

**Aboriginal Governance in the Canadian  
Federal State 2015**

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## Foreword

This Working Paper is one of six case studies on the scenarios for global and regional integration now being released by the Institute of Intergovernmental Relations. The Institute embarked in 1999 on a multi-year research program on the effects of and challenges for Canadian federalism of global and regional integration. This project proceeded from an assumption of continuing and possibly accelerating international integration and governance, and that policy matters within provincial government jurisdiction will increasingly be the subject of international negotiation. The broader objective of the project has been to examine whether the institutions and dynamics of the Canadian federal system can continue to effectively manage this change. The central issue we have been investigating is under what circumstances continued *ad hoc* adjustment to the processes and institutions of the federation would remain the appropriate course of action; and under what conditions more systemic reform would be the preferred or even the essential course to take. For more information of the research output and findings of the project overall, please consult the Institute's website at [www.iigr.ca](http://www.iigr.ca).

Our research program has consisted of several components: the development of a set of scenarios for the world in 2015; a baseline study of Canadian federalism and international relations; a set of papers applying the scenarios and comparing integration challenges in other federal systems; and these six case studies. The case studies cover the following policy sectors: Biodiversity, Climate Change, Health and Health Care, Agriculture and Agri-foods, Aboriginal Governance, and Financial Services. They were initially prepared for discussion with the policy sector communities. Most of these discussions were sponsored by the Government of Canada through the relevant departments.

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Finally, as Director I wish to acknowledge the role that Douglas Brown, Institute fellow, has played in the overall coordination of these case study papers and in our Global and Regional Integration project as a whole.

Harvey Lazar  
Director  
March 2003

## 1. INTRODUCTION

The purpose of this paper is to discuss the likely impact that four potential scenarios of future global and regional change would have on Aboriginal governance within the context of the Canadian federal system. These scenarios are described in *The Future of Global and Regional Integration*, a study by The Institute of Intergovernmental Relations, Queen's University, under the titles of Global Club; Shared Governance; CyberWave; and Regional Dominators. Synopsized in the context of this paper, the four groups form the basis for our development of future scenarios for First Nations governance in Canada.

Employing a systematic method to speculate about the future is a provocative but useful way of helping us mold the choices we make today around the expectations and hopes for our tomorrows. The rapid and profound transformations occurring in global political and economic relations add immediacy to this speculation. The same can be said for the metamorphosis of modern-day Aboriginal governance in Canada. The creation of Nunavut and the recent constitutional recognition of self-government for the Nisga'a Nation in British Columbia are the clearest indications that Canada's Aboriginal reality is already changing the face of the Canadian federation and the place of Aboriginal people within it. But these are only harbingers of a widespread and perhaps fundamental process of change and renewal that

is sweeping Aboriginal Canada. Attempting to connect the dynamic realities of global change and the transformation of Aboriginal governance in Canada, therefore, offers a particularly exciting if not daunting opportunity to talk about the future.

Even though we are authors with considerable firsthand experience with developments in Aboriginal governance (most recently as federal negotiators in the *Nisga'a Treaty* process), we faced a rather barren landscape in our attempts to draw together the issues of Aboriginal governance and global change. Our own knowledge of the domestic situation was quite extensive, but how Aboriginal governance might relate to global factors was not something that either of us had considered or encountered to any degree in the past. Apparently, we are not alone. We have yet to identify any research or writing that focuses extensively on the connection between these two subjects.

So we found ourselves not unlike explorers bravely heading off into uncharted waters, uncertain of whether we would find the solid ground needed to make a convincing connection. Aboriginal governments in Canada, after all, mostly involve small populations living in more rural and remote parts of the country. In addition, their governance authority is largely local in nature. What bridges could there be between this type governance situation and large-scale changes in the scenarios of global and regional integration?

Like most smart explorers, we decided to fill the gaps in our knowledge and seek as much help and direction as possible. One particularly important issue was the international relations environment as it affects and relates to indigenous people. Construction of the global scenarios centres on changes in global and regional governance and in the relationships among international players. We presumed that the changes at the international level that affect indigenous people and issues would be a factor to be considered. But we were uncertain how it might connect to and affect change in Aboriginal governance domestically, if at all. This led us to

undertake a special research project into indigenous international relations. Having looked at the matter more closely, we believe that the implications of the international aspects of indigenous relations, explored later in this paper, will be of growing importance to the future of Aboriginal governance in Canada.

We were assisted in this project by a reference group that brought together Aboriginal leaders and officials as well as academics and federal government policy experts in Aboriginal Affairs. The input from this group was invaluable. Its members helped to shape our approach to Aboriginal governance by challenging our basic, arguably overly Eurocentric, concepts of governance. They questioned, for example, the usefulness of power and influence as core concepts when talking about societies in which traditional relationships and custom play such a prominent role in the structure and practice of governance. Indeed, there were questions of whether factors of causation identified in the global integration scenarios even operate in a similar way when placed in an Aboriginal context. During a focus group session, our reference group helped us to identify key forces in the global system that it felt would affect the development of Aboriginal governance. That information gave us the basic outline for the four First Nation governance scenarios developed in this paper. The final product is, of course, fully the responsibility of the authors.

### **Limitations of the Report**

The reader should be aware that our study of the various scenarios does not include a detailed analysis of Canadian northern Aboriginal peoples (such as those who live in Nunavut; Aboriginal peoples of the Western Arctic; and the Inuk) or the Métis and other off-reserve Aboriginal groups. Rather, it focuses on self-defined First Nations and Indian Bands that function under the *Indian Act* or within treaty or self-government agreements. Because of the additional complexity involved, we also decided not to introduce the dynamic of Aboriginal group relations into the scenarios, even though we recognize its political and legal importance and the richness it would add to the stories. However, we did not believe

that this particular dynamic would have enough force to alter the outcomes of the scenarios.

Typically, discussions of governance assume that the system under question operates within a defined territorial base. We have tried to note specific instances that may arise in one or more of the scenarios where First Nation governance may be exercised without a corresponding land base. Undoubtedly this will be true, for example, under some self-government arrangements with respect to the exercise of some jurisdictions such as culture and language and membership. We also touch upon the connections between on- and off-reserve First Nations communities. By no means, however, do we explore urban Aboriginal governance in any fulsome way.

### **The Meaning of Governance**

As a beginning framework for a definition, it is useful to turn to the meaning of governance utilized by the *Royal Commission on Aboriginal Peoples* (RCAP) during its extensive hearings and in its report published in 1996. RCAP identified three fundamental attributes of government:

*Power (Capacity)<sup>1</sup>:*

the acknowledged legal capacity to act as government, which includes legislative, executive, administrative and judicial capacity;

*Legitimacy:*

public confidence and support which flows to Aboriginal governments—internally from Aboriginal constituents and externally from other governments (and the public at large); and

*Resources:*

the financial, economic, natural resource base, information, technological and human resources necessary to exercise governmental powers and meet the needs and expectations of their Aboriginal constituents.

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<sup>1</sup>We use the term capacity rather than power (which is the term used in RCAP) because it is more inclusive of aboriginal as well as broader “European” notions of governance.

We have added intergovernmental relations, at both domestic and international levels, as a fourth fundamental attribute of governance for the purpose of the case study:

*Intergovernmental Relations:*

the formal and informal relationships, institutions, practices and decision-making processes among governments, including mechanisms for managing these relationships and processes.

A primary rationale for this addition to the characteristics of governance is that intergovernmental relations is a particular focus of the four different world scenarios which have been developed. Even more important for our purposes is the recognition that the intergovernmental dimension is an increasingly significant feature of Aboriginal governance in the domestic Canadian context. Despite a formal constitutional division of powers in Canada, the high level of interdependence among the federal and provincial governments has produced an expansive and highly institutionalized set of intergovernmental relationships that are part and parcel of the function and workings of the federation. The range of issues that federal-provincial structures and processes deal with includes matters of significance to Aboriginal groups. Although not formally integrated into this system, Aboriginal leaders have for some time held regular meetings with federal and provincial government political leaders and officials, including the Prime Minister and provincial Premiers. Moreover, as conflicts over Aboriginal exclusion from Social Union negotiations have revealed, the absence of a place for Aboriginal groups at intergovernmental tables in Canada is an area of continuing political sensitivity.

In a narrower context, intergovernmental relationships are being more precisely defined through Aboriginal treaty and self-government processes, such as the *Nisga'a Treaty*. These arrangements include formal mechanisms for harmonization and coordination among governments, but they exist outside the federal-provincial intergovernmental system *per se*. We can expect added pressure to open federal-provincial relations to far greater Aboriginal

participation, particularly as Aboriginal self-governing entities with extensive jurisdictional capacity become a larger part of the governance landscape in Canada. In addition, the relationships among First Nation governments and organizations themselves are of growing importance as First Nations enter into process of rebuilding their nations and creating larger regional, tribal and provincial units of governance.

Canadian Aboriginal groups, including First Nations, are playing a more active role on the international stage in attempts to address a wide variety of indigenous issues. They are also developing their own relationships with international organizations and with national governments and indigenous groups from other countries. As we will see later in the paper, these relationships are becoming more formalized, which in itself adds a further dimension to the Aboriginal governance equation.

### Capacity

Governance capacity is the central feature around which we shape First Nation government scenarios. In defining governance, RCAP highlighted the legal capacity of government, which brings to the forefront issues such as the scope of authority, jurisdiction and the institutions of government. This focus, although extremely important, is too narrow and static. One needs to look beyond the legal-institutional framework of governance to explore how authoritative decisions actually get made on the ground. When considering First Nation governance, broadening the view of governance capacity has two advantages. First, it points us beyond formal Band government to traditional systems and practices of governance which may be operating concurrent with (or sometimes in conflict with) the formal institutions of First Nation governance. The process of cultural and political renewal underway in many First Nation communities often centres on traditional understandings and practices of governance and how these are to be reconciled with contemporary Western democratic governance principles and practices. This reconciliation is finding concrete legal expression in new self-governing

arrangements that are now in place or are being negotiated in Canada.

Second, under the current *Indian Act* system, a narrow legalistic focus highlights the “administrative” on-reserve nature of Band government and the First Nation political-federal bureaucratic axis as the primary origin of decision-making in most First Nations communities. Since these are likely not permanent features, this emphasis distorts the existing reality that many First Nations assert and attempt to exercise authority based on views of sovereignty and treaty and Aboriginal rights. The governance lines between formal legal powers and *de facto* assertive power are blurry at best and are often in a state of flux that depends on a host of factors. As the history of First Nations amply demonstrates, establishing the effective balance of power between First Nations and other governments is a source of ongoing tension, conflict and legal battles. The search for that balance will always be a dynamic factor in the evolution of Aboriginal governance and the relationship between First Nations and other Canadian governments and citizens.

Improvements in economic, educational and technological conditions that are now transforming First Nation governance capacity must also be taken into account when considering the future development of Aboriginal governance. In addition, the impact of demographic factors needs to be carefully assessed. For example, a shift away from on-reserve political elites may occur as the number of First Nation members living off-reserve, now almost 50 per cent, increases and exerts more political clout. Already, new political and governance relationships among First Nations have emerged to deal with the new realities of the Aboriginal urban environment. In Saskatchewan, for one, the Saskatoon Tribal Council has entered into protocol agreements with other local First Nations to provide single-window services to all Aboriginal people in that urban community.

Playing out how global and regional forces might affect these and other aspects of governance are what shape the various scenario

pictures of First Nation government in 2015 that are developed later in the paper.

### **Aboriginal Governance : A Shifting and Evolving Picture**

The final concept that we will use to describe First Nations governance is that of a rapidly shifting and evolving model of governance. Because of the range of changes, there will not be one cohesive picture of First Nations governance under each of the future scenarios. Today, First Nations governments mainly administer programs and services under authority delegated by the federal government under the federal *Indian Act*. Such a simple characterization, however, masks the complex range of First Nation government experience and even the capacity that exists under this single legislative framework. At one end of the spectrum are those communities that are highly dependent on financial resources from the federal government and operate under the *Indian Act* with limited delegated authority or responsibilities. At the other end, under modern treaties and self-government arrangements, are First Nation governments that rely extensively on their own resources to exercise a wide range of jurisdictions and to deliver an array of programs and services that are beyond the scope of most municipalities in Canada. Most First Nations governments operate somewhere within these two broad parameters of governance.

As evidenced by recent measures such as the *First Nations Land Management Act*, the locus of First Nation governance accountability is also shifting from a government-centred to a citizen-centred accountability. Through legislative and other changes, decision making will become more community-based, transparent and removed from the direct control of the Minister of Indian Affairs. Transforming the nature of accountability in this way effectively alters the capacity of First Nations to exercise governance autonomy and authority.

First Nation governance is being transformed by negotiation of self-government agreements and, importantly, by internal processes of political and cultural renewal. Many First Nations, encouraged in part by government, are moving rapidly to aggregate their capacity by

strengthening and creating Tribal, Nation and regional governance structures. All of this leaves us with a very complex picture of governance that is not likely to move in one direction. Our scenarios attempt to take into account diverse governance outcomes. But they do not do justice, by any means, to the possible variations in the First Nation governance that could emerge.

### **SETTING THE SCENE IN THE YEAR 2000**

As we have noted, there is considerable and significant diversity among Aboriginal governance structures in Canada. For example, structures to accommodate the breadth of representation range from single Band Councils under the *Indian Act*; to Tribal Councils that represent several First Nations; to province-wide and national political organizations, such as the Assembly of First Nations (AFN), the national body representing First Nations in Canada.

The *Indian Act* recognizes approximately 620 Indian Bands in 600 distinct communities. About 60 per cent of these communities have populations of less than 200 people and nearly half of Band membership lives off-reserve, although exact numbers can vary considerably. There is a great deal of movement among Band members on and off reserves throughout Canada. Also, Aboriginal population growth rates are more than double the Canadian rate as a whole, with approximately 50 per cent of the population under the age of twenty-five. In effect, First Nation communities are experiencing the 'baby boom' a decade or so later than mainstream Canada, which adds special pressures on those communities and governments. Added to this, Indian people living in First Nation communities and off-reserve are socially and economically disadvantaged by all standards of comparison to other Canadians.

Governance capacities among these First Nations vary widely. Most First Nations currently exercise administrative responsibility for the delivery of federal programs and services and have limited power to enact by-laws within their Band through administrative delegation that flows from the *Indian Act*. As well, many First

Nations simultaneously practise traditional forms or systems of governance, including consensus-based decision making and ongoing oversight by Elders in the community.

Bands receive funding from the federal government under a number of arrangements that vary according to length of agreement and spending flexibility. For most social programs, Bands are required to meet provincial standards as a matter of the terms and conditions of funding. There are also limits on allowable deficits and Bands operate under financial administration guidelines that include compliance reviews by funding Departments. Failure to meet compliance standards or exceeding deficit limits can lead to intervention by the Department of Indian and Northern Affairs (DIAND). In more extreme cases, DIAND will assume direct responsibility for Band management.

Approximately 500 of the 600-plus First Nation communities are involved in some level of self-government negotiations with the federal government. The outcomes of these negotiations most often recognize a broad range of First Nation government powers that must operate within the framework of the Canadian constitutional order, including the Charter of Rights and Freedoms. As of 2000, governments from five provinces—British Columbia, Saskatchewan, Manitoba, Quebec and Newfoundland—were involved in self-government negotiations. Other provincial governments have yet to endorse the principle of Aboriginal self-government and have chosen not to participate in these processes. In these situations, self-government negotiations concentrate on a narrower set of jurisdictional powers, excluding areas normally defined as provincial jurisdiction.

At least 35 of the current negotiations are with larger groupings of First Nations, in particular with Tribal Councils or self-defined First Nation groupings of several *Indian Act* Bands. Most of the self-government negotiations in British Columbia, for one, are connected to the settlement of land claims. There are also sectoral negotiations that involve the right of First Nations to exercise control in specific

jurisdictions such as health or education. Even those First Nations not involved in self-government negotiations are increasing their program and service responsibility under the *Indian Act* in the areas of education, health, policing, social services, housing and land management. In fact, federal government Aboriginal policy has focused on the devolution of authority since the 1980s.

Governance arrangements develop through both formal intergovernmental negotiations and internal processes of cultural and political renewal. The governance structures that emerge from these two processes are neither mutually exclusive nor static in nature. As noted earlier, traditional governance arrangements can coexist with current *Indian Act* structures and be incorporated within negotiated self-government arrangements. Many First Nations are contemplating governance arrangements that include aspects of traditional practices along with Western democratic structures and principles.<sup>2</sup>

### **The Domestic Legal Framework**

The federal government has primary responsibility for “Indians and lands reserved for Indians” under ss.91(24) of the *Canadian Constitution Act, 1982*. The federal government acts under the *Indian Act*, which is a comprehensive federal statute governing the so-called “status” Indians (members of a Band recognized under the *Indian Act* who have been issued a number and a status card) and lands reserved for Indians. This statute is much reviled by many First Nation people in Canada who view it as the foundation for a paternalistic regime that keeps them relegated to living as wards of the state.

Canada also has a long history of treaty making with Aboriginal groups—initially to maintain peace and friendship with the resident Aboriginal groups and subsequently, as the new country was formed, to secure lands for settlement. Indeed, a large number of land

<sup>2</sup> Appendix A is an illustrative but not exhaustive list of both traditional models of aboriginal governance and arrangements currently under negotiation through self-government and treaty processes.

cession treaties were completed post-Confederation. These treaties form an important part of the legal framework for all Aboriginal issues and governance, particularly since the Supreme Court of Canada has tended to see treaty rights as collective rights exercisable by individuals on the authority of the local community to which the person belongs. Few treaties were ever concluded in British Columbia, resulting in the modern comprehensive land claim and self-government treaty process that led to the recent *Nisga'a Treaty*. Similar negotiations continue with First Nations in the Northwest Territories and Quebec, most notably with the Yukon's 14 First Nations.

Canadian courts have recognized the existence of Aboriginal rights as a matter of Canadian common law for more than 30 years. In addition, since 1982, Aboriginal and treaty rights in Canada have been "recognized and affirmed" by s.35 of the *Constitution Act, 1982*, which refers to the "existing aboriginal and treaty rights of the Aboriginal peoples of Canada." The section specifies that treaty rights include rights that existed at the time under land claims agreements, as well as similar rights that may be acquired in the future. It is through this modern treaty-making process that self-government agreements receive constitutional protection.

Beyond this, s.35 does not specify the nature or extent of Aboriginal and treaty rights. Since Aboriginal law is a relatively new area of jurisprudence, many issues are not clear, especially those involving the existence and content of the Aboriginal right to self-government. Landmark court decisions that provide a level of guidance on these issues, however, are reshaping the rights of Aboriginal people and the nature of First Nation governance in the country. In its 1990 *Sparrow* decision, the Supreme Court of Canada held that "existing aboriginal rights" must be interpreted flexibly to permit their evolution over time. This direction by the Court effectively places rights that are based on treaties and the historic occupation of lands prior to British sovereignty in a contemporary context. The courts recognize justifiable infringements of Aboriginal and treaty rights by federal and provincial governments,

however these infringements must meet a series of tests, including a valid legislative objective such as public safety or conservation (*Sparrow*, 1990). In such cases, the honour of the Crown is to be held to the highest standard, which implies a duty on the part of government to consult First Nations and in some instances to obtain consent or provide compensation.

In another landmark case, the Supreme Court's *Delgamuukw* decision in 1997 confirmed underlying Aboriginal title for those First Nations that had not signed treaties and stated that the Crown had a moral, if not legal, duty to negotiate land claims in good faith. The Court further ruled that Aboriginal title derives from historic occupation and possession of Aboriginal lands prior to the assertion of British sovereignty. The decision also limited unilateral action by governments by requiring consultation with title First Nations if future development or regulatory activities might affect their interests. Expressed differently, inherent limits exist on the uses to which land may be put and these uses must not be irreconcilable with the attachment by Aboriginal groups to the land. The commercial alienation of these lands is a case in point.

A series of other treaty cases in the 1990s, including the *Marshall* decision in 1999, established the basis for the interpretation of historic treaties. Most important from the point of view of First Nation governance, these rights have tended to be seen as collective rights exercisable by community members on the authority of the community. An individual's entitlement to exercise a treaty right is therefore dependent on his or her membership in one of the modern First Nation communities that holds the right. Thus it is quite possible that First Nations could see the scope of their governance capacities expand as the courts clarify treaty rights. What the Court has so far left unclear, however, is the ability of government to "regulate" Aboriginal and treaty rights. Because of this uncertainty, we anticipate that First Nations will increasingly assert their authority to regulate these rights, thereby triggering conflicts over jurisdiction with the federal and provincial governments.



Another case with long-term legal and political ramifications on First Nation governance is the Supreme Court of Canada's *Corbière* decision in 1998. That decision directed that status Band members who did not reside on reserves must be allowed to participate in Band governance. The rationale for this decision was that the interests of off-reserve members might be affected by such Band Council decisions as those involving the allotment of land or on-reserve residences. In its decision, the Court required the federal government to amend the *Indian Act* to order changes in Band election procedures by November 2000. While the *Corbière* decision was quite limited from a legal point of view, the governance implications of the political reconnection of on- and off-reserve members implied by *Corbière* are likely to be substantial as off-reserve members contest for political representation and begin to exert demands on their Bands. While the most immediate effect is on the *Indian Act*, the impact of *Corbière* will be felt in self-government negotiations in which off-reserve issues will play a more prominent role. Already, off-reserve members of a First Nation must be involved in the ratification of treaties and self-government arrangements for these agreements to be valid.

The Supreme Court has yet to deal directly with the issue of the inherent right to Aboriginal self-government. In the case of treaty First Nations, the Supreme Court said in *Pamajewan* (1996) that the right to self-government must be looked at on a fact-specific basis in each case, taking into account the history and culture of the Aboriginal group claiming the right. However, a recent lower court decision in British Columbia involving a challenge to the constitutional validity of the *Nisga'a Treaty* held that the inherent right to self-government had not been extinguished (*Campbell et al*, 2000). Moreover, in the Court's view, the self-government jurisdiction of the Nisga'a as set out in the Treaty is not inconsistent with the division of powers in Ss 91 and 92 of the *Constitution Act, 1867*. In other words, not all of the legislative powers have been assigned to Parliament and the legislatures. The Court also found that Aboriginal self-government forms part of the unwritten principles underlying the Canadian Constitution.

Not unexpectedly, the decision has been appealed and will likely be taken to the Supreme Court, with potentially far-reaching consequences for the future evolution of First Nation governance and the Canadian federation.

### **Federal Policy**

The most influential federal policy currently affecting the evolution of Aboriginal governance is the *Inherent Right Policy*, developed in 1995 in response to both the *Charlottetown Accord* and the interim report of the *Royal Commission on Aboriginal Peoples* (RCAP). The aim of the policy is to approach the implementation of self-government with "practical and workable" agreements to avoid lengthy and costly litigation. (See Appendix A for a review of the policy and its application.) Under the policy, Canada recognizes the inherent right of self-government as an existing Aboriginal right under s.35 of the *Constitution Act, 1982*. The policy is based on the view that Canadian Aboriginal peoples have the right to govern themselves in relation to matters integral to their communities, cultures, identities, traditions, languages, institutions and with respect to their special relationship to their land and resources. Powers related to Canadian sovereignty, national defence, external relations, criminal law and the national interest are not subject to negotiation. However, the policy allows for the recognition of a wide range of First Nation jurisdictions and, in certain instances, the paramouncy of First Nation laws. Self-government agreements negotiated under the policy can be constitutionally protected, thereby giving Aboriginal governments a distinct place within the governance framework for the federation.

The second major development in federal policy was the release in 1997 of *Gathering Strength—Canada's Aboriginal Agenda*, the federal government's response to the RCAP Final Report. The centrepiece of the plan was a commitment by the federal government to strengthen Aboriginal governance by supporting the rebuilding of First Nations into larger governance groupings. This would be accomplished through institution and capacity building, creating new fiscal relationships, and strengthening accountability, particularly

between First Nation governments and their members.

Just as federal policy has evolved, so has the governance capacity of First Nations across Canada. The *Gathering Strength* policy not only targets First Nations actively engaged in self-government negotiation processes but also those exercising authority under the *Indian Act*. It also envisages a new partnership among Aboriginal groups, the provinces and the federal government to bring about practical improvements in the social and economic situation of Aboriginal Canadians. In the absence of major intervening events, such as landmark court decisions, the focus of federal policy will likely continue to steer away from “rights-based” arrangements and instead concentrate on practical and workable approaches that support the development of more open, transparent and sustainable First Nation governments in Canada.

### **Provincial Policy**

All provinces in Canada assert that the federal government has primary responsibility for Aboriginal people. In practice, this has meant that the federal government exercises on-reserve responsibility while provinces accept, albeit under duress, the major responsibility for Aboriginal people off-reserve. The debate over responsibility for Aboriginal people has been an ongoing point of federal-provincial tension, particularly since the 1970s when Indians living on reserves started to migrate to the cities.

With the advent of self-government and land claims negotiations across the country in the 1990s, the provinces became increasingly engaged in questions of First Nation governance. Some provinces, notably British Columbia, Saskatchewan, Manitoba, Quebec and Newfoundland, have endorsed at some level the principle of Aboriginal self-government and are willing to see the constitutionalization of these arrangements. A number of these provinces have also demonstrated a willingness to look at access to resources and resource benefit sharing as a way of reconciling conflicts over access and development of resources on lands traditionally used and occupied by Indians tribes and nations.

These policy positions, of course, may change in the future with changes in government.

Current federal policy requires provincial legislative concurrence with treaties and comprehensive self-government arrangements. Therefore, changes to provincial policy may have a substantial impact on the future of First Nation governance. Variations in provincial support for self-government will likely curtail uniform development of First Nation governance for the foreseeable future. For this and other reasons, First Nations continue to push for constitutional recognition of the right to self-government and a constitutional commitment to its implementation.

With the exception of blanket recognition of self-government, most provinces have policies that endorse cooperation and partnership with First Nations when dealing with issues that focus on economic and social policy matters and the delivery of programs and services. Provinces are particularly concerned that they will be left to pick up the financial and service load if these communities cannot sustain themselves socially and economically. Generally, the provinces recognize that effective governance is key to community stability and well being. Therefore, they share an interest in the promotion of Aboriginal governance capacity and have been willing to undertake some measures to that end.

Understandably, the relationship between First Nations and the provinces differ markedly across the country. For example, in the Prairies, where there is a strong treaty tradition, First Nations are reluctant to recognize any substantial provincial role. Because of the treaty relationship with the Crown, tripartite arrangements with the federal and provincial government are anathema in these provinces; double bilateral agreements are often employed to produce the effect of three-way agreements. Differing histories and relationships in each province have led to particular Aboriginal political cultures that are quite distinct and entrenched. As a result, these provincial-Aboriginal cultures represent very consequential factors in the evolution of First Nations governments and their relationships with Ottawa and the provinces.

## The Indigenous International Relations Picture

### *International Law*

At the beginning of the paper, we noted the need to explore how international factors might influence the development of Aboriginal government in Canada. One obvious connection is international law. Undoubtedly, decisions by Canadian courts will be a continuing force in shaping First Nation government. Since Canadian courts are influenced by international jurisprudence, it is necessary to consider how the international legal context might impact on Aboriginal rights. More broadly, international legal opinion also influences political and popular opinion and the legitimacy of state policy and action. We examine these issues below.

Although the international legal system is heavily geared toward states (represented by recognized governments), non-state actors now occupy a place in international law. Examples include international organizations and NGOs; transnational companies; individuals; national liberation movements; minorities; and indigenous peoples. International custom, as evidence of a general practice accepted as law, is as difficult to define as it is to enforce. Nonetheless, it is an established doctrine in international relations. Essentially, customary law is created by the practices of states and established norms in international law. Customary norms are generally adhered to, or at least acknowledged, by nation-states regardless of any formal act of assent to the norms. Through customary law, indigenous rights have made their way to the international table. Prior to the early 1990s, indigenous rights had been considered only in the general sense of minority rights in international law. However, today there is an increasing acceptance of indigenous human rights, including social, political, economic and cultural rights, as a separate and unique area of international law. Examples include the ratification of ILO *Convention 169* and the UN and OAS *Draft Declarations on the Rights of Indigenous Peoples*.

The definition and enforcement of indigenous rights as a matter of domestic law (i.e. the judgements of the courts of individual nation states) has been demonstrably influenced both by

judgements of other nation states and by decisions of international tribunals, including those established and maintained by the United Nations. For example, the landmark *Delgamuukw* judgement of the Supreme Court of Canada was strongly influenced by the judgements of the Marshall Court (the U.S. Supreme Court in the mid-19th century) and by the recent judgement of the Supreme Court of Australia in *Mabo*. The *Delgamuukw* judgement, in turn, was strongly influential in the *Wik* decision of the Supreme Court of Australia. The legal scholarship of Brian Slattery, whose influence is obvious in such Supreme Court of Canada judgements as *Delgamuukw* and *van der Peet*, is, in turn, largely derivative of ideas first developed in the international arena and given voice by such institutions as the UN Working Group on Indigenous Peoples. Evidence of a more direct influence by international bodies can be found in the earlier *Lovelace* and more recent *Lubicon Lake* decisions. In each of those cases, criticism of Canadian legislation and judgements by the International Human Rights Committee led to legislative change by the Canadian Parliament.

There are also a number of issues, explored below, that are of particular importance to Canada's Aboriginal people and the indigenous peoples of other countries in terms of international law and the emerging international recognition of indigenous rights.

### *Human rights:*

The right to self-determination as recognized in international law and as it pertains to indigenous peoples has created a significant amount of concern at the international and domestic level. International understanding of official UN documentation generally defines self-determination in the form of statehood and recognizes that:

all *peoples* have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>3</sup>

<sup>3</sup> Article 1 of 1960 UN Declaration on Granting of Independence to Colonial Countries and Peoples,

This definition raises an issue around the usage of “peoples” in indigenous documentation, such as the UN and OAS Draft Declarations. If all “peoples” have the right of self-determination guaranteed under international human rights laws, does this not carry profound implications for the rights of indigenous peoples and their position with respect to the nation state?

Grappling with this problem internationally has led to a refinement of the concept of self-determination as applied to indigenous peoples:

... self-determination is not just about achieving statehood but also the ability to assert identity, preserve language, culture, tradition, achieve autonomy and self-government, free from undue interference.<sup>4</sup>

The latter half of this definition describes a possible legal and political space in international relations for indigenous peoples by focusing rights of self-determination on questions of autonomy and self-government within the context of the sovereign nation state. Questions of autonomy, self-government and cultural identity are the central axes around which Aboriginal governance in Canada turns. With these connectors, we can see that international legal opinion and judgements with respect to rights of self-determination may have considerable bearing on how the self-government of First Nations is framed at home.

*Environment and sustainable development:*

As noted, international conventions can influence the evolution of international law as well as exert direct pressure on the policies and actions of states. Another area vital to Aboriginal people in Canada is environmental protection and sustainable development. Indigenous peoples are

credited with certain knowledge of, and respect for, the environment and sustainable development practices. At the international level, the traditional relationship between indigenous peoples and land and resources is now more recognized and valued in sustainable-development thinking. For example, the language of the *Convention on Biological Diversity* (CBD) mandates the recognition of indigenous knowledge and use of intellectual property mechanisms to protect that knowledge (*Article 8J*).

*Intellectual Property Rights (IPR):*

Another example is the protection of culture and traditional knowledge. Intellectual Property Rights (IPR) are of growing importance in international law and indigenous peoples are duly impacted, in particular as IPR include cultural property and traditional knowledge. Intellectual property rights are generally reserved for individuals and nation-states, and may conflict with the rights and interests of indigenous communities. On one hand is the right of individuals to appropriate indigenous knowledge; on the other is the extent to which culture and traditional knowledge which is “owned” by indigenous communities can override the rights of others.<sup>5</sup> While the debate on these matters is in the early stages, they are nonetheless contentious issues in international law. The World Intellectual Property Organization (WIPO) Roundtable on Intellectual Property and Indigenous Peoples reflects a growing consensus that IPR are of critical import for the future cultural and commercial rights of indigenous peoples. The role that indigenous governments play in the protection and regulation of the use of cultural and customary practices and knowledge will be heavily influenced by what gets settled through such international forums.

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loose interpretation of Article 73 of UN Charter, UNGA Resolution 1514 (XV) December 1960

<sup>4</sup>As quoted by S. James Anaya in, *Indigenous Rights Norms in Contemporary International Law*, Arizona Journal of International and Comparative Law, Fall 1991, p.37

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<sup>5</sup> For example: if an indigenous community proves that they have traditional knowledge of a certain herbal remedy that is used for religious and/or medicinal purposes in that community, do they then have the *exclusive* rights to that remedy, thereby creating a monopoly that infringes on another’s right to property?

*Relevant International, Regional and Non-Governmental Organizations:*

In the past 20 years, indigenous peoples and issues have been increasingly recognized and included at international and regional tables. Organizations leading these efforts include the United Nations at the international level and the Inter-American Human Rights Commission of the Organization of American States at the regional level.<sup>6</sup> In 1989, the International Labour Organization (ILO) provided the first strong statement on indigenous rights when it adopted *Convention 169*, or the *Convention and Recommendation on the Protection and Integration of Indigenous and Tribal Populations*<sup>7</sup>. In particular, *Convention 169* recognizes the right of indigenous peoples to develop and live by their own designs as distinct communities.

Numerous other international organizations recognize and advocate indigenous issues. The WIPO's Roundtable on Intellectual Property and Indigenous Peoples in July 1998 was the first of its kind to include indigenous peoples and to recognize and discuss the notion of traditional knowledge and cultural property of indigenous peoples. The World Health Organization (WHO) regularly surveys indigenous health issues and

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<sup>6</sup>In 1983, the United Nations (UN) established its Working Group on Indigenous Populations (WGIP) that produced a Draft Declaration on the Rights of Indigenous Peoples. Among the key points in the Draft Declaration are the affirmation of the right to self-determination (including the right to self-government and autonomy), and a wide range of civil and political and economic, social, and cultural rights (including land and resource rights). According to Declaration, states would be required to adhere to and be proactive in their affirmation of these rights. In addition, 1993 was declared the Year and 1994 the start of the Decade of the World's Indigenous Peoples. There is now a distinct possibility that a Permanent Forum on Indigenous Peoples will be created within the UN. A number of First Nation organizations in Canada have played a significant role in these developments.

<sup>7</sup> Convention 169 was an adapted version of ILO Conventions 104 and 107, 1957.

the effect of poverty and quality of life in the ongoing dilemma of poor standards of living for many of the world's indigenous peoples.

Other international trade organizations, such as the World Bank, are only now mentioning the rights of indigenous peoples. Those trade agreements and organizations, such as the Multilateral Agreement on Investment (MAI) and the World Trade Organization (WTO)<sup>8</sup>, that ignore them are heavily criticised by indigenous and other groups.

The Organization of American States (OAS) and the Inter-American Human Rights Commission (IAHRC) have drafted the *Inter-American Draft Declaration on the Rights of Indigenous Peoples*. Among the document's key points are the affirmation and protection of self-identity, which in effect is an affirmation of self-government and autonomy rights; cultural integrity; and human rights, which encompass civil and political, economic, social and cultural rights. Regionally, the OAS and IAHRC are involved in the Summit of the Americas ongoing development of the *Free Trade Agreement of the Americas* (FTAA). Among its commitments, the FTAA promises to promote the full integration of indigenous peoples into political and economic life in ways that affirm their cultural identity.

The Inter-American Development Bank has various funding for indigenous projects and, on a more general level, promotes awareness of indigenous issues in the region. On the other hand, regional trade agreements, including the *North America Free Trade Agreement* (NAFTA), have been criticized for neither recognizing nor including issues of import to indigenous peoples in their negotiations and documentation.

Various regional and international NGOs have also made concerted efforts to bring the unique nature of indigenous rights into the

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<sup>8</sup> The WTO language in TRIPS (Trade Related Intellectual Property Rights) does not specifically acknowledge or recognize either traditional indigenous rights or any protection of indigenous rights.

international spotlight and to promote awareness and protection of these rights. Among these NGOs are Amnesty International (international), Human Rights Watch (U.S.), European Centre for Minority Issues (Europe), Minority Rights Group (Europe), and the Latin America-based Survival International (international). In addition, numerous international environmental organizations support and advocate indigenous methods of environmental preservation and sustainable development.

### **Indigenous International Relations**

Indigenous organizations have developed a growing level of international and regional cooperation and understanding on common issues and concerns. The Assembly of First Nations and other Canadian Aboriginal groups are very active on this front.

The International Indian Treaty Council and the Grand Council of the Crees of Quebec were awarded consultative status with the United Nations Economic and Social Council (ECOSOC) in 1977 and 1989<sup>9</sup> respectively. Academic literature has increasingly focused on the social, moral and juridical perspectives of indigenous rights. Other organizations include the Centre for World Indigenous Studies; the Indian Law Resource Centre; the Arctic Council; and the Inuit Circumpolar Conference (which also has consultative status with ECOSOC). Legal protection for and international awareness of distinct indigenous communities and cultures are central issues for these organizations.

As well, indigenous peoples are creating their own networks and institutions in the international forum to deal with a variety of important issues. Among the concerns dealt with in these indigenous international forums are: environmental issues (the Indigenous Environmental Network, the Commission of Environmental Cooperation, and Indigenous Peoples against Bio-Piracy); education (the International Indigenous Peoples Education

Association); and women's rights (the Indigenous Women of the Americas and the Indigenous Women's Forum.)

### **ABORIGINAL GOVERNANCE SCENARIOS**

We now turn to the development of the Aboriginal governance scenarios. The paper has so far examined the starting points for Aboriginal governance in Canada and identified some of the critical forces that are driving its evolution. Although the picture is extraordinarily complex and dynamic, it is possible to see that many of the drivers of Aboriginal government—federal and provincial government policy; federal-provincial relations; the courts; access to economic, financial and technological resources; the capacity for community and cultural renewal; political leadership and organization—are susceptible to global and regional conditions and forces. Some factors are obviously more contingent than are others. Aboriginal cultural renewal and political leadership and effectiveness are conditioned by the dominant environment and may be triggered in one direction or another, either by what happens on the policy front or by the direction taken in court decisions. This at least is how we have used these factors in developing First Nation governance scenarios. Other factors, such as government policy and intergovernmental relations, have a more immediate interplay with global forces. The globalization and regional integration scenarios provide some general sense of direction with respect to policy factors. However, we needed to elaborate on the direction of federal and provincial policy in order to draw a closer connection between the broad forces in the global scenarios and how they are translated into an impact on Aboriginal governance. The courts, on the other hand, do not figure in the prototype global scenarios. Jurisprudence is a critical factor shaping Aboriginal governance, however, so we have created court scenarios that we think are appropriate to each of these prototypes.

We have also seen that the international domain, while of secondary significance, is nonetheless of growing importance to the evolution of indigenous rights and the

<sup>9</sup>The Grand Council of the Crees of Quebec has been actively involved with the United Nations since 1981 but was only awarded consultative status in 1989.

development of state policies on self-determination, self-government and intellectual property rights. The globalization scenarios focus directly on international governance. One can speculate how global and regional governance in these instances may play out with respect to indigenous peoples, and we have incorporated such speculation in the Aboriginal governance scenarios. It is also possible to think of the international environment as an “opportunity space” which alters with each global scenario. If this idea is correct, then the international environment becomes a strategic factor in the political calculus of Aboriginal leaders, governments and other important international players. International affairs, much like public opinion, thus can become a contested political zone among competing parties. Recently, for example, the Assembly of First Nations has indicated that it will escalate the international campaign for Aboriginal rights as part of the AFN’s strategy to bring the federal government back to the table to deal with outstanding land claims and constitutional questions. Accordingly, we used international affairs as a strategic political factor in developing the story lines for the Aboriginal governance scenarios.

Four Aboriginal governance scenarios have been developed. The scenarios follow the same structural format, beginning with a brief overview of the global, regional and broad Canadian political and policy context. Each story is shaped around key driving forces and concludes with a picture of First Nation governance in 2015. To many readers, the time lines that are used in some of the scenarios may seem improbable, however, we ask you to stretch your imaginations and accept them at face value. In our view, time factors are not especially important to the outcomes of the scenarios. We have also not attempted to be comprehensive in either the stories or pictures that have been drawn. Rather, the objective is to give a reasonable sense of what is at play in any scenario and generally what features dominate First Nation governance in 2015. As a result, the depth of detail and the descriptive length of each scenario varies according to what is needed to convey the main points.

## **GLOBAL CLUB**

### **Broad Context**

In this scenario, global economic and political crisis has led to the emergence of a small global power elite (Global Club) of wealthy states and multinational corporations (MNC) that exert decisive control over global affairs. While the global position and power of non-governmental organizations (NGOs) has radically diminished, a number of global NGOs, mainly centred on environmental issues, nevertheless wield considerable influence within the Club. These NGOs enjoy this insider influence because the Club is highly sensitive to maintaining a sustainable environment and its members have close associations with key inner sanctum corporate players who have a major economic stake in environmentally related industries.

The composition of and key influences within the Club fluctuate somewhat because of changes in power and wealth. The United States (U.S.) and the European Economic Community (EEC), however, are effectively charter members. With the Club’s ascension to power, the influence of global and regional institutions such as the United Nations (UN) and the Organization of American States (OAS), which have been key centres of support for recognition and advancement of indigenous rights, suffer radical decline. These institutions are not only less influential on a global scale, their financial bases have been so badly eroded by Club members that more marginal states and groups that might benefit politically and economically by clustering within these institutions have drifted away. Instead, they search for direct channels and strategies of influence with individual Club members.

By contrast, international institutions that were under the tight control of key members of the club, such as the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank, have become key instruments for the Club’s global economic management. The Club’s decisive leadership and strict enforcement of international economic order has brought about an era of widespread economic prosperity, which trickles down to slowly improve the economic lot of lower income

groups, including indigenous people. Prosperity has made middle classes around the world keen supporters of the new economic and political order. As a result there are few politically destabilizing forces within the Club.

Middle-power nation states such as Canada and indigenous-friendly states such as Australia, Sweden, New Zealand and Finland are relegated to the outside fringes of the inner circle, with greatly diminished influence. For Canada's part, a hobbled national government must rely on its channels of influence with its American neighbour to get its critical interest taken into account by the Club. Unfortunately, sustaining this channel of influence comes at the hefty price of responding to Club dictates. However, even these channels have weakened with the ascendancy of provinces in the political pecking order. Key MNC players, such as the auto giants in Ontario and resource industries in the West, find it easier to deal directly with the provinces, which are considerably more pliable and responsive than a national government with a chip on its shoulder over its lost prestige. Although federal and provincial relations are strained, neither side wants to upset the political equilibrium in the country. Low tax policies, forced on both levels of government by the Club's adherence to economic liberalization, have produced ever-tightening government spending and greater pressure to rationalize roles and responsibilities.

### **The Story**

#### *Evolution from 2000 – Dominant Forces*

It took some time for First Nations in Canada to realize the extent and full implications of the global transformation in power. Yet the economic crisis at the beginning of the decade that triggered the realignment of global and political forces had immediate consequences for First Nations, as both federal and provincial governments moved to sharply curtail spending. As it had done in the early 1990s, Ottawa argued that it had protected the Aboriginal envelope as best it could, but that reductions in funding were unavoidable. The first to be affected was a number of major self-government and land claim deals, years in the making, which were scuttled for lack of funding. As a result, these processes,

including potential breakthrough negotiations with Treaty First Nations on the Prairies were effectively put on hold.

For a short time, First Nations were able to successfully mobilize their traditional allies—including the church, environmental and other social action groups—in political protest to these cuts. But the corridors of power were effectively closed to appeals. The public was equally unmoved. Soon, managing the perilous state of the global economic situation gripped the political and public consciousness. Aboriginal allies were understandably absorbed in their own survival. While the period of crisis was relatively brief, First Nation communities, structures and leadership emerged politically shaken, and weakened.

#### *The Message of a 'New Order'*

The return to prosperity by mid-decade triggered a rebirth of optimism across the country. Just as in the 1990s, a catastrophic economic crisis had been diverted with the cooperation and joint management of the big power players. The first hints of strong economic growth, which occurred in the early part of 2005, created expectations of a return to prosperity and social renewal.

First Nations were not immune to the bullishness over future prospects. There was an air of confidence, especially among First Nations leaders, that a resurgent economy would enable them to once again aggressively push the Aboriginal agenda onto the political stage. It was therefore a rude awakening when meetings with the Prime Minister and other senior federal and provincial political figures produced nothing but polite audiences.

Political discourse changed in both tone and message. The language of partnership and collaboration of the past was displaced by a more direct, missionary-style message from the Canadian political elite. That message was of permanent change, of a new economic order and of smaller government. First Nations were told that the use of the fiscal dividend to rebuild the economic and social role of government in the late 1990s had been a principal cause of the most recent economic crash. This mistake would not



be made again. In the future, the benefits of prosperity would be left in the hands of individuals and corporations. First Nations would simply have to become more self-sufficient.

Federal and provincial leaders attempted to be non-confrontational but their message was blunt and unanimous: governments no longer were able to respond to the political and social aspirations of Aboriginal people as they once had. Prosperity for Canada depended on major economic and social policy changes that fully supported economic liberalization. Aboriginal people would become full participants in the mainstream economy if, and only if, government policies and programs concentrated on employment and business opportunities created by a period of sustained economic growth. Aboriginal leaders were asked to accept the new global political economic realities and get on board with the message of social and economic integration. The sub-text of the message was that to do otherwise, Aboriginal leaders would fail in their responsibilities to their people.

#### *Public Support for “New Thinking” on the Aboriginal Question*

A key political speech by the Minister of Indian Affairs to outline the government’s shift in policy triggered a full-scale national debate about the future place of Aboriginal people. Doubts about the ongoing viability of many First Nation communities were openly raised in the media, which drew parallels to the demise of the Newfoundland’s outposts and small Prairie towns. For the first time since the 1969 White Paper, authoritative mainstream voices openly challenged the existing Aboriginal policy orthodoxy that had been entrenched by RCAP and the *Gathering Strength* policy of the 1990s. Significantly, the Aboriginal community’s thoughts about this new Canada had little impact on the public debate. Public opinion quickly tilted toward a dramatic redirection of Aboriginal policy. Tolerance for sustaining so-called non-viable First Nation communities waned, as did a willingness to moderate the economic and financial impacts of further economic liberalization. Perhaps clearest of all, the appetite for a policy of broadly strengthening Aboriginal governments and communities, and for creating

new forms of Aboriginal government that would further complicate the jurisdictional and political landscape of the country, had largely evaporated. In the minds of policy makers and the public, the supportive hand of the past would be much more constrained and selective in the future.

#### *A Hollow Court Victory*

In the midst of the political clamour for new thinking, First Nations won a victory of sorts with confirmation by the Supreme Court of the constitutionality of the *Nisga’a Treaty*. Deliberately downplayed in the media, the Court’s decision supported a lower court view that the right of Aboriginal self-government had not been extinguished at the time of Confederation and that the right to self-government did exist and could not be ignored. The judgement, however, gave substantial weight and scope to the justifiable infringement of First Nation powers by the federal and provincial governments. Moving well beyond the established *Sparrow* tests, the Court signaled considerable latitude around government economic policy justifications for infringement.

Focusing on those limitations, the media and legal scholars concluded that three recently appointed justices to the Court had made their weight felt in the *Nisga’a* decision and that the tenor of the decision signaled a change in attitude towards Aboriginal rights issues. The new appointees initially had been touted as economic liberals but their track records revealed strong support for government intervention and regulation in the marketplace at times when the health of the economy was considered to be at risk. Unknown to the public, the Prime Minister and the U.S. President had discussed the issue of appointments to their Supreme Courts at length during private discussions. The two leaders had agreed that it was imperative that their highest courts support the type of interventionist government regulation and economic management needed to achieve lasting economic stability and growth. Concerns by Canada’s Prime Minister over a “wild-card” Court, however, were unnecessary. The recent economic crisis had indeed tempered the views of all members of the Court. The dominant tenor was one of growing caution about the economic

implications of decisions; the new members had simply entrenched an emerging viewpoint. In 2005, it would have been hard to imagine an economically risky decision like *Delgamuukw* coming from the bench.

### *Shattered Dreams and Expectations*

Two seminal political events illustrated the scale of geopolitical change and shattered any aura of expectation of renewal and progress among First Nations. The first occurred just before Christmas 2005 at a meeting between the UN Secretary General and a mission of indigenous leaders intent on securing action on UN final approval of the *Declaration on the Rights of Indigenous Peoples*. The mission was staggered by the Secretary's blunt statement that it was impossible to mobilize the necessary support for the Declaration and that it was effectively a dead issue. With her statement, bright hopes for a flourishing international future for indigenous people around the world were crushed. The statement drew outrage and indignation within the global indigenous community but no world leader contradicted the Secretary's message. Indigenous peoples organizations mobilized on an international scale to lobby their traditional allies to get the *Declaration* back on track. But protests in major capitals in Europe, the Americas and Australia drew scant media attention. Environmental groups that had been mainstays of the NGO Aboriginal support coalition now counseled patience rather than protest. They suggested new strategies that focused less on the recognition and protection of rights and more on cooperation and partnerships with multinational corporations that were sensitive to environmental issues and were open to sharing the benefits of economic development with Indigenous people. Ironically for Canadian Aboriginal groups, Canada was singled out as a prime example of what could be accomplished. Joint resource development ventures in the Territories and in Western Canada were cited as models of the new way of doing business.

Themes of environmental protection and sustainable development also assumed dominance within the international business community. MNCs announced they would

introduce 'environmental charters' to their business plans, as well as economic declarations that would guide their activities when seeking development in the traditional territories of indigenous peoples. Ultimately, the signal was that old doors were closing but that new opportunities, targeted to the immediate economic welfare of indigenous people, were opening up.

The second seminal event in Canada was the federal budget of 2006. The so-called Prosperity Budget set the course for a radical redirection of fiscal and economic policy, with dramatic corporate and personal income tax cuts accompanied by a multi-year program of deep cuts in government spending. Despite strong projections for economic growth, the federal government's fiscal noose around First Nations predictably tightened. The budget included a five-year plan to chop federal funding to First Nations by 20 per cent and restructure Aboriginal programs to more closely mirror those provided by provinces and municipalities. The restructuring initiative was designed to produce an additional budget dividend for Ottawa. The federal Finance department knew that the provinces were likely to follow Ottawa's lead and curtail funding and re-engineer their own programs.

At meeting with First Nations leaders shortly after the budget, the Minister of Indian Affairs produced a detailed plan of action revamping of the federal funding and program approach to First Nations. While government spending cuts were to be across-the-board, funding for band government and local administration was to be cut more quickly and deeply than other programs. First Nation communities, however, would be given greater latitude to restructure their relationships and achieve greater economy scale in program delivery and aggregation of government institutions. The Minister said that the government, with provincial support, would transfer the federal government's special Aboriginal labour market programs to the provinces. Some federal funding for Aboriginal delivery mechanisms was to be maintained but activities would have to be integrated into provincial delivery structures. Of course, the

Minister added, self-government negotiations would be shelved until the process of institutional transformation had been worked out. The Minister sought cooperation on governance and program restructuring but left no doubt that, if necessary, the powers of the *Indian Act* would be used to transform First Nations government to make it more cost effective, affordable and accountable. On these fundamentals, there was to be no debate.

The most dramatic changes, however, were to occur in programs that provided what were called “super benefits” to Status Indians, bringing them in line with what was generally available to other Canadians. These programs focused mainly on health care and student assistance and they provided an array of benefits at public expense that were considerably more generous than was available to other Canadians. First Nations had long seen these programs as part of a birthright that upheld treaty promises and accompanied their agreement to share land and resources. As such, these programs had always been among the untouchables.

Changes to these special programs were cleverly structured and orchestrated to sidestep public opposition. Federal grants to support Status Indians attending post-secondary education institutions, for example, were to be restructured to mirror student financial assistance available to other Canadians. Research to justify their actions conveniently found that government financial assistance was negatively correlated to successful completion of post-secondary studies. To offset the cutback, Ottawa offered a somewhat more generous loan remissions program to Aboriginal students who successfully completed their schooling. This refinement allowed government officials to persuasively argue that the new policy recognized the financial disadvantage facing many Aboriginal people while providing an incentive for Aboriginal young people to stay in school and achieve better results.

The one major policy break in this pattern of fiscal retrenchment occurred in British Columbia. Out of the blue, or so it seemed, the federal and provincial government in early 2007 signaled a

commitment to quickly settle outstanding land claims through an expedited Treaty process that included generous improvements in financial and economic benefits. The money for the policy was to come from a reprioritization of funds within the Aboriginal envelope. The two governments were clear that treaties negotiated through this process would only deal with those governance arrangements essential to land and resource management. Negotiations on more comprehensive self-government powers would still be possible but these negotiations would follow the settling of the claims, and only on the basis of governance units that made sense in terms of economies of scale. Land claim negotiations were to be completed within 10 years.

For government policy-makers and their supportive public, these changes fit the long term goals of mainstream integration and First Nation self-sufficiency that were to be the hallmarks of the new Aboriginal policy. First Nation leaders and communities reeled from the myriad changes and the sense of isolation and weakness that accompanied them. Despite modest success in political and legal efforts to challenge the government’s new course, First Nations realized that profound changes underway around the world had engulfed them and narrowed their political options. As a result of deep cuts to band budgets and services, the safety net in many reserves eroded quickly and the exodus of young people and families to surrounding towns and cities dramatically accelerated. The flood of people created problems particularly in Prairies, where providing access to housing and managing the inflow of Indian children into the school system became huge challenges for public officials.

#### *Provincial and Federal Repositioning*

The provinces predictably demanded additional funds from Ottawa to help deal with the added burden of out-migration from reserves. By previous standards, however, their protests were strangely muted. Eventually, it became apparent that the provinces were pursuing a unified strategy of distancing themselves from the federal government in an attempt to directly enhance their political and economic power and

influence with the big global players. Presenting the global power brokers with an image of a stable and well-managed provincial economy and community was critical to their success. On the Prairies in particular, this strategy was marked by a new eagerness to work on practical solutions to Aboriginal issues, whether or not the federal government was involved.

The federal government was not distressed by this turn of events. The new sensitivity and openness by the provinces to Aboriginal issues relieved political pressure and allowed Ottawa to play a much more strategic hand in other vital issues, such as the settling of B.C. land claims. The short-term transition cost to help the provinces through an adjustment period was a small price to pay to achieve the longer-term policy goals of integration and restructuring of First Nation governance in the country.

#### *Reappraisal and Renewal*

The rapidly shifting political and economic landscape triggered a crisis of confidence in First Nations leadership. Many communities challenged the wisdom of leaders that had brought them to this point. Despite the allure of money, First Nations in B.C. backed away from the Treaty process, uncertain of the implications of the new policy. Some communities sank into despair, showing all the concomitant signs of increased numbers of suicides and violence. National and provincial political organizations erupted into bitter conflict. In short order, paralysis rather than activism prevailed.

What emerged was a grassroots process of deep political dialogue and rethinking within First Nation communities that reached out across old divides and bridged the boundaries of reserve and city. Initial anger gave way to recognition that the world had changed. Ultimately, intense reflection led to a profound sense of cultural reawakening, personal and community reconnection, and a vision of First Nation people asserting control over their own destiny. The metamorphosis was not unlike the Quiet Revolution of the 1960s in Quebec when inward-looking cultural survival was displaced by cultural nationalism, the search for contemporary identity and a process of nation building in which

Quebec played a central role. The critical fact of life, now fully apparent, was that First Nations needed to become stronger and more influential at the new centers of power. Achieving this goal would require a transformation of historic proportions. Neither the struggle for Aboriginal and treaty rights nor the historic relationship with the Crown would be abandoned. Rather, First Nations realized the source of strength lay in the rediscovery of their culture, their identity and their nationhood.

This renewal process sparked a “real politick” strategy that rested on solid foundations of consensus at community and leadership levels. At its core, the strategy involved building political and economic capacity and enhancing leverage with the creation of larger units of governance and alliances that connected on and off-reserve members. It also entailed the co-option of new government policy, and all of the opportunities it offered, to the advantage of First Nations as well as strengthened economic cooperation among First Nations, particularly at the regional and international levels. This “opening doors” tactic targeted key multinational economic players, particularly in the strategic resource sector. First Nations would use all political and legal means at hand to gain the attention of key economic players. The goal was to turn the goodwill touted by big international business in the aftermath of the *Declaration’s* failure into more than just empty platitudes.

#### *Responding to a More Powerful Provincial Voice*

Adjusting to the rise of provincial power proved to be one of the more difficult challenges for First Nations. In Western Canada, where the treaty philosophy was strongest, First Nations held tenaciously to the idea that their primary legal and political relationship was with the federal government. In the past, the provinces had reinforced this view by asserting treaties and s. 91.24 of the Constitution as a basis for federal responsibility to Indians. But the new international order had rebalanced the federation in favour of the provinces, which were now closest to the resource industries. While the outward manifestations of their political position did not alter much vis-a-vis the federal responsibility to Indians, First Nations began to

more actively pursue and strengthen their bilateral relationships with the provinces.

Paradoxically, the first significant breakthrough occurred in Alberta, where treaty ideology was held to in its purest by both the province's First Nations and the provincial government. The process began with a series of alliances among the three treaty groups in Alberta. Since the 1980s, Alberta Chiefs had made numerous attempts to form a provincial political organization to pressure both the federal and provincial governments to deal with treaty rights and resource issues. Each effort had failed. By 2007, members of the old political guard had been replaced by a new generation of leaders who set aside differences to create the Alberta First Nations Alliance.

At the Alliance's inaugural session, leaders agreed to attempt to resurrect the treaty rights issue with an aggressive campaign, which the more prosperous, resource-rich First Nation members offered to finance. To the surprise of the Alberta First Nations, the province, with the endorsement of the business community, set up province-wide tables to discuss and negotiate a framework for resource revenue and benefit sharing. Within months, there were glimmers of success. An Alberta First Nations resources consortium was established to manage First Nations resources and conduct negotiations with the private sector. By the end of the year, the consortium had mushroomed to include First Nations in Saskatchewan, Manitoba and British Columbia. Supported by a highly qualified and sophisticated secretariat, the new agency, known as the Indian West Force Resources (IWFR), instantly became one of the big resource players on the Canadian oil and gas and forestry scene. In time, the scope of IWFR's operations also provided the leverage to lower transportation costs and create spin-off businesses with the railways and other major shippers, expanding new Indian business ventures even more.

#### *Redrawing the Governance Map*

First Nations across the country began to negotiate new regional, tribal and nation-based relationships. Seemingly overnight, there were consolidations in program and service delivery

structures, improving the level and quality of services. Innovative programs included single-window urban-based program and service delivery systems that provided a seamless array of services available to both on- and off-reserve members. The federal government, for its part, welcomed and financially supported these changes, divesting control in progressive stages to First Nation entities that emerged. Misinterpreting the rekindled enthusiasm, Ottawa touted the turnaround as proof that the government's new policy of integration and self-reliance was working. It was not until much later that government officials came to appreciate that, in fact, First Nations were regrouping in preparation for an even more vigorous attempt to reassert their rights and regain a measure of control of the agenda.

Indeed, a wave of strength, confidence and a growing sense of independence surged through the Aboriginal community. The new generation of leaders had revitalized the Aboriginal community with their fresh ideas and savvy at the political game. Rather than languishing cap-in-hand, the First Nations hierarchy used the consolidation of financial resources and political power to secure a more equal footing with other government and third-sector agencies. For one, they negotiated partnerships with regional and local governments to improve access to health and educational services and make them more responsive to First Nation needs. They also turned the tide of public opinion. No where was this more apparent than in the larger cities in Western Canada, where higher levels of Aboriginal employment and improvements in housing and community services from First Nation agencies eased racial tensions and created a more stable environment for Aboriginal people. In turn, the growing prosperity among many of the reserve communities helped to sustain political and social development.

#### *Building the American Connection*

For First Nations, the logic of forging strong economic and political alliances with American Indian tribes and organizations was inescapable. There was already a well-established history of relationships to capitalize upon. Given the power of U.S. as a driving force within the Global Club,

American Aboriginal groups were allies that could guide their Canadian counterparts through the corridors of Washington. For their part, American Indian organizations welcomed the overtures from Canada's First Nations. While they might live on the turf of the Club's leading member, American Indians were very aware that their government had adopted a global outlook that often overshadowed what were now seen as second-tier domestic concerns. They also realized that economic leverage and corporate channels were key to increasing political influence. Building the northern relationship offered the immediate benefit of strengthening the Indian political voice in Washington, particularly as many Canadian First Nations were better positioned legally and politically to affect strategic 'assets' that were important to the Club. Further, trade liberalization also made it easier to contemplate developing cross-border economic ties between American and Canadian Indian nations.

A number of highly successful North American Indian Economic Summits were held to explore and forge new relationships around issues of mutual interest. Considerable initial success was achieved through joint lobbying campaigns in Washington, particular progress was made on the issue of indigenous knowledge and intellectual property rights. In time, the momentum and dialogue spawned by these early successes produced a host of practical opportunities for cross-border commercial and cultural ventures that deepened north and south Indian economic and political ties.

### **Aboriginal Governance in 2015**

By 2015, the process of First Nation renewal had dramatically transformed the Aboriginal landscape in Canada. First Nations, which at the turn of the century numbered more than 600, has consolidated into 80 large First Nations governance clusters that wield considerable economic and political clout. Most of these are streamlined organizations with sophisticated management capacity that not only untangled the organizational web of its disparate membership but has also reduced costs and improved services. While there are many Aboriginal communities that feel disenfranchised and resent the

disappearance of their independent political voice, the transformation is accepted by the vast majority as unavoidable. The Assembly of First Nations is a different organization with a sharp focus on lobbying power brokers and using public campaigns to regain lost political ground and popular support for Aboriginal rights. Paradoxically perhaps, the revamping of Aboriginal power structures also produces regional political organizations that are more participatory, more open and inclusive of the broad cross-section of First Nation members living on- and off-reserve. Most regional political leaders are now elected by popular vote rather than by chiefs.

First Nations in Saskatchewan and Manitoba that built their political renewal strategies around uniting on and off-reserve populations under umbrella governance structures now enjoy the benefits of large membership bases and a greater rationalization of services. The unity of purpose and commitment embodied in these new governance relationships dramatically increases the political leverage of Aboriginal people to the point that the two provincial governments are willing to sit down and negotiate new program and service delivery arrangements. This process is topped off by landmark agreements in 2015 to amend provincial public school legislation in each province to recognize Aboriginal school divisions that serve both on and off-reserve children and families. The mandates of these school divisions are modeled along the lines of the separate Francophone school system in Manitoba.

As important, the Aboriginal economic alliances forged across Canada are making strong headway into both the traditional and new economic realms. Using Internet technology, for instance, First Nation governments have established self-financing, global E-commerce group purchasing systems that feature lower, cost-preferred supplier relationships with multinationals, which in turn supply training and job opportunities to Aboriginal people as part of the economic benefits package negotiated through these arrangements. The system also taps into the purchasing power of a \$10-billion First Nations revenue base that now buys everything

from construction products, to copying paper, pens and pencils and paper clips at bargain basement prices.

In the traditional economy, joint venture distribution systems that include Indian shipping and trucking operations and supply centers are a common feature of the economic landscape. Specialized marketing and communication firms advise non-Aboriginal companies on ways to access and sell in the Aboriginal marketplace. This expanding economic and business base with mainstream economic players provides First Nations with the financial and organizational capacity to more successfully develop a larger, multi-million-dollar variety of Aboriginal product lines to sell to national and global markets.

With their growing economic sophistication and clout, Canadian First Nations begin to explore the viability of joining their American counterparts in the formation of a giant consortium that merges the four major native group purchasing systems into a single, North American operation with triple the purchasing power. Aboriginal casino operators form partnerships across North America to expand their already cash-rich operations. The Indian Casino Travel Tour, for one, takes gamblers across the U.S. and Canada on a circuit that, with its sideshow of spectacular Aboriginal entertainment, is considered one of the prime gaming experiences in the world. The burgeoning cross-border ventures and prospects stir high-profile excitement, including a Forbes magazine cover story on key Aboriginal power brokers. Increasingly, parallels are drawn to the business strategies of Health Maintenance Organizations in the U.S. and early 1980s phenomena such as Price Club, which used the buying power of its members to lower its costs and dramatically expand business.

The growing economic success of the North American Aboriginal Bloc sparks fresh interest in the political realm of Washington and eventually, but only later, in Ottawa. In the fall of 2015, the U.S. President delivers an extraordinary speech at Wounded Knee Creek, South Dakota, the site of a massacre of Sioux men women and children by

American soldiers in 1890 and a 69-day occupation by the American Indian Movement in 1973. Pledging action on the long-dormant U.S. Aboriginal file, the President calls upon other countries, including Canada, to recognize indigenous rights. Media pundits note that the President, a year away from election, is cobbling together economic and social planks to support a second-term bid for office. Despite the obvious link between the need for long-term economic stability and the growing potential power of the Aboriginal bloc, the affect could not have been more dramatic. In Canada, pressure again falls on the federal and provincial governments to restart the process of sorting out Aboriginal rights and self-government negotiations. With the American ace at play, however, the First Nations in B.C. and the Prairies refuse to conclude any deals or launch new initiatives unless self-government, with greatly enhanced and more legally binding jurisdictional foundations, is dealt into the hand. For perhaps the first time in their history—and possibly the last if events do not go as they plan—First Nations have the elusive combination of economic and political leverage they need.

## SHARED GOVERNANCE

### Broad Context

A series of crises around the world has produced a more integrated global economic system in which global institutions, especially the United Nations and other multi-lateral mechanisms, have been dramatically strengthened. Principles of interdependence, equality and responsibility are widely recognized and enjoy strong public support. At both international and domestic levels, governments are more strongly committed to the reduction of social disparities and to the achievement of greater social justice. Human and indigenous rights are high on the international agenda. Major shifts in foreign policy have occurred, allowing important international agreements to be ratified. Community activism and the growing power and influence of NGOs and their ability to mobilize public opinion are among the major reasons behind these changes in policy direction. Another is that MNCs, which are powerful players in this scenario, are more socially and environmentally conscious. Much strengthened international

economic and financial regulation has created the foundations for solid if not spectacular economic growth, which allows governments to make observable gains on their social and human rights agendas while preserving broad political support.

For its part, Canada is a major proponent of and player in the reshaping of the global governance system. Indeed its prestige and influence has become highly tied with the new international agenda. The social and economic status and place of Aboriginal people in Canada are therefore particularly sensitive issues for the federal government. Federal and provincial relations enter into something of a renaissance as all governments are persuaded that collaboration and partnership provide “Team Canada” with far greater economic and political opportunities in the emerging global order of shared governance.

### **The Story**

#### *Evolution from 2000 – The Dominant Forces*

Despite the sensitivity of the Aboriginal file, the treaty and self-government process began to seriously unravel in the early 2000s with the election of new provincial governments opposed to Aboriginal self-government. Paradoxically, the national political mood on Aboriginal issues shifted sharply negative just as First Nations in B.C. celebrated their greatest success, the passing of the *Nisga’a* Treaty. The Treaty had severely divided public opinion, especially around the issue of “race-based government.” Open conflicts over treaty rights in Atlantic Canada and the Prairies further soured the public and political mood. Profound questions about the type of federation that was evolving became a hot topic of debate across the country in such venues as newspaper editorials, talk shows and televised community forums.

#### *Treaty Meltdown*

The meltdown of the treaty process was cemented in British Columbia with the election of a provincial government opposed to constitutionally recognized self-government powers for First Nations. Increasing pressure from large multi-national corporations over issues such as logging and fishing rights stiffened the resolve of the B.C. government to sweep the Aboriginal agenda off the table and get on with

economic development in the province.

International corporate interests and corporate Canada were reassured by the new government in Victoria that it would be firmly on their side in the battles everyone knew were coming. True to its word, the provincial government adopted a hard line and was able to claim success as new resource investment started to return to British Columbia. Tensions escalated rapidly when Aboriginal peoples in turn accelerated legal action and political civil disobedience to tie up major resource and economic development projects in the province. Unlike the provincial government, the courts weren’t willing supplicants of the corporate interest and supported a host of injunctions that wrapped up major investments in legal wrangles that increased the financial and economic risks of investors. Internationally, some multinationals pushing development projects in the face of Aboriginal rights came under fire from the NGO community. In particular, the powerful international environment lobby threatened political and financial action in support for provincial First Nations. Ultimately, in protest of provincial retrenchment and the refusal of the federal government to intervene on their behalf, B.C. First Nations withdrew en masse from the treaty process.

#### *Falling Dominos*

The deterioration of Aboriginal relations in B.C. was echoed in Saskatchewan with a similar collapse of the self-government process. Saskatchewan had long been designated as the national showcase for First Nation self-government in Canada. Trilateral negotiations between the federal and Saskatchewan governments and provincial First Nations had focused on recognition legislation that would establish a framework for a radical overhaul of the governance and fiscal relationship with First Nations, built around the renewal of the treaty relationship. But here, as in B.C., there were overriding and irresolvable issues involving treaty rights and the exclusion of First Nations from decisions on benefits from economic development on lands claimed by First Nations as their traditional territories. Combined with Ottawa’s resolute refusal to renovate and modernize the historic treaties to reflect



contemporary realities, the turmoil ground the negotiation process to a stalemate. Concurrently, in a move designed to curry political favour, the Saskatchewan government rolled back off-reserve sales tax exemptions. Under intense pressure from the Métis and the Saskatchewan business community, it also abandoned its pursuit of a special deal to give First Nations off-reserve access to resources in First Nation traditional territories. In a cascading domino effect, the events in B.C. and Saskatchewan effectively paralyzed any further progress on high-profile implementation of federal self-government policy. Instead, Ottawa quietly began a strategic repositioning to shift the focus away from self-government and toward the capacity-building recommendations outlined in *Gathering Strength* and on less controversial economic development and off-reserve programs. The apparent political momentum of the late 1990s to revamp Aboriginal governance in Canada was stopped in its tracks.

Ironically, the only bright spot on this bleak Aboriginal landscape was in Quebec. The sovereigntist Parti Québécois (PQ) government had increased its efforts to settle land claims and self-government deals in the hope of integrating the Inuit and First Nations into the province's political and economic life. Indeed, the PQ was willing to recognize a wide range of First Nation jurisdiction powers, both on and off their lands, as well as to share resource revenues. Ever suspicious of Quebec's motives, Ottawa was a reluctant partner. Nonetheless, the process, although extremely slow, survived the fallout from the imbroglios elsewhere in the country.

Focus groups and polling surveys conducted by the federal government during this period indicated that public opinion, at least at the outset, remained malleable despite the increasingly "us or them" climate. While a majority of slightly more than 50 per cent of non-Aboriginal Canadians supported the *concept* of self-government, Canadians surveyed were exceedingly less supportive of giving Aboriginal governments much power, particularly when those powers exceeded those of municipal governments or were seen to infringe on individual proprietary or economic rights.

Simplistic at the best of times in their coverage of complicated Aboriginal issues, the Canadian media were slow to acknowledge the escalating crisis at anything but a superficial level. The media resurrected its reactive scenarios centred on potential acts of civil disobedience such as roadblocks, demonstrations and standoffs along the lines of Oka and Gustafson Lake. Substantive treatment of issues such as treaty rights, self-government and constitutional rights were largely buried by sound bites and inflammatory headlines.

Media rhetoric and the political fire it was igniting changed dramatically, however, as a spate of high profile confrontations provoked a more direct intervention in editorial content by the owners of media conglomerates. The concentrated circle of media barons who controlled Canada's journalistic landscape wanted the Aboriginal issue to cool out and they used their television, print and Internet outlets to contain an escalating problem, but with only marginal success.

#### *Management Crisis*

As expected, the destabilization of the Aboriginal agenda created a management crisis across the political spectrum. The federation swirled with continued Aboriginal conflict. Thwarted in their own province, the Saskatchewan First Nations joined forces with their Alberta counterparts in a legal challenge to the *Natural Resource Transfer Act*—the foundation of the Prairie provinces entrance into Confederation—as it became clear that resource-based claims could not be negotiated. Ontario First Nations turned to the courts to mount a direct challenge to the validity of a number pre-Confederation treaties, claiming that Aboriginal title had not been settled in that province. While the Ontario government offered reassuring messages, Bay Street reacted in alarm, realizing that a legal victory for First Nations would likely result in large unsettled land claims that would threaten the province's economic stability. In Atlantic Canada, First Nations launched actions to enhance the legal rights to hunt, fish and harvest timber resources secured in earlier court decisions. Existing resource management deals with the federal government and a number of

Atlantic provinces began to break down and new attempts to open negotiations floundered.

Despite the risks inherent in litigation, the federal government, pushed along by the provinces, adopted a hard-line approach that challenged the right to self-government and authority to regulate treaty benefits implied earlier Supreme Court decisions of the late 1990s. The federal tactic was in part symbolic, designed to force the First Nations to revert to low-key negotiations. However, Ottawa badly miscalculated the determination of First Nations, which viewed the federal position as a retrogressive and antagonistic challenge to rights already ceded to them by the courts.

#### *International Catalyst*

Paradoxically, while relations between government and First Nations were spiraling downward in Canada, the rights and treatment of indigenous populations around the world reached a new level of discourse on the world stage. The widespread penetration of the Internet and cheap wireless technology, combined with a spreading democratization and rising standard of living, allowed NGOs and other activist groups to mobilize support around the issue of global political and human rights for individuals. At the same time, the clarification of rights for indigenous populations, and in some cases the right to self-determination, assumed unprecedented prominence at international forums, particularly the UN. Public exposure of unjust treatment and discrimination had long been a potent weapon in the activist arsenal. In much the same manner employed by the James Bay Cree and the anti-apartheid movement in the 1980s, First Nations used international indignation to shift the spotlight to their own plight in Canada.

The threat of a slide in international prestige that blossomed alongside growing international disenchantment with Canada's treatment of Aboriginal rights forced the federal government to rethink its hard-line legal strategy and approach to self-government. At stake was Canada's otherwise enviable position of influence in the fast strengthening international governance system. In an effort to restore

Canada's badly tarnished image, the federal government tried to regroup around support for renewal of the Aboriginal constitutional process as a means of putting the treaty and self-government genie back into the bottle. But the provinces, especially B.C. and Ontario, continued to resist efforts to renew the process. Central to provincial reasoning was a belief that the courts would sustain legal opposition to self-government rights being claimed by Canada's Aboriginal people. Acquiescence now, the provinces feared, would relinquish crucial leverage in future negotiations with First Nations.

#### *The Turning Tide*

Suspended in uneasy limbo, the Aboriginal file languished until the middle of the decade, when the combined clout of international pressure and a spate of domestic legal decisions galvanized the federal and provincial governments into action. As part of a general strengthening of international and regional governance, the UN and the OAS each adopted a *Declaration on the Rights of Indigenous Peoples*. More important, accompanying the passage of the two declarations was the development of enhanced roles for indigenous peoples within international institutions. Canadian Aboriginal groups were well positioned within this new hierarchy. All but abandoning their efforts to move their political agenda forward in their own country, they instead focused their attention and considerable lobbying skills on a vigorous international campaign. Meanwhile, they waited for a roll of the dice by the courts in their favour.

#### *Court Activism*

In a relative explosion of jurisprudence, courts across Canada responded with a flurry of decisions that set the stage for a radical and irrevocable change in the legal landscape. Chief among these was a decision by the Supreme Court to uphold the disputed *Nisga'a Treaty* as both constitutional and representative of an inherent right to self-government. The federal government, as well as a substantial majority of legal scholars, had for years recognized that the inherent right to self-government was an existing Aboriginal right under s. 35 of the Constitution. Ottawa's tacit acceptance in particular could not diminish the importance of the Court's

concurrence, as the federal government had been very reluctant during the proceedings to support the inherent right arguments of the Nisga'a. The opponents of self-government, including most provinces, saw the Court's decision as a wholesale undermining of the constitutional foundations of the federation and were quick to predict that jurisdictional and legal chaos would follow. Still, the Court was no more willing to open wide the legal envelope than it had done in its landmark 1997 *Delgamuukw* decision. While the majority decision noted the protected scope of self-government rights, such as those involving matters integral to Aboriginal culture, it also specified key limitations of those rights, including matters of over-riding national significance such as national security, public safety and conservation. As did *Delgamuukw*, the Court ruling also cautioned that the implementation of self-government rights should be worked out among governments and the Aboriginal people themselves. Predictably, in an effort to exert political pressure, several well-established First Nations bands, which included a number of critically placed urban bands, announced they would begin to simply assert the jurisdiction they said was implicit in the Court's ruling.

Canadian and international multinational business opinion also crystallized on the issue of Aboriginal rights in Canada. The situation in Canada was destabilizing the investment environment, as the fight over indigenous rights in Canada became an international cause. Indigenous groups and their allies in other countries realized that a major victory in Canada would reshape the global political ground for indigenous rights. Increasingly anxious, important MNC players began to lobby Ottawa and the provinces for quick action.

#### *Opening the Constitutional Door*

With the tables turned, the provinces finally submitted to the federal government's call for a renewed effort to settle substantive Aboriginal issues at the political and constitutional level rather than in the Courts. At a hastily called First Ministers' Conference held in the Foreign Affairs building in Ottawa, the provinces extracted a closed-door commitment from the Prime Minister

that self-government would not mean the establishment of a constitutionally recognized third order of government. The provinces also made it clear that any deal would have to tackle the issue of taxation and Aboriginal government accountability if it were to be successfully sold to their political constituencies. The First Ministers came out of the meeting with an agreement that it was imperative to regain control of the substance and implementation of the Aboriginal agenda before it was wrestled from their grasp by the swelling international movement in support of indigenous rights. In keeping with established protocol that excludes all but provincial premiers and the Prime Minister from First Ministers' conferences, Aboriginal leaders were barred from the conference proceedings. Instead they rallied with their supporters outside. Described by the media as the largest staged gathering of its kind, the demonstration stretched 20-deep, from the curved driveway of the government building along more than a kilometer of Sussex Drive, past the guarded gates of the Prime Minister's Official Residence.

At the conclusion of the conference, the Prime Minister read a unanimously endorsed communiqué that stated only that First Ministers had reached an agreement-in-principle to work together with Aboriginal representatives toward a constitutional amendment to formally recognize self-government. The two-line public announcement concluded with a statement that negotiations would commence at the earliest date possible at especially convened First Minister/Aboriginal Conferences, to be held at least once a year until agreement had been reached. At subsequent press conferences, First Nation leaders declared that despite a legacy of broken promises, they were willing to accept the olive branch at face value, and in good faith. They were equally as clear that there would be no deal unless land claims, resource sharing, fiscal issues and a direct role for Aboriginal people in federal-provincial processes were firmly on the table.

#### *A New Deal—Reshuffling the Federation*

In 2010, Canadian Aboriginal scored a pivotal victory in the battle for public opinion. With their extensive array of international

contacts, First Nations representatives at the UN in New York lobbied for and won a bid to host a *Summit of Indigenous Peoples* in Canada, sponsored and funded by the UN. The invitation list for the five-day event, to take place in 2015, included UN member countries, international agencies and a host of NGOs from around the world.

Propelled by quickening circumstance, the Canadian federal and provincial governments stepped up efforts to agree to major transformations of governance. Over a series of First Ministers/Aboriginal Conferences that spanned several years, the two levels of government and Aboriginal representatives forged the framework of a constitutionally recognized right of Aboriginal self-government. Along the lines envisaged by RCAP, there was agreement on a *Recognition Act* that would give First Nations a broad range of powers (similar in scope to the *Nisga'a Treaty*) and establish principles for "good government," including commitments to create larger governance aggregations, transparency and other accountability strengthening measures. Details were to be hammered out during a series of implementation negotiations.

For First Nations the centrepiece of the deal was the establishment of new, but non-constitutionally recognized, First Nations national and regional Assemblies that included provisions for on- and off-reserve representation and an Elders Council. The National Assembly would have formal responsibility to advise Parliament on legislation and significant policy matters affecting First Nations people. It was also given a mandate to advise Parliament annually on the financial needs of First Nations and had a direct role in the allocation of resources approved by Parliament. Under the *Recognition Act* legislation, National and Regional First Nation Assemblies were also granted the right to exercise delegated powers from First Nations. Concerned about the scale and effectiveness of First Nations governance, federal and provincial negotiators insisted on a "starter set" of powers for the Assemblies. Community consultations by First Nation leaders had produced the consensus for a side agreement on an initial set of

jurisdictions to be exercised by the Assemblies and on a number of core government institutions, dealing mostly with financial and program governance as well as intergovernmental matters. Given the diversity of First Nation circumstances in the country and the need to harmonize laws and programs and services within each province, the regional assemblies were left with the key jurisdictional and program roles.

Another major breakthrough occurred in federal-provincial-Aboriginal relations with concurrent agreement on a *Relationship Accord* that secured for First Nations a seat at First Ministers Conferences through the representation of the head of First Nation National Assembly. In addition, this understanding on Aboriginal participation extended to other intergovernmental areas. The Accord also included commitments from the provinces and federal government to create regional political and officials forums to ensure ongoing dialogue and cooperation among governments. An Office of Dispute Resolution headed by a board of directors of distinguished Aboriginal and Non-Aboriginal Canadians was to be established with considerable authority to investigate, mediate and arbitrate self-government and treaty disputes between federal, provincial and Aboriginal governments.

An implementation period of 15 years gave the First Nations time to build capacity and ensure a smooth transition from the *Indian Act* to self-government. Existing *Indian Act* and other federal financial arrangements were to be replaced by a co-managed Federal-First Nation fiscal relationship. This step was instituted in order to facilitate the establishment of the national and regional First Nation Assemblies, which had been given a much shorter five-year implementation window under the Accord. As well, a generous fund built into the deal would support transition costs and capacity development with a significant portion of the funds targeted at developing a professional First Nation public service. Further, a First Nations Secretariat conceived along the lines recommended by the Royal Commission on Aboriginal Peoples (RCAP) would be established to implement the arrangements, thereby replacing DIAND.

Significantly, the agreement granted constitutional recognition to the inherent right to self-government without creating a constitutionally recognized third order of government. The lack of recognition as an equal partner in Confederation angered a number of high profile members of the First Nation community, as well as a militant sovereigntist wing that opposed any constitutional deal with Canada. But First Nation negotiators and their supports, cognizant of earlier failures, had undertaken extensive consultation with their grassroots constituency and had kept communities well informed as negotiations progressed. As a result, the deal invoked widespread community support right across the country and when put to a vote passed overwhelmingly. The negotiators were also able to meet the charge of their critics by arguing that, as part of the Accord, they had secured agreement to another constitutional meeting in 10 years to review progress and consider further constitutional change, including constitutional recognition of the First Nations National Assembly. All told, the deal was hailed as an historic breakthrough that would transform the Canadian federation.

#### *The Price of Success*

Paradoxically, some of the toughest negotiations had occurred away from the spotlight of the Constitution on issues of taxation, land claims and revenue sharing. A working group process had been set up in parallel to the main constitutional negotiations to deal with these issues. First Nations were pressed to give up their tax exemption and to agree that their own government revenues from business and other sources be included in the determination of government financial transfers, along the lines of the equalization principle in the Constitution. First Nation leaders vigorously objected to what they saw as a hostage taking of their rights. The hard message back was that a new Constitutional deal could not be sold to the public without a price. Aboriginal negotiators pushed back, this time on land claims and resource revenue sharing. It was the Quebec government that ultimately brokered a breakthrough on these issues, convincing the resource-rich Western provinces that revenue sharing was in their long-

term interest. A direct stake in the growth of the provincial revenue base would create an incentive for First Nations to participate in rather than oppose economic development. It was also clear to the B.C. government that resource revenue sharing could be a key building block in the task of kick-starting the land claim process in that province. The only way B.C. would agree to initiate such an offer, however, was if Ottawa contributed to a sizable chunk of the costs.

The economic deal that emerged was a landmark. First Nations agreed to give up their tax exemption within a 20-year period, either by having the federal and provincial governments tax individuals directly or through tax coordination arrangements in which First Nation governments levied comparable taxation on their citizens and had these revenues offset some of the financial transfers from Ottawa and the provinces. The federal and provincial governments also agreed to enter into revenue-sharing arrangements based on a 50-50 cost sharing arrangement between Ottawa and the provinces that entered into the scheme. This deal, along with a number of other understandings on co-management and cultural rights, allowed the B.C. land claim process to move forward again, this time with a renewed sense of optimism for rapid conclusion of treaties.

#### **Aboriginal Governance in 2015**

The first UN *World Summit of Indigenous People*, hosted by the National Secretariat of Canadian Indigenous People (NSCIP) and held in Toronto, attracts more than 5,000 delegates and observers from around the world. The Summit is a celebration of Canada and its remarkable achievements in restoring Aboriginal rights. In the welcoming remarks, the UN Secretary-General describes the event as a “unparalleled step by humanity to embrace the diversity and equality of its kind.” The Canadian Special Ambassador to the UN Indigenous Assembly, elected by NSCIP to represent Canada on the newly created UN advisory assembly, notes that Canada, while recognized as an international leader in indigenous rights, still had a considerable way to go to fulfil the spirit of the 2013 Accord. The First Nation National Assembly and a number of Regional Assemblies

are up and running. However, building the institutional infrastructure to support the transitional process has been a far greater problem than first imagined. Mechanisms to resolve disputes and an appeal process have yet to be finalized. The widely divergent mix of First Nations and regional aboriginal organizations has still not found a united voice. The Special Ambassador notes that great strides are being made in the treaty process and that the pre-Accord litigation drive has been replaced by negotiations. Fears about intergovernmental processes in Canada becoming unworkable with the addition of Aboriginal players had proved unfounded. Quite the opposite, Aboriginal participation has moderated the usual federal-provincial bickering in these areas and has quickly produced a series of practical agreements on program and service coordination and funding in areas that had previously proved to be intractable.

The single biggest challenge following the Accord, according to the Special Ambassador, is at the community level. Years of struggle in the courts and the constitutional process had diverted leadership and energy away from building governance capacity at the local level. The provisions of the Accord required a profound change in the way many First Nation people and communities viewed their position and relationships within Canada. This has created so many governance challenges that there are now worries that the 15-year time frame set out in the Accord is excessively optimistic. Moreover, what were called 'sovereignist' First Nations remain disaffected with the Accord and refuse to participate in the Accord's self-government implementation process.

While much of his speech was on the Constitutional breakthrough, the Ambassador talks with some satisfaction about other improvements that he saw in the situation of Aboriginal people in Canada. Over the past decade, there is evidence of a marked improvement in the social and economic conditions of Canadian Aboriginal peoples. The challenge for First Nations had been to balance the demands of governance building with the need for tangible improvements in economic

conditions at the community level. There are now signs that the federally sponsored process of strengthening governance is indeed paying off. Canada's private sector, eager to capitalize on the opportunities of an improved political climate, is opening access to training and jobs and is promoting joint ventures with First Nation members. First Nations enterprises in all sectors are responding, as improvements in the administrative and management skills of a more experienced and trained First Nation workforce emerges. Creative partnerships that take advantage of the wide-open opportunities of the new economy are flourishing. Recent social policy agreements with the federal and a number of provincial governments offer the prospect of an across-the-board commitment to preventative strategies in health care and social support, which the Ambassador was confident would show dramatic results in short order. As well, a nationally coordinated collection of both written and oral history is launched across the country to preserve the languages, traditions and culture of individual First Nations. Meanwhile, a growing number of Aboriginal Canadians are entering politics at every level of government, giving voice to an increasingly vibrant and culturally rich community within Canadian society.

Despite its unresolved flaws, the Canadian compromise is celebrated worldwide as a model of shared governance, greatly enhancing the level of prestige and influence of both the country and its indigenous people at the international table. After more than a century of struggle, the tide shows every sign that it has indeed turned.

## **CYBER WAVE**

### **Broad Context**

In this scenario, global technologies and telecommunications have transformed the shape of governance. Political structures are overwhelmed and governments are trapped in a cycle of instant and unconnected reactions to rapid changes and critical events and forces largely out of their control. Technology and the increasingly irrelevance of borders in particular make it extraordinarily difficult to maintain economic and commercial order and property rights. Volatile rates of economic growth and black-market activity have severely weakened the

ability of governments to effectively perform many of their traditional social, economic and environmental roles. With increasingly mobile capital markets, growth of the underground economy and tax evasion associated with the growth of e-commerce and self-employment, potential tax revenues that once supported government activities fall dramatically. More generally, the world is splitting into the techno “haves” versus the techno “have-nots” and disparities across this digital divide between rich and poor are growing rapidly.

All international and regional organizations, including the UN and the OAS, are increasingly ineffective in the wake of alliances that sprout on an ad hoc basis to deal with particular issues. Broad public policy has dramatically diminished in importance in terms of the day-to-day lives of citizens of all countries.

Social divisions and conflict are growing within individual countries that suffer increased crime as an offshoot of both a weakened state and social despair. In Canada, these divisions reflect even sharper racial tones as Aboriginal peoples and other visible minorities bear the brunt of a deteriorating social safety net and the incapacity of government to respond to their problems. While federal and provincial leaders continue to meet in vain hopes of addressing problems and maintaining political confidence, little in the way of effective action emerges from these sessions and federal-provincial relations turn into breeding grounds of frustration.

Aboriginal communities and their governments are equally swept up in the social, economic and financial fallout from global technological transformation. Despite the best efforts of governments to mitigate the damage, the dependency and vulnerability of Aboriginal communities only exacerbates the effects of economic dislocation and government cutbacks. First Nation governments face parallel pressures challenging their capacity to govern effectively. Overwhelmed by old and new problems, these governments have fewer resources to support their individual needs, let alone champion for reform. Like the rest of society, Aboriginal communities are buffeted by the prevailing

climate of consumerism and an everyone-for-yourself attitude.

### **The Story**

#### *Evolution from 2000—dominant forces*

The single most important element that jump-started significant change in Aboriginal communities was a major federal government technology initiative at the beginning of the new millennium. The program, called *Connecting Aboriginal Communities*, was based on a series of successful pilot projects in Aboriginal communities across Canada, including a highly effective program to give children in remote communities access to e-education and enrichment programs via the Internet. Evaluations had shown tremendous interest and community use in the public access components of the pilots and a real drive to explore e-commerce ideas and opportunities.

Building on these pilots, a multi-million-dollar initiative was launched in 2001 in partnership with the provinces and territories (including Nunavut), the private sector, and Aboriginal groups. The ambitious goal was to connect all First Nation communities to the Internet and to install computers with Internet access in every First Nation school and library across the country by 2004. The objective of this targeted initiative was to create “e-smart aboriginal communities” by integrating First Nations into the information and communications economy and building the capacity in communities to create new-economy-based local businesses and products. In addition, by bringing information and communications technology to the young Aboriginal workforce where they lived, expectations were that these young people would gain the knowledge and skills to move into the new economy and to be better positioned to compete for jobs in the knowledge and IT sectors. Many of these same young people would be the dynamic factor in developing and sustaining e-smart communities.

The federal initiative had a three-faceted approach:

1. Joint projects with private sector IT providers to build the infrastructure to bring the Internet to communities;
2. A federal investment in training and skills development to ensure that a critical mass of people within the aboriginal community was able to use and support the systems. On-line education was the leading edge of the strategy, supported by a consortium of post-secondary and Aboriginal and non-Aboriginal education and training groups. A critical component of the capacity-building program was an on-line information exchange between Bands and Tribal Councils and the federal Department of Indian and Northern Affairs; and
3. An entrepreneurial program created to expand community uses of information technology and directly support e-commerce business development. One major national project that received millions of dollars was the creation of a multi-use aboriginal-owned and -operated Web network to connect Canadian Aboriginal communities and enterprises and provide global access to the Canadian Aboriginal market place.

#### *Moving With the New Economy*

The *Connecting Aboriginal Communities* initiative quickly created enormous synergies within the Aboriginal population, galvanizing numerous Aboriginal communities and capitalizing upon the hundreds of Aboriginal people already engaged in information technology and communications jobs and businesses. Within two years of the launch, the First Nations School Net program had connected more than 400 communities to the Internet. Hundreds of new jobs for young Aboriginal Canadians were created in an emerging and dynamic Aboriginal IT and communication sector. Although many of these jobs were in urban centres where some of the most exciting and innovative work was happening, there was also an explosion of individual and small-scale niche business opportunities on-reserve where urban location was not as important.

In tandem with the federal agenda, many Aboriginal communities across the country

rushed ahead on their own to develop telecommunications systems and Internet sites, purchasing high-tech telecommunications equipment to enable rural and remote communities to access the Internet through advanced digital, satellite and mobile communications networks. Given the federal government's long history of doling out impressive amounts of money for pilot projects and then abruptly withdrawing it at the first whiff of trouble, the investment in their own future was both prescient and fortunate. In the early days of the first round of economic instability in the decade, Ottawa dramatically reduced its financial support to the *Connecting Aboriginal Communities Program*. Once started, however, Aboriginal entrepreneurs were not about to be turned back. In an impressive feat of self-sufficiency and commitment, many communities picked up the pieces and reprioritized their efforts. Within a short period of time, they had created their own global communications networks and e-businesses, establishing a unique indigenous presence in the world e-commerce marketplace.

The creativity, innovation and success of Canada's Aboriginal community, especially among its young, attracted venture capital for many of the most promising Aboriginal high-tech businesses. In many respects, the international IT community regarded Aboriginal Canada as a test bed for new products and development strategies to help them penetrate third-world markets. Increasingly, Aboriginal ventures were incorporated into the business plans of established high-tech players as well as fledgling start-up companies. One of the most exciting developments was the emergence of a number of joint venture R&D consortiums that provided research and product grants to Aboriginal IT businesses. To meet the demand for high-skilled employees, Aboriginal entrepreneurs formed partnerships within the private sector to establish IT training institutes to accelerate the training of Aboriginal young people for high-tech jobs. The sum of these innovative developments was the development of a dynamic IT sector of world-class caliber that was, by a long stretch, both a pioneer and a model for indigenous people around the world.



Lagging behind but inspired by the Aboriginal CyberWave phenomenon in Canada, Indian Nations in the United States, jumped on the IT band wagon, with the help of U. S. federal funding programs that mirrored the Canadian initiative. Given their already close ties, Canadian and American Indian Nations and businesses predictably began to connect and share knowledge and experience to exploit mutually beneficial cultural and economic opportunities. With the formation of a host of contact networks, it was not long before cross-border business relationships began to flourish. In particular, Individual Indian entrepreneurs and community groups on both sides of the border saw strategic wisdom in consolidating their efforts to take advantage of regional and global e-commerce opportunities to sell indigenous products.

One of the by-products of this creative surge was a dramatic expansion of an already robust Aboriginal cultural industry. In the early 1980s, Canadian singer-songwriter Buffy Sainte-Marie, born on the Piapot Reserve in Saskatchewan, had been an early pioneer of digital music and art, recording her internationally-acclaimed CDs on a home computer and then sending the music via a modem and satellite to the studio. With even more sophisticated technology now at hand, Aboriginal artists and musicians had unfettered access to a global audience that craved what became known as “the Northern indigenous sound” and a distinctive artistic genre. The revolution with Internet-based film and music propelled many of Canada’s Aboriginal moviemakers, actors and singers to international stardom both within and outside the indigenous community.

#### *On The Leading Edge*

By 2010, the CyberWave economy was entrenched on a global scale. Canada’s First Nations, in contrast to a legacy of exclusion from earlier economic transformations, were not about to be left behind. Indeed, a large number of “e-Smart” Aboriginal communities in Canada were at the leading edge of the rapidly expanding knowledge-based economy. Creating a distinct, nationally recognized information and communications e-based industry, Aboriginal

businesses operated in every facet of the dominating economy. A flood of highly sought Canadian Native products washed over the Internet. The numerous Indigenous Web sites operated by Canadian and American Indian businesses included internationally recognized animation groups, small scale software companies and a popular array of interactive games and indigenous healing and spiritual sites.

#### *Struggling With Commercialization*

Despite the opening of doors to a lucrative commercial world, CyberWave posed serious challenges for First Nations. One of the most controversial issues to emerge within the Canadian Aboriginal community was the exploitation and commercialization of traditional knowledge and cultural by both Aboriginal and non-Aboriginal people and businesses. The world was increasingly swept up by the uncontrolled and arguably illegal appropriation of intellectual knowledge and products. Highly original indigenous symbols, concepts and ideas were prime targets. Paradoxically, the most tragic affect of the global race for new products and ideas was at home. A number of First Nation communities took legal action in high profile court cases that pit one tribe against another over the right to the economic exploitation of specific aboriginal culture and practices. Other court actions involved attempts to protect First Nations heritage, traditions, folklore and symbols from individual appropriation and commercialization by community members. Central to the arguments presented in court was the belief that the commercialized products were in fact communal property to be held and used for the benefit of the community. The explosion of litigation involving intellectual property rights that stemmed from the growth of the World Wide Web and e-commerce clogged both domestic and international courts. For years, indigenous people around the world had fought against the exploitation of their heritage, viewing it as a threat to their cultural identity and spirituality. Continuation of the fight was doomed from the outset. The appropriation of Indian spirituality into popular culture was accelerating so rapidly that it soon became a seamless thread within a burgeoning global new age cultural movement. The international popularity of things Aboriginal

offered wealth for individuals in the position to exploit these economic opportunities. The ability of a single state or any of the decreasingly effective international bodies, let alone a First Nation community, to regulate that exploitation of ideas and culture rapidly diminished.

#### *Aboriginal Rights and Self-Government Stall*

In the face of the cyber assault, federal treaty and self-government policies remained essentially intact. Indeed, there was little compelling reason to change them. The political, bureaucratic and financial capacity to implement these policies had simply eroded as both the federal and provincial levels of government became focused on larger, seemingly more urgent, issues in the CyberWave transformation. Pressures from First Nation communities did not stop, however, and many fell back on the traditional strategy of pushing their case through the courts. Barriers to this strategy quickly emerged as the courts struggled with new case law and backlogs of intellectual property cases. The enormous time and money now required for court action was beyond the reach of most First Nations. Federal funding for legal procedures had withered and vanished, along with funding for treaty and self-government negotiations. While the Supreme Court of Canada heard at least three significant cases on Aboriginal rights and title in the first decade, it had decided the issues so narrowly that any expansion of those rights was effectively stalled. The effectiveness of the court as a pressure point on governments waned in importance. The rights and self-government agenda of First Nations may have survived the onslaught, but it was clearly struggling on life support.

#### *A Growing Divide*

Despite the visible progress in the Aboriginal economy, sharp divisions among First Nations communities began to appear. Communities that had received large injections of money and training under earlier federal initiatives or that were able to move quickly to capitalize on the cyber economy were able to mitigate the worst effects of successive waves of destabilization created by a volatile economy and ever-deepening cutbacks in funding. Wealthier First Nations were able to extend social, housing and

health benefits to their off-reserve members. However others struggled as the federal government reduced its off-reserve funding in an effort to shelter its financial flows to reserve-based communities. The social and economic divide between urban and on-reserve Aboriginal members widened. Communities that lacked resources or were unable to adjust to ongoing economic and social change suffered the worst, falling dramatically further behind on all socioeconomic indicators. Many devolved into dysfunctional disarray as their members fled to urban centres or to more “connected” communities. Aboriginal factionalism intensified as debates over the new ways versus the old deepened. Social problems inevitably followed as successful e-commerce elites superseded the old political guard. The one constant thread in both have and have-not communities, however, was the respect accorded to Elders, who remained cultural and spiritual leaders. Even still, there was a shadow over the venerable role: many Elders questioned whether they were valued for their wisdom or for their mercenary worth as the intellectual reservoir for the traditions and knowledge that were the stock and trade of the Aboriginal e-commerce wave.

#### **Aboriginal Governance in 2015**

By 2015, a significant portion of Canada’s Aboriginal community has been fully integrated into the information and communications economy, with a multi-million-dollar Aboriginal IT and communications sector that provides products, services and jobs to the Aboriginal community. More important, Aboriginal Canadians and communities are regional and global players, with thousands of successful e-businesses supplying mainly indigenous products to the world. One interesting development is a return to the traditional bartering system, modernized by the use of the Internet. Canadian Aboriginal talent flourishes on the world stage. Aboriginal IT/communications firms have captured a lucrative consulting niche with services that, among other things, help indigenous people in other countries develop their own local networks and cyber enterprises.

*A New Vision*

As less and less money is transferred directly from the federal government to Aboriginal communities, Aboriginal e-business players and communities emerge as the new Aboriginal elite. Accepted by the non-Aboriginal population as innovators in their own right, these elites banish social stigmas that had hobbled previous generations. A dynamic element within the Aboriginal community, they are the source of new jobs and represent the vanguard of a movement that was breaking down the wall of dependence. Indeed, some of the most successful players are regarded as e-commerce superstars, preaching the gospel of the new information economy. At the heart of their message is the mantra that the information economy offers unheralded opportunity. Far from a homogenizing threat, the new economy values and rewards difference; it is the potential salvation of their own communities and a beacon for their future prosperity. In fact, the Internet and cyberspace connections are powerful enablers by which Aboriginal people can foster a cultural and spiritual renewal.

In the new cyber world, governance is what you make it, they say. The old battles around self-government and rights were debilitating and had perpetuated the myth that old-style institutional structures and a traditional economy mattered most. Institution building is a thing of the past, one only had to look around at political and governance structures to see the obvious. The future lay in a different direction, one that draws on confidence and pride as an Aboriginal person, and that uses personal creativity and talent to seize opportunity. Fashioning a place in Canadian and global society is a matter of reconstructing, exploring and tapping into the collective Aboriginal imagination; in drawing strength from a vibrant Aboriginal culture and identity to create a space that is not bound by traditional norms, conventions and structures of land and geography. In many ways, this is a revolutionary message. But its seductive allure is fed by the Aboriginal renaissance that is so plainly evident. Indeed, a majority of Aboriginal and non-Aboriginal Canadians now view individual initiative and self-reliance, coupled with open,

dynamic and networked relationships, as core values of a successful cyber society.

A dynamic cyber voices heard above others is that of a National Chief, elected in 2012 after the traditional power base of the Assembly of First Nations (AFN) disintegrated and lost legitimacy. Over the previous 15 years, the combination of demographic changes that increased the number of status Indians residing off-reserve and the rise of individualism and entrepreneurship had shifted the balance of the AFN's core constituency into large urban centres. A new wave of leaders from First Nation communities has dramatically changed the political connections and functions of the once-powerful organization. As the relevance of federal and provincial governments in the lives and governance of Aboriginal people faded, the AFN had evolved into a national clearing house for knowledge sharing and expertise as well as a point of connection that builds and strengthens indigenous cultural, technological, and economic relationships. Eventually, as post-secondary education became disseminated in bytes over the Internet rather than from large institutions, the AFN enlarges its role to sponsor media networks to coordinate innovative aboriginal content and programs.

*The Decline of Politics*

The dominant model of Aboriginal governance in the 21<sup>st</sup> century is focused on dynamic e-smart First Nation communities whose new-style governments opt for pragmatic approaches over emotionally draining and costly battles for traditional aboriginal and treaty rights. These governments adopt economic and social priorities that reach out to and form partnerships with the larger mainstream business community. They facilitate high tech/new economy deals that create jobs both on and off aboriginal lands. As well, they pursue tough, aggressive strategies, including non-Aboriginal business acquisitions, to create economic synergies and to leverage investment opportunities for their communities. Understandably, these new loci of power and influence flow from those First Nations communities that capitalized on the new economy as well as their traditional resource base. Large off-reserve memberships provide the

workforce needed to meet the rapidly expanding labour needs of Aboriginal IT enterprises, which rapidly discover that cultural differences are a major barrier to integrating non-Aboriginal employees into their businesses. The principle underlying the relationship with the federal and provincial governments is that minimal connection is required. By contrast, relationships between First Nations and non-Aboriginal communities at the local and regional level have become a dynamic source of strength. Old tension points are displaced by the search for synergies and networks to better position local communities and citizens in the cyber economy. In this new environment, the oppression of dependence is a relic of the past. Although still in the minority, these communities are healthy, vibrant, entrepreneurial and independent. They are mainstream Canada's role models, perceived to be ideal First Nation communities, confident and connected with other successful aboriginal communities and businesses as well as with the non-Aboriginal business world. Indeed, like the world that surrounds it, the measure of a successful Aboriginal community for many is the length of its millionaire row.

Despite the imprimatur of the new economy, some First Nation governments continue to rely on traditional law and clan and other tribal structures to provide guidelines for economic decisions and community development. This notion of general guidelines, as opposed to rules or laws, is practical for the range of ad hoc decisions required of leadership elected by communities increasingly drawn into the mainstream global economy. Inherent to the seemingly backward pull of tradition is recognition that community consensus building remains the most, if not the only, effective way to protect Aboriginal knowledge from external appropriation and exploitation. These communities view cultural control as vital to successful economic development. While the leadership in Canada's more dynamic new economy communities is increasingly influential at both the provincial and federal levels, there is little genuine interest in playing the political game. The big gains are clearly elsewhere.

At the grassroots level, the new environment sparks a more intense degree of interaction. In an effort to maintain legitimacy and social cohesion, the federal and provincial governments opt for populist strategies, using the expansive tools of new electronic information age to enhance Aboriginal capacity for extensive interactive policy development and decision-making. First Nations members treat this strategy as an open portal: more than any other group, they burn up cyberspace to present to governments their demands, complaints and policy ideas. For the most part, they have little expectation their efforts will produce tangible benefits, but it is certainly gratifying to put the government on the receiving end for a change.

These "wired" First Nation communities also develop the capacity for significant involvement on the international front. With the decline of formal institutional politics and the rise of ad hoc issue politics, popular mobilization through the Internet is a productive vehicle to mobilize a groundswell of worldwide support. The AFN and other Aboriginal political organizations use the unfiltered cyberwaves to capture attention and to muster international alliances to advance their interests. More significantly, on the home front, First Nations successfully rally sympathetic international opinion on several occasions to pressure both the federal and a number of provincial governments to back away from damaging development projects and policy positions. Unlike the old days of political appointments and letter-writing campaigns, the new age offers the Internet as a powerful political tool, always at the ready.

#### *The Dark Side of CyberWave*

The digital economy has proved to be an empowering tool for most First Nations communities. But there is also a troubling, and much more negative, cast to the picture. Even in the most successful Canadian Aboriginal communities, many young people are unable to break the legacy of dependency and despair. Migrating to the cities, they form an ever-larger population of the urban dispossessed living on the streets, often outside the law. One indicator of the scale of the problem is that young Aboriginal men and women occupy an even larger

percentage of the population in the Canadian prison system. Indian youth gangs are an entrenched feature of a well-established gangland environment that exists in most of the country's largest cities, which are increasingly unsafe for all.

There are other victims of the new economy. While the federal government could no longer afford the broad structure of services that had existed at the turn of the century, even fewer of the remaining services are specifically targeted to Aboriginal groups. In the past, First Nations had often found allies in the provincial governments, which traditionally had held the federal government accountable for funding and services to Indians. Reluctantly accepting the harsh economic reality, the provinces however have abandoned old-style jurisdictional squabbles over federal off-loading. The impact of a fiduciary vacuum is as widespread as it is tragic. With the Canadian Medicare system in tatters, for example, the federal government has whittled down funding for medical services for status Indians. As a result, some diseases reach epidemic proportions in struggling First Nations communities. The health status of many Aboriginal young people, in particular, show graphic declines as chronic diseases such as AIDS and tuberculosis take an increasing toll. Private charities that are stepping into the fray to play a larger role in providing public health and social services have no history on-reserve. Overwhelmed with other clients, they are unable to tackle the special needs of a socially and culturally isolated Aboriginal population.

Changes in federal policies and funding exacerbate the growing disparity between the have and have-not Aboriginal communities. By 2015, overall federal transfers to Indian Bands have declined in real dollars to almost 50 percent of 2000 levels. In addition, in 2013, the federal government legislates an end to the historical tax exemption afforded to Indians and hikes the GST as part of a larger initiative to shore up fast evaporating government revenues. These changes, combined with similar provincial increases to retail taxes, reduce the disposable incomes of First Nation members and increase the cost of living on-reserve. The overall social

impact is immediate. Migration to cities accelerates, raising questions about the viability of maintaining many reserve communities.

Even thriving First Nation communities are not immune to the shifting realities. Undercurrents of unease among community members grow with the retrenchment of policy, particularly as the federal government slows down treaty and self-government negotiations. Because of its high cost, the federal government has effectively put Aboriginal self-governance on the back burner and is instead pushing a policy to "modernize" the *Indian Act* to give communities more autonomy. This move is a reflection of an earlier era when provinces, faced with declining financial support for Medicare, had demanded that the Canada Health Act be repealed and that they be given the right to design their health care systems as they saw fit. Despite the transparency of this action by government to limit its obligations, there is little outcry from the political leadership of successful Aboriginal communities. From a pragmatic point of view, their economic capacity is less dependent on the financial and resource dividends to be gained through the treaty and self-government process. Settling land claims is still on the agenda but, for the most part, it no longer commands the urgency it once did. Why give up the fight for land and resources when the future may produce a better deal?

Still, the whirlwind of change creates uncertainty within these technology-oriented communities. The electoral defeat of some of the new political stars by so-called "radical traditionalists" is the first sign of a growing grassroots militancy and, more troubling, the threat of impending political trouble.

## **REGIONAL DOMINATORS**

### **Broad Context**

This scenario is one in which right-wing and neo-conservative governments have increased in number and strength worldwide. Regional power blocks have solidified and are in competition for geo-political and economic dominance. Protectionism rules the day. The nation state remains an effective player, but small states must seek protection and influence by linking unreservedly with one of the big power alliances.

For Canada, that means membership in the Americas Bloc that is dominated by the United States. There is pressure from the U.S. on the Canadian federal government to abandon all major vestiges of the universal social safety net on the grounds that it creates an unfair production environment and is a barrier to regional economic integration. Canada, like other countries in the region, buys into the integration scenario, but only after intense political conflict between the neo-conservative and nationalist political forces within the country. By 2010, integration has reached the point of a North American monetary union.

The economic picture is one of low, uneven growth with cyclical swings that are more extreme than in recent decades. As a trade-oriented and resource-based economy, Canada is particularly vulnerable to economic volatility. A compensating factor is that strategic resources such as oil and gas retain a high market price due to the critical interest of the Americas Bloc in security of supply. As well, Canada's priority in the 1990s of developing a solid knowledge-based and technology infrastructure has paid dividends and the country is able to take advantage of the information economy to help sustain growth.

In all countries, income disparities have grown measurably along with government retrenchment. The unemployed and underemployed classes are expanding rapidly, resulting in social protest, militancy and the growth of a black-market economy. In North America, Aboriginal groups are especially militant. Governments either don't listen or react with force to quell social protest. Non-Government Organizations (NGOs) and other social interest factions have thus been largely marginalized.

International organizations such as the United Nations (UN) and the World Trade Organization (WTO) have lost their effectiveness and many are either ignored or dismantled. In the Americas, key pan regional organizations such as the Organization of American States (OAS) have become instruments for pursuing the strategic interests of the bloc. As a consequence, NGOs have had to reorganize and frame their

activities within the regional Blocs to maintain any influence.

### **The Story**

#### *Evolution from 2000—the Dominant Forces*

In Canada, a deep recession, disillusionment with existing government policies and a growing sense of the need for a "fortress North America" stance accelerated a political realignment within the country and led to a massive federal election victory in 2005 for the political right. The new Prime Minister, with a long and active history in the North American Christian fundamentalist movement, had forged a strong alliance with the American political right, which now sat comfortably in power in Washington.

The nucleus of the new government's policy direction was a neo-conservative economic, fiscal and social policy agenda that included:

- closer economic integration with the United States;
- major cutbacks in federal government expenditures;
- a major realignment of responsibilities to the provinces;
- deep personal and corporate tax cuts;
- repeal of the *Canada Health Act* and the introduction of private hospital and medical care; and,
- most important for purposes of this case study, a radical new Aboriginal policy.

#### *A New Federal Policy Paradigm*

The revamped Aboriginal policy of the federal government was sold to the public as a policy that promoted "the equality of all Canadians." Inherent to that principle was the belief that economic self-reliance could only be achieved by the full integration of Aboriginal people and their communities into the Canadian economic and social mainstream. Implicit in the policy was an understanding that non-viable Aboriginal communities would have to disappear—in the same manner that many fishing communities in the Atlantic provinces and on the west coast of British Columbia had vanished over the previous two decades.

The Aboriginal agenda featured major cuts in direct federal funding to national and regional Aboriginal political organizations, including the Assembly of First Nations (AFN). The political intent of the cuts was obvious: with the ability of Aboriginal groups to mount a battle for public support critically limited, they would be incapable of rallying opposition to the new agenda. Under the mantle of ridding the system of waste and inefficiency and increasing financial accountability, federal funding was capped at the 2004 level until legislation could be introduced to include First Nation non-government revenues in funding formulas. This policy cut the level of overall funding, in some cases dramatically, and allowed the federal government to mount a more positive public relations campaign by diverting some of the savings to the expansion of Aboriginal economic development, employment and training programs.

#### *Abandoning Self-Government*

Shortly after taking office, the federal government abandoned the inherent right policy on self-government, reversing a strategy that had dominated the Aboriginal political agenda for almost 15 years. Most of the negotiation processes that gave Aboriginal governments the responsibility for programs and services were re-oriented toward local governance improvement initiatives or phased out altogether. In particular, the treaty negotiation process in British Columbia was restructured to fast-track land claims negotiations in order to obtain certainty for resource development in that province. This was accompanied by a hard-ball, "take it or leave it" strategy that included the acceleration of resource exploration and development to force First Nations to accept government bottom lines rather than endure lengthy and expensive court battles. The new treaty strategy did allow the creation of a municipal-style local government, with delegated authority from the province and federal government. But by any standard, it was a meager carrot and a marked divergence from the optimistic atmosphere that had prevailed at the turn of the century.

#### *A Futile Battle*

First Nations launched an intensive national campaign in opposition to the new federal

Aboriginal agenda and cutbacks in funding. The campaign was a coordinated effort that included direct political action; alliance building with NGOs and other social interest groups; a media blitz; and civil disobedience. The federal government, expecting such a response, went on the offensive. In a number of public speeches at carefully staged partisan events, the Prime Minister appealed to the popular view that the old system of dependence and federal government largess had not worked and that it was time for a radical overhaul. After a sophisticated communications assault, the federal government declared that polls and the positive feedback from constituents supported Ottawa's actions. In rapid order, provincial governments jumped on the bandwagon, while police forces across the country were given full backing to deal quickly and decisively with blockades and demonstrations. First Nations leaders, unsure of whether or not the government's message was getting through to the grassroots, were hesitant to alienate whatever support they had left. The increasing difficulty they encountered in attempts to mobilize sustained local opposition and the retreat of some of their traditional support base began to sap their political confidence.

Thwarted at home, Canadian Aboriginal organizations turned to familiar international allies for support. But indigenous groups in the U.S. and Latin America, severely challenged by events in their own countries, were either financially strapped or too dispirited to join their northern colleagues in an effective transnational fight. American Indian groups were battling Congress to protect their existing rights and sovereignty. In Latin America, militant insurgency politics held sway as indigenous people fought to protect their lands and, in some instances, their lives. Against this backdrop, the problems of Canadian Aboriginal groups seemed minor, even trifling, by comparison. Focused on the crisis of destabilization in Central and Latin America, international organizations such as the OAS that had once been positive sources of influence had neither the time nor a particular interest in tackling the issues that confronted Canadian Aboriginal groups.

*U.S.-Canada Coalition*

The spring of 2007, however, was a decisive turning point in the Aboriginal struggle with government. At their first official meeting soon after the Canadian election, the new Prime Minister and the U.S. President had agreed that it was essential to move quickly to bring Canada's vast West coast oil and gas reserves on stream in order to secure the strategic economic dominance of North America. These reserves, located in the waters around Vancouver Island and the Queen Charlottes, were three times the size of the Hibernia field off Newfoundland. In the early 1970s and 1980s, Ottawa and the British Columbia government had placed moratoria to prohibit exploration and drilling in these ecologically sensitive regions. Now, the two governments announced that they planned to introduce legislation to lift the moratoria and remove any impediments to rapid development of the oil and gas resources. Domestic and international Aboriginal groups, as well as environmental groups and social activists, were outraged. Led by the Haida Nation, which claimed that the area to be exploited fell within their traditional territories and was therefore subject to unresolved Aboriginal rights and title, Aboriginal groups launched legal actions challenging the validity and constitutionality of the legislation. Ottawa, in a supreme act of confidence, proceeded with the legislation arguing that commercial development was in the national interest and therefore represented an acceptable infringement on the rights and title of the affected First Nations. As a final coup, the U.S. President came out in persuasive support of the Canadian action, stressing the strategic interest at stake, which included keeping the pumps flowing for consumers. Disheartened, Aboriginal groups resorted to petitioning the unsympathetic courts for injunctions to stop the actual development. But the B.C. courts ruled that it was not at all clear that offshore lands were covered by Aboriginal land claims.

*Ottawa's Trump Cards*

In a clear demonstration of the new realpolitik, Ottawa moved quickly to sweeten the pot and thereby divide its opposition. Ever wary of political vulnerability, the Prime Minister shrewdly announced the creation of a B.C. *First*

*Nation Resources to Prosperity Fund* that was based on a revenue-sharing scheme for oil and gas development. The big oil-producing multinationals leapt onboard with major commitments to open up jobs and training for the First Nations most affected by offshore development. All told, these announcements offered a boost to the economic future of First Nation communities in B.C. In the end, although there was very little said about it, some coastal First Nations breathed a sigh of relief. The resources from oil and gas more than offset the declining revenues and job losses triggered by restrictions on lumber imports by the Asian Bloc. By the time the protesting cases reached the Supreme Court of Canada in 2010, exploration and development had already commenced, reaping handsome profits for even the most vocal opponents in the province's Aboriginal communities. As a further guarantee that any outstanding legal challenge would fall short, the Prime Minister had adroitly tilted the Supreme Court's bench with strategic appointments of jurists more sympathetic to Ottawa's political agenda. By 2012, when a final decision was finally handed down, the Court ruled that development of offshore oil and gas was not only in the overriding interest of the country but that B.C. Aboriginal groups had been more than adequately compensated by the Resource Fund. Spread as they were over a number of years, the events represented a masterstroke of political maneuvering that slipped by all but the most fastidious political and legal observers.

Divided at its most critical juncture, the national Aboriginal campaign sputtered in decisive and dismal political defeat. In the face of cutbacks and stonewalling, Aboriginal groups were unable to sustain the political effort required to shift public opinion and federal policy. With great fanfare, the federal government then launched a national *Aboriginal Economic and Training Strategy* with the strong endorsement of the business community, the provinces and post-secondary institutions. Billed as a partnership for self-reliance, the strategy included national forums to mobilize support and generate ideas. The results were unquestionably impressive, at least in number. The spate of announcements ranged from the availability of new investment



funds and high-tech joint ventures, to the creation of innovative long-distance training and educational initiatives. The centrepiece of the strategy, however, was the Prime Minister's commitment to the achievement of ambitious national goals for Aboriginal employment. The realignment of national Aboriginal priorities, combined with the business community's pledge of partnership and investment, created immediate opportunities for those First Nations that were either financially secure or had a proven track record of success. The young urban Aboriginal population also benefited as numerous training and employment opportunities opened up. Ottawa had counted on the allure of immediate results. With positive examples to illustrate the strategy's effectiveness, it was then only a matter of time—and another public relations blitz—before even the most skeptical public was convinced that this was the right path to take.

#### *Realigning Federal and Provincial Roles and Responsibilities*

The next bold move of the new government was a major off-loading on the provinces of program and service responsibility for the delivery of basic on-reserve social programs. In the 1960s, Ottawa had attempted a similar sidestep with the Canada Assistance Plan but the initiative had failed, with only Ontario taking the bait. In an era of radical decentralization to the provinces, however, Ottawa found a more receptive audience. The rationale for this policy was that it would streamline on- and off-reserve program and service delivery while at the same time reduce costs and improve the levels of services. The fate of existing Aboriginal services organizations and the role of First Nation governments in service delivery was left to the provinces to work out. Not surprisingly, many of the provinces opted to phase out many of these organizations. The federal government sweetened the proposed realignment of program and funding responsibility with a commitment to assist provinces with the growing financial challenge of off-reserve Aboriginal issues. Ottawa was quite aware that service restructuring and funding cutbacks would result in a major out-migration from many First Nation communities. If the provinces were not assured that the federal government would share the cost of this

transition, Ottawa knew full well their plans would go nowhere.

Predictably, the initial negative reaction of the provincial governments, the majority of them conservative, centred on the familiar complaint of fiscal off-loading. But this time, there was no major objection. The federal moves, after all, were a logical extension of neo-conservative thinking. As long as Ottawa retained full responsibility for on-reserve Aboriginal people, the issues between Ottawa and the provinces came down to money. Again, the federal government had a political ace up its sleeve. Adding Aboriginal issues to the package on the table at federal-provincial negotiations on decentralization, Ottawa announced to the provinces that it would consider shouldering half of their escalating costs of off-reserve services and that it was prepared to put its commitment into legislation. Calculating that such a deal would likely result in an eventual net financial gain, the provinces agreed to talk. The First Ministers knew that Aboriginal groups would never accept such a dramatic realignment of responsibility. Secretly, they hammered out a deal. By agreeing to end the s.87 tax-exemption for status Indians living on-reserve, the federal government hoped to fully integrate Aboriginal people and businesses communities into the tax system and thereby raise additional funds to help pay for the new deal.

The federal-provincial deal on realignment was more than a transformation of the Aboriginal agenda. The death of the tax exemption represented the end of an era and the introduction of the political doctrine that "all Canadians would be treated equally". With their agreement, Ottawa and the provinces had effectively transformed Aboriginal on-reserve governance into little more than municipal-style government. Program control had shifted to the provinces, which clearly had no interest in transferring program responsibilities from line ministries to First Nations and community-based Aboriginal organizations unless it made financial sense and unless they agreed to follow provincial policies and guidelines. It was not an easy pill for outraged Aboriginal groups to swallow. They argued that they had been deliberately and coldly

shunted aside—shut out of talks that involved their futures; robbed of their hereditary rights; burdened with taxes they were promised they'd never have to pay; and shoved into a system they wanted no part of. But their anger was theirs alone. The elimination of the tax exemption was highly popular with the public, which had no sympathy for and little understanding of a deal that was struck in a different, and distant, era. On this issue, the courts were equally unmoved. Deeming that no treaty or basic social rights had been violated, the courts saw no basis for interfering in federal financial and program decision-making. Effectively, the Aboriginal agenda belonged to everybody but to those it was intended to serve.

#### *A Difficult Transition*

In the meantime, individual provinces had embarked on transition arrangements to streamline the delivery of programs and services. Strategies of program enrichment, along generous offers to attract Aboriginal staff into the public service, were used to facilitate the realignment process. Most large First Nations with significant program and service delivery capacity continued to deliver programs to their members through agreements with the province. As part of the realignment, attempts were made with some success to persuade local municipal and regional governments to extend services on the reserves where proximity permitted.

Most provinces encountered serious transition problems. There was considerable disruption to services and a great deal of anger at the community level, especially over efforts to bring service benefits into line with other programs offered to the general public. Occupations of government offices, fierce protests on Parliament Hill and outside provincial legislatures became a staple of daily news. Entrenched provincial bureaucracies also proved resistant to change. Even though federal officials were transferred to help in the transition, provincial public servants neither welcomed nor were adequately prepared to deal with the “realities” of the Aboriginal responsibilities. An alarming number of people fell between the cracks as the quality of services deteriorated markedly in many First Nation communities. The

full weight of cutbacks and the realignment process were now apparent, as the traditional safety net role of the reserves eroded and a steady stream of people abandoned their communities to seek better luck in the cities. Most were young families poorly equipped for the transition. Frequent stories appeared in the media about the terrible increasing social problems both on and off Aboriginal lands—but little was done to solve them.

By 2010, there was a growing and widespread sense of political and public anxiety over the realignment strategy. But the adjustments were too major and too far advanced to turn back the clock. Municipal governments, particularly in the major urban centres where responsibilities for program and services were extensive, reacted angrily to what they perceived as federal and provincial downloading of responsibilities and problems. This was particularly true on the Prairies, where concentrations of Aboriginal people in the cities were the highest in the country for many years. Municipal politicians joined Aboriginal groups in an unsuccessful attempt to lobby Ottawa for a resumption of federal support for specific Aboriginal programs. The federal government, however, did agree to a series of special measures to assist urban centres on the Prairies to cope with local aboriginal program and service issues.

#### **Aboriginal governance in Canada in 2015**

##### *A Community Divided*

Deep divisions and differences have emerged as some of the more self-sufficient Aboriginal communities and business interests begin to look favourably upon opportunities created by the federal government's economic agenda. With access to natural resource and revenue sharing, First Nations in B.C. and Alberta have become the center for First Nation economic growth and prosperity. Many First Nation people here and elsewhere across the country sense that it is in the best interests of the Aboriginal population to evolve in step with the ever-changing times. Although this is by no means the dominant opinion, a growing aura of inevitability permeates the transformation underway. Economically successful First Nations, left on

their own to develop their own governance structures and relationships, are able to improve social programs and build more self-reliant communities that meet as equals with local governments and regional agencies to collaborate on issues of mutual interest and strengthen cooperation. The result is a blossoming network of relationships between Aboriginal and non-Aboriginal communities that in some cases leads to joint planning and economic promotion as well as development initiatives.

But there is also a growing economic and social crisis looming outside this relatively narrow band of wealthy First Nations. Enormous differences now exist from First Nation to First Nation in the quality and extent of infrastructure and services. In fact, at no time in recent history have there been such stark disparities in social and economic conditions among Aboriginal communities. Many communities are political tinderboxes, waiting to explode.

#### *Entrenching Change*

In British Columbia, the hard-line taken by the federal and provincial governments in treaty negotiations have resulted in a number of important breakthroughs. Motivated by crushing financial debt or by the fear that they would forfeit financial and resource-development opportunities, several First Nations are in the mood to deal. In 2013, a prominent B.C. First Nations community—urban-based, sophisticated and blessed with an abundance of revenue-producing properties and resources—had surprised many by negotiating a fast-track treaty settlement that resolved its land claims and secured one of the largest cash transfers in First Nation history. The deal, which had taken an unprecedented period of only four months to close, included the acceptance by the First Nation of the basic constraints set out by the provincial and federal governments on municipal-style governance. The deal is seen by many as uncorking the treaty process once again in British Columbia. True to prediction, negotiations accelerate on a number of fronts.

At the same time, a new generation of Aboriginal political insiders more aligned with federal and provincial ideology and closely

connected to big multi-national business interests, gains prominence within the more economically self-reliant First Nation communities. The confidence of this new charismatic elite is matched by its determination to preserve its political platforms by hanging on to what community resources and authority it can. The mantra of its members is pragmatism, not political struggle; its philosophy is tangible economic results and entrepreneurial risk taking. Indeed, its thinking on most issues fits comfortably within the prevailing neo-conservative paradigm of individual self-reliance. This new generation has no difficulty putting heart and soul behind an “America First” view of the world.

While economic liberalization hurt many First Nations, it proves to be a boon for the more wealthy groups, particularly in western Canada. As deal makers with a long history of experience in the resource sector, these communities are particularly well positioned to take advantage of a more open economic environment. With a rich resource base and the financial means at their disposal, several First Nations consolidate their assets to forge economic trading and negotiating Blocs with their counterparts in the U.S. and Latin America. Mutual interests include strong support for economic integration and monetary union and they joined other leading proponents to publicly express this view as a way to help mitigate opposition from a nationalist coalition of activists and Aboriginal groups. The majority of First Nations left out of this picture of growing opportunity and prosperity struggle to survive; others buckle under pressure to consolidate into larger groups. As a result, the number of individual First Nations begins to decline at such a rate that experts predict that their numbers will likely drop within a decade to less than 200, a third of the total that existed 2000.

Off-reserve, those Aboriginal service organizations that survived downsizing and the restructuring process by the provinces, are swamped with the influx of new arrivals relocating to urban centres. At the same time, their autonomy and connections with their communities are diminishing dramatically with

increasing integration within provincial service delivery systems.

The relationship between First Nations and the federal and provincial governments is now focused heavily on accountability and control of spending. Alongside declining government funding is a corresponding increase in demands to account for each dollar spent. Nor is the federal government reluctant to step in and take control of the financial management of bands and organizations at the first sign of problems. Bands that have consolidated into larger tribal and regional blocs must demonstrate that they are capable of sound financial and program management. For their parts, the provinces, looking for ways to ease transition problems, move aggressively to re-establish the old model of First Nation program and service delivery. Ironically, quite a few First Nations reject these overtures, preferring to leave responsibility with provincial ministries while they concentrated on economic, cultural and political development

The transformation of Aboriginal Canada by 2015 has dramatically weakened solidarity within the Aboriginal community and has created a climate of the survival of the fittest. The courts remain as constant theme in the struggle of First Nations to protect their interests and safeguard their rights. Unfortunately, many of the cases that clog the courts stem from injunctions sought by provincial Attorneys-General to quash roadblocks, demonstrations and sit-ins across the country, and critical cases are stalled. For their part, provinces and the federal government continue to turn the legal screws to discourage protest. Citing a need to maintain law and order, the federal government overturns a longstanding policy in Canada of not penalizing otherwise law-abiding citizens with criminal records solely for acts of civil disobedience. Unable to pay fines or mount effective legal representations, many Aboriginal protestors find themselves in jail for lengthy periods for the simple act of staging protest. While the action has the desired affect of quieting civil action on the streets, civil libertarians warn of profound and lasting consequences. Over the years, the Prime Minister has been able to adjust the mix on the Supreme Court so that judicial conservatives now

dominate. It was not surprising, therefore, that Aboriginal rights are dealt another blow when the Supreme Court expands the language of the court by ruling that the word *priority* does not necessarily mean *first*. The Court states that Aboriginal rights are simply one set of rights to be balanced with other rights of the larger Canadian public and therefore are not necessarily *special* in the sense of being recognized first.

The domestic and international issue of indigenous rights, once imbued with the promise and optimism that swirled around the opening of the 21<sup>st</sup> century, has settled despondently under a black cloud. In a state of crisis, the UN is no longer a centre of any influence on indigenous rights and issues. The OAS, on the other hand, has become a more important regional forum for strategic and policy co-ordination among the states of the Americas Bloc. Unfortunately for the cause of indigenous rights, the OAS has changed radically, with security and economic concerns dominating its agenda. Indigenous issues slide off the OAS table. The long-awaited *Declaration of Indigenous Rights* was abandoned as an unnecessary and unwanted imposition on the actions of government. One of the darkest chapters in OAS history is an agreement whereby the United States supports a tough security and counter-insurgency agenda to crack down on the opposition in Latin America, many of whom are indigenous peoples groups.

Paradoxically, those closest to the indigenous rights movement in 2015 now refer to the bygone period at the end of the second millennium as the golden era for Canada's Aboriginal people.

## CONCLUSION

At the beginning of this paper we talked about the benefits of scenario analysis. Scenarios are fundamentally about exploring change. In the case of this study, the transformations are on a global scale. As we suggested earlier, looking at change through the prism of different futures at the global and regional levels should help us to better understand and comprehend more deeply the forces at work in today's world and where they might lead us. Such understanding should in turn allow us to make better choices today, so

that we can realize our aspirations for tomorrow. What is also interesting about the scenarios approach is that it allows us to create, within certain boundary and directional limits, independent, free-flow stories built around key driving forces, which we can then critically examine to draw out important insights or themes to guide strategic policy thinking. In our case, the question would be whether the four First Nation scenarios speak to how we might more effectively reconcile the relationship of Canada to its Aboriginal people and, more particularly, find a better path for defining a rightful place for First Nations within the Canadian system of governance. In our view, the answer to both questions is in the affirmative.

### **The Challenge of Reconciliation**

In the most profound sense, the act of Aboriginal reconciliation is Canada's great, unfinished project of nation building. It entails dealing with our history and the recognition of fundamental rights and resolving how the self-determination of Aboriginal people will be expressed within the Canadian constitutional context. What do our scenarios tell us about the nature of this project? This is not an easily answered question. In light of recent court decisions, most commentators today would likely note a perceptible hardening of political attitudes on Aboriginal issues that, combined with the recent shift of First Nations back onto the track of a rights agenda, is leading to a critical turning point on Canada's Aboriginal question. All of the major driving factors projected in the First Nation scenarios are present and active to some degree in today's political, social and economic landscape. So the scenarios fit within the current contour, and they suggest two very relevant conclusions about the nature of this act of nation and governance building.

First, they tell us that the established configuration of forces is deeply entrenched. This is extremely worrisome since social and economic indicators clearly show that Aboriginal circumstances are not improving rapidly enough and that both the public and Aboriginal groups are growing more and more frustrated. None of the scenarios present a plausible case for moving forward incrementally to an alternative future. In

three of the cases it took a crisis in Canada's relationship with its Aboriginal people to move to a different path of political development. Only in CyberWave was this not the case. Sadly, the inescapable conclusion is that it takes crises to produce results, which is consistent with the history of Aboriginal relations in Canada. Remember Oka! is the bumper sticker that seems to count. Without this seminal event and the worldwide attention it garnered, it is relevant to ask whether or not Aboriginal self-government would have made it onto Canada's political agenda.

The second conclusion is perhaps paradoxical in light of the first. What the scenarios suggest is that despite the entrenched nature of today's situation, the position of Aboriginal people, their communities, and their governments is quite fragile. The scenarios suggest that sharp change, especially where it affects the resources and social supports available to Aboriginal people or when it destabilizes political and social relations, can produce dramatic, largely negative consequences, at least in the short run. All the scenarios, for example, produced major winners and losers among First Nations, although the shared governance scenario did constrain the losing column, at least in the long run. This in our view is not an artifact of the way the scenarios were constructed. Rather, it expresses the axiomatic statement that dependency creates vulnerability and, when the status quo is broken, risks creating causalities. Perhaps this is why change is so difficult to introduce in the Aboriginal context. From many different vantage points, the risks associated with change are seen as simply too high. This in itself is quite distressing because it suggests that even when we know an alteration in course is necessary or desirable it is very hard to produce. On the other hand, the indications from the scenarios are that when the system is under stress, as it surely will be at some point, the alternatives for change expand enormously. We are thus left with the extremely difficult dilemma of trying to produce and manage change concurrently. If our goal is to build harmonious and beneficial relationships, as it should be, the conclusion to be drawn from the scenarios is that political and policy choices need to include a full

and careful assessment of the risk and consequences of action.

### **Renewal and Autonomy**

The global scenarios and their application to Aboriginal governance amply demonstrate that external shocks and dramatic changes can come from many directions. In a period of transformation as far-reaching as what we are experiencing today, the risk of system shocks, even those that emerge as unintended consequences, is heightened considerably. A fundamental question raised by the scenarios is what can be done to mitigate the negative risks of change, while capitalizing on the opportunities that global and national economic and political change will also present to Aboriginal people. Again, the four scenarios give some indications of the direction in which thinking and policy ought to be moving.

We see, for example, that cultural and community renewal in all cases was a source of strength and empowerment that allowed First Nations to deal more effectively with both adversity and opportunity. The logical consequence of this is that policies and strategies should work to promote the renewal process, which is already underway in many First Nations.

The same is true with the issues of autonomy and governance. Scenario outcomes were more positive when First Nations took it upon themselves to build governance capacity and assert their autonomy according to their needs and values. If the scenarios are correct, federal policies that promote capacity building and self-government should therefore not be overly prescriptive. Sustainable First Nation government lies in building upon foundations that encompass a strong sense of cultural and political identity. The scenarios suggest that rebuilding Aboriginal identity and governance may be a long-term process, the outcomes of which are uncertain. If accurate, this assessment means that Canadians will have to accept a progressive and evolutionary view of Aboriginal political development, and therefore, in turn, of our overall system of governance.

We need to be mindful that assertion of political autonomy by Aboriginal people has not always been greeted with enthusiasm by mainstream Canada and its decision-makers. Containment, confrontation and legal action are often the normative reactions to the assertion of Aboriginal rights and political autonomy. The scenarios suggest that we should be less worried about the assertion of Aboriginal autonomy than we are. In the scenarios at least, common sense and the collective best interest as determined by First Nations themselves seemed to prevail, and the outcomes for Canada and the federation were not horrific. Only when the raw power of the state was exerted full force, as it was in the Regional Dominators scenario, did we see widespread political breakdown and social distress.

Some might argue that a scenario as extreme as Regional Dominators is not probable in a country like Canada, which has important checks and balances to prevent abuse of power. But even in the most benign scenario, Shared Governance, it took extraordinary international pressure to turn around a potentially destructive course of events. It would not be difficult to sketch a real-life scenario in which a situation becomes so intractable that the country wanders perilously close to a scenario like Regional Dominators without even realizing it. The risks of such events are highest when the synergies between public opinion and state power are overwhelming, as occurred in the Regional Dominators scenario. Political pluralism, federalism, and the entrenchment of existing Aboriginal and treaty rights are important checks on the excesses of state power in Canada. But we have to admit that there are still risks. Manipulation of public opinion is obviously one that we used in the scenarios. The primary drivers, however, are public uncertainty and a fear that the exercise of First Nation autonomy and self-government might have adverse consequences on the rights and interests of others. This is clearly among the lessons from the recent national political debate over the *Nisga'a Treaty*. Continuing national dialogue and public education can help ease these concerns. Such a course does not happen naturally. As we saw in the Global Club scenario, the burden of educating and changing public attitudes seems, unfortunately, to rest most

heavily on the Aboriginal people themselves. It is they who have had to speak out to Canadians and demonstrate through their actions the kind of respect for the rights of others that they have themselves not enjoyed.

### **Choice and Opportunity**

The capacity to effectively respond to and benefit from change is more than a question of community strengths and capacity; it is also about individuals and families, their alternatives, and their ability to make good personal choices and take advantage of opportunities. Among Canadians, Aboriginal people start with greatest disadvantage. At the moment, First Nation communities represent the most secure safety net for many Indian people. As out-migration from reserves has demonstrated over the years, these community supports are not working for everyone. Government policy is now committed to strengthening communities. As the scenarios illustrate, however, there are many circumstances in which the existing community support system could erode. One could discount these scenarios as simply constructed story lines. First Nation communities, after all, have endured great adversity in the past. However, if the thesis of global transformation is true, the risks today are higher today than in the past. Today the effects of social and economic instability have much more room to spread and engage many more facets of Canadian life. This is especially true in the western region of the country, where most Aboriginal people make up sizeable portions of the populations.

The current pace of global change tells us that expanding the capacity for personal choice among Aboriginal people ought to be a fundamental public policy objective. This means, among other things, that we need to tackle the social, and educational deficits now confronting Aboriginal people in Canada while, at the same time, expand opportunities for participation in the economy. Some of the scenarios offer interesting ideas on how this might be approached. In Global Club, for example, First Nations self-initiated a “clustering strategy” to deal with global and regional change. These clusters used economic alliances, market power, mergers, and cross border networks to build economic and

governance capacity, expand the Aboriginal economy, and lever mainstream jobs for Aboriginal people. Another interesting idea was the development of corporate charters, which dictate how businesses will operate when undertaking economic development and activity on the traditional lands of Aboriginal groups. CyberWave showed that capitalizing on the new economy is another possible path, especially for young Aboriginal Canadians. The list could go on. What is most promising about these ideas is the realization that First Nations economic and political capacities have developed to the point where all of these are realistic alternatives. What is now needed from First Nations and policy makers alike is the vision and the will to be the type of innovators and boundary breakers that transform ideas into action on the ground.

### **Bridging the On- and Off-Reserve Divide**

Today, as many as 50 per cent of First Nation members live off-reserve, mostly in Canada’s major urban centres. Even though there is a great deal of movement of people back and forth, this division between on- and off-reserve has been relatively stable for some time. Many who live off-reserve are not there as a matter of choice but rather as result of community distress and social breakdown. While the reasons may differ somewhat, all the scenarios produce a shift in the balance towards off-reserve. In some instances the displacement is quite extreme. Mostly, it is the young who move but in a major displacement scenario, large segments of the entire community could be effected. The scenarios anticipate a continuing pattern of social dislocation and cultural isolation that currently affects many Aboriginal people moving into the city. If the future involves proportionately more First Nation people moving from their communities to towns and cities, then there will be a far greater need to equip people with the knowledge and skills to make these transitions successfully. Fundamentally, this entails bridging the on- and off-reserve divide.

What a number of the scenarios suggest is that the reconstruction of First Nation governance and political institutions to reconnect on- and off-reserve members may be one strategy for addressing this challenge. CyberWave was particularly interesting in this respect because it

saw First Nation governments as vehicles for delivering off-reserve programs and services, such as housing, and as enablers that facilitate the growth of economic and cultural networks and pathways that would broaden the meaning of community and strengthen its sustainability. The insight here is to see a positive benefit in breaking down the barriers between the reserve and the city by constructing a more multi-layered and interdependent relationship between the on- and off-reserve domains of First Nation life. The expectation is that such a link might help ease the transition from reserve, reduce the cultural isolation of the city, strengthen the economic base for on-reserve communities. At the same time, the links create a broader range of economic opportunities for First Nation people who decide to move away from their communities. Equally important, First Nation governments would work in partnership with other governments and agencies to help deal with off-reserve problems. There are a growing number of examples of this type of political development across the country, and off-reserve issues are becoming a more important priority for First Nation communities. If we can see benefit in these new directions, it would also suggest that the change in the political relationship between on and off-reserve members heralded by the recent *Corbière* decision ought to be seized upon as a window of opportunity to create more effective bridges across the reserve divide.

### **Strengthening Federal-Provincial-Aboriginal Relations**

At the outset of the paper we discussed how the policy perspective of the federal and provincial governments and the interplay of federal-provincial-First Nation relations shape both Aboriginal policy and the prospects for First Nations governance, particularly self-government and the ability to conclude modern treaties. A particular policy example was the Social Union Framework Accord. The principles and commitments in this document represent the most complete expression of Canada's social policy charter with its citizens. But Aboriginal people were excluded from the process in the development of this accord. As distinct governance entities, First Nations in particular have no guaranteed means of ensuring that what

is available to Canadians is also available to their members. As First Nations move away from the *Indian Act* to become more autonomous political units, the state of these basic social program commitments is even more uncertain. So the challenge is how to better integrate and harmonize the relationship among federal, provincial and First Nation governments so that the capacity for First Nation governance is enhanced and public policy is better attuned to the needs and aspirations of First Nations people.

Unfortunately, the scenarios do not point to an easy path. Instead they reveal that when critical federal and provincial interests are at stake, First Nations interests are treated in an exclusionary and often roughshod manner. Only in Shared Governance do we get to a significant point of reconciliation, achieved with difficulty at a constitutional table laden with other key issues such as land and resource claims. Everyone would agree that the prospects for a return to this constitutional forum are remote at best. This very fact will ultimately drive the First Nations to look to strategies that allow them to exert greater leverage on Ottawa and the provinces. The scenarios suggest that First Nations have a far greater range of options that they might have had in the past. Each scenario forced First Nations to examine the strategic options available to them. And in each case, they found the means to exert greater political influence. Most decisions involved difficult economic and governance choices; many included sacrifices for future gain. As demonstrated in *Global Club*, however, the best way to maximize social benefits and exert political influence was to build and strengthen economic alliances within and outside the Canadian Aboriginal sphere, as well as to create larger aggregate units of governance. Or, in RCAP parlance, to focus on nation building. Indeed, as the scenarios suggest, such nation building by First Nations seems to be a question of will, rather than of capacity.

The question of leverage and support for Aboriginal rights and self-government leads us into the international arena. Throughout this work, the significance the international relations environment for indigenous people was an important factor in shaping the future of



Aboriginal self-government in Canada. Three of the general global scenarios severely impacted on existing international institutions of cooperation and governance. When applied in the context of First Nations, it was clear that political options for indigenous people, including Canada's, are dramatically more limited, especially when international forces retreat from global integration. The scenarios also suggest that especially in North America, indigenous regional strategies that deepen economic, cultural and political interconnections create much greater capacity to respond to and capitalize on a changing international and regional picture. This point has not been lost on First Nations in Canada, which nonetheless do not appear to place the priority on expanding those relationships that these scenarios suggest they should.

There are implications here as well for Canada's reputation as an internationalist and rights-oriented nation. Support for the efforts of Aboriginal groups to internationalize their relationships in this multifaceted manner can only contribute to the enhancement of Canada's prestige and effectiveness abroad. Part of that entails promoting Canadian Aboriginal members and groups as key players with leadership roles in international affairs and institutions. Certainly one would prefer to see Canada celebrated as a world leader in the recognition of Aboriginal rights and self-determination, as it was in the Shared Governance scenario, rather than witness the federal government and Aboriginal groups battling it out on the international stage of public opinion.

### **Leadership and Vision: An Uncommon Quality**

The above commentary points to a single important thread for achieving fundamental improvements in the relationship between Canada and its Aboriginal people: namely, visionary leadership. In all of the scenarios, leadership and vision play significant roles in the process of change. No one is asked to embrace the pattern of change described in the scenarios, or even accept the type of leadership at play. Rather, the larger point is that leadership plays a critical role in bringing about and managing transformations. This is true whether leadership

is national or local in scope. In Global Club, communities that engaged in a process of renewal emerged with new, forward-looking leaders. As the anecdote about the U.S. President at Wounded Knee illustrates, leadership is also about the capacity to change, to see a new way and to advance the possibilities for progress to a higher level. Each scenario offers a glimmer of that particular genius, nowhere more so than in Shared Governance when the Prime Minister, Premiers and Aboriginal leaders reached beyond entrenched positions and, with inspired candor and community engagement, crafted a very different vision for the country.

### **A Final Comment on Reconciliation and Learning**

The history of Canada's Aboriginal people is one of endurance, of prevailing against untold adversity, and of relying on personal and community wisdom and spirit to try to build a better, more secure and respectful future for themselves in a land which was once theirs. Reconciliation means coming to grips with this history and the aspirations of Aboriginal Canadians to fashion a new understanding and relationship with our First Peoples. These scenarios offer no promise that this will be an easy task. In fact, quite the opposite is likely. In some instances, the global economic and political changes already underway threaten to propel us backward. Against backdrops of uncertainty and even crisis, we have tried to capture the Aboriginal spirit of endurance and generosity, as well as the Aboriginal capacity for vision and renewal. The implication is that these values are needed to achieve a lasting reconciliation. The scenarios, however, take us one step further. They show us that reconciliation is about living together and building bonds through mutual recognition of our shared needs. Too often in a fast-paced world, this sense of interdependence is overlooked. We need to cultivate an openness to learn about and better understand each other, to recognize and acknowledge that each one of us has something valuable to add. In CyberWave, the force of global change liberated First Nations and empowered them to evoke their own contemporary conception of community and governance by opening portals that connected them across the many layers and spaces of social

life to refine and enlarge the sense of their own identity. It is a compelling story and one that speaks to our larger needs as a country as we navigate through an ever-changing global sea. If so, then reconciliation in the final analysis is about building a country of people who are willing to shape a collective identity by sharing something of who they are, their values and their dreams, and integrating them into a seamless whole. First Nations and other Aboriginal people have a special place in this order, a place that must be recognized before we can make that leap as a country.

## GLOSSARY OF TERMS

**Aboriginal peoples:** The descendants of the original inhabitants of North America. The Canadian Constitution recognizes three groups of Aboriginal people: Indians, Métis and Inuit. Aboriginal peoples are bound as a group by historical continuity, culture, language and values as opposed to by race.

**Aboriginal rights:** Aboriginal rights derive from the fact that Aboriginal peoples maintained organized societies in Canada since “time immemorial” and were the first inhabitants of what is now called Canada. These rights are constitutionally protected under s. 35 of the *Constitution Act, 1982*. Aboriginal rights encompass cultural practices and language, as well as “site specific” activities such as hunting and fishing.

**Aboriginal self- government:** Governments designed, established and administered by Aboriginal peoples within the framework of the Canadian Constitution.

Aboriginal self-government is generally recognized through negotiated self-government agreements or treaties.

**Aboriginal title :** The courts have outlined the characteristics of Aboriginal title as being a communal right to exclusive use and occupation of lands for a variety of activities. Aboriginal title derives from the historic occupation and possession of Aboriginal lands prior to British sovereignty.

This communal right differs from site-specific Aboriginal rights such as hunting and fishing.

According to the *Delgamuukw* decision, Aboriginal title refers to a “right to the land itself,” a specific aboriginal right.

**Authority:** Authority refers to administrative powers of a government, such as program and service delivery or law enforcement, but excludes law-making powers.

**Band:** The *Indian Act* defines a “band” as a body of Indians with common use and benefit of lands and moneys. There are currently 608 First Nation bands in Canada.

**Comprehensive Claims:** These claims are based on the concept of continuing Aboriginal rights and title, which have not been dealt with by a treaty or another lawful means. Comprehensive claims occur where there are no existing treaties, such as in B.C. and the NWT.

**Fiduciary:** The federal government has a “special” relationship with Aboriginal peoples and the Supreme Court has characterized this relationship as “fiduciary”. Special fiduciary obligations or duties may be derived from treaties, constitutional provisions, common law or express undertakings.

The Courts have identified two types of fiduciary obligations through the *Guerin* and *Sparrow* decisions. Obligations may arise where the federal government controls Aboriginal assets, such as land or money; and, obligations arise in connection with constitutionally protected Aboriginal and treaty rights.

**First Nation:** A word with no legal definition used to refer to a group of Indians occupying a specific land base (for the most part, reserve land). It refers to both status and non-status Indian people in Canada. In some instances, First Nation also refers to the name of a community and is used in place of “band.”

**Indian:** An “Indian”, as defined by the *Indian Act*, is a person who is or is entitled to be registered as an Indian. The regulations of entitlement can be found in the *Indian Act*. The Department of Indian Affairs & Northern Development maintains a registry of those who are registered.

**Inherent Right :** The Inherent Right of Aboriginal Self-government is a claimed Aboriginal right. Federal government’s policy recognizes the inherent right as a general right based in section 35(1) of the *Constitution Act, 1982*. The Courts have yet to adjudicate on the existence or nature of the inherent right.

This right is in addition to the right to self-determination, treaty rights and any other Aboriginal rights. Not all Aboriginal governments may choose to take advantage of this right.

**Inuit:** An Aboriginal people in northern Canada who reside “above the tree line” in the Northwest Territories, Northern Quebec and Labrador. The word means “people” in Inuit.

**Jurisdiction:** Law-making authority of a government, or, the ability to enact laws over or within a certain area.

**Métis:** An Aboriginal people with a combination of cultural and genetic heritages that pre-dates European settlement, as opposed to European contact.

**Reserve:** A “reserve”, as defined by the *Indian Act*, is a tract of land set aside for the use and benefit of an Indian band. Legal title of the land remains with the Crown.

**Self-determination:** According to the United Nations, self-determination should “be interpreted as entitling Indigenous peoples to negotiate freely their status and mode of representation within existing states.” (RCAP, V2, Ch3, s2.2) The foundations of self-determination are based on international law standards and stem from the fact that Aboriginal peoples were once independent and sovereign nations.

In Canada, self-determination would entitle Aboriginal peoples, as collectives, to negotiate their relationships with Canada, however, it does not entitle Aboriginal peoples sovereignty or the power to secede. It has not been determined by the courts in which the right of self-determination vests.

**Self-government:** Self-government is “the right of peoples to exercise political autonomy” (RCAP, V2, Ch3, s.2.2).

**Treaties:** An Indian treaty is an agreement between the Crown and a group of Indian people that created promises, obligations and benefits of

the parties to be respected. In many historic treaties, in exchange for land surrender, Indians would receive cash settlements, as well as education and health services and agricultural equipment.

Indian treaties differ from international treaties. Indian treaties are protected under s.35 of the Constitution.

## APPENDIX A

### Aboriginal Self-Government - Inherent Right Policy (1995)

In 1995, the federal government adopted a policy to promote Aboriginal self-government based on the concept of inherent right to self-government being one of the Aboriginal rights recognized and affirmed under section 35 of the *Constitution Act, 1982*. The policy's approach is to negotiate practical self-government arrangements with Aboriginal groups.

*What is the scope of self-government negotiations?*

Currently First Nation band governments may exercise delegated authority under the *Indian Act*. Self-government negotiations are about providing law-making capacity to First Nations through the recognition of specific jurisdictions. If certain conditions are met with respect to provincial concurrence with the agreements, the federal government is willing to extend constitutional protection to self-government agreements by way of section 35 of the *Constitution Act, 1982*.

*What are the key policy parameters?*

- Agreements exist within the existing Canadian Constitution.
- First Nation citizens remain Canadian and provincial citizens—First Nations are not sovereign.
- The Charter of Rights and Freedoms will apply to First Nation governments.
- Certain federal and provincial laws, such as the Criminal Code, will prevail, or take precedence over Aboriginal laws.
- The interests of all Canadians will be taken into account.

*What is the scope of self-government arrangements?*

The *Inherent Right Policy* identifies the range of matters, categories and subjects that the federal government is prepared to see included in self-government agreements. They are generally

matters that are central to governance or internal and integral to Aboriginal culture. The federal government will not negotiate jurisdictional responsibility in a number of areas that are considered national scope or related to “peace, order and good government,” where it is considered essential that the federal government retain its law-making power. Federal policy identifies three lists of power, the first two of which are the subject of negotiation. (See lists one, two, and three below.) Taken together, lists one and two represent an extensive list of possible jurisdictional powers that may be included in self-government agreements. Social jurisdictions will be negotiated if there is provincial involvement and concurrence.

### Negotiation Parameters

The *Inherent Right Policy* also include references to:

- Where jurisdictions or interests of provincial and territorial governments are affected, the governments must be party to the negotiations and agreements.
- In areas that are not integral and internal (list 2), Aboriginal governments may have law-making powers, however, federal or provincial laws will prevail in the event of a conflict.

Powers related to Canadian Sovereignty, Defense, External Relations and other National Interests are not negotiable.

### Types of Self-Government Agreements

There is considerable diversity among the Aboriginal groups negotiating self-government arrangements with Canada, ranging from single First Nations; to nations (culturally and politically homogenous Aboriginal group with a land base); to Tribal Councils (groupings of First Nations); to treaty groups; to province-wide organizations. There is also considerable diversity in the internal governance structures that are contemplated or are being created through self-government agreements. Many of the institutions and practices incorporate traditional western democratic structures and procedures along with more traditional form of governance. For the most part, the powers under

<b>List One Matters Central to Self- Government</b>	<b>List Two Matters not Integral and Internal</b>	<b>List Three Matters not Subject to Negotiation</b>
<ul style="list-style-type: none"> <li>•elections</li> <li>•structures</li> <li>•membership</li> <li>•marriage</li> <li>•child welfare</li> <li>•language, culture</li> <li>•local taxation</li> <li>•education</li> <li>•health</li> <li>•monies</li> <li>•hunting, fishing</li> <li>•law administration</li> <li>•policing</li> <li>•housing</li> <li>•property</li> <li>•public works</li> <li>•local transportation</li> <li>•business licensing and regulation</li> <li>•land management</li> <li>•agriculture</li> </ul>	<ul style="list-style-type: none"> <li>•divorce</li> <li>•labour/training</li> <li>•administration of laws of other jurisdictions</li> <li>•penitentiaries and parole</li> <li>•environmental protection and assessment</li> <li>•fisheries co-management</li> <li>•gaming</li> <li>•emergency preparedness</li> <li>•migratory birds co-management</li> </ul>	<ul style="list-style-type: none"> <li>•immigration</li> <li>•international trade</li> <li>•management and regulation of national economy</li> <li>•national and criminal law</li> <li>•health and safety of Canadians</li> <li>•broadcasting</li> <li>•national transportation</li> <li>•postal</li> <li>•navigation</li> </ul>

self-government agreements are exercisable only on First Nation lands. Recently, negotiations have begun to focus on negotiation of jurisdiction and authority with respect to First Nation members living off First Nation lands.

#### *Comprehensive Self-Government*

A comprehensive agreement covers a wide range of subject areas and jurisdictions. (Generally, those subjects included in lists one and two.) A comprehensive agreement must include provincial participation and concurrence to ensure that jurisdictions are recognized and agreements are constitutionally protected. A number of these types of agreement are currently being negotiated in British Columbia, Saskatchewan and Manitoba.

#### *Self-Government and Comprehensive Claims Agreement*

A claims related self-government agreement is one that is done in conjunction with comprehensive claims negotiations. Comprehensive claims are modern treaties that

are accorded Constitutional protection. Until recently, claims negotiations may or may not have included self-government provisions. The federal policy changed with the *Nisga'a Treaty* negotiations, and now self-government is an integral part of comprehensive claims.

Comprehensive claims are based on an assertion of continuing Aboriginal rights and title that have not been dealt with by a treaty or other legal matters.

The *Nisga'a Final Agreement* is the most recent example of this type of agreement.

#### *Local Self-Government Agreements*

This type of self-government agreement is restricted to jurisdictions that are local in nature, such as responsibilities that would pertain to municipalities. They are generally negotiated as bilateral agreements between the federal government and the First Nation(s), in which the province is not party to the process. The federal government will not negotiate jurisdictions that it believes fall constitutionally within the provincial domain. (e.g. health, education, social welfare)

The exercise of powers under these agreements is restricted to First Nation lands.

#### *Sectoral Self-Government Agreements*

A sectoral agreement establishes First Nation jurisdiction with respect to one or more jurisdictional area such as education or health.

A recent example of a sectoral agreement is the *Mi'kmaq Education Authority*, an agreement that includes 9 First Nations within Nova Scotia. The powers under this agreement are delegated to the First Nations. Province-wide negotiations are taking place in Saskatchewan on a framework agreement that will recognize a number of sectoral jurisdictions that may be taken up by First Nations in that province.

#### *Public Government*

Public government is self-government within a larger public government arrangement(s). The only current example of the public government model is Nunavut. In this model, the government is Aboriginal controlled as opposed to Aboriginal exclusive. Aboriginal specific jurisdiction and authority and culture matters are incorporated into governing mechanisms by constitutionally protecting Aboriginal, treaty and economic rights.

### **Traditional Governance Structures**

Self-government agreements often deal with and are shaped by traditional governance concepts and practices. While the precise forms and practices vary widely, traditional governance structures are generally founded on a nation basis (sociologically and culturally defined group with an identifiable land base). Two generic examples of traditional Aboriginal governance structures are summarized below.

#### *Clans/Kinship Systems*

Clan or kinship systems are comprised of extended families and define the social order, the governance structure, and the system of justice. The clan was a system of relationships defined by birth, and the determinant of membership in the group. In many cases, leaders were both identified and dismissed by women of the tribe. A council of Elders often constituted the primary decision-making body. Other government

functions included with traditional practices normally included leadership selection, education, health, spiritual knowledge and the administration of justice.

#### *Confederacies*

An example of an historic confederacy is the Blackfoot Confederacy. A more contemporary example would be the Nishnawabe Aski Nation, which is comprised of Cree, Ojibwa and Oji-Cree First Nation communities in Northern Ontario. In the confederacy structure, each member is equal and autonomous yet they maintain a joint political structure that pursues common interests such as program and service delivery and economic goals. Although jurisdiction vests at the First Nation level, there is a strong alliance at the nation level.

In the self-government context, the confederacy approach would involve alliances and pooling of jurisdiction to carry out common functions.