**The implications of self-government
with respect to Aboriginal justice initiatives**

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Abstract

This thesis explains the complexity of several issues relevant to Aboriginal self-government initiatives to facilitate an understanding of not only the challenges, but also the sustainability of self-government, in part one. From here, this thesis expands one of the primary issues of self-government, the administration of justice and the question of the compatibility of justice initiatives within the movement towards self-government. Part two problematizes many of the challenges in transferring responsibility of justice to Aboriginal people. Finally, in part three, this thesis provides a case study of pending government policy with respect to self-government by examining the *First Nations Governance Act*, or *Bill C7*, in relation to the progress of self-government agreements, its applicability to justice initiatives, and its applicability to the current reality of Aboriginal people. Overall, this thesis argues that creating conditions of social justice within communities is a necessary prerequisite in furthering, not only the administration of justice, but also self-government.

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It seems every discussion related to Aboriginal issues is somehow connected to the move towards self-government. But what exactly is self-government? There seems to be an understanding that everyone already knows what this is and what this involves. However, as this paper will illustrate, there is no simple answer to this question, since self-government is a multifaceted concept meaning different things to different people. For some people it might mean sovereignty, or the entrenchment of Aboriginal rights, while to others it means greater control over their affairs as a necessary means to preserving their language and culture. This paper will describe how these competing definitions gauge the success and inadequacies of different self-government agreements. For instance, many self-government agreements are criticized for not entrenching Aboriginal rights, however this only legitimately becomes a criticism if entrenching Aboriginal rights is defined as a critical aspect of self-government. If self-government is simply defined as being able to gain greater control over the issues that are of particular concern to a specific group, the entrenchment of Aboriginal rights seems to be a peripheral issue. These competing definitions are in part, attributable to the diverse life experiences of Aboriginal people. As such, there is unlikely to be one model of self-government to address the needs and aspirations of all Aboriginal people in Canada.

The first part of this thesis explores the issue of Aboriginal self-government in Canada. Primarily, this part attempts to decipher the complexity of the issues relevant to negotiations and agreements. As such, it is important to contextualize these negotiations in reference to Aboriginal people and non-

Aboriginal Canadians. Therefore part one begins with an examination of the traditional modes of Aboriginal governance in an attempt to understand the dominant characteristics of Aboriginal governance. This section is intended to explain the background from which Aboriginal people advance their aspirations in pursuing self-government. Added to this, it is also necessary to appreciate the evolution of the relationship between Aboriginal people and non-Aboriginal Canadians. This paper will adopt the position that this relationship has been characterized by a lack of understanding and recognition on the part of non-Aboriginal Canadians of the unique and diverse lifestyles of Aboriginal people. As such, significant attention is given to describing the evolution of this relationship from the point of European contact. Following this, part one continues by offering a variety of suggestions for potential models of self-government. These models are based on the recommendations of the Royal Commission on Aboriginal People as well as the recommendations of Aboriginal organizations, such as the Congress of Aboriginal People, the Metis National Council, and the Manitoba Metis Foundation. Defining jurisdictional boundaries is also an important aspect of negotiating self-government, as such part one will then continue with an explanation of the diverse levels of jurisdiction. Finally, this part will conclude with an examination of five existing self-government agreements. The agreements that will be analyzed include those negotiated with the James Bay Cree, the Sechelt, Nunavut, Nisga'a, and Metis. These agreements have been chosen as all five present unique characteristics and techniques in addressing governance. None of these models are intended to represent ideal forms that should be

duplicated, but rather, are introduced in an attempt to illustrate the spectrum of options available to self-government negotiations and agreements.

Part two follows by exploring the issue of justice within the framework of Aboriginal self-government. As such, the outline of part two intentionally mimics the flow of part one. Much like self-government, justice means different things to different people. For the most part, both Aboriginal and non-Aboriginal Canadians realize the failure of the current justice system in accommodating the culture of Aboriginal people. According to Aboriginal people, the role of the justice system is to restore the balance caused by a wrongdoing, rather than to punish the offender, which seems to be the primary role of the Canadian system. It is this implicit responsibility of the justice system to correct the social disorder which may have caused an offender to appear before it, which needs to be addressed. In response to this perceived inadequacy of the Canadian justice system, there has been a recent influx of Aboriginal justice initiatives. However, it is important to query the context of these initiatives, and their viability within the move towards Aboriginal self-government. Part two addresses these questions since the issue of the adequacy of these responses is critical to furthering self-government, at least in part due to the fact that acceptable models of dispute resolution are necessary to sustaining successful governance. Determining the viability of justice initiatives within self-government agreements is difficult to decipher since self-government agreements are rather isolated from justice initiatives in terms of negotiations and implementation. Although many self-government agreements acquire the administration of justice, there is very little

specification as to what exactly this entails. Therefore, instead of questioning the viability of justice initiatives with respect to self-government agreements, it is necessary to determine the compatibility of justice initiatives with self-government agreements in terms of the underlying principles and objectives of both endeavors. Part two examines this compatibility by analyzing a number of justice initiatives being implemented in various communities across Canada.

Part two begins with an exploration of traditional mechanisms of dispute resolution in Aboriginal societies prior to European contact. Following this is a description of the lack of common ground implicit in these cultural differences and the types of responses that have resulted from recognition of this discord. Although there have been a multitude of responses by the justice system, the responses that will be explained in part two include a wide variety of justice reforms. Discussion will incorporate an examination of restorative justice programs since these programs are premised on some of the same principles that espouse self-government; namely, empowering individuals and communities to become increasingly involved in the management, development and growth of their societies. Some of the restorative justice programs that will be detailed in part two include elder panels, and sentence advisory committees. Additional programs, which complement restorative justice will also be discussed in detail, these include indigenization and cultural awareness programs. Interestingly, none of these programs required any legislative changes, and can be said to reflect either the flexibility of the existing justice system, or the stubbornness of

the system to relinquish any authority. As such the adequacy and appropriateness of these systems will be discussed in great detail.

Part three concludes this thesis by offering a case study of a proposed piece of legislation, namely the First Nations Governance Act (FNGA), or Bill C-7. This piece of legislation was chosen in an attempt to identify what level of priority the government seems to attribute to Aboriginal self-government. The FNGA is an amendment of the Indian Act and offers changes to three aspects of band governance, namely, band leadership selection, band administration and accountability. How these proposed changes might impact justice, self-government and other priorities facing Aboriginal people will be discussed in depth.

Part One: Exploring Aboriginal Self-Government

Introduction

In order to understand the demands of Aboriginal people with respect to self-government, it is necessary to first understand their traditional modes of governance. This paper does not attempt to capture every possible traditional mode of governance that was present in pre-contact traditional Aboriginal societies, rather, this paper highlights the predominate characteristics of governance that have been documented to date by making reference to the pan-Indian characteristics of governance. This paper recognizes that many traditions have been lost over the years due to a variety of reasons, and many of these reasons will be discussed briefly. As well, this paper also appreciates that only a small number of Aboriginal societies have documented their traditions. Therefore, this paper is representative of the limited documentation available with respect to traditional Aboriginal modes of governance.

Following the discussion on traditional modes of governance, this paper will provide a background to the lack of common ground present in Aboriginal and Canadian relations in negotiating terms for peaceful co-existence. For the most part, this lack of common ground is founded upon the imposition of Euro-Canadian standards upon the alternative ways of life and governance structures of Aboriginal people. This paper will then continue by summarizing various proposals of models for self-government. A heavy concentration has been placed on the models and recommendations offered by the *Royal Commission on Aboriginal People* (RCAP) simply because RCAP is the most comprehensive and

recognizable source available to date. Finally, this paper will conclude with an analysis of existing forms of self-government arrangements. This analysis will examine both land based and non-land based models, and will include the Sechelt Band model, the James Bay Cree land claims agreement, the Nisga'a treaty, the Nunavut land claims agreement, as well as urban Aboriginal and Metis initiatives. These initiatives have been specifically chosen since each one presents unique characteristics and techniques of addressing governance issues.

Traditional Modes of Governance

Traditional modes of governance are reflective of the highly variant traditional and contemporary ways of life of Aboriginal communities. These variant societies are largely due to the diverse geographical contribution of Canada's landscape (Dickason, 2002: 45). At the time of first European contact, the vast majority of Aboriginal people were hunters and gatherers (Dickason, 2002: 45). These traditional Aboriginal communities maintained a nomadic routine, which followed changing seasons and migration of prey. These communities varied in size depending on the type of prey. For example, bison hunting was a communal enterprise and required the co-operation and organization of bands and tribes (Dickason, 2002: 57; Jefferson, 1994: 75). At times, communal hunting could involve several tribal nations at once (Dickason, 2002: 57; Jefferson, 1994: 75). The Naskapi of Quebec and Labrador are an example of Aboriginal people who were hunters and gatherers (Jefferson, 1994: 13). The Naskapi were loosely divided into bands of several families and each of

these bands had their own recognized hunting grounds (Jefferson, 1994: 13). There was no formal tribal government (Jefferson, 1994: 13). Instead, in times of peace, each band selected a head man or chief whose duties "included overseeing the distribution of hunting territories, the welfare of the members of his village, and certain judicial functions" (Jefferson, 1994: 13). The powers of this chief were limited, as he/she would primarily act according to the consensus of his/her band during the warmer months when bands would gather (Jefferson, 1994: 13-14). During the hunting season when each band was dispersed on their own hunting ground, chiefs had very little authority (Jefferson, 1994: 13). Only during times of war was there a general council who generally involved the most notable warriors of each band (Jefferson, 1994: 13). For the Naskapi, normally each band was responsible for handling their own problems during hunting season (Jefferson, 1994: 13). There were also sedentary Aboriginal communities who relied on agriculture prior to European contact, such as the Iroquoian groups of southern Quebec and Ontario (Dickason, 2002: 45; Jefferson, 1994: 33). The Iroquois, also known as the Six Nations, lived and continue to live along Lake Ontario and the St. Lawrence River (Barman et al., 1999: 2). Historically, the Six Nations resided in large villages surrounded by large gardens and would move to new sites as resources were depleted (Dickason, 2002: 51). As the influx of Canadian settlers restricted the economic and geographical feasibility of nomadic ways of life, many Aboriginal communities began to settle. Other communities who were further isolated, were able to continue their traditional ways of living until forced by the federal government to settle on reserve lands. Some communities, like

those of northern Ontario, have only become permanent settlements in the last fifty years (Ross, 1992: 102). As a result, traditional ways of living are still very much vibrant in some Aboriginal communities.

Prior to European contact, Aboriginal people spoke anywhere from 50 to 70 different languages, and these have been classified into 12 linguistic groups (Dickason, 2002: 45). The social organization of Aboriginal people, consistent with the diversity of languages, entailed a wide variety of structures. Dickason maintains that with the exception of some chiefdoms, which only developed on the Northwest Coast of Canada, Aboriginal people shared the general characteristics of pre-state societies (2002: 48). These societies were generally egalitarian and regulated by consensus (Dickason, 2002: 48; Ross, 1992: 135). Chiefdoms, on the other hand, many of whom were semi-sedentary, were hierarchical and based on class divisions which were structured according to wealth and heredity (Dickason, 2002: 48-49; Jefferson, 1994: 101). Alternatively, the Iroquoians, who are an example of a sedentary group of Aboriginal people, developed confederacies (Dickason, 2002: 51; Jefferson, 1994: 33). At the point of European contact there were at least 34 First Nations who were considered Iroquoian (Dickason, 2002: 50). The League of Ho-de'-no-sau-nee, also known as the League of Five Nations, or the Great League of Peace is an example of one Confederacy developed by the Iroquoians in 1451 (Dickason, 2002: 52-54; Jefferson, 1994: 33). This Confederacy was able to unite Aboriginal people of five quite distinct First Nations. Each of these Nations maintained their own language, which included Mohawk, Oneida, Onondaga, Cayuga and Seneca, as

well as occupied their own villages (usually at least two for each First Nation), and had their own council, as did each tribe (Dickason, 2002: 52-53; Jefferson, 1994: 33). These settlements were “governed by a council of 50 chiefs representing participant tribes, although not equally; despite that fact, each tribe had one vote” (Dickason, 2002: 53; Jefferson, 1994: 33). The objective of this council of chiefs was to maintain peace between the League of Five Nations and to negotiate external relations, which was determined according to unanimous decisions (Dickason, 2002: 53; Jefferson, 1994: 33-35). The social organization of the Iroquois, like the Chiefdoms on the Northwest Coast, relied on divisions according to phratries and clans (Dickason, 2002: 54; Jefferson, 1994: 33).

Lack of Common Ground

Prior to the 1763 Royal Proclamation, treaties and relations between Aboriginal people and the settlers were premised on peace and friendship (Dickason, 2002: 163; Dickason, 2000: 22-23; Jefferson, 1994: 50). However, following the 1763 Proclamation, treaties began to focus primarily on land (Dickason, 2002: 163). Although the language of treaties is suggestive of international agreements, Dickason maintains the British did not consider treaties as such since “no colonizing power considered [Aboriginal people] to be sovereign ... [and, as well,] ... none of these treaties were put through the procedure in the British Parliament that would have been necessary for such a status to have been recognized, nor have Canadian courts made such an acknowledgment” (2002: 154). Similarly, the Supreme Court decision in *Simon v. The Queen* concluded that Canada’s treaties with First Nations are agreements

"sui generis which [are] neither created nor terminated according to the rules of international law" (RCAP, 1996: 23; Dickason, 2002: 330). According to Dickason, the federal government used treaties as mechanisms for extinguishing Aboriginal land rights in order to free up land for settlement and development (2002: 255; Dickason, 2000: 23; McFarlene, 2000: 53). For example, Dickason maintains that the federal government approached treaty negotiations from a 'take-it-or-leave-it' position and Aboriginal people were basically forced to take what they were offered (2002: 257; Jefferson, 1994: 132). Government officials are said to have threatened Aboriginal people "with being swamped by settlers without any compensation if they did not agree" (Dickason, 2002: 258; McFarlene, 2000: 53). Treaty Seven, which was signed in 1877, is an excellent example of when Aboriginal people were left with little alternative to signing (Dempsey, 1987:1). Treaty Seven was critical to the federal government since it facilitated the freeing up the necessary land to construct the transnational highway (Dempsey, 1987: 1). The representative of the government offered annuities, reserve land (calculated on the basis of one square mile for every five persons); the right to hunt on unoccupied land subject to the Queen's regulations; monies to purchase ammunition; teachers; clothing for chiefs and councilors; and as well livestock and agriculture supplies in exchange for the Natives to "cede, release, surrender, and yield up to the Government of Canada all rights, titles and privileges to their hunting ground", and as well to obey the Queen's law and leave unmolested anyone who settles in the surrendered territory (Dempsey, 1987: 22-23). Some of the Natives were suspicious of the

offers made by the government due to the broken promises of the Americans in earlier treaty negotiations and responded with their own demands for compensation for the wood used by the settlers who already occupied the land and an increase in the monetary compensation offered (Dempsey, 1987: 21). However, even though the government officials refused to make any concessions of their original offer, the chiefs of the Blackfoot, Bloods, Peigan, Stoneys and Sarcees agreed to take the offer (Dempsey, 1987: 27-29). Under the dual threats that the buffalo herd was depleting, and the invasion of other First Nations and settlers taking over their traditional territory, the chiefs who agreed to Treaty Seven felt they were left with no other alternative than to share their land (Dempsey, 1987: 35-37). According to Dempsey, "the speeches of the leaders imply that they were signing [the] treaty because of their faith in [the government official] Colonel Macleod, rather than any comprehension of the terms" (1987: 44). Dempsey further adds that most of the chiefs, with the exception of Crowfoot (chief of the Blackfoot Nation) did not seem to appreciate the significance of this treaty and could not comprehend the long-term effects of this treaty (1987: 44).

Difficulties in negotiating treaties included the inability of the chief or the elected spokesperson to sign on behalf of everyone affected by the proposed treaty, since Aboriginal people "did not accept that one could sign for all; at most a chief could sign for his immediate band, and then only if its members had been consulted and were in agreement" (Dickason, 2002: 155). This is validated by the principle of consensus politics that dominated Aboriginal systems of governance (McFarlane, 2000: 50). As well, language barriers forced negotiations to take

place via interpreters (Dickason, 2002: 155). Dickason points out that these interpreters could not always provide accurate translations of the negotiations either because of ignorance or the inability to directly translate concepts such as landownership, which is a foreign concept to Aboriginal people (2002: 155; Dickason, 2000: 23). An Ojibwa chief, Minweweh, voiced the general sentiment of Aboriginal people with respect to the British settlers when he told them, “[a]lthough you have conquered the French, you have not conquered us. We are not your slaves. These lakes, these woods and mountains were left to us by our ancestors. They are our inheritance, and we will part with them to none.” (Dickason, 2002: 157).

The influx of immigrants and the development of industries led to an increased demand on reserve lands, in that “reserve lands beyond immediate requirements came to be regarded as ‘surplus’ and thus open to negotiations for surrender to the Crown” (Dickason, 2002: 300-303). These negotiations seemed to be very much reminiscent of treaty negotiations, in that Dickason reports “Indians were seldom either eager or unanimous about surrendering; far more often, they had to be persuaded, reluctantly, to accept a deal” (2002: 302). Following the War of 1812 for example, the Crown was able to accumulate 2.8 million hectares of reserve lands from seven surrender agreements (Dickason, 2002: 303). Between 1896 and 1911, more than one-fifth of reserve lands on the prairies were also surrendered (Dickason, 2002: 303). In British Colombia, continued demands on valuable reserve lands caused the federal government to

sever some reserves and substitute the severance with land of lesser value, or none at all (Dickason, 2002: 304).

Another response by the federal government was to relocate the band to less valuable land (Dickason, 2002: 305; Jefferson, 1994: 59). Perhaps one of the most noted examples of this was the forced relocation of an Innu community to an island in Davis Inlet (Dickason, 2002: 414). According to the federal government in 1948, these Innu, who were excluded from the Indian Act, would be better off as fishermen and woodcutters than as caribou-hunters at a location 240 kilometers away from their traditional territory (Dickason, 2002: 414). In the following two years, the death of 70 Innu motivated the community to walk back to their traditional territory (Dickason, 2002: 414). They were only allowed to stay until 1967 when they were forcibly moved again, this time to an island in Davis Inlet (Dickason, 2002: 414). According to the federal government, this move was necessary because “the new location was better suited for building housing and sewage systems” (Dickason, 2002: 414). According to Dickason, this dispossession of the Innu has “led to a spiral of welfare dependency, alcoholism, gasoline sniffing, and suicide” (2002: 414). According to the Chief of Davis Inlet, “unless meaningful changes occur, [they] are facing extinction” (Dickason, 2002: 414).

The overall result of the treaties, land surrenders and forced relocation of bands have left Aboriginal people dispossessed of their traditional homelands and with scarce resources for sustainable development. In 1999, “only one-third of the reserved land [was] suitable for agriculture and another one-sixth for

raising livestock” (Dickason, 2002: 305). As land is a prominent issue in pursuing self-government, the inadequacy and lack of land poses challenges to many First Nations. The decision in *Baker Lake v. Minister of Indian Affairs and Northern Development* in 1980, listed the necessary conditions to validate Aboriginal title (Dickason, 2002: 336). The criteria required the Aboriginal peoples to establish that [1] “they and their ancestors lived within, and were members of, organized societies”; [2] “these societies occupied the specific territory over which they were claiming Aboriginal title”; [3] “their occupation was exclusive”; and [4] “this occupation was in effect when England claimed sovereignty over the region” (Dickason, 2002: 336). Although these criteria seem relatively straightforward, the fact that many nomadic societies shared hunting grounds complicates matters, especially when First Nations are bringing forth claims separately. Similarly, allocating title in areas of dense urbanization such as Vancouver, Edmonton and Toronto is somewhat complex to say the least.

Assimilative strategies of the federal government have led to the introduction of many pieces of legislation that have implicitly restricted the development of Aboriginal people. Perhaps the best example of this would be the implementation of the *Indian Act, 1876* (Dickason, 2002: 263; Jefferson, 1994: 132). In an attempt to eliminate tribal systems of governance, the Indian Act imposed a system of elected band governments with very limited power (Dickason, 2002: 264; Jefferson, 1994: 135). This system of imposed elected band councils allowed large families to monopolize positions of power and facilitated the establishment of asymmetrical power relations on many reserves

(RCAP, 1996: 136). This imposed system of governance also involved the designation of an Indian Affairs agent who controlled band finances (Dickason, 2002: 264; Jefferson, 1994: 134).

The imposition of the Indian Act, in addition to the denial of appropriate land, has historically and currently generated resistance and protest by Aboriginal people. One of the federal government's responses to persistent Aboriginal protests concerning their land was to amend the Indian Act in 1910 to prohibit the use of band funds to pursue land claims without the consent of the Crown (Dickason, 2002: 304; Jefferson, 1994: 133-134). It wasn't until 1951 that this provision was removed from the Indian Act (Dickason, 2002: 304; McFarlene, 2000: 69). However, bands are still required to obtain departmental approval in order to use band funds allocated for research to pursue litigation (Dickason, 2002: 335). This amendment was a part of an extensive amendment of the Indian Act that was implemented in 1951. This amendment was revolutionary, in the sense that it was the first time there was any sort of Aboriginal input in determining policy (Dickason, 2002: 310). In content however, the amendments were no where near revolutionary (Dickason, 2002: 310-311). The Minister's role was limited to one of a supervisory capacity, but he retained veto power (Dickason, 2002: 311). And although bands were still not permitted to establish their own forms of governance, they were granted greater control over their affairs, the opportunity to incorporate as a municipality, and as well, "the secret ballot was introduced, and women were granted the vote in band council elections" (Dickason, 2002: 311). Band councils were also granted authority over

“the management of reserve lands, band funds, and the administration of bylaws” (Dickason, 2002: 311). However it was not until 1958 that bands were able to secure complete control over their band funds (Dickason, 2002: 311).

The ability of bands to define their own membership codes is attributable to the reinstatement of status for several Aboriginal people facilitated by Bill C-31 (Dickason, 2002: 313-314; Wherrett and Brown, 1994: 4). By 1995, 240 bands had adopted their own membership codes (Dickason, 2002: 314). According to section 11 of the Indian Act, the only condition imposed on the band is that a membership code must be approved by a majority of the electors of the band. Interestingly, because there is no requirement that these codes be published (Dickason, 2002: 314), the potential for corruption and partiality is heightened.

By the time of Confederation, 123 treaties and land surrenders had been negotiated with Aboriginal people, and by 1975, this number had risen to almost 500 (Dickason, 2002: 253). However, even with these agreements, or perhaps largely because of these agreements, antagonism between Aboriginal people and the federal government continued. A number of commissions and task forces have taken place to investigate the inability of Aboriginal people and the federal government to negotiate symbiotic agreements. The first political paper to make a significant impact on furthering Aboriginal self-government was the Report of the Special Parliamentary Committee on Indian Self-Government, or the Penner Report, published in 1983. This report recommended that Aboriginal people “be allowed to establish their own level of government, distinct from those of the municipality and the Indian Act” (Dickason, 2002: 401). This report also

recommended that these rights be entrenched by legislation, and as well that the Indian Act and the Department of Indian Affairs be phased out (Dickason, 2002: 401). RCAP, which was published in 1996, has been said to be the most comprehensive investigation of the lives of Aboriginal people in Canada to date (Dickason, 2002: 413). These reports underscore the notion that "... being [Aboriginal] is not incompatible with being Canadian, and that perhaps the First Nations might even have a dimension to add to the country's cultural riches" (Dickason, 2002: 315). Thus in 1993, the federal government's policy with respect to Aboriginal policy had significantly changed over the years to now recognizing the inherent right to self-government and a willingness to negotiate self-government agreements through tri-partite negotiations (DIAND, 1995: 1-2, 16). The government is also willing to delegate authority over such areas that are "integral to Aboriginal cultures, or internal to Aboriginal groups" (DIAND, 1995: 6). At the same time, the government maintains its fiduciary obligations to Aboriginal people, albeit in a diminished capacity (DIAND, 1995: 10). The government is also willing to negotiate with Metis and Aboriginal groups off a land base on a variety of initiatives (DIAND, 1995: 14). This promise was substantiated by the Supreme Court decision in *R. v. Powley*, which confirmed the existence of Aboriginal hunting rights for Metis people. Examples of the types of negotiations offered by the government include: "forms of public government; devolution of programs and services; the development of institutions providing services; and, arrangements in those subject matters where it is feasible to exercise authority in the absence of a land base" (DIAND, 1995: 14).

In 1998, the government of Canada responded to RCAP by establishing *Gathering Strength – Canada's Aboriginal Action Plan*, in order to work through "the challenges of the past, the realities of the present and the opportunities of the future" (Minister of Indian Affairs and Northern Development, 2000: 5; Wherrett, 1999; 6). One of the core objectives of *Gathering Strength* is to improve the lives and life chances of Canada's Aboriginal People by helping build "strong, healthy Aboriginal communities, people and economies" (Minister of Indian Affairs and Northern Development, 2000: 5; Wherrett, 1999; 6). Similarly, another core objective of *Gathering Strength* is to strengthen Aboriginal governance (Minister of Indian Affairs and Northern Development, 2000: 12; Wherrett, 1999; 6). A recent speech from the throne delivered on September 30th 2002 confirmed Canada's commitment to strengthen First Nations governance institutions (Canada, Governor General, 2002: 16). Strengthening First Nations governance institutions is intended to be done with an emphasis on supporting "democratic principles, transparency and public accountability, and provid[ing] the tools to improve the quality of public administration in First Nations communities" (Canada, Governor General, 2002: 16). Another ambition of the Government of Canada is to work with First Nations communities to establish sustainable development and promote Aboriginal cultures and languages (Canada, Governor General, 2002: 16). How these promises fared will be discussed later in the discussion of existing agreements.

Models for Self-Government

There is no consensus on how self-government should work or what it should look like. There is however recognition that one model will not work for everyone due to the diversity of Aboriginal people (Wall, 2000: 147). As noted previously, this section will place a heavy concentration on the models and recommendations offered by the *Royal Commission on Aboriginal People* (RCAP) simply because RCAP is the most comprehensive and recognizable source available to date. RCAP offers three models for potential Aboriginal self-government arrangements, the nation government model, the public government model and the community of interest government model (1996: 245). RCAP offers these models as hypothetical ideal models, which are not intended to be prescriptive, but rather to be a source for guidance (1996: 245). In addition to RCAP, the Metis National Council, the Manitoba Metis Foundation (MMF), and the Congress of Aboriginal Peoples (CAP) also offer models of potential Metis and urban self-government initiatives. Following a brief description of each proposal, these models are summarized below in Figure 1. As well, in order for any of these models to succeed, there are a number of challenges each initiative must tackle. For example, all of these initiatives require sufficient membership to warrant any type of agreement made. As well, many of these initiatives require an adequate land base and suitable jurisdiction over this land base and its residents. In addition, these agreements must adequately address the issue of overlapping boundaries of claims and agreements of other First Nations.

Moreover, all of these initiatives will require substantial funding, particularly with respect to capital and the implementation of sustainable development.

The Nation Government Model

The Nation model is an Aboriginal-only form of government (RCAP, 1996: 246). This model could be implemented by an Aboriginal society who identify themselves as a Nation, i.e. the Inuit or the Metis (RCAP, 1996: 246). An Aboriginal nation government would have its own land and resources and would sustain full rights of ownership over these lands (RCAP, 1996: 250). This type of government may also agree to joint jurisdiction over land that was their traditional territory (RCAP, 1996: 250). Over its own land and resources, an Aboriginal nation would retain “core jurisdiction in **most** matters affecting their lands, including resource management and allocation, and the lands would be administered in accord with a nation’s traditions of tenure and governance” (RCAP, 1996: 250-251 emphasis added). From this recommendation, RCAP suggests that even with respect to land and resources under the core jurisdiction of the nation government, the nation government would not have absolute control. Although a nation government would sustain full rights and ownership over these lands, the federal government could retain jurisdiction in some matters affecting resource management and/or allocation of land. As such, this recommendation suggests RCAP subscribes to the idea of the federal government maintaining patriarchal authority rather than relinquishing political power.

RCAP goes on to suggest that an Aboriginal nation adopt a system of dual citizenship between their Aboriginal nation and Canada (1996: 251). The basis for determining citizenship would be up to the nation to define under its constitution (RCAP, 1996: 251). RCAP provides the following suggestions for determining citizenship: community acceptance; self-identification; parentage or ancestry; birthplace; adoption; marriage to a citizen; cultural or linguistic affiliation, and; residence (1996: 251). As well, citizenship could be limited to various levels, i.e. nation-wide or community (RCAP, 1996: 251). The aftermath of Bill C-31 is evidence that determining citizenship might be easier said than done, since citizenship does not necessarily mean acceptance in the community. Furthermore, the suggestion that citizenship could be limited to various levels only complicates matters, especially when considering proposed citizens may choose to live off the land retained by the specific nation. What would happen for instance, if a citizen from one First Nation decided to move to an area under the administration of a different First Nation? Would this individual be eligible to assume citizenship of where he/she is a resident all the while retaining their original dual citizenship of their homeland and Canada? Would there have to be a limit on the number of citizenships one person could hold?

The jurisdiction and powers of a nation government would be territorial (RCAP, 1996: 253). The parameters of jurisdiction and powers would need to be determined and finalized through negotiations for areas that would fall under both core jurisdiction and co-jurisdiction with whichever level of government is sharing the jurisdiction (RCAP, 1996: 253). Negotiations would be necessary to

determine the extent of a nation's legislative, executive and judicial authority (RCAP, 1996: 254). Possible legislative structures may include "councils, assemblies, congresses, senates, elders councils and clan leaders" (RCAP, 1996: 258). Executive structures may be comprised of "chiefs, councils, chairpersons and presidents" (RCAP, 1996: 258). Judicial structures could take on the form of: "justice circles, judicial councils, peacemaker courts, healers and tribunals" (RCAP, 1996: 258).

Nation governments will also vary considerably with respect to the internal organization of their government (RCAP, 1996: 255). Some of the factors that will account for these variances will depend on the demographics of the residents, population density, traditional structures of governance, as well as the extent of the legislative, executive and judicial jurisdiction awarded to each nation. Therefore, each nation government would have an internal government structure that meets its particular needs. Again, much like determining citizenship, it will be up to the constitution of each nation to specify the allocation of jurisdictions and internal organization (RCAP, 1996: 257).

Nation governments may exercise their authority over a particular territory, an Aboriginal land base for example, or citizens of the nation, whether or not they live on the lands of the nation (RCAP, 1996: 262). Therefore, nation governments could potentially be extended into rural and urban centres. RCAP recommends that if such options were available to urban citizens, their participation would be entirely voluntary (1996: 262). RCAP provides four options for urban extension. These options include "extra-territorial jurisdiction; host nation; treaty nation

government in urban areas, or; Metis Nation government in urban areas” (RCAP, 1996: 262). Extra-territorial jurisdiction may involve the extension of services and programs to citizens residing on land that is governed by joint jurisdiction (RCAP, 1996: 262; RCAPa, 1996: 588-589). These institutions could be established and administered by the nation’s citizens under the nation government’s authority (RCAP, 1996: 262; RCAPa, 1996: 589). Alternatively, nation governments could establish urban councils to administer the nation’s institutions on their behalf (RCAP, 1996: 262; RCAPa, 1996: 590). Host nations would involve the extension of an Aboriginal nation’s jurisdiction to Aboriginal people living in urban centres that are still in the nation’s traditional territory (RCAPa, 1996: 589). The nation would then act as a ‘host’ to other Aboriginal residents living in their urban areas (RCAPa, 1996: 589). The extent of the host nations’ jurisdiction varies according to the programs and services offered by the nation (RCAPa, 1996: 589-590). As well, participation in the services and programs offered by the host nation would be entirely voluntary (RCAPa, 1996: 590). Treaty nations on the other hand, may either on their own or in connection with other treaty nations establish “urban centres in urban areas to deliver services and treaty entitlements” (RCAP, 1996: 263; RCAPa, 1996: 598). Finally, Metis nation government in urban areas would involve the establishment of Metis institutions in urban centres for the benefit of urban Metis residents (RCAP, 1996: 263). Justification for these programs would necessarily warrant adequate economies of scale to warrant funding and administration costs. At the same time, because these programs would be voluntary, sufficient participation would be necessary.

Nation governments may also join with other nation governments in order to establish confederacies. Creating confederacies will then enable smaller nations without sufficient economies of scale to deliver culturally suitable programs to their citizens (RCAP, 1996: 264). Establishing confederacies may also be a viable option for managing territory bound by joint jurisdiction (RCAP, 1996: 264). However, such confederacies would be limited to First Nations who are culturally similar. As well, RCAP does not specify whether there would be any protection from domination for smaller First Nations who might join larger First Nations?

The Public Government Model

The public government model is “a form of government in which all the residents of a particular region or territory would be represented” (RCAP, 1996: 246). Interestingly, this model is not exclusive to Aboriginal people since it would represent all residents regardless of their national identity (RCAP, 1996: 247). Therefore, rather than being an Aboriginal-exclusive government, it is a form of Aboriginal controlled government (RCAP, 1996: 264).

Much like a nation government, jurisdiction of public governments is limited to a geographically defined territory (RCAP, 1996: 265). As well, public governments may also acquire joint jurisdiction of traditional land and resources (RCAP, 1996: 266). The magnitude of a public government’s jurisdiction over its land and resources would be negotiated through either a treaty or land claims agreement (RCAP, 1996: 266).

A public government would be responsible for attending to all of its inhabitants who reside within its jurisdictional boundaries (RCAP, 1996: 267). Public governments allow for the differentiation of residents in order for the Aboriginal majority to “promote and protect Aboriginal heritage, culture, language and traditions” (RCAP, 1996: 267). Shared and differentiated rights of residents subject to a public government would be defined in either the constitution or laws of the public government (RCAP, 1996: 267). As public governments, all its residents would be bound by the *Canadian Charter of Rights and Freedoms*. RCAP proposes complimentary legislation would be instrumental in protecting and promoting “the specific rights and interests of the Aboriginal residents” (RCAP, 1996: 268). Special rights for specific groups of individuals have proven to be problematic to say the least. As well, simply because individuals might belong to the same First Nation does not necessarily mean everyone belonging to that First Nation shares similar perspectives. How would this dissonance be addressed in a manner that is equitable to all members?

Jurisdiction of powers for public governments will vary according to negotiated treaty rights, land claims agreements or any other similar agreement (RCAP, 1996: 267). Again, much like nation governments, the jurisdiction of public governments would employ legislative, executive and judicial powers (RCAP, 1996: 269). Public governments are distinct from other non-Aboriginal governments found in Canada due to the spectrum of powers available to public governments. Unlike municipal, provincial, federal or territorial governments, the jurisdiction of public governments is not limited to any one of these, as public

governments may be awarded a melange of powers necessary to accommodate Aboriginal traditions, culture and values (RCAP, 1996: 247). Jurisdiction of public governments could also be extended with respect to land and resources present in areas of joint jurisdiction (RCAP, 1996: 272). Once again, specific jurisdictional issues would have to be negotiated with all concerned stakeholders (RCAP, 1996: 272). Yet RCAP does not specify what measures would be taken to assure that all stakeholders would be involved and satisfied with what is decided. Similarly, nor does RCAP indicate whether a stakeholder means everyone affected by the issue at hand, or simply those interested in participating in the discussion?

Public governments “may operate at community, regional or territorial levels” and may incorporate multiple levels of government (RCAP, 1996: 269). Internal organization of the government will again vary according to the needs of the residents. Possible organizational structures include a centralized form of government, a federal form of organization operating at probably two levels or another federal form, but organized according to the principle of subsidiarity (RCAP, 1996: 269-270). This arrangement might involve the creation of a regional government to function on behalf of community of Aboriginal nation governments (RCAP, 1996: 270). Although this regional government would have its own powers and authorities, it would primarily act on behalf of the community and/or nation governments (RCAP, 1996: 270). This regional government could facilitate program and service delivery in areas of shared interest of participating governments (RCAP, 1996: 270).

The Community of Interest Government Model

The community of interest model suggests that Aboriginal people, “with ties to different nations, who share common needs and interests arising out of their aboriginality, may associate voluntarily for a limited set of governing purposes” (RCAP, 1996: 248; RCAPa, 1996: 584; Wherrett and Brown, 1994: 13). This model is an Aboriginal-exclusive option of government (RCAP, 1996: 272). These governments may be extensions of other institutions already in place for non-land based Aboriginal people (RCAP, 1996: 248; Wherrett and Brown, 1994: 13). Although this model is offered to address the needs and interests for a multitude of Aboriginal people, RCAP fails to define any assurance of how representative the community of interest government will be with respect to the diversity of participating First Nations.

Even though the community of interest model is described as a non-land based model, this model “may operate within a clearly defined geographic area” (RCAP, 1996: 273). This area would probably be defined according to sufficient economies of scale to warrant funding and administration of programs and services to members in either rural or urban areas (RCAP, 1996: 273). RCAP maintains a community of interest model “may own or hold land or be involved in land and resource co-management projects” (1996: 273).

Citizenship or membership is entirely voluntary and would be available to all Aboriginal people regardless of heritage (RCAP, 1996: 272). According to RCAP, citizenship would necessitate self-identification of Aboriginal people “who may or may not have emotional, familial, cultural, political or other affiliations with

a particular nation” (1996: 273). RCAP seems to contradict itself since it urges that ultimately, rules for eligibility would have to be defined by the community of interest government (RCAP, 1996: 273). Furthermore, because citizenship seems to be so unrestricted, the purpose of it seems questionable, since it seems participation is open to anyone who claims to have some sort of affiliation with a nation.

Jurisdiction would be limited to delegated authority over programs and services that are important to its members (RCAP, 1996: 272). Powers would be delegated from Canadian and/or Aboriginal governments (RCAP, 1996: 275). RCAP suggests the areas most likely to be dealt with by the community of interest model include education, culture and language; social services; child welfare; housing, and; economic development (1996: 275). Due to the limited range of jurisdictional powers of a community of interest model, levels of jurisdiction would probably be limited to “by-law, rule and policy making, and exercis[ing] administrative powers and authority” (RCAP, 1996: 276). RCAP maintains that the community of interest model is also capable of the administration of justice and enforcing “its own by-laws, as well as the laws of other authorities, according to [negotiated] agreement” (1996: 276). Even though RCAP maintains this model does have a dispute-resolution mechanism to administer justice it does not identify any specifics (1996: 272).

In most cases, the community of interest model would only have one level of government organization that would oversee and co-ordinate the programs and institutions offered to Aboriginal people (RCAP, 1996: 272; RCAPa, 1996:

585). The size of the community of interest government would vary according to the volume of members, programs and services (RCAP, 1996: 276). Pending sufficient numbers, RCAP envisions the capacity for a legislative body and potential executive group (1996: 276). However, at the same time, RCAP anticipates most community of interest models will be comprised of sector-specific institutions and agencies that will operate autonomously (1996: 276).

Metis Proposals

Due to the demographics of Metis people in Manitoba, a submission made by the MMF to RCAP stressed the need develop urban initiatives to deal with Metis governance (1995: 3). However, at the same time, proposals submitted to RCAP by the Metis National Council, the Metis Society of Saskatchewan and the Manitoba Metis Federation all clearly articulated that they do not want to grouped together with urban initiatives designed for urban Aboriginal people (RCAP, 1996: 153). The Powley decision by the Supreme Court of Canada lends legitimacy to the fact that Metis people are a distinct group of Aboriginal people in their own right. The ideal approach for Metis people is a “multi-layered system with local, regional, provincial and Canada-wide decision-making bodies” (RCAP, 1996: 153). As well, the MMF maintains that Metis governance initiatives should only be applicable to Metis people and therefore do not seek modes of public governance (1995: 8). The form of governance sought by the MMF is Metis self-governing institutions in urban centres much like “the current structure and design of the [MMF], and its respective institutions” (1995: 8). The jurisdiction and responsibility of these institutions would be clearly defined and “would apply

only to those Metis who choose to participate in their affairs" (MMF, 1995: 8). These institutions are expected to "promote Metis rights at the provincial and federal level while respecting the autonomy of the Metis at the community and regional levels" (MMF: 1995: 10). Essentially, the MMF maintains "[s]elf-governance to the Metis people in urban areas simply means having a say in matters directly affecting the people" (1995: 11). The areas of prime importance to MMF include education, child, family and other social services, as well as housing and economic development programs (MMF, 1995: 15).

One example of legislation specifically for Metis people was passed by Alberta in November 1990, and is known as the Metis Settlements Accord (Wall, 2000: 148). This agreement provides land ownership of 1.28 million acres, \$310 million in compensation to be paid over 17 years and most importantly, a reconfiguration of the structure of governance for eight Metis settlements (Wall, 2000: 148-149). According to this agreement, these settlements obtained municipal-style governance, each with their own local council (Wall, 2000: 149). These local councils all report to a General Council, all the while, the provincial Minister retained his/her advisory role for the Metis (Wall, 2000: 149).

Urban Proposals

The Congress of Aboriginal People (CAP) made a submission to the RCAP suggesting four models for urban self-government. The first model is the establishment of urban reserves or satellite reserves of existing reserves (RCAP, 1996: 155; Wherrett and Brown, 1994: 13). This model would be bound by the Indian Act, much like any other reserve. CAP's dismal perception of the Indian

Act, led them to dismiss this option because they believe the Indian Act carries a “tainted legacy of fragmentation and exclusion” (RCAP, 1996: 156). Urban or satellite reserves also have the potential to develop into gated communities or ghettos (Wherrett and Brown, 1994: 14). The second model suggested was the formation of a community government comprised of a community or neighbourhood largely inhabited by Aboriginal people (RCAP, 1996: 156). This community government could then operate its own institutions for such things as education, health, housing and policing (RCAP, 1996: 156). Even with an exemption from the Indian Act, this model could also lead to promotion of ghettos if adequate institutions and services are not provided for the community’s inhabitants. This model also seems unlikely to succeed given the demographics of large urban centres (RCAP, 1996: 156). The third model is simply an extension of the second model to encompass a city-wide governmental authority (RCAP, 1996: 156). This model would incorporate all Aboriginal people within the city and therefore is a more feasible alternative (RCAP, 1996: 156). CAP consider this option to be both workable and desirable (RCAP, 1996: 156). Since this model is not restricted to a geographically defined area, it is also less likely to lead to ghettoization. However, this model does assume a certain level of homogeneity of Aboriginal people. The fourth model is the development of “single-sector institutions in areas such as education, housing and health” (RCAP, 1996: 156). These institutions would be controlled and administered by Aboriginal people much like religious school boards (RCAP, 1996: 156; RCAPa,

1996: 586). However, CAP doubts the feasibility of this option due to financing and jurisdictional issues (RCAP, 1996: 156).

Fig. 1. Summary of Suggested Models for Aboriginal Self-Government

	<i>Lands & Territory</i>	<i>Citizenship</i>	<i>Jurisdiction & Powers</i>	<i>Internal Government Organization</i>
Models proposed by Royal Commission on Aboriginal People				
<i>Nation Government Model</i>	Identified land and territory base, some land may be subject joint jurisdiction	Dual Citizenship (Canada and Nation) – Each nation to determine eligibility * Aboriginal-exclusive model	Comprehensive jurisdiction, possibly multi-leveled, i.e. community, regional and tribal levels Organized centrally or federally Possible extension, i.e. extra-territorial jurisdiction and/or urban institutions	May vary according to requirements of nation
<i>Public Government Model</i>	Identified land and territory base, some land may be subject joint jurisdiction	Mandatory * Non-Aboriginal-exclusive model	Combination of powers necessary to protect Aboriginal rights and interests	Centralized or a federal form at either two levels or according to subsidiarity
<i>Community of Interest Government Model</i>	Non-land based	Voluntary * Aboriginal – exclusive model	Limited jurisdiction to programs and services pertinent to members	One level – Autonomous sector-specific institutions and agencies
Models proposed by the Manitoba Metis Federation				
<i>Metis Self-Governing Institutions</i>	Non-land based	Voluntary	Limited jurisdiction to programs and services pertinent to the preservation and promotion of Metis culture, history and language	Bureaucratic structure with Metis involvement at all levels
Models proposed by the Congress of Aboriginal People for Metis People				
<i>Urban/Satellite Reserves</i>	Identified land and territory base within city limits	Mandatory	As those stipulated for reservations by the Indian Act	As those stipulated for reservations by the Indian Act
<i>Community Governments</i>	Land based	Voluntary	Limited jurisdiction to programs and services pertinent to members	Bureaucratic structure with Aboriginal involvement at all levels
<i>City-Wide Governments</i>	Non-land based	Voluntary	Limited jurisdiction to programs and services pertinent to members	Bureaucratic structure with Aboriginal involvement at all levels
<i>Single-sector institutions</i>	Non-land based	Voluntary	Limited jurisdiction to programs and services pertinent to members	One level – Autonomous sector-specific institutions and agencies

Levels of Jurisdiction

Territorial jurisdiction is comprised of authority over a specific area and all of its inhabitants, regardless of who the inhabitants are or which group they may

belong to (RCAP, 1996: 140). Jurisdiction of this type is mandatory and all inhabitants who fall under this category are subject to the government's authority (RCAP, 1996: 140). Traffic laws are an example of this type of authority in that everyone within a specified territory is subject to the territorial traffic laws (RCAP, 1996: 140). Communal jurisdiction on the other hand only applies to members of a specific group (RCAP, 1996: 140). Communal jurisdiction may be carried out within a mixed population and as well, it may be used to complement existing governments (RCAP, 1996: 140). This type of jurisdiction is voluntary and dependent on self-identification of members of a particular group (RCAP, 1996: 140-141).

Territorial Jurisdiction

Many Aboriginal groups already possess territorial jurisdiction under a variety of arrangements. RCAP found these arrangements largely fall under three categories: "reserve lands, settlement lands recognized under land claims agreements, and lands set aside by a province" (RCAP, 1996: 141). Jurisdiction in these regions is exclusive since it is primarily inhabited by Aboriginal people (RCAP, 1996: 141). However, the actual power of Aboriginal people with respect to these areas is severely limited and these areas are often very small with few resources (RCAP, 1996: 142). RCAP found three types of initiatives that enable Aboriginal people to exert greater authority and influence. These initiatives include authority over exclusive territories, joint jurisdiction, and public governments that allow significant Aboriginal participation (RCAP, 1996: 142). Authority over exclusive territories exists with respect to reserve and settlement

lands (RCAP, 1996: 142). However, the powers ascribed to Aboriginal people are generally minor, delegated authorities which are subject to provincial and federal government approval (RCAP, 1996: 142-143). In some cases, like the Metis settlements in Alberta, the provincial and federal governments retain veto power over Aboriginal governments (RCAP, 1996: 144). Most Aboriginal people retain exclusive jurisdiction of only a fragment of their traditional land and as such, request continued joint jurisdiction over shared territories as was agreed upon in original treaties (RCAP, 1996: 146). Public government options on the other hand, allow for majority groups to gain control through elected majority rule and exercise significant control over territorial lands, resources and inhabitants (RCAP, 1996: 149). The Inuit of Nunavut are able to take advantage of this arrangement with the creation of Nunavut since they make up 85% of Nunavut's population.

Communal Jurisdiction

Most Aboriginal people do not live on exclusive territorial bases and are outnumbered in mixed areas (RCAP, 1996: 150-151). For these individuals, RCAP recognizes communal jurisdiction to be a feasible solution to maintain and strengthen Aboriginal culture and identity in these areas (1996: 151). RCAP also reports that these initiatives could be made available for Aboriginal people residing in both urban and rural areas (1996: 151).

The extra-territorial approach facilitates the extension of territorial jurisdiction to members living off-reserve (RCAP, 1996: 152; Wherrett and Brown, 1994: 14). In the Yukon territory, Yukon First Nations are allowed optional

extra-territorial powers in matters such as: “spiritual and cultural matters, Aboriginal languages, health care, social and welfare services, training programs, education, and dispute resolution outside the courts. ... [and] also have extraterritorial powers regarding guardianship and custody of children, inheritance, wills and estates, determination of mental competency, solemnization of marriage, and granting of licenses” (RCAP, 1996: 152). Extra-territorial powers can also be implemented by all levels of government, be it First Nation communities, tribal, regional or provincial organizations (RCAP, 1996: 153). For instance, the Touchwood File Hills Qu’Appelle council, comprised of 16 First Nations communities, provides services to its urban members in Regina (RCAP, 1996: 153).

Existing Approaches and Initiatives to Self-Government

Many Aboriginal people seek self-government as a means to regain control over their lives and help preserve their language and culture (Wherett, 1999; 3). It was the Calder decision by the Supreme Court of Canada in February 1973 that initiated the modern process of land claims negotiations (Rose, 2000: 21; Taylor, 1989: 302). In this historic decision, the Supreme Court of Canada “supported the view that English law, in force in British Columbia when colonization began, had recognized aboriginal title to the land” (Rose, 2000: 105). In response to this hallmark decision, on August 8, 1973, the Minister of Indian Affairs announced that the federal government intended to settle Aboriginal claims in regions where treaties had not already extinguished Aboriginal title (Rose, 2000; 105-106; Taylor, 1989: 302).

It should be noted that although all self-government agreements are bound by the *Canadian Charter of Rights and Freedoms* and the *Constitution Act, 1982*, they all negotiate some sort of exemption from the *Indian Act* (Wherrett, 1999: 7). Also, each agreement is unique in order to respond to the needs and demands of each First Nation (DIAND, 1995: 5). Therefore, the models suggested above and detailed below are not intended to be duplicated, but rather to demonstrate opportunities and encourage discussion.

Land Based Approaches and Initiatives

James Bay and Northern Quebec Agreement, Northeastern Quebec Agreement

On the 30th of April 1971, the Premier of Quebec announced the immediate start for the development of the James Bay hydroelectric project over the traditional territory of the James Bay Cree and Naskapi First Nations (Dickason, 2002: 395). Not surprisingly, this project was planned without any consultation with the First Nations who lived there (Dickason, 2002: 394). In response, the Grand Council of the Crees and the Northern Quebec Inuit Association applied for an injunction to halt the project, and although it was initially granted, it was suspended one week later on appeal (Dickason, 2002: 397). These First Nations were at a further disadvantage since this area was not bound by any treaty (Dickason, 2002: 394). However, even though these First Nations communities completely opposed this project, they realized that they must share their resources and needed to work out an agreement with the government (Dickason, 2002: 397). Reminiscent of earlier treaty negotiations, the Crees were told whether or not they signed, the hydroelectric project would

continue as planned and they were thus threatened with a take or leave it stance (McFarlane, 2000: 74).

The James Bay Cree and Naskapi First Nations were the first Aboriginal groups to negotiate self-government as part of their land claim agreement in 1975 and 1978 (Wherrett, 1999: 9; Dickason, 2002: 404). In addition to \$232.5 million in compensation over 21 years, and assistance with economic development, the Cree acquired ownership of over 5500 square kilometers as well as hunting and fishing rights in other areas (Dickason, 2002: 397). The municipality of James Bay and the Cree are jointly responsible for a second land category where the Cree have exclusive right to more than 62 000 square kilometers to hunt, fish and trap (Dickason, 2002: 397). There was also a third category of land, which was even larger in area than the second category, which was surrendered to the province (Dickason, 2002: 397). Of this area, 10 500 square kilometers of fertile hunting grounds were flooded destroying an abundance of wildlife (Dickason, 2002: 397). The Naskapi agreement of 1978 “confirmed and extended the regions to which the James Bay Agreement applied” (Dickason, 2002: 397). In 1984, the *Cree-Naskapi Act* replaced the *Indian Act* for the Cree and Naskapi (Wherrett, 1999: 9 Cassidy and Bish, 1989: 146; Dickason, 2002: 404). Further, the *Cree-Naskapi Act* prevails if there is any inconsistency with provincial laws (Cassidy and Bish, 1989: 146). The powers awarded to the Cree and Naskapi mostly amounted to the devolution of federal government administration of band affairs and lands (Wherrett, 1999: 9). Further, the Cree and Naskapi also gained municipal powers since all the Cree and

Naskapi bands were incorporated, and some of their land constituted municipalities or villages under the Quebec *Cities and Towns Act* (Wherrett, 1999: 9). The Inuit signatories of northern Quebec were able to negotiate the *Kativik Act*, permitting the Kativik Regional Government village municipal powers over those areas not already controlled by village corporations and regional powers over the remaining territory (Wherrett, 1999: 9). There are also a number of governing authorities that exercise delegated provincial jurisdiction which supplement band governments (Cassidy and Bish, 1989: 147). For example, the Cree have a Health and Social Services Board, as well as a Cree School Board (Cassidy and Bish, 1989: 147). None of these agreements constitute an Aboriginal-exclusive government, however, since the Inuit comprise the majority of the population, they are able to maintain control (Wherrett, 1999: 9). Although the Cree and Naskapi gained substantial authority over their affairs, the federal government maintains the definitive decision in all areas (Dickason, 2002: 397). Similarly, mineral and subsurface rights remain with Quebec, although the Cree and Naskapi did acquire veto power over the province's decision, as well as compensation, in the case of development (Dickason, 2002: 397). None of these agreements entrenched Aboriginal rights (Dickason, 2002: 397).

Sechelt Indian Band

Fifteen years of negotiations concluded in the passing of the *Sechelt Indian Band Self-Government Act* in May 1986 (Wherrett, 1999: 9; Taylor, 1989: 308). This Act granted the Sechelt Indian Band municipal status under provincial legislation and transferred fee-simple title of Sechelt lands to the Sechelt Indian

Band (Wherrett, 1999: 10). The *Sechelt Act* only replaced the Sechelt Band created by the *Indian Act* (Cassidy and Bish, 1989: 136-137). Therefore, the *Indian Act* still applies "to the Band, its members, the Council, and Sechelt lands, except where it is inconsistent with new legislation, the constitution of the Band or a law of the Band" (Cassidy and Bish, 1989: 137). Therefore, the Sechelt Band is still very much subjected to the authority of the federal government. Sechelt lands consist of over 2500 acres of land along British Columbia's Sunshine Coast (Cassidy and Bish, 1989: 136; Taylor, 1989: 305). Due to the prime location of the Sechelt Indian Band, there is an unusually high number of non-Aboriginal people residing on their land (Cassidy and Bish, 1989: 139). In fact, there is almost an equal number of non-Aboriginal and Aboriginal people residing on Sechelt land (Cassidy and Bish, 1989: 139; Taylor, 1989: 305). Therefore, the Sechelt model "was developed for a highly urbanized, strategically located, relatively prosperous band, holding lands with immense development potential" (Taylor, 1989: 298).

The Act authorized the Sechelt Indian Band to define "its own constitution establishing its government, membership code, legislative powers and system of financial accountability" (Wherrett, 1999: 10). The government consists of an elected council and is delegated authority with respect to "access to and residence on Sechelt lands, administration and management of lands belonging to the band, education, social welfare and health services, and local taxation of reserve lands", as well as public order and safety (Wherrett, 1999: 10; Cassidy and Bish, 1989: 137). Because the Act defines territorial jurisdiction with respect

to the administration and management of land, the Sechelt Indian Band gained more authority over non-Aboriginal people than any other Aboriginal government due to the large number of non-Aboriginal people who reside on Sechelt land (Cassidy and Bish, 1989: 139). One final interesting aspect of the Act is that it has a life span of only twenty years, so on June 30th, 2006 the Act is repealed “unless a referendum of the band and the provincial Cabinet approve a continuation of the Act” (Taylor, 1989: 319).

Nunavut

The Nunavut territory and government is a public form of government that came into existence on April 1, 1999, after twenty years of negotiations (Government of Nunavut Website; Legare, 1998: 274). The Nunavut Land Claims Agreement is unique since it is the largest native land claim settlement in Canadian history as the newly created territory of Nunavut comprises one-fifth of Canada’s total landmass (approximately two million square kilometers) (Government of Nunavut Website; Dickason, 2002: 406). Of this, the Inuit were given ownership of 350 000 square kilometers, which amounts to half the size of Saskatchewan and “is the largest private landholding in North America” (Dickason, 2002: 406). In addition, the Inuit will receive \$1.17 billion in cash over 14 years (Dickason, 2002: 406).

Nunavut is comprised of three regions Qikiqtaaluk, Kivalliq and Kitikmeot, making up twenty-six communities (Nunavut Planning Commission Website; Government of Nunavut Website). In 2001, the population was 29 000 and the Inuit represented approximately 85 percent of this total (Government of Nunavut

Website). Nunavut also has four languages, Inuktitut, Inuinaqtun, English and French (Government of Nunavut Website). The powers of Nunavut are comparable to those of the Yukon and the Northwest Territories (Nunavut Planning Commission Website; Legare, 1998: 272).

The primary governmental institutions of Nunavut include an elected Legislative Assembly of 19 Members of the Legislative Assembly (MLAs), a Cabinet and a territorial court (Nunavut Planning Commission Website). MLAs are elected residents of Nunavut who run for office without a party, since there are no political parties in Nunavut (Government of Nunavut Website). MLAs select a Premier amongst themselves and then the Premier assigns Ministers and their portfolios (Government of Nunavut Website; Legare, 1998: 280). All decisions are based on consensus rather than majority rule (Dickason, 2002: 408). The government of Nunavut is gradually assuming the responsibilities of the government of the Northwest Territories and is expected to assume the administration of all programs with respect to culture, public housing and health care by 2009 (Nunavut Planning Commission Website).

Nunavut has many challenges in order to establish a sustainable future for its present and future residents. These challenges which contribute to the highest cost of living in Canada include low population density, an extreme climate and a lack of affordable transportation (Government of Nunavut Website). For example, because of Nunavut's vast land and modest population, Nunavut only has 0.01 person per square kilometer compared to 3 people per square kilometer in Canada overall (Nunavut Planning Commission Website). The arctic climate also

strains the efforts of Nunavut residents as the capital, Iqaluit, has an average temperature in February of minus 27 degrees Celsius and an average of only 8 degrees in July (Nunavut Planning Commission Website). As well, Iqaluit receives up to 19 hours of daylight in June and as little as five hours in December (Nunavut Planning Commission Website). Similarly, the most northern community in Nunavut, Grise Fiord, is subject to similar temperatures as Iqaluit, but experiences twenty-four hour daylight for four months of the year and twenty-four hour darkness for four months of the year (Nunavut Planning Commission Website). The Nunavut Planning Commission Website reports that Nunavut only has a meager 21 kilometers of highway. Therefore, everything is transported by either air or sea (Government of Nunavut Website). Consequently, simply due to physical isolation, Nunavut experiences the highest cost of living in Canada (Government of Nunavut Website).

According to Article 23 of the Nunavut Land Claim Agreement, Nunavut is expected to have a workforce representative of its population (Government of Nunavut Website; Legare, 1998: 285). Therefore, by 2020, Inuit are required to take 85 percent of the government of Nunavut positions (Government of Nunavut Website). This is quite a venture since Nunavut has the youngest population in Canada, with a median age of 22.1 years old (Government of Nunavut Website). Moreover, Nunavut does not have a university and Nunavut's population reports low levels of high school graduates; notwithstanding a dramatic increase in the number of high school graduates in the last ten years (Government of Nunavut Website). For example, Nunavut's Department of Education reports that in 1992,

there were less than fifty high school graduates, by 2002, there were over 131 (2003: 7). As well, there are a number of initiatives and programs already in place to improve the levels of education (Government of Nunavut Website). For example, mentorship programs, on-the-job training programs, off-site instruction, seminars, and workshops are all in place (Government of Nunavut Website). Nunavut has also made available the Akitsiraq Law School, a “Nunavut-specific program to train Inuit lawyers”, the Nunavut Arctic College, offering both teaching and nursing programs, as well as a certificate in Nunavut Public Service Studies, available through the Nunavut Arctic College and Carleton University (Government of Nunavut Website). Nunavut appears to be succeeding in furthering the education of its residents, but only time will tell if these ventures are adequate.

Nisga'a

The final agreement reached by the Nisga'a is unique since it is the first land claims agreement or treaty to include provisions for self-government (Rose, 2000: 152). The Nisga'a treaty received royal assent on April 13, 2000, ending a 113 year struggle for the Nisga'a to reassert some control over their land and people. The final agreement took twenty-three years of negotiations between the Nisga'a and the federal and provincial governments (Rose, 2000: 26). According to the final agreement, the Nisga'a now collectively own 1992 square kilometers of land and resources valued at \$100 million (Rose, 2000: 26; Dickason, 2002: 418). However this only amounts to eight percent of the area they originally claimed (Dickason, 2002: 338). Also included in the agreement was “\$190 million

in compensation, municipal-style government, exclusive rights to their territory's pine-forest mushroom harvest, shares in the Nass River's salmon run and forest industries, and the return of listed Nisga'a artifacts held by the Canadian Museum of Civilization and the Royal British Columbia Museum" (Dickason, 2002: 418).

Under the new treaty, the Nisga'a are governed by the Lisims Government (Rose, 2000: 26; Wherrett, 1999: 11; Nisga'a Lisims Government Website). The Lisims Government is the central authority and governs four village governments (Rose, 2000: 26; Wherrett, 1999: 11; Nisga'a Lisims Government Website). These four village governments represent Nisga'a's four clans, Gisk'aast (Killer Whale), Laxgibuu (Wolf), Ganada (Raven), and Laxsgiik (Eagle) (Rose, 2000: 51; Nisga'a Lisims Government Website). The Lisims Government also has three urban locals to provide services to Nisga'a citizens living in Vancouver, Terrace, or Prince Rupert (Nisga'a Lisims Government Website). The Lisims Government is an Aboriginal-exclusive government, since non-Nisga'a citizens may become residents but cannot vote or run for office in elections, but at the same time, the Nisga'a government is required to consult non-Nisga'a residents with respect to decisions that will affect them (Rose, 2000: 26; Wherrett, 1999: 11). The Nisga'a government is authorized to pass laws concerning: "Nisga'a citizenship; Nisga'a language and culture; Nisga'a property within the Nisga'a lands; public order; peace and safety; employment; traffic and transportation; the solemnization of marriages; child and family [services], social and health services; child custody, adoption and education" (Rose, 2000: 29). For the most part, Nisga'a laws only

apply to Nisga'a citizens (Rose, 2000: 29). Also, powers concerning the solemnization of marriages, social services, and adoption apply to Nisga'a people throughout British Columbia pending each person's consent (Wherrett, 1999: 11). As well, the federal government retains the power to interfere with the Nisga'a Governments legislation if "it can justify its interference in the name of the greater public good" (Rose, 2000: 181).

Non-Land Based Approaches and Initiatives

Metis

The existing structure of Metis governance is a multi-layered approach including national, provincial, regional and local levels (Metis National Council Website). At the national level there is the Metis National Council, comprised of five provincial organizations in British Columbia, Alberta, Saskatchewan, Manitoba, and Ontario (MMF, 1995: 11; Metis Nation Website). In turn, the provincial organizations represent regional councils, which are further broken down by local or community councils (MMF, 1995: 11; Metis National Council Website). Local or community councils differ "according to local needs and relationships to the provincial structures" (Metis National Council Website). These local councils are similar to what RCAP refers to above as extensions of the Nation government model to Urban Metis Nation governance (RCAPa, 1996: 591). The MMF is an example of a provincial organization which "represents Manitoba's Metis population at the individual, provincial and national levels" (MMF, 1995: 12). All representatives at all levels are determined by a democratic

election of the Federation's members and all Metis are welcome to participate (MMF, 1995: 12).

One example of a Metis governance institution is the Louis Riel Institute of Manitoba. According to its website "the Louis Riel Institute is committed to preserving the cultural heritage and enhancing the educational achievements of Metis people in Manitoba". Some of the initiatives of this institute include establishing a scholarship program for Metis students as well as promoting and supporting research with respect to Metis culture, history, education and language (Louis Riel Institute Website). Interestingly, the Louis Riel Institute is not a Metis-controlled institution but rather "is an autonomous body that encourages Metis participation and influence in current mainstream programs" (MFF, 1995: 17). Therefore, by way of support for this type of institution, it is clear that the MFF does not necessarily advocate Metis-controlled institutions but instead promotes the creation of opportunities for interested Metis people to participate in institutions that affect them personally.

Conclusion

Clearly, self-government is a pressing issue to Aboriginal people. As well, due to the uniqueness of each Aboriginal group, there is not one model, approach, nor initiative that will address the needs and demands of every Aboriginal person in Canada. Therefore, the information provided above is intended to highlight some of the challenges and accomplishments of Aboriginal people and the government of Canada. This part also provides the framework that surrounds, informs and, in some cases constrains Aboriginal justice

initiatives. The existing initiatives and approaches summarized above are recent and the long-term success of these agreements is still, for the most part, uncertain. However, the commitment by Aboriginal people and the Government of Canada with respect to addressing Aboriginal self-government promotes the advancement of these and other arrangements.

Part Two: Exploring Aboriginal Justice Initiatives

Introduction

Justice is a critical issue to furthering Aboriginal self-governance, since the maintenance of social control is a necessary function of governance. Having proper mechanisms of dispute resolution that respond to the needs of citizens is crucial to maintaining effective social control. Therefore, this part will analyze the possibilities of establishing modes of justice that correspond to Aboriginal peoples' self-government initiatives. Much of the contention between Aboriginal people and Canada's justice system is due to the perceived failure of the justice system to recognize the distinct culture of Aboriginal people. Following a synopsis of traditional systems of Aboriginal justice, this paper will continue with an explanation of the lack of common ground implicit in these cultural differences, and an examination of the responses to the recognition of conflicting cultures of justice. These responses are examples of justice reforms and include indigenization, diversion, and cultural awareness programs. Interestingly, these responses did not require any legislative changes nor do they significantly challenge the established authority. Some of these reforms are examples of restorative justice programs, which are important to strengthening self-government initiatives, since the central themes of these programs emulate governance. Restorative justice programs further governance because these programs require increased community involvement in all aspects, as well as strive to empower individuals throughout the process. The restorative justice programs that this part will examine include elder panels, sentence advisory

committees, and mediation. Pragmatic models of dispute resolution are critical to strengthening self-government initiatives since maintaining social control through mechanisms of dispute resolution is a function of successful governance.

Traditional Systems of Aboriginal Justice

Traditional Aboriginal approaches to justice are fundamentally different than those of non-Aboriginal cultures. As such, much of the antagonism between Aboriginal people and the current justice system originates from this clash of cultures. Although the perseverance of traditional Aboriginal approaches to justice is somewhat questionable, it still may be helpful to understand these, as they are potentially relevant to discussions of Aboriginal justice (Depew, 1996: 27). Many justice initiatives claim to adhere to traditional principles of justice and as such, it is important to understand what these are. As suggested in the previous chapter, due to the diverse ways of many Aboriginal people, there is a variety of traditional approaches to justice. However, even among these differences, there are similarities and these aspects will form the basis of this chapter. It is important to consider that when discussing tradition and traditional practices, this is sometimes implicitly tempered by the “selective valorization” of specific aspects and “a neutralization, suppression or eschewal of those aspects which are seen as counterproductive, hostile or incompatible” (O’Malley, 1996: 317). The discussion of traditional systems of justice will be largely based on the work of Rupert Ross who is a Crown Attorney with the fly-in court system that services remote Aboriginal communities in Northern Ontario. According to Aboriginal people, the Creator is believed to have “created the universe, the

world and the beings upon, above, and below” (Ross, 1992: x). Creation is “seen as an act of generosity” as the Creator is believed to have implanted “a seed or small clutch of talent” in “each person’s inmost being” (Ross, 1992: x-xi). In order to thank the Creator, it is believed to be everyone’s personal quest to discover and employ the talent that is bestowed on him or her (Ross, 1992: xi). It is because of this talent that everyone is believed to be a valuable member of the community (Ross, 1992: xii; Ross, 1996: 54). As well, according to Aboriginal people, “life is a process of slow and careful self-fulfillment and self-realization. ... The duty of all people therefore, is to assist others on their paths, and to be patient when their acts or words demonstrate that there are things still to be learned. The corollary duty is to avoid discouraging people by belittling them in any fashion and so reducing their respect for, and faith in, themselves.” (Ross, 1992: 27).

Therefore, instead of specifying what people should *not* do, traditional systems of Aboriginal justice emphasize *how* people should behave (Ross, 1996: 257). Justice to Aboriginal people involves creating the social conditions that avoid or minimize wrongdoing (Ross, 1996: 255-256; Warry, 1998: 192). Offences are considered “a misbehaviour which requires teaching, or an illness which requires healing” (Ross, 1992: 62; Ross, 1996: 5). Therefore, rather than punishing offenders for their actions, Aboriginal people prefer instead to correct their behaviour through teaching and guidance, and at the same time employ compensation or restitution when appropriate (Ross, 1992: 62; RCAPb, 1996: 59-60). The role of a traditional dispute resolution process is to restore the

relationships damaged by the offence (Ross, 1992: 45; Ross, 1996: 96; RCAPb, 1996: 64; Warry, 1998: 189; Rose, 1995: 26; Green, 1998: 36; Awasis Agency of Northern Manitoba, 1997: 41-42; Depew, 1996: 23), and to thereby restore the community as a whole.

In traditional times of hunter-gatherer type societies, basic survival and the threat of starvation predominated Aboriginal life and provided the primary mechanism for social control (Ross, 1992: 135; Rose, 1995: 26). Furthermore, this mechanism was not maintained by anyone, instead, "if people stepped out of line ... they faced the immediate and occasionally fatal response of nature" (Ross, 1992: 135). As well, because communities were comprised of extended families, "duties that were neglected had direct consequences ... upon loved ones" (Ross, 1992: 135). Due to the high levels of interdependencies of traditional communities "injury to them [family] meant consequent injury to yourself" (Ross, 1992: 135). Thus, the imposition of formal sanctions was for the most part unnecessary in hunter-gatherer type societies (Ross, 1992: 135).

Lack of Common Ground

The cultural barriers of Canada's justice system have alienated Aboriginal people (RCAPb, 1996: 54; Andersen, 1999: 305). This is largely due to the continued failure of the justice system to accommodate the "traditions, values and customary ways" of Aboriginal people (RCAPb, 1996: 55-57). There are two predominating principles of traditional Aboriginal communities that pervaded their social order and potentially continue to conflict with Canada's justice system, namely, the principle of non-interference, and the ethic that anger must not be

shown. Although the principle of non-interference restricts Aboriginal people from demanding conformity, teaching and guidance are subtly used to procure compliance. This principle of non-interference is grounded in the doctrine that it is up to the Creator or the spirit world to define one's fate (Ross, 1992: 62). The allocation of responsibility is therefore necessarily different and substantially reduced when compared to Canada's justice system (Ross, 1992: 64). In light of this, punishment no longer serves a purpose and simply becomes "an empty act of viciousness" (Ross, 1992: 64). That is why Aboriginal responses to offences emphasize the restoration of interpersonal harmony and cooperative co-existence (Ross, 1992: 66). Similarly, the ethic that anger must not be shown and the repression of emotional indulgences has also impeded Aboriginal peoples' protection from Canada's justice system as the behaviour attributed to this principle is also often misinterpreted.

In addition to the misconceptions surrounding these cultural differences, the justice system also places unrealistic expectations upon programs specifically designed to extend the justice system to remote Aboriginal communities. An example of this is the fly-in or circuit court program. The fly-in court program is a transportable court that travels to remote communities otherwise isolated from the justice system. The fly-in court personnel normally includes a judge, a court clerk, a prosecutor and a defence lawyer (Green, 1998: 38). This transportable court visits a community on a regular basis, normally these visits are separated by a number of months, and offences that occur in a community are scheduled accordingly. Due to the infrequency of these visits,

many communities must deal with extensive delays in processing offences as they are forced to wait until the next scheduled fly-in court date. At the same time, the dockets of these courts are often overburdened with the number of cases they must deal with in the limited amount of time allotted to each community.

Ethic of Non-Interference

Aboriginal societies, which were traditionally nomadic, were dominated by an ethic of non-interference (Ross, 1992: 12; RCAPb, 1996: 60). This ethic forbids interference of any type, regardless of the potential outcome of a situation (Ross, 1992: 12). According to this principle, it is rude to interfere in the activities and freedom of another individual (Ross, 1992: 12-13). This principle is said to be particularly evident in the child-rearing practices of many Aboriginal communities. For example, Ross suggests that the traditional child-rearing practices of traditional nomadic Aboriginal people of Northern Ontario would allow their “children to make their own choices in virtually every aspect of life” (Ross, 1992: 16; Ross, 1996: 84-85). This would include everything “from bedtimes, clothing, and school attendance to selection of friends, and eating habits” (Ross, 1992: 16; Ross, 1996: 84-85). Instead of being told what to do, these Aboriginal children are expected to model the behaviour of others by following their example and learning through observation (Ross, 1992: 16). Children are also indirectly instructed through story telling and ceremonies (Ross, 1996: 83; Carswell, 1984: 304). Instead of teaching Aboriginal children “what to say, think or do”, Aboriginal children are taught their responsibilities to society and how to develop the talents bestowed on them by the Creator (Ross, 1996:

83-84). In essence, Ross suggests that Aboriginal children from traditional nomadic societies of Northern Ontario are taught problem-solving skills or how to think, rather than the answers and what to think (Ross, 1996: 85-87). According to Ross, traditional nomadic societies of Northern Ontario have a fundamentally different approach to social interaction, because this ethic of non-interference governs all social interaction perceptions concerning the role of a justice system will necessarily differ as well. However, the continuation of this ethic of non-interference has not been adequately documented. Ross, was found to be the only author who proposes that this ethic continues to perpetuate in the northern Ontario communities he services as a member of a fly-in court service.

Ross describes an interesting example of how dominant this principle of non-interference is and how, according to him, some Aboriginal people of Northern Ontario continue to adhere to it. He presents an example of a young Aboriginal boy who was charged for "breaking into a reserve school at four in the morning with a group of friends, and trashing the teacher's lounge" (Ross, 1992: 17). When the court asked what the boy's father had done in response to learning what his son had done, the father replied he had hidden his son's shoes at night (Ross, 1992: 17). Ross points out that because the father was bound by his adherence to the ethic of non-interference, "[w]e characterized him as a man possessing only minimal concern, when in fact his concern was so great that it forced him to act against centuries-old commandments. ... Had we known of his inner struggle, we might well have applauded his idea of shoe-hiding for its inventiveness rather than deriding it" (1992: 18). At the same time, the father may

have hidden his boy's shoes for a number of reasons unrelated to the principle of non-interference. Perhaps the father simply did not know what to do. Or perhaps, the father felt helpless in controlling his son's behaviour and/or was afraid of his son. Whatever the reason may have been, it is simply naïve to assume the principle of non-interference is responsible for the father's behaviour without first analyzing the contemporary reality of the father and his relationship with his son.

Another aspect of the principle of non-interference which Ross claims to still influence Aboriginal peoples' behaviour, is that they are reluctant to directly give advice to someone (1992: 21). Offering advice blatantly goes against the principle of non-interference as it necessarily suggests some perspectives are better than others (Ross, 1992: 22). Instead, Aboriginal people tend to speak of hypothetical situations that place emphasis on what is deemed important to them in order to guide the listener in finding their own conclusion (Ross, 1992: 22; Ross, 1996: 26). However, the reluctance to give another person advice can also be due to feelings of helplessness or indifference rather than this principle.

The ethic of non-interference has been said to potentially hinder an Aboriginal person's experience within justice system as it is improper to tell someone that they are wrong, since by telling someone that they are wrong, you necessarily suggest your superior knowledge (Ross, 1992: 25; Ross, 1996: 71). Ross explains that "the rule appears to be that it is better to suffer inconvenience and loss yourself than to directly confront someone else with their error" (1992: 25). In order to illustrate his point, Ross provides further anecdotal evidence of a young girl who was mistaken for someone else in a case involving a break and

enter (1992: 25). Instead of simply telling the police that they had the wrong person, this young girl gave a statement denying any involvement with the offence and then signed it with the name of the accused (Ross, 1992: 25). Added to this, this girl then appeared on the scheduled court date as told to do so by the police officer (Ross, 1992: 25). When this girl was asked why she had acted this way, she replied "because that's who the cops thought I was" (Ross, 1992: 25). Ross then adds that the police officer was a Native man from her community and naively concludes that the principle of non-interference was responsible for her behaviour. However, once again, there are many reasons for why she may have acted as she did. Perhaps this young girl acted out of fear rather than a century old commandment. For example, if there was a presence of asymmetrical power relations in her community, she may have been fearful to challenge the police officer. Or perhaps, she committed another offence and thought that by cooperating with the police officer, he would not attach her to the offence she actually committed. Whatever the reason may have been, it is possible that Ross hastily made this conclusion by failing to consider other possibilities.

Ethic that Anger Not be Shown

In traditional nomadic Aboriginal communities the restraint of anger, grief and sorrow was a survival tactic since these emotions "if indulged, can threaten the group, for they incapacitate the person who is overwhelmed by them" (Ross, 1992: 29). According to Ross, this repression of emotions has continued among Aboriginal people despite the elimination of the threat of starvation (Ross, 1992: 29). According to Ross for example, many Aboriginal people of Northern Ontario

continue to feel it is unfair to burden others with their problems (1992: 32-33). The continuation of the ethic of the repression of emotional indulgences is potentially demonstrated by psychological assessments of many Aboriginal offenders, since their refusal to open up often leads psychiatrists and court personnel to the erroneous conclusion that they are unresponsive and uncooperative (Ross, 1992: 33; RCAPb, 1996: 63). At the same time, this failure of Aboriginal offenders to open up could also be due to language barriers or distrust of the psychiatrists and/or court personnel. Similar to the principle of non-interference, it is difficult to accurately attribute an offender's behaviour to the principle that anger must not be shown. As such, the prevalence of these principles is ambiguous.

Unrealistic Expectations of Fly-In Court Services

Another failing of the justice system is the availability of services to remote communities. The fly-in court service is an example of a program designed to bring the court system to otherwise detached communities. Considering that these courts mimic all other court proceedings, the fly-in court maintains its intimidating structure which continues to be foreign to many accused, since many of them do not understand the court proceedings, nor English (Green, 1998: 39). Green also found that the fly-in courts lack interpreters for the accused (1998: 39). As well, the structure of this program places many unrealistic expectations upon the fly-in court personnel and the participants. In northern communities for example, fly-in courts only visit communities once every few months (RCAPb, 1996: 109-110). After such a lapse of time, many communities have moved on since the offence and found their own way of dealing with it (RCAPb, 1996: 110).

As well, fly-in courts provide another example of how the present justice system tends to decontextualize the offence by permitting such lapses of time (Warry, 1998: 191). Added to this is the expectation that justice personnel, who are the least familiar with what happened are charged with determining the consequences of the offender's actions (Green, 1998: 39). As well, because of the infrequency of the fly-in courts, they are overloaded with heavy dockets and very limited time (Green, 1998: 39-40). Therefore, fly-in court personnel are not provided with sufficient resources to properly address all the relevant issues in each case. As such, the reality that these hearings are often conducted hastily almost seems excusable (Green, 1998: 40). Consequently, isolated Aboriginal communities are subjected to "an offender-processing system" rather than a justice system (Green, 1998: 40).

Responses to the Recognition of Conflicting Systems

It is well known that Aboriginal people are vastly over-represented in Canada's justice system (Andersen, 1999: 303; Green, 1998: 18; Depew, 1996: 21). In response, there have been a number of initiatives to address this. Primarily, these responses include indigenization, diversion programs, and cultural awareness programs (Andersen, 1999: 306). Examples of indigenization programs include policing, Aboriginal justices of the peace and Aboriginal judges, as well as the Native court worker program. Alternatively, examples of diversion programs include programs such as the Community Holistic Circle Healing Project and mediation. All of these programs are intended to increase the involvement of Aboriginal people in the justice system. As well, because none of

these programs required legislative changes, they reveal the flexibility of the existing justice system. Similarly, cultural awareness programs, which are intended for non-Aboriginal justice personnel, combined with the incorporation of indigenization and diversion programs reflects the justice system's pronounced commitment to improving the existing system.

Indigenization

Indigenization involves replacing non-Aboriginal justice personnel with Aboriginal personnel (Warry, 1998: 184). In Canada's justice system, this has been done in areas such as policing, justices of the peace, judges and court workers (RCAPb, 1992: 82). Indigenization does little to change the fundamental structure of the justice system and therefore ignores many of the problems faced by Aboriginal people (Warry, 1998: 184; RCAPb, 1996: 93). RCAP explains that "philosophically, these programs start from the premise that all people ... should be subject to the same justice system, but that special measures may have to be taken to make that system understandable and comfortable to Aboriginal people who come to it from a different perspective" (RCAPb, 1996: 93). RCAP also pointed out that in 1994 almost 90 percent of funding for Aboriginal justice programs and projects in Ontario were to indigenization programs (RCAPb, 1996: 93). As well, RCAP also explained that the reason for this may be due to the fact that "indigenization programs tend to lie within the exclusive domain of government" and therefore pose little threat of challenging the "existing judicial and bureaucratic control" of the justice system (RCAPb, 1996: 94).

Policing

The First Nations Policing Program (FNPP) was introduced in June 1991 and involves tri-partite agreements between First Nations communities, the federal government and provincial or territorial governments (Solicitor General of Canada, 1996: 6). Despite the title of the program, however, Aboriginal policing continues to perpetuate “mainstream policing patterns” since training and certification of Aboriginal officers is determined by the Royal Canadian Mounted Police and other provincial policing authorities (Warry, 1998: 184). Although the FNPP is said to “operate on the principle of partnership” it has been “administered” by the Solicitor General since April 1992 (Solicitor General of Canada, 1996: 14) and is intended to be “a practical means to support the federal policy on the implementation of the inherent right and the negotiation of self-government” (Solicitor General of Canada, 1996: 7). The three principle objectives of the FNPP include strengthening public security and public safety, increasing responsibility and accountability and building a new partnership (Solicitor General of Canada, 1996: 8). The second principle is particularly interesting since it claims “to support First Nations in acquiring the tools to become self-sufficient and self-governing through the establishment of structures for the management, administration and accountability of First Nations police services” (Solicitor General of Canada, 1996: 8). Compatible with government policy, the implicit meaning of this phrase is intriguing, as it is suggestive of the imposition of existing structures, rather than the co-operative development of alternative structures. It should also be noted that the policy principles of the

FNPP include provisions for Aboriginal officers “to enforce applicable provincial and federal laws (including the *Criminal Code*), as well as Band by-laws” (Solicitor General of Canada, 1996: 9).

Although Aboriginal police officers may improve the level of service on reserve, the role of policing has not changed (Warry, 1998: 184). The level of service may be improved due to the similarities of the cultural and linguistic backgrounds of the Aboriginal officers and First Nations communities (Solicitor General of Canada, 1996: 9). However, the very nature of policing continues to be adversarial, as it requires officers to charge and arrest people (RCAPb, 1996: 88). Therefore, rather than assuming a peacekeeping role in communities, Aboriginal policing services are a mechanism to control and process criminal behaviour (RCAPb, 1996: 88). The structure of these policing practices are reinforced by funding agreements which rely on crime and enforcement statistics where funding is decreased with declining rates (RCAPb, 1996: 88). In other words, RCAP promotes the peacekeeping model of policing, however, this seems to be the polar opposite of existing policing structures in Aboriginal communities.

Aboriginal Justices of the Peace and Aboriginal Judges

The idea behind the appointment of Aboriginal justices of the peace (JPs) and Aboriginal judges is that it “will put Aboriginal people appearing [before] the court more at ease and make the point that what is being dispensed is not solely ‘white man’s justice’” (RCAPb, 1996: 94). The appointment of Aboriginal JPs and judges follows the same conditions as their non-Aboriginal counterparts and they

are expected to fulfill the role in the same capacity (RCAPb, 1996: 94). In some provinces and territories, there are special programs to appoint Aboriginal JPs (RCAPb, 1996: 94). For example, in Ontario, Aboriginal JPs are appointed based on statistical evidence of sufficient Aboriginal people within a defined area (RCAPb, 1996: 94). Furthermore, these Aboriginal JPs are subjected to a separate application process and are evaluated according to distinct qualifications and hiring processes (RCAPb, 1996: 94). An example of these unique requirements for Aboriginal JPs in Ontario is being fluent in an Aboriginal language (RCAPb, 1996: 95). Unfortunately, this is an increasingly difficult qualification to meet considering the loss of culture and language suffered by many Aboriginal people due to assimilative policies of the federal government. At the same time, according to sections 530 and 530.1 of the *Criminal Code* trial proceedings can only be conducted in Canada's official languages, either English or French. Furthermore, "individuals who wish to speak in court in a language other than one of the country's two official languages must do so through an interpreter" (RCAPb, 1996: 95). Therefore, for the most part, the ability of a JP to speak the same language of the accused is irrelevant (RCAPb, 1996: 95). However, the Northwest Territories are an exception to this as they have recognized six Aboriginal languages in their territorial *Official Languages Act* (RCAPb, 1996: 96). Similar to policing programs offered to Aboriginal communities, the appointment of Aboriginal JPs does nothing to change the adversarial structure of the justice system. As well, this program does nothing to

accommodate the cultural differences and special circumstances of Aboriginal people.

Native Court Worker Program

The Native Court Worker program is a joint program of the federal, provincial and territorial arrangements and it is offered in every jurisdiction of Canada with the exception of Prince Edward Island and New Brunswick (Department of Justice Website; RCAPb, 1996: 96). The objective of this program is to ensure that Aboriginal people subjected to the justice system “obtain fair, just, equitable, and culturally sensitive treatment” (Department of Justice Website). Native Court Workers offer information, counselling and referrals to Aboriginal accused to help them better understand the system as well as their rights and responsibilities (Department of Justice Website; RCAPb, 1996: 96-97). This program, unlike policing and Aboriginal JPs at least makes an attempt to address the cultural differences and special needs of Aboriginal people. However, once again, this program does nothing to change the structure of the justice system and instead offers an introductory or liaison service to the system. This program therefore, much like all indigenization programs, fosters the adjustment of Aboriginal people in understanding and complying with the justice system, rather than any sort of adaptation of the justice system to meet special needs of its participants.

Diversion Programs

Diversion programs are primarily alternatives to the justice system (RCAPb, 1996: 104; Green, 1998: 52). As well, normally an accused must accept

responsibility for the offence in order to qualify for a diversion program (RCAPb, 1996: 104). However, there are a number of jurisdictions in Canada where cases are diverted prior to the laying of a charge or even after a charge has been laid, but before a plea has been entered (RCAPb, 1996: 104). As well, because accepting responsibility for the offence is not equated with a finding of guilt, participation in diversion programs does not result in a criminal record for the offender (RCAPb, 1996: 104). Diversion programs are generally made available to first time offenders of minor and non-violent offences (RCAPb, 1996: 104). However, some Aboriginal diversion programs take on a wider range of offences, including violent ones such as sexual assault and even second-degree murder. For example, the Community Holistic Circle Healing program that will be discussed below, primarily treats sex offenders, but has also treated a number of other crimes that have ranged from break and enter to second degree murder (Native Counselling Services of Alberta, 2001: iv). As well, because diversion programs are removed from the justice system, there is more flexibility to allow them to be “culturally appropriate” reactions to any particular offence (RCAPb, 1996: 104). It should be noted that diversion programs are not a right, but the decision of justice personnel, for example, police officers, the crown attorney or the judge (RCAPb, 1996: 104). As well, if offenders fail to follow the program requirements of the diversion program, it is possible for the Crown to continue with the charge against the offender (RCAPb, 1996: 105). However, RCAP reports they were unable to find a single example of this (RCAPb, 1996: 105). In addition, Aboriginal diversion programs sometime include non-Aboriginal

professionals (RCAPb, 1996: 106). It should also be noted that just because an offender completes the program requirements does not necessarily mean that the program objectives were achieved. Moreover, no conclusive evidence exists which clearly ascertains the effectiveness of diversion programs (LaPrairie, 1998: 71; Roberts and LaPrairie, 1997: 82; Depew, 1996: 22; Latimer and Kleinknecht, 2000: 4).

Aboriginal diversion initiatives are unique in that they contradict the justice system's idea of an independent judicial governing body (Warry, 1998: 189-190). Instead, Aboriginal initiatives nullify "the possibility of 'bias' ... by the understanding that friends and kinsmen have an intimate knowledge of the offender and that they, better than strangers, can weigh the complex factors involved in disputes" (Warry, 1998: 189). Aboriginal initiatives are also grounded in the assumption that it is much more difficult to face your own community than a stranger (Green, 1998: 40). Added to this, and consistent with the Aboriginal attitude towards restoring balance and harmony between relationships, all Aboriginal initiatives focus on healing. The pipe and sweat lodge ceremonies for example, are important cultural traditions of Aboriginal people of the prairies (RCAPb, 1996: 135). On the West Coast, longhouse ceremonies serve a similar function (RCAPb, 1996: 135). Correctional Services Canada currently provides funding or operates nine healing lodges across Canada (Correctional Services Canada Website). In addition, it should be noted that many Aboriginal justice initiatives are not limited to reserves and are very adaptable to urban centres. The diversion programs that this paper will describe include elder panels,

sentencing advisory committees, sentencing circles and mediation. It should be noted that although sentencing circles are not a diversion program per se, it will be treated as a diversion program for the purposes of this paper since one of the underlying principles of sentencing circles is that they facilitate the restoration of balance.

Elder Panels

Elders or leaders in some communities sit with the judge and provide advice with respect to appropriate dispositions (RCAPb, 1996: 110; Warry, 1998: 185). The elders' and leaders' intimate knowledge of their community and residents facilitates the courts access to more information (Green, 1998: 104). For example, the Elders Justice Advisory Council at Waywayseecappo, Manitoba, provides information to the court concerning each offender and advice on appropriate sentencing (Green, 1998: 105). These elders also hold meetings a week prior and a week following each court date and encourage accused, and sometimes order offenders, to attend (Green, 1998: 106). These meetings feature "traditional Ojibway lessons, talking circles, healing circles, sweet grass ceremonies, smudging, and traditional prayers" (Green, 1997: 106). The Chief and Council selected the elders who participate on this advisory council because they were highly respected in the community (Green, 1998: 107). In Ontario, there have been two of these programs established, one in Attawapiskat and one in Sandy Lake (Warry, 1998: 185). An initial review by the Ministry of the Attorney General exposed a number of concerns respecting elder panels, these included most notably the lack of training provided to elders, the consistency of the cases

being diverted, and the overall community understanding of the court system (Warry, 1998: 185). Also worthy of discussion is the selection procedure implemented for this type of program, as well as the implicit assumptions concerning the relationship between elders and their communities. This type of program is best suited for a close-knit community where the elders are intimately involved in the lives of their community members. This program assumes as well, that elders are respected and hold positions of power and influence in their communities. Another key assumption of this program and other community justice programs is that elders have the experience and knowledge to provide adequate advice to the courts concerning the offender and an appropriate disposition (LaPrairie, 1998: 66). At the same time, small communities are highly susceptible to corrupt leadership practices and asymmetrical power relations, which in turn, may potentially pollute the objectives and equity of this program (LaPrairie, 1998: 66; Clairmont, 1996: 147). As such, community justice initiatives, like elder panels, ignore the potential for the program to divide the community rather than unite it (LaPrairie, 1998: 69).

Sentence Advisory Committees

Sentence Advisory Committees are a variant of elder panels that serve the same function. Local sentence advisory committees are established at Cumberland House, Sandy Bay and Pelican Narrows (Green, 1998: 110). However, unlike elder panels, these committees formally meet with the accused and sometimes the victims prior to determining their recommendations (Green, 1998: 110). A member of the Sandy Bay committee revealed to Green that these

meetings opened the lines of communications between the accused and the committee (Green, 1998: 111). Green concludes that "it is too early to draw conclusions about the overall impact of the sentence advisory process; however, it appears to have alleviated time pressures on the court ... while at the same time facilitating community sentencing input" (1998: 113). Sentence advisory committees are able to alleviate time pressures on the court by helping the court determine the facts of a case and offer recommendations to a judge prior to the actual court date. However, like elder panels, sentence advisory committees are based on several assumptions. Program designers assume that community members are interested in participating in this program (LaPrairie, 1998: 66). As well, it is assumed that the participants of these committees are well versed in determining appropriate dispositions for these offenders (LaPrairie, 1998: 66). At the same time, it is assumed that these committee members have the best interests of the offenders at heart and are able to overcome any bias or personal attachment to the offender, their offence or the victim (LaPrairie, 1998: 66). As well, community justice initiatives like sentence advisory committees assume that the community members will be equally committed to every offender and victim presented to them (LaPrairie, 1998: 68).

The Community Council Program offered by Aboriginal Legal Services of Toronto (ALST) is an example of an urban sentence advisory committee that has been in operation since March 1992 (ALST, 1997: unpaginated). Participants are referred from defense or duty counsel, Aboriginal and non-Aboriginal agencies, clients and their families (ALST, 1997: unpaginated). Eligibility for the program is

based on the availability of resources to address the needs of each offender (ALST, 1997: unpaginated). Similar to the previous programs discussed, it is up to the Crown to determine eligibility for this program (ALST, 1997: unpaginated). If the accused decides to participate in the program following their discussion with their counsel, the charges are either stayed or withdrawn by the Crown (ALST, 1997: unpaginated). Following this, a Council hearing will be held and “will usually have three people serving. Members of the Council are concerned volunteers of the community who are Aboriginal (ALST Website). The Council will reach its decision by consensus and only the individuals involved with the offence themselves discuss their cases with the Council” (ALST, 1997: unpaginated). Their decision consists of their recommendations in order to reintegrate the accused back into the community (ALST, 1997: unpaginated). The recommendations may include any combination of “counselling, restitution, community service, [and, or] treatment suggestions” (ALST, 1997: unpaginated). If the accused fails to follow the instructions of the Council they are required to respond to the court (ALST, 1997: unpaginated). As well, it should be noted that the Crown only brings charges back in exceptional circumstances (ALST, 1997: unpaginated). Although this Council sounds promising, the fact that it is comprised of volunteers questions the representativeness and consistency of the program. As well, the training and objectiveness of these council members is potentially problematic, as is the experience and appropriateness of their dispositions. As well, because participation is based on the availability of resources, the consistency and reliability of this program must be questioned.

Sentencing Circles

Sentencing circles are another extension of elder panels in that, they are essentially sentencing hearings conducted in a circle (Warry, 1998: 185; Green, 1998: 67). Also, with sentencing circles everyone involved in the offence in whatever capacity, as well as anyone else who wishes to be included, is welcome to sit in a circle with the accused and sometimes the victim to determine an appropriate sentence for the accused (RCAPb, 1996: 110; Roberts and LaPrairie, 1997: 71). Much like elder panels, sentencing circles have been thought of as only a minor diversion from the justice system since the final decision with respect to sentencing remains with the judge (RCAPb, 1996: 110; Warry, 1998: 187; Green, 1998: 72). At the same time, a northern Saskatchewan judge evaluated by Green “claimed never to have rejected a circle consensus” of the sixty to seventy sentencing circles he had participated in (1998: 74). Green adds that he deemed it “unlikely a judge would disregard a circle consensus that proposed a viable alternative to the sentence that would otherwise have been imposed. To do so would undoubtedly risk a loss of credibility by the court in the eyes of the local community” (1998: 74). This stems from the fact that in order for programs like sentencing circles to work it is essential to maintain community support for the program, since disregarding a community’s recommendation would mean invalidating the community’s role in the program. It should also be noted that formal sentencing guidelines also take precedence over community decisions (RCAPb, 1996: 114). At the same time, the objectives of sentencing circles include “to enhance sentencing options, to afford greater concern to the

impact on victims, to shift [the] focus from punishment to rehabilitation, and to meaningfully engage communities in sharing responsibility for sentencing decisions" (Green, 1998: 67). Everyone in the circle is given an opportunity to voice their opinion, as well as ask whatever questions they may have (Green, 1998: 68). However, what types of offences or offenders who should be diverted to sentencing circles still has not been clearly defined (RCAPb, 1996: 111-112). Likewise, there is no single model to dictate the administration of each circle (Green, 1998: 69; Roberts and LaPrairie, 1997: 71). However, this lack of defined structure allows each community to make any necessary adjustments in order to respond to their requirements (Green, 1998: 69). Another interesting aspect is that the implementation of sentencing circles did not require any legislative changes (Warry, 1998: 187; Green, 1998: 18).

Sentencing circles provide an opportunity for community development since "it is through community participation that sentencing circles can become a vehicle for community healing and reintegration" (Warry, 1998: 186). Since it is this type of communication that allows offenders to see the effects of their actions and acknowledge their behaviour (Warry, 1998: 186). In theory, sentencing circles assume that everyone participating in the circle is equal (Roberts and LaPrairie, 1997: 71). However, given that the judge retains the power of determining the outcome of the circle, this hardly seems plausible. As well, this postulation ignores the potential of the presence of unequal power relations in the community and assumes the community is committed to helping the offender and victim reconcile (Linker, 1999: 117).

Criticisms of sentencing circles include the inconsistency across Aboriginal communities, and the fear that some communities impose harsher penalties than those permitted under the sentencing guidelines of the justice system (Warry, 1998: 186; Roberts and LaPrairie, 1997: 79). As well, because there are no theoretical underpinnings of sentencing circles, it is difficult to expect their uniformity and assess their effectiveness (Warry, 1998: 186-187; Roberts and LaPrairie, 1997: 71). Warry also points out that sentencing circles have "been heavily influenced by non-Aboriginal self-help approaches" (1998: 193). As well, Warry considers sentencing circles are "neither tradition nor about community healing" (1998: 193). On the other hand, Green found that initiatives like sentencing circles do have traditional significance and are based on traditional cultural beliefs (1998: 33). The circle for example, formed the basis of traditional life of the Cree and Ojibway (Green, 1998: 33). Rose also commented on the value of the circle with respect to the Dene belief in the careful balance among people, animals, plants and the spirits that must be respected at all times (1995: 23-27).

The Community Holistic Circle Healing Project established by the community of Hollow Water, Manitoba is an innovative variation of sentencing circles. In 1984, Hollow Water and three surrounding communities (Manigotagan, Ahbaming and Seymourville) began working towards healing the damage done to their communities by the intergenerational effects of sexual abuse (Ross, 1996: 29-30; Native Counselling Services of Alberta, 2001: 10). Since December of 1993, the community of Hollow Water has been conducting sentencing circles

in recognition that the deviant behaviour of their residents was symptomatic of the epidemic of widespread inter-generational sexual abuse (Green, 1998: 85). In response, CHCH has developed a thirteen-step process to healing (Green, 1998: 87; Awasis Agency of Northern Manitoba, 1997: 45; Lajeunesse, 1993: 2-3). CHCH also provides a support team not only for the victimizer, but also for the victim and family (Green, 1998: 87; Awasis Agency of Northern Manitoba, 1997: 45; Native Counselling Services of Alberta, 2001: ii). CHCH works with these individuals while the courts are requested to adjourn sentencing of the victimizer pending treatment (Green, 1998: 87). In the first sentencing circle, the key participants, including the victimizer and the victim sit in the inner circle, while relatives, friends and interested community members sit in the outer circle (Green, 1998: 91). Discussion moves around the sentencing circle four times (Green, 1998: 91). During the first round, participants explain why they are there, during the second, they speak to the victims, in the third round, participants speak of how the offence has affected them and finally during the fourth round, participants offer their advice on how to restore harmony (Green, 1998: 91). Subsequent circles are considered community reviews and are held every six months for three years to allow the CHCH to provide continued support throughout the treatment process (Green, 1998: 90-91). An evaluation completed for the Solicitor General reported that it takes a minimum of five years for a victimizer, the victim and their families to prepare for the final, 13th step (Lajeunesse, 1993: 8).

A cost benefit analysis was also performed on the CHCH concluded that although the CHCH had treated 108 victimizers and between 400 and 500 victims, the entire community has benefited from the CHCH program (Native Counselling Services of Alberta, 2001: iv). The cost benefit analysis claims that the entire community has benefited from this program is grounded in their finding that the healing accomplished by this program “creates spiritual, physical, emotional and intellectual balance that benefits the entire Hollow Water community” (Native Counselling Services of Alberta, 2001: i). This same analysis concluded that although the CHCH has cost approximately \$2.4 million in the first ten years of operation, comparable services if provided by the federal and provincial governments would have cost between \$6,212,732 and \$15,901,885 (Native Counselling Services of Alberta, 2001: iv). At the same time, the analysis maintained the community development and healing effect is incomparable to any service available from either the province of Manitoba or the federal government (Native Counselling Services of Alberta, 2001: iv-v). Also excluded from the calculated savings are the very low levels of recidivism appreciated by CHCH, as less than 2% of the victimizers who have received treatment have re-offended (Native Counselling Services of Alberta, 2001: v). Comparatively, approximately 13% of sexual offenders re-offend and this figure rises to 36% for recidivism of any type of crime (Native Counselling Services of Alberta, 2001: v). However, it should be noted that sexual abuse is recognized as being an offence with a massive rate of non-reporting. As well, this analysis validated recidivism using the Correctional Service of Canada’s Offender Management System

(OMS) however, in order to be included in this system an offender must be processed and sentenced by the justice system. This hardly seems like a plausible evaluation considering the CHCH is a diversion program and many participants are diverted from the justice system long before they could be entered into the OMS. In other words, the OMS is inadequate in tracking victimizers who were not charged or for whatever reason were not sentenced.

Although the findings of this cost benefit analysis suggest impressive success of the CHCH, the method of their inquiry necessitates some further inquiry. This cost-benefit analysis consisted of participatory research involving interviews and questionnaires (Native Counselling Services of Alberta, 2001: 5). However, rather than generating a random sample from the program's participants, "CHCH workers freely advised and generated an appropriate list of people to be interviewed. They also assisted in distributing some of the questionnaires in order to obtain a broader community sample" (Native Counselling Services of Alberta, 2001: 5). Clearly, this does not seem to constitute an objective evaluation of the program participants. Alternatively, LaPrairie reports a much less impressive evaluation of the CHCH. She reports that "only 44% of those who had participated in a circle found it a positive experience and 33% a negative one" (LaPrairie, 1998: 72). At the same time, LaPrairie found that "only 34% of the victims [who participated in CHCH] felt the community was supportive of them after going through the program" (1998: 72). Clearly, there has not been a consensus reached on the overall impact and success of CHCH.

Although sentencing circles are theoretically feasible alternatives to the court process, in actuality, much like the previous community justice initiatives discussed above, sentencing circles are plagued by many assumptions. Some concerns raised with respect to sentencing circles include the "reluctance of victims and participants to speak; domination of discussion by certain high profile individuals in community; focus of the discussion on the accused and not the victim; little information about the circle or preparatory work before it occurred; and ... [uncertainty about] how representative of the community the group was" (LaPrairie, 1998: 72). Interestingly, LaPrairie reports "that 72% of offenders and only 28% of victims found sentencing circles a positive experience" (1998: 72).

Mediation

Mediation involves the intervention of a neutral party in order to negotiate reconciliation between an offender and a victim (Green, 1998: 52; Awasis Agency of Northern Manitoba, 1997: 51). Much like the previous diversion programs discussed, cases diverted to mediation require consent by appropriate justice personnel (Green, 1998: 52). Mediation, again like the previous programs discussed, is often a preferable option to the adversarial and impersonal court system (Green, 1998: 52). Rather than focussing on the punishment of the offender, mediation focuses on the ability of the offender to accept responsibility for his or her actions by agreeing to provide reasonable restitution (Green, 1998: 53). Also, because mediation also focuses on restoring the relationship between the offender and his or her victim, it is premised on core beliefs of traditional Aboriginal justice. In fact, the Awasis Agency of Northern Manitoba found "that

mediation comes closest to the First Nations perspective on justice" (1997: 51). The Awasis Agency of Northern Manitoba has employed a slight variation of mediation, in that they incorporate family and community members in their mediation (1997: 8). Another interesting aspect of mediation is that, unlike the previous diversion programs discussed, the outcome of mediation is not subject to judicial approval (Green, 1998: 121; Awasis Agency of Northern Manitoba, 1997: 51). However, in order for mediation to be effective, it is essential that "mediators possess sufficient power, authority and credibility to equalize the balance between disputants" (Depew, 1996: 40). As well, it is also crucial that the mediator is completely neutral and does "not influence agreements to the point of bias which may contribute to the instability of outcomes" (Depew, 1996: 40).

Cultural Awareness Programs

Contrary to the previous initiatives discussed, cultural awareness programs are intended for non-Aboriginal people. The assumption "behind this training is that if people working in the justice system are more familiar with Aboriginal cultural norms and values, Aboriginal people will find the judicial process less threatening and more accommodating of their concerns" (RCAPb, 1996: 99). Also by familiarizing non-Aboriginal justice personnel with Aboriginal cultural practices, it will hopefully lessen the misconceptions due to cultural bias (RCAPb, 1996: 99). For example, according to many Aboriginal people, looking someone straight in the eye and direct eye contact is considered disrespectful, however, according to Canada's western justice system, the opposite is true (Ross, 1992: 3-4). Many Aboriginal people feel that looking someone straight in

the eye is disrespectful since it “sends a signal that you consider that person in some fashion inferior” (Ross, 1992: 3). While on the other hand, Canada’s western justice system perceives indirect eye contact as evasive behaviour (Ross, 1992: 4). Therefore, something as simple as body language is easily misinterpreted and could potentially lead to inaccurate conclusions that would result in unfair treatment of the accused. Fortunately, several cultural awareness programs are already in place and have been incorporated in the training programs of the RCMP and municipal police forces (RCAPb, 1996: 99).

Conclusion

Although all of the initiatives discussed did not require any legislative changes nor did they significantly alter the established authority, they are still worthy of further analysis. And, despite the newness of these initiatives as well as the lack of substantial evaluation, some preliminary assessments can be made. All of these initiatives reflect the increased recognition of Aboriginal culture, which is a necessary adjustment to the justice system. A meta-analysis of restorative justice programs revealed that victims who participated in restorative programs were “significantly more satisfied” with the process (Latimer, Dowden and Muise, 2001: 9; Latimer and Kleinknecht, 2000: 11). This same analysis reported that “offenders who participated in restorative justice programs tended to have substantially higher compliance rates than offenders exposed to other arrangements” (Latimer, Dowden and Muise, 2001: 12; Latimer and Kleinknecht, 2000: 13). With respect to recidivism, “restorative justice programs, on average, yielded reductions in recidivism compared to non-restorative

approaches to criminal behaviour” (Latimer, Dowden and Muise, 2001: 14; Latimer and Kleinknecht, 2000: 10). However, there is a void in the research with respect to the long term effects of restorative justice programs (Latimer, Dowden and Muise, 2001: 20; Latimer and Kleinknecht, 2000: 13)

At the same time, all of these initiatives foster an increased level of community participation in these programs and this is congruent with the objectives of furthering self-government. Unfortunately however, these programs do not necessarily indicate an increased level of participation in the design of these programs. As well it is assumed that the participants of these programs are representative of the community (LaPrairie, 1998: 75). Also, because the offender is forced to accept responsibility for the offense in order to participate, there are no opportunities for the accused to challenge the community's perception of them or their actions (Andersen, 1999: 309). Another aspect of restorative justice programs that is often overlooked is the accountability of the program's participants and facilitators (LaPrairie, 1998: 76). Depew reports findings that restorative justice programs “have a tendency to reinforce relations of power rather than transform them ... some studies also suggest that mediation and dispute resolution participants may be under coercive pressures or ‘active recruitment’ to accept popular justice services” (1996: 33). As well, it is assumed that Aboriginal communities agree on the appropriate action that should be taken to address justice issues and that cultural homogeneity exists in Aboriginal communities (Depew, 1996: 28). As such, although these justice initiatives are riddled with assumptions, and are not without their problems, there are many

potential benefits of these programs if implemented with the proper mechanisms of accountability and evaluation. Clearly, not every community will be able to address every justice issue simply due to the level of resources, the complexity of the issue and economies of scale. However, many communities could quite easily take on more responsibility in administering mechanisms of dispute resolution that are relevant to their community's needs. At the same time, in order for communities to effectively deal with taking on this responsibility, there must be adequate consideration given to determining the most appropriate response that is not only representative of the interests of the entire community but also legitimated through properly instituted mechanisms of accountability.

Patterns of criminal behaviour in many Aboriginal communities suggest problems of social disorder rather than crime (Depew, 1996: 45). For instance, Depew reports that "overcrowded housing, low education levels and limited skills, uneven or minimal employment, meager or irregular incomes and welfare dependency, and idleness affect many aboriginal people and contribute to tensions ... and social interactions ..." (1996: 45). Therefore, perhaps part of the reason that Aboriginal people are so overrepresented in the justice system is due to their social conditions, which in turn, contributes to an increased level of criminal behaviour. As such, perhaps the reason the traditional justice system has failed Aboriginal people in the past is due to its inadequacy in addressing the social problems of Aboriginal people. Interestingly, as restorative justice programs claim to fill the inadequacies of the traditional justice system, the objectives of these programs should be carefully selected (Andersen, 1999: 306).

In order for restorative justice programs not to fail as the traditional justice system did, it is imperative that these programs define appropriate and feasible objectives. These objectives not only need to be based on each community's particular needs, but also, refined to a level that each community is actually able to satisfy. Alternatively, over-arching principles and unattainable objectives will ultimately lead to the demise of otherwise promising programs.

Part Three: The First Nations Governance Act, A Case Study

Introduction

The *First Nations Governance Act* (FNGA), or Bill C-7, is the impending policy with respect to First Nations and governance issues. Although justice is a central aspect of self-government initiatives, the FNGA seems to ignore this and other pertinent issues facing Aboriginal people. The intent of the FNGA is to largely increase the transparency of band administrative practices and thereby decrease the potential for corrupt band practices in Aboriginal communities. However, by focussing on this one aspect of band practices, there remains a void in addressing justice and other self-government issues. There are many potential reasons for this line of reasoning, but of course it is all speculation. Perhaps the reason for the avoidance of justice issues is the rationale that the government has already instituted appropriate justice mechanisms to alleviate the overrepresentation of Aboriginal people in the justice system. Or perhaps the avoidance of justice is an intentional decision by the government, in that it is a part of a rather different agenda. Could it be that federal policymakers are attempting to alleviate some of the asymmetrical power relations of some band councils and make this a pre-requisite to acquiring more governance powers, such as the opportunity to facilitate more justice initiatives? After all, the presence of asymmetrical power relations greatly hinders any potential for the realization of any type of social justice. Despite the rationale behind the FNGA, it is clear that the government is specifically targeting one aspect of governance, and justice is simply not one of them. Moreover, justice is not the only aspect

lacking of the FNGA and the remainder of this paper will offer a critical analysis of the direction taken by the FNGA.

The federal government's global mandate for First Nations, *Gathering Strength - Canada's Aboriginal Action Plan* is the catalyst for much of the current policy directed towards Aboriginal people. Gathering strength involves four central themes: renewing the partnerships, strengthening Aboriginal governance, developing a new fiscal relationship and, supporting strong communities, people and economies (Minister of Indian Affairs and Northern Development, 2000). Gathering strength is further supported by the 2001 speech from the throne, when the Governor General of Canada announced that,

"[t]oo many [Aboriginal people] continue to live in poverty, without the tools they need to build a better future for themselves or their communities. As a country, we must be direct about the magnitude of the challenge and ambitious in our commitment to tackle the most pressing problems facing aboriginal people. Reaching our objectives will take time, but we must not be deterred by the length of the journey or the obstacles. ... [the government] will support First Nations communities in strengthening governance, including implementing more effective and transparent administrative practices. And it will work to ensure that basic needs are met for jobs, health, education, housing and infrastructure. This commitment will be reflected in all the Government's priorities."

The 2002 speech continued to support *Gathering Strength*, as the Governor General announced that,

"the government will reintroduce legislation to strengthen First Nations governance institutions - to support democratic principles, transparency and public accountability, and provide the tools to improve the quality of public administration in First Nations communities. It will work with these communities to build their capacity for economic and social development, and it will expand community-based justice approaches, particularly for youth living on reserves and Aboriginals in the North."

The FNGA that is currently being considered by the government of Canada is tangible evidence of the direction of governmental policy towards Aboriginal people. In line with the principle of strengthening Aboriginal governance, the Government of Canada has maintained that the FNGA is intended to be an interim step in the move towards self-government. As clearly stated in the preamble, this Act is not "intended to define the nature and scope of any right of self-government or to prejudge the outcome of any self-government negotiation". This preamble is also in line with both the 2001 and 2002 speeches from the throne as the FNGA is intended to implement "more effective and transparent administrative practices". However, the question is begged whether band administrative practices are one of the most "pressing problems facing aboriginal people"? The speech from throne for 2002 seemed to limit the objectives of the government with respect to Aboriginal people, living on-reserve only, as there was no mention of policy objectives geared specifically to Aboriginal people living off-reserve. Therefore, does this line of reasoning appreciate the reality of Aboriginal people where over 70% are currently living off-reserve? Also, considering the substantial progress in negotiating self-government agreements, is this interim stage even necessary? Is this stage simply limiting resources that could instead be directed to negotiating self-government agreements, and other program and services? This paper will question whether the direction taken by the FNGA is the most appropriate given the present reality of many First Nations.

Current Reality of Aboriginal People

According to Statistics Canada 2001 census, there were 713 000 self-identified Aboriginal people living off-reserve (O'Donnell and Tait, 2003: 8). Also taken from the 2001 census, Statistics Canada reports on their website that there is a total of 983,090 Aboriginal people in Canada. This means 72.5% of Aboriginal people are living off-reserve. Of this, 68% of self-identified Aboriginal people living off-reserve are living in a large urban centre (O'Donnell and Tait, 2003: 8). These extraordinary numbers of Aboriginal people who are no longer living on reserves are for the most part ignored by the proposed FNGA, since the FNGA focuses primarily on band governance practices on reserve. Furthermore, Aboriginal people living off-reserve continue to occupy the lower strata of the socio-economic status. Health and housing for instance are significant indicators of socio-economic status. As such, this part will begin with a detailed comparison of the health and housing conditions of Aboriginal people living off-reserve to the Canadian average. The initial findings of the *Aboriginal Peoples Survey* recently released by Statistics Canada forms the basis of this analysis.

Health of Aboriginal People Living Off-Reserve

Overall, the self-rated health of off-reserve self-identified Aboriginal people is lower compared with the total Canadian population (O'Donnell and Tait, 2003: 12). Even though the differences for the number of Aboriginal and non-Aboriginal people who reported excellent or very good health is negligible, the gap significantly widens for those who reported fair or poor health (O'Donnell and Tait, 2003: 12-13). This is particularly the case for older age groups. For

instance, 69% of Aboriginal people between the age of 15 and 24 reported excellent or very good self-rated health compared with 71% of the non-Aboriginal population (O'Donnell and Tait, 2003: 12). However, only 38% of off-reserve Aboriginal people between 55 and 64 reported excellent or very good health compared to 51% of the non-Aboriginal population (Statistic Canada, 2001: 12). Similarly, 6% of the off-reserve Aboriginal population between 15 and 24 reported fair or poor self-rated health compared with 5% of the non-Aboriginal population (O'Donnell and Tait, 2003: 13). While 38% of off-reserve Aboriginal people between the ages 55 and 64 reported fair or poor health, only 19% of the non-Aboriginal population did (O'Donnell and Tait, 2003: 13). As well, off-reserve Aboriginal people, particularly older Aboriginal women, continue to disproportionately suffer from diabetes and other chronic illnesses such as arthritis, high blood pressure and asthma (O'Donnell and Tait, 2003: 13-15). For instance, 18.9% of off-reserve Aboriginal people between 55 and 64 suffer from diabetes, compared with 12.7% of non-Aboriginal people aged between 55 and 64 (O'Donnell and Tait, 2003: 14). Statistics Canada further reports that almost one out of every four Aboriginal women over 65 has been diagnosed with diabetes compared to only 11% of non-Aboriginal women over 65 (2001: 14).

Access to Medical Professionals in Remote Areas

Aboriginal people living in the Canadian arctic have also reported less contact with health professionals than those living in urban and rural areas (O'Donnell and Tait, 2003: 16). For example, in 2001, 75% of Aboriginal people living in an urban centre reported having contact with a family doctor or general

practitioner in the past 12 months (O'Donnell and Tait, 2003: 16). Similarly, 69% of Aboriginal people living in a rural area reported such contact, while only 43% of Aboriginal people living in the Canadian arctic reported contact with a family doctor or general practitioner in the past 12 months (O'Donnell and Tait, 2003: 16). Comparatively, 82% of the total Canadian population had reported contact with a family doctor or general practitioner in the past 12 months (O'Donnell and Tait, 2003: 16). Conversely, these figures are reversed for reported contact with a nurse (O'Donnell and Tait, 2003: 16). Whereas, only 23% of Aboriginal people living in an urban centre and 27% living in a rural area reported contact with a nurse in the past 12 months, 58% of Aboriginal people living in the arctic reported such contact (O'Donnell and Tait, 2003: 16). In terms of traditional healing practices, 34% of the urban Aboriginal people reported access, compared with 26% living in rural areas and 14% living in the arctic (O'Donnell and Tait, 2003: 17). However, in urban areas, one-third reported having access to these services, but an equal number reported not knowing if these practices were even available (O'Donnell and Tait, 2003: 17).

Housing of Aboriginal People Living Off-Reserve

Statistics Canada maintains that all across Canada "Aboriginal people are more likely to live in crowded conditions" (O'Donnell and Tait, 2003: 24). Statistics Canada defines crowded conditions as one or more persons per room (O'Donnell and Tait, 2003: 24). For Aboriginal people living off-reserve, this number has decreased from 22% in 1996 to 17% in 2001 (O'Donnell and Tait, 2003: 24). Still, 17% continues to be relatively high when compared to 7% of all

Canadians (O'Donnell and Tait, 2003: 24). Furthermore, 25% of Aboriginal children aged 14 and under were living in crowded conditions in 2001 compared with only 13% of all Canadian children (O'Donnell and Tait, 2003: 24). Crowded living conditions are particularly troubling in Winnipeg, Regina, Saskatoon and Edmonton (O'Donnell and Tait, 2003: 24). In Regina and Saskatoon for instance, Aboriginal people are three times as likely to live in crowded conditions compared to the total population (O'Donnell and Tait, 2003: 24-25). The situation is even more troubling among the Inuit in the far north, where 53% live in crowded conditions in 2001 (O'Donnell and Tait, 2003: 25). However, this number has declined from 61% in 1995 (O'Donnell and Tait, 2003: 25).

Clearly, the overall health of Aboriginal people living off-reserve continues to be lower than the rest of the Canadian population. Not only does diabetes continue to disproportionately affect Aboriginal people, so do other chronic illnesses such as arthritis and high blood pressure. Unfortunately as well, Aboriginal people living in more remote areas like the arctic are not able to receive the same access to medical professionals as the rest of Canadians. There also seems to be some confusion as to the availability of health services for Aboriginal people living off-reserve with respect to traditional healing practices. This begs questions regarding what other programs and services available to Aboriginal people are not readily accessible. With respect to crowded housing conditions, it is clear that the disproportionate number of affected Aboriginal people living off-reserve perpetuates their socio-economic position in Canadian society. From this brief description of the health and housing

conditions of Aboriginal people living off-reserve, it is clear that Aboriginal people who leave the reserve do not necessarily improve their social conditions.

Self-Government Agreements and Negotiations

Of the 614 First Nations communities in Canada many have either completed or are in the process of negotiating a self-government agreement with the Government of Canada. DIAND's departmental data released in 1995 reported that at the time of publication, there were 86 self-government on-going negotiations affecting 347 communities (1995: 77). Similarly, according the federal government's progress report on Gathering Strength, 16 specific claims were settled and 70 comprehensive claims were negotiated during 1999-2000, at the same time, a reported 80 self-government negotiations were underway (2000: 8-9). At the time of writing, according to Indian and Northern Affairs Canada (INAC) website, the federal government has arrived at 15 self-government final agreements, 11 agreements in principle and 7 framework agreements. A list of these agreements is summarized in table 3.1. The federal government has also signed 15 comprehensive claims that potentially include provisions for self-government; these are briefly outlined in table 3.2. Also, table 3.3 provides a summary of the on-going negotiations between the federal government and various groups as well as a brief summary of the claims awaiting a decision with respect to acceptance or rejection. In addition to these, INAC's website reports a memorandum of understanding has been agreed to with the Manitoba Denesuline in 1999. INAC's website also reports a land governance agreement reached in 2000, namely the Kanesatake Land

Governance Agreement. With respect to specific claims, Mr. Yvan Loubier who is a Member of Parliament, in response to the proposed budget during the House of Commons debates, referred to the pending 500 claims and another 500 that are forthcoming (16 May 2003 at 1020). According to Dickason, there are 1031 land claims in progress across the country (2002: 419). Clearly, many First Nation communities have either completed or are in the process of negotiating some sort of self-government agreement. As well, the variability of these agreements is reflective of the uniqueness of each First Nation community. Also, from these tables, the complexity of these agreements becomes apparent simply from the length of time elapsed from the date accepted to the date an agreement was signed, the number of individuals affected by these agreements, as well as, the substantial amount of land involved.

Conclusion

Given the reality that the majority of Aboriginal people now live off-reserve, the immediacy to secure the transparency of band administrative practices seems to pale in comparison to the dismal social conditions of many Aboriginal people. Added to their social conditions, Aboriginal people are still dealing with the residual effects of former government policies, such as the sixties scoop, and the legacy of residential schools. The sixties scoop and residential schools were two government policies which tore apart families by forcibly removing Aboriginal children from their families and communities. This forcible removal not only hindered the continuation of Aboriginal culture and language, but also interrupted traditional child rearing and development. With respect to residential schools for

instance, the Aboriginal Healing Foundation (AHF) reports that there are approximately 93 000 survivors of residential schools still alive (2002: 2). As well, the intergenerational impacts of the abuse suffered in these institutions continues to plague many Aboriginal people (AHF, 2002: 2). Although the survivors account for less than 10% of the Aboriginal population, the residual impacts of the suffered abuse along with the loss of language and culture have been passed from generation to generation and the impact continues to have a profound influence on many Aboriginal people and communities. Therefore, addressing the social conditions as well as the legacies of past policies seem to be more immediate priorities to Aboriginal people than the transparency of band administrative policies which is the focus of the proposed FNGA. In order provide the space for justice reform it is necessarily to improve the social conditions of Aboriginal people, living off, and on-reserve. Improving social conditions is also a necessary pre-requisite to strengthening social justice in Aboriginal communities. Moreover, facilitating social justice not only creates a strong foundation for justice reforms and restorative justice programs to succeed, but also creates the necessary basis for furthering self-government initiatives. There are parliamentarians who also agree with this line of reasoning. For instance, Mr. Yvan Loubier stated during the House of Commons debate that "instead of concentrating on improving the first nations' socio-economic conditions and tackling the real issues, we are being handed garbage like Bill C-7, which no one wants." (16May2003 at 1020). Likewise, in an earlier House of Commons debate, Mr. Brian Pallister, another Member of Parliament, referred to the findings of a

survey done by DIAND which revealed that the priorities facing Aboriginal people are: "health care, education, social services, unemployment, the environment and so on. Aboriginal self-government and aboriginal sovereignty did not make the top 10" (30Jan2003 at 1040). Similarly, the FNGA is even more unnecessary considering the progress already made in negotiating self-government agreements. For instance, Mr. Yvan Loubier during the House of Commons debates alluded to the government's mismanagement of resources in that, the negotiations on self-government could have already been completed if there had been a reallocation of appropriate funding (16May2003 at 1020). Therefore, in conclusion, the FNGA is nothing more than a misinterpretation of the immediate pressures facing Aboriginal people.

Conclusion

Although the Constitution Act of 1982 entrenched Aboriginal rights, because there was no clear definition of the extent and nature of these rights, it remains open to interpretation. In recent years, there have been a number of court decisions which have lent some clarification to this, however there still has not been any legislation or court decision to confirm Aboriginal self-government as an inherent right. Therefore, although the self-government agreements addressed in part one, as well as the justice initiatives described in part two, and the proposed legislative changes of the First Nations Governance Act, all have the potential to increase Aboriginal participation in governance, none provide clarification or entrenchment of self-government.

Securing this type of legislation is not the only obstacle to successfully pursuing self-government. Successful governance demands adequate participation and membership to warrant sufficient economies of scale to facilitate funding and administration. Proper mechanisms of accountability are also necessary to impede the development of asymmetrical power relations. Similarly, appropriate leaders need to be chosen in a manner that is suitable to the participants of each community. Clear jurisdictional boundaries need to be determined with respect to allocating authority over land, institutions and programs, as well as members. Finally, mechanisms of dispute resolution are also critical to pursuing self-government. Based on the information provided in part one, it is clear that the pursuit of self-government is a complex endeavor to say the least. Due to the unique nature of each self-government agreement and every First Nation for that matter, measuring the success of self-government initiatives also proves to be an obscure undertaking, since there is no consensus of what this entails. Perhaps measurements of success could be defined in terms of the flexibility of the stakeholders in negotiating the terms of the agreements? Or perhaps, success could be measured by the overall satisfaction of the stakeholders, including both Aboriginal and non-Aboriginal Canadians affected by the agreement? It is important to remember that self-government is not an issue that is only relevant to Aboriginal people and government officials. The magnitude of self-government is of importance to all Canadians since there is much insight that the conclusion of these agreements can lend to non-Aboriginal

Canadians, not only in terms of alternative governance and institutional structures, but as well as alternative ways of approaching life and life's problems.

Alternative mechanisms of dispute resolution for example, could lessen Canada's over reliance on the use of prisons. These alternatives could also redirect the aim of the justice system from punishment to restoring the balance caused by an offense and reintegrating an offender back into a community. Although part two explains there is a lack of conclusive evidence with respect to the short and long term success of Aboriginal justice initiatives, there is also a lack of consistency of defining appropriate measurement. As well, although there is still a great deal of work to be done in improving the level of service of Aboriginal justice initiatives, the direction that these initiatives have taken is congruent with the pursuit of self-government.

In spite of promises from the speech of the throne and gathering strength, current government policy is ambiguous with respect to furthering self-government. Since based on the First Nations Governance Act, it is clear that the federal government is not inclined to simply relinquish powers to First Nations without instituting proper mechanisms of accountability. As well, although the government continues to assert their patriarchal authority over First Nations by retaining veto power and an advisory role, it is clear that the federal government is making incremental progress in slowly delegating powers to First Nations.

In conclusion, due to the diversity of First Nations and the complexity of their relationships with the federal government, the pursuit of self-government is a necessarily lengthy and complicated process. Although there is nothing to

suggest whether this is the most appropriate direction for Aboriginal people to take, it is clear that maintaining their traditional relationship with the federal government is inadequate in furthering themselves and preserving their languages and cultures.

Appendix I

Table 3.1 Self-Government Agreements

SELF-GOVERNMENT FINAL AGREEMENTS

	Date Signed
<u>Tlicho Agreement</u>	25 Aug 2003
<u>Ta'an Kăch'ăn Council Final Agreement</u>	2002
<u>Ta'an Kwăch'ăn Council – Self-Government Agreement</u>	2002
<u>Nisga'a Final Agreement</u>	1999
<u>Tr'ondek Hwech'in Self-Government Agreement</u>	1998
<u>Little Salmon/Carmacks Final Agreement</u>	1997
<u>Little Salmon/Carmacks Self-Government Agreement</u>	1997
<u>Mi'kmaq Education Agreement</u>	1997
<u>Selkirk First Nation Final Agreement</u>	1997
<u>Selkirk First Nation Self Government Agreement</u>	1997
<u>Vuntut Gwitchin First Nation Self-Government Agreement (effective date 1995)</u>	1993
<u>Champagne and Aishihik First Nations Self-Government Agreement (effective date 1995)</u>	1993
<u>Teslin Tlingit Council Final Agreement (effective date 1995)</u>	1993
<u>Teslin Tlingit Council Self-Government Agreement (effective date 1995)</u>	1993
<u>Nacho Nyak Dun First Nation Self-Government Agreement (effective date 1995)</u>	1993

AGREEMENTS-IN-PRINCIPLE

<u>Lheidli T'enneh Agreement-in-Principle</u>	2003
<u>Draft Maa-Nulth First Nations Agreement-in-Principle</u>	2003
<u>Snuneymuxw Treaty Negotiations Draft Agreement-In-Principle</u>	2003
<u>Snuneymuxw Governance Agreement-In-Principle</u>	2003
<u>Gwich'in and Inuvialuit Self-Government Agreement-in-Principle for The Beaufort-Delta Region</u>	2003
<u>Meadow Lake First Nations Comprehensive Agreement-In-Principle</u>	2001
<u>Meadow Lake First Nations Tripartite Agreement-In-Principle</u>	2001
<u>Sioux Valley Dakota Nation Comprehensive Agreement-In-Principle</u>	2001
<u>Sioux Valley Dakota Nation Tripartite Agreement-In-Principle</u>	2001
<u>Dogrib Agreement-In-Principle</u>	2000
<u>Anishnaabe Government Agreement-In-Principle</u>	1998

FRAMEWORK AGREEMENTS

<u>Joint Presentation – Renewed Relationship between the Mohawks of Kahnawake and the Government of Canada</u>	
<u>Draft Sub-Agreement with respect to education, Mohawk language and culture</u>	17 Jan 2001
<u>Draft Sub-Agreement with respect to policing aspects of the administration of justice</u>	17 Jan 2001
<u>Draft Sub-Agreement with respect to Membership</u>	17 Jan 2001
<u>Draft Sub-Agreement with respect to Kahnawake lands</u>	17 Jan 2001
<u>Draft Umbrella Agreement with respect to Canada/Kahnawake Intergovernmental Relations Act</u>	17 Jan 2001
<u>Micmac Nation of Gespeg Self-Government Negotiation Framework Agreement</u>	1999
<u>Anishinabek Nation Framework Agreement with Respect to Governance</u>	1998

Source: http://www.ainc-inac.gc.ca/pr/agr/index_e.html

Appendix II

Table 3.2 Comprehensive Claims Agreements

SETTLED COMPREHENSIVE CLAIMS

Name	Area Affected	Popl'n Affected	Comments
THE JAMES BAY AND NORTHERN QUÉBEC AGREEMENT (1975)	Over 1,165,286 km ²	12,103 Cree and 8,643 Inuit	This was the first settled comprehensive claim. The final agreement was signed in 1975, and came into effect in 1977.
THE NORTHEASTERN QUÉBEC AGREEMENT (1978)	Same as the Cree claimed in the James Bay and Northern Québec Agreement (JBNQA)	660 Naskapi	This agreement was signed in 1978 and amended the James Bay and Northern Québec Agreement to integrate the Naskapi.
THE INUVIALUIT FINAL AGREEMENT (1984)	435,000 km ²	2,500 Inuvialuit	The Inuvialuit claim was accepted for negotiation on May 13, 1976, and the final agreement, signed in June 1984, was effective July 1984.
THE GWICH'IN AGREEMENT (1992);	57,000 km ²	Approximately 2,300	First Dene and Metis group to negotiate a regional comprehensive claim. Their final agreement was signed on April 22, 1992, and came into effect in December 1992.
THE NUNAVUT LAND CLAIMS AGREEMENT (1993);	1.9 million km ²	19,000 Inuit	Largest comprehensive claim settlement in Canada
THE SAHTU DENE AND METIS AGREEMENT (1994);	280,278 km ²	Approximately 2,400	Second Dene and Metis group to seek a regional comprehensive land claim. Their final agreement was signed on September 6, 1993 and came into effect on June 23, 1994
THE NISGA'A AGREEMENT (2000);	2,000 km ²	Approximately 6,000	Please see detailed discussion in part one
<p><i>EIGHT YUKON FIRST NATION (YFN) FINAL AGREEMENTS</i> based on the Council for Yukon Indians <i>UMBRELLA FINAL AGREEMENT (1993)</i> (UFA) and corresponding <i>Self-Government Agreements</i> for:</p> <ul style="list-style-type: none"> • THE VUNTUT GWICH'IN FIRST NATION (1995); • THE FIRST NATION OF NACHO NYAK DUN (1995); • THE TESLIN TLINGIT COUNCIL (1995); • THE CHAMPAGNE AND AISHIHIK FIRST NATIONS (1995); • THE LITTLE SALMON/CARMACKS FIRST NATION (1997); • THE SELKIRK FIRST NATION (1997); • THE TR'ONDĚK HWĚCH'IN FIRST NATION (1998); AND, • THE TA'AN KWACH'AN COUNCIL (2002). 	Whole of Yukon Territory	Approximately 8,000 Indians	The UFA establishes the basis for the negotiation of individual settlements with each of the 14 YFNs. It also provides for the negotiation of self-government agreements with YFNs

Source: <http://www.ainc-inac.gc.ca/ps/clm/brief/e.html>

Appendix III

Table 3.3 Ongoing Comprehensive Claims Negotiations

ONGOING COMPREHENSIVE CLAIMS NEGOTIATIONS

Name	Area Affected	Popl'n Affected	Comments
DOGRIB TREATY 11 CLAIM (N.W.T.)	210,000 km ²	3,000	Accepted during the fall 1992
TREATY 8 DENE (N.W.T.)			No further information available during time of writing
ATIKAMEKW AND MONTAGNAIS CLAIMS (QUEBEC)	700,000 km ²	19,528	Accepted in 1979
MAKIVIK CLAIM - OFFSHORE (NUNAVUT) AND LABRADOR (ONSHORE AND OFFSHORE)	Offshore area along the coast of Northern Quebec and Labrador, and inland northeast Labrador.	10,000	The Nunavut portion was accepted in 1992 and the Labrador portion in 1993
CREES OF QUEBEC OFFSHORE ISLANDS CLAIM (NUNAVUT)	To be determined	11,428	Currently under review at time of writing
ALGONQUINS OF EASTERN ONTARIO LAND CLAIM (ONTARIO)	34,000 km ²	Approximately 3,500	Accepted in 1992 although Ontario negotiations began in 1991
LABRADOR INUIT ASSOCIATION (LIA) CLAIM (NFLD. AND LABRADOR)	Coast line, interior, and offshore of northern Labrador	5,000 Inuit and Native settlers	Accepted in 1978
INNU NATION CLAIM (NFLD. AND LABRADOR)	Central Labrador and Quebec lower north shore	2,000 (700 Naskapi, 1,300 Montagnais)	Accepted in 1978. Self-government negotiations were initiated between the Innu Nation, Canada and Newfoundland in May 1996. These negotiations were undertaken in tandem with the comprehensive land claim negotiations which had begun in 1991. An accelerated negotiation process allowed for the ratification of an Innu Government Framework Agreement on February 11, 1997. Canada, however, advised the Innu on May 1, 2001, that their self-government negotiations would be suspended in order for them to focus on the outstanding land claim issues and the registration of the Innu under the Indian Act. The Innu registration and reserve creation process is expected to be completed by summer 2003.
53 BRITISH COLUMBIA FIRST NATIONS TREATY NEGOTIATIONS (COMPRISING OF 124 INDIAN BANDS)	Various locations within British Columbia	70% of BC's Aboriginal popl'n	Of these, five are in early stages of negotiations, five are negotiating a framework agreement, and 43 are negotiating an AIP. To date, 45 First Nations have signed framework agreements. One table, the Sechelt Indian Band, is in final agreement negotiations
NORTHWEST TERRITORY MÉTIS NATION (N.W.T.) REGIONAL CLAIMS	5 Regions in the Mackenzie Valley		On November 7, 1990, Canada announced that it would be willing to negotiate regional claims with the Dene and Métis of the five regions in the Mackenzie Valley on the basis of the April 9, 1990 Dene/Métis Final Agreement which was initialled but not accepted by the Dene/Métis leadership. Discussions with the South Slave Métis Tribal Council have been expanded to include self-government.
THE MANITOBA DENESULINE NEGOTIATIONS NORTH OF 60° (MANITOBA)	Lands and harvesting rights North of 60°, (lands included in the Nunavut Settlement Area)	1543	Accepted in 1999. In December, 2002, Canada and the Manitoba Denesuline began ongoing discussions on a draft agreement with respect to harvesting rights in the NWT.
THE SASKATCHEWAN ATHABASCA DENESULINE NEGOTIATIONS NORTH OF 60° (SASKATCHEWAN)	Harvesting Rights North of 60°	4386	Accepted in 2000. In December, 2002, Canada, GNWT and the Saskatchewan Athabasca Denesuline began ongoing discussions on a draft agreement with respect to harvesting rights in the

DEH CHO FIRST NATIONS (N.W.T.)	Southwestern region of the Northwest Territories		NWT. Tripartite negotiations between the Deh Cho First Nation (DCFN), Canada, and the Government of the Northwest Territories (GNWT). The objective of the process is aimed at resolving outstanding land, resource, and governance issues in the Deh Cho territory. Negotiations on the interim resource development agreement and the interim land withdrawals are now complete and the parties hope to sign these agreements in the Spring of 2003. It is anticipated that the parties will reach an agreement-in-principle within 5 years.
LONG-TERM RESPONSE TO THE MARSHALL DECISION OVERVIEW OF INDIAN AND NORTHERN AFFAIRS STRATEGY - Mi'kmaq - Nova Scotia - Canada Umbrella Agreement			Signed 7Jun2002, confirming the parties' commitment to the long-term negotiations process. The Mi'kmaq are expected to appoint a chief negotiator in the near future so that framework agreement negotiations may commence early in 2003.
LONG-TERM RESPONSE TO THE MARSHALL DECISION OVERVIEW OF INDIAN AND NORTHERN AFFAIRS STRATEGY - Other affected provinces	New Brunswick, Prince Edward Island, Gaspé region of Québec		All at various stages of development

CLAIMS AWAITING A DECISION RE: ACCEPTANCE OR REJECTION

Name	Area Affected	Popl'n Affected	Comments
QUEBEC ALGONQUIN CLAIM (QUEBEC)	Ottawa River watershed		Submitted in 1989. However, the Algonquins are not currently engaged in comprehensive land claim negotiations. The six member communities (Kipawa, Kitchisakik, Kitigan Zibi, Pikogan, Lac Simon and Winneway) of the Algonquin Anishinabeg Nation Tribal Council (AANTC) confirmed that they were ready to begin the scooping out process in December 2000, and the process was initiated in February 2001. Kitigan Zibi Anishinabeg later withdrew from the AANTC process and completed its own scooping out process. The three member communities of the Algonquin Nation Secretariat (Wolf Lake, Timiskaming and Kitikanik) were not ready at that time for formal participation in this process but were invited as observers. In 2003, the Algonquin Nation Secretariat indicated that they could be in a position to consider the potential of negotiation in 2004. The scooping out process has been completed and, as a result, in October 2002 two communities (Lac Simon and Kitigan Zibi) formally requested a beginning of the negotiation. All the Algonquin communities will now be asked if existing research can demonstrate that overlapping territories and beneficiaries between them are not issues that would effect the successful negotiation of agreements with the two communities who have requested it.
LABRADOR METIS NATION (LMN) (NFLD. AND LABRADOR)	All Southern Labrador		Submitted in Nov 1991. It is the preliminary federal position that the LMN claim cannot be accepted for negotiation under the Comprehensive Land Claims Policy. Additional historical research is required in order to continue.
NASKAPI OF QUEBEC (SCHEFFERVILLE) COMPREHENSIVE LAND CLAIM (NFLD. AND LABRADOR)	Large section of Labrador		Submitted in Aug 1995. Additional information has been requested from the Naskapi.
MIAWPUKEK MI'KAMAWAY MAWI'OMI (CONNE RIVER MIKMAQ BAND OF NEWFOUNDLAND) (NFLD. AND LABRADOR)	South-central Newfoundland		Submitted in Sep 1996. Further information has been requested to document current use and occupancy

Source: http://www.ainc-inac.gc.ca/ps/clm/brief_e.html

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