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**Interests and the Public Interest in Law and Public Policy:
A Case Study in Aboriginal Policy in Canada**

by

Bentley G. Hicks, B.A.(Regina), M.A. (Ottawa)

A Thesis Submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Law
Carleton University
Ottawa, Ontario
September 12, 1995

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Abstract

This thesis is an examination of the current state of federal Aboriginal policy within Canada. It assesses the degree to which current Aboriginal policy initiatives take cognizance of broader non-Aboriginal concerns, and the extent to which these concerns might be considered expressions of a 'public interest.' The thesis analyzes Aboriginal self-government and comprehensive land claims policy in order to determine where and to what extent they make provision for the consideration of other interests that might bear on the implementation and application of these policies at the broader social level.

The thesis considers the crisis of legitimacy that is affecting all Aboriginal policy initiatives that relate to self-determination. Recent attempts by the federal government to reconcile underlying Aboriginal sentiments for self-determination with non-Aboriginal concerns regarding the political integrity of the established Canadian order have had, at best, modest success. New methods both of identifying and reconciling Aboriginal and non-Aboriginal interests must be found, if future Aboriginal policies are to ward off increased social and cultural isolation.

Thesis Acceptance Form

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The undersigned recommend to the Faculty of Graduate Studies
and Research acceptance of the thesis

**Interests and the Public Interest in Law and Public Policy: A Case Study in Aboriginal
Policy in Canada**

submitted by **Bentley G. Hicks**, B.A. (Regina) M.A. (Ottawa)

in partial fulfilment of the requirements for
the degree of Master of Arts

Thesis Supervisor

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Carleton University
September 22, 1995

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Most people do not undertake to write a thesis in any subject area before stopping (at least for a moment) to count the cost; but many of us fail to consider the costs that may accrue to others who will, both of choice and necessity become involved in the undertaking. For myself, it is these latter undertakings by others that have been most instrumental in bringing this project to this stage of completion, and to these people I owe a great debt of gratitude.

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NOTICE TO READER

At the time of completion of this thesis, the author was a policy analyst with the Department of Indian Affairs and Northern Development, Government of Canada.

The author affirms that this thesis is solely a work of individual research. It has not been reviewed or approved by the Department of Indian Affairs and Northern Development.

Except where otherwise noted, the analysis and conclusions presented herein are not intended to be statements of departmental policy; neither do they represent a position of the Government of Canada with respect to Aboriginal persons.

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Chapter 1 - The Public Interest and the Challenge of Aboriginal Interests

Aboriginal Self-Consciousness and Difficult Political Choices

...for better or for worse, every recognition of a right carries with it an altered sense of community and of what membership in the community entails.¹

On the eve of the 21st Century, Canada faces its future standing on the horns of a dilemma. This dilemma involves several discrete, yet interrelated issues. Perhaps most basic, there remain important, as yet unanswered questions concerning the extent to which the demands for individual and collective rights and interests can be reconciled within the confines of a modern, pluralistic state. These demands have continued unabated since the end of the Second World War, and their incessant satisfaction both calls into question the capacity of the state to deliver on the same and gives rise to calls for changes to the citizen-state relationship so as to make the demands less burdensome.² This, inexorably, leads to broader questions concerning the nature of the social and political community which we share (and which the state attempts to reinforce) and the interaction of this community with the cultural values and understandings that many of us would wish to protect and from which most of us derive our identities. Canada, being a nation of many immigrant cultures with a

¹ Alan Cairns and Cynthia Williams, "Constitutionalism, Citizenship and Society in Canada: An Overview," in Alan Cairns and Cynthia Williams, Research Coordinators, *Constitutionalism, Citizenship and Society in Canada*, volume 33 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985), p. 34.

² As evidenced by various contemporary theorists' calls for what might be considered "good citizenship," "active citizenship," or "responsible citizenship." On this see Will Kymlicka, *Recent Work in Citizenship Theory*, A Report Prepared for Corporate Policy and Research, Multiculturalism and Citizenship Canada, September 1992, p. 7.

comparatively short history of interaction to date, feels these problems acutely. Simply put, how can we continue to develop socially and politically and retain some measure of social and political cohesion, if such development means acknowledging and celebrating the cultural pluralism that seems to be both an irresistible and near universal impulse?

The push and pull of these seemingly contradictory forces is intensified and given immediate, substantive political currency as we consider the repeated and, to date, unsuccessful attempts to come to terms with what one writer has called the "colliding nationalisms"³ that make up our population. These nationalisms include Québec and English-speaking Canada (the 'founding cultures' of an earlier political ideology), the various immigrant groups who are now vociferously claiming that this two-nations theory is hopelessly outdated, and, finally, the Aboriginal peoples of Canada who, perhaps more than anyone else, have the strongest reasons for looking for "fresh beginnings and new hope"⁴ in the midst of the national crisis of ongoing collective identity.

Indeed, next to Québec, it is Canada's Aboriginal peoples who have devoted the most time and energy on the national political stage to capitalizing on this wave of seemingly inexorable social and cultural evolution in order to appropriate for themselves as firm a measure of protection and security for their identity and position

³ David Milne, "Whither Canadian Federalism? Alternative Constitutional Futures," in Michael Burgess and Alain-G. Gagnon, *Comparative Federalism and Federation: Competing Traditions and Future Directions* (Toronto: University of Toronto Press, 1993), p. 205.

⁴ Milne, "Whither Canadian Federalism?", p.217.

as Aboriginal people as can be maintained within the national political framework. In recent history, the most significant political manifestations of this desire for Aboriginal empowerment have been the extended - and largely unsuccessful - constitutional debates between Canada's First Ministers and Aboriginal representatives. The first round of these debates (which were, essentially, extended versions of executive federalism at work) took place between 1983 and 1987,⁵ in the immediate aftermath of constitutional patriation; the most recent, and more publically informed round of constitutional deliberations was finally laid to rest in 1992.⁶ Despite the fact that the sought after constitutional guarantees being negotiated never materialized when all was over and done with, the fact that the negotiations took place provided the Aboriginal population with a significant boost of political momentum. This boost has been enough to ensure that the political rallying cry of the new Aboriginal self-consciousness that was, even then, permeating all levels of contemporary Aboriginal life⁷ would be carried forward by the vast majority of Aboriginal people across the

⁵ More particularly, there were four First Minister's Constitutional Conferences on Aboriginal Matters, held between 1983 and 1987, three of which were required by the *Constitution Act, 1982*, as amended.

⁶ 1992 marks the defeat, by general referendum, of the proposed constitutional changes agreed to by the Premiers and the Prime Minister at Charlottetown (known as the *Consensus Report on the Constitution*, Charlottetown, August 28, 1992, Final Text). Had the *Consensus Report* been accepted, and the Constitution duly ratified thereafter, Aboriginal people would have seen the "inherent right of self-government within Canada" recognized within the Constitution, and would have, simultaneously, accepted the immediate application of the *Charter of Rights and Freedoms* to Aboriginal governments.

⁷ This is evident throughout the collected statements of Aboriginal representatives to the conference on Aboriginal self-determination held at the University of Toronto in 1990. On this, see Frank Cassidy, ed., *Aboriginal Self-Determination*, proceedings of a conference held September 30 - October 3, 1990 (Lantzville, B.C. and Halifax, N.S.: Oolichan Books and the Institute for Research on Public Policy, 1991), *passim*.

country both within and beyond the constitutional context.

In fact, as this self-consciousness is currently expressed and interpreted, it is often taken to mean nothing less than a comprehensive desire for collective empowerment: for recognition and autonomy as peoples and the power to control their own destinies. Such an interpretation - in some instance unintended, in some instances not - directly challenges the present Canadian legal-political order and the role that Aboriginal peoples currently play within this same order. Consequently, talk by Aboriginal people, or by governments, about having or exercising inherent Aboriginal rights or treaty rights, or native self-government - particularly when such talk seems to wilfully ignore or set aside the realities of post-contact European settlement and development⁸ - can be cause for uncertainty, mistrust and even resentment. Assertions of Aboriginal sovereignty, which in some instances appear to be buttressed by weapons and uniforms and in which armed confrontation between Aboriginals and non-Aboriginals appears inevitable (as at Oka)⁹, are causes for alarm

⁸ As an example of this type of approach, see the Statement of the NWT Treaty 8 Tribal Council to the First Constitutional Conference, Western NWT, January 18 22, 1995. Among other things, the Tribal Council stated that: (a) they would not participate in the constitutional development process because it is a violation of their treaty with the Crown, (b) they are the legal owners of their land, and would not condone persons with no interest in their lands to determine their future, and (c) in their opinion, the Minister of Indian Affairs and Northern Development was attempting to destroy the trust relationship between the federal government and the Treaty 8 Dene through "a rather clumsy and ill conceived method of trying to establish a government upon our lands without our consent." Constitutional Development Steering Committee, *Conference Report: First Constitutional Conference, Western NWT, March 1994* (Yellowknife, NT: Constitutional Development Steering Committee, 1995), pp. 12-13.

⁹ "Before July 11, 1990, the use of arms by First Nations people in the contemporary struggle for land rights was almost unprecedented. Only the future will reveal the significance of the past summer in the larger national context of indigenous peoples' rights. However, that future is fast approaching." Ken Huges, M.P., Chair, *The Summer of 1990: Fifth Report of the Standing Committee on Aboriginal Affairs*, May, 1991 (Ottawa: House of Commons No. 59, 1991), p. 29. The central issue over which the Oka crisis began that summer - control of the land that the

Research conducted on behalf of the Royal Commission on the Economic Union and Development Prospects for Canada (hereinafter referred to as the 'Macdonald Commission'), whether intended or not, lends credence to some of these popular concerns on an analytical plane, when it declares that, "...there is a clear conflict between certain versions of the Aboriginal claim for self-government and the basic status of citizenship as a bundle of rights and obligations held by all Canadians."¹⁰ There is, at the least, an implication that the politicization of Aboriginal self-consciousness, under the right conditions, might prove to be one of our nation's limits to its capacity to integrate the tendency towards universalization of individual rights claims with the collective aspirations of those various sub-groups that currently inhabit the Canadian polity, while attempting to ensure that this latter polity remains viable in the future.

One comes to understand the potential for such limits when we consider how often Aboriginal demands are publically articulated and internalized with the dominant socio-political milieu, for they are often interpreted very differently than their Aboriginal authors intended according to the makeup and sentiments of the non-Aboriginal audience listening to them. Some of the latter see them as demands for special rights and special recognition over and above that which is already enjoyed by citizens generally, the acknowledgement of which would make an already precariously balanced confederation even more unstable and prone to future fragmentation. Others

Mohawks have, for so long, occupied - remains legally unresolved as of the time of writing.

¹⁰ Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 30.

understand them simply as a species of those attempts by various individuals or groups to secure their interests by appealing to governments with, "...increasing frequency for the satisfaction of an ever-expanding array of wants and desires,"¹¹ which interests cannot ultimately be satisfied regardless of how far the state is prepared to go in accomodating them. Neither interpretation, within its own frame of reference, is necessarily invalid, but in both cases the historical motivations and grievances of the minority are submerged within the political fora of the majority, without due consideration of their importance, often in the name of some sort of equality of rights or benefits for all.¹²

Because of these barriers, and despite various political commitments that have been made during the past several years, addressing Aboriginal concerns in a meaningful way is not an easy undertaking. The likelihood that at least some of these concerns may not even be susceptible to resolution by adjustments to the existing legal-political order, the mandate of the current federal government notwithstanding, is cause for even greater concern, since one possible outcome of a political stalemate is that uncertain relations and an uneasy peace between the Aboriginal and non-Aboriginal population will continue in the immediate future. In fact, given the current realities of fiscal constraint, a clear reticence of the current government towards constitutional and other such fundamental political discussions which might serve to

¹¹ Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 31.

¹² Such exhortations for equality of status between Aboriginals and non-Aboriginals are particularly strong in western Canada, where the magnitude of potential land claims yet to be settled and the concomitant loss of taxation revenue to the various provinces are both significant

accelerate the movement towards a resolution,¹³ and the unique, historical relationship that Aboriginal people have with Ottawa, there is a real possibility that the unsatisfied demands of this particular people will be part of the political landscape for several years, or even decades.

On the other hand, it is just as much a political possibility that this explosion of unsatisfied self-awareness may well force some Aboriginal people to make hard choices on their own about their individual and collective identities and the ways in which they are able to see themselves as members of a larger nation-state - or if, indeed, they are members at all.¹⁴ Should these types of choices be made, they will force the rest of the country into a reexamination of the bases for its social and political identity, if for no other reason than to be in a better position to respond to the reality of a new Aboriginal political order which may well come into being through continued, short-term inaction. In either of these scenarios, there is a high degree of probability that reactive politics will be the order of the day.

At the end of the day, there is no guarantee that the existing social and political order will be able to satisfy the particular social and political needs that Aboriginal

¹³ This reticence has repeatedly been reaffirmed by the current Minister of Indian Affairs and Northern Development, Ron Irwin, as evidenced by his speech to the Treaty Negotiation Advisory Committee on March 31, 1995. In this same speech, the Minister made it clear that recognition of the inherent right to self-government, "does not mean Aboriginal People are sovereign in the international sense."

¹⁴ "We entered the Charlottetown arena with open hearts and open minds....Now that we have been rejected in the area of compromise, we now take the next and perhaps more hazardous step. We shall act without the permission of the Constitution of this country." Presentation by Chief Roger Augustine, President of the Union of New Brunswick Indians, in Royal Commission on Aboriginal Peoples, *Overview of the Second Round*, Public Hearings, prepared for the Commission by Michael Cassidy, Ginger Group Consultants, April 1993 (Ottawa: Minister of Supply and Services, 1993), p. 5.

people have without incurring numerous, possibly fundamental changes in the process.¹⁵ It is even possible that fundamental changes, if they are made, will simply not be enough for some Aboriginal people. These are political realities that cannot necessarily be anticipated, and which must be faced if and when they are encountered. Until and unless this happens, however, Aboriginal policy development must proceed: both because of the hope that an optimal solution to the dilemma can be found and because the history of Aboriginal-state relations within Canada requires that new and better (even if provisional) approaches to the relationship be articulated. If nothing else, an approach to a new, shared social and political arrangement which builds upon a set of discernable common interests that both Aboriginals and non-Aboriginals can agree to and willingly be part of must be attempted, even if it is never completed or implemented, lest we admit to complete decisional paralysis and the utter bankruptcy of rational policy making in general.¹⁶

¹⁵ A particularly useful summary of both process related and institutional related changes that might be considered in the attempt to involve the Aboriginal peoples of Canada in constitutional reform (beyond that which has already been attempted) can be found in David C. Hawkes and Bradford W. Morse, "Alternative Methods for Aboriginal Participation in Processes of Constitutional Reform," in Ronald L. Watts and Douglas M. Brown, eds., *Options for A New Canada* (Toronto: University of Toronto Press, 1991), pp. 163-187. However, as they note at the end of their paper (p. 187), substantive constitutional changes regarding Aboriginal issues must be followed by an equally decisive recognition that, "...aboriginal peoples require a permanent and ongoing role in national decision-making, and...this can only be achieved through structural reform of our governing institutions."

¹⁶ I do not disagree with Stephen Brook's observation that "fragmented decision-making and incremental change," of the kind often described by various types of pluralist-incrementalist models of public policy development, is often "a much closer characterization of the reality" of the policy development that takes place within the modern state (Stephen Brooks, *Public Policy in Canada* (Toronto: McClelland & Stewart Inc., 1989), p. 67). Indeed, because of the sheer number of decisional variables accompanying most political issues, it is highly likely that ongoing Aboriginal policy development across various of its areas (such as future amendments to the *Indian Act* recently proposed by the Minister of Indian Affairs and Northern Development) will proceed along such incremental, developmental lines. At the same time, and as we shall see below, many of the

The Way Ahead

Within the confines of the problematic that we have outlined above, it would appear that the necessary first step in the development of any viable political solution to Aboriginal needs that might find a home within the broader Canadian political order is to try and identify the extent to which current Aboriginal policy initiatives can be said to manifest common understandings and acceptance across both the Aboriginal and non-Aboriginal publics. This exercise, it is hoped, will help to disclose the extent to which, currently, there are any common or shared interests are maintained between these publics that might have an impact on their continued coexistence.

As part of this undertaking, it is assumed at the outset that viable common interests must be capable of sustaining a structured, long-term relationship that will allow both groups to benefit from the relationship in some way. It would seem self-evident that, if no such common interests exist or can be developed, there would no point in attempting a democratic ordering that would have, amongst its goals, the inclusion of those who otherwise have no reason to be together in the first place. Indeed, to do otherwise would be to do a disservice to each people's legitimacy as a people, and would deny each's unique capacity to develop and even transcend their

defining parameters of the current Aboriginal-state relationship were policy decisions with strategic implications in their own right: undertakings such as the codification of Indian-state relations through the same *Indian Act* mentioned above; the taking over of treaty-making from the United Kingdom at the time of Confederation; the commitment to settle Aboriginal land claims in 1973 and the enshrining of Aboriginal Rights in the *Constitution Act, 1982*. Such decisions, when taken and implemented, impel both state and society in new directions as much as represent the resultant of social and political forces at the point at which they were made. To this extent, they are evidence of a rationality, and a purpose, that is greater than the sum of their immediate political parts.

own history on their own terms.¹⁷

At the same time, however, it is clear from our introduction that the nature of the interests that would be shared by the parties must be adaptable to the demands of mutual coexistence that a democratic polity imposes on its members. In other words, they cannot simply be those kinds of interests, whether in the short or the long-term, whose satisfaction provides individual and independent benefits to each of the parties, as though a contractual obligation is being discharged and nothing more. They would have to be interests that contribute to what John Bell calls the "...cohesion or development of the community":¹⁸ that help to develop and sustain something which is larger than each of the groups that are contributing parties. They must serve to inculcate a sense of responsibility in each party to the other that is able to transcend the demand for the recognition of rights by each party that can, if left unchecked, pull the parties apart. In a broad sense, this can be considered both the promise and the demand that living in a democratic society imposes upon us, for as Marcus Raskin puts it:

By definition, modern democracy is committed to all people being active subjects of their own history. Democratic adherents accept the potentiality and the common sense of all people. The result is that a

¹⁷ Of course, this argument presupposes that both Aborigines and non-aborigines, as collectives, have the capacity to freely opt out of any political arrangement that might not suit them, which is, essentially, to grant the strong case for self-determination. However, I use it here solely as a means to highlight one of the minimum conditions for continuing with the investigation

¹⁸ John Bell, "Public Interest: Policy or Principle?", in Roger Brownsword, ed., *Law and the Public Interest*, Proceedings of the 1992 ALSP Conference (Stuttgart: Franz Steiner Verlag, 1993), p. 30.

common good may be forged.¹⁹

Finally, these interests, whatever their origin, must enjoy public sanction within their respective populations. By 'public sanction,' I mean that they find their legitimacy squarely in the public domain, sculpted both by the demands of formal analysis and justification and by the interaction of the rhetoric of argument and counter-argument that advocates and opponents might produce.²⁰ Since the raw materials for forging any contemporary public policy are a combination of individual and collective interests, political ideas, political and administrative institutions, and significant social, economic, and political events, the result is not simply a mixture of these, but something more. Moreover, given that its development will also be influenced by existing political institutions and processes that have statutory or constitutional standing, the outcomes that are acceptable to the public are additionally influenced by legal habits and legally sanctioned assumptions and rules of what can and cannot be legitimately achieved as a public policy outcome. In this sense, my undertaking is as much a search for those processes, events, and indicators that can claim to confer public sanction on the part of both Aboriginals and non-Aboriginals as much as anything else.

¹⁹ Marcus G. Raskin, *The Common Good: Its Politics, Policies and Philosophy* (New York: Routledge & Kegan Paul, 1986), p. 37.

²⁰ Giandomenico Majone, *Evidence, Argument and Persuasion in the Policy Process* (New Haven: Yale University Press, 1989), pp. 145ff. Following Majone, "rhetoric" is not used here in a disparaging sense, but refers to the craft of argumentation. The assertion of the need for the 'public' development of policies or a policy approach, which may seem self-evident, is a current issue within the Aboriginal policy domain in light of the recent development and publication of the federal government's new policy on the recognition and implementation of the Inherent Right of Self-Government. On this see footnote 216 below, and accompanying main text.

Given the range of analytical caveats that have been highlighted above, it is tempting to suggest that what is needed, more than anything else at the moment, is a rethinking of basic principles. Perhaps a new, comprehensive articulation of clear general guidelines for yet another round of wide-ranging (perhaps constitutionally directed) Aboriginal-state negotiations would start us on the path towards a universal set of interests that both sides could live with. Alternatively, it may be more appropriate, and realistic, to forego the idea of such a wide-ranging agreement and concentrate instead on forging new understandings and commitments at local and regional levels: levels at which the real differences between coexisting communities are acknowledged but through which (perhaps) these communities can find other means by which coexistence is maintained.²¹ Both alternatives are possible, and both would likely achieve some measure of success. I believe, however, that neither in and of themselves would adequately capture the nuances of Aboriginal identity and Aboriginal political sentiment that must yet be met, so that Aboriginal people generally can make the Canadian political 'house' their political 'home.' One must attempt to integrate both approaches to the unique circumstances and place of Aboriginal people within our national order, while overcoming the arbitrary strictures and dependencies that a history of many centuries of uneasy coexistence together has produced.

Having said this, it is, therefore, most appropriate that we examine both the history of Aboriginal policy development and implementation in Canada and some of

²¹ This is to draw upon Charles Taylor's suggestion that we cultivate what he calls a, "...second level or 'deep' diversity, where a plurality of ways of belonging would...be acknowledged and accepted." Charles Taylor, "Shared and Divergent Values," in Watt and Brown, *Options for A New Canada*, pp. 75-76.

the more recent initiatives in this policy domain in order to begin exploring these nuances and this sentiment. More particularly, we need to consider their actual and potential impact on our (ie., the non-Aboriginal) struggle to demarcate ways of belonging and moving ahead for the common good, and the degree to which the common good, when it has been invoked, actually encompassed Aboriginal needs and interests. An analysis of this relationship, in turn, will help to shed light on the debate concerning Aboriginal rights and citizen's rights, the nature of the relationship between the rights' and the 'obligations' of citizens within the contemporary, democratic state, and the ways in which rights are balanced off against interests within the culturally pluralistic political environment that is ours.

As subject matter for our investigation, current governmental responses to the call for recognizing Aboriginal self-determination, together with new governmental initiatives in negotiating self-government and more settled process for negotiating land claims settlements, give us insight into the various publics who have both rights and interests that need to be considered in the long-term. At the same time, an examination of the contexts for and outputs of these policy areas also give us a sense of how these publics are already undergoing redefinition and transformation as implementation within each policy area proceeds. Indeed, self government proposals and land claim settlements will establish new boundaries, processes and administrative structures within which public interest questions will be aired and settled. As such, they bring an entirely new dimension to such legally animated questions as: legitimacy; accessibility; rights and interests; public participation, and so on. In the midst of this

change and development, however, questions remain: in particular, will these changes mean increased legitimacy of action for the public good, and to which public or publics - will the more tangible benefits of the policy accrue?

The initiatives that we will examine, which clearly have a life of their own within the federal system, form an appropriate analytical counterpoint to the broader desire of Canada's Aboriginal peoples to have and to exercise self-determination. As we shall see in more detail later on, self-determination, from a policy-maker's perspective, is an extremely volatile concept - one that is not, in fact, used as extensively in the political discourse of Aboriginal representatives as others that are related to it,²² but which carries with it profound implications for Aboriginal policy development across the entire spectrum of Aboriginal issues currently being debated. As an example of what we might call the ultimate rights claim, the call for self-determination also represents a fundamental limit: an interest that may not be susceptible to satisfaction but for which the attempt to provide satisfaction in some form must be made in any case. Equally as important, however, the satisfaction of such an interest could, theoretically, undermine the current legal and constitutional foundations of the Canadian policy process,²³ and thereby render moot the Canadian

²² The most common term in current use to express Aboriginal self-determination, on the part of Aboriginals, is "the inherent right of self government." Depending upon the context, self-determination can also mean the sovereignty of First Nations and/or independence from Canada. On this, see Kenneth J. Tyler, "Another Opinion: A Critique of the Paper Prepared by the Royal Commission on Aboriginal Peoples Entitled: 'Partners in Confederation'," in *The Inherent Right of Aboriginal Self-Government*, volume 2, Continuing Legal Education Program, Annual Meeting, 1994, pp. 6ff.

²³ Among the principles that would be breached would be the paramountcy of the Canadian state. This might not, however, be either impossible or undesirable. On this see, for example, Colin Scott, et. al., *Custom, Tradition, and Aboriginal Self-Government Within the Context of Canadian*

state's capacity to recognize or honour any other rights or interests that may have been achieved. As we examine the spectrum of current policy, whose potential for change is clearly less than this, we do well to keep this broader challenge in mind.

Chapter 2 - Aboriginal Interests and the Current Policy Context

Conflicting Identities and the Demands of Citizenship

People are owed respect as citizens and as members of cultural communities. In many situations, the two are perfectly compatible, and in fact may coincide. But in culturally plural societies, differential citizenship rights may be needed to protect a cultural community from unwanted disintegration. If so, then the demands of citizenship and cultural membership pull in different directions.²⁴

In their most basic sense, the satisfaction of interests and the demarcation of rights both require a social and a political context for their realization. Neither rights nor interests - be they the concerns of individuals or communities - make any sense outside of the intersubjective horizon that links people to one another and to other peoples with whom they might have various forms of intercourse. Staking claims about our particular needs marks us as who we are and how it is that we are both related to and yet different from others; rights and interests are currencies that establish the particulars of the identity and the difference at any given time.

At least one aspect of political existence over which these currencies have been traded and through which they have found something akin to a 'cash value' is the notion of citizenship: that state of being that identifies one's membership in a political community, with all of the attendant rights and obligations that this membership entails.²⁵ In determining one's citizenship, the claims for rights and interests

²⁴ Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989), pp 151-152.

²⁵ On the notion of citizenship as 'belonging,' see J. Rick Ponting, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986), p. 235; Noel Lvon, *Aboriginal Self-Government: Rights of Citizenship and Access to Government Services* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1984), pp. 6-7. The constitutional evolution of

encounter the consequences of making those rights and interests real possibilities - for large segments of the population, if not the entire political community. As such, we often see instances, sometimes incremental and usually highly visible, of people asserting or appropriating new rights (whether through the political or legal infrastructure) which the state is then compelled to recognize and adjust to. At the same time, even as these new (or improved) rights become part of the social order, there are, very often, mitigating influences that assert themselves through the everyday course of social and political interaction and which serve to ensure that the gains that are realized by the acquisition of new rights are not obtained at the expense of the stability of the wider political community in which these rights will be actualized and, hopefully, find their fullest expression.²⁶ This political dialectic of increasing autonomy within increasing responsibility is a dominant aspect of contemporary democratic life and, in particular, the interaction between citizen and state.

Of course, this process is neither uniform nor even strictly evolutionary. Indeed, the question of exactly what citizenship now means in an increasingly multicultural society like Canada is an extremely difficult question to answer. As Will Kymlicka intimates above, citizenship as the definitive mark of the relationship between a person

Canadian citizenship is an important theme in Alan Cairns's analysis of constitutional politics up to Meech Lake. On this, see Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal and Kingston: McGill-Queen's University Press, 1992), *passim*.

²⁶ "In its best sense, citizenship is that type of participation in the life of a nation which allows the person to fulfill his or her natural attributes in social, economic and political benefit with others. It guards against what the ancient Greeks termed idiocy. They meant by idiocy a person who was without citizenship and who, therefore, had no responsibilities, rights or political power to share his or her own destiny, or that of the nation." Raskin, *The Common Good*, pp. 296-297.

(or persons) and the state to which these persons attach themselves will not necessarily claim the measure of exclusivity or priority over other relationships that previous generations of national apologists may well have taken for granted. Put another way, citizenship, long taken to symbolize the congruence of a person's identity with that of the state in which he or she resides, is perhaps better understood in the contemporary period as the locus of a type of social and political 'work' under construction: something open-ended and yet to be completed, and which, when completed, may still have to share the field with other allegiances that are seen both to confer benefits and impose obligations at the same time.

Nonetheless, citizenship still plays an important, normative role in the maintenance of social and political values. Within a multicultural milieu that acknowledges and embraces the value of cultural antecedents to current identities, tackling the citizenship project means, in some way, developing and legitimizing new boundaries both for individual and collective self-awareness. As evidenced by the fact that their relationship to the Canadian state was given a measure of explicit affirmation when the Constitution was patriated in 1982, it can justly be said that to be an Aboriginal person in Canada at the present time is to be engaged in an exercise both of redefining one's citizenship - one's place of belonging - and of defining one's rights and obligations relative to that citizenship so redefined, all the while continuing to live in the midst of non-Aboriginally developed definitions that still constrain both his identity and his opportunities. Within the Aboriginal population, this exercise is currently being pursued primarily at the group level, as Aboriginal people strive to be

recognized as a distinct, founding culture with a distinct historical and legal relationship to the Canadian state on the basis of this culture.²⁷ Ultimately, the hope is that there will be a return to Aboriginal control over Aboriginal needs and concerns, based on clear and mutually-agreed-to undertakings between Canada and Aboriginal groups that acknowledge both the distinctiveness of 'Aboriginality' itself and the priority of this prior relationship that Aboriginality necessarily implies.²⁸

At the national level, therefore, the ongoing tension between Aboriginal people in Canada and the rest of the country reflects a fundamental problem with the nature of Canadian citizenship and the degree to which that citizenship might be acknowledged and internalized by Aboriginal and non-Aboriginal alike. Indeed, in the face of some of the harder policy choices that Aboriginal interests are requiring from government - particularly those that express the nature and the commitment of Aboriginals to the pursuit of self-determination - it may be necessary to fundamentally rethink what it is that we mean when we speak about citizenship and the ways in which citizenship is both taken up and affirmed. It may be necessary to reconceive how it is that rights, interests and obligations can be focused through a political

²⁷ As various writers have observed (eg., Lyon, *Aboriginal Self-Government*, p. 4), it is misleading to speak of a single, homogenous Aboriginal culture. There are considerable differences between, for example, the Inuit and the southern Indians and Métis, and between Plains Indians and Coastal Indians. To this extent, it is generally asserted that processes for reclaiming identities and establishing new citizenships must originate in and be primarily driven by local aboriginal bands and communities.

²⁸ "The principle of Aboriginality may be defined in essentially political terms, as a statement of power that acknowledges the special status of the original occupants of a territory and aims at restoring rights and entitlements that flow from recognition of this unique relationship with the state. . . ." Augie Fleras and Jean Leonard Elliot' *The 'Nations Within': Aboriginal-State Relations in Canada, the United States and New Zealand* (Toronto: Oxford University Press, 1992), p. 29.

concept that presupposes some reduction of these aspects of political existence to a common denominator in the first place. The Nisga'a First Nation of B.C.'s statement on self-determination captures this quandary quite nicely:

...we as a distinct people and as citizens, must be allowed to face the difficulties and find the answers, answers that can only be found by determining our own social, economic and political participation in Canadian life.²⁹

If, as the quote suggests, the Aboriginal struggle is in large part an attempt to redefine the nature and extent of the participation of one group of people within the life and work and goals of another, then it would seem that there is some sort of obligation on the part of both groups to lay out more clearly just what the expectations and assumptions of the other's 'whole' is. This assertion assumes, of course, that the act of participation by Aboriginal people in the Canadian experiment, no less than the participation of any other distinct peoples, itself has an impact on all the participant's identities as they make the journey together: an impact that cannot necessarily be captured by judicial fiat (or even, necessarily, by a constitutional amendments) but which might be uncovered and articulated through a process of reasoned and reasonable political exchange between governments and Aboriginal people.³⁰ While this impact is, at present, felt mainly in defined policy areas such as claims implementation and self-government/inherent right negotiations, it will likely not

²⁹ Nisga'a Declaration, in Ken Coates, ed., *Aboriginal Land Claims in Canada: A Regional Perspective* (Toronto: Copp Clark Pitman, 1992), p. 31.

³⁰ Keith Penner, "Their Own Place: The Case for a Distinct Order of Indian First Nation Government in Canada," in J. Anthony Long and Menno Boldt, eds., *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988), p. 31.

end there, but will extend to the broad gamut of governmental responsibilities and institutions that make up the Canadian federation.³¹

However, in suggesting that citizenship within a common socio-political framework might be negotiable between different cultures, we do well not to lose sight of the discontinuities that exist between cultures that may impose limits to our ability to redefine just what citizenship might entail. More particularly, we have to have some sense of the range of ways in which Aboriginal people articulate both their assessments of the current legal-political arrangements between Aboriginals and the rest of Canada and their desires for change. Amongst some Aboriginal groups and their leadership, where the ideology of what has been called "cultural nationalism" is particularly strident,³² there is a strong and vocal sense of profound and potentially irreparable separation between Aboriginal and non-Aboriginal culture. Publically, these groups assert that recent and continued political attempts to legitimize Aboriginal demands through the existing constitutional-political order are hopelessly grounded in a social-cultural environment that is, at best, inimical to Aboriginal interests and, at worst, fundamentally incompatible with politically 'strong' notions of Aboriginal sovereignty and self-determination that such groups remain intent on publically

³¹ Penner, "Their Own Place," in Long and Boldt, *Governments in Conflict*, pp. 33-34.

³² Adrian Tanner, "Introduction: Canadian Indians and the Politics of Dependency," in Adrian Tanner, ed., *The Politics of Indianness: Case Studies of Native Ethnopolitics in Canada*, Social and Economic Papers No. 12 (St. John's, NF: Institute of Social and Economic Research, Memorial University of Newfoundland, 1983), p. 13. Tanner observes that this kind of nationalism does not necessarily aim for complete independence from the existing nation-state, but is part of the larger complaint of territorial dispossession.

advancing.³³

For many of these Aboriginal people, who are on the one end of the Aboriginal political spectrum (and for many non-Aboriginals who are sympathetic to their concerns), the history of Aboriginal policy development in Canada is a case study in the forced adaptation of Aboriginal interests and institutions to non-Aboriginal norms, as well as the more or less systematic elimination of any Aboriginal cultural distinctiveness as a component of the broader policy environment.³⁴ The answer to this fundamental injustice, to their minds, is not to attempt to build bridges between Aboriginal and non-Aboriginal culture. It is, rather, to leave the gulf between the cultures be while encouraging Aboriginal communities to pursue their own path to self-determination independent of any other Canadian considerations.³⁵ From this perspective, and with respect to current relationships between Aboriginals and governments in Canada, the fact that, "...the potential of Canadian citizenship has not

³³ For a survey of the range of attitudes on this, see the various statements by Aboriginal leaders in Cassidy, *Aboriginal Self-Determination*, especially the section entitled "Sources of Power: What is First Nations Self-Government?," pp. 33-60.

³⁴ Colin H. Scott, "Custom, Tradition, and the Politics of Culture: Aboriginal Self-Government in Canada," in Noel Dyck and James B. Waldram, eds., *Anthropology, Public Policy, and Native Peoples in Canada* (Montreal and Kingston: McGill-Queen's University Press, 1993), p. 328.

³⁵ Even high-profile inquiries such as the Royal Commission on Aboriginal Peoples have not been entirely immune from this approach, with its suggestion that there are "...persuasive reasons for thinking that in core areas Aboriginal peoples may implement their right of self-government at their own initiative, without the concurrence of federal and provincial authorities." Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group, 1993), p. 47.

been realized,"³⁶ is not a cause for lament, but is most appropriately an acknowledgement of what can never be.

Admittedly, this perspective represents the extreme end of the spectrum of Aboriginal political sentiment. There is another perspective, much more common and much more vocal, that asserts that Aboriginals are and want to be part of the Canadian landscape, but in a special and unique way. This perspective advances the protection of specific rights (many non-Aboriginals would say privileges) under the existing constitutional, legislative and political regimes of Canada, in addition to the rights guarantees available to all other Canadians by virtue of their citizenship.³⁷ The list of these specific rights has included: the desire for constitutional entrenchment of self government (and, most recently, the recognition of the right to self-government as an 'inherent' right); the maintenance of the *Indian Act* unless and until a more protective alternative is developed; the strengthening and enforcement of land claims and self-government agreements; the protection of treaty rights; enhanced respect for the fiduciary obligations of the Crown, and so on. Far from being claims that originate

³⁶ Roger Gibbins and J. Rick Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada," in Alan Cairns and Cynthia Williams, eds., *The Politics of Gender, Ethnicity and Language in Canada*, vol. 34 of the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press; Minister of Supply and Services Canada, 1986), p. 173.

³⁷ This is the so-called "citizens plus" model of Aboriginal rights, which was first advanced in the *Survey of the Contemporary Indians of Canada* (1966) - a report of the Department of Indian Affairs and Northern Development, researched and edited by H.B. Hawthorn (the "Hawthorn Report"). The concept was later picked up and elaborated on by the Indian Association of Alberta in response to the 1969 federal White Paper on Indian Policy, which will be discussed in more detail below. For a summary of the Hawthorn Report's recommendations, see Royal Commission on Aboriginal Peoples, *Public Policy and Aboriginal Peoples 1965-1992*, volume 2, Summaries of Reports by Federal Bodies and Aboriginal Organizations (Ottawa: Minister of Supply and Services Canada, 1994), pp. 7-12.

outside of any historical precedent, these demands are almost always, to some degree, predicated on the "special relationship" that Aboriginal people assert exists between themselves and the Crown: a relationship that has its origins in the earliest contact between Aboriginal people and European explorers, and which is now understood to animate everything from the historical treaties to contemporary constitutional interpretation.³⁸ There is, in short, a not insignificant desire to continue advocating for a distinctive Aboriginal place within the non-Aboriginal culture. Such an arrangement will help both to achieve self-determination and the equality of the cultures and at the same time will continue to legitimize preferential treatment of the Aboriginal culture by the non-Aboriginal one. This two-pronged approach, capturing the best of both worlds, is stated aptly by the Gitksan-Wet'suwet'en of British Columbia: "The way of life of our people must be recognized, protected and fostered by the Governments of Canada and the Laws of Canada. Only then will we be able to participate fully in Canadian society."³⁹

While the more extreme views on the divide between the two cultures would appear to discountenance any need for discussion or debate about the possible meanings of citizenship that we might wish to consider, they do, in fact have an impact on the non-Aboriginal community as it struggles to come to social and political accommodation with those Aboriginals who appear to want to continue to make the Canadian experiment work. They force the non-Aboriginal majority into asking more

³⁸ I will discuss the legal and political foundations of this relationship in more detail in chapter 4, below.

³⁹ Gitksan-Carrier Declaration, in Coates, *Aboriginal Land Claims in Canada*, p. 32.

clearly where both the individual and collective boundaries of a new citizenship might be and how those boundaries might be identified and established. Moreover, in forcing these questions, they highlight the much larger questions of the legitimacy of discrete community identities within an overarching political order and the potential implications of shared citizenship between these communities under this same order. It remains to be seen whether these very complex questions of substance and process at multiple political levels can be successfully dealt with in the long term.

Unequal Opportunity and Ambivalent Policy Commitments

A brief sketch of the history of Aboriginal/non-Aboriginal relations, and cursory consideration of both attitudes towards and policy initiatives on behalf of Aboriginal people in Canada would initially suggest that a productive political partnership between the two cultures in the future, let alone a shared understanding of citizenship, is still far from certain. In fact, when we consider the potential merits to Aboriginal people of maintaining common bonds and a shared identity with the non-Aboriginal community that displaced them over the course of several hundred years, there appears to be little reason for them to be interested in such an undertaking.

To begin with, one can well point to the ever-present reality of the disadvantaged socio-economic status of the vast majority of the Aboriginal population, and their continuing struggle to rise out of the basement of the Canadian social and economic hierarchy. As far as their quality of life and their share of the larger community's wealth goes, Aboriginal people have been effectively marginalized from

any effective or meaningful participation in the developing Canadian socio-economic milieu since the advent of colonial expansion and mercantile development in the 17th and 18th centuries and the diminished need of the European colonists for trade or contact with Aboriginals. As a result, they have largely been deprived of their means of economic support, and their level of social and economic well being as a group relative to the rest of the Canadian population is evidence of this fact.⁴⁰ Basic living conditions, particularly for Aboriginals living on reserves, have been described in many instances as equivalent to those in third world countries, with extensive overcrowding and unreliable access to basic services such as sewers, water and electricity.⁴¹ Economically, the average income for Aboriginals is about half the Canadian average, and overall on-reserve dependence on welfare or unemployment insurance as a supplement to earned income is anywhere from 40% to over 90% of the local reserve

⁴⁰ For a concise, one-page comparative summary of Indian and national social, economic and other conditions circa 1980 see Keith Penner, M.P., Chair, *Minutes of Proceedings of the Special Committee on Indian Self-Government*, Issue No. 40 (Ottawa: Speaker of the House of Commons, 1983), p. 15. In addition to annual compilations of basic Aboriginal socio-economic indicators compiled by the federal government, there have been numerous reports and commissions of inquiry conducted over the past twenty-five years on selected Aboriginal socio-economic and other issues. A convenient summary of many of these reports has been produced by the School of Public Administration at Carleton University (Royal Commission on Aboriginal Peoples, *Public Policy and Aboriginal Peoples 1965-1992*, volume 2, "Summaries of Reports by Federal Bodies and Aboriginal Organizations," and volume 3, "Summaries of Reports by Provincial and Territorial Bodies and Other Organizations" (Ottawa: Minister of Supply and Services, 1994)).

⁴¹ Penner, *Indian Self-Government in Canada*, p. 15; Fleras and Elliott, *The Nations Within*, p. 16. While, according to Departmental statistics, slightly less than half (45.7%) of all on-reserve housing units were characterized as "adequate" in 1993/1994, 85.6% of all such housing units had adequate sewage disposal and 92.1% had adequate water supply. On this see Minister of Indian Affairs and Northern Development, *Basic Departmental Data - 1994* (Ottawa: Minister of Government Services Canada, 1994), pp. 70-73.

population.⁴² Attempts to improve the overall levels of Aboriginal education have met with little success, and less than 25% of Aboriginal students manage to obtain their high-school diploma.⁴³ Finally, and perhaps most significantly, the Aboriginal population has far more than its share of the most disturbing social statistics: five times the national rate of their children in foster care; three times the national rate of accidental or violent deaths; and anywhere from three to six times the national rate of suicides, depending on age group.⁴⁴

While there is no doubt that the statistics, in themselves, paint a picture of a people clearly at the bottom of the socio-economic order and, in many respects, outside of the benefits that their relationship to Canada was supposed to provide, there is a not inconsequential debate amongst many commentators as to the causal relationship between the fact of the statistics and past and present approaches to Aboriginal policy development. Many have argued that these socio-economic realities

⁴² Penner, *Indian Self-Government in Canada*, p. 15; Fleras and Elliott, *The Nations Within*, p. 16. By way of caveat, these economic indicators need to be viewed alongside overall federal expenditures averaging just over \$12, 400 per capita on behalf of each status Indian living on-reserve as of 1992-1993, an amount which has increased by an average of 7.5 percent annually since the mid 1970's. Moreover, in constant dollars, federal spending on all Aboriginal programs has increased steadily at a rate of 5.4 percent annually since 1975. Adjusting for inflation, federal spending on Aboriginal programs is now more than double what it was twenty years ago. On this see Minister of Indian Affairs and Northern Development, *Growth in Federal Expenditures on Aboriginal Peoples* (Ottawa: DIAND, 1993), p. i. Federal spending on Aboriginal programs will continue to see growth (albeit more modest) even with the release of the latest federal budget. This budget imposed huge budgetary reductions on a number of federal departments and programs, but left Indian Affairs and Northern Development largely untouched.

⁴³ Fleras and Elliott, *The Nations Within*, p. 16. Cf. *Basic Departmental Data - 1994*, p. 39 which claims that over three-quarters (77.7%) of on-reserve Indian children are remaining in school until Grade XII. According to DIAND, this number has more than doubled since 1985-86.

⁴⁴ Penner, *Indian Self-Government in Canada*, p. 15; Fleras and Elliott, *The Nations Within*, p. 17.

are a direct consequence of a people being directly dependant on a larger establishment which they simply have no control over,⁴⁵ and for which no amount of tinkering with the current legal-constitutional order can adequately rectify. Others, by contrast, assert that there are "...no simple answers or clearly defined villains or events...." that one can point to as being the cause of such dependency,⁴⁶ and that it is to overstate the case to argue that social and economic well-being can only be achieved through the assertion of political power and some measure of political independence. Even amongst the broader Aboriginal population there are suggestions that the relationship between socio-economic and political dependency is not all that clear-cut, and there is uncertainty as to how best to achieve a level of social and economic well-being that would be broadly comparable to the rest of the Canadian population.

In the midst of all of these constraining factors, there is the history of past and current federal government Aboriginal policy and practice to contend with: a history that conditions both the types and the viability of any solutions that may be offered. As an element of Canadian political history, Aboriginal policy-making has been analyzed with increasing scrutiny since the 1960s both within and outside of government - predictably, with somewhat different assessments of its achievements. Insofar as the specific policy outputs emanating from successive governments within any area of governmental responsibility might be seen to be evidence of a formal

⁴⁵ See, for example, Tanner, "Politics of Dependency," in Tanner, *The Politics of Indianness*, pp. 1-2.

⁴⁶ Fleras and Elliott, *The Nations Within*, p. 20.

policy strategy or underlying policy goals, some analysts view federal Aboriginal policy making with quizzical eyes. For these analysts the bulk of Aboriginal policy that has been produced up to the present time is a result of both the "intended and unintended operation of the overall federal policy process,"⁴⁷ with line departments and central agencies struggling to make some sense of ever-increasing Aboriginal demands on the one hand and a static federal capacity to satisfy these demands on the other. The results of this haphazard interaction have been described as lacking overall coherence: a "collage of policies rather than a consistent policy framework with guiding principles or goals."⁴⁸ In rather muted dissent to this, the federal government has claimed that there is discernable and positive movement and that this movement is, in large measure, in response to Aboriginal concerns. DIAND, for example, claims that the Aboriginal people of Canada, long accustomed to living in a socio-political environment in which their needs were neglected and their wishes seen to be irrelevant, have, for the past several decades, been both the subjects and beneficiaries of what the Department has called an "Age of Resurgence."⁴⁹ Progress on identifying and meeting Aboriginal concerns, though slow and very often halting, has been made, according to these accounts.

⁴⁷ G. Bruce Doern, *The Politics of Slow Progress: Federal Aboriginal Policy Processes*, A Study Prepared for the Royal Commission on Aboriginal Peoples, Ottawa, November 1994, p. 3.

⁴⁸ Sally Weaver, "Federal Difficulties with Aboriginal Rights Demands," in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), p. 139.

⁴⁹ Minister of Indian Affairs and Northern Development, *The Canadian Indian* (Ottawa: Minister of Supply and Services, 1990), p. 86.

Yet, even as progress is claimed at the micro-policy level, there is acknowledgement that many of these policy initiatives are still predicated on ideas, institutions and interests that do not necessarily originate within the horizon of Aboriginal self-consciousness. As a consequence Aboriginal people, albeit indirectly, still find themselves isolated and marginalized from main-stream Canadian social and political consciousness.⁵⁰ One writer, summing up the current popular perception of the place of Aboriginal peoples within the Canadian legal and political environment, has observed that, "it is [now] evident that Aboriginal policy is about a founding people, Aboriginal first nations, and Canadian citizens."⁵¹ However, such appreciation of their political status has yet to translate into clear statements of policy concerning Aboriginal rights as both citizens and as founding peoples that both Aboriginals and non-Aboriginals might be able to agree to.⁵² Indeed, the citizenship that is now so strongly asserted is one that has been lacking for the majority of Aboriginal history in Canada, and with the lack of citizenship there was, correspondingly, a lack of any meaningful form of participation in those political processes and institutions that were

⁵⁰ Speaking of the Aboriginal capacity to influence government policy generally, it has been observed that: "The various means adopted by native peoples in Canada...to represent their interests to governments reflect not only the asymmetry and historical peculiarity of these relations, but also a fundamental divergence of views with respect to their needs and rights." Noel Dyck, "Aboriginal Peoples and Nation-States: An Introduction to the Issues," in Noel Dyck, ed., *Indigenous Peoples and the Nation-State: Fourth World Politics in Canada, Australia and Norway* (St. John's, NF: Institute of Social and Economic Research, Memorial University of Newfoundland, 1985), p. 11

⁵¹ Doern, *Politics of Slow Progress*, p. 3.

⁵² Michael Asch's observation in 1984, that one has to extrapolate governmental views on the nature of Aboriginal rights indirectly from other policies developed in relation to governmental Aboriginal dealings, is still true in 1995. On this see Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Scarborough: Nelson Canada, 1988), p. 55

held up by so many as the icons of responsible and representative government.

In fact, one could say that diametrically opposed perceptions of the place of Aboriginal people within Canadian society have, at one time or another, held sway in Canadian policy circles. Largely under pressure from Aboriginal groups themselves, the federal government has, at least formally, been forced to repudiate what both Aboriginal people and various political historians have observed was a wide-ranging desire underlying much Aboriginal policy development of the late 19th and early 20th centuries: to circumscribe and eventually eliminate Aboriginal rights and Aboriginal identity and to culturally assimilate Aboriginal people into the larger, non-Aboriginal population.⁵³ To this end, governments of the day used tactics that ranged from the strict federal control of on-reserve activity, to the forced schooling of Aboriginal children off-reserve, to outlawing traditional legal systems and means of redistributing economic wealth and status.⁵⁴ Concerning more recent initiatives, however, many would say that the pendulum of cultural appreciation has swung towards the opposite extreme, and there is now a substantial school of political thought, having its roots largely in the failed attempts at Aboriginal constitutional reform in the 1980s, that believes that the primary aim of federal responsibilities towards contemporary Aboriginal people should be to preserve and enhance:

⁵³ According to Fleras and Elliott, *The Nations Within*, p. 39, the approaches since Confederation have ranged from "assimilation through wardship and separation" to "assimilation through integration and equality," to "acceptance of limited Aboriginal autonomy."

⁵⁴ Penner, *Indian Self-Government in Canada*, p.13; Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*," in David. C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989), pp. 65-66.

...'Indianness' or more generally, 'Aboriginality.' This includes the definition and protection of the incidents of the special status of Aboriginal persons, communities, institutions and lands, as well as specific legal protections as set out primarily in the *Indian Act*.⁵⁵

However, despite the fact that these shifts would seem to suggest that the federal government is prepared to develop a new relationship with Canada's Aboriginal people,⁵⁶ various authors and Aboriginal leaders claim that paternalism is still alive and well within federal-Aboriginal relations. Attacks against the ongoing existence and mandate of the Department of Indian Affairs and Northern Development (DIAND) and its incompatible and often contradictory responsibilities towards its client group and the federal government are not uncommon.⁵⁷ Accusations that the government is unwilling to follow through on policy recommendations on various aspects of Aboriginal rights and Aboriginal self-determination - even those recommendations commissioned by the Minister of DIAND - are also not uncommon.⁵⁸ More generally,

⁵⁵ Alan Pratt, "Federalism in the Era of Aboriginal Self-Government," in Hawkes, *Aboriginal Peoples and Government Responsibility*, p. 51.

⁵⁶ The need for such a new relationship was addressed in some detail in Penner, *Indian Self Government in Canada*, pp. 39ff.

⁵⁷ "I am optimistic and I am pessimistic. I am pessimistic in terms of the Department of Indian Affairs [sic.] being involved in our lives....they have this section called Indian Self-Government. To me it is one of the biggest contradictions in life. Having a department within the Department of Indian Affairs called Indian Self-Government. The two are very opposites. You can't have white bureaucrats in a department and at the same time over here you have Indian people who are looking for their inherent right to self-government." Statement by George Watts, Chairman, Nuu-chah-nulth Tribal Council, in Cassidy, *Aboriginal Self-Determination*, p. 162.

⁵⁸ See, for example, the assessment by Murray Angus of the recommendations of the Coolican Report on comprehensive claims policy (Task Force to Review Comprehensive Claims Policy, 1985, *Living Treaties: Lasting Agreements, Report of the Task Force to Review Comprehensive Claims Policy*, Murray Coolican, Chairman (Ottawa: Department of Indian Affairs and Northern Development, 1985)) and the Departmental response to this report under then-Minister Bill McKnight (Minister of Indian Affairs, *Comprehensive Land Claims Policy* (Ottawa: Minister of Supply and Services Canada, 1987)), in Murray Angus, ... "and the last shall be first": *Native Policy in an*

the government is indicted for being oblivious to the specific socio-economic needs of Aboriginals, and for capitulating to what has been called their "institutional assimilation:"⁵⁹ the pervasive, non-directed attempt to keep Aboriginal people subservient to an imposed, non-differentiated socio-economic infrastructure that cannot help but be indifferent to their particular needs and realities. There is even a growing awareness of just how much the struggle for recognition of Aboriginal rights and Aboriginal self-determination is still pursued using the language and concepts of the non-Aboriginal culture that has displaced it.⁶⁰ These ongoing internal contradictions suggest that the likelihood of implementing Aboriginal policy initiatives in the near future that might be judged to be successful by the Aboriginal population is not too great, and that policy successes, when they do emerge, could well be seen to be fortuitous and very possibly not repeatable. As a consequence, the trust necessary to the cumulative development of shared interests and values has, as yet, little likelihood of development.

Distinctive Publics and Common Interests: Possibilities and Limitations

...what the Minister [of Indian Affairs] is trying to do is reverse history and try to revert back to the time in 1969 when his government, when the Prime Minister of the day...introduced a policy that would have

Era of Cutbacks (Ottawa: Aboriginal Rights Coalition (Project North), 1990), pp. 41ff.

⁵⁹ Menno Boldt and J. Anthony Long, "Native Indian Self-Government: Instrument of Autonomy or Assimilation?", in Long and Boldt, *Governments in Conflict*, pp. 41-45.

⁶⁰ See Ken Coates, "Introduction," in Coates, *Aboriginal Land Claims*, p. 4 for a brief assessment of the significance of this translation insofar as it affects comprehensive claims negotiations

terminated Indian rights. This [government policy document on inherent right] is the continuation of that policy.⁶¹

The more recent, imputed strength of Aboriginal self-consciousness as a catalyst for policy development within Canadian politics is an important variable to be contended with.⁶² Nonetheless, its current status was only achieved with the passage of much time and, in particular, with the translation of this self-consciousness since the end of World War II into clear political terms and political agendas for national action.⁶³ Originally forged within a horizon of long-held beliefs about what was promised to them in the past through treaties and other commitments made on behalf of the colonizing newcomers, the Aboriginal drive for control over their individual and collective destinies has benefitted at least as much from post-war developments in the field of international law and the recognition of the rights of indigenous peoples everywhere.⁶⁴

⁶¹ Ovide Mercredi, Chief, Assembly of First Nations, press conference on the proposed government policy document on inherent right to self-government, Ottawa, March 22, 1995

⁶² "What we have earlier described as the "self-consciousness explosion" extends with particular cogency to the aboriginal peoples of Canada." Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, pp. 28-29.

⁶³ Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, pp. 28-29. One must be cautious about stating the degree to which the various Aboriginal peoples across Canada buy into a common, national political outlook or set of discrete national political objectives. Beyond the clear calls for self-determination, self-government, the resolution of land claims, the honouring of historic treaties, and sustained economic development, there are divergent and sometimes competing points of Aboriginal view concerning both policy ends to be achieved and the means to achieve them. Oftentimes these reflect the various and distinctive relationships that particular Aboriginal groups have had with the state in the past. On this, see Doern, *Politics of Slow Progress*, pp. 178-180.

⁶⁴ The literature on this is considerable. For a brief survey of the standing and rights of Aboriginal peoples in relation to international and United Nations policies, see Gordon Bennett, *Aboriginal Rights in International Law* (London: Royal Anthropological Institute of Great Britain and

This self-consciousness has also benefitted from the general erosion of what might be termed 'normative politics' within the developed world and the gradual subjectification of the socio-political order that has taken place over the last fifty or so years. This has been fostered to a large extent by the rise of "multiple politicized cleavages and identities" which are the hallmarks of those nations that are the products of immigration and which become, by consequence, the catalysts for cultural pluralism and social-political relativism.⁶⁵ These cleavages lead to fragmented social and political interests, with competing agendas, all of which seek equal recognition and treatment under the law. This latter phenomenon - what some have called the "rights revolution" - has included the empowerment of the traditionally disenfranchised, changes to the means in which society's wealth is distributed, and the replacement of unequally distributed social privileges with universal, legal entitlements.⁶⁶ The fact of expanding legal entitlements has helped to supplement, and in some instances displace, the political basis for effecting changes to what Aryeh Neier calls "distributive justice," or the control over "the direction of the wealth of the society" with a jurisprudential basis. In effect, the courts, a wide range of

Ireland, 1978); for assessments of Canadian and other Aboriginal assertions of their rights under international law or convention, see Douglas Sanders, "Aboriginal Rights: The Search for Recognition in International Law," in Boldt and Long, *The Quest for Justice*, pp. 292-303; Rudolph Ryser, "Fourth World Wars: Indigenous Nationalism and the Emerging New International Political Order," in Boldt and Long, *The Quest for Justice*, pp. 304-315.

⁶⁵ Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 8.

⁶⁶ On this see Joel F. Handler, *Law and the Search for Community* (Philadelphia: University of Pennsylvania Press, 1990), p. 13; Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1990), pp. 24ff.

administrative agencies and other forms of what are now called "public government institutions" become the new rule-makers and guardians of interests that the state is either unwilling or unable to honour.⁶⁷ Aboriginal people have begun to benefit from more recent jurisprudential activity as it relates to the articulation of their rights, and will likely be more frequent beneficiaries in the future.

Despite these favourable political developments, it is safe to say that Aboriginal distrust of the political system runs both deeper and longer than its non-Aboriginal counterpart, in large measure because it springs from a conception of Aboriginal identity and status that is alien to the dominant social and political mindset and only accommodated to this mindset with great difficulty, if at all. Many Aboriginal people would claim that the evidence of this incompatibility has existed for decades, if not centuries, but that it has, in any case, been politically visible on the national stage ever since the federal government first advanced its 1969 white paper proposals to eliminate any reference to distinctive Aboriginal status and/or rights in Canada.⁶⁸ At the very least, there has been a lingering feeling amongst many Aboriginals that federal intentions towards Aboriginals are not to be trusted, and that government is

⁶⁷ Aryeh Neier, *Only Judgement: The Limits of Litigation in Social Change* (Middletown, CT: Wesleyan University Press, 1982), p. 16.

⁶⁸ Minister of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (Ottawa: Minister of Indian Affairs and Northern Development, 1969). The policy contemplated the extension to 'Indians' of all economic, social, educational, health and other services provided by the provinces at the time: in effect, an exercise in extending a uniform conception of citizenship. On this see, Boldt and Long, *The Quest for Justice*, pp. 7-8.

still more interested in doing away with Aboriginal rights rather than addressing them.⁶⁹ This feeling was confirmed during and after the Aboriginal constitutional negotiations which began in 1983 and ended in 1987,⁷⁰ and which, at the end of the day, left Aboriginal leaders both defeated in their pursuit of a constitutional guarantee of self-government and feeling betrayed by a political leadership that Aboriginals perceived to be clearly less than enthusiastic about moving beyond the Aboriginal 'concessions' that had already been provided for in 1982.⁷¹

The reality of this distrust cannot, it seems, be ignored. Moreover, it continues to draw strength from a litany of other discrete policy failures that have dogged successive federal governments, who sought to institute change with little or not benefit of Aboriginal consultation.⁷² One must, therefore, ask whether it is possible

⁶⁹ A recent example of this distrust can be seen in the debate that erupted between Ovide Mercredi, Grand Chief of the Assembly of First Nations, and Ron Irwin, Minister of Indian Affairs and Northern Development over the proposals for recognition of the Aboriginal Inherent Right to Self-Government as contained in a draft, secret Memorandum to Cabinet being prepared by the Department of Indian Affairs and Northern Development. Mercredi, who had an opportunity to read the draft proposals, went public and accused the Minister of backing away from the Charlottetown constitutional agreement on inherent right and of returning to a 1969 assimilationist mentality. On this see Ovide Mercredi, "Government Policy Document on Inherent Right to Self-Government," Press Conference Transcript, March 22, 1995; Ron Irwin, "Chief of First Nations Accuses Minister of Betrayal," Interview with Don Newman, March 22, 1995.

⁷⁰ "Suspicion was overwhelming during these negotiations. Provincial governments were suspicious of the motives of the federal government, especially when the federal Department of Indian and Northern Affairs appeared to be only marginally involved. The Aboriginal parties at the table were suspicious of both the federal and provincial governments." David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989), p. 60.

⁷¹ On this, see Hawkes, *Aboriginal Peoples and Constitutional Reform*, pp. 9-12.

⁷² This list would include such notable failures as: the 1969 White Paper on Indian Policy, and the consultations that led up to it; Bill C-52 (1984), which attempted to provide a framework for Band-based self-government, but which was opposed by various Aboriginal groups and which died on the order paper prior to the 1984 general election; the Neilson Task Force on Program Review

to identify or articulate approaches to Aboriginal policy development that can acknowledge and maintain the interrelationship between the satisfaction of the general public's needs and the recognition of Aboriginal rights. Is an integrated Aboriginal policy approach possible, or is Aboriginal policy activity forever consigned to endless rounds of confrontation and compromise over a range of seemingly irreconcilable positions.

Indirectly, this question came up as former Prime Minister Mulroney was attempting to navigate through the often tortuous discussions that marked the Aboriginal constitutional conferences that were held during the 1980s. The Prime Minister, cognizant of the wide rift between the parties to these conferences, invoked a familiar analogy as he tried to keep the discussions moving towards some form of productive conclusion when he said to the Aboriginal leadership that:

...having been a labour negotiator, I know what it means to be sitting on one side of the table looking at powerful interests on the other. But this is not the situation today. We are here together to try to come to grips with problems common to us all.⁷³

The shift in perception that the Prime Minister was trying to achieve - from independent parties with interests to defend to interdependent participants in a common undertaking - was an ambitious, even if largely unsuccessful undertaking.

(1985), from which the recommendations for extensive reductions in federal expenditures on Aboriginal programs were subsequently withdrawn as a result of pressure both from Aboriginal groups and the Minister of IAND; the Meech Lake Accord (1987), which failed to address any Aboriginal concerns and which was negotiated the same year in which the last Aboriginal Constitutional Conference concluded with no agreement on Aboriginal rights. See Doern, *Politics of Slow Progress*, pp. 11-20.

⁷³ Brian Mulroney, "Notes for an Opening Statement to the Conference of First Ministers on the Rights of Aboriginal Peoples, Ottawa, 2-3 April 1985," in Boldt and Long, *The Quest for Justice*, p. 158.

Indeed, in a cynical world of straight interest competition, such observations by a high-ranking politician could be interpreted as a warning bell for some interest group to reduce their expectations, particularly when tough decisions are being called for which will almost certainly not be made (or which, if they are made, will require sacrifice from those least able to afford it). When considered further, however, the comment implies more than just managing Aboriginal short-term well-being within the reality of fiscal restraint. Since the immediate occasion for the challenge was a constitutional conference that had gathered to entertain proposals for entrenching Aboriginal self-government, the recognition of what the Prime Minister called the "mutual responsibilities and common objectives" of Aboriginal peoples and Canadian governments⁷⁴ clearly suggests something that includes but goes beyond constitutional and other kinds of negotiations, and which must necessarily survive into the everyday to and fro of political life. His remarks raise the issue of redefining the very publics that must recognize their responsibilities even while they are acting upon their rights, and which must, individually and severally, adopt and adapt policy proposals to the world of rights and responsibilities that they inhabit together.

There have, in fact, been various attempts by politicians and bureaucrats who make their living dealing with Aboriginal issues over the past decade and a half to develop a political framework within which the reality of divergent Aboriginal and non-Aboriginal publics might be recognized, while at the same time providing a means

⁷⁴ Brian Mulroney, "Notes for an Opening Statement," in Boldt and Long, *The Quest for Justice*, p. 163.

whereby their interests can be identified and accommodated - perhaps even developed - in the service of a genuine and meaningful co-existence. They have spoken of the need to establish a "new relationship" between Aboriginal people and Canada as a precondition both for Aboriginal development and Aboriginal-state renewal: a relationship based on openness, trust, and an acknowledgement of the limitations and failures of the past.⁷⁵ Unfortunately, the continuing ambivalence that pervades contemporary Aboriginal-state relations - in particular, the failure to achieve any politically-sanctioned and implementable interpretation of those provisions regarding the recognition and affirmation of existing Aboriginal and treaty rights as currently provided for in the *Constitution Act, 1982* - is testimony to the present inability of the parties together to articulate acceptable elements of a broader, more inclusive social and political relationship that all can subscribe to, without participants on either side feeling that their historical, communally-based identities have to be sacrificed in the process.

In addition to this problem, current proposals by Aboriginals to assume greater political control over their affairs tend to elicit various, somewhat disparate federal responses. For example, they often reflect a preoccupation with the potential impact of the proposals both on the rights-based focus of ongoing Aboriginal policy discourse, as well as concern for the implications for future governance that such decisions might

⁷⁵ For example, Penner, *Indian Self-Government in Canada*, pp. 39ff; Coolican, *Living Treaties: Lasting Agreements*, p. vi, 21. The implications of the phrase "new relationship," as it is used in these documents, are ambiguous. They appear to be referring both to the fact of a new relationship on the basis of non-Aboriginal recognition of the legitimacy of Aboriginal demands and also to the need to acknowledge the demands as a condition of the establishment of this same relationship.

entail.⁷⁶ Such preoccupations are understandable, since the vast majority of Aboriginally-driven policy discourse on their concerns and desires is cast not in the tone of another interest lobby "lining up for policy favours and public largesse" but is, rather, the language of one nation (or nations) talking to another about having rights and seeking recognition for these rights.⁷⁷ However, governmental responses to these assertions are also indicative of the current limits that governments, as custodians of the established legal and political order, are prepared to go to in accommodating interests that have, at least theoretically, the capacity to undermine this same order.⁷⁸

Regardless of whether the clash between Aboriginal rights advocacy and government responses to this advocacy issues forth in a call for thoroughgoing institutional change or not, government within a federal system is generally not excused from finding some means of reconciliation between the conflicting issues - or, at the very least, from developing some form of appeal to a larger 'rational' or 'public' interest that might serve to soften the anticipated impact of the recognition of the particular rights under consideration. By way of example (and to anticipate our discussion of comprehensive claims policy below), there has been a fairly consistent desire for the past ten years or so to sell the Canadian public on the idea that the Aboriginal desire for self-determination, as expressed through the settlement of comprehensive land claims, would mean (a) less reliance by Aboriginals on government

⁷⁶ Doern, *Politics of Slow Progress*, pp. 13-14.

⁷⁷ Doern, *Politics of Slow Progress*, p. 51.

⁷⁸ Scott, "Politics of Culture," in Dyck and Waldram, *Anthropology, Public Policy and Native Peoples in Canada*, pp. 320-321.

initiatives and government resources, which means the possibility (at least) of an Aboriginal contribution to the socio-economic order as the non-Aboriginal public understands it, and (b) certainty of economic development opportunities as a result of achieving certainty of (Aboriginal) land ownership. Such was the approach taken by the Coolican Commission on Comprehensive Claims Policy when advancing its proposed model for a new comprehensive claim policy, which, in addition, declared that there had already been real economic loss to the country by virtue of the fact that land ownership had not yet been settled.⁷⁹ Though there is no hard economic evidence or analysis to support either of these two contentions,⁸⁰ and though there are, in fact, discrete economic provisions (with attendant governmental costs) designed exclusively to assist the beneficiaries in all of the comprehensive claim agreements negotiated to date,⁸¹ both observations (and, in particular, the one linking

⁷⁹ "People may ask what a new comprehensive claims policy offers to all Canadians or why it is in the national interest. The answers are clear. Canada will be enriched if Aboriginal peoples become contributors to Canadian life, rather than wards dependent upon the state....Economic growth often has been dampened or new development delayed by the uncertainty of unresolved land claims. Agreements will resolve the uncertainty and will allow both Aboriginal and non-Aboriginal Canadians to benefit from new economic development." Murray Coolican, Chairman, to David Crombie, Minister of Indian Affairs and Northern Development, in *Living Treaties: Lasting Agreements*, p. v.

⁸⁰ There is some evidence that the economic development provisions of the James Bay and Northern Quebec Agreement (1975) have provided tangible economic benefits to their respective beneficiaries, but even this is fragmentary. See J. Rick Ponting, "Economic Development Provisions of the New Claims Settlements," in Ponting, *Arduous Journey*, pp. 199ff. Concerning the *Inuvialuit Final Agreement (1984)*, preparations are currently underway for a review of this Agreement's economic development provisions, to be completed by the year 2000. An evaluative framework has been prepared by an external consultant under terms of reference approved by Indian Affairs and Northern Development, but it is not yet clear if third-party impact will be assessed.

⁸¹ These include: provisions regarding contracting and procurement by governments in the settlement areas; notification of contracting opportunities and requirements for beneficiary participation; development of economic development policies for settlement regions, in consultation with beneficiaries, and so on. The precise nature of the requirements varies considerably from

economic development with certainty of ownership) are still regularly advanced by the federal government as it works to convince the electorate of the public value of comprehensive land claim settlements.

From the Aboriginal perspective, the economic value of these agreements to non-beneficiaries is an inconsequential issue; each agreement is a vehicle for its beneficiaries both to catch up to the economic prosperity that they have missed out on and is also a means whereby economic development can be controlled so as to conform to other, non-economic concerns over development that many Aboriginals have. However, government simply has not been in the position of being able to produce plausible and publically acceptable reasons for proceeding with a policy so thoroughly focussed on the acquisition of Aboriginal rights without, at the same time, having to face the necessity of balancing off these rights claims against other specific, potentially competing rights and interests that both the public and specific third parties would wish to see preserved in the face of such agreements being concluded. Indeed, in its most recent statement on comprehensive claims policy, the federal government declares that:

In attempting to define the rights of Aboriginal people, the Government of Canada does not intend to prejudice the existing rights of others. The general public interest and third party interests will be respected in the negotiation of claims settlements and, if affected, will be dealt with equitably.⁸²

While specific, third party interests can be identified, and steps taken to deal with

agreement to agreement.

⁸² DIAND, *Comprehensive Land Claims Policy*, pp. 21-22.

them during the course of claims negotiations, the question of just what the "general public interest" is or might be in such specific situations is much more difficult to identify. In this sense, the negotiation of specific rights and benefits packages which, functionally, comprehensive claim settlements are - are micro-indicators of the more general question of the relationship of specific interests to the public interest as one engages the policy process towards a particular end. We will examine this issue in more detail in chapter 6 below.

Chapter 3 - Aboriginal Interests as A Function of Law and Polity

After the Constitutional Debates: Between Equality and Special Status

Any analysis of current Aboriginal demands and federal responses to these demands that fails to consider the constitutional dimension of this interaction does so at considerable risk to its overall validity. Indeed, the existing constitutional order (which remains far from settled), insofar as it applies to Aboriginal people, manifests considerable legal ambiguity and is the source of much political perplexity to Aboriginal policy. This can be highlighted by a brief examination of federal policy and constitutional initiatives, and their impact, in respect of what until 1982 were the only constitutional obligations regarding Aboriginal people: section 91(24) of the *Canada Act, 1867*. By virtue of s. 91(24), the federal parliament was given exclusive authority for "Indians, and Lands reserved for the Indians," thereby assuming, for the most part, "...those obligations formerly accruing to the colonial governments under pre Confederation treaties, along with responsibility for all existing Indian reserves whether created by the Crown or otherwise."⁸³ In part, the rationale for giving this specifically-delineated authority to Ottawa, and not the provinces, was so that some consistency was maintained in the protection afforded to those Aboriginals that the

⁸³ Morse, "Government Obligations," in Hawkes, *Aboriginal Peoples and Government Responsibility*, p. 64. By way of caveat, the exclusivity has, over time, been circumscribed to extend only to those Indians with whom the Crown had entered into treaties and even then only with those who were "recognized" as Indians by virtue of their registration. For those Indians with whom treaties were never concluded, those living off-reserve (whether in rural or urban areas), the Métis, and generally those without any form of a land-base, the laws of general application of the relevant jurisdiction (federal and/or provincial) applied. On this latter point see Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 29; Noel Lyon, "Constitutional Issues in Native Law," in Bradford W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, revised first edition (Ottawa: Carleton University Press, 1989), pp. 429-431.

Crown had dealings with.⁸⁴

Over time, the prerogatives of this jurisdiction have become buttressed by complementary legal doctrines concerning its exercise: in particular, the need to pay heed to the interests of those people over whom Parliament held such power in the first place. This constitutes the essentials of the fiduciary relationship that is regularly spoken of by Aboriginal advocates today. In contemporary debates, the relationship is regularly invoked so as to perpetuate the principle of exclusive federal jurisdiction; principally in defence of other Aboriginal concerns as they come up against provincial interests. In other words, exclusive federal jurisdiction still remains of benefit to Aboriginal people because it shields them from what they perceive as the vagaries of provincial desires.

However, it is also a fact of our history that the new country required a centralized, consistent, federal approach to treaty-making and clearing frontier lands of existing Aboriginal title: lands which were needed for expansion and the influx of settlers that began arriving during the close of the 19th century and the beginning of the 20th.⁸⁵ S. 91(24) lent itself admirably to undertaking just such a task, and, moreover, led the federal government to believe that it had legislative authority to, "...do what it wished regarding all aspects of the lives of the indigenous population."⁸⁶

⁸⁴ Pratt, "Federalism," in Hawkes, *Aboriginal Peoples and Government Responsibility*, p. 24

⁸⁵ Morse, "Government Obligations, Aboriginal Peoples," in Hawkes, *Aboriginal Peoples and Government Responsibility*, pp. 64-65; Coolican, *Living Treaties: Lasting Agreements*, p. 3

⁸⁶ Morse, "Government Obligations, Aboriginal Peoples," in Hawkes, *Aboriginal Peoples and Government Responsibility*, p. 65.

As a consequence, Ottawa, in the interests of satisfying the expansionist impulses of a culture dedicated to opening up and 'civilizing' a frontier land, often found itself working against the best interests of those Aboriginals to whom it owed jurisdictional obligations under s. 91(24).

In fact, with such contradictory motives as these informing government-Aboriginal relations, buttressed by an as-yet constitutionally unfettered legal prerogative over the types of initiatives that the government might wish to take, development of federal Aboriginal policy that actually advocated Aboriginal interests on their own merit was often thwarted by the countervailing demands of the broader social and political theatre. It is to put the matter diplomatically to suggest, in the words of the MacDonald Commission, that Aboriginal policy most often became a, "...tortured essay in the difficulties of finding a recipe and status for Indians which would simultaneously do justice to their distinctiveness and incorporate them in an acceptable manner into the larger Canadian community."⁸⁷ More often than not, in the interests of securing and maintaining the acceptance of the community, it was assumed that Aboriginal concerns and dis-integrating predilections and values, insofar as they impacted on the non-Aboriginal culture, would be supplanted by the non-Aboriginal culture and values that were encroaching upon them, eventually eliminating the conflict of values through thoroughgoing assimilation.

The sense of the inevitability of this outcome was confirmed by the fact that,

⁸⁷ Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 29.

prior to the 1960s, Aboriginal advocacy of their own interests on a collective level through Aboriginal associations or organizations - was virtually unknown within the political process, both because of lack of resources on the part of Aboriginals and because of political (and, sometimes legal) impediments created by non-Aboriginal culture and law.⁸⁸ As a consequence, government decisions respecting Aboriginal concerns, when they were made at all, were not the products of informed or negotiated settlements so much as they were the terms of government dictates made in the absence or denial of first-hand knowledge of the subjects in question.

The 1969 Federal White Paper on Indian Policy is often considered the definitive statement of the federal assimilationist policy of the time. In this paper, the federal government asserted its desire to redefine what it would thereafter have meant to be an Aboriginal in Canada: a minority with equal access to all the general entitlements available to other citizens, but with no special entitlements or protections by virtue of Aboriginal background.⁸⁹ Had its recommendation to repeal the *Indian Act* and, over the longer term, eliminate any specific constitutional reference to "Indians,"⁹⁰ been

⁸⁸ Sally M. Weaver, "Political Representivity and Indigenous Minorities in Canada and Australia," in Dyck, *Indigenous Peoples and the Nation-State*, pp. 116-117.

⁸⁹ "Designed largely to shield Canada from external criticism rather than to meet the needs defined by Aboriginal peoples themselves...the White Paper...recommended the eventual elimination of 'privileges' for Aboriginal peoples. By 'normalizing' their entry into Canadian society as 'equals', the White Paper attempted to do away with special and separate status as set out in section 91(24) of the Constitution Act...." Fleras and Elliott, *The Nations Within*, p. 43. The White Paper did recognize the need to honour treaty obligations, but felt that these obligations, as historical curiosities, would gradually become unimportant to Aboriginals as they took up their new status as members of the general citizenry.

⁹⁰ Royal Commission on Aboriginal Peoples, *Public Policy and Aboriginal Peoples*, volume 2, p. 14.

implemented, the Aboriginal problem would have officially ceased to be by being reclassified, and specific federal obligations to Aboriginals would have been abolished.⁹¹

The near-universal condemnation of the 1969 White Paper, however, and the subsequent galvanization of Aboriginal interests in support of a distinctive status both in policy and in law (including their continued appeal to s. 91(24) as a guarantor of this distinctiveness) meant that the federal government had to beat a hasty retreat away from any notion of the formal equality of Aboriginals as citizens with all other citizens that suggested, in any way, a move towards the eventual effacement of Aboriginal culture as a component of Canadian society. In fact, the government fairly quickly moved towards the opposite end of this perspective and towards embracing the differential treatment of Aboriginals as distinctive citizens with "unique political status, veto power, resource ownership, and collective entitlements."⁹²

Since 1969, and more particularly since the Aboriginal constitutional conferences of the 1980s, the tension manifested between political masters and Aboriginal clients over the development and implementation of Aboriginal policies has both intensified and become much more sharply focussed on the need to address issues relating both to equality and special status at the same time.⁹³ This, in turn,

⁹¹ Fleras and Elliott, *The Nations Within*, p. 43.

⁹² Fleras and Elliott, *The Nations Within*, p. 44.

⁹³ One can discern this in various policy initiatives. For example: devolution, or program transfer, of existing DIAND-administered services to Indian Bands and the National Strategy for Aboriginal Economic Development, both of which are designed to allow Aboriginal communities to control the same services and opportunities as non-Aboriginal communities (ie., policies aimed at

has had an interesting side-effect, in that it has contributed to the evolution of the principles of equality and special status into policy paradigms. Indeed they act as two different political and institutional 'lenses' through which the eventual outcome and significance of the implementation of any proposed Aboriginal policy - whatever the policy's specific intention - is quickly assessed for its impact, both on the Aboriginal population and on the rest of the country. In this respect, confusion or reticence over Aboriginal demands on the part of policymakers may not simply be an instance of a lack of originality or even a belief that the demand is unworkable:⁹⁴ it may be indicative of the policy-maker's unwillingness to compromise the paradigms as he or she sees them, given that a synthesis of the paradigms seems an unrealizable possibility.

Aboriginal Citizenship and the Unfinished Constitutional Project

In spite of constitutional patriation in 1982 and the referential incorporation of

achieving equality), and comprehensive claims settlement policy and changes to the *Indian Act* in 1985 (ie., policies aimed at recognizing/enhancing special status). On this see Fleras and Elliott, *The Nations Within*, pp. 46-47; Doern, *Politics of Slow Progress*, pp. 114ff. It is ironic that the "Indian Act Alternatives Process," a much wider initiative intended to remove the legal impediments to Aboriginal self-government as found within this legislation (hence, indirectly, to facilitate Aboriginal rights) has consistently bogged down in discussions with various Aboriginal organizations and bands precisely because these same organizations and bands either do not trust DIAND to make changes in such a way as to avoid unintentional diminution of the status relationship that the Act provides for, or because they do not want to be seen to be co-opted into a process in which they are implicitly agreeing that aspects of the special status can be changed by statute (as opposed to constitutional entrenchment)!

⁹⁴ As suggested by Fleras and Elliott, *The Nations Within*, pp. 50-51.

existing Aboriginal rights into the Constitution at the same time,⁹⁵ the quest for the realization both of Aboriginal identity and rights and a new relationship between Aboriginals and the Canadian state continues to be bounded by an open-ended legal and political context. By way of general comment, there can be little doubt that the role of the federal government as the principal player in determining the relationship of Aboriginal interests to the interests and desires of the government and the wider public has been irrevocably altered by the more recent constitutional changes that have been effected, and demarcating the boundary between Aboriginal interests and ongoing government policy has now become something much more than just determining the ends to which parliamentary power was directed in the service of section 91(24) of the *BNA Act*. The references to "existing Aboriginal and treaty rights" in the Constitution, while not in themselves specific as to the content of these rights so referenced, are nonetheless a first step on the way towards such definition. As much as with the other provisions that eventually made their way into the Constitution, the Aboriginal rights that are enumerated therein do, on the surface, appear to be an instance of the turn away from the "philosophical modesty and practical efficiency"⁹⁶ of the *BNA Act*, with its indifference towards political rights generally and its general lack of distinction between individual and collective rights

⁹⁵ More particularly, there is provided in the *Charter of Rights and Freedoms* the guarantee of the non-abrogation and non-derogation of "Aboriginal, treaty or other rights or freedoms" in section 25, whereas one finds the affirmation of existing Aboriginal and treaty rights outside the *Charter*: in section 35 of the *Constitution Act, 1982*.

⁹⁶ Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986), p. 18.

specifically, towards a more liberal, individual rights-based approach to the citizen-state relationship.

On closer examination, however, one begins to realize that the Aboriginal rights provisions that the Constitution refers to, unlike their counterparts in the *Charter of Rights and Freedoms*, are not straightforward statements of discrete rights that accrue to Aboriginal people, nor do they necessarily accrue to Aboriginal persons as individuals. Instead, these constitutional Aboriginal guarantees are cast in the form of blanket affirmations of bundles of collective rights, accruing to Aboriginals both by virtue of their distinctive origin and heritage and by virtue of those treaties and other agreements that they, as peoples, entered into with the non-Aboriginal culture around them.⁹⁷ Consequently, one possible approach to determining the specific application of these rights is by drawing upon the significant events in the collective history of Aboriginal people, in particular those events (such as the making of treaties) that both demarcate the collective identities of specific Aboriginal groups and define the relationship of that Aboriginal group to the non-Aboriginal culture around it. In the

⁹⁷ "These [Aboriginal] rights are *sui generis*...rather than fitting an existing category of beneficial interest or being some sort of a personal usufructuary right as they had been previously described. They contain rights to use and take the fruits and products of traditional lands, including the right to hunt, fish, and trap thereon. The rights are collective in the sense of communal occupation, but individual in the sense that the members of the Aboriginal group have personal harvesting rights." Canadian Bar Association, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, August 1988), p. 18. See also William F. Pentney, *The Aboriginal Rights Provisions in the Constitution Act, 1982*, unpublished LL.M. dissertation, University of Ottawa, 1987, pp. 32ff. While both Aboriginal and treaty rights are grounded in the relationship of Aboriginal people to their land, individual treaty rights are a function of the agreement between the Crown and the Aboriginal group concerned and can, and often do, go beyond those Aboriginal rights that would be said to predate and underlie the treaty itself. On the matter of the specific limits of Aboriginal rights, Canadian law is still largely undeveloped. See, for example, *Sparrow v. Attorney General of Canada* (1990) 1 S.C.R. 1075; *Delgamuukw v. Attorney General of British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.).

main, these events have preceded and have helped to give shape to the constitutional relationship, but it is also important to remember that they are supplementary to the normal definitional process that tends to accompany constitutional design and subsequent constitutional interpretation and amendment. By virtue of their recognition and protection within the Constitution, there is, at the least, a bolstering of the existing methods of interpreting and applying treaty rights,⁹⁸ and, perhaps even more significantly, the establishment of a *de facto*, quasi-constitutional process of entrenching new Aboriginal rights that follows its own set of rules for ratification. We see this process in action every time a new comprehensive land claim is negotiated and ratified.

In fact, depending on one's point of view, the ongoing addition of new, constitutionally-protected and enforceable rights through new land claim agreements could be seen as an anomaly within the overall integrity of the constitutional amendment process generally or as alternative to that process and in addition to it. Regardless of one's preference, it, in essence, provides through a controlled bilateral process what may not, in fact, have been realizable within the more open and unpredictable boundaries of general public debate.⁹⁹

⁹⁸ On this, see Pentney, *Aboriginal Rights Provisions*, p. 146.

⁹⁹ According to most constitutional observers, the current process for amending the *Constitution Act* very clearly gives governments the lead role in initiating such amendments; a lead that may or may not have been irrevocably circumscribed with the general referendum on the Charlottetown Accord that former Prime Minister Mulroney elected to proceed with. On the inherent incompatibilities between citizen-centred and government-centred emphases that reside within the *Constitution Act*, see Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal & Kingston: McGill-Queen's University Press, 1992), pp. 62ff.

The fact that the protection of Aboriginal rights made it into the Constitution at all has significant implications for the way in which discrete Aboriginal interests are conceptualized and expressed as elements of socio-political discourse and policy rhetoric. Had there been no constitutional entrenchment, and in the absence of judicial decisions on federal obligations arising out of section 91(24), the debate over the meaning of "existing Aboriginal and treaty rights" would be more tightly focussed as a political debate that parliamentarians would likely be confronted with during the ordinary course of their mandates. The extent of the rights in question could be addressed and, possibly, satisfied as part of a package of concrete federal commitments to Aboriginal peoples - say, for example, the commitment to negotiate Aboriginal self-government at the community level. With changing circumstances, the commitment could be reevaluated, revised, circumscribed, perhaps even reduced or eliminated if the interest mix demanded it and the political will to make the 'hard' decisions was in evidence. While it is quite conceivable that the benefits accruing through implementation could, over time, acquire the status of what A.J. Harding calls a "positive public duty"¹⁰⁰ - obligations of the state owed to its citizens which are susceptible to judicial review and enforcement - it is not inevitable that this would

¹⁰⁰ A.J. Harding, *Public Duties and Public Law* (Oxford: Clarendon Press, 1989), pp. 5ff. The term "positive public duty," as being used here, includes duties that are stipulated in statute or found at common law, although the definition that is advanced in the text does not capture the sense of invariability that such duties often entail (particularly those related to due process and equity). From the public policy perspective, a positive public duty is probably closest in kind to what Doern and Phidd call a "dominant idea:" an identifiable goal of state-society relations, somewhere between an ideology and a specific public policy goal. On this see G. Bruce Doern and Richard W. Phidd, *Canadian Public Policy: Ideas, Structure, Process*, 2nd. edition (Scarborough. Nelson Canada, 1992), pp. 38-41.

happen. Neither is it inconceivable that the benefits could be recast in another form which maintains delivery of the benefits while avoiding the obligatory dimension that a rights-based approach to the problem would entail. In other words, the benefits would remain policy outputs, to be reviewed and adjusted as necessary and as needs change, rather than becoming justiciable ideals against which policy design and delivery is measured and potentially questionable assessments about the adequacy of the delivery are asserted.¹⁰¹

Having achieved constitutional recognition, however, these interests *cum* entitlements not only become justiciable in their own right. They also assume a symbolic value that goes beyond immediate interest satisfaction. In this transformation they are now the tip of a socio-legal iceberg: the debate that has developed in the west over the role of law in mediating divergent and often competing social, political, and economic visions of the 'good'. As statements of our highest law, they are now accorded a role both in the ongoing process of constitutional evolution and in the realignment of the relationship of the legislative and judicial elements of the state. They are also signposts around which various Aboriginal groups, communities and individuals can rally to seek judicial and other non-political means to raise concerns, address grievances, and redress past political wrongs¹⁰² In fulfilling such varied functions, they may well serve to contribute to an inadvertent

¹⁰¹ Neier, *Only Judgement*, p. 18.

¹⁰² On the potential impact of the *Charter* in this area, see Alan C. Cairns, "The Past and Future of the Canadian Administrative State," *University of Toronto Law Journal* 40 no. 3 (Summer, 1990), pp. 335ff.

bypassing of the processes of interest reconciliation and synthesis that the public policy-making process, unimpeded, provides for. In this regard, long-term conflict between policy-making and adjudicative processes, relative to public interest issues, appears inevitable.

Considering these uncertainties and ambiguities, the constitutional struggles of Aboriginal people to achieve a measure of citizenship that both they and the rest of the country can live with, together with their successes and failures in achieving it, might well be considered a case of pouring new wine into an old wineskin. Whether the old wineskin - Canada - is as inelastic as the metaphor (and many Aboriginal people) would have us believe is still an open question. In any event, both the developments and the pitfalls that we have witnessed within the Canadian political environment in recent history serves to highlight what Bryan Schwartz has called a "basic tension in Canadian political and legal life,"¹⁰³ and from a policy perspective this tension can be both frustrating and creative at the same time. It is the tension between the theory of liberal individualism and the application of this theory within the Canadian constitutional reordering that came to pass with the entrenchment of the *Charter* in 1982, and countervailing historical-political realities that characterize and continue to inform Canadian constitutional practice, and which are described by what Schwartz calls the "community of historical communities" model of constitutional

¹⁰³ Schwartz, *First Principles, Second Thoughts*, p. 1.

development.¹⁰⁴

In simple terms, the communities model that Schwartz describes is an account of the genesis and development of the various group-based relationships that have found expression within the Canadian constitutional and political order. These groups have, over the course of our constitutional history, managed to secure specific and unique rights under the constitution, which rights stand alongside and are equal to the universal rights accorded to individuals. In some respects, these groups are historical curiosities that are coextensive with Confederation, but whose political importance is no longer that well understood: the denominational school rights in s. 93 of the *Constitution Act, 1867*, for example.¹⁰⁵ In other instances, however, such as in the provision respecting minority language education rights in s. 23 of the *Charter*, protecting the interests of the groups in question (Anglophones in Québec; Francophones throughout the rest of Canada) has a clear political impact on the survivability of key federal policies such as bilingualism, and for this reason if no other merited special constitutional consideration.¹⁰⁶ Finally, in more recent political science

¹⁰⁴ Schwartz, *First Principles, Second Thoughts*, pp. 1-2. I note that Schwartz later indicates (p. 36) that, as part of the thesis of his work, he favours the liberal individualist approach to Canadian constitutional development because "liberal individualism is a more coherent, more egalitarian, more easily applicable and more widely acceptable political philosophy than history-based groupism."

¹⁰⁵ As Schwartz, *First Principles, Second Thoughts* observes (pp. 6-7), the admission of other provinces to Confederation led to the passage of similar provisions in subsequent constitution acts.

¹⁰⁶ "Central to the federal purpose was the protection of official language minority rights, especially in education, as a constitutional expression of 'pan-Canadian nationalism which, at the level of ideology, is the counter to the nationalism of Quebec separatism.'" Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 25.

analysis, the notion of constitutional 'groups' can, and has, been taken to include the provinces as constitutive, regional communities that have permanent, structural influence on the order of Confederation itself: in effect, the constitutional guarantors of regionalism as a never-ending consideration in federal politics.¹⁰⁷

Regardless of their origin, or even their present legitimacy, these groups (and others) are discrete constitutional players who possess rights which cannot be abridged or overridden by political process or by the simple will of the majority. More importantly, the acknowledgement of the group is a given in any political or legal discussions that takes place in which the group-rights holder has an interest. Because of this, Canadian debates concerning citizenship, far from being simply exercises in tabulating the current or desired mix of rights and obligations for undifferentiated individuals, must, in many instances, pause to consider the social and historical contexts that inform the lives of those individuals who belong to any of those groups so identified within our constitutional arrangement. Canadian citizenship cannot, in other words, be history-negating but must be history-affirming and must respect the differences between communities that history has produced.

In recent history, with the development of the social welfare state and the rise of a more thoroughgoing rights discourse, many of these groups have themselves become important policy actors within everyday Canadian political life and have vested collective interests in the ongoing political and constitutional development of our institutions. Indeed, the reality of individualism and communitarianism coexisting, side

¹⁰⁷ Cairns, *Charter versus Federalism*, pp. 44-45.

by side, within Canadian political and constitutional process has been characterized by Allan Hutchinson as the reality of "partial and incomplete depictions of social life and its possibilities" alternately striving for supremacy in the ebb and flow of day to day political life.¹⁰⁸ Since neither one of these normative frameworks enjoys complete cultural hegemony within Canadian society, nor even amongst Canadian Aboriginals, the likelihood of future twists and turns on the road towards Aboriginal self-determination and citizenship seems a given.

Aboriginal Interests, Federalism, and the Problems of Jurisdiction

...the contemporary state is engaged in the never-ending task of fashioning a social coherence and normative integration for a citizenry subject to multiple and changing cleavages.¹⁰⁹

As important as the remapping of the constitutional terrain has been within the Aboriginal policy environment, Aboriginal demands and the responses to these demands must still find their way into and through the existing federal arrangement of powers and attendant political processes that animate the Canadian state on a day to day basis. By virtue of this federal organization, the Canadian political system has often been appraised as an environment which is both prone to and adept at managing the needs of the divergent interests that continually find expression within the ordinary course of political decision-making. Faced with challenges that might threaten our

¹⁰⁸ Allan C. Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship " in Allan C. Hutchinson, *Dwelling on the Threshold: Critical Essays in Modern Legal Thought* (Toronto: Carswell, 1988), pp. 92-94.

¹⁰⁹ Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 15.

political survival as a people who very much have a politically constituted identity (i.e., as Canadians), we tend to try and develop policies and programs to counter these challenges and which reaffirm, through the maintenance of our political structures and institutions, our sense of community, responsibility and citizenship.¹¹⁰

Our federal structure tends to encourage these responses on an incremental basis, possibly because measured, short-term responses are more susceptible to identification and implementation within an environment in which the institutions matter at least as much as the ideas that the institutions embody. In this sense, federalism is the Canadian state in its conflict management mode,¹¹¹ and while concerns about the public interest in a thematic way may not normally be part of federalism in action they are present as political and constitutional boundaries within which interest conflicts can be successfully resolved.

At the same time, there is no doubt that our federal, constitutional arrangement, with its assignment of responsibilities at different and independent levels, helps to institutionalize a certain measure of political instability and uncertainty that our political process cannot overcome.¹¹² In large measure, this is because divergent

¹¹⁰ Cairns, *Charter versus Federalism*, p. 33.

¹¹¹ Alain-G. Gagnon, "The Political Uses of Federalism," in Burgess and Gagnon, *Comparative Federalism and Federation*, p. 18.

¹¹² "Unlike many federations where the pull of the centre has quite eclipsed the original tenacity of state or local communities, Canada's, for better or worse, has retained and even enhanced that original federal polarity. Indeed, many Canadians have become convinced that it is precisely this excess of federalism - the enervating, perpetual struggle between the centre and the parts - that has irretrievably weakened national unity and threatened the continued existence of the country." Milne, "Whither Canadian Federalism," in Burgess and Gagnon, *Comparative Federalism and Federation*, pp. 203-204.

interests are able to repeatedly find and maintain expression and influence at various levels within the political-constitutional order, regardless of the solutions that might be proposed to deal with the specific issues at hand.¹¹³ Indeed, in some instances, the interests are able to appropriate for themselves a permanent vehicle of expression, which appropriation survives the particular issue at hand and which thereby changes, to some degree, the ongoing federal arrangement. This built-in propensity for the institutionalization of interests, while clearly advantageous to minorities, special interests, and those promoting provincial and territorial concerns,¹¹⁴ can prove to be a limiting factor as one attempts to move beyond a simple aggregation of the interest agenda and towards a more integrated, long-term political perspective.

As a counterpoint to this emphasis on institutions and structures, there is the reality of the social evolution of the Canadian community: more specifically, the weaning away of our identification with all things 'English' towards a bicultural, 'two-nations' understanding of our collective identity and, more recently, into an understanding of our more ever-emerging multicultural, multiethnic and multilingual makeup. Indeed, seen against the backdrop of recent political and constitutional developments, Canada is a state that now prides itself on being tolerant of other cultures and values; so much so that it has made specific political and legal commitments both to recognize and incorporate those values into its conception of

¹¹³ "Paradoxically, the capacity of a federal system to reflect diversity constitutes a built-in weakness since it allows for conflicts to emerge and be politicized." Gagnon, "The Political Uses of Federalism," in Burgess and Gagnon, *Comparative Federalism and Federation*, p. 18.

¹¹⁴ On this, see Gagnon, "The Political Uses of Federalism," in Burgess and Gagnon, *Comparative Federalism and Federation*, pp. 21ff.

society and citizenship - even to the point of enshrining some of them within the *Charter*.¹¹⁵ It is reasonable to assume that this commitment, in turn, cannot help but have a significant impact on the relationship between society and political process, insofar as citizens who come from different cultures and maintain different value systems interact with and bring their interests to bear on the making and implementation of decisions through this same process. Assuming that their interests are, at least in some sense, tied to their sense of identity and belonging to a particular cultural heritage,¹¹⁶ and assuming that they are prepared both to enrich the broader cultural heritage into which they have been placed and be enriched by the same, one can infer that their participation in the political process will help to change the mould from which the common good is forged.

From what we have said previously about the development of Aboriginal self consciousness, the limits of these suppositions are of critical importance to their survival and ongoing identity as a unique people. Like other minority peoples within our now-pluralistic national community, Aboriginal people have a specific interest in ensuring the continuation of their own culture and the repudiation of earlier political ideas concerning the , "...constitutional hegemony of British and French 'charter'

¹¹⁵ "At the citizen level, the evolution of rights consciousness over the last half-century is itself a profound change. The collective identity of citizens has been transformed to incorporate more fully Canada's linguistic dualism and multicultural heritage. Our multiracial composition is next on the agenda." Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 6. Specific provisions regarding the preservation and/or enhancement of multicultural values within the *Charter* can be found at s.15(2) and s.27.

¹¹⁶ Kymlicka, *Liberalism, Community, and Culture*, pp. 135-136. Kymlicka raises this as a prelude to the question of the survivability of distinct cultures within a liberal political framework

groups and 'founding' peoples...."¹¹⁷ that have characterized Canadian constitutional debates in the not-too-distant past and which resurfaced in the discussions leading up to the Meech Lake Accord in 1987. In this sense, addressing the needs and desires of both the Aboriginal minority and other ethnic minorities represents a 'reality check' on the capacity of the Canadian federal arrangement to encompass and express common social values and perceptions with the passage of time. This is particularly important, given the increasingly non-territorially localized nature of ethnic diversity in Canada and the inability of discrete jurisdictions (be they federal or provincial) to satisfy particular cultural needs through policy and legislation without incurring unintended spillover throughout the jurisdiction in question.¹¹⁸

Unlike the majority of ethnic minorities, however, Aboriginal people are prepared to undertake specific steps to ensure that their unique, communally-derived identities, in the spirit of the discredited two-nations ideology, be given further, more explicit recognition within the existing political and legal system that they otherwise find so confining.¹¹⁹ In and of itself, this desire undermines some of the fundamental tenets of the liberal conception of the relationship between self and community: specifically the idea that notions of community are derived sources of authentication for

¹¹⁷ Cairns, *Charter Verses Federalism*, p. 111.

¹¹⁸ On this, see Cairns, *Charter Verses Federalism*, p. 112; Charles Taylor, *Multiculturalism and 'The Politics of Recognition'*, with commentary by Amy Gutmann, ed. (Princeton: Princeton University Press, 1992), pp. 52ff. As with Québec's language laws and policy, it is clearly not always the case that mediating values between cultures is the option that will be seized upon by the government of the day.

¹¹⁹ Cairns, *Charter Verses Federalism*, pp. 111-112.

individuals, and that the community, unlike the individual does not have standing to claim rights that might be equal to or conflict with the rights of an individual.¹²⁰ However, the desire for such recognition goes beyond the simple repudiation of this latter claim, in that Aboriginal people, like the Québécois, value their collective separateness and distinctness from the dominant society and view forced integration as a "badge of inferiority"¹²¹ that continues to damage their potential for self-realization and self-development. This assertion, in turn, begs the question of the extent to which the Aboriginal self, the Aboriginal community and the broader Canadian community are able to interact with one another. The desire to recognize cultural pluralism, combined with the reality of Aboriginal politicization within constitutionally-demarcated boundaries, may imply a kind of Aboriginal-cultural 'gridlock' over the long term, with policy activity that purports to be undertaken in the spirit of the common good forever incurring legislative and political limits that it may not be able to cross.

The possibility of this kind of gridlock is not the only threat to the development of a genuinely inclusive common good. Historically, Canadian federalism as it has been practiced has concerned itself not so much with rights but with jurisdictions: that is, who has the authority and the power to act.¹²² The fact that the effective exercise

¹²⁰ Kymlicka, *Liberalism, Community, and Culture*, p. 140.

¹²¹ Kymlicka, *Liberalism, Community, and Culture*, pp. 145ff.

¹²² "Federalism is first an article of belief, not just a document containing the deathless prose of the British North America Act or the more inspiring ideals of the Constitution Act, 1982, and the Charter of Rights and Freedoms. It legitimizes the existence of separate, but interdependent, realms of political power." Doern and Phidd, *Canadian Public Policy*, p. 24. In the *British North America*

of authority has been a contentious political issue between the federal government and the provinces within the Canadian federal arrangement since the time of Confederation has contributed to an expansion and appropriation of governmental influence at all levels of society, as jurisdictions strive for increasing influence over the population that must return them to office from time to time.¹²³ However, in this current environment of large accumulated deficits and the desire of all governments to achieve deficit reduction, it is also recognized that increasing one's influence has a price, and this price is very often increased governmental costs for the administration of services.

These contradictory impulses are perhaps nowhere more evident than in the ongoing interjurisdictional debates that take place between Ottawa and the provinces over the provision of services to Aboriginal people.¹²⁴ The provinces generally, while demanding to be fully involved in the process of identifying and defining Aboriginal rights and the implementing processes that will be used to realize these rights, are equally adamant that such recognition involve no incremental costs to their treasuries

Act, the assignment of jurisdiction between the various levels of government is accomplished through a simple elaboration of heads of power under sections 91 and 92 of the Act. Prior to the advent of the *Charter*, the primary role of the courts in judicial interpretation of the Constitution, "...has been almost entirely based on the single issue of reconciling federal and provincial jurisdiction." J.R. Mallory, "The Continuing Evolution of Canadian Constitutionalism," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, pp. 53-54.

¹²³ For a brief synopsis of the jurisdictional struggles between Ottawa and the provinces since the Second World War, particularly insofar as they affected constitutional discussions, see Rainer Knopff and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, pp. 139-144.

¹²⁴ See, for example, Ian G. Scott and J.T.S. McCabe, "The Role of the Provinces in the Elucidation of Aboriginal Rights in Canada," in Long and Boldt, *Governments in Conflict*, pp. 59-71.

whatsoever.¹²⁵ In addition, where questions of Aboriginal self-government have been concerned, the provinces have, "...consistently stonewalled any constitutional initiatives that might have yielded more than municipal status"¹²⁶ for Aboriginal jurisdictions, seeing such a concession as a direct threat to their (the provinces') jurisdictional capacities. In the midst of this struggle to maintain or increase influence and minimize fiscal commitments, all of which takes place within an overarching horizon of finite resources for any new undertakings, the possibility of any common approach to Aboriginal issues that might necessitate a realignment of resources between jurisdictions is small indeed.

¹²⁵ "...provincial governments can be expected vigorously to seek appropriate mechanisms for the recovery of costs in the event that the federal government withdraws from current program responsibilities or program supports." Scott and McCabe, "Role of the Provinces," in Long and Boldt, *Governments in Conflict*, p. 65.

¹²⁶ Menno Boldt and J. Anthony Long, "Native Indian Self-Government: Instrument of Autonomy or Assimilation?", in Long and Boldt, *Governments in Conflict*, pp. 51-52. It remains to be seen how the provinces will react to the federal call for provincial devolution of selected powers to Aboriginal governments under the new Aboriginal Self-Government policy.

Chapter 4 - Self-Determination: The Horizon of Rights and Interests

Self-Determination as the Catalyst for Rights Claims

Self-determination, sovereignty, and self-government are for some people dry and ultimately meaningless terms. For others, they are misleadingly loud bullets in the arsenal of rhetoric. Upon occasion, they can be terms which represent great emotion and deep aspiration. This is particularly so when a people are struggling, as the First Nations in Canada are, to assert their independence and identity, to become more self-sufficient and to gain freedom.¹²⁷

No matter where one turns when one attempts to understand current initiatives in Aboriginal policy, one cannot avoid dealing, in some way, with the issue of Aboriginal self-determination. Though not spoken of as a discrete demand within Aboriginal discourse, in the manner of those rights that are related to it and flow out of it, it is, nonetheless, critically important to the Aboriginal political cause, insofar as it a necessary presupposition underlying all of the rights that Aboriginal people are looking to realize.¹²⁸ Indeed, following upon the observations made to the Royal Commission on Aboriginal Peoples over the course of some three dozen public hearings spanning some six weeks of very critical Aboriginal history in the aftermath of the defeat of the Charlottetown Accord, self-determination emerges both as a theme and as a conscious starting point for the development of a new relationship between all of the peoples of Canada: Aboriginal and non-Aboriginal alike.¹²⁹ Being

¹²⁷ Frank Cassidy, "Self-determination, Sovereignty, and Self-government," in Cassidy, *Aboriginal Self-Determination*, p. 1.

¹²⁸ Bar Association, *Aboriginal Rights in Canada*, p. 32.

¹²⁹ Royal Commission on Aboriginal Peoples, *Public Hearings: Focusing the Dialogue*, Public Hearings, Discussion Paper 2 (Ottawa: Minister of Supply and Services Canada, 1993), p. 20. The second round of public hearings before the Commission began the day after the defeat of the

a starting point, self-determination is best understood as a general social and political principle that remains to be invested with specific content depending upon the circumstances; it is also seen as a political catalyst that (so it is hoped) will help to knock down the wide range of political, social and cultural barriers that continue to plague Aboriginal people in their quest for social and cultural legitimacy. In this sense, as some writers have already observed, self-determination joins together both the rights-based and the interests-based dimensions of the global Aboriginal project.¹³⁰

Though non-Aboriginal awareness of the Aboriginal plight is not a new phenomenon, it is fair to say that the Canadian public's first real, sustained taste of Aboriginal political and legal desires came about in the late 1970s and early 1980s. It was then that Aboriginal demands for the recognition of their rights and the desire to entrench these rights in a renewed constitution became an important public relations exercise for Aboriginal people during the repatriation the *British North America Act*. This exercise took Aboriginal representatives to England to argue their case. As a consequence of repatriation of the Constitution in 1982, national interest in the Aboriginal agenda reached its highest levels through four different Aboriginal constitutional conferences convened by then Prime Ministers Trudeau and Mulroney between 1983 and 1987, which, nonetheless, when all was said and done, produced a great deal of discussion on the question of Aboriginal rights within the Canadian confederation but little by way of concrete gains in these rights relative to that which

Charlottetown Accord, in the referendum of October 26, 1992.

¹³⁰ As outlined by Richard Simeon, "Comment on 'Sharing Power: How Can First Nations Governments Work?'" in Cassidy, *Aboriginal Self-Determination*, pp. 99-107.

was included as part of patriation itself.¹³¹

As of 1995, the after-effects of what has become something considerably less than full constitutional satisfaction of Aboriginal demands continue to be felt within policy making circles. However, while it is still too early to say for sure, there is the possibility that more discernable movement in the development and implementation of federal policy on the recognition of Aboriginal self-determination might emerge than what we have witnessed previously.¹³² On the one hand, the present Liberal government has, after months of consultation, formally delivered on one of its key election promises: to recognize and proceed to implement a constitutionally derived, yet politically and administratively variable right of self-government,¹³³ thereby avoiding yet more rounds of highly charged constitutional discussions. In effect, the government has elected to proceed as though the Constitution already gives Aboriginals that which they previously struggled long and hard to win constitutional agreement on, only now the agreements on the exact meaning will come at other than

¹³¹ *Constitution Act, 1982*, ss. 25 and 35. As a result of the 1983 First Ministers' Conference, section 25(b) was amended to include rights already acquired by existing land claims agreements. Section 35 was expanded to include existing and future land claims agreements in the definition of "treaty rights" and to guarantee that Aboriginal and treaty rights applied equally to male and female persons. On this, see Hawkes, *Aboriginal Peoples and Constitutional Reform*, p. 7.

¹³² "... federal Aboriginal policy as a whole during this period [the 1980's and early 1990's] has been characterized by only episodic attention to Aboriginal needs and by a slow recognition that both policies, and approaches to how policy was made, had to change and become more integrated." Doern, *Politics of Slow Progress*, p. 12.

¹³³ As based on the commitment of the government in its pre-election platform "red book." On this, see Liberal Party of Canada, *Creating Opportunity* (1993), p. 2; Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Public Works and Government Services Canada, 1995), *passim*.

the national level. At the same time, the government appears somewhat more receptive to resolving other governance policy issues such as alternatives to the blanket extinguishment provisions of the present land claims policy,¹³⁴ and accelerating the transfer of program delivery responsibilities to Indian Bands in the provinces. In short, while it is not likely that there will be a return to the constitutional table on Aboriginal matters in the near future, it could become the case that, with the proper implementation, such a return might not be necessary.

Given recent federal Aboriginal policy history, one is inclined to say that there is and has been an unofficial acknowledgement of some limited form of self determination by government for some time, and that the real problem has been to find policy-based instruments that would allow the development and implementation of Aboriginal self-government at the community level; ostensibly in response to community-based needs.¹³⁵ We do well, however, to keep in mind just how specifically focused this perception is, since these initiatives have, without exception, been considered and crafted with a view towards reconciling Aboriginal desires for

¹³⁴ In January, 1995, Minister Ron Irwin announced the appointment of the Hon. A.C. Hamilton, former Associate Chief Justice of the Manitoba Court of Queen's Bench, to examine "the current surrender provisions in [comprehensive land claim] agreements and other ways to achieve certainty about rights to land and resources." Mr. Hamilton was to solicit the views of the parties to claims negotiations, as well as other interested persons and groups, and report their views and his recommendations to the Minister sometime in the Spring of 1995. See Minister of Indian Affairs and Northern Development, "Background Paper: Achieving Certainty in Comprehensive Land Claims Settlements," and accompanying communique.

¹³⁵ "Since the federal government believes that local communities, not central governments, are best able to make the important decisions affecting people's daily lives, discussions and negotiations to advance self-government will be community-based; conducted at a practical level and at a measured pace; and, tailored to specific circumstances that exist today." David Crombie, Minister of Indian Affairs and Northern Development, "Policy Statement on Indian Self-Government In Canada," Ottawa, April 15, 1986, p. 2.

autonomous decision-making capacity with both the perceived strictures of the existing constitutional and statutory framework and the strategic policy concerns of government officials who, above all else, could not commit in advance to a legally undefined and fiscally unsupported right with no clear relationship to the existing constitutional and legal order.¹³⁶ One such policy, the Community-Based Self-Government process, which was available only to Indians under the *Indian Act*, produced mediocre results over the course of some eight years and has now quietly been set aside.¹³⁷ Other approaches, such as treaty-based self-government negotiations, still lack conceptual clarity, have yet to deliver anything concrete, and will in many instances likely be superceded by the new self-government initiative.¹³⁸ Despite the uneven progress on specific proposals, patterns of self-determination are, as one writer notes, continuing to evolve independently of the constitutional

¹³⁶ See Fleras and Elliott, *The Nations Within*, pp. 71-72.

¹³⁷ According to the then-Minister of IAND, Bili McKnight, this "community-based process" of negotiating and implementing self-government was designed as an interim measure, in the absence of a constitutional agreement on the recognition of the inherent right of Aboriginal self-government. It did not presuppose any national agreement or understanding of what self-government might actually mean. See "Notes for Remarks by the Honourable Bill McKnight, Minister of Indian Affairs and Northern Development, to the Cree General Assembly," Chisasibi, Quebec, August 2, 1988. According to DIAND policy statements, this process, "...provides an opportunity for those Indian communities which have already done some developmental work and are ready to move beyond the limits of the current *Indian Act*, to negotiate new self-government arrangements with appropriate government authorities." On this see DIAND, "Indian Self-Government Community Negotiations: General Information," March 1988, p. 2. The policy was rendered practically inert this year as funding for the initiative was exhausted and not renewed. For a summary of the policy's limitations, see Scott, "Politics of Culture," in Dyck and WalDRAM, *Anthropology, Public Policy, and Native Peoples in Canada*, pp. 319-320.

¹³⁸ There is still the possibility that various First Nations, such as the Huron-Wendat, the Treaty 8 Dene, will elect to pursue self-government agreements based on their treaties.

process,¹³⁹ but their significance and long-term impact are ambiguous.

The fact that progress explicitly recognizing and implementing self-determination through either legal or policy means is as tentative as it has been also speaks both to the multidimensionality of the idea of self-determination as an interest and, more importantly, to the non-contingent, non-derivative nature of self-determination as a right. The collapse of constitutional agreements relating to self-determination, far from stymying Aboriginal aspirations or diminishing the importance of the Aboriginal political agenda, have had an opposite effect, and increasing numbers of Aboriginals are coming to believe that the, "...Aboriginal rights now recognized in the constitution and in existing common law may be used, without constitutional amendment, as a springboard to self-government for Aboriginal peoples."¹⁴⁰ For many Aboriginals, invoking both the need and the intention to pursue self-determination sends out a powerful message about their status as, "...sovereign and self-governing nations with a distinct political status within the Canadian confederation,"¹⁴¹ regardless of the current manifestation of this status within the existing socio-political order. Claiming the right to self-determination provides the claimant group with the strongest position from which to bargain with the majority for whatever rights they might eventually win. At the same time, it also runs the risk (as Aboriginals know all too well) of alienating

¹³⁹ David Hawkes, panel discussion comments in "Accomplishments and Failures of the Aboriginal Constitutional Reform Process," in *Aboriginal Self-Government and Constitutional Reform: Setbacks, Opportunities, and Arctic Experiences*, being a national conference held in Ottawa, 9-10 June 1987 (Ottawa: Canadian Arctic Resources Committee, 1988), p. 16.

¹⁴⁰ Royal Commission on Aboriginal Peoples, *Focusing the Dialogue*, p. 23

¹⁴¹ Fleras and Elliott, *The Nations Within*, p. 57.

the non Aboriginal majority from the legitimate grievances that the claimants might have. In this sense, it is most certainly the "most extreme" of all rights claims.¹⁴²

Self Determination: Mapping the Current Debate

...self-determination is an expression of self-government, it is not the other way around. Self-government will not give us self determination. Self-determination can't be legislated, it can't be negotiated, and it can't be enshrined in the Constitution, because it comes from within....¹⁴³

Amongst many policy-makers and non-Aboriginal stakeholders who are active in the debate, talk about Aboriginal self-determination itself as a discrete concept is both problematic and, one suspects, intimidating. After all, pressed to its logical conclusion, it has the potential to destroy Canadian federalism as it is currently understood. For those committed to the maintenance or renewal of the relationship between Aboriginal peoples and Canada, the concept must be stripped of this potentially destructive implication. Whatever self-determination is, so such stakeholders argue, it surely cannot mean outright sovereignty for Aboriginal people; it must mean some sort of mutual coexistence within existing (or renewed) arrangements.¹⁴⁴ If pressed, they have gone so far as to acknowledge the inevitability of autonomous, self-governing Aboriginal communities within Canada, and even

¹⁴² Cynthia Williams, "The Changing Nature of Citizen Rights," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 125.

¹⁴³ Statement by Brian Tuesday, in Royal Commission on Aboriginal Peoples, *Overview of the Second Round*, p. 9

¹⁴⁴ Comment by David Hawkes, in *Aboriginal Self-Government and Constitutional Reform*, p. 29.

concede the primacy of Aboriginal needs and interests in developing such communities, but in such a fashion so as to not deny the legitimate interests and values of the larger Canadian community out of which such communities might spring.¹⁴⁵ Seen from this perspective, the pursuit of self-determination is derivative of and subsidiary to the renewal of Canadian federalism and Canadian society generally. The 1983 House of Commons report on Indian Self-Government in Canada (the "Penner Report") - recognized by various writers as one of the strongest briefs for Aboriginal rights produced within official circles - endorsed the implementation of Aboriginal political self-determination within this particular context: as a means toward renewing the relationship of Aboriginal peoples with the rest of Canada and with a view towards strengthening national unity generally.¹⁴⁶

Even when the discussion tries to avoid debates over principle and focusses on pragmatic solutions, the road to recognizing and defining self-determination is by no means a straight one. There is general agreement that self-determination, "...means giving native people the capacity to develop and implement their own solutions to their special political, social and economic problems....",¹⁴⁷ but there is precious little agreement over how that capacity might actually be transferred to the Aboriginal

¹⁴⁵ Statement by Richard Simeon, in Cassidy, *Aboriginal Self-Determination*, p. 99. See Garth Nettheim, "'Peoples' and 'Populations': Indigenous Peoples and the Rights of Peoples," in James Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988), pp. 119-121 for a brief discussion on some of the recognition issues under international law on this.

¹⁴⁶ Penner, *Indian Self-Government*, pp. 41ff. For a critique of the report's approach and recommendations, see Schwartz, *First Principles, Second Thoughts*, pp. 151-152.

¹⁴⁷ Statement by Thomas Siddon, former Minister of Indian Affairs and Northern Development, in Cassidy, *Aboriginal Self-Determination*, pp. 155-156.

groups who seek it. For some, who have had a political stake in settling Aboriginal grievances, self determination, through the recognition of land title and self-government, can and should be accomplished in the here and now through existing political and constitutional processes. Such a view is well summarized in a position taken by the former Premier of Yukon, Tony Penniket, who declared that: "...there will be no progress on Aboriginal political, social, and economic development until First Nations are recognized as nations - within Canada and the Canadian Constitution - for whom self government is a right."¹⁴⁸

For others, both in government and the private sector, neither the way ahead nor the speed at which self-determination should be pursued is so clear. Some are confident that a practical outcome - some kind of power-sharing with Aboriginals within an existing legal-constitutional structure - can be arrived at, and that with such power sharing the ability of Aboriginal peoples to address their own problems will surely follow.¹⁴⁹ Others, however, are not so sure that the goal has yet been adequately delineated, and believe that more comprehensive and incrementally-driven negotiations between various stakeholders are required to ensure that all "reasonable" points of view are aired and synthesized into an "agenda for action."¹⁵⁰

This latter approach, which may sound quite reasonable to non-Aboriginal

¹⁴⁸ Statement by Tony Penniket, former Premier of Yukon, in Cassidy, *Aboriginal Self-Determination*, p. 144.

¹⁴⁹ Statement of Dick Martin, Executive Vice-President, Canadian Labour Congress, in Cassidy, *Aboriginal Self Determination*, p. 85.

¹⁵⁰ Statement of Adam H. Zimmerman, Chairman and CEO, Noranda Forest Products, in Cassidy, *Aboriginal Self Determination*, pp. 129-130.

interest-holders, enjoys little favourable sentiment amongst Aboriginals and is, rather, likely to be a cause for friction and even confrontation.¹⁵¹ Indeed, despite different approaches to implementing the outcome, there is a very high degree of clarity amongst Aboriginal people concerning the source of self-determination. The fact that self-determination is understood as a right means that, for Aboriginal people, the key element in implementing it is the simple recognition by non-Aboriginals that it exists. More importantly, it exists independent of any process of identification or definition which would involve negotiating the substantive content of the right with non-Aboriginals. In this regard, any attempt at recognition of the right that implies a delegation of power from some non-Aboriginal source is looked upon with particular disdain.

In line with this attitude, and according to many of its advocates, the parameters for Aboriginal self-determination are, in the first instance, best put forward in their strongest (perhaps most provocative?) sense. To this end, the demand is usually advanced in a manner that encompasses both the collective and individual dimensions of the Aboriginal rights agenda, as well as requiring full, collective autonomy as its effective starting point. As Sharon McIver describes it:

"Aboriginal peoples, collectively and individually, have the inherent right to self-government and the right to self determination. In plain language, women and men have the collective and individual right to govern

¹⁵¹ in large part because self-determination is the means whereby the foundations of collective identity are identified, recovered and nurtured - an undertaking that encompasses but goes beyond the search for self-government. In this respect, self-determination is not a negotiable political outcome. On this see Royal Commission on Aboriginal Peoples, *Focusing the Dialogue*, pp 19ff

themselves including their land, people and resources."¹⁵²

The assertion of both the "collective and individual" right to both self-government and self-determination seems to beg at least two different sets of questions. The first is the possibility of an internal dilemma: an inevitable conflict, at one or the other level, between the two types of rights as actualized by the group and its constituents at some point in time.¹⁵³ The possibility of this dilemma and its associated questions is not, of course, unique to present or future Aboriginal governments, but is shared by all complex political units. The second question, of far greater concern to policymakers at present, is the potential conflict between these rights and the right of the parent state (that "basic unit of international law"¹⁵⁴) to its continued viability and integrity. This goes right to the heart of any ongoing interaction between Aboriginal governments and current Canadian governments, and must be resolved in a 'win/win' fashion if any form of relationship between the two sides is to survive in the long-term.

It is instructive to note that, in a partial response to the first question, McIvor takes an extreme position on the possibility of internal conflict; in fact, she denies that

¹⁵² Sharon D. McIvor, "The Inherent Right to Aboriginal Self-Government: Collective and Individual Rights," in *The Inherent Right of Aboriginal Self-Government*, proceedings of the 1994 Annual Meeting of the Continuing Legal Education Program, volume 1, p. 1.

¹⁵³ For a discussion of some of the specific issues related to this dilemma, see Gillian Triggs, "The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?", in Crawford, *The Rights of Peoples*, pp. 141-157; Brian Slattery, "The Paradoxes of National Self-Determination," *Osgoode Hall Law Journal* 32 no. 4 (Winter, 1994):703-733.

¹⁵⁴ James Crawford, "The Rights of Peoples: 'Peoples' or 'Governments'?", in Crawford, *The Rights of Peoples*, p. 55

there is any possibility of "...inherent conflict between collective and individual rights when speaking of Aboriginal self-government.¹⁵⁵ The context for taking this position is, ostensibly, to refute various non-Aboriginal observations about the apparent friction between Aboriginal women and the (male) Aboriginal leadership during the negotiations leading to the Charlottetown Accord.¹⁵⁶ There is, in the refutation, a widely-defended belief that sovereign Aboriginal governments, once operational, will be 'more' democratic than their non-Aboriginal counterparts by virtue of their strong belief in consensus-building and their respect for the opinions of all of their individual members. Being more democratic, they are better able to mediate between and reconcile competing interests than the non-Aboriginal paradigm of majority rule.

While we are certainly not in a position to prejudge the actual behaviour of sovereign, yet-to-be-established Aboriginal jurisdictions towards their citizens, it is permissible to question the extent to which certain types of conflicting rights might be reconciled with each other: in particular, the right of certain sub-groups of people within this new jurisdiction to leave it. As Brian Slattery and others have pointed out, the strong claim for self-determination (which McIvor is clearly advancing), necessarily entails a claim both of authority and territoriality and, indirectly, of allegiance, and emphasizes throughout a "close link between group membership and individual self

¹⁵⁵ McIvor, "Collective and Individual Rights," in *The Inherent Right of Aboriginal Self Government*, volume 1, p. 1.

¹⁵⁶ McIvor, "Collective and Individual Rights," in *The Inherent Right of Aboriginal Self Government*, volume 1, p. 3.

identity."¹⁵⁷ Even within Canada, however, such cultural homogeneity within a given territory as the strong argument for self-determination presumes is a rare exception.¹⁵⁸ This raises the spectre of further assertions of self-determination by various cultural sub-groups, each making formal claims to govern the territory that they inhabit. Clearly, if certain Aboriginal groups want to have and exercise unfettered territorial sovereignty, they may well have to eat some of the destabilizing implications of the same.

One alternative to leaving this issue to the would-be Aboriginal jurisdictions to sort out as a matter of internal governance is to provide for some form of external, mutually agreeable mechanism for review and redress so as to protect the balance between both individual and sub-group rights and the rights of the Aboriginal jurisdiction, most particularly in those cases wherein reconciliation of a conflicts between them is not possible. This is not to suggest the establishment of a tribunal that could somehow decide 'legitimate' instances of self-determination. It would be more like an agency that would have a formal mandate to recognize and act upon such instances when they are initiated, and could bring resources to bear to ensure as

¹⁵⁷ Slattery, "Paradoxes of National Self-Determination," p. 722.

¹⁵⁸ Even the new territory of Nunavut, when created, will have a substantial minority population of some 15% non-Inuit. To date, there has been no formal consideration given to providing institutional and other protection to this minority (for example, guaranteed representation in the legislature) that I am aware of. Consideration of such provisions would, in any event, be seen to undercut the federal government's claim that Nunavut, when created, will be a "public" (ie., not aboriginal) government.

smooth a transition as possible from the old political order to the new.¹⁵⁹ In any event, to not provide for some sort of mechanism like this, or, as an alternative, to agree to circumscribe the territorial implications of the strong case for self-determination, is to suggest, by acquiescence, that the group in power is entirely synonymous with the jurisdiction that they administer.¹⁶⁰ This is an unhealthy relationship, if political history is any guide.

On the second question raised by McIvor's assertion, it is again interesting to note that when she speaks about self-determination she claims that the fact of self-determination is a simple derivative of the fact of self-government: that the exercise of the latter necessarily entails the existence of the former.¹⁶¹ This assessment of the relationship between the concepts is certainly in line with what has been observed above, and it presumes that the acceptance of Aboriginal governments must include the recognition of Aboriginal territories over which these governments would govern.¹⁶² This is clearly a rebuke the federal government's refusal to acknowledge the right of self-determination even as it is prepared to acknowledge the right to self-

¹⁵⁹ This follows a suggestion by Avishai Margalit and Joseph Raz, "National Self-Determination," *Journal of Philosophy* 87 no. 9 (Sept., 1990), pp. 457-458.

¹⁶⁰ On this see Triggs, "Peoples' Rights," in Crawford, *The Rights of Peoples*, pp. 142-143. Triggs speaks specifically about the need to guarantee the right of 'a people' against its own government, but it is also the case that the principle needs to work in reverse. Tyranny exercised in the name of collective self-determination is still tyranny, no matter how real the historical oppression of the collective now in power.

¹⁶¹ McIvor, "Collective and Individual Rights," in *The Inherent Right of Aboriginal Self Government*, volume 1, p. 4.

¹⁶² This is, effectively, what Margalit and Raz mean by "national self-government." See Margalit and Raz, "National Self-Determination," p. 440.

government, since self-government need not, in federal eyes, necessarily entail the right of sovereignty from the parent state.¹⁶³ Given that the federal government does acknowledge a right to self-government in principle, the worst case scenario for Aboriginal people who accept McIvor's assertion is that refusal to accept self-government without sovereignty does not necessarily commit Aboriginal people to opt out of confederation but does put government on notice that these people still intend, at the least, to see the map of confederation redrawn to better suit their needs, interests and rights.

Over and above the internal problems mentioned above, the major difficulty with this particular approach is that it does nothing to address non-Aboriginal concerns about the perceived inevitability of self-determination leading to outright political sovereignty, which is clearly a significant policy variable to be considered by non-Aboriginals when considering options for recognizing self-determination. Not only does it attempt to obviate the rights and interests of the Canadian state as a pre-existing national entity recognized in international law, it, as yet, fails to show how it is that the right of self-determination, as claimed by any given Aboriginal group, either preempts or outweighs the rights and interests of Canada and its citizens in maintaining the existing state (with its territory) intact¹⁶⁴. This is no small

¹⁶³ This principle has been reiterated most recently in the new Aboriginal self-government policy. In addition, as Peter Hutchins observes, "Under international law, sovereignty and self-government are two distinct notions and although sovereignty does not exist without self-government, the contrary is possible." Peter W. Hutchins, "The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine," in *The Inherent Right of Aboriginal Self-Government*, volume 1, p. 19.

¹⁶⁴ Slattery, "Paradoxes of National Self-Determination," p. 725.

consideration, especially considering, on balance, Canada's favourable political environment and record on human and civil rights.

Because the broader context for this expression of self-determination arises from and is animated by (to paraphrase John Amagolik) Aboriginal peoples' histories (ie., plural collective histories), traditions and cultures,¹⁶⁵ the intimacy of the relationship that McIvor suggests between it and self-government would imply that modes of governance are inextricably tied up with these histories. Consequently, they might be independent of derivation from any currently shared political or legal process, institution or undertaking. Such unmediated self-determination, giving rise to new political structures within the existing confederation, could produce ever-increasing fragmentation of existing social norms and, thereby, increasing social isolation between political groups. It could also lead to the placing of a particular people's rights or interests over and against the rights and interests of others who must coexist with these groups within proximate areas, while their claims remove from consideration any possibility of negotiated compromise at the outset.

Because of these difficulties, acknowledgement of a delimited right of self determination - at least in principle - within the context of what is so clearly an immigrant, multinational and multiethnic society as Canada now is has critical implications for the way in which we understand our national socio-political order to be constituted and, in particular, the ways in which the rights of sub-national groups

¹⁶⁵ Statement by John Amagolik, former President, Inuit Tapirisat of Canada, in Cassidy, *Aboriginal Self-Determination*, p. 35.

to pursue their particular social and political goals within this backdrop might be accommodated. Having foresworn assimilationist objectives, as our contemporary policy makers would now unanimously claim,¹⁶⁶ the outputs of various peoples intent on pursuing their self-determination within an explicitly accommodationist socio-legal environment must, at least potentially, include the development of differentiated, but equal social and political sub-orders, and multiple 'publics' against which social and political values and norms will be judged. The political wisdom and assumptions of the past, together with the fairly homogenous social and cultural norms that informed this earlier stability, is simply no longer viable.

The "Special Relationship" and the Limits of Self-Determination

While the discourses of self-determination, as advanced above, would lead one to believe that the concept is employed more often than not without regard for existing political realities, this is not entirely the case. Moreover, the possibility of there being independent, multiple publics co-existing within the same society takes on special meaning when considering the Aboriginal/non-Aboriginal relationship. While it is generally argued that the historical application of the constitutional and statutory relationship between Canada and Aboriginal peoples has been an ongoing impediment for Aboriginals in the process of arriving at a viable sense of Aboriginal identity and citizenship, there is another dimension of state-Aboriginal relations that has, in more

¹⁶⁶ Scott, "Politics of Culture," in Dyck and Waldram, *Anthropology, Public Policy, and Native Peoples in Canada*, p. 311.

recent policy history, been cultivated by advocates and others as a counterpoint to this impediment. It is what more than one federal task force has referred to as the "distinctive place" that Aboriginal people have within Confederation.¹⁶⁷

This distinctive place, or special relationship, is a somewhat nebulously defined, legally grounded and politically actualized phenomenon that arises from a number of discrete sources: from Aboriginal history, both pre- and post-contact, which is for the most part oral history; proclamations of the Crown in respect of Indians (most particularly the *Royal Proclamation of 1763*); treaties between the Crown and various First Nations, including the various treaties that were entered into between the Crown and Indians during the 18th, 19th and early 20th centuries, and, by way of elaboration, various court decisions concerning Aboriginal title, Aboriginal rights, the fiduciary responsibility of the Crown, and so on.¹⁶⁸ In essence, this special relationship is the cumulative history of the continuing legal and political interaction of Aboriginals and Europeans as jurisprudence has come to understand it, together with the assumptions concerning cultural and political integrity that are thereby believed to accrue to both peoples in their common journey together as equals. Put another way, it is the history of the Aboriginal relationship with the Crown, before the imposition of post-Confederation law and the transition from a relationship of trust to one of

¹⁶⁷ Coolican, *Living Treaties: Lasting Agreements*, p. ii; Penner, *Indian Self-Government*, p. 46

¹⁶⁸ Coolican, *Living Treaties: Lasting Agreements*, p. ii; For a note on the principles of the relationship emanating from case law, see Brian Slattery, "First Nations and the Constitution: A Question of Trust," in *The Inherent Right of Aboriginal Self-Government*, Volume 2, pp. 262-265

domination.¹⁶⁹ This history, during this particular period, is the benchmark against which any subsequent changes to the relationship are to be measured.

As part of their modern political activism, Aboriginal people readily accept, defend and advance this notion of a special relationship since it gives them a status as a politically significant culture and a set of distinct societies within Confederation that both precedes and is independent of the later society and polity into which they have, unwillingly, been subsumed. Moreover, the Aboriginal strategy for the past several years has been to articulate the dynamics of this relationship primarily in terms of certain rights that flow out of it. These rights-based arguments are bolstered by a genuine concern, amongst large numbers of non-Aboriginals, for the preservation and development of Aboriginal culture, to the extent that the celebration of the uniqueness of Aboriginal culture itself has gained favour as a positive policy value in the post-assimilationist and post-1969 White Paper world.¹⁷⁰ In this way, the special relationship is both the product of and a catalyst for social and political evolution.

Just what the long-term implications of acting upon such a renovated and newly-invigorated special relationship might impose upon the Canadian state and the general public are still, at bottom, an open question. On the one hand, for someone like George Erasmus, former National Chief of the Assembly of First Nations, acknowledging the special relationship on a national or constitutional plane is not an

¹⁶⁹ Penner, *Indian Self-Government*, pp. 119-121.

¹⁷⁰ Scott, "Politics of Culture," in Dyck and Waldram, *Anthropology, Public Policy, and Native Peoples in Canada*, p. 313.

attempt to rupture Confederation, but is instead a means of completing it.¹⁷¹ Such an assertion would seem to build upon the conclusion that the Royal Commission makes regarding the ultimate goal of self-determination within the Canadian context: that it is the means whereby a renegotiated relationship between Aboriginals and non-Aboriginals, based on partnership, can be forged.¹⁷² Of course, this assertion assumes that there are elements of the existing relationship, with its implications for participation in and responsibility for the broader political life of the nation, that both Aboriginal and non-Aboriginal people might actually want to hold on to: an assumption for which the Royal Commission, through its hearings, appears to have received some measure of confirmation.¹⁷³

On the other hand, this broad measure of affirmation is often overshadowed by the perceived institutional implications of the specific rights demands, such as the inherent right of Aboriginal self-government and the claim of subsisting Aboriginal land title, that many Aboriginals feel are the minimum expression of the special relationship. Fulfillment of these demands for Aboriginals generally is both an essential part of the relationship's restoration and an acknowledgement of the historical inequity that was created. Non-Aboriginals, by contrast, often lack the specific knowledge concerning

¹⁷¹ Georges Erasmus, "Towards a National Agenda," in Cassidy, *Aboriginal Self Determination*, p. 173.

¹⁷² Royal Commission on Aboriginal Peoples, *Focusing the Dialogue*, p. 20.

¹⁷³ Royal Commission on Aboriginal Peoples, *Focusing the Dialogue*, pp. 19ff.

the historical significance behind these demands on the part of non-Aboriginals.¹⁷⁴ This, combined with emotional motivations for their resolution, such as was felt during the highly public exposure of the Aboriginal Constitutional Conferences in the 1980s,¹⁷⁵ almost invariably provokes a reaction of guilt, uncertainty, alarm and even denial. These reactions will likely not be attenuated until a comprehensive understanding of what the special relationship is and should mean in the present is understood and accepted on both sides.

Does Self-Determination Necessarily Mean Sovereignty?

Expressed as a fundamental human right and as a fundamental doctrine in current norms of international law, self-determination is a necessary precondition for the legitimate development of a people across the entire panoply of human existence - that is, their social, cultural, political and economic development - in a manner that can be said to be free from external coercion.¹⁷⁶ Measured strictly against this

¹⁷⁴ In many respects, this is the crux of the debate over the recognition of Aboriginal rights for most non-Aboriginals: how do we incorporate the realities of the past into the demands of the present and future? As the Royal Commission has noted, many of the treaty First Nations who spoke at Commission hearings are of the opinion that, at minimum, Aboriginal rights should be recognized and implemented in the manner in which they existed at the time that the various treaties between First Nations and the Crown were signed (*Overview of the Second Round*, p. 11). Non-Aboriginals, while not necessarily disputing the basis for rights, are struggling to find a way to assess the impacts of such recognition on the existing political system (*Overview of the Second Round*, p. 12).

¹⁷⁵ Statement by Ian McKinnon of Decima Research, in *Aboriginal Self-Government and Constitutional Reform*, pp. 38-39.

¹⁷⁶ Bar Association, *Aboriginal Rights in Canada*, p. 32, quoting the *International Covenant on Civil and Political Rights* (1966). See also Crawford, "The Rights of Peoples," in Crawford, *The Rights of Peoples*, p. 58.

standard, the struggle of the Aboriginal Peoples of Canada for the right to control their lives, their lands, their resources, and their future is clearly a struggle that continues to elude them and which can be only partially realized within the confines of what is, essentially, a foreign legal and political arrangement.

At the same time, Aboriginal people do not deny that these rights transcend purely political considerations even as they remain firmly tied to them, and that they must also be understood both as an acknowledgement of the tenacity of Aboriginal people in their determination to survive in the face of the dominant non Aboriginal culture and as an expression of this people's inalienable responsibility for, or stewardship of, the creation from which they come and which they continue both to use and respect.¹⁷⁷ Framed in such terms, self-determination is a profoundly important statement of cultural stability and vigour: one which has survived several centuries of past neglect and injustice, and which may well receive a sufficient infusion of new health through the various current and planned policies relating to Aboriginal governance so as to be able to survive and prosper.

Even if this is possible, however, there can be no doubt that fundamental changes would have to occur within the Canadian polity and society generally. For one thing, the fact that evidence for the realization of self determination being actualized is assessed across such a broad spectrum of human activity means that a people claiming self-determination always has a kind of 'back door' to claiming the

¹⁷⁷ On this, see statements by Gordon Peters, Ontario Region Chief, Chiefs of Ontario, and John Amagolik, Former President, Inuit Tapirisat of Canada, in Cassidy, *Aboriginal Self Determination*, pp. 33-35.

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need for the further development of their self-actualized, autonomous existence: a door which can never be closed through the confines of a superimposed political community. This is not to say that the claim for self-determination does not permit the claimant group a range of options for a political relationship with the dominant state short of outright political independence; only that any other option actually seized upon may, by its nature, be provisional and subject to future change at the claimant group's instigation.¹⁷⁸

Moreover, in contradistinction to the paradigm of developing and advancing individual rights that we are so used to - rights which demarcate (often in a negative way) a zone or region into which the activity of the *polis* may not intrude on the freedom of the individual - the collective right of a people to self-determination is a positive affirmation; something whose expression is inherently political in nature, as the report of the Canadian Bar Association on Aboriginal Rights would seem to suggest.¹⁷⁹ It is not simply a claim about the absence of coercion and a guarantee of more or less explicitly defined individual freedoms. It entails, necessarily, the ability of persons to willingly choose their political status and to enter into political arrangements that better enable them to pursue their economic, social and political

¹⁷⁸ "Self-determination is normally thought to permit a people a range of options from absorption within another nation, at one end of the range, to full sovereign independence, at the other. If the sovereignty option is not, realistically, open to those indigenous populations in 'internal colonial situations', can one apply the concept of self-determination to such 'peoples' at all?" Nettheim, "Indigenous Peoples and the Rights of Peoples," in Crawford, *Rights of Peoples*, p. 118.

¹⁷⁹ "It is widely recognized that the right of self-determination through self-government is a fundamental human right of all peoples. As individuals we are not confined to the assertion and exercise of individual rights, but can act publicly and collectively." Bar Association, *Aboriginal Rights in Canada*, p. 31.

aspirations.¹⁸⁰ As a consequence, to make this free choice to enter into a new political arrangement is not only to affect the individual doing the choosing, but also the group or association into which he or she is entering and from which he or she may be departing.

The emphasis on collectively held rights and the equality of the group with other groups is an important dimension of self-determination. While to many of its respondents the kinds of demands made in the struggle for self-determination often raise very pragmatic questions about such political basics as power, visibility, status, and entitlements, for the advocates the struggle does not stop at these issues but often goes beyond them. As it is pursued, it involves both sides in a broader reexamination of what many would say are both the classic themes of Western political philosophy and the ideological controversies of the present era: the relations between citizens and the states in which they live, between the market and the polity, and between citizen's rights and obligations.¹⁸¹ Few states can stand up to such scrutiny without incurring significant changes, regardless of their political record and commitments.

From the standpoint of political activism, the reality of this induced uncertainty is something that is not lost on those who have taken up the call for self-determination, within the existing political order, that builds up the special relationship described above. When backed by specific, crafted forms of political discourse which provide context for specific demands, the appeal to the special relationship is used not

¹⁸⁰ Bar Association, *Aboriginal Rights in Canada*, pp. 31ff.

¹⁸¹ Cairns and Williams, "Constitutionalism, Citizenship and Society, in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 2.

only to advance and undergird a specific agenda on the part of Aboriginal advocates but also to circumscribe and relativize the normative nature of the dominant political regime so that change might be seen to be both desirable and possible at the same time.¹⁸² As a political tool, it can, in the broadest sense, be regarded as evidence of what many anthropologists have called the "politicization of culture" that has occurred in many jurisdictions throughout the western world.¹⁸³ From this perspective, self determination is a metaphor through which the rights of heretofore suppressed cultural collectivities are given expression. In particular, it encapsulates their demand by virtue of their membership in a specific and identifiable collective - for that social, economic and cultural equality with the dominant majority which they claim the political realities of the parent state have systematically denied them. In short, self determination is evidence of almost irresistible, global political evolution, of a kind that promises to remake many nations after a fashion not experienced since the European age of discovery some five centuries ago. The question remains whether, in the end, it will result in a similarly tumultuous reordering of the social and political realities of the present.

¹⁸² As in the following example: "The treaties signed between First Nations and the Crown are as real and basic to them as *Magna Carta* is to the British " Royal Commission on Aboriginal Peoples, *Focusing the Dialogue*, p. 20.

¹⁸³ Scott, "Politics of Culture," in Dyck and Waldram, *Anthropology, Public Policy, and Native Peoples in Canada*, p. 311.

Chapter 5 - Self-Government: Possibilities and Limitations

Finding Self-Determination through Self-Government

I am frustrated that we are compelled to establish and prove our inherent right to self-government....I assumed that it was accepted that the earlier practices of colonialism were illegal and the self-determination of Indian people is now a legal right.¹⁸⁴

For better or worse, one cannot have a serious discussion about the struggle for Aboriginal self-determination in the 1990s without talking about the Aboriginal right to self-government. As a component of the political agenda of Aboriginal people, it is, paradoxically, the most settled and also the most contentious of all Aboriginal rights claims. It is the most settled in the sense that the quest for the right has been a specific preoccupation of the Aboriginal leadership for over fifteen years: ever since the beginnings of the final push towards constitutional patriation in the late 1970s.¹⁸⁵ In addition, support for the general concept of self-government is virtually universal amongst Aboriginal people, as testimony at the Royal Commission hearings has borne out.¹⁸⁶ Beyond this, there can be little doubt that the concept of Aboriginal self-government has done yeoman's service in the broader pursuit of crystallizing the desires of Aboriginal people to extricate themselves from federal government control

¹⁸⁴ Delia Opekokew, "The Inherent Right of Self-Government as an Aboriginal and Treaty Right," in *The Inherent Right of Aboriginal Self-Government*, volume 2, pp. 2-3.

¹⁸⁵ See Gibbins and Ponting, "An Assessment of the Probable Impact of Aboriginal Self-Government in Canada," in Cairns and Williams, *Politics of Gender, Ethnicity and Language*, pp. 173-174.

¹⁸⁶ On this see Royal Commission on Aboriginal Peoples, *Overview of the First Round*, Public Hearings, prepared for the Commission by Michael Cassidy, Ginger Group Consultants, October 1992 (Ottawa: Royal Commission on Aboriginal Peoples, 1992), pp. 36-37; Royal Commission on Aboriginal Peoples, *Overview of the Second Round*, p. 7.

and domination: that it has become, in Sally Weaver's words, "...a metaphor for the greater empowerment of the First Nations to direct their own lives with greater freedom from government involvement."¹⁸⁷ Self-government is a key term within the contemporary Aboriginal lexicon, without which the remainder of their political vocabulary becomes virtually meaningless.

At the same time, Aboriginal self-government is still a most contentious claim, in the sense that there is still virtually no consensus amongst the general public (both Aboriginal and non-Aboriginal) over how the concept might actually be both recognized as a matter of law and implemented as a matter of policy. The recent policy announcement on the recognition of Aboriginal self-government as an inherent right has only exacerbated this disagreement, and there is still a good deal of political and policy maneuvering room left, both for governments and the non-Aboriginal public, as they work to package and tailor the establishment and implementation of self government after their own, preferred, image and through a range of policy instruments that vary widely in their legal and political significance.¹⁸⁸ The Royal Commission acknowledged this problem as early as its deliberations following the death of the Charlottetown Accord, wherein it has noted that there remain various routes open to Aboriginal people through which self-government might be effected.

¹⁸⁷ Sally M. Weaver, "Self-Government Policy for Indians 1980-1990: Political Transformation or Symbolic Gestures," A revised copy of the paper delivered to the 1989 UNESCO Conference on Migration and the Transformation of Cultures in Canada, Calgary, October 21-22, 1989, p. 1.

¹⁸⁸ "The Government anticipates that agreements on self-government will be given effect through a variety of mechanisms including treaties, legislation, contracts and non-binding memoranda of understanding." *Aboriginal Self-Government (Policy)*, p. 8.

These range from outright challenges to the existing legal-political order through unilateral action claiming self-government all the way to accepting administrative devolution of powers and services to existing Aboriginal governmental institutions (such as Band Councils).¹⁸⁹ While the Commission acknowledges that Aboriginal people may prefer one route over another, "...their choices are greatly constrained by the responses of governments."¹⁹⁰

Even despite the new, federal commitments, governmental responses have, traditionally, been ambiguous. Three years after the failure of the Charlottetown Accord to receive majority support in a general referendum, in which Aboriginal peoples had finally secured a place for Aboriginal self-government within the nation's constitutional order, the quest for political control over their lives and their futures is as uncertain as it has ever been. In many respects, Aboriginal people, like the Québécois, still find themselves to be social and political outsiders in the midst of a community which surrounds them and yet is separate from them.

There are, of course, many parallels between the 'Aboriginal problem' and the 'Québec problem', insofar as Aboriginal people claim and maintain a distinct identity and certain rights that flow from this identity. However, unlike the 'Québec problem,' the drive for Aboriginal identity and self-determination has yet, as an ongoing political phenomenon, to capture the sustained attention of the non-Aboriginal population outside of those governments - politicians and bureaucrats - who have had vested

¹⁸⁹ Royal Commission on Aboriginal Peoples, *Focusing the Dialogue*, pp. 21-22.

¹⁹⁰ Royal Commission on Aboriginal Peoples, *Focusing the Dialogue*, p. 21.

interests in the disposition of the issue.¹⁹¹ Such lack of public understanding is neither unexpected nor inexplicable. For one thing, the total Aboriginal population in Canada represents only about 4 per cent of the population as a whole,¹⁹² in contrast to some one-fifth of Canadians who are Quebeckers and who have a vested interest in Quebec independence. Moreover, many Aboriginal people live on reserves, which tend to be located away from urban areas, or in rural or northern areas which, for the most part, do not garner significant national media attention in any but the most sensational circumstances. Because of this, Aboriginal people have not, until fairly recently, had the political means whereby they were able to regularly force their concerns onto political centre stage and have them remain there long enough for the average Canadian to take more than a passing interest in.

Perhaps more importantly, however, there is the sheer fact of Quebec as a province: a political entity within the constitutional fabric which, independent of any particular issue, gives Quebec a guarantee of visibility and significance throughout the

¹⁹¹ Public Environment Scanning Reports are compiled by the Communications Branch of the Department of Indian Affairs and Northern Development on a bi-weekly basis. The purpose of these reports is to "identify any trends of thought among the media and other stakeholders on Aboriginal self-government and their appraisal of government efforts in its implementation." Scanning reports for the past several months have disclosed "moderate" levels of coverage of Aboriginal issues. The report for the period November 5 to November 18, 1994 (as a random example) notes that coverage of Aboriginal issues in general was "diminished slightly" from these moderate levels, while specific attention to self-government concerns showed a "marked drop." In addition, there was no sustained attention paid to any of the concerns that showed up in media stories or press releases, etc. Another significant government source of media coverage of Aboriginal issues is the Privy Council Office (PCO) weekly communications summary, *Aboriginal Perspectives: A Weekly Summary of Aboriginal Developments in the Electronic and Print Media.*"

¹⁹² According to projections based on the 1986 Census, Canada's Aboriginal population (excluding Métis) was expected to reach 3.9 per cent of the total population by 2001. On this see N. Janet Hagey, et. al., *Highlights of Aboriginal Conditions 1981-2001*, Part I Demographic Trends (Ottawa: Finance and Professional Services, Indian and Northern Affairs Canada, October 1989), p. 5.

overall political process that Aboriginal people simply do not possess.¹⁹³ Indeed, this guaranteed visibility has been an ever-present phenomenon in constitutional politics since the advent of the Quiet Revolution and the popularization, in Quebec, of the sovereigntist cause - which, ironically, is the manifestation of a cultural evolution and growth in spite of the strictures of the established political order. The Aboriginal cultural evolution, by contrast, has, as yet, no corresponding political-institutional base from which to draw strength; indeed, it has very few political leaders who command enough resources within the established political order to make their presence felt on an ongoing basis.¹⁹⁴ The singular achievement of Elijah Harper in the Manitoba Legislative Assembly notwithstanding, there has been no guaranteed constitutional or legislative venue on which Canada's Aboriginal people can speak their concerns since the demise of the last First Ministers Aboriginal Constitutional Conference in 1987.

Even if we confine our analysis to the cumulative institutional impacts of various Aboriginal self-government initiatives to date, progress in the policy area is still uneven and the achievements are still spotty. Apart from the open-ended guarantees respecting Aboriginal and treaty rights contained within s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*, the only significant and long-lasting political

¹⁹³ David J. Elkins, "Aboriginals and the Future of Canada," in Douglas Brown, ed., *Aboriginal Governments and Power Sharing in Canada* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1992), p. 56.

¹⁹⁴ Politically visible Aboriginal politicians are perhaps nowhere more in evidence than within the current Liberal government in Ottawa. The Parliamentary Secretary to the Minister of Indian Affairs and Northern Development, Jack Anawak, is an Inuit leader with a considerable history in the development and negotiation of the Nunavut Land Claim, while the Secretary of State for Training and Youth in the Ministry of Human Resources and Development, Ethel Blondin-Andrew, is an established Dene politician from the western NWT.

developments that one can speak of are: (a) the *Cree-Naskapi Act* of 1983 and the *Sechelt Indian Band Self-Government Act* of 1986, both of which provide legislative frameworks for the implementation of self-government by particular Indian bands in Quebec and British Columbia respectively,¹⁹⁵ (b) federal government guidelines for the negotiation of self-government agreements with the beneficiaries of a comprehensive land claim agreement (the former agreements which will not, in any event, have constitutional protection unless and until there is a general constitutional amendment giving them such protection)¹⁹⁶, and (c) federal government comprehensive claims policy and specific claims settlement agreements that have been enacted over the past twenty years.¹⁹⁷ The only other constitutional attempt to grapple with the issue

¹⁹⁵ The *Cree-Naskapi Act* provides for self-government of two bands, both of whom are signatories to the James Bay and Northern Quebec and Northeastern Quebec Comprehensive Land Claim Agreements and, as such, were never dealt with by treaty. The Sechelt Band, by contrast, is a treaty band and part of the reserve system. For detailed summaries of these legislative initiatives, see Evelyn J. Peters, *Aboriginal Self-Government Arrangements in Canada*, background paper no 15 (Kingston: Institute of Intergovernmental Relations, Queen's University, 1987), pp 8-14. I am excluding Band government under the *Indian Act*, which, as Peters observes (*ibid.*, p. 5); "...is limited in its jurisdiction, and...does not represent self-government, but rather self-administration or self-management."

¹⁹⁶ Minister of Indian and Northern Affairs, *Federal Policy for the Settlement of Native Claims* (Ottawa: Department of Indian Affairs and Northern Development, 1993), p. 9. This policy and its immediate predecessor have enabled the negotiation of self-government agreements with four Yukon First Nations, but implementation of these agreements is on hold pending passage of enabling legislation for the First Nations' comprehensive claims. The new policy on Aboriginal Self-Government appears to circumscribe this constitutional caveat somewhat, since it allows (*Aboriginal Self-Government* (Policy), p. 8) for the constitutional protection of the rights set out in self-government agreements as treaty rights within the meaning of s. 35 of the *Constitution Act, 1982* provided that the "other parties" to the treaty or comprehensive claim agreement agree to such protection.

¹⁹⁷ "Since 1973, federal policy has distinguished between 'specific claims' (legal claims arising from federal obligations under treaties or from federal management of Indian assets...)...and 'comprehensive claims' (claims based on unextinguished Aboriginal title).... The original policy statement on comprehensive claims policy was entitled *In All Fairness* (1981)." Wendy Moss and Peter Niemczak, "Aboriginal Land Claims Issues," Background Paper, Library of Parliament, Research Branch, July 1991, p. 5.

following repatriation of the Constitution outside of the First Minister's conferences that ended in 1987 - the consultations with Aboriginal peoples after the failure of the Meech Lake Accord that ultimately issued forth in the Charlottetown proposals for constitutional amendment - proved in the end to be non-starters, for reasons that Aboriginal people were not in a position to change. As a consequence, fragmented, perhaps even transitory political initiatives concerning the implementation of a concept that appears consigned to a realm of constitutional "limbo" remains the order of the day.¹⁹⁸

Remaining within this horizon of recent political and constitutional history, it is tempting from an analytical perspective to view the struggle for Aboriginal self-determination almost entirely through the lens of self-government; indeed, to collapse the former into the latter. The reasons for equating these two pursuits are not, in every instance, apparent, but there can be no doubt that one important contributing factor was the ambiguous outcome of the First Ministers' debates over the nature of the Aboriginal rights throughout the Aboriginal Constitutional Conferences that followed patriation. The outputs of these conferences, while not successful in and of themselves, have served both to politically direct the wide spectrum of opinion currently being held on the nature of self-determination and its place within or beside or under this same constitution, as well as to catalyze the analysis and discussion of

¹⁹⁸ While the new Aboriginal Self-Government Policy has the authority of Cabinet behind it, there is no guarantee that this policy would not be modified or even revoked by a successor government. Indeed, since the range of policy instruments available for implementation remains almost completely discretionary, a new government could, at least theoretically, seek to reopen or renegotiate any of those elements of self-government agreements that do not receive constitutional protection.

the legal constraints on and opportunities for achieving self determination that the consideration of self-government helped to answer.

For one thing, the struggle to define and give substance to some form of legal means whereby Aboriginal self-determination was to be effected means that participants in the debate were, and are, under an obligation to give sustained consideration to the structural and policy implications of their concerns and interests as they have approached the question (even though whether they actually did this or not is another consideration). If we assume, for the sake of argument, that the majority of Aboriginal people are, in fact, willing to subscribe to a form of self determination that does not necessarily imply outright political independence, but rather a degree of freedom that allows them to choose how they will be governed within an existing constitutional-political matrix (together with appropriate forms of compensation for wear and tear on their natural and other resources),¹⁹⁹ then the means and the degree to which they might both define themselves through and allow themselves to be defined by the overarching constitutional-political matrix becomes the litmus test for future Aboriginal-state interaction across the entire spectrum of Aboriginal issues. The fact that this definitional process has not yet been completed to the satisfaction of the two parties would simply mean that more work in this area is necessary and that the process is inherently complex and tendentious.

Likewise, for governments, creating an environment in which legal, political, and

¹⁹⁹ On this reading of self-determination, see Joe Sanders, "First Nations Sovereignty and Self Determination," in Cassidy, *Aboriginal Self-Determination*, p. 191

policy processes might interact to produce a viable, and mutually binding approach to the recognition and implementation of self-determination within the existing constitutional order becomes an issue of paramount consideration, for which governments may well be prepared to make adjustments in other areas in order to achieve the desired end result. Firmly locating the pursuit of self-determination within the context of sustained constitutional-political discussions, with additional definition provided through specific, negotiated self-government options, gives the federal government justification for advancing other specific issues of Aboriginal policy (such as Aboriginal land rights) insofar as these latter interests can then be portrayed as similar instantiations of the more general discussion without necessarily having to be tied to it. This is, in essence, to pursue self-determination through an incrementalist strategy: a strategy that may have a greater chance for success in the long run.

Purely from a process perspective, the fact that the final trajectory of constitutional debates that took place in the aftermath of 1982 eventually spanned a decade meant that there was ample time for stakeholder positions on the Constitution's existing Aboriginal guarantees to become focussed and intransigent; and become focussed and intransigent they did. With the patriation of the Constitution on April 17, 1982, the precise legal meaning of section 35(1) within the Constitution and its reference to "existing Aboriginal and treaty rights" was uncertain, and this ambiguity was fuelled by the political fact that the very status of the section within the Constitution was in doubt until the 11th-hour.²⁰⁰ Following patriation, the

²⁰⁰ Schwartz, *First Principles, Second Thoughts*, p. 87.

dynamics of the preparations for the 1983 First Ministers' Conference required under the existing section 37 of the Constitution - at the time, the only conference so required - were such that no clear, concise agenda of manageable issues emerged for discussion. As one writer has observed; "All the Aboriginal groups could do was insist that the agenda include everything. They did and it did."²⁰¹ Finally, the prevailing public opinion, while not necessarily foreclosing available policy options for the Ministers who were assembled, was certainly not conducive to the exercise that the conferences were designed to undertake. As Richard Hatfield remarked at a gathering following the conclusion of the final First Minister's Conference in 1987:

The reason we were not able to go further with regard to self determination for the Aboriginal peoples is because a large number of people either didn't understand it, didn't think it was important, or didn't believe that it was necessary. As always, a large number of people were totally opposed to it.²⁰²

As the First Ministers' Conferences progressed, however, stakeholder positions on the section's guarantees quickly became more focussed and, very often, more contentious. Very early on in the conferences, the search to define Aboriginal rights became the search for Aboriginal self-government, aided to a considerable degree by the release of the Report of the Commons Special Committee on Indian Self Government (the "Penner Report") just prior to the commencement of the second conference. The recommendations of the Penner Report were enthusiastically embraced by most Aboriginal people, and its recommendation that the right of

²⁰¹ Schwartz, *First Principles, Second Thoughts*, p. 90

²⁰² Richard Hatfield, "Opening Address: Reflections on Constitutional Reform in Canada, 1979-1987," in *Aboriginal Self-Government and Constitutional Reform*, p. 6

Aboriginal self government should be stated and entrenched in the constitution was particularly welcome.²⁰³ In settling on the pursuit of entrenching the right to Aboriginal self government, the question of what was required as an outcome to these negotiations that would both satisfy Aboriginal demands and address the general public concern over the Aboriginal plight was, at least partially, answered.²⁰⁴ The struggle for self-determination had found a politically feasible, if still elusive, focus.

Time has passed since the final Aboriginal Constitutional Conference in 1987, and it is abundantly clear from our discussion that the centrality of the pursuit of self-government within the ambit of the entire self-determination panopoly has not been lost, even to this day. It remains to be seen whether this fixation has unduly restricted either future constitutional or policy debates, or whether it unalterably fixed the boundaries of the terrain over which the satisfaction of Aboriginal interests might be achieved.

Self-Government and Inherency: Some Policy Implications

...there are persuasive reasons for concluding that under the common law doctrine of Aboriginal rights, Aboriginal peoples have an inherent right to govern themselves within Canada. This right is inherent in the sense that it finds its ultimate origins in the communities themselves rather than in the Crown or Parliament.²⁰⁵

²⁰³ Schwartz, *First Principles, Second Thoughts*, p. 154

²⁰⁴ There was still the very important question of whether this right was to be understood as pre-existing the constitutional order or dependent upon it. On this see Hawkes, *Aboriginal Peoples and Constitutional Reform*, p. 17.

²⁰⁵ Royal Commission on Aboriginal Peoples, *Partners in Confederation*, p. 21.

The terms "inherent" and "inherency" seem, on the face of it, deceptively simple to understand: Aboriginal people don't have to rely on anybody else's authority in order to exercise their own. This simplicity, however, would appear to lead to us to the potentially explosive possibility that anything that we negotiate with Aboriginal people regarding self-government is, by nature, contingent, and susceptible to nullification by Aboriginal people in the future.²⁰⁶ Surprisingly, in the current debates over Aboriginal rights, this possibility has only been suggested on a sporadic basis by various Aboriginal leaders. Indeed, in considering specific proposals for self-government, it is not entirely clear what the attachment of the adjective "inherent" adds to the definition of Aboriginal self-government as it has generally been articulated. In large part, this is because successive analyses of the nature of and grounds for self-government have repeatedly emphasized the historically and legally diverse and independent origins of the concept. Exploration of each of these sources, individually, has helped both to ground the source of self-government within the context of the Aboriginal community (as the Royal Commission suggests above) and to place it beyond the pale of any straight derivation from within or under existing Canadian legal sources. Gibbins and Ponting, as an example, waste no commentary when they refer to Aboriginal self-government's pre-constitutional foundations relative to Canadian history, its significance under the *Charter*, and its intrinsic relationship to

²⁰⁶ See, for example, Robert A. Young, "Aboriginal Inherent Rights of Self-Government and the Constitutional Process," in Brown, *Aboriginal Governments and Power Sharing in Canada*, p 34

the evolving right of self-determination as understood under international law,²⁰⁷ at one and the same time. Inherency, insofar as it might add anything of value to the idea of self government on this analysis, can be seen simply as a shorthand way of expressing self-government's rather convoluted legal and political evolution.

However, it has become fairly obvious over the past number of years that the issue of 'recognition' itself is an important political element, not only in the self-government debate but in the entire debate concerning Aboriginal rights,²⁰⁸ and to this end inherency is a concept that facilitates the understanding of this dynamic. In its broadest sense, recognition necessarily means that one person or body must notice the other person or body, and must pay attention to what that person or body wants or needs. In order for recognition to happen, I must be in a position to acknowledge both the identity of the other (in the sense that the other is different than me) and the substantiality of the other (in the sense that the other is possessed of a different history, different values, different hopes, etc. than me).²⁰⁹ Inherency is a statement,

²⁰⁷ "Self-government is seen by Aboriginal leaders as an Aboriginal right based on the Royal Proclamation of 1763, the treaties, and Section 25 of the Constitution Act. It is also viewed as a collective right embedded in the right to self-determination as recognized by international law." Gibbins and Ponting, "Aboriginal Self-Government," in Cairns and Williams, *Politics of Gender, Ethnicity and Language*, p. 177.

²⁰⁸ One can see the primacy of the recognition question in the following observation: "The doctrine of Aboriginal rights is common law in the sense that it is not the product of statutory or constitutional provisions and does not depend on such provisions for its legal force. Rather, it is based on the original rights of Aboriginal nations, as these were recognized in the custom generated by relations between these nations and incomers. French and English settlers from the seventeenth century onward." Royal Commission on Aboriginal Peoples, *Partners in Confederation*, p. 20.

²⁰⁹ "Consider what we mean by *identity*. It is who we are, 'where we're coming from.' As such it is the background against which our tastes and desires and opinions and aspirations make sense. If some of the things that I value most are accessible to me only in relation to the person I love, then she becomes part of my identity." Taylor, *The Politics of Recognition*, pp. 33-34.

by the one to be recognized, about the self-appropriation of this identity and substantiality, especially in the face of that, "...typically human blindness to the reality of any culture or society but one's own."²¹⁰ In the long term, it is a social and political way of coming to apprehend the relative nature of one's own social orders and values, so that genuine accommodation to the other's can begin.

The Penner Report, in taking up of the question of establishing self government, talks about inherency in terms of 're-recognition', and speaks approvingly about self-government being recognized by the Canadian government on the basis of the concept's implicit expression in both the Royal Proclamation of 1763 and the treaties.²¹¹ At the same time, it acknowledges that the *Constitution Act, 1982*, while invoking this principle in its recognition and affirmation of existing Aboriginal and treaty rights, nonetheless did not define them. Hence the need for a definitional process, based on negotiation,²¹² which would allow the non-Aboriginal community to come to terms with what it had once known but subsequently denied. Though the Committee could not have possibly known the eventual outcome of the Aboriginal Constitutional process, its observation that, "...it is not the rights of Indian people that are ill-defined, but the recognition of these rights in Canadian law that has been ill defined," is both prophetic and a continuing reminder of the state of affairs that the

²¹⁰ Royal Commission on Aboriginal Peoples, *Focusing the Dialogue*, p. 27.

²¹¹ "Many Indian witnesses asserted that rights implicitly recognized in the Royal Proclamation of 1763 and in the treaties provide a basis in law for true Indian governments to be recognized by the Canadian government and for Indian people to exercise their inherent right to self-government." Penner, *Indian Self-Government in Canada*, p. 43.

²¹² Penner, *Indian Self-Government in Canada*, p. 44.

policy on the recognition of the inherent right is trying to capture and settle. In this sense, the affirmation of inherency by Aboriginal people is a calculated stand against the legal ethnocentrism that has continually plagued western lawmakers and jurists right up until the present time.²¹³

However, the politics of recognition, in its strong sense, can go well beyond the restoration of identity and rights. In particular, when it is married to the struggle for the realization of collective aspirations it can lead to what Charles Taylor has called the "politics of difference": a politics that strives to institutionalize differentiation along various group-based lines and provide for political and legal recognition on the basis of this differentiation.²¹⁴ Now clearly, to a certain extent, the cultivation of difference is an inherent (pun intended) aspect of the cultivation of recognition, insofar as all people are truly different from one another, but there is a legitimate question to be asked about the extent to which we can, and should, recognize differentiation at the level of the collective for social and political purposes. This is particularly true as a matter of law, where questions of identity and difference, belonging and exclusion, and the answers that we provide to them, can have profound, long-term social implications. If self-government is an inherent right of a community, and this right

²¹³ "Although international courts of the twentieth century did not recognize Aboriginal nations any international personality [*sic.*], they did not deny their existence and their capacity to enter into agreements." Hutchins, "Aboriginal Right of Self-Government," in *The Inherent Right of Aboriginal Self-Government*, volume 1, p. 19. On the domestic front, the capacity of the sovereign to unilaterally extinguish Aboriginal rights (at least, prior to the coming into force of the *Constitution Act, 1982*) is very clearly a continuation of this attitude. On this see Pentney, *Aboriginal Rights Provisions*, p. 37.

²¹⁴ Taylor, *The Politics of Recognition*, pp. 38-40.

accrues to it as a function of culture, then how, if at all, can the recognition required within such an environment lead to meaningful interaction with the broader political community - Canada - whose identity must be measured in political and legal terms such as citizenship? If Canadian citizenship is to be shared by those who identify themselves as 'citizens' of the self-government in question, will Canadian citizenship, in itself, be enriched, altered, or eroded?²¹⁵ In a roundabout way, we have returned to the disintegrating potential suggested by 'inherency' in the first place, with the additional realization that the potential for disintegration may be the only real catalyst for fundamental political and constitutional change.

To date, the potential problems raised by competing identities and competing citizenships have not been addressed within Aboriginal policy circles, largely because the question of the recognition of inherency, as a principle and a point of departure, has been effectively side-stepped. During the time of writing these observations, development of Ottawa's new Aboriginal Self-Government Policy was the singular focus of the Department of Indian Affairs and Northern Development, and it has been plagued throughout its development by problems. Indeed, the substance of the policy proposals was, until just prior to the policy's announcement, overshadowed by the circumstances surrounding its being 'leaked' by Minister Ron Irwin to Ovide Mercredi, Grand Chief of the Assembly of First Nations.²¹⁶ According to recollections provided

²¹⁵ Gibbins and Ponting, "Impact of Aboriginal Self-Government in Canada," in Cairns and Williams, *Politics of Gender, Ethnicity and Language*, p. 175.

²¹⁶ According to news reports, a draft of the cabinet submission on the inherent right was provided to Mr. Mercredi to "look at" during a brief luncheon encounter on Parliament Hill between Mr. Mercredi and Mr. Irwin sometime around March 1, 1995. The Minister subsequently gave a

by Mr. Mercredi, the policy in its present draft form was, in essence, an exercise in revisiting and revising the now-defunct community-based self-government exercise, and bore little resemblance to the commitments that were made by the Liberal government both before and after they came to power almost two years ago.

Mr. Mercredi's recollections appear to have been correct. The policy proposals survived the passage through Cabinet substantially in the form in which they were leaked, and the policy itself might be said to be, more than anything else, a calculated risk at minimal, incremental interpretation of the current constitutional provisions respecting Aboriginal rights as provided for in s. 35 of the Constitution. On the one hand, as already noted, the policy affirms support for the inherent right of Aboriginal self-government as a right. On the other hand, the policy deliberately avoids discussion about what this recognition might mean (ie., backs away from the recognition question), and focuses instead on encouraging negotiations on specific powers to be transferred at the community level. As a final caveat, the policy seeks to do minimal upset either to the division of powers under the current federal system or to the integrity of the protection of rights afforded by the *Charter*.²¹⁷

private reading of portions of the document to the Treaty 6, 7, and 8 Alberta Chiefs in Calgary on March 16, 1995. For specific recollections, see Office of the National Chief, Assembly of First Nations, "New Federal Government Policy on Inherent Right to Self-Government Flagrant Contradiction of the Constitutional Guarantees Enshrined in 1982 Constitution," Ottawa, March 22, 1995.

²¹⁷ "Aboriginal governments and institutions exercising the inherent right of self-government will operate within the framework of the Canadian Constitution. Aboriginal jurisdictions and authorities should, therefore, work in harmony with jurisdictions that are exercised by other governments. It is in the interest of both Aboriginal and non-Aboriginal governments to develop co-operative arrangements that will ensure the harmonious relationship of laws which is indispensable to the proper functioning of the federation." *Aboriginal Self-Government* (Policy), pp. 3.

While there was, by way of public comment, virtually no Aboriginal sympathy for the draft provisions as released, there appears to be some measure of non-Aboriginal interest in making the policy, as announced, work: principally because it is seen to be a practical alternative to what many now regard as expensive, overblown constitutional exercises that cannot guarantee results.²¹⁸ If nothing else, it is hoped that this policy will signal the restoration of good will between Aboriginals and non-Aboriginals, by convincing the former that the latter, through this commitment to effective recognition at the local level, has finally abandoned , "...the goal of assimilation in favour of the goal of partnership."²¹⁹ In the absence of clear, guiding principles that facilitate our understanding and appreciation for who it is that we are trying to be partners with, it remains to be seen how successful the implementation of this policy can be.

Where Can We Go With Self-Government?

Both the distance and the contradictions that exist between Aboriginals and non-Aboriginals over the various models that have been advanced in pursuit of self government are significant, and there has not, to date, been any agreement on any

²¹⁸ For examples of the range of both Aboriginal and non-Aboriginal reaction to the policy, see the following articles: "Self-government approach offers practical solution," *Cape Breton Post*, August 14, 1995, p. 4; "Fed self-government policy 'insulting' but chiefs will keep talking," *Edmonton Journal*, August 15, 1995, p. B13; "Self-government strategy called step backwards [Formal rejection of policy by Assembly of First Nations]," [Regina] *Leader-Post*, August 15, 1995, p. C5. Editorial reviews are also mixed. See William Johnson, "Irwin is trying to limit aboriginals' expectations," *Montreal Gazette*, August 18, 1995, p. B3; Douglas Fisher, "Self-government that makes sense," *Toronto Sun*, August 18, 1995, p. 11.

²¹⁹ Royal Commission on Aboriginal Peoples, *Focusing the Dialogue*, p. 20.

one method of approach. Moreover, the models are indicative not only of the underlying concerns that each group has for the impact of the possible jurisdictional changes that might be wrought, but also of the means whereby individual and collective rights might be related to each other, as well as accounted for and protected within the given jurisdiction. At the same time, it is not yet a foregone conclusion that an impasse over the 'proper' means of implementing self-government is the inevitable outcome since neither Canadians in general nor Aboriginal peoples in particular have yet to categorically assert that Aboriginal self-government and existing Canadian sovereignty are mutually exclusive concepts.²²⁰ In fact, according to the Royal Commission, the opposite is the case:

Aboriginal peoples are making a fundamental choice: to pursue self-government within the structure of Confederation - to join in the process of building a country that derives its strength from the contributions of all its peoples.²²¹

Some Aboriginal peoples, like the Inuit of Nunavut, have repeatedly rejected sovereignty or the Aboriginal self-government approach and have fought for the creation of a new public, territorial government instead, so that their place within the

²²⁰ "We must not assume that 'sovereignty' carries the same connotations for Aboriginal people as for Euro-Canadians, who are inured to a centralized, hierarchical vision of the 'Sovereign Crown'." Scott, *Custom, Tradition, and Aboriginal Self-Government*, p. 62. However, as Scott and others point out, the possibility of some form of co-existent sovereignty does mean, for many Aboriginal people, an authentic power-sharing within a transformed Canadian state. It does not mean delegated or subordinate power that is somehow transferred to Aboriginal people by Canadian jurisdictions.

²²¹ Royal Commission on Aboriginal Peoples, *Focusing the Dialogue*, p. 20.

Canadian federal structure remains assured.²²² While the Inuit model is not, by any means, the preferred method of implementing self-government,²²³ the more recent constitutional politics of Aboriginal self-determination (particularly as they were played out during the negotiation of the Charlottetown accord) have not been unaware of the need to circumscribe the claim to self-determination by locating the exercise of the right of self-government within the Canadian constitution. Those negotiations attempted to reconcile the divergent principles of sovereignty and belonging by advancing proposals that favoured a generalized, non-specific expression of a right to self-government, which would have allowed various Aboriginal groups the option not to be bound to a definition that might constrain their ability to work towards the more particular interests that their particular people deem to be of most immediate importance.²²⁴ In this regard, the contrast between the symbolic politics of Charlottetown and the absence of the same in the current inherency initiative are both significant and instructive.

Whatever else self-government might mean, in practical terms the implementation of self-government arrangements means that there will be fundamental

²²² As examples of this assertion, see Inuit Tapirisat of Canada, *Political Development in Nunavut*, a report prepared for the Board of Directors of Inuit Tapirisat of Canada, to be discussed at the Annual General Meeting, Igloolik, September 3-7, 1979; Stefton Mark Malone, *Working Paper No. 1 - Nunavut: The Division of Power*, Nunavut Constitutional Forum, 1983.

²²³ Strictly speaking, the Government of Nunavut will be a public government, both by and for all inhabitants of the new territory, in accordance with the provisions of the *Nunavut Act*. However, as I have mentioned previously, since over 85% of the population of Nunavut is Inuit, the public government will effectively represent Inuit interests as the majority interest in the territory.

²²⁴ On this approach, see Young, "Aboriginal Rights and the Constitutional Process," in Brown, *Aboriginal Governments and Power Sharing in Canada*, pp. 34-37.

and long-lasting changes both in the responsibilities of governance and in the distribution of these responsibilities. In the changes that are effected, more than passing consideration has to be given to the expectations that the transfer of responsibilities might entail. This is particularly true when one considers the ongoing need for Aboriginal social, economic and other development that must continue unabated, regardless of who finally has the lead on these undertakings. In the words of Gibbins and Ponting:

Just as it can be argued that Aboriginal self-government must not permit Aboriginals to turn their backs on Canada, so too Canadians must not be permitted to turn their backs on long standing Aboriginal problems that will not simply fade away in the new dawn of Aboriginal self-government.²²⁵

It is important to recognize that this is not simply an admonition about future policy direction. The comment also expresses a concern amongst non-Aboriginals over how the confirmation of such a right might change our understanding of Canadian and Aboriginal citizenship, the relationship between the two, and the continuing obligations (if any), due to each. It stands as a kind of sober counterpoint to the groundbreaking, if somewhat speculative arguments of the Royal Commission, and others, which have been advanced in favour of an interpretation of our present Constitution that includes the Aboriginal right of self-government as something already given and simply waiting to be filled out.²²⁶ Setting aside, for the moment, the derivative arguments about the

²²⁵ Gibbins and Ponting, "Aboriginal Self-Government in Canada," in Cairns and Williams, *The Politics of Gender, Ethnicity and Language*, pp. 235-236.

²²⁶ "Much of the commentary on section 35 [of the *Constitution Act, 1982*] has focused on the range and character of the rights that it guarantees. While these are, of course, important matters, another dimension of the section needs to be emphasized, namely its far-reaching structural

rights accruing to a land's first inhabitants,²²⁷ proposals concerning who actually were partners in Confederation at the beginning or to what extent Canadian federalism implies coexistent, coextensive and even revivable sovereignty aside,²²⁸ self-government, when it is realized, must work and must address Aboriginal needs at the end of the day. It must, in fact as much as on paper, allow Aboriginal people to, "...do a better job of serving Aboriginal needs...than the present system could,"²²⁹ without, at the same time, depriving Aboriginal people of the support of the non-Aboriginal governments from whom responsibilities will eventually be transferred. It reminds us, in other words, of the reality of the current Aboriginal/non-Aboriginal relationship, with its problems and its pitfalls, its dependencies and its restrictions, and the fact that the intricacies and responsibilities attendant within this relationship cannot simply be effaced by the creation of yet another order of government.

From the perspective of internal management, the struggle for Aboriginal rights, and the focus on self-government as a means of achieving many of these rights, will no doubt engender very high expectations on the Aboriginal population as the implementation of self-government is effected. It is likely that Aboriginal people are

significance. In effect, section 35 serves to confirm and entrench the status of Aboriginal peoples as original partners in Confederation." Royal Commission on Aboriginal Peoples, *Partners in Confederation*, p. 29.

²²⁷ "Aboriginal peoples through their First Nations had, at the time of first contact, *de facto* title to their lands and were self-governing. This historical fact is now recognized by the courts, by governments and by Commissions charged with studying the matter." Hutchins, "The Aboriginal Right to Self-Government," in *The Inherent Right of Aboriginal Self-Government*, volume 1, p. 3

²²⁸ Royal Commission on Aboriginal Peoples, *Partners in Confederation*, pp. 29-35.

²²⁹ Royal Commission on Aboriginal Peoples, *Overview of the First Round*, p. 37.

going to expect that their Aboriginal politicians will be able to deliver on a vast range of issues for which the actual policy capacity may not exist until some time after self-government is achieved.²³⁰ This expectation, combined with the decades of general, incremental government involvement in the social-economic order following the Second World War and the expectations of ever increasing services and entitlements that this development has engendered, will very likely severely constrain and direct Aboriginal governmental policy activity as it strives to manage new social, political, and economic variables.

More than this, however, there are both questions of the extent to which Aboriginal governments might be able to provide for specific services and entitlements for their people (together with the attendant costs of delivery for the same), and the extent to which services and entitlements to individuals governed by different Aboriginal jurisdictions might vary from jurisdiction to jurisdiction.²³¹ Within the profound reality of social and economic interdependence that will very likely characterize Aboriginal governmental relationships with the existing orders of both federal and provincial governments, any contemplation of augmented service delivery or entitlement will have an impact on both the Aboriginal government providing the service and on the non-Aboriginal government helping to underwrite the cost. With

²³⁰ On this, see J. Rick Ponting and Roger Gibbins, "Thorns in the Bed of Roses: A Socio-political view of the Problems of Indian Government," in Leroy Little Bear, Menno Boldt and J. Anthony Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984), pp. 125-126.

²³¹ On the latter issue, see Ponting and Gibbins, "Thorns in the Bed of Roses," in Little Bear, et. al., *Pathways to Self-Determination*, pp. 127-128.

increasingly limited fiscal capacities, trade-offs and concessions in what might be offered will certainly increase, and the satisfaction of the non-Aboriginal interest in cost control may well come into conflict with the Aboriginal interests in jurisdictional augmentation. Likewise, between Aboriginal jurisdictions, political decisions to offer some services and not others may well become a point of contention, both for the jurisdictions at odds and, more importantly, for those Aboriginals living 'off-reserve' and outside of Aboriginal jurisdictions generally.²³² In other words, the supposed benefits of a 'stand-alone', Aboriginal citizenship may be counterbalanced by the uneven application of benefits across the jurisdictions, aggravated by the propensity for governmental (Aboriginal and non-Aboriginal) fiscal trade-offs for what will likely be smaller pieces of the fiscal pie.

Of course, just because there is a possibility that these problems might develop does not necessarily mean that the push towards recognizing and implementing the right to self-government should not proceed. The fact is, the implementation of Aboriginal self-government will result in shortcomings, problems, and probably even mistakes, but all of these things are part and parcel of the exercise of a right that, in the nature of the right itself, cannot be bypassed. To elaborate on the point made by

²³² Ponting and Gibbins, "Thorns in the Bed of Roses," in Little Bear, et. al., *Pathways to Self Determination*, p. 127. As Ponting and Gibbins caution at the outset of their paper, they have, "...dealt with the amorphousness of Indian government by treating Indian government somewhat as a 'black box.' That is, rather than addressing the specifics of one or another model of Indian government, we have instead treated Indian government as a relatively abstract concept." (p. 122) However, while the on-reserve/off-reserve issue may not be as significant a consideration under the 'inherency' option, there will still be a question about what is or is not available to an Aboriginal person living outside of an Aboriginal jurisdiction, relative to what might be available living within that jurisdiction, assuming that territorial-jurisdictional models are being applied.

Lloyd Barber before the Royal Commission, the right to fail and learn from one's mistakes is also a "fundamental entitlement"²³³ that should not be denied; not only because this is how we grow, but because it is one of the ways in which the interaction between rights and interests is finally settled within the political process. For it is in the testing, and, very often, the setting aside of options that finally allows us to develop policy that can both work for the few while respecting the already finely-tuned needs of the many.

²³³ Royal Commission on Aboriginal Peoples, *Overview of the First Round*, p. 38.

Chapter 6 - Comprehensive Claims: The Current Limits of Aboriginal Rights

Structural Implications of Claims Settlements

Aboriginal land claims today involve much more than strictly legal questions about the collective property rights of Aboriginal people. Contemporary land claims issues are not simply, or even primarily, concerned with determining an appropriate amount of monetary compensation for existing land rights or for lands improperly taken away.²³⁴

While the recognition of Aboriginal self-determination and its implementation through self-government continues to be a slow and elusive promise within the Aboriginal policy spectrum, there has been a somewhat greater degree of measured progress in the recognition of Aboriginal rights through the settlement of comprehensive land claims. Unlike various of the self-government initiatives that have been tried (and abandoned), the comprehensive claims settlement process has generally succeeded in making a virtue out of specific, detailed negotiations with specific Aboriginal groups over the recognition and satisfaction of specific rights and claims. While there are various complaints by Aboriginal people against both the provisions of the current comprehensive claims policy and the process whereby comprehensive claims settlements are effected,²³⁵ it is generally believed that these

²³⁴ Wendy Moss and Peter Niemczak, "Aboriginal Land Claims Issues," Background Paper (Ottawa: Minister of Supply and Services Canada, 1992), p.1.

²³⁵ Complaints include: frustration over the perceived desire of the federal government to minimize settlement costs; the fact that the Department of Indian Affairs and Northern Development is in a perceived conflict of interest because it must both judge the merits of a claim and then advance the government's interest during the negotiation process; and strong opposition to the "extinguishment" provisions in claims settlements that require the claimant group to give up their undefined Aboriginal rights. On this see Royal Commission on Aboriginal Peoples, *Overview of the Second Round*, pp. 23-24.

complaints can be addressed without eroding the fundamental components of the current policy.

Indeed, the evolution of comprehensive claims policy over the past twenty years reflects this penchant for making incremental adjustments, while at the same time taking cognizance of both the rising degree of awareness of and sympathy for the recognition of Aboriginal rights and the heightened levels of expectation that have been generated amongst Aboriginal peoples for solutions to their social and economic problems. Individual claim settlements, and the negotiation processes that inform them, reflect this dynamic in various subtle ways, while at the same time attempting to definitively address certain fundamental questions that have been at the heart of claim settlement policy from the beginning. These questions include: the legal and administrative need to give definite shape to those largely undefined Aboriginal rights that are both constitutionally protected and have received various degrees of articulation through case law; the commercial demand for certainty in land and resource ownership so that economic development might proceed in some predictable fashion, and the political need of the claimants in question to enter into binding arrangements with government that afford the claimants significant and ongoing input into and responsibility for those issues that they deem to be of importance to their members.

Purely from the perspective of the resources that it consumes, the negotiation and settlement of comprehensive land claims represents an enormous investment of federal time, energy and money; indeed, it is one of the very few growth areas of

federal policy and spending that has survived the onslaught of fiscal conservatism and deficit-reduction measures.²³⁶ Since 1975, when the first of these "modern day treaties" (as they are often referred to in federal policy documents) was settled with the Cree of James Bay, the federal government has concluded negotiations with ten different claimant groups in Québec, the Northwest Territories and the Yukon Territory for rights and/or title to over one-half million square kilometres of territory within those three jurisdictions.²³⁷ Settlement payments (essentially compensation in exchange for extinguishment of undefined rights) for all of these claimant groups will total over \$1.4 billion dollars, excluding interest. Negotiations for five other claims in British Columbia, the Northwest Territories, Québec, and Labrador have been underway for a number of years now,²³⁸ and it is, as yet, uncertain as to what the total compensation and land transfer will be as a result of their settlement. Finally, the treaty negotiation process recently agreed to by British Columbia and Canada for the settlement of a possible 130 claims covering some two-thirds of that province has, as of the time of writing, accepted some sixty statements of claim for negotiation, and it is likely that negotiations for these claims will take the remainder of this decade and

²³⁶ This was made quite apparent in the release of the federal government budget in February, 1995.

²³⁷ See *Federal Policy for the Settlement of Native Claims*, pp. 11-14. By way of update to this material, the enabling legislation for the Nunavut and Sahtu claims was proclaimed in force in 1993, while the legislation for the first four First Nations settlements under the CYI Comprehensive Land Claim was finally proclaimed in February, 1995.

²³⁸ This includes only the Nisga'a claim in northern B.C., which is being pursued independently of the more recently established B.C. Treaty Commission. On this, see *Federal Policy for the Settlement of Native Claims*, p. 15.

much of the next to conclude. It has been estimated that, once all present and potential future comprehensive claims are settled, the government will have committed to a transfer of some six billion dollars to affected Aboriginal groups over the course of a fifteen to twenty year period from the date that the last claim is settled.²³⁹ This amount includes several hundred million dollars which is earmarked for implementing and monitoring these agreements, and which Canada provides both directly to designated beneficiary organizations and settlement structures and indirectly through territorial and (eventually) provincial governments tasked with specific implementation responsibilities.²⁴⁰

From the perspective of social, political and institutional development in the long-term, the potential impact of comprehensive claims settlements is staggering. Not only will the settlements have a direct impact on the vast majority of those Aboriginal peoples outside the Maritimes who were not party to a historical treaty settlement with the Crown since the mid-1800s, the structures that are established under them will affect the operations of government and the rights and interests of third-parties in areas ranging from environmental management to economic development in all regions of the country. This will happen in a number of ways: first,

²³⁹ According to 1993 projections, combined settlement and implementation costs will rise from approximately \$200 million annually in 1995 to over \$600 million annually by 2005, and then level off to around \$350 million annually by 2015. On this, see the *Presentation for the Hon. Ron Irwin on the Claims and Indian Government Sector*, November 1993.

²⁴⁰ These monies are provided through different funding mechanisms, including block grants to Aboriginal settlement corporations and conditional transfer payments to various public government institutions. In the latter instance, the Department usually enters into what is known as a "contribution agreement" with the recipient, wherein the conditions respecting the use of the funds being transferred is specified.

with the provision for the active participation of Aboriginal groups in claims management; second, with the imposition of new administrative, legal and financial obligations on territorial and provincial governments and, in the case of British Columbia, municipal and other third-party interests as well; and third, with the establishment of new or adaptation of existing advisory and regulatory regimes so as to provide for joint Aboriginal-government management of a wide range of environmental and resource matters, identified by the Aboriginal claimants, which were formerly reserved to the exclusive jurisdiction of various levels of government.²⁴¹ These structures will continue to operate and affect policy and decision-making within settlement regions long after the implementation of each agreement is concluded and the financial settlement has been fully paid out. As a sign of the complexity of these arrangements, the implementation plans that have been negotiated to date, which accompany their respective agreements, already itemize several thousand discrete agreement obligations that are shared by some three hundred different government departments, agencies, settlement structures, municipal corporations, Aboriginal corporate bodies, private industry and other individual and corporate interests.

Because of the comparative lack of other meaningful policy outputs that are, at present, being implemented within the Canadian Aboriginal policy environment, and the uncertain strategic context in which these outputs are being produced, the implications of the comprehensive claims settlement process for the existing legal and

²⁴¹ This does not include the establishment and implementation of self-government as provided for in various self-government agreements.

political order cannot be overstressed. Moreover, certain aspects of the agreements as they have been negotiated and ratified are significant instances of policy choices that beg examination, both for what they provide and what they fail to provide.

From a formal perspective, claim settlement agreements are the products of a multi-stage claims negotiation and settlement process, whose official goal is both to define and give certainty to the relationship between a claimant group and Canada and to ensure that this relationship is equitable to the claimant group and to other Canadians.²⁴² In substance, however, they are the results of extensive, non-public, multilateral discussions and negotiations,²⁴³ almost exclusively between bureaucrats and representatives of the claimant group, the final outputs of which are ratified by elected, political representatives at public signing ceremonies. As a necessary follow-up to the signing, the agreements are then submitted to Parliament for formal, legal enactment through some form of comprehensive claim or self-government settlement

²⁴² According to the *Comprehensive Land Claims Policy*, 1986, pp. 23-25, there are six stages to the claims settlement process: (1) Preparation and submission of a statement of claim; (2) Acceptance/Rejection of claim by the Minister of IAND; (3) Preliminary negotiations; (4) Negotiation of a Framework Agreement, which determines the "scope, process, topics and parameters for negotiation."; (5) Negotiation of an Agreement-in-Principle, which must cover all substantive topics to be concluded in the final agreement, and (6) Negotiation of the Final Agreement, which must be accompanied by an implementation plan. Implementation of the settlement agreement follows upon ratification of the settlement legislation.

²⁴³ The current comprehensive claims policy directs that; "Information about the general status and progress of negotiations will be made available to the public." (*Comprehensive Land Claims Policy*, p. 22). However, very little of the specifics of the proposed settlement is communicated to the public by the Department of Indian Affairs and Northern Development until such time as an Agreement-in-Principle is signed with the claimant group. By this point, there will already have been several years of negotiations concluded.

act.²⁴⁴ As a consequence, policy choices which were the result of specific, negotiated and tightly balanced interests are now reflected in laws of general application - law that is, ostensibly, by and on behalf of the public but which was given shape by policy actors who will have had their own needs in mind. We may justly ask where the public legitimacy for the transition from agreement to statute was made and how, if at all, its legitimacy is maintained throughout the long term.

One of the most important legal implications flowing out of all of the comprehensive claims settlement agreements to date is the constitutional protection of the rights and freedoms that are conferred in these agreements under sections 35 of the *Constitution Act, 1982*, and the status of these rights relative to the *Charter*. As with Aboriginal rights generally, the nature of the constitutional protection afforded is of two types. Section 25, which is itself a *Charter* provision, prevents the application of any other rights in the *Charter* from interfering with the existence and exercise of those rights and freedoms that accrue to Aboriginal people through other specified sources.²⁴⁵ While it is true that this is not the same thing as enshrining the

²⁴⁴ Within the comprehensive claim framework, the only self-government implementation legislation that has been ratified is in respect of Yukon First Nation comprehensive claims. In addition, and unlike comprehensive claims agreements, self-government agreements and their legislation do not, as yet, enjoy constitutional protection within the meaning of s. 35 of the *Charter of Rights and Freedoms*.

²⁴⁵ "All original and consequential agreements between the Crown and Aboriginal peoples concerning, *inter alia*, Aboriginal title are...shielded from other Charter provisions by s. 25." Pentney, *Aboriginal Rights Provisions*, p. 153. See also Lyon, "Constitutional Issues in Native Law," in Morse, *Aboriginal Peoples and the Law*, p. 423. But contrast Bruce H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) who observes that: "Not all matters covered by such documents [land claims agreements] are necessarily 'rights or freedoms'; the rub comes in distinguishing such rights and freedoms from privileges or forebearances that are not included in section 25." (p. 4).

non-*Charter* rights within the Constitution, and while it is generally accepted that section 25 does not create new rights,²⁴⁶ it clearly extends the range of sources within which rights of a constitutional-type nature might be found. Section 35, by contrast, by "recognizing and affirming" Aboriginal and treaty rights and, by explicit amendment, the rights acquired by land claims settlements, creates a class of rights that stand outside of the rights provided for in the *Charter* and which, it has been argued, are not subject to the reasonable limitations contemplated by the *Charter*.²⁴⁷ The net effect of these sections is that the rights that are conferred by way of a land claim settlement have both constitutional standing and enjoy some measure of protection and shielding from the operation of the Constitution at the same time, insofar as there is no basis on which other *Charter* provisions might be invoked in order to balance off the effect of the land claim settlement rights so conferred.

From a functional perspective, therefore, there is no difference in status

²⁴⁶ Lyon, "Constitutional Issues in Native Law," in Morse, *Aboriginal Peoples*, p. 423.

²⁴⁷ For example, the "reasonable limits" provision of section 1 and, most importantly, the "notwithstanding" provision under section 33. According to Roy Romanow, now Premier of Saskatchewan and former Attorney General of that province at the time that the Constitution was patriated, "Section 35, which forms part 2 of the constitution, is not subject to the enforcement procedures in part 1 (the Canadian Charter of Rights and Freedoms). Viewed one way, it is possible that section 35 means that Aboriginal rights are inviolate and no other federal legislation or policy can supersede them. Another interpretation holds that section 35 is too generally worded; it is not enforceable and therefore means nothing." Roy Romanow, "Aboriginal Rights in the Constitutional Process," in Boldt and Long, *The Quest for Justice*, pp. 81-82. According to Blair J.A.: "Because s. 35 is in Part II of the *Constitution Act, 1982* and not Part I, which comprises the Charter, the rights protected by s. 35 cannot be limited under s. 1, overridden under s. 33, or enforced under s. 24 of the Charter. Laws contravening s. 35 can, however, be set aside under s. 52(1) of the *Constitution Act, 1982*...." *R. v. Agawa* [1988] 3 CNLR 73 (Ont. C.A.), in Morse, *Aboriginal Peoples*, p. 852. Following the *Sparrow* decision [*Sparrow v. Attorney General of Canada*, [1990] 1 S.C.R. 1075], laws affecting or regulating Aboriginal rights will not automatically be set aside under s. 52, provided that their effects can meet the tests, as laid down by the Supreme Court, for justifying an interference with a right recognized and affirmed under s. 35.

between the as yet unspecified Aboriginal rights within the Constitution that have been the subject of much debate and those rights that are negotiated in considerable detail (and, to date, considerable privacy) in the course of producing a claim settlement agreement. As a consequence, these settlement rights become, in some substantial measure, additions to the constitutional order of the country: an order which is not subject to the general provisions of constitutional ratification but for which any proposed changes will require the consent of the claimant group in question. In addition, by virtue of their status as law they thereby constrain and direct further policy change in their areas of competence and jurisdiction. Functionally, they are perhaps one of the clearest and most significant instances of what Martin Loughlin would call that law which is, in its origin, simply a highly sophisticated form of political discourse, and which has resolved, through legal modalities, an extended political dispute.²⁴⁸

The provisions for constitutional protection of the Aboriginal rights of the claimants conferred within these agreements are not the only variables that are finding their way into the legal landscape. There are also specific legal responsibilities, processes and structures that the comprehensive claim agreements provide for both Aboriginals and non-Aboriginals, both within and beyond the settlement areas that the claims cover, whose significance cannot be underestimated. In particular, most comprehensive claim settlement agreements provide for a range of administrative,

²⁴⁸ Martin Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992), p.4.

advisory, and quasi-judicial regimes to deal with such issues as: access to and development of unoccupied Crown land and resources, environmental protection within the settlement area,²⁴⁹ renewable and non-renewable resource acquisition, fish and wildlife harvesting and management, rights and responsibilities of third parties, and the like. Once the claim is ratified, and the implementation of these regimes commences, there occurs what might be called a net transfer of interest in their management from the general public (as represented by the government(s) involved in the negotiations) to the Aboriginal claimants. For their part, the Aboriginal claimants now have a regularized and protected - some would say privileged - voice in such management, while the needs and concerns of the general public on the other hand, insofar as they might be represented at all in the long-term, must be focussed more tightly through the governmental representation to such regimes as the claim settlement affords. This change would appear to instantiate some of the difficulties in what Meyer calls the "theoretically ambiguous" meanings of the public interest: that it can refer both to those values or goals that the public might want or need and, as a consequence, pursue, or, more generally, that it is merely a referent for these issues that are of public (as opposed to private) concern.²⁵⁰ For the general public in any post-claim environment, the reality is that any issue of public interest, however this

²⁴⁹ The "settlement area" or "settlement region" is the area of traditional use and occupancy claimed by the Aboriginal group and accepted by the federal government during negotiations. The settlement area includes both settlement lands that are actually transferred over to designated Aboriginal organizations as part of the settlement package and unoccupied Crown lands, which in the north are virtually all federal lands.

²⁵⁰ William J. Meyer, *Public Good and Political Authority: A Pragmatic Proposal* (Port Washington, N.Y.: Kennikat Press, 1975), p. 31.

interest is defined, must now seek to justify itself against the normative Aboriginal interest that animates each claim's implementation. In other words, both the scope and the focus of the public interest relative to comprehensive claim settlements undergoes transformation.

Aboriginal Title and Competing Interests

Given the degree to which comprehensive claim issues have been in the forefront of political debate over the past few years, it is easy to forget that both the concept of Aboriginal title and the process of settling comprehensive land claims are both fairly recent and still evolving additions to the Aboriginal policy vocabulary. Beyond the near-universal agreement amongst both Aboriginals and non-Aboriginals that Aboriginal rights to land and resources are amongst the Aboriginal and treaty rights recognized and affirmed under section 35(1) of the *Constitution Act, 1982*, there is considerable room for ongoing disagreement as to the precise scope, content and exercise of these rights and the ways in which they might be expressed within land claim agreements. There is enough room for disagreement, in fact, that the federal government's comprehensive land claim policy has been modified twice since its first promulgation in 1973 and is going through another review at the time of writing.²⁵¹ Despite the modifications, however, it is still safe to say that these modern agreements: "...have provided neither the finality [of securing title] desired by

²⁵¹ The current comprehensive claims policy was amended in 1981 and again in 1986. The report and recommendations on extinguishment that were to be provided by Mr. Justice Hamilton to the Minister (see above, footnote 134) sometime in the Spring of 1995 have not yet been released to the public.

government nor the guarantee for the future desired by Aboriginal peoples."²⁵²

For Aboriginal people, rights to land seem patently simple and straightforward: land is part of their identity, both as a people and as individuals. The right to use and occupy the land, therefore, is as 'inherent' as the right to self-determination and is inexorably bound up with self-determination.²⁵³ Consequently, many Aboriginal people do not think of their land rights in terms of 'claims', and they do not see the comprehensive claims process as a search for 'benefits' that they have yet to negotiate.²⁵⁴ For many Aboriginal people, the end result of the process should be more of a recognition and declaration of what has always been rather than a confirmation or legitimation of what continues today.²⁵⁵

The necessity of having to plead their case within the framework of the dominant, non-Aboriginal legal and political system, however, also means that the

²⁵² Coolican, *Living Treaties: Lasting Agreements*, p. 6.

²⁵³ "Even under the Canadian Indian treaties, the oral history of First Nations is that they never agreed to the annihilation of their political existence. They wanted their Indian way of life to continue and that is the preservation of the inherent right to self-government. They entered into political arrangements, the treaties, only to share the land and resources in order to co-exist peacefully with the settlers and not to give up their nationhood." Opekokew, "The Inherent Right of Self-Government," in *The Inherent Right of Aboriginal Self-Government*, volume 2, p. 12.

²⁵⁴ "The First Nations of Canada do not view their rights in terms of 'claims.' We more properly view the claims process as one of the few mechanisms available for implementing our constitutionally protected rights." Assembly of First Nations, "A Critique of Federal Government Land Claims Policies," in Cassidy, *Aboriginal Self-Determination*, p. 244.

²⁵⁵ In many of the complaints registered by Aboriginals in respect of the interpretation of treaty rights and obligations, there is a constant theme that the intentions of the treaties, as understood by the Aboriginal signatories, are continually distorted. In addition, there are often accusations that additional clauses, obligations and liabilities have been inserted into the treaties following their ratification by the signatories; additions that never would have been agreed to by the Aboriginal people concerned had they been raised in the negotiation of the treaty. On this, see Royal Commission on Aboriginal People, *Overview of the Second Round*, pp. 22-23.

seemingly self-evident nature of Aboriginal title as Aboriginal people want to assert it is suddenly no longer so self-evident. If nothing else, this is a failing of legal history that cannot be overlooked. On the one hand, there is no doubt that the constellation of questions relating to Aboriginal title has both a long history and has found expression in Canadian law and its antecedents: so much so that the issue predates and may even underlie the present constitutional order. One can, from both anthropological and sociological perspectives, assert that some concept of Aboriginal title was present and vibrant at the time of first contact as European political and military explorers, as well as settlers, had to deal with the reality of prior Aboriginal occupation and use of much of the land that is now part of North America. The fact that large numbers of Aboriginal people were, in fact, systematically denied basic rights by those Europeans who were bent on expansion and conquest led to the development, by the Spanish in the sixteenth century, of the first rudimentary assertions of what we would now call Aboriginal rights.²⁵⁶ These rights were confirmed in a declaration by Pope Paul III in 1537, who additionally asserted that Aboriginals had the free and legitimate possession of their property.²⁵⁷ The question of just what "possession" and "property" meant were, however, open to considerable debate considering both the source of the pronouncement and that source's general

²⁵⁶ Opekokew, "The Inherent Right of Aboriginal Self-Government," in *The Inherent Right of Aboriginal Self-Government*, volume 2, p. 7.

²⁵⁷ See William R. Morrison, *A Survey of the History and Claims of the Native Peoples of Northern Canada*, second edition, revised (Ottawa: Minister of Indian Affairs and Northern Development, 1985), p. 14; Pentney, *Aboriginal Rights Provisions*, p. 34. As Pentney points out (pp. 34-35) there were opposing viewpoints which were advanced to justify the Spanish conquest of the Indies, Mexico and Peru

perceptions of the subjects otherwise.

Whether by formal acceptance or merely practical acknowledgement, this doctrine appears to have passed into British law and practice by the early seventeenth century, although several important caveats were subsequently developed so as to reconcile the land rights of the Aboriginal population with the needs of the colonizing power. These caveats were, first, that Aboriginal property rights were collective rights rather than individual ones; second, that sovereignty over Aboriginal land passed into the hands of the colonial power, and third, that the rights in question could only be surrendered to the Crown.²⁵⁸ By the time of the *Royal Proclamation of 1763*, these legal principles were fairly well established, and the Proclamation made explicit the additional requirements that (a) Aboriginal consent to the surrender of land was required before the Crown could proceed to finalize it and (b) the surrender had to be effected at "some public Meeting or Assembly of the said Indians, to be held for that Purpose...."²⁵⁹ Because of this, even before Confederation, it can be argued that there existed both a set of fundamental principles and a process for the state to follow if and when it desired to conclude transfers of land ownership with receptive Aboriginal groups. In other words: - and as succinctly stated by the British Columbia Claims Task Force - "Aboriginal land ownership and authority were recognized by the Crown as

²⁵⁸ Morrison, *History and Claims*, p. 15. The relationship of Aboriginal title to French law at the time of colonization, and the question of French claims to sovereignty over New France and the Aboriginal people who inhabited it, is not as clear cut, although certain authors argue that the French claims to sovereignty during this period are inflated. On this see Hutchins, "Aboriginal Right to Self-Government," in *The Inherent Right of Aboriginal Self-Government*, volume 1, pp. 5-9.

²⁵⁹ *Royal Proclamation of 1763*, in *Consolidated Native Law Statutes, Regulations and Treaties 1994* (Scarborough, ON: Thomson Canada Limited, 1993), p. 353.

continuing under British sovereignty."²⁶⁰

When considering Aboriginal/non-Aboriginal relations in the years following the *Royal Proclamation*, one can justifiably say that the recognition of Aboriginal rights and interests finds its strongest and most consistent expression in the use of treaties as instruments to establish and/or settle relations between Aboriginals and non-Aboriginals. As a contractual instrument, the act of treaty-making between Aboriginals and non-Aboriginals in what is now Canada (which is, incidentally, the foundation of the current comprehensive claims process according to current policy) goes back at least to the early eighteenth century.²⁶¹ Between that time and the advent of the modern claims process, and depending on how you count them, some sixty major historical treaties were entered into between Aboriginals and settlers: the earliest of which were concluded primarily to formalize military alliances and promote peace and co-operation, the later ones of which had as their goal the clearing of lands in the north and west of Aboriginal title so that settlement and resource cultivation could commence.²⁶² Whatever the specific desires of the government of the day in entering into negotiations, it is probably safe to say that there was a recognition both

²⁶⁰ Chief Joe Mathias, et. al., *The Report of the British Columbia Claims Task Force*, Vancouver, B.C., June 28, 1991, p. 6.

²⁶¹ *Comprehensive Land Claims Policy*, p.5; Coolican, *Living Treaties: Lasting Agreements*, p. 2.

²⁶² Coolican, *Living Treaties: Lasting Agreements*, pp. 1-4. The estimate of the number of treaties includes: the so called "Peace and Friendship Treaties of New Brunswick and Nova Scotia, the Upper Canada treaties concluded prior to 1840; the Robinson Treaties around Lakes Huron and Superior (1850); The Douglas Treaties on Vancouver Island (1850-1850); The so-called "Numbered" post-confederation treaties of Northern Ontario, the Prairies, Northwestern B.C. and the Northwest Territories (1871-1921), and the Williams Treaties of 1923. On this see Bruce H. Wildsmith, "Pre-Confederation Treaties," in Morse, *Aboriginal Peoples and the Law*, pp. 122-123; Norman K. Zlotkin, "Post-Confederation Treaties," *op. cit.*, pp. 272-276.

of the need to reach agreements with the Aboriginal population for certain transactions and, at the same time, an acknowledgement that the Aboriginal party to each agreement was in possession of some interest that required transacting.²⁶³

The federal government does not deny the validity of this legal source of Aboriginal title, but has, instead, regularly asserted that this title begs precise, legal definition: definition which has, ironically, eluded the judiciary and which must be negotiated by politicians who are left to walk where judges fear to tread.²⁶⁴ Within the context of comprehensive claims, this definition is effectively worked out through the negotiation process. According to DIAND's current comprehensive claims policy, a comprehensive claim originates with a statement of traditional use and occupancy of a particular parcel of land by an Aboriginal group (or groups), whose use and occupancy has not been interrupted and which continues up until the present time.²⁶⁵ Under the current policy, settlement of comprehensive claims can only be entertained by the government where the Aboriginal group making the claim has not previously accepted one of the historical treaties that were negotiated between the Crown and Aboriginal peoples in Ontario, the Prairie Provinces, or what is now the Northwest

²⁶³ Asch, *Home and Native Land*, pp. 56-57.

²⁶⁴ "The courts have been reluctant to describe Aboriginal rights in any more detail than is strictly necessary to decide the particular issue in a case before them. The courts have said that Aboriginal rights are not uniform across the country....The courts have encouraged negotiation as the best method of resolving uncertainties about Aboriginal rights." Minister of Indian Affairs and Northern Development, *Achieving Certainty in Comprehensive Land Claims Settlements*, Background Paper prepared for the Federal Fact Finder (Ottawa: Minister of Indian Affairs and Northern Development, 1995), p.2.

²⁶⁵ *Comprehensive Land Claims Policy*, p. 23.

Territories.²⁶⁶ In this sense, the federal government sees comprehensive claims settlements as the direct descendants of these historical treaties of the 19th and early 20th centuries, in which various Aboriginal people gave up the right to exercise their traditional use and occupancy - indeed, gave up their title - in exchange for certain defined rights and benefits over certain, defined parcels of land.²⁶⁷

For Ottawa, the current comprehensive claim process is not intended to be an exercise in giving definition to the concept of Aboriginal title; it is, rather, a process whereby the parties to an agreement define, in modern terms, the ownership and/or use of specific, designated lands and resources, and, in addition, implement measures to ensure that other issues of concern to both the claimants and the government are dealt with equitably.²⁶⁸ However, the fact that comprehensive claim settlement agreements, like their treaty predecessors, do not attempt to define the specific content of Aboriginal title per se should not blind us to the other important similarity they share: the fact that both seek to extinguish this title. Indeed, the modern settlements are just as thorough in their demands upon the beneficiaries, requiring

²⁶⁶ *Comprehensive Land Claims Policy*, p. 23.

²⁶⁷ "...the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles, and privileges whatsoever, to the lands included within the following limits..." Excerpt of Treaty 8, 1899, in Coates, *Aboriginal Land Claims In Canada*, p. 61. Such forfeiture (with minor variations in the language) is required in all of the numbered treaties (i.e., Treaties 1 through 11, covering what is now Northern Ontario, all of the Prairies, the Northwest Territories between and to the west of Great Bear and Great Slave lakes, and Northern British Columbia to the east of the Great Divide).

²⁶⁸ "Although Canadians have inherited the uncertainty and the legal ambiguities surrounding 'Aboriginal title', they have also inherited a way for addressing such ambiguities: treaty making." *Comprehensive Land Claims Policy*, p. 5.

them to "cede, release, and surrender" all of their Aboriginal "claims, rights, title and interests" to any lands and waters not covered by the agreement they are entering into "anywhere in Canada."²⁶⁹ As an example of current governmental preferences in the management of governmental-aboriginal relations, it is singularly instructive that government insists on the irrevocable extinguishment of those rights which it continues to refuse to attempt to generally define, while at the same time insisting on a governmentally-directed process of functional definition in its place after extinguishment has been made a reality.

Despite the relative success (from the government's perspective) of the post-confederation treaty-making process via the "numbered treaties," and despite what appears to be the genesis of a claims settlement policy as early as the *Royal Proclamation of 1763*,²⁷⁰ government in the post-Confederation era had neither a policy nor formal mechanisms for the assessment or negotiation of comprehensive claims by Aboriginal groups prior to 1973. That is to say that government did not give any serious consideration to the potential implications of Aboriginal title, beyond the

²⁶⁹ See, for example, *The Gwich'in Comprehensive Land Claim Agreement* (1992), Volume I, s. 3.1.12; *The Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* (1993), s. 2.7.1(a).

²⁷⁰ "The broad outline of a policy for dealing with comprehensive claims was already in place at the time of Confederation. The Royal Proclamation of 1763 had stipulated that any purchase of Indian lands by a British colony should be carried out at a public meeting or assembly of the Indians held for the purpose of such purchase. Many such surrenders of Indian title had been taken by colonial governments prior to 1867 as settlement spread, the last being the Robinson Treaties of 1850 on Lakes Huron and Superior, and the Manitoulin Island Treaty of 1862." Richard C. Daniel, *A History of Native Claims Processes in Canada 1867-1979*, prepared for the Research Branch, Department of Indian and Northern Affairs (Ottawa: Tyler, Wright & Daniel Limited, Research Consultants, 1980), p. 203. On the terms of the *Royal Proclamation of 1763*, see *Consolidated Native Law Statutes*, p. 353.

need for its extinguishment as a condition to any other governmental-Aboriginal interaction relating to the areas that Aboriginal people claimed as theirs. In fact, to a large extent, the timing of negotiations for the post-Confederation treaties made such a policy unnecessary, since Aboriginal title to those lands where settlement was taking place was, by virtue of these settlers, being effectively extinguished in advance of negotiations commencing anyway. Outstanding grievances were lodged from time to time by various Aboriginal groups against the government in respect of specific treaty provisions, but these grievances were (and continue to be) handled within the existing treaty framework.²⁷¹ In other cases where provincial interests were coming to bear on the resolution of Aboriginal claims, the federal government managed in some instances to secure treaty extensions (as in Ontario and British Columbia) and, in the case of the extension of Québec's northern boundary in 1912, to obtain the province's commitment "...to recognizing and obtaining surrenders of Indians' territorial rights" in a manner similar to that which had been effected by the federal government.²⁷²

Indeed, it is not even clear if the federal government had, at this point, the requisite conceptual tools, from a policy perspective, to distinguish between Aboriginal 'grievances' arising out of, for example, the alleged non-fulfilment of treaty

²⁷¹ Hence the notion of "specific claims," which have been defined by the Minister of Indian Affairs and Northern Development as: "...specific actions and omissions of government as they relate to obligations undertaken under treaty, requirements spelled out in legislation and responsibilities regarding the management of Indian assets." John C. Munro, "Forward" to *Outstanding Business: A Native Claims Policy* (Ottawa: Minister of Supply and Services Canada, 1982), p. 3.

²⁷² Daniel, *History of Native Claims*, pp. 207-208.

obligations, and 'claims' for the more general satisfaction of Aboriginal rights to the use and occupancy of land that various groups were already presenting to government in the late 1960s and early 1970s.²⁷³ Both the proposed White Paper of 1969 and subsequent remarks to B.C. Aboriginal people by then Prime Minister Trudeau appear to have rejected the notion that there could, in principle, be 'claims' of the latter type, since the concept of unextinguished Aboriginal title was, itself, rejected at that time.²⁷⁴ These confident assertions, however, were destined to be abandoned with the rather rapid genesis and development of federal government comprehensive claims policy. By August, 1973 both Trudeau and the then Minister of Indian Affairs and Northern Development, Jean Chrétien (largely on the basis of the *Calder* decision) confirmed that the government was willing to negotiate what Chrétien called: "'comprehensive claims' - where rights of traditional use and occupancy had not been extinguished by treaty or superseded by law."²⁷⁵

Comprehensive Claims and Aboriginal Benefits

Because of the heterogeneous nature of the policy drivers, and depending on who one is talking to, the net benefits accruing to the parties of a comprehensive

²⁷³ The more well-known claims that had made their way into Canadian public consciousness by the early 1970's included the Nisga'a of British Columbia, the Cree of Northern Québec, the Dene/Métis of the Mackenzie Valley and the Indians of Old Crow in the Yukon (later to become part of the Council for Yukon Indians (CYI) claim). On this see Daniel, *History of Native Claims*, pp. 221-225; Morrison, *History and Claims*, pp. 42-46; Coates, *Aboriginal Land Claims in Canada*, pp. 15, 111-113.

²⁷⁴ Morrison, *History and Claims*, p. 39.

²⁷⁵ Daniel, *History of Native Claims*, p. 222.

claims settlement can be assessed according to considerably different and often incompatible criteria. On the one hand, insofar as one compares the pre-settlement and post-settlement environment with respect to settlement deliverables, the ratification of any given claim means that specific Aboriginal groups are finally able to achieve some measure of control over the land that they call their own, particularly with respect to the maintenance of traditional hunting and harvesting practices for fish and wildlife on that land. For the Inuvialuit, the Dene, the Metis and the Inuit in the North, as well as the Cree, Inuit and Naskapi of Northern Quebec, securing this kind of control has been a high priority since the prospect of long-term and potentially environmentally damaging resource development was first pursued in the Arctic and in Northern Quebec back in the early 1970's. Threatened with sudden and uncontrolled development pressures, virtually no information on the kinds and degree of damage that such development might have on either their lands or their communities, and no concrete guarantees that they might benefit from the development, Aboriginal people in these areas began to organize to assert their rights.²⁷⁶ As a result of their efforts, these Aboriginal groups now have tailor made environmental and land-management regimes in place that guarantee that Aboriginal concerns in these areas are addressed prior to approvals being granted for development proposals above a certain threshold to proceed. Indeed, in some

²⁷⁶ On this see Morrison, *History and Claims*, pp. 42-46, 61-68; Philip Awashish, "The Stakes for the Cree of Québec," in Sylvie Vincent and Garry Bowers, eds., *James Bay and Northern Québec: Ten Years After*, Proceedings of the Forum on the James Bay and Northern Québec Agreement, Montréal, November 14-15, 1985 (Montréal: Recherches amérindiennes au Québec, 1988), pp. 42-45; Murray Angus, ... "and the last shall be first": *Native Policy in an Era of Cutbacks* (Ottawa: The Aboriginal Rights Coalition (Project North), 1990), p. 36.

instances, the diligence with which settlement bodies have discharged their responsibilities under these areas of concern - particularly as they may have favoured the beneficiaries of the settlement - has itself become a point of contention between the beneficiaries and those industries (and sometimes government) who seek to pursue development initiatives in the North.²⁷⁷

On the other hand, comprehensive claims settlement agreements, as they have been negotiated and implemented to date, are, fundamentally, 'stand-alone' initiatives, and they have a force and permanence to them that is afforded few other policies or agreements concluded by any government. Indeed, concluded agreements neither presuppose nor require any form of additional, supporting policy superstructure, despite the fact that it was through policy developments that the idea of the comprehensive claim agreement entered into Aboriginal policy vocabulary in the first place. A significant reason for the durability of these agreements is their quasi-constitutional nature,²⁷⁸ but it is also important to realize that the very nature of the comprehensive claim process contributes to this status, because it begins with a particular Aboriginal group providing a statement of claim of unextinguished Aboriginal title to the federal government, and ends with an agreement which provides for a range of specified rights and benefits for this Aboriginal group in exchange for certain

²⁷⁷ On this see *Inuvialuit Final Agreement: Environment and Wildlife Provisions*, an implementation evaluation prepared for the Joint IFA Evaluation Advisory Committee under the auspices of Indian and Northern Affairs Canada (Ottawa: Resource Futures International, 1993), pp. 13-15.

²⁷⁸ All of the comprehensive land claim agreements ratified after 1982 are understood to be "treaties" within the meaning of section 35 of the *Constitution Act*, 1982.

guarantees regarding further claims by this group upon Canada. Like the historic treaties which these agreements are claimed to stand in the tradition of, the federal government, through the negotiation process, looks to define, or redefine, some of the most fundamental aspects of its relationship with the Aboriginal group at the table: a relationship that government has, traditionally, intended to see endure for a good long time and which it would not likely undertake to change without good reason.²⁷⁹ On an issue like extinguishment there have been and continue to be profound difficulties experienced by Aboriginal people over such a requirement and the importance that government attaches to it, but the dynamics of these settlements are such that changes in federal expectations in this area will be both slow and incremental.

As a matter of policy, the federal government has generally pursued comprehensive claim settlements that address a defined package of specific Aboriginal concerns but which do not go beyond these concerns. At the same time, the *sui generis* nature of both process and output has not detracted from the durability of the decision-making mechanisms that are put in place in each agreement, nor has it attenuated in any way the extent to which the agreements redefine existing governmental/Aboriginal/third-party relations in the long-term. Indeed, the specific provisions, once ratified, can be considered as discrete, enduring policy choices that should, in themselves, be taken into account when one is assessing the potential strategic impact of claims settlements on future Aboriginal policy development. With some justice, it may be said that the settlement of each claim represents a watershed

²⁷⁹ *Comprehensive Land Claims Policy*, pp. 5-6.

in the evolving relationship between the particular Aboriginal group and government; it is equally true, however, that subsequent developments within this relationship will be irrevocably conditioned by the assumptions, inclusions and exclusions that the claims settlement has made. It is not very far removed from the dynamics of on-reserve policy initiatives and the interposing strictures of the *Indian Act* that have continued to plague Aboriginal-government relations until the present time.

Ultimately, it may be argued that comprehensive land claim agreements bring into sharp relief many questions inherent in the maintenance of any form of public interest rationale that might be assumed both to underlie public policy-making and guarantee the legitimacy of the law that such policy-making produces. These agreements, as instruments for satisfying the interests of a people who are intent on taking control of their own future, both call into question the nature of the public whose interest is to be served and provide new mechanisms through which public interest definition and development are to take place. At the same time, their particular legal-constitutional status within the Canadian legislative framework, when ratified, means that a particular expression of a 'public' interest is now a normative component both of Canadian policymaking and lawmaking activity. It is somewhat ironic that such an endpoint is reached, particularly in light of the federal government's stated commitment to respect the "general public interest and third party interests" in the negotiation of any claims settlement and to deal with these interests equitably if they are affected.²⁸⁰ One might venture to say that, with each new settlement, both

²⁸⁰ *Comprehensive Land Claims Policy*, pp. 21-22.

the publics who have interests in the settlements and the public interest that is left after the settlement is concluded are each changed in ways that none of them understand, but which will have an impact on future activities and interests nonetheless.

Chapter 7 - Aboriginal Interests and the Public Interest: Concluding Observations

The Instrumental Nature of the Public Interest to Aboriginal Interests

Throughout this inquiry, I have taken my analytical cue from what is very clearly a normative proposition: that an analysis of that which is claimed to represent the common good, or the public interest of a society cannot be dismissed, ignored, or avoided if there is to be a full understanding of political organization and behaviour.²⁸¹ I have also asserted, with no small amount of analytical exertion, that attempting to come to terms with what might actually constitute a normatively meaningful understanding of this common or public interest amongst the proliferation of interests that constitutes our society leads us, inevitably, into an inquiry about the nature and capacity of the policy-making function within the pluralistic, democratic state. For while it is indeed true that most political debate, at least at the outset, concerns itself with more immediate and particular interests of the kind that generated the debate in the first place,²⁸² the transition from political debate to a political decision that has policy implications must move beyond the immediate and consider the long-term, general implications of the decision now having been made. It is at this point that questions concerning the public interest, or the common good, first make themselves felt.

This being said, my inquiries have demonstrated, in the first instance, that the public interest is probably best understood not as discrete set of propositions that

²⁸¹ For example, Meyer, *Public Good and Political Authority*, p. 43.

²⁸² Bell, "Public Interest: Policy or Principle?", in Brownsword, *Law and the Public Interest*, p. 31.

inform public policy development so much as a kind of social 'tool' whereby public policy development is assessed for its legitimacy and viability. In other words, invocation of the public interest is, generally, instrumental to the establishment or advancing of some other overarching policy goal or goals. In this respect, Aboriginal policy development discloses several different modalities of its instrumentality.

For example, as a barometer of state-society relations, attempting to assess the role of the public interest means accounting for the fluidity of both state and society, and the lack of congruity between the two that is the hallmark of modern political communities generally.²⁸³ In this respect, the rise of Aboriginal political consciousness and the various governmental responses to this consciousness over the past number of years are testimony to this fluidity and to the provisional nature of the Canadian political experiment. Determining what the optimal political arrangement for Canada and for the Aboriginal Peoples of Canada might be has changed with the passage of time, and it is likely that it will change further as time goes on. We have to acknowledge the appropriateness of this dynamic relative to our efforts to articulating Aboriginal policy in the public interest, without, at the same time, allowing ourselves to believe that all such change is ultimately relative. In other words, some changes are worth preserving in the long term.

As a means of identifying the boundaries of citizenship or the norms of civic responsibility, speaking to the desirability of some concept of the public interest very

²⁸³ Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, pp. 14-15.

pointedly means navigating between the rocks of citizens' rights (whether individual or collective) and the shoals of divergent interests within society which the state will often be called upon to mediate between. This will likely not change in the foreseeable future, although the navigation is certain to become more complex as questions about citizens' responsibilities are added to the rights-interest mix. All of these political factors, and, more importantly, their interrelationships, are being increasingly recognized as crucial to the maintenance of a stable social and political order. The continuing development of Aboriginal policy provides multiple access points (ie., both through the claims and self-government processes) for governments, Aboriginal people and, increasingly, third parties to clearly delineated and negotiated arrangements that take rights, interests, and responsibilities into account. The key will be to insure that these arrangements are firm without being inflexible, and just without being legalistic. Such arrangements are, admittedly, to move away from what Taylor calls the "uniform model of citizenship" that characterizes the classical, western, liberal state,²⁸⁴ and are clearly not easy to manage. It seems clear that the refusal to enter into such arrangements, given our history and our still comparatively shallow sense of cross-cultural trust, would result in uncontrollable interests fighting within an increasingly outdated national polity.

Finally, as a method of inculcating a desired political behaviour or a desired social or political end, invoking the symbolic value of the public interest is a powerful

²⁸⁴ Taylor, "Shared and Divergent Values," in Watts and Brown, *Options for a New Canada*, p.

linguistic device which can either enable or inhibit discussion about the end or ends to be achieved, as well as provide criteria by which evidence relative to the ends is included in or excluded from the discussion.²⁸⁵ The entire history of Aboriginal constitutional debates is an example of this type of public interest instrumentality in action, as assertions about the political and legal significance of historical relationships and commitments are regularly advanced and defended so as to lay the groundwork for various rights claims. Indeed, one could say that in much of this high-level debate the ambiguities of fact that one finds in both the history and law of nations are often folded over into revisionist declarations of new social and political norms for both Aboriginal people and the state.²⁸⁶ These declarations, in turn, often become the bases for new points of departure for yet other rounds of policy development.

It might be claimed that this assessment of the instrumental value of the concept of the public interest, rather than providing us with any substantive means whereby 'good' public policy can be distinguished from 'bad' public policy, merely plays into current analytical predilections within political science. More specifically, the predilection for avoiding debates about the nature and purpose of political life in

²⁸⁵ Bell, "Public Interest: Policy or Principle?", in Brownsword, *Law and the Public Interest*, p. 31.

²⁸⁶ The research that has, to date, been produced by the Royal Commission on Aboriginal Peoples - particularly those works that have been or are intended for public consumption - may be considered as examples of this type apologetic literature, since they generally attempt to marshal the facts of the research question under consideration in such a manner so as to advance the general mandate of the Commission. This is not to say that the work produced by the Commission is neither analytically rigorous nor controversial, for it has been both to date. It is only to observe that the Commission's research is fueled by a particular agenda, which is and has been to challenge and to change current government policy and practice. On this see, for example, Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Coexistence: An Alternative to Extinction* (Ottawa: Minister of Supply and Services Canada, 1995), pp. 6-7.

favour of empirical (and supposedly value-free) inquiries into the ways in which political and ethical motivations are operationalized within concrete political activity and political discourse²⁸⁷. This analytical tendency, rather than allowing for the possibility that universal social values might be defined in some objective manner or that political activity might be a long-term, goal-oriented undertaking that transcends the moment, tends to assert instead that such values, if they exist, are simply a transitory product of the political process and subsidiary to it. This is (or so it is claimed) evidence of the belief in the priority of process over principle: a belief which both political analysts and politicians often manifest as they practice their respective crafts.

The findings of this research, in and of themselves, do not refute this criticism. All things considered, they probably support this argument to the extent that it also emphasizes the primacy of the political process and the actors involved in that process. Beyond this, however, the findings lend support to alternative traditions within contemporary political science and public policy research that subscribe, in varying degrees, to the principle of a purposeful, rational approach to public policy development. These traditions defend and advance the notion that the public interest, whatever it might be, is not something which, on the one hand, is simply a collection

²⁸⁷ Meyer, *Public Good and Political Authority*, p. 7. Cf. Douglas Sturm, *Community and Alienation: Essays on Process Thought and Public Life* (Notre Dame: University of Notre Dame Press, 1988), pp. 75-76.

of private interests writ large,²⁸⁸ or, on the other hand, something so broad and diffuse as to be of no implementable value whatsoever.²⁸⁹ Depending upon one's particular point of view within this orbit, the specific expression of this public good may well be in normative, valuational terms that reflect what is perceived to be the identity and measure of a political community: an identity that is found in the community's beliefs, symbols, sensibilities and virtues.²⁹⁰ Conversely, it might find expression as a functional measure of the degree to which:

...a public is knowledgeable about, is organized to respond creatively to, and has officers constituted to deal effectively with all those social transactions within its historical situation that have an impact on its life.²⁹¹

Neither of these analytical perspectives suggest that questions concerning the nature and role of the public interest in policy debates can be reduced to activities of aggregation or quantification, as though the public interest might be some discretely distributed entity that inheres in the members of a political community and which can be extracted and lumped together when needs require. What they do suggest, however, is that political communities may well be, given the right conditions, able to

²⁸⁸ Leslie A. Pal, *Public Policy Analysis: An Introduction* (Scarborough: Nelson Canada, 1992), p. 199f. This notion also finds currency amongst contemporary political philosophers. See, for example, Raskin, *The Common Good*, p. 31. On the distinction between "common interests" and the "Public Interest", see Bell, "Public Interest: Policy or Principle?", in Brownsword, *Law and the Public Interest*, p. 30.

²⁸⁹ As in the following definition of the public interest: "broad, diffuse, [and] noncommercial", Peter H. Schuck, "Public Interest Groups and the Policy Process," in E.F. Paul and P. A. Russo, eds., *Public Policy: Issues, Analysis, and Ideology* (Chatham, NJ: Chatham House Publishers, Inc., 1982), p. 202.

²⁹⁰ Sturm, *Community and Alienation*, pp. 80-81.

²⁹¹ Sturm, *Community and Alienation*, p. 79.

respond to questions concerning their future from within a more holistic and integrative horizon than current analytical methodologies might be able to identify.²⁹² Normative, more-or-less widely held, ends-based concerns about policy purposes may well become justifications for particular developmental 'moments' in the contemporary policy process. These moments, in turn, would help to augment and sharpen the further development and application of the policy, regardless of whether or not the motivating concerns survive as discrete contributing factors to the policy being developed when all is said and done.

The Future: Aboriginal Interests and Reduced Political Expectations

It is still very unclear what long-term effects the return, by the present Liberal government, to an incremental, communally-based process for satisfying the Aboriginal need for self-determination will have on other Aboriginal policy development and implementation. It is possible that this initiative, together with the other surviving policies that relate to governance²⁹³ and animated by the undefined Aboriginal rights

²⁹² "Are there divergences of value between the different regions of Canada? In a sense, these are minimal. There appears to be a remarkable similarity throughout the country, and across the French/English difference, when it comes to the things in life which are important. Even when it comes to the values that specifically relate to political culture, there seems to be broad agreement." Taylor, "Shared and Divergent Values," in Watts and Brown, *Options for A New Canada*, p. 53. Clearly this is not an assessment of a society's capacity to deal with public interest questions, but is rather an inference concerning what it is that is available to a society for consideration when such questions come up. The fact that Canadians were deeply involved with constitutional politics for the better part of two decades, and, moreover, that certain proposed constitutional agreements negotiated by political representatives were both heavily debated and, ultimately, rejected suggests that such resources are, in fact, drawn on when the occasion warrants it.

²⁹³ "By governance is meant initiatives, short of constitutional change, that affect the structure of power and decision making among Aboriginal peoples, and between Aboriginal peoples and the federal government." Doern, *Politics of Slow Progress*, p. 102. The initiatives that Doern explores

provided for in the Constitution, will provide the ongoing federal policy 'core' against which progress in Aboriginal-state relations will be measured. To the extent that this policy 'core' reflects the limits to which the federal government is currently prepared to advance an integrated approach to aboriginal needs and concerns generally, it can be seen as an expression of the ongoing tension between what Cairns and Williams called, "...competing analytical and normative frameworks for grappling with the complexities of the degree of coexistence possible between Indian rights and status and Canadian citizenship."²⁹⁴

It may well be the case that such an approach is the only one possible at the present time, given both the political realities of our federal system and the consequences that seem to follow upon opening up the constitution in order to debate changes to the same. However, foreclosure of this avenue has a price. It leaves us having to settle aboriginal needs and concerns without necessarily answering (or even asking) critically important questions concerning Aboriginal identities: specifically the ways in which these identities might interact or intermesh with the state from which they are seeking renewed social and political commitments. Indeed, it would seem that answering such questions would at least help us to begin articulating basic understandings of Canadian citizenship and statehood, the extent to which these

under this rubric are: community based self-government; *Indian Act* alternatives, and "policy processes regarding land claims." I would argue that, depending on the context, changes in policy processes regarding land claims may well entail *de facto* changes to the constitutional order, even if they do not issue forth in explicit constitutional amendments.

²⁹⁴ Cairns and Williams, "Constitutionalism, Citizenship and Society," in Cairns and Williams, *Constitutionalism, Citizenship and Society*, p. 30.

attributes are more than just a function of our legal and political order, and the extent to which both have the capacity to change and to grow.

Moreover, with such an approach, there is no guarantee that the kinds of issues that are brought to the table in an environment unconstrained by more basic considerations (such as consideration of constitutional questions of legitimacy and order) will be identified or approached in a manner that provides an opportunity for them to be appropriately prioritized, relative to their potential long-term impact. Part of this difficulty derives from the nature of policy development itself, for as public policy analysts who understand the rhetorical nature of policy-making are aware; "Objective conditions are seldom so compelling and so unambiguous that they set the policy agenda or dictate the appropriate conceptualization [of the policy problem]."²⁹⁵ In other words, the problems and the needs that Aboriginal people might identify and advance before the Canadian public at any given time may be more or less visible, more or less plausible, depending upon the attitudes, perceptions and beliefs of the Canadian public at that time. There is, of course, an inherent circularity between problem identification, solution identification and solution justification, and one of the limits to the rational approach to policy development is the fact that this circularity cannot, ultimately, be broached within a democratic political environment. As a consequence, interest satisfaction is a dynamic process, not a static one, and it presupposes the articulation of values that are, generally speaking, neither immutable nor subject to rational or ordered development.

²⁹⁵ Majone, *Evidence, Argument and Persuasion in the Policy Process*, p. 24.

In addition to this circularity, there is also the question of the perception of the changing agendas of those who may first be engaged in policy debate in the public forum (with concomitant public scrutiny of the issue) and who later bring other interests to bear when discussing the implementation of the policy so developed. As Leslie Pal has observed, "...the nature of policy discourse in public arenas (eg., parliament, the media, the hustings) forces interlocutors to address the public interest, not self-interest. Public arguments about policy always take place on the higher plane of the public good."²⁹⁶ When one moves from development to implementation, however, the public interest as it was advanced to justify the policy can very quickly evaporate, and the affected parties can be left to stake out new interest turf over which position under the policy is sought. It is important, at the level of policy implementation, to study the changes that this kind of interaction brings as these newer, specific interests are either 'baptized' or 'condemned' at the hands of a process that is largely independent of their formulation. In other words, the terrain of policy implementation can itself become a vehicle for the development and elaboration of new interests and, ultimately, a newer public interest, especially when all other avenues of development are exhausted. As a case in point, in the area of comprehensive claims implementation, government is only just beginning to come to terms with the importance of this dynamic, as lessons learned from the implementation of previously settled claims (such as the James Bay & Northern Québec Agreement and the Inuvialuit Final Agreement) have found their way into both

²⁹⁶ Pal, *Public Policy Analysis*, pp. 199-200.

new implementation guidelines and recommendations to claims negotiators on the more recent northern comprehensive claims that DIAND has undertaken to settle.²⁹⁷

Considering the unwillingness of the Canadian public to ratify the proposed Charlottetown Accord in 1992, and the commitment of the current Liberal government to the recognition of the inherent right to self-government in its "red book,"²⁹⁸ there is no political reason for the federal government to reopen formal constitutional negotiations on those Aboriginal concerns that were such significant political drivers during the previous decade. At the same time, the commitment to recognizing an inherent right to self-government necessarily entails the development and implementation of context-specific programmes for achieving some significant and acceptable measure of self-determination through whatever appropriate vehicles of political organization that government and the Aboriginal groups in question might

²⁹⁷ The 'policy learning' that has taken place with respect to the negotiation and implementation of comprehensive land claims is, broadly speaking, twofold. On the one hand, there is a constant learning process with respect to the process of claims implementation itself: how it is defined and managed, and how successes and failures in implementation are utilized to improve the implementation process in the future. As an example of this, see the internal policy document entitled *Guidelines: Comprehensive Land Claims Implementation Plans*, December 1989, issued by the Senior Assistant Deputy Minister and building upon reviews of the implementation of the Inuvialuit Final Agreement, reports of the Auditor General, and other sources. On the other hand, there is also a learning process (and a certain tension) going on between claims negotiators and claims implementors, insofar as implementation difficulties with specific components of claims agreements are often communicated to the negotiators for discussion and resolution. In these communications, there are often subtle suggestions that future negotiations attempt to avoid 'replays' of these problems, either by avoiding the subject matter that occasioned them or by seeking alternative settlements should avoidance be impossible.

²⁹⁸ "The Liberal government will act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right within the meaning of section 35 of the Constitution Act, 1982." *Creating Opportunity*, p. 2.

agree to.²⁹⁹ Unlike the failed Charlottetown Accord, the new policy makes no commitments to the constitutional recognition of Aboriginal governments, as structures, as a 'distinct order' of government.³⁰⁰ It proposes, instead, that the self-government agreements, when concluded, will be effected through a variety of historically-sanctioned mechanisms that have varying degrees of durability relative to the present legal and constitutional order.³⁰¹ At the same time, the specific rights that are to be negotiated are open for constitutional protection if all parties agree to such protection, and given that the implementation of such protection, where provided, is necessarily a long-term undertaking, the implications for the relationship between the Aboriginal and non-Aboriginal publics could be significant.

Barring any deviation from this approach, the search for some form of genuine *rapprochement* between Aboriginal aspirations and the desires of the general public

²⁹⁹ "The Government recognizes that Indian, Inuit and Métis peoples have different needs, circumstances and aspirations, and want to exercise their inherent right in different ways. Some want their own governments on their land base; some want to work within wider public government structures; and some want institutional arrangements. The Government is prepared to support various approaches, taking into account differing needs and circumstances, and to be flexible on the specific arrangements which may be negotiated." *Aboriginal Self-Government* (Policy), p. 17. The specifics of the new policy commitment were released at a press conference jointly held by the Minister of Indian Affairs and Northern Development, Ron Irwin, and the Federal Interlocutor for Métis and Non-Status Indians, Anne McLellan, on August 10, 1995. At the time of completing this thesis, reaction to this new policy amongst the Aboriginal population has been mixed, and it is still too early to tell whether the policy will be able to achieve any measure of success in negotiating and implementing a constitutionally recognized but non-constitutionally defined Inherent Right of Self-government amongst Aboriginal people.

³⁰⁰ The draft legal text of the Charlottetown Accord, (*Consensus Report on the Constitution*) as put to the general referendum of October 26, 1992, contained explicit provisions in s. 35 to this effect. By contrast, the Aboriginal Self-Government Policy makes a clear distinction between constitutional protection of the rights that are negotiated and the mechanisms that are developed to implement and safeguard these rights.

³⁰¹ According to the policy, these would include, "treaties, legislation, contracts and non-binding memoranda of understanding." See *Aboriginal Self-Government* (Policy), p. 8.

would now no longer be pursued at the level of formal debate or through the development of wide-ranging goals or responsibilities that might transcend current issues, but would instead proceed through tightly-focussed, incremental initiatives staged at the level of the "multiple political communities within which we live."³⁰² Rights and, quite possibly, responsibilities, which would be identified by those who would stand to gain or lose the most from the implementation of either, could well be implemented at a level of particularity that addresses real need, but which sacrifices something of portability and universality at the same time. Perhaps more significantly, the acquisition of such locally negotiated and implemented rights will almost certainly have a symbolic effect on the relationship between citizenship and belonging, and may, inadvertently, lead to a breakdown of identity and cohesion between an already dispersed national community and those local communities that are governed by differently constituted agreements with different aggregations of rights and obligations.

The potential benefits of the new policy notwithstanding, it remains the case that the approach and process that it contemplates for acquiring rights and political membership is still very much an approach of second choice. Indeed, as Bruce Doern has observed:

Slicing through the Aboriginal policy process is the compelling reality that key Aboriginal organizations and peoples see their main policy goal as that of constitutional change and recognition. In a sense this suggests that policies, the normal focus of interest group politics, is not what the

³⁰² Comment by Simeon, in Cassidy, *Aboriginal Self-Determination*, p. 99.

recent Aboriginal policy process is about.³⁰³

Moreover, it is within the framework of constitutional-type debates (such as the one currently taking place in the Northwest Territories with respect to the future shape of the western territory after Nunavut is created in 1999)³⁰⁴ that one is most likely to find questions of the public good, or common values, or guiding principles raised and articulated most clearly. By contrast, an incrementally-driven strategy has the potential to allow government to conveniently sidestep the broader obligation to rethink government policy and practice generally with respect to the status of Aboriginal self-government. If nothing else, an unintended result of the policy cul-de-sac is that much of the specific language that Aboriginal people have been using to advance their interests within a constitutionally-oriented debate (terms such as "inherent right," "self-government," "self-determination," "treaty rights," and so on) is left without its primary context, thereby causing many of their concerns to be misunderstood, if not outright condemned, by a non-Aboriginal population who is

³⁰³ Doern, *Politics of Slow Progress*, p. 5.

³⁰⁴ While both the Meech Lake and Charlottetown Accords dealt with federal constitutional issues and proposed changes to the *Constitution Act, 1982*, which required the consent of a majority of the provinces, the debate in the Northwest Territories is an internal, territorial discussion over the future shape of the *Northwest Territories Act*: the federal legislation that governs the NWT and which can be unilaterally amended by Parliament. Notwithstanding these differences, the debate over changes within the NWT is a constitutional debate to the extent that changes that are recommended through the territorial consultative process will likely be ratified in a new, territorial act. For a sense of the issues currently under discussion in the NWT, see: *Summaries of Member Group Research Reports*, September, 1994; *Themes and Issues in the Constitutional Process for a New Western Territory*, November, 1994, both produced by the Constitutional Development Steering Committee, Western NWT, 1994.

afraid of the unintended structural changes that such language suggests.³⁰⁵ As constitutional elucidation of the terms is abandoned in favour of non-constitutional alternatives, further decontextualization and even distortion appears inevitable.

Now that the long-awaited announcement of the specific contents of the new inherent right policy has taken place, and the contents of the policy are finally in the public domain, questions by the public concerning the relationship of Aboriginal interests to the public interest can only be expected to increase as time goes on. There can be no doubt that this policy's implementation has the potential to simultaneously affect more Aboriginal and non-Aboriginal interests than perhaps any other Aboriginal initiative either before or since the negotiation of the numbered treaties that first cleared Aboriginal land in Ontario and the west for occupation and development. In consideration of the issues that I have attempted to address in this thesis, it is likely that the success or failure of this policy initiative will, in the long run, be assessed against the policy's ability to reconcile those substantive interests who have a stake in the discrete settlements that the policy will have to provide for with those rights that are claimed by those who stand to benefit from the policy's success in the first place. Like what is often regarded as a good settlement in a family law

³⁰⁵ "In fact, terms such as 'self-government' and 'treaty rights' have come to constitute something more than devices to draw political or public attention to Aboriginal grievances. To the extent that they evoke emotional responses and value judgements, and are sufficiently imprecise to allow numerous interpretations, making it possible to create an illusion of consensus that masks factions and divisions, these terms constitute symbols....These symbols are manipulated to shape public opinion, to shame the government into action through public pressure, and to influence the underlying terms of Aboriginal-government discourse...." Fleras and Elliott, *The Nations Within*, pp. 85-86. See also Weaver, "Federal Difficulties," in Boldt and Long, *The Quest for Justice*, pp. 140-141.

dispute, the end result will satisfy everyone's needs to a certain degree but will be less than what everyone wanted at the outset. Perhaps it is only these kinds of settlements that can enjoy any measure of short-term success and long term commitment from the parties at the end of the day.

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