle so forcefully during this event was a shock to many observers. While the two agreements are temporary and do not commit either party to future political engagement, they suggest that the province now acknowledges First Nations as communities of Alberta.

There are several positive elements to this unusual bilateral collaborative effort. In an attempt to save time and money, the province initiated the dialogue with the affected First Nations and established a positive relationship from the outset. Rather than waiting for the First Nations to seek out and secure financing through grants and other funding mechanisms, a negotiated framework expedited

the relationships leading to the existing funding model. Moreover, the province wisely did not establish a fixed revenue pool for which Stoney Nakoda and Siksika leaders were to compete. The totality of funding available is therefore directed to service delivery as opposed to grant writing and other associated servicing. Perhaps more significantly, the traditional reliance on top-down models demanding First Nations administering programs was abandoned in lieu of engaging First Nations as key negotiating partners. The resulting agreements reflect the diversity and complexity of the situation on the ground. Notably, the province elected to repair all homes, even those that might not have experienced flood damage. The goal was to ensure that all homes achieved "provincial safety and construction standards for the Nation's infrastructure and housing" (Leclair 2013). Such an approach hints at larger provincial concerns of First Nations social cohesion and poverty. Finally, the accountability framework devised in the agreements could be emulated. Specifically, the usual model requiring First Nations to jump through a series of bureaucratic hoops in order to obtain funding has been reversed insofar as the province has agreed to provide the capital and then produce a final report to demonstrate fully its actions to the First Nations within the context of the MoUs.

There are of course substantial limits to these agreements. Given their temporary nature, they have not resulted in further discussion concerning how these relationships can or should evolve. The challenge here for First Nations leaders is that all substantial contact will cease once the reserve housing is in place. There is no guarantee that the government-to-government relationship will retain any currency beyond this event. Federal government participation is also conspicuously absent in each of the MoUs, and any ongoing provincial involvement in reserve housing will eventually demand that both federal and provincial governments sit at the table with First Nations. Should Ottawa refuse, the province may choose to avoid becoming further involved in First Nations housing, for it could set a precedent allowing further federal divestment of reserve housing concerns. The provincial leadership's decision to limit its involvement in reserve housing rehabilitation to two First Nations could also be detrimental, especially considering the extensive flooding that occurred in other southern First Nations that did not receive the attendant fanfare or funding arrangements. It must be noted that Alberta has been criticized for practising an approach to First Nations policy-making that manufactures regional economic disparity by privileging some First Nations over others (Belanger, Williams, and Arthur 2011).

This is notably a one-off response strategy based on a state of emergency. One could argue, however, that most reserve housing is in a state of emergency. For instance, there are 45 First Nations in Alberta, and with the exception of Tsuu T'ina, which has funnelled impressive casino revenues into improved local housing initiatives, the majority of communities are in dire need of improved housing. For Alberta to withdraw at this stage would send the message that only in times of extreme emergency as defined by provincial officials are First Nations deemed a part of the province. Finally, each reserve's limited land base means that new

parcels of land are required to make sure the needed houses are constructed off the flood plain. As Chief Carrier stated, the previous houses located on the flood plain reveal ongoing historic residential land-use patterns that many residents may be unwilling to abandon.

FINAL THOUGHTS

Albert Einstein is said to have characterized as insanity "doing the same thing over and over again and expecting different results."[10] If not insanity, it is certainly futility not to adopt a new strategy when we are faced with failure. Our failures provide us with opportunities to learn; yet the federal government has learned little in relation to reserve housing. Since the 1960s, administrators have approached housing issues with a resolve that reflects certainty of vision. Going on six decades, we're no closer to creating culturally reflective or adaptable policies that are able to respond to an increasingly fluid social, political, and economic environment. A key issue identified by the auditor general in 2003 is the evident disconnect between First Nations and Ottawa policy-makers charged with fashioning housing policies:

> Parliament is not receiving a complete picture of the housing situation on reserves and what is actually being achieved with departmental and CMHC funds. Better information about on-reserve housing costs, program performance, and results is also needed, both to help the Department, CMHC, and First Nations make informed decisions about the allocation of funds and to strengthen accountability to Parliament and to First Nations communities. (Canada 2003, 1)

Communication leads to innovative improvement strategies. These aforementioned examples also suggest that there is merit in promoting multilevel governance to improve reserve housing in Canada. This would demand the entry of conspicuously absent parties in this national discussion: provincial governments. In Alberta's case, provincial officials are clearly not averse to establishing MoUs with flood-devastated First Nations. The on-the-ground process is slowly evolving and has the potential to inform other impoverished First Nations seeking housing aid. Improving Aboriginal housing issues nationally begins with ongoing discussions with First Nations and with the development of working partnerships that foster communication and joint decision-making.

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[10] I've never been able to find this quote in Einstein's various writings (certainly I've yet to explore them completely). I use the quote colloquially while stressing that it is generally attributed to Einstein.

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16

ON-RESERVE SCHOOLS: AN UNDERPERFORMING "NON-SYSTEM"

John Richards

Ottawa published two major Aboriginal policy reviews in the 1960s. One was the infamous "White Paper" (Canada 1969) presented to Parliament by Jean Chrétien, at the time minister of Indian affairs in Pierre Trudeau's first government. It recommended abolition of the Indian Act and phasing out of reserves in favour of complete integration of First Nations into Canadian society. The White Paper served as foil for Harold Cardinal's "Red Paper" (Indian Chiefs of Alberta 1970), an early statement on behalf of indigenous autonomy and an expansive interpretation of treaty rights.

The second policy review, now largely forgotten, was more nuanced. The Hawthorn Report (Canada 1966–67), named for its director, insisted that policy not be directed at assimilation – "the research on which the Report is based was not directed to finding ways in which Indians might be assimilated" (vol.1, 10) – but also insisted "that individuals be given the capacity to make choices which include the decision to take jobs away from reserves, play a part in politics, and move and reside where they wish" (vol.1, 10). Central to Hawthorn's vision was expansion of the capacity of individuals, which required provision of high-quality on-reserve social services. Once health care and schools of decent quality were available, Hawthorn predicted, many reserve residents would choose to leave the

I thank the volume's editors for helpful advice. For detailed criticism of earlier drafts, I thank Barry Anderson and Michael Mendelson. The usual caveats apply. They bear no responsibility for the chapter's inadequacies.

reserve and participate in mainstream society, as equals with other Canadians. He acknowledged that many would not make that choice and that living on-reserve was an equally valid option.

The argument I make in this chapter is that the post-2011 project to provide a legislative basis for reserve schools across Canada was, in effect, taking up Hawthorn's recommendation that reserve-based social programs – schools, in this case – be of sufficiently high quality that First Nation youth have "the capacity to make choices." Over the half-century since Hawthorn wrote, Ottawa has played a very limited role in K-12 education, other than to provide cash transfers to reserves. Since the 1960s, individual First Nation councils have, with important exceptions and qualifications, managed their respective schools on a stand-alone basis. On-reserve education results have improved, but the status quo remains unsatisfactory. Part of the problem, I suggest, has to do with an over-fragmented system of governance.

Bill C-33, tabled in spring 2014, was the culmination of the three-year reform project. The legislation was a compromise drafted by the Ministry of Aboriginal Affairs with the active participation of Assembly of First Nations (AFN) leaders. The legislation's provisions were pragmatic and, it can be argued, simultaneously enhanced the potential of reserve schools and strengthened First Nation control of them. On the other hand, Bill C-33 can be interpreted as an infringement of First Nations treaty rights over education. Such is the case made by the bill's opponents, who argued in the tradition of the Red Paper. Given the intense controversy surrounding Bill C-33, Shawn Atleo, national AFN chief during the previous three years, resigned. In response, the government decided not to proceed with the bill's passage. The fate of Bill C-33 indicates the difficulty of reconciling the Hawthorn and the Red Paper visions of First Nations governance. At time of writing (August 2015), Parliament has been dissolved, and all legislation tabled but not given royal assent has died – including Bill C-33.

The intellectual and political links from the 1970 Red Paper through section 35 of the 1982 Constitution Act to the 1996 report of the Royal Commission on Aboriginal Peoples are obvious. "We propose," stated the RCAP report, "that the treaty relationship be restored and used from now on as the basis of the partnership between Aboriginal and non-Aboriginal people in Canada." And in elaboration:

> To bring about this fundamental change, Canadians need to understand that *Aboriginal peoples are nations* [emphasis in original]. That is, they are political and cultural groups with values and lifeways distinct from those of other Canadians. They lived as nations – highly centralized, loosely federated, or small and clan based – for thousands of years before the arrival of Europeans. As nations, they forged trade and military alliances among themselves and with the new arrivals. To this day, Aboriginal people's sense of confidence and well-being remains tied to the strength of their nations. Only as members of restored nations can they reach their potential in the twenty-first century. (Canada 1996, x-xi)

There is scant acknowledgment in RCAP that First Nation individuals might choose to "take jobs away from reserves" and participate in mainstream Canadian society. While not stated explicitly, RCAP implied that a life separate from the reserve meant inevitable loss of culture and a life probably scarred by discrimination. A prominent image in the RCAP report was the two-row wampum, a belt commemorating a 1613 treaty between the Dutch and Mohawk:

> There are two rows of purple, and those two rows represent the spirit of our ancestors. Three beads of wampum separating the two purple rows symbolize peace, friendship and respect. The two rows of purple are two vessels traveling down the same river together. One, a birch bark canoe, is for the Indian people, their laws, their customs, and their ways. The other, a ship, is for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel. (Canada 1996, 10)

Given the near-universal rejection of the White Paper by First Nation leaders, Ottawa abandoned it and inaugurated instead a strategy of transferring funds to First Nation councils in expectation that they design social programs autonomously. In 1972 the Native Indian Brotherhood, forerunner of the Assembly of First Nations, published "Indian Control of Indian Education," a submission to the minister. It summarized contemporary leaders' expectations with respect to schools:

> The past practice of using the school committee [composed of band members] as an advisory body with limited influence, in restricted areas of the school program, must give way to an education authority with the control of funds and consequent authority which are necessary for an effective decision-making body. The Federal Government must take the required steps to transfer to local Bands the authority and the funds which are allotted for Indian education. (NIB 1972, 30)

Relative to the tragedy of residential schools in the first half of the twentieth century, post-1970 policy has obviously been an improvement, but it has not lived up to expectations. The gains in education have disproportionately accrued to First Nation individuals living off-reserve, and to Métis. While education outcomes for these two groups should not invite complacency, they are far superior to those among First Nation members living on-reserve.

The following section introduces and briefly summarizes evidence on Aboriginal education from the 2011 census. The third section is an informal discussion of the case for professionalizing reserve-school management and governance. The fourth section summarizes the motivation behind reserve-school legislation, which owes much to the BC experience, and also summarizes the provisions of Bill C-33. The final section speculates on what comes next in terms of reserve-school governance reform.

THE CENSUS EVIDENCE

The best evidence of the education disadvantage faced by on-reserve children comes from the census.[1] It provides consistent pan-Canadian evidence on highest education level, by age, by identity (see footnote 2 for elaboration), and by location of residence at time of the census. It is self-reported data and subject to various biases.[2] It does not provide evidence on location of respondents' K-12 schooling but location of residence is a useful if imperfect proxy. Most First Nations living on-reserve probably received most of their schooling on-reserve; most living off-reserve probably received most of their schooling off-reserve, in provincial schools of the relevant province.

The importance of high school completion in predicting whether a young adult avoids poverty as an adult is hard to exaggerate.[3] While high school completion is a low rung on the education ladder, it remains the crucial rung for getting a job. Whether a census respondent identified in 2011 as North American Indian/First Nation, Métis, or non-Aboriginal, the probability of being employed was below 40 percent if he or she lacked high school certification. For the three identity groups, it jumped by over 25 percentage points for those with high school certification but

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[1] In recent years, the census has primarily reported results based on self-identification questions. The Aboriginal identity population is all those who identify as belonging to one of three groups: (1) North American Indian or First Nation (Mohawk, Ojibwa, Cree, and so on); (2) Métis (descendents of communities formed from the intermarriage of the former with *coureurs de bois* engaged in the fur trade); or (3) Arctic Inuit. Self-identification as an Aboriginal does not necessarily mean Aboriginal ancestry, and identification as North American Indian or First Nation does not necessarily mean the respondent is a "registered Indian" pursuant to the Indian Act. The census Aboriginal identity population does, however, include those who indicate being a registered Indian, whether or not they also identify as Aboriginal.

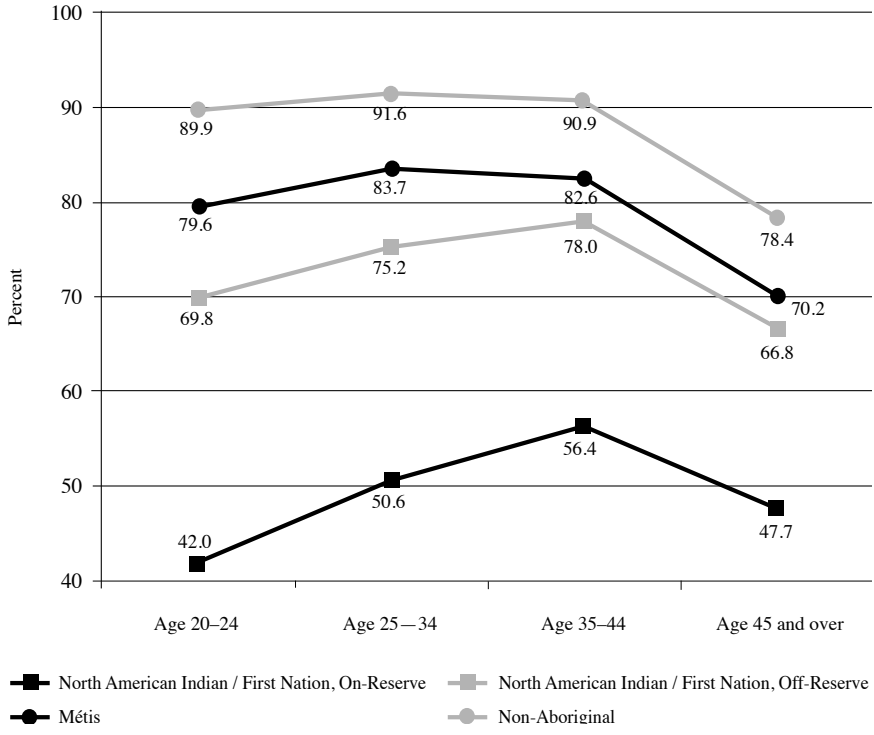
[2] In addition to bias arising from self-reporting, the 2011 census introduced bias due to the voluntary nature of the National Household Survey. The NHS eliminated mandatory participation in the "long-form" 20 percent sample used in previous censuses. This second source of bias is probably worse among Aboriginals than in the overall population. Probably those Aboriginals most alienated from mainstream Canadian society have lower education levels than the Aboriginal average, and are more likely than other Aboriginals not to have participated in the NHS sample. Hence, some unknowable portion of the reported improvement in Aboriginal education levels between the 2006 and 2011 censuses should be attributed to the change in census protocols. The NHS bias is most extreme in highly disaggregated communities where participation was exceptionally low. At the highly aggregated provincial level, reported here, the bias is lower.

[3] For further discussion of census data on Aboriginal education and employment levels, see the discussion in Richards (2014).

no further education. At higher education levels, the probabilities of employment converged and for those with university degrees were all above 75 percent.

Figure 1 illustrates high school completion profiles of four groups, by four age cohorts. Age 20-24 is the youngest cohort for which it is reasonable to expect high school completion. The statistics are derived from the 2011 census; hence those in the oldest cohort illustrated were born prior to 1965, and all but a few in this cohort can be expected to have completed high school (if they did complete) before 1980. Within the non-Aboriginal population, over one in five of those age 45 and older did not complete. For the three younger cohorts, high school completion is roughly constant, at 90 percent. The first profile illustrates that for non-Aboriginal adults below age 45, near-universal high school completion has become the norm. The analogous profile for Métis tracks that for non-Aboriginals but is roughly

Figure 1: Share with High School Certification or Above, Selected Aboriginal Identity Groups and Non-Aboriginals, by Selected Age Cohorts, 2011



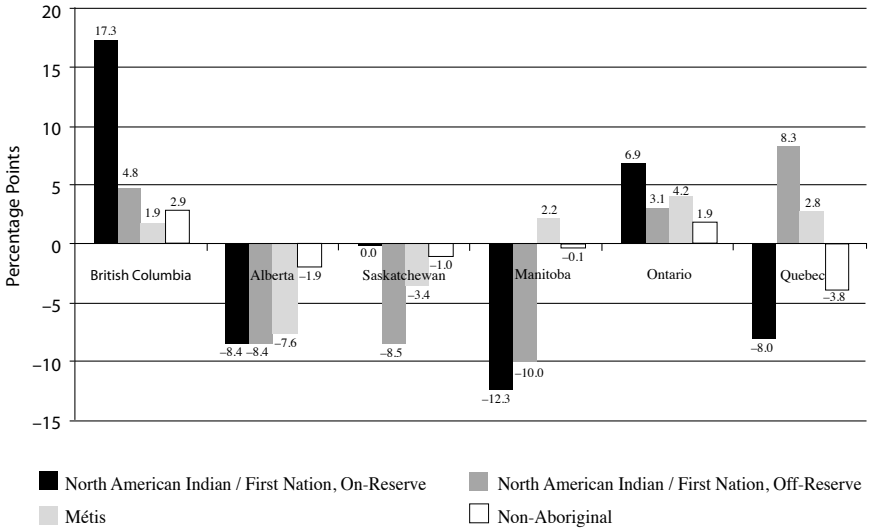
Source: Author's calculations from Canada (2013).

10 percentage points lower for all cohorts. While Métis high school completion rates for younger cohorts have not converged on those for non-Aboriginals, the percentage point increases for Métis (relative to age 45 and older) have matched the increases for non-Aboriginals.

The story among First Nation cohorts is more complex. Their maximum high-school completion rates occur at middle age (the age 35-44 cohort). The differences between middle age and young adult (age 20-24 cohort) rates are much larger than for Métis and non-Aboriginals. The middle-age off-reserve high school completion rate approaches 80 percent, not far below the analogous statistic for Métis. For on-reserve First Nations, the middle-age completion rate is well below 60 percent. The completion rate for the on-reserve age 20-24 cohort is only slightly above 40 percent. Although this cohort will presumably increase its education credentials as it ages, its present high school completion rate is below that for its parents' generation (age 45 and older).

National averages hide substantial provincial variations. Figure 2 illustrates provincial high school completion for the four groups in six provinces, Quebec to British Columbia, at ages 20-24. Collectively, the six provinces include nearly 90 percent of the Aboriginal identity population. The data are here presented as

Figure 2: Provincial Deviations from Respective Canadian Average Identity Group Share with at Least High School Certification, Age 20–24, by Selected Provinces, 2011



Source: Author's calculations from Canada (2013).

deviations from the respective national averages age 20-24, illustrated in Figure 1. Immediately evident is the superior on-reserve result in BC. Ontario's result is 10 points lower; Saskatchewan is 17 points lower and close to the national average; the remaining three (Alberta, Manitoba, and Quebec) are at least 25 points lower than BC.

THE PRESENT "NON-SYSTEM"

In trying to explain student education outcomes – including whether students obtain high school certification or drop out – it is useful to divide relevant factors into those impacting the demand by families for formal education for their children, and those operating on the supply side. The weak performance of Aboriginal students relative to non-Aboriginal students arises, in part, from demand-side factors. Many Aboriginal parents harbour a mistrust of formal education as an instrument of assimilation and place limited importance on mastery of core material in reading, science, and mathematics. It also arises from the supply side. An important distinction to make here is between the contribution of schools and of student's families. Parents with higher education and income contribute more, on average, to their children's education. Disproportionately, Aboriginal students come from low-income families with low formal education. They are also more likely to reside in isolated communities. Despite higher per-student funding in rural schools than in urban ones, the education outcomes in small schools in isolated communities are, for all students, generally inferior to outcomes in urban communities. Negative peer effects play a role. In schools with large Aboriginal student cohorts, Aboriginal students tend to perform less well. Finally, discrimination may exist in the school system. For example, teachers and administrators may form low expectations of Aboriginal student potential.[4]

In explaining BC's superior performance, above-average on-reserve incomes and employment rates and higher education levels among those in age cohorts comprising parents are probably all relevant.[5] In addition, many analysts have insisted on institutional factors. BC stands out relative to most other regions of the country in having a longer history of encompassing First Nation education associations assuming some functions of school districts in provincial systems, and having more organized links between reserve and provincial schools.

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[4] The explanation for low Aboriginal education invites controversy. Demmert and McCardle (2006) survey empirical research on education among American Indians.

[5] See Richards (2014) for an informal analysis of the relative importance of factors cited.

There exist approximately 500 reserve schools across Canada with a median size of 100 students (Richards and Scott 2009, 60).[6] In some cases there are close links between particular reserve schools and adjacent schools in a provincial system. In all provinces there are associations, some weak, some strong, that provide secondary services for some or all reserve schools in the province. However, for most reserve schools the relevant council makes the managerial decisions, with little coordination among other reserve schools or the relevant provincial school system.

Dedicated teachers can achieve remarkable results in stand-alone schools, but the overall results are never likely to be satisfactory. Michael Mendelson (2009) has described the status quo as a "non-system" and compared it to the situation in the Prairies a century ago when rural municipalities each ran one- and two-room schools. In a broad discussion of reserve governance, John Graham (2012, 38) states his pessimistic conclusion about individual band governance of major social programs: "In the rest of Canada and elsewhere in the western world, local governments serving 600 or so people have [limited] responsibilities. No countries assign to such small governments responsibility for the 'big three' areas of education, health and social assistance."

In the mid-twentieth century, rural municipalities yielded the strategic direction of schools, often reluctantly, to provincial education ministries. If children growing up on reserves are to realize decent education outcomes, Mendelson and Graham argue, a necessary – albeit not sufficient – condition is that individual First Nations agree to entrust many decisions over school policy (such as teacher certification) and secondary services (such as curriculum design) to professionally managed First Nation school authorities. My colleagues and I made a similar argument in an attempt to explain the widely divergent outcomes on core competency tests among Aboriginal (Métis and First Nation) students studying in BC provincial schools (Richards, Hove, and Afolabi 2008). Socio-economic factors and peer effects matter, but so too does the hard-to-identify quality of district-level management of Aboriginal instruction in the various provincial school districts.

WHAT'S BILL C-33 ALL ABOUT?

The controversy surrounding Bill C-33 is the visible tip of a policy initiative that dates back to 2011, when the AFN and the federal Aboriginal Affairs ministry agreed to a joint panel to evaluate reserve schools. (I acknowledge a role in the post-2011 initiative as one of four who wrote an initial internal report for Aboriginal Affairs, suggesting the appropriate design of legislation.) The joint panel report

[6] While the median size is approximately 100 students, two-thirds of all reserve school students are in one of the 125 schools with a student population over 200.

(AFN/AANDC 2012) based much of its analysis on the potential for encompassing institutions to support reserve schools:

> In the early 1970s, following the dissolution of the residential school system, and the devolution of First Nation education to individual First Nations, virtually no thought was given to the necessary supporting structure for the delivery of First Nation education. There was no clear funding policy, no service provision and no legislation, standards or regulations to enshrine and protect the rights of a child to a quality education and to set the education governance and accountability framework. (AFN/AANDC 2012, 9)

The panel also discussed the case, mentioned in the above passage, for statutory funding ensuring comparable per-student funding for reserve schools to that provided by provinces for provincial schools. Stating the case for comparable funding has proved much easier than identifying the size of the "funding gap" in any province. A recent attempt to analyze the gap (Drummond and Rosenbluth 2013) concluded that present data do not allow for a convincing conclusion. Two basic reasons for agnosticism are incompatibility between federal and provincial accounting procedures and the difficulty of defining what provincial schools should serve as benchmarks for comparison with reserve schools.[7]

The panel highlighted the role of several existing institutions that provide secondary services and enjoy some of the authority exercised by school districts within provincial education systems.[8] The most elaborate of these is the First Nations Education Steering Committee (FNESC) in BC. In assessing the role of FNESC, it is important to realize that many First Nation children whose families are "registered Indians" (and hence have the right to attend reserve schools) are living on-reserve but nonetheless attending provincial schools. At the secondary school level, most on-reserve children attend provincial schools. Furthermore, mobility among the First Nation population is higher than among non-Aboriginals: many families move frequently between their reserve and an off-reserve community, or between provincial communities. At any time, approximately 40 percent of children living on-reserve are attending a nearby school within a provincial system. When these students transfer schools during a school year, complex administrative problems arise. Hence, to the extent that institutional factors explain BC's superior high school completion rate, it is important to take note not only of First Nation

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[7] The most recent attempt to compare per-student expenditure in provincial and reserve schools (Bains 2014) concluded that reserve schools receive more than provincial schools. This study does not attempt adjustments for school size and other school district characteristics.

[8] The three highlighted are the Akwesahsne School District covering Mohawk schools in Ontario, Quebec, and New York State; the Mikmaq Kinamatnewey Agreement in Nova Scotia; and the First Nations Education Steering Committee (FNESC) in BC.

institutions in the province but also of innovations undertaken by the provincial school system and by the regional Aboriginal Affairs office. In summary, BC's multilevel governance model of education has four components:

- *Well-established, encompassing First Nation education organizations exist*. Virtually all First Nations in BC belong to FNESC, a provincial society in existence since 1992. It represents First Nations in negotiations with the provincial education ministry in Victoria and the federal Aboriginal Affairs ministry. The First Nations Schools Association, closely allied with FNESC, provides secondary services to schools, assesses reserve school performance in reading, arithmetic, and other metrics, and designs curriculum (FNESC/FNSA 2013).
- *Since the 1990s, the provincial education ministry has provided incentives for provincial school districts to accommodate Aboriginal students and reduce the district-level performance gap between Aboriginal and non-Aboriginal students*. For two decades the BC education ministry has provided provincial school districts with additional funds based on the number of Aboriginal students in district schools, and required the districts to prepare Aboriginal Education Enhancement Agreements in conjunction with local Aboriginal leaders having a stake in education. These leaders may be First Nation or Métis, on- or off-reserve. The intent is that districts use their incremental funds for Aboriginal education projects and that the Enhancement Agreements define proximate goals, such as targets for Aboriginal students in provincial core competency tests or in attendance rates.
- *The province gathers and publishes better Aboriginal student performance data*. More so than in other provinces, the BC education ministry has a tradition of publishing detailed Aboriginal student performance in provincial schools, disaggregated to the school level. The province is the only one in Canada that reports Aboriginal student results on core competency tests (in mathematics and reading) disaggregated by school (British Columbia 1998–). While its results are less comprehensive, FNSA publishes on-reserve student performance.
- *Relations with the regional Aboriginal Affairs office have been more productive than in most regions*. Thanks to well-established, encompassing First Nation education organizations and a provincial tradition of affirmative action with respect to Aboriginal education, it has been easier in BC than in most provinces for the regional office to build working relationships with the provincial education ministry and to coordinate education policy with First Nations. BC has a relatively ambitious tripartite education agreement among FNESC, the BC government, and AANDC (Strahl and Richards 2012). Unfortunately, the polarization over Bill C-33 has adversely affected relationships in BC as elsewhere.

The Ministry of Aboriginal Affairs and Northern Development posted a draft First Nation education bill online in fall 2013. It was excessively prescriptive and provoked near-unanimous rejection by First Nation leaders, including Shawn Atleo (2013). There followed an intense exercise in collaborative drafting, leading to the tabling of Bill C-33 in Parliament in April 2014. The motivation of the bill's authors was to create a legislative framework that would require First Nations across Canada to provide clearer lines of authority for professional management of reserve schools and enable creation of larger encompassing education associations. Simultaneously, the bill legislated the principle of comparable per-student funding. The key provisions of Bill C-33 can be summarized as follows:

- *Preamble*: The preamble contains 11 "whereas" clauses that state the dual goals of the legislation as perceived by the AFN national office and AANDC. As an illustration, one clause refers to the appropriate cultural dimension of First Nation education ("whereas First Nations children attending schools on reserves must have access to education that is founded on First Nations history, culture and traditional values"). Another clause refers to a curriculum enabling students to acquire competence in core subjects and hence be mobile between school systems ("whereas First Nations children attending schools on reserves must have access to elementary and secondary education that allows them to obtain a recognized high school diploma and to move between education systems without impediment").
- *Creation of the Joint Council of Education Professionals (secs. 10-19)*: Given the evolution of federal policy since the 1970s, the legislative powers of the minister of Aboriginal affairs are rarely used. Nonetheless, wide ministerial discretion exists. Bill C-33 reduces the discretion in the domain of education by the creation of this joint council, to be composed of an equal number of members appointed by the minister and by "any entity representing the interests of First Nations that is prescribed by regulation" (sec. 12(1)). The expectation was that the "entity" be the AFN. The duties of the joint council are ill-defined but open-ended. The expectation was that it would assume a progressively more important role in elaboration of reserve school policy.
- *Enabling First Nation councils to delegate powers to a First Nation Education Authority (sec. 27)*: The bill enables First Nation councils to delegate their education powers to "a body corporate incorporated under federal or provincial legislation if the agreement meets the conditions set out in the regulations" (sec. 27(1)). This section enables councils to create collectively a reserve equivalent of a school district in provincial systems. While instances are expected to be rare, the section enables a First Nation council, if it desires, to join a provincial school district.
- *Specifying minimum structure for schools run by a First Nation council*: While far less prescriptive relative to the draft bill posted in fall 2013, Bill C-33

requires that any council operating schools on its territory on a "stand-alone" basis meet certain statutory requirements:

- The council must prepare the school's annual budget and provide the minister and the joint council with a copy (sec. 21(1)(a)).
- The council must appoint individuals to three positions: director of education (sec. 35) responsible for overall management of education programs; principal (sec. 36) responsible for running a school; and school inspector (sec. 37) responsible for evaluating school programs.
- The principal must, among other duties, construct a "success plan" stipulating proximate school goals that the principal deems appropriate (sec. 27(2)).

- *Principle for statutory funding (secs. 43-45)*: The bill stipulates that payments to a reserve school must be such as to enable provision of services "of a quality reasonably comparable to that of similar services generally offered in a similarly sized public school [in the relevant province] that is regulated under provincial legislation and is located in an analogous region" (sec. 43(2)). Funding "must include an amount to support the study of a First Nation language or culture as part of an education program" (sec. 43(4)).

Once the bill had been tabled, the AFN published a detailed analysis (AFN 2014a) that elaborated on the case for it. The AFN stressed the extent to which the legislation limited existing ministerial discretion and enhanced the AFN's objectives with respect to the goals and funding of reserve schools. The AFN's analysis did little to persuade the majority of chiefs who, from the beginning of the reform initiative in 2011, had been sceptical of any legislation requiring change to reserve school organization.[9] The majority of chiefs argued that the core remedy was to close the elusive "funding gap" via increased funding of reserve schools. In addition, many opposed Bill C-33 on grounds that the treaty right over K-12 education is absolute; any legislation that constrains the autonomy of First Nations in managing reserve schools is unacceptable. Examples of such constraints cited by opponents are the provisions in secs. 21 and 35–37.[10]

Yet others noted the many sections in the legislation refer to as-yet-unwritten regulations and the extent of ministerial discretion that remains. Given a history of mistrust, many chiefs interpreted all such qualifications as loopholes whereby

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[9] Rennie (2014) offers an account of internal divisions among chiefs on the education reform file.

[10] Mendelson (2014) discusses the complexities of accommodating treaty rights within the context of a liberal parliamentary democracy. Any constitutional provision (in this case treaty rights) can only be rendered operational via legislation specifying what actions the government of the day must undertake.

Ottawa would symbolically enhance First Nation control while in fact maintaining control. The gap between the intent of Bill C-33's advocates and interpretation of the bill by critics is stark:

> [Bill C-33] … is an attempt to create the illusion of First Nations control over education. At the same time it maintains – in the spirit of Canadian colonial lawmaking – an unfettered discretion accruing to the minister and granting him or her with sweeping power and control over a variety of educational matters …
>
> Indigenous peoples living in the successor state of Canada (with or without treaties), have rights of self-determination, recognized under international law and are blatantly denied in the current form of this bill. (Nepinak 2014)

Perhaps not surprisingly, many of the most prominent First Nation critics of Bill C-33, including Manitoba Grand Chief Derek Nepinak quoted above, head First Nation reserves in the Prairies. These chiefs represent a disproportionate share of the most isolated reserves, where members have few local off-reserve employment opportunities. In his assault on Bill C-33 Nepinak did not attempt to explain why high school completion among young First Nation adults in his province is so low, or why completion in Atleo's province is double that in Manitoba. It seems fair to conclude that, for many of the chiefs who opposed Bill C-33, discussing managerial and administrative changes likely to increase reserve school outcomes is not the point. What matters is affirmation of treaty rights, in this case the right to run reserve schools autonomously.

Put crudely, the opponents of Bill C-33 argue in the tradition of the Red Paper; the supporters are in the tradition of Hawthorn. Bill C-33 was the product of collaboration – at times strained – between an articulate, largely urban and well-educated First Nation leadership and senior government officials committed to institutional reform. Implicitly, the AFN under Atleo acknowledged widespread weakness of reserve school management and the legitimacy of Bill C-33's attempt to create a "space" on-reserve for leaders interested in education as opposed to other political concerns. Implicitly, the engaged government officials acknowledged the absence of professional knowledge on school management within AANDC. Ironically, those with the best practical knowledge of running schools, namely those engaged in provincial school systems, were largely absent from this debate – despite the fact that about two in five First Nation children living on-reserve are attending a provincial school.

CONCLUSION

Criticism of Bill C-33 has come not only from First Nation leaders; some education professionals have criticized the legislation on the grounds that it overemphasizes institutional reform. The most elaborate exploration of an alternate strategy for

reform is that of Anderson and Fleming (2014).[11] Their agenda could be embodied in an amended version of Bill C-33, but much of it could be implemented without legislation. Their agenda contains three elements. The first two would cover all reserve schools; participation by a First Nation council in the third would be voluntary:

- *Separating the thorny question of comparable school funding from school reform*. To achieve this separation, they argue, it is necessary to undertake in each province an exercise equivalent to that between provincial education ministries and their respective school districts. Funding formulas in a province should accept the provincial formula as a starting point, but should also fund courses in First Nation culture and language. Unlike the status quo, results would be widely publicized and generate a basis for conducting funding comparisons between provincial and reserve schools, on a province-by-province basis.
- *Endorsing a much more limited role for encompassing First Nation school authorities*. Anderson and Fleming view the role of such authorities as more modest than that implied in Bill C-33. They could provide secondary-level services (for example, preparing online courses). They could represent reserve schools in negotiating school funding formulas with regional AANDC offices. Any delegation of First Nation council treaty rights to such school authorities would be of a limited nature. AANDC would accommodate the costs of such authorities.
- *Specifying a small number of fundamental education outcomes and providing some financial incentives to schools to improve performance on them*. This third element would be voluntary. It can be interpreted as specifying outcomes for the school "success plan" envisioned by Bill C-33. The outcomes should include attendance and year-to-year retention levels, numeracy and literacy levels, high school completion rates, and share of first-year students with special needs. A prerequisite for a participating First Nation is to benchmark present outcomes. For example, numeracy and literacy levels could be assessed by participation in the relevant province's core competency tests. Anderson and Fleming propose that AANDC make available a fund providing modest incremental funding to participating schools that maintain over several years significant improvements on initial benchmarks.

At time of writing, any conclusion must be tentative. Bill C-33 has died on the order paper. Given time for passions to cool, the AFN may return to fundamental education reform and, with some amendments, a version of Bill C-33 may be enacted in the next Parliament.

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[11] Anderson and Fleming have served as consultants to FNESC in BC, and to AANDC in preparation of Bill C-33.

Alternatively, both AANDC and AFN may abandon education reform as a priority. In which case, the best prediction for reserve schools over the coming decade is a continuation of the status quo: pockets of on-reserve education excellence led by exceptional chiefs and councils committed to education success, tentative reform initiatives in some provinces led by coalitions of First Nation and provincial politicians, but, overall, far too many under-performing schools.

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VI

Provincial Aboriginal Policy in Changing Times

17

ONTARIO'S APPROACH TO ABORIGINAL GOVERNANCE

David de Launay

Ken Coates at the beginning of this conference observed that a lot of things have changed in a decade. I would like to point out that ten years ago, for example, we wouldn't have had so many Aboriginal speakers at a policy-focused conference like this. This is a reflection of the new dialogue and the changes happening in our country. I also think there are some fundamental challenges that we all have to work with, and I'll be speaking to that.

I'm going to talk about the role of the Ontario government in relations with Aboriginal peoples, how our role is changing, and some of what I think are the key challenges and positive relationships we're building on. But first, it is important to look at some facts about Ontario. According to the 2011 National Household Survey, Ontario has the largest Aboriginal population in Canada, with approximately 301,430 persons who self-identify as Aboriginal, representing 22 percent of Canada's total Aboriginal population and 2.4 percent of the total population in Ontario. As elsewhere, the Aboriginal population is young: 24.6 percent are 15 years or younger (compared with 17 percent of the non-Aboriginal population), and it's growing. The First Nation population in Ontario has increased by 27 percent between 2006 and 2011, while the Métis population has increased by 17 percent. If we take a look at areas like job development, job creation, and new labour force, there are parts of our province – particularly in the North and Northwest – where the new labour force will essentially be Aboriginal.

The Aboriginal population of Ontario is also highly urbanized and lives predominantly off reserve. Some 62 percent (150,565) of Aboriginal people live in

Thanks to Samantha Eisleb-Taylor for her generous transcription work.

urban areas, and 76 percent of First Nations live off reserve, according to the 2011 National Household Survey. The largest single concentration of Aboriginal people in Ontario and, I think, in the country is in Toronto. People don't think of Toronto as having a big Aboriginal population; they think more of other areas such as Regina, Winnipeg, Kenora, and Thunder Bay. The issue of addressing the urban challenges, the challenges for people not living on First Nations territory, is key in Ontario.

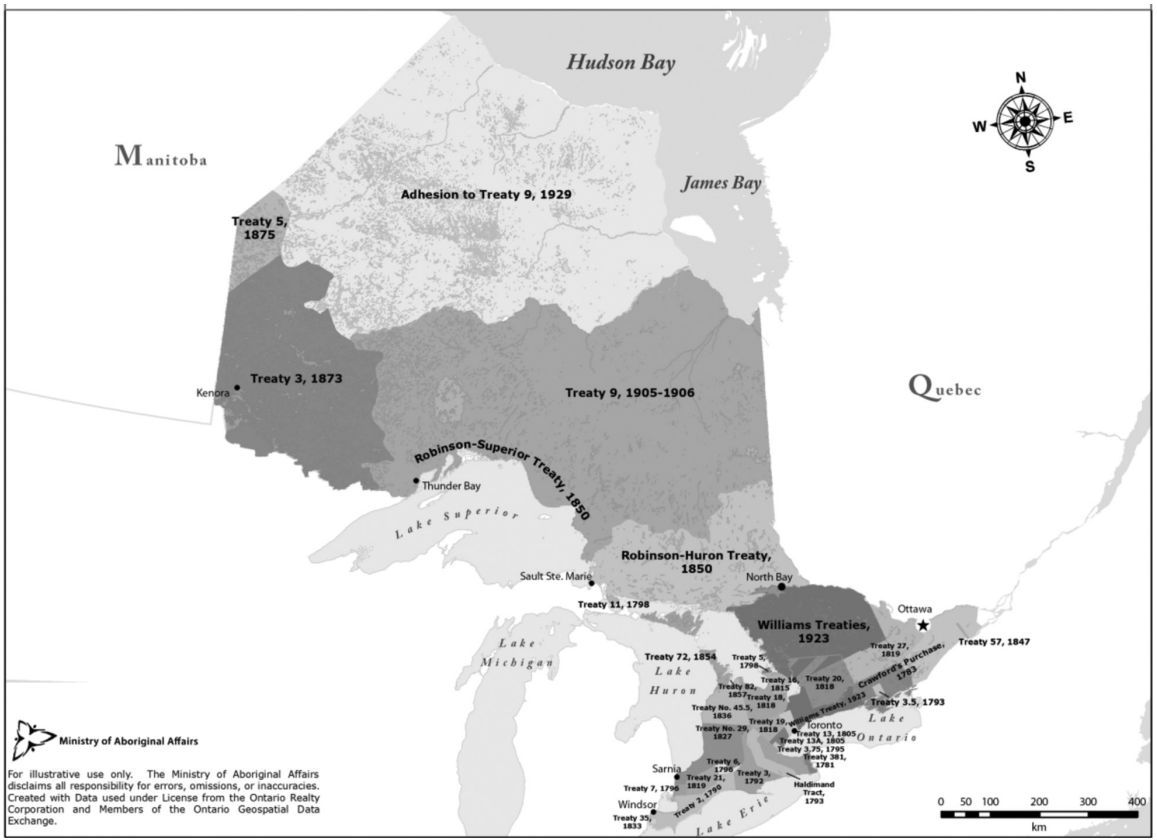
THE CHANGING ROLE OF THE GOVERNMENT OF ONTARIO IN RELATIONS WITH ABORIGINAL PEOPLES

When we talk about the role of the Province of Ontario in Aboriginal affairs, it is important to ground ourselves in the legislative context: the division of powers set out in the Constitution suggests that the federal government has the primary role to play when it comes to Aboriginal peoples. But Ontario also has substantial constitutional powers to make its laws, programs, and services extend to, benefit, or impact Aboriginal peoples. We have responsibility for lands and resources, and we have been the pointy end of the stick on many of the discussions around forestry, oil and gas, mining, and so on. We are also active in the provision of services. We provide health care, education services for the mentally challenged, and children's aid, and in many cases we do so even when it is a federal responsibility – say, education on reserve, where we have greater expertise. So, we're providing services off reserve, but we are also working with the federal government in the context of the particular challenges that arise for those transitioning from reserve. It is also important to note that section 35 of the Constitution Act, 1982, compels us to "recognize and affirm" Aboriginal and treaty rights in our policies and legislations.

Treaties are a fundamental part of our relationship with First Nations. We have 47 treaties in Ontario, from pre-Confederation peace and friendship treaties that established military alliances between Aboriginal nations and the British and French Crowns, to the numbered treaties, Treaty 3, and Treaty 9 in the North, which are firstly about land secession, harvesting rights, and other entitlements (see Figure 1). Section 35 of the Constitution Act, 1982, requires both the federal and provincial governments to respect treaty rights.

It is important to note that except for the Algonquin land claim, which we are negotiating right now, historic treaties cover all of Ontario. We've been hearing about the modern treaties, which provide for co-management, self-government, and economic partnerships. Historic treaties like those in Ontario create a very different context. Ontario generally views treaties as having extinguished the Aboriginal title to the land, allowing settlement and land development. Ontario therefore has full jurisdiction over almost all Crown lands in the province, providing that treaty and Aboriginal rights are respected. We thus recognize that we have a duty to consult First Nations where a government decision may adversely affect Aboriginal or

Figure 1: Treaties in Ontario



treaty rights, and to accommodate them when appropriate. But we disagree with the claim that First Nations still have jurisdiction on the land.

If I can give an example, the Nishnawbe Aski Nation, as the political organization for Treaty 9 signatories, does not agree with Ontario's Far North Act (2010). They consider it an encroachment on their lands and their jurisdiction. They are perfectly entitled to see things that way, but we consider that Treaty 9 seceded the land, which is now provincial Crown land. What we do recognize, though, is that First Nations should have a say in the management of their traditional lands. Instead of acting unilaterally, the government took a fairly bold step with the Far North Act. The province is entering into land use planning partnerships with local First Nations to decide jointly how the land will be developed. According to the Far North Act, local First Nations can initiate land use plans and then sit down with the province to figure out the details. At the end of the day, First Nations and the province have to agree. The province can say no, but so can the First Nations. It's almost like a mutual veto. We don't talk about it that way, but that's essentially what the act does.

I raise the Far North Act as an example of how Ontario sees its relationship with Aboriginal peoples. While it's not perfect, I think we've made major progress in the past ten years or so. It's quite clear that historic treaties in Ontario do not provide the same possibilities and opportunities as the modern treaties, but within those historic treaties and within that legal definition of what the province's land is and how the First Nations see it, there is space for moving forward. The Far North Act is an example. It creates the conditions for collaboration. I think it points to the fact that we can move beyond historic treaties. I use that example because I think a lot of what we do in Ontario fits that. We accept a certain legal framework – the cession of lands to the Crown, our jurisdictions, and constitutional obligations – and then within that we try to develop models of co-management and recognition of Aboriginal and treaty rights that are beyond just following the letter of the law.

Another point I would like to make is around our attitude toward court battles, especially in relation to the Métis people in Ontario. When I first joined the Ministry of Natural Resources in 1993 (this was post-*Sparrow*[1]), we were spending a lot of time figuring out how we must change our approach to law enforcement, because First Nations now had a right to subsistence harvesting. They no longer needed a card or a licence from the provincial government to harvest. The harvesting regime of the province simply did not apply anymore, so we had to figure out how we were going to adapt. One thing we did was to establish a committee that looked at some of the Aboriginal charges that came before us. I was on that committee, and one of the charges was a Mr Powley, who shot a moose in the Sault Ste Marie area. Mr Powley's claim that he could shoot the moose in the Sault Ste Marie area was

[1] *R. v. Sparrow* [1990] 1 S.C.R. 1075.

because he was Métis. Now the *Sparrow* decision didn't speak to Métis people, so here we were, government bureaucrats, stuck with a classic conundrum. If we didn't charge Mr Powley, we would have all the non-Native people in the province led by the very powerful anglers and hunters organizations pounding us for not doing so. And if we did charge Mr Powley, we would spend the next ten years going to the Supreme Court of Canada, and they would define Métis rights. So we were back and forth, and it took us three years – and this was a fairly straightforward decision: charge, don't charge. We went to the Supreme Court of Canada and now have the most definitive harvesting rights for Métis people across the country based on that, with a test for what Métis membership is. The question is, are we going to go through another 20 to 30 years of court battles to settle Métis claims, or are we going to find common grounds through policy and negotiations? I think we need to be proactive and make the necessary changes as opposed to waiting for court decisions. Again, this is a big change in our approach to relations with Aboriginal peoples.

Ontario's new approach to Aboriginal relations was developed in a policy document in 2005. It called for a relationship that is mutually respectful, constructive, and cooperative. A standalone Ministry of Aboriginal Affairs (MAA) was created in 2007 to lead in the development, coordination, and implementation of the government's new policy as well as its response to the Ipperwash Inquiry Report. The creation of a standalone ministry with its own minister and deputy minister reflected the desire to establish a more formalized governance structure and process. However, other ministries still have a significant role in delivering programs, services, and initiatives to Aboriginal peoples. The MAA's role is to bring to the attention of other ministries the needs, initiatives, or concerns raised by our Aboriginal partners. The MAA also works with individual First Nations and Aboriginal organizations to respond to issues of concern, coordinating with other provincial ministries or federal departments where appropriate.

The provincial government as a whole has four strategic goals for improving provincial-Aboriginal relationships in Ontario:

- build stronger relationships with Aboriginal communities
- improve social conditions for Aboriginal children and families
- create economic opportunities and sustainability for Aboriginal communities now and into the future
- resolve land claims and foster community reconciliation.

I think we are making progress in all four areas, but I would like to particularly highlight our significant achievement in resolving land claims: in the past ten years, more land claims have been settled than in the previous 20. We now have 50 claims accepted, three more that we are researching, and 11 agreements that are being implemented. Much remains to be done, but we are definitely moving forward.

The key reason why I continue to be in government working on these issues (and I've worked with Aboriginal communities since 1989) is because I fundamentally believe that we have to rebuild our relationship with Aboriginal communities. We don't always agree on how to get there, but that's my mission, that's my commitment, and that's what I think the government's commitment is. Building relationships, engaging with First Nations, settling past grievances, settling land claims, working toward formal agreements, developing informal agreements – it's all part of the much bigger reconciliation journey that I think we're all on. For this, we need a sustained relationship. Prior to 2005, there were no formal tables between Ontario and Aboriginal Partners to provide a venue for discussions on challenging issues. Now, there are multiple formal relationship tables and other processes in place. These have been created through agreements between Ontario and Aboriginal organizations to develop and renew effective relationship processes that foster meaningful communication, leading to stronger relationships and more productive partnerships.

Relationship tables and processes focus on diverse subject matter, including lands and resources, economic opportunities, child welfare, education, cultural recognition and preservation, and good governance. Recently, the province held its Annual Premier's Meeting with key Aboriginal leaders. We also have formal relationship tables with the Grand Council Treaty #3, the Anishinabek Nation–Union of Ontario Indians (UOI), and the Métis Nation of Ontario (MNO). We have informal relationships and processes with the Mohawk Council of Akwesasne (MCA) and the Nishnawbe Aski Nation (NAN).

The second way that Ontario is strengthening the Ontario-Aboriginal relationship is through investment. In an era of government cutbacks, we continue to provide organizations (including Chiefs of Ontario, Ontario Federation of Indian Friendship Centres, and Métis Nation of Ontario) with core funding to encourage capacity building, because we know that building our partners is really building stronger partnerships.

This change in perspective regarding how we engage with Aboriginal peoples can be illustrated by our approach to the Ring of Fire mining development in the James Bay Lowlands of Northern Ontario. There we faced a fundamental challenge, given our differing views about whose land it is. Initially, many of the communities set up blockades because people didn't know what was happening. It's a huge mining development, and communities from the Sudbury area were pointing out the negative impact of mining in their region. There was a lot of concern around environmental assessment. Now First Nations are involved in a negotiation with the province. Bob Rae is representing First Nations, and Frank Iacobucci is representing us. It's a high-level negotiation, and we will see where that goes. But the point is that we are creating the conditions for reconciliation. The government has reached out and has agreed to negotiate about everything that's involved – infrastructure, energy requirements, potential social problems. Individual discussions are going on with the communities in the Ring of Fire, both with companies and with government.

CONCLUSIONS: BUILDING POSITIVE RELATIONSHIPS WITH ABORIGINAL PEOPLES IN ONTARIO

That is the short story of some of the things that are going on in Ontario. Much remains to be done. For example, we need to continue to build trust and mutual understanding. To build new relationships, we must understand how the past has created the present. The lack of trust by Aboriginal groups is a direct result of past actions and of historic grievances that remain unaddressed. Socio-economic challenges must also be addressed head on. Although Ontario has made significant investments to foster social and economic development in Aboriginal communities, improvement in outcomes are far from satisfactory. Too many Aboriginal communities in Ontario are still struggling with crowded living conditions, inadequate housing, and lack of access to healthy food. The Aboriginal population also faces higher unemployment rates, over-representation in the social assistance system, over-representation in the justice system, low graduation rates, higher rates of infant mortality, higher rates of alcohol, drugs, and solvent abuse, and higher rates of suicide. These are issues we simply cannot ignore.

Moreover, the Ontario government is facing rising political and legal pressures, including direct action related to unresolved land claims, natural resource development, and long-standing treaty and legislative grievances. The resulting uncertainty can have significant economic implications for Ontario. As we embark together with First Nations, industry, and the federal government in negotiations surrounding the Ring of Fire, we are particularly aware of the challenges that other governments (such as British Columbia, Alberta, and New Brunswick) are facing with regards to resource development in their jurisdictions.

Despite these challenges, there are also opportunities. Based on our experiences to date, we believe that strong, positive relationships with Aboriginal peoples can be created by recognizing that they are not stakeholders but critical and essential partners in change. This kind of partnership can form the basis for developing key policies to improve the quality of life for Aboriginal peoples, to frame solutions that make sense to both Aboriginal communities and government, and ultimately to enable Aboriginal control over Aboriginal interests and affairs.

18

RETHINKING PROVINCIAL-ABORIGINAL RELATIONS IN BRITISH COLUMBIA

Jan Gottfred

My perspective in this chapter is a little different from the rest of the conversations that we've been having in this book. I focus on what has been happening in British Columbia since 2005 when a new relationship between Aboriginal peoples and the province was announced. I shift away from the focus on lands and natural resources that seems to underscore many of the chapters to look at more of the social side of our work. I provide some background on the current policy and priorities context in British Columbia and highlights of the progress we have made so far under the New Relationship. I conclude with an overview of our appreciative inquiry project called Leveraging Success, through which we identified the critical success factors in our Aboriginal-provincial working relationships.

THE CURRENT PROVINCIAL CONTEXT

The government of British Columbia has made job creation and investment in the province key priorities. I think those priorities are fairly consistent across Canada. The focus is on investments in natural resources, notably liquefied natural gas (LGN). Job readiness and skills training are key. If we want to make progress in these areas, it is clear that we need to have productive relationships with First Nations and also support their readiness for job opportunities.

The editors would like to thank Samantha Eisleb-Taylor for the transcription of this presentation to the State of the Federation conference, 30 November 2013.

British Columbia is home to over one-third of the more than 600 First Nations communities in Canada, comprising the most culturally and linguistically diverse groups of Aboriginal peoples in the country. In British Columbia the Aboriginal population is much younger than the non-Aboriginal population. In 2011, nearly 45 percent of the Aboriginal population was under 25 years old, compared to nearly 28 percent of the non-Aboriginal population.

The province recognizes that effective engagement and negotiation are preferred ways of moving forward together, rather than through litigation. Developing a good, positive relationship is critical. We need to support First Nations communities, Métis, and urban Aboriginal citizens so they can realize their potential, and we need to recognize that they and their youth are an important component of BC's active labour force.

A NEW RELATIONSHIP

"A New Relationship" is not a signed document: it is a vision document that establishes the foundations for improving our relationships.

The Union of BC Indian Chiefs website offers an important insight into the genesis of the New Relationship vision:

> The document agreed to by the leadership of the First Nations Summit, the Union of BC Indian Chiefs, the BC Assembly of First Nations and BC Premier Gordon Campbell is entitled "A New Relationship". This document is the result of discussions with senior provincial government officials on how to establish **a new government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights**.
>
> The document sets out a vision statement, goals of the parties, principles of a new relationship and some action plans. The action items represent the next steps that must be done to advance this new relationship and the common vision. Our respective organizations and Premier Campbell have committed to making this work a priority.
>
> By way of background, following the decisions of the Supreme Court of Canada in *Haida* and *Taku*, resolutions were passed by the First Nations Summit and the Union of BC Indian Chiefs to work promptly and together to develop a plan to ensure the implementation of these and other Court decisions. **This unity of purpose was strengthened on March 17, 2005 with the signing of an historic Leadership Accord where the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations committed to work together for the benefit of all First Nations in British Columbia.** Among the joint commitments was an agreement to engage with the provincial and federal governments regarding implementation of the Crown's honourable duty to consult with and accommodate First Nations Aboriginal title, rights and interests.
>
> The Province also saw that it must make a bold shift in how the Provincial Crown conducts business, not only because of *Haida* and *Taku* and subsequent court decisions

> dealing with the Crown's duty, but also because of the growing level of conflict and uncertainty. The Province realized that it can no longer be "business as usual" (emphasis in bold in original).[1]

Clearly, "A New Relationship" is an important document that sets the tone for our current work. The document recognizes that "the historic Aboriginal-Crown relationship in British Columbia has given rise to the present socio-economic disparity between First Nations and other British Columbians." Relationship is powerful. It is not always easy as government to acknowledge that our ways of doing things must change, but we have made considerable progress in developing a relationship that is based on that recognition and guided by a set of principles. The New Relationship approach gave us a mandate to think and work differently with First Nations in a government-to-government relationship based on principles of respect, recognition, and reconciliation.

I want to stress the role of leadership in bringing about this shift. As much as Premier Campbell was seminal in championing a new relationship, we also need to honour and recognize that British Columbia First Nations leadership came together to establish strong and cohesive leadership at the provincial level. The First Nations Summit, the Union of BC Indian Chiefs, and the BC Assembly of First Nations historically came together to speak with one voice in negotiating the New Relationship.

As I mentioned, the New Relationship approach is grounded in a set of principles. These are not empty concepts. The New Relationship vision qualifies the principles by stating that, among other things, we must respect our respective laws and responsibilities, recognize First Nations' inherent rights that flow from their historical and sacred relationship with their territories, and work towards reconciling Aboriginal titles and jurisdictions with Crown titles and jurisdictions. The vision also states that we recognize that we are responsible and accountable to each other.

We've taken the principles from the New Relationship and extended them as appropriate to how we work with all Aboriginal people across British Columbia: First Nations status, non-status, on- or off-reserve, Métis, Inuit. While recognizing that we have a unique relationship with First Nations, we also have an obligation to work well with all Aboriginal people living in BC. This new approach is more receptive to Aboriginal ways of being and working, to Indigenous world views, and it requires that the BC public service learns how to work in a two-world approach – something we have been demanding of Aboriginal people for hundreds of years. When I think about it, when we embarked on the Asia-Pacific Initiative a few years ago in BC and started to do some training for the BC public service, it made me realize that the relationships we want to prepare ourselves for with First

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[1] Union of BC Indian Chiefs, backgrounder, "A New Relationship": Implementation of Supreme Court of Canada Decisions, http://www.ubcic.bc.ca/issues/newrelationship/#axzz2xwdWoc8K.

Nations and Aboriginal people on a government-to-government basis is not unlike how we prepare ourselves as a public service when we want to do good business in an international market. We recognize our shared interests, and we respect our distinctions as well.

FROM COMMON VISION TO ACTION

As a vision document, "A New Relationship" gives us a foundation for our work in British Columbia. And while leadership commitment is important, so is the development and implementation of shared priorities, clear strategies, and action plans.

The Kelowna Accord has been invoked a couple of times during this symposium and I want to recognize that Premier Campbell was a passionate advocate for the accord, formally entitled First Ministers and National Aboriginal Leaders: Strengthening Relationships and Closing the Gap. Provincial premiers, territorial leaders, and leaders of the national Aboriginal organizations were invited by the prime minister to meet with representatives of the Government of Canada in Kelowna, BC, on 24 and 25 November 2005. This meeting was preceded and informed by a series of Canada–Aboriginal Peoples' Roundtables.

In preparation for the historic First Ministers' Meeting (FMM), a Multilateral Indicators Working Group (composed of officials from AFN, ITK, MNC, CAP, NWAC, British Columbia, Saskatchewan, Manitoba, Ontario, Quebec, Northwest Territories and the Government of Canada) developed guiding principles and a short list of indicators for identifying change over time in education, health, housing, and economic opportunities.[2]

In British Columbia, we were directed to develop a plan to announce during the First Ministers' Meeting, for the day after the accord was signed – our go-forward action plan in BC. The Transformative Change Accord (TCA) recognizes that two important documents preceded the First Ministers' Meeting, including the First Nations–Federal Crown Political Accord and the New Relationship, and that the goals of each document would continue to be pursued and the understandings reached in both would serve as a foundation for the tripartite TCA. The TCA is a shared commitment to achieve the goals of closing the social and economic gaps between First Nations and other British Columbians over ten years, of reconciling Aboriginal rights and title with those of the Crown, and of establishing a new relationship based upon mutual respect and recognition. Even though the Kelowna Accord did not retain its stature as a focus of federal policy after the federal election, in BC we have continued to work in a focused tripartite way with our federal partners and First Nations on moving forward on the TCA commitments and goals.

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[2] Further information on the Kelowna Accord and related agreements can be found at http://www.parl.gc.ca/Content/LOP/researchpublications/prb0604-e.htm.

In 2006, a year after the TCA, we signed the Métis Nation Relationship Accord (MNRA), which is a bilateral commitment with the Métis Nation British Columbia. The MNRA includes similar socio-economic and relationship commitments to the TCA. In 2011, the Speech from the Throne committed us to work with Aboriginal partners, the federal government, and local governments to develop an Off-Reserve Aboriginal Action Plan (ORAAP) to achieve better education and job training, healthier family life, and strengthened cultures and traditions. This commitment has resulted in a multilateral partnership that includes municipalities, the federal government, First Nations, urban Aboriginal peoples, and Métis.

The series of commitments allows us to work more strategically with all Aboriginal peoples in BC – and to recognize distinctions. The goals for each of these agreements are similar: to improve Crown-Aboriginal relationships and to close the gaps in economic opportunities, education, health, housing and infrastructures.

Some concrete examples of progressive work include the transition of all Aboriginal-serving social housing stock and its management to the Aboriginal Housing Management Authority; significant action towards First Nations education jurisdiction including most recently a Tripartite Education Framework Agreement; co-creation and implementation of an Aboriginal Post-Secondary Education and Training Framework; establishment of a Minister's Advisory Council on Aboriginal Women; broadband connectivity to 84 percent of BC First Nations; and transfer of the BC First Nations/Inuit Health Branch to the First Nations Health Authority (FNHA) wherein the FNHA has full responsibility for the planning, design, delivery, and funding of First Nations health programs and services.

Even though my focus here is on the social policy side, it is important to mention that, before the New Relationship, the treaty table was the only venue where the BC government and First Nations came together to talk. And progress under the BC treaty process takes considerable time. Additionally, about one-third of First Nations in the province have chosen not to participate in the treaty process – but all are interested in the land, their relationship to the land, and how they can move forward in their communities.

While BC considers treaties the highest form of reconciliation with First Nations, we have made significant progress on other types of agreements since the New Relationship. We don't wait for treaties to be negotiated to start doing work with communities. Since 2005, the BC government has developed a much bigger toolbox through the creation of non-treaty agreements to address legal requirements, create incentives for First Nations to support economic development, and facilitate partnerships and First Nations participation in immediate opportunities.

For example, the Ministry of Aboriginal Relations and Reconciliation and natural resource ministries have developed a variety of revenue sharing and shared decision-making agreements that are designed to enable natural resource development on Crown lands while fully addressing consultation and accommodations obligations associated with Aboriginal rights pre-treaty. Three broad agreement categories include:

1. Incremental Treaty Agreements (ITAs) that allow First Nations and the Province to enjoy shared benefits in advance of a Final Agreement;
2. Revenue Sharing Agreements that include Economic and Community Development Agreements (ECDAs), which provide the means to share revenue on new major mining or resort projects; Forest Consultation and Revenue Sharing Agreements (FCRSAs), which provide the means to share forestry revenues in consideration for First Nations participation in consultation and accommodation of Aboriginal interests respecting forestry activity; Economic Benefit Agreements (ECBs), which are available to First Nations in Treaty 8, one of British Columbia's two historic treaties, and establish a process for consultation and collaborative management of lands and resources and provide a means for sharing revenue that flows from use of Treaty 8 lands; First Nations Clean Energy Business Fund (FNCEBF), which promotes increased First Nation participation in the clean energy sector within their asserted traditional territories and treaty areas through agreements between the province and eligible First Nations and allows for revenue sharing.
3. Shared Decision Making Agreements that include Strategic Engagement Agreements (SEAs), which serve to coordinate multiple agencies and First Nations to reduce overall consultation burden, and Reconciliation Agreements, which generally combine elements of shared decision making, revenue sharing and economic development.

These agreements are not static. They are ever evolving, improving, and forming to align with the needs of the province, First Nations, and the changing economy.

MEASURING PROGRESS

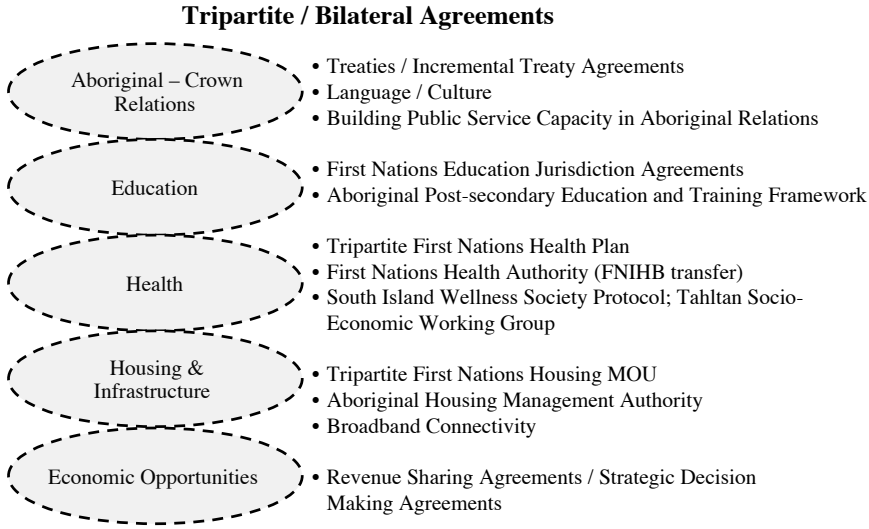
Of course, the challenge is to move from stated commitments and agreements to concrete action on the ground, in communities. This is in part why we need to track and measure our progress. My area is responsible to report on progress made since 2005 under our commitments mentioned above. We produce an annual report, entitled *New Relationships with Aboriginal People and Communities in British Columbia*. Year over year, our partner ministries report on the actions that they've undertaken to realize the commitments of the TCA, MNRA, and ORAAP – and clearly lots is happening in partnership with Aboriginal organizations and communities. We also put out a companion report called *Measuring Outcomes*. This technical report, which reports on the gap indicators, is not a "good news" report, but we knew this would be the case when the ten-year commitment to close the gaps was made; you do not close gaps that were created over generations in ten years. Not surprisingly, the *Measuring Outcome*s report shows that we still have a long way to go. In some important areas, though, such as in educational outcomes, improvement is being made.

MOVING FORWARD

I mentioned that the TCA is a ten-year commitment, and we are very aware that it is getting closer to 2015. It has been an amazing journey of change in British Columbia since 2005, and we realize we have a lot to learn from our experience in leading a significant corporate policy shift across government. In early 2013, the Ministry of Aboriginal Relations and Reconciliation undertook a "midterm review" of progress, with the intention of moving beyond our annual reporting on indicators and actions to a deeper inquiry seeking to identify and describe the critical success factors present in a number of initiatives that exemplify the best work between government and First Nations and other Aboriginal organizations. We called the project Leveraging Success. Our intention was to identify critical success factors in order to incorporate them more broadly and robustly into how government works with Aboriginal people.

Within the five pillars of the Transformative Change Accord, we can identify a number of successful initiatives and relationships, some of which I've mentioned, in areas such as health, education, post-secondary education, housing, infrastructure, and new agreements.

Figure 1: The Five Pillars of the Transformative Change Accord



Source: Internal documents, Intergovernmental and Community Relations Branch, BC Ministry of Aboriginal Relations and Reconciliation.

For the Leveraging Success project, our Aboriginal partners and our government colleagues identified initiatives where successful government-Aboriginal relations contributed to success. We undertook an appreciative inquiry of these initiatives in which we interviewed about 18 people from 17 ministries, and more than 20 people from 14 Aboriginal organizations and First Nation communities. We also undertook a separate literature review.

When we compared the results of the literature review and the interviews, we were not surprised to find that what people were telling us worked on the ground was also what research has been telling us we should be doing more of. These critical success factors include developing *trusted relationships* built over time and grounded in honesty, respect, and a willingness to listen, learn, and share; having clear, ongoing, and public *leadership*, both government and Aboriginal, that establishes a mandate for change; improving *cultural understanding and knowledge* across government; recognizing and supporting the goals of *Aboriginal self-governance, management, and control* as core elements of success; recognizing that *community-driven and community-based* programs and services are the foundations for success; co-developing mutually satisfactory *processes for working together* that are reciprocal, effective, clear, and accountable; and finally, working in a way that embraces *collaboration and partnerships***,** bringing all the right partners to the table.

In British Columbia we learned that leadership and clarity of mandate were critical pieces that helped our public service move forward in a New Relationship approach. With our provincial and First Nations leadership coming together with a common vision, the public service and our Aboriginal partners were empowered to work differently together – to work "outside the box" and co-create what a new relationship would look like.

Relationship is perhaps the most important critical success factor, and the most elusive to quantify or define. We learned we need to have inquiring minds and be receptive to Indigenous ways in redefining how we work with Aboriginal peoples. As one respondent said, "It's all about relationship."

Recognition of self-governance and self-determination also figured prominently in our interviews. While jurisdiction discussions continue, at a pragmatic level we have often been able to find opportunities to clarify "what's on the table" and jointly move forward with an interests-based approach. The principles of self-governance and self-determination were often spoken of in conjunction with community capacity and community development. Supporting communities and organizations to succeed requires listening to them to define what they need in order to address vulnerabilities. And mobilizing ourselves to muster the right kind of supports through collaboration and partnerships has in particular been critical to working with communities. We talk about collaboration and partnerships in government all the time, but we don't always do it well. Putting the time into developing the partnerships, bringing the right people to the table, and operating holistically as much as possible are all important pieces of the puzzle.

The issues associated with a lack of cultural competency are, I'm sure, familiar. We learned early that, in order to develop a new relationship, the public service had to step up and address our gap in cultural knowledge and understanding. This issue came up in our interviews time and again. Aboriginal peoples are burdened by the regular turnover among public service employees, who all need to be educated in Aboriginal relations. It is taxing for First Nations, Métis, Inuit, and urban-living Aboriginal people to constantly have to educate the new guys in government about what it means to embrace an Indigenous worldview when too often we don't know who the Aboriginal peoples of Canada are, what our shared history is, or what the impacts of colonial policies are today.

In British Columbia we are making significant changes to our K-12 education curriculum with Aboriginal education partners. My grandkids will be learning from a different curriculum than the one I and even my children learned from. Children are going to graduate with a new level of understanding about our shared history, in a way that we never did before. But we can't wait for this generational shift in knowledge and awareness.

In British Columbia we are working closely with a joint Aboriginal/Government Advisory Council on implementation of the Building Public Service Capacity in Aboriginal Relations (BCAR) strategy. Under BCAR, we have jointly developed a number of resources and tools available to all BC public service employees including a corporate Aboriginal Relations Resource Centre website, online training in Aboriginal relations, and a set of Aboriginal Behavioural Competencies for everyone in the BC public service who works with Aboriginal people. Our goal is to create a culture of change within government that is informed by Aboriginal partners and systemically supported through our Public Service Agency.

CONCLUSION

I believe we have come a long way in British Columbia in the area of provincial-Aboriginal relations – and we acknowledge that we have a long way to go. The lessons learned since 2005 about what it means to embrace and realize a new relationship are profound. In many ways this vision has required a culture shift within government, and we are not fully there yet. We have identified critical success factors that are equally embraced by Aboriginal partners and public service employees who attest to their importance in achieving success in working with Aboriginal communities and organizations. We know that none of these factors is expendable or sufficient on its own. Leveraging all these factors into the future is perhaps our next big challenge and opportunity.

VII

Concluding Thoughts

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CONCLUDING THOUGHTS

Jody Wilson-Raybould

An exciting transformation is taking place within our Nations, and our federation is becoming stronger for it, despite our challenges with current governments and existing policies towards our peoples.

In my opinion, the resurgence of Aboriginal governance, based on Indigenous laws and Indigenous legal traditions, will, over the next generation, change the way Canada is governed – transforming not only Indigenous Nations but our country. For I believe that truly having a third order of government in Canada with real powers and real influence will be good for the federation and for creating the proper national balance. As Aboriginal peoples take back control of our lives, so too will all Canadians take back control, ensuring we have a Canada that we all aspire to live in – a country based on shared values and principles that we have spent years as a nation fostering, creating a caring and liberal society that until very recently ensured our place on this planet as a favoured nation and one of the best countries in which to live.

So, from an Aboriginal perspective, I want to focus on our solutions and the opportunities we have for strengthening the federation, where, in the spirit of partnership, we look to complete the project of federalism and where the promise of federalism is enjoyed by Aboriginal and non-Aboriginal Canadians alike.

When the fathers of Confederation came together in 1864 in Charlottetown and then again a year later in Quebec to lay out the foundation for this country, our people were not present. We were left out, despite the early treaty-making and the many political and military alliances made with our peoples under the auspices of the Royal Proclamation of 1763, 250 years old this year. The exclusion of Aboriginal peoples has had far-reaching implications for Confederation in the tumultuous intervening years, as reflected in the state of Aboriginal and non-Aboriginal relations.

Today, what we are doing, simply stated, is correcting this mistake.

Before Confederation, some of our Nations indicated their assent to treaty by presenting wampum to officials of the Crown. The wampum belt stipulates that

neither group will force their laws, traditions, customs, or language on the other but will coexist peacefully.

Considerable water has flowed down the symbolic river of the two-row wampum belt since it was originally presented. And while we need to get back to the spirit and intent of the two-row wampum, the nature of that relationship in a modern nation state has changed. The laws of our respective peoples are not simply in their own boat or canoe side by side. As the common law has evolved with new legal principles being developed, and notwithstanding the 1867 constitutional division of powers, the reality today is a Canada with multilevel governance where the federal, provincial, territorial, and now our remerging Aboriginal governments share power and decision-making between and among each other. Existing and evolving legal principles such as cooperative federalism increasingly guide the complex web of authority for governments to make laws, often in the same area, and to actually govern effectively.

When the original framers of our Constitution met, they were, of course, not completely silent with regards to our peoples. Section 91(24) gives the federal government exclusive jurisdiction for "Indians and lands reserved for the Indians." This section was included to ensure that our peoples would be dealt with as a national matter in balancing the provincial quest for expansion and development with the interests of the First Peoples. More treaties were contemplated.

Unfortunately, after Confederation, the policy became one of pure assimilation, not partnership. As we know, the most insidious of the tools used to propagate this policy was the Indian Act. Rather than being citizens or members of a nation or tribes of Indians based on a treaty relationship as symbolized by the wampum belt, under the Indian Act we were made wards of the state. The government became our trustee.

Limited band council government under the Indian Act is not self-government and is certainly not an expression of self-determination – it is an impoverished notion of government where the chief and council are really Indian agents delivering federal programs and services. Band councils have limited authority to enact laws or make important decisions, and accountability is primarily to Canada, not to those who elect them.

In my own province of British Columbia, our nations, for the most part, still have never entered into treaties. But the reality is, whether your nation has an historic or pre-confederation treaty or not, we are all in the same boat – the same policies, the same Indian Act, has applied to all of us.

SECTION 35 AND ITS SIGNIFICANCE 30 YEARS ON

Since 1867, a lot has happened constitutionally with respect to the recognition of our title and rights, including treaty rights. Today our challenge is not to refight the fights from 40 years ago – after all, we have section 35 in the Constitution Act and

now the UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples). We have won over 170 court cases. Our challenge today is to translate these rights into practical benefits on the ground to improve the lives of our people. And it is in this context that I now turn to exploring our efforts to reconcile with the Crown.

The 1982 repatriation of the Constitution, and the inclusion of Section 35, was, of course, incredibly significant. At the time, some legal advisors to the provinces played down the significance of Section 35, arguing that our continuing rights were limited and that their clients need not worry about the implications of the provisions. For these folks, Section 35 was an "empty box" that could only be populated at the will of the Crown. In other words, there really were no inherent rights at all: the constitutional division of powers had been exhausted, and our people were not in the mix.

For those who had fought so vigorously for Section 35 and for the charter amendments – including my father – it was anything but an "empty box." Thirty years on, and dozens of court cases later, they have been proven right. It is our legal reality in Canada that Aboriginal Peoples do have the inherent right of self-government and that these rights survived as, to quote the British Columbia Supreme Court, "one of the unwritten 'underlying values' of the Constitution outside the powers distributed to Parliament and the legislatures in 1867." They are not absolute rights but they are still very real.

So today the question is not, legally, whether there is a right of self-government: rather, the question is political: how does pluralism as a result of these rights work? What makes this work challenging, despite the case law, is that there are still deeply divergent perspectives within Canada on what the inherent right means or does not mean. These perspectives distract us from the difficult political work of reconciliation and the related but fundamental community development work required of each of us in our communities.

THREE PERSPECTIVES ON INHERENT RIGHTS

There are, I think three clear and conflicting perspectives on the inherent right.

The first, advanced by what I will respectfully call First Nation fundamentalists, is that the inherent right provides the basis for First Nations to stand alone from Canada. That is, self-government is a right of sovereignty that in its full expression could result in independence from Canada, perhaps as much as a response to the terrible experiences of our people within Confederation at the hands of the colonial governments as a true cry for independence. Nevertheless, it is real, reactionary, and aggressive, an approach that could lead, and has led, to more conflict.

The second perspective, juxtaposed to the first, is that the inherent right does not exist. This perspective comes from non-Aboriginals who seek to deny Aboriginal rights and promote a greater role for assimilation of Indigenous people into the institutions and structures of non-Indigenous systems of government and society

within Canada. This approach has also led to conflict and helps to fuel the fire of those who share the first perspective.

The third perspective, and the one that I support and would like to believe the vast majority of Canadians support, is that the inherent right exists within Canada – within Confederation – and reflects what is unique and special about the idea of Canada: that there is room in our country for different legal traditions and compromise. This Canada is one where there is a full box of Section 35 rights, and our job as a nation is to allow those rights to find their expression through a process of reconciliation.

Since reparation in 1982, the work of attempting to bring Aboriginal peoples more fully into Canada as partners was most public during the constitutional conferences on self-government held during the mid-1980s, and then in the work to amend the Constitution in 1992 through the Charlottetown Accord. Certainly with respect to Aboriginal issues, Charlottetown was a missed opportunity. The power of self-government and the route to get there would have been more clearly articulated.

CHARTING A PATH FORWARD

I do not know when our country will next look to amend our Constitution – although it may be sooner than we think in light of recent events. What I know is that when we open that door, we need to revisit Charlottetown with respect to our peoples' rights. Until then, we need to support existing efforts and develop additional mechanisms to facilitate our peoples' implementing their inherent right and transitioning away from the Indian Act.

In the wake of the Idle No More protests – a cry for us all to do better, First Nations and non-First Nations leaders alike – some of us met with Prime Minister Harper outside his office on 11 January 2013, to the sounds of drums. At the meeting, while not making too many commitments, Mr Harper at least agreed that he needed to establish a high-level mechanism to oversee the reform both of the way Canada negotiates modern treaties and also of the way it implements existing ones. Accordingly, Senior Oversight Committees were established that include representatives from the PM's office, Privy Council Office, AANDC, and the AFN.

The prime minister also agreed we needed to get rid of the Indian Act, and he wanted solutions. We, of course, told him we have solutions.

And it is in this respect that today I feel a sense of optimism. Because, in spite of the obstacles and the challenges – federal governments come and go – there are an increasing number of Aboriginal success stories in implementing their rights and rebuilding their nations within Confederation. And we need to build on this success.

Over the past 20 years, First Nations have been developing their own solutions, and they are rebuilding their communities and nations – developing their institutions of government post–Indian Act, some at the community level, others regional or national in scope, some a result of modern treaty-making, some not.

To document this progress, during my first term as regional chief I undertook to develop a Governance Toolkit for our nations that included a comprehensive Governance Report. The report sets out what BC First Nations are actually doing on the ground with respect to governance reform and locates that work within the context of the current legal and political framework in which reconciliation is occurring.[1]

There are now almost 40 First Nations comprehensively governing outside of the Indian Act, and many more are involved in sectoral governance initiatives in areas such as land management, fiscal relations, and taxation. The results of these initiatives are promising; First Nations are showing improved social and economic indicators. But the results are uneven, and we need to know more about why this is so.

As others have suggested, it is of course unrealistic to expect that all of our small communities would be able to reinvent themselves and assume jurisdiction over the full range of matters that need to be governed or to the extent that the inherent right provides. Nation-building, therefore, is occurring and will continue to occur beyond the band, typically as an aggregation of bands at the tribal level. In some cases, nation-building will involve opting to use existing institutions and structures of government within Canada – in some cases, federal, provincial, or Aboriginal ones.

There are in fact now a number of national First Nations institutions providing support to our nations, including providing regulatory functions. These institutions include the First Nations Financial Management Board. Others dealing with sectoral governance matters include the First Nations Lands Advisory Board and the First Nations Tax Commission.

When we look at how to provide the institutional support for re-emerging First Nations government at the local level, and at what authority is used to create regional or national institutions, there are huge challenges. The machinery of government needed to support this framework for First Nations government within Canada has not been fully worked through. How institutions are established, under what authority, how they are governed, and to whom they are accountable are all questions that need to be answered as we continue to experiment with shared governance bodies, Crown corporations, and other special-purpose bodies to support re-emerging Aboriginal government.

An even more fundamental issue is that there is still no practical and efficient mechanism in Canada to facilitate a First Nation or group of First Nations transitioning beyond the Indian Act when they are ready, willing, and able to do so. Some (particularly government officials) have challenged us that many First Nations, when pushed, do not appear to want to move out from under the Indian Act. To

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[1] The BCAFN Governance Toolkit is available online, downloadable from the BCAFN website, www.bcafn.ca.

which I would say this: they do. The problem with respect to the transition is the policy of the Crown in areas such as land tenure, taxation, and application of laws.

While this is an interesting conversation we will continue to have, if a First Nation or a group of First Nations want to comprehensively remove themselves from the clutches of the Indian Act, today they really only have three choices: go to court, negotiate, or simply act.

With respect to the practicality of the three choices ... as to the first, although the courts have said the inherent right to self-government exists, it is not possible for many reasons for all of our nations to go to court and test whether they have jurisdiction over a particular subject matter. With respect to the second choice, at the rate that self-government negotiations are going, it would take by some accounts more than 100 years for all First Nations to have in place rudimentary governance beyond the Indian Act. Which leaves the third – where many nations are heading as they want to have order in their community but where they take their chances of being challenged, politically, legally, and financially.

This is obviously not a good situation because every First Nation needs to have the certainty of legitimate and appropriate governance to take its rightful place within the federation. So creating a more efficient mechanism for the transition to self-government is a must, as has been recommended in numerous reports, commissions, and studies. With the support of the chiefs in British Columbia, I have made creating this mechanism my political priority as regional chief.

In the last Parliament, with the help of our friends in the senate, we drafted self-government recognition that was introduced as a public member's bill. Our bill, without government support, fell off the order paper. Our Self-Government Recognition Act would have provided that individual bands, either individually or in groups, could at their option develop their own self-government proposal – including that nation's constitution – and, once it was ratified by their citizens, that act would require Canada to recognize that nation's post–Indian Act government. There would be no interminable negotiations.

The powers of a "recognized First Nation" would be similar to the powers of the current self-governing First Nations where the law-making powers or jurisdictions could be drawn down by the nation over time. The legislation would also establish a new fiscal relationship between the recognized First Nation and the Crown; this relationship would include taxation. Our people are not averse to paying tax. What we are adverse to is paying tax to the wrong government or one that is not accountable or legitimate in the eyes of our citizens.

While we continue to develop and advance our own solutions, what is very troubling to us during this transition period is that Canada continues to redesign our governance for us with its own legislative agenda. While we can all appreciate that some First Nations leaders may want some of this legislation, the legislation is not, for the most part, permissive, and it is being imposed. This situation is regressive, dangerous, and inconsistent with the direction our county has been moving, politically and legally, since 1982.

The names of the government bills – the Family Homes on Reserves and Matrimonial Interests or Rights Act, An Act Respecting the Safety of Drinking Water on First Nation Lands, An Act to Enhance Financial Accountability and Transparency of First Nations – may sound like good, reasonable initiatives. On closer examination, however, they are simply more examples of Canada telling us how we ought to live. They do not account for the nature of the relationship, and they assume that the Crown can still legislate over us at will. I have confrontationally called this legislating "neo-colonial" when meeting both publically and privately with the prime minister, and I am deeply afraid that the government by its actions is only fuelling the fire of those Aboriginal leaders who have a more radical agenda. More importantly, such initiatives deny our governments the ability to determine our own policy with respect to our peoples' future.

In some respects, I can appreciate the government's dilemma. The tragedy of "wardship" is that in the absence of emancipation, the colonial authority is legally bound to act in what it believes is in the best interest of its subjects. This continuing situation – what I have called "fiduciary gridlock" – clouds the debate on implementing Aboriginal and treaty rights and building strong and appropriate First Nations governments. It clouds our work back home in our communities to develop the political support to let go of the Indian Act.

Nevertheless, I am confident that we are on our way to broader governance reform within our nations. Self-government recognition legislation would, I know, focus the energy on community development work back home. Our people can then undertake the hard work of building community trust and consensus and rebuilding governance in which citizens themselves are empowered to work through their own issues, find the solutions, and take responsibility for implementing them. We can aggregate and deal with issues such as shared territory and resource development as required.

The need to complete this work will become even more pressing when the first Aboriginal title declaration is granted by the courts. The next big Aboriginal title case, to be decided before the Supreme Court of Canada on 7 November 2013, had perhaps more potential than any other case to impact how our federation works. The *William* case,[2] named for Chief Roger William, the humble and unassuming leader of the Xeni Gwet'in, part of the Tsilhqot'in Nation, was the latest in the long

[2] On 26 June 2014, the Supreme Court of Canada handed down its decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. In doing so the court did in fact recognize that the scope and extent of Aboriginal title lands is territorial in nature, as was found by the trial judge, and not only in small spots, as had been argued by the Crown and found by the BC Court of Appeal. The decision also raised a number of questions regarding how Aboriginal title lands may be governed, and provided some important guidance respecting the division of powers that speaks to the evolution of multilevel governance and cooperative federalism within Canada.

line of BC Aboriginal title and rights cases. To those of us in the court, it seemed from the tough questioning of the Crown's lawyers that the justices had come to the conclusion that the trial judge had properly applied their test for proving title. At the appeal level, the court found that Vickers, the trial judge, had overstretched, and the court sided with the Crown's arguments that Aboriginal title was far more limited and only extended to intensively used sites – essentially only small spots or postage stamps such as salt licks or buffalo jumps.

What was most telling for me was that the bench, having apparently made up their mind on the larger track of the proven title area, was moving on to the next big question, which is "what laws will apply to the title lands so proven." The answer is, of course, multilevel governance. It will be a combination of laws in accordance with the constitutional division of powers and the rules of federalism as they are evolving. It will be a combination of Tsilhqot'in National Government law, provincial law, and federal law. And the relationship between laws will have to be addressed through reconciliation discussions among the parties.

In our self-government recognition legislation, we anticipated that at some point the courts would begin issuing declarations of Aboriginal title, and therefore included provisions to ensure that a recognized First Nation could include Aboriginal title lands. Canada has the power to make such legislation under Section 91(24) to address recognized Section 35 rights.

TOWARDS A RECONCILIATION POLICY FRAMEWORK FOR CANADA

So perhaps the first title declaration may be the impetus for true reconciliation. Let us hope so.

Through the Senior Oversight Committee and elsewhere, we are pushing the federal government to develop a new horizontal federal Reconciliation Framework to guide all federal departments, negotiators, and other officials tasked with reconciling with our nations. Such a framework would ensure coordination of federal policy in support of a number of reconciliation options, not just modern treaty-making.

Our aim is to have Canada eventually get rid of its outdated comprehensive claims policy altogether, the premise of which is fundamentally flawed, and to move away from the idea of so-called "final agreements." We are not making claims: we are reconciling. And the process of reconciliation is ongoing, not final.

A few more thoughts, finishing where I started …

Reconciling with Aboriginal Peoples will, I predict, help to change the way we approach government in Canada generally. We often remark, sometimes glibly, that Aboriginal government is a unique form of government, but it truly is. When we consider those Nations that are self-governing today, they typically have powers that are municipal, provincial, and federal, and some that are distinctly Indigenous.

It is a hybrid government. No other form of government within Canada has this range of multilevel powers – a blend of Section 91 and 92 of the Constitution Act forged and enhanced on the strength of Section 35. We are already seeing the impact of this in BC with the Nisga'a and at Westbank and Tsawwassen and looking to the North in the Yukon.

And speaking of the North, not only is the lawmaking power there unique but so too is the geographical distribution of that power. Historically, political power in Canada has rested in the South, where most people live and therefore vote. In this political model, rural Canada is akin to a colony of urban Canada – urban centres exploiting the vast resource wealth. Local communities with their limited governance in rural Canada have little influence over significant public policy decisions that affect them, and they do not keep much of the wealth generated from resource development. Most of the wealth heads south or further afield, in terms of both taxes generated and business profits. In the case of business profits, large amounts are heading overseas to the owners of the international companies that operate within our borders.

However, this situation is changing with re-emerging Aboriginal government – where there is real political power and real control by Aboriginal governments in their traditional territories, wherever located. Typically, people who are attached to, live on, and survive off the land they live on take a different perspective to land management and resource exploitation than those who do not or who are just passing through. This emerging political reality is already changing the way that land-use planning and decision-making are being conducted in my province. As a consequence, more control and more of the wealth are staying in rural BC – much of it controlled by First Nations governments and their business offshoots.

Regardless of whether I am right or wrong about my last two points, for me there is no question that Canada as a whole will be a better place when our peoples are full partners within the federation, and our distinct and rich cultures continue with an improved quality of life for our peoples, with practising and thriving cultures. It is our collective task and responsibility to promote this day. As has been said numerous times before, "We are all here to stay."

Gilakas'la.

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