BUREAU DE COORDINATION DES ÉTUDES
Fiche d'identification de la mise à jour

COMMISSION : Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté.

ÉTUDE ORIGINALE

Référence : Volume 1, pages 307 à 345

Auteur : Bradford Morse

Titre : Comparative Assessment of Indigenous Peoples in Quebec, Canada and Abroad

MISE À JOUR

Auteur : Bradford Morse

Titre : Comparative Assessment of the position of Indigenous Peoples in Quebec, Canada and Abroad

2001-12-19

COMPARATIVE ASSESSMENTS OF THE POSITION OF INDIGENOUS PEOPLES IN QUEBEC, CANADA AND ABROAD

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February 2002

Executive Summary

The original study was written in early 1992 at the request of the Committee to Examine Matters Relating to the Accession of Québec to Sovereignty at a time of major constitutional and social debate and controversy. The proposed constitutional amendments better known as the Meech Lake Accord had expired on June 23, 1990, the Oka-Kanesatake crisis was still fresh in peoples minds, the Spicer Commission had reported, the Beaudoin-Edwards Joint Parliamentary Committee had released its report on the amending process, a number of other provincial legislative committees had released reports, the Beaudoin-Dobbie Joint Parliamentary Committee was holding hearings, the Federal government had released a number of research reports and tentative constitutional proposals, and the prospects of a new round of constitutional talks was definitely in the air. The Royal Commission on Aboriginal Peoples had also been launched by Prime Minister Mulroney on August 26, 1991.

My original report was intended to provide a general overview of the position of Indian, Inuit and Metis peoples in Québec in comparison with the standing of indigenous peoples elsewhere in Canada and selected foreign countries. The first part of the paper described the Aboriginal situation in the USA, Australia, New Zealand, Greenland and Scandinavia. The next major portion considered similar issues, however, it concentrated upon the situation of the Indian, Inuit and Metis peoples within Québec and contrasting their experience to that found in the other provinces and territories within Canada. The final section of the essay contained brief concluding comments and overarching assessments.

In this new edition I provide an overview of relevant issues in each of the countries or regions that were examined in the original report [that is, the USA, the Nordic countries, Greenland, Australia, New Zealand and Canada] relying upon the most recent information available. Each section commences with a summary of demographic information to give an overall context of the indigenous population in that country. The indigenous affairs policy within that territory then follows along with whatever fiscal information is available. This national review then proceeds to describe the legal framework, land rights and other important issues with each region or country.

After offering an abbreviated assessment of the position of indigenous peoples among the jurisdictions under consideration, the essay proceeds to examine the situation in which the Aboriginal peoples residing within Québec find themselves and compares this to the experience that exists in the rest of Canada. The final portion of the paper contains brief concluding remarks.

COMPARATIVE ASSESSMENTS OF THE POSITION OF INDIGENOUS PEOPLES IN QUEBEC, CANADA AND ABROAD

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Introduction

The original study was prepared in late 1991 to early 1992 and was written within the context of a number of critical factors. It was prepared at the request of the Committee to Examine Matters Relating to the Accession of Québec to Sovereignty at a time of major constitutional and social debate and controversy. The proposed constitutional amendments contained within the Meech Lake Accord[1] had expired on June 23, 1990, having failed to meet the three year deadline established by subsection 39(2) of the *Constitution Act, 1982* as the amendment package had not been authorized by resolutions of all ten provinces and the Parliament of Canada as required by section 41 for several of the specific changes contained in the Accord.

The deep emotional dispute over the planned use of a Mohawk cemetery as part of an expansion to a local golf course by the municipal government of Oka led initially to peaceful road blocks in the Spring of 1990 but exploded into violence in July between the Surete du Québec and members of the Mohawk community in Kanesatake culminating in the intervention of the Canadian Army and a standoff that subsisted for a further two months.[2] Criminal charges were subsequently laid and tensions simmered for years afterwards that have not yet fully dissipated.

[1] For a detailed discussion of the contents of the Meech Lake Accord see, e.g., Ronald L. Watts and Douglas M. Brown (eds.), *Canada: The State of the Federation 1990* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1990); Lorne Ingle, *Meech Lake Reconsidered* (Hull: Voyageur Publishing, 1989); and Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Vancouver: Douglas & McIntyre, 1990); among others.

[2] For further information on the "Oka Crisis" see, for example, Geoffrey York and Loreen Pindera, *People of the Pines: The Warriors and Legacy of Oka* (Toronto: Litle Brown & Company, 1992); House of Commons, Fifth Report of the Sanding Committee on Aboriginal Affairs, *The Summer of 1990* (May 1991).

The Spicer Commission[3] was appointed by the Government of Canada to consult with the Canadian public generally about their vision for the future of Québec and Canada. The establishment of this Commission was then quickly followed by a Special Joint Committee of the Senate and House of Commons (better known as the Beaudoin-Edwards Committee) appointed on December 17, 1990 to review the existing constitutional amending formula and suggest changes, and it reported in June of 1991.[4] A further Special Joint Committee of the Senate and House of Commons (better known as the Beaudoin-Dobbie Committee)[5] was immediately created after the prior one had reported with the mandate to inquire into and make recommendations upon the latest proposals for constitutional change that the federal government was planning to distribute after the Committee was appointed.[6] A number of other special committees and task forces were struck in 1991 by a range of provincial legislatures across the country to discuss the desire by some for constitutional change and to consider what positions to adopt regarding specific principles that might arise to guide possible reform.[7]

Prime Minister Brian Mulroney appointed the seven member Royal Commission on Aboriginal Peoples on August 26, 1991 to undertake the most exhaustive review in Canadian history on the position of Aboriginal peoples within Canada with a sweeping mandate including 16 broad themes.[8] The Government of Canada also released a series of discussion papers and launched a national campaign to discuss its proposals for a comprehensive overhaul to the Constitution in the Fall aided by a series of invitation-only 'public' conferences across the country convened by regional research institutes in

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[3] Citizen's Forum on Canada's Future, *Report to the People and Government of Canada* (Ottawa: Supply and Services, 1991).

[4] Canada, Special Joint Committee of the Senate and House of Commons, *The Process for Amending the Constitution of Canada*, (June 20, 1991).

[5] Canada, Special Joint Committee of the Senate and House of Commons, *Report of the Special Joint Committee on a Renewed Canada*, (February 28, 1992).

[6] Canada, Shaping Canada's Future Together (Ottawa: Supply and Services Canada, 1991). This proposal was accompanied by a number of research and background papers on a variety of related topics including one entitled, *Aboriginal Peoples, Self-Government, and Constitutional Re*form (Ottawa: Supply and Services Canada, 1991).

[7] See, for example, *Report of the Manitoba Constitutional Task Force* (October 28, 1991); *Report of the New Brunswick Commission on Canadian Federalism* (January 1992); *Final Report of the Select Committee on Ontario in Confederation* (February 5, 1992); and *Alberta in a New Canada: Visions of Unity – Report of the Alberta Select Committee on Constitutional Reform* (March 1992).

January and February 1992.[9] Another round of constitutional negotiations was then initiated under the leadership of the then federal Minister Responsible for Constitutional Renewal, the Rt. Hon. Joe Clark, with provincial, territorial and Aboriginal leaders in March of 1992. The Government of Québec did not participate formally in these negotiations, later called the Canada Round, until the very end. The agreement reached among First Ministers and Aboriginal leaders in August, called the Charlottetown Accord after the city in which it was finalized, was subsequently rejected in a national referendum on the 26th of October.[10]

The Province of Québec was, of course, not a bystander in the aftermath of the collapse of the Meech Lake constitutional amendments. The National Assembly enacted the *Act to establish the Commission on the Political and Constitutional Future of Québec* in 1990 that authorized the Belanger-Campeau Commission, which reported the following year after holding extensive hearings within Québec. The National Assembly then enacted the *Act respecting the process for determining the political and constitutional future of* on June 21, 1991.[11] This latter statute provided the foundation for the Committee to Examine Matters Relating to the Accession of Québec to Sovereignty for which the original paper was prepared.[12] I appeared before the Committee on March 26, 1992 and my submission, "Comparative Assessments of Indigenous Peoples in Québec, Canada and Abroad," was quoted by the Committee on several occasions in the section of its report addressing Aboriginal nations.[13]

Part 1 - The Original Report

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[8] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, 5 vols. (Ottawa: Canada Communication Group, 1996).
[9] Canada, *Renewal of Canada Conferences – Compendium of Reports* (Ottawa: Privy Council Office, 1992).
[10] For further information on the contents of the proposed amendments and the referendum campaign see, Kenneth McRoberts and Patrick Monahan, eds., *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993).
[11] S.Q. 1991, c. 34, as later amended by *An Act to amend the Act respecting the process for determining the political and constitutional future of Quebec*, S.Q. 1992, c, 47 to enable the Government of Quebec to hold a referendum on the Charlottetown Accord.
[12] National Assembly, *Draft Report of the Committee to Examine Matters Relating to the Accession of Quebec to Sovereignty* (September 16, 1992).

A. Overview

The paper written a decade ago was intended to provide a general overview of the position of Indian, Inuit and Metis peoples in Québec in comparison with the standing of indigenous peoples elsewhere in Canada and selected foreign countries. The specific purpose of that 37 page essay was to summarize a large body of material and to highlight salient points for the information and guidance of the members of the Assemblée nationale and its two commissions on the future of Québec. It was prepared in accordance with a limited timeframe and brief instructions in the hope that, even though it was a relatively short review, it would be of some assistance to the members of the Committee in their deliberations.

The paper was divided into two major parts. The first half of the submission described the Aboriginal situation in the USA, Australia, New Zealand, Greenland and Scandinavia. Common elements examined included socio-economic and demographic descriptions of the indigenous populations, the fiscal expenditures by the national governments, the internal governmental responsibilities and structures in relation to indigenous peoples within these countries, the domestic jurisprudence and legislation concerning aboriginal land and treaty rights, the levels of Aboriginal autonomy that were officially recognized and other unique legal features. The situation in Canada on the same topics was then summarized and compared to the indigenous reality found in the other western countries surveyed. A very superficial and succinct comparative analysis was then provided.

The next major portion of the paper considered similar issues, however, it concentrated upon the perspective of describing the situation of the Indian, Inuit and Metis peoples within Québec and contrasting their experience to that found in the other provinces and territories within Canada. The final section of the essay contained brief concluding comments and overarching assessments.

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[13] *Ibid*., pp. 27-28.

B. The International Setting

United States

At just under 2 million the indigenous population in the U.S. was under 1% of the total population in 1990. This population is in the form of recognized and non-recognized tribes and individuals that reside both on and off reservations. Native Americans in the U.S. experience the all too common and severe socio-economic problems faced the world over by indigenous populations. Low income and poor education, inadequate housing, low life expectancy, higher infant mortality rates and high unemployment are just some of the problems faced everyday by American Indians. The Bureau of Indian Affairs (BIA) has promoted the development of tribal colleges in recent decades, which have helped, but high school dropout rates are still extremely high.

Total federal expenditures in 1991 through the BIA were unclear but they exceeded $600 million US and were supplemented by additional expenditures for health and education programs through various federal departments and agencies as well as some state and local grants. The federal government's response to the position of Indian people, which is administered primarily through the BIA, focuses on Indian tribes and, to a lesser degree, Alaskan Natives and Native Hawaiians, with support for Metis or others coming from a hodgepodge of state grants, if at all.

The few references to Indians in the U.S. Constitution have not afforded protection for aboriginal or treaty rights but it has been enough initially for the Courts to confer jurisdiction over Indians to Congress. Case law, however, has been largely positive towards aboriginal and treaty rights, confirming aboriginal title and protecting the legal significance of treaties as well as the liberal reading they should be given. Case law has also raised the "domestic dependant nation" theory whereby Indian tribes are recognized as retaining the original sovereign status they held prior to contact but restricted to the domestic sphere, thereby losing control over all matters affecting foreign affairs. This theory, however, has been coupled with a "guardian-ward" characterization of the federal-tribal relationship, which was later adapted to include the "plenary power

doctrine" through which the exclusive jurisdiction of Congress was judicially declared to include the right to intrude on residual Indian sovereignty at will. This intrusion must be explicit, however, and absent any express legislative provision an Indian tribe will maintain a high degree of authority over civil, taxation and resource royalty matters. Indian tribes also maintain control over many criminal matters, although this has been limited by federal statute so as to exclude certain enumerated offences and various rulings of the U.S. Supreme Court that restrict tribal criminal law to Indian offenders. He vast majority of tribes have established their own justice systems with tribal courts serving as significant entities handling over 400,000 cases heard in a year.

Finally, control over natural resources by U.S. Indian tribes within their territories is fairly broad, with some reservations having major holdings of petroleum, uranium and other valuable resources. The U.S. government holds all reservation lands as trustee for the individual tribes, which includes all surface and subsurface rights. While in the past almost all land use agreements negotiated by the U.S. government did not meet their trustee duties as they negotiated long term leases at low rents, the recent Indian Mineral Development Act of 1982 has tried to foster more equitable leases by the government. In addition, developments in trust law have seen an increase in tribal say.

Scandinavia

The Sami people are small minorities within Russia, Sweden, Norway and Finland. Their socio-economic position is worse then the general population but is not as bad as other global examples. As of 1991, Sami Parliaments had been created in both Norway and Finland to formally consult and advise the regular Parliaments. In Sweden the system was far more circumscribed with the only structure at that time being a departmental work group, although a Sami Rights Commission had been appointed in 1982 to investigate expanding Sami rights. Legal rights were largely confined in all three countries to equal linguistic access to services, although in Sweden and Norway there were some secondary land and water rights for reindeer farming, a traditional Sami practice. The judiciary had provided precious little in the way of recognized legal rights

for the Sami although some case law had suggested that ownership could derive from customary use. The general lack of success in the courts as well as a dearth of legislation had left the nature of natural resource rights uncertain a decade ago.

Greenland

Unlike the other countries described, the indigenous population remained the majority in Greenland. While formally still a colony of Denmark, the Inuit, through a governance system called "Home Rule," control most significant areas of domestic policy. Traditional economies still existed in 1991 but had been weakened significantly by the effectiveness of the anti-fur movement and were incapable of supporting the entire population. Denmark had continued to subsidize the colony through transfer payments and internal economic measures. Inuktitut is the official and main language with Danish being the main bureaucratic language. Since the Inuit were and still are the majority in Greenland, the standard models of looking at the legal situation of indigenous peoples as original inhabitants who had become minorities through immigration did not apply as the indigenous population controlled their land through traditional use as well as by exercising effective control over public government.

New Zealand

The Maori formed approximately 15% of the total population at the time of the original study and like the other countries were significantly disadvantaged in socio-economic areas. A growing number of programs and educational initiatives, however, had helped significantly, especially in the promotion of the Maori language. Health policy had only recently started to adapt and initiatives by the Labour government to devolve control to the Iwi (tribe) level had been clawed back by the then new National Party government. A wholesale change in orientation toward a system of "mainstreaming" was predicted by me as undermining the potential for political progress by Maori Iwi and likely limiting them in accessing expenditures from governmental departments.

The legal position of the Maori and the Crown in New Zealand is grounded in the Treaty of Waitangi of 1840. Although there has been continuing disagreement over the level of internal sovereignty addressed by the terms of the Treaty (particularly due to the differences between the Maori and English language versions of the Treaty, each of which is authoritative), both sides have generally agreed in recent decades that it contains some recognition of traditional land and economic rights. Hundreds of treaty violations had been alleged over the years and government response had been very slow in coming. It had only been with the passage of the Treaty of Waitangi Act of 1975 and the creation of the Waitangi Tribunal that implementation had begun to be taken seriously. The Tribunal created by this Act investigates all complaints filed, holds hearings and renders reports with recommendations. The Tribunal had become very active in the 1980s and had developed a very positive reputation. Principles had been developed in New Zealand to guide government policy objectives with the bilingual policies modeled largely off of the Canadian experience of official bilingualism.

Australia

The Aboriginal and Torres Strait Islander population in Australia a decade ago were extremely poor and disadvantaged with tragic socio-economic problems. Recent policy initiatives had slowly started to address these problems, however, the position was very bleak for most of the indigenous peoples. At least one advantage that existed in Australia was that they had moved away from a system of legally describing Aborigines through the use of 'blood quantum' definitions as had been retained in some countries such as Canada. Federal health and education initiatives had been created in the 1970s and 1980s to respond to health, education and language needs while the extraordinarily high unemployment rate had been targeted by federal and state programs. The provision of legal services specifically to the Aboriginal and Torres Strait Islander population were well designed and well funded, although for the most part they had launched few test cases directed toward expanding the recognition of the legal rights of the indigenous population. Despite those recent initiatives, however, Australia was still battling with the aftermath of the extremely racist approach to the Aboriginal peoples that had prevailed

through much of its history since contact in 1788. The Constitution had only addressed Aborigines in a negative sense and the courts had ignored the aboriginal title doctrine based on occupancy (although this has now completely changed). Despite these problems public support for action had been high and legislation such as the Land Rights (Northern Territory) Act of 1976 had helped convey land and rights to land to traditional owners in some regions. In addition, sacred sites legislation had been well received and promoted as a matter of national importance. These large land transfers, however, were still subject to a shift in governmental policy and offered no redress for past problems. Exact expenditures by government overall were unknown and spread throughout a complex scheme of federal and state grants. Each state has a unique regime and as such programs are not evenly administered.

Natural resource rights were similarly limited to some preferential rights to harvest traditional foods with no subsurface rights, although those Aborigines who had successfully reacquired some of their traditional lands could refuse surface access rights to third parties, unless their decisions were overridden by the government which had provided the settlement lands.

Canada

Aboriginal people represented approximately 4% of the Canadian population ten years ago consisting of three major groups: Indians, Inuit and Metis. The federal government, primarily through its Department of Indian Affairs and Northern Development, exercised significant control over the lives of on-reserve Indians, although Health Canada also played a major role. As with most countries in which indigenous peoples live, the socio-economic situation they faced was severe. Canada, however, did appear to have the highest per capita expenditure on programs targeting the Aboriginal peoples. Most of these expenditures, however, go solely to on-reserve Indians.

The federal government possesses primary jurisdiction through s.91(24) regarding "Indians, and Lands reserved for the Indians". The Supreme Court of Canada has declared that "Indians" in s. 91(24) includes the Inuit, however, whether or not the Metis

also fall within this head of power had not been addressed at that time. Federal jurisdiction and its impact upon provincial authority had been modified by s.35 of the *Constitution Act, 1982*. A number of court cases up to 1992 had also given a level of primacy to aboriginal or treaty rights when in conflict with federal and provincial legislation. Developments in the area of fiduciary obligations of the Crown during the 1980s had also expanded the unique legal status and rights of First Nations. While the hundreds of treaties signed over the centuries in Canada had been given some constitutional protection through section 35, the status of the Metis in the whole scheme was still very uncertain despite their express inclusion in s. 35(2).

The area of natural resources in relation to Aboriginal peoples in Canada was and remains extremely complex. Due to the specific terms contained in each treaty, the different approaches taken by provincial governments across Canada and the negotiation of modern land claim agreements, it was difficult to generalize in this area. Indeed, the best approach was to examine the position of each First Nation and Inuit and Metis community in isolation, although even this yielded no generalized conclusion. Canadian courts had not been clear as to the extent of aboriginal title and whether or not it was even included within the scope of s. 35(1), which had further clouded the situation. As of 1992, the courts had suggested that the aboriginal rights and aboriginal title would only extend to those specific rights exercised traditionally, prior to contact. This narrow approach had received a great deal of criticism and was of dubious validity.

Canada's record was mixed a decade ago in comparison to the other countries discussed. On a general scale, Canada's treatment of Aboriginal peoples and their rights could seem enlightened when compared to Australia or Scandinavia but considerably less so then New Zealand or the United States. This would have been a somewhat crude conclusion, however, as each country did some endeavours better than the others. Constitutional protection in Canada was and is unique among the countries considered [although several Latin American countries have also adopted this approach] and overall expenditures were the highest. Canada, however, had lagged behind the Americans in recognizing the internal sovereignty of First Nations despite the extensive debate surrounding potential

constitutional amendments regarding Aboriginal self-government that had occurred through the first Ministers' Conference process from 1982-87. Canada and its judiciary appeared to be awaiting a constitutional amendment before proceeding down the path of addressing self-government issues. Land claims negotiations for Indian and Inuit peoples in the 1970s and 1980s were offering settlements that were reasonably good and far more comprehensive than those under discussion in the other nations considered. The general exclusion of the Metis and the position of non-status Indians in Canada, however, was a major source of concern and led to a policy vacuum. The *Indian Act* and the use of a de facto 'blood quantum' nature to establish entitlement in terms acceptable to federal and provincial governments had received extensive and warranted criticism. On the subject of natural resources, the U.S. had provided the highest degree of recognition for aboriginal interests and tribal influence within exclusively held Indian lands while at the same time pursuing more extensive initiatives in promoting fiscal independence. Canada, though, appeared to be achieving the best success, in relative terms, in addressing improved health and educational policies, albeit with less devolution of power than in the U.S.A.

C. Québec vis-à-vis other Provinces

Québec had a much higher percentage of the Indian population living on reserve in 1991 than other provinces but in the previous 15 years a significant number had moved off-reserve in a pattern that had occurred all across the country. This had moved a growing number of status Indians into areas of primarily provincial jurisdiction, such as in matters concerning health and education. The registered Indian population in Québec was the 6th largest Indian population in Canada. They possessed the lowest social distance, in accordance with socio-economic criteria, of any provincial Indian population compared to the general non-Aboriginal population. The amount of land recognized as exclusively confirmed to Aboriginal users was the largest in any province as well, with most set aside pursuant to the James Bay and Northern Quebec Agreement as well as the Northeastern Quebec Agreement.

Aboriginal languages in Québec, as in the rest of Canada, were under severe pressure and most risked disappearance in the next generation. The importance of language to cultural identity and survival is well documented and efforts in Québec to maintain linguistic heritage were better than in other regions of Canada, with the exception of the Northwest Territories. The James Bay and Northern Quebec Agreement, which had provided for more adaptive educational systems though Cree and Inuit control was enabling this development. Positive political and financial support from the Québec Department of Education had helped significantly in this regard. The Charter of the French Language (Bill 101), while exempting reserves from its application, had fostered some objections from the off-reserve Indian population whose languages were not equally protected and fears among certain First Nations who thought that their exemption might disappear in the future.

The Government of Québec had been most supportive of educational initiatives with the James Bay and Northern Quebec Agreement being a major reason for the greater provincial financial allocations devoted to the Cree and Inuit populations. While not a leader in health initiatives, the government of Québec had been far above average in providing services directly through autonomous Aboriginal organizations. A prime example was the Kahnawake hospital, which was operated by the Mohawk community while receiving public funds.

Québec had also been in the vanguard in promoting economic development through special grant programs and through its commitments under the two comprehensive land claim agreements that had been settled. Income support programs for traditional forms of wildlife-based economic activities under the James Bay and Northern Quebec Agreement had helped their survival in the face of dramatically declining fur pelt values.

The Province of Québec had the first provincial government to recognize the continued existence of aboriginal title and the necessity for negotiating new treaties or land claim settlements. Although this recognition was somewhat tempered by the fact that it had been stimulated by the issuance of an interim injunction by the Québec Superior Court,

nonetheless the province had acted quickly and sustained its willingness to negotiate even when the injunction was rescinded on appeal. Both Agreements that had emanated from this recognition represented a fundamental shift in prior policy, both in Québec and in Canada. The willingness to negotiate agreements was in marked contrast to the position of the province of British Columbia, which had pursued a course of endless litigation and refusal to negotiate aboriginal title claims until 1990. While not universally applied across the province, Québec had adopted an overall position that was more favourable to Aboriginal peoples than existed in the other provinces.

The Government of Québec had further been the provincial leader on the matter of self-government. The James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement both had provided for a greater degree of control to the Aboriginal signatories over their lives and affairs within their communities than existed anywhere else in Canada at that time. Provincial legislation had complemented the two claims settlements by providing for significant delegated powers to regional Cree and Inuit bodies. Provincial action had also helped the Cree to prod the federal government to honour its commitment under both agreements to enact special local governance legislation [the *Cree-Naskapi (of Quebec) Act* in 1984] as a substitution for the *Indian Act*. While the federal and provincial statutes were a far cry from true self-government, they still represented a noteworthy advance from the prior situation. Only the Sechelt First Nation of B.C. had obtained broader powers of local government in Canada and this was largely through federal, not provincial, legislation. The Assemblee nationale had also acted positively in this area by passing a very important resolution recognizing the sovereignty of the original Aboriginal nations in the province, although this excluded the Metis. The resolution of 1985 demonstrated a great deal of respect and support for the goals of Aboriginal groups, which had not been mirrored elsewhere in the country. The government of Ontario had signed a number of political statements and agreements with First Nation groups but these were accords with the government of the day and do not carry the same significance as general resolutions of the legislature. The Statement of Political Relationship from 1991 in Ontario, however, did declare respect for and

recognition of the inherent right to self-government for First Nations, something the Assemblee's resolution did not.

For the most part, Metis and off-reserve Indian groups, represented politically by the Native Alliance of Québec, had been excluded from all land claims negotiations in the province. These two groups of people faced a similar fate in other provinces. The only exception to this has been in Alberta where the government had established eight Metis settlements in the 1930s in a fashion similar to Indian reserves and later negotiated a local government arrangement for the remaining six settlements.

Conclusions

The policies of Quebec vis-à-vis Indian, Inuit and Metis peoples had been subject to a great deal of scrutiny and controversy. Much of this can be attributed to a number of controversial incidents within Quebec, and particularly the hydroelectric developments in the north and the Oka crisis of 1990. This had painted as a province actively seeking to undercut the interests of the Aboriginal population. The possibility of separation from Canada in the face of active and adamant opposition by First Nations had only compounded the image of conflict.

In comparison with other countries a decade ago, Canada had been relatively superior in most areas critical to the future of Indian and Inuit populations. Within Canada, despite the perception to the contrary, the same could be said about Quebec. While both records had been far from exemplary, recent movements away from disastrous policies of colonization and assimilation had led to significant progress in socio-economic areas. Constitutional and legislative change had provided for this progress as had changes in public perceptions about the demands by Aboriginal peoples for a relationship built on mutual understanding and respect.

I concluded at that time that governments in Canada should not be quick to congratulate themselves. In many cases they had been merely doing what the courts had been

directing them to do, and doing that quite slowly. The relatively progressive nature of Canada and Quebec in contrast to most other nations was also largely due to the terrible track record of so many others to which we seek to compare ourselves. In the end far too many Indian, Inuit and Metis peoples in Canada suffered from extreme poverty and despair. At that time I called for more innovative policy initiatives to be undertaken in order to insure that our collective future would be just for all.

Part 2 - Ten Years On

A. Canada vis-B-vis Selected Countries

In this part, I will attempt to provide an overview of relevant issues in each of the countries or regions that were examined in the original report completed in early 1992. Each section will begin with a summary of demographic information such that the overall context of the indigenous population in that country can be appreciated. The indigenous affairs policy within that nation then follows along with fiscal information where available. This national review then proceeds to describe the legal framework, land rights and other important issues with each region or country.

United States

In 2000, there was an estimated indigenous population of 2,402,000 people in the 50 states consisting of American Indians, Eskimos (Inuit) and Aleuts. Native Hawaiians, although clearly constituting indigenous peoples, have generally been recorded by the U.S. Census Bureau within a category that also encompasses Asians and all other Pacific Islanders. The Native Hawaiian population likely consists of over 300,000 people with approximately one third of this number residing out of state. Only a very small portion of this population, estimated by some as under 10,000, have no mixed ancestry. Combining these figures suggests that the total number of indigenous peoples represents only 0.98% of the total American population. The Bureau of Indian Affairs (BIA), which is the lead federal agency with trustee responsibilities, only provides services to 1.4 million American Indians and Alaskan Natives. Therefore, approximately 1 million people who

claim Aboriginal ancestry are not included within the client group served by the BIA and its parent department, the Department of the Interior.

The Indian people belong primarily to 557 federally recognized tribes as well as many other tribes that do not yet possess federal recognition, although some of their tribes have received state sanction. Indian reservations constitute barely 2.5% of the total land mass of the United States. As of 2000, the BIA administers 43,450,267 acres of tribally owned land, 11,000,000 acres of individually owned land and 443,000 acres of federal land held in trust. While many Indians reside upon reservations, a sizeable number live outside of reservations in cities and rural areas. American Indians represent the vast majority of this Aboriginal population. They are in many ways the poorest of the poor in the country with extremely low income and educational levels, inadequate housing, high infant mortality rates, lower life expectancy and high unemployment rates.

The situation regarding education has considerably improved in recent years. The BIA, for the federal government, maintains significant direction and control of all educational programs on reservation through funding allocations, although the jurisdiction rests with the tribes. The BIA funds 185 educational facilities on reservations, 121 of which are operated directly by tribal governments or through educational authorities they have created under tribal law. The BIA also funds 25 tribal colleges across the US, which have become a vital mechanism for progress. Approximately 234,611 Native students attended these and other colleges and universities in 1990 with federal funding. A further 427,501 Native students attend public schools. The BIA also continues to operate a limited number of boarding schools and dormitories for youth from more remote communities to receive elementary and secondary education. Although major progress has been made in increasing performance levels of Indian people, they still face an extraordinarily high secondary school drop out rate.

The federal government also provides health and medical services without charge through the Indian Health Services (IHS) to over 1.5 million Native Alaskans and American Indians within their territories under the *Indian Self-Determination Act*, the

Indian Health Care Improvement Act and the *Public Health Service Act* at a projected cost during fiscal year 2003 of $2,271,055,000. The IHS operates hospitals and clinics on reservations, contracts directly with doctors for the provision of medical services, provides funds to tribes to deliver these services themselves under contract (at a proposed cost of $268,781,000 in 2003), and offers some scholarship aid. In addition, the latest budget identifies in excess of $290 million for the construction, repair and maintenance of medical facilities for HIS recipients.

Housing and economic development assistance is also made available to tribes, Native Alaskan villages and Native Hawaiian authorities from the federal government through several line departments by virtue of express legislation. The BIA and the Department of Housing and Urban Development (HUD), and its Office of Native American Programs, solely provide housing assistance to tribes and individual members for housing on reservation and other Indian lands. Despite significant progress in recent years, the indigenous population in all 50 states remains at or near the bottom of all of the indices of quality of life.

1. Expenditures

The precise magnitude of all federal and state expenditures on the Aboriginal population is unclear. In addition to the financial provided above, the 2003 budget submission of the BIA through the Department of the Interior tabled on February 4, 2002 is seeking $2.2 billion, which represents a net increase of $22.9 million over the current fiscal year or a 1% proposed increase. The entire proposed budget of BIA for school operations in 2003 is $522.8 million and a further $292.7 million for school construction and renovation. The federal Department of Education has proposed to devote an additional $122.3 million in educational funding in 2003 for American Indians and Alaskan Natives. HUD is proposing in the 2003 budget to provide $11 million specifically to Native Hawaiians under block grant and loan guarantee programs along with $647 million to tribes and Alaskan Natives for on reservation housing programs.

Finally, an unknown but substantial amount of federal and some state funds are provided directly to tribes to implement a range of governmental responsibilities, while many states also provide special grants and programs to individual Indians, Native Alaskans and Native Hawaiians. Nevertheless, Aboriginal people outside of reservations receive little federal attention and few specifically culturally appropriate services from state, federal or local governments such that pressing needs go unmet.

2. Governmental Structure

As is apparent from the prior discussion, the Bureau of Indian Affairs is the primary agency of the federal government to carry out its relations with the 558 federally recognized Indian tribes and the Native Alaskans, including federal trust responsibilities regarding reservation lands and tribal resources. The BIA is part of the Department of the Interior whose Secretary is a member of the President's Cabinet. The BIA works with tribal governments to help provide normal government services such as: road construction and maintenance, social services, law enforcement, administration of tribal courts and other judicial services, economic development, education, and support for governmental administration. As a result, the BIA's mandate cover almost the entire range of state and local government services as well as act as the lead in representing the federal government in the implementation of legislation land and water claim settlements. Certain other federal departments, such as HUD, HIS, Department of Agriculture, Department of Education and others also must carry out obligations assigned by statute.

The remainder of the indigenous population is largely ignored. Native Hawaiians are basically excluded from the jurisdiction of the BIA, however, they do benefit from certain federal programs as a result of explicit legislative provisions, such as concerning education and housing. The state legislature established the Office of Hawaiian Affairs in 1979 to provide a focal point for the provision of special state programs and services as well as to administer trust lands regarding Native Hawaiians. It is controlled by a board of trustees, who have been elected since 1980 by those Native Hawaiians who choose to register on a special voters' list for this purpose. As a result of the US Supreme Court

decision in *Rice v. Cayetano* (120 S. Ct. 1044 (2000)), the election rules will have to be overhauled drastically. The Court, by a 5-4 majority, struck down the existing rules as discriminatory against non-Native Hawaiians. Legislation to extend status to Native Hawaiians similar to that held by American Indians (by the Akaka Bill) has received support within Senate and House committees of Congress but has not yet been passed.

The Office of Hawaiian Affairs (OHA) is mandated to promote the improvement of conditions for Native Hawaiians as well as other residents of the state, to serve as the principal public agency for the delivery and coordination of programs for Native Hawaiians (other than concerning housing which is administered by a separate commission), assess government wide policies, distribute grants and donations for Native Hawaiian services, advocate Native Hawaiian rights, and be the recipient of compensation that may be paid for reparations and land claims. The OHA possessed over $400 million in assets as of June 30, 2000, over 90% of which consisted of market investments. This fund was generated initially by a major land claim settlement in 1991 through which the OHA relinquished claims for the loss of 1.4 million acres of land in return for $100 million and $8.5 million annually thereafter. The OHA also received $2.5 million in state grants in the 1999-2000 fiscal year.

The small Métis population and members of Indian tribes that have not received federal recognition are completely ignored by Congress and the federal bureaucracy. There is, however, a detailed and protracted procedure whereby Indian tribes can apply to the Secretary of the Interior under the Code of Federal Regulations for official recognition. This process has been successfully utilized by four tribes over the past decade in acquiring federal recognition. The BIA also largely ignores tribal members who are residing outside of their home reservations.

On the other hand, a number of states also provide certain programs to Indian people who possess minimum levels of Indian ancestry off-reservation or regardless of location (e.g., Michigan provides specialized legal services and tertiary educational support for any person of 1/4 Indian “blood” or more). Some states also enter into formal relations with

those Indian tribes that they recognize. This results in a situation in which some tribes are recognized by the federal government, some by a state, and some by both levels of government with the balance unrecognized and unable to obtain the unique rights recognized at law for Indian tribes or to access programs and funding tailored to meet their special needs.

Many states have also entered into compacts, agreements or protocols with tribes within their borders to share common resources (e.g., regarding water and fish), to improve law enforcement (e.g., cross-deputization of police officers and extending full faith and credit or comity to tribal court decisions), or to enhance administrative arrangements for more effective governmental operations (e.g., sharing prison facilities and developing common tax collection schemes). These agreements have been reached usually as a result of court decisions, or at least threatened litigation, leading the state government to determine that it was in its interest to seek accommodation of mutual objectives through negotiation rather than judicially imposed solutions to jurisdictional confrontations.

3. Legal Status

The US Constitution does not contain any specific provisions establishing or protecting the existence of indigenous nations or their rights. The Constitution in fact only refers to Indian tribes in passing, with the most important clause being the one extending legislative jurisdiction to the Congress regarding interstate commerce and trade (Art. I, s. 8, cl. 3). This was understandable at the time as Indian tribes were independent nations who represented economic importance in regard to trade and a military threat to the fragile new nation (the latter element is particularly evident in the clause that grants an exception to the general rule that only Congress can wage war where a state is actually invaded or becomes aware of an intention by "some nation of Indians to invade such state"). The more general clause declares that Congress has the sole and exclusive right vis-B-vis the states of "regulating the trade and managing all the affairs with the Indians, not members of any of the states: provided, that the legislative power of any state within its own limits be not infringed or violated."

The American courts and Congress quickly built upon the prior British governmental practice and judicial direction in the early years after the Revolution by confirming the existence of aboriginal title. Under the leadership of Chief Justice John Marshall, the United States Supreme Court elaborated the "domestic dependent nation" theory whereby the sovereign status of Indian nations was recognized by the common law, but reduced through the loss of authority to conduct foreign affairs (see, for example, *Cherokee Nation* v. *Georgia*, 30 US (5 Pet.) 1 (1831)). At the same time, he described the continuing relationship of the Indian Nations with federal government as resembling "that of a ward to his guardian."

The minimal constitutional references to Indian Nations were, however, subsequently interpreted by the courts as granting exclusive jurisdiction to the federal government, as opposed to the states, in exercising the sole authority to deal with the Indian tribes. The US Supreme Court later revisited this interpretation to redefine the import of the Indian commerce clause so that it no longer merely gave to Congress and the executive branch the power to negotiate treaties but instead helped to justify the creation of an extra-constitutional plenary power doctrine. This doctrine, emanating solely from the judiciary (see, e.g., *United States v. Kagama*, 118 U.S. 375 (1886)), grants to Congress unlimited power to pass legislation concerning Indian Nations, their property and their affairs. The net effect of this has meant a critical diminution in the residual or inherent sovereignty of the Indian tribe that was retained under the domestic dependent nation doctrine. Congress can, therefore, intrude upon the sovereignty of Indian nations as it wishes, even to the extent of terminating the existence of a tribe, but that in the absence of any federal statute the residual sovereignty remains.

Thus, Indian tribes possess in theory the sovereign authority to establish whatever form of government that they choose without any general obligation to comply with the United States Constitution or its doctrines championing the separation of church and state or the emphasis upon checks and balances through three branches of government. The passage of the *Indian Civil Rights Act* in 1968 has, however, imposed a requirement on tribes and

their legal institutions to adhere to a number of civil liberties and due process rights that are drawn from the American Bill of Rights (which itself does not apply to tribes). Tribal governments are generally free to pass their own laws regulating membership, law enforcement, administration of justice, economic affairs, general welfare, estates, corporations, family matters, torts, tax, and all other non-criminal matters. This civil jurisdiction can apply in reference to all persons and other legal entities operating within the territory of the tribes. Another example of the status of Indian tribes is that they also possess sovereign immunity such that they cannot be sued without an "unequivocally expressed" waiver of this immunity. This latter doctrine also applies in relation to any entity created by the tribe to manage collective assets.

Tribal governments also can enact a broad range of criminal laws other than those concerning 16 major offences, which have been removed from tribal jurisdiction through federal legislation. By virtue of a US Supreme Court decision (*Oliphant* v. *Suquamish Indian Tribe*, 435 US 191 (1978)), tribal governments and their courts have no jurisdiction over non-Indians in the criminal sphere unless expressly so authorized by Congress. The Supreme Court also further restricted the criminal jurisdiction of tribes as applying only to their own members (*Duro* v. *Reina*, 495 US 696 (1990)). Congress quickly overruled that judgement by statutorily restoring tribal jurisdiction over Indians who are not tribal members. A tribe's criminal laws, which may be traditional, western or an amalgam of both, are usually enforced by a separate tribal court system containing Indian judges and court personnel. Tribal courts in the US now handle well in excess of 400,000 cases per annum through more than 350 judges and hundreds more lawyers, prosecutors and other court personnel.

Although there is no explicit constitutional provision recognizing and affirming aboriginal and treaty rights, the American courts have generally been relatively positive over the years in articulating the scope of these rights and being vigilant in their protection. As a result, treaties are considered solemn and binding agreements on the federal government that must be liberally construed from the perspective of how they were understood by the Indian signatories. On the other hand, the exercise of

Congressional authority to terminate the treaty-making authority of the Executive Branch in 1871 by express legislation was upheld. Since that time, new rights and land settlements have emanated from federal legislation or from the federal courts. As the vast majority of Indian tribes possess existing treaties or special legislative guarantees, the importance of aboriginal rights in the United States has lessened. It continues to retain theoretical vitality as the foundation for internal sovereignty and as the source of aboriginal title to many lakes and rivers as well as ensuring rights to water, which is a particularly relevant issue in the western states, while disappearing in practical terms from current discourse.

Treaties, on the other hand, remain of great relevance as they provide paramountcy for rights to harvest game and fish. Specific treaties have been enforced by federal courts in landmark decisions in the 1970s in Washington (by Judge Boldt) and Michigan (by Judge Fox) resulting in a guarantee of 50% of the fishery for Indian tribes for food, ceremonial and commercial purposes, thereby leading to major realignment of the fisheries and enhancing economic revival for the tribes affected. Treaties also frequently confirm the rights to reservation lands for tribes.

4. Special Legislation

Congress has passed a number of statutes in recent years of interest. As previously mentioned, the *Indian Civil Rights Act* of 1968 was enacted to extend most of the *American Bill of Rights* to Indians on reservations (other than the right to bear arms) as the tribal governments were not subject to those constitutional provisions due to their unique position as sovereigns. This Act also sets maximums upon the nature of criminal penalties that can be created under tribal law and order codes and imposed by tribal courts. It also establishes a number of Anglo legal safeguards and due process requirements.

The *Indian Child Welfare Act* of 1976 is a particularly interesting and relevant statute to indigenous peoples in many countries. Although tribal governments and courts already

possessed exclusive jurisdiction regarding child welfare matters arising within the boundaries of Indian country, many tribal children were being apprehended by state, local and private child protection and adoption agencies outside of the reservations. As a result, a significant concern was raised about the high numbers of Indian children that were ending up being raised in non-Indian homes. The response to this crisis by Congress was legislation that compelled state courts to transfer all child welfare cases involving tribal members to the tribal courts of the home reservation, unless the tribal court with jurisdiction refused to accept jurisdiction over the child or if the parents opposed the transfer.

Another Congressional initiative of particular relevance is the passage of the *American Indian Religious Freedom Act* of 1978. As the title indicates, the purpose of this statute is to guarantee religious freedom and to protect the "inherent right" to exercise traditional religions by Indians, Eskimos, Aleuts, and Native Hawaiians from federal and state laws that might undermine the exercise of these religions and their specific practices, including access to sacred sites and the use of sacred objects.

The final statute especially worthy of note is the *Indian Self-Determination and Education Assistance Act* of 1975. This law was designed by Congress to compel all federal government agencies to accept the right of Indian tribes to be self-determining and to advance that status in all federal actions, programs and relations with tribes. This Act has helped to a degree in re-orienting the BIA away from its legacy of paternalism and colonialism toward a new era. The BIA is now statutorily required to encourage and support the economic advancement of tribes and the enhancement of their capacity to govern their own affairs. The Act also contains a strong declaration of Congressional policy, which refers to such matters as defining Indian education and self-determination as "a major national goal" while committing the federal government to maintaining its "unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy". Financial resources to implement these noble objectives have not, however, been as readily forthcoming as the principles would suggest.

5. Natural Resources

As indicated earlier, the doctrine of aboriginal title was recognized by Congress in the initial development of the law (see, for example, the Trade and Non-Intercourse Act of 1790, and its successors, that adopted the basic provisions contained in the *Royal Proclamation of 1763* regarding the purchase of Indian lands). Hundreds of treaties were negotiated between the US government and Indian nations whereby much of the country was ceded to the US while the tribes reserved to themselves certain enumerated rights and lands. The treaties and the assertion of radical title by the federal government formed the foundation for a judicially elaborated federal-tribal trust relationship. Title to all reservation lands and natural resources is held by the United States, unless a particular treaty or statute contains a provision to the contrary, such that the US government must sanction all sales, conveyances, leases, licences or other encumbrances of these lands and resources. The courts have declared that the United States must hold its title to reservation lands as a trustee for the specific tribe. The Indians' interest, which is "as sacred as the fee simple of the whites" (per Chief Justice Marshall in *Johnson v. McIntosh* 21 U.S. (8 Wheat.) 543 (1823)), extends to all of the surface and subsurface resources including timber, minerals, sand and gravel, water, fish and wildlife.

The original pattern was for the Bureau of Indian Affairs to exercise total control over such transactions for the supposed benefit of the individual tribes. This reflected the view that the tribes were incompetent to handle their own affairs so as to require the federal government as guardian to intervene to protect its ward. The elaboration of the trust doctrine by the American courts coupled with Congressional legislative initiatives in the 20th century has meant that tribal governments have a far greater say in the way in which the BIA carries out its trustee duties in leasing reservation lands and natural resources (e.g., minerals, petroleum, timber, etc.) to third parties than was previously the case. Many Indian reservations are rich in natural resources as nearly 5% of the proven reserves of petroleum, 30% of the low-sulphur coal and over 50% of the uranium in the United States are located upon reservation land.

Despite this resource wealth, many tribes became impoverished as the BIA engaged in long-term leases as low as $2 per barrel of oil and 15 cents per ton of coal. The *Omnibus Leasing Act*, which was passed by Congress in 1938, imposed certain restraints and safeguards on the leasing of reservation lands including a ten-year maximum for mineral leases entered into by tribal councils. The Secretary of the Interior, however, was declared able to override most of these protections. The more recent *Indian Mineral Development Act* of 1982 is designed to foster economic self-determination through maximizing the potential financial return for tribes. The Act authorizes tribes not only to lease subsurface resources but also to embark upon joint ventures with the private sector or establish tribally owned mining companies. A number of tribes have become fairly successful economically as a result of this natural resource wealth. A group of tribes has gathered together to form the Council of Energy Resource Tribes (CERT), that has sometimes been called the Indian OPEC.

Possessing and exercising rights to water quantity and quality are of immense importance to the economy in the southwestern United States. The *Winters* doctrine from the United States Supreme Court (207 US 564 (1908)), whereby reservations possess rights to appropriate water under federal law that prevail over conflicting rights of use under state law, has also had a major effect upon tribal economic development in the western US as well as upon tribal-state relations.

It is also important to realize that tribal sovereignty has an impact upon this area as it means that the tribes have the authority to legislate in relation to natural resources. Thus, tribes possess the right to tax mineral development on tribal land by Indian or non-Indian companies (see, for example, *Merrion* v. *Jicarilla Apache Tribe* (455 US 130 (1982)) and *Kerr-McGee Corp.* v. *Navajo Tribe of Indians* (471 US 195 (1985)). At the same time, the courts have ruled that state governments have no power to impose taxes upon the mineral royalties that tribes earn or upon the mining companies directly as this would infringe tribal self-government and reduce tribal revenue.

Likewise, tribal sovereign immunity exists in this sphere such that tribes and their wholly owned corporate enterprises cannot be sued without an express waver. Many tribes do create companies that waive tribal immunity for business purposes while the companies and individual tribal members are, of course, always subject to suit in tribal court. On the other hand, certain federal statutes of a general nature may apply, such as environmental protection legislation.

Nordic Countries

The indigenous peoples of Sweden, Finland and Norway [who also extend across the Finnish border into the Kola Peninsula region of Russia] call themselves the Sami or Saami (formerly labeled Lapplanders by others), who reside primarily in the far north of each of these countries. There are approximately 100,000 Sami living in all four countries with about 20,000 Sami in Sweden, which represents 2% of the total population of that country. In Finland the numbers appear somewhat lower as there are only 10,000 Sami according to the latest data available out of a total population of 5,181,000. They reside predominantly in the municipalities of Enontekio, Inari, Utsjoki and the northern part of Sodankyla, which is legally defined as a Sami homeland totalling 35,000 square kilometres. Norway has the largest group of Sami numbering just under 50,000 people, which constitute under 1% of the nation. The Sami population is largely concentrated in the northern counties of Finnmark, Troms and Nordland. February 6th is celebrated each year as National Sami Day in all three Nordic countries.

1. Socio-economic Information

While the Sami experience greater socio-economic disadvantages in comparison to the general population, including a lower standard of living, their position overall appears relatively positive from a distance when contrasted with the situation confronting indigenous peoples globally. Traditionally, reindeer herding was the primary livelihood of the Sami in all three countries. It has declined in recent years such that only approximately 10% of the Sami are now employed in this capacity. In Sweden,

approximately 2500 of the 20,000 Sami are directly involved in reindeer herding while in Norway there were reported to be only 558 Sami herders in 1999 possessing 183,100 reindeer. This traditional activity appears to have declined to a lesser degree in Finland where the northern municipalities are the highest recipients of social assistance. Nevertheless, its well-being is seen as a bellwether for the overall prosperity of the Sami people as reindeer herding is inextricably linked with their cultural survival and self-determination, although the Sami only hold a statutory monopoly on this activity in Sweden and Norway. The Sami also continue to engage actively in hunting, fishing, trapping and traditional crafts, such as in leather, wood, pewter and antler.

The survival of the Sami language (of which there are ten dialects) is in some doubt in all of the countries but particularly in Finland where approximately .03% of the country identified Sami as their primary language in 2000. It has been suggested that the language may disappear there due to a lack of instructors, materials and critical mass. The provision of bilingual services by the Finnish government in practice is often lacking due to the limited availability of bilingual speakers within the public service. The latest estimates are that there are only about 35,000 active speakers of the Sami language with some dialects having under 100 speakers.

2. Governmental Structures

As unitary states, the governmental structure is rather simple in that dealings with the Sami remain primarily with the national governments of all three Nordic countries. An extremely interesting institutional and political development in Scandinavia over the past three decades has been the creation of Sami Parliaments. All three countries have now accepted the importance of recognizing separate legal entities to represent the interests of the Sami people in dealing with the national governments.

Sami began to organize local and national organizations in each country to focus on protection of reindeer herding as well as to promote broader economic, social, cultural and political interests starting shortly after World War II. The Nordic Sami Council

(NSC) was established in 1956 to develop solidarity and advocate common approaches among the Sami. The NSC, headquartered in Utsjoki, Finland, has worked effectively for many years to forge a pan-Nordic identity among the Sami and to strengthen their position under international law as indigenous peoples. The NSC was a founding member of the World Council of Indigenous Peoples established in British Columbia in 1975 and was recognized as an official observer when all Arctic Nations signed the Arctic Environmental Protection Strategy in 1991. The NSC is now formally accepted as a "permanent participant" in the Arctic Council process that was launched through the signing of the Arctic Council Charter by the eight Arctic countries in Ottawa in 1996 along with NSC and other interested parties. The NSC has recently renamed itself simply the Sami Council as it now includes representatives from Russia. It receives funds from the three Nordic countries although it is a non-governmental organization as opposed to the Sami Parliaments, which are officially part of their respective governments.

Finland was the first of the Scandinavian governments to create a specific governmental response to Sami issues outside of reindeer herding. It launched the Advisory Council on Sami Affairs in 1960 and later created the first Sami Parliament by Cabinet decree in 1973, headquartered in Inari. Norway initiated the Sami Affairs Division of its Ministry of Local Government in 1980 to co-ordinate a number of government policies and programs directly affecting the sami people. The Royal Commission on Sami Rights was also established in 1980 and it has filed three major reports over the intervening years. Sweden followed this approach by appointing a Sami Rights Commission in 1982.

Sami assemblies were created in 1973 in Finland, in 1987 in Norway and finally in Sweden in 1992 as focal points for the Sami to present official positions to the national governments. The members of these assemblies are directly elected by those Sami voters who choose to enrol on special voters' lists for this purpose. Norway opted to pass the *Sami Act* in 1987 as the vehicle to create its Sami Parliament rather than follow the Finnish model of doing so by a cabinet order. The legislation gives a broad mandate to the Sami Parliament to pursue "any matter which in the view of the Assembly particularly affects the Sami people" as the Act's objective is "to make it possible for the

Sami people in Norway to safeguard and develop their language, culture and way of life." The Norwegian Sami Parliament formerly held its sessions in different communities but has recently built a beautiful permanent building at a total cost of 127 million NOK for the Parliament in Karasjok (that was formally inaugurated by Norwegian King Harald V on November 2, 2000) such that some of its proceedings are now televised. It consists of 39 members elected from 13 electoral districts every four years on the same date as the national parliamentary elections. It meets four times per year with each session lasting five days. The administrative wing of the Parliament has 90 fulltime staff spread among six regional offices as well as its headquarters. The budget for the Parliament for 2002 is 189.8 million NOK, which is fully provided by the Norwegian government.

The Swedish Parliament accepted one of the main recommendations in the second report of the Sami Rights Commission and passed legislation on December 15, 1992 to establish the Swedish Sami assembly. In addition to the type of broad mandate granted to the Norwegian version, in Sweden the Assembly has the authority to distribute government funds allocated for this purpose to local departments, appoint a Sami school board under the *Education Act*, take the lead in Sami language protection and participate in local community planning

The oldest of these institutions, the Sami Parliament of Finland, was the last to acquire a statutory base in 1995 to parallel the approach that had been adopted in the other two countries. The Finnish President has presided over the official openings of the sessions of the Sami Parliament in 1995 and 2000.

These Sami Parliaments are, thus, far more than non-profit organizations or political parties as they are officially constituted by the national governments through regular legislation with the clear authority to make official recommendations, to appoint representatives to various state and local agencies, and to act formally as an advisory body to their respective governments. The main function of the Sami Parliaments is to assert the rights and to protect the interests of the Sami people by submitting proposals and initiatives regarding legal, economic, social and cultural issues that directly affect the

Sami. Although they appear to have no legislative jurisdiction in their own right as such, they have the potential to make important contributions to national governmental decision-making by lobbying in favour of proposals that the Sami Parliament may generate and in responding to initiatives by the national governments of these states.

None of the Sami Parliaments have enacted their own laws, although the Finnish Sami Parliament once considered doing so a decade ago. This latter Parliament has drafted a Sami Language Rights Bill that it forwarded to the Finnish Minister of Justice in February 2002 for consideration by the national parliament. This Bill would replace the current Sami language law so as to expand the scope of Sami language rights and compel the national government to make all services available in Sami within their traditional homeland. The Norwegian Parliament is currently considering a new reindeer herding bill recommended by its Sami Parliament that would overhaul the management regime for reindeer.

The three Sami Parliaments have also been negotiating since 1997 to establish the Sami Parliamentary Council (SPC) as a vehicle to promote greater cooperation among them. Norway and Finland joined the SPC when it was initially established on March 2, 2000, however, Sweden has not yet joined. All three national governments have now endorsed and agreed to fund this initiative such that the SPC is likely to be re-launched later this year with seven parliamentarians selected by each Sami Parliament as representatives along with official observer status for Russian Sami. Its mandate will be to work together on language preservation, cultural issues, traditions, environmental concerns and common political questions. It is anticipated that it will continue to leave truly international issues within the domain of the former NSC, as has been the case since the original founding of the individual Sami Parliaments designed to concentrate upon purely domestic matters.

3. Legal Rights

The Swedish government has been especially sensitive to the interrelationship between language and education. Thus, Sami children have the opportunity of attending government funded Sami schools or the regular municipal schools for the first nine years, with even the latter providing some instruction in the Sami language where numbers warrant. Sami schools also possess some responsibility for curriculum design. The objective of the government is that Sami children, regardless of which school system they follow, will receive the same overall quality of instruction while exposing them to the Sami language and culture. The government of Finland has been more reticent in this regard, however, amendments to the *School System Act* in 1983 and to the *Comprehensive School Act* in 1985 have guaranteed special status to the Sami language in the schools within the Sami region in the North.

The *Act on the Cultural Activities of the Municipalities* of Finland ensures that the Sami language is given an equivalent status to Swedish and Finnish. This has resulted in some media production and radio in the Sami language and other limited initiatives. The *Sami Language Act* was passed on January 1, 1992. Under the terms of this Act, a Sami has the right to use his/her language with any public authorities. Upon request, the Sami have the right to receive translation services without charge. Any laws, decrees, public notices or decisions of the government must be published in the Sami language. The new Finnish Constitution has also been translated into Sami. In Norway, the Sami people also have the right to use their mother tongue before official institutions, the police, the legal system and health services, as well as to receive replies in their language.

Sweden has also enacted the *Reindeer Husbandry Law*, which has as its main purpose the promotion of more efficient reindeer breeding while ensuring the opportunity for the Sami to preserve this aspect of their culture and traditional lifestyle. Legislation in this sphere has existed in this country since 1886 with ever increasing levels of state regulation being imposed upon local practices. The current statute provides land and water rights for reindeer breeders but solely as an occupational benefit rather than as an aspect of aboriginal title to traditional land. It does, however, recognize the unique position of the Sami to some degree by granting exclusive rights. If a Sami should cease

partaking in this economic activity, then he or she must give up these special benefits granted by the law and tend to be seen as possessing no unique natural resource rights whatsoever. Sweden established a boundary commission in 2000 with a three year timeframe in which to determine precise boundaries for reindeer breeding and winter grazing rights.

Norway has recognized reindeer herding as both a culturally and economically important activity of the Sami since 1854, however, once again the emphasis has been upon regulating the activity rather than seeing it as an aboriginal right. A special pension scheme was set up in 1990 to benefit those Sami who have had reindeer herding as their primary occupation for their entire working life or for a minimum of 15 out of 20 years. This scheme provides a guaranteed retirement pension for any Sami herders who meet this criteria upon reaching the age of 62. Although apparently not based upon the guaranteed income scheme for Cree wildlife harvesters under the James Bay and Northern Quebec Agreement (JBNQA) as a treaty or an aboriginal right, it does bear some interesting parallels to that groundbreaking initiative.

The Sami have had very limited success before the courts in obtaining respect and recognition for their aboriginal rights and they are not generally seen as parties to treaties with the states. A plausible explanation for this limited recognition is that the Scandinavian governments and societies wish to avoid defining themselves as non-indigenous. One important exception can be found in a decision of the Swedish Supreme Court in 1981. In the *Taxed Mountains* case, the Court decided in favour of the Swedish state by rejecting Sami claims to ownership of certain lands and several types of limited rights of use. The Court did, however, say that Swedish law supported the principle that ownership of land and water could be derived from customary use since time immemorial; that it did not apply to the land claimed but might in more northerly regions; and that reindeer herding was a protected right for the Sami through immemorial use and that its termination or expropriation would give rise to a claim for compensation. This decision led the government to appoint the Sami Rights Commission the following year.

The Sami have had far less success in Norway, where the government has been particularly reluctant to recognize Sami ownership of any portion of their traditional territory or control over the extraction of natural resources. This has occurred despite the recognition that the Sami do have some level of land and water rights. The basis for the acceptance of the latter rights emanates from a decision of the Norwegian Supreme Court in 1862 in which the Court concluded that "a definite nomadic right for Norwegian Lapps [to use land and water] ensues from the 1751 Convention, on the basis of reciprocity with rights granted to Swedish Lapps in Norway."

A more recent decision of the same court in 1982 was far less satisfying for the Sami as their attempt to halt the construction of a major hydroelectric dam, partly on the basis that the dam was alleged to interfere with their aboriginal rights, was rejected. Since the Court seemed to rely on an analysis of the evidence that led the judges to conclude that the risk of interference with the aboriginal rights of reindeer herding was insignificant, the government chose to respond in a conciliatory fashion. Ironically, this defeat for the Sami in the courts has led to a re-evaluation of Sami rights under national and international law as well as sparked new proactive legislation.

The Sami were successful, however, in two major cases before the Norwegian Supreme Court in 2001. The right to graze reindeer on privately owned land within the Selbu local authority was upheld in the *Selbudommen* case while the Court upheld Sami land rights through prescription in opposition to the state in the *Svartskog* case. Although a Sami defendant was convicted by this Court in September of last year in another test case (for the minor crime of failing to keep his dog on a leash), the Court indicated that it was prepared to accept that Sami customary law was part of the Norwegian legal system as a result of Article 8 of the International Labour Organization's Convention 169, however, the evidence in that case as to the specifics of Sami customary law on this topic was too unclear.

The International Labour Organization's Convention 169, Concerning the Rights of Indigenous and Tribal Peoples in Independent Countries, has received particular

prominence in the Nordic countries since its approval in 1989. Norway was one of the first countries in the world to ratify the Convention within a year. The Finnish parliament has not yet ratified the Convention although a parliamentary committee had recommended doing so in 1990. Sweden has apparently decided not to ratify ILO 169 due to concern over article 14, which acknowledges rights to ownership and possession of land as flowing from traditional occupation, however it has acknowledged that the Convention does apply to its Sami population.

There have been some positive developments of note on the constitutional front. The Norwegian Constitution was amended in 1988 to affirm a special status for the Sami by declaring in section 110a that: "It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life." The Finnish Constitution officially protects Sami language rights (in section 17) and further buttresses legislation on the Sami by extending a level of recognition of the distinctness of the Sami through section 121(4). Sweden has no equivalent to these constitutional provisions.

The Sami have retained some level of practical influence over large portions of each country due to their location in the far north and the limited migration inward by other nationals such that the Sami occupy almost 40% of the territory of Sweden and Norway while the Sami homeland in Finland designated by Cabinet formally in 1973 reflects almost 10% of that nation. On the other hand, the Sami have yet to achieve success in any of the three Nordic countries concerning their efforts to have aboriginal title or natural resource rights recognized at law.

Greenland

The latest available data on the population of Greenland indicates that there are 55,983 residents of which 49,623 were born in Greenland, while the remainder are primarily Danes who were born in Denmark. The overwhelming majority of native Greenlanders are Inuit. The world's largest island was a colony of Denmark for two and a half centuries before obtaining a form of self-government in a modern context. In 1979, with

the establishment of the Home Rule Government, Greenland became the first jurisdiction in the world in which the Inuit predominate to once again achieve a significant degree of autonomy. The Inuit of Greenland play an active role within the Inuit Circumpolar Conference, which brings together Inuit leaders and organizations from Alaska, Russia, Greenland and Canada to share experiences and formulate common strategies on issues of importance to them all. The Home Rule government has also been active on the international stage as it played co-host with Denmark to a United Nations meeting of experts, indigenous leaders and representatives from a number of countries sponsored by the UN Commission on Human Rights. This official gathering resulted in the *Nuuk Conclusions* and *Recommendations on Indigenous Autonomy and Self-Government.* The Greenland government directly participated in the formation of the Arctic Council in 1996 and has also developed links with the Nunavut and Canadian Governments.

The traditional economy of the Inuit has been based upon harvesting renewable resources, especially seal, whale, fish and fur-bearing animals. This harvest would provide both the primary source of food as well as cash income for more recent generations. Although the fishery has experienced rapid modernization of late, about 20% of the population still relies upon the hunting of sea mammals for their livelihood.

Greenland possesses the lowest life expectancy levels within Scandinavia as a result of a very high suicide rate, an elevated rate of crimes of violence, and a significant problem with alcohol abuse. Although increased emphasis has been placed upon education in recent years as a strategy to overcome social problems, it has proven to be difficult to encourage Inuit to move on to higher levels of training.

The success of the animal rights movement over the past 25 years has had a devastating effect upon the traditional economy of Greenland. The European Economic Community's ban on the importation of seal products into Europe in 1983 deprived Greenland of one of its major markets and sources of revenue. While the Home Rule government has responded by subsidizing the trade in sealskin pelts and promoting the diversification into other products to help compensate for the decline in sales and prices, most hunters are

simply no longer able to earn their living from this activity as the market has largely disappeared. The only major alternative was to expand the fishery in terms of increasing mechanization and capital expenditure, expanding the territory harvested, and the development of new resources such as shrimp. The fishing industry now employs almost one-third of Greenland's population and accounts for 94% of total exports**.** Mining exploration, shipping and tourism have become important elements of the economy in recent years. Exploration has also begun for oil and natural gas with a number of test wills being drilled in recent years. No production is currently underway.

1. Fiscal Expenditures

The Home Rule government has full authority to raise revenue through imposing a broad range of direct and indirect taxes. Nevertheless, the economy of Greenland is far too small and fragile to provide a tax base sufficient to meet all of the needs of the population. As a result, the majority of the government's budget comes from the provision of transfer payments annually as approved by the Danish Parliament. The latest budget information available indicates that the Greenland government was spending 6,331,200,000 Danish Kroner (DKK) per year [which is the equivalent of approximately $1.2 billion CDN]. Over 1 billion DKK of the budget is devoted to education costs for the 88 schools of all levels located in Greenland. The schools system contains 1,109 teachers, of which 865 are Greenlandic and the balance are Danish.

The Home Rule government is, therefore, still very much financially dependent upon the generosity of Denmark to which it must demonstrate its fiscal responsibility for the funds transferred. Greenland also obtains much of its economic investment from the Danish government and the private sector, however, it is seeking to maximize revenue from renewable and non-renewable natural resources, as well as tourism, so as to become economically independent.

2. Governmental Structure

Although still officially a part of Denmark, the country was granted Home Rule by the Danish Parliament by ordinary statute in 1979. As a result, the people of Greenland now possess full control over education, culture, land use, the economy and internal political matters. The Danish Parliament retains control over foreign affairs, the military, currency and a limited range of subjects that directly affect the lives of Greenlanders (e.g., criminal law).

All Danes and Inuit have the right to vote for and to be elected to serve in the Parliament of Greenland. The territory is divided into 18 municipalities. These municipal governments, which are also elected, exercise limited jurisdiction over local matters. It is the Home Rule Government and the Parliament of Greenland, however, that have the dominant governmental role in the lives of the people. Somewhat similar to the situation in the Northwest Territories and Nunavut Territory of Canada, the bureaucracy still contains many Danes in senior and technical positions while the Parliament and Cabinet is far more representative of the ethnic make-up of Greenland as a whole. One of the unfortunate by-products of the difficulty in fostering higher education among the Inuit population is that there are not enough Greenlanders with the experience and expertise necessary to assume many of the senior positions within the bureaucracy that have heretofore been filled by Danes. This also impacts upon the degree to which Danish has retained much of its presence as the language of the senior civil service.

The Home Rule government is responsible for the overall administration of all primary and lower secondary schools through its Directorate of Culture, Education and Labour Market. Each municipality also exercises responsibility over public education for the lower grades. There is as well a three-year program of upper secondary courses regulated by the Home Rule government that leads to exams that will determine the potential for further education. Limited tertiary education is available in Greenland, however, more specialized studies require attendance at universities in Denmark or elsewhere. A growing number of students are now pursuing their studies in Canada and the USA.

Control over health services in Greenland was transferred from the Danish Ministry of Health to the Home Rule Authority on January 1, 1992. The Greenland Officer of Health is in charge of public hygiene, food control, environmental protection and the control of infectious diseases. The Greenland government is now responsible for the provision of medical services and hospitals, which are available to all free of charge.

All land in Greenland is considered public property. Formally held by the Danish government in the name of the Crown, the Home Rule Government now exercises full authority over the development and use of all land. Since construction costs are very high due to the small market, the high transportation costs due to the distance from the production of building materials, and the climate, substantial housing subsidies are available. The Home Rule Government provides a number of programs consisting of grants and low interest loans for the construction, acquisition, repair and improvement of homes, however, most housing is owned by the government.

3. Language

Inuktitut, or Greenlandic as it is called locally in English, is recognized as the main language of the population. Almost all Inuit have retained fluency in their own language. Both Greenlandic and Danish have the equivalent of official language status. While Danish remains the more common in many governmental circles, public services are required to be offered in both languages.

4. Legal Situation

The normal language of aboriginal and treaty rights does not truly fit the Greenlandic context. Since the Inuit are the majority population and control the government that has authority over almost all important internal matters, there is no need to obtain constitutional or legal guarantees of exemption from externally imposed laws [subject to the risk that the Danish Parliament could repeal the legislation that gave rise to the home rule regime]. Public ownership over all lands and resources also ensures that the Inuit

majority will be able to protect traditional interests and control development as they think best. The Inuit are themselves the legislators and the decision-makers such that they can readily protect their own cultural, linguistic, economic and political interests. This does not create a paradise as there are critical economic and social problems, which themselves give rise to an increase in crime. Nevertheless, through home rule the Inuit possess the opportunity to address these problems in their own terms and to determine their own future.

For the same reasons as in relation to the absence of aboriginal and treaty rights, the Inuit of Greenland do not have any particular guarantees or rights in relation to renewable or non-renewable surface and subsurface resources. As a public government, these resources are owned by the state and managed by the Home Rule Government for the benefit of all Greenlanders, both Inuit and Danes. There is, however, a great concern to protect the environment and to authorize land development only in ways that will not be disruptive to people who are living off the natural resources of the lands and seas.

New Zealand

The indigenous population of New Zealand are the Maori. Although belonging to many different tribes residing on two of the three major islands, they speak a single language and are all derived from the original seafarers who came to Aoteroa (the Maori name for what is now called New Zealand) over a thousand years ago. There are now estimated to be over 600,000 Maori in New Zealand, which represents more than 15% of the total population. They possess the fastest growing birth rate in the country. Most of the remainder of the citizens are of British ancestry who began to settle in the country in the late 1700s with a growing population of more recent immigrants from around the world, and especially from other islands in the South Pacific. The Maori regard any person of Maori ancestry who chooses to self-identify as being Maori. There has never been a legal system of sub-dividing Maori through registration or otherwise such that some are excluded from being members of Maoridom.

Similar to the position of Aboriginal peoples in North America, the Maori suffer from chronic unemployment, poverty, lower education levels, higher rates of incarceration and poorer health. Life expectancy for the Maori is seven years shorter, their rate of diabetes is twice the national average and they have higher rates of asthma, heart disease and obesity. They are twice as likely to smoke and are less likely to be moderate drinkers (ie, they have higher rates of both abstinence and alcoholism). They are more than twice as likely to experience single parent families and three times more likely to be unemployed. They have a much higher rate of school suspensions with a lower tertiary education participation rate. This bleak situation has begun to undergo dramatic and positive change in recent years, however, there is still a long way to go before their position is on a par with the pakeha (non-Maori) population. There is even growing evidence that real median income for Maori has fallen since 1986 as lesser skilled and unskilled labour positions disappear.

A growing number of programs and educational institutions are committed to promoting and respecting the Maori language. The first major initiative in this regard was the development by Maori people of what are called Maori language nests. These are day care and pre-kindergarten programs, most of which are self-financed, in which Maori elders are the primary staff and the sole language in use is Maori. As a result, the number of Maori youth and children who are speaking their language fluently has skyrocketed in recent years, thereby reversing what had been a long-term decline in the use of the language. The latest data suggests that 36% of Maori students are in immersion or bilingual education programs. Performance in schools overall has dramatically improved with many elementary and secondary schools now function at least in part in Maori as the language of instruction. As a result, over one-quarter of urban Maori and one-third of rural Maori are able to converse in te reo Maori. In addition, the rate of Maori going on to higher education has been growing rapidly and now exceeds one-third in comparison to 47% of non-Maori.

The health care system is only just beginning to incorporate traditional practices and to develop community based approaches geared toward prevention and targeted toward the

Maori under their control. The Ministry of Health has recently increased spending on Maori health care and has emphasized the importance of research on Maori health needs.

One of the particularly positive initiatives of late is the enhancement of a Maori media. There are now well over a dozen radio stations that operate under local Maori control and broadcast to a large degree in their language. A national Maori news service has been created, Maori TV programs are broadcast regularly, and the most popular radio station in the largest city (Auckland) is Maori owned.

1. Fiscal Expenditures

The Government of New Zealand has vacillated back and forth over the past few decades in pursuing policies that solely emphasized integration and later switching to approaches that tempered an integrationistic flavour with strategies designed simultaneously to respect Maori legal rights and political aspirations. The budget for the Ministry of Maori Development (Te Puni Kokiri) in the 2001/2002 fiscal year was just over $43 million NZ [or $28.86 million CDN]. A number of line departments also have some specific programs targeted at improving conditions for Maori as well as general services available to all such that it is not possible to clearly identify total expenditure levels. The government has, however, recently announced that it has committed $258 million NZ [$173.15 million CDN] over a four year timeframe to focus on “closing the gaps” between the situation of the Maori and the rest of New Zealand society.

2. Government Structure

As a unitary state, the primary level of government in New Zealand is the national government operating under a parliamentary system augmented by municipal and regional councils with delegated powers of a local nature. A Department of Maori Affairs, headed by a cabinet minister, existed for many years as the focal point for relations between the Maori and the state. The Labour Government of David Lange in the late 1980s launched a major revision that was designed to transfer virtually all

governmental programs and funds related to the Maori directly to regional *iwi* (a Maori expression roughly equivalent to tribe). This resulted in the dissolution of the former Department and its replacement with the Ministry of Maori Affairs - to serve as a co-ordinating and policy arm of the national government - and the Iwi Transition Agency. The latter was, as its title indicates, given a mandate to implement the complete devolution of governmental services and to serve on a temporary basis as the vehicle for this fundamental change. A variety of initiatives were launched, such as the development of Maori agencies to deliver child welfare, educational, health and social services.

The National Party government elected in 1990 substantially reversed this process. A new Ministry of Maori Development was created in January of 1992 to replace both the former Ministry and the Iwi Transition Agency. The new policy was to promote "mainstreaming" through which the Ministry would merely facilitate the linkages between the Maori and large government departments. As a result, whatever funding the Maori received would come primarily from the normal state authorities, such that distinctions based on the unique political position of the Maori as the original inhabitants was de-emphasized from the perspective of governmental structures.

The Labour Party came back into power in late 1998 and has reoriented government thinking somewhat. While it has not returned to the prior self-determination approach of the Lange government of the 1980s, it has also not entirely sustained the "mainstreaming" idea either. The new policy has been labelled "Closing the Gaps" and its focal point is to recognize that Maori are lagging behind on the socio-economic front which requires increased fiscal resources yet it does not really contain a drive to empower the Maori as a distinct people.

A far older element of the New Zealand situation is the presence of guaranteed representation in Parliament. A minimum of four seats was reserved for the Maori when the New Zealand Parliament was first created. Individual Maori can choose to register to vote either on the exclusive Maori list or on the general list for their district. Although this scheme was implemented initially to restrict Maori voting strength solely to four

seats at a time in which they were the majority population, this guarantee has served as a bulwark against assimilation while ensuring that the Maori voice is heard in Parliament. This minimum was increased to five seats before the October 1996 election. Maori voting strength through the general list coupled with a charismatic Maori leader of a new party (who was formerly a National Party MP from the general list) led to the overall election of 17 Maori Members of Parliament and control of the balance of power in a minority government with the National Party. The last election saw the guaranteed Maori seats increase to six with a total of 17 Maori MPs being elected, 10 of whom sit with the majority Labour government.

One of the major political forces within Maoridom is the National Maori Congress. It consists of representatives from all of the Maori tribes or iwi who meet regularly to develop national strategies and positions. Its objectives include the general advancement of the Maori, the exercise by each iwi of its own authority, and the provision of a national forum in which tribal representatives can promote their economic, social, cultural, legal and political interests.

3. Legal Rights

The British and a number of the Maori chiefs of the North Island negotiated the *Treaty of Waitangi* in 1840, which was subsequently adhered to by many other chiefs throughout the country. The Treaty is widely regarded as the founding document of the new land as it structured the original relationship between the British Crown and the Maori people. The Treaty was negotiated and recorded both in English and in Maori, however, the significant differences between the two versions has been a source of continuing controversy ever since its signing. The Treaty not only created a strong link between the two societies and their political representatives, but it has also come once again to symbolize the partnership and commitment to mutual understanding between the two cultures. Great debate has ensued, however, over whether the chiefs surrendered complete sovereignty or merely control over external affairs while preserving internal sovereignty (their *tino rangatiratanga*). At the very least, both sides agree that it

confirmed the continued land and traditional economic rights (especially over fisheries) of the Maori people.

The Treaty was not property respected or implemented for many years, even though the courts ruled early on (in *R.* v. *Symonds* (1847), [1840-1932] N.S.P.C.C. 387 (N.Z.S.C.)) that the Treaty as well as the common law recognized the aboriginal title of the Maori. Part of the rationale for this deficiency was the failure of the Treaty to be ratified by Parliament coupled with the absence of any written constitutional guarantees in a unitary state such that the Diceyan view of parliamentary supremacy allowed the government to ignore its treaty obligations. The Chief Justice of New Zealand subsequently ruled in 1877 that the treaty was unenforceable as he refused to recognize the Maori as possessing sufficient legislative sovereignty to enter into binding treaties (*Wi Parata v. Bishop of Wellington*, 3 JUR. (N.S.)).

This unfortunate history began to change with the passage of the *Treaty of Waitangi Act* in 1975. This statute created an independent and bicultural tribunal to receive complaints and hold hearings into alleged treaty violations. Although the tribunal=s jurisdiction was not invoked for sometime thereafter, the Waitangi Tribunal has become very active over the past fifteen years. Its primary mandate is to examine any disputes, determine the appropriate interpretation of the Treaty=s terms within the context of the complaint, and to recommend practical resolutions. The Tribunal conducts its own research, hears evidence and receives legal submissions based upon which it issues a specific report with its recommendations. The experience to date is that almost all of its proposed solutions has been accepted by government even though its decisions are not binding. (The Tribunal does possess limited authority to render binding judgements in relation to certain Crown assets, but this has not yet been invoked.) Its major conclusions have included providing a guaranteed share of the fisheries for the Maori (through the Muriwhenua Fishing Report (1988) that led to the passage of the *Maori Fisheries Act 1989* that set 10% of the total available catch for exclusive Maori use through negotiations), the rejection of a pipeline that would have damaged the beds of a traditional shellfish harvest area and upholding several major land claims. In recent years

it has also been pursuing claims for water rights, ownership of river beds and petroleum resources.

The Tribunal=s report of treaty fishing claims led to the creation of the Maori Fisheries Commission under the Maori Fisheries Act 1989 with an initial 10% commercial quota. This later sparked the enactment of the *Treaty of Waitangi Fisheries Commission Act*. Under this Act, the Commission of Maori leaders was appointed by the government to manage the commercial fish quota allocated to the Commission for exclusive Maori use as well as the corporate entities created or purchased by the Commission to use or lease out the Maori quota. Some of the iwi have also established their own fishing companies. As a result of very effective management and the purchase of the largest fishing company in New Zealand (Sealords), the Maori now directly or indirectly control over half of the commercial fishing quota while becoming global exporters. On the down side, the allocation of quota and the provision of NZ$170 million to purchase an initial half interest in Sealords along with a guarantee of 20% of any new species made available was in return for the extinguishment of a general commercial fishing right under the Treaty.

Several of the Tribunal=s reports upholding land claims of Maori iwi or *whenua* (somewhat akin to a sub-tribe or band) caused the government to establish a treaty claims branch and to agree to engage in land claims negotiations. A compensation fund capped at NZ$1 billion (although increased annually based on the national inflation rate) has been created to settle all claims. Several major settlements have been reached over the past seven years involving the return of significant amounts of Crown land, assets and cash. The Office of Treaty Settlements has paid out $635,722,000 NZ to date in cash compensation for land claim settlements along with providing some Crown lands. These payments have ranged from very small settlements (e.g., the Te Ngae farm claim of the Ngati Rangiteaorere for $0.76 million) to very large ones (e.g., the Ngai Tahu settlement of $170 million). The Tribunal continues to receive 50-80 claims per year with 869 claims registered as of September 2000. One of its major difficulties has been that the process has been relatively slow with new claims filed at a much faster rate than the

Tribunal has been able to handle resulting in a growing backlog and recent efforts to streamline the process.

The former Lange Labour Government had established four principle objectives to guide all policy, namely:

1. to enable Maori to achieve standards of excellence comparable to the best international standards;
2. to ensure Maori are able to participate fully in decision making;
3. to ensure that the Maori language and culture is preserved and enhanced; and;
4. to deal speedily and fairly with outstanding grievances.

Although governments have changed on several occasions over the intervening years, these principles still appear to guide national policy. One of the methods used to meet these objectives was to include an interpretive cause in all relevant statutes whereby it is directed that the legislation is to be interpreted in accordance with the terms of the *Treaty of Waitangi* and to advance its purpose. Another highly interesting statutory initiative was the passage of official language legislation through which New Zealand recognized both English and Maori as having equal status (the *Maori Language Act 1987*). In doing so, senior New Zealand officials closely studied the Canadian experience with official languages and adopted bilingualism based largely upon the Canadian model.

A further important achievement was the passage of the *Resource Management Act, 1991*. It is designed to promote sustainable development of both natural and physical resources. Among its many provisions it defines the relationship of the Maori and their culture and traditions with their ancestral lands, water sites and sacred sites as matters of national importance. The Maori interest in natural resources must be considered in the development of all regional land use plans and in the review of major economic or other development projects likely to impact upon Maori environmental interests.

Another 19th century initiative designed for a colonialist purpose was the creation of the Maori Land Court. Its raison d'être was to facilitate the leasing or sale of remaining Maori lands to *pakeha* (non-Maori). These lands were declared by statute to be held in tenancy in common and to pass on to future generations through inheritance by will or intestacy. As the number of descendants increased in relation to any particular property it became progressively more difficult to find suitable uses agreeable to all legatees such that conveyances and leases to pakeha became favoured as the most viable means of creating assets that were easily distributable among large numbers of beneficiaries in the form of cash. The Maori Land Court still exists, however, its standing in Maori eyes has dramatically improved over the last fifteen years as many of the judges are now Maori and those pakeha on the bench are very knowledgeable both in this branch of the law as well as in reference to Maori customs and aspirations. In many ways, this Court played an instrumental role in the latter half of the 20th Century in keeping intact what remained of Maori lands still under Maori control. Several members of this Court, including its Chief Judge and Deputy Chief Judge, are members of the Waitangi Tribunal.

The final point to mention is the passage of the *Runanaga a Iwi Act* in 1990. This legislation was designed to extend legal authority to the iwi or to structures they designated so that they could receive and distribute government funds as well as formally enter into contracts. The Act would also have given full effect by legislation to tino rangatiratanga (the governmental authority of the chiefs referred to in the Treaty), thereby allowing the iwi authorities to take complete control of their resources. Much of the tribal lands at present are instead in the control of Maori trustees elected by the beneficiaries. The Act would have, in effect, created a form of Maori local government. It was, however, never fully implemented as it was repealed in 1991 after a change in government. As a result, there is a broad array of Maori corporations, boards, and trusteeships but no recognized governments similar in nature to the North American experience. The Ngai Tahu of South Island did obtain special legislation modelled in large part on the *Runanaga a Iwi Act* that comes closest to American Indian tribes and Canadian First Nations in that they possess an elected political structure with a statutory basis that confirms certain limited powers. The Ngai Tahu has been extraordinarily

successful in rebuilding their tribal identity while also creating a powerful economic foundation over the past decade.

Australia

The indigenous population in Australia is comprised of two major groups, namely, the Aboriginals of the mainland and the Torres Strait Islanders of the islands to the north of Queensland neighbouring the southern islands of Papua New Guinea, to whom the Torres Strait Islanders are related culturally, racially and economically. These two groups are completely distinct with relatively little in common other than having shared the ravages of colonization. The combined population of the two groups totalled 386,500 people according to the 1996 census, or 2% of the total population. The latest estimates suggest the population has now grown to approximately 427,000 people of Aboriginal and Torres Strait Islander descent. The Aboriginals are by far the larger group and are in fact subdivided into many different linguistic, political and cultural societies living in some cases dramatically different lifestyles with quite divergent aspirations for the future. The indigenous population is much younger than the national average and is growing almost twice as fast (with a 2.3% annual growth rate in comparison to 1.2% for the whole country). In addition, many more people have been self-identifying as indigenous with almost half of the growth from the 283,560 people in the 1991 census stemming from non-demographic factors.

The Aboriginal population is extraordinarily poor and disadvantaged to an extent that is unknown in any of the other countries under discussion. In addition, the level of racism is completely unparalleled in these other nations. For example, the pattern of openly shooting Aboriginal people in the northwest part of Western Australia for sport or spite (in the Kimberley Mountain region in particular) only disappeared a few decades ago, as did the virtual enslavement of Aboriginals as drovers in many cattle stations.

Therefore, it is not surprising that the Aboriginal people suffer from extremely high unemployment (17.6% in February 2000 versus 7.3% for the non-indigenous population),

low levels of educational achievement, inadequate health and social services (with infant mortality rates 3-4 times the national average, maternal mortality rates 10 times higher and a life expectancy 17 years lower), extensive discrimination, extraordinarily high rates of incarceration (especially for non-payment of fines and alcohol offences with 20% of the total inmate population as of 2000 being indigenous prisoners thereby reflecting an overrepresentation rate of ten times what it should be), tragically high levels of suicide and accidental death (particularly shortly after being placed in jail), a far greater likelihood to suffer from contact with the child welfare system, and far too little control over their own affairs. The report of the Royal Commission into Aboriginal Deaths in Custody, in reference to the sudden deaths of over 100 Aboriginals in the custody of prison, police or juvenile detention institutions in all jurisdictions across Australia since 1980, provides graphic evidence of the degree to which the justice system has failed to respond properly to the needs of Aboriginal people even when accused of the most minor offences - and the level of racism that has become institutionalised. Although the Royal Commission did not conclude that any of the deaths were a direct result of violence by guards, it did find an extraordinarily high rate of incarceration of Aboriginals and numerous deficiencies in governmental policies.

Although there is no system of legal subdivision whereby Aboriginals or Torres Strait Islanders are differentiated between those who are accepted as Aboriginal by law and those who are excluded, there are many other similarities with the Canadian experience, in addition to the disastrous consequences of colonization and dispossession. Australian law in some states used to distinguish among Aboriginals based upon the level of European ancestry, through using terms such as quadroon and octoroon rather than Métis/half-breed and non-status Indian. Fortunately, the indigenous population has generally overcome this part of their history as they have developed a three part definition, which has received almost universal acceptance by the laws and governments within Australia. The constituent elements of the definition are that the individual must:

1. be of Aboriginal ancestry [although no precise percentage or Ablood quantum@ is required];

2. choose to self-identify as Aboriginal; and
3. be accepted by the Aboriginal community as being Aboriginal [although this can be from any Aboriginal community rather than solely from the one from which the person=s Aboriginal ancestry is derived].

This approach effectively avoids the debate over proving entitlement or seeking recognition for entire communities as in the USA and Canada as well as avoiding a statutory process of segregating Aboriginals into categories of those who are legally recognized from those who are not. Nevertheless, a person must be accpted by the specific Aboriginal group that possesses title to specified Aboriginal lands or the rights of residency on a particular reserve in order for that individual to acquire rights in relation to that territory. The same holds true in relation to acquiring a share in the royalties or other funds that might emanate from these lands. This can lead to some internal conflicts between those Aboriginals on traditional lands and others who have urbanized.

The Commonwealth Government has initiated a number of programs over the past 25 years to attempt to redress the terrible socio-economic position of the Aboriginal population. There are approximately 75 Aboriginal and Torres Strait Islander health organizations throughout the country that are controlled by the local Aboriginal communities. They have helped to launch national efforts to immunize all children against hepatitis B, improve health and hearing services, and attack substance abuse. A similar effort was commenced in 1989 to redress the very poor educational success rates of Aboriginal students in the public school system and the small numbers who were enrolling in tertiary institutions. The National Aboriginal and Torres Strait Islander Education Policy of the federal government is designed to ensure that:

1. Aboriginal people are involved in educational decision-making;
2. equality of access is provided to all educational services;
3. participation of Aboriginal people is improved; and
4. indigenous history and culture is part of the educational system.

It has met with some success as the numbers pursuing higher education have risen from almost none in the late 1960s to 7,460 indigenous students by 1997. The participation rate is still lower and the success rate is about 20% lower than for other Australians. The existence of a special financial aid scheme has helped considerably.

Particular inroads have been made in the broadcasting field. Aborigines are involved in a range of enterprises in both the commercial and public sectors of television and radio. This is a particularly vital source of information and community development in the Outback of central Australia.

Since over 17% of the Aboriginal labour force is unemployed (which itself reflects a major improvement from over one-third less than a decade ago), in part due to the fact that almost half live in rural and remote regions of the country, the federal government has emphasized the importance of job training. Some of the state governments are also supporting this approach with complementary programs.

One of the areas in which the Commonwealth has been particularly innovative has been concerning the delivery of legal services. Aboriginal groups have been funded for almost three decades to operate their own legal aid programs using staff lawyers and Aboriginal field officers. The American experience with Indian legal services organizations created under the former Office of Economic Opportunity created by President Johnson in the 1960s was the inspiration for these agencies. The latter perform a somewhat more limited version of the role of native court workers in Canada. There are 23 different and independent Aboriginal Legal Services corporations providing criminal and civil legal assistance in almost all parts of Australia. Somewhat surprisingly, these Aboriginal legal service programs have sponsored relatively little in the way of test case litigation (although there have been some very important exceptions, such as the development of the *Anunga Rules* governing appropriate methods for police interrogation of Aboriginal accused persons and the *Mabo* land rights case) and have not made as significant an impact upon how the justice system operates as one might expect after 30 years of existence.

A number of Aboriginal child care agencies have also been financially supported over the past twenty years. They are having some success in reversing the extraordinarily high rate of apprehension of Aboriginal children and in obtaining recognition for the importance of relying upon the extended family of Aboriginal people as foster parents where removal from the home is absolutely necessary.

1. Expenditures

The Commonwealth Government allocated AUS$2.39 billion in the 2001 fiscal year for indigenous programs reflecting an increase of $327 million over the prior year. This included funds for education (19%), approximately 11% on health care, and roughly $700 million on employment and job training. The Aboriginal and Torres Strait Islander Commission (ATSIC). received almost $1.2 billion in federal allocations during the fiscal year ending June 30, 2001, or 47% of the total federal expenditure expressly for Aboriginal and Torres Strait Islander people. ATSIC is the primary vehicle for delivering funds to over 2700 non-profit Aboriginal organizations incorporated under the federal *Aboriginal Councils and Associations Act, 1976* and others established under state or territorial legislation.

The individual state and territorial governments spend an unknown amount of funds directly on programs targeting the indigenous people as well as providing grants and contributions to their associations.

2. Governmental Structure

The Australian Constitution of 1901 only addressed the indigenous population in a negative fashion. It declared that the requirement to conduct a regular census did not mean the inclusion of Aborigines and the ability of the federal government to enact laws for specific races explicitly did not encompass the Aboriginal race. The latter provision was judicially interpreted as meaning that only the state governments could pass laws

specifically designed to affect Aboriginal people. As a result, the federal role in this sphere was limited to the territories or to affecting Aboriginal people through general legislation. This state of affairs was changed by a constitutional amendment in 1967 that obtained an overwhelming endorsement from the voters through a referendum.

The current constitutional situation is that both levels of government are able to pass laws expressly in relation to Aboriginals. Where co-operative federalism is not possible, then a federal law prevails in case of conflict. Nevertheless, the Parliament has been highly reluctant to engage in direct clashes with state governments wherever possible. The sole exception to this policy of avoiding confrontation was in reference to the former National Party government of Joh Bjelke Peterson of Queensland. Even in this case, one federal law designed to override state legislation was never proclaimed. In another more dramatic situation, former Labour Party Prime Minister Bob Hawke backed down on an election promise to pass national land rights legislation due to the opposition of the Labour Premier of Western Australia.

Therefore, both levels of government frequently operate programs intended to ameliorate the conditions facing Aboriginal people. The Commonwealth remains very active on the legislative front in reference to the Northern Territory and concerning racial discrimination while traditionally leaving aboriginal and land rights issues largely to the states. This has obviously meant that there is no uniform system of law or programs in existence. It has also too often resulted in a situation in which the state government, which is the one that faces the most direct consequences of recognizing any special legal rights for Aboriginal people, has dominated the debate and has adopted policies contradictory to the interests of Aboriginal people.

Both levels of government have also maintained their own departments of Aboriginal affairs. The federal government has also pursued the approach of establishing special semi-independent commissions to operate at some distance in the areas of sponsoring economic development, providing housing grants and purchasing land for Aboriginal communities. The latest initiative is the establishment of ATSIC in 1990 under the

Aboriginal and Torres Strait Islander Commission Act, 1989. This agency was formed through the merger of the Department of Aboriginal Affairs and the Aboriginal Development Commission. ATSIC is a significant effort to give the Aboriginal and Torres Strait Islander people the direct power to control the programs that most affect them. The 18 Commissioners are all Aboriginals or Torres Strait Islanders with 17 of them elected by their constituents in the 17 zones, one of whom is then elected by the Commissioners to serve as Chair and be replaced by his or her region, such that they can ensure that their cultures, values and aspirations are reflected in the design and delivery of services as well as in the allocation of priorities. ATSIC originally included two Commissioners appointed by the Commonwealth Minister responsible but these positions have been abolished. ATSIC=s regional base is maintained through 35 regional councils of locally elected indigenous representatives. These regional councils are increasingly taking over decision-making and budget spending authority.

ATSIC is an unusual entity with a multiplicity of roles. It advocates indigenous issues vigorously at the regional, national and international level (and is a recognized non-governmental organization with the United Nations) while at the same time providing advice to the federal Minister of Immigration and Multicultural and Indigenous Affairs. It monitors the performance of other federal government departments while serving as the main federal agency in delivering programs and services directly or indirectly to the indigenous population concerning community development, employment, housing and related infrastructure, legal aid, native title representation, and in promoting cultural and identity, while expressly having no mandate concerning education and health care. It can advise any government in Australia on request or exercise particular authority granted to it by state or territorial governments. While the Commissioners are elected by the constituents for whom they serve, their autonomy is constrained by fiscal controls in the hands of the government along with the power of the Minister to issue requests to the Commission. A separate Torres Strait Regional Authority was established on July 1, 1994 to assume ATSIC's functions within that region such that the Commission's functions are now solely aimed at Torres Strait Islanders not residing in their home area.

Another relatively new federal initiative directed toward providing a new climate in which the goals of Aboriginals can be advanced arose through the creation of the Council for Aboriginal Reconciliation in 1991 through a unanimous vote in both houses of Parliament. The intention behind the Council was to promote a deeper appreciation among the citizenry of Aboriginal culture, as well as a greater understanding of the effects of their dispossession and continuing disadvantages within Australian society. The Council consisted of highly regarded Aboriginal and non-Aboriginal Australians who were attempting to create bridges between the cultures. The Council tabled its final report and recommendations in 2000.

3. Legal Rights

Aboriginal and Torres Strait Islander people are generally subject to the same laws as all other Australians. There has been no history of negotiating treaties between the Crown and the original owners of the land, despite repeated directions to do so in the 19th century by the Colonial Office in England. Only one treaty was actually signed (the *Bateman Treaty*), however, it was voided by the Colonial Governor of what is now Victoria as the treaty was signed by a private individual for his own benefit without prior approval or authority from the Crown.

British settlement of Australia started in 1788 with the landing of the ships in Botany Bay containing prisoners transported to build a new colony. The subsequent development of disparate colonies in parts of the continent and Tasmania resulted in the dispossession and dispersal of Aboriginal peoples from their coastal and other lands that were viewed as productive by the colonists. Although there was active resistance by the Aboriginal people, their military skills and equipment were no match for the newcomers. In addition, Aboriginal societies were structured in a relatively loose fashion with people primarily residing within extended family groupings of small numbers such that it was not possible for them to organize a large scale fighting force to counteract the invasion of their territory.

The first British explorer in this region, Captain Cook, was under explicit instructions to pursue a policy of creating peaceful relations with any indigenous peoples that he encountered. Subsequent colonial representatives were regularly instructed to respect the land rights of the Aboriginals and to negotiate treaties to ensure peaceful relations and to acquire land for settlement. These instructions were repeatedly ignored or resisted by local officials.

Eventually, after almost a century of colonization, the doctrine of *terra nullius* was invoked to justify the colonial practice that had been followed. That is, the land was treated as if it had been vacant or desert so as to be available for claim by any nation that established settlements upon it. The fact that the land was not empty of people was discounted by the assertion that the Aboriginal people were so primitive that their occupation was inconsequential. Since they had not cultivated the land in a fashion similar to European methods of farming, and since they were believed to have no system of law or government, they could be regarded as little more than wild animals. The debate that was undertaken within Australia was so racist that the more enlightened viewpoint was represented by the perspective that Aboriginal people were in fact humans and in need of protection under British law so as to ensure that they would not simply be exterminated by settlers with impunity. This argument was ratified by the colonial courts, which also ruled that Aboriginals were subject to the common law whether they understood it or not while their systems of laws, that had been in existence for perhaps as much as 40,000 years, were ignored. Reserves and church missions were created by state governments as a means to segregate Aboriginals from general society while efforts at assimilation through boarding schools and the like could be pursued. These reserves did, however, provide at least some protection for the people and a small portion of their original territory.

The courts have historically played a very negative role in dealing with aboriginal rights questions in Australia. Even the Privy Council chose to distinguish between the Canadian and Australian situation when it delivered its judgements in *St. Catherine=s Milling and Lumber Co. v. The Queen* in reference to aboriginal title and Treaty No. 3 in

Ontario and in *Cooper v. Stuart* in reference to Queensland only months apart. The Australian courts had been little better until the 1990s. The Northern Territory Supreme Court rendered judgement in 1971 in *Malirrpum v. Nabalco Pty. Ltd.* ((1971) 17 F.L.R. 141) in which it ruled that the doctrine of aboriginal title did not apply in Australia even though Aboriginals have maintained organized societies for thousands of years with their own legal systems and intricate uses of the land. Despite the fact that this was only a trial court decision from the Northern Territory, it had acquired a status as the ruling decision on this issue for the whole country. It is worth noting that this decision of Mr. Justice Blackburn relied upon the *Calder* decision of the British Columbia Court of Appeal, which was subsequently reversed on its interpretation of the law by the Supreme Court of Canada on appeal. The *Malirrpum* decision has also been rejected by the Canadian courts, while the Australian High Court expressed a willingness in its decision in *Coe v. Commonwealth* ((1979) 53 A.L.J.R. 403) to consider the aboriginal title issue in the future in an appropriate case, while clearly rejecting any assertions to sovereignty in that decision.

Despite the lack of success before the courts in the past, the issue of Aboriginal land rights received great public support starting in the 1970s and some very concrete results through legislative recognition. The first such initiative was the *Land Rights (Northern Territory) Act*, 1976 passed by the Commonwealth Parliament in reference to its responsibility and ultimate authority over this region. This Act enables the traditional Aboriginal owners to make claims to unalienated Crown land by lodging a formal claim with a judge who has been appointed as the Commissioner under this Act. The Commissioner conducts a formal hearing in which the claimants have to prove their direct spiritual and physical attachment to the land while others may challenge the validity of the claim or the eligibility of the land for this process. The Commissioner then renders a report to the federal Minister of Aboriginal Affairs with recommendations for action. Although the Commissioner=s decision is not binding, virtually all of the reports since the creation of this process have been implemented. As a result, over one-half million square kilometres of land within the Northern Territory have been conveyed to Aboriginal trustees in inalienable freehold title to hold for the traditional owners. This

consists of all of the remaining Aboriginal reserves and missions, as well as huge tracts of land including the Uluru (Ayers Rock) National Park, which has been leased back to the Australian Parks Service, reflecting one-third of the entire Territory. There was no compensation scheme under this Act to redress the historical loss of use or regarding non-Crown land that is ineligible for claim. The Aboriginal owners must rely upon mining royalties for surface exploration rights or other means to raise funds to meet their economic needs.

The Government of South Australia also responded in a positive fashion to the land claims of the Aborigines in the northern part of that state. Legislation was passed to grant inalienable freehold title to the Pitjantjatjara, and later for another adjacent region to the Maralinga people, which comprises virtually the entire top end of the state other than one mining district or approximately 176,000 square kilometres. Similarly to the federal statute for the Northern Territory, these Aboriginal groups did not receive title to the subsurface and are still subject to the general laws in force in the state. They do, however, have a statutory right to propose the adoption of regulations designed to protect the environment within their region.

Limited land rights legislation has been passed by the state legislatures in New South Wales and in Victoria. The statues in the latter state refer solely to certain former reserves whereas in New South Wales, not only was title to all reserves conveyed but local and state-wide Aboriginal land councils were created to receive a portion of the state property tax revenue annually (7.5%) for a period of 15 years for the Aborigines to purchase other lands on the open market and to develop the lands acquired.

The legal position of the indigenous population changed dramatically on June 3, 1992 with the decision of the High Court in *Mabo v. Queensland (No. 2)* ((1992) 107 A.L.R. 1) as it declared that Australian common law did recognize aboriginal or Anative title@, thereby overriding *Malirrpum* and turning Australian law on its head. Although *Mabo* was in relation to the Torres Strait Islanders, it was accepted as applying on the continent. The Court also stated that the Crown could exercise its sovereign power through

legislation or express executive act to extinguish native title interests. Unless and until that occurred, however, the native title interest would still exist.

After extensive public debate, the federal Parliament passed the *Native Title Act 1993*. Its purpose was to address the consequences of *Mabo* through imposing a compromise. The Act sought to recognize and protect all native title rights that had not yet been extinguished while at the same time ensure that all non-Aboriginal interests in land were sustained. These somewhat contradictory objectives led to the determination that fee simple titles would be fully protected as they were declared to have extinguished native title. The Act further declared that mining leases granted before October 31, 1975 extinguished native title where the lessee was granted exclusive possession of the land. Mining leases without exclusive possession and leases granted after that date (when the *Racial Discrimination Act* was promulgated) may only impair native title that would be fully restored upon the expiration of the lease. Pastoral leases in effect on January 1, 1994 were statutorily deemed to be valid and could be renewed, regranted or extended by the Crown but with compensation to the native title holders. The High Court subsequently ruled in *Wik Peoples v. Queensland* ((1996) 141 A.L.R. 129) that certain longstanding pastoral leases in northern Queensland did not extinguish native title rights as at least some aspects of those rights could co-exist with the lessees= rights. The Court did declare that where conflicts exist between the lessees and the native titleholders, the rights of the pastoralists would prevail. The High Court has also declared that the *Native Title Act* was not discriminatory for creating a special legal regime concerning indigenous land rights in *Western Australia v. Commonwealth* ((1995) 183 C.L.R. 373). The legislation was subsequently watered down in 1998.

The National Native Title Tribunal came into existence on January 1, 1994 pursuant to the *Native Title Act, 1993* to facilitate the making of agreements among Aboriginals and Torres Strait Islanders, governments, industry and third party interests. It is not a court and has no power to decide whether or where native title exists. It does formally receive claims filed, it monitors the decisions of the Native Title Registrar whether to accept the claim or not, it offers mediation services to the parties where the claim has been accepted

by the Registrar and monitors agreements reached regarding proposed uses of lands and waters in areas where native title may exist. Where mediation is unsuccessful, the Tribunal must refer the application to the Federal Court for a decision on the merits. The Tribunal can award compensation for any native title extinguished since the federal *Racial Discrimination Act*, *1975* took effect. As of June 30, 2001 there were 576 claims underway across the country.

For many Aboriginal groups, especially those whose traditional territory has been taken through settlement, there are no land rights. Even for those who have been fortunate in obtaining recognition for their historic ownership, they possess only the most limited powers of local self-management rather than true self-government. Since there is no constitutional protection for aboriginal rights, Aboriginal landowners are always vulnerable to a change in governmental policy or legislation that might reduce or eliminate their rights. The *Land Rights (Northern Territory) Act* has repeatedly been amended by Parliament since its passage in 1976, thereby demonstrating this vulnerability very graphically. The *Mabo* decision does provide some legal brakes upon a government that may wish to disregard or eliminate native title generally or repeal claim settlements. On the other hand, some commentators suggest that the thrust of the government response to land rights over the past decade has been to validate non-native title interests.

Even with the severe limitations of the Australian approach to land rights pre-*Mabo*, it is important to note that almost 15% of the country had been set aside for the exclusive use of the original inhabitants of the land. This occurred even though there was no legal compulsion on governments to act before the *Mabo* decision. Due to the prior lack of judicial support and the failure of the national government to demonstrate true leadership and commitment to this issue, the experience has been highly varied. Many Aboriginal groups have no land whatsoever while others have only postage stamp size communities, yet some have a huge land base consisting of virtually all their original territory. The latter is far more true for the far north and the outback - that is, in regions that settlers have not historically desired until the arrival of mining interests. As a result, Aboriginal

landholdings vary widely: from a low of 0.01% in Tasmania and Victoria and 0.19% in New South Wales and the Australian Capital Territory to 1.85% in Queensland, 8% in Western Australia, 19.2% in South Australia up to 40% of the Northern Territory.

Although there is no system of discriminating among Aboriginal people based upon status or ancestry in blood quantum terms, the people of the cities, country towns and farming areas have received limited benefit from land rights recognition. The limited statutory rights for wildlife harvesting do, however, apply to all Aboriginal people within that jurisdiction.

One of the other interesting statutory initiatives in Australia has been the passage of sacred sites legislation in many parts of the country. These statutes are designed to: confirm the right of those Aboriginal people who possess a spiritual connection to certain land to travel to and upon the land regardless of who holds title to the land; ensure that sacred sites are not destroyed; and empower the relevant Minister of the Crown to prohibit development that might damage or disrupt these places. Some of these statutes also provide protection to sacred and spiritually important objects. One example demonstrating this type of legislation is the *Aboriginal and Torres Strait Islander Heritage Act* passed by Parliament in 1984.

Canada

The Aboriginal peoples of Canada, who have occupied this territory for over 40,000 years, consist of three broad but very distinct groupings, namely, the Indians, Inuit and the Métis. Each of these three constitutional labels mask considerable diversity within their ranks in terms of languistic, cultural and spiritual differences as well as concerning their lifestyles, traditional and modern economies, political structures, histories, land usages and current realities. Among the Indian people alone there 52 nations or cultural groups possessing 11 different language families with more than 50 distinct dialects.

Data regarding the Canadian situation is far from clear. The 2001 Statistics Canada census results have not yet been reported nor has the special Aboriginal Peoples Survey II

that was conducted last Fall. The total Aboriginal population has been estimated by the federal government as consisting of approximately 1.4 million people or over 4% of the entire country. The 1996 Census only recorded 779,790 as self-identifying as Aboriginal while 1,101,960 people indicated they possessed Aboriginal origins. Unfortunately, the 1996 census had a number of implementation difficulties, including the refusal by some First Nations to participate. As a result, it only recorded 488,040 people as being Status Indians at a time when the Indian registry maintained by DIAND included 593,050 registered Indians as of December 31, 1995 and 610,874 as of the end of the year in which the census was taken. It has been suggested that the census obviously underreported well over 100,000 registered Indians and may, therefore, similarly have underreported many Metis, non-status Indian and Inuit peoples. Adding somewhat to possible sources of confusion is that over 40% of First Nations control their own membership lists and many individuals now only identify themselves in terms of their original national identity or through the name of their First Nation rather than as an 'Indian' at all.

According to the Department of Indian Affairs and Northern Development (DIAND), there are approximately 65,000 Inuit in Canada, the vast majority of which live in the Northwest Territories, Nunavut, Quebec and Labrador. Due to the *Indian Act,* the Indian population has been divided into those who are registered, or have status, under that Act and those who are not recognized as legally being Indians for the purposes of that statute or the services made available by DIAND and Health Canada. DIAND=s latest statistics recorded 659,890 registered Indians as of December 31, 1999, of whom 112,482 individuals gained status through the 1985 amendments to the Act (Bill C-31), while it estimated the Métis and non-status Indian population at 632,800 people at the end of 1997. The Congress of Aboriginal peoples estimates the latter two groups as comprising 750,000 to 1.25 million people.

The Aboriginal population has been growing at a rapid and varied rate over the past 15 years. The Indian population had an annual growth rate of over 7% from 1986 to 1991 according to Statistics Canada, which then fell to 1% from 1991-1996. On the other hand

the INAC data demonstrates an annual growth rate of almost 4% for the latter five-year period. The data from Statistics Canada indicates that the Metis population kept increasing throughout the ten-year period while the Inuit numbers were falling. Demographically speaking the annual growth rates for Indians from 1986-91 and Metis from 1991-96 were more than double the world's highest national rates and even higher than the theoretical maximum natural population increase rates. Thus shifts in population have been affected by legal changes [with over 100,000 non-status Indians and Metis moving over to become registered Indians by 1995] and relatively high natural growth rates. In addition, however, there is obviously a growing number of Canadians who are self-identifying as being Aboriginal [and particularly as being Metis]. Even if this trend is not sustained to the same degree, projections from DIAND indicate that the registered Indian population should rise to over 810,000 people by the end of this decade. In Saskatchewan it is projected that the on-reserve Indian population will grow by 37.2% from 1998 to 2008 compared to 1.5% for the province as a whole. Over two-fifths of the status Indian population is under the age of 19 compared with just over one-quarter for the country as a whole such that it will continue to grow at a faster rate than the rest of the citizenry.

The changes in the demographic data are also reflected further in place of residence. There are 275,112 registered Indians who resided outside of reserves as of the end of the last century, or 41.7% of the total status Indian population. The on-reserve Indian population had grown from 218,270 people in 1979 to 384,778 Indians by the end of 1999. In percentage terms, however, they reflected an ever-diminishing portion of the overall status Indian population, which stood at 70.5% of the total as residents of reserves in 1979 that had fallen to 58.3% of the total over a twenty-year period.

Although great progress has been made over the past three decades, the Aboriginal population in Canada remains the poorest of the poor with lower life expectancies, educational levels, employment rates, etc. as well as extraordinary over-representation in the prisons and child welfare agencies across the country. For example, there were 6483 status Indian children in the child welfare system across the country as of 1999-2000,

which reflects a massive overrepresentation in numbers. Although it had looked by the end of the 1980s that the situation was improving considerably in this area, the numbers are growing fairly rapidly once again as there were only 4533 in the child welfare system in 1992/93 that had grown to 5448 by 1997/98. The number of Aboriginal Child and Family Services Agencies receiving some federal financial assistance has also increased from 54 in 1993/94 to 79 in 1997/98, thereby reflecting an increase by 46%. The number of children being raised outside of their parental homes had also increased by 18% from 1994/95 to 1999/00.

Similarly, Aboriginal people encounter Canada's criminal justice system in hugely disproportionate numbers. Last year there were more than 2100 Aboriginal men and women in federal correctional facilities with 70% of them either previously urban residents or having committed their offences while off-reserve. While Canada already possesses one of the highest incarceration rates among developed countries at 129 per 100,000 Canadians, adult Aboriginal people are imprisoned more than eight times the national rate. Saskatchewan is at the extreme end of the spectrum with an adult Aboriginal incarceration rate of over 1600 per 100,000 compared to a non-Aboriginal rate of 48 per 100,000 residents of that province.

Housing conditions within reserve communities is improving in some spheres as 97% of all homes had water and 93% had access to sewage disposal systems by 2000. The number of dwelling units had also increased from 67,000 in 1991/92 to over 87,000 by 1999/00 with 2313 new units built during that last fiscal year. On the other hand, the number of units being built annually had fallen during the last decade from an average of 3156 units/year and a peak of over 4000 homes per annum. While the conditions of the homes seem to be improving, it is important to note that only 54% of them were considered to be adequate without need for significant repair or renovation as of March 31,1998.

First Nations continue to experience severe rates of unemployment and underemployment. While the numbers of small businesses located on reserves has been

improving, this has been insufficient to keep up with the growth in the labour force. It is not uncommon for many First Nations to have less than 20% of their able-bodied work force with full time jobs. The number of social assistance recipients has been growing dramatically. There were 110,202 social assistance beneficiaries living on reserve in 1989/90, which had grown to 156,629 people by 1997/98 before declining modestly to 151,737 beneficiaries by 1999/00. Thus, approximately 40% of all residents on Indian reserves in Canada are dependant upon social assistance payments for their livelihood. To this number can then be added the people who rely upon other forms of income support programs like pensions and employment insurance.

There are now, however, some 448 First Nation managed schools serving over 60% of the status Indian students who live on reserve with only 8 schools still administered directly by DIAND as of 2000. Post-secondary enrolment has mushroomed from almost nothing 30 years ago to 11,170 in the 1985-86 academic year to over 27,000 students during the 2000-01 fiscal year, with 35% of them over the age of 30 and two-thirds of them being women. Total enrolment of registered Indian youth in elementary and secondary schools has grown over 20% from 1993 to 2000. Day care and pre-school attendance rates have also been growing with over 4000 young children enrolled in on-reserve programs. Success in education is clearly being achieved, however, the employment opportunities for the graduates within reserve communities remains limited and may further encourage people to leave home for work and advanced education.

Health care has also improved in some ways for Aboriginal people in recent years. The gap in life expectancy has shrunk from over 11 years in 1975 down to 6.5 years for Indian males and 4.8% for Indian females as of 2000. Registered Indians in Canada, however, continue to suffer from far higher rates of diabetes, heart disease, hypertension, arthritis, infant mortality, tuberculosis, violent deaths and suicide than the national average, with youth suicide rates in particular being some of the highest in the world.

It is without question that conditions remain deplorable in far too many First Nations communities. While discrete data is generally not available for Inuit and Metis

communities, there situations appear similarly tragic. The urban reality for Aboriginal peoples is often just as bad.

1. Financial Expenditures

The Department of Indian Affairs and Northern Development=s budget for the 2001-2002 fiscal year estimates expenditures of $5.11 billion. This total includes $1.165 billion for social assistance and welfare services, $1.03 billion for education, $292 million for post-secondary education support, $638 million for the settlement of comprehensive and specific land claims, $125 million for self-government initiatives, $842 million for capital construction, $148 million for economic development encouragement, $175 million for housing costs and $364 million for Indian government support. DIAND now has almost 3500 employees such that a significant portion of its budget is for operational expenses in dollar terms but it reflects less than 2% of the total. DIAND funds 612 First Nations and 80 tribal councils who administer approximately 85% of the department's annual budget with a further 10% transferred directly to provincial governments for contracted services.

Other federal departments allocate almost $2 billion more in funds targeted directly to Indian, Inuit and Metis peoples. The Department of Justice launched a modest new initiative to support programs designed to improve the position of Aboriginal peoples within the Canadian justice system in August of 1992 through $25 million over five years, which was renewed effective April 1, 1997. The Solicitor General=s budget for Indian policing on reserves doubled in 1992-1993, as a result of the transfer from DIAND of funding for this program, initially to about $30 million. These funds reflect the 52% federal share that is matched by a 48% contribution from provincial governments to support 127 policing agreements that have been negotiated over the years throughout Canada concerning both on and off reserve First Nations policing.

Heritage Canada maintains responsibility to fund the core operations budgets of friendship centres in urban areas and off-reserve Aboriginal political representation

organizations. It also has specific programs to offer financial support for Aboriginal language initiatives, Urban Multipurpose Aboriginal Youth Centres (UMAYC), Aboriginal television and radio broadcasting and Aboriginal Women's programs. It now provides approximately $30 million annually through a block grant to the National Association of Friendship Centres to distribute to the over 100 friendship centres in Canada.

Health Canada projected budget for 2001-02 included $1.323 billion to the First Nations and Inuit Health Branch to fund all health initiatives on reserve, as well as providing uninsured health care for status Indians and the Inuit wherever they reside. A range of other departments or federal agencies (for example, Central Mortgage and Housing Corporation provided $278 million in 1997 for urban and on-reserve Aboriginal housing while Department of Human Resources Development Canada (HRDC) has committed $41 million annually to meet child care needs for First Nations and Inuit parents who are working or in employment programs) also fund specific programs that are of importance to all Aboriginal people. HRDC developed the Aboriginal Human Resources Development Strategy in 1999. This is a five-year, $1.6 billion initiative to provide funds directly to Aboriginal organizations to develop and deliver job and skills training, labour market enhancement as well as programs geared toward Aboriginal youth and persons with disabilities.

All of these different initiatives are further augmented by relatively small but significant contributions by the Departments of Fisheries and Oceans, Industry Canada, Natural Resources, National Defence, the Privy Council Office and others. All told this results in a total federal expenditure in programs solely directed toward Aboriginal peoples of over $7 billion in the current fiscal year. Over 70% of this sum emanates from INAC and well over 90% of the funds are earmarked for First Nations and the Inuit, such that the Metis and non-status Indians receive a very small portion of federal funding.

It is estimated that provincial governments likely spend approximately $5 billion per annum in providing Aboriginal specific and general programming to their Aboriginal residents, with the vast majority of this in the form of non-targeted funding.

Federal data suggests that the on-reserve Indians, who are exempt from income and a number of taxes on goods consumed on reserve as a result of sections 87 and 90 of the *Indian Act*, pay an unknown amount of taxes for goods consumed off reserve or for those buried within the purchase price of goods and services. The Inuit, Metis and non-status Indians are fully taxable while status Indians residing or working off-reserve are eligible for very few tax exemptions.

2. Land Base

There were 2,617 reserves across the country as of 1999-2000 totalling 2,995,490.4 hectares held by the Crown in trust for 610 recognized bands or First Nations. Over the prior ten-year period there had been an increase of 354 reserves totalling 364,000 hectares, most of which flowed from the Saskatchewan Treaty Land Entitlement Agreement of 1992. While these numbers do involve a large number of parcels of land this still reflects less than 0.3% of the landmass of the country for the original owners even though they represent 4% of the total population. These reserves, which are virtually all south of the 60th parallel, are solely for First Nations recognized under the *Indian Act* and do not assist the Inuit, Metis or non-status Indians. The latter have no lands held for their exclusive use whatsoever, while the Metis only possess six large settlements in Alberta. The Inuit were seen officially as squatters on Crown land in the eyes of Canadian law for many decades until the modern era of land claims negotiations has confirmed a portion of their traditional territory for their exclusive use (except in Labrador where the Inuit are still negotiating their comprehensive land claim having reached an agreement-in-principle signed on June 25, 2001).

Fifteen comprehensive land claims have been settled across the North over the last 27 years, starting with the James Bay and Northern Quebec Agreement of 1975, that have

provided a very different picture for the Aboriginal groups affected. Large tracts of land as well as cash, resource rights and other benefits have been guaranteed in return for the relinquishment of aboriginal title over the remainder of their traditional territories. These agreements to date in Québec, Nunavut, Northwest Territories, Yukon and British Columbia have confirmed exclusive use or title to the Aboriginal parties regarding 545,000 square kilometres, or approximately 6% of Canada. Although seen by some as generous settlements, it must be realized that the Aboriginal party to each of these agreements has generally surrendered over 80-90% of its original land base in order to achieve an agreement.

It should also be noted that DIAND had 452 specific land claims from First Nations under review as of September 30, 2001 with a further 118 claims in negotiations, 48 in active litigation and 47 claims appealed to the Indian Specific Claims Commission. A further 12 comprehensive land claims were in active negotiation in various parts of the country along with 47 claims involving 127 *Indian Act* bands in British Columbia and 6 claims in Yukon. At least another six comprehensive claims are either in other processes or awaiting a decision by the federal government. The land claims process is an extraordinarily slow and frustrating one that often creates a new sense of grievance but will result in many further settlements in coming years.

3. Legal Status and Constitutional Structure

The *Constitution Act, 1867* assigned exclusive responsibility to Parliament under section 91(24) for AIndians, and Lands reserved for the Indians.@ This gave Parliament two heads of legislative jurisdiction as it could enact laws for both the people referred to in the Constitution as AIndians@ and also in relation to all of the lands that remained unceded territory (which is not the same as Indian reserves set aside under the *Indian Act*.) Parliament has exercised this authority since 1868 by passing legislation in relation to some of the Indian people and some of their lands.

The jurisdiction of Parliament regarding AIndians@ was determined by the Supreme Court of Canada to include the Inuit (in *Reference re Eskimos* in 1939) and has been used by Parliament to vary the definition of Indians narrowly or broadly over the intervening years. While the federal 91(24) jurisdiction was traditionally viewed as permissive rather than mandatory, this may have changed as a result of the development of the fiduciary obligation doctrine by the courts upon the Crown in right of Canada since the *Guerin* decision in 1984 and the terms of s. 35 of the *Constitution Act, 1982*. It is also possible that the hints from the judiciary about a provincial sphere to fiduciary obligations concerning Aboriginal peoples may temper suggestions that the existence of the s. 91(24) head of power requires federal action.

What is clear is that the Parliament of Canada has not exercised its legislative jurisdiction in reference to the Inuit anywhere in the country, although the federal government has assumed the financial aspects of the authority in practice in Québec by taking over certain expenditures for health and social services for the Inuit after the Supreme Court=s decision.

The position of the Métis in regards to s. 91(24) has remained a subject of legal and political debate for many years with the federal and Alberta governments taking the view that the Métis do not fall within s. 91(24) while all other provinces and most commentators, as well as the Métis, assert the contrary perspective. The Government of Alberta has expressed concern over the years about this issue as it has maintained Metis legislation since the 1930s regarding a number of settlements set aside for exclusive Metis use during the Depression and it has not wanted this regime to be struck down as *ultra vires*. During the Charlottetown Round of constitutional negotiations in 1992 it endorsed an amendment that would confirm the inclusion of the Metis within s. 91(24) coupled with a further amendment that would protect its Metis settlements legislation. Although in my opinion the Métis are within s. 91(24), the continuing uncertainty in this regard has left the Métis as a political football passed back and forth between the two levels of government resulting in limited special legislation outside Alberta and few governmental initiatives designed to meet their needs. The Government of Saskatchewan

has recently broken the mold somewhat by enacting the *Metis Act* and proclaiming it into force in February 2002. This new statute recognizes the contributions of the Metis to that province and creates a vehicle for future bilateral initiatives. Its preamble makes clear, however, that "nothing in this Act is to be construed as altering or affecting the position of the Government of Saskatchewan that legislative authority in relation Metis people rests with the Government of Canada pursuant to section 91(24) of the *Constitution Act, 1867*."

In addition to the *Indian Act*, the federal government has absorbed the role formerly reserved to the Imperial government of negotiating treaties in the name of the Crown. Literally hundreds of treaties were negotiated with the Indian nations in the pre-confederation era in what are now the Atlantic provinces, southern Québec, southern Ontario, and Vancouver Island. Since 1867, the Crown in right of Canada has entered into 11 numbered treaties in northern Ontario, the Prairie Provinces, northeastern British Columbia and parts of the Yukon and NWT as well as the 1923 Treaty in southeastern Ontario. These treaties and their subsequent adhesions, along with those from the earlier era in Upper Canada, on their face share in common the surrender of exclusive land rights to the Crown by the Indian parties in return for annuities, confirmation of wildlife and fishing harvesting rights, the preservation of certain lands for exclusive Indian use as reserves, and other specific commitments (e.g., promises of ammunition, agricultural implements and a tax exemption in Treaty No. 8 and a medicine chest clause in Treaty No. 6). The Indian version of many of these treaties and their surrounding oral negotiations, however, differs dramatically from the written version in English.

The Inuit, with a few minor exceptions, did not sign any treaties as there was little interest in their traditional territories until the latter part of the 20th Century.

The land rights of the Métis were sporadically recognized as, for example, through signing the adhesion to Treaty No. 3 in Ontario as a distinct indigenous people. The more common approach was for the Métis frequently to join in the treaties with their Indian relatives or to take scrip under the *Manitoba Act* and subsequent Dominion land

legislation. As implemented under federal laws, which are currently being contested before the Manitoba courts in the *Dumont* case by the Manitoba Métis Federation and the Native Council of Canada, scrip entitled the holder to exchange this certificate for a specified number of acres of land to be held in fee simple by the individual rather than collectively, as in the case of reserve lands. Much of the scrip issued was exchanged with land speculators for cash and has given rise to allegations that the federal government participated in or turned a blind eye to a widespread pattern of extensive fraud through which very few Métis indeed received their allotted land.

The *Constitution Act, 1982* has dramatically changed the relationship between all Aboriginal groups and the rest of Canada. Not only does s. 25 of the Charter protect Aaboriginal, treaty or other rights or freedoms@ of the Aboriginal peoples from being abrogated by the remaining provisions of the Charter, but s. 35 confirms the Aexisting aboriginal and treaty rights@ as part of the Asupreme law of Canada@ (s. 52(1)). AAboriginal peoples@ is also defined in s. 35(2) so as to clearly include Athe Indian, Inuit and Métis peoples@, while their unique rights have been guaranteed equally among female and male Aboriginal persons through the 1984 amendments adding s. 35(4). These latter amendments also made certain that prior and future land claims settlements will receive the same constitutional status as treaties (through ss. 25(b) and 35(3)) so as to encompass the two settlements reached in the 1970's in Québec. The *Constitution Act, 1982* was further altered in 1984 to ensure that no future amendments to the constitutional provisions that explicitly apply to Aboriginal peoples can occur without the Prime Minister previously having convened a First Ministers= Conference to which Aboriginal representatives will be invited (s. 35.1).

The effect of these provisions has had a profound impact upon the jurisprudence as well as upon the political stature and public profile of the Aboriginal peoples in Canada. The precise nature of the changes in the case law that has occurred over the past twenty years outstrips the scope of this paper but suffice it to say that our perceptions of what constitutes a treaty has been broadened considerably by the decisions of the Québec Court of Appeal and Supreme Court of Canada in the *Sioui* case while it is now clear as a

result of the latter court=s decision in *Sparrow* that aboriginal and treaty rights can render federal and provincial laws inapplicable to Aboriginal people in appropriate situations. The Court also recognized in *Sioui* that Aboriginal peoples at least once constituted independent, sovereign nations (without commenting upon their current status) who could enter into treaties as such with the Crown and its representatives.

The Supreme Court of Canada has further developed a new doctrine called fiduciary obligations in the *Guerin* and *Sparrow* cases and stated that it applies to restrain the behaviour of both federal and provincial governments in the way they deal with Indian, Inuit and Métis peoples. The Supreme Court in the *Simon* case also made it clear that treaty rights are not limited to status Indians but can apply to any descendant of the treaty beneficiaries. The Court further elaborated a test and an approach to interpreting treaties that requires that they be given a liberal interpretation from the perspective of the Aboriginal party in light of all the evidence surrounding the negotiations of the treaty concerned. This position in Simon has been repeated on a number of occasions subsequently including the *Sioui, Badger* and *Marshall* decisions. A similar liberal approach to statutory provisions conferring benefits upon Aboriginal peoples was declared to apply in the *Nowegijick* case.

Our highest court has issued a number of other critical pronouncements in the 1990s. The judges declared that aboriginal rights exist across a spectrum from aboriginal title granting exclusive possession at one end of the spectrum to land based rights exercised within traditional territory to practices or customs that are "integral to the distinctive cultures of aboriginal peoples" but are non-site specific rights at the other in two cases arising from Québec (*Adams* and *Coté*). The Supreme Court jettisoned any lingering questions concerning the continuing relevance of aboriginal title in the modern era in *Delgamuukw* while suggesting that the test for aboriginal title may have to be modified to accommodate the post-contact reality of the Metis. On the other hand, the court also declared that aboriginal rights must be grounded in the specific factual context of a particular Aboriginal Nation which must prove that the rights in question were and

continue to be integral to their distinct identity today (in *Van der Peet*, *Gladstone*, *Pamajewon* and others).

In 1999 the Supreme Court had its first opportunity to grapple with the interrelationship between s. 15 of the Charter and aboriginal legal issues in the *Corbiere* case. The Court accepted that "aboriginality-residence" was an analogous ground to those specified in s. 15(1) and the *Indian Act* election rules excluding off-reserve members from voting was discriminatory and unconstitutional. On the other hand, the Court made clear in *Lovelace* that an Ontario government scheme to share profits from an on-reserve casino among all First Nations recognized under the *Indian Act*, thereby excluding Metis and unrecognized Indian communities, was not a violation of s. 15 as favouring one somewhat similarly situated disadvantaged group with an ameliorative initiative over another was not discriminatory within the sense of s. 15 at the expense of the groups omitted as more than mere economic prejudice was required since the more restrictive accommodation did not truly exclude the Plaintiffs from "access to a fundamental social institution" or "a basic aspect of full membership in Canadian society (e.g. voting, mobility)." The Court did, however, determine that s. 15 applied not merely to "laws" but to government programs as well.

Federal legislation has also been used on occasion to advance the Aboriginal agenda in recent years. The *Kanesatake Interim Land Base Governance Act* was passed and received Royal Assent on June 15, 2001 to implement an agreement reached between the Mohawk Council and the government that recognizes certain lands as falling within s. 91(24) although not being reserve lands under the Indian Act. It also provides statutory assurance that the Kanesatake Council has a legal foundation on which to adopt its own laws and regulations over land-related matters on its land base, as well as the necessary authority to enforce those laws. In addition, the Act sets out a framework intended to foster a constructive dialogue on harmonization between Kanesatake and the Municipality of Oka.

The Parliament of Canada has also enacted the *British Columbia Treaty Commission Act* in 1995, the *Mi'kmaq Education Act* in 1998, the *First Nations Land Management Act* in 1999, and a large number of individual land claim settlement implementation statutes over the past decade concerning First Nations in Yukon, Northwest Territories, Manitoba, Saskatchewan, and Nova Scotia. With approximately 80 self-government negotiations underway across the country, one would anticipate that the face of governance in Canada will continue to change in the years ahead.

Canadian law has, therefore, evolved quite dramatically indeed over the past two decades concerning First Nations and the Inuit. The appeal by the Ontario government of the *Powley* decision to be heard later this year by the Supreme Court of Canada may give rise to similar breakthroughs for the Metis.

B. Overall Assessment Among States

From a Canadian perspective, how do these countries compare? There is no definitive answer possible. No doubt one=s national origin will influence any such comparative assessment. Furthermore, engaging in any type of ranking exercise immediately leads to subjective elements of priorizing among competing values. Is possessing constitutionally protected rights (Canada) more important than having a much larger land base yet vulnerable to disappearance (Australia)? How important is a longer life span (Canada)? For example, one might say that Canada looks very enlightened and positive in relation to Scandinavia and Australia but far less so when examined in comparison to many aspects of American and New Zealand policy. Even these statements are crude, however, as there are aspects of the Canadian experience that are better than other countries under inspection as well as facets that are far worse. It is necessary, therefore, to examine certain key points of analysis more closely.

The existence of constitutional protection for aboriginal and treaty rights is unique to Canada among the countries studied, although constitutional guarantees of rights for indigenous peoples are also present in the new constitutions of Brazil, Columbia and

Nicaragua, among other countries. On the other hand, the right of Aboriginal peoples to govern themselves and determine their own futures under their own laws has yet to be fully recognized in Canada as it has been in the United States for over 200 years. This has occurred even though the Canadian doctrine of aboriginal title has been based largely upon the same decisions of the US Supreme Court that articulated the Adomestic dependent nation@ concept of residual Indian sovereignty at the same time as confirming the existence of aboriginal rights and title as part of the common law. Indian tribes in the USA, therefore, have clear jurisdiction to enact all civil laws to apply to anyone within their territory along with criminal laws over Indians, except for 16 major crimes.

Aboriginal peoples may have the same or similar sovereign status in Canada protected by s. 35 of the *Constitution Act, 1982*, but Canadian courts have not yet declared that Canadian law incorporates this aspect of the American jurisprudence. No legislature has yet enacted a general statutory confirmation of self-government or sovereignty either, although the federal government has adopted a policy that an inherent right to self-government is contained within s. 35(1). The official position of the federal, several provincial and all three territorial governments is that the right of self-government or internal sovereignty exists without a further requirement for a constitutional amendment. These governments are seeking to negotiate self-government agreements with First Nations to establish the scope of Aboriginal governments and conflicts of laws rules rather than agreeing to blanket general recognition of jurisdiction.

The Nisga'a Nation Treaty represents the first such confirmation of the right to self-government as being constitutional in nature and elaborates the jurisdiction of the Nisga'a Lisims Government. This Treaty has been implemented through complementary British Columbia and federal statutes. The Nisga'a Lisims Government has now been functioning for almost two years during which time it has enacted a number of laws. A series of self-government statutes have also been enacted by Parliament and the Yukon Legislature over the past ten years for seven First Nations, however, they rights contained therein are not yet protected by s. 35.

The majority of provincial governments, however, continue to refuse to accept an inherent right of self-government as an existing right under the Canadian Constitution. Instead, they assert that no Aboriginal government can exercise any jurisdiction beyond what is delegated under positive law that includes the required approval of the effected provincial government.

The Indian and Inuit peoples in some parts of Canada are clearly seen as having a legally recognized interest in their traditional lands such that land claims settlements have been reached in recent years or are under active negotiation. These settlements look reasonably good in comparison with the position of indigenous peoples in the other countries examined. On the other hand, the Métis are excluded from land claims negotiations in Canada except in the NWT (and possibly in Labrador where a claim has been filed with the federal government by the Labrador Métis Association and is under review by the federal Justice Department), while non-status Indians are likewise left out except in the northern territories and in Labrador concerning the Innu. From the perspective of southern Métis and non-status Indians, the Canadian policy appears to be one based on aspects of segregation and inequality tied to federal recognition solely of bands and Inuit communities that renders Canada worse than all of the other countries under review. The colonialist inspiration for the *Indian Act* still plays a significant role in 2002 in defining the nature and content of federal and most provincial policies on land claims.

If one considers aboriginal questions from the vantage point of total land quantum that is currently in the hands of or dedicated for the exclusive use of the original owners of the land, then Australia has the best record by far even though its courts had failed to accept the application of the common law doctrine of aboriginal title to that nation until 1992. Nordic treatment of the Sami would then deserve the worst rating with New Zealand a close second. Greenland would be poorly assessed if the criteria was exclusive possession of land but would be the highest ranked if one focussed instead on effective indigenous control over territory as the key.

The American Indian tribes are also in the best position in terms of recognition of their rights over natural resources within their reservations as well as in their treaty areas. They have further obtained the most recognition for their aboriginal rights to water and the beds of waters. Congress has been pursuing a number of positive legislative initiatives over the past 30 years that are in keeping with its recognition of the sovereign status of the tribal governments and their needs for economic and social assistance in order to become fully strong and self-sufficient communities. On the other hand, Congress has most recently been imposing severe budget cuts on the BIA while also starving statutory mandates (such as in the area of tribal justice) and threatening to roll back certain advances gained in recent years (e.g., in gaming).

Canada does, however, appear to make the largest devotion of fiscal resources to the indigenous population of any of these nations on a per capita basis, while the USA has the largest bureaucracy employed on aboriginal affairs. Canada is achieving the best success in secondary education and improved health care while the USA has had the most success in post-secondary education training of professionals. Interestingly, the United States even with its emphasis on private medicine has devolved less control over health care matters than has either Australia or Canada. On the other hand, there are 25 colleges under tribal control in the United States, which far surpasses the situation in any other nation.

C. Quebec vis-à-vis other Provinces

Since the federal government has the lead constitutional role in reference to Aboriginal peoples, there is nothing resembling uniformity in the policies or practices of the provincial governments in this realm. Some are very active in reference to the provision of services and legal issues while others have done almost nothing and rely upon the federal government to pursue any policy thrusts in these areas. Rather than reviewing each province separately, I have chosen to examine a number of themes that are of particular relevance to Quebec in order to determine how its response compares to that taken by other provincial governments.

Before exploring certain specific issues in detail, let me provide some relevant data. According to the 1996 census, which has been widely accepted as an underestimate even by Statistics Canada, the total Aboriginal population in Quebec at that time was 71,975, or less than 1% of the overall Quebec Population. This indicates that the population actually had fallen from 80,945 people recorded in the census ten years earlier. The 1996 census clearly gives an inaccurate presentation overall as the people of Wendake (1462), Kahnawake (8544), Kanesatake (1992) and the Quebec portion of Akwesasne (approximately 3500) did not participate in the 1996 census.

The Statistics Canada figure is subdivided into 47,600 registered Indians (although official DIAND data recorded 58,640 status Indians in that year), 8300 Inuit and 16,075 Metis and non-status Indians. This data reflects almost a fourfold increase in the Inuit population since 1986 (from 2270 Inuit) while those self-identifying as Metis and non-status Indian people dropped by two-thirds in the same period (from 47,785). Therefore, the reliability of this data can readily be called into question, especially when one realizes the dramatic increase in those self-identifying as Aboriginal and Metis in particular nationally.

The Secrétariat aux affaires autochtones (SAA) has recorded 68,440 status Indians within the province as of 2001 along with a further 9,397 Inuit for a total of 77,837 but they do not have data for non-registered Indians or Metis living in the province.

The DIAND registry data for 2000 recorded 63,315 status Indians of which 43,046 were residing on their own or another reserve and 19,041 off reserve, with a further 1228 living on other Crown land. This translates into a ratio of 70% living on reserve or Crown land, or a much higher ratio than the 58.3% average in Canada. Quebec thus has the highest on-reserve resident population. As is true across the country, the percentage of registered Indians living outside of reserves is continuing to grow; for example, almost 82% of all status Indians were living on reserve in Quebec in 1976 such that over 10% of this population has migrated away from reserves in the past 25 years thereby moving primarily into the realm of provincial jurisdiction and fiscal responsibility.

The registered Indian population in Quebec as of December 31, 1999 represents 9.4% of the Canadian total in comparison with 3.9% in the Atlantic, 22.8% in Ontario, 15.8% in Manitoba, 15.7% in Saskatchewan, 12.5% in Alberta, 16.5% in British Columbia, 1.1% in the Yukon and 2.3% in the NWT. As this data makes apparent, the largest registered Indian population in Canada lives in Ontario followed by B.C. with Quebec ranked 6th. Quebec contains the lowest social distance, in accordance with socio-economic criteria, of any province between the Aboriginal and non-Aboriginal populations.

Lands exclusively dedicated to Aboriginal use cover 14,770 square kilometers of Quebec. Almost 95% of this total have been set aside under the James Bay and Northern Quebec Agreement in reference to the Cree (5,544 square kilometers of Category I lands) and the Inuit (8,151 square kilometers) and under the Northeastern Quebec Agreement regarding the Naskapi. The remaining 5% is allocated as reserves and settlements to the other two-thirds of registered Indians in the province, while the Metis and non-status Indians have no lands exclusively set aside for their use. Nevertheless, the amount of land recognized as belonging exclusively to Aboriginal people in Quebec is much higher than in any other province as a result of the two land claims settled in the 1970s.

1. Aboriginal Languages

There are 53 distinct languages and dialects that have survived centuries of colonization and linguistic suppression in Canada with numerous dialects emanating from 11 major language families. Tragically, many experts predict that up to 40 of these languages may disappear within the next two decades with some having only a few living speakers left. Only three of these languages are on a reasonably solid foundation (Inuktitut, Cree and Ojibway), and even they are not adapting sufficiently quickly to develop new words to respond to increasing consumerism and technological change.

The importance of language to self-identity and transmission of knowledge cannot be overstated. Basil Johnston, an Ojibwa writer from Ontario, has stated that when

languages disappear Aboriginal peoples “lose not only the ability to express the simplest of daily sentiments and needs, but they can no longer understand the ideas, concepts, insights, attitudes, rituals, ceremonies, institutions brought into being by their ancestors; and, having lost the power to understand, cannot sustain, enrich or pass on their heritage.” This means that “no longer will they think Indian or feel Indian.” It almost goes without saying that there is no homeland other than North America for these languages. They cannot be revitalized by immigrants or through returning to a mother country. Thus, when they disappear here they truly vanish from the face of the earth. Aboriginal languages can sometimes cease to exist within a region while still surviving elsewhere. For example, Malecite and Huron are no long spoken by these Nations within Quebec but the former survives (albeit barely) in New Brunswick while efforts are underway by linguists and the people of Loretteville/Wendake to revive the latter.

Overall, the situation in Quebec is far better than most regions of Canada as 8 languages are still spoken. Fortunately, Inuktitut (spoken in 14 Arctic communities), Cree (spoken on 9 communities), Montagnais (spoken in 11 communities), Attikamek (spoken in 3 communities), Algonquin (spoken in 9 communities), and Mi’kmaq (spoken in 3 communities) have a significant degree of use. The Mohawk language is undergoing a renaissance at Kahnawake through the efforts of the Mohawk Survival School (Karonhia-Monhnha). The Abenaki language is facing extreme jeopardy and there are serious concerns about the future of Attikamek.

One of the major achievements emanating from the James Bay and Northern Quebec Agreement (JBNQA) has been the strengthening of formal instruction in Cree and Inuktitut by the Cree and Kativik School Boards respectively. The JBNQA provided a clear commitment that the education systems in Northern Quebec would be radically changed to accommodate the aspirations of the Cree and Inuit for curriculum that would more effectively meet their needs, including the preservation and promotion of their languages. The Quebec Department of Education has supported this development actively as well as concretely through financial assistance. The Assemblee Nationale has also played a positive role through enabling legislation.

Although French has been declared to be the dominant language of the province through the passage of the Charter of the French Language (Bill 101), the Preamble of the Charter expressly recognizes the right of Indians ("Amerinds") and Inuit to preserve and develop their own languages and cultures. The Charter expressly exempts reserves from its application, while formally ensuring the Cree and Inuit communities of their authority to provide instruction to their children in their respective languages (s. 87). The Cree and Kativik School Boards are compelled by the Charter, however, also to pursue the use of French as a language of instruction to enable students to have the opportunity for post-secondary education in French language institutions within Quebec and to develop the capacity to conduct their administrative affairs in French (s. 88).

There has been some resistance to the application of the Charter among certain Aboriginal groups. There is no exemption for the off-reserve population and their languages such that they are treated as if they were immigrants in reference to their own languages with schooling options determined in the same manner as for long resident French and English speaking peoples. Those First Nations and the Inuit who have relied upon English as a second language have voiced some concern over the possible removal in the future of the limited exceptions in the Charter that currently apply to them unless they obtain federal or constitutional assurances. Tensions over language issues have, however, declined dramatically over the last decade.

No other provincial government has made the limited yet relatively concerted efforts to support the survival of Aboriginal languages on a par with Quebec, although the Province of Ontario has provided some financial help to encourage Aboriginal language broadcasting. The governments of the Northwest Territories and Nunavut continue to lead the way within Canada for their fostering of indigenous languages while also respecting official bilingualism requirements of the federal government.

2. Education

The Government of Quebec has in general been far more supportive of educational initiatives, particularly for the Cree and Inuit, than any other provincial government in Canada. The government of Quebec allocated $152,446,483 in the 1999-2000 fiscal year toward the education of Aboriginal peoples, or 2.2% of its total educational budget of $6.4 billion, with the vast majority of this committed to the Cree and Inuit by virtue of provisions within the JBNQA. This represented an increase in over 60% from nine years earlier and appears to be dramatically higher than any other province in Canada. It should be realized, however, that this greater expenditure is a result of provincial obligations negotiated through the JBNQA and some of which are cost-shared with the federal government.

There were 14,341 registered Indian and Inuit students attending elementary and secondary schools in 1996-97. This total is comprised of 3146 attending schools administered by the Cree School Board, 2649 in the Kativik School Board system, 186 in the Naskapi school, 6154 in First Nations schools, 126 in federal schools and the remaining 2080 in provincial and private schools. There has been a huge shift over the past two decades with federal schools almost completely disappearing (down from 21% to less than 1% in the last ten years) and First Nations and Inuit operated schools completely assuming the former federal role as well as absorbing over tow-thirds of those who previously attended the provincially regulated system. Less than 15% of status Indian and Inuit students are now enrolled in provincial schools through tuition payment agreements with DIAND (reduced from 48% a decade earlier). While First Nations and Inuit control has permitted the design of more culturally relevant curriculum and the recruitment of more Aboriginal teachers, there continues to be a severe problem of attrition with a high dropout rate and too many falling behind. Retention and graduation rates have improved somewhat in recent years.

There has also been increasing rates of success at the post-secondary level. 328 Inuit and registered Indian people graduated from tertiary institutions during the 1998-99 fiscal year out of 3681 graduates across the country, thereby placing Quebec fifth overall.

3. Health and Social Services

The Quebec government devoted $100,272,689 during the 1999-2000 fiscal year, which reflected an increase of over 80% since 1990-91, through the Ministry of Health and Social Services to providing services directly or via Aboriginal organizations. A number of the latter have been established to operate as an adjunct to the existing provincial social service network. These expenditures also did not include the expenses paid by the Regie de l'assurance maladie or those paid for out-of-province services.

The Government of Quebec has not been seen as a leader in facilitating the development of autonomous Aboriginal organizations in the health care and social services sector, although its record is far superior to that of many other provinces. Manitoba has been in the forefront in co-operating in the creation of Indian controlled child and family services agencies in conjunction with DIAND since 1980. This lead has now been followed to a lesser degree in Ontario, British Columbia and Alberta.

One of the more innovative efforts of Quebec has been through enacting An Act to Ratify the Agreement Concerning the Building and Operating of a Hospital Centre in the Kahnawake Territory in 1984. This statute authorized the Mohawks of Kahnawake to construct the hospital and to receive provincial funds for its operation as a private establishment completely administered by the Mohawks. To the best of my knowledge, this legislation and arrangement remains unique in Canada.

4. Economic Initiatives

Quebec has been a leader among provinces in sponsoring economic development within Aboriginal communities and First Nations through provision of special grant programs. One of the most innovative initiatives is a direct result of provisions contained within the JBNQA and the Northeastern Quebec Agreement. An income support programme was negotiated under the JBNQA to encourage and perpetuate the traditional hunting, fishing and trapping lifestyle and economy of the Cree and Inuit. This commitment has been

further implemented by An Act Respecting the Support Program for Inuit Beneficiaries of the James Bay and Northern Quebec Agreement for their Hunting, Fishing and Trapping Activities of 1982. The total amount allocated to meet this purpose in 1990-91 by the province was $2,725,743, which was spent for assisting these activities through the provision for funds for, equipment, travel, courses, marketing, wildlife studies and other related matters.

The province also devoted over $11 million under An Act Respecting Income Security for Cree Hunters and Trappers Who are Beneficiaries Under the Agreement Concerning James Bay and Northern Quebec of 1989 to subsidize these harvesting activities for individuals who were unable to earn a sufficient income from the commercial aspects of this labour while seeking to maintain this traditional lifestyle. Again, this positive initiative is somewhat tempered by the realization that it reflects obligations undertaken as part of the JBNQA through which aboriginal title was surrendered for the benefit of the province by the Cree and Inuit to a territory the size of France.

Another interesting effort of the Government of Quebec: was the passage of An Act Respecting the James Bay Native Development Corporation in 1980 to stimulate investment and economic activity within the Cree territory.

The Government further created an Aboriginal Development Fund (ADF) in June of 1999 with a commitment of $125 million over five years ($5 million of which is reserved for non-First Nation Aboriginal communities or by Aboriginal peoples living outside a designated community while the remaining $120 million is segregated on a community-by-community allocation) to encourage improvements to capital infrastructure, promote job creation and foster an increase in the number of Aboriginal entrepreneurs. A minimum of 20% of the funds allotted to each nation or community must be devoted to economic development purposes. The funds available also must be twinned with other sources. The ADF will provide seed funds for local start-up investments, to sponsor the creation of community venture capital funds and to respond to priority needs that do not fit within normal provincial government programs. A formal agreement flowing from the

ADF was signed between the Kativik Regional Government and the Government of Quebec on June 29,1999 through which $25 million of the ADF was earmarked exclusively over five years for the Inuit communities.

5. Overall Fiscal Expenditures

The Secrétariat aux affaires autochtones (SAA) is the coordinating agency established in 1979 by the provincial government is the focal point for all interactions with the Aboriginal population. It has maintained an annual compilation of all disbursements, support and expenditures by the government since 1987 in relation to the Aboriginal peoples of the province. It has recorded total allocations in the 1999-2000 fiscal year by the provincial government for Aboriginal peoples in the amount of $516, 946,371.

6. Land Claims

The Government of Quebec was the first province in Canada to accept the continued existence of aboriginal title under Canadian law and to respond to this recognition through seeking to negotiate land claims settlements. This was not due to altruistic reasons or a function of a change in political perspective as it reflected the decision of Mr. Justice Malouf in the *Kanatewat* Case of 1973. Nevertheless, the Province did quickly respond to the substance of this decision positively rather than rely upon the vacation of the injunction granted by Mr. Justice Malouf one week later by the Court of Appeal. The Court of Appeal subsequently reversed Malouf J. two years later.

The James Bay and Northern Quebec Agreement of 1975, followed by the Northeastern Quebec Agreement three years later, presented an historic breakthrough in the relations between Aboriginal peoples and other levels of government in Canada. Although both Agreements have been criticized over the years for a broad range of reasons, it must be appreciated how significant they were for their time and how they represented a dramatic change with prior policy. Their significance remains as profound today over a quarter of a century later.

This willingness to negotiate aboriginal title rather than pursue endless litigation, as was historically the approach of British Columbia where these issues were equally as lively in the 1970s, has clearly been a far more enlightened policy. It is currently being followed in relation to the ongoing negotiations with the Atikamekw Nation as well as with the Innu (formerly called the Montagnais) represented by the Mamuitun Tribal Council (three First Nations) and those represented by the Mamu Pakatatau Mamit Assembly (four First Nations) in the North Shore. The same approach has not, however, been consistently applied when it comes to the Mohawks, Algonquins, Mi'kmaq and many off-reserve Indian and Metis groups. Nevertheless, in comparison to the attitude of other provinces, Quebec has adopted an overall position that can be perceived as far more favourable to Aboriginal peoples and their interests within their traditional territory.

This more positive approach has been evidenced in the vast array of agreements involving Crown land that have been entered into by the provincial governments with First Nations over the years since the JBNQA. A Common Approach agreement was reached among the Mamuitun Tribal Council, Quebec and Canada on July 6, 2000 that sets the stage for negotiations to conclude a final comprehensive land claim settlement that would involve the three First Nations receiving $250 million from Canada and $90 million from the provincial government as well as confirming exclusive title to 535 square kilometers and wildlife harvesting rights throughout their traditional territory. The principles accepted for further negotiations guarantee Innu a share in royalties deriving from resource development in the area, participation in planning and environmental management decisions and involvement in the creation of new parks and protected heritage sites. If a final settlement is reached along these lines then it should assure the Innu that they will be major players in any future development of their traditional territory.

Another historic entente was reached between the province and the Grand Council of the Crees on February 7, 2002 when Prime Minister Bernard Landry and Grand Chief Ted Moses signed a fifty-year, multi-billion dollar agreement. This final document was

developed rather rapidly as the agreement in principle was only reached on October 23, 2001 and has already been ratified by the Cree citizens of the nine Cree communities. The document commits the two parties to a "nation-to-nation" foundation for their relationship. The Cree agree to withdraw a number of lawsuits challenging proposed hydroelectric projects and not to bring any further ones during the lifetime of the agreement or to seek redress for past application of the JBNQA by Quebec. As a result, work on the Eastmain 1 power station and the Eastmain 1-A/Rupert diversion will proceed this Spring. The agreement includes the transfer of all provincial responsibility for economic and community development under the JBNQA directly to the Crees. The Crees will receive $23 million in 2002-03, $46 million in 2003-04 and $70 million in 2004-05 with subsequent years indexing the $70 million to a formula reflecting "the evolution of activity in the James Bay territory in the hydroelectricity, forestry and mining sectors." The parties also agree to adapt the provincial forestry management regime to involve the Crees more extensively in management processes and better reflect their traditional way of life and concern for sustainable development.

7. Self-Government

The Government of Quebec has also been the provincial leader in fostering the desires of Aboriginal people to exercise greater control over their lives and the affairs of their communities. The JBNQA once again has showed the way to some degree through its provisions guaranteeing the creation of new regimes and modifications to existing ones in a large number of spheres of human endeavour. The commitments contained in this Agreement resulted in provincial legislation (e.g., the *Northern Villages and Kativik Regional Government Act*, *An Act to establish the Makivik Corporation*, and the *Cree Villages Act*) as well as the *Cree-Naskapi (of Quebec) Act* by Parliament. Although these statutes merely provide delegated powers to the Cree, Naskapi and Inuit, as opposed to implementing the widespread Aboriginal desire for recognition of an inherent right to self-government, they still represented a significant advance over the prior situation. Only the Sechelt First Nation of B.C. had obtained any enhancement of the powers available to bands under the *Indian Act* at the time my original report was prepared, and

even this was obtained solely in 1986 through federal legislation coupled with a provincial statute acknowledging the federal law as part of a broader government for the Sunshine Coast District.

The Assemblée nationale took a further bold step forward on March 20, 1985 with the adoption of a resolution recognizing the existence of most of the Aboriginal nations within the province (it did not initially include the Malecite Nation, which was similarly recognized by a Resolution of the National Assembly passed on May 30, 1989) and in favour of forging a new relationship with these nations. The Metis and non-registered Indians have not received the same group recognition. The Resolution of 1985 endorsed the acceptance of the ancestral rights of the Aboriginal peoples, their "right to their own language, culture and traditions," the "right to own and control land," and their "right to self-government within Quebec." These rights were recognized based on the historical legitimacy of their claims and on the value to Quebec society to have harmonious relations with the indigenous population. The Resolution demonstrates a significant degree of respect and active support by the government for the goals and unique position of the identified Aboriginal groups as well as to ensure that the Aboriginal nations would "participate in, and benefit from, the economic development of Quebec."

While the Government of Ontario has signed a Declaration of Political Intent with the First Nations in that province in 1985, and subsequently a Statement of Political Relationship in August of 1991, these have been accords with the government rather than resolutions of the Legislature. It should be noted, however, that the latter document does pledge the provincial government to respect and recognize the inherent right of the first nations to self-government, whereas the Resolution of the Assemblée nationale does not. None of these policy thrusts provide similar recognition to off-reserve Indians and Metis. These initiatives have not been replicated to date by any other provincial legislature or by the Parliament of Canada.

The latest effort of the Government of Quebec was to develop a new policy on Aboriginal matters. This was pursued through a series of symposia in four regions of the

province and various other discussions over several years. Premier Lucien Bouchard formally released the Quebec Government's Guidelines on Aboriginal Affairs, "Partnership - Development - Achievement" in 1998.

8. Recent Negotiated Agreements

The Government of Quebec has been extraordinarily busy on a number of fronts in recent years. It has been particularly active in negotiating new agreements with First Nations and the Inuit. As an example, more than fifteen separate agreements were announced in 2000 while ten sectoral agreements were signed with the Mohawks of Kahnawake on March 30, 1999 alone (covering policing; child care; taxation issues; administration of justice; registration of marriages, births and deaths; transport; liquor permits; economic development and combat sporting permits). A number of these agreements are specifically to promote economic development and emanate from the establishment of the Aboriginal Development Fund in 1999. Others stem from different aspects of the Government's approach announced in 1998, such as the self-government framework agreement reached between the Micmacs of Gesgapegiag and the province on February 11, 1999, or the tripartite agreement to establish the Nunavik Commission on November 5, 1999 that resulted in the tabling of its proposals on April 5, 2001 for the creation of a Nunavik Assembly that is currently under discussion among the three parties.

The Government has also been proactive on the legislative front, for example, the *Youth Protection Act* was amended through Bill 166 (proclaimed into force on June 21, 2001) that enable the government to enter into agreements with First Nations and Inuit communities to create special Aboriginal youth protection programs.

Conclusions

The policies and attitudes of the Government of Québec in relation to Indian, Inuit and Metis peoples have been the subject of great controversy within as well as outside the province. The sense of negativity that has often been directed toward the provincial

government by some has, in many ways, been triggered by a handful of incidents of great import rather than by the overall approach of the government. The events at Kahnawake and Kanesatake of 1990, as well as the overwhelming changes introduced to the lifestyle and territory of the Cree through massive hydroelectric projects, have created an image of the province as one that resists Aboriginal aspirations. The active resistance of the Cree to La Grande Baleine fueled this sense of animosity as had the frequent expression of hostility toward this opposition by senior officials of Hydro-Québec and other representatives of the provincial government. The fact that the Grand Council of the Crees has regularly been compelled to initiate court action to obtain recognition of the environmental provisions of the JBNQA and their applicability to La Grande Baleine, and the judicial approval of their arguments, has, further enhanced the image that the Province is willing to ignore the concerns of the Cree to meet the interests of the southern majority. The possibility of separation, coupled with the assertions by some MNAs over the years that there is no requirement to obtain the consent of the Aboriginal population within the borders of Québec, has only further inflamed passions. Developments over the past four years suggest that a major turn for the better has occurred in the relations among First Nations, the Inuit and the Government of Québec.

If one attempts to examine objectively the record of the federal government in comparison with other countries, and of Québec in relation to other provinces within Canada, one cannot help but conclude that the performance of both Québec and Canada has been superior, relatively speaking, in most areas. This is not to suggest that the record has been outstanding, as the effects of colonization and dispossession of the Indian, Inuit and Metis peoples have been tragic beyond belief. Our history has been one in which our European ancestors at an early stage pursued positive and respectful policies toward the Nations they encountered due to economic, political and military self-interest. This attitude, however, was quickly jettisoned when the motivating forces disappeared and our self-interest switched to favour oppression and assimilation so as to facilitate the purchase - or theft - of their lands and its resources as well as the denial of their inherent rights to maintain their ways of life, traditions, cultures, religious beliefs, laws and governments. The history of colonization in the land now called Canada has been an

unmitigated disaster from the perspective of Aboriginal peoples and from the view of any neutral observer.

It has only been over the past three decades that as a society we have moved away from the policies of complete assimilation that was championed in the federal White Paper of 1969. This has not been an easy transformation in the thinking and attitudes of non-Aboriginal peoples - nor has this change been accepted by all. This change has, however, been made far more difficult for federal and provincial governments that have vigorously resisted the development of a new relationship based upon mutual respect and the sharing of the bounty of this land that was at the cornerstone of the original relationship symbolized by the treaties of peace and friendship of the Atlantic and the Two Row Wampum of the Iroquois Confederacy of the 1600s and 1700s.

Significant progress has been made over the last thirty years spurred on as a result of a number of major court cases, the constant pressure of Aboriginal peoples and their political organizations, the receptivity of the Canadian public to Aboriginal demands, the constitutional changes of 1982 recognizing and affirming the "existing aboriginal and treaty rights of the aboriginal peoples of Canada," the perception that prior policies were a disaster, numerous inquiries and parliamentary reports and the acceptance by at least some governments that justice and Canadian law required the negotiation of new arrangements. This progress should not be underestimated as we have come a long way in the legal and political arenas.

On the other hand, governments should not be quick to pat themselves on their collective back for doing what they are often compelled by the courts to do in order to honour their legal obligations. Likewise, the fact that Québec and Canada appear reasonably progressive when compared to a number of other western economically developed countries says more for how poor the track record is in those other regions than serving as a commendation for our performance. It must also be noted that our "achievements," if they can truly be called that, have been regionally limited within both the country as a whole and within Québec. While Québec has a very impressive record in comparison to

other provinces when examining province-wide data, the achievements decline dramatically when the effects of the James Bay and Northern Quebec Agreement and its aftermath are excluded. Other major initiatives on the legal and policy fronts within Québec and within Canada as a whole are similarly limited to particular Aboriginal groups or regions of the country and province.

Therefore, there is still a very long road to travel before the Governments of Canada and Québec can properly claim to be global leaders in developing a new relationship with indigenous peoples that throws off the remaining shackles of colonialism and apartheid policies. Far too many Aboriginal people continue to live in third world conditions confronted by little more than poverty and despair despite the richness of their original territory and the achievements reached by generations of immigrants to their lands. We have yet to accept fully that a proper basis for our future is mutual respect of our differences, including the Aboriginal desire for autonomy or self-determination, while forging true partnerships for the enjoyment of this territory and in the decision-making that will regulate our collective future for the betterment of all.