ABORIGINAL ENGAGEMENT IN CANADA: SEEKING RECONCILIATION THROUGH ELECTORAL PARTICIPATION AND LAND NEGOTIATIONS

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ABSTRACT

Aboriginal reconciliation is a process of healing that seeks to repair and restore the legal, political and socio-cultural relationships that exist between Aboriginal peoples and the rest of Canada. In order to heal these relationships, a new approach to reconciliation that emphasizes active, meaningful Aboriginal engagement may be effective. To this end, it is presumed that positive forms of engagement contribute to reconciliation. However, meaningful Aboriginal engagement can only be a successful mechanism through which to achieve reconciliation if the multifaceted differences that define Aboriginal peoples and their histories, cultures, languages and practices are accepted and respected. Moreover, meaningful engagement means effective outcomes wherein the uniqueness of Aboriginal identities are more fully represented and included, so as to foster greater cooperation, mutual awareness, reciprocity and trust between Aboriginal peoples and Canada.

To demonstrate the importance of these factors, a theory of *cultural sensitivity* is put forward, which posits that respectful, inclusive social interaction that acknowledges Aboriginal distinctiveness may lead to increased social cohesiveness between Aboriginal peoples and Canada. This model is an amalgamation of theories on social capital and social intelligence, only it is broadened to encompass a compassionate awareness and acceptance of Aboriginal distinctiveness in order to promote higher levels of social cohesion, respect and trust across Aboriginal-Canada relations.

Two specific forms of Aboriginal engagement are evaluated: participation in Canadian elections, particularly voter turnout, and involvement in land negotiations. The dissertation seeks to determine the extent to which elections and land negotiations provide positive opportunities for meaningful Aboriginal engagement, and whether improvements need to be made to the election system and negotiations process in order to promote more positive engagement.

Ultimately, it is argued that increased Aboriginal engagement will improve overall social cohesiveness, at the very least by increasing the frequency of positive interactions between Aboriginal peoples and Canada. Where such exchanges are constructive, Aboriginal-Canada relationships should ideally improve through the building of trust and mutual respect. This, in turn, ultimately leads to an increased likelihood of achieving more meaningful Aboriginal reconciliation.

DEDICATION

This dissertation is dedicated to my mother, Janet E. Dalton, for continually supporting my dream of becoming an academic, and for never doubting my ability to complete the PhD. She always taught me to love learning, believe in myself and in my ability to accomplish what I set out to complete. Several times throughout the completion of this degree, I found it necessary to draw from this source of confidence that she instilled in me as a child. For this, I am truly grateful.

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CHAPTER ONE – INTRODUCTION: ABORIGINAL ENGAGEMENT IN CANADA AND THE PURSUIT OF RECONCILIATION

Reconciliation is an ongoing process. In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated. The Government of Canada recognizes that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country. We must instead continue to find ways in which Aboriginal people can participate fully in the economic, political, cultural and social life of Canada in a manner which preserves and enhances the collective identities of Aboriginal communities, and allows them to evolve and flourish in the future. Working together to achieve our shared goals will benefit all Canadians, Aboriginal and non-Aboriginal alike.[1]

The need to bring...Aboriginal peoples into our national consciousness, to deal fairly and equitably with them, to reconcile them as part of the Canadian mainstream and to deal with their problems, [is] likely the most important public issue of the 21st century.[2]

Aboriginal[3] reconciliation as a contemporary phenomenon in Canada has been sought incrementally, with recognition of the injustices faced by Aboriginal peoples occurring only gradually, and often arduously, over the past several decades. Reconciliation is a complex and nuanced ongoing process of renewal and restoration, rather than a quick fix or one-time remedial solution. Yet, most attempts at Aboriginal

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[1] Indian Affairs and Northern Development, "Statement of Reconciliation: Learning from the Past," *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 1997) at 3.

[2] John C. Crosbie, "Letter to the Editor," *National Post*, January 18, 2003.

[3] "Aboriginal" is used throughout to refer to the combined Indigenous peoples of Canada, including First Nations, Inuit and Métis. This is not meant to diminish the distinct, diverse and heterogeneous nature of Aboriginal peoples across Canada. Where specific Aboriginal nations or communities are discussed, the appropriate proper names are used. In some instances, the discussions concern individual Aboriginal community members, in which cases "Aboriginal people" or "Aboriginal individuals" may be used.

reconciliation have occurred through the Canadian judicial system, with a myriad of landmark legal rulings now representative of the many challenges brought by various Aboriginal peoples across the country. There also have been notable policy shifts over the past few decades, reflecting the desires of successive governments to "keep pace" with legal and public opinion developments. However, the practical effects of formal government policies have been less obvious, quite simply because the apparent benefits of policy changes are often slow to appear since their impacts develop incrementally over time. For instance, in the context of Aboriginal land and governance negotiations, potentially-progressive developments in government policies have been particularly difficult to observe because of the complex, lengthy nature of negotiation and implementation of agreements, some spanning decades to completion. Policies are also subject to revision or reversal, based on changes to the governments in power.

Within this context, this dissertation examines Aboriginal engagement in Canada, specifically as a novel pathway to achieve reconciliation. To this end, it is presumed that positive forms of engagement contribute to reconciliation. In this context, Aboriginal reconciliation is a process of healing that seeks to repair and restore the legal, political and socio-cultural relationships that exist between Aboriginal peoples and the rest of Canada. In order to heal these relationships, a new approach to reconciliation that emphasizes active, meaningful Aboriginal engagement may be effective. There are two fundamental caveats to this assertion. First, meaningful Aboriginal engagement can only be a successful mechanism through which to achieve reconciliation if the multifaceted

differences that define Aboriginal peoples and their histories, cultures, languages and practices are accepted and respected. Second, and as a corollary to the first, meaningful engagement means effective outcomes wherein the uniqueness of Aboriginal identities are more fully represented and included, so as to foster greater cooperation, mutual awareness, reciprocity and trust between Aboriginal peoples and Canada on the road to reconciliation.

To demonstrate the importance of these factors, a theory of *cultural sensitivity* is put forward, which posits that respectful, inclusive social interaction that acknowledges Aboriginal distinctiveness may lead to increased social cohesiveness between Aboriginal peoples and Canada. This model is an amalgamation of theories on social capital and social intelligence, only it is broadened to encompass a compassionate awareness and acceptance of Aboriginal distinctiveness in order to promote higher levels of social cohesion, respect and trust across Aboriginal-Canada relations. Improved cohesion arguably grows with frequency and promotes greater trust, cooperation and a sense of belonging, thereby advancing the broader cause of Aboriginal reconciliation through increased engagement.

In-depth evaluations of the construction of Aboriginal engagement in Canada, and the role such engagement plays in shaping and pushing forward the larger objective of Aboriginal reconciliation, are undertaken. Engagement is necessarily an amorphous and broad term. Indeed, the different types of engagement are numerous, ranging from small-scale, community-based social endeavours such as sports, recreational or seasonal

activities to more individualistic participation such as responding to electronic discussions and postings. As a result, the focus of Aboriginal engagement needs to be narrowed further to make the scope more manageable. Two very specific forms of Aboriginal engagement are evaluated: participation in Canadian elections, particularly voter turnout, as well as involvement in land negotiations. Both revolve around mainstream political and legal institutions in Canada, and thus are important for the socio-legal and political relationships that exist between Aboriginal peoples and Canada. The quality of these relationships is, in turn, foundational to the successful pursuit of Aboriginal reconciliation.

Electoral engagement tends to reflect more of a political form of participation, while involvement in the negotiation of land settlements revolves around a form of legal engagement. Both types of engagement embody individual and collective elements of participation. For instance, voting is very much an individual choice and action, but it is likely to be affected by community interests and pressures. Almost conversely, land negotiations take place at the community level, but individual community members may impact the process with their opinions or concerns in consultation with their leaders, negotiators and each other. Yet, individual representatives conduct the actual negotiations, akin to representative democracy. Consequently, both types of engagement tend to take place more indirectly, with representatives acting on behalf of broader constituencies. In this context, the dissertation seeks to determine the extent to which elections and land negotiations provide positive opportunities for meaningful Aboriginal

engagement, and whether improvements need to be made to the electoral system and negotiations process in order to promote more positive engagement.

Ultimately, it is argued that increased Aboriginal engagement will improve overall social cohesiveness, at the very least by increasing the frequency of positive interactions between Aboriginal peoples and Canada. Where such exchanges are constructive, thereby engendering more meaningful engagement, Aboriginal-Canada relationships should ideally improve through the building of trust and mutual respect. This, in turn, ultimately leads to an increased likelihood of achieving more meaningful Aboriginal reconciliation, and in this sense, the forces of social cohesiveness and engagement are mutually-reinforcing.

More specifically, these two forms of engagement might be considered opportunities to build and improve Aboriginal-Canada relationships and potentially achieve reconciliation. For example, the decision to vote or how to vote generally requires information-gathering or additional knowledge about the voting process, Canadian electoral institutions and potential candidates running for office. The process of voting may also result in more interactions between different cohorts, such as Aboriginal and non-Aboriginal voters, or even with the candidates themselves. Each of these aspects of electoral participation arguably provide more opportunities for Aboriginal peoples to engage with non-Aboriginal voters or Canadian institutions, and more importantly, may contribute to the building of mutual respect and shared belonging. This potentially provides at least a small step toward improving relationships and

achieving reconciliation. Similarly, participation in the negotiation of claims also mandates interaction with others, including non-Aboriginal community members or external negotiators. Where interactions are positive or constructive, some level of respect and trust might be fostered, which again, potentially provides opportunities to improve Aboriginal-Canada relationships and achieve reconciliation.

SEEKING ABORIGINAL RECONCILIATION IN CANADA: THE ROLES OF CONSTITUTIONAL LAW AND GOVERNMENT POLICY

Since the Supreme Court of Canada's *Calder*[4] decision in 1973, Aboriginal peoples have sought remedy through Canadian courts with relative frequency, although in recent years, increasing numbers of Aboriginal communities have sought redress through negotiation of claims.[5] While litigation is very time-consuming and costly, judicial decisions have provided a level of certainty and clarity for Aboriginal claimants in several instances, as discussed below. Aboriginal peoples have also employed litigation to secure specific constitutional recognition and protection of distinct Aboriginal and treaty rights, thus resulting in the development of a more substantive legal framework within which to situate Aboriginal reconciliation. However, while litigation has aided in the "mainstreaming" of Aboriginal issues in the Canadian legal landscape, litigation is,

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[4] *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

[5] This is not to say that Aboriginal peoples did not seek legal remedy prior to the *Calder* decision, but rather, this particular Supreme Court of Canada decision set a precedent even amongst watershed cases in that it represented the first significant Supreme Court judgment that acknowledged the importance of Aboriginal title.

by its very nature, highly adversarial, which prompts a reconsideration of how effective the courts can be at promoting reconciliatory outcomes. Of course, viewed through a longer-term lens, part of the result of litigation has been greater public awareness of the many historic and contemporary injustices faced by Aboriginal peoples. This is arguably an important, albeit preliminary, step in achieving Aboriginal reconciliation, although a great deal hinges on how public opinion is shaped and informed by the media's coverage of the legal issues involved.[6]

For the most part, relevant constitutional developments in Aboriginal law have evolved under section 35 of the *Constitution Act, 1982*,[7] which provides the following:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[8]

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[6] There is an extensive body of scholarship, beyond the scope of this discussion, on the role of the media in shaping and forming public opinion. For further information on the impact of the media on Canadian public opinion on the law and courts, see generally Florian Sauvageau, David Schneiderman, and David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: UBC Press, 2006).

[7] Section 25 of the *Canadian Charter of Rights and Freedoms* works in the context of Aboriginal and treaty rights under section 35, but the Supreme Court of Canada has held that section 25 does not create any new rights (see generally *R. v. Kapp*, [2008] 2 S.C.R. 483; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 2003 at paras. 51-54). Section 25 provides: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired" (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Sched. B to the *Canada Act 1982* (U.K.), 1982, c. 11).

[8] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

The Supreme Court of Canada first dealt with Aboriginal and treaty rights under section 35 with the *Sparrow*[9] decision in 1991. Since that time, section 35 jurisprudence has developed into an extensive and complex body of law. This does not mean that the role of public policy has been unimportant in the context of Aboriginal rights and reconciliation. Indeed, the significance of the Royal Commission on Aboriginal Peoples (RCAP) is embedded in an approach to Aboriginal reconciliation that is quite different from the legal approach embodied in the relevant jurisprudence. For instance, the relevant jurisprudence has revolved primarily around reconciliation between Aboriginal peoples and the Crown, while the approach of the RCAP deals primarily with reconciliation between Aboriginal peoples and the rest of Canada. Both approaches and the relevance of each are considered in detail in subsequent chapters.

The extent to which Aboriginal distinctiveness has translated into tangible rights and reconciliation in practice is contested. Both Canadian courts and governments have recognized the uniqueness of Aboriginal peoples, yet the results have occurred slowly and incrementally. From a policy standpoint, much of the recognition of Aboriginal rights and reconciliation has arguably been more formal in nature, without a corresponding degree of practical benefits. These trends ultimately bear significantly on Aboriginal engagement inasmuch as the legal and policy landscapes shape and condition the attitudes of Aboriginal peoples toward their involvement in Canadian institutions.

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[9] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

For the purposes of the subsequent analyses, both courts and legislatures hold significant importance in the context of Aboriginal rights and reconciliation. Perhaps, more precisely, where jurisprudence takes a more expansive view of Aboriginal rights and reconciliation, Aboriginal peoples might arguably fare better off, or vice versa in the legislative context. However, neither one branch of government nor the other is likely to have the last word on these matters. Instead, longer-term outcomes are affected by the back-and-forth interplay between courts and legislatures. Moreover, Aboriginal issues tend to be so tremendously complex and nuanced, both in terms of substance and development, that progress made with respect to different Aboriginal rights and approaches to reconciliation is likely to occur at drastically different rates. In short, the range of complicating factors and variables at play, alongside gradual, evolving developments in pursuing Aboriginal reconciliation, necessarily mean that there are equally-complex layers of judicial and legislative wrangling and interconnectedness. Thus the importance of both courts and legislatures should be obvious and will be treated as such in subsequent chapters. In this specific context, Chapter Two provides an in-depth analysis of the interplay between the relevant judicial rulings and government policies on Aboriginal rights and reconciliation. The primary purpose of this examination is to provide a comparative backdrop of relevant jurisprudence and policy within which to situate subsequent analyses of Aboriginal engagement.

Yet, accomplishing Aboriginal reconciliation in Canada is still an elusive objective, irrespective of the role the courts have taken in developing a body of relevant

Aboriginal jurisprudence or governments' policy responses. As already described, the body of jurisprudence on Aboriginal rights and reconciliation is extensive, while government policies have developed and evolved over the past several decades, recognizing to varying degrees Aboriginal distinctiveness and unique rights. Through this series of judicial–governmental exchanges, some degree of Aboriginal reconciliation arguably has been achieved, but by no means is the end of the process even remotely visible on the horizon. Indeed, Prime Minister Harper and the federal Conservative government issued a formal apology on June 11, 2008, in order to address the historical injustice and ongoing trauma faced by victims of the Indian Residential Schools system in Canada.[10] Similarly, the implementation of the *Indian Residential Schools Settlement Agreement*,[11] and the operation of the Truth and Reconciliation Commission,[12] the latter originally marred and delayed by internal discord, are slowly progressing along their historic paths.

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[10] Canada, *Statement of Apology – to former students of Indian Residential Schools*, June 11, 2008, online: http://www.ainc-inac.gc.ca/ai/rqpi/apo/sig-eng.pdf.

[11] *Indian Residential Schools Settlement Agreement*, finalized May 8, 2006, online: http://www.residentialschoolsettlement.ca/Settlement.pdf [*Indian Residential Schools Settlement Agreement*]. Under the various provincial class proceedings statutes, *In re Residential Schools Class Action Litigation* was brought by claimants in each province in order to give effect to the *Indian Residential Schools Settlement Agreement*. The provincial court judgments are as follows: *Northwest v. Canada (Attorney General)*, 2006 ABQB 902; *Quatell v. Attorney General of Canada*, 2006 BCSC 1840; *Semple et al. v. The Attorney General of Canada et al.*, 2006 MBQB 285; *Kuptana v. Attorney Gen. of Canada*, 2007 NWTSC 01; *Ammaq et al. v. Canada (Attorney General)*, 2006 NUCJ 24; *Baxter et al. v. The Attorney General of Canada et al.*, 2006 ONSC 1920; *Bosum et al. v. Attorney General of Canada et al.*, 2006 QBSC 5794; *Sparvier et al. v. Attorney General of Canada et al.*, 2006 SKQB 533; *Fontaine et al. v. Canada et al.*, 2006 YKSC 63.

[12] The mandate for the Truth and Reconciliation Commission is laid out in Schedule N of the *Indian Residential Schools Settlement Agreement*, *ibid.*

While these efforts – some long-term and arduous, others brief and symbolic – have sought reconciliation through the reparation of relationships between Aboriginal peoples and the rest of Canada, Aboriginal reconciliation is by-and-large a means of healing which necessarily takes considerable time and effort. A great deal of work still remains to be done, and it would appear that a variety of methods and approaches is needed, beyond traditional litigation, formal policy-making, or other merely-symbolic recognitions of injustice. Concrete, tangible results that build relationships and improve mutual trust between Aboriginal peoples and the rest of Canada are needed. No matter what form they take, such efforts are expected to be time-consuming, intricate and multifaceted.

ABORIGINAL ENGAGEMENT AND IDENTITY: THE IMPORTANCE OF NATIONALISM AND ALIENATION

Two of the underlying factors that are part of the complicated nature of Aboriginal–Canada relations are nationalism and alienation. Nationalism is at once an impetus behind and offshoot of engagement. Aboriginal nationalism is a significant component of Aboriginal engagement precisely because of the role that nationalism plays in defining how Aboriginal peoples perceive and define their citizenship, identities and roles in the socio-legal and political landscapes of Canada and their communities. In other words, Aboriginal nationalism in this context refers to the ways in which Aboriginal peoples identify themselves and often strongly consider themselves to be nations, distinct from the rest of Canada, and indeed from other nations. Aboriginal

nationalism in this sense also entails the ways in which Aboriginal peoples present themselves to and engage with Canadian society and Canadian institutions, such as the Crown, partly as a response and reaction to mainstream Canadian identities. Such interactions understandably contribute to what may be perceived as a disconnect between distinctly Aboriginal and Canadian identities, both in the context of Aboriginal–Crown relations as well as relationships between Aboriginal peoples and the rest of Canada, more broadly.

By extension, many, if not most, Aboriginal peoples arguably experience significant alienation from Canadian institutions. There are various historical, socio-economic, political, geographic and communications factors that contribute to feelings of exclusion by Aboriginal peoples, while nationalist sentiments often serve to justify the distance that exists between Aboriginal peoples and Canada. This affects significantly the ongoing relationships between Aboriginal peoples and Canada, while arguably impacting Aboriginal engagement. Ultimately, Aboriginal nationalist sentiments alongside feelings of alienation restrict the potential for Aboriginal reconciliation, thus marginalizing Aboriginal peoples further within the Canadian federation.

Aboriginal nationalism and alienation are important components of citizenship and identity. Aboriginal citizenship and debates over Aboriginal identities are crucial contributors that shape and define how Aboriginal peoples engage with Canadian institutions, as individuals and as nations. Debates over Aboriginal identity tend to occur on a continuum, with Aboriginal groups considered as ethnic minorities on one end of the

spectrum versus the other end of the spectrum where Aboriginal peoples are viewed as sovereign nations. Critics of broad Aboriginal rights often argue merely for "special" group rights which are more in keeping with those afforded to visible minorities and immigrant groups, amongst others. However, Aboriginal communities are considered markedly different from any other group in Canada because they are the original occupants of the land where they historically lived according to their own laws, governance and practices. Assertions of prior occupancy, prior sovereignty as well as the existence of treaties constitute a distinct and unique Aboriginal position in Canada that ultimately runs through Aboriginal identities, which in turn, shape Aboriginal nationalism or nationhood. These interconnected conceptions of Aboriginal nationalism, alienation, identity and citizenship ultimately affect the extent and quality of Aboriginal engagement based on a theory of *cultural sensitivity*, as discussed above. These theoretical issues are examined at length in Chapter Three and re-evaluated in light of the conclusions presented in Chapter Ten.

ABORIGINAL ENGAGEMENT: AN ALTERNATIVE PATHWAY TO RECONCILIATION

The larger context of Aboriginal engagement is still very abstract, thus requiring a further tightening of the focus for the discussion to follow. In particular, and as noted at the outset, subsequent chapters seek to evaluate Aboriginal engagement from the vantage points of the Canadian electoral system and land negotiations. These two specific forms of Aboriginal engagement – electoral voting and negotiations – have been chosen

because of the unique insights that each affords into Aboriginal participation in the relevant Canadian institutions, and due to the relatively wider scope offered by their combined assessments. These seemingly-disparate types of participation are jointly related, not only under the broader rubric of Aboriginal engagement, but particularly with regard to how each is affected by Aboriginal nationalism and alienation, and ultimately, how each might contribute to a broader, more effective means of Aboriginal reconciliation.

With regard to the former mode of engagement, Chapter Four lays out an historical and policy review of Aboriginal representation and electoral participation in Canada. In Chapter Five, voting patterns amongst specified cohorts in the Aboriginal electorate are examined, including analysis of original cross-national, cross-time data on Aboriginal voter turnout in federal, provincial and band council elections. In particular, Aboriginal voting trends are assessed with an eye to determining the levels of Aboriginal engagement in the broader context of Canadian electoral politics. Alienation and nationalism are recurrent themes underlying and contributing to these broader examinations, most of which are highlighted and examined in Chapter Six.

Throughout these chapters, it is demonstrated that Aboriginal peoples, and specifically First Nations, tend to vote at significantly lower levels than the general Canadian population. While there are some regional variations, the trend is striking and relatively consistent across time and in federal and provincial elections. Yet, turnout in band council elections defies these trends, with First Nations turnout levels consistently

high across time and in all regions. In general, a variety of factors tend to contribute to lower voter turnout, such as lower levels of income, education and political interest, but it is argued that other factors also affect turnout levels amongst Aboriginal peoples. In particular, the distinctiveness of Aboriginal nationalist identities, along with feelings of alienation due to historical colonialism and discrimination, seem to work together to justify Aboriginal rejection of state-imposed electoral institutions.

With regard to the latter form of engagement, the Supreme Court of Canada has increasingly encouraged the use of negotiation over litigation to resolve land disputes between Aboriginal peoples and Canadian governments,[13] partly prompting Canadian governments to establish relevant policies, review Aboriginal claims and engage more actively in a variety of land negotiations with Aboriginal peoples across the country. Chapter Seven provides cross-national and cross-time policy comparisons related to land negotiations, while Chapter Eight and Chapter Nine look more closely at the role that this form of Aboriginal engagement plays in accomplishing reconciliation and improving relationships between Aboriginal peoples and Canadian governments. These chapters demonstrate that, while there are important benefits for all parties in the settling of Aboriginal land claims, the negotiation of agreements suffers from several problems that may negatively impact those Aboriginal communities who are involved. From the standpoint of Aboriginal engagement, land negotiations appear to offer opportunities for

[13] See *R. v. Horseman*, [1990] 1 S.C.R. 901 at 934; *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1071; *Sparrow*, *supra* note 9 at 1105; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186.

Aboriginal peoples to participate actively, but the problems that plague settlement may arguably have a negative impact on the quality of Aboriginal engagement in the process.

Concluding remarks in Chapter Ten provide an overview and synthesis of the trends apparent thus far in the context of Aboriginal engagement in Canada. Perhaps more importantly, the theoretical issues raised in Chapter Three are brought full circle and applied specifically to the findings presented in previous chapters. Most notable in this regard are the broader implications for Aboriginal reconciliation. Future possibilities and potential options to further engage Aboriginal peoples in Canadian political and legal institutions are examined, with the overall objective of accomplishing more meaningful Aboriginal reconciliation, including the reparation of relationships between Aboriginal peoples and the rest of Canada. Ultimately, it is argued that there needs to be formal and explicit recognition of and respect for Aboriginal peoples. More meaningful reconciliation mandates improvements in the relationships between Aboriginal peoples and Canada. In this regard, an application of *cultural sensitivity* mandates compassionate awareness and acceptance of Aboriginal distinctiveness, and arguably constitutes an effective foundation for repairing Aboriginal-Canada relationships. Such an approach should underlie the electoral and land negotiations processes in order to effectively and meaningfully engage Aboriginal peoples. However, the quality of Aboriginal participation and involvement is vital, which is where trust, inclusivity and societal cohesiveness are important in potentially achieving meaningful engagement and reconciliation.

It is readily obvious that achieving Aboriginal reconciliation is a complex, multifaceted and arduous task, requiring many different nuanced approaches that are sensitive to the varied and different histories, injustices, voices and rights of Aboriginal peoples. Thus far, the primary path to reconciliation has taken place between Aboriginal peoples and the Crown through litigation in the Canadian judicial system, but the outcome has been neither comprehensive nor adequate. Canadian governments have, at times, sought to keep pace with Aboriginal jurisprudence through the formulation and implementation of an assortment of policies, at least where considered politically feasible in light of the restrictions inherent in political ideologies and voter support. Yet, the results have been deficient in this regard as well, with Aboriginal peoples still alarmingly disengaged from many aspects of Canadian political and legal life. The importance of the analyses presented in the subsequent chapters lies in a unique exploration of Aboriginal engagement as valuable, and thus far unexamined, pathway to Aboriginal reconciliation.

CHAPTER TWO – ABORIGINAL RIGHTS AND RECONCILIATION DISCOURSES IN CANADA

The concept of the Two Row was developed by our ancestors so they could peacefully co-exist, conduct trade and share resources with the European Nations. The Two Row embodies the principles of sharing, mutual recognition, respect and partnership and is based on a nation-to-nation relationship which respects the autonomy, authority and jurisdiction of each nation.[1]

Aboriginal reconciliation in Canada in contemporary times embodies the objective of addressing historical wrongs suffered by Aboriginal peoples due to colonial imposition of sovereignty. Aboriginal reconciliation serves as a foundational grounding for the legal, political and socio-cultural relationships that exist between Aboriginal peoples and the rest-of-Canada as well as the larger Aboriginal–Crown relationship, including relations between Aboriginal peoples and Canadian governments. From a practical standpoint, Aboriginal reconciliation seeks to generate and maintain functional, respectful relationships.

Aboriginal policy and legal jurisprudence on Aboriginal rights and reconciliation hold significance for Aboriginal engagement, inasmuch as they define and shape the legal and political landscapes in which Aboriginal peoples engage. These discourses impact Aboriginal engagement and provide important frameworks within which to examine Aboriginal engagement as a means of achieving reconciliation. Together they illuminate

[1] Haudenosaunee Confederacy, Oral Presentation, *Minutes of Proceedings and Evidence of the Special Committee on Indian Self-Government*, Issue 31 (May 31-June 1, 1983).

the institutional structures at play in Aboriginal–Crown relations. In other words, the jurisprudence and government policy on Aboriginal rights and reconciliation inform most clearly the power imbalances and struggles that exist between Aboriginal peoples and the Crown. A foundational, legal understanding of these relationship dynamics is thus necessarily important in order to more fully grasp why reconciliation is needed and how it has developed in the relevant jurisprudential context. Equally important, such an understanding helps to highlight what needs to be done in order to improve mutual respect, trust and balance in Aboriginal–Crown relations, which in turn holds importance in the broader context of reconciliation between Aboriginal peoples and the rest of Canada.

HISTORICAL ROOTS OF ABORIGINAL RECONCILIATION IN CANADA[2]

Historically, interactions between Aboriginal peoples and the colonizing powers were rooted in cooperative efforts, with land treaties, peace–and–friendship agreements, trade arrangements and military alignments between the original inhabitants and settlers of what is now Canada. Based on a nation–to–nation relationship rooted in the *two–row wampum* tradition of autonomy, mutual respect and friendship, original interactions

[2] The rest of the discussion in this chapter is adapted from Jennifer E. Dalton, "Constitutional Reconciliation and Land Negotiations: Improving the Relationship between Aboriginal Peoples and the Ontario Government" (2009) 3 J. Parliamentary & Pol. L. 277 at 277-292, by permission of Carswell, a division of Thomson Reuters Canada Limited.

between Aboriginal peoples and newcomers were ubiquitous and largely beneficial for all parties concerned. As Robert Williams, Jr. describes,

> [w]hen the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus–Wen–Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.[3]

These treaties ostensibly were viewed by Aboriginal peoples and Europeans alike as agreements between nations or sovereign peoples.[4] The historical treaty-making process between Aboriginal peoples and the Crown

> [...] reflected and constructed a relationship of equality between Aboriginal nations and European newcomers, wherein European powers respected the political autonomy of their North American indigenous counterparts, and sought to formalize principles of peaceful co-existence. Aboriginal people view the historic treaties that emerged from this process as authorizing the sharing of territory and affirming continued Aboriginal self-governing authority.[5]

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[3] Robert Williams, Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence" (1986) Wisconsin L. Rev. 219 at 291. For further historical discussion of treaty-making, see Bradford Morse, "Indigenous-Settler Treaty Making in Canada," in Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain, eds., *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Carlton, Victoria: Melbourne University Publishing Ltd., 2004) 50 [Morse].

[4] *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1039-1040 [*Sioui*]; *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 548-549, the latter where Marshall C.J. emphasized British policy of considering Aboriginal peoples as nations. For further discussion, see Darlene Johnston, "The Quest of the Six Nations Confederacy for Self-Determination," in S. James Anaya, ed., *International Law and Indigenous Peoples* (Burlington, VT: Dartmouth, 2003) 85.

[5] Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995-1996) 21 Queen's L.J. 173 at 191.

The *Royal Proclamation, 1763*[6] stemmed, in part, from this depiction of the Aboriginal–settler relationship. While the early relationship between Aboriginal peoples and the colonizing powers entailed the recognition of the primacy of treaties and alliances between nations, the *Proclamation* itself mirrored significant developments that had occurred over time in the Aboriginal–Crown relationship. As noted by Brian Slattery, "[t]he *Proclamation*'s provisions reflect[ed] the common law principles that had crystallized after a century and half of dealings between Indigenous American peoples and the British Crown."[7] Specifically, the overarching purpose of the *Proclamation* was to address issues surrounding Aboriginal title in light of the territorial and political divisions that had developed between the Aboriginal and settler communities. The *Proclamation* served to recognize the existence of Aboriginal title, namely the exclusive right of Aboriginal communities to any of their territories that had not been ceded to the Crown. Ultimately, the Aboriginal–Crown relationship embodied in the *Proclamation* served to protect Aboriginal lands and provide a mechanism for the surrender of those lands to the Crown, when the Crown determined that further territory was needed for settlement.[8] As summarized by Slattery,

> The *Proclamation* addressed a situation in which there were broad factual lines of division between settler communities and Indigenous peoples. The division was both territorial and political. British and French settlements were still relatively small and localized, concentrated along the eastern seaboard and riverbanks. The colonies were

[6] *Royal Proclamation, 1763*, R.S.C. 1985, App. II, No. 1.
[7] Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255 at 261.
[8] *Ibid.* at 260-261.

> governed by their own systems of law and government, based on models imported from the mother countries. Although much of the vast hinterland was claimed by the British Crown, building on the pretensions of its French predecessor, in reality the interior was still largely occupied and controlled by independent Indigenous groups, living under their own laws and systems of government.[9]

The Treaty of Niagara followed suit one year after the *Proclamation*, with the purpose of extending the recognition of distinct sovereignty of Aboriginal and European nations as originally exemplified in the *Proclamation* and through a new Covenant Chain of Friendship. While *oral* emphasis at Niagara was placed on the importance of reconciling the Aboriginal–settler relationship, including the delineation and protection of respective territories and jurisdiction, Crown control was enforced through carefully–scripted portions in *printed* English, enhancing more wide-ranging European "sovereignty" and "dominion."[10]

The *Proclamation* and the Treaty of Niagara would eventually form part of the basis for modern-day land negotiations in Canada, but not before the legitimacy of the original intent of these historical treaties would fall into disrepute. Over time, the Aboriginal–Crown relationship disintegrated alongside expanding European power and influence, in part strengthened by a significantly-diminished Aboriginal population due to the ravages of disease and conflict. The Crown asserted ever-increasing sovereignty,

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[9] *Ibid.* at 260.

[10] For further discussion, see generally John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 159-162; Harold Johnson, *Two Families: Treaties and Government* (Saskatoon, Saskatchewan: Purich Publishing Ltd., 2007) at 41-54; *Report of the Ipperwash Inquiry*, Volume 2, Policy Analysis, "Treaty Relations in Canada" (Toronto: Queen's Printer for Ontario, 2007) at 45-46.

dismantling the precepts on which the *Proclamation* and Treaty of Niagara were built. The Two Row Wampum treaties were abandoned, Aboriginal peoples were dispossessed of their lands and the strength of Aboriginal sovereignty was obliterated. The Crown adjusted the treaty process to compel Aboriginal relocation, assimilation and the dispossession of Aboriginal ancestral territory.[11] Significant focus was placed on acquiring land for the new settlers and for agricultural purposes. As noted by Bradford Morse, emphasis was also placed on

> acquiring clear legal title to land in a form of conveyance, in return for a lump-sum payment consisting of a combination of money and trade goods. Promises were made to reassure the [Aboriginal] negotiators that they could continue to hunt and fish as before and retain some of their lands, but little was said about how the influx of white colonists would reshape the country.[12]

Most historical treaties between Aboriginal peoples and the Crown covered territories in Ontario and the Prairie Provinces, while almost no historical treaties were negotiated in British Columbia. The only exceptions to the latter included the Douglas Treaties of the 1850s, which covered portions of Vancouver Island, and Treaty 8 in 1899, which covered the northeastern corner of British Columbia. In fact, historically, the British Columbia provincial government avoided negotiating treaties in most of the province because it would not acknowledge the existence of Aboriginal territorial rights

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[11] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 152 [Macklem].
[12] Morse, *supra* note 3 at 59.

at that time.[13] Further, the Robinson Treaties, which established the concept of retaining small portions of the land surrendered under a treaty, also called reserves, set a precedent for the rest of the post-Confederation treaties until 1975.[14] As with the "Numbered Treaties," which followed the pattern established by the Robinson Treaties, each treaty required that Aboriginal groups surrender vast tracts of land in exchange for small parcels of land to which the Crown held underlying title. In exchange, the Aboriginal communities were guaranteed annual payments and continued fishing and hunting rights.[15] Notably, Aboriginal interpretations of treaty negotiations and oral promises made during the negotiations are consistently and significantly different from the "official" texts.[16] As asserted by Morse, "[t]reaties became anachronistic documents that had outlived their purpose and were neither to be renewed nor replicated elsewhere."[17] Worse still, neither international law nor Canadian domestic law regarded these treaties as legally-binding from an early stage.[18] As noted by Patrick Macklem,

> treaty jurisprudence first regarded Aboriginal people as different from and inferior to non-Aboriginal people. Aboriginal people thus lacked the authority to enter into binding reciprocal arrangements with the Crown. Treaties were imagined as not having the force of law, and amounted to little more than non-binding political arrangements entered into by the Crown with Aboriginal people.[19]

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[13] For further discussion, see Kent McNeil, "The Vulnerability of Indigenous Land Rights in Australia and Canada" (2004) 42 Osgoode Hall L.J. 271 at 286.
[14] *Ibid.* The Robinson Treaties consisted of the *Robinson-Huron* and *Robinson-Superior Treaties*, which covered the upper Great Lakes Region.
[15] Morse, *supra* note 3 at 60.
[16] *Ibid.*
[17] *Ibid.* at 61.
[18] For example, see *R. v. Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.) at 313-314.
[19] Macklem, *supra* note 11 at 144. This has changed over time, with Canadian judicial interpretation now emphasizing the recognition of Aboriginal perspectives on treaties (See *R. v. Simon*, [1985] 2 S.C.R. 387 at

The *St. Catherine's Milling*[20] ruling, handed down by the Judicial Committee of the Privy Council in 1888, held that the *Proclamation* was the original source of Aboriginal title. Aboriginal title was nothing more than "a personal and usufructuary right," constituting a mere burden on Crown interest in the land.[21] It was not until the Supreme Court of Canada's *Calder*[22] ruling in 1973 that the significance of Aboriginal title and contemporary land negotiations came to the fore once more. In *Calder*, the Supreme Court ruled that communal Aboriginal title could indeed exist as a legal right in British Columbia apart from the *Royal Proclamation.*[23] Furthermore, Aboriginal title doctrine was still relevant in Canada.[24] As a result, the Canadian federal government changed its approach from one of disinterest in negotiating agreements with Aboriginal peoples to issuing a new policy statement in August 1973, wherein comprehensive land

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paras. 21-24; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1107-1108 [*Sparrow*]; *R. v. Badger*, [1996] 1 S.C.R. 771 at paras. 9, 41; *R. v. Marshall*, [1999] 3 S.C.R. 456 at paras. 51-52 [*Marshall [No. 1]*].

[20] *St. Catherine's Milling & Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.).

[21] *Ibid.* at 54, 58. For further discussion, see Michael Coyle, *Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future*, research paper Commissioned by the Ipperwash Inquiry, Ontario, 2005, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Coyle.pdf at 21-22.

[22] *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 [*Calder*].

[23] For historical background on and interpretive discussion of the *Royal Proclamation*, see John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 155; Brian Slattery, *The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of their Territories* (Saskatoon, Saskatchewan: University of Saskatchewan Native Law Centre, 1979).

[24] *Calder*, *supra* note 22 at paras. 12-13, 17, 118; Morse, *supra* note 3 at 61. For further discussion on the importance of *Calder* in paving the way for contemporary land claims negotiations, see Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence," in Hamar Foster, Heather Raven and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 129 at 129-133.

claims agreements would be negotiated for areas where Aboriginal title was unextinguished. A new era of Aboriginal land negotiations had begun.[25] Prior to that time, claims were dealt with on an *ad hoc* basis, with few ever being resolved. Since then, while the number of Aboriginal claims has rapidly increased, particularly in recent years, rates of successful settlement of specific claims are still relatively low.

Yet, despite seemingly noble-sounding rhetoric on the part of Canadian federal and provincial governments, Aboriginal discontent with government approaches to addressing land claims continues to intensify, with blockades and protests becoming quite frequent amongst Aboriginal peoples as tools to convey their frustration with the negotiations process. This hard-line stance has been especially pervasive in the last several years and speaks to growing tensions between Aboriginal peoples and Canadian governments as well as a deteriorating Aboriginal–Crown relationship, ultimately underlining the need to find workable solutions. More generally, and perhaps more importantly, these problems underline the need for Aboriginal reconciliation and functional, respectful relationships between Aboriginal peoples and the rest of Canada.

These conflicts are particularly troubling given that Aboriginal lands are at the heart of Aboriginal identity and many Aboriginal peoples are indeed committed to

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[25] Department of Indian Affairs and Northern Development, *Statement on Claims of Indian and Inuit People* (Ottawa: Queen's Printer, 1973). Under section 35 of the *Constitution Act, 1982*, Aboriginal title, as subsumed under Aboriginal and treaty rights, can no longer be extinguished without the consent of Aboriginal peoples. In *Sparrow*, the Supreme Court of Canada set out its "clear and plain" intention test, wherein "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right" (*Sparrow*, *supra* note 19 at 1099).

resolving land disputes through negotiations. As stated by the Royal Commission on Aboriginal Peoples (RCAP), based on nationwide consultations and hearings with Aboriginal communities,

> Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies.
> ...
> The fundamental concern of Aboriginal people, as expressed throughout the hearings, was that the resolution of land and resources concerns – including the recognition, accommodation and implementation of Aboriginal rights to and jurisdiction over lands and resources – is absolutely critical to their goals of self-sufficiency and self-reliance.[26]

ABORIGINAL RECONCILIATION: CONSTITUTIONAL ORIGINS AND SUPREME COURT JURISPRUDENCE

Aboriginal reconciliation as a constitutional concept originates in section 35(1) of the *Constitution Act, 1982*,[27] which recognizes and affirms Aboriginal and treaty rights. Generally speaking, there are two broad models of Aboriginal reconciliation. The first refers to the rectification of historical wrongs so as to create and develop a renewed relationship between Aboriginal peoples and non-Aboriginal Canadians. The second involves a coalition, so to speak, between Aboriginal and treaty rights and Crown sovereignty.[28] As held by the Supreme Court of Canada, section 35 attempts to reconcile

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[26] Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Volume 2, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996), online: http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html.

[27] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[28] For further discussion, see Carole Blackburn, "Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada" (2007) 13 J. Royal Anthropological Institute 621.

"the pre-existence of aboriginal societies with the sovereignty of the Crown."[29] At its core, *constitutional reconciliation* is a form of legal reconciliation, which, in an Aboriginal context, seeks to balance Canadian legislative authority and the "sovereignty of the Crown" with the prior occupation of Aboriginal peoples in what is now Canada.

By extension, *treaty constitutionalism*, or *treaty federalism*, places primary emphasis on the negotiation of treaties or agreements, rather than litigation, in seeking to resolve Aboriginal–Crown conflicts over contested jurisdiction. Canadian governments and the Supreme Court of Canada have both expressed preference for negotiation over litigation in settling Aboriginal land claims and governance issues,[30] despite the fact that the Courts have served as the primary mechanisms through which resolution of disputes and reconciliation has been sought. In the context of Aboriginal claims, Patrick J. Monahan presents the advantages of negotiation over litigation effectively:

> It is generally accepted amongst lawyers that, other things being equal, negotiation is clearly preferable to litigation. It is preferable for a lot of reasons. Consensual outcomes are more stable outcomes. They are more legitimate outcomes because all parties accept them. Therefore, they are more durable and more lasting than those outcomes imposed by the court. Litigation is extremely costly – not that negotiation isn't also costly – and the costs include more than the costs of lawyers involved. In terms of social costs, litigation tends to foster conflict and "all or nothing" solutions. Litigation is also of very

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[29] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31 [*Van der Peet*].

[30] See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186 [*Delgamuukw*]; *Sparrow*, *supra* note 19 at 1105; *Sioui*, *supra* note 4 at 1071; *R. v. Horseman*, [1990] 1 S.C.R. 901 at 934. Yet, at the same time, the Supreme Court of Canada has handed down judgments that have taken the sovereignty of the Crown for granted, without addressing how that sovereignty was acquired without Aboriginal consent. For in-depth critical discussion on assumed Crown sovereignty, see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta. L. Rev. 498; John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw* v. *British Columbia*" (1999) 37 Osgoode Hall L.J. 537.

> limited utility because all it will do is resolve very narrow, discrete issues. It will not provide a comprehensive settlement or resolution of all matters that are in dispute.[31]

Treaty constitutionalism is rooted in historical treaty negotiations and concomitant Aboriginal–Crown relationships, which, as noted, initially acknowledged Aboriginal sovereignty and autonomy.[32] Where treaties were not finalized the assertion of Crown sovereignty was assumed to have extinguished Aboriginal sovereignty.[33]

Reconciliation and the Infringement of Aboriginal and Treaty Rights

The Supreme Court first addressed Aboriginal reconciliation in *Sparrow* through the justification–of–infringement test. The test consists of two components: it must be determined if relevant legislation infringes *prima facie* an existing Aboriginal right under section 35(1), and if so, it is ascertained whether the infringement can be justified.[34] In so doing, reconciliation is sought between Aboriginal rights and valid legislative

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[31] Patrick J. Monahan, "The Road Ahead: Negotiation or Litigation?," in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) 521 at 521-522.

[32] For further discussion on the history of treaty federalism, see James (Sa'ke'j) Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241 at 250-251 [Henderson]; Kiera L. Ladner, "Up the Creek: Fishing for a New Constitutional Order" (2005) 38:4 Can. J. Pol. Sci. 923.

[33] There are four primary means through which new territories may be acquired by states: conquest, cession or formal transfer, annexation or assertion of sovereignty without military action, or through settlement based on the presumption that the territory in question was previously unoccupied. The "settlement thesis" is also known as the doctrine of *terra nullius*, where it is assumed that any inhabitants are too "primitive" to exercise sovereignty, possess political rights or hold underlying title (see generally Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of the Territory* (Saskatoon, Saskatchewan: University of Saskatchewan Native Law Centre, 1979). For further discussion, see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29:2 Alta. L. Rev. 498; Macklem, *supra* note 11 at 95; Angela Pratt, "Treaties vs. *Terra Nullius*: 'Reconciliation,' Treaty-Making and Indigenous Sovereignty in Australia and Canada" (2004) 3 Indigenous L.J. 43.

[34] *Sparrow*, *supra* note 19 at 1113.

objectives, such that the relevant legislation is consistent to the greatest extent possible with the constitutional affirmation and recognition of the Aboriginal rights in question.[35] In order to meet this standard "[t]he special trust relationship and the responsibility of the government *vis-à-vis* aboriginals must be the first consideration in determining whether the legislation or action in question can be justified."[36] Thus in *Sparrow*, the Court held that legislative infringements of Aboriginal rights must be supported by valid objectives while simultaneously upholding the Crown's fiduciary duty to Aboriginal peoples,[37] thereby tempering the impact of constitutional recognition of Aboriginal and treaty rights on Canadian legislative authority.

The *Van der Peet* decision further refined the infringement analysis laid out in *Sparrow*, based on the rationale that reconciliation could not be achieved if constitutional protection were granted to Aboriginal practices, customs, or traditions that were not fundamental components of the Aboriginal cultures in question.[38] The Court held that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition *integral to the distinctive culture* of the aboriginal group claiming the right."[39] An integral practice must have developed prior to European contact, must be a "defining"

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[35] *Ibid.* at 1113-1114.
[36] *Ibid.* This "special trust relationship" is also known as the fiduciary duty of the Crown toward Aboriginal peoples. While not setting out an exhaustive list of considerations, the Court held that it must also be determined whether "there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the...measures being implemented."
[37] *Ibid.* at 1113-1114.
[38] *Van der Peet, supra* note 29 at paras. 31, 46.
[39] *Ibid.* at para. 46 (emphasis added).

characteristic of the society, and while it may have evolved over time, it must still be rooted in pre-contact time.[40] It is important to note that *Van der Peet* reasserted the need to be "sensitive to the aboriginal perspective itself on the meaning of the rights at stake," as was found in *Sparrow*.[41] However, the Court also held that "[t]he definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system."[42] This statement is reflective of the recurrent judicial emphasis placed on reconciliation between Aboriginal peoples and the Canadian state, but at the same time, it maintains the paramount importance accorded to Crown sovereignty.[43]

Arguably, therefore, the Supreme Court has tied the justification of infringements to the goal of Aboriginal reconciliation, but usually to the detriment of Aboriginal and treaty rights. In *Van der Peet*, the dissenting judgment of McLachlin J., as she then was, addressed this issue. Specifically, while McLachlin J. argued for reconciliation between the prior occupancy of Aboriginal peoples and Crown sovereignty, she emphasized reconciliation based on the negotiation of treaties and of a form that recognized equally Aboriginal and non-Aboriginal legal perspectives. She stated:

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[40] *Ibid.* at paras. 55, 60.
[41] *Sparrow, supra* note 19 at 1112.
[42] *Van der Peet, supra* note 29 at para. 49.
[43] *Ibid.*

> This desire for reconciliation, in many cases long overdue, lay behind the adoption of s. 35(1) of the *Constitution Act, 1982*. As *Sparrow* recognized, one of the two fundamental purposes of s. 35(1) was the achievement of a just and lasting settlement of aboriginal claims.
> ...
> The process must...consider the non-aboriginal perspective – how the aboriginal right can be legally accommodated within the framework of non-aboriginal law. Traditionally, this has been done through the treaty process, based on the concept of the aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together. ...[U]ntil we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode aboriginal rights seriously.[44]

McLachlin J. also criticized the majority ruling of Lamer C.J. in *Van der Peet* with regard to the scope of legitimate infringement of Aboriginal rights, most notably in light of the fiduciary duty of the Crown:

> "In the right circumstances," themselves undefined, governments may abridge aboriginal rights on the basis of an undetermined variety of considerations. While "account" must be taken of the native interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass muster.[45]

Couched in critical terms, McLachlin J. sought to restore balance to the process of Aboriginal reconciliation by drawing attention to those components of the majority ruling that she considered to be fundamentally flawed. In particular, for McLachlin J., the honour of the Crown and corresponding fiduciary duty were fundamental in fairly and

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[44] *Ibid.* at paras. 310, 313.
[45] *Ibid.* at para. 309.

justly seeking Aboriginal reconciliation through negotiation.[46] The broader significance of fiduciary duty of the Crown in this context is returned to momentarily.

Subsequently, the formulation and application of the "integral to the distinctive culture" test has been even less balanced. Little significance has been accorded to Aboriginal perspectives,[47] and the Supreme Court arguably has used its constitutional interpretation of reconciliation to permit increased limitations on Aboriginal and treaty rights. For instance, in *Gladstone*,[48] the Court held the following:

> Although by no means making a definitive statement on this issue, I would suggest that with regard to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the*

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[46] *Ibid.* There is an extensive body of case law and scholarship on the fiduciary obligations of the Crown, particularly with respect to the Crown's fiduciary duty of care and the more expansive honour of the Crown in its fair dealings with Aboriginal peoples. Relevant case law includes *R. v. Guerin*, [1984] 2 S.C.R. 335 [*Guerin*]; *Kruger v. The Queen* (1985), 17 D.L.R. (4th) 591 (F.C.A.); *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 [*Wewaykum*]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388. Case law on fiduciary obligations of the provincial governments includes *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 and *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550. Scholarly discussion is found in Mary C. Hurley, *The Crown's Fiduciary Relationship with Aboriginal Peoples* (Ottawa: Parliamentary Research Branch, 2002); Kent McNeil, "Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples" in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001) 309; James Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd., 2005); Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996); Leonard Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Government Power and Responsibility" (1994) 32:4 Osgoode Hall L.J. 735; Leonard Rotman, "Wewaykum: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004) 37:1 U.B.C. L. Rev. 219.

[47] See Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous L.J. 1 at 5, especially with regard to *R. v. Pamajewon*, [1996] 2 S.C.R. 821 and *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911.

[48] *R. v. Gladstone*, [1996] 2 S.C.R. 723.

> *reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.*[49]

There is significant contention in the entitlement of "economic and regional fairness" to infringe the rights of Aboriginal peoples. Similar to the *Van der Peet* ruling, the Court's emphasis on Aboriginal reconciliation appeared to treat as unquestioned Crown sovereignty, while ultimately reducing or minimizing the assertion of Aboriginal rights. The Court's emphasis on reconciling Aboriginal rights with prior Crown sovereignty and the broader political community played a vital role.[50]

In *Delgamuukw*, the Court held that "accommodation must be done in a manner which does not strain 'the Canadian legal and constitutional structure',"[51] quite simply because of the unquestionable "underlying title" of the Crown,[52] ultimately justifying further infringements on Aboriginal rights, including Aboriginal title.[53] Similarly, the Supreme Court further limited Aboriginal treaty rights in *Marshall II*,[54] wherein various aspects of the *Marshall I*[55] ruling were clarified. While the Court held in *Marshall I* that the treaty right to fish should be limited to obtaining a moderate livelihood,[56] in *Marshall II*, the Court relied on its reinterpretation of reconciliation in *Gladstone* to justify broader

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[49] *Ibid.* at para. 75 (emphasis in original).
[50] *Ibid.* at para. 72.
[51] *Delgamuukw*, *supra* note 30 at para. 82.
[52] *Ibid.* at para. 145.
[53] For in-depth discussion of Aboriginal reconciliation and land tenure, see James (Sa'ke'j) Youngblood Henderson, Marjorie L. Benson and Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000) at 331-395.
[54] *R. v. Marshall [No. 2]*, [1999] 3 S.C.R. 533 [*Marshall [No. 2]*].
[55] *Marshall [No. 1]*, *supra* note 19.
[56] *Ibid.* at para. 58.

infringements of Aboriginal treaty rights, specifically in relation to the allocation of fishery resources.[57] In *Marshall II*, the unanimous Court held that reconciliation justified allocation of fishery resources to non-Aboriginal peoples, even if it infringed treaty rights, because non-Aboriginal people had been involved in commercial and recreational fishing at the time of and since the Mi'kmaq Treaties of 1760-61.[58]

Until more recently, the Court's conception and reinterpretation of Aboriginal reconciliation has been viewed to have increasingly undermined the special, constitutionally-protected status of Aboriginal and treaty rights embodied in s. 35(1). Of course, the Canadian common law system is constitutionally based on the conception of parliamentary sovereignty, which explains, in part, the reasoning of the Supreme Court based on the recognized existence of only one sovereign, namely the Crown. However, it was only with *Sappier* and *Gray*[59] that the Supreme Court relaxed slightly the "integral to the distinctive culture" test. Writing for the Court,[60] Bastarache J. urged courts to be "cautious in considering whether the particular aboriginal culture would have been fundamentally altered had the gathering activity in question not been pursued."[61]

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[57] *Marshall [No. 2]*, *supra* note 54 at para. 41.
[58] *Ibid.* at para. 38. For further discussion, see Gordon Christie, "Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17 Can. J.L. & Soc. 41 at 54-55.
[59] *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686 [*Sappier; Gray*]
[60] The ruling was unanimous save for the concurring judgment of Binnie J.
[61] *Sappier; Gray*, *supra* note 59 at para. 41.

Reconciliation through Consultation

The Supreme Court of Canada has allowed a more expansive notion of reconciliation in three other relatively recent cases – *Haida*,[62] *Taku River*[63] and *Mikisew*,[64] though in the context of fiduciary duty and the honour of the Crown. As originally laid out in *Guerin*, "a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf."[65] However, there are limits to the fiduciary doctrine, specifically when the Crown has responsibilities to the larger public or other groups of interest. As argued by Peter W. Hogg and Patrick J. Monahan, the Crown is more often in a political trust rather than a legally-enforceable trust.[66] Timothy Huyer summarizes a fiduciary obligation as "rightfully exist[ing] when the Crown has a trust-like responsibility on behalf of a First Nation and where the exercise of the Crown's discretion is not in conflict with its broader public policy mandate."[67] The Supreme Court attempted to clarify further the fiduciary relationship in *Wewaykum*,[68] where Binnie J., speaking for a unanimous Court, found that the purpose of the fiduciary duty is "to facilitate supervision of the high degree of

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[62] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida*].
[63] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 [*Taku River*].
[64] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 [*Mikisew*].
[65] *Guerin*, *supra* note 46 at 385.
[66] Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at 257-260.
[67] Timothy Huyer, "Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation" (2006) 21 Windsor Rev. Legal & Soc. Issues 33 at 36 [Huyer].
[68] *Wewaykum*, *supra* note 46.

discretionary control gradually assumed by the Crown over the lives of aboriginal peoples," but at the same time, the fiduciary obligation "does not exist at large but in relation to specific Indian interests."[69]

Yet, this can leave Aboriginal interests unprotected where they do not fall under the protection of the Crown's fiduciary duty. The Supreme Court of Canada has applied the doctrine of the honour of the Crown in order to protect such interests, since the honour of the Crown is a much broader obligation than the Crown's fiduciary duty to Aboriginal peoples. Moreover, the honour of the Crown is the source of governmental duty to consult, rather than a fiduciary obligation.[70]

In each of *Haida*, *Taku River*, and *Mikisew*, the Court has held that the Crown must consult Aboriginal peoples where Aboriginal or treaty rights might be infringed, in order to uphold the honour of the Crown. The overarching purpose of such consultation is to seek reconciliation, wherein the Crown is broadly obliged to consult with Aboriginal peoples in good faith, while making accommodations where necessary for Aboriginal peoples. In *Haida*, the duty to consult was broadened, wherein the Supreme Court held that the Crown's obligation occurs "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that

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[69] *Ibid.* at paras. 79, 81.
[70] *Haida*, *supra* note 62 at para. 18.

might adversely affect it."[71] *Mikisew* specified that the Crown must give adequate and timely notice of any potential impacts on the affected Aboriginal peoples.[72]

Yet, while the duty to consult has a low threshold, the Crown is not required to enter into extensive consultations with Aboriginal peoples in all instances. Consultation was addressed by the Supreme Court of Canada in *Delgamuukw*,[73] wherein Lamer C.J. held that a duty to consult and accommodate Aboriginal peoples exists in respect of Aboriginal title. Moreover, consultation and accommodation vary depending on the facts of the case at hand.[74] As further clarified in *Haida*, there is a range specifying the degree of consultation and accommodation that are required:

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding."
> ...
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.[75]

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[71] *Ibid.* at para. 35.
[72] *Mikisew*, *supra* note 64 at para. 64.
[73] Consultation was first addressed in *Sparrow* as an essential aspect of the test for justifiable infringement (*Sparrow*, *supra* note 19 at 1113-1114).
[74] *Delgamuukw*, *supra* note 30 at para. 168.
[75] *Haida*, *supra* note 62 at paras. 43-44. See also Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 Alta. L. Rev. 49 at 61.

Yet, only the Crown is required to consult with and accommodate Aboriginal peoples; this requirement is not expected of third parties, although it may be in their best interests to participate in any consultation processes.[76] Even still, "[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples," and it is assumed that "the Crown must act honourably."[77] Consequently, the fiduciary duty can be viewed as a subset of the honour of the Crown.[78] Moreover, while the Aboriginal communities in question do not have a veto over any outcomes that may affect their lands or rights,[79] the process of consultation and accommodation is distinct from the justification test developed in *Sparrow*, *Van der Peet*, *Gladstone*, *Delgamuukw*, and the *Marshall* cases. The duty to consult exists before it is ever determined or justified that a proposed activity might infringe an Aboriginal or treaty right. As held by Binnie J. in *Mikisew*,

> [w]here, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.[80]

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[76] See *Haida*, *ibid.* at para. 53. For further discussion, see Thomas Isaac, Tony Knox, and Sarah Bird, "The Crown's Duty to Consult and Accommodate Aboriginal Peoples: The Supreme Court of Canada Decision in *Haida*" (2005) 63:5 The Advocate 671.
[77] *Haida*, *ibid.* at para. 16.
[78] *Ibid.* at para. 18. For further discussion, see Huyer, *supra* note 67 at 42-43.
[79] *Haida*, *ibid.* at para. 48.
[80] *Mikisew*, *supra* note 64 at para. 59 (emphasis in original).

The overarching purpose of consultation and accommodation, as laid out in *Haida*, *Taku River* and *Mikisew*, is to achieve a level of reconciliation with Aboriginal peoples whose Aboriginal and treaty rights may be infringed. In other words, Aboriginal rights recognition is a subset of Aboriginal reconciliation. Extending from the concepts of treaty negotiations and treaty federalism, as noted above the Supreme Court has held that reconciliation entails the negotiation and just settlement of Aboriginal claims. In *Haida*, McLachlin C.J. held that

> [w]here treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims... . Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition... . This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.[81]

It would appear, therefore, that more recent Supreme Court of Canada jurisprudence has allowed for a more expansive conception of Aboriginal reconciliation, albeit in the context of consultation and accommodation, rather than justification of infringement of Aboriginal and treaty rights.

ENVISIONING A MORE EXPANSIVE INTERPRETATION OF ABORIGINAL RECONCILIATION

Given that the road to reconciliation has been extremely lengthy and arduous, and given the fact that a great many problems continue to persist between Aboriginal peoples

[81] *Haida*, *supra* note 62 at para. 20.

and the rest of Canada, a more expansive interpretation of Aboriginal reconciliation is arguably needed – one that extends beyond the "accepted" path through the Canadian judicial system. The approach taken by the Supreme Court of Canada, specifically with respect to treaty federalism, needs to be expanded upon. A similar contention is raised by James Youngblood Henderson, who envisions treaty federalism and the role of reconciliation therein as including Aboriginal–Crown negotiations, but extending beyond that, with significance placed on genuine respect for and "consolidation" of Aboriginal perspectives and worldviews as part of the Canadian federation.[82] He challenges judicial approaches to reconciliation, asserting that they do little to disturb colonialist assumptions about Aboriginal peoples within Canada. He asserts the following, which is included at length due to its salience:

> To be an effective reconciliation of unity and diversity, a renewed federal system should establish a harmonious resolution between the First Nations' constitutional rights and the immigrants' perplexing colonial regime. Such a consolidation must have the explicit and clear consent of the existing Treaty First Nations as well as other First Nations.
> ...
> Without a balance between Aboriginal perspectives and the Eurocentric view, existing federalism reflects political domination and oppression built on colonial misunderstandings. Without a proficiency in indigenous worldviews, languages, rights and treaties, the Canadian legal system cannot equitably talk about authentic democracy. Past attempts to balance treaties and British legal customs and colonial conventions were contrived and superficial.
> ...
> Without Aboriginal perspectives on the treaties and their constitutional meaning, the existing political and legal perspectives will remain Eurocentric biases of the colonial era. Canadians need to conceptualize First Nations in a post-colonial way, recognizing their

[82] Henderson, *supra* note 32 at 244-245.

> Aboriginal rights, treaty rights and worldviews without losing sight of the maturity and future of Canada, the nation.[83]

Kiera Ladner makes similar contentions, although her analysis of reconciliation goes even further, highlighting Aboriginal sovereignty and unrest instead of depictions of Canada as a unified nation.[84] With regard to the Aboriginal–Crown relationship, she asserts that

> [a]s change erupts, reconciliation will become increasingly necessary. Reconciliation will be necessary given that the stories of Canada which define and confine perspectives and political realities make it impossible to engage in any meaningful conversation which would resolve unrest and address Indigenous demands for the dismantling of the colonial order. There is no starting point or common position from which to begin as the first thoughts and principles of Indigenous nations run contrary to the first thoughts and principles of the Canadian nation(s). Worse yet, both contest the sovereignty and constitutional claims of the other.[85]

The RCAP outlined a foundational argument on Aboriginal reconciliation as part of one of its final recommendations, which is also useful in providing a more expansive conception of reconciliation, only it depicted a renewed relationship based on the concepts of mutual recognition, mutual respect, mutual responsibility and sharing. "When taken in sequence, the four principles form a complete whole, each playing an equal role in developing a balanced societal relationship. Relations that embody these

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[83] *Ibid.*
[84] Kiera L. Ladner, "Take 35: Reconciling Constitutional Orders," in Annis May Timpson, ed., *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (Vancouver: UBC Press, 2009) 279 at 280.
[85] *Ibid.* at 280-281.

principles are, in the broadest sense of the word, *partnerships*."[86] In expanding on each component further, the RCAP outlined the following:

> [T]he principle of mutual recognition...requires both sides to acknowledge and relate to one another as partners, respecting each other's laws and institutions and co-operating for mutual benefit.
> ...
> From mutual recognition flows mutual respect...the quality of courtesy, consideration and esteem extended to people whose languages, cultures and ways differ from our own but who are valued fellow-members of the larger communities to which we all belong.
> ...
> Closely related to mutual respect is the principle of sharing: the giving and receiving of benefits.
> ...
> Ideally, Aboriginal peoples and Canada constitute a partnership in which the partners have a duty to act responsibly both toward one another and also toward the land they share.[87]

As noted by the Honourable René Dussault, former co-chair of the RCAP, a broader vision of the constitutional origins of Canada was required in developing the RCAP's approach, so as to include Aboriginal peoples and their histories especially in relation to land and resources.[88] Reciprocity and sharing were at the forefront of the RCAP's approach, with an emphasis on "the interconnection of all things" alongside the "protection and enhancement of Aboriginal identity, languages, cultures, and ways of

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[86] Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, Volume 1, Report of the Royal Commission on Aboriginal Peoples (Ottawa: Canada Communications Group, 1996), online: http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html (emphasis in original).

[87] *Ibid.* For further discussion, see Paul Chartrand, "Towards Justice and Reconciliation: Treaty Recommendations of Canada's Royal Commission on Aboriginal Peoples (1996)," in Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain, eds., *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Carlton, Victoria: Melbourne University Publishing Ltd., 2004) 120; Kiera L. Ladner, "Negotiated Inferiority: The Royal Commission on Aboriginal People's Vision of a Renewed Relationship" (2001) 31:1-2 Amer. Rev. Can. Stud. 241.

[88] The Honourable René Dussault, "The Vision of the Royal Commission on Aboriginal Peoples" (2007) 70 Sask. L. Rev. 93 at 94.

life."[89] Further, reconciliation was viewed as "a matter of trust," and "to succeed, this partnership approach required that partners from both sides leave their comfort zone, question long held views, put aside prejudices often inspired by ignorance and fear, and accept the other in his or her difference."[90]

Overall, this RCAP conception was broad in scope, dealing with a renewed partnership between Aboriginal peoples and the rest of Canada. Indeed, the emphasis that the RCAP placed on reconciliation was seen as a primary cornerstone of its relevance and perceived usefulness in improving Aboriginal relations in Canada. As noted by Michael Murphy,

> [r]econciliation speaks to the past, present, and future of Aboriginal-state relations in Canada. Perhaps nowhere was this message more clearly articulated that in the final report of the Royal Commission on Aboriginal Peoples. ...[T]he commissioners recommended an honest and open confrontation with the history of colonization, concrete measures to address the contemporary legacy of injustice, and the forging of a new relationship built on the foundations of mutual recognition, respect, and trust.[91]

Despite the fact that the federal government largely ignored the more expansive RCAP conception of reconciliation, subsequent governments have sought to improve Aboriginal relations in the country through other mechanisms, primarily through policy developments, which are analyzed in detail in subsequent chapters. Yet, the efforts of governments thus far arguably are not enough.

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[89] *Ibid.*
[90] *Ibid.* at 95.
[91] Michael Murphy, "Civilization, Self-Determination, and Reconciliation," in Annis May Timpson, ed., *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (Vancouver: UBC Press, 2009) 251 at 251.

In a recent publication by the Aboriginal Healing Foundation,[92] the issue of Aboriginal engagement is alluded to as a component of reconciliation, the latter of which is couched in terms of a more expansive dialogue between Aboriginal peoples and the rest of Canadian society. In this context, Stan McKay articulates three principles that constitute a framework for effectively undertaking Aboriginal reconciliation. First, a common or shared starting point for dialogue between Aboriginal peoples and the rest of Canada is necessary in order for healing and reconciliation to occur meaningfully, and in this sense, "[r]econciliation is more than people getting along."[93] In fact, reconciliation is also described as "shared humanity."[94] Second, the history of colonization in Canada alongside the continued marginalization of Aboriginal peoples need to be acknowledged and addressed with the purpose of transforming the current relationships that exist between Aboriginal peoples and the rest of Canadian society.[95] Third, the ways in which Aboriginal peoples *engage* with Canadian society – which arguably includes Canadian

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[92] The Aboriginal Healing Foundation is an Aboriginal-run, not-for-profit corporation that was established in 1998, partly in response to the Canadian federal government policy release, *Gathering Strength – Canada's Aboriginal Action Plan* (Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 1997)). The Foundation was given a one-time grant of $350 million in order to provide research, support and resources in the process of healing and reconciliation of Aboriginal peoples across the country who were victims in Indian Residential Schools (see www.ahf.ca).

[93] Stan McKay, "Expanding the Dialogue on Truth and Reconciliation – In a Good Way," in Aboriginal Healing Foundation, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 103 at 106.

[94] *Ibid.* at 108.

[95] *Ibid.* at 106-107.

legal and political institutions – need adjustment, especially in the broader context of successfully achieving reconciliation.[96]

In keeping with this need for a more wide-ranging transformation of Aboriginal–Canada relations is the assertion that *all* Canadians should take part in the process of Aboriginal reconciliation because Aboriginal *and* non-Aboriginal individuals and communities are parties to the original, historical treaties. McKay contends that "[w]e are all treaty people. We are committed to sharing life on this land, and all Canadians are participants in the benefits and responsibilities of maintaining the treaty."[97] Similarly, Marlene Brant Castellano argues that the "[m]ovement toward reconciliation therefore requires that awareness and acknowledgement be experienced at a thousand points of encounter between Aboriginal and non-Aboriginal people, so that the need for change and the promise of a new relationship ripples through networks of families, communities, and nations."[98] In other words, Aboriginal reconciliation needs to be envisioned as an expansive undertaking that brings together Aboriginal and non-Aboriginal individuals and communities in a partnership marked by reciprocity, mutual respect and shared experiences. Ultimately, Brian Rice and Anna Snyder summarize these contentions effectively:

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[96] *Ibid.* at 107.
[97] *Ibid.* at 113.
[98] Marlene Brant Castellano, "A Holistic Approach to Reconciliation: Insights from Research of the Aboriginal Healing Foundation," in Aboriginal Healing Foundation, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 385 at 395.

> Reconciliation is about healing relationships, building trust, and working out differences. ...Reconciliation must meet concerns about both the past and the future. Acknowledgement of the past through truth telling, recognition of interdependence, and desire or necessity for peaceful co-existence in the future are key elements of reconciliation.
> ...
> Trust comes, in part, from a general belief in the good intentions of the other and from indications that past behaviour and/or patterns of violence will not be repeated.
>
> In order for reconciliation to occur, the process must reflect the mutual interests of the parties involved. Without power-sharing in decision-making, a constructive outcome from the reconciliation process is unlikely. A destructive outcome results from one party imposing decisions made unilaterally with little or no consideration for the interests and needs of the other party.[99]

Yet, as this discussion illustrates, difficulties arise where different conceptions of Aboriginal reconciliation are at odds, which is often the case given competing interests. These differences are further reflected in the range of diverse government policies that have developed alongside relevant jurisprudence, and thus reinforce the chasms that already exist between Aboriginal peoples and Canada. Nevertheless, reconciliation must entail healing, trust, sharing and renewed relationships between Aboriginal peoples and the Crown, and between Aboriginal peoples and the rest of Canada, in order to more closely resemble historical relationships when Aboriginal legal perspectives[100] and approaches were more fully respected. Progress arguably has been made, at least partially in this direction, both in the context of jurisprudence and government policy, but

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[99] Brian Rice and Anna Snyder, "Reconciliation in the Context of a Settler Society: Healing the Legacy of Colonialism in Canada," in Aboriginal Healing Foundation, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 45 at 45-46.

[100] For further discussion of Aboriginal legal perspectives, see generally Dawnis Kennedy, "Reconciliation without Respect? Section 35 and Indigenous Legal Orders," in Law Commission of Canada, ed., *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77.

a great deal still needs to be accomplished. It is apparent that other approaches are necessarily worth considering, which is why meaningful Aboriginal engagement, wherein Aboriginal distinctiveness is respected and represented, is a novel and potentially-fruitful path to explore in this regard.

CHAPTER THREE – TOWARDS A THEORETICAL UNDERSTANDING OF ABORIGINAL ENGAGEMENT: IDENTITY, NATIONALISM AND ALIENATION

One of the greatest barriers standing in the way of creating new and legitimate institutions of governance is the notion that Aboriginal people constitute a "disadvantaged racial minority"... . Only when Aboriginal peoples are viewed, not as "races" within the boundaries of a legitimate state, but as distinct political communities with recognizable claims for collective rights, will there be a first and meaningful step towards responding to Aboriginal peoples' challenge to achieve governance.[1]

The primary purpose of this chapter is to expand upon some of the theoretical issues alluded to thus far and illuminate how they are relevant for Aboriginal engagement in Canada. The various strands of thought related to these themes are amorphous and fluid, and thus there are important overlapping interconnections between them. This chapter seeks to draw together those aspects of each that provide a combined theoretical framework on which to base a more solid understanding of how Aboriginal engagement might lead to Aboriginal reconciliation in Canada. In undertaking this task, there are several core themes that work together. Identity and citizenship are foundational aspects of how Aboriginal peoples define themselves, not only as communities and community members, but also vis-à-vis the rest of Canada and the non-Aboriginal population. By extension, Aboriginal nationalism is a fundamental component entering into almost any

[1] Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Volume 2, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996), online: http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html [RCAP].

discussion on Aboriginal identity; Aboriginal identities inform Aboriginal nationalist sentiments. In other words, the process of self-identification or self-naming necessarily exists alongside conceptions of what it means to be Aboriginal, and at the same time, is reflected in Aboriginal nationalist sentiments. As will become evident in subsequent chapters, Aboriginal nationalism and alienation also explain Aboriginal disengagement and help identify patterns for engagement.

Discussions on nationalism often situate different forms of nationalism under one of two broad categories: civic nationalism or ethnic nationalism. The former usually refers to a shared national identity or patriotism that citizens may feel within a state, irrespective of other factors, such as ancestry, race, ethnicity, religion or other factors. The latter refers to groups, usually sub-state communities, who do have ascriptive characteristics such as ancestry, race, ethnicity and so on, and who hold a sense of pride because of such shared qualities.[2] Aboriginal peoples in Canada fall under the latter category, but for reasons discussed shortly, tend to be adverse to the label of "minority," and thus Aboriginal nationalism should be considered as a distinct form of nationalism. The subsequent analyses deal specifically with Aboriginal nationalism and do not engage the debates surrounding these broader or more general theoretical conceptions of nationalism.

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[2] Philip Resnick, "Civic and Ethnic Nationalism: Lessons from the Canadian Case, in Ronald Beiner and Wayne Norman, eds., *Canadian Political Philosophy: Contemporary Reflections* (Oxford: Oxford University Press, 2001) 282 at 282-283.

Ultimately, with a better theoretical understanding of how these aspects shape and define Aboriginal peoples, it is easier to understand some Aboriginal perspectives on the relationships that exist between Aboriginal peoples and the rest of Canada. This understanding, in turn, can shape a better awareness of Aboriginal engagement, including an appreciation of how and why Aboriginal peoples appear to be alienated from Canadian institutions and non-Aboriginal people and communities. This provides a theoretical map to illustrate how improved engagement might help bridge the gap between Aboriginal peoples and Canada on the road to achieving Aboriginal reconciliation.

DEFINING ABORIGINAL NATIONS AND IDENTITIES

The concept of citizenship is vague, indeed uncertain, and definitely contentious. This chapter adopts *cultural citizenship* as a starting point or overarching theme. For the purposes of this chapter, the *cultural citizenship* of Aboriginal peoples in Canada refers primarily to Aboriginal identity through shared histories, cultural practices, languages and so on; it reflects a melding together of culture, identity and social practices of Aboriginal peoples.[3] In this sense, while Aboriginal cultural citizenship may be distinct from Canadian citizenship, this does not preclude membership of Aboriginal peoples in Aboriginal communities and in Canada. Indeed, many if not most people self-identify

[3] David Smith provides a classification of various characteristics of citizenship, including imperial, legislative, social, cultural, legal and global aspects. While Smith notes the fluid, interpretative nature of his indices, it should be emphasized that it is arguably not possible, nor is it wise, to separate too distinctly different aspects of Aboriginal citizenship. See generally David E. Smith, "Indices of Citizenship," in Pierre Boyer, Linda Cardinal and David Headon, eds., *From Subjects to Citizens: A Hundred Years of Citizenship in Australia and Canada* (Ottawa: University of Ottawa Press, 2004) 19 at 21.

with different citizenships or cultural group memberships, and thus Aboriginal citizenship and Canadian citizenship do not need to be considered mutually-exclusive. Instead, some may consider themselves to be members of different cultural communities, and as such, may define themselves as Aboriginal-Canadian, French Canadian, Irish-Canadian, Scottish-Canadian, African-Canadian, Chinese-Canadian, Italian-Canadian, Iranian-Canadian and so forth.

In this broader cultural context, Canada is known worldwide for its multicultural heritage and wide-ranging legal and policy provisions that accommodate different cultures, ethnic groups, religious communities and others. In fact, other countries often examine Canada's system in order to identify some form of workable solution to various inter-group tensions. Canada's multicultural history is long and storied, the details of which are far too complex and multifaceted to be effectively recounted here. However, more contemporary iterations or depictions of multiculturalism in Canada hold importance for current attempts to achieve Aboriginal reconciliation, in part because Canada is defined by the many groups and communities that live within its borders, and thus the interests of many groups must be considered and balanced. Will Kymlicka argues that "cultural identity provides an 'anchor for self-identification and the safety of effortless secure belonging.' But this in turn means that people's self-respect is bound up

with the esteem in which their national group is held. If a culture is not generally respected, then the dignity and self-respect of its members will also be threatened."[4]

Perhaps more importantly, multiculturalism holds significance for many Aboriginal peoples because it is considered to be intrinsically linked with ethnicity and the recognition of minority cultures. For instance, Aboriginal peoples have many of the characteristics that distinguish minority groups from the dominant Canadian population: distinct histories, languages, cultural and religious practices and social norms. Other characteristics, however, make Aboriginal peoples very distinct from minority groups in Canada, and in fact, these unique characteristics are foundational to Aboriginal identity. Indeed, most Aboriginal communities are adverse to the label of "minorities." This aversion is rooted in historical justifications as well as in contemporary Aboriginal objectives to secure various political and legal rights. Many Aboriginal peoples consider the designation of "minorities" as potentially undermining Aboriginal identities. There is concern expressed by many Aboriginal peoples that a designation of "minority" ultimately reduces Aboriginal claims and more expansive rights. Such designation amounts to a categorization of Aboriginal peoples as "mere components of the states claiming unqualified sovereignty over them."[5] Patrick Macklem summarizes this contention well:

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[4] Will Kymlicka, *Multicultural Citizenship* (Toronto: Oxford University Press, 1995) at 89 [Kymlicka].
[5] Richard Spaulding, "Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective" (1997) 47:1 U.T.L.J. 35 at 37.

> One weakness associated with invoking the value of minority cultural protection...is that this characterization runs the risk of reducing Aboriginal claims to those of minority claims. In the forceful words of the International Indian Treaty Council, "[t]he ultimate goal of their colonizers would be achieved by referring to Indigenous peoples as minorities." Normatively grounding a right of governance in international principles respecting the rights of minorities would ignore important historical and contemporary differences between Aboriginal peoples and other cultural minorities in Canada, namely, that Aboriginal peoples lived on, occupied, and exercised sovereign authority over, the North American continent prior to European contact.[6]

The Importance of Prior Occupancy, Prior Sovereignty and Aboriginal Treaties

These issues reflect a larger, contentious theoretical debate surrounding Aboriginal identities, particularly whether Aboriginal communities constitute nations.[7] While most Aboriginal peoples contend that they are indeed nations, critics of expanded Aboriginal rights are often apt to argue for only limited "special" rights, largely in line with those accorded visible minority groups, immigrant groups and sexual minorities, amongst others. Some of the most well-known opposition is associated with Tom Flanagan, Melvin Smith, and Frances Widdowson and Albert Howard. In *First Nations? Second Thoughts* Flanagan challenges what he calls an "Aboriginal orthodoxy," which he argues unjustifiably recognizes Aboriginal peoples as nations and as entitled to "special treatment" based on prior occupation. He argues that this recognition of difference has

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[6] Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995-1996) 21 Queen's L.J. 173 at 213 [Macklem].

[7] For further discussion, see Jennifer E. Dalton, "Expansion of the Canadian *Polis*: Replicating International Legal Norms of Indigenous Self-Determination in the Canadian Context," in Sean P. Hier and B. Singh Bolaria, eds., *Race and Racism in 21st Century Canada: Continuity, Complexity, and Change* (Peterborough: Broadview Press Ltd., 2007) 313; Jennifer E. Dalton, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21:1 Can. J. Law & Society 11 [Dalton].

ultimately led to Canadian government policies that somehow maintain Aboriginal disadvantage through capitalizing on difference, while keeping power in the hands of a small elite. His is essentially an assimilationist argument, presented under the guise of concern for full and equal Aboriginal participation in Canadian society, which he asserts can only be obtained through similar treatment, not "special rights."[8] In *Our Home or Native Land? What Governments' Aboriginal Policy is Doing to Canada* Melvin Smith refers to an "industry" around the claims of "special rights" for Aboriginal "minorities," which he characterizes as a waste of money.[9]

Widdowson and Howard have put forward similar arguments, most recently in *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation.* However, the authors contend that Aboriginal disadvantage continues in Canada primarily because of an "industry" which entrenches the very problems it supposedly seeks to remedy through land claims and governance provisions. Couched in terms of greed and avarice, the authors portray current land claim and governance policies, supposedly aimed at alleviating Aboriginal disadvantage, as serving only to

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[8] See generally Tom Flanagan, *First Nations? Second Thoughts* (Montreal & Kingston: McGill-Queen's University Press, 2000).
[9] See generally Melvin Smith, *Our Home or Native Land? What Governments' Aboriginal Policy is Doing to Canada* (Victoria: Crown Western, 1995).

financially sustain legal and policy actors, ultimately to the detriment of Aboriginal peoples.[10]

Underlying the contentions of these critics is a denial of the differences that exist between ethnic minority groups and Aboriginal peoples in Canada. It is contended here that Aboriginal peoples are indeed markedly different from any other group in Canada because they are the original occupants of what is now Canada, they lived on the land according to their own laws, governance and practices, they functioned as sovereigns over their lands, and were treated as such by the newcomers. These claims of prior occupancy, prior sovereignty as well as the existence of treaties combine to form the distinct and unique position of Aboriginal peoples in Canada, a position that is crucial in defining Aboriginal nationalism, and which in turn arguably impacts Aboriginal engagement in legal and political institutions.

A claim of prior occupancy asserts that "a prior occupant of land possesses a stronger claim to that land than subsequent arrivals."[11] As noted in Chapter Two, in *Van der Peet* the Supreme Court of Canada held that Aboriginal peoples occupied the land, lived in communities and participated in distinctive cultures for centuries before the earliest Europeans arrived. This fact "separates aboriginal peoples from all other minority groups in Canadian society and...mandates their special legal, and now

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[10] See generally Frances Widdowson and Albert Howard, *Disrobing the Aboriginal Industry: The Deception Behind Indigenous Cultural Preservation* (Montreal & Kingston: McGill-Queen's University Press, 2008).
[11] Macklem, *supra* note 6 at 180.

constitutional, status."[12] Ultimately, the claim of prior occupancy bolsters Aboriginal peoples' claim to territorial rights and their lands.[13] Equally important, it serves to demonstrate a significant difference between Aboriginal peoples and minority groups in Canada, while simultaneously forming an important part of Aboriginal identities.

A claim of Aboriginal prior sovereignty, or sovereign authority over the land, assumes occupancy as a crucial underlying element in addition to jurisdictional authority over the land, resources and people therein. As a result, prior sovereignty arguably provides greater support for the assertion of Aboriginal rights that are more expansive in nature than those provided to minority groups in Canada.[14] Moreover, this historical sovereign authority is directly related to the deep, spiritual connections that Aboriginal peoples have with their traditional lands. While most cultural minority groups have strong bonds to their traditional homelands, Aboriginal peoples

> have unique spiritual relationships with ancestral territories that transcend particular cultural customs, practices, and traditions that may be engaged in by communities on ancestral land. ... Although Aboriginal systems of belief are diverse, Aboriginal relationships with land are often structured by beliefs that manifest an overarching spiritual responsibility to protect, nurture, and cherish the earth as the giver of life.[15]

The significance of this point for Aboriginal peoples lies in the general difference in the type of connection that Aboriginal peoples have with their ancestral lands, a

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[12] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 30 [*Van der Peet*].
[13] See Macklem, *supra* note 6 at 180, 183; *Van der Peet*, *ibid.* at para. 30; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 376-369; *Calder v. A.G.B.C.*, [1973] S.C.R. 313 at 375.
[14] For further discussion see Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1992-1993) 45 Stan. L. Rev. 1311 at 1334.
[15] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 102.

difference that is more than a cultural, political or emotional attachment. This is certainly not meant to minimize the connections of minority groups to their traditional homelands, but rather, to demonstrate that the spiritual connection that most Aboriginal peoples in Canada have with their lands is more holistic, informing many other aspects of their identities. This Aboriginal attachment is rooted in history before European settlement, during which time Aboriginal peoples exercised sovereign authority, akin to a form of stewardship, over the land.[16] The fact that the Canadian state was established on Aboriginal ancestral lands is distinctive, as is Canadian judicial recognition of the unique nature of Aboriginal title. In *Delgamuukw*, the Supreme Court of Canada held that "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests."[17]

The existence of treaties also represents a crucial difference between Aboriginal peoples and minorities in Canada. Treaties, treaty-making and modern-day land negotiations are generally linked to claims of prior occupancy and prior sovereignty. They are based on the earliest negotiations between Aboriginal peoples and the early European settlers in Canada. These treaties were originally considered agreements

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[16] For further discussion on Aboriginal authority, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 13-16 [Borrows].
[17] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 115 [*Delgamuukw*]. For further discussion, see Borrows, *ibid.* at 104.

between nations or sovereign peoples, at least from the perspective of most Aboriginal peoples involved. The *two-row wampum* approach depicts the nation-to-nation bargaining process that took place and describes succinctly the ways in which Aboriginal peoples negotiated with the Crown and early European settlers.[18] The historical treaty-making process between Aboriginal peoples and the Crown

> reflected and constructed a relationship of equality between Aboriginal nations and European newcomers, wherein European powers respected the political autonomy of their North American Indigenous counterparts, and sought to formalize principles of peaceful co-existence. Aboriginal people view the historic treaties that emerged from this process as authorizing the sharing of territory and affirming continued Aboriginal self-governing authority.[19]

Modern agreements and efforts at negotiations are rooted in Aboriginal difference and the goal of achieving Aboriginal reconciliation. No other group in Canada can assert their rights based on these forms of historic or contemporary agreements.

The Significance of Societal Culture

Assertions of prior occupancy, prior sovereignty and the existence of treaties reflect the very different nature of Aboriginal societal cultures vis-à-vis ethnic minorities in Canada. Indeed, the Supreme Court of Canada has acknowledged the existence of pre-

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[18] For further discussion, see Darlene Johnston, "The Quest of the Six Nations Confederacy for Self-Determination," in S. James Anaya, ed., *International Law and Indigenous Peoples* (Burlington, VT: Dartmouth, 2003) 85; *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1039-1040; *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 548-549, wherein Marshall C.J. emphasized the British policy of considering Aboriginal peoples as nations.

[19] Macklem, *supra* note 6 at 191.

contact Aboriginal legal systems and the role they played in defining Aboriginal societal cultures.[20]

An alternative perspective, which reflects the role of societal culture in defining minorities and peoples is offered by Will Kymlicka, whose theories pertain primarily to minorities and minority-based rights. In the context of Canadian multiculturalism, he presents an important differentiation between *ethnic minorities* and *national minorities*. For Kymlicka, ethnic minorities are immigrants with various different cultures who have left their own countries to come to Canada. National minorities, such as the Québécois and Aboriginal peoples in Canada, are "distinct and potentially self-governing societies incorporated into a larger state." National minorities have "[t]he capacity and motivation to form and maintain... a distinct culture [which is] characteristic of 'nations' or peoples' (i.e. culturally distinct, geographically concentrated, and institutionally complete societies)."[21] For Kymlicka, a nation refers to "a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture. A 'nation' in this sociological sense is closely related to the idea of a 'people' or a 'culture'."[22] By extension, a societal culture is "a culture which provides its members with meaningful ways of life across the full range of human activities,

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[20] *Delgamuukw*, *supra* note 17 at 1099-1100.
[21] Kymlicka, *supra* note 4 at 19, 80.
[22] *Ibid.*, at 11. For further detail on multination and polyethnic states, see Will Kymlicka, "Liberalism, Ethnicity, and the Law," paper presented at the *Legal Theory Workshop Series*, WS 1988-89 no. 2, Faculty of Law, University of Toronto, Toronto, Ontario, October 14, 1988 at 1-5.

including social, educational, religious, recreational, and economic life, encompassing both public and private spheres. These cultures tend to be territorially concentrated, and based on a shared language."[23]

Notably, Kymlicka cites four beneficial purposes that the language of nationalism serves for Aboriginal peoples. First, he argues that such terminology provides Aboriginal peoples with some standing, and perhaps some legal rights, within the realm of international law. Second, the language of nationhood allows for an historical dimension to be applied to Aboriginal groups and their corresponding claims. Third, in using the terms "nation" and "nationhood" Aboriginal peoples are able to differentiate their claims from those made by other groups. Finally, a larger function of the language of nationalism is that it tends to equalize the bargaining power between Aboriginal groups and the majority population.[24]

Yet, it is significant that Kymlicka still labels all groups as some form of "minority" if they are not part of the traditional dominant population. His classification neglects to consider fully the extent to which ethnic minorities and national minorities are distinctive, and thus restricts Aboriginal identity to "minority group status," undermining the credibility of Aboriginal peoples to define themselves. The very fact that most

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[23] Kymlicka, *supra* note 4 at 76.
[24] *Ibid.*, at 131-132.

Aboriginal peoples consider themselves distinct from ethnic minority groups is an important component that should inform Aboriginal identity.[25]

The RCAP Conception and the Irrelevance of Hereditary Biology

The RCAP provides a more expansive conception of Aboriginal nationhood with the basic premise that Aboriginal peoples are nations vested with a right of self-determination, including the right to self-identify as Aboriginal and exercise power over community membership.[26] Issues of identity and culture are clarified further as follows:

> By Aboriginal nation, we mean a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories. There are 60 to 80 historically based nations in Canada at present, comprising a thousand or so local Aboriginal communities.
>
> The more specific attributes of an Aboriginal nation are that the nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland; it is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and it constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.[27]

However, there are some notable problems with the RCAP conception. For instance, the classification of 60 to 80 Aboriginal nations is noted as being historical in nature, and thus does not take into account that some Aboriginal communities no longer exist as

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[25] For example, see Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (New York: Oxford University Press, 1998) at 127-146; Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (New York: Oxford University Press, 2001) at 28-32, 152-176, 229-234, 242-253, 275-289. Further discussion is provided in Leighton McDonald, "Regrouping in Defence of Minority Rights: Kymlicka's *Multicultural Citizenship*" (1997) 34:2 Osgoode Hall L.J. 291 at 296-306.
[26] RCAP, *supra* note 1, Vol. 2, Part 1, Chapter 3.
[27] *Ibid.* at 72, 90.

political entities. The RCAP depiction does not appear to consider the historical, contemporary or developmental differences that exist between different Aboriginal communities. At the same time, it does not support extensive rights for communities deemed too small.

Additionally, the RCAP conception does not seem to consider the effects of the *Indian Act*[28] on "Indian status" and band membership restrictions. Notably absent from the RCAP definition of nations is any reliance on race or blood quantum, factors which have been used historically and continue to be apparent in the "registered Indian Status" and band membership provisions of ss. 5-17 of the *Indian Act*. While the exclusion of race or blood quantum is arguably a positive aspect of the RCAP conception, the impact of the relevant *Indian Act* provisions on First Nations identity and membership is still applicable. The debate over these sections and indeed contentions over the continued existence of the *Indian Act* itself are too extensive and complex to discuss at any length within the confines of this research endeavour. While Aboriginal community membership is relevant to any debate on Aboriginal citizenship, the discussion presented herein is intended to be theoretical and normative rather than based on a doctrinal legal analysis. However, it is important to clarify that primary reliance on biological factors undermines the right of Aboriginal peoples to determine their own community

[28] *Indian Act*, R.S.C. 1985, c. I-5.

membership through the imposition of external standards of citizenship and membership requirements.[29]

The Role of International Law[30]

Similar membership issues are reflected in global considerations of Aboriginal peoples and Aboriginal rights. In fact, the debate over whether Aboriginal peoples constitute nations or minorities has frequently taken place in the international legal arena, and these global considerations hold relevance for Canada. Canada is both a member of the United Nations and a signatory to the *Charter of the United Nations* and relevant international covenants, such as the *International Covenant on Civil and Political Rights*

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[29] There can be internal community conflict over membership, and the individual rights of disadvantaged community members may be at odds with the authority of the community to determine membership. One example which illustrates this clash of rights involves the gender discrimination suffered by many First Nations women under section 12(1)(b) of the *Indian Act*, which stipulated that First Nations women would lose their registered status if married to a non-First Nations man and none of her children would have registered status. The same restriction was not placed on registered First Nations men, and in fact, where First Nations men married non-First Nations women, the women would gain status as would any of their children. Ultimately, the results of this provision included exclusion and ostracism of many First Nations women from their communities as well as the loss of accommodation or employment rights and the loss of many rights simply associated with being a "status Indian." However, in 1981, the United Nations Human Rights Committee in *Lovelace* found that the Canadian government was in breach of article 27 of the *International Covenant on Civil and Political Rights* due to the discrimination incurred by Sandra Lovelace and other First Nations women under section 12(1)(b). This decision helped lead to the introduction and implementation of Bill C-31, the purpose of which was to reinstate First Nations status for those who had lost it under section 12(1)(b). However, Bill C-31 had the effect of increasing the financial burden of many First Nations communities, and some ultimately protested the reinstatement of status for those members who previously had been excluded. For further commentary, see Russel Lawrence Barsh, "Political Recognition: An Assessment of American Practice," in Paul L. A. H. Chartrand, ed., *Who are Canada's Aboriginal Peoples?: Recognition, Definition, and Jurisdiction* (Saskatoon, Saskatchewan: Purich Publishing Ltd., 2002) 230 at 232, 240-241, 243, 244.

[30] An earlier version of the discussion in this section appeared in Jennifer E. Dalton, "Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21:1 Can. J. Law & Society 11 at 25-28, Can. J. Law & Society/Revue Canadienne Droit et Société, Copyright © 1992-2010 University of Toronto Press Incorporated, www.utpjournals.com.

(*ICCPR*)[31] and the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*).[32] Most notably, Article 1 is identical in both the *ICPPR* and the *ICESCR*, and deals with the right of self-determination of *peoples*, or nations:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

In the *Concluding Observations* of the United Nations Committee on Economic, Social and Cultural Rights[33] (CESCR) and the United Nations Human Rights Committee[34] (HRC) in December 1998 and March 1999 respectively, Canada implicitly recognized Aboriginal peoples as nations. At the time, these two committees had undertaken analyses of Canada's human rights record with regard to Aboriginal peoples. While previous assessments had occurred, this was the first time that the CESCR and HRC had applied article 1 of both the *ICESCR* and the *ICCPR* to Aboriginal peoples in Canada.

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[31] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).
[32] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 999 U.N.T.S. 3 (entered into force January 3, 1976).
[33] United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, 57th Session, UN Doc. E/C.12/1/Add.3.1 (1998).
[34] United Nations Human Rights Committee, *Concluding Observations on Canada*, UN HRCOR, 65th Session, CCPR/C/79/Add.105 (1999).

This application was significant because it employed usage of the term "peoples," akin to nations,[35] as follows:

> The Committee notes that, as the State Party acknowledged, the situation of the Aboriginal peoples remains "the most pressing human rights issue facing Canadians." In this connection, the Committee is particularly concerned that the State Party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). *With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of Aboriginal self-government will fail, the Committee recommends that the right of self-determination requires,* inter alia, *that all peoples must be able to freely dispose of their natural wealth and resources* and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation.[36]

Additionally, Canada's role in the development of two international declarations on the rights of Indigenous peoples demonstrates further that Aboriginal nations are distinct from ethnic minority groups. These include the Organization of American States (OAS) and the *United Nations Declaration on the Rights of Indigenous Peoples* (*Declaration*).[37] Within the OAS, the Inter-American Commission on Human Rights approved the *Proposed American Declaration on the Rights of Indigenous Peoples*[38] in

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[35] For further discussion, see Andrew Orkin and Joanna Birenbaum, "Aboriginal Self-Determination within Canada: Recent Developments in International Human Rights Law" (1999) 10:4 Const. Forum Const. 112 at 114.

[36] *Ibid.* By extension, there is continuing debate over whether Indigenous peoples have a right of self-determination normally associated with "nations" under international law. While various states including Canada are gradually supporting some internal form of self-determination powers for Indigenous populations, this right has not yet been formally recognized under international law, and a consensus amongst states has not yet been achieved. For further analysis of this ongoing debate, see Erica-Irene Daes, "The Right of Indigenous Peoples to 'Self-Determination' in the Contemporary World Order" in Donald Clark & Robert Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin's Press, 1996) 47 at 55.

[37] *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, September 17, 2007.

[38] Organization of American States, *Proposed American Declaration on the Rights of Indigenous Peoples*, Reg. Ses. 95 (1997).

February 1997, which is currently undergoing further examination at the request of the OAS General Assembly.[39] The *Declaration* is more ambitious and less "integrationist,"[40] and in particular, Article 3 states that "Indigenous 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." This global recognition of Aboriginal peoples and more expansive rights, especially the right to determine political status, sets Aboriginal peoples apart significantly from ethnic minorities. Despite the subsequent refusal of the Canadian federal Conservative government under Prime Minister Harper to support the *Declaration*,[41] its international reach and high degree of global acceptance point to the distinctiveness of Aboriginal nations far beyond traditional conceptions of ethnic minorities. Moreover, given the substantial public and political outrage expressed at Canada's vote against the *Declaration*, including by the other political parties represented in the House of Commons,[42] it is arguable that

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[39] Joanna Harrington, "Canada's Obligations under International Law in Relation to Aboriginal Rights," paper presented at the *Pacific Business & Law Institute*, Ottawa, Ontario, April 28-29, 2004 at 16.
[40] *Ibid.*
[41] Canada was one of only four countries to vote against the adoption of the *Declaration*, joined by the United States, Australia and New Zealand. Eleven abstentions were counted while the remaining 144 member countries voted in support.
[42] For example, see "Canada votes 'no' as UN native rights declaration passes," CBC News, September 17, 2007, online: http://www.cbc.ca/canada/story/2007/09/13/canada-indigenous.html; "Tories defend 'no' in native rights vote," Montreal Gazette, September 14, 2007, online: http://www.canada.com/montrealgazette/news/story.html?id=5a03839b-6ee5-4391-8cd8-fe9338ac7baf; Liberal Party of Canada, *Aboriginal Affairs Resolutions*, Resolution 75 (2009), online: http://www.liberal.ca/pdf/docs/convention09_aboriginal_e.pdf; New Democratic Party of Canada, *Aboriginal Platform 2008* (New Democratic Party of Canada, 2008), online: http://xfer.ndp.ca/campaign2008/Aboriginal_Platform_2008_EN.pdf at 7; Bloc Québécois, "The

subsequent governments are likely to return to the former support of the *Declaration* for which Canada was known.

CITIZENSHIP AND IDENTITY: SEEKING ABORIGINAL RECONCILIATION THROUGH ENGAGEMENT

In light of the discussions above and in the preceding chapters, especially those concerning the historical discrimination faced by Aboriginal peoples in Canada, it is little wonder that Aboriginal peoples so frequently feel detached or alienated from the rest of Canada. Aboriginal nationalism, as a Canadian political manifestation, found its primary impetus in response to the federal government's 1969 White Paper, a contentious policy which sought assimilation, partly through the protection of individual rights, while discrediting any notion of group-based or community Aboriginal rights.[43] Subsequent to this government policy release, Aboriginal peoples across the country united as a formidable collectivity to "craft an ideology of opposition which rejected the dominant political ethos and the place of Aboriginal people within it."[44]

However, Aboriginal communities have existed as peoples and as nations since time immemorial, thereby attesting to the existence of more wide-ranging Aboriginal nationalism long before the earliest European contact, and yet a majority of so-called

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government's refusal to ratify the Declaration puts Canada to shame," Press Release, May 1, 2008, online: http://www.blocquebecois.org/archivage_com_lemaylevesques_droitsautochtones_anglais080501.pdf.

[43] Canada, *Statement of the Government of Canada on Indian Policy* (Ottawa: Minister of Indian Affairs and Northern Development, 1969).

[44] Radha Jhappan, "Inherency, Three Nations and Collective Rights: The Evolution of Aboriginal Constitutional Discourse from 1982 to the Charlottetown Accord" (1993) 7-8 Int'l J. of Can. Studies 225 at 232.

"conventional" academic research contradicts this conception of Aboriginal nationalism. Most scholarly work roots Aboriginal nationalism in a western Eurocentric tradition, having developed alongside the values of the Enlightenment period. For example, Gerald Alfred focuses much of his work on "native nationalism," but he looks primarily at the militancy that has developed amongst Aboriginal peoples in Canada since the 1960s and 1970s as a response to increasing awareness of and mobilization against imposed colonial institutions and structures.[45] Similarly, Jane Jenson focuses on Aboriginal nationalism as a social movement, defined by self-identification, association and the assertion of corresponding rights. This contemporary iteration is presented as a response to historical discrimination, but with a primary focus on current or recent attempts at rights recognition in a broader context of collective identities and political power struggles.[46]

In these depictions, the specific development of Aboriginal nationalism is interpreted as resulting *from* European contact, settlement and proliferation of western ideals, but these conceptions arguably do not sufficiently consider Aboriginal nationalism as consisting of political identities that also existed *prior to* colonialism. Instead, the distinctiveness of Aboriginal nationalism is overlooked; Aboriginal nationalism is treated solely as a *defensive response* to the imposition of western Eurocentric norms, not as

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[45] Gerald Alfred and Lana Lowe, *Warrior Societies in Contemporary Indigenous Communities*, submitted to the Ipperwash Inquiry (Toronto: Govermment of Ontario, 2005) at 35-37. See generally Gerald Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Toronto: Oxford University Press, 1995).

[46] Jane Jenson, "Naming Nations: Making Nationalist Claims in Canadian Public Discourse" (1993) 30 Can. Rev. Soc. & Anthr. 337.

"nationalisms unto themselves."[47] Kiera Ladner's response as an Aboriginal woman and scholar is especially notable: "What I have experienced and observed are nationalisms, contemporary expressions of social, cultural and political identities that have a long history independent of the western Eurocentric experience. To name this experience otherwise is to deny the existence and history of Aboriginal nationalism."[48]

However, this does not mean that Aboriginal nationalism has not also evolved and developed in response to colonialism and discrimination. Aboriginal nationalism stems in part from contested citizenship rooted in historical colonialism and forced assimilation. Indeed, in any discussion of nationalism, particularly sub-state nationalism involving ethnic minority groups or non-majority communities, alienation is almost always an attendant factor. In other words, where nationalism exists, the "minority" group or groups in question almost always consider themselves to be excluded or in some way separate or unique from the dominant population. This difference is often historically rooted, with community members united by common ethnicity, cultural and spiritual norms, practices, and experiences and by language. Alienation is at once an offshoot of Aboriginal difference and part of the driving force behind many Aboriginal communities' desire to maintain distinctiveness from the mainstream culture. This is where Aboriginal nationalism arguably maintains its core.

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[47] For further discussion, see Kiera L. Ladner, "Women and Blackfoot Nationalism" (2000) 35:2 J. of Can. Studies 35 at 35-36.
[48] *Ibid.* at 36.

In light of the two broader influences of Aboriginal nationalism and alienation, it seems abundantly clear that, together, they underscore crucial components of Aboriginal disengagement. Further still, the preceding discussions illuminate the importance of achieving Aboriginal reconciliation in order to bridge the significant gaps that exist between Aboriginal peoples and the rest of Canada. Engagement can be effective in promoting this task. More broadly, a theoretical framework that recognizes and respects Aboriginal difference, distinct identities and Aboriginal nationhood is more likely to promote reconciliation. Such a framework serves the purpose of fighting Aboriginal alienation through respectful inclusion, while fostering greater societal cohesiveness and respecting Aboriginal nationalism. Aboriginal engagement arguably provides potential opportunities to utilize these objectives. An examination of those aspects which speak to such a theory is the task in the remainder of this chapter.

Recognition of Diversity or Shared Identities: What Constitutes Meaningful Aboriginal Reconciliation?

An important theoretical starting point in this regard is liberal democratic theory. Robert Groves situates liberalism at the centre of Canadian democracy:

> Canada is styled as a liberal democracy, reflecting a vision of representative and responsible government, equality of citizenship and the protection of individual liberties, both in property and in relations with the state, as its most fundamental norms. The core value of this tradition is to be found in a particular view of how "equality" constitutes "justice."[49]

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[49] Robert Groves, *Urban Aboriginal Governance in Canada: Re-Fashioning the Dialogue* (Ottawa: National Association of Friendship Centres and Law Commission of Canada, 1999) at 27.

However, there are many different theoretical conceptions of democratic liberalism, and thus there are necessarily different conceptions of what "equality" and "justice" entail, especially with regard to citizenship. At the heart of liberal democratic theory is an emphasis on individual rights or the primacy of the individual. Along this vein, Margaret Moore maintains that democratic liberalism promotes the dominance of a single culture to the detriment of disadvantaged groups, communities or cultures, such as Aboriginal peoples, and thus is not suited to regulate diversity, especially in view of Canada's multicultural make-up.[50] This critique touches the very edge of a much larger liberal-communitarian debate, one in which citizenship, diversity and shared identities share the spotlight.

After the Second World War an approach of "benign neglect" or neutrality towards all groups regardless of ethnic or racial background permeated the practice of liberalism in western democracies. Priority was placed on the stability or well-being of nations with the rights of disadvantaged minorities set at a distance. This form of liberalism is known, more generally, as procedural liberalism or neutral liberalism. Changes began to occur during the 1960s and 1970s when increasing demands were made to recognize the distinct character of various ethnic and cultural groups. More recently, especially since the successful South African transition from apartheid to

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[50] Margaret Moore, "Citizenship and Diversity," in Ronald Beiner and Wayne Norman, eds., *Canadian Political Philosophy: Contemporary Reflections* (Oxford: Oxford University Press, 2000) 177 at 177.

democracy in the 1990s, the "politics of reconciliation" has increased in prevalence. In some of Kymlicka's most recent work, he and Bashir Bashir present the "politics of reconciliation" alongside the "politics of difference," noting that the latter has also seen dramatic increases reflected in the increasing pluralism of democratic citizenship.[51] While historically considered as separate phenomena, the authors assert that they are increasingly occurring in tandem, and ultimately this has provided "greater opportunity for historically marginalized groups to be recognized and heard, to have their legitimate interests and identities respected, and to contest inherited practices, rules, and narratives that exclude or disadvantage them."[52] Specifically applied to Aboriginal reconciliation in Canada, these two themes reflect the desire of many Aboriginal peoples to be recognized and accepted in Canada, while still maintaining their distinct identities, histories and cultures as nations.

The politics of difference represents a greater awareness of cultural pluralism. When viewed alongside the objective of reconciliation, greater appreciation is cultivated concerning the disharmonies that often exist in multination states and the corresponding need to create a respectful, inclusive society that is accepting of difference and

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[51] Bashir Bashir and Will Kymlicka, "Introduction: Struggles for Inclusion and Reconciliation in Modern Democracies," in Will Kymlicka and Bashir Bashir, eds., *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 1.
[52] *Ibid.* at 2.

diversity.[53] Charles Taylor argues for a similar place for Aboriginal peoples *within* Canadian society with his conception of *deep diversity*. Taylor contrasts this ideal with "first-level diversity," which accepts diversity through multiculturalism, but is usually accompanied by support for the *Charter* and its liberal ideals, without significant emphasis on cultural or group difference.[54] In contrast, Taylor argues the following:

> To build a country for everyone, Canada would have to allow for second-level or "deep" diversity, in which a plurality of ways of belonging would also be acknowledged and accepted. Someone of, say, Italian extraction in Toronto or Ukrainian extraction in Edmonton might indeed feel Canadian as a bearer of individual rights in a multicultural mosaic. His or her belonging would not "pass through" some other community, although the ethnic identity might be important to him or her in various ways. But this person might nevertheless accept that a Québécois or a Cree or a Dene might belong in a very different way, that these persons were Canadian through being members of their national communities. Reciprocally, the Québécois, Cree, or Dene would accept the perfect legitimacy of the "mosaic" identity.[55]

There is an underlying similarity between the theories of Taylor and Kymlicka with respect to Aboriginal peoples: Kymlicka argues for recognition of their distinctness, along with respect and support for their cultural differences. For Kymlicka, this "station of difference" is entirely workable, if not completely necessary, within a liberal multination state such as Canada. Aboriginal peoples comprise a national minority, and

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[53] For further discussion, see Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1991) at 213; Charles Taylor, *Multiculturalism and the Politics of Recognition: An Essay* (Princeton, New Jersey: Princeton University Press, 1992) at 49-50, 56, 57-61, 68-69.

[54] Charles Taylor, *Reconciling the Solitudes: Essay on Canadian Federalism and Nationalism* (Kingston & Montreal: McGill-Queen's University Press, 1993) at 182-183 [Taylor]. For further discussion, see generally Charles Taylor, *The Malaise of Modernity*, The Massey Lectures Series (Concord, Ontario: Anansi, 1991) at 17-19; Charles Taylor, "Can Liberalism be Communitarian?" (Spring 1994) 8:2 Critical Review 257 at 257-258; Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate," in Nancy Rosenblum, ed., *Liberalism and the Moral Life* (Cambridge: Harvard University Press, 1989) 160 at 160.

[55] Taylor, *ibid.* at 183.

as such they deserve to hold a special place within Canadian society. For Taylor, although he is a communitarian theorist and approaches the question of citizenship and belonging from a different standpoint, namely deep diversity, his ultimate goal is the same: recognition of the different cultural belongings of Aboriginal peoples.

However, a common objection to deep diversity and the recognition of difference is that expansive rights for certain groups can work against social unity or civic integration. In the specific context of Aboriginal peoples in Canada, Alan Cairns is one of the most well-known theorists who raises the importance of societal cohesiveness, including concerns over the potentially-divisive impact of nationalism on such unity. His theory extends beyond traditional conceptions of liberalism to embrace what he calls "citizens plus," a now-famous term applied to explain the place of Aboriginal peoples *as part of* Canadian society, but with special recognition of Aboriginal distinctiveness. Cairns envisions expansive rights for Aboriginal peoples, especially through governance and autonomy, as evidenced in the following quotation:

> Aboriginal constitutional policy needs to be sensitive to two fundamental facts: First, it applies to a particular category of peoples whose previous history has set them apart and generated, in the contemporary era, varying degrees of nationalist self-consciousness and particularistic identities. Some response to the specificity of Aboriginal peoples – including some degrees of recognition, and where appropriate some self-governing powers – is essential. Aboriginal peoples of the future, accordingly, will not be standard Canadians, although individuals may choose to be so if they wish. Second, the future of Aboriginal peoples lies inside, not outside the Canadian state. Independence is not a realistically available option. Hence, the policy response to Aboriginal peoples must

> include some conception of a common citizenship – some way in which we relate to each other as more than strangers.[56]

Most notable is the emphasis that Cairns places on "shared identity." In this sense, Cairns' theory respects the differences that exist between Aboriginal peoples and the rest of Canada, but importance is attached to the presence of a shared overarching culture with which *all* Canadians should ideally identify.

In keeping with Cairns' conception of "citizens plus," Melissa Williams notes that it is often asserted

> that meaningful democratic citizenship requires that citizens share a subjective sense of membership in a single political community. This sense of shared membership, theorists argue, constitutes a distinctive identity, that is, it partially constitutes individuals' understandings of who they are. Political membership is internalized as an affective bond to the political community and its other members.[57]

In other words, citizens need to share a common identity in order to function fully as members in society. Williams further explains the liberal argument for shared identity amongst citizens by noting two general liberal ends: distributive justice and political stability. The first refers to the notion that in a country where citizens see themselves as holders of a similar identity each can see the needs of others as part and parcel of the overall good of the whole. Consequently, each is willing to make the necessary sacrifices for the good of others and the notion of distributive justice is supported. However,

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[56] Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 90.

[57] Melissa S. Williams, "Citizenship as Identity, Citizenship as Shared Fate, and the Functions of Multicultural Education," in Kevin McDonough and Walter Feinberg, eds., *Citizenship and Education in Liberal-Democratic Societies: Teaching for Cosmopolitan Values and Collective Identities* (Oxford: Oxford University Press, 2006) 208.

Williams also notes the difficulty in promoting citizenship as a common identity, wherein groups that do not "integrate" or conform to the norm are marginalized, which could ultimately lead to increased instability. She offers an alternative theory based on *citizenship as shared fate*, referring to the various relationships that join people and communities. Williams describes shared fate as a "web" in which individuals shape the lives of others: "What connects us in a community of shared fate is that our actions have an impact on other identifiable human beings, and other human beings' actions have an impact on us."[58] This concept emphasizes the interdependencies that exist between people in that their "futures are bound to each other," whether institutionally or materially. In this way, certain groups are not held in privileged positions within society, and individuals are able to hold membership in several cultural groups, if so desired. As a result, the disadvantage that is faced by cultural groups is alleviated because shared fate allows for differentiation and co-operation, ultimately placing everyone on an equivalent footing; relations between people focus on the "norms of egalitarian reciprocity and respect for individual freedom."[59] In this respect, Williams' theory is more expansive than what could be described as the more "integrationist" approach of Cairns.

John Borrow's conception of "landed" citizenship shares some similarities with the theories of Cairns and Williams. Indeed, as an Aboriginal scholar, his approach arguably holds some needed authenticity and legitimacy for a discussion on Aboriginal

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[58] *Ibid.* at 229.
[59] *Ibid.* at 229-233.

identities and citizenship. Of particular note is the twofold nature of his work, which simultaneously advocates for the recognition of unique Aboriginal legal traditions[60] alongside incorporation of Aboriginal and non-Aboriginal legal norms. He asserts that colonialism and discrimination have had the broad impact of making Aboriginal peoples "uncertain citizens."[61] However, the seeming contradiction in his work is tempered by the fact that Borrows is careful to emphasize the fact that Aboriginal peoples and cultures are not static, but rather fluid and evolutionary. More importantly, he advocates for the inclusion of Aboriginal norms and practices into Canadian society so that mainstream values are impacted by and imbued with a new sense of Aboriginality. He describes this unique proposal as follows:

> Aboriginal people must transmit and use their culture in matters beyond "Aboriginal" affairs. Aboriginal citizenship must be extended to encompass other people from around the world who have come to live on our land.
>
> After all, this is *our* country. Aboriginal people have a right and a legal obligation as a prior but ongoing indigenous citizenship to participate in its changes. We have lived here for centuries, and will for centuries more. We will continue to influence the land's resource utilization, govern its human relationships, participate in trade, and be involved in all of its relations – as we have done for millennia. Fuller citizenship requires that this be done in concert with other Canadians – as well as on our own, in our own communities. Aboriginal control of Aboriginal affairs is a good message, and it has to be strengthened – but it is also limiting. It is not consistent with holistic notions of citizenship that must include the land, and all the beings upon it.[62]

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[60] See Borrows, *supra* note 16.

[61] See generally John Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court" (2001) 80 Can. Bar Rev. 15.

[62] John Borrows, "'Landed' Citizenship: Narratives of Aboriginal Political Participation," in Will Kymlicka and Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 326 at 329.

This discussion would be remiss if it did not note the highly-critical approaches of other Aboriginal scholars toward notions of "shared citizenship" or "citizens plus," including the "landed" citizenship conception put forward by Borrows. Most notable in this regard is the work of Kiera Ladner and Gerald Alfred, discussed above, as well as work by Patricia Monture-Angus, which adamantly promotes Aboriginal nationalism alongside the denial of Canadian citizenship as applied to Aboriginal peoples. Rooted in the destructive histories of colonialism and paternalism, and based on personal negative experiences, Monture-Angus' work is notable for its advocacy of First Nations independence and secession from Canada.[63] Alfred also supports independence in his work, but these are exceptions amongst most Aboriginal scholars.[64]

In sharp contrast, and given the extreme divides that can and do exist across communities, Joseph Carens maintains that the best way to achieve civic integration is not through shared cultural or moral values, but rather through the recognition and

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[63] See generally Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995); Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999).

[64] Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell Int'l L.J. 579 at 493. Turpel is also an Aboriginal scholar, but her work deals more with international law rather than citizenship theory. She does not advocate for Aboriginal independence, but she does emphasize the destruction caused by colonialism and paternalism against Aboriginal communities and especially Aboriginal women (see generally Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6:1 C.J.W.L. 174).

appreciation of difference.[65] He states that "greater respect for difference is more likely to generate more genuine unity than any attempt to manufacture that unity directly."[66] While he concedes that differentiated citizenship does involve a risk of divisiveness, specifically in the context of Aboriginal relations in Canada, he nonetheless advances it as the solution most likely to be effective. In doing so, he recalls Taylor's deep diversity wherein everyone's identity does not have to be identical. Aboriginal and non-Aboriginal peoples have different histories, cultures and practices, but this need not preclude fruitful dialogue from taking place between both sides. Carens argues that it is through the recognition of difference that dialogue and understanding can be developed.[67]

As Kymlicka and Bashir have noted, more recently there is increasing confluence between the "politics of reconciliation" and the "politics of difference." This assertion underscores Margaret Moore's contention that a melding together of theories which both respect Aboriginal difference and seek to provide some degree of societal cohesiveness is not an entirely new approach. Perhaps more importantly, these assertions point to a more sophisticated theoretical conception underlying the objective of Aboriginal reconciliation in Canada. Specifically, it is argued here that *both* recognition of Aboriginal difference and enhanced societal cohesiveness are needed in order to work towards more meaningful, effective reconciliation between Aboriginal peoples and the rest of Canada.

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[65] Joseph Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Toronto: Oxford University Press, 2000) at 194.
[66] *Ibid.*
[67] *Ibid.* at 194, 196.

This requires respect for the distinct histories and cultures of Aboriginal peoples and acknowledgement of Aboriginal peoples as nations, which in turn may contribute to building relationships and seeking reconciliation between Aboriginal peoples and the rest of Canada. At the same time, the role of Aboriginal engagement within this equation is important inasmuch as it both drives and stems from the quality and nature of relationships between Aboriginal peoples and Canada. In other words, it is argued here that increased Aboriginal engagement improves overall social cohesiveness, at the very least by increasing and improving Aboriginal-Canada interactions. Where these exchanges are positive, increased Aboriginal engagement should ideally enhance Aboriginal-Canada relationships through the building of trust and mutual respect, which ultimately leads to a greater likelihood of achieving Aboriginal reconciliation. In this sense, social cohesiveness and engagement are mutually-reinforcing, with the end goal of reconciliation more likely through improved relationships between Aboriginal peoples and Canada.

A Theory of Cultural Sensitivity: Examining Cohesiveness, Respect and Trust in the Context of Engagement

In attempting to achieve Aboriginal reconciliation, a certain level of cohesiveness and trust are apt to promote a greater sense of shared belonging. This is not a statement advocating for the assimilation of Aboriginal peoples, but rather speaks to the importance of interconnectedness, unity and mutual respect in developing Aboriginal–Canada relationships on the road to Aboriginal reconciliation. Stuart Soroka et al. define three

primary approaches that are most often considered in this context. The first focuses primarily on shared values and a common sense of identity as underpinnings of unity. This conception stems from Emile Durkheim's "collective consciousness," first coined in the 1880s.[68] This approach is very much akin to the "shared identity" or "citizens plus" theory posited by Cairns as well as the "shared fate" approach offered by Williams.

The second broad approach places primary emphasis on engagement or participation in order to achieve social connectedness. Not as concerned with shared values or identities, this approach allows for a higher level of difference across societies, provided that some level of unity is achieved through consensus on procedures and institutions for addressing conflict. This approach is most similar to the work of Kymlicka. Ultimately, more active engagement across diverse groups is arguably more effective in achieving meaningful inclusion and mutual acceptance. As Soroka et al. note, "the priorities are to ensure that different identities are recognized as legitimate, ...that citizens bring their diverse values and identities into the political life and that all groups engage in the political institutions that manage the tensions inherent in modern diversity."[69] In this way, a more expansive version of this approach would be similar to

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[68] For further discussion, see Start N. Soroka, Richard Johnston and Keith Banting, "Ties That Bind? Social Cohesion and Diversity in Canada," in Keith Banting, Thomas J. Courchene and F. Leslie Seidle, eds., *Belonging?Diversity, Recognition and Shared Citizenship in Canada* (Montreal: Institute for Research on Public Policy, 2007) 561 at 566-567.
[69] *Ibid.* at 567-568.

Taylor's "deep diversity." At the same time, this sort of active engagement as applied to Aboriginal peoples is reminiscent of Borrow's depiction of "landed" citizenship.

A third general approach considers social cohesiveness as a form of "social capital," reminiscent of the political theory posited by Robert Putnam. Putnam defines social capital as the essence of social interconnectedness and the result of engaged, interpersonal networks. His work emphasizes the importance of social capital in contributing to a larger sense of community and shared interest between individuals and groups. His work also demonstrates how a significant decline in social capital has resulted in relatively high levels of atomism and plummeting civic engagement. In this sense, interpersonal trust and social networks are key to fostering a sense of harmony across diverse groups. Perhaps more importantly, such participation builds trust over time because it encourages further interactions, and thus is contingent on continued engagement.[70] Similar contentions have been raised specifically in the context of voter apathy and deference in Canada. Elisabeth Gidengil et al. and Neil Nevitte illustrate significant declines in political engagement amongst the Canadian electorate through extensive quantitative analyses. In particular, both studies note that Canadian voters are more likely than ever to view Canadian politics and political institutions with scepticism, cynicism and mistrust, resulting in lower levels of political engagement, especially in

[70] See generally Robert Putnam, "Bowling Alone: America's Declining Social Capital" (1995) 6:1 J. of Democracy 65, and the book that expanded on this article, Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000).

traditional electoral activities such as voting, party membership or running for political office.[71]

Yet, even taken together, these three approaches cannot cover the entire conceptual ambit of societal interconnectedness, but they do offer a useful starting point. Applied to the current research endeavour, it is argued that a combination of these three approaches would better contribute to an understanding of how societal interconnectedness is affected by Aboriginal peoples and identities in Canada and, in turn, might lead to Aboriginal reconciliation. The primary argument put forward here in this broader context is that achieving Aboriginal reconciliation is a nuanced, complex task that requires *both* respect for Aboriginal distinctiveness, including recognition of Aboriginal nationhood, and an understanding or awareness of similar values and ideals that are commonly-held by Aboriginal and non-Aboriginal peoples in Canada. Increased Aboriginal engagement is arguably a crucial mechanism through which to improve such awareness, and if the "social capital" theory is applied, increased participation is apt to lead to increased trust amongst all parties involved, including Aboriginal peoples. It is argued that this is foundational to achieving reconciliation and building the relationship between Aboriginal peoples and the rest of Canada.

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[71] See generally Elisabeth Gidengil, André Blais, Neil Nevitte and Richard Nadeau, *Citizens* (Vancouver: UBC Press, 2004); Neil Nevitte, *The Decline of Deference: Canadian Value-Change in Cross-National Perspective* (Peterborough: Broadview Press, 1996).

Expanding further on the "social capital" aspect of this combined approach is appropriate, given its resonance for Aboriginal alienation. More specifically, an emphasis on "social intelligence" has also emerged recently, which refers to the ability of individuals to assess and understand the perspectives, needs and desires of others. In *Ontario in the Creative Age* Roger Martin and Richard Florida assert that social intelligence places value on a diversity of ideas, expanded social networks and improved connectedness between and across groups and individuals.[72] Couched in broader terms, this is arguably a type of "social sensitivity" to the differing perspectives of others. It would seem that social capital and social intelligence share important overlapping characteristics, most notably with regard to engagement. It is argued here than an application of *social sensitivity* to Aboriginal peoples in Canada could be coined as *cultural sensitivity*, which refers to a compassionate awareness and acceptance of the distinctiveness of Aboriginal individuals and their communities. This alternative approach should ideally bring into sharper focus the negative implications of alienation for Aboriginal peoples as well as for the rest of Canada. Where trust is lacking on either side of the Aboriginal–Canada relationship, alienation of certain individuals and groups is likely to occur, thus undermining the potential for reconciliation. Conversely, where experiences and encounters are positive, individuals are more likely to be actively

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[72] Roger Martin and Richard Florida, *Ontario in the Creative Age* (Toronto: Martin Prosperity Institute, 2009), online: http://martinprosperity.org/media/pdfs/MPI%20Ontario%20Report%202009%202nd%20Ed.pdf at 1-2.

engaged.[73] Where engagement is enhanced, trust is more likely to be forged, thereby reducing problems of alienation.

An important corollary to this approach involves the sense of pride or belonging that individuals may feel for their communities or affiliated groups. When individuals take pride in their communities or institutions, they are less likely to exhibit apathy, more likely to feel empowered, and more likely to make a difference.[74] Picking up on the work of Putnam in this regard, Jane Jenson itemizes five dimensions of social capital or societal cohesiveness, each if which arguably helps to shape Aboriginal reconciliation: belonging, inclusion, participation, recognition and legitimacy. The first, belonging, is closely related to feelings of pride, which might also reflect nationalist sentiments. Notably, "[a] threat to social cohesion...is associated with feelings of isolation from the community," which is also affected by perceived inclusivity of that community.[75] The dimension of participation is straightforward in its supposition that increased engagement promotes enhanced unity, while recognition notably entails respect for difference. The final aspect involves the legitimacy of both "public and private institutions that act as

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[73] Harriet Griggs and Barbara Stewart, "Community Building in Higher Education: To Bring Diverse Groups Together with Common Goals" (1996) 117:2 Education 185 at 185.

[74] See James McNinch, "Building a University Community," *TDC News: A Publication of the University of Regina Teaching Development Centre* (April 2002), http://www.uregina.ca/tdc/Building%20University%20Community.htm. As noted in a community newsletter at the University of New Brunswick, people tend to be more supportive of those things in which they have taken an active role (see Milan Chotai, "Apathy in Our Communities: How to Fight It and Win" (January 27, 2004) *UNB Perspectives: A Newsletter from UNB*, http://www.unb.ca/perspectives/view.php?id=100).

[75] See Jane Jenson, *Mapping Social Cohesion: The State of Canadian Research* (Ottawa: Canadian Policy Research Networks Inc., 1998) at 15.

mediators and maintain the spaces within which mediation can occur. ...[R]ising tides of cynicism or negativity that question the representativity of intermediary institutions" are likely to exacerbate alienation and disharmony.[76] By extension, Avigail Eisenberg emphasizes the importance of political trust in promoting confidence in representative leaders and institutions. She notes that trust needs to be depicted as between equals, "because it is likely to generate the 'social cement' [that] is crucial for the right sort of social unity.[77] In this regard, respect for difference and the need to bridge social divides, such as ethnic and cultural cleavages, are crucial in creating a sense of "trust between equals."[78]

Overall, the role of trust is foundational in promoting a sense of belonging in order to build social cohesion and feelings of community connectedness. These components are arguably important in engaging Aboriginal peoples and promoting Aboriginal reconciliation in Canada. Applied specifically to Aboriginal peoples in Canada, such sentiments of community connectedness, mutual respect and trust are vital. In other words, promoting and achieving meaningful Aboriginal reconciliation requires the building of greater trust, respect and connectedness between Aboriginal peoples and the rest of Canada. The current alienation and divisiveness that mark many of the

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[76] *Ibid.* at 15-16.
[77] Avigail Eisenberg, "Equality, Trust, and Multiculturalism," in *Equality, Security and Community: Explaining and Improving the Distribution of Well-Being in Canada, Research Paper Series, Cluster 2: Social Capital, Community, and Political Processes* (Vancouver: Centre for Research on Economic and Social Policy, University of British Columbia, 1999) at 15.
[78] *Ibid.*

interactions between Aboriginal peoples and the rest of Canada may be remedied, at least partly, through improved Aboriginal engagement. Yet, such engagement must be meaningful in the sense that it recognizes the distinctiveness of Aboriginal peoples and reflects outcomes that effectively represent and include Aboriginal identities. The following chapters build on these theoretical constructs with respect to Aboriginal engagement in Canada as a novel pathway to reconciliation.

CHAPTER FOUR – ABORIGINAL ELECTORAL ENGAGEMENT IN CANADA: EXAMINING THE ROLES OF HISTORY AND REFORM

Only the Aboriginal peoples have an historical and constitutional basis for a claim to direct representation. Only the Aboriginal peoples have a pressing political claim to such representation. Only Aboriginal peoples can make the claim that they are the First Peoples with an unbroken and continuous link to this land.

In sharp contrast, Canada's ethno-cultural communities have immigrated to Canada and, in so doing, have exercised free choice to accept the electoral system here.[1]

HISTORICAL DENIAL AND POLITICAL CONSEQUENCES: RESTRICTIONS ON ABORIGINAL ELECTORAL PARTICIPATION[2]

The development of electoral rights for Aboriginal peoples in Canada, including representation and voting rights, was a very arduous and incremental process, marred by negative depictions of Aboriginal peoples based on race, culture and citizenship. From Confederation onward, "registered Indians" under the *Indian Act* were only legally entitled to vote in federal elections "if they gave up their treaty rights and Indian status through a process defined in the *Indian Act* and known as 'enfranchisement'."[3] In order to vote in federal elections, "registered Indians" were also expected to surrender their

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[1] Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report*, Vol. 1 (Ottawa: Supply and Services Canada, 1991) at 183.

[2] Earlier versions of portions of this chapter were published in Jennifer E. Dalton, "Alienation and Nationalism: Is It Possible to Increase First Nations Voter Turnout in Ontario? (2007) 27:2 Can. J. Native Stud. 247 at 248-255, 258-264.

[3] Elections Canada, *A History of the Vote in Canada* (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 89.

distinct identities or status, "integrate" into the dominant society, and give up the right to property tax exemption.[4] While these were early developments in granting legal rights to Aboriginal people to become politically involved in Canadian electoral institutions through the right to vote or run for office, the overall process was in fact a comprehensive tool of assimilation, which to this day casts a negative shadow on electoral participation for many Aboriginal peoples.[5]

Early on, various arguments were advanced in parliamentary debates in order to support the denial of the franchise specifically to First Nations. In particular, four central contentions stand out, not only because of the frequency with which they were used, but also because they are singularly and explicitly unjust. First, it was contended that Aboriginal socio-economic conditions were too poor, and consequently, "Aboriginal people were not 'civilized' or 'literate', that they were 'wards' of the government and susceptible to voter manipulation by the government in power and thus not worthy of the right to vote."[6] Second, precisely because of the distinct status of First Nations under the *Indian Act*, some asserted that the right to vote could not reasonably be extended to "registered Indians." For instance, treaty payments and annuities, prohibitions on entering into contracts, buying or selling, as well as exemption from taxation were

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[4] Committee for Aboriginal Electoral Reform, "The Path to Electoral Equality," in *Report of the Royal Commission on Electoral Reform and Party Financing*, Vol. 4 (Ottawa: Supply and Services Canada, 1991) 228 at 235 [Committee for Aboriginal Electoral Reform].
[5] Kiera L. Ladner, "The Alienation of Nation: Understanding Aboriginal Electoral Participation" (2003) 5:3 Electoral Insight 21 at 22-23 [Ladner].
[6] Committee for Aboriginal Electoral Reform, *supra* note 4 at 236.

considered "special" factors which justified the withholding of fundamental citizenship rights.[7] Third, early on, the franchise was considered as an incident of proprietary ownership. Since First Nations reserve lands are designated as federal lands, some contended that the distinct First Nations land tenure system on reserves was at odds with the franchise at the time.[8] Finally, those who sought to deny voting rights to First Nations over the course of parliamentary debates used the distinct political consciousness of First Nations to their advantage. In particular, opponents of First Nations voting rights argued that First Nations assertions of sovereignty were "inconsistent with any [First Nations] participation in Parliament."[9]

It was not until 1960, under the government of Prime Minister John Diefenbaker, that the *Canada Elections Act*[10] granted all "registered Indians" the right to vote. The Inuit were able to vote in federal elections held after 1950,[11] but federal ballot boxes were not available in all Inuit hamlets until 1962. Historically, non-status First Nations and Métis have not formally been restricted from voting, but this is primarily because they have been considered outside of the ambit of federal government responsibility.[12]

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[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*
[10] *Canada Elections Act,* S.C. 1960, c. 39.
[11] Federal legislation explicitly denied the right of Inuit to vote between 1934 and 1950 (*The Dominion Franchise Act*, S.C. 1934, c. 51).
[12] This does not mean that there have not been other impediments to their electoral participation. Of course, non-status First Nations and Métis women, along with all women, were not permitted to vote until 1918. With regard to non-status First Nations and Métis, more generally, the federal government has usually taken the position that they have no existing rights under section 35. Therefore, the government is

The restrictions placed on the right of Aboriginal peoples to vote have resulted in an overall lack of Aboriginal political representation in Canadian governments.[13] This trend continues to the present, with very few First Nations, Inuit, or Métis individuals ever having served in Parliament or provincial legislatures. For example, there have been only twenty-nine self-identified First Nations, Inuit or Métis who have been elected to the House of Commons and fifteen appointed to the Senate.[14] As a result, the Canadian electoral system arguably suffers from a lack of legitimacy from the perspective of many Aboriginal peoples. A detailed listing of those First Nations, Inuit and Métis who have served or are serving as Members of Parliament is provided in Table 1, while First Nations, Inuit and Métis Senators are listed in Table 2.

Table 1. Self-Identified First Nations, Inuit and Métis Candidates Elected to the House of Commons, 1867–2010

First Elected	Name	Electoral District(s)	Political Affiliation	Aboriginal Heritage	Years Re-elected
2008	Leona Aglukkaq	Nunavut	Conservative	Inuit	NA
2008	Rob Clarke	Desnethé--Missinippi--Churchill River, Saskatchewan	Conservative	First Nations	NA

not under any obligation to negotiate with Métis. However, recognition of Métis rights has occurred with the relatively recent Supreme Court of Canada ruling in *Powley* [*R. v. Powley*, [2003] 2 S.C.R. 207]. For further discussion on the history of Aboriginal enfranchisement, see Royal Commission on Electoral Reform and Party Financing and Robert A. Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada*, Vol. 9 of *The Collected Research Studies, Royal Commission on Electoral Reform and Party Financing* (Toronto: Dundurn Press, 1991) at 4-5.

[13] For further discussion, see Manon Tremblay, "The Participation of Aboriginal Women in Canadian Electoral Democracy" (2003) 5:3 Electoral Insight 34 at 34.

[14] For further discussion, see Anna Hunter, "Exploring the Issues of Aboriginal Representation in Federal Elections" (2003) 5:3 Electoral Insight 27 at 29 [Hunter]. In-depth assessment of Aboriginal representation in the 2004 federal election is provided in Loretta Smith, "Aboriginal Candidates in the 2004 General Election" (2005) 7:1 Electoral Insight 17.

2008	Shelly Glover	Saint Boniface, Manitoba	Conservative	Métis	NA
2006	Rod Bruinooge	Winnipeg South, Manitoba	Conservative	Métis	2008
2006	Tina Keeper	Churchill, Manitoba	Liberal	First Nations	None
2006	Gary Merasty	Desnethé--Missinippi--Churchill River, Saskatchewan	Liberal	First Nations	None
2005	Todd Norman Russell	Labrador, Newfoundland and Labrador	Liberal	Métis	2006; 2008
2004	Bernard Cleary	Louis-Saint-Laurent, Quebec	Bloc Québécois	First Nations	None
2004	David Smith	Pontiac, Quebec	Liberal	Métis	None
1997	Nancy Karetak-Lindell	Nunavut, Northwest Territories; Nunuvut, Nunavut	Liberal	Inuit	2000; 2004; 2006
1997	Rick Laliberte	Churchill River, Saskatchewan	NDP; Liberal	Métis	2000
1996	Lawrence O'Brien	Labrador, Newfoundland and Labrador	Liberal	Métis	1997; 2000; 2004
1993	Paul Devillers	Simcoe North, Ontario	Liberal	Métis	1997; 2000; 2004
1993	Elijah Harper	Churchill, Manitoba	Liberal	First Nations	None
1988	Jack Iyerak Anawak	Nunatsiaq, Northwest Territories	Liberal	Inuit	1993
1988	Ethel Dorothy Blondin-Andrew	Western Arctic, Northwest Territories	Liberal	First Nations	1993; 1997; 2000; 2004
1988	Wilton Littlechild	Wetaskiwin, Alberta	PC	First Nations	None
1984	Thomas Suluk	Nunatsiaq, Northwest Territories	PC	Inuit	None
1983	Gerry St. Germain	Mission--Port Moody, British Columbia	PC	Métis	1984
1980	Cyril Keeper	Winnipeg--St. James, Manitoba; Winnipeg North Centre, Manitoba	NDP	Métis	1984
1979	Peter Ittinuar	Nunatsiaq, Northwest Territories	NDP	Inuit	1980
1972	Walter Firth	Northwest Territories, Northwest Territories	NDP	Métis	1974
1968	Leonard Stephen Marchand	Kamloops--Cariboo, British Columbia	Liberal	First Nations	1972; 1974
1963	Eugène Rhéaume	Northwest Territories, Northwest Territories	PC	Métis	None

1948	William Albert Boucher	Rosthern, Saskatchewan	Liberal	Métis	1949
1930	Errick French Willis	Souris, Manitoba	PC	First Nations	None
1873	Louis Riel	Provencher, Manitoba	Independent	Métis	1874; 1874
1871	Pierre Delorme	Provencher, Manitoba	Conservative	Métis	None
1871	Angus McKay	Marquette, Manitoba	Conservative	Métis	None

Source: Parliament of Canada at http://www.parl.gc.ca/.

Table 2. Self-Identified First Nations, Inuit and Métis Senators, 1867–2010

Year Appointed	Name	Province/Territory	Political Affiliation	Aboriginal Heritage	Currently Sitting
2009	Patrick Brazeau	Quebec	Conservative	First Nations	Yes
2005	Lillian Eva Dyck	Saskatchewan	NDP	First Nations	Yes
2005	Sandra Lovelace Nicholas	New Brunswick	Liberal	First Nations	Yes
1999	Nick Sibbeston	Northwest Territories	Liberal	First Nations	Yes
1998	Aurélien Gill	Quebec	Liberal	First Nations	No
1997	Thelma Chalifoux	Alberta	Liberal	Métis	No
1993	Gerry St. Germain	British Columbia	PC	Métis	Yes
1990	Walter Patrick Twinn	Alberta	PC	First Nations	No
1984	Leonard Stephen Marchand	British Columbia	Liberal	First Nations	No
1984	Charlie Watt	Quebec	Liberal	Inuit	Yes
1977	Willie Adams	Northwest Territories	Liberal	Inuit	No
1971	Guy Williams	British Columbia	Liberal	First Nations	No
1957	William Albert Boucher	Saskatchewan	Liberal	Métis	No
1957	James Gladstone	Alberta	Independent Conservative	First Nations	No
1888	Richard Charles Hardisty	Northwest Territories	Conservative	Métis	No

Source: Parliament of Canada at http://www.parl.gc.ca/.

RESULTANT LOW VOTER TURNOUT AMONGST ABORIGINAL PEOPLES IN CANADA: CAUSES AND CONSEQUENCES

In light of the historical restrictions placed on Aboriginal voting, the development of Aboriginal political participation in Canadian electoral politics has not occurred in tandem with that of non-Aboriginal groups. Instead, political involvement of Aboriginal peoples has been restricted and encumbered by historical government policies.[15] While this might be considered reasonable, given that newly-enfranchised groups frequently require several decades to exercise their right to vote at rates comparable to the general population,[16] the trend of low voter turnout amongst Aboriginal peoples is also a contemporary phenomenon, having lasted for approximately fifty years.

More generally, voter turnout tends to be lower amongst certain groups. Voter turnout is most commonly affected by socio-economic, psychological and political factors. Socio-economic factors such as age, education, income and employment status play important roles. More often, those who are younger with lower levels of education and income and who are unemployed are less likely to vote. Psychological factors are also significant determinants of voter turnout, particularly level of interest in politics, knowledge of information about politics, alongside feelings of political efficacy. Those who have less interest in politics, have less knowledge about political issues, or feel that

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[15] See Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report, Volume 1 – Reforming Electoral Democracy* (Ottawa: Supply and Services Canada, 1991) at 170 [RCER].

[16] Daniel Guérin, "Aboriginal Participation in Canadian Federal Elections: Trends and Implications" (2003) 5:3 Electoral Insight 10 at 10.

their votes will have little impact are less likely to vote. Finally, there are important political factors at play in influencing voter turnout, including party identification and overall degree of political cynicism. Those who are not affiliated with a political party or who do not identify with any political ideology are less likely to vote, as are people who are more cynical toward the political system and politics.[17]

Alienation is at once a common cause and consequence at the core of many of these elements. As discussed in the preceding chapter, those who feel alienated from the political system and electoral politics are often less interested in politics, and consequently, may have less knowledge about political affairs. This, in turn, contributes to feelings of political inefficacy and worsened alienation. Additionally, those who feel alienated from the political system are less likely to have any sort of party affiliation and are more likely to convey pessimism towards or distrust of the political system. Groups who feel alienated from Canadian politics come from a wide spectrum of cohorts, including youth, minority cultures, immigrant groups and Aboriginal peoples.[18]

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[17] For further discussion, see Tony Coulson, "Voter Turnout in Canada: Findings from the 1997 Canadian Election Study" (1999) 1:2 Electoral Insight 18. For extensive discussion on general causes of low voter turnout, see André Blais, Elisabeth Gidengil, Neil Nevitte and Richard Nadeau, "Where Does Turnout Decline Come From?" (2004) 43 European J. Pol. Research 221; Jon H. Pammett and Lawrence LeDuc, *Explaining the Turnout Decline in Federal Elections: A New Survey of Non-Voters* (Ottawa: Elections Canada, 2003); André Blais, Elisabeth Gidengil, Richard Nadeau and Neil Nevitte, "Generational Change and the Decline of Political Participation: The Case of Voter Turnout in Canada," paper presented at *Citizenship on Trial: Interdisciplinary Perspectives on Political Socialization of Adolescents*, McGill University, Montreal, Quebec, June 20-21, 2002; Law Commission of Canada, *Voting Counts: Electoral Reform for Canada* (Ottawa: Public Works and Government Service, 2004) at 38-42.

[18] For further discussion see Gina Bishop, "Civic Engagement of Youth and of New and Aboriginal Canadians: Preliminary Findings from CRIC Research" (Summer 2005) Canadian Issues 15.

It is argued here that Aboriginal peoples are significantly alienated from the Canadian political system, largely because of historical restrictions on voting and electoral participation. However, the case of Aboriginal voter turnout is more complex, with several nuanced aspects underlying Aboriginal voter turnout levels.[19] Not only has Aboriginal enfranchisement occurred relatively recently, but as noted above, enfranchisement itself was used previously as a tool of assimilation. As a result, this particular factor is both historical and political in nature. It constitutes one of the central underlying features of low levels of Aboriginal voter turnout in Canadian elections. This is primarily because it embodies "a sense of alienation from the electoral system and political processes, feelings of exclusion, ...a perceived lack of effectiveness, the non-affirmation of group difference by and within electoral politics, and the virtual lack of a group's presence or representation in electoral politics (and in politics generally)."[20] All of this is intensified by the fact that Aboriginal peoples "see themselves as distinct from other Canadians and as belonging to 'nations within', [but] as nations that are not represented 'within'."[21] Consequently, while there are analogous underlying factors that explain lower levels of voter turnout amongst various cohorts, voter turnout amongst Aboriginal peoples is a unique phenomenon with distinctive underlying factors.

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[19] Low First Nations voter turnout has been receiving increased attention through the media and various roundtable discussions. There have also been various government attempts to improve First Nations voter turnout. These attempts are discussed subsequently.
[20] Ladner, *supra* note 5 at 21-22.
[21] *Ibid.* at 23.

In addition, Aboriginal voter turnout is also affected by overall age and socio-demographic characteristics. The Aboriginal population is younger than the general population in Canada, while a disproportionate number of Aboriginal peoples live in poverty, with high levels of mobility and low levels of education.[22] Each of these components is relevant to both on- and off-reserve Aboriginal communities, contributing to feelings of political inefficacy and exclusion. Moreover, off-reserve and urban Aboriginal individuals often suffer from weak social connectedness,[23] thereby increasing feelings of alienation.

Each of the above elements is exacerbated further by nearly non-existent Aboriginal representation in Canadian political institutions, alongside an overall lack of recognition of distinctive Aboriginal political and cultural practices in Canadian electoral politics.[24] Aboriginal communities are also geographically-dispersed across the country; there are no electoral districts that consist of Aboriginal majorities, while few ridings have "sizeable" Aboriginal populations. Issues of low Aboriginal electoral representation rates are further compounded by poor media communications for many Aboriginal

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[22] Statistics Canada, *Aboriginal Peoples of Canada: A Demographic Profile* (Ottawa: Minister of Industry, 2003) at 7, 13. For further discussion, see Elections Canada, *Aboriginal People and the Federal Electoral Process: Participation Trends and Elections Canada's Initiatives* (Ottawa: Elections Canada, 2004), online: http:/ www.elections.ca/content.aspx?section=res&dir=rec/part abor&document=index&lang=e.
[23] RCER, *supra* note 15 at 168-170.
[24] For further discussion, see Hunter, *supra* note 14 at 27.

communities, particularly in the North where media availability is insufficient and campaign materials are rarely provided in Aboriginal languages.[25]

Table 3 provides a comparative breakdown of current Canadian federal electoral districts with total Aboriginal populations of at least 10% based on data from the 2006 Census and 2001 Census. Of particular note are the obvious increases in both the percentage of Aboriginal electors in various ridings as well as the overall number of ridings where Aboriginal electors constitute at least 10% of the population. While precise reasons for these changes cannot be determined conclusively from the data, it is likely that they derive from a combination of factors, including the rapidly-increasing Aboriginal population,[26] relatively higher rates of Aboriginal mobility compared to non-Aboriginal populations,[27] as well as increased efforts by Elections Canada to enumerate Aboriginal electors.[28] These findings are presented to illustrate the Aboriginal proportion

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[25] Valerie Alia, "Aboriginal Peoples and Campaign Coverage in the North," in Royal Commission on Electoral Reform and Party Financing and Robert A. Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada*, Vol. 9 of *The Collected Research Studies, Royal Commission on Electoral Reform and Party Financing* (Toronto: Dundurn Press, 1991) 105 at 108-109.

[26] Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census* (Ottawa: Minister of Industry, 2008) at 9, 19, 30, 38.

[27] *Ibid.* at 12, 17, 23, 31, 36, 43.

[28] See Elections Canada, *Aboriginal People and the Federal Electoral Process: Participation Trends and Elections Canada's Initiatives* (Ottawa: Elections Canada, 2004), online: http:/ www.elections.ca content.aspx?section=res&dir=rec/part/abor&document=index&lang=e; Elections Canada, *Report of the Chief Electoral Officer of Canada on the 38th General Election of June 28, 2004*, online: http://www.elections.ca/res/rep/off statreport2004_e.pdf at 44-45; Elections Canada, *Memorandum of Understanding*, signed December 6, 2006, online: http: /www.elections.ca/vot abo understanding.pdf and Elections Canada, *Expanding the Partnership Between the Assembly of First Nations and Elections Canada*, December 6, 2006, online: http://www.elections.ca/content.aspx?section=med&document=dec0606&dir=pre&lang=e; Elections Canada, "Roundtable on Aboriginal Youth and the Federal Election Process" (2004) 6:1 Electoral Insight

of the Canadian electorate, especially those ridings where Aboriginal engagement could have a significant impact on election outcomes.

Table 3. Comparison of Canadian Federal Electoral Districts with Minimum Ten Percent Aboriginal Electors, 2006 and 2001 Census Data

Province or Territory	Electoral District	Current 2006 Census (%)			Previous 2001 Census (%)		
		Total Pop.	Aboriginal Electors	%	Total Pop.	Aboriginal Electors	%
Nunavut	Nunavut	29325	24920	85	26665	22720	85
Manitoba	Churchill	74985	52405	70	73100	47555	65
Saskatchewan	Desnethé—Missinippi—Churchill River*	67655	44910	66	63985	40805	64
Northwest Territories	Western Arctic	41055	20635	50	37100	18730	50
Quebec	Abitibi–Baie-James–Nunavik–Eeyou*	79945	26300	42	79425	23305	29
Ontario	Kenora	63870	26180	41	60230	20160	33
Newfoundland and Labrador	Labrador	26235	9965	38	27760	9700	35
British Columbia	Skeena—Bulkley Valley	91550	28930	32	99075	26510	27
Saskatchewan	Prince Albert	69670	17345	25	71805	15380	21
Alberta	Fort McMurray—Athabasca*	100425	24895	25	88380	23025	26
Yukon	Yukon	30195	7580	25	28520	6545	23
Manitoba	Dauphin–Swan River–Marquette*	73995	17915	24	76475	16185	21
Saskatchewan	Regina—Qu'Appelle	65665	13580	21	67930	12655	19
Manitoba	Selkirk—Interlake	89100	17930	20	84875	14935	18
Manitoba	Winnipeg North	78655	15150	19	78370	13255	17
Saskatchewan	Battlefords—Lloydminster	70330	13365	19	72430	13055	18
Manitoba	Winnipeg Centre	79280	14150	18	78955	13340	17
Saskatchewan	Saskatoon—Rosetown—Biggar	68495	11670	17	71890	11875	17

40; Elections Canada, *Aboriginal Participation in Federal Elections* (January 26, 2006), online: http:/ www.elections.ca/content.aspx?section=vot&document=index&dir=abo/circle&lang=e.

Ontario	Algoma—Manitoulin—Kapuskasing	77055	12460	16	81515	11920	15
Quebec	Manicouagan	82565	11560	14	84125	9355	11
Alberta	Peace River	137000	19515	14	122735	15945	13
Alberta	Westlock—St. Paul	99855	13515	14	97840	13270	14
British Columbia	Cariboo—Prince George	105880	14375	14	110830	12890	12
British Columbia	Chilliwack—Fraser Canyon	111260	13835	12	102355	12190	12
British Columbia	Prince George—Peace River	105165	12125	12	103720	11855	11
Ontario	Thunder Bay—Rainy River	84045	10420	12	84700	8075	10
Ontario	Thunder Bay—Superior North	81450	9040	12	82795	8110	10
Ontario	Timmins—James Bay	79800	9720	12	83060	9295	11
Manitoba	Elmwood—Transcona	77990	8420	11	77255	6815	<10
Alberta	Macleod	106740	11470	11	96470	11450	12
Alberta	Wetaskiwin	106565	12155	11	99975	8565	<10
Alberta	Yellowhead	102215	10340	10	96885	9165	<10
Ontario	Sault Ste. Marie	88010	8655	10	87315	6470	<10
Manitoba	Provencher	87170	9095	10	81410	6795	<10
Saskatchewan	Saskatoon—Wanuskewin	71945	6915	10	71530	5955	<10

Source: Statistics Canada, Census 2001 and Census 2006. Refers to total Aboriginal identity population in each electoral district, including First Nations, Métis, Inuit, and multiple Aboriginal identity responses.
* Names of the electoral districts are current. In the context of the 2001 Census, and in the same order as they appear above, these electoral districts were previously Churchill River, Nunavik—Eeyou, Athabasca, and Dauphin—Swan River respectively. In 2004, the names of the ridings were changed as per parliamentary representation requirements in accordance with the *Constitution Act, 1967,* 30 & 31 Vic. (U.K.), c. 3 and the *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3. Representation in the House of Commons must be adjusted after each decennial census (ten years). In each instance, a representation order takes effect on the dissolution of Parliament, occurring at least one year after the representation adjustments are proclaimed. The names of these electoral districts were legislatively changed according to *An Act respecting the effective date of the Representation Order of 2003*, R.S.C. 2004, c. 1 (2003 Representation Order), and *An Act to change the names of certain electoral districts*, S.C. 2004, c. 19. Thus the federal electoral districts that correspond with the 2001 Census data presented are based on the 1996 Representation Order.

In broad terms, both Aboriginal representation and voter turnout are foundational aspects of engagement in the context of electoral politics, and yet historical attempts at

assimilation and restrictions placed on meaningful Aboriginal engagement have resulted in far-reaching ramifications. Aboriginal peoples continue to be disengaged from Canadian electoral institutions, including traditional modes of political participation, and Aboriginal nationalism may serve partly as a justification for these sentiments. This assertion is explored more fully in the following chapters.

ELECTORAL REFORM IN CANADA: POTENTIAL EFFECTS ON ABORIGINAL ENGAGEMENT

Engagement is often considered a fundamental indicator of political legitimacy in a representative democracy. By extension, voter turnout levels are deemed to embody civic connectedness or lack thereof. However, in seeking to understand the roots of engagement, including voter turnout, the underlying political climate in a democracy is rarely as straightforward as these statements would suggest. Rather, nuanced complexity is the norm. The legitimacy of a democracy and its electoral system cannot be based solely on the extent of voter turnout at periodic elections.

There has been extensive academic debate and ardent advocacy in favour of electoral reform by various organizations, including Fair Vote Canada and its Ontario and Alberta provincial counterparts, Fair Voting BC, the Mouvement pour une Démocratie Nouvelle in Quebec, amongst others. The debate over electoral reform stems largely from concerns over a "democratic deficit" in Canada. More recently, there is greater demand for citizen access to political decision-making processes because increased resources and political skills within the general population mean that electorates are

more "adept" and can be reliably involved in complex, political decision-making and democratic processes. Ironically, however, concerns over the democratic deficit are fuelled by ever-dropping voter turnout rates,[29] rooted in what appears to be an overall political *disengagement* by the Canadian electorate, at least from more traditional forms of participation such as voting or running for political office. At the same time, high levels of public cynicism prevail toward government, government officials and political institutions, ultimately resulting in greater disaffection toward politics and political institutions, which in turn has reduced public confidence in traditional modes of democracy.[30] How can worsening Canadian political disaffection be remedied? How can electoral participation be improved, especially in the context of Aboriginal peoples?

There are several theories on improving voter turnout, based largely on political participation data. A full discussion is beyond the scope of this chapter. However, the most pertinent insights for improving voter turnout, at least for the purposes of this chapter, are institutional in nature. Aside from compulsory voting, which tends to result in higher turnout,[31] many contend that electoral reform can increase overall voter turnout,

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[29] Voter turnout in most democracies has been declining in recent years (see André Blais, Elisabeth Gidengil, Neil Nevitte and Richard Nadeau, "Where Does Turnout Decline Come From?" (2004) 43 European J. Pol. Research 221 at 221).

[30] See Neil Nevite, *The Decline of Deference: Canadian Value Change in Cross-National Perspective* (Peterborough, Ontario: Broadview Press, 1996); André Blais, Paul Howe and Richard Johnston, "Strengthening Canadian Democracy: A New IRPP Research Project" (November 1999) Policy Options 7; David Zussman, "Do Citizens Trust their Governments?" (1997) 40:2 Can. Pub. Admin. 234.

[31] In countries where voting is compulsory, voter turnout tends to be on average 13% higher than in countries where voting is not mandatory. However, this is generally only the case where there are penalties

including amongst those groups with historically lower levels of engagement, such as youth and Aboriginal peoples.[32] Specifically, it is suggested that where electoral systems have higher levels of proportionality between the parties' shares of the popular vote and the number of corresponding party seats in the legislative body – as occurs in Proportional Representation (PR) or mixed systems – higher levels of voter turnout are more likely. Consequently, in countries where plurality-majority electoral systems are in place, reforms to include proportionality are likely to improve overall voter turnout, even if only slightly.[33]

Given the distinctiveness of Aboriginal engagement, or lack thereof, is it possible to increase Aboriginal voter turnout through electoral reform, or are there other substantive issues at play? First, it is contended that numerically increasing Aboriginal voter turnout is a multifaceted task, requiring a different approach than simply altering the type of electoral systems in place. Second, the issue of low Aboriginal voter turnout across Canada in federal and provincial elections does not appear to be simply a matter of voter apathy or alienation, as is often the case amongst groups with low voter turnout.

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for not voting (see André Blais, Louis Massicotte and Agnieszka Dobrzynska, *Why is Turnout Higher in Some Countries than in Others?* (Ottawa: Elections Canada, 2003) at 8 [Blais et al.]).

[32] Some assert that no electoral system can have a significant effect on voter turnout (see Ontario Citizens' Assembly on Electoral Reform, *One Ballot, Two Votes: A New Way to Vote in Ontario* (Toronto: Queen's Printer for Ontario, 2007), online: http:/ www.citizensassembly.gov.on.ca assets One%20Ballot,%20Two%20Votes.pdf at 14.

[33] Blais et al., *supra* note 31 at 8; Law Commission of Canada, *Voting Counts: Electoral Reform for Canada* (Ottawa: Public Works and Government Service, 2004) at 40 [Law Commission of Canada]; Andrew Reynolds, Ben Reilly and Andrew Ellis, *Electoral System Design: The New International IDEA Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2005) at 119 [*IDEA Handbook*].

Instead, key components of Aboriginal engagement and nationalism arguably help shape how many Aboriginal peoples perceive their involvement in Canadian elections and Canadian legal and political institutions, more broadly.

Classifying Electoral Systems: A Brief Overview Based on Proportionality

The contention that higher levels of proportionality in electoral systems are more likely to promote active engagement should arguably impact Aboriginal electoral engagement. Yet, there are many aspects of differing electoral systems that serve different purposes, and therefore there are trade-offs and limitations inherent in every electoral system. For example, in addition to the impact of electoral system on engagement or voter turnout, several other factors are usually considered when assessing the quality or effectiveness of electoral systems. These include the legitimacy of the system as perceived by citizens, overall voter choice as well as corresponding electoral outcomes. This latter aspect is, in turn, related to institutional transparency and accountability of elected representatives. Effective and accurate representation of voters and voter interests, alongside the effective functioning of the political parties and party system, are also crucial, which includes stable and efficient government.[34]

[34] These principles are laid out in Ontario's *Election Act*, R.S.O. 1990, c. E.6 and discussed in Ontario Citizens' Assembly on Electoral Reform, *Principles and Characteristics of Electoral Systems* (Toronto: Queen's Printer for Ontario, 2006), online: http://www.citizensassembly.gov.on.ca/en-CA/docs/Introductory/Principles%20and%20Characteristics%20of%20Electoral%20Systems.pdf.

Electoral formula, district magnitude, and ballot structure are arguably three of the most important components of an electoral system. The *electoral formula* directly defines the type of system in place, referring to the rules that determine who will win the electoral seat or seats. Generally speaking, there are four broad groupings under which electoral systems fall: plurality, majority, proportional representation and mixed. A *plurality* electoral system or formula requires that the winning candidate receive the most number of votes as compared to any other candidate. A *majority* requires the winning candidate win more votes than all of the other candidates, or 50% plus one vote. An electoral system defined by *proportionality* requires the allocation of seats in proportion to shares of the votes received. Under a mixed electoral system, proportional representation is combined with either plurality or majority components. As noted, electoral systems with higher levels of proportionality tend to be more reflective of historically-disenfranchised groups and arguably are more likely to engage those same groups at higher levels.

In addition to the electoral formula, the *district magnitude* is also important, which refers to the number of representatives elected in a single electoral district, riding or constituency. In the context of these districts, there can be *single-member* districts, *multi-member* districts or a *mixed-system* option where the electorate votes in a single-member district while also voting in a national or regional, multi-member district. District magnitude is the most important factor in determining proportionality, with larger numbers of representatives in an electoral district producing more proportionality and

lower numbers producing less proportionality. *Equal district magnitude* occurs when the same number of representatives is elected to each electoral district and ensures that proportionality is the same from one district to the next. *Variable district magnitude* allows for differing numbers of representatives per electoral district and is often based on geographic representation and population size, but it can result in lower proportionality in some districts. The *average district magnitude* is determined by dividing the number of representatives to be elected by the number of electoral districts.[35]

The *ballot structure* refers to the way in which voters are presented with options to express their preferences for candidates and parties. Ballot type may be *categorical*, which requires each voter choose only one candidate or party. This is also known as an *exclusive* ballot. Alternatively, ballots may be *ordinal* or *preferential*, wherein voters rank order candidates based on preference. There is also the possibility for ballots to be both categorical and ordinal, such that voters rank order candidates while choosing only one party.[36]

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[35] For further discussion on district magnitude, see generally André Blais and Louis Masicotte, "Electoral Systems," in Lawrence LeDuc, Richard Niemi and Pippa Norris, eds., *Comparing Democracies 2: New Challenges in the Study of Elections and Voting* (Thousand Oaks, California: SAGE Publications, 2002) 40 [Blais and Massicotte]; Law Commission of Canada, *supra* note 33; *IDEA Handbook*, *supra* note 33; Larry Johnston, under the direction of the Ontario Citizens' Assembly Secretariat, *From Votes to Seats: Four Families of Electoral Systems* (Toronto: Queen's Printer for Ontario, 2006), online: http:/ www.citizensassembly.gov.on.ca/en-CA/docs/Advanced From%20Votes%20to%20Seats.pdf [Johnston]; Brian O'Neal, *Electoral Systems* (Ottawa: Library of Parliament, Parliamentary Research Branch, 1993).

[36] For further discussion on ballot structure, see Blais and Massicotte, *ibid.*; Law Commission of Canada, *ibid.*; *IDEA Handbook*, *ibid.*; Johnston, *ibid.*

Ultimately, there are some electoral systems with a range of these characteristics which are considered to be more effective in promoting higher levels of engagement or voter turnout, most notably electoral systems with some degree of proportionality. However, it should be noted that there is a very wide array of electoral systems in place around the world, and thus it would not be appropriate to discuss the minutiae of these systems. As noted by André Blais and Louis Massicotte, "[e]ven scholars specialized in the field are amazed by the diversity and complexity of contemporary electoral systems," and "[t]he rules that govern how votes are cast and seats allocated differ markedly from one country to another."[37] With this proviso in mind, a few electoral systems are most relevant for the purposes of this research.

The *first-past-the-post* (FPTP) system, also known as the *single-member plurality* system in place across Canada, is one of the most straightforward electoral systems. It is also used primarily in the United States and the United Kingdom. Simply put, candidates need only win more votes than any other candidate in order to be elected, and hence this type of system is often likened to a "horse race." Multimember districts are also possible under plurality systems, including the *bloc vote*, where the winner takes or sweeps all the seats in a district. A variant occurs under the *single non-transferable vote* (SNTV)

[37] Blais and Massicotte, *ibid.* at 40.

system, used in Japan, where a single vote in a district elects several representatives with the most votes.[38]

Majority electoral systems are slightly more complex since requiring a majority in order for a representative to win can feasibly result in no clear winner in the first round. In order to resolve this issue, *majority-runoff* systems allow for a second round of voting, or two-round system, between the top two candidates from the first round. This system is in place in France, Egypt, Iran, Vietnam and other countries. The *alternative vote* system, which is in place in Australia, requires voters to rank order their preference of candidates, with second and lower preferences considered only where first preferences do not result in a winning majority.[39]

There are two central types of proportional representation (PR) systems used: the *list system* and the *single transferable vote* (STV). By definition, PR systems require multimember districts and are necessarily more complex. The *list system*, prevalent in Switzerland, Netherlands, the Nordic countries and parts of Europe, uses a party-list ballot which can be closed or open. *Closed lists* are predetermined by parties, with votes automatically allocated to those representatives deemed as top choices by the relevant parties. *Open lists* allow for ranking or re-ordering by voters based on preference. An alternative is the *free list* which allows voters to choose and rank any candidates

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[38] *Ibid.* at 42-43.
[39] *Ibid.* at 43.

regardless of political party affiliation.[40] Alternatively, STV, which is used in Ireland, does not employ lists, but rather allows voters to rank order candidates in multi-member districts, irrespective of party affiliation. Similar to the alternative vote system, first preference votes are usually initially counted, but *electoral quotas* are required in any PR system to determine the number of votes necessary in an election to ensure that a party or candidate will win. There are four different types of quotas under this rubric. The *Hare quota* is determined by dividing the number of votes cast by the number of seats for election. The *Hagenbach-Bischoff quota* requires the number of votes be divided by the number of seats plus one. Under the *Droop quota*, the number of votes is divided by the number of seats plus one, but one is also added to the quotient, or final result. The *Imperiali quota* is determined by dividing the number of votes cast by the number of seats plus two.[41]

Finally, mixed electoral systems allow for a hybrid or combination of different electoral systems, although the accepted meaning behind "mixed" is vague and contested.[42] The most commonly-used conception is the *mixed member proportional* (MMP) system, which is in place in Germany, New Zealand, Hungary, Mexico and other countries. It mandates a two-tiered system of elected representatives – one based on

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[40] For further discussion, see Johnston, *supra* note 35 at 27-28.
[41] For more in-depth discussion, see Blais and Massicotte, *supra* note 35 at 45-54. Electoral quotas are also used to ensure proportional representation of a particular group, such as women or ethnic minorities, on party lists, for constituency nominations and as representatives in legislatures or elected bodies.
[42] Blais and Massicotte, *ibid.* at 54.

districts for single members elected to the legislature, and a second proportional tier of at-large seats based on a single national district or several regional districts. Formal thresholds are also required under this system, wherein parties must receive a certain proportion of the overall vote in order to qualify for seats from the proportional pool. The rationale herein is to avoid a potential proliferation of many fringe parties. Ideally, MMP provides the simplicity and perceived stability of plurality systems, while adding an element of proportionality to improve more effective representation of the electorate, including any historically-underrepresented constituents.[43]

Evidently, there is a wide range of complexity in defining electoral systems, with benefits and drawbacks inherent in each one. The specific characteristics that hold significance for Aboriginal engagement, including potential benefits and problems as well as the impact of electoral reform on Aboriginal electoral involvement, are discussed below and at greater length in Chapter Ten.

Proposed Electoral Reforms to Improve Aboriginal Turnout

In recent years, various jurisdictions in Canada have looked at the issue of electoral reform, including the addition of some degree of proportionality, in order to improve political participation, most notably voter turnout, of the entire electorate. For example, in April 2003, the government of British Columbia created the Citizens' Assembly on Electoral Reform, with the purpose of assessing the electoral system in the

[43] For extensive discussion, see Johnston, *supra* note 35 at 41-49.

province, including the possibility of reform. In October 2004, the final report of the Citizens' Assembly proposed that the FPTP electoral system should be changed to an STV system, customized to British Columbia as "BC-STV." On May 17, 2005, the British Columbia electorate voted in a referendum on the proposed electoral reform, but the proposal failed.[44] In November 2005, Prince Edward Island (PEI) held a plebiscite on whether the province's electoral system should be changed to MMP, but the proposal also failed.[45] In New Brunswick, a referendum was planned for May 12, 2008 concerning the possibility of changing to an MMP electoral system for the province, based on the recommendations of a report released by the Commission on Legislative Democracy.[46] However, the Progressive Conservative government under Premier Bernard Lord was

[44] The referendum was held in conjunction with the provincial election. Ultimately, electoral reform did not occur in the case of British Columbia, despite support for reform in 77 of the 79 electoral districts, since only 57.7% of voters supported a new "BC-STV" electoral system. A super-majority was required, including the support of 60% of valid votes across the province along with more than 50% of valid votes in at least 60% (48) of the 79 provincial electoral districts. For a detailed of the final results, see Elections BC, *Statement of Votes: Referendum on Electoral Reform, May 17, 2005* (Victoria: Elections BC, 2005), online: http:/ www.elections.bc.ca/docs/rpt/SOV-2005-ReferendumOnElectoralReform.pdf.

[45] A super-majority was required with the following threshold limits: a minimum of 60% of valid votes province-wide would have to approve the proposal, and at least 50% of valid votes cast in at least 60% (16) of the provinces' electoral districts would need to approve the proposal. Only 36.42% of valid votes supported the proposed reform. For further information see *Report of the Chief Electoral Officer of Prince Edward Island: Plebiscite for the Provincial Mixed Member Proportional System* (Charlottetown: Elections Prince Edward Island, 2005), online: http://www.electionspei.ca plebiscites pr/plebiscitefinalreport.pdf.

[46] The New Brunswick Commission on Legislative Democracy released its final report on December 31, 2004 (New Brunswick Commission on Legislative Democracy, *Final Report and Recommendations* (Fredericton: Commission on Legislative Democracy, 2004). It can be found at http://www.gnb.ca/0100/FinalReport-e.pdf.

defeated, and the new Liberal government, which came to power in September 2006, announced in June 2007 that a referendum would not be held on the matter.[47]

Similarly, in March 2006, the Ontario government established the Ontario Citizens' Assembly on Electoral Reform, which undertook to determine whether a change to Ontario's FPTP electoral system was needed.[48] The Assembly's final recommendation was included in a report released on May 15, 2007. Electoral reform to Ontario's FPTP electoral system was suggested in the form of MMP,[49] but the Ontario government determined that the recommended electoral system would only come into effect if a super-majority threshold of 60% of valid votes province-wide, plus a simple

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[47] New Brunswick, *An Accountable and Responsible Government: A New Generation of Canadian Leadership...The Government's Response to the Final Report of the Commission on Legislative Democracy...Renewing Democracy in New Brunswick* (Fredericton: Province of New Brunswick, 2007), online: http://www.gnb.ca/0012/PDF/ResponseFinalReport-CLD-June2007-e.pdf.

[48] Between April 2006 and June 2006, 103 registered voters were randomly selected, one from each of Ontario's electoral districts at the time, to serve on the Citizens' Assembly. Including the Chair, George Thomson, 52 members of the Assembly were women and 52 members were men. At least one member was an Aboriginal person. As of October 2007, there were 107 electoral districts in Ontario (*Representation Act, 2005*, S.O. 2005, c. 35, Sched.1).

[49] The proposed system would have allowed each voter to choose both a local member, as with FPTP, as well as a preferred political party. The Legislative Assembly of Ontario would have had 129 seats, with the number of electoral districts reduced to 90 and the remaining 39 seats filled by party list members. If a political party received at least 3% of the votes, and if that party was entitled to a greater number of seats than won locally, list members would have been added in order to achieve approximate proportionality. Before elections, parties would have been required to publicly nominate candidates for their list members, including a description of how these members were chosen. Overall, the party with the largest number of seats won would have been asked to form the government, likely resulting in recurrent minority governments. Full details of the recommended electoral system are in Ontario Citizens' Assembly on Electoral Reform, *One Ballot, Two Votes: A New Way to Vote in Ontario* (Toronto: Queen's Printer for Ontario, 2007), online: http://www.citizensassembly.gov.on.ca/assets/One%20Ballot,%20Two%20Votes.pdf.

majority of at least 50% in 64 of Ontario's provincial ridings, were both achieved.[50] On October 10, 2007, Ontarians voted overwhelmingly against the proposed changes, with 63.1% voting against the changes and 36.9% supporting. Notably, there were only five electoral districts where the required "50% + 1" formula for support for change was reached, while the remaining 102 districts did not reach the threshold.[51]

It would seem from the failed attempts at reform that significant electoral change is unlikely to occur in the near future in Canada. The debate over reform continues, and specifically in the context of Aboriginal electoral engagement, there are only a few notable landmark studies on Aboriginal peoples and electoral reform. While broader in scope, the relevance of these studies to Aboriginal voter turnout in Canada lies in the approaches and solutions that each takes to targeting low Aboriginal turnout. In particular, a portion of the *Royal Commission on Electoral Reform and Party Financing*,[52] a special Research Volume[53] related to the same *Commission*, and a report

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[50] *The Electoral System Referendum Act, 2007*, S.O. 2007, c. 1. There was significant outrage when the legislation was first proposed, most notably from supporters of electoral reform, since a super-majority reduces the possibility that reform will be approved, as occurred in British Columbia and Prince Edward Island.

[51] Full statistical results and poll-by-poll breakdowns are available at http:/ www.elections.on.ca/NR/rdonlyres/61A53BBE-4F27-41F7-AF0E-5D3D6F8D153D/0 ReferendumStatisticalResults.pdf and http://www.elections.on.ca/en-CA Tools ReferendumPollbyPollResults.htm respectively.

[52] Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report, Volume 1 – Reforming Electoral Democracy* (Ottawa: Supply and Services Canada, 1991).

[53] Royal Commission on Electoral Reform and Party Financing and Robert A. Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada*, Vol. 9 of *The Collected Research Studies, Royal Commission on Electoral Reform and Party Financing* (Toronto: Dundurn Press, 1991).

from the Committee for Aboriginal Electoral Reform,[54] also published as part of the *Commission*, stand out as being thoroughly comprehensive and creative in seeking and recommending options for improving Aboriginal voter turnout. Notably, the primary objective of each report was to suggest possible mechanisms to enhance Aboriginal voter turnout and electoral participation, including improving Aboriginal representation in Canadian legislatures.

While slightly dated, there are important aspects in these reports that are still applicable to Aboriginal engagement, especially since so little progress has been made during the past two decades in this regard, and the urgency of achieving Aboriginal reconciliation continues to increase. Each of these reports contends that Aboriginal voter turnout could be improved through various reforms or adjustments to the current FPTP electoral system in Canada. Without going into extensive discussion about the recommendations of these reports at this point, it is relevant to note that each asserts that the current FPTP electoral system limits Aboriginal participation in Canadian electoral politics. In particular, the *Royal Commission on Electoral Reform and Party Financing* emphasizes the importance of improving Aboriginal representation in Canadian legislatures, as a good in itself, but also to indirectly improve Aboriginal voter turnout in Canadian elections. This is particularly relevant given the dispersed geographical nature

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[54] Committee for Aboriginal Electoral Reform, "The Path to Electoral Equality," in *Report of the Royal Commission on Electoral Reform and Party Financing*, Vol. 4 (Ottawa: Supply and Services Canada, 1991) 228.

of the Aboriginal population, inadequate media communications, including in Aboriginal languages, and the general socio-economic trends of many Aboriginal peoples, as discussed earlier in this chapter.[55] The rationale behind improving Aboriginal voter turnout through increased numbers of Aboriginal representatives is based on the idea that Aboriginal peoples may be more likely to participate in Canadian electoral politics if there are candidates with whom they can relate, both politically and culturally; these candidates are also considered potentially more effective in advancing community interests. Further, the *Royal Commission* notes that Aboriginal peoples "find themselves disproportionately among those who have been negatively affected by the requirements and regulations of the present voting process, especially given their geographic locations and their languages."[56] Each of these factors contributes to lower Aboriginal voter turnout.

In *Aboriginal Peoples and Electoral Reform in Canada*, which stems from the *Royal Commission on Electoral Reform and Party Financing*, similar contentions are advanced. While this particular volume deals with a broad range of issues related to electoral issues and Aboriginal peoples in Canada, and while it does overlap with the *Royal Commission* on certain issues, one portion specifically emphasizes the inability of the FPTP electoral system "to provide an effective vehicle of political interaction or

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[55] RCER, *supra* note 15 at 169-170.
[56] *Ibid.* at 171.

influence for Aboriginal peoples."[57] The reason behind the ineffectiveness of FPTP for Aboriginal peoples rests on the fact that the electoral system does little to promote Aboriginal voter turnout or Aboriginal representation in Canadian legislatures.[58] Aboriginal voter turnout and representation are presented as two sides of the same coin, with representation ultimately influencing turnout levels. Specifically, the current FPTP electoral system consists of several barriers that affect any sort of direct representation of most minority groups in Canada. For Aboriginal peoples, this problem rests primarily with their geographically-dispersed nature, thereby minimizing the possibility that candidates might be elected to legislatures. Further, legislatures, including the House of Commons, do not reflect accurately the composition of the Canadian population.[59] Ultimately, this calls into question the overall legitimacy of the political system, not only because of explicit limitations on accurate representation, but also in the way that the composition of legislatures affects electoral debate on so-called relevant issues.[60] In other words, when representatives consist primarily of the dominant majority population, the voices of underrepresented minority groups, including those of Aboriginal peoples, are more likely to be stifled amidst a plethora of seemingly-relevant "mainstream" issues.

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[57] Roger Gibbins, "Electoral Reform and Canada's Aboriginal Population: An Assessment of Aboriginal Electoral Districts," in Royal Commission on Electoral Reform and Party Financing and Robert A. Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada*, Vol. 9 of *The Collected Research Studies, Royal Commission on Electoral Reform and Party Financing* (Toronto: Dundurn Press, 1991) 153 at 156.
[58] *Ibid.*
[59] *Ibid.* at 159.
[60] *Ibid.*

Together, these issues have an important effect on voter turnout, which is the other side of the coin. Lack of Aboriginal representation, along with perceived illegitimacy of the electoral system, are likely to exacerbate feelings of Aboriginal alienation. The result is a significant disconnect from the Canadian electoral system, and corresponding low voter turnout levels.[61] As Roger Gibbins notes, where Aboriginal candidates run in predominantly-Aboriginal polling areas, Aboriginal turnout rates increase.[62] It would seem that Aboriginal candidates help to restore some level of legitimacy to the FPTP electoral system, but the fact that there are very few areas where Aboriginal peoples are geographically concentrated makes this option potentially futile.

One other central report to consider is "The Path to Electoral Equality," released by The Committee for Aboriginal Electoral Reform. This report also emphasizes the impact of historical electoral discrimination on Aboriginal peoples and resultant low levels of Aboriginal voter turnout.[63] Additionally, significant importance is attached to the negative impact of the FPTP electoral system and corresponding structure of the party system on Aboriginal voter turnout. With regard to the latter, it is contended that "[a]s long as the Aboriginal vote remains diluted and partitioned, political parties have little

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[61] *Ibid.* at 160.
[62] *Ibid.*
[63] Committee for Aboriginal Electoral Reform, *supra* note 4 at 8-9.

incentive to field Aboriginal candidates to win the Aboriginal vote."[64] This assertion is also premised on the geographically-dispersed nature of the Aboriginal population.

With regard to the electoral system, the report contends that electoral laws have not recognized the Aboriginal community of interest.[65] This is particularly the case within the confines of the FPTP electoral system in Canada. While electoral law does allow for various group interests, including official language minority groups and concentrated ethnic communities, to be considered when determining electoral boundaries, the same cannot be done for Aboriginal peoples, precisely because they are geographically dispersed.[66] However, this is worsened by the fact that earlier federal electoral boundaries served to dilute the Aboriginal vote further. As noted by the Committee, this dilution resulted

> from the north-south axis on which the boundaries of northern electoral districts have been drawn, allowing the non-Aboriginal population in the more populous towns in the southern parts of a constituency to outvote the Aboriginal population forming the majority in the rest or most of the constituency.
> ...
> [T]he application of electoral boundaries legislation has served to partition the Aboriginal community of interest into different electoral districts, thereby diluting the Aboriginal vote and rendering it ineffective.[67]

Ultimately, this has led to worsened Aboriginal alienation from the Canadian electoral system in conjunction with further degradation of the legitimacy of the system for Aboriginal peoples, thus resulting in lower levels of Aboriginal voter turnout.

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[64] *Ibid.* at 11.
[65] *Ibid.* at 9.
[66] *Ibid.* at 9-10.
[67] *Ibid.* at 10.

It should be noted, however, that more recently, Elections Canada has attempted to enhance overall Aboriginal participation in Canadian electoral politics alongside improving public awareness of some of the issues faced by Aboriginal electors, more generally. For example, in addition to launching a variety of information and educational programs, particularly in northern areas of Canada, Elections Canada has extended communication and advertisements through print, television and radio in 37 Aboriginal languages. Elections Canada has also established the Aboriginal Community Relations Officer program and the Aboriginal Elder and Youth Program (AEYP). The former, which was originally called the Aboriginal Liaison Officer program, began during the 2000 general election and allowed returning officers to appoint Aboriginal Liaison Officers where electoral districts contain at least one First Nations, Inuit or Métis community and/or the off-reserve Aboriginal population represents at least 10% of the total riding population. The latter program allows Elders and youth to provide and interpret information for Aboriginal electors and to assist as elections officers at polling stations in Aboriginal communities. Finally, Elections Canada provides that, where First Nations, Inuit or Métis communities agree, polling stations are set up on reserves or in communities in order to facilitate Aboriginal voting, although the vast majority of such instances occur in First Nations communities.[68]

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[68] For discussion, see especially Elections Canada, *Aboriginal People and the Federal Electoral Process: Participation Trends and Elections Canada's Initiatives* (Ottawa: Elections Canada, 2004), online: http://www.elections.ca/content.aspx?section=res&dir=rec/part/abor&document=index&lang=e.

As discussed in the next chapter, some of the efforts of Elections Canada appear to have resulted in noticeable improvements in Aboriginal turnout levels at the federal electoral level, but efforts have not been matched in all provincial districts. Instead, there tends to be a smattering of disparate attempts to improve Aboriginal electoral engagement across the country. Of course, the same can be asserted in the broader framework of Aboriginal reconciliation: some Canadian jurisdictions and some Canadian governments are far more interested in actively seeking Aboriginal reconciliation. While government attempts arguably may be rooted in ideological concerns or political motivations, the pursuit of reconciliation remains an integral component in building the relationship between Aboriginal peoples and the rest of Canada. It is not clear whether the attempts at electoral reform discussed above might be effective in increasing Aboriginal voter turnout, since most proposals for reform have gained insufficient traction to be implemented. Other possible electoral reforms are analyzed shortly, but for the time being, an examination of relevant Canadian data on Aboriginal turnout levels is in order.

CHAPTER FIVE – HOW ENGAGED ARE ABORIGINAL PEOPLES IN CANADIAN ELECTIONS?: AN EXAMINATION OF CONTEMPORARY VOTER TURNOUT IN CANADA

Participation within Canada may not sound or appear to be "Aboriginal." It may be said that this notion violates sacred treaties and compromises traditional cultural values. Yet, it should be asked: what does it mean to be Aboriginal or traditional? Aboriginal practices and traditions are not "frozen." Aboriginal identity is constantly undergoing renegotiation. We are traditional, modern, and postmodern people. Our values and identities are constructed and reconstructed through local, national, and sometimes international experiences.

...

Aboriginal participation even at a level proportionate to their population in Canada would have an unparalleled effect on the functioning of our society and our conceptions of citizenship.[1]

There are many forms of engagement that extend beyond electoral politics, but these would be classified more broadly as civic engagement, and hence are beyond the stated scope of this endeavour. Even in the context of electoral participation, there is a wide range of activities in which citizens may be involved, including traditional methods of involvement such as running for political office, working on campaigns and voting, as well as less conventional means of protest, petition-signing or grassroots debates. The specific issue of electoral voting is particularly salient for Aboriginal peoples in Canada because it is arguably reflective of one of the most basic forms of political engagement and since Aboriginal peoples traditionally have very low levels of voter turnout. The

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[1] John Borrows, "'Landed' Citizenship: Narratives of Aboriginal Political Participation," in Will Kymlicka and Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 326 at 333, 337.

contention that electoral reform is likely to improve Aboriginal political participation, especially voter turnout levels, is of note in this regard. Since Aboriginal voter turnout is even lower than that of the general population, there is potentially greater salience of the possible benefits of electoral reform for Aboriginal peoples, which in turn, has important implications for accomplishing Aboriginal reconciliation through enhanced or improved Aboriginal engagement. However, in order to assess these assertions, it is necessary to provide supporting evidence.

ABORIGINAL VOTER TURNOUT: METHODOLOGICAL CONSIDERATIONS AND RESTRICTIONS

The primary purpose of the collection and analyses of the data presented herein is to gain greater insight into more wide-ranging and more recent trends in Aboriginal voting vis-à-vis the general population and compared to that offered in earlier studies. In keeping with the broader themes of this research undertaking, the data are assessed within the context of Aboriginal nationalism and alienation, with an eye to determining the role that each plays in affecting Aboriginal voter turnout.

There has been very limited scholarly attention paid to Aboriginal voter turnout. While increased attention has been paid more recently to the political participation of Aboriginal peoples across the country, very few studies have collected or examined quantitative data on Aboriginal voter turnout, and for the most part, those studies that have done so have dealt almost exclusively with Aboriginal representation in Canadian

legislatures.[2] For the purposes of this chapter, only quantitative studies bear direct importance. Yet, there are only a few which examine Aboriginal voter turnout and mostly in certain Canadian provinces; none has focused specifically or solely on Newfoundland and Labrador, Ontario, Quebec, Alberta, British Columbia or the territories, although some have looked across the country at broader federal trends.

The primary studies that have evaluated Aboriginal voter turnout include work by David Bedford and Sidney Pobihushchy on First Nations in the Maritimes, another similar study by Bedford that deals specifically with First Nations in Nova Scotia and New Brunswick, a study by Jim Silver et al., which deals with First Nations turnout in Winnipeg, Manitoba, and one other by Michael Kinnear that focuses solely on First Nations in Manitoba. There are also two other very recent studies, released in 2009, which address Aboriginal turnout more broadly: one conducted by Paul Howe and David Bedford for Elections Canada examines data on Aboriginal turnout across Canada, while

[2] For example, see Anna Hunter, "Exploring the Issues of Aboriginal Representation in Federal Elections" (2003) 5:3 Electoral Insight 27; Loretta Smith, "Aboriginal Candidates in the 2004 General Election" (2005) 7:1 Electoral Insight 17; Trevor Knight, "Electoral Justice for Aboriginal People in Canada" (2001) 46 McGill L. J. 1063; Tim Schouls, "Aboriginal Peoples and Electoral Reform in Canada" (1996) 24:4 Can. J. Pol. Sci. 729; Russel Lawrence Barsh, "Canada's Aboriginal Peoples: Social Integration or Disintegration?" (1994) 14:1 Can. J. Native Stud. 1; James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask. L. Rev. 241; Jonathon Malloy and Graham White, "Aboriginal Participation in Canadian Legislatures," in Robert J. Fleming and J. E. Glenn, eds., *Fleming's Canadian Legislatures 1997*, 11th ed. (Toronto: University of Toronto Press, 1997) 60.

the other conducted by Harell et al. concerns the Prairie provinces.[3] A few other studies are much smaller in scope, forming part of Elections Canada's larger studies.[4]

In most of these studies, data collection has been limited to poll-by-poll results on First Nations reserves, thereby focusing solely on results for First Nations. This task has become somewhat easier more recently given that Elections Canada and some provincial elections offices have attempted to ensure that some poll boundaries do coincide with First Nations reserve boundaries. The study conducted by David Bedford and Sidney Pobihushchy[5] is considered the benchmark for research on First Nations voter turnout in Canada, precisely because it set a precedent for gathering data on First Nations voting.[6] Specifically, Bedford and Pobihushchy gathered First Nations turnout data for federal,

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[3] These studies include David Bedford and Sidney Pobihushchy, "On-Reserve Status Indian Voter Participation in the Maritimes" (1995) 15:2 Can. J. Native Stud. 255 [Bedford and Pobihushchy]; David Bedford, "Aboriginal Voter Participation in Nova Scotia and New Brunswick" (2003) 5:3 Electoral Insight 16 [Bedford]); Daniel Guérin, "Aboriginal Participation in Canadian Federal Elections: Trends and Implications" (2003) 5:3 Electoral Insight 10; Gina Bishop, "Civic Engagement of Youth and of New and Aboriginal Canadians: Preliminary Findings from CRIC Research" (Summer 2005) Canadian Issues 15; Michael Kinnear, "The Effect of Expansion of the Franchise on Turnout" (2003) 5:3 Electoral Insight 46; Jim Silver, Cyril Keeper and Michael MacKenzie, *"A Very Hostile System in Which to Live": Aboriginal Electoral Participation in Winnipeg's Inner City* (Ottawa: Canadian Centre for Policy Alternatives, 2005); Paul Howe and David Bedford, "Electoral Participation of Aboriginals in Canada," commissioned by Elections Canada for the *2009 Aboriginal Policy Research Conference*, Ottawa, Ontario, March 9-12, 2009; Allison Harell, Dimitrios Panagos and J. Scott Matthews, "Explaining Aboriginal Turnout in Federal Elections: Evidence from Alberta, Saskatchewan and Manitoba," commissioned by Elections Canada for the *2009 Aboriginal Policy Research Conference*, Ottawa, Ontario, March 9-12, 2009.

[4] A study conducted by Jean-Nicholas Bustros summarizes some findings of previous studies (Jean-Nicholas Bustros, *Electoral Participation of Aboriginal People: Summary of Previously Conducted Research and Analysis* (Ottawa: Elections Canada, Legal Services Directorate, 2000), while other general studies include small segments on Aboriginal voter turnout, such as Elections Canada, *2000 General Election Post-Event Overview* (Ottawa: Supply and Services Canada, 2000) at 5-7, 10-11, 16 [Elections Canada].

[5] Bedford and Pobihushchy, *supra* note 3.

[6] An article released later by Bedford provided many of the same data (see Bedford, *supra* note 3).

provincial and band council elections in Nova Scotia, New Brunswick and PEI between 1962 and 1993. In order to ensure that the data they collected dealt solely with First Nations, they had to limit the collection of data to poll-by-poll results for polling stations that served First Nations communities alone. Poll-by-poll results for areas that included both First Nations and non-First Nations electors were excluded, thereby reducing the size of the First Nations sample.[7] However, given the rigour with which their methodology was employed, and since their results were broad-based and "reasonably exhaustive," it can be argued that the results were statistically representative of First Nations in the three provinces.[8] Of course, the poll-by-poll approach for First Nations communities analyzes aggregate data and thus does not allow for an in-depth understanding of the variations that may exist from one particular community to another,[9] save where particular voting trends emerge, such as repeatedly low or high voter turnout for particular communities. In such instances, there may be cultural or geographic factors at play that affect the overall tendency of community members to vote, but the data preclude a clear understanding of the causes behind such variations.

The approach taken in this current research undertaking is very similar to that employed in the Bedford and Pobihushchy study. Almost exclusive emphasis is placed

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[7] Bedford and Pobihushchy, *supra* note 3 at 256-257, 259-260.
[8] *Ibid.* at 256.
[9] Aboriginal peoples are as culturally, linguistically and politically heterogeneous as other peoples around the world. For further discussion, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 3.

on First Nations on-reserve communities, with poll-by-poll data obtained for those polling stations that serve exclusively First Nations communities across the country. Data were gathered from the official poll-by-poll results published by elections offices across the country for the most recent federal and provincial elections. Elections Canada and most of the provincial offices provided lists of relevant polling stations that served exclusively First Nations communities in several recent elections. However, for many of the other elections examined, the relevant polling stations, names and numbers had to be matched separately with the original information provided by the elections offices. In all instances, voter turnout was calculated from the total amount of votes cast as a percentage of the overall numbers of eligible voters across all relevant First Nations polling stations. Where polling stations could not be matched with complete certainty, or where non-Aboriginal voters were likely to reside, these polls were eliminated in order to maintain the integrity of the data. Ultimately, while the scope of the data is restricted in this way, it is important to note that the data collected are reliable and significant given the sheer volume of data collected, covering a vast number of polling stations across the country.

For the purposes of this research endeavour, cross-time comparative data were collected on First Nations voter turnout across the country in federal and provincial elections between 1997 and 2007, with some variations in time frames based on the given jurisdictions and corresponding election schedules. Further comparisons are drawn with

First Nations voter turnout in band council elections, held under the *Indian Act*.[10] At the federal level, the most recent year for elections analyzed was 2006, as since that time the landscape of Canadian electoral politics has shifted considerably to embody a unique period of minority governance. This recent trend arguably presents a different set of considerations that may or may not impact First Nations voter turnout levels, an assessment of which is beyond the scope of the current research. Further, it was considered logically consistent to analyze provincial and band council elections within a similar period of time so as to keep constant, to the greatest extent possible, the time frame factor across different elections.

It is suspected that one of the reasons behind the shortage of quantitative studies on Aboriginal voter turnout is the arduous and complex nature of relevant data collection. Quite simply, much of the relevant data simply do not exist nor can they be obtained easily. For this reason, there are a few notable exceptions in the data collected. It is very difficult to isolate Inuit or Métis communities from amongst the electorate, largely because neither Elections Canada nor the provincial or territorial counterparts maintain discrete polling information for Inuit hamlets or Métis communities.[11] It was not possible to obtain conclusive data for elections in the territories since it could not be determined

[10] *Indian Act*, R.S.C. 1985, c. I-5.

[11] It is not known why this is the case, but it may be because the sheer numbers of First Nations sizeably outweigh Inuit or Métis communities, and thus greatest statistical emphasis is placed on the largest proportion or populations of Aboriginal peoples.

from the data which polling stations included non-Aboriginal voters.[12] Inuit in Nunavut are dispersed across the territory, and while they make up 85-95% of the population in all ridings, they are not exclusive, and therefore data results would be skewed. In the Northwest Territories and Yukon, both First Nations and Inuit communities are in various locations and it was not possible to disaggregate First Nations communities from Inuit communities in the Elections Canada data. This effectively excludes data on Inuit voters, except for the data presented on Nunavut at the federal level in Figure 30.

Gathering reliable voter turnout data is nearly impossible for Métis, off-reserve or urban Aboriginal populations because individual demographics are not collected to correspond with individual voting preferences; electoral ballots are confidential. Demographic information, including self-identification with First Nations communities, is only collected as part of the Canadian Census, and results from Census cannot be matched with electors' voting choices. Similarly, the amount of available data for Métis voters is so sparse that it cannot be statistically significant or reliable. There are only a few results specific to the Alberta Métis Settlements, which are included in Figure 28 and Figure 29. Generally, the data presented on Inuit and Métis voters are included primarily for illustrative purposes, especially since the few results that are presented are in keeping with those on First Nations voters across the country.

[12] There are non-Aboriginal residents scattered throughout the territories, including those who live for short-term, work-related periods and who become eligible to vote after a given period of time.

One final exception is the lack of available data for provincial elections in British Columbia; unfortunately Elections British Columbia does not maintain a database of relevant polling stations, nor would they agree to compile one upon request. However, the British Columbia data for federal elections and band council elections are extensive and present a definite picture of First Nations turnout in the province.

ABORIGINAL VOTER TURNOUT IN CANADA: EXAMINING THE FINDINGS

One alternative to the restrictions inherent in collecting Aboriginal voter turnout data is to examine data on self-reported voter turnout. However, the proportion of those who respond in the affirmative is often inflated, since respondents are often motivated to provide socially-desirable responses that cast themselves in a favourable light.[13] This tendency to over-report turnout is seen clearly in Figure 1. Data were analyzed from self-reported voter turnout levels in the Canadian Election Study[14] for the 1993, 1997, 2000 and 2004 federal elections and were weighted nationally to adjust for bias. The results show that Aboriginal voters[15] consistently report lower levels of voter turnout than do

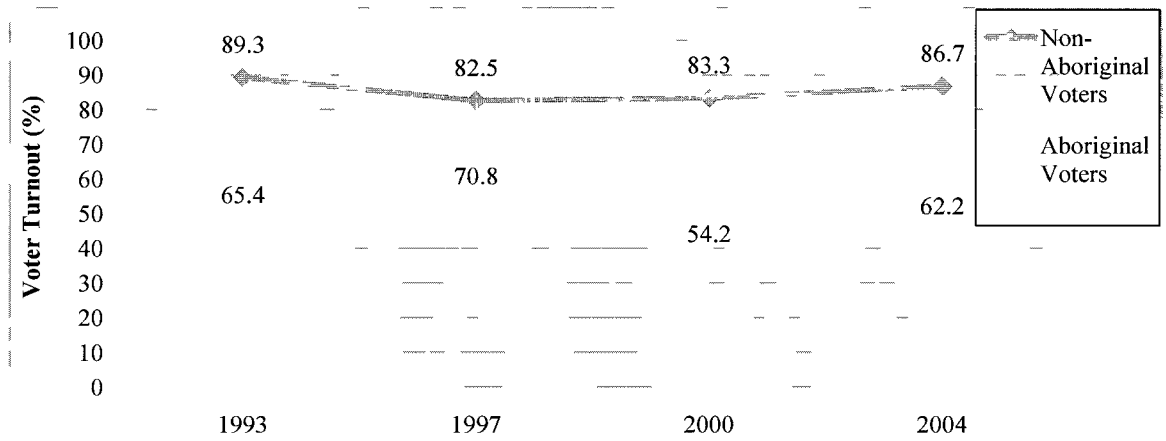
[13] For further discussion, see Jeffrey A. Karp and David Brockington, "Social Desirability and Response Validity: A Comparative Analysis of Overreporting Voter Turnout in Five Countries" (2005) 67:3 J. of Politics 825.

[14] First Nations reserves are excluded from the Canadian National Election Studies, but the samples are still representative of the general population, including those who self-identify as Aboriginal (see Roger Gibbins, "Electoral Reform and Canada's Aboriginal Population: An Assessment of Aboriginal Electoral Districts," in Royal Commission on Electoral Reform and Party Financing and Robert A. Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada*, Vol. 9 of *The Collected Research Studies, Royal Commission on Electoral Reform and Party Financing* (Toronto: Dundurn Press, 1991) 10 at 158).

[15] In these studies, there was no differentiation between First Nations, Inuit or Métis respondents. Instead, respondents self-identified as either Aboriginal or non-Aboriginal. This is significant because an amalgamation of all respondents who self-identified as Aboriginal allowed for a larger sample size and thus

non-Aboriginal voters in federal elections. However, self-reported turnout levels amongst non-Aboriginal voters are at least 20% higher than official voter turnout for each election.[16]

Figure 1. Canadian Election Study (CES): Cross-Time Comparison of Aboriginal and Non-Aboriginal Self-Reported Voter Turnout Levels in Canadian Federal Elections, 1993–2004



The results shown in Figure 1 were obtained by crosstabulating ethnic origin and voter participation variables, both of which were present in each survey. The ethnic origin variable was recoded to identify Aboriginal and non-Aboriginal respondents. The

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increased reliability. However, at the same time, the differences that may exist from one Aboriginal group to another were not accounted for, especially from cultural, legal or political perspectives.

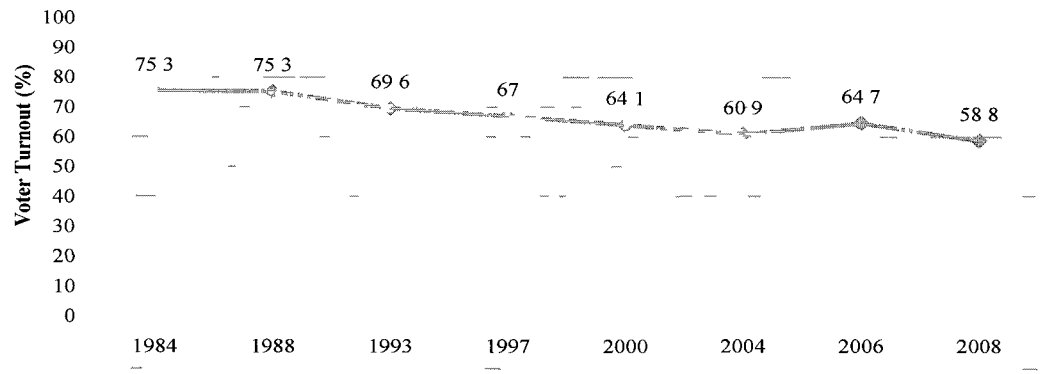
[16] An Ipsos-Reid study conducted for Elections Canada after the 2000 federal election found that 70% of Aboriginal respondents reported having voted, which is even higher than the official voter turnout across the country. It is important to note, however, that the findings of this study for Aboriginal respondents was based on an over-sample of 150 Aboriginal individuals and a telephone survey of 556 Aboriginal individuals, all of whom resided in northern areas of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec. As a result, the survey was not representative of the national Aboriginal population, but instead, was a "proxy." Nor did it specify whether respondents were First Nations, Inuit or Métis (see Elections Canada, *supra* note 4 at 10, 16).

results for the 1993 CES are statistically significant at .00 with Cramer's V at .090. However, 1997 results are not statistically significant at .139 with Cramer's V at .038. This occurs because there are too few cases. The 2000 results are statistically significant at .00 with Cramer's V at .072, while the 2004 results are statistically significant at .00, with Cramer's V at .086. The same analysis was run based on similar variables in the 2006 CES, but are not included here for methodological reasons. Specifically, the 2006 dataset was a longitudinal study, combined with results from the 2004 CES, and in the context of the voter turnout variable the same respondents were contacted in both the 2004 and 2006 surveys. As a result, it is arguably likely that respondents in the 2006 study were much more likely to report having voted in the past election due to the above-noted problems with self-reported turnout levels. This suggestion is evident from the 90.2% affirmative response rate amongst non-Aboriginal survey respondents, while fully 90% of Aboriginal respondents reported as having voted in the 2006 election. While results were statistically significant at .00, with Cramer's V of .097, based on the data results discussed below, these 2006 findings are very unlikely to be accurate, especially given that official turnout levels across the country were a mere 64.7%, as shown in Figure 2. As subsequent data findings will demonstrate, the likelihood that Aboriginal turnout levels in the 2006 federal election came even remotely close to 90% is essentially unfeasible.

Figure 2 provides actual voter turnout levels for the entire electorate in Canadian federal elections since 1984, demonstrating a gradual decline in voter turnout, albeit with

a slight anomalous increase in the 2006 federal election. Specifically with regard to First Nations voters, the data collected for the purposes of this research, along with the results of various other studies, also demonstrate that First Nations voter turnout is usually significantly lower than the Aboriginal data reported in Figure 1.

Figure 2. National Voter Turnout (%) in Canadian Federal Elections, 1984–2008

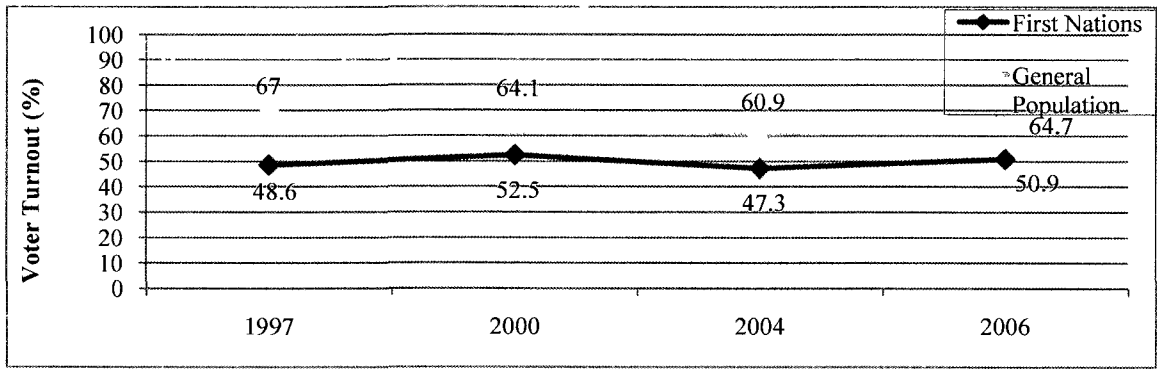


Source: Elections Canada at http://www.elections.ca .

First Nations Voter Turnout in Federal Elections

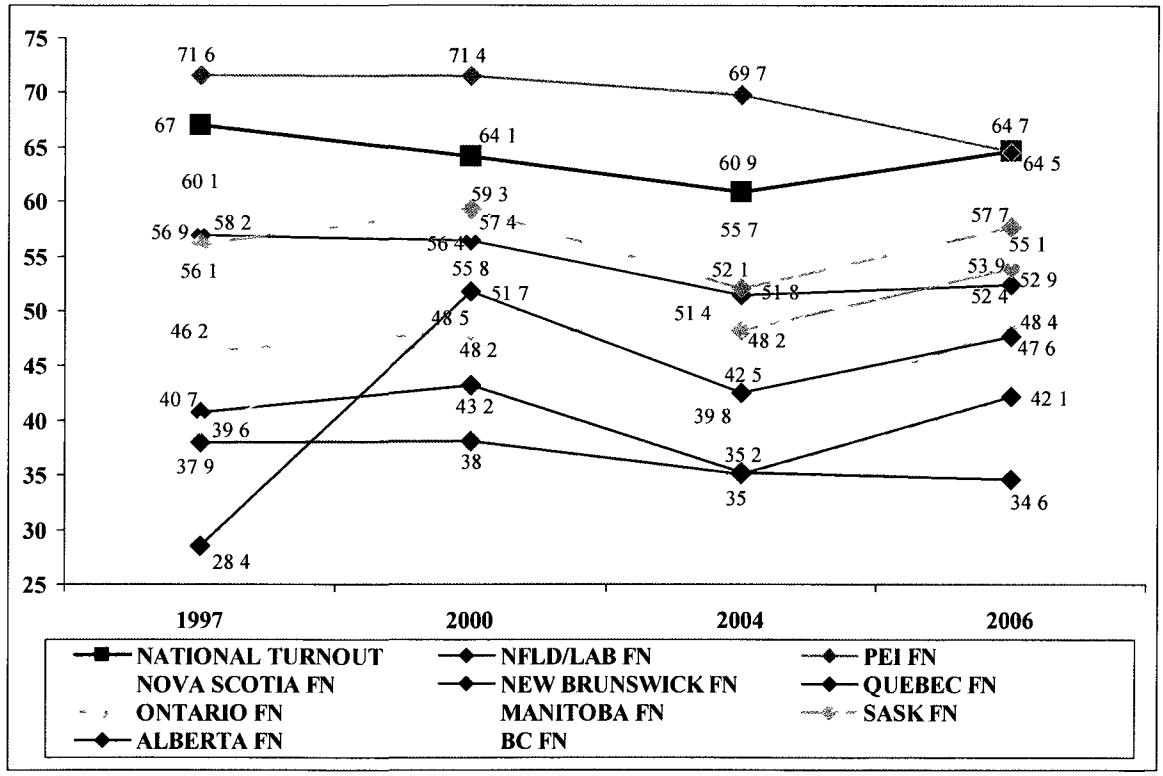
The first portion of the polling data collected focuses on the 1997, 2000, 2004 and 2006 federal elections. General results are presented in Figure 3, while cross-time comparisons of First Nations turnout in each province are presented in Figure 4.

Figure 3. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections, 1997–2006



Source for data on general population: Elections Canada.

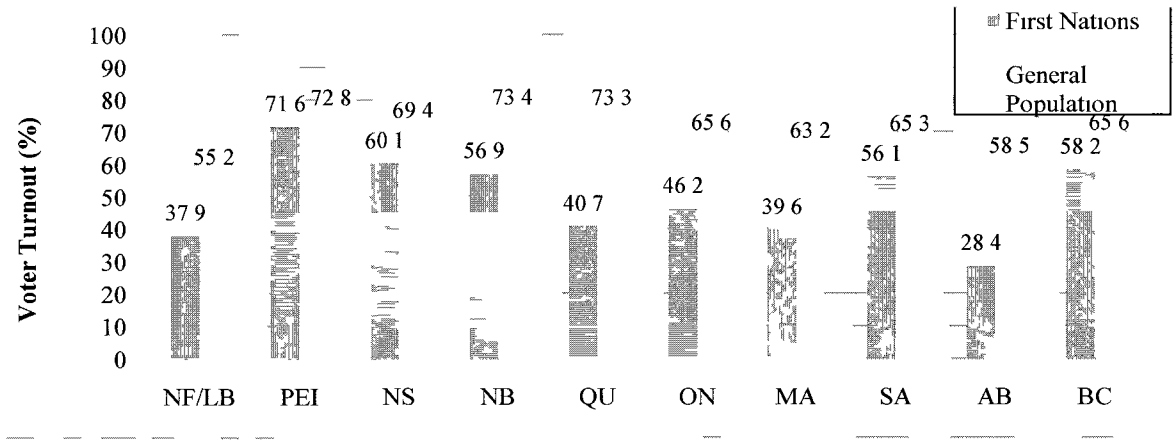
Figure 4. Cross-Time First Nations Voter Turnout versus the National Average (%), 1997–2006



Source for data on general population: Elections Canada.

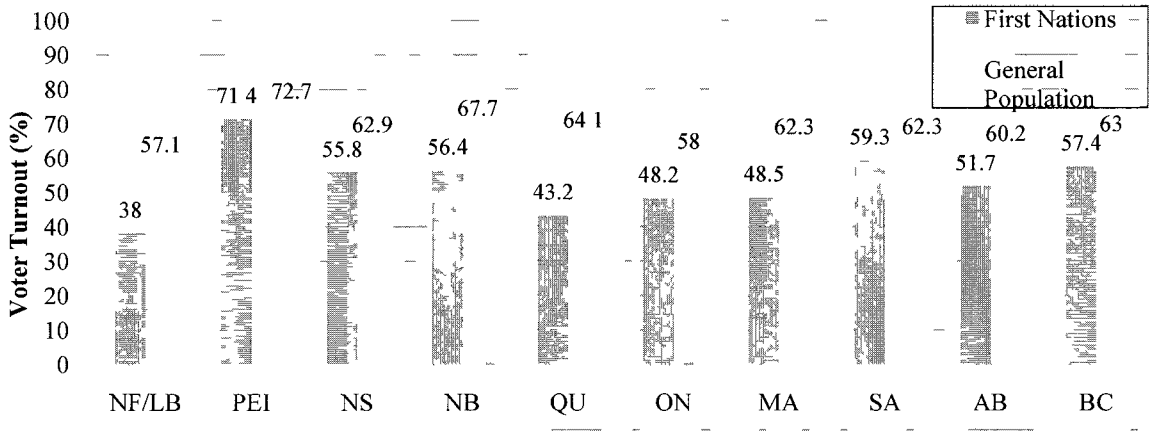
Figure 5, Figure 6, Figure 7 and Figure 8 provide a different cross-national perspective, with comparisons of First Nations voter turnout in each province for each federal election. In these cases, First Nations turnout was tabulated as the overall average of provincial results in each federal election. These tables provide a regionally-based comparative snapshot of First Nations turnout in each province.

Figure 5. Cross-National Comparative Breakdown of First Nations Voter Turnout in the 1997 Canadian Federal Election



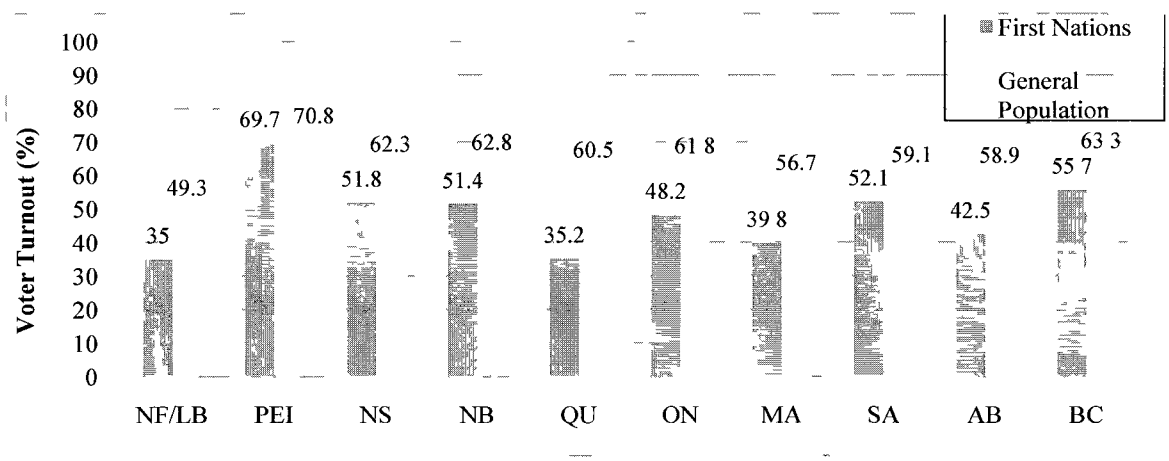
Average First Nations turnout 48 6%
Average turnout for the general population 67 0% (after National Register of Electors was updated)
Source for data on general population Elections Canada

Figure 6. Cross-National Comparative Breakdown of First Nations Voter Turnout in the 2000 Canadian Federal Election



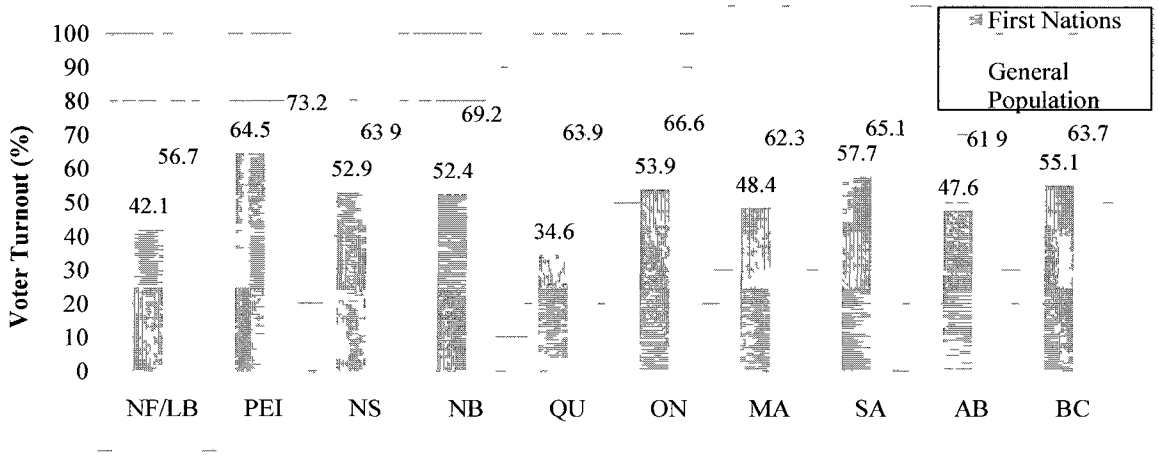
Average First Nations turnout: 52.5%
Average turnout for the general population: 64.1% (adjusted from 61.2% after National Register of Electors was updated). Source for data on general population: Elections Canada.

Figure 7. Cross-National Comparative Breakdown of First Nations Voter Turnout in the 2004 Canadian Federal Election



Average First Nations turnout: 47.3%
Average turnout for the general population: 60.9% (after National Register of Electors was updated).
Source for data on general population: Elections Canada.

Figure 8. Cross-National Comparative Breakdown of First Nations Voter Turnout in 2006 Canadian Federal Election



Average First Nations turnout: 50.9%.
Average turnout for the general population: 64.7% (after National Register of Electors was updated).
Source for data on general population: Elections Canada.

As evident from the results presented above, in each election, and in every province First Nations electors voted at consistently lower rates than the general population, with a 10- to 30-point range of difference. What is also striking is the fact that, despite the overall national decline in voter turnout, First Nations turnout in several provinces has increased overall and most consistently in Ontario and Newfoundland and Labrador. Conversely, in PEI, where First Nations turnout is highest, there has been a notable decrease in turnout since 2000.

Cross-time comparisons for each province provide a similar disparity in voter turnout between First Nations voters and the general Canadian population. However, these individual tables provide a different picture in that they allow for a more in-depth

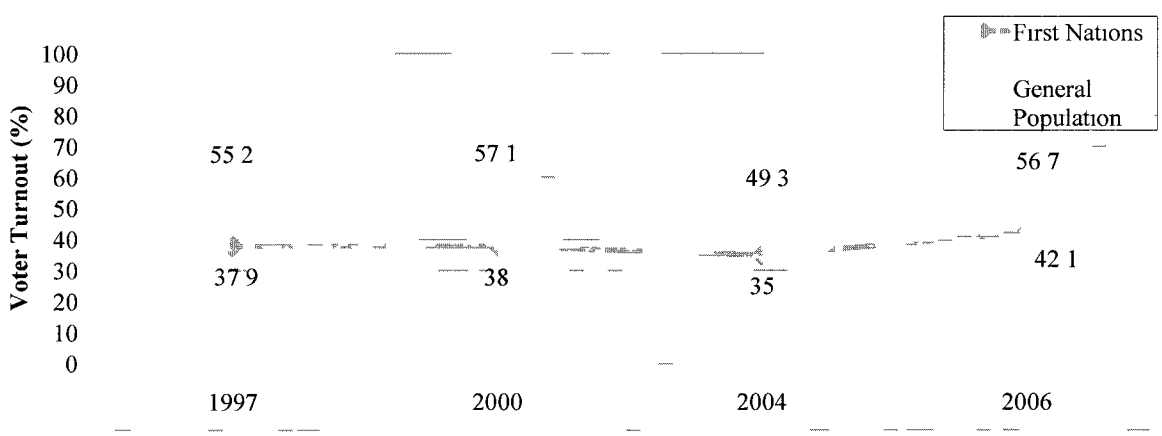
examination of the specific variations that exist in First Nations turnout from one province to the next. Analysis of these variations is provided below based on region.

First Nations Voter Turnout by Canadian Region

Atlantic Canada

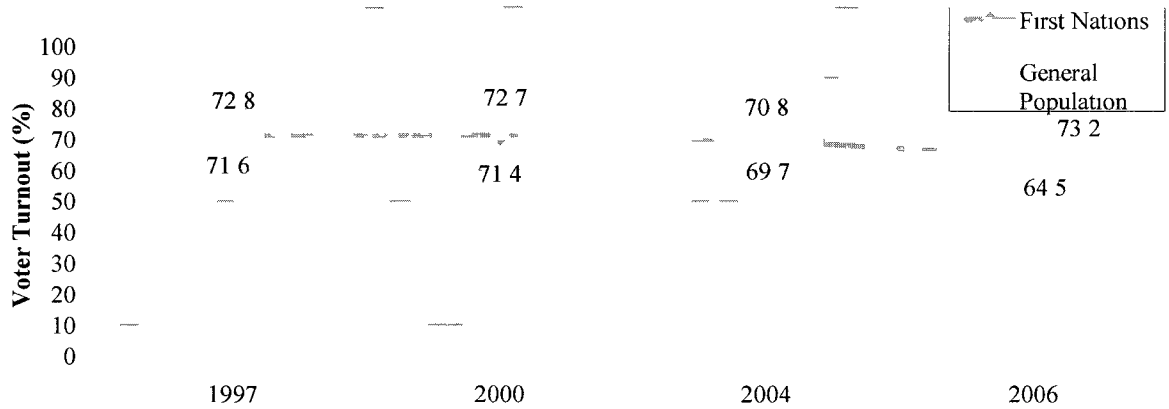
The turnout levels in Atlantic Canada in Canadian federal elections tend to be fairly consistent across the provinces and over time, with greatest similarity in turnout levels between Nova Scotia and New Brunswick. Lower turnout levels are apparent in Newfoundland and Labrador. This applies to both First Nations voters and the general population. Figure 9, Figure 10, Figure 11 and Figure 12 provide results for each of the Atlantic provinces in federal elections.

Figure 9. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections: Newfoundland and Labrador, 1997–2006



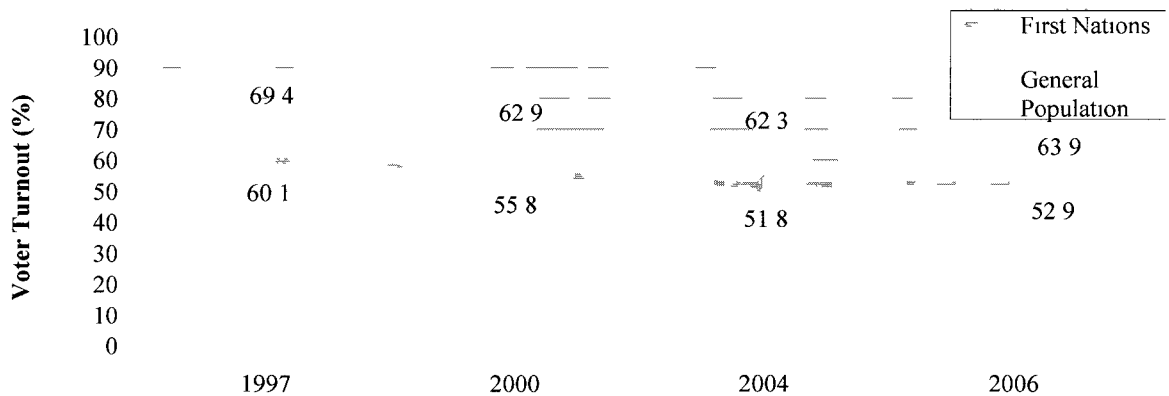
Source for data on general population Elections Canada

Figure 10. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections: Prince Edward Island, 1997–2006



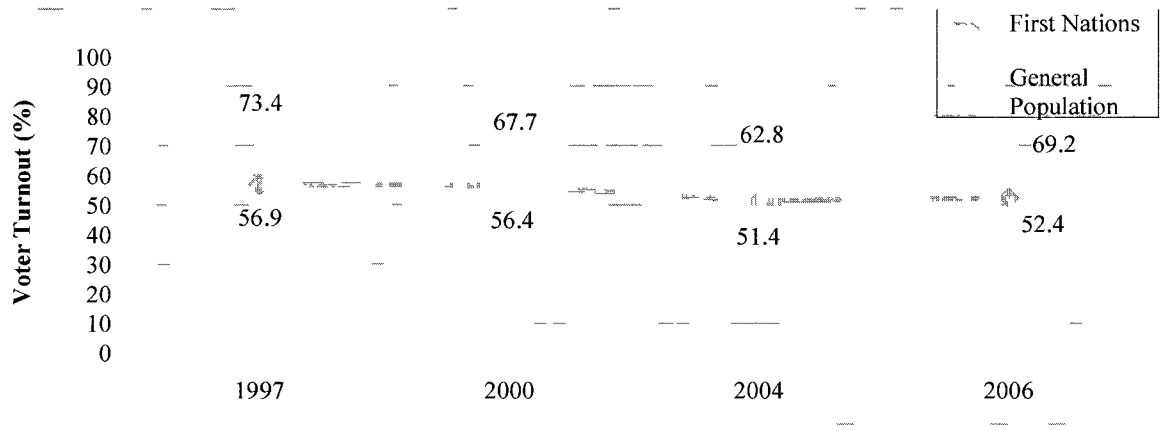
Source for data on general population Elections Canada

Figure 11. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections: Nova Scotia, 1997–2006



Source for data on general population Elections Canada

Figure 12. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections: New Brunswick, 1997–2006



Source for data on general population: Elections Canada.

The most striking finding is the high voter turnout in PEI, particularly when compared to the national average. Compared to the data presented in Figure 3 and Figure 4, voters in PEI participate at consistently higher levels than voters in any other part of the rest of the country. Moreover, in two of the four elections listed, First Nations voters in PEI also voted at higher levels than the general population across the rest of the country. It is notable that First Nations voters still vote at lower levels than the general population in PEI, but the difference is negligible in some instances. The precise reasons behind this discrepancy are not readily apparent, but it seems reasonable to expect that historical and cultural norms surrounding political participation and specific to each province or region are likely to affect First Nations turnout levels. Historical and cultural variations in First Nations turnout is an area that would benefit from future research,

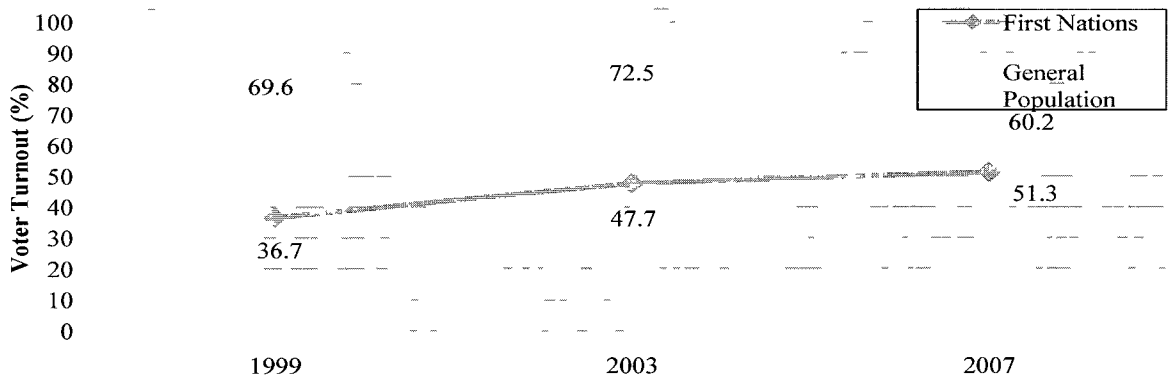
since aside from the potential roles of alienation and nationalism, more in-depth examination on a specific regional basis is beyond the scope herein.

Similar findings are apparent in provincial elections held in the Atlantic provinces, although some of the trends are even more extreme, as shown in Figure 13, Figure 14, Figure 15 and Figure 16. Generally speaking, provincial turnout levels tend to be lower than in federal elections, and this is the case in Nova Scotia and New Brunswick. However, in Newfoundland and Labrador as well as in PEI, turnout levels amongst the general population are actually higher than in the federal elections. Further, in PEI participation levels amongst the general population in provincial elections reached an astonishing 97.8% in 2007. At the same time, while turnout amongst First Nations is largely comparable in both federal and provincial elections in the provinces of Newfoundland and Labrador and PEI, First Nations turnout in New Brunswick provincial elections dropped nearly 20 percentage points from 1999 to 2006. In Nova Scotia, First Nations turnout in provincial elections is noticeably lower than in federal elections over the same period, at about 25 to 30 points lower. Other than New Brunswick, this is quite different from any other of the Atlantic provinces, and is somewhat surprising given that the Elections Nova Scotia and New Brunswick offices were more thorough about First Nations data collection compared to the other provincial elections offices.[17] Of course, it

[17] During data collection, Elections New Brunswick had detailed polling lists for all First Nations communities in the province, and were working quickly to compile historical polling lists for provincial elections which had occurred recently in the province. Notably, name changes to polling stations occur

may be that Elections Nova Scotia and Elections New Brunswick have devoted considerable energy to data collection precisely because of low First Nations turnout in their respective provincial elections, especially relative to federal electoral turnout in the provinces.

Figure 13. First Nations Voter Turnout in Newfoundland and Labrador Provincial Elections: 1999–2007



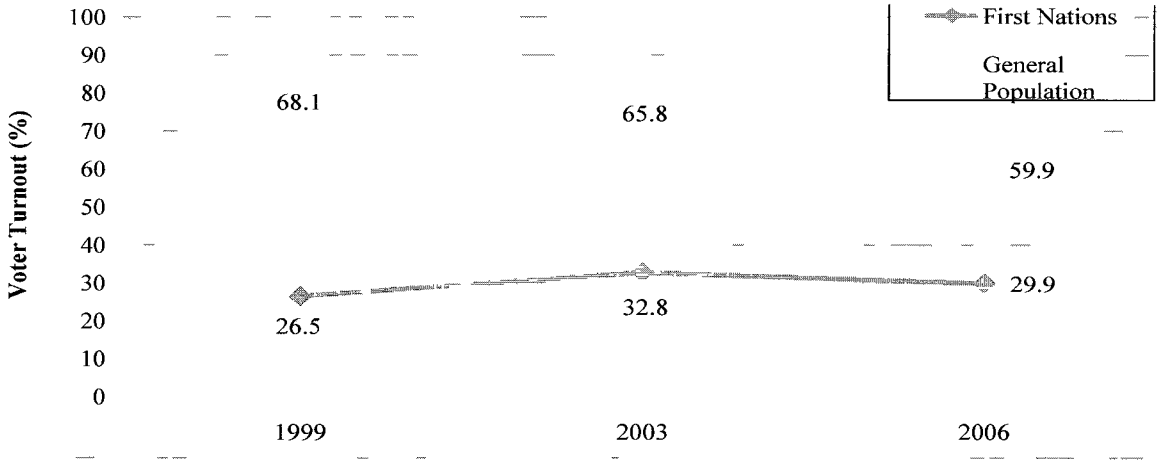
Source for data on general population: Elections Newfoundland and Labrador.

over time, and prior to 2000, very few polling station names in any elections provided any sort of reference to First Nations communities or reserve lands, as they now do.

Figure 14. First Nations Voter Turnout in Prince Edward Island Provincial Elections: 2000–2007

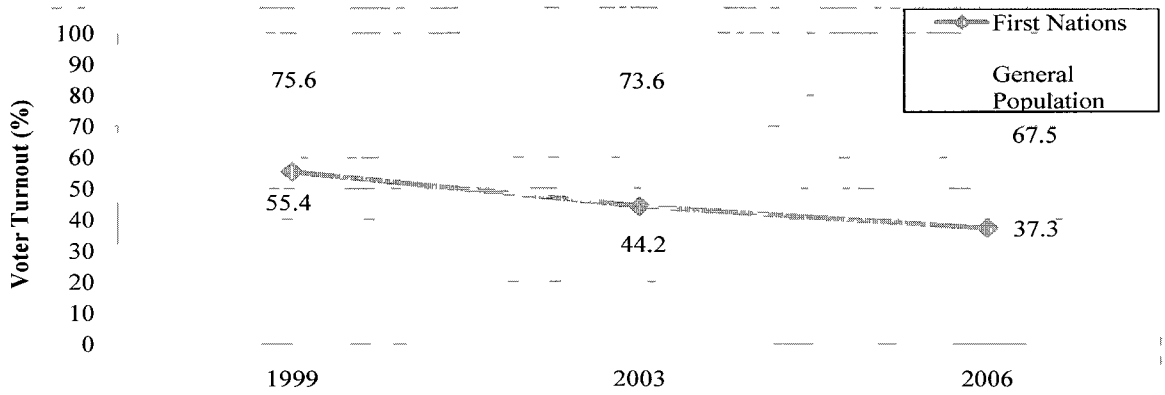
Source for data on general population: Elections Prince Edward Island.

Figure 15. First Nations Voter Turnout in Nova Scotia Provincial Elections: 1999-2006



Source for data on general population: Elections Nova Scotia.

Figure 16. First Nations Voter Turnout in New Brunswick Provincial Elections: 1999–2006

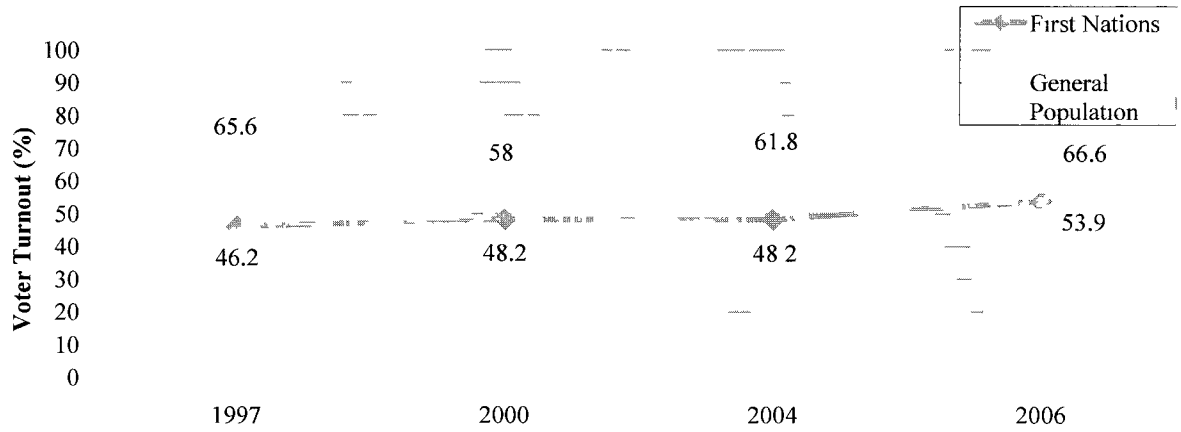


General population voter turnout in the 2003 New Brunswick provincial election was adjusted after duplicate names on the voter register were removed.
Source for data on general population: Elections New Brunswick.

Central Canada

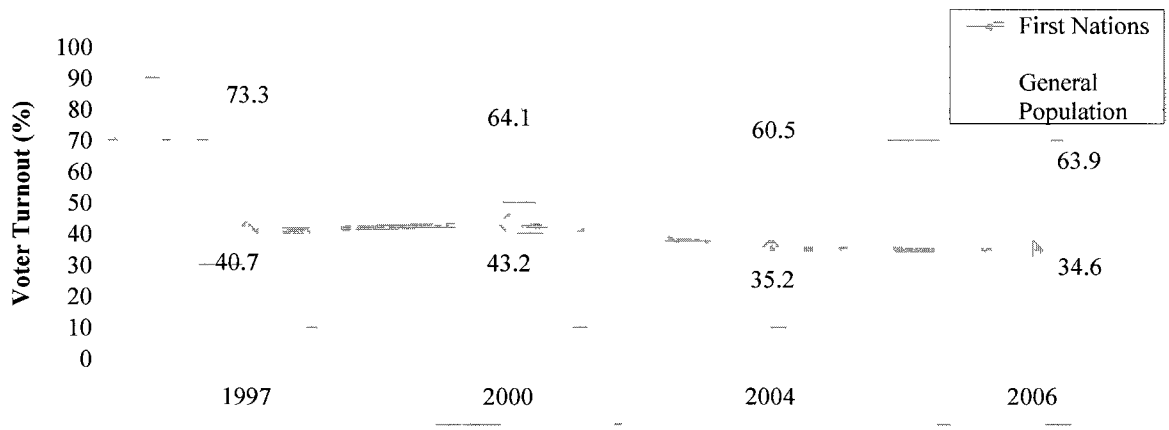
When looking at the federal results for Central Canada, namely Ontario and Quebec, there are some very interesting findings as well. What is striking is the fact that, despite the national decline in voter turnout, First Nations voter turnout in Ontario in the 2000, 2004 and 2006 federal elections has gradually increased. While the disparity between First Nations voters and the general population in Ontario is largely consistent with that seen in most areas of the country, Quebec turnout levels are the exception. At the federal level, voter turnout amongst First Nations in Quebec is lower than anywhere else in the country.

Figure 17. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections: Ontario, 1997–2006



Source for data on general population: Elections Canada.

Figure 18. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections: Quebec, 1997–2006



Source for data on general population: Elections Canada.

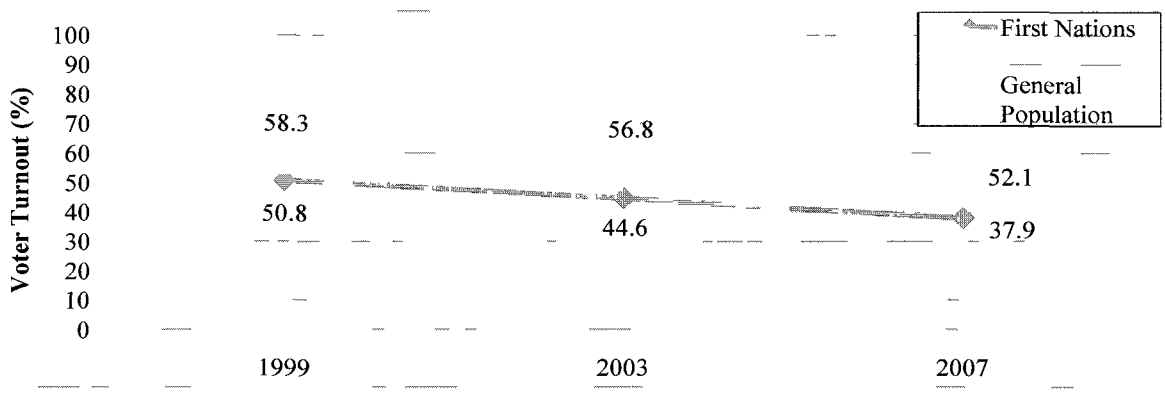
At the provincial level, elections in both Ontario[18] and Quebec elicited similar voter turnout levels, with Quebec First Nations voting at consistently lower levels than anywhere else in the country. This is despite the fact that the general Quebec population votes at significantly higher levels in provincial elections than is the case at the provincial level elsewhere in the country. In Ontario, a noticeable difference is present between voter turnout levels for First Nations and the general population, albeit to a lesser extent, with a range of eight to twelve percentage points between the two groups. A drop in voter turnout rates is also noticeable when comparing the 1999, 2003 and 2007 elections. This is quite different from the results in federal elections, where voter turnout levels for First Nations in Ontario actually increased over time. While data were not available for First Nations voter turnout in Ontario provincial elections prior to 1999, the drop in First Nations voter turnout from 1999 to 2007 seems to be indicative of an overall trend in First Nations participation in Ontario *provincial* elections.

Unfortunately, the reasons behind this federal-provincial disparity in Ontario are not clear, and without additional cross-time data or further research it is difficult to speculate with certainty on the potential causes. One reasonable contention is that during the last decade First Nations in Ontario have arguably adopted increasingly-negative impressions of Aboriginal relations with the provincial government. The conflict that the

[18] It was discovered that Elections Ontario has not maintained any databases or listings on those polling stations that served exclusively First Nations communities prior to the 2003 provincial election.

Ipperwash Inquiry[19] sought to address, namely with respect to the police-shooting death in 1995 of Aboriginal protestor Dudley George, is relevant, along with the relative increase in violent protest behaviour related to land negotiations in the province, such as the blockades and standoffs at Caledonia and Deseronto.[20] These events add weight to the importance played by Aboriginal–Crown relations in shaping and determining Aboriginal engagement in electoral politics.[21] More generally, the Aboriginal-Crown relationships in the provinces are also affected by government policies, which in turn impact Aboriginal engagement in the provinces, including in land negotiations. This issue is closely analyzed in subsequent chapters.

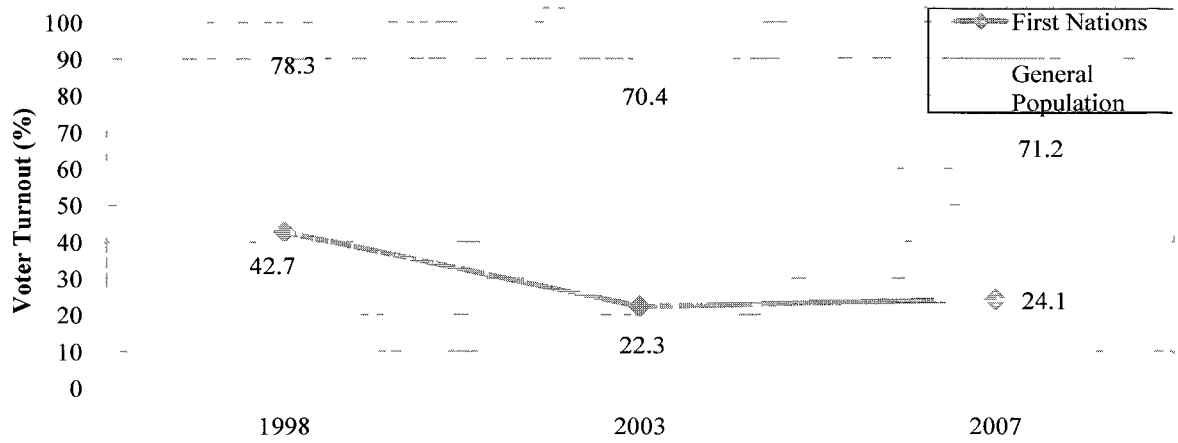
Figure 19. First Nations Voter Turnout in Ontario Provincial Elections: 1999–2007



Source for data on general population: Elections Ontario.

[19] See generally *Report of the Ipperwash Inquiry* (Toronto: Queen's Printer for Ontario, 2007).
[20] The latter is also named Tyendinaga Mohawk Territory. Extensive coverage of these events has been provided in the media.
[21] The impact of these events was described in the media in the context of First Nations voting controversy in the 2007 Ontario provincial election (see "Ontario election voting controversial among First Nations," CBC News, online: http://www.cbc.ca/canada/ontariovotes2007/story/2007/10/01/ov-first-nations.html).

Figure 20. First Nations Voter Turnout in Quebec Provincial Elections: 1998–2007



Source for data on general population: Elections Quebec.

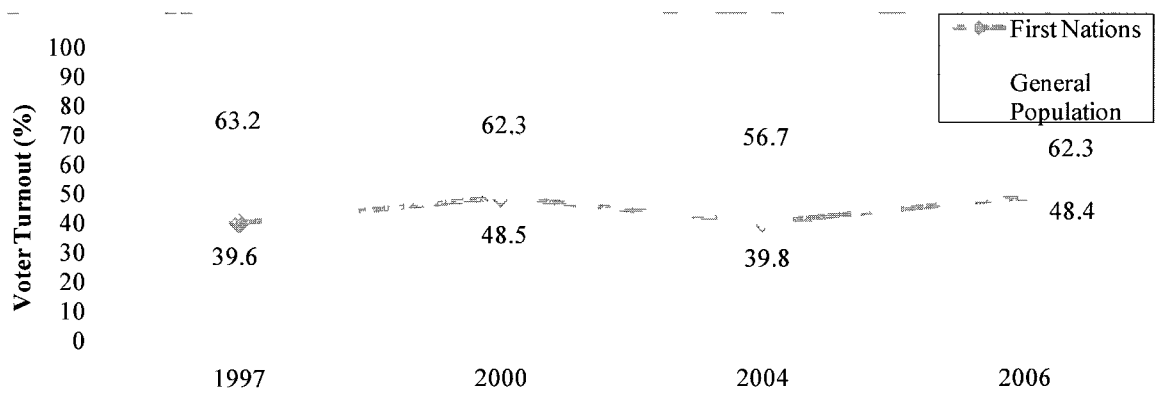
Western Canada

In the West, there are no significant anomalies, other than the complete lack of available data for First Nations turnout in British Columbia provincial elections. Great efforts were made to obtain these data, and at the very least, to obtain lists of First Nations polling stations used by the Elections British Columbia office in order to calculate First Nations turnout over time. However, it was not possible to obtain these data because the elections office in the province does not maintain such records, nor were they interested, either in the short- or long-term, in building such lists. Whether this was due to a lack of resources or a broader lack of political interest is unknown. The only other option would be the utilization of geographic mapping software (GIS) in order to

determine which polling stations correspond to specific First Nations communities in the province, but such geographic specialization is beyond the confines of this current study.

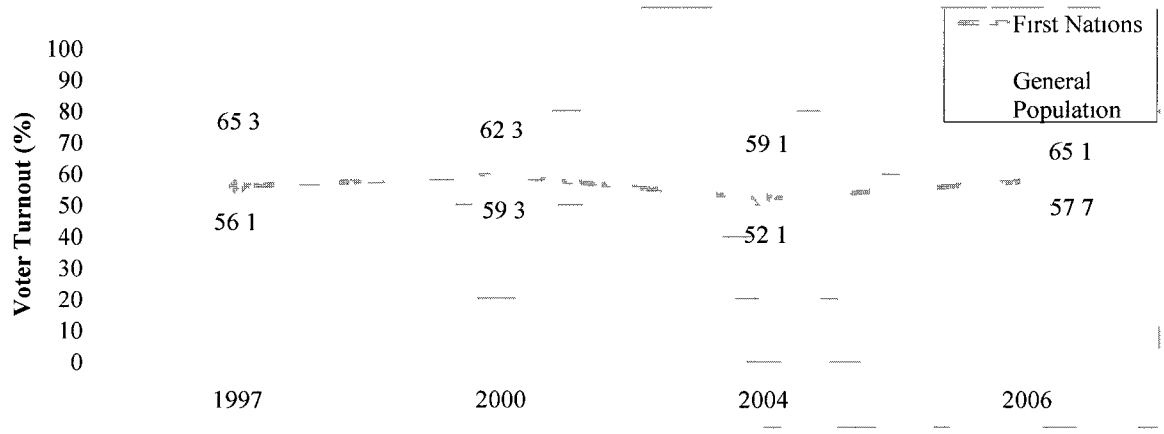
The data that are presented cover federal elections for British Columbia along with federal and provincial results for the other provinces in the West. As shown, First Nations turnout in each instance is significantly lower than that of the general population, and this trend is apparent over time and in each province. The trend is somewhat less noticeable in federal elections in Saskatchewan and British Columbia, which are also two provinces with the largest Aboriginal populations in the country, but the specific reasons behind this smaller gap in turnout between First Nations and the general populations are not clear.

Figure 21. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections: Manitoba, 1997–2006



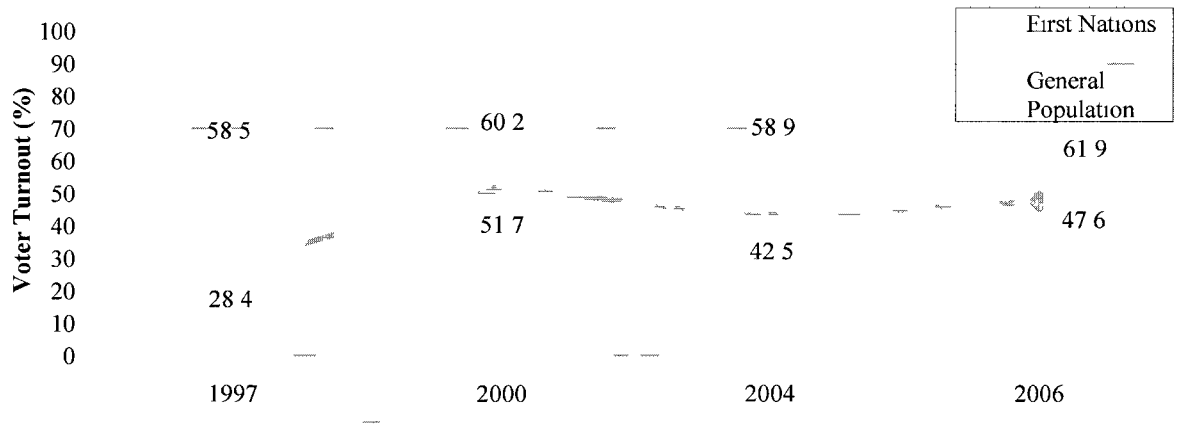
Source for data on general population: Elections Canada.

Figure 22. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections: Saskatchewan, 1997–2006



Source for data on general population Elections Canada

Figure 23. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections: Alberta, 1997–2006



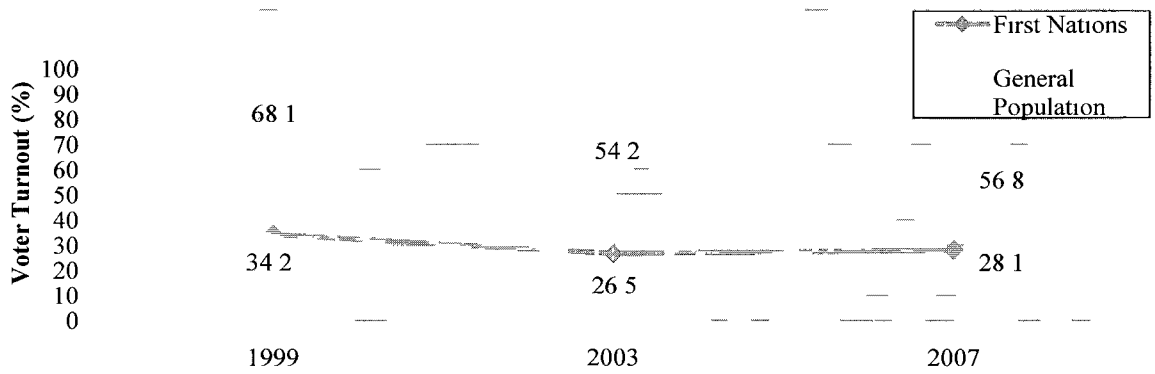
Source for data on general population Elections Canada

Figure 24. Cross-Time Comparison of First Nations Voter Turnout in Canadian Federal Elections: British Columbia, 1997–2006

Source for data on general population: Elections Canada.

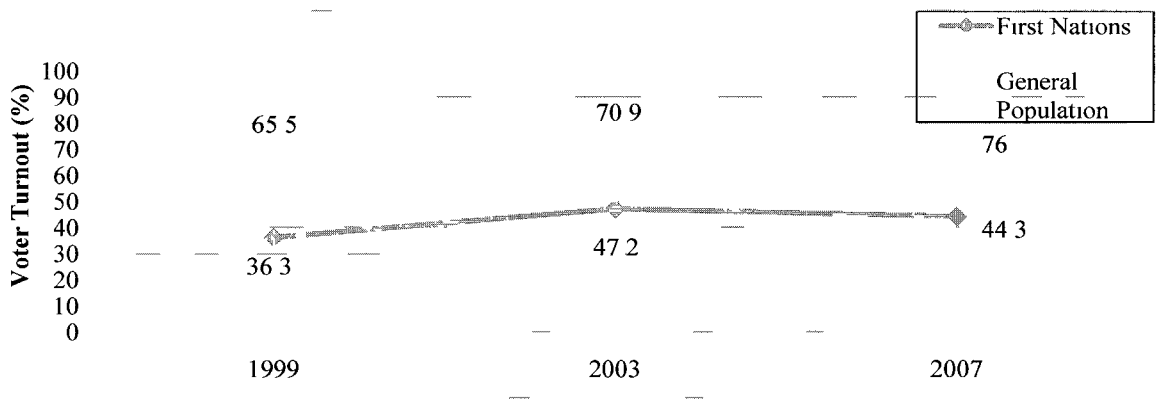
In provincial elections, turnout levels are lower amongst both First Nations and the general populations. Of note were the quality of provincial polling data in Saskatchewan, with noticeable care in providing many polling stations that serve specifically First Nations communities. This increased attention to First Nations polling, especially when compared to most of the other provincial elections offices across the country, potentially relates in part to the high proportion of Aboriginal peoples who live in Saskatchewan, relative to the rest of the country.

Figure 25. First Nations Voter Turnout in Manitoba Provincial Elections: 1999–2007



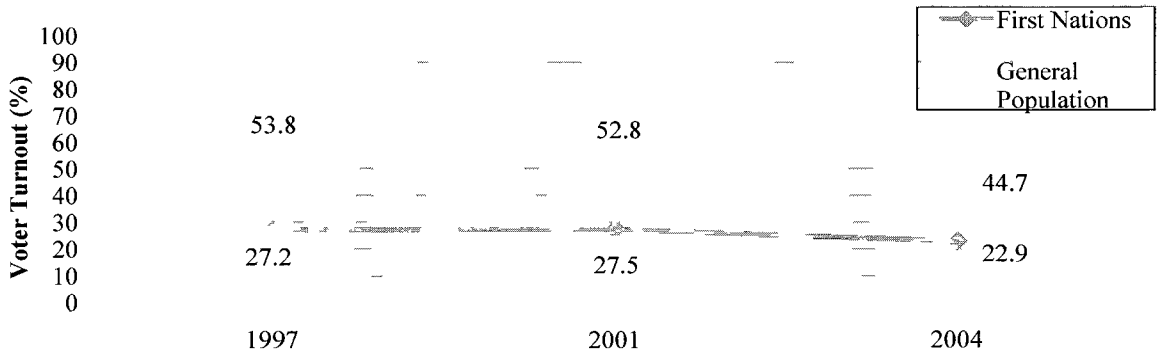
Source for data on general population Elections Manitoba

Figure 26. First Nations Voter Turnout in Saskatchewan Provincial Elections: 1999–2007



Source for data on general population Elections Saskatchewan

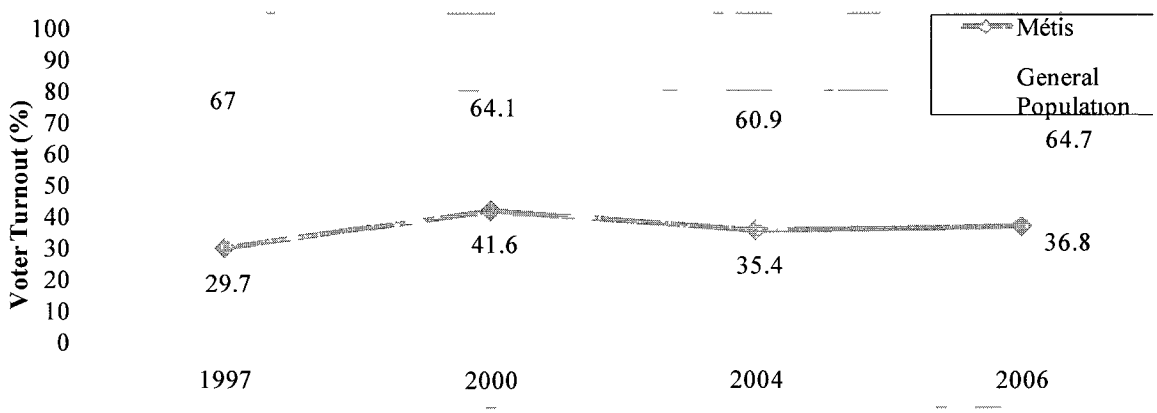
Figure 27. First Nations Voter Turnout in Alberta Provincial Elections: 1997-2004



Source for data on general population: Elections Alberta.

As noted above, there are a few data on Métis and Inuit voters, which are presented below, but these are presented primarily for illustrative purposes. While demonstrating similar trends to turnout levels of First Nations across the country, the overall lack of reliable data for Métis and Inuit voters means that broader conclusions cannot be formulated with sufficient certainty.

Figure 28. Métis Voter Turnout in Federal Elections (Alberta Métis Settlements), 1997–2006

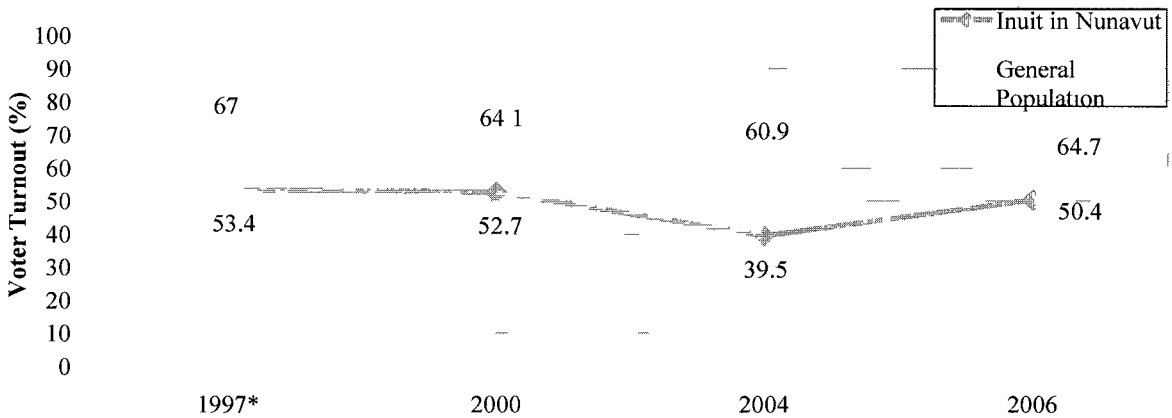


Source for data on general population: Elections Canada.

Figure 29. Métis Voter Turnout in Alberta Elections (Alberta Métis Settlements), 1997–2004

Source for data on general population: Elections Alberta.

Figure 30. Voter Turnout for Inuit in Nunavut in Federal Elections, 1997–2006



*1997 Inuit voter turnout from Nunavut riding in Northwest Territories (pre-Nunavut).
Source for data on Canadian general population: Elections Canada.

SUMMARIZING THE FINDINGS: ABORIGINAL VOTING ACROSS CANADA

Interestingly, First Nations voter turnout in Ontario consistently increased in the 2000, 2004 and 2006 federal elections, while First Nations turnout in Newfoundland and Labrador and PEI provincial elections has also increased. The reasons behind these

increases are unknown, but it may be that the efforts of Elections Canada, the relevant importance that some provincial elections offices may attach to Aboriginal engagement, as well as some of the efforts of Aboriginal organizations, such as the Assembly of First Nations (AFN), to improve overall Aboriginal voter turnout have been somewhat successful. Notably, the rates of participation of the PEI, Ontario and Alberta general populations have also seen slight improvements in federal elections over time, which may represent a broader cultural shift in these provinces, which could potentially impact First Nations turnout. This is an interesting dynamic, especially given the downward trend of voter turnout across the country. Of course, this downward trend has been an overall country-wide average, without taking into consideration regional deviations.

Conversely, overall Aboriginal electoral participation in provincial elections is not something that the elections offices, other than Elections Nova Scotia and Elections New Brunswick, have attempted to improve in any sort of substantive way, even in recent years. This is in stark contrast to the significant efforts of Elections Canada over the past several years in this regard. It is contended here that Elections Canada's efforts at improving education and access to voting for Aboriginal peoples have been effective, primarily at the *federal* level and especially given collaborative endeavours with national Aboriginal organizations. More recently, there was a Memorandum of Understanding signed by the Assembly of First Nations and Elections Canada to work together to

increase First Nations participation in federal elections.[22] Alternatively, in the context of most provincial elections offices Aboriginal voter turnout has largely functioned as a non-issue, with little attention paid to the special problems faced by the Aboriginal electorate, arguably doing relatively little to affect First Nations voter turnout levels over time.[23]

At the most basic level, it is apparent that Aboriginal voter turnout, and specifically First Nations turnout, is consistently lower than that of the general Canadian population. Ultimately, Aboriginal peoples are significantly disengaged from the Canadian electoral process, at least in the context of traditional forms of participation such as voting or running for public office. It is argued that this disengagement stems

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[22] See Elections Canada, *Memorandum of Understanding*, signed December 6, 2006, online: http: /www.elections.ca/vot abo/understanding.pdf, and Elections Canada, *Expanding the Partnership Between the Assembly of First Nations and Elections Canada*, December 6, 2006, online: http: /www.elections.ca/content.aspx?section=med&document=dec0606&dir=pre&lang=e. For further discussion, see Elections Canada, *Report of the Chief Electoral Officer of Canada on the 39th General Election of January 23, 2006*, online: http://www.elections.ca/res/rep/off/statreport2006_e.pdf; Michelle MacAfee, "Elections Canada Tries to Turn Around Low Aboriginal Turnout" (June 12, 2004) CNews, online: http://cnews.canoe.ca/CNEWS/Politics/CanadaVotes/2004/06/12/497018-cp.html (no longer available); Elections Canada, "Roundtable on Aboriginal Youth and the Federal Election Process" (2004) 6:1 Electoral Insight 40; Elections Canada, *Aboriginal Participation in Federal Elections* (January 26, 2006), online: http://www.elections.ca/content.aspx?section=vot&document=index&dir=abo/circle&lang=e; Elections Canada, *Presentation of the Chief Electoral Officer to the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources*, Ottawa, Ontario, January 28, 2003, online: http://www.elections.ca/content.aspx?section=med&document=jan2803&dir=spe&lang=e; "Education and Awareness Campaign – First Nations Voter Turnout (2005) 2:5 AFN Echo 6; Len Kruzenga, "Federal Election in Full Flight: Importance of Aboriginal Vote Greatest in 17 Ridings" (2004) The First Perspective, online: www.firstperspective.ca (no longer available).

[23] In general, while federal turnout levels tend to be higher than provincial turnout levels, which in turn, are higher than municipal turnout levels, this tendency may not be applicable to First Nations. This is illustrated most clearly in the context of band council elections and local politics, where First Nations voter turnout is drastically higher than the norm. Relevant data and associated analysis are presented in the subsequent chapter.

from a variety of factors, especially historical and cultural ones, not the least of which is rooted in previous electoral practices that discriminated against and sought to assimilate Aboriginal peoples. The resultant alienation of Aboriginal peoples has continued to contemporary times, highlighting the urgent need to find a meaningful way to engage Aboriginal peoples and achieve reconciliation in the process. However, in order to understand the relevance of these findings, an examination of other similar studies is warranted. This will provide a better sense of some of the broader issues related to Aboriginal engagement in Canadian elections, and it will situate the relevance of these findings in a wider context. This is the primary task of the next chapter.

CHAPTER SIX – COMPARATIVE FINDINGS ON ABORIGINAL ELECTORAL ENGAGEMENT: REVEALING THE SIGNIFICANCE OF ABORIGINAL ALIENATION AND NATIONALISM

A major weakness of the vast literature on rights, on self-government, and on what should be done in the area of Aboriginal-state relations in Canada is the negligible attention to how Aboriginal peoples are to relate to the representative political institutions of the country in which they live. This is especially true of writings by the academic legal community, both Aboriginal and non-Aboriginal. A comprehensive discussion of how we are to live together should include a concern for how Aboriginal citizens/nations relate to the political arenas of Canadian federalism, to elections and legislatures, and for their capacity to influence public policies that affect Aboriginal peoples as such and as Canadians.[1]

Other studies provide important comparisons for the data presented in the previous chapter. They help to situate the current findings in a broader framework and they highlight the relevance of this study. Perhaps more importantly, when taken together these studies reveal some of the broader theoretical implications of the trends in Aboriginal electoral engagement. This chapter first reviews the key elements of the findings of other studies, comparing and contrasting them with the results presented in the previous chapter. An interesting exception to these broader trends in Aboriginal electoral engagement is comparatively evaluated. Finally, the broader theoretical ramifications are examined, specifically in the context of Aboriginal alienation and nationalism.

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[1] Alan C. Cairns, *First Nations and the Canadian State: In Search of Coexistence* (Kingston: Institute of Intergovernmental Relations, Queen's University, 2002) at 50.

COMPARATIVE FINDINGS ON ABORIGINAL VOTER TURNOUT[2]

Similar to the findings presented in this current study, Bedford and Pobihushchy found that First Nations electors in Nova Scotia, New Brunswick and PEI voted at significantly lower rates than the general population, both in federal and provincial elections. In most instances, the rate of First Nations voter turnout was between 20% and 30% lower than that of the general population. Some instances demonstrated more drastic differences between First Nations turnout and that of the general population, while results for PEI were less dissimilar.[3] Moreover, the authors showed that participation rates decreased significantly between 1963 and 1993 in Nova Scotia and New Brunswick. For instance, First Nations voter turnout in Nova Scotia dropped from 89.3% in 1962 to 54.0 % in 1988 for federal elections and from 52.0% in 1963 to 45.2 percent in 1993 in provincial elections.[4] In New Brunswick, First Nations voter turnout dropped from 70.0% in 1962 to 17.8% in 1988 in federal elections and from 64.4% in 1967 to 27.6% in

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[2] An earlier version of the discussion in this section was published in Jennifer E. Dalton, "Alienation and Nationalism: Is It Possible to Increase First Nations Voter Turnout in Ontario? (2007) 27:2 Can. J. Native Stud. 247 at 267-269 [Dalton].

[3] David Bedford and Sidney Pobihushchy, "On-Reserve Status Indian Voter Participation in the Maritimes" (1995) 15:2 Can. J. Native Stud. 255 at 271-272 [Bedford and Pobihushchy]; Elections Canada, *Voter Turnout at Federal Elections and Referendums, 1867–2004*, online: http:/ www.elections.ca/content.asp?section=pas&document=turnout&lang=e&textonly=false; Elections Nova Scotia, *Comparative Statistics*, online: http:/ electionsnovascotia.ns.ca/results Comparative%20Stats%202006.pdf; Elections New Brunswick, *1995 Recapitulation*, online: http: /www.gnb.ca/elections 95prov/95recapsheet-e.asp (no longer available); Elections Prince Edward Island, *Statistics on General Elections from 1966 to 2003*, online: http://www.electionspei.ca/provincial/historical/ceoreports/turnout/turnout.pdf.

[4] Bedford and Pobihushchy, *ibid.* at 259-260.

1991 in provincial elections.[5] A more moderate decline is evident for PEI, where First Nations participation rates changed from 75.0% in 1962 to 72.8% in 1988 in federal elections and 80.4% in 1976 to 77.7% in 1993 in provincial elections.[6]

While the lower rates of First Nations voter turnout in Nova Scotia, New Brunswick and PEI are comparable to those found in this study vis-à-vis the general populations in each province, an interesting contrast is apparent with regard to voter turnout decline. In particular, Bedford and Pobihushchy found that First Nations voter turnout dropped drastically over a three-decade period, but the data presented in the previous chapter do not show First Nations turnout to be as low as reflected in the Bedford and Pobihushchy study. Indeed, as noted, in the data presented herein on federal elections, First Nations voter turnout in PEI, Ontario and Alberta has actually increased moderately over the past decade. The fact that First Nations turnout is highest in the early 1960s would seem to indicate the importance of the extension of the franchise to all Aboriginal peoples at the time. A full examination of the precise reasons behind these differences is beyond the scope of this chapter. However, the varying timeframes, regional differences, and Elections Canada's efforts may be relevant factors once again.

A similar study conducted by Jean-Nicholas Bustros, which focused on First Nations voter turnout data across the country in federal elections, provides further comparison. The methodology was similar, with data based on poll-by-poll results at the

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[5] *Ibid.* at 258.
[6] *Ibid.* at 261.

federal level. This study found that First Nations voter turnout for the 1992 Charlottetown referendum was 41%, with 38% and 40% respectively for the 1993 and 1997 general elections.[7] When compared with voter turnout for the general population – at 71.8% for the referendum, 69.9% for the 1993 general election, and 67.0% for the 1997 general election – the differences between First Nations voter turnout and that of the general population is striking. While the data presented by Bustros do not deal specifically with individual provinces, there is one notable statistic for comparison, namely the First Nations voter turnout rate of 40% during the 1997 federal election. This turnout rate was calculated for First Nations electors across the country and is several points lower than the value of 48.6% turnout found for First Nations in the 1997 federal election, as shown in Figure 3. This difference may be due to differences in methodology employed in each study, although specific details of Bustros' methodology are not provided, and thus comparisons are not possible.

A third important study, conducted by Daniel Guérin, builds on the work of Elections Canada's National and International Research and Policy Development Directorate. Both use a similar poll-by-poll methodology as that employed in the current study. In the Directorate's study, it was determined that First Nations voter turnout

[7] Jean-Nicholas Bustros, *Electoral Participation of Aboriginal People: Summary of Previously Conducted Research and Analysis* (Ottawa: Elections Canada, Legal Services Directorate, 2000).

across the country during the 2000 federal election was 47.8%.[8] In conducting his own analyses, Guérin found that First Nations turnout across the country was 48% for the 2000 federal election.[9] These results are very close to the 52.5% result shown above in Figure 3. However, Guérin also determined that variations existed across provinces and territories. While most results for First Nations voters were lower than the national average, First Nations in a few provinces, namely Saskatchewan and PEI had higher turnout levels than that of the general population.[10] The existence of provincial variations is consistent with the findings of this current study. While Guérin provided no concrete reasons for these differences, he did suggest that community participation may depend on a *socio-cultural* factor, wherein elections that deal with issues directly affecting First Nations communities may garner higher voter turnout from relevant community members.[11] This theory is addressed below in the context of alienation and nationalism in the subsequent chapter.

A more recent study completed by Michael Kinnear, which also uses a similar poll-by-poll methodology, provides data on First Nations voter turnout in Manitoba for federal elections between 1962 and 2003. As noted therein, voter turnout was quite high right after the franchise was extended to "registered Indians," with First Nations turnout

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[8] See Daniel Guérin, "Aboriginal Participation in Canadian Federal Elections: Trends and Implications" (2003) 5:3 Electoral Insight 10 at 12.
[9] *Ibid.* at 12-13.
[10] *Ibid.* at 14.
[11] *Ibid.*

at 60.5%.[12] This lasted for a few years, but then started to gradually and continually decline, dropping to 6.0% in 2003. Most notably, while downward trends in voter turnout have been found for the general Canadian population, this drop in First Nations voter turnout in Manitoba has been extreme.[13] These results are quite different from those presented above for Manitoba, and indeed for the rest of the First Nations turnout findings across the country, but Kinnear provides no explanation for the severe drop in First Nations voter turnout in Manitoba.

A very recent study, conducted by Harell et al., also examines turnout in Manitoba, but the study includes data from Saskatchewan and Alberta as well, yet only in federal elections from 1997 to 2004. Perhaps more importantly, the study takes a very different approach to data analysis. Rather than looking at raw data from poll-by-poll statistics relevant to First Nations communities, the authors based their study on quantitative analyses of self-reported Aboriginal turnout in a subsample of the *Equality, Security and Community* (ESC) survey, a relatively recent multidisciplinary study conducted in Canada. There are two positive aspects to using survey data over raw polling data. First, it allows the researchers to statistically analyze a range of variables in conjunction with turnout, and thus explanatory models can be calculated which have the potential to provide greater insight into the factors which determine or affect whether or

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[12] Michael Kinnear, "The Effect of Expansion of the Franchise on Turnout" (2003) 5:3 Electoral Insight 46 at 47.
[13] *Ibid.*

not Aboriginal peoples choose to vote. Second, in the ESC survey, while the data only pertain to a subset of self-identified Aboriginal peoples in the Prairie provinces, they do include all Aboriginal peoples, both on- and off-reserve. In this way, the Harell et al. study provides a unique perspective that has rarely, if ever, been explored elsewhere.

Nevertheless, this current study veered away from taking an approach similar to that adopted by Harell et al, despite the potential for seemingly more wide-reaching findings on Aboriginal voter turnout, primarily because of several methodological problems. First, and as discussed above, self-reported turnout data are inherently challenging. It is argued here that such inflated data cannot provide sufficient accuracy or reliability of results and thus lack analytical rigour. Second, in using a subset of data, the overall sample size is necessarily smaller, and in the Harell et al. study, there were only 608 self-identified Aboriginal respondents from the Prairie provinces, a number which becomes exponentially smaller when various quantitative models are run with additional variables factored into the analyses. This ultimately undermines the statistical significance of the findings. In other words, the findings are less likely to accurately reflect the larger Aboriginal population. Along these lines is a perceived effort by Harell et al. to stretch or present their methodology as yielding "acceptably-reliable" findings. For instance, the authors assert that, "while not strictly representative, our sample does approximate the Aboriginal population with respect to key characteristics," and that, "while differences between our sample and the broader Aboriginal population prevent us from deriving firm conclusions about Aboriginal turnout, in general, these data shed light

on the determinants of turnout among a broad range of Aboriginal peoples."[14] Yet, the problems in their methodology noted above still remain, and little is done to effectively address these issues.

A similar contention can be raised about one other very recent study conducted by Paul Howe and David Bedford, since theirs is also based on self-reported turnout levels. However, this problem is somewhat offset by the fact that their study is much more extensive than the study by Harell et al., covering Aboriginal turnout across the entire country in federal, provincial and municipal elections, while their methodology is also arguably more rigorous.[15] For instance, they use data from the 2003 *General Social Survey* (GSS), which deals more broadly with the theme of social engagement, while the sample size obtained and overall response rate of 78% are both higher than in most similar survey studies, thus increasing the reliability of their findings.[16] Howe and Bedford presume that this higher response rate is the cause behind the lower rates of inflation found in the self-reported turnout data.[17] Nevertheless, Aboriginal peoples still constitute a subset in the GSS, and thus, as conceded by the authors, there is a concern

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[14] Allison Harell, Dimitrios Panagos and J. Scott Matthews, "Explaining Aboriginal Turnout in Federal Elections: Evidence from Alberta, Saskatchewan and Manitoba," commissioned by Elections Canada for the *2009 Aboriginal Policy Research Conference*, Ottawa, Ontario, March 9-12, 2009 at 11-12 [Harell et al.].

[15] Howe and Bedford note the sample size problems in the Harell et al. study (Paul Howe and David Bedford, "Electoral Participation of Aboriginals in Canada," commissioned by Elections Canada for the *2009 Aboriginal Policy Research Conference*, Ottawa, Ontario, March 9-12, 2009 at 13 n. 5 [Howe and Bedford]).

[16] For further explanation, see Howe and Bedford, *ibid.* at 13.

[17] *Ibid.* at 15.

that Aboriginal respondents are underrepresented. As a result, the data had to be weighted in order to align more closely the sample of Aboriginal respondents with actual "population parameters" provided in census data.[18] Moreover, without any examination of regional variations, the results presented constitute national averages and ultimately lose some of the detail and analytical precision provided by comparative assessments.

Despite these methodological differences and various limitations, both of the studies by Howe and Bedford as well as Harell et al. provide some important findings for comparison with the current study. Generally speaking, both studies reveal consistently lower levels of Aboriginal turnout vis-à-vis the rest of the population. Harell et al. also find provincial deviations across the Prairie provinces, with lowest average self-reported turnout rates amongst Aboriginal voters in Alberta at 34%. Averages in Manitoba and Saskatchewan are both 54%.[19] These findings are quite different from the poll-by-poll results presented above in Figure 4, Figure 5, Figure and Figure 7, which not only show different values in all instances, but also First Nations turnout in Manitoba is consistently lower than in the other Prairie provinces.

Harell et al. also note distinctions between on- and off-reserve Aboriginal voters, with lowest rates amongst the urban Aboriginal population at 44%. Howe and Bedford also examine similar comparative data, only they focus more closely on the urban-rural divide, noting a significant and consistent 10-point difference in turnout amongst urban

[18] *Ibid.* at 13.
[19] Harell et al., *supra* note 14 at 13.

Aboriginal voters. Despite the lowest self-reported turnout rates amongst the Canadian urban Aboriginal population at 57.5% in the 2000 federal election, 54.4% in the most recent provincial election, and 44.4% in the most recent local election, Howe and Bedford contend that the gap between urban and rural Aboriginal voters is about one-third as large as was suggested in prior Elections Canada research.[20] Overall, despite the methodological restrictions of these studies, the results are interesting, given the additional perspective they add to the data presented in this current endeavour.

However, beyond these findings, there is one exceptional trend discovered, which contradicts all of the data discussed thus far. This trend is striking because it indicates that active First Nations electoral engagement can in fact occur, but in band council elections. These distinct findings are interesting, but complicate the conclusions which can be drawn with regard to Aboriginal engagement in Canada. Only the Bedford and Pobihushchy study has examined similar data. Comparative discussion on their findings will be provided momentarily.

SOARING FIRST NATIONS VOTER TURNOUT?: FIRST NATIONS BAND COUNCIL ELECTIONS UNDER THE *INDIAN ACT*

First Nations band council elections are administered through Indian and Northern Affairs Canada (INAC) under the *Indian Act*. First Nations communities hold these elections to select chiefs and band councillors. For the purposes of this study, data were

[20] Howe and Bedford, *supra* note 15 at 15.

collected on First Nations voter turnout in band council elections across the country. The Band Governance Directorate of INAC provided the raw data used to extrapolate the information provided in Figure 31. The values calculated comprise the average First Nations voter turnout for all band council elections held in each province in a given year. Most notable are the significantly-high levels of First Nations voter turnout in band council elections between 1998 and 2000, particularly when compared with First Nations voter turnout in federal and provincial elections.

Nevertheless, while voter turnout levels are consistently high, this occurs prior to the Supreme Court of Canada ruling in *Corbiere*[21] in 1999, after which turnout levels drop drastically. In *Corbiere*, the Supreme Court held that band members living outside of their reserve communities have the right to vote in band council elections. Among other things, this ruling substantially increased the numbers of eligible First Nations voters. Ultimately, the decision required the expansion of eligible voters lists for band council elections to include members living outside of the relevant communities. Two sets of data lines are presented in Figure 31, one indicating the results before *Corbiere*, and the other representing the results after *Corbiere*. There is an overlap in the yearly values shown because of the 18-month timeframe allowed to communities for implementation of the ruling and because different bands implemented the relevant requirements at different rates.

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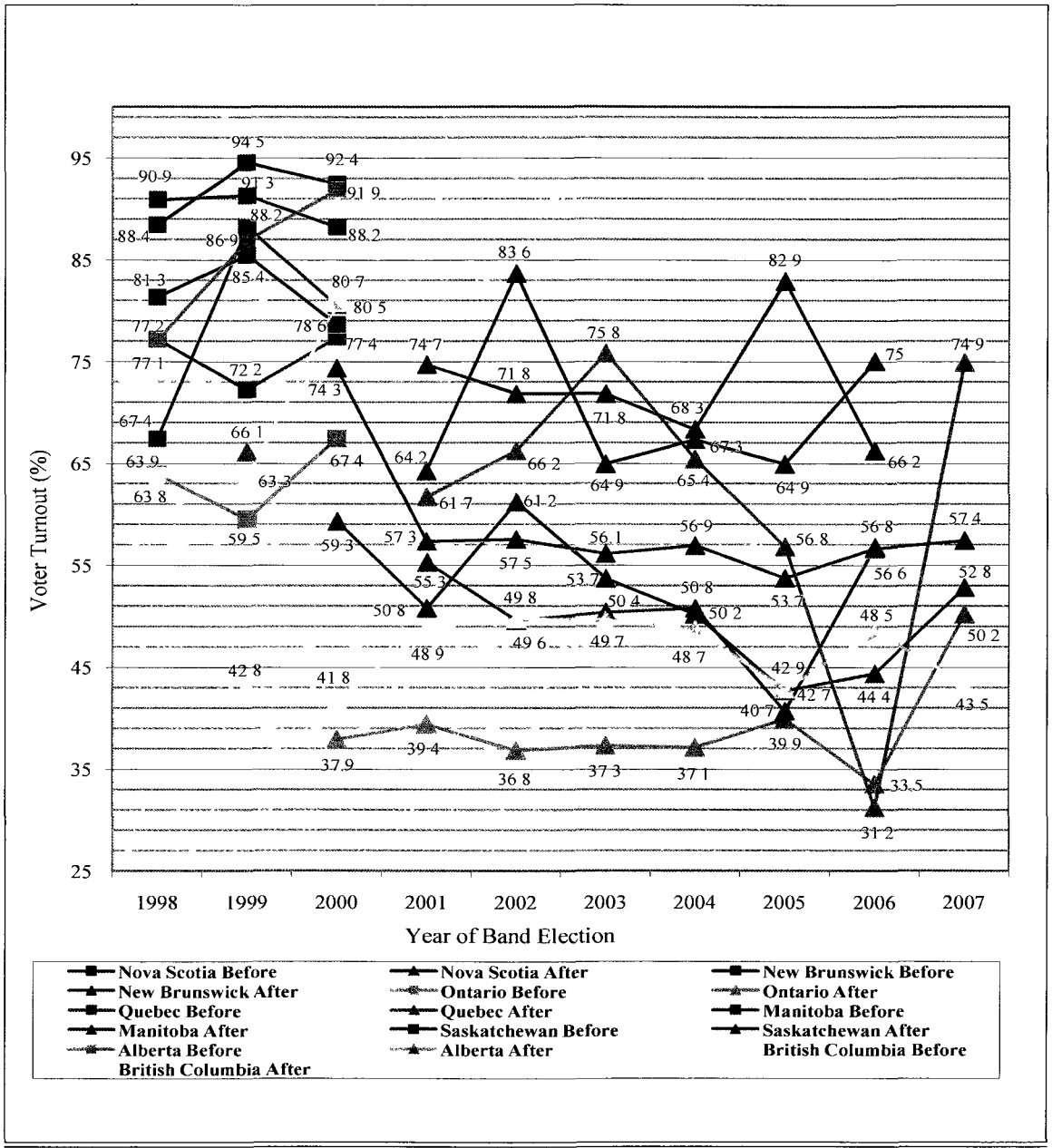
[21] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

Figure 31. First Nations Voter Turnout in Band Council Elections, 1998–2007: Before and After *Corbiere*



Band council elections are not held in Newfoundland and Labrador, PEI, Yukon, NWT or Nunavut. Instead, customary elections are held, which are based on the customs and practices specific to each community, the results of which are not required to be disclosed.

Ultimately, the number of eligible voters has expanded several-fold, but the results of these analyses show that many eligible voters living outside of their First Nations communities have not voted in band council elections, thereby causing the overall drop in voter turnout levels. This does not, however, indicate that members residing in the communities have voted in fewer numbers. Unfortunately, it is no longer possible to determine voter turnout levels amongst only those individuals living in their communities. Nevertheless, the results in Figure 31 show that voter turnout levels have gradually increased despite the initial drop after *Corbiere*. The delay in improved voter turnout amongst those living outside of First Nations communities was most likely due to a lack of information and confusion about the new voting rights.[22]

Bedford and Pobihushchy have provided the only other available data on First Nations voter turnout in band council elections in Canada, only their study deals exclusively with Nova Scotia and New Brunswick between 1961 and 1993.[23] They found that participation rates were consistently high at approximately 90%.[24] In this instance, First Nations voter turnout in band council elections is very similar to the Nova Scotia and New Brunswick results presented above. Overall, these results, along with the data presented in Figure 31, are striking, particularly given the usual inattention paid by the

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[22] Sidura Ludwig, "Amended *Indian Act* Causes Election Confusion" (March 3, 2000) Capital News Online, School of Journalism & Communication, Carleton University, Ottawa, Ontario, March 3, 2000, online: http://temagami.carleton.ca/jmc/cnews/03112000/n1.htm.

[23] No data were provided for PEI because the two bands in that province hold customary elections (Bedford and Pobihushchy, *supra* note 3 at 262).

[24] *Ibid.*

general population to comparable municipal politics, where voter turnout rates of approximately 30% are typical.[25]

The only other relevant data on First Nations voter turnout *within* First Nations communities relates to the 1995 Quebec Referendum. At the time, several First Nations communities held their own referendums on the issue of Quebec secession from Canada, particularly with regard to whether Quebec could forcibly include those First Nations communities living in the province as part of a new sovereign country. The Grand Council of the Crees asserted that no secession could occur that would require their inclusion without prior consent. In a separate referendum held on 24 October 1995, Cree voters were asked the following question: "Do you consent, as a people, that the Government of Quebec separate the James Bay Crees and Cree traditional territory from Canada in the event of a Yes vote in the Quebec referendum?" In response, 96.3% of the Crees voted to stay within Canada, and notably, the turnout was 77%, which is much higher than First Nations turnout rates in Canadian elections.[26] Similarly, the Inuit of Northern Quebec held their own referendum, where they were asked the following question: "Do you agree that Quebec should become sovereign?". In this instance, 96% voted against Quebec sovereignty, with Inuit voter turnout at 75%.[27]

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[25] *Ibid.* at 270.
[26] See Jill Wherrett, *Aboriginal Peoples and the 1995 Quebec Referendum: A Survey of the Issues* (Ottawa: Library of Parliament, Research Branch, 1996) at 4-6.
[27] *Ibid.* at 7.

THEORETICAL CONSIDERATIONS: ALIENATION, NATIONALISM OR BOTH?[28]

What do these results mean? Why is there such a stark contrast between First Nations voter turnout in federal and provincial elections on the one hand and in band council elections on the other hand? It is argued here that meaningful Aboriginal engagement through electoral involvement is derived from a complex set of factors. In addition to some of the "standard" socio-demographic factors that help to explain why Aboriginal peoples choose to vote or not, the roles of alienation and nationalism are arguably also important determinants. However, none of the factors related to alienation explains the high levels of First Nations voter turnout in band council elections. In fact, the results presented above, alongside the previous research of Bedford and Pobihushchy on band council elections in Nova Scotia and New Brunswick, seem to speak against assertions of alienation. This contradiction is especially notable given that overall voter turnout in Canadian municipal elections, which are arguably roughly comparable to First Nations band council elections, tends to be much lower than in either federal or provincial elections.

In light of the band council elections data, it is apparent that voting patterns amongst Aboriginal peoples, more broadly, are the result of more than just alienation. Aboriginal nationalism stems from contested citizenship rooted in historical colonialism

[28] An earlier version of the discussion in this section was published in Dalton, *supra* note 2 at 272-274.

and forced assimilation. Many Aboriginal peoples view their participation in Canadian elections as constituting acceptance of colonialism and their historical dependence on the Canadian state. It is this sense of nationalism that maintains the drive of Aboriginal peoples to protect their cherished heritages, cultures, languages, religions and political practices. For many Aboriginal peoples, this may entail the refusal to "give in" to the dominant electoral culture, including voting in federal and provincial elections.

Nationalism and alienation are concomitant components underlying Aboriginal voter turnout. As asserted by Kiera Ladner,

> Aboriginal people are not simply a community of interest or a minority group that feels alienated from the political process. They form "nations within": nations with distinct political cultures, political systems, political traditions, histories of colonization, relationships with other nations (such as Canada), and visions as to how the relationship between their nations and Canada should be structured and the manner in which each nation should participate in the affairs of the other.[29]

In other words, both alienation and nationalism are crucial factors in determining levels of Aboriginal voter turnout, more broadly. However, this makes the possibility of improving Aboriginal voter turnout in Canada more difficult. While electoral reform may address feelings of alienation, it is unlikely to influence Aboriginal nationalism. These issues will be returned to in the concluding chapter.

Others have noted the relevance of Aboriginal nationalism in affecting Aboriginal voter turnout. For instance, in referring specifically to First Nations voter turnout,

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[29] Kiera L. Ladner, "The Alienation of Nation: Understanding Aboriginal Electoral Participation" (2003) 5:3 Electoral Insight 21 at 23 [Ladner].

Bedford and Pobihushchy contend that First Nations nationalism is the central factor in determining low and declining voter turnout.[30] They argue that First Nations' "'sense of civic duty' as Canadians has all but disappeared as they see themselves less and less as Canadians,"[31] but it is questionable whether such sentiments ever existed for Aboriginal peoples in this context, given the historical restrictions and attempts at assimilation through enfranchisement. Silver et al., who conducted a qualitative study on First Nations electoral participation in Winnipeg, place similar importance on First Nations nationalism as an underlying determinant of voter turnout:

> A major part of the explanation for the relatively low levels of participation in the mainstream Canadian political process is this nationalism explanation. Many Aboriginal people see themselves as distinct peoples, as nations.
> ...
> [B]y the early 1980s almost all Aboriginal politics had been effectively...centred upon the pursuit of Aboriginal rights and governance, and the winning of sovereignty for First Nations.[32]

A study conducted by Tracey Raney and Loleen Berdahl on a broader, but related area, emphasizes the significance of citizenship and identity in determining voter behaviour. While their study does not deal specifically with Aboriginal peoples in Canada, some of their conclusions are applicable to the current study. In particular, they note that the more salient one's group identity is, the more likely one is to make electoral choices – such as whether or not to vote – "in accordance with the expectations of that

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[30] Bedford and Pobihushchy, *supra* note 3 at 269.
[31] *Ibid.*
[32] Jim Silver, Cyril Keeper and Michael MacKenzie, *"A Very Hostile System in Which to Live": Aboriginal Electoral Participation in Winnipeg's Inner City* (Ottawa: Canadian Centre for Policy Alternatives, 2005) at 12-13.

identity. ...It is expected that group identity influences behaviours consistent with the norm of what it means to be a 'good member' of that group."[33] Their findings show that "[b]irds of a feather clearly 'do politics' together,"[34] which has important implications for the broader issue of Aboriginal nationalism: in the context of Aboriginal voter turnout, Aboriginal nationalism would appear to justify, at least in part, Aboriginal peoples' disengagement from Canadian electoral politics.

These matters are further complicated by the fact that Aboriginal voter turnout varies from one community to the next. This point was alluded to earlier in the previous chapter, but detailed data on specific First Nations' voter turnout levels could not be included due to the sheer volume of data. Nonetheless, it is reasonable to expect that different Aboriginal communities will be more or less likely to vote depending on a variety of historical, cultural and political factors that are specific to each community. By extension, Ladner notes that

> [a]s each Aboriginal collectivity has its own political traditions and its own vision of a just relationship with Canada, electoral participation varies substantially, as does the manner in which individuals and collectivities rationalize their participation (or lack thereof) in Canadian politics. To further complicate matters, participation rates (and the rationalization thereof) vary, especially when comparing nationalists and traditionally minded individuals who are grounded in their communities with individuals who have few ties to their nation and its history, political traditions and sense of nationalism.[35]

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[33] Tracey Raney and Loleen Berdahl, "Birds of a Feather? Citizenship Norms, Group Identity, and Political Participation in Western Canada" (2009) 42:1 Can. J. Pol. Sci. 187 at 197.
[34] *Ibid.* at 207.
[35] Ladner, *supra* note 28 at 24.

Nevertheless, the nationalist explanation does not account for high voter turnout levels in band council elections. Band council elections are also state-imposed electoral institutions, and nationalist sentiments, which obviously affect Aboriginal participation in Canadian electoral politics, should arguably also apply in this context, thereby resulting in lower First Nations voter turnout. This is a puzzling contradiction. Bedford and Pobihushchy address this same issue in the context of their research. They contend that voter apathy or alienation cannot be a factor in First Nations band council elections, quite simply because of the high level of voter turnout. However, "[t]hese data appear less anomalous when one understands how critical Band council decisions are for persons living in Reserve communities. Welfare, housing, unemployment insurance, jobs, social and health services and education are very frequently controlled by the Chief and Council. They are responsible for most of the key services that are delivered."[36] In the context of New Brunswick and Nova Scotia, they assert that high First Nations voter turnout in band council elections is due to the amplified significance of band governance in the lives of First Nations vis-à-vis the relative importance of Canadian federal and provincial governance.[37] To this end, it would seem that First Nations voters are indeed engaged in some electoral politics, specifically when the stakes are high because such participation may be considered to have an important impact on electoral outcomes.

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[36] Bedford and Pobihushchy, *supra* note 3 at 274.
[37] *Ibid.* at 262.

This, in turn, demonstrates the significance of voter turnout in increasing Aboriginal engagement, at least in the context of First Nations band council elections.

In light of the scope of political power held by chiefs and councils, and given the often-poor socio-economic conditions of most reserve communities, it is little wonder that First Nations individuals would feel compelled to vote in much higher numbers in band council elections. In this context, by actively engaging in this elections process, First Nations individuals are better able to determine the governing structures that so significantly affect their lives. As Bedford and Pobihushchy note, "[t]he political stakes are simply too high on Reserves to permit the relatively disinterested politics that mark Canadian elections."[38] They refer to this complex phenomenon as the "politics of dependency," which has resulted from the legacy of colonialism experienced by Aboriginal peoples, more broadly. They describe this aptly in the following quotation:

> A political culture and socio-economic reality of dependency has been created on Reserve communities which expresses itself in the form of (what would be for municipalities in the non-Aboriginal culture) abnormally high turnout. ... [T]he only way to explain these striking results is by grounding them in the unique political, economic and social existence that one finds in Reserve communities. Local politics has a different meaning and different consequences for people living in Reserve communities than in other communities, and this difference must be central to any explanation of the vast differences in turnout rates that one finds between local elections on Reserves and in non-Aboriginal communities.[39]

Ultimately, given the socio-economic conditions faced by most Aboriginal peoples, and in light of the corresponding centrality of band governance in the lives of First Nations,

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[38] *Ibid.*
[39] *Ibid.* at 273.

the data on voter turnout in band council elections are more readily understandable, irrespective of Aboriginal nationalism.

Yet, these conclusions do not provide remedies for the larger issue of low Aboriginal voter turnout across the country. There still exists Aboriginal alienation from the dominant federal and provincial electoral institutions, while Aboriginal nationalism is a fundamental component entering into any discussions on Aboriginal issues. The end result is an electoral system that lacks legitimacy for Aboriginal peoples, potentially leading to further alienation. The tenuous relationship between Aboriginal peoples and the Canadian state should not be weakened further. Instead, solutions need to be found that will simultaneously address Aboriginal alienation and Aboriginal nationalism, especially in the context of the electoral institutions in place in Canada. Mechanisms to build meaningful Aboriginal engagement in Canadian elections may provide important opportunities to achieve reconciliation.

Prior to further analysis of the implications of these issues, an in-depth evaluation of a second form of Aboriginal engagement is necessary. Subsequently, the discussion will be brought full circle in the broader context of Aboriginal reconciliation. More specifically, the objective will be to reflect on broader considerations as they relate to the impacts of Aboriginal identities, nationalism and alienation on reconciliation. To this end, future projections and possibilities for the role of Aboriginal engagement as a new path to reconciliation will be discussed, particularly in light of the specific examples of engagement evaluated throughout.

CHAPTER SEVEN – ABORIGINAL ENGAGEMENT IN LAND NEGOTIATIONS: THE HISTORY AND DEVELOPMENT OF LAND DISPUTES AND SETTLEMENT IN CANADA

When aboriginal peoples talk about their lands, we are talking about our homelands. We are talking about the territories and resources upon which our people have survived for thousands of years. We are talking first and foremost about our cultures and our way of life in these territories. The land, the waters, the wildlife—and we, the people—are one and the same. We are not separate from our environment. We are part of it, and it is part of us.

Yet non-aboriginal governments have looked upon land claim negotiations as real estate transactions. This is not our view. It is difficult for us to understand the non-aboriginal concept of individual land title and ownership.

We see these negotiations primarily as the means to preserve our relationship with the land and ensure our survival as a people in the larger society surrounding us. Therefore, we are also taking economic and political means to control what happens on our lands. –Jack Anawak, Member of Parliament for Nunatsiaq.[1]

As the last few chapters have examined, the theme of alienation is of paramount importance when determining Aboriginal engagement. As demonstrated, Aboriginal engagement in federal and provincial elections is consistently low. Additionally, while research has shown that various socio-demographic factors contribute to lower voter turnout overall, it would appear that additional issues may also affect Aboriginal turnout levels, including sentiments of alienation and Aboriginal nationalism. Broadly speaking,

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[1] Jack Anawak, MP for Nunatsiaq, excerpt from a statement given on the day that the bill was first passed, leading to the *Nunavut Act*, 1993, c. 28, also *An Act to establish a territory to be known as Nunavut and provide for its government and to amend certain Acts in consequence thereof.*

in order to address low levels of engagement, some degree of societal cohesiveness must be built, but only in the context of recognition of the distinctiveness of Aboriginal nations. Trust must be fostered on the road to Aboriginal reconciliation, but again, this requires respect for the differences inherent in Aboriginal identities. Such an approach is apt to build meaningful interactions and arguably promote a greater sense of inclusion.

A similar argument can be made in the context of Aboriginal engagement in land negotiations. The negotiation of land disputes has been chosen as a type of Aboriginal engagement, which takes place primarily at the community level rather than at the level of the individual voter. At the same time, land negotiations are directed primarily by negotiators who represent the various parties involved; the process of settlement is not defined by grassroots engagement, other than varying degrees of community input and final ratification votes. Yet, the structures underlying both Aboriginal electoral participation and land negotiations are similar in that they are primarily, if not exclusively, governed by various Canadian institutions, procedures and policies. In this way, there is an application, and arguably an imposition, of Canadian processes on Aboriginal peoples, which could be reminiscent of colonialism for many Aboriginal peoples. This, in turn, potentially contributes to and exacerbates feelings of Aboriginal alienation and exclusion in both instances. This is not to say that elections and land negotiations processes are not with any positive aspects. Indeed, as will be discussed in the concluding chapter of this dissertation, there are several potential adjustments that could be made to both systems, which could provide a basis on which to build improved

Aboriginal engagement. Herein lies the potential for fostering reconciliation through improved engagement, while promoting respect for the distinctiveness of Aboriginal identities and nationhood, in the context of both elections and land negotiations.

THE CAPACITY TO NEGOTIATE AND RESOLVE CLAIMS: COMPETING FEDERAL AND PROVINCIAL JURISDICTIONAL AUTHORITIES[2]

The jurisdictional division of powers between the Canadian federal and provincial governments is a significant component of the Aboriginal land negotiations process. The debate surrounding jurisdictional tensions, which are normally part of Aboriginal land claims, necessarily entails a very broad and complex spectrum of related case law and scholarship, a detailed discussion of which could easily be the topic of an entirely separate research undertaking.[3] The heart of the jurisdictional debate, in the context of Aboriginal land claims, is the determination of which level of government is liable for previous wrong-doing related to Aboriginal lands. The very fact of the division of powers means that usually one government alone cannot rectify historic wrongs as they

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[2] The rest of the discussion in this section is adapted from Jennifer E. Dalton, "Constitutional Reconciliation and Land Negotiations: Improving the Relationship between Aboriginal Peoples and the Ontario Government" (2009) 3 J. Parliamentary & Pol. L. 277 at 292-296 [Dalton, "Constitutional"], by permission of Carswell, a division of Thomson Reuters Canada Limited.

[3] There are numerous judicial cases that have addressed the federal-provincial jurisdictional divide in the context of Aboriginal lands and Aboriginal rights, including Aboriginal title (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*]; *R. v. Morris*, [2006] 2 S.C.R. 915 [*Morris*]; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 [*Lovelace*]; and *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 [*Tsilhqot'in*]). There is also a plethora of scholarship on the topic, including Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction," in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001) 249; Kerry Wilkins, "Negative Capability: Of Provinces and Lands Reserved for the Indians" (2002) 1 Indigenous L.J. 57 [Wilkins]; Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. L.J. 185.

pertain to Aboriginal treaties, and instead, multiple governments are involved in the resolution process.[4] These jurisdictional tensions have important ramifications for Aboriginal reconciliation inasmuch as they affect the success of the negotiations process and impact the Aboriginal–Crown relationship.

Jurisdiction can be exclusively exercised by one government or concurrently exercised where it is shared between two or more governments, such as between the Canadian federal and provincial governments. When jurisdiction is held concurrently, the doctrines of paramountcy[5] and interjurisdictional immunity[6] apply in order to determine which government's laws prevail where conflicting jurisdiction exists. Sections 91 and 92 of the *Constitution Act, 1867*[7] delineate the federal and provincial division of powers. Specifically with regard to Aboriginal peoples, section 91(24)

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[4] For further discussion, see Michael Coyle, *Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future*, research paper Commissioned by the Ipperwash Inquiry, Ontario, 2005, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Coyle.pdf at 36-38 [Coyle].

[5] Where federal and provincial laws directly conflict, federal laws are paramount over provincial laws, thereby rendering the latter inoperative to the extent that they directly conflict with the federal laws in question. For further discussion on the Aboriginal context in this regard, see Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments," research paper for the National Centre for First Nations Governance, October 11, 2007, online: http://fngovernance.org/pdf/Jurisdiction_of_Inherent_Rights.pdf.

[6] Interjurisdictional immunity provides protection for federal persons, things or undertakings from provincial regulatory regimes that would significantly interfere with them. Supreme Court of Canada jurisprudence on this doctrine relating to Aboriginal peoples includes *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Morris*, *supra* note 3. For further discussion on interjurisdictional immunity in the context of Aboriginal peoples, and specifically Métis, see Kent McNeil, "The Métis and the Doctrine of Interjurisdictional Immunity: A Commentary," in Frederica Wilson and Melanie Mallet, eds., *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Law, 2008) 289.

[7] *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3.

specifies exclusive federal legislative and executive authority over "Indians and Lands reserved for the Indians." This responsibility was originally given to Parliament because it was thought that the federal government was further from local interests, and therefore would be more likely to deal fairly with Aboriginal peoples.[8] However, this does not isolate Aboriginal lands completely from provincial areas of jurisdiction. There are several subsections under section 92 which outline areas of provincial jurisdiction that directly impact Aboriginal land disputes and negotiations. For instance, section 92(5) covers the management and sale of provincial lands, section 92(13) deals with "[p]roperty and [c]ivil rights in the [p]rovince," while section 92(16) refers to "all [m]atters of a merely local or private [n]ature in the [p]rovince." Section 92A delineates "[n]on-renewable [n]atural resources, [f]orestry resources and [e]lectrical energy" as falling under provincial authority, while section 109 covers provincial ownership of lands and natural resources.

When issues of Aboriginal and treaty rights are at play, especially those pertaining to land disputes, the constitutional waters are muddied by jurisdictional overlap and competing government responsibilities. Uncertainty or lack of clarity over the federal-provincial jurisdictional divide and which government should control or administer certain lands in question also exacerbates tensions and causes delays in the land negotiations process. The practical challenge of the federal-provincial division of

[8] See the concurring judgment of Dickson C.J. in *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 108-109.

powers as it relates to Aboriginal lands and land negotiations is determining which lands are "lands reserved" and which are not. Provinces may pass laws of general application falling within provincial jurisdiction that affect Aboriginal peoples, provided that they are not inconsistent with the *Indian Act*,[9] do not interfere with the "core" of Aboriginal identity, and do not single out Aboriginal peoples for special treatment.[10]

Looking at the *St. Catherine's Milling* ruling once more,[11] it is notable that Canada's assertion was that Aboriginal title to the territories in question had been extinguished because of Aboriginal surrender under the provisions of Treaty 3 of 1873, and consequently, the interest in the contested lands had transferred to the federal Crown. Based on the federal authority under section 91(24), the federal Crown could administer treaty lands. Ontario challenged this federal assertion, maintaining that section 91(24) only pertained to parcels of land that had been specifically set aside as reserves, not treaty lands.[12] The Judicial Committee of the Privy Council found that upon Aboriginal

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[9] *Indian Act,* R.S.C. 1985, c. I-5. For further discussion on the role of the *Indian Act* in this respect, see Kent McNeil, "Aboriginal Title and Section 88 of the *Indian Act*" (2000) 34 U.B.C. L. Rev. 159; Kerry Wilkins, "'Still Crazy after All These Years': Section 88 of the *Indian Act* at Fifty" (2000) 38 Alta. L. Rev. 458.

[10] See *Delgamuukw*, *supra* note 3; *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470; *Kitkatla Band v. B.C.,* [2002] 2 S.C.R. 146 [*Kitkatla*]; *Paul v. B.C.,* [2003] 2 S.C.R. 585. As per section 88 of the *Indian Act*, "[s]ubject to any terms of any treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

[11] The current discussion deals with case law that specifically pertains to jurisdictional issues as they relate to Aboriginal lands or treaties.

[12] *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (J.C.P.C.) at 48-49. Ontario's argument stemmed from section 109 of the *Constitution Act, 1867*, which had vested in the

surrender of the lands in question, administration and control of the lands passed to the "original" owner, namely Ontario, because the underlying legal title had been "cleared" of the burden of Aboriginal title, reverting to the Crown in right of the Province, not Canada.[13] Subsequent to this ruling, if treaties were signed or reserve lands surrendered, the province could delay or interfere with the agreements, sometimes resulting in surrendered lands that were never sold as promised. Either way, these lands could remain under the control of the province.[14] The jurisdictional complications that arose from *St. Catherine's Milling* were significant and unresolved until a series of legislative agreements passed by Parliament and the Ontario government in 1924 that specifically clarified land issues and competing jurisdictional powers.[15] A subsequent agreement in 1986, and confirmed by corresponding legislation,[16] also further clarified federal and provincial jurisdictional responsibilities concerning land claims.

The Supreme Court's *Delgamuukw* ruling fully clarified this jurisdictional matter. The Court found that Aboriginal title and Aboriginal title lands, including reserve lands are at the heart of section 91(24) federal jurisdiction. As a result, provincial laws cannot apply to unextinguished Aboriginal title and rights, thereby limiting the constitutional

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provinces underlying title to Crown lands that were within the newly-created provincial boundaries at the time of Confederation.

[13] *Ibid.* at 60.

[14] For further discussion, see Coyle, *supra* note 4 at 41-42.

[15] See *An Act for the settlement of certain questions between the governments of Canada and Ontario respecting Indian Lands*, R.S.C. 1891, 54-55 Vict., c. 5; *Canada-Ontario Indian Reserve Lands Agreement*, R.S.C. 1924, c. 48.

[16] *Indian Lands Agreement (1986) Act*, S.C. 1988, c. 39.

capacity of provincial governments in respect of Aboriginal lands.[17] In 2006, in *Morris*, at issue was the application of provincial legislation of general application, by virtue of section 88 of *Indian Act*, that infringed the right of the Tsartlip Band in British Columbia to hunt. The Supreme Court held that treaty rights are also at the core of section 91(24) jurisdiction, and therefore provincial laws cannot apply in this respect. In *Tsilhqot'in Nation* at the British Columbia Supreme Court, Aboriginal title, hunting rights, and the Aboriginal right to trade were asserted over an area of the Cariboo Chilcotin region in British Columbia. The Court held again that Aboriginal title and rights are at the core of section 91(24).[18]

Ultimately, these judicial rulings have significantly shaped the constitutional division of powers pertaining to Aboriginal and treaty rights. More specifically, the scope of federal jurisdiction has become much broader over time.[19] The result is that

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[17] *Delgamuukw*, *supra* note 3 at paras. 172-183, 1011. For further discussion, see Wilkins, *supra* note 3 at 62-64.

[18] *Tsilhqot'in*, *supra* note 3 at paras. 1001-1003.

[19] Two exceptions are *Lovelace* and *Kitkatla*, where the Supreme Court of Canada found in favour of the provinces. At issue in *Lovelace* was the restriction as per the *Ontario Casino Corporation Act, 1993*, S.O. 1993, c. 25 that proceeds from reserve-based, commercial gaming activities could only be distributed amongst First Nations in Ontario who were registered as bands under the *Indian Act*. The Supreme Court of Canada found that the exclusion of "non-status" Aboriginal communities did not affect the core of section 91(24) federal jurisdiction. The province did not violate the Aboriginal rights embodied in section 35(1) of the *Constitution Act, 1982*, nor did it impair the "Indianness" of the appellants, since the province was merely exercising its spending power (*Lovelace*, *supra* note 3 at paras. 34, 40, 49). *Kitkatla* revolved around the application of the British Columbia *Heritage Conservation Act* to Aboriginal heritage sites and objects. The Supreme Court of Canada held that the provisions in question applied to both Aboriginal and non-Aboriginal people, with any disproportionate effects against Aboriginal peoples occurring only because Aboriginal peoples have created the largest number of heritage sites and objects. The legislation did not apply specifically to Aboriginal peoples, and therefore did not fall under federal jurisdictional authority (*Kitkatla*, *supra* note 10 at paras. 60-63, 65-69, 75, 78).

provincial governments must be more careful in passing legislation that could affect Aboriginal and treaty rights, since such rights fall under the core of section 91(24) federal jurisdiction.

It is against this backdrop of case law that the negotiation of Aboriginal land claims occurs across the country. Through these cases, the Supreme Court has clarified to a great extent the authority of the federal government relative to the provincial governments in relation to Aboriginal and treaty rights. In the context of Aboriginal land negotiations, each claim that is submitted is unique and distinctive in its own ways and must be addressed on a case-by-case basis. Yet, it is apparent from the relevant case law that provincial governments do not have the constitutional authority that the federal government has in finalizing treaties. This, in turn, has considerable bearing on the responsibilities of the federal and provincial governments in resolving land claims. Since Aboriginal and treaty rights fall under the core of section 91(24) federal jurisdiction, then the federal government must hold the primary obligation in rectifying historical wrongs as they relate to land claims.

THE HISTORY AND DEVELOPMENT OF LANDS CLAIMS IN CANADA[20]

Attempts at negotiating and implementing land claims agreements for Aboriginal peoples have become regular occurrences in Canada. While the negotiation processes leading to successful implementation are generally arduous and complex, this broad approach to the settlement of Aboriginal claims is one of the most wide-ranging in the world. Moreover, the development of the settlement process in recent years has progressed beyond previous Canadian government disinterest in negotiations and later attempts at outright extinguishment of Aboriginal rights and title. This is not to say that the process as a whole is without fault; on the contrary, land claims negotiations and agreements often do not provide ideal environments for recognition of Aboriginal cultural difference. As asserted by Peter Russell, land claims "[a]greements reached through...negotiations are heavily compromised – too little autonomy for many on the Aboriginal side, too much for many in the dominant society."[21] Generally, governments attempt to defer to public opinion on Aboriginal rights, while simultaneously avoiding the possibility of "Aboriginal resistance."[22]

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[20] An earlier version of the discussion in this section was published in Jennifer E. Dalton, "Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claims Agreements?" (2006) 22 Windsor Rev. Legal & Social Issues 29 at 30-35 [Dalton, "Aboriginal"], Copyright © 2010 Windsor Review of Legal and Social Issues.

[21] Peter Russell, "Aboriginal Self-Determination: Is Canada as Good as it Gets?," in Barbara A. Hocking, ed., *Unfinished Constitutional Business?: Rethinking Aboriginal Self-Determination* (Canberra, Australia: Aboriginal Studies Press, 2005) 170 at 171.

[22] *Ibid.*

While formal government recognition of various Aboriginal rights has occurred, for the most part, land agreements do not incorporate robust conceptions of those rights. Moreover, in practice, federal policies of blanket and partial extinguishment of Aboriginal title have been sources of significant contention for Aboriginal peoples, since such extinguishment is considered representative of a fundamental loss of identity.[23] In order to begin to rectify the historical injustice committed against Aboriginal peoples, including the harm of colonial assimilation, it is crucial that recognition of broader Aboriginal rights and the distinctiveness of Aboriginal identity fill more primary roles in land claims agreements. This moral imperative requires the rejection of federal policies of extinguishment of Aboriginal title and related rights. This, in turn, is necessary in order to enhance the successful implementation and functioning of land claims agreements, and perhaps more importantly, to reconcile the relationship between Aboriginal peoples and the Canadian state.

The broader legal and policy underpinnings of Aboriginal land claims negotiations are expansive and well beyond the scope of the next few chapters. Instead, two of the most contentious areas of negotiated agreements are evaluated, namely governance and land tenure provisions. Specifically, a comparative approach is taken, wherein Canadian government recognition of Aboriginal title and governance is

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[23] For further discussion, see Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essay on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 208 at 215 [Asch and Zlotkin].

contrasted with the approach laid out by the Supreme Court of Canada. Emphasis is placed primarily on Supreme Court of Canada rulings vis-à-vis federal government approaches, rather than undertaking an extensive examination of lower case rulings and provincial and territorial policies, as the scope of such an examination would be too broad for this chapter. A comparative approach is taken in order to gain further insight into the nature of both approaches.

Along with providing the necessary information in which to situate the analyses, the following chapters focus on three central components. First, an assessment of Aboriginal title in Canada is undertaken. This examination includes a review of relevant Supreme Court case law on Aboriginal title doctrine and an analysis of government policy on Aboriginal title, including the extinguishment policies of the latter. Extinguishment provisions have evolved over time, with the Canadian government responding in part to several task force, commission, and academic calls to end blanket extinguishment requirements. Overall, through a comparative analysis, these chapters seek to delineate the current Supreme Court and federal government positions on Aboriginal title.

Second, the extent to which Aboriginal governance has been formally recognized by the Supreme Court and the federal government is assessed. Emphasis is placed on formal federal government recognition of Aboriginal governance provisions, particularly with regard to written policies.

Finally, the policies of the federal and provincial governments are compared to what actually occurs in practice. This includes an examination of the implications of any differences between policy and practice, as well as, more broadly, the implications of any differences between government and judicial approaches to Aboriginal title and governance. Primary emphasis is placed on comprehensive land claims in the next few chapters, since Aboriginal governance and title provisions are most frequently dealt with therein, but further analysis pertaining to specific land claims in also provided later in the dissertation.

NEGOTIATIONS PROCEDURES AND CONSIDERATIONS[24]

Given the overarching role that the Canadian federal government plays in all land agreements with Aboriginal peoples, a closer look at the negotiations procedures that are in place at the federal level is warranted.[25] Specifically, the federal government has set up a variety of procedures in order to facilitate negotiation with Aboriginal peoples. While the majority of these processes are guided by associated policies that were developed during the mandates of the most recent federal Liberal governments, these overarching processes are still used by the current minority Conservative government under Prime Minister Harper. Generally speaking, agreements are reached on a case-by-

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[24] An earlier version of the discussion in this section was published in Dalton, "Aboriginal," *supra* note 20 at 40-42, Copyright © 2010 Windsor Review of Legal and Social Issues.

[25] For comparative discussion of international land claim policies, see generally Christa Scholtz, *Negotiating Claims: The Emergence of Indigenous Land Claim Negotiation Policies in Australia, Canada, New Zealand, and the United States* (New York: Routledge, 2006).

case basis. For land claims, the federal government has established a specific claims process and a comprehensive claims process, which are fairly similar in practice, but involve different substantive considerations. The specific claims process deals with the resolution of claims that are based on alleged failures of the Crown to perform treaty obligations, improper alienation of resources, assets or reserve lands, and other claims that deal with breach of lawful federal government obligations and responsibilities.[26]

By comparison, the comprehensive claims process has the purpose of producing agreements for areas where Aboriginal title has not yet been dealt with by treaty. These agreements cover ownership of territory and resources, participation in environmental management, economic development responsibilities and rights, financial compensation, and resource revenue sharing support.[27] In the context of land claims and self-government arrangements, the federal government engages in tripartite negotiations with Aboriginal peoples and the relevant provincial and territorial governments in order to arrange agreements that are acceptable to all parties involved. During negotiations, some provincial treaty processes might also come into play.[28]

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[26] Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy* (Ottawa: Indian and Northern Affairs Canada, 1982).

[27] Department of Indian Affairs and Northern Development, *Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995).

[28] In British Columbia, the British Columbia Treaty Process has replaced the federal comprehensive claims policy. The tripartite Treaty Commission Agreement of 1992 led to the creation of the *British Columbia Treaty Commission Act*, S.C. 1995, c. 45, which came in effect on March 1, 1996. As of April 1999, 51 First Nations from a total of 197 First Nations in British Columbia were involved in the British Columbia

There are various steps in the comprehensive claims process. According to the Indian and Northern Affairs Canada, the claims process begins when an Aboriginal community submits a statement of claim along with supporting materials. The reasons behind the decision of the Aboriginal community to submit a claim or claims, and be willing to engage in the difficult, arduous negotiations process, are obviously nuanced and complex. An in-depth understanding of individual cases is more difficult when unaccompanied by fieldwork, but even then, the results are necessarily community-based or case-specific. Given the different histories, cultures and circumstances surrounding the hundreds of claims currently in process across Canada, as well as the hundreds of Aboriginal individuals involved in those claims, sufficiently-conclusive fieldwork would need to be quite extensive in order to be more broadly applicable to Aboriginal peoples. Despite the current limitations in this regard, two case studies are analyzed in Chapter Nine, but from legal and policy perspectives, rather than in the context of field research. Yet, this approach is still arguably effective, at least in adding to an enhanced understanding of the impact of land negotiations on Aboriginal engagement.

After an Aboriginal community chooses to submit a claim, the federal government will accept it for negotiation if the Aboriginal community successfully confirms that, since time immemorial, it has continued to be an "organized society," occupying the lands over which it asserts Aboriginal title largely to the exclusion of other

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Treaty Commission process (see Jill Wherrett, *Aboriginal Self-Government*, Current Issue Review 96-2E (Ottawa: Library of Parliament, Parliamentary Research Branch, 1999) at 14).

organized societies. The Aboriginal community in question must have traditionally occupied and used the relevant territory to a sufficient extent so that it was an "established fact" at the time European sovereignty was asserted. Some current use and occupancy of the relevant land for traditional purposes should be demonstrated. Finally, the government requires that the community's title and resource rights have been neither extinguished nor dealt with in another treaty.[29] A federally-accepted Aboriginal claim will proceed only if the relevant provincial government is also willing to negotiate.[30]

The next stage requires that the parties sign a Memorandum of Understanding (MOU), a formal document signifying the commitment of the parties to undertake negotiations.[31] At the first stage of negotiations, a Framework Agreement is developed, wherein the parties agree on the issues to be resolved, including how the issues will be discussed and pertinent deadlines for reaching an Agreement-in-Principle (AIP). The negotiations leading up to the AIP are often the most complex and lengthy stage of the resolution process, but once finalized the AIP usually contains all of the central

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[29] Indian Affairs and Northern Development, *Comprehensive Claims Policy and Status of Claims* (Ottawa: Public Works and Governments Services, 2003).

[30] While the federal government will negotiate with any Aboriginal community that has an acceptable claim, in practice, treaty negotiations have not extended beyond First Nations and Inuit communities (see Paul Chartrand, "Towards Justice and Reconciliation: Treaty Recommendations of Canada's Royal Commission on Aboriginal Peoples (1996)," in Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain, eds., *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Carlton, Victoria: Melbourne University Publishing Ltd., 2004) 120 at 130).

[31] In British Columbia, this stage of negotiations requires that the negotiators demonstrate a capacity and "mandate" to proceed with the negotiations process. For further discussion, see Ravi de Costa, "Treaties in British Columbia: Comprehensive Agreement Making in a Democratic Context," in Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain, eds., *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Carlton, Victoria: Melbourne University Publishing Ltd., 2004) 133 at 136.

components of the Final Agreement. The Final Agreement is the result of successful negotiations, detailing the relevant issues including land ownership and title, financial benefits and resources, and sometimes self-government provisions. All parties must ratify, and the principals must sign, the Final Agreement. Finally, legislation is passed to give effect to the Final Agreement, rendering it valid. A Final Agreement Implementation Plan is also negotiated between the parties during the Final Agreement negotiations. The Implementation Plan is a crucial appendix to the Final Agreement since it specifies how the agreement will be put into effect, who will be responsible for the implementation and when these events will occur. Annual reports are used to review the activities of the parties involved in the implementation process; five-year reviews are used to provide a detailed analysis of the impact of the Final Agreement, including implementation issues and recommendations for future improvement.[32]

With regard to ratification at the end of the settlement process, a few broad points related to the role of community engagement in the process are worth mentioning. As noted above, bargaining primarily takes place amongst frontline negotiators for Aboriginal communities and Canadian governments, and thus constitutes a different form of engagement from individual voting in elections. However, the community perspectives of the Aboriginal peoples involved theoretically and ideally play an

[32] For further details on the entire process of comprehensive land claims agreements, see Indian and Northern Affairs Canada, Comprehensive Claims Branch, *Agreements*, online: http://www.ainc-inac.gc.ca/pr/agr/index_e.html.

important role throughout negotiations, and in this way, the negotiations of claims *should be*, at least indirectly, an exercise in Aboriginal engagement. Unfortunately, details of specific negotiations, including involvement of community members, are usually not readily available due to the confidential nature of the negotiations process. However, this is partly offset by the fact that the final ratification votes leading to community acceptance of settlement agreements allows community members the opportunity to directly express their support or opposition. This type of voting is comparable to that which occurs in elections, although the former is a direct form of engagement, rather than what is generally considered representative democracy through elections.

The distinction between direct democracy and representative democracy is an important one. While an extensive analysis is beyond the scope of this chapter, its relevance for engagement in land claims is pertinent. Representative democracy and direct democracy are often presented as being two entirely different forms of democracy, one emphasizing the role of elected representatives, the other stressing the importance of citizen involvement and direct political participation. In each case, the role of engagement is paramount. Yet, while these general differences are accurate, in and of themselves, Matthew Mendelsohn and Andrew Parkin see a mutually-exclusive differentiation of the two forms as erroneous, since ratification votes have been included successfully in representative democracies. They note that "there are no 'direct democracies' in which citizens enact their preferences at will," but rather, such votes are

intertwined with representative institutions and their associated political actors.[33] Equally relevant in the context of engagement is the rise in liberal democracies of the use of direct democratic mechanisms,[34] partly in response to greater levels of apathy and cynicism. As discussed in Chapter Three, the growing level of public cynicism toward government and government officials has arguably resulted in greater disaffection toward politics and political systems, ultimately resulting in a "loss of public confidence in traditional democratic structures."[35] Direct democracy has been used increasingly as a protective mechanism to ensure that public opinions and demands are given attention.[36] These points serve to indicate the role of and importance attached to final Aboriginal community ratification of settlements during the negotiations process. In this respect, it is argued here that ratification of land claims agreements is an important tool of

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[33] Matthew Mendelsohn and Andrew Parkin, "Introduction: Referendum Democracy," in Matthew Mendelsohn and Andrew Parkin, eds., *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns* (New York: Palgrave Publishers Ltd., 2001) at 1, 4.

[34] Broadly speaking, direct democratic initiatives might include referendum voting, which is similar to binding ratification or non-binding plebiscites, as well as the citizen initiative, recall or other measures. Within complex systems of representative democratic institutions and processes the use of government-initiated referendums as a form of direct democracy at the national level has continued to increase in many western democracies (see Matthew Mendelsohn and Andrew Parkin, "Introducing Direct Democracy in Canada" (2001) 7:5 Choices 3 at 3, 15). Citizen-initiated referendums are still much less common, occurring in fewer countries. Previously, the importance of government-initiated referendums was very limited. However, since the 1960s, the use of referendums to settle a wide range of issues has expanded significantly (Laurence Morel, "The Rise of Government-Initiated Referendums in Consolidated Democracies," in Matthew Mendelsohn and Andrew Parkin, eds., *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns* (New York: Palgrave Publishers Ltd., 2001), 47).

[35] Stephen Craig, Amie Kreppel and James Kane, "Public Opinion and Support for Direct Democracy: A Grassroots Perspective," in Matthew Mendelsohn and Andrew Parkin, eds., *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns* (New York: Palgrave Publishers Ltd., 2001) at 25.

[36] *Ibid.*

engagement that provides community members with the opportunity to be more directly involved in negotiations.

POLICY PERSPECTIVES: FEDERAL AND PROVINCIAL GOVERNMENT POLICIES IN COMPARISON[37]

An extensive, cross-national policy review was conducted for the purposes of this research in order to achieve a better sense of the approaches that the Canadian federal, provincial and territorial governments take in negotiating and resolving Aboriginal land claims. The relevance of these policies for land negotiations lies in their connections, both direct and indirect, to the overarching purpose of land claim settlement. More specifically, these official policies span various aspects of the land claims process, from negotiation and resolution, Aboriginal governance, Aboriginal consultation, Aboriginal economic and community development to Aboriginal reconciliation and the improvement of the Aboriginal–Crown relationship, including with Métis and the off-reserve and urban Aboriginal populations.

At this point, a detailed analysis of the merits of the policies is not undertaken, but instead, the purpose is to assess the extent to which the Canadian governments directly address issues that pertain to the land negotiations process, more generally. In this regard, and given the restrictions on the scope of this dissertation, this chapter seeks only to review the degree and extent to which the Canadian federal and provincial

[37] The majority of the discussion in this section is adapted from Dalton, "Constitutional," *supra* note 2 at 309-311, by permission of Carswell, a division of Thomson Reuters Canada Limited.

governments make formal policies related to Aboriginal governance, negotiation, land claims and reconciliation a priority. While an assessment of the mere existence of these policies does not provide for an understanding of the effectiveness of these policies in practice, since that task is beyond the scope of the dissertation, it still allows for greater insight into the importance and effectiveness of the land negotiations process in each region across the country. Further, it provides a relevant policy backdrop within which to consider Aboriginal engagement. The broader relevance of these findings is revealed at relevant points throughout the remaining chapters.

Policies at the federal level tend to be extensive and wide-reaching, dealing with all types of claims. Most of the provincial government policies deal with specific land claims. On the other hand, most land negotiations in the North are comprehensive in nature, and therefore the relevant policies are geared in that direction.[38] While the federal government[39] and nearly every provincial and territorial government across the country

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[38] Yukon Land Claims/First Nations Relations, *Land Claims and Self-Government Overview* (Whitehorse: Government of Yukon, 2008), online: http:/ www.eco.gov yk.ca/landclaims overview.html; Northwest Territories Department of Aboriginal Affairs and Intergovernmental Relations, *Implementation* (Yellowknife: Government of the Northwest Territories, 2008); Northwest Territories Department of Aboriginal Affairs and Intergovernmental Relations, *Lands Negotiation* (Yellowknife: Government of the Northwest Territories, 2008); Northwest Territories Department of Aboriginal Affairs and Intergovernmental Relations, *Negotiations* (Yellowknife: Government of the Northwest Territories, 2008); Northwest Territories Department of Aboriginal Affairs and Intergovernmental Relations, *Policy and Legislation Section* (Yellowknife: Government of the Northwest Territories, 2008).

[39] At the federal level, government policies that define specific, comprehensive and self-government Aboriginal claims are available through the Specific Claims Branch, Comprehensive Claims Branch and Self-Government Claims Branch of Indian and Northern Affairs Canada (see generally http www ainc-inac gc ca ps clm index e html). Other relevant federal policy documents and statutes which continue to guide negotiations include Indian Affairs and Northern Development, *Comprehensive Claims Policy and Status of Claims* (Ottawa: Public Works and Government Services, 2003); Department of Indian Affairs

emphasizes the importance of resolving Aboriginal land claims in a timely manner, either in policy documents or on Ministry web pages, maintaining this stance does not automatically translate into tangible gains.

The extent of government policy attention paid to Aboriginal land negotiations and related to Aboriginal affairs appears to be regionally based. More generally, the federal government and provincial governments in the West have the most far-reaching, extensive and comprehensive policies on Aboriginal land negotiations compared to anywhere else in the country. Ontario and Quebec are nearly equivalent with regard to policy scope and substance, although in Quebec there are more settled claims and claims under review, with fewer claims in negotiation, relative to Ontario.[40] However, in the

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and Northern Development, *Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995); *Specific Claims Resolution Act*, R.S.C. 2003, c. 23; Indian and Northern Affairs Canada, *Specific Claims: Justice At Last* (Ottawa: Minister of Public Works and Government Services Canada, 2007); *Specific Claims Tribunal Act*, S.C. 2008, c. 22; Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 1997); Indian Affairs and Northern Development, *Gathering Strength – Canada's Aboriginal Action Plan: A Progress Report* (Ottawa: Public Works and Government Services Canada, 2000); Indian Affairs and Northern Development, *Gathering Strength – Canada's Aboriginal Action Plan: A Progress Report, Year One* (Ottawa: Public Works and Government Services Canada, 1998); Indian and Northern Affairs Canada, Saskatchewan Region, *A Synopsis of the Saskatchewan Treaty Land Entitlement Framework Agreement* (Ottawa: Indian and Northern Affairs Canada, 1992).

[40] The central polices in Ontario include Ontario Ministry of Aboriginal Affairs, *Ontario's New Approach to Aboriginal Land Claims* (Toronto: Queen's Printer for Ontario, 2005), online: http:/ www.aboriginalaffairs.gov.on.ca/english/negotiate/approach.htm; Ontario Ministry of Aboriginal Affairs, *Aboriginal Land Claim Settlements* (Toronto: Queen's Printer for Ontario, 2005), online: http:/ www.ontla.on.ca library repository mon 20000/278014.pdf; Ontario Ministry of Aboriginal Affairs, *Aboriginal Land Claims and Public Involvement* (Toronto: Queen's Printer for Ontario, 2005), online: http:/ www.ontla.on.ca/library/repository mon 20000/278013.pdf; Ontario Ministry of Aboriginal Affairs, *Ontario's Negotiation Process* (Toronto: Queen's Printer for Ontario, 2005), online: http://www.ontla.on.ca/library/repository/mon/20000/278011.pdf; Ontario Ministry of Aboriginal Affairs,

West, it would appear that the higher volume of policies on Aboriginal issues, including land negotiations, reconciliation and relationships, may have a positive impact on efficient resolution of claims. For instance, in Manitoba and Saskatchewan, the existence of treaty land entitlement agreements stands out as a unique mechanism used to minimize potential conflict during negotiations, most notably because these agreements outline in detail the requirements and expectations of all parties to the negotiations. It is argued that in reducing the potential for conflict in this way, the overall negotiations process is hastened.[41]

About Land Claims (Toronto: Queen's Printer for Ontario, 2006), online: http://www.ontla.on.ca/library/repository/mon/20000/278007.pdf; Ontario Native Affairs Secretariat, *Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights* (Toronto: Queen's Printer for Ontario, 2006). Quebec's relevant policies include Secrétariat aux affaires autochtones du Québec, *Amerindians and Inuit of Québec: Interim Guide for Consulting the Aboriginal Communities* (Québec: Gouvernement du Québec, 2006); Secrétariat aux affaires autochtones du Québec, *Claims and Demands* (Québec: Gouvernement du Québec, 2004), online: http://www.saa.gouv.qc.ca/relations_autochtones/revendications_demandes/revendications_demandes_en.htm; Secrétariat aux affaires autochtones du Québec, *Mission and Orientations of the Secrétariat* (Québec: Gouvernement du Québec, 2009), online: http://www.saa.gouv.qc.ca/secretariat/mission_secretariat_en.htm; Secrétariat aux affaires autochtones du Québec, *Quebec Relations with Aboriginal People: Toward a New Partnership for the Twenty-First Century* (Québec: Gouvernement du Québec, 2005).

[41] Relevant policies in Manitoba that deal with these areas include Manitoba Aboriginal and Northern Affairs, *Framework Agreement: Treaty Land Entitlement* (Winnipeg: Government of Manitoba, 1997); Manitoba Aboriginal and Northern Affairs, *A Reference Manual for Municipal Development and Services Agreements* (Winnipeg: Government of Manitoba, 2004); Manitoba Aboriginal and Northern Affairs, *Vision, Mission and Goals* (Winnipeg: Government of Manitoba, 2007), online: http://www.gov.mb.ca/ana/info/vmg.html. Policies in Saskatchewan include Saskatchewan First Nations and Métis Relations, *Bilateral Protocol* (Regina: Government of Saskatchewan, 2003; Saskatchewan First Nations and Métis Relations, *Framework for Governance of Treaty First Nations* (Regina: Government of Saskatchewan, 2000); Saskatchewan First Nations and Métis Relations, *History of Treaty Land Entitlement in Saskatchewan* (Regina: Government of Saskatchewan, 2008); Saskatchewan First Nations and Métis Relations, *The Government of Saskatchewan Guidelines for Consultation with First Nations and Métis People: A Guide for Decision Makers* (Regina: Government of Saskatchewan, 2006); Saskatchewan Métis and First Nations Relations, *Métis Tripartite Memorandum of Understanding* (Regina: Government of Saskatchewan, 2003). In Alberta, the relevant policies include Alberta Ministry of International,

An opposite trend emerges in Atlantic Canada where there are fewer government policies. While Newfoundland and Labrador as well as New Brunswick have policies on land, governance, reconciliation, consultation and economic and community development, they are not nearly as comprehensive or far-reaching as the policies in the West. For instance, any relevant policies in Newfoundland and Labrador and New Brunswick are covered only generically in broader strategic plans.[42] PEI and New Brunswick have essentially no formal policies, except one in New Brunswick on Aboriginal reconciliation.[43] PEI has no office or ministry to address Aboriginal affairs, but it also has only one claim being negotiated and another that has been closed or dismissed. The one exception in Atlantic Canada is the *Made-in-Nova Scotia Process*,[44] a short framework agreement outlining federal, Nova Scotia and Mi'kmaq objectives to negotiate outstanding issues related to land. Other policy documents in the province are

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Intergovernmental and Aboriginal Relations, *Alberta/Métis Nation of Alberta Association (MNAA) Framework Agreement* (Edmonton: Government of Alberta, 2001); Alberta Ministry of International, Intergovernmental and Aboriginal Relations, *An Understanding on First Nations/Alberta Relations*, signed November 10, 1995; Alberta Ministry of International, Intergovernmental and Aboriginal Relations, *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* (Edmonton: Government of Alberta, 2000). British Columbia's policies include British Columbia Aboriginal Relations and Reconciliation, *Métis Nation Relationship Accord* (Victoria: Government of British Columbia, 2006); British Columbia Aboriginal Relations and Reconciliation, *The New Relationship* (Victoria: Government of British Columbia, 2005); British Columbia Aboriginal Relations and Reconciliation, *Transformative Change Accord* (Victoria: Government of British Columbia, 2005); British Columbia Aboriginal Relations and Reconciliation, *Treaties and Other Negotiations* (Victoria: Government of British Columbia, 2007), online: http://www.gov.bc.ca/arr/treaty/default.html.

[42] All relevant polices in Newfoundland and Labrador are covered generically in Newfoundland and Labrador Department of Labrador and Aboriginal Affairs, *Business Plan* (St. John's: Government of Newfoundland and Labrador, 2006).

[43] New Brunswick Aboriginal Affairs Secretariat, *What We Do* (Fredericton: Government of New Brunswick, 2007).

[44] Nova Scotia Office of Aboriginal Affairs, *"Made-in-Nova Scotia Process": Mi'kmaq – Nova Scotia – Canada Framework Agreement* (Halifax: Government of Nova Scotia, 2007).

fairly comprehensive in scope and comprise a significant attempt to deal head on with land negotiations.[45] Of particular note is the fact that, as discussed previously, the Elections Nova Scotia office stood out amongst provincial elections offices in Atlantic Canada because of a higher degree of data collection and attention paid to First Nations turnout in the province. Taken together, it would appear that Nova Scotia's policies on Aboriginal peoples, particularly in the context of reconciliation, negotiation, consultation and participation, are especially forward-looking.

Table 4 provides a summary of specific land claims that have been submitted to the federal government by province or territory between 1970 and 2007. These data provide insight into the number and location of specific land claims along with their current status. Moreover, the data demonstrate that the majority of provinces have the largest backlog of claims at the review stage of the process, but other than British Columbia, this generally does not hold true in the West.[46] The number of claims that have been concluded in Manitoba, Saskatchewan and Alberta relative to the number of

[45] These policies include Nova Scotia Office of Aboriginal Affairs, *Made-in-Nova Scotia Process Update* (Halifax: Government of Nova Scotia, 2008); Nova Scotia Office of Aboriginal Affairs, *Province of Nova Scotia Consultation with the Mi'kmaq: Interim Consultation Policy* (Halifax: Government of Nova Scotia, 2007); Nova Scotia Office of Aboriginal Affairs, *Terms of Reference for a Mi'kmaq – Nova Scotia – Canada Consultation Process* (Halifax: Government of Nova Scotia, 2006); Nova Scotia Office of Aboriginal Affairs, *What We Do* (Halifax: Government of Nova Scotia, 2007), online: http://www.gov.ns.ca/abor/officeofaboriginalaffairs whatwedo. A follow-up policy document, released in 2006, was the Mi'kmaq – Nova Scotia – Canada Tripartite Forum, *2006 Strategic Direction Document* (Truro: Mi'kmaq – Nova Scotia – Canada Tripartite Forum, 2006).

[46] British Columbia's process may be somewhat slower given the sheer volume of claims submitted.

Table 4. Summary of Specific Land Claims Submitted to the Federal Government by Province or Territory, 1970–2007

Province or Territory	Under Review	In Negotiation	Settled Claims	Administrative Remedy	Inactive/ Dismissed/ Closed	In Litigation	In ICC Process	TOTAL
PEI	0 (0%)	1 (50%)	0 (0%)	0 (0%)	1 (50%)	0 (0%)	0 (0%)	**2**
NS	9 (32.1%)	3 (10.7%)	2 (7.1%)	5 (17.9%)	9 (32.1%)	0 (0%)	0 (0%)	**28**
NB	12 (40%)	6 (20%)	4 (13.3%)	2 (6.7%)	6 (20%)	0 (0%)	0 (0%)	**30**
QB	68 (58.6%)	4 (3.4%)	19 (16.4%)	3 (2.6%)	20 (17.4%)	0 (0%)	2 (1.7%)	**116**
ON	111 (41.6%)	20 (7.5%)	33 (12.4%)	6 (2.2%)	47 (17.6%)	49 (18.4%)	1 (0.4%)	**267**
MA	25 (27.2%)	10 (10.9%)	35 (38%)	3 (3.3%)	17 (18.5%)	0 (0%)	2 (2.2%)	**92**
SK	41 (28.5%)	13 (9%)	52 (36.1%)	1 (0.7%)	20 (13.9%)	2 (1.4%)	15 (10.4%)	**144**
AB	33 (25.6%)	12 (9.3%)	42 (32.6%)	2 (1.6%)	27 (20.9%)	10 (7.8%)	3 (2.3%)	**129**
BC	306 (58.6%)	41 (7.9%)	88 (16.9%)	9 (1.7%)	60 (11.5%)	7 (1.3%)	11 (2.1%)	**522**
YK	4 (16%)	0 (0%)	7 (28%)	0 (0%)	14 (56%)	0 (0%)	0 (0%)	**25**
NWT	3 (27.3%)	1 (9.1%)	2 (18.2%)	4 (36.4%)	0 (0%)	1 (9.1%)	0 (0%)	**11**
TOTAL	**612**	**111**	**284**	**35**	**221**	**69**	**34**	**1366**

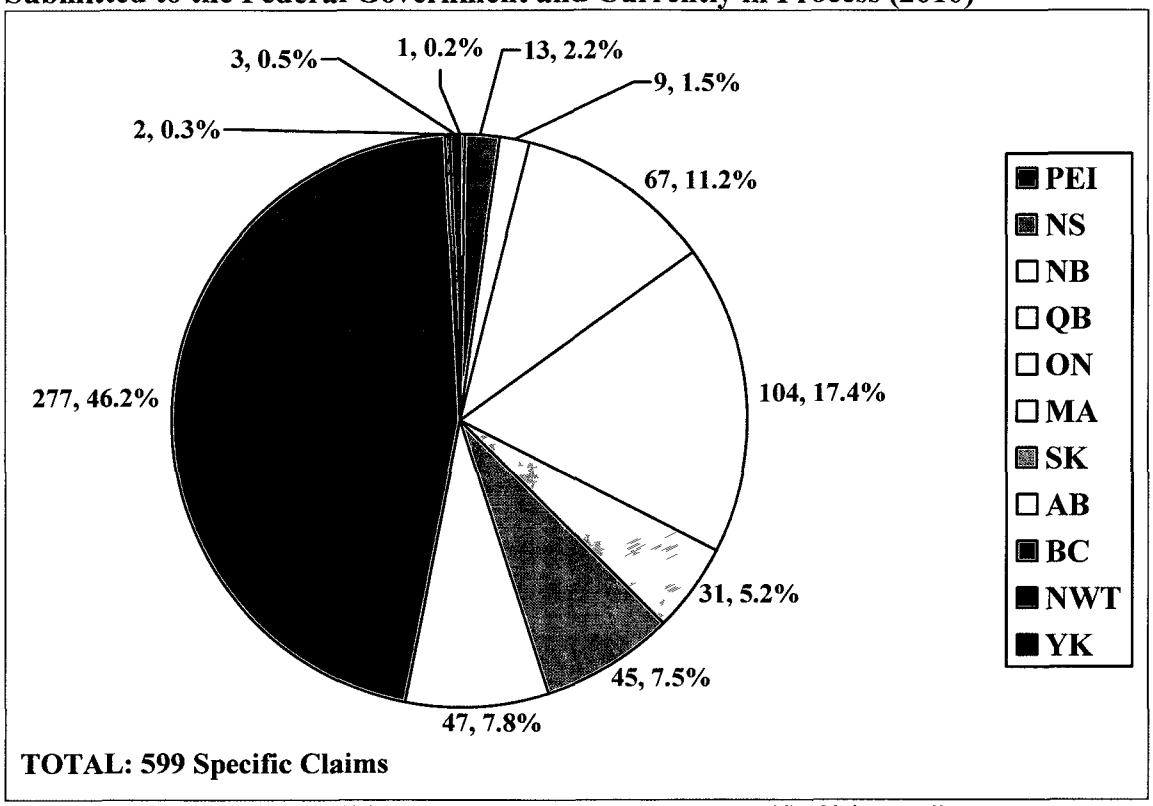
Source: Indian and Northern Affairs Canada, Specific Claims Branch, *Public Information Status Report* (Ottawa: Ministry of Public Works and Government Services Canada, 2007). Data beyond 2007 were not available. Since the release of the *Public Information Status Report* Indian and Northern Affairs Canada has set up an alternative online status system to check the status of current claims. Figure 32 provides current data, specifically for claims in process in 2010.

claims currently under review in those provinces is striking.[47] With regard to claims in litigation, other than Alberta, the percentage of claims in each province or territory is quite small relative to the total number of claims in process. This is much different from

[47] The same is also true in the Yukon, although the number of claims currently in process is quite small.

Ontario, where claims in litigation constitute the largest group after claims under review: 49 claims, or 18.4%, of the total claims submitted to Canada are in litigation,[48] and of claims submitted directly to Ontario, thirty, or 22.6%, are in litigation.

Figure 32. Cross-National Comparison of Specific Claims (Number of Claims, %) Submitted to the Federal Government and Currently in Process (2010)



Source: Indian and Northern Affairs Canada, Reporting Centre on Specific Claims, online status report, http://pse4-esd4.ainc-inac.gc.ca/SCBRI/Main/ReportingCentre/External/ExternalReporting.aspx?lang=eng.

Figure 32 provides a cross-national comparison of specific claims that have been submitted to the federal government and are currently in process. These claims pertain to

[48] It should be noted that a large proportion of these claims have been submitted by the Six Nations of the Grand River Territory.

only those under review or in negotiation. The primary purpose in including this chart is to provide an up-to-date snapshot of the share of specific claims that are outstanding in each province or territory. When viewed in conjunction with Table 4, a clearer and broader picture emerges with respect to the cross-time and current status of specific claims across the country, as well as where the highest proportion of claims, and hence potential backlogs in settlement, occur.

COMPREHENSIVE LAND CLAIMS IN CANADA: CONTEMPORARY CIRCUMSTANCES[49]

As noted earlier, following the Supreme Court ruling in *Calder*, a new era of land claims negotiations began in the 1970s. The first negotiations in this new era resulted in the 1975 *James Bay and Northern Quebec Agreement* (*JBNQA*).[50] Although not a federally-mandated agreement, the *JBNQA* has held some important content-related relevance for the agreements that have since followed. The negotiations sprang from litigation over the proposed James Bay Hydroelectric Project. Preliminary negotiations between the Quebec government and the Cree and Inuit failed; as a result, the Cree began legal proceedings against the Quebec government for not consulting them prior to commencing the project. After a six-month hearing, it was found that the Cree and Inuit

[49] An earlier version of the discussion in this section was published in Dalton, "Aboriginal," *supra* note 20 at 35-40, Copyright © 2010 Windsor Review of Legal and Social Issues.
[50] *Quebec, James Bay and Northern Quebec Agreement and Complementary Agreements*, 1991 ed. (Québec: Les Publications du Québec, 1991).

had Aboriginal rights over their territory since time immemorial.[51] However, this decision was overturned on appeal at the Quebec Court of Appeal.[52] In response, a further appeal was set for the Supreme Court of Canada, but because of the further costs and delays that would be incurred, the Quebec government agreed instead to negotiate with the Cree and Inuit.[53]

The scope of the negotiations was fairly broad. Generally speaking, the federal government was not active in the negotiations, but wanted to ensure that a precedent would not be set that might compromise the federal government in future settlement of land claims elsewhere in Canada. The Quebec government wanted to protect its sovereignty over the northern areas of the province, while maintaining the economic viability of the project and opening the territory for controlled development. Quebec also intended to extinguish outstanding Aboriginal rights and limit any royalty payments to the Aboriginal peoples residing in the territory.[54] Conversely, the Cree and Inuit attempted to ensure community control over social services and sufficient land for their communities. They also wanted to ensure that their subsistence economy would be

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[51] *Kanatewat v. James Bay Development Corporation* (1974), RP 38 (Q.S.C.).
[52] *Société de dévelopement de Baie James v. Kanatewat* (1975), C.A. 166 (Q.C.A.).
[53] *Kanatewat v. James Bay Development Corporation*, [1975] 1 S.C.R. 48 (leave to appeal to the Supreme Court of Canada was granted, but the appeal was discontinued in 1980 after it was decided that a settlement would be possible outside of the courts).
[54] Evelyn Peters, "Native People and the Environmental Regime in the James Bay and Northern Quebec Agreement" (1999) 52:4 *Arctic* 395 at 396-397.

maintained, while securing significant financial compensation for any lost lands and modifying the project to decrease any environmental impacts.[55]

The negotiations processes were inherently unbalanced. Negotiations and related substantive content were controlled by the government, which ultimately undermined the negotiating position of the Cree and Inuit.[56] Additionally, the implementation of the agreement was not as was hoped, at least not for the Cree and Inuit. The agreement extinguished Aboriginal title and related rights in northern Quebec, while "providing" some Aboriginal rights in return. However, these "new" rights flowed from the negotiated agreement, rather than from inherent Aboriginal rights. Financial compensation was to be provided, and social and economic benefits as well as participation in environmental management were included. However, the Quebec government and related departments did not adhere to the spirit of the agreement, failing to provide the services required by the Cree and Inuit. Moreover, the Cree and Inuit have not been provided with sufficient opportunities to take part in decision-making, and instead, most decisions have been controlled by the Quebec government and related departments.[57]

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[55] *Ibid.*
[56] Paul Rynard, "'Welcome In, But Check Your Rights at the Door': The James Bay and Nisga'a Agreements in Canada" (June 2000) 33 Can. J. Pol. Sci. 211 at 217 [Rynard].
[57] *Ibid.* at 217-218; 222-223; 225-227.

The *JBNQA* set a tentative framework, informing subsequent agreements. There have been ten comprehensive agreements, not including separate self-government agreements, settled since the *JBNQA*, including the following:

- *Northeastern Quebec Agreement*[58]
- *Inuvialuit Final Agreement*[59]
- *Gwich'in Comprehensive Land Claim Agreement*[60]
- *Nunavut Land Claims Agreement*[61]
- *Yukon First Nations Land Claims Settlement*[62]
- *Sahtu Dene and Métis Land Claim Settlement*[63]
- *Nisga'a Final Agreement*[64]
- *Tlicho Land Claims and Self-Government Agreement*[65]
- *Labrador Inuit Land Claims Agreement*[66]
- *Nunavik Inuit Land Claims Agreement*[67]

The scope of these agreements is extensive, and thus discussion specific to each is not feasible for the purposes of this chapter. It is relevant to note, however, that over time the negotiations processes have been refined and adjusted through government policy, partly in response to academic, commission and task force suggestions for improvements,

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[58] *An Act approving the Northeastern Quebec Agreement*, R.S.Q. 1978, c. C-67.
[59] *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c. 24.
[60] *Gwich'in Land Claim Settlement Act*, S.C. 1992, c. 53.
[61] *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29.
[62] *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34.
[63] *Sahtu Dene and Métis Land Claim Settlement Act*, S.C. 1994, c. 27.
[64] *Nisga'a Final Agreement Act*, S.C. 2000, c. 7.
[65] *Tlicho Land Claims and Self-Government Act*, S.C. 2005, c. 1.
[66] *Labrador Inuit Land Claims Agreement Act*, S.C. 2005, c. 27.
[67] *Nunavik Inuit Land Claims Agreement Act*, S.C. 2008, c. 2.

including the Royal Commission on Aboriginal Peoples (RCAP),[68] and in light of the enactment of the *Constitution Act, 1982*.

The development of negotiations processes is also reflected in the resultant agreements and the expanding provisions that they have included over time. For example, earlier agreements tended to include more limited land rights, hunting rights and financial compensation. While some involvement with resource management was specified, explicit governance provisions were not included in such agreements until the *Yukon First Nations Land Claims Settlement* for fourteen Aboriginal nations in the Yukon.[69] Once finalized for all fourteen Aboriginal nations, the agreement will include fee simple title to 41,595 square kilometres of land, along with a total of $242,673,000 to be paid in fifteen annual instalments. Specific harvesting and resource management rights are included. However, while each of the ten Aboriginal nations that have finalized agreements thus far has also finalized corresponding governance agreements,

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[68] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996), online: http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html.

[69] The Liard, Ross River Dena and White River First Nations have not finalized agreements. The successful negotiation of final agreements, including concurrent governance agreements, has occurred for the Vuntut Gwich'in (1995), Nacho Nyak Dun (1995), Teslin Tlingit (1995), Champagne and Aishihik (1995), Little Salmon/Carmacks (1997), Selkirk (1997), Tr'ondëk Hwëch'in (1998), Ta'an Kwach'an (2002), Kluane (2003), Kwanlin Dun (2005) and Carcross/Tagish (2005) First Nations.

these agreements are separate from the comprehensive agreements, and therefore are not part of the treaty rights constitutionally protected by section 35.[70]

The *Nunavut Land Claims Agreement* and the *Nisga'a Final Agreement* both represent examples of more robust systems of Aboriginal governance and expanded land tenure rights. Both are also discussed extensively in Chapter 9, and thus analysis is kept brief at this point. The former is the largest comprehensive claim in Canada; in 1999, the Northwest Territories were divided and Nunavut was established as the third Canadian territory. This agreement includes fee simple title to 350,000 square kilometres of land, $1.17 billion in compensation for the Inuit over 14 years, and greater involvement in land and environmental management. Most notable is the creation of a Nunavut government. However, this government is arguably limited in its scope of power. For example, the "independence" of the governmental apparatus is debatable, since it is a public government that also represents a minority, non-Aboriginal population. While the majority of the population is Aboriginal, the government still exercises delegated authority, rather than a more independent form of governance.

Although the *Nisga'a Final Agreement* is not as extensive as Nunavut, the establishment of a Nisga'a Central Government and village governments are crucial components of the agreement. It includes $190 million in compensation and fee simple

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[70] The 1993 federal policy still applies in this respect (Department of Indian and Northern Affairs, *Federal Policy for the Settlement of Native Claims* (Ottawa: Public Works and Government Services, 1993)). For further information, see Asch and Zlotkin, *supra* note 23 at 214.

ownership of 1,900 square kilometres in the Nass River Valley, with minimal restrictions placed on the Nisga'a interest in those lands. Additionally, surface and subsurface resource rights as well as harvesting rights are included.

Finally, the *Tlicho Land Claims and Self-Government Agreement*, *Labrador Inuit Land Claims Agreement* and *Nunavik Inuit Land Claims Agreement* are the most recent comprehensive land claims agreements that have been settled. They also include more expansive land rights and governance rights. For example, the first includes the development of a Tlicho government, along with 39,000 square kilometres of land, $100 million in compensation, subsurface resources and an annual share of resource royalties from the Mackenzie Valley development. The *Labrador* agreement includes the creation of a Nunatsiavut government, fee simple ownership of 72,520 square kilometres of land, except for subsurface rights, $140 million in compensation paid over 15 years and harvesting rights.[71] The *Nunavik* agreement is slightly distinct in that it is the result of three overlapping agreements between the Nunavik Inuit and the Nunavut Inuit, Crees of Eeyou Istchee as well as the Labrador Inuit. The final settlement revolves around the use and ownership of Nunavut lands and resources in several areas, including James Bay, Hudson Bay, Hudson Strait, Ungava Bay, a part of northern Labrador and an offshore

[71] Further information on most of the above agreements can be found in Indian Affairs and Northern Development, *Comprehensive Claims (Modern Treaties) in Canada* (Ottawa: Department of Indian Affairs and Northern Development, 1996), online: http://www.ainc-inac.gc.ca/pr/info/trty_e.html (no longer available); Indian Affairs and Northern Development, *Comprehensive Claims Policy and Status of Claims* (Ottawa: Public Works and Government Services, 2003).

area adjacent to Labrador. Under the agreement, the Nunavik Inuit have fee simple ownership of 80% of the Nunavik Marine Region, including surface and subsurface rights, which is approximately 5,100 square kilometres, in addition to a 400-square kilometre area shared with the Crees of Eeyou Istchee. Additionally, $54.8 million will be transferred in trust over a nine-year period. Extensive wildlife management and harvesting rights are part of the agreement, along with resource royalty entitlements.

Yet, it is important to remember that, while increasingly robust governance and land rights provisions have been included in more recent agreements, these agreements still include release clauses or surrender provisions, wherein the Aboriginal peoples involved must "release" their title and related rights as well as future claims to those rights.[72] The title and governance provisions that may be included in the agreements flow from and are redefined by the agreements themselves. As asserted by Paul Rynard, "[t]he central problem with this exchange of Aboriginal rights for redefined treaty rights is that the redefinition inevitably involves the confining and limiting of fundamental rights."[73] This "new" extinguishment approach is a source of serious contention amongst Aboriginal peoples and is evaluated in the next chapter.

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[72] For further discussion, see Rynard, *supra* note 56 at 219.
[73] *Ibid.* at 220.

CHAPTER EIGHT – ABORIGINAL LAND NEGOTIATIONS AND THE ROLES OF TITLE AND GOVERNANCE

At first blush, land claims are anything but unifying. And yet, at the heart of every claim is the acknowledgement of a relationship and the desire to explore greater mutuality. The act of settling a land claim is an act of reconciliation across history and societies. Indeed, the settlement of land claims is part of the reconciliation of Canada's existence with the prior occupation of the land by Aboriginal peoples. Negotiation is uniquely suited to this purpose for it is enormously flexible and demands responsibility on the part of all parties for the outcome.[1]

In the broader intersection between law and policy, there is considerable debate over the appropriate function of the courts in formulating law and contributing to policy. In the context of Aboriginal peoples and land negotiations, this debate holds importance given the predominant degree to which contemporary Aboriginal rights and reconciliation discourses have played out in the judicial realm. Effectively, the underlying conundrum is whether law shapes policy or policy shapes law, but more realistically, law and policy are in fact interwoven together with nuanced complexity, making their separation often difficult. More directly, should the courts and corresponding judicial decisions take a more "activist" role in formulating or "creating" law, or do the courts more appropriately confine rulings to the mere application of precedent and statute law? By extension, does the principle of parliamentary supremacy mandate significant deference by the courts to

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[1] Ontario Native Affairs Secretariat, *The Resolution of Land Claims in Ontario: A Background Paper* (Toronto: Queen's Printer for Ontario, 2005) at 4-5.

elected governments and laws passed by those governments, or must governments create and amend laws in the shadow of the courts' supposedly overbearing willingness to strike down laws found to be inconsistent with the Canadian Constitution? While these perceptions are put forward conversely by proponents and skeptics of judicial review, in reality these iterative functions usually occur in more of a reactive succession, akin to a "dialogue" between courts and legislatures, and thus there are no easy answers to these questions. The same holds true in the context of Aboriginal land negotiations.

Reference to adjudication as a form of "dialogue" was first coined by Peter Hogg and Allison Bushell in their seminal article of 1997 in the context of Canadian constitutionalism and the *Charter of Rights and Freedoms*.[2] Specifically used to counter the argument that courts have become overly-zealous in judicial review of legislation, the realm of which is considered legitimately left to elected governing officials, the dialogue theory posits that courts seldom have the final word in determining legislative objectives anyway. Rather, the purpose of judicial review is more aptly described as follows:

> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which *Charter* values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded.[3]

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[2] Peter Hogg and Allison Bushell, "The Charter Dialogue between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75).

[3] *Ibid.* at 79-80. A follow-up to this article was written by the authors in 2007, providing an examination of the dialogue metaphor as embraced by the Supreme Court of Canada and concluding that the dialogue

Patrick J. Monahan contends that, in this context, "[t]he challenge for the courts...is not to ignore their new political responsibilities but to come to terms with them in a manner that strikes an appropriate and fair balance between the role of the judiciary and that of the other branches of government."[4] Of particular note, he contends that the Supreme Court has been extremely attentive to this difficult challenge and largely successful in doing so, especially given the legitimate significance attached to the supervisory role of courts in overseeing development of Canadian law.[5]

Kent Roach asserts that so-called judicial activism occurred long before the *Charter* era. For him, while the *Charter* did mark the start of a crucial period in the relationship between courts and legislatures, fears about uncontrolled or rampant judicial activism are unwarranted. Akin to the dialogue theory, he argues that "[t]hose who see the *Charter* as either a welcome revolution or a terrible one are not paying enough attention to the ability of the legislatures...to sustain the type of dialogue that has always occurred between the courts and legislatures under the common law."[6] Additionally, he

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phenomenon continues as an important part of Canadian democracy (see Peter W. Hogg, Allison A. Bushell-Thornton and Wade K. Wright, "*Charter* Dialogue Revisited – Or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall L.J. 1) [Hogg et al.].

[4] Patrick J. Monahan, "The Supreme Court of Canada in the 21st Century" (2001) 80 Can. Bar Rev. 374 at 376.

[5] *Ibid.* at 377-378.

[6] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 253.

notes that Canada's parliamentary system of government "has the potential to produce legislative activism to counter judicial activism."[7]

A more recent addition to the debate is "coordinate constitutional interpretation," and while depicting a similar counteracting tension between legislative and judicial activism as that posed in dialogue theory, coordinate interpretation is generally understood as giving primary interpretive authority, or "legislative finality," to legislatures.[8] An alternative model of coordinate constitutional interpretation, which has been given very little scholarly attention, is referred to as "departmental interpretation" and is examined in-depth by Dennis Baker. He argues for an approach that allows for shared legitimacy and authority for both courts and legislatures through interpretation of the *Charter* by both elected and appointed officials. While seemingly critical of dialogue theory, his approach is actually very similar. He defines coordinate interpretation as providing that "each branch of government – executive, legislative, and judicial – is entitled and obligated to exercise its constitutional powers in accordance with its own interpretation of what the constitution entails," while "interpretive power is shared between institutions in the course of an unfolding process of constitutional interpretation."[9]

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[7] *Ibid.*
[8] See Hogg et al. *supra* note 3 at 38, n.133.
[9] Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal and Kingston: McGill-Queen's University Press, 2010) at 4-5.

Criticism of judicial activism has and continues to be strong. Some of the most vociferous opposition to judicial activism has been proffered by Ted Morton and Rainer Knopff, who assign labels such as "*Charter* Revolution" and "Court Party" to describe what they consider to be unreasonable judicial powers that expanded with the advent of the *Charter*. They make the bold assertion that "[t]he Charter does not so much guarantee rights as give judges the power to make policy by choosing among competing interpretations of broadly worded provisions."[10] Worse still, they define judicial review in this context as "judicial intervention in the policymaking process," arguing that the "Supreme Court now functions more like a *de facto* third chamber of the legislature than a court."[11]

This larger dialogue debate has important ramifications for Aboriginal land negotiations, inasmuch as it reflects the varying roles played by the Supreme Court and Canadian government in shaping the settlement of land claims. More specifically, Aboriginal engagement through land negotiations is evaluated here as a novel path to reconciliation. Yet, in this context, the process of negotiations has several problems that undermine Aboriginal engagement and ultimately Aboriginal reconciliation. As noted in the previous chapter, the two most contentious aspects of most settlements are governance and land tenure provisions. These two sub-themes have been chosen because

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[10] F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ontario: Broadview Press, 2000) at 33.
[11] *Ibid.* at 58.

of their continual significance during the negotiation of many, if not most, Aboriginal land claims. Policies and related provisions on governance and land tenure tend to be very large issues that consistently cause dissension between Aboriginal peoples and Canadian governments during the course of settlement negotiation. Moreover, there tends to be a higher level of dissatisfaction amongst Aboriginal peoples concerning these aspects of the negotiations process because the provisions that are acceded to by Canadian governments have traditionally been fairly limited, and as such, do not fully represent the distinctiveness of Aboriginal cultures. These provisions traditionally have not granted enough authority to the Aboriginal communities in question, seemingly minimizing the importance that Aboriginal peoples attach to their territories and related governing mechanisms. Similarly, from an Aboriginal perspective, limitations placed on Aboriginal lands, governance and resource management may arguably reflect a lack of respect for Aboriginal distinctiveness, thereby potentially undermining attempts at meaningful reconciliation.

To this end, the following discussion is relevant to the broader relationship dynamics that exist between Aboriginal peoples and the rest of Canada, particularly with regard to the impact of Canadian government policies and Supreme Court jurisprudence on the successful settlement of land claims. More specifically, the approaches that governments take in negotiating land settlements are affected by vital policy considerations and relevant jurisprudence. This, in turn, arguably affects meaningful engagement for Aboriginal peoples during the settlement of claims, inasmuch as the

negotiations process is able to address the history of alienation that has restricted Aboriginal peoples' active involvement and equal participation in the Canadian federation. In this context, belonging, inclusivity, trust and respect are arguably necessary during the negotiations process so as to foster effective, meaningful Aboriginal engagement with sensitivity to the cultural differences that exist between the parties involved.

With this larger backdrop in mind, the following analyses provide a detailed evaluation of the roles of government policies and Canadian Supreme Court jurisprudence in framing and shaping the land negotiations process. The detailed policy analyses should be seen as complementary to the more comparative inventory of nationwide policies included in the previous chapter. The objective of achieving meaningful reconciliation should be kept in mind throughout the following discussion, especially in the context of Aboriginal engagement. At the same time, Aboriginal distinctiveness, nationalism and alienation bear importance on such engagement.

SUPREME COURT RECOGNITION OF ABORIGINAL TITLE[12]

Aboriginal title is a cornerstone of comprehensive land claims agreements. It is also the main aspect in a few specific claims, although this is not normally the case. For

[12] Except for the final section in this chapter, earlier versions of portions of the remainder of this chapter were published in Jennifer E. Dalton, "Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claims Agreements?" (2006) 22 Windsor Rev. Legal & Social Issues 29 at 42-66, Copyright © 2010 Windsor Review of Legal and Social Issues.

this reason, the following discussion deals primarily with the negotiation of comprehensive claims. Extinguishment of Aboriginal title is a significantly controversial issue, and especially so in the context of land negotiations. The Canadian courts, in particular, the Supreme Court of Canada, and the Canadian government have treated Aboriginal title quite differently in recent times. Essentially, the Supreme Court has specifically defined Aboriginal title, including its nature and content, whereas federal government practice has sought the extinguishment of Aboriginal title – first explicitly, and now, more indirectly – through negotiated comprehensive agreements.

It was not until the Supreme Court of Canada handed down its *Delgamuukw*[13] ruling that an explicit judicial definition of Aboriginal title, including its nature and content, was provided. Prior to *Delgamuukw*, the Canadian judiciary looked to the *Royal Proclamation* as a source recognizing Aboriginal title. Most notably, the Supreme Court of Canada stated in *Sioui* that the purpose of the *Royal Proclamation* was to implement a set of procedures in order to provide a land base for Aboriginal peoples and to protect Aboriginal interests in those lands.[14] Not only did the *Royal Proclamation* consolidate the dominion of Great Britain over North America, but it also "[...] set aside a huge tract of land as land reserved for the Indians 'as their hunting grounds'; prohibited grants, purchases, and settlement of reserved Indian land without Crown authorization; required that all non-Indians who had settled on non-ceded land vacate such land; and required a

[13] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].
[14] *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1064.

licence for all trade with Indians."[15] The prohibition of purchases or settlement of Aboriginal lands, as provided for in the *Royal Proclamation*, is part of "the long-standing rule that Aboriginal title is inalienable other than by surrender to the Crown."[16] Moreover, under section 35 of the *Constitution Act, 1982*, Aboriginal title, as subsumed under Aboriginal and treaty rights, can no longer be extinguished without the consent of the Aboriginal peoples involved.[17]

As noted earlier, the Judicial Committee of the Privy Council in *St. Catherine's Milling* held that the source of Aboriginal title was the Royal Proclamation.[18] However, despite this ruling, and despite the general importance accorded to the *Royal Proclamation*, the Supreme Court of Canada made it clear in both *Calder* and *Guerin* that Aboriginal title was affirmed, not created, by the Royal Proclamation or any other legislative or executive act;[19] Aboriginal title existed as a legal right before European contact.[20] Nevertheless, the Supreme Court has avoided defining the precise legal origins

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[15] Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials*, 3rd ed. (Saskatoon, Saskatchewan: Purich Publishing Ltd., 2004) at 4 [Isaac].
[16] Kent McNeil, "The Post-*Delgamuukw* Nature and Content of Aboriginal Title," in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001) 102 at 127 [McNeil, "Post-*Delgamuukw*"]. The Supreme Court of Canada ruling in *Delgamuukw* affirmed the inalienability of Aboriginal title (*Delgamuukw*, *supra* note 13). For further discussion of the inalienability of Aboriginal title, see Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2001-2002) 47 McGill L.J. 473.
[17] In *R. v. Sparrow* the Supreme Court of Canada set out its "clear and plain" intention test, wherein "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right" (*R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099 [*Sparrow*]).
[18] *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 App. Cas. 46 (J.C.P.C.) [*St. Catherine's Milling*].
[19] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 379 [*Guerin*].
[20] *Ibid.* at 376-379; *Roberts v. Canada*, [1989] 1 S.C.R. 322 at 340.

of Aboriginal title. As noted, in *St Catherine's Milling*, the Judicial Committee of the Privy Council only referred to Aboriginal title as "a personal and usufructuary right."[21] In *Calder*, Judson J. held that Aboriginal title meant that Aboriginal peoples were here at the time of colonization, "[...] organized in societies and occupying the land as their forefathers had done for centuries "[22] In *Guerin*, Dickson J. stated that Aboriginal title is "[...] best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered [to the Crown]."[23]

Calder: The Turning Point for Land Claims Negotiations

Further discussion of *Calder* is warranted due to the importance it holds in the context of Aboriginal title and land negotiations. *Calder* centred on various assertions of the Nisga'a Nation Tribal Council, which represented various Aboriginal communities in British Columbia. These assertions pertained to Aboriginal title to a 1000-square mile area of land around the Nass River Valley, Observatory Inlet, Portland Inlet and Portland Canal in northwestern British Columbia. It was asserted that no treaty or contract had been entered into between the Crown and Nisga'a Nation, and while there are several reserves contained in the land in question, the Nisga'a Nation had neither agreed to nor

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[21] *St Catherine's Milling*, *supra* note 18 at 54
[22] *Calder v Attorney-General of British Columbia*, [1973] S C R 313 at 328 [*Calder*]
[23] *Guerin*, *supra* note 19 at 382 For further discussion of the origins of Aboriginal title, see Kent McNeil, "Defining Aboriginal Title in the 90s Has the Supreme Court Finally Got it Right?," Twelfth Annual Robarts Lecture, York University, Toronto, Ontario, March 25, 1998 at 5-11 [McNeil, "Defining"]

accepted the creation of the reserves. Instead, the Nisga'a Nation asserted title to the area based on Aboriginal occupation, and that title had never been lawfully extinguished:

> The Nishgas claim that their title arises out of aboriginal occupation; that recognition of such a title is a concept well embedded in English law; that it is not dependent on treaty, executive order or legislative enactment. In the alternative they say that if executive or legislative recognition ever was needed, it is to be found in the Royal Proclamation of 1763, in Imperial statutes acknowledging that what is now British Columbia was "Indian Territory", and in Royal instructions to the Governor of British Columbia. Finally, they say that their title has never been extinguished.[24]

Overall, the judgment addressed three central issues: first, whether Aboriginal title existed more generally; second, whether Nisga'a title to the area in question had been extinguished; and third, whether the Court had jurisdiction to grant a declaration concerning Aboriginal title, despite the fact that the Nisga'a had not yet received permission to sue the Crown over title issues.[25]

The final Supreme Court of Canada ruling indicated a sharply-divided court, with six of the seven judges supporting the existence of Aboriginal title at common law, but with those six judges evenly divided on the legal foundations of Aboriginal title and concomitant extinguishment. Of the six judges, Judson J. handed down his ruling on behalf of one group of three, affirming Nisga'a title based on an assertion of prior occupancy.[26] Judson J. held that Aboriginal title could not be grounded in the *Royal*

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[24] *Calder*, *supra* note 22 at 318.
[25] Such permission was still required in British Columbia (see Christina Godlewska and Jeremy Webber, "The Calder Decision, Aboriginal Title, Treaties, and the Nisga'a," in Hamar Foster, Heather Raven and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 1 at 4 [Godlewska and Webber).
[26] *Calder*, *supra* note 22 at 318.

Proclamation, 1763, since the *Proclamation* did not extend to British Columbia, but was instead rooted in the fact that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[27] That said, Nisga'a title had effectively been extinguished in this case based on public land transactions that had occurred in British Columbia. Hall J., writing for the second group of three, found that the application of the *Royal Proclamation, 1763* did extend to the Nisga'a and British Columbia, but nevertheless, chose to root the assessment of Aboriginal title in the common law of possession. He found that Nisga'a title did still exist because it was "beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the [government] and the intention must be 'clear and plain'."[28] Since there was no proof to this effect, Nisga'a title remained, and as a result, the Court was evenly divided on the issue of extinguishment.

Pigeon J. provided the final ruling for the Court, basing his decision on a purely procedural matter. He avoided dealing with title and extinguishment, and instead, focused on the requirement that litigants obtain the consent of the British Columbia attorney-general prior to bringing an action against the provincial government, also

[27] *Ibid.* at 317.
[28] *Ibid.* at 404.

known as a *fiat*.[29] Since the Nisga'a Nation had failed to do so, he rejected their arguments.

In essence, then, while *Calder* was decided based on purely procedural grounds, the significance of the decision lay in its implications for Aboriginal title. This was the first time that the Supreme Court had recognized the existence of Aboriginal title, more generally, and as a result, Aboriginal title was recognized as a right under common law, irrespective of any acknowledgement in a treaty or recognition by government, and across the entire country.[30] Further, as asserted by Christina Godlewska and Jeremy Webber,

> [a]s with many leading decisions, *Calder*'s implications were difficult to predict at the time. It was entirely possible that a future court would agree with the reasons of Justice Judson and his two colleagues and hold that the colony of British Columbia had extinguished Aboriginal title wholesale (as indeed Chief Justice Allan McEachern did at trial in *Delgamuukw v. British Columbia* eighteen years later). If so, then the First Nations' victory would have been pyrrhic indeed. Furthermore, the Court's reasoning contained the openness and range of possibilities that often mark path-breaking judgments. Even if Aboriginal title had not been extinguished, which of the rationales would have prevailed – those cited by Justice Hall, that expressed by Justice Judson, or some new formulation? What was required to prove the existence of Aboriginal title? What was its scope? What powers of regulation, what powers of governance, were implicit in the title? What constraints did it impose on the provincial administration of public lands? Over the next thirty years – and still today – these issues would be worked out through judicial decisions and treaty negotiations.[31]

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[29] *Fiat* comes from the Latin phrase *fiat justicia*, which is used by attorneys general to signify their consent to an action. In English, it means "let right be done," which is also the name of an important edited collection on the *Calder* ruling (Hamar Foster, Heather Raven and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007)).

[30] For further discussion, see Godlewska and Webber, *supra* note 25 at 5-6.

[31] *Ibid.* at 6.

It is precisely these issues that the *Nisga'a Treaty* and the negotiations leading up to its settlement sought to address.

The Post-*Calder* Era: The Impact of Supreme Court Rulings on Aboriginal Title

Generally speaking, these elusive judicial depictions of Aboriginal title were situated within a larger discussion of whether Aboriginal title was rooted in assertions of prior occupancy, the pre-existence of Aboriginal legal systems, or a combination thereof. Early jurisprudence relied mainly on prior occupancy as proof of Aboriginal title; the relevance of Aboriginal legal systems was more uncertain.[32] As discussed earlier, a claim of prior occupancy asserts that "[...] a prior occupant of land possesses a stronger claim to that land than subsequent arrivals."[33] The Supreme Court of Canada reinforced this Aboriginal claim in its *Van der Peet* ruling:

> [W]hen Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.[34]

Canadian common law, as it pertains to Aboriginal title, is heavily affected by the fact of Aboriginal prior occupancy. More specifically, personal and real property law in

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[32] For further discussion, see McNeil, "Post-*Delgamuukw*," *supra* note 16 at 104.
[33] Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995-1996) 21 Queen's L.J. 173 at 180.
[34] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 30 [*Van der Peet*].

Canada treat occupancy as "proof of title in the absence of a better claim by another."[35] In the case of Aboriginal peoples, the law of Aboriginal title "[...] partially acknowledges the legal significance of Aboriginal prior occupancy. [...] It provides that, under certain circumstances, Aboriginal nations can claim rights of possession and use of remnants of ancestral territory subject to surrender to or extinguishment by the Canadian state."[36] While Aboriginal title differs in some ways from common law real property interests, the Supreme Court of Canada has ruled that Aboriginal title is nevertheless a real property right.[37] Perhaps more importantly, with the constitutional entrenchment of Aboriginal and treaty rights in section 35, Aboriginal title is also a constitutionally-protected property right.[38]

The importance of pre-existing Aboriginal legal systems, as indicative of Aboriginal title, was not given adequate attention until the Supreme Court of Canada handed down the *Delgamuukw* decision. The Gitksan and Wet'suwet'en Nations claimed Aboriginal title and governance rights to 58,000 square kilometres as their traditional lands in northern British Columbia, an area which had never been covered by treaty and

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[35] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 78 [Macklem].
[36] *Ibid.* at 93.
[37] See Kent McNeil, "Aboriginal Title as a Constitutionally Protected Property Right," in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001) 292 at 297-300 [McNeil, "Aboriginal Title"]; *Delgamuukw*, *supra* note 13 at paras. 112, 130-132.
[38] McNeil, "Aboriginal Title," *ibid.* at 301.

which had never been surrendered.[39] The Court found that *both* prior occupancy and Aboriginal legal systems were relevant for determining the existence of Aboriginal title. This reinforces the importance of Aboriginal societal cultures in shaping Aboriginal nationalism, as reflected in the existence of distinctive Aboriginal systems of law. For the Court, Lamer C.J. stated the following:

> This debate over the proof of occupancy reflects two divergent views of the source of aboriginal title. The respondents argue, in essence, that aboriginal title arises from the physical reality at the time of sovereignty, whereas the Gitksan effectively take the position that aboriginal title arises from and should reflect the pattern of land holdings under aboriginal law. However, as I have explained above, the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy.[40]

The two divergent views presented in this quotation, namely those of the Gitksan on the one hand, and British Columbia and the federal government on the other hand, are likewise reflected in another debate that remained unresolved until *Delgamuukw* was decided at the Supreme Court of Canada. While the above debate revolved around the *nature* of Aboriginal title, prior to *Delgamuukw*, non-Aboriginal governments usually argued that the *content* of Aboriginal title was also significantly limited, consisting only of the uses that Aboriginal peoples made of the land prior to the assertion of Crown sovereignty. Conversely, Aboriginal peoples have argued that they are entitled to use

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[39] *Delgamuukw*, *supra* note 13 at 1011.
[40] *Ibid.* at 1099-1100.

their lands in any way they see fit, including possible utilization that had not occurred in the past, such as the extraction of resources.[41]

The response of the Supreme Court in *Delgamuukw* was significant. Most notably, Lamer C.J. rejected the argument of British Columbia and Canada that Aboriginal title includes no more than "[...] the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves."[42] Further, he modified the application of the *Van der Peet* "integral to a distinctive culture" test[43] by adjusting the timeframe from pre-European-contact to the assertion of Crown sovereignty.[44] Lamer C.J. held that the "integral to a distinctive culture" aspect of the test was subsumed by proof of exclusive occupation; and that Aboriginal peoples have the constitutional right to use and occupy their lands exclusively, protected against the intrusion of others, including governments.[45] "[A]boriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if

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[41] McNeil, "Defining," *supra* note 23 at 6.
[42] *Delgamuukw*, *supra* note 13 at para. 110.
[43] As held by the Supreme Court of Canada in *Van der Peet*, "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition *integral to the distinctive culture* of the aboriginal group claiming the right." In order to be integral to the group's culture, the practice must have developed prior to European contact and it must be a "defining" characteristic of the society. While the practice may have evolved over time, it must still have been rooted in pre-contact time (*Van der Peet*, *supra* note 34 at paras. 46, 55, 60).
[44] *Delgamuukw*, *supra* note 13 at paras. 141-145.
[45] The fact that Aboriginal rights are protected by the *Constitution Act, 1982* gives even greater protection to Aboriginal peoples in this respect. For further discussion, see McNeil, "Defining," *supra* note 23 at 8.

title cannot. What aboriginal title confers is the right to the land itself."[46] If the content of Aboriginal title were limited to traditional uses of the land, it would ultimately amount to a discriminatory practice; at common law, persons who physically occupy land usually have possession, which gives them an interest in the land, which ultimately entitles them to use it in any way permitted by the law.[47]

However, Lamer C.J. did not accept the argument of the Gitksan and Wet'suwet'en either. They asserted that their Aboriginal title is equivalent to an inalienable fee simple, and therefore, they have the right to use their lands however they deem fit.[48] Instead, he found that the content of Aboriginal title was in between these two assertions:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit...flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.[49]

Ultimately, the clarity provided by the Supreme Court in *Delgamuukw* represented a decisive turn, considered progressive, given that the Supreme Court of Canada finally articulated a doctrine of Aboriginal title in a more expansive way, taking

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[46] *Delgamuukw*, *supra* note 13 at 1095.
[47] McNeil, "Post-*Delgamuukw*," *supra* note 16 at 112-113.
[48] *Delgamuukw*, *supra* note 13 at 1095.
[49] *Ibid.* at 1080-1081.

into consideration pre-existing Aboriginal legal systems as proof of Aboriginal title. However, the "inherent limit," as referred to by Lamer C.J. in the above quotation, refers to the limitation that uses to which Aboriginal lands are put "must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title."[50] Chief Justice Lamer's purpose in including this limitation, which has no foundation in earlier Aboriginal title jurisprudence, nor precedent in common law,[51] was to ensure that the special relationship Aboriginal peoples have with their lands would continue into the future.[52] In particular, it would appear that, while Lamer C.J. was careful to ensure that Aboriginal uses of the land would not be restricted *to* activities that were traditionally carried out on the land, land use would be restricted *by* past practices, traditions and customs.[53] This limit is potentially problematic, since it restricts the uses to which Aboriginal peoples might put their lands, and thus it can be argued that Supreme Court recognition of Aboriginal title has progressed to a certain point, but it is not on a par with fee simple title.

More recently, in *Marshall; Bernard*[54] Stephen Marshall and thirty-four Mi'kmaq loggers from Nova Scotia, along with Joshua Bernard, a Mi'kmaq logger from New Brunswick, were charged and convicted for commercial logging on Crown lands without

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[50] *Ibid.* at 1081.
[51] McNeil, "Post-*Delgamuukw*," *supra* note 16 at 116.
[52] McNeil, "Defining," *supra* note 23 at 9.
[53] For more extensive discussion on the inherent limit and its potential problems, see McNeil, "Post-*Delgamuukw*," *supra* note 16 at 116-122.
[54] *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 [*Marshall; Bernard*].

permits from their respective provinces. The Courts of Appeal in Nova Scotia and New Brunswick overturned the convictions, but the Supreme Court of Canada reinstated them, reversing the decisions. Marshall, Bernard and the other loggers asserted that they did not need permits to log on Crown lands because of their treaty rights, based on the 1760 and 1761 peace and friendship treaties concluded with the British Crown, and based on their unextinguished Aboriginal title to the lands in question.[55] Moreover, they contended that, as per *Marshall*,[56] the right to harvest and trade for a moderate livelihood should further support their rights. In *Marshall; Bernard*, harvesting and selling trees for a moderate livelihood was asserted as being equivalent to the context of fishing.[57] Despite these assertions, the Supreme Court held that Aboriginal title to the specific sites where the logging occurred was not sufficiently proven. Further, the Court held that modern logging was not "the logical evolution of a traditional trade activity," and that "what the treaty protects is not the right to harvest and dispose of particular commodities, but the right to practice a traditional 1760 trading activity in the modern way and modern context."[58]

While the final ruling of the Supreme Court was restrictive in this instance, it should be noted that the Supreme Court did not state that the Mi'kmaq do not have Aboriginal title to any areas in the provinces. Instead, the decision implies that the

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[55] *Ibid.* at paras. 2-4, 7, 13-14.
[56] *R. v. Marshall*, [1999] 3 S.C.R. 456.
[57] *Marshall; Bernard*, *supra* note 54 at para. 14.
[58] *Ibid.* at para. 26.

Mi'kmaq have the treaty right to trade or sell products that were traded in 1760 and that have a logical continuity with modern trading practices in order to support moderate livelihoods. In this way, the Supreme Court provided further clarification on Aboriginal and treaty rights, including Aboriginal title.[59]

FEDERAL GOVERNMENT POLICY APPROACHES AND THE EXTINGUISHMENT OF ABORIGINAL TITLE

The federal government has had an evolving policy on Aboriginal title that is largely incongruous with recent Supreme Court jurisprudence. Generally, federal policy has been one of blanket or outright extinguishment. The purpose in so doing has been to achieve certainty and clarity concerning rights of ownership and use of lands and resources. As noted, after the *Calder* decision was handed down by the Supreme Court of Canada, the federal government changed its approach to be more in line with this watershed decision. In the context of Aboriginal title, early federal government policy was exemplified in its 1973 policy release.[60] While the government stated that it was willing to engage in land claims negotiations with Aboriginal peoples based on traditional use and occupancy, complete surrender of Aboriginal title and related rights were

[59] For further discussion, see Bruce Wildsmith, "Putting the Supreme Court Mi'kmaq Logging Decision in Perspective," online: http://www.mikmaqrights.com/images/resources/SCCMarshallBernardPerspective.pdf (no longer available) at 2-3.

[60] Department of Indian Affairs and Northern Development, *Statement on Claims of Indian and Inuit People* (Ottawa: Queen's Printer, 1973).

required. This policy of extinguishment has been offensive to Aboriginal peoples, at times resulting in stalled or failed negotiations.[61]

However, the 1973 policy was quite different from federal practices prior to the *Calder* decision. Notably, financial compensation for surrendered lands, resources and rights was increased, and the Aboriginal communities involved would have some degree of input into management policies concerning wildlife and the environment. Further, areas of land to negotiate would be much larger. These lands would be held by an Aboriginal corporate identity, rather than in trust by Canada, and Aboriginal hunting and fishing rights would be preferential or exclusive.[62]

The 1973 policy was revised in 1981 by the *In All Fairness* policy.[63] The overarching purpose of the new document was to clarify federal policy on the resolution of land claims, including a commitment to settle comprehensive land claims. The government wanted to ensure that fair and equitable settlements would be achieved, that claims would be settled that allow Aboriginal peoples to live how they desire, and that

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[61] See Michael Coyle, *Addressing Aboriginal Land and Treaty Rights in Ontario: An Analysis of Past Policies and Options for the Future*, research paper Commissioned by the Ipperwash Inquiry, Ontario, 2005, online: http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Coyle.pdf at 59-60 [Coyle]; Indian and Northern Affairs Canada, *Resolving Aboriginal Claims: A Practical Guide to Canadian Experiences* (Ottawa: Minister of Public Works and Government Services Canada, 2003) at 24; Mary C. Hurley, *Aboriginal Title: The Supreme Court of Canada Decision in Delgamuukw v. British Columbia* (Ottawa: Library of Parliament, Parliamentary Research Branch, 2000) at 29; Assembly of First Nations, *Confederacy Resolutions Nos. 2/98 and 3/98*, March 11, 1998, affirmed June 1998 by *General Assembly Resolution 34/98*.

[62] *Ibid.*

[63] Indian Affairs and Northern Development, *In All Fairness: A Native Claims Policy* (Ottawa: Supply and Services Canada, 1981).

the terms of the settlement would also respect the rights of all other people. The central gist of the policy was to exchange undefined Aboriginal title and related rights for concrete rights laid out in settlement agreements given the force of law by legislation. Ultimately, the policy of blanket extinguishment remained unchanged. Aboriginal peoples were required to extinguish their title and related rights, in exchange for statutory fee simple title to small sections of land with financial compensation for land ceded and previously unauthorized use of the land. Equally as controversial was the government requirement that settlements would be considered final, without the possibility for future adjustments based on changing circumstances.[64] However, the usual government response emphasizes the importance attached to certainty and closure for all parties affected by settlement agreements.[65]

The federal policy was revised again in 1986, partly in response to the 1985 *Report of the Task Force to Review Comprehensive Claims Policy* headed by Murray Coolican (Coolican Report),[66] and partly in response to the entrenchment of Aboriginal and treaty rights in the Canadian Constitution in 1982. The Coolican Report sought to evaluate ways through which Aboriginal title and other rights might no longer be extinguished outright. The Coolican Report noted that the government's insistence on

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[64] The Office of Native Claims, established in 1974, was also given the responsibility of determining which claims would be accepted or rejected.
[65] Coyle, *supra* note 61 at 106.
[66] Indian Affairs and Northern Development, *Living Treaties, Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Supply and Services Canada, 1985).

the blanket extinguishment of Aboriginal title and rights, combined with the finality of settlements, formed one of the most crucial obstacles to reaching agreements. Instead, it was recommended that negotiated agreements should recognize Aboriginal rights and title. In particular, a workable alternative to extinguishment would require Aboriginal consent in advance and would secure land and resource rights. Further, a simple statement on the matter of title would need to be used in order to promote clarity, while rights would be defined so as to work within the dominant property law system.[67]

In its 1986 policy response,[68] the federal government amended its extinguishment requirements, deciding that there might be exceptions to the policy of extinguishment, provided that certainty over lands and resources could be established. The policy allowed for some defined rights to be "granted" in specified areas, reserve areas or the settlement area as a whole. Only those rights related to the title, use of the land and related resources could be relinquished, since only rights related to land and resources would be at issue in the negotiations, rather than other forms of rights, which would remain unaffected by any settlements reached. Other Aboriginal rights could be "retained" provided they were not inconsistent with the terms of the agreements reached. The federal government did accept that the relevant Aboriginal communities could receive royalties from natural resource development in settlement areas, but that revenue would be deducted from compensation

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[67] *Ibid.*

[68] Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Supply and Services Canada, 1986).

payments.[69] Ultimately, the revised 1986 policy emphasized the need for a more flexible, evolving relationship between Aboriginal and non-Aboriginal interests. In seeking greater certainty on land-based rights, the policy provided two options: the cession of Aboriginal title over the claimed area would be required, but without using the terminology of extinguishment; or the cession of Aboriginal title to specific lands in the relevant area would be required, while Aboriginal title would be undisturbed in other areas. However, these other areas, to be selected by the Aboriginal community, were generally confined to those already occupied, thereby limiting access to lands.[70]

Since that time, the federal government policy on extinguishment of Aboriginal title and related rights has not undergone significant change.[71] While the explicit language of extinguishment is not used anymore, words such as "cession," "release" or "surrender" are used and essentially have the same meaning and serve the same purpose as extinguishment, and thus these changes appear merely semantic. Moreover, Aboriginal rights that are inconsistent with the rights outlined in the agreements must also be "released" or "surrendered." As a result, this remains a contentious, unresolved issue, with many Aboriginal peoples maintaining that they will never sign an agreement that requires the extinguishment of their title and rights. Instead, they assert that

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[69] *Ibid.*
[70] *Ibid.*
[71] There was a 1991 federal government policy report in response to the Report of the British Columbia Claims Task Force, but this policy statement did not deal directly with title or extinguishment (see Indian Affairs and Northern Development, *Building a New Relationship with First Nations in British Columbia: Canada's Response to the Report of the British Columbia Claims Task Force* (Ottawa: Indian and Northern Affairs, 1991).

agreements should affirm Aboriginal title and related rights within the context of sharing and accommodation between themselves and Canada.[72] Such sentiments of sharing and accommodation arguably imply a desire on the part of some Aboriginal peoples to achieve a level of societal cohesiveness through reconciliation.

NEGOTIATING THE INHERENT RIGHT OF ABORIGINAL GOVERNANCE: POLITICAL OR JUDICIAL REVERSAL?

Aboriginal title and Aboriginal governance are connected in important ways. While the issue of Aboriginal title is addressed in every comprehensive land claim agreement, Aboriginal governance is also often included, either as part of the agreement, or in a concurrent agreement. Aboriginal title and governance are also connected in important ways under Canadian common law, most notably under section 35. However, contrary to the relatively progressive stance adopted by the Supreme Court of Canada on Aboriginal title, the Court has been more hesitant on the matter of Aboriginal governance. Conversely, the Canadian government has been much more active in its formal recognition of an inherent right of governance. This has been most apparent in fairly recent federal government policy statements, giving a very different policy impression than that conveyed on Aboriginal title.

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[72] For further discussion, see Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essay on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 208 at 211, 217 [Asch and Zlotkin]; Mary Hurley and Jill Wherrett, *Aboriginal Self-Government*, Current Issue Review PRB 99-19E (Ottawa: Library of Parliament, Parliamentary Research Branch, 1999) at 3 [Hurley and Wherrett].

Judicial Hesitance and Its Effect on Aboriginal Governance

The *Pamajewon*[73] and *Delgamuukw* rulings are the central Supreme Court of Canada rulings related to Aboriginal governance. The British Columbia Supreme Court decision in *Campbell*[74] is also important since it relies, in part, on the legal rationale laid out by the Supreme Court of Canada in *Delgamuukw*.

In *Pamajewon*, the Shawanaga First Nation and the Eagle Lake First Nation claimed the right to authorize and regulate gambling on their reserves, based on an inherent right of governance,[75] but the lottery laws enacted by each First Nation contravened section 201(1) of the *Criminal Code*.[76] While it seemed that the Supreme Court would have to deal with the issue of governance head-on in this case, rather than avoiding it as it had in *Sparrow*,[77] Lamer C.J. for the majority did not directly address the question of broader governance rights. Instead, he assumed that section 35(1) includes a right of governance, as demonstrated in the following:

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[73] *R. v. Pamajewon,* [1996] 2 S.C.R. 821 [*Pamajewon*].
[74] *Campbell v. British Columbia (Attorney General)* (2000), 189 D.L.R. (4th) 333 (B.C.S.C.) [*Campbell*].
[75] *Pamajewon, supra* note 73 at para. 6.
[76] *Criminal Code of Canada*, R.S.C. 1985, c. C-46. This section states that "[e]very one who keeps a common gaming house or common betting house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."
[77] Instead of dealing directly with the Musqueam Nation's asserted right of governance, the Supreme Court upheld the sovereignty of the Crown as unquestioned (*Sparrow*, *supra* note 17 at 1103). The Court stated that "there was from the outset never any doubt that sovereignty and legislative power...vested in the Crown" (*ibid.*). For further discussion, see Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence," in Hamar Foster, Heather Raven and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 129 at 7 [McNeil, "Judicial"].

> The appellants' claim involves the assertion that s. 35(1) encompasses the right of governance, and that this right includes the right to regulate gambling activities on the reservation. [...] Assuming s. 35(1) encompasses claims to aboriginal governance, such claims must be considered in light of the purposes underlying that provision and must, therefore, be considered against the test derived from consideration of those purposes. This is the test laid out in *Van der Peet*. [...] In so far as they can be made under s. 35(1), claims to governance are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.[78]

While this would appear to demonstrate judicial recognition of Aboriginal governance, the scope of Aboriginal governance was actually restricted. Rather than addressing the First Nations' assertion that their lottery laws and gambling activities were part and parcel of a right of governance "to manage and use their reserve lands,"[79] Lamer C.J. emphasized a context-specific analysis of the right in question by considering "the appellants' claim at the appropriate level of specificity."[80] In avoiding what he considered a "level of excessive generality," Lamer C.J. characterized the asserted right as a *specific* right "to participate in, and to regulate, high stakes gambling activities on their respective reserve lands."[81]

Additionally, the second part of the "integral to a distinctive culture" test, which had been laid out in *Van der Peet*,[82] was applied to this case, further restricting Aboriginal rights. Lamer C.J. viewed the right of governance no differently than any other Aboriginal right, and consequently, placed the onus on Aboriginal claimants to

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[78] *Pamajewon*, *supra* note 73 at para. 24.
[79] *Ibid.* at para. 27.
[80] *Ibid.*
[81] *Ibid.* at para. 26.
[82] *Van der Peet*, *supra* note 34 at paras. 46, 55, 60.

demonstrate that the activity related to their asserted right was integral to their distinctive cultures at the time of European contact.[83] This approach by the Supreme Court restricted the scope of Aboriginal rights, particularly the right of Aboriginal governance, under section 35(1). Not only did the Court retreat from any sort of substantive discussion of governance under section 35(1), but it also ruled that the First Nations' lottery laws and gambling activities were not Aboriginal rights, and as a result, were accorded no protection from section 35(1). As asserted by Peter Hogg,

> [a]ccording to *Pamajewon*, the aboriginal right of governance extends only to activities that took place before European contact, and then only to those activities that were an integral part of the aboriginal society. These restrictions are very severe even for rights to hunt and fish and harvest, but they are singularly inappropriate to the right of governance. In order to give meaning to governance in a modern context, it should be couched in much wider terms.[84]

The *Delgamuukw* decision at the Supreme Court of Canada was more progressive regarding governance, although the existence of Aboriginal governance as a right protected under section 35(1) was only implicit. Notably, the Aboriginal claimants' original assertion was of "'ownership' of the territory and 'jurisdiction' over it."[85] The British Columbia Supreme Court dismissed these claims, ruling that the establishment of

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[83] *Ibid.* at para. 46. Kent McNeil contends that treating a natural resource right no differently than jurisdictional authority, such as governance, was unexpected, "[...] given the fundamental and long-standing distinction in the common law between natural resource rights, which are generally proprietary in nature, and jurisdiction, which is governmental in nature." See McNeil, "Judicial," *supra* note 77 at 11. *St. Catherine's Milling*, *supra* note 18, distinguished between natural resource rights and jurisdictional authority.

[84] Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2003) at 607.

[85] *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 at 194 (B.C.S.C.).

Crown sovereignty excluded the possibility for Aboriginal governance thereafter.[86] A majority of the British Columbia Court of Appeal agreed, restricting the distribution of legislative powers to the federal and provincial governments, leaving no room for a third order of Aboriginal government.[87] While the Supreme Court of Canada avoided addressing directly the issue of governance, it "affirmed that Aboriginal title is held communally,"[88] stating that "Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests."[89] This point is crucial because communal property rights imply some form of self-governing apparatus so as to regulate control over and use of land, thereby justifying a right of Aboriginal governance.[90] Ultimately, the repercussions of these assertions are indeed significant – the Supreme Court of Canada indirectly acknowledged a right of Aboriginal governance.

Nevertheless, despite this indirect judicial recognition, and while many acknowledged *Delgamuukw* as providing for possible expansion of Aboriginal rights, the

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[86] *Ibid.* at 196-197.
[87] *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 at para. 171 (B.C.C.A).
[88] McNeil, "Post-*Delgamuukw*," *supra* note 16 at 122.
[89] *Delgamuukw*, *supra* note 13 at para. 115. For further discussion, see McNeil, "Post-*Delgamuukw*," *ibid.*
[90] See *Delgamuukw*, *ibid.* at para. 133; *Campbell*, *supra* note 74 at paras. 137-138; McNeil, "Post-*Delgamuukw*," *supra* note 16 at 124-125.

Supreme Court potentially undermined explicit constitutional recognition of governance. As noted by Thomas Isaac,

> there is a general lack of substantive judicial commentary dealing with governance. [The] decisions speak only to the regulation of rights and the means of dealing with s. 35 generally. They do not deal with the ongoing relationships between Aboriginal governments and the federal, provincial, and territorial governments. [...] To date the courts have offered a restrictive interpretation of s. 35 and the right of governance. Unless the courts take a more liberal view of whether a right of governance exists and has not been extinguished negotiation may be the only forum for Aboriginal people to address the issue.[91]

There is one central exception to the jurisprudence on Aboriginal governance, namely the *Campbell* case. However, this case was not decided at the Supreme Court of Canada, but was handed down by the British Columbia Supreme Court. It is discussed here due to the significance it holds in the context of judicial recognition of Aboriginal governance. Gordon Campbell, at the time Liberal Leader of the Opposition in the British Columbia legislature, and two colleagues, Michael De Jong and P. Geoffrey Plant, initiated the case. They challenged the governance components of the *Nisga'a Final Agreement*, arguing that the Agreement violates the Canadian Constitution because it confers legislative jurisdiction on the Nisga'a Nation, which is inconsistent with the "exhaustive division of powers" granted to the federal and provincial governments.[92]

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[91] Isaac, *supra* note 15 at 457, 469.

[92] *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, ss. 91, 92, reprinted in R.S.C. 1985, App. II, No. 5. They also argued that the legislative powers described in the Agreement do not conform with set principles of royal assent and that non-Nisga'a citizens are denied rights guaranteed in section 3 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitutional Act*, being Sched. B to the *Canada Act 1982* (U.K.), 1982, c. 11. *Campbell*, *supra* note 74 at para. 12. Section 3 of the *Canadian Charter of Rights and Freedoms* provides that "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

However, Williamson J. rejected their argument, instead finding that the unwritten principles of British imperial policy provide for the extension of legislative powers beyond federal and provincial jurisdictions by "filling out 'gaps in the express terms of the constitutional scheme'."[93] Williamson J. also found that Aboriginal governance has continued, albeit in diminished form, since the assertion of Crown sovereignty. He determined that Aboriginal governance was not extinguished, but instead, "long before the 1982 enactment of s. 35, aboriginal rights formed part of the unwritten principles underlying our Constitution."[94]

By extension, Williamson J. focused on the communal nature of Aboriginal title, relying on the *Delgamuukw* ruling of the Supreme Court of Canada. He stated that "[o]n the face of it, it seems that a right to aboriginal title, a communal right which includes occupation and use, must of necessity include the right of the communal ownership to make decisions about that occupation and use, matters commonly described as governmental functions. This seems essential when the ownership is communal."[95] Further, Williamson J. explicitly addressed whether the right of Aboriginal governance is included under section 35(1). He concluded the following:

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[93] *Campbell*, *ibid.* at para. 68.
[94] *Ibid.* at para. 70.
[95] *Ibid.* at para. 114. Williamson J. also found that, unlike *Pamajewon* and *Delgamuukw*, where "the right to governance was framed 'in excessively general terms' and therefore was not 'cognizable' to the court, ...[t]he legislative power set out in the Nisga'a Treaty does not succumb to the failing of being 'excessively general.' Rather, it is a detailed document setting out precisely what powers and what limitations to those powers reside with each party" (*ibid.*).

> Can it be, as the plaintiffs' submission would hold, that a limited right to governance cannot be protected constitutionally by Section 35(1)? I think not. The above passages from *Delgamuukw* suggesting the right for the community to decide to what uses the land encompassed by their Aboriginal title can be put are determinative of the question. The right to Aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by [section] 35.[96]

It is apparent that *Campbell* represents the first judicial instance of direct legal recognition of Aboriginal governance under section 35(1). Yet, can the ruling of Williamson J. be reconciled with the hesitation of the Supreme Court of Canada on Aboriginal governance, particularly in light of the restrictions placed on governance in *Pamajewon*, as discussed above? Ultimately, uncertainty remains, given that the Supreme Court of Canada is the highest court in the land and thus has the final judicial word in this regard. However, one notable exception is the concurring judgment of Binnie J. in *Mitchell*, which provided some important insight into a broader approach to an inherent right of governance. Along with accepting the conceptions of "merged" sovereignty, outlined by the Royal Commission on Aboriginal Peoples, and "residual Aboriginal sovereignty," accepted in American law, Binnie J. suggested that there might be an internal right of Aboriginal governance that is workable within the confines of the Canadian federal system. Specifically, Binnie J. held the following:

> If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort. It is this new entity, as inheritor of the historical

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[96] *Ibid.* at paras. 137.

attributes of sovereignty, with which existing aboriginal and treaty rights must be reconciled.[97]

Federal Government Policy Directions: Recognition of the Inherent Right of Aboriginal Governance

The Canadian government has been much more explicit in its formal acceptance and recognition of Aboriginal governance, but Aboriginal governance did not receive any sort of robust recognition or meaningful application until the patriation of the Canadian Constitution.[98] More specifically, section 37 of the *Constitution Act, 1982* provided that a First Ministers' Conference had to be held by April 17, 1983, with representatives of Aboriginal peoples in attendance. The purpose of the conference was to negotiate various Aboriginal constitutional matters, including the "identification and definition of the rights of those peoples to be included in the Constitution of Canada."[99] During this Conference, an accord was reached that provided for several amendments or

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[97] *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at paras. 129, 165, with reference to Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996), online: http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html [RCAP].

[98] Prior to contemporary governmental recognition of Aboriginal governance, the *Indian Act*, R.S.C. 1985, c.I-5 has provided a very limited form of governance through delegated statutory authority. Of course, this form of governance is not inherent in nature. The fact that its governance provisions are very limited justifies the extensive criticism levelled at the *Indian Act* by Aboriginal and non-Aboriginal groups alike. One notable exception to the limitations of the *Indian Act* in this regard was the implementation in 1999 of the *First Nations Land Management Act*, S.C. 1999 (*FNLMA*). This *Act* was initiated by fourteen *Indian Act* bands who wanted to manage their own reserve lands and related economic affairs by escaping the land management provisions of the *Indian Act*. The *FNLMA* is not a treaty under section 35 of the *Constitution Act, 1982*, but it does allow First Nations who sign onto the *Framework Agreement on First Nation Land Management, 1996* to actively develop their own land codes in accordance with the *Agreement*.

[99] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

clarifications to the *Constitution Act, 1982*. In particular, section 25 was expanded to cover existing and future land claims agreements, while section 35 was adjusted to indicate that treaty rights include any rights under existing or future land claims agreement.[100] Two new sections were added – sections 35.1 and 37.1 – with the former requiring that First Ministers' Conferences be held before any amendments could be enacted that directly affect Aboriginal peoples, and the latter requiring two additional First Ministers' Conferences to be called before 1987.

Three First Ministers' Conferences followed, each focusing primarily on the right of Aboriginal governance, and in particular, whether that right was an inherent one, whether it was reinforced or extinguished through treaties, or whether it no longer existed and thereby required constitutional recognition. The Penner Report[101] had urged the government to constitutionally entrench Aboriginal governance, but the government took a "contingent right" approach "that required the content of governance to be defined by agreement amongst federal and provincial governments prior to any entrenchment in the Constitution."[102] This was entirely unacceptable to Aboriginal peoples, since it presupposed that Aboriginal governance had been extinguished and now would be created by the Constitution. In response, the representatives of four national Aboriginal

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[100] It was also clarified that Aboriginal and treaty rights under section 35 would be guaranteed equally to male and female individuals.

[101] House of Commons, Special Committee on Indian Self-Government, "Indian Self-Governance in Canada," in *Report of the Special Committee*, No. 40 (Ottawa: Queen's Printer, 1983).

[102] Bradford Morse, "The Inherent Right of Aboriginal Governance," in John Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2nd ed. (Saskatoon, Saskatchewan: Purich Publishing Ltd., 1999) 16 at 20 [Morse].

organizations[103] drafted their own accord shortly before the adjournment of the First Ministers' Conference in 1987. The draft accord recognized and affirmed "the inherent right of governance for all Indian, Inuit and Métis peoples of Canada."[104] However, the conference terminated before any official reaction could be received.

Following on the heels of these First Ministers' Conferences was a round of negotiations leading up to the 1987 *Meech Lake Accord.*[105] *Meech Lake* ultimately failed because it was not ratified by June 23, 1990 by all required bodies. In particular, Elijah Harper, the lone Aboriginal MLA in the Manitoba legislature, withheld his approval of the *Meech Lake Accord* due to its inattention to Aboriginal rights, thereby preventing the unanimous consent required for approval of the Accord. Some Aboriginal peoples were also insulted by how quickly the agreement had been negotiated just after the four national Aboriginal groups had unsuccessfully presented their own accord on governance at the 1987 First Ministers' Conference.[106]

After the demise of *Meech Lake*, the federal government struck a series of committees to examine in-depth the issue of constitutional reform and to promote more

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[103] The Assembly of First Nations (AFN), the Native Council of Canada (NCC), the Métis National Council (MNC) and the Inuit Committee on National Issues (later to be renamed the Inuit Tapirisat of Canada (ITC).

[104] Assembly of First Nations, Native Council of Canada, Métis National Council and Inuit Committee on National Issues, *Joint Aboriginal Proposal for Self-Government*, Document 800-23/030 (Ottawa: Government Services, 1987).

[105] *The Meech Lake Constitutional Accord Constitution Amendment, 1987* (Ottawa: Government of Canada, 1987). For extensive discussion of the Meech Lake Accord, see Patrick J. Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991).

[106] For further discussion, see Morse, *supra* note 102 at 20.

broad-based citizen involvement in constitutional negotiations than had been the case during the *Meech* round. Related to Aboriginal issues, the Spicer Committee had the purpose of attracting public involvement in the process, while Brian Dickson, former Chief Justice of the Supreme Court of Canada, was appointed to explore the possibility of a Royal Commission on Aboriginal Peoples, which was ultimately launched in 1991. The Special Joint Committee of the Senate and House of Commons, the Beaudoin-Edwards Committee and the Beaudoin-Dobbie Committee were established in 1990 and 1991 to evaluate several constitutional issues, including amending procedures and constitutional conferences that would affect Aboriginal peoples.[107]

Amidst this series of committees, the federal government changed its stance toward Aboriginal governance from the "contingent right" approach to one that embraced the constitutional entrenchment of a judicial right to governance. This latter approach would have allowed for the recognition of Aboriginal autonomy within the Canadian federation and would have become legally enforceable within ten years.[108] However, the approach suffered from ambiguity, causing uncertainty over whether it would recognize Aboriginal governance as an inherent right or as a right newly-created by the Canadian government. In response, the Assembly of First Nations formulated a statement, supported by many Aboriginal peoples, regarding the inherent nature of their right of governance. It stated that:

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[107] *Ibid.* at 22-23.
[108] Canada, *Shaping Canada's Future Together – Proposals* (Ottawa: Supply and Services Canada, 1991).

> [o]ur Creator, Mother Earth, put First Nations on this land to care for and live in harmony with all her creation. We cared for our earth, our brothers and sisters in the animal world, and each other. These responsibilities give us our inherent, continuing right to governance. This right flows from our original occupation of this land from time immemorial.[109]

A final agreement still was not reached. As a result, the federal government, leaders of the provincial and territorial governments and leaders of four national Aboriginal groups[110] attempted to come up with a new, far-reaching agreement for Canada that might be successfully implemented. All of these leaders supported the final negotiated agreement – the 1992 *Charlottetown Accord.*[111] Most importantly, if the draft 1992 *Charlottetown Accord* had been successfully implemented, it would have included the inherent right of Aboriginal governance within a new section 35.1 of the *Constitution Act, 1982*. Subsection (3) of the new section would have read as follows:

> The exercise of the right referred to in subs. (1) ["the inherent right of governance within Canada"] includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,
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> (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and

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[109] Assembly of First Nations and First Circle on the Constitution, *First Nations and the Constitution: Discussion Paper* (Ottawa: Assembly of First Nations, 1991) at 8.

[110] The AFN, NCC, MNC and ITC were involved once again, but the Native Women's Association of Canada (NWAC) was vehemently opposed to the lack of representation of Aboriginal women in the consultations leading up to the Charlottetown agreement. NWAC was not permitted to take part directly in the negotiations, and as a result, took its case to court (see *Native Women's Assn. of Canada v. Canada*, [1992] 2 F.C. 462 (F.C.A.) rev'd on other grounds *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627).

[111] *Consensus Report on the Constitution,* Charlottetown, August 28, 1992, Final Text (Ottawa: Supply and Services Canada, 1992) (*Charlottetown Accord*) [*Charlottetown Accord*]. A draft legal text was also prepared: *Charlottetown Accord, Draft Legal Text* (Ottawa: October 9, 1992). For extensive discussion on the Charlottetown Accord, see Kenneth McRoberts and Patrick J. Monahan, eds., *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993).

(b) to develop, maintain and strengthen their relationship with their lands, waters and environment,

so as to determine and control their development of peoples according to their own values and priorities and to ensure the integrity of their societies.[112]

Despite the ultimate demise of the *Charlottetown Accord*,[113] and what appeared to be a constitutional impasse more generally, the federal government chose to explicitly recognize the inherent right of Aboriginal governance. In 1993, the Liberal Party released its election manifesto, *Creating Opportunity: The Liberal Plan for Canada*,[114] also known as the "Red Book." Not only did this policy outline the platform and agenda of the soon-to-be government, it also included an entire chapter on Aboriginal peoples. It outlined a series of goals that would be implemented largely through negotiating Aboriginal governance. It also stated that "the priority of a Liberal government will be to assist Aboriginal communities in their efforts to address the obstacles to their development and help them marshal the human and physical resources necessary to build and sustain vibrant communities."[115] Once the new government was elected, it acted to implement the relevant promises laid out in its election platform through its Inherent

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[112] *Charlottetown Accord, ibid.* at 37-38.
[113] The Accord was defeated in a national referendum, a referendum held in Quebec and several others that were held by Aboriginal communities across Canada. For further discussion on the repercussions of the failed Charlottetown Accord for Aboriginal peoples, see Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments," in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001) 184.
[114] Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993).
[115] *Ibid.* at 96.

Right Policy,[116] which included the first-ever explicit acknowledgement by the federal government of the inherent right of Aboriginal governance.[117]

There are five central themes to the Inherent Right Policy. First, the federal government accepts the right of Aboriginal peoples to govern themselves, decide what is best for their communities and, ultimately, to exercise the responsibility required to achieve governance. Second, the inherent right of governance is recognized by the federal government as an existing, constitutionally-protected right under section 35(1). Third, the government understands that Aboriginal governments must be diverse, allowing for different community objectives, varying community characteristics, governance goals and various negotiation environments. However, restrictions are placed on the extent of autonomy that Aboriginal governments might exercise. This federal policy maintains that Aboriginal peoples should have the right to determine matters "internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to the land and their resources." In areas that are not integral to Aboriginal cultures, the government

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[116] Department of Indian Affairs and Northern Development, *Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995).

[117] In 1985, the Quebec National Assembly was the first Canadian government to recognize Aboriginal peoples and, in particular, passed a resolution that recognized the inherent right of Aboriginal peoples to self-government within the province of Quebec (see Quebec, *Resolution of the Quebec National Assembly on the Recognition of Existing Aboriginal Rights*, March 20, 1985, online: http:/ www.saic.gouv.qc.ca/publications Positions/Part3/Document19_en.pdf). In 1991, the Ontario government under Premier Bob Rae signed a *Statement of Political Relationship*, which provided the basis of establishing government-to-government relations between the Ontario government and Aboriginal peoples in the province (see Ontario, *Statement of Political Relationship*, signed August, 6, 1991; Ontario, *Legislative Assembly of Ontario Debates (Hansard)*, Session 35:1, June 6, 1991).

does allow some level of Aboriginal autonomy. The federal government will not negotiate at all in areas related to Canadian sovereignty, defence and external relations, as well as other areas of national interest, such as the country's economy, national law and order, national transportation, broadcasting, postal service, the census and statistics. Fourth, the government has proposed that the financial costs associated with governance arrangements should be borne together by the federal, relevant provincial or territorial and Aboriginal governments involved. Fifth, Aboriginal peoples should initiate negotiations processes. Where comprehensive land claims negotiations are underway, the policy also allows for the specific inclusion of governance provisions in the comprehensive agreements, ultimately providing for possible constitutional protection of governance in certain cases.[118]

After the Inherent Right Policy, the next major policy development of the federal government occurred in 1998 with the release of *Gathering Strength: Canada's Aboriginal Action Plan*,[119] which was a response to the Final Report of the RCAP. While the scope of the government's response was broad, none of the crucial or fundamental recommendations of the RCAP were included. In the context of reconciliation, *Gathering Strength* did provide an official apology to Aboriginal peoples for historical injustice and wrongdoing through its "Statement of Reconciliation." Additionally, its

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[118] For in-depth discussion of these provisions, see Morse, *supra* note 102 at 27-31.
[119] Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 1997) [*Gathering Strength*].

"Statement of Renewal" and plan of action provided an "official nod...in the direction of some features of the RCAP approach."[120] For example, *Gathering Strength* provided that a new partnership between Aboriginal peoples and non-Aboriginal peoples should reflect mutual interdependence and that Aboriginal peoples should attain a quality of life on a par with non-Aboriginal peoples. Additionally, financially-viable, responsive and strengthened Aboriginal governments should be possible, along with the development of a new fiscal relationship between the governments and Aboriginal peoples.[121]

The Inherent Right Policy was clarified in 1997 when the Department of Indian Affairs and Northern Development (DIAND) circulated an internal policy document that outlined its approach to Aboriginal peoples in Canada, including the right of governance. Drawing on some of the recommendations of the RCAP, it emphasized the importance of "practical size, geographical proximity, and 'national identity' of Indian groups" in determining whether an Aboriginal community might qualify as a nation entitled to

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[120] Paul Chartrand, "Towards Justice and Reconciliation: Treaty Recommendations of Canada's Royal Commission on Aboriginal Peoples (1996)," in Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain, eds., *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Carlton, Victoria: Melbourne University Publishing Ltd., 2004) 120 at 127.

[121] *Gathering Strength*, *supra* note 119 at 1. For further analysis, see Jill Wherrett, *Aboriginal Self-Government*, Current Issue Review 96-2E (Ottawa: Library of Parliament, Parliamentary Research Branch, 1999) at 5-7, and Hurley and Wherrett, *supra* note 72. The federal government released two progress reports following the release of *Gathering Strength* (see Indian Affairs and Northern Development, *Gathering Strength – Canada's Aboriginal Action Plan: A Progress Report, Year One* (Ottawa: Public Works and Government Services Canada, 1998) and Indian Affairs and Northern Development, *Gathering Strength – Canada's Aboriginal Action Plan: A Progress Report* (Ottawa: Public Works and Government Services Canada, 2000)).

governance arrangements.[122] DIAND went further, quoting from the RCAP, that Aboriginal "nations" should have "a common heritage including a common history, language, cultural traditions, political consciousness, laws, governmental structures, spirituality, ancestry, homeland or adherence to a particular treaty."[123]

Nevertheless, the Inherent Right Policy plays out differently in practice, especially in the context of comprehensive land claims agreements, ultimately affecting Aboriginal reconciliation through the settlement of claims and in the broader context of Aboriginal–Canada relations. For instance, while the Inherent Right Policy is very explicit in its recognition of Aboriginal governance as an inherent and constitutionally-protected right, governance is not always given this degree of recognition or protection in comprehensive land claims agreements. Examples include the *Nunavut Land Claims Agreement*, the *Gwich'in Comprehensive Land Claim Agreement* and the *Sahtu Dene and Métis Comprehensive Land Claim Agreement*, none of which contain governance provisions. Not all agreements have been given treaty status, and therefore may not be protected under section 35, causing uncertainty regarding the protection of governance. Additionally, rather than benefiting from seemingly-straightforward federal legislation, some governance agreements have been and continue to be negotiated separately from the comprehensive land claims agreements, and as a result are not constitutionally

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[122] Russel Lawrence Barsh, "Political Recognition: An Assessment of American Practice," in Paul L. A. H. Chartrand, ed., *Who are Canada's Aboriginal Peoples?: Recognition, Definition, and Jurisdiction*, Chapter 6 (Saskatoon, Saskatchewan: Publishing Ltd., 2002) 230 at 232.
[123] *Ibid.*, quoting from RCAP, *supra* note 97.

protected as acquired treaty rights under section 35(3) of the *Constitution Act, 1982*. Instead, in this context, governance agreements are only "protected" by policy provisions such as the Inherent Right Policy, but this gives Aboriginal peoples little constitutional recourse.[124]

The federal government's Inherent Right Policy does provide that where the negotiating parties agree, governance provisions will be included "as treaty rights within the meaning of section 35 of the *Constitution Act, 1982*."[125] Consequently, in instances where such agreements are achieved, the formal recognition by the federal government of the inherent right of Aboriginal governance works more effectively in practice. Of course, this does not preclude the fact that many Aboriginal communities do not have, or are not provided with, the resources necessary to effectively implement and exercise governance. In these circumstances, the right of governance ultimately becomes less effective, despite government policy.[126]

Recent Policy Developments to Achieve Aboriginal Reconciliation

The approach embodied in the Inherent Right Policy continued through to the minority Liberal government of Prime Minister Paul Martin, representing a progressive

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[124] Ravi de Costa, "Treaties in British Columbia: Comprehensive Agreement Making in a Democratic Context," in Marcia Langton, Maureen Tehan, Lisa Palmer and Kathryn Shain, eds., *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Carlton, Victoria: Melbourne University Publishing Ltd., 2004) 133 at 144.

[125] The first instance where this occurred was the *Nisga'a Final Agreement.*

[126] This is a complex issue beyond the scope of this chapter. For further discussion, see Assembly of First Nations, *Federal Government Funding to First Nations: The Facts, the Myths, and the Way Forward* (Ottawa: Assembly of First Nations, 2005).

stance to Aboriginal governance that surpassed the hesitance of the Supreme Court of Canada.[127] Aboriginal issues were a key priority for Prime Minister Martin, wherein he sought to emphasize the need to improve Aboriginal–Canada relations through reconciliation. In this respect, he sought more active involvement of Aboriginal peoples in matters of importance to them. Of particular note are the circumstances surrounding the development and perceived demise of the Kelowna Accord. In November 2005, while Prime Minister Martin was still in power, an overarching agreement was reached between Canada's First Ministers and National Aboriginal leaders in Kelowna, British Columbia. Termed the *Kelowna Accord*, $5.1 billion were dedicated over a ten-year period to close the gap between Aboriginal peoples and non-Aboriginal Canadians. Of particular note, the overarching objective of the Accord was to achieve meaningful reconciliation and improve the relationships between Aboriginal peoples and Canada.

The *Accord* itself was the culmination of an unprecedented 1-1/2 year national consultative process. Consultations began with the 2004 Canada-Aboriginal Peoples Roundtable on Strengthening the Relationship, which involved a wide range of

[127] Nonetheless, there is one recent exception that would have significantly infringed the inherent right of Aboriginal governance. The *First Nations Governance Act*, then Bill C-61, proposed to alter the band governance provisions of the *Indian Act*. Introduced in 2002 in the House of Commons by Robert Nault, at the time Minister of Indian Affairs, the bill would have further restricted the already-limited governance provisions of the *Indian Act*. The proposed bill encountered strong opposition from many Aboriginal leaders. It died after the Parliamentary session ended, but was revived as Bill C-7 in October 2002. When Paul Martin's new Liberal government came to power a short time thereafter, the Prime Minister announced that this *Act* would neither be implemented nor explored further. For further discussion, see Stephen Cornell, Miriam Jorgensen and Joseph Kalt, *The First Nations Governance Act: Implications of Research Findings from the United States and Canada* (West Vancouver: B.C. Assembly of First Nations, 2002); Kent McNeil, "Aboriginal Rights: Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government" (2003) 22 *Windsor Y.B. Access Just.* 329.

government and Aboriginal participants. The next phase involved sectoral tables, also called policy tables, involving more than 750 representatives from Aboriginal organizations, government and the private sector. Their primary purpose at this stage was to generate policy options in the priority areas identified, which would subsequently form the basis for the key objectives of the *Accord.* A bilateral policy retreat followed in May 2005, and a final First Ministers' meeting took place in Kelowna, BC in November 2005, which was where the *Kelowna Accord* itself was drafted. The five priority areas identified in the *Accord* included Education, Housing & Infrastructure, Relationships & Accountability, Economic Opportunities and Health. Table 5 table lays out the financial commitments in each priority area. It shows funding projections over a five-year period from 2006 to 2011, for a total of just over $5 billion, with primary funding going to Education, Housing and Health for Aboriginal peoples.

Table 5. Financial Commitments ($ million) in the Kelowna Accord (Original): 2006-2011

	2006-07	2007-08	2008-09	2009-10	2010-11	TOTAL
EDUCATION (on- and off-reserve, post-secondary, K to 12, children)	95.0	264.0	408.0	484.0	549.0	**1800.0**
HOUSING & INFRASTRUCTURE (on- and off-reserve, northern, water)	500.0	275.0	275.0	275.0	275.0	**1600.0**
RELATIONSHIPS & ACCOUNTABILITY (policy capacity, accountability, engagement)	39.5	32.5	32.0	27.0	39.0	**170.0**

ECONOMIC OPPORTUNITIES (*FNCIDA**, development)	40.0	40.0	40.0	40.0	40.0	**200.0**
HEALTH (stabilizing health systems, building capacity)	137.0	218.0	309.0	320.0	331.0	**1315.0**
TOTAL	**811.5**	**829.5**	**1064.0**	**1146.0**	**1234.0**	**5085.0**

Source: First Ministers' Meeting with National Aboriginal Leaders: Financial Commitment, http://lpintrabp.parl.gc.ca/lopimages2/bibparlcat/7000/Ba391003.pdf (no longer valid), cited in Lisa Patterson, *Aboriginal Roundtable to Kelowna Accord: Aboriginal Policy Negotiations, 2004-2005* (Ottawa: Library of Parliament, Parliamentary Information and Research Service, 2006) at 18.

However, with the demise of the minority Liberal government in 2006, significantly-reduced attention has been paid to Aboriginal peoples under the successive minority Conservative governments of Prime Minister Steven Harper. While this has not resulted in a negation of government policy stances pertaining to the inherent right of self-government, attempts at Aboriginal reconciliation have taken a backseat to other policy issues deemed more important. Most notable is Prime Minister Harper's refusal to implement the terms of the *Kelowna Accord.* In fact, in an effort to force the Conservative government to honour the *Accord*, Paul Martin introduced a Private Member's public bill, namely Bill C-292, *An Act to Implement the Kelowna Accord.* However, to date, the *Kelowna Accord Implementation Act*,[128] which became law in June

[128] *Kelowna Accord Implementation Act*, S.C. 2008, c. 23.

2008, has not resulted in any substantive actions on the part of the Conservative government.[129]

Despite the subsequent negative policy trends under the successive minority Conservative governments, there are two broad areas which have pushed forward the objective of Aboriginal reconciliation. First, as noted in the introductory chapter, the *Indian Residential Schools Settlement Agreement* was finalized in May 2006, Prime Minister Harper issued a formal apology on June 11, 2008, and the work of the related Truth and Reconciliation Commission has progressed, despite some internal conflicts and delays along the way.[130] Second, the government's policy on specific claims negotiations

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[129] It would seem obvious that the government should be bound by the law. However, controversy surrounds the *Kelowna Accord Implementation Act* because it was introduced as a private members' bill, and despite the government's lack of support, it became law with enough minority support in Parliament. The key area of contention stems from section 54 of the *Constitution Act, 1867*, which stipulates that public charges or appropriations may only be incurred on the initiative of the Crown, also known as a Royal Recommendation. However, Royal Recommendations are obtained only by government ministers, and as a result, private members are restricted in their ability to introduce bills which involve the spending of public funds. In the context of *Kelowna*, the government argued that public funds would need to be spent at some point in order to achieve the objectives included in the original *Kelowna Accord.* However, what is most notable in this regard is that, while the financial commitments shown in Table 5 form a central foundation of the *Accord*, the *Accord* itself was a separate document that did not include specific funds or financial commitments. For this reason, when the *Kelowna Accord Implementation Act* was introduced and debated, it was argued that a Royal Recommendation was not needed because the *Act* itself would not effect a direct appropriation. When Conservative House Leader Rob Nicholson asserted that the bill was out of order without a Royal Recommendation, Speaker Milliken ruled that a Royal Recommendation was not needed because the bill itself did not specifically propose the spending of public funds nor did it provide any specific details concerning funding, and thus the bill was allowed to proceed. This issue is addressed in-depth in Jennifer E. Dalton, "Private Members' Business and the Royal Recommendation: Assessing the Changing Role of Private Members' Public Bills in Light of *Kelowna* and *Kyoto*" (2010) J. Parliamentary & Pol. L. (forthcoming).

[130] The original Chair of the Commission, Justice Harry LaForme of the Ontario Court of Appeal, stepped down in 2008 due to internal conflicts with the other commissioners, Claudette Dumont-Smith and Jane Brewin Morley. In June 2009, Justice Murray Sinclair of Manitoba was appointed as the new Chair along with commissioners Wilton Littlechild, Alberta regional chief for the Assembly of First Nations, and Marie Wilson.

has been updated through the *Specific Claims Action Plan*,[131] the primary purpose of which is to address the significant backlogs and delays that plague the resolution process. To this end, the *Specific Claims Tribunal Act*,[132] which became law in June 2008, established a specific tribunal to provide binding decisions on claims which cannot be satisfactorily addressed through negotiations. In such instances, Aboriginal peoples may opt to use the Tribunal where a claim is not accepted by the federal government, where negotiations have not resulted in a final settlement, or where the three-year time frame for resolution is not met. Mechanisms are in place, however, to help ensure that the three-year target is met. These include clearer guidelines that set minimum standards for acceptance of claims, the bundling of similar claims at the research and assessment stages in order to expedite decisions on whether or not to proceed with negotiations, and a commitment to expend additional effort to settle small value claims with added expediency. These are a few examples of more recent, positive policy developments with the aim of improving the overall process of resolving Aboriginal claims.

Overall, the willingness of Canadian governments to negotiate with Aboriginal peoples gives meaning to Aboriginal reconciliation, at least in theory. In more practical terms, federal treaty processes and comprehensive land negotiations should be conducted

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[131] Indian and Northern Affairs Canada, *Specific Claims: Justice At Last* (Ottawa: Minister of Public Works and Government Services Canada, 2007).
[132] *Specific Claims Tribunal Act*, S.C. 2008, c. 22.

in good faith[133] and according to constitutional provisions as interpreted by the Courts. The "honour of the Crown" comes into play in this regard, and most notably, the Supreme Court of Canada recently reiterated the importance of the fiduciary duty in *Haida Nation*[134] and *Taku River Tlingit*.[135] These two cases clarified further the mechanisms for the Crown's duty to consult Aboriginal peoples and to undertake such consultations in good faith. The Supreme Court held that fiduciary obligations are not required where Aboriginal rights are yet unproven. However, the duty of the Crown to consult and possibly accommodate the Aboriginal peoples involved arises from the honour of the Crown. This expectation has important implications for the resolution of comprehensive land claims agreements, particularly inasmuch as it sets out more clearly the responsibilities of Canadian governments. As argued by Patrick Macklem,

> [c]onstitutional recognition and affirmation of existing Aboriginal and treaty rights impose certain positive obligations on governments to respect, promote, and fulfill such rights. Constitutional protection of Aboriginal territorial interests, for example, would be meaningless in the absence of institutional processes designed to recognize and

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[133] For case law on the fiduciary duty of the Crown, see generally *Guerin*, *supra* note 19; *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245; *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746; and *Kruger v. The Queen* (1985), 17 D.L.R. (4th) 591 (F.C.A.). Case law on potential fiduciary obligations of the provincial governments includes *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *Ontario (A.G.) v. Bear Island Foundation*, [1991] 2 S.C.R. 570. For further scholarly discussion, see generally James Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd., 2005); Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996); Leonard Rotman, "Provincial Fiduciary Obligations to First Nations: The Nexus Between Government Power and Responsibility" (1994) 32:4 Osgoode Hall L.J. 735; Leonard Rotman, "Wewaykum: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004) 37:1 U.B.C. L. Rev. 219; Kent McNeil, "Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples" in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon, Saskatchewan: Native Law Centre, University of Saskatchewan, 2001) 309.

[134] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511.

[135] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550.

implement Aboriginal rights of access and use and enjoyment of their ancestral territories.[136]

IMPLICATIONS FOR ABORIGINAL RECONCILIATION AND ENGAGEMENT

What are the implications of the different approaches taken by the Supreme Court of Canada and federal government to Aboriginal governance and title, especially in the context of land negotiations? How do these implications impact Aboriginal engagement and Aboriginal reconciliation? First, it is apparent that the Supreme Court and the federal government are not in lockstep on issues of Aboriginal title and governance. This disparity between the approaches of the government and judiciary arguably limits the potential for progressive recognition of Aboriginal title and governance, which in turn affects meaningful reconciliation and the resolution of land agreements. Neither the federal government nor the Supreme Court is apt to rashly choose a new path of unqualified recognition of Aboriginal title and governance, whether on paper or in practice through negotiations. Instead, it is reasonably expected that progress will be incremental. The fact that the Canadian government and the Supreme Court do not see eye-to-eye on Aboriginal title and governance can only cause further protraction due to the resultant uncertainty of who has the official "last word" in the dialogue between courts and legislatures.

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[136] Macklem, *supra* note 35 at 270-271.

Second, it is generally accepted that the government of the day is motivated by the desire to stay in power. In order to do so, the government must defer to public opinion while balancing competing "special" interests in order to maintain as much support as possible. This means that the government is likely to avoid outright recognition of Aboriginal title to lands, which could be perceived as undermining Canadian sovereignty. It is also unlikely that the government would agree to extensive Aboriginal governance regimes as part of settled land agreements, which could lead to the constitutional protection of expansive Aboriginal governance powers. Once again, this could lead to the perception of undermined Canadian sovereignty along with public outcry against the so-called "special treatment" of Aboriginal peoples.

Third, the Supreme Court is not likely to stray from its current path on Aboriginal title or indirect recognition of governance. In neither respect has the Supreme Court been overly activist. Instead, judicial recognition of Aboriginal title and governance has been a protracted process since first raised in the Courts, and there is no reason to expect this to change now. In fact, the Supreme Court under McLachlin C.J. has defined itself as more deferential to Parliament than in the recent past.[137] Consequently, this means that further judicial progress on these issues is likely to be incremental at best. While the Supreme Court has emphasized a preference for negotiations over litigation, these interrelated issues lead to an overall slower, lengthier process of Aboriginal

[137] More in-depth commentary is provided in Kirk Makin, "Judicial Activism Debate on Decline, Top Judge Says" (January 8, 2005) Globe and Mail A1.

reconciliation. While gradually evolving progress might be easier for the public to swallow, it is sure to try the patience of Aboriginal peoples and their supporters, who are eager for substantive comprehensive claims provisions and improved relations between Aboriginal peoples and the rest of Canada.

Ultimately, it is argued here that federal policies of extinguishment of Aboriginal title and related rights be rejected. Further, strong governance provisions must take more prominent roles in comprehensive land claims agreements including constitutional protection under section 35(1). These two combined objectives arguably enhance the successful implementation and functioning of new agreements, in part, because they are likely to help minimize sentiments of injustice that persist from previously-settled agreements considered by some Aboriginal peoples to be too restrictive in nature.[138] This arguably leads to enhanced Aboriginal reconciliation through successful negotiations. Moreover, these objectives will return to Aboriginal peoples some of the dignity and components of their identities which have been lost through prior extinguishment provisions. In other words, these remedies help to address Aboriginal alienation, which in turn, may help to enhance societal cohesiveness, repair Aboriginal-Canada relationships and achieve more meaningful Aboriginal reconciliation.

[138] For further discussion, see Asch and Zlotkin, *supra* note 72 at 221-222.

CHAPTER NINE – COMPARATIVE CASE STUDIES: AN ANALYSIS OF ABORIGINAL ENGAGEMENT IN THE NEGOTIATION OF THE *NISGA'A TREATY* AND THE *NUNAVUT AGREEMENT*

Look around you. Look at our faces. We are the survivors of a long journey. We intend to live here forever.[1]

What we have been seeking throughout the years is the acknowledgement by the Canadian government that this was, and is, our land and that we have the right to control what happens to that land, our homeland.[2]

Despite the obligations placed on Canadian governments in the context of land negotiations, particularly the fiduciary duty and the honour of the Crown, there are significant problems in practice. The purpose of this chapter is to assess some of the implications of these problems, specifically with regard to Aboriginal reconciliation. The use of comparative case studies provides greater insight into the negotiation of land claims, albeit limited to two specific cases. The *Nisga'a Treaty*[3] and *Nunavut Land Claims Agreement* were chosen as two of the most foundational, innovative and far-reaching agreements settled in Canada. What follows is a comprehensive review of these

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[1] Joseph Gosnell, "No Longer Beggars in Our Own Lands, We Now Go Forward," at the signing of the Nisga'a Treaty in New Aiyansh (August 5, 1998) Vancouver Sun A11, reprint of Chief Gosnell's speech on August 4, 1998.

[2] Jack Anawak, MP for Nunatsiaq, excerpt from a statement given on the day that the bill was first passed, leading to the *Nunavut Act*, 1993, c. 28, also *An Act to establish a territory to be known as Nunavut and provide for its government and to amend certain Acts in consequence thereof.*

[3] The *Nisga'a Final Agreement Act*, R.S.C., 2000, c. 7 gave legislative effect to the *Nisga'a Final Agreement*, signed April 27, 1999 [*Nisga'a Final Agreement*].

agreements, including the ways in which each was negotiated and settled, as well as an application to the negotiation process from the standpoint of Aboriginal peoples. Similar to the preceding chapters, special emphasis is placed on Aboriginal governance and land tenure provisions. A brief description of each agreement was provided in Chapter Seven, thus only those components of each which shed further light on Aboriginal engagement and participation in the negotiation processes involved in land claim settlements are discussed subsequently.

NEGOTIATING THE *NISGA'A TREATY*: PROCEDURE, STRUCTURE AND JURISDICTIONAL TENSIONS

Shortly after the *Calder* ruling, the federal government began negotiations with the Nisga'a, but it was not until 1990 that British Columbia agreed to participate in the tripartite negotiations. In order for a treaty to resolve the issues surrounding the Nisga'a, the provincial government had to be involved because the province held the Crown land under dispute as per section 92 of the *Constitution Act, 1867*. Eventually, the land that was transferred under the agreement was contributed by British Columbia, with a value of $107 million. More broadly, the *Nisga'a Treaty* covers an area of land that is 1,992 square kilometres in size, which the Nisga'a Nation owns in fee simple, including surface and subsurface rights, and substituted for Nisga'a title. These lands are designated as "Nisga'a Lands," and interest in these lands can be created and transferred by the Nisga'a without requiring the consent of the Canadian or British Columbia governments. "Nisga'a Fee Simple Lands" consist of an additional 1,500 hectares of privately-owned

land, including eighteen adjusted First Nations reserves, which the Nisga'a do not have jurisdiction over. An area, designated as "Nisga'a Public Lands," is accessible to non-Nisga'a, including reasonable access and some hunting and fishing rights.[4]

From 1972 to 1980, Don Rosenbloom represented the Nisga'a Nation, followed by Jim Aldridge from 1980 until the conclusion of the *Treaty*. An agreement-in-principle was reached in 1996, with the final agreement reached in 1998. The Nisga'a ratified the *Treaty* in 1998, with the British Columbia legislature and Parliament following suit in 1999 and 2000 respectively. The conclusion of the *Nisga'a Treaty* was the first Canadian instance where both Aboriginal governance and resource rights, including title, were negotiated as part of a comprehensive land claims agreement.

Perhaps most significant was the overarching substantive context of the negotiations for the Canadian governments versus the Nisga'a Nation. For the negotiators who represented the federal and British Columbia governments, the central purpose was to protect the interests of their governments. Conversely, the negotiation of the *Treaty* was not simply a settlement of land issues for the Nisga'a Nation. Rather, the process of negotiations was rooted in the fundamental objective of historical and cultural preservation of that Nation. As noted by Thomas Berger, "[f]or the Nisga'a negotiators...the very idea of the Nisga'a Nation had to be preserved – the history of a

[4] *Ibid.* at ch. 3, paras. 3-4, 16, 19, 22, 45; ch. 6, paras. 1-7.

people and of a culture that had never died."[5] It was precisely because of this ultimate goal that the Nisga'a had persisted for over 100 years. This larger backdrop helped to frame the climate of the negotiations over the decades during which they took place. The following provides an excellent illustration, from a negotiator's perspective, namely that of Thomas Berger, of the sheer resolve of the Nisga'a Nation in successfully achieving their goals:

> They weren't negotiating merely a land claim—though their claim was characterized as such—but the future of their people. They were engaged in redefining the relationship between the Nisga'a and the dominant Canadian society. That was what was always at stake and what remained at stake through the negotiations. I never had clients who were steadier, more composed, or possessed of a greater determination to see their struggle through to the end.
>
> ...
>
> As the negotiations moved towards consummation, the issue of governance emerged as one of critical importance. It was an issue overarching the treaty process. For the Nisga'a did not wish to continue to be subject to the Indian Act. As Joe Gosnell was to say many times, "We want to be free to make our own mistakes." The Nisga'a wished to govern themselves. This was not a claim to independence, to constitute themselves a kind of nation-state within Canada. It was founded on a belief that they were a political community, one that existed before the Europeans came and survived to the present day. Every attempt to shatter it had failed. They believed that the Nisga'a Nation should determine, for itself, issues related to Nisga'a land, resources, language and culture.[6]

Such determination and consistency of efforts on the part of the Nisga'a was arguably a valiant demonstration of active Aboriginal engagement at its best.

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[5] Thomas R. Berger, "The Nisga'a Odyssey," paper presented at the *Aboriginal Law Conference 2004*, Vancouver, British Columbia, June 11, 2004 (Vancouver: The Continuing Legal Education Society of British Columbia, 2004) 2 at 2.2.11 [Berger].

[6] *Ibid.* at 2.2.12. Quite significantly, once the agreement-in-principle had been reached in 1996, and even after the Supreme Court's *Delgamuukw* decision raised expectations about the potential for litigation, the Nisga'a decided that it would be honourable to proceed with the negotiations to reach a final settlement (*ibid.*).

Complications and Political Implications During the Negotiations Process

As noted above, it took a long time for the negotiations process to start gaining momentum, in part because the British Columbia government refused to be a party to the process. However, such participation was not just crucial, but imperative, given the jurisdictional division of powers revolving around Crown lands. More generally, the negotiations leading to the conclusion of the *Treaty* as well as the content of the *Nisga'a Treaty* itself "generated a level of controversy in British Columbia that [was] reminiscent of the debates over the Meech Lake and Charlottetown Accord packages of constitutional amendments."[7] Some who supported the *Nisga'a Treaty* applauded the certainty and finality that they thought it would provide, and simultaneously praised the inclusion of constitutional protection of Aboriginal and treaty rights, including Aboriginal governance, as a step away from old patterns of paternalistic colonialism. Conversely, those who opposed the *Treaty* criticized it for establishing a "race-based" system of governance akin to apartheid, while ultimately undermining the Canadian constitutional structure and restricting the rights of non-Nisga'a living on Nisga'a lands.[8] Many Aboriginal critics found fault with the *Treaty* because it was considered a "custodial agreement," giving the British Columbia provincial government far too much

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[7] Douglas Sanders, "'We Intend to Live Here Forever': A Primer on the *Nisga'a Treaty*" (1999-2000) 33 U.B.C. L. Rev. 103 at 103-104 [Sanders].

[8] *Ibid.* at 104-105. In particular, critics argued that non-Nisga'a residents would be likened to second-class citizens without the right to vote or hold public office in local government matters (*ibid.*).

constitutional authority over the Nisga'a. Others asserted that the governance provisions included in the *Treaty* were too limited, amounting to little more than municipal-style powers for the Nisga'a. By extension, some have contended that the Nisga'a surrendered too much sovereignty in the process of negotiation and in the final agreement, while opponents argued that it ultimately created a third order of government.[9]

In fact, four court challenges were launched in opposition to the *Treaty*. One challenge was based on the assertion of some Nisga'a community members that their leaders did not have the authority to sign the *Treaty*'s provisions. Another revolved around a shared land dispute between the Gitanyow and the Nisga'a. These two challenges were brought by Aboriginal community members, and thus demonstrate an additional form of Aboriginal engagement during the negotiation of the *Treaty*. Further, the first challenge noted above, brought by some Nisga'a community members, speaks to the larger issue of adequate or sufficient community involvement in the negotiation of land claims. While the desires of all community members cannot be fulfilled in a final settlement, quite simply because negotiations require the brokerage of different competing interests, the concern in this context refers to how effectively the interests of all community members are represented during the negotiation and settlement of land agreements. Unfortunately, ratification results generally are the primary indication of overall community support for the final agreement, but these results are not sophisticated

[9] *Ibid.* at 105.

enough to provide insight into the complex nuances inherent in individual community members' decisions to support or oppose the final agreement.[10]

A third legal challenge was brought by Reform MP John Cummins and the Fisheries Survival Coalition in order to protect their own fishing rights. The Liberal Party of British Columbia launched a fourth challenge, ultimately resulting in the *Campbell* decision. Both were particularly disagreeable over the governance components of the *Treaty*, carrying on public campaigns against it based on the assertion that the *Treaty* represented a race-based form of government akin to segregation and special rights. In contradiction, as asserted by Thomas Berger, "[t]his argument, of course, ignores the fact that treaties with First Nations are treaties not with a race of people but, as Chief Justice John Marshall said, with distinct political communities that have survived in our midst."[11]

Specifically with regard to the issue of Nisga'a governance, more of a middle ground has been created where the Nisga'a are able to control and legislate in various areas that are directly related to their cultural preservation and development and sovereignty. This is vital for preservation and development of Nisga'a distinct identities, which in turn, arguably show respect for Nisga'a difference. By extension, there is a

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[10] Extensive field research and one-on-one interviews with a large number of community members arguably would provide more insight into the nuanced complexities underlying support for or opposition against agreements, but such research would need to be very extensive in order to garner reliable conclusions, and thus is beyond the scope of this endeavour.

[11] Berger, *supra* note 5 at 2.2.13.

Nisga'a Constitution and central Nisga'a Lisims government, with four Nisga'a village governments subsumed there under. The central government is composed of three elected individuals, all elected councillors of the four village governments, as well as one representative from each of three Nisga'a urban locals from Vancouver, Prince Rupert/Port Edward and Terrace.[12] The governance provisions of the *Nisga'a Treaty* are also significant, partly because of their constitutional protection under section 35 of the *Constitution Act, 1982*. Specifically, the *Treaty* stipulates that the Nisga'a Nation "has the right to governance, and the authority to make laws, as set out in this Agreement."[13] However, while the governance provisions are relatively extensive, the land provisions are much more limited because they pertain to the smaller area designated as "Nisga'a Lands," without any co-management arrangements for surrounding lands. In other words, the governance powers of the Nisga'a have limitations partly because they pertain to a fairly limited territorial area. As asserted by Douglas Sanders, constitutional protection of the *Nisga'a Treaty* under section 35(3) of the *Constitution Act, 1982* is significant only where the powers conferred are significant.[14] The below is quoted at length due to its relevance:

> The debate on the *Nisga'a Treaty* is three-sided. Yet, public debate has been dominated by two sides: non-Indian supporters and opponents. The *Treaty* is sufficiently complex, so that certain phrases can be effectively used in public debate without great concern for their accuracy. Statements that the *Treaty* establishes a "third order" of government,

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[12] *Nisga'a Final Agreement*, *supra* note 3, at ch. 11, paras. 1-4, 9-15.
[13] *Ibid.* at ch. 11, para. 1.
[14] See Sanders, *supra* note 7 at 120.

> linked with suggestions that Nisga'a government powers [are] "sweeping," are highly misleading. The powers involved in Nisga'a governance are appropriate and modest.
> ...
> The Nisga'a agreement is complex but the fundamentals are reasonably clear. The Nisga'a have secured a land base in their traditional territories and a modest degree of constitutional autonomy in order to further their collective control over their own lives. Do the opponents reject the proposition, accepted internationally, that arrangements that support indigenous cultural survival promote human rights? If they really are serious, then we will have to reverse the constitutional amendments of 1982 and three decades of Supreme Court of Canada decisions.[15]

The broader jurisdictional authority of the *Nisga'a* is limited to cover a set range of areas, with Canadian and provincial government control maintained in fundamental areas outside of Nisga'a service delivery and cultural preservation. For instance, responsibility for defining Nisga'a citizenship, culture and language falls to the Nisga'a Lisims government, but the relevant *Indian Act* provisions on membership still affect and define those individuals who qualify for programs from Indian and Northern Affairs Canada.[16] The Nisga'a also have legislative jurisdiction over the delivery of various social, health and child welfare services, Nisga'a policing and community corrections, liquor sales, land use, building standards, local business, language, education, which must conform with provincial laws, and culture, including devolution of Nisga'a cultural property. Gambling and gaming jurisdiction is included, but it is subject to federal and provincial laws. Additional roles are played in child and family services, adoption and

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[15] *Ibid.* at 128.
[16] *Nisga'a Final Agreement, supra* note 3, at ch. 11, paras. 33, 39, 41-43. As asserted by Douglas Sanders, "[t]his is a wholly unjustified qualification on Nisga'a control over membership criteria. It can only be understood as reflecting a rejection of Nisga'a decision-making on eligibility" (*ibid.* at 111, n. 32).

marriage.[17] Of note, there are no areas where the Nisga'a have legislative exclusivity, and therefore federal and provincial laws will apply in certain areas where there are no Nisga'a laws.

Another area of significant contention during negotiations was the fishing rights component of the *Nisga'a Treaty*. Opposition was well organized, including several staged fishing protests by non-Aboriginal fishers during unauthorized times. Additionally, the New Democratic Party, Liberal Party and Reform Party each opposed constitutional protection of a "commercial fishing entitlement based on race."[18] Nevertheless, the Nisga'a are entitled to a share of five species of salmon runs for domestic and commercial purposes under the *Treaty*, but a cap is set for the Nisga'a portion.[19]

One final controversial aspect of the *Treaty* dealt with tax exemption. At the time of negotiation, the New Democratic, Liberal and Progressive Conservative parties were opposed to the continuation of tax exemptions as per the *Indian Act*, and it was a non-negotiable demand for the federal and provincial governments during negotiations. Under the *Treaty*, Nisga'a became fully liable for federal and provincial taxation in 2007 and will become liable for income tax in 2011. In exchange, the Nisga'a government will

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[17] *Nisga'a Final Agreement*, *ibid.* at ch. 11, paras. 69-120; ch. 12.
[18] For further discussion, see Sanders, *supra* note 7 at 114.
[19] *Nisga'a Final Agreement*, *supra* note 3 at ch. 8.

have jurisdiction to directly tax Nisga'a citizens living on Nisga'a lands, but this will not affect provincial and federal taxation powers.[20]

The Complexity of Negotiations: Trust and Engagement

There is very little available information on the structures and procedures surrounding the negotiations of the *Nisga'a Treaty*, largely because of their confidential nature. This tends to be the case with most Aboriginal land negotiations, save for the guiding federal, provincial or territorial government policies, which were discussed in detail above. That said, there is only so much that can be learned from the content of formal policies with regard to the negotiations process. What can be garnered from the relevant literature, specifically in the context of the *Nisga'a Treaty* negotiations, is discussed below.

There were three primary negotiating teams for the *Nisga'a Treaty*, one each for the federal government, British Columbia and the Nisga'a. The primary Nisga'a negotiator was Jim Aldridge, while the Chief Federal Negotiator was Thomas Molloy, and the chief negotiator for the British Columbia government was Jack Ebbels. Molloy and his "Nisga'a core team" represented the Government of Canada on behalf of the Minister of Indian Affairs and Northern Development. They were bound to negotiate within the terms of the mandate provided for and approved by the federal Cabinet, subject to ministerial instructions, and any documents included in the final settlement

[20] *Ibid.* at ch. 16.

package had to be approved by the federal Minister.[21] Each of the three negotiating parties had experts to deal with various aspects of the process. These experts, along with legal representatives from each party would usually sit at the main negotiating table, with participation typically ranging from eight to forty people at any given time. In addition, there were various working groups and advisory groups to add to the mix of complexity.[22]

Partly because of the sheer number of parties involved in the negotiations process, including third party interests, advisory bodies, experts and others, the role of the primary negotiating parties was constantly in flux. In other words, each of the federal, provincial and Nisga'a negotiating teams had to adjust their negotiating postures and tactics based on the parties with whom they were negotiating at any given time. As in the case of most negotiations, these dynamics were affected primarily by the parties' objectives at varying times. As noted by Thomas Molloy in the federal context, "[w]hen we were dealing internally with the federal government, the core team pushed for positions that could be taken to the table to advance the negotiations. ...That relationship changed when we were at the table negotiating the federal position."[23] Consequently, the level of complexity of the negotiations was extreme, contributing to a very long, arduous process, particularly because of the range of interests to be considered.

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[21] W. Thomas Molloy, "A Testament to Good Faith: The Process and Structure of the Nisga'a Negotiations: A Federal Negotiator's Perspective" (2004) 11 Int'l J. Min. & Grp. Rts. 251 at 251.
[22] For further discussion, see *ibid.* at 256.
[23] *Ibid.* at 257.

Ultimately, in order to make complex, tripartite negotiations such as these work, the crux of success is found in trust. The following is quoted at length as representative of the importance of trust:

> Indeed, trust at every level was the key element of the relationship amongst all the negotiators. The core team needed to be trusted by the government, by the Nisga'a, by the Province, and by the advisory groups: trusted that what was being told to everyone was the truth, trusted that hard messages would be delivered and not glossed over, trusted that departmental positions were being fully defended at the negotiation table, trusted that the team could deliver on its undertakings.
>
> The Nisga'a negotiations were difficult and rigorous, but what was said at the table remained there. Emotions expressed within the confines of the negotiation room remained there as well. Negotiations are demanding enough when the stakes are high; they are particularly challenging when the negotiators must seek compromise at every level. It is important to maintain good relationships among and between the parties. Nevertheless, the nature of the relationship must never compromise a negotiator's ability to do the job effectively.[24]

Thomas Molloy summarizes the implications of the *Nisga'a Treaty* eloquently in the following passage:

> The Nisga'a Final Agreement has given hope to an aboriginal nation that wished to become full partners in the Canadian confederation. It has also given the tools to that nation to derive self-sufficiency. It has offered Nisga'a leadership the chance to put in place the aspirations and desires of a people that have been fighting for a treaty since 1887, when a group of Nisga'a chiefs first journeyed from the distant Nass Valley to Victoria to meet with the premier of British Columbia.
>
> After more than three years of long days and nights, from Agreement-in-Principle to Final Agreement, a treaty was negotiated that brought credit to all parties. The Nisga'a Final Agreement is a testament to good faith. It is an agreement among people and about people. Its benefits go far beyond the Nisga'a and the Province of British Columbia, to all of Canada and the future. It proves beyond doubt that negotiations are the most honourable way to resolve aboriginal issues in this country.[25]

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[24] *Ibid.* at 258.
[25] *Ibid.*

With these issues in mind, the difficulties and nuanced complexities surrounding the *Nisga'a Treaty* negotiations become apparent. This shows that, despite the problems inherent in the negotiations process, the finalization of an agreement with so many detailed intricacies, with agreement of all the parties involved, was a significant accomplisment. As noted by Thomas Molloy, the *Treaty* is indeed a milestone, not only with respect to what was accomplished despite various complications and competing interests, but with regard to the ceaseless determination of the Nisga'a to achieve for themselves their right to governance over their lands. The willpower of the Nisga'a combined with significant efforts to build and promote trust amongst the negotiating parties and the Nisga'a underscore the importance of Aboriginal engagement in the overall process of negotiation. This is all the more significant, given the issues raised above regarding problematic government policies on negotiation and settlement. In this sense, the resolution of the *Nisga'a Treaty* was arguably positive from the standpoint of offering significant opportunity for Aboriginal engagement. More specifically, and as discussed in Chapter Three, trust is foundational in promoting effective engagement and meaningful reconciliation.

Similarly, two of the most significant tensions underlying the entire negotiation process of the *Nisga'a Treaty* entailed the governments' emphasis on certainty versus Nisga'a insistence on the inclusion of an inherent right of governance. In the context of the active involvement of the Nisga'a in the negotiations process, it is notable that these tensions were emblematic of the determination of the Nisga'a during years of unwavering

effort. Quite simply, and in a significant departure from the "acceptable" government expectations, the Nisga'a refused to surrender their title and rights, while maintaining the tenacity to achieve recognition of their inherent right of governance. Consequently, in order to achieve certainty for the federal and provincial governments, the Nisga'a and third parties, several clauses replaced the "standard" cede, surrender or release components. The relevant sections are included at length due to their significance:

> 22. This Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, in Canada of the Nisga'a Nation.
>
> 23. This Agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations on those rights, to which the Parties have agreed, and those rights:
>
> (a) the aboriginal rights, including aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation and its people in and to Nisga'a Lands and other lands and resources in Canada;
> (b) the jurisdictions, authorities, and rights of Nisga'a Government; and
> (c) the other Nisga'a section 35 rights.
>
> 24. Notwithstanding the common law, as a result of this Agreement and the settlement legislation, the aboriginal rights, including the aboriginal title, of the Nisga'a Nation, as they existed anywhere in Canada before the effective date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement.
>
> 25. For greater certainty, the aboriginal title of the Nisga'a Nation anywhere that it existed in Canada before the effective date is modified and continues as the estates in fee simple to those areas identified in this Agreement as Nisga'a Lands or Nisga'a Fee Simple Lands.[26]

As noted above, while language was included in the *Treaty*, which had the effect of creating certainty and finality, the Nisga'a still retain title to the lands in question. This holds symbolic and practical significance for the Nisga'a: symbolically, it

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[26] *Nisga'a Final Agreement*, *supra* note 3 at ch. 2.

represents ownership and control over the lands in question, which necessitates a governing apparatus and the recognition thereof. In practical terms, it means that the Nisga'a have ownership of their lands, hold jurisdictional authority over those lands, and therefore exercise self-determination in respect of those lands.

In the context of the inherent right of governance, Edward Allen, Chief Executive Officer of the Nisga'a Lisims Government, summarizes the success of the Nisga'a aptly:

> [O]ur Treaty is a comprehensive land claims agreement which includes our right of governance. Our people have always maintained that our ownership of the land must go hand in hand with our governance over the land – one cannot be separated from the other. Thus, our treaty is the first modern day land claims agreement in British Columbia to include a constitutionally protected form of Aboriginal governance. In recognizing this right, the treaty does not alter the constitutional framework in Canada, especially in respect of the division of powers between Canada and British Columbia.[27]

Of course, some argued that the extent of governance authority was not sufficient to ensure that the Nisga'a could control adequately their own affairs. Instead, these critics wanted expanded Nisga'a authority over a broader range of jurisdictional issues. Yet, others have lauded the governance scheme of the *Nisga'a Treaty* as an historic first, giving self-determination powers back to the Nisga'a. As asserted by Edward Allen,

> ...we have the ability to control the pace, direction and evolution of our Nisga'a Government. As every law making section of the treaty provides, the Nisga'a Nation may enact a law in respect of any particular matter set out in the Treaty. So clearly we have the right to enact a law if we choose to enact such law.
>
> However, while we have the right to occupy an area of jurisdiction, we have the discretion to decide when we wish to occupy any such field. Until we exercise such

[27] Edward Allen, "Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement" (2004) 11 Int'l J. on Minority & Group Rts. 233 at 236.

> jurisdictions, federal and provincial laws continue to apply in respect of those subject matters.
>
> This approach has three advantages. Firstly, as stated, we control the pace of our evolution of government. We need not occupy a field of jurisdiction until we have completed the requisite planning, policy preparation, and administrative development necessary to take on any area of responsibility. Until we do, we take the advantages of an existing system of laws of Canada. Secondly, at the moment our law making authority of our government was recognized, we did not have to enact our own entire system to replace federal and provincial laws since those laws continued to operate outside of our laws. Thirdly, in some areas, we may continue to take advantage of some aspects of the laws of general application, and combine them with our own jurisdictions.[28]

In both respects, the extent to which the Nisga'a asserted their objectives and underlying identity in the process is evident, arguably demonstrating a significant degree of engagement throughout.

Of course, it could be argued that the concessions made by Nisga'a negotiators likely do not reflect the interests of all Nisga'a community members, and thus negotiation through representation does not and cannot allow for full engagement of all individuals. Indeed, the same is true of election outcomes in representative democracies. As noted, critics of the *Treaty*, including those Nisga'a members who voted against its ratification arguably were not happy with the provisions, and in most cases, felt that too much autonomy, including governance and self-determination powers, had been relinquished. While Allen's description above seems to epitomize the contentions that the Nisga'a did indeed achieve the degree and type of governance that they had hoped for, it must be remembered that negotiated settlements usually cannot be all things to all people quite

[28] *Ibid.* at 238.

simply because they are the result of a balancing process of give-and-take and concession. To this end, the degree to which this type of engagement is meaningful for all individual participants or community members is difficult to ascertain, but it is arguable that, in all instances, at least a handful of individuals will feel that their involvement was ineffectual because the outcome was not desirable for them. The key in this regard is to determine ways in which greater consensus can be built and trust fostered so that higher numbers of participants are actively and meaningfully involved with improved support for the outcome.

A COMPARATIVE CASE STUDY: ASSESSING THE *NUNAVUT LAND CLAIMS AGREEMENT*

As with the *Nisga'a Treaty*, negotiations leading to the *Nunavut Land Claims Agreement*[29] were subject to considerable contention. The final agreement has been simultaneously lauded as constituting the "first full territory in a modern nation ever to be governed and administered by aboriginal people"[30] and criticized as a racially-based territory constituting a drain on Canadian tax dollars.[31] Yet, the debate was not as clear-cut as this simplistic dichotomy appears. As with the *Nisga'a Treaty*, some of the most

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[29] *Nunavut Land Claims Agreement*, signed May 25, 1993 [*Nunavut Land Claims Agreement*]. The *Nunavut Land Claims Agreement Act*, R.S.C., 1993, c. 29 gave legislative effect to the *Nunavut Land Claims Agreement*.
[30] John Amagoalik, *The Nunavut Land Claim*, online: http:/ www.arctic-travel.com/chapters/landpage.html (no longer available) at 275.
[31] *Ibid.*

vehement opposition originated amongst various Aboriginal groups who felt that they would be negatively affected by the agreement in question.

Contentions and Complications: The Debate Over the Creation of Nunavut

The federal government first entered into negotiations with the Inuit in 1973, and the Inuit Tapirisat of Canada (ITC) submitted a proposal for negotiations in 1976 on behalf of the Inuit of Nunavut. However, the negotiations process was delayed when the ITC demanded that a comprehensive claims agreement must have a provision to create a new political territory, namely Nunavut. In 1982, the Tungavik Federation of Nunavut (TFN) took over the negotiations for the Inuit.[32] Original negotiations between the Tungavik Federation of the North (TFN), which represented the Inuit of Nunavut, and the Dene-Métis had continued for more than two years before a boundary line dividing their respective territories was agreed to in May 1986. In January 1987, the boundary was endorsed by the Western Constitutional Forum and the Nunavut Constitutional Form, followed by a territory-wide plebiscite to occur once the formal ratification of the boundary had passed successfully by the Inuit, Dene and Métis. However, the Dene and Métis of the Northwest Territories were opposed to the creation of Nunavut for a variety of reasons, most notably because of the concern that the agreement would preclude their

[32] Charles J. Marecic, "Nunavut Territory: Aboriginal Governing in the Canadian Regime of Governance" (1999-2000) 24 Am. Indian L. Rev. 275 at 281-282 [Marecic].

assertion of Aboriginal title over some of the lands in question.[33] Consequently, the Dene and Métis never did ratify the agreement, resulting in the plebiscite being postponed indefinitely.[34]

There were also significant difficulties in negotiations between the Inuit and the federal government with respect to Inuit governance. In accordance with the Canadian government's 1986 Land Claims Policy,[35] the federal government would not address any governance issues while negotiating land claims.[36] As was the case for many Aboriginal communities engaged in land claims negotiations, the Inuit of Nunavut considered this policy unacceptable. As Laureen Nowlan-Card aptly describes,

> [t]he establishment of Nunavut and the settlement of land claims in the area [were] seen by the Inuit as simply two different aspects of one process. They [were] intertwined, and agreement [was] required on both issues to achieve Inuit goals. Land is of primary importance to Inuit culture and way of life. Inuit economies, political systems, family relations, and traditions are derived from their relationship with the land. Thus, in order to maintain their cultural integrity, the Inuit must have rights in their lands and resources. Likewise, political power would be artificial without a land base. Lands and resources can provide a revenue base for the government to function. However, land and resources, without political authority to control the decisions which affect those lands and resources,

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[33] For further discussion, see *ibid.* at 275, n. 2; Kevin R. Gray, "The Nunavut Land Claims Agreement and the Future of the Eastern Arctic: The Uncharted Path to Effective Self-Government" (1994) 52 U.T.F.L.R. 300 at 308, n. 21.

[34] John Merritt, *Nunavut: Political Choices and Manifest Destiny* (Ottawa: Canadian Arctic Resources Committee, 1989) at 21 [Merritt, *Nunavut*]. There was a plebiscite in 1982 concerning the division of the Northwest Territories, more generally. The results fell largely along geographic lines, with 80% support in Eastern and Central Arctic, where Nunavut would be created, but only 56.5% in the Western Arctic. For further discussion, see Laureen Nowlan-Card, "Public Government and Regulatory Participation in Nunavut: Effective Self-Government for the Inuit" (1996) 5 Dalhousie J. Legal Stud. 31 at 34 [Nowlan-Card]; Inuit Committee on National Issues, *Completing Canada: Inuit Approaches to Governance* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1987) at 32 [Inuit Committee].

[35] Department of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Minister of Supply and Services, 1987).

[36] Nowlan-Card, *supra* note 34 at 35.

> would also fall short of Inuit goals. In this way, land is inseparably intertwined with the goals of cultural preservation, self-determination, and economic development.[37]

Similarly, as asserted by John Merritt, "[l]and ownership is a deeply felt and highly emotive issue, striking at the heart of Inuit self-identity and aspirations. ...Inuit feel passionately that they already own all the land in Nunavut,"[38] which meant that it was difficult for them to accept a settlement that gave the Crown ownership over approximately 80% of the territory.[39] These tensions and the sentiments underlying them are reminiscent of the Nisga'a resolve to press forward with their most-deeply-held values. They represent an important element of nationalism rooted in distinct identities, quite simply because of the attachment felt to the lands.

Yet, the Canadian government would not adjust its stance, and the only leverage the Inuit had was to emphasize the low likelihood of ratification of the final agreement amongst Inuit community members without some sort of commitment to Inuit governance.[40] As a result, Article 4 of the final agreement represents a middle-ground and includes an explicit reference to the Canadian government's commitment to introduce legislation in order to establish the Nunavut territory and corresponding public government. Equally important, an earlier agreement entitled the *Nunavut Political*

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[37] *Ibid.*
[38] Merritt, *Nunavut*, *supra* note 34 at 16.
[39] Nowlan-Card, *supra* note 34 at 36.
[40] For further discussion, see *ibid.*

Accord,[41] between the federal government, Northwest Territories government and the Tungavik Federation of Nunavut, which represented the Inuit, had to be finalized before ratification of the *Nunavut Land Claims Agreement*. In this way, the federal government agreed to *de facto* negotiations on Inuit governance at a later time.[42] In November 1992, the Inuit approved and ratified the final agreement in a Nunavut-wide plebiscite. Of those who voted, 85% supported the agreement, with 69% of eligible voters casting ballots. At the same time, consensus had been reached on the provisions of the *Nunavut Political Accord*, which stated that a public government of Nunavut would be created by April 1999 and would be vested with administrative capacity and legislative authority similar to the government of the Northwest Territories. The federal government had also agreed to provide funds associated with the creation of the Nunavut government and its operation, to assist in training initiatives for Inuit, and to create a Nunavut Implementation Commission for the new government.[43] These provisions were crucial in solidifying Inuit support for the *Nunavut Land Claims Agreement*.

The Limits of a Public Form of Government: Impacts on Title, Governance and Jurisdiction

The *Nunavut Land Claims Agreement* includes fee simple title to 355,842 square kilometres of land, with subsurface rights and royalty sharing rights of 50% for the first

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[41] Tungavik Federation of Nunavut, Government of Canada and Government of the Northwest Territories, *Nunavut Political Accord* (Ottawa: Minister of Supply and Services, 1992).
[42] For further discussion, see Nowlan-Card, *supra* note 34 at 36.
[43] *Ibid.* at 36-37.

$2 million and 5% thereafter of resource royalties per year in 35,257 square kilometres of the larger portion of land.[44] Other resource rights include harvesting throughout the settlement area and the creation of a wildlife management board to promote Inuit economic, social and cultural interests. Additionally, the Inuit have a right of first refusal on commercial development and sporting activities that affect renewable resources. In these ways, the land and resources provisions are much broader than those contained in the *Nisga'a Treaty*. The *Agreement* provided capital transfer payments of $1.1 billion, paid over fourteen years starting in 1993 along with a $13 million training fund for the Inuit.[45] In exchange, and unlike the Nisga'a, the Inuit agreed to a variant of a release clause, namely the "surrender of any claims, rights, title and interests based on their assertion of an aboriginal title."[46]

The *Nunavut Act* gave legislative effect to the establishment in 1999 of the Nunavut territory, along with the creation and functioning of Nunavut governance and legislative and administrative powers.[47] The *Act* also provided that the Legislative Assembly would consist of at least ten individuals elected from the various electoral districts to be established in Nunavut.[48] The legislature currently has nineteen MLAs, one for each electoral district in the territory. Nunavut itself constitutes one federal

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[44] *Nunavut Land Claims Agreement*, *supra* note 53, Arts. 19.2, 19.3, 25.1. Comparatively, the Nisga'a have complete jurisdictional authority over one portion of their lands, the Nisga'a Lands.
[45] See generally *ibid.*, Arts. 10-13, 29.
[46] *Ibid.*, preamble.
[47] *Nunavut Act*, S.C. 1993, c. 28 at s. 3 [*Nunavut Act*].
[48] *Ibid.* at ss. 12-14.

electoral district within Canada. The Inuit make up roughly 85% of the population in Nunavut, so they do have effective control of the government. However, it is a public form of government, structured very similarly to the government of the Northwest Territories and rooted in the British Westminster system of governance. In this way, the Nunavut government is not a "traditional" form of Aboriginal community or nation-based governance. This form of government has benefits and detriments, and it was a significant form of contention during negotiations. In particular, the Nunavut government favours Inuit control and jurisdiction over a range of issues, but only as long as the Inuit constitute a significant majority in the territory. With increasing numbers of non-Aboriginal people moving from the south to northern parts of Canada, including Nunavut, this may give cause for concern.[49] Nevertheless, it has been argued that this model "expresses self-determination through an Aboriginal-controlled public government rather than an Aboriginal-exclusive form of governance."[50]

With regard to legislative and administrative authority, the jurisdiction of the government of Nunavut is similar to that of the government of the Northwest Territories. For example, the Nunavut government has jurisdiction to pass legislation pertaining to

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[49] Wendy Moss, "Inuit Perspectives on Treaty Rights and Governance Issues," in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Supply and Services, 1995) at 430-431. It should be noted that the use of the term "ethnic-based" in this context is contentious, as it refers to the notion that governance is predicated on ethnic minority origin or status.
[50] Royal Commission on Aboriginal Peoples, *Perspectives and Realities*, Volume 4, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996), online: http://www.collectionscanada.gc.ca webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html.

the administration of justice in the territory, including in both civil and criminal matters, including a territorial court structure and the appointment of judges. The Nunavut government also has jurisdiction to legislate in areas related to education, hospitals, charities, marriage, property and civil rights, prisons and the imposition of fines or penalties, agriculture, intoxicants, preservation of game in the territory, direct taxation, licensing, administrative matters having to do with election of MLAs, management and sale of lands, preservation and promotion of the Inuktitut language, and any matters of a local or private nature.[51] However, this fairly expansive jurisdictional authority is curbed as follows:

> 23. (2) Nothing in subsection (1) shall be construed as giving the Legislature greater powers with respect to any class of subjects described in that section than are given to the legislatures of the provinces by sections 92 and 95 of the *Constitution Act, 1867* with respect to similar subjects described in those sections.
>
> (3) Subject to any other Act of Parliament, nothing in subsection (2) shall be construed as preventing the Legislature from making laws of general application that apply to or in respect of Indians and Inuit.[52]

In other words, there are significant limits placed on the legislative authority of the Nunavut government, precisely because it is a public form of government similar to those of the other territories.[53]

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[51] *Nunavut Act*, *supra* note 47 at s. 23(1).
[52] *Ibid.* at s. 23 (2), (3).
[53] Additionally, the very fact that the Nunavut government stems from federal legislation means that it technically could be repealed unilaterally, especially if Inuit were outnumbered geographically in the future.

The power of the Nunavut legislature is also limited by Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*, just as it is subject to Canadian common law, the Criminal Code, the Canadian Constitution and the *Canadian Charter of Rights and Freedoms*. While most of this seems reasonable given the fact that the Inuit agreed to a public governance model, there are potential drawbacks in the degree to which a public government can adequately reflect the interests of Inuit and Inuit culture. As asserted by Charles Marecic,

> [o]n the surface, this appears to be a quite workable option. However, this arrangement is predicated on both trust and patience. It is based on trust because the federal government must provide the space for the Inuit legislature to change, if it so desires, the "Canadian" paradigm — a paradigm which is rooted in British common law, not Inuit tradition. Inuit tradition, like other aboriginal traditions, is "an evolving body of ways of life." It is not some "exoticized state depicted in books and displayed in museums," rather it is "everyday actions of northern individuals...a set of practices engaged in by Inuit of both the recent or distant past."[54]

Before the finalization of either agreement, the Nunavut Constitutional Forum[55] expressed concerns, formulating an argument premised on a "critical mass" of Nunavut powers that would ensure that the Inuit could exercise sufficient governance:

> [T]here is clearly a minimum "critical mass" of powers below which Nunavut is no more than a legal fiction. ...It is essential that the government and people of Nunavut acquire enough powers and responsibilities through the various forms of agreement, devolved

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[54] Marecic, *supra* note 32 at 289-290.

[55] The Nunavut Constitutional Forum was originally set up by the Constitutional Alliance of the Northwest Territories, along with the Western Constitutional Forum, to provide options for discussion, debate and planning concerning the future division of the Northwest Territories. The Nunavut Constitutional Forum represented the eastern portion of the Northwest Territories, while the Western Constitutional Forum represented the western portion. The Constitutional Alliance of the Northwest Territories was created by the legislature of the Northwest Territories in order to define the boundaries for division and to develop constitutional proposals for the new territories.

> authorities, administrative delegations, etc. that political participation for Nunavut residents is meaningful and not simply a public relations deception.[56]

This issue of public governance versus Aboriginal governance is cast by Laureen Nowlan-Card in more positive terms:

> The creation of the Nunavut government proposed a new government sensitive to Inuit culture, traditions, social problems, and concerns, but open to all people in the region. Nunavut government is to be a public government, as opposed to an ethnic government. With a public government system everyone residing in the particular geographic area, the Nunavut region, is under the jurisdiction of that government. With an ethnic government system membership or citizenship is determined by some sort of ethnic criteria. The Inuit of the Nunavut region have expressed their preference for a public government: "Public government does not deviate from governance principles as much as it contributes towards the establishment of a working relationship with government involving active Inuit participation."[57]

Given these issues, it would appear that there are legitimate arguments that both support and critique the public governance model in Nunavut. It is argued here that the bottom line is the form of government that the Inuit determined for themselves, and in the case of Nunavut, the Inuit ratified the agreements by a wide margin, thus indicating majority support for the model of governance that is now in place in the territory. Granted that not all who were eligible to vote did in fact participate, and not all Inuit who voted supported ratification of the agreements. Nevertheless, the common theme throughout is one of Inuit participation, not just in the context of ratification, but also in the broader sense offered by public governance in the territory. In other words, despite

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[56] Nunavut Constitutional Forum, *Building Nunavut: A Working Document with a Proposal for an Arctic Constitution* (Nunavut Constitutional Forum, 1983). For further discussion, see Nowlan-Card, *supra* note 34 at 42.

[57] Nowlan-Card, *ibid.* at 40, quoting Inuit Committee, *supra* note 34 at 39.

its potential shortcomings and arguments made against it, the public form of government established still provides an important mechanism for Inuit engagement.

Moreover, underlying these jurisdictional authorities is a much broader, far-reaching set of powers pertaining to the preservation and promotion of Inuit culture and language. Of course, an argument could be made with respect to the potential impact of non-Inuit culture and language on the Inuit in Nunavut, especially if non-Aboriginal individuals continue to move in increasing numbers to the territory. However, the effects that non-Aboriginal culture might have on language use and Inuit cultural practices can only be fully ascertained over time in light of changing demographics and mobility in the territory. It is arguable that the Inuit nationalism which helped push for the settlement of the *Nunavut Land Claims Agreement* and the creation of Nunavut will sustain the distinct Inuit identity and culture in the territory.

Negotiations and Bargaining Strategies: Building Trust and Engagement?

As with the *Nisga'a Treaty*, the actual process of negotiation is an important part of the analysis of engagement. That said, it is difficult to garner much information on the negotiation process itself since most of the negotiations are confidential.[58] Thomas Molloy was the chief federal negotiator for the *Nunavut Land Claims Agreement*, while Jack Stagg was the chief federal negotiator for the *Nunavut Political Accord.* Molloy

[58] Tom Molloy, "Negotiating the Nunavut Agreement – A View from the Government's Side" (Fall 1993) 21:3 Northern Perspectives 9 at 9 [Molloy, "Negotiating"].

noted that the weight of the Nunavut land claim and subsequent agreement could not be underestimated, given that it would be viewed as a precedent for future land claims across Canada:

> Negotiation of the Nunavut land claim, the largest in Canada, required considerable time and effort from many in both the federal and territorial governments. The federal government, like all governments, is organized in levels that peak at the ministerial and Cabinet levels: it incorporates diverse interests, which are separated into different departments. Since the Nunavut Agreement cuts across many levels and interests, successful negotiation required extensive consultation among and co-ordination between key federal agencies. ...
>
> From 1982...until the signing of the final agreement, the negotiations involved three prime ministers, six ministers, and four deputy ministers, as well as several assistant deputy ministers, directors general, and administrators from the Department of Indian Affairs and Northern Development (DIAND).[59]

Moreover, as with the *Nisga'a Treaty*, trust and good faith negotiations were crucial to achieving success in the long term:

> Absence of trust between Inuit and government had to be addressed before serious negotiations could begin. Good faith was only built slowly, through long and tiring bargaining sessions. ...[T]o get agreements initially depended on one critically important element: honesty at the bargaining table.
> ...
> The negotiations remained difficult and rigorous, but in time what was said at the table remained at the table, and the feelings and emotions that were expressed remained within the confines of the negotiation room. This provided a solid foundation for the tough decisions each party would face. ...For its part, government eventually embraced provisions that in earlier days it would have rejected out of hand.[60]

Yet, the delays inherent in the process were the direct result of the complexity that occurred at each level of the process, including the sheer number of government

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[59] *Ibid.*
[60] *Ibid.* at 11.

departments involved.[61] Unfortunately, the delays "led to accusations by TFN that government was foot-dragging, stalling, or even showing bad faith."[62] This final point is significant, particularly with respect to the commonly-shared ideal amongst negotiators of negotiating in good faith. Rampant amongst the scholarly literature on Aboriginal land claims negotiations is the sheer length of time involved in resolving a large array of very complex issues. Very often, one or more parties may consider delays unreasonable and symptomatic of a larger policy or ideological stance. However, when viewed in the above context, particularly in light of the number of parties involved in the negotiations, alongside the usually extensive length of the agreements that are finalized, the fact that negotiations can take years becomes much less surprising. This is particularly important in the context of fostering trust.

In addition to these complexities, the issue of land ownership for the Inuit communities in Nunavut added an additional layer of difficulty. Specifically, the land selection process was conducted on a community-by-community basis during 1991 and 1992, and there were additional negotiators who were added to the Inuit and government teams to resolve the land selection issues. As a result, further delays were unavoidable

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[61] For instance, involvement branched out to include the Department of the Environment, Department of Fisheries and Oceans, the Department of Energy, Mines and Resources and the Northern Program of both DIAND and the Government of the Northwest Territories (Thomas Molloy, "Assessment of Negotiation Process" (November 1993), unpublished article (on file with author) [Molloy, "Assessment"]).
[62] *Ibid.*

since Cabinet approval was a necessary once the various departments had agreed on each of the provisions.[63]

There were also two competing approaches to the negotiations process at play, which ultimately hindered timely progress. Negotiators for both the TFN and Northwest Territories government considered the agreement to be a contract, whereas the federal government negotiators did not. In this context, while negotiations were conducted using a "rolling draft" approach, wherein nothing was considered agreed to until the entire document was finalized, Molloy asserted that the TFN negotiators considered agreed-to clauses as final.[64]

When examined from the perspective of the Inuit, it would appear that the delays inherent in the process were not accepted easily. Instead, there was a great deal of mistrust and unpleasantness on both sides of the negotiation table.[65] According to Molloy, the TFN negotiators were quick to point to the fact that the Canadian government, through negligence and ill will, was responsible for many of the economic and social difficulties faced by the Inuit in the North. Of primary concern for the Inuit was the historical imposition of Canadian government decisions that were undertaken

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[63] Molloy, "Negotiating," *supra* note 58 at 10-11.
[64] Molloy, "Assessment," *supra* note 61 at 26-27.
[65] *Ibid.* at 5.

unilaterally against the Inuit. Further, issues addressed were often very personal in nature for the Inuit, particularly those having to do with land ownership.[66]

In addition, the Inuit leadership was willing to take calculated risks at various points in the negotiations process to bolster their bargaining position. For instance, involvement in the Northwest Territories plebiscites in 1982 and 1992 on the boundary of division allowed them to achieve significant community-level participation and support to proceed with the division. Earlier in 1979, the ITC determined that coalescing with the government of the Northwest Territories, rather than continuing to run with the established policy of ignoring its involvement, would allow for a stronger support base when approaching negotiations. Finally, and as discussed above, the demand that the Canadian government commit to the creation and governance of Nunavut in order for Inuit support to be garnered for the finalized settlement helped ensure the achievement of Inuit goals. "In hindsight, Nunavut may seem to have an air of inevitability about it; the reality is that what has been accomplished has only been achieved out of a willingness to go to the wall for essential political objectives."[67]

There were also external circumstances that affected the negotiations process leading up to the Nunavut agreements. In the early 1990s the Dene-Métis land claims negotiations collapsed, with each Aboriginal group subsequently pursuing its own claims

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[66] *Ibid.* at 21.
[67] John Merritt, "Nunavut: Preparing for Self-Government" (Spring 1993) 21:1 Northern Perspectives, online: http://www.carc.org/pubs/v21no1/nunavut1.htm.

separately. However, the failure of these negotiations, along with the 1991 Oka crisis in Quebec, arguably pressured the Canadian government to keep Nunavut negotiations proceeding because of a general concern that if all negotiations in the Northwest Territories failed, an overarching dissatisfaction might occur, "engender[ing] a climate of escalating ethnically defined ill-will."[68]

From the commentary provided, it appears that the negotiations leading to the settlement of the *Nunavut Land Claims Agreement* and the creation of Nunavut were difficult and, at times, unpleasant and much more so than those leading to the *Nisga'a Treaty*. In the context of the former, there were many internal and some external factors which caused significant feelings of mistrust and ill will. This arguably worsened relations between the Inuit and Canadian governments involved and potentially added to feelings of alienation. Add to the mix the strong nationalist sentiments of the Inuit, as evident from some of their bargaining approaches, and it is little wonder that conflict was the norm during these negotiations. This makes the final resolution all the more significant and hard-won.

The above analysis also demonstrates that Inuit negotiators were very assertive in maintaining their negotiation terms and positions. Their efforts appear to have been strengthened by some of the community involvement and support they received as well, especially in light of the unique community-based approach taken in the land selection

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[68] *Ibid.*

process. It seems that there was a greater level of community engagement in the process leading to settlement since, as noted above, the Inuit negotiators used the backing of community members to their advantage. As with the *Nisga'a Treaty*, the ratification of the agreements allowed for further engagement at the grassroots level. While the choice of the majority of Inuit was to create a public model of governance, this does not mean that those who were against the creation of Nunavut or the form of governance now in place were not still effectively engaged. At the very least, those who opposed the creation of a public model of governance were able to vote to express their opinions.

At the end of the day, as in the case of the *Nisga'a Treaty*, the Nunavut negotiations provided an important mechanism to elicit Inuit engagement. Despite the difficulties which plagued the process, including significant delays, mistrust, alienation and nationalism, the end result was still a successfully-negotiated and ratified settlement. While neither the Nunavut nor Nisga'a examples are analogous to all negotiations, they are useful because they provide a closer look at some of the dynamics surrounding this form of Aboriginal engagement. The broader implications for Aboriginal engagement, including the potential for achieving Aboriginal reconciliation, are discussed in the concluding chapter.

CHAPTER TEN – CHARTING THE TRAJECTORY OF ABORIGINAL ENGAGEMENT IN CANADA: THE FUTURE OF ABORIGINAL RECONCILIATION?

We cannot complacently assume that our current electoral process will always meet this standard or that it leaves no room for improvement. Parliament and the national government must be seen as legitimate; electoral reform can both enhance the stature of national political institutions and reinforce their ability to define the future of our country in ways that command Canadians' respect and confidence and promote the national interest.[1]

What are the implications of Aboriginal engagement for Aboriginal reconciliation in Canada? Do the specific forms of engagement discussed in the preceding chapters – Aboriginal participation in elections and land negotiations – promote reconciliation? The underlying presumption is that positive forms of engagement contribute to reconciliation. The purpose throughout has been an examination of the potential benefits of Aboriginal engagement in elections and land negotiations as novel pathways to reconciliation, beyond the traditionally-trodden route of litigation through the Canadian judicial system. In particular, the extent to which elections and land negotiations provide positive opportunities for meaningful Aboriginal engagement is a vital consideration, along with whether improvements are necessary in order to promote more meaningful engagement. Increased Aboriginal engagement arguably improves overall social cohesiveness, at the

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[1] Royal Commission on Electoral Reform and Party Financing and Robert A. Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada*, Vol. 9 of *The Collected Research Studies, Royal Commission on Electoral Reform and Party Financing* (Toronto: Dundurn Press, 1991) at ix-x.

very least where interactions are constructive. To this end, efforts are needed to build trust, mutual respect and inclusive relationships between Aboriginal peoples and the rest of Canada.

However, that does not mean that the types of engagement analyzed herein are without their problems or drawbacks. It is possible that the suggested mechanisms may not be effective enough. For this reason, the exploratory nature of this concluding chapter consists primarily of in-depth analysis and synthesis of the preceding chapters on Aboriginal engagement. In particular, the potential effectiveness of Aboriginal participation in Canadian elections and land negotiations in achieving Aboriginal reconciliation is evaluated. To this end, the discussion first evaluates the findings presented on Aboriginal engagement in elections followed by the issues raised in the context of Aboriginal engagement in the land negotiations process. In both instances, the analyses are rooted in the theoretical groundwork developed in Chapter Three. Most notable in this regard are the roles of Aboriginal identities, including Aboriginal nationalism and alienation, in shaping and impacting Aboriginal involvement in Canadian elections and land negotiations. Following these examinations, broader conclusions are drawn with direct application to Aboriginal reconciliation. In other words, the potential for meaningful Aboriginal engagement to lead to Aboriginal reconciliation is assessed.

THE IMPLICATIONS OF LOW ABORIGINAL VOTER TURNOUT: ENGAGEMENT AS A PATH TO RECONCILIATION

As the discussions in Chapters Four, Five and Six reveal, Aboriginal peoples tend to be disengaged, indeed alienated, from Canadian electoral institutions. This overall lack of participation spans representative involvement, such as serving as elected members to the House of Commons or appointed members of the Senate, to voter turnout in Canadian federal and provincial elections. Indeed, as the majority of the analyses in those particular chapters illuminate, Aboriginal peoples – particularly First Nations – tend to vote at significantly lower levels than the non-Aboriginal electorate. While part of this trend is rooted in socio-economic and demographic factors such as age, education and income, which generally apply to mainstream populations anyway, Aboriginal voters are also disengaged from the electoral process because of other foundational issues related to identity. In other words, while youth and those with lower levels of education and income are less likely to be involved in traditional means of electoral participation, such as voting or running for political office, Aboriginal peoples appear less likely to be involved because of additional factors related to their distinctive identities as Aboriginal peoples. While Aboriginal peoples are disproportionately younger with lower levels of education and income vis-à-vis the general Canadian population, Aboriginal nationalism and alienation arguably pose an additional set of challenges. Fundamentally, Aboriginal nationalism and alienation draw attention to the distinctive histories of Aboriginal

peoples and the role that Aboriginal identities play in the broader context of Aboriginal–Canada relations.

These factors bear significantly on the degree of Aboriginal engagement in elections and the extent to which such engagement might lead to reconciliation. Ultimately, the research findings presented in the preceding chapters, as well as in other studies, demonstrate that disengagement of Aboriginal peoples from Canadian electoral systems and institutions is rooted in historical discrimination, which has perpetuated Aboriginal alienation and discouraged Aboriginal peoples from participating in Canadian electoral institutions. At the same time, the distinctiveness of Aboriginal identities, along with the role that Aboriginal nationalism has played in shaping and maintaining those identities, has helped, in part, to justify the ongoing chasm that exists between Aboriginal peoples and the rest of Canada. These contentions are not meant to insinuate that Aboriginal identities should be altered or shifted to "conform" to more mainstream conceptions of Canadian identity or citizenship. Indeed, the very opposite has been argued throughout: respect for and inclusion of the uniqueness of Aboriginal identities is crucial if reconciliation is to be achieved in Canada. Such inclusivity needs to be part of a larger process of re-building relationships between Aboriginal peoples and the rest of Canada. These complex factors underline the need for workable solutions to build bridges between Aboriginal peoples and the rest of Canada, and it is argued here that improving engagement in this regard will lead to more effective reconciliation because it will work to build those bridges and develop increased trust and belonging.

Increasing General Aboriginal Representation[2]

There are many recommendations and possible solutions for improving Aboriginal voter turnout, all of which cannot be discussed within the confines of this chapter. Some proposed mechanisms are already in place, including in international jurisdictions, and they have had varying levels of success. The purpose is to determine whether these proposals are effective mechanisms to improve Aboriginal engagement in this context, and thus serve as meaningful approaches to Aboriginal reconciliation in Canada, or if alternative approaches are needed in the future.

Several straightforward, basic mechanisms could be put in place to potentially increase Aboriginal voter turnout. These mechanisms would turn on issues of Aboriginal representation in order to enhance issue salience and reduce Aboriginal alienation. For instance, increasing the number of Aboriginal Members of Parliament or representatives in provincial legislative assemblies could help to promote Aboriginal connectedness to federal and provincial electoral politics. In order to do so, more opportunities for nomination of Aboriginal candidates in the main political parties would be required, alongside the encouragement of Aboriginal involvement in party policy and decision-making.

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[2] Earlier versions of the discussions in the next several sections, at 306-316, were published in Jennifer E. Dalton, "Alienation and Nationalism: Is It Possible to Increase First Nations Voter Turnout in Ontario? (2007) 27:2 Can. J. Native Stud. 247 at 275-280.

Of course, it is easy to make these suggestions, but much harder to put them into practice. The impetus to provide opportunities for Aboriginal peoples to become more involved lies with the major political parties in the provinces and across the country, and yet, under the current FPTP electoral system, it seems that there is little desire on the part of political parties to field Aboriginal candidates who are considered less "safe." Instead, it is commonly argued that proportional representation and semi-proportional electoral systems are much more effective at providing some level of representation for disadvantaged or excluded groups, such as Aboriginal peoples. However, would this really affect Aboriginal voter turnout? If the federal or provincial electoral systems were changed to ones with some degree of proportionality, would this improve Aboriginal voter turnout? It is argued here that changing the model of electoral system in place would do little to improve Aboriginal voter turnout because Aboriginal nationalism remains a crucial factor in determining voter turnout levels. Changing the type of electoral system will not affect Aboriginal nationalism.

One relevant example is found in the relatively-recent reforms to New Zealand's electoral system. After recommendations released by the Royal Commission on the Electoral System and two subsequent referendums in 1992 and 1993 on proposed electoral change, the electoral system was changed from FPTP to a mixed-member proportional (MMP) system. One of the goals behind this reform was to ensure that the House of Commons would be more proportionate in its representation. This was important for the Maori as well, who constitute the Indigenous population in the country.

Another goal was to improve overall voter turnout. In the elections following the reforms, increased representation for historically-disadvantaged groups, including the Maori, indeed occurred, but Maori voter turnout did not increase. In fact, shortly thereafter, overall voter turnout actually decreased further.[3] By extension, it is argued that changing any of the electoral systems in Canada, whether federally or provincially, to ones which are perhaps more proportionate, may help to improve Aboriginal representation, but in the long run will not substantially improve Aboriginal voter turnout because of the existence of Aboriginal nationalism. In this way, and as discussed earlier, theories on electoral reform which contend that proportionality would improve voter turnout are largely irrelevant in the context of Aboriginal turnout.

Particularistic Aboriginal Representation

Mechanisms that add specific, guaranteed Aboriginal representation to existing electoral systems may be more effective than general tools of representation in increasing Aboriginal voter turnout. These options do not require fundamental alterations to the

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[3] For extensive discussion, see Thérèse Arseneau, "The Representation of Women and Aboriginal Peoples under PR: Lessons from New Zealand" (November 1997) 18 Policy Options 9; Jeffrey Karp, "Members of Parliament and Representation," in Jack Vowles, Peter Aimer, Jeffrey Karp, Raymond Miller and Ann Sullivan, eds., *Proportional Representation on Trial: The 1999 New Zealand General Election and the Fate of MMP* (Auckland, New Zealand: Auckland University Press, 2002)[Karp]; Jeffrey A. Karp and Susan A. Banducci, "The Impact of Proportional Representation on Turnout: Evidence from New Zealand" (1999) 34:3 Aust. J. Pol. Sci. 363; Nigel S. Roberts, *A Case Study in the Consequences of Electoral System Change* (Hong Kong: Hong Kong Democratic Foundation, 2000), online: http:/ www.hkdf.org/seminars 001021 roberts.doc; Jack Vowles, "Offsetting the PR Effect?: Party Mobilization and Turnout Decline in New Zealand, 1996-99" (2002) 8:5 Party Politics 587; Jack Vowles, Susan A. Banducci and Jeffrey A. Karp, "Forecasting and Evaluating the Consequences of Electoral Change in New Zealand" (2006) 41 Acta Politica 267.

electoral system in place. For instance, guaranteed seats in legislatures, affirmative redistricting, Aboriginal electoral districts (AEDs) and Aboriginal legislatures have been suggested. However, guaranteed Maori seats in the New Zealand Parliament have been in existence since the 1860s, and yet, this has done little to ensure that Maori voter turnout is on a par with that of the general population. This is primarily because these seats are largely symbolic.[4] While it could be argued that, in Canada, guaranteed seats might foster feelings of Aboriginal connectedness or allow greater representation of Aboriginal issues in legislative debates, the New Zealand example is cause for hesitation. Providing a few token seats in the House of Commons or a provincial legislature may be fairly ineffective, given that the voices of a few Aboriginal representatives could be stifled easily by the majority. In such instances, the seats would have to go beyond mere tokenism and serve as effective vehicles of Aboriginal representation.

Affirmative redistricting is somewhat similar, although it does not entail the creation of any new seats set aside specifically for Aboriginal representatives. Instead, electoral districts are adjusted to allow for ridings with more concentrated Aboriginal populations, thereby increasing the possibility that Aboriginal representatives will be elected. This may be a difficult task, given the dispersed nature of the Aboriginal population across the country, but there are some northern electoral districts with much higher concentrations of Aboriginal peoples, such as those shown in Table 3. As in the

[4] See Karp, *ibid.* at 130.

case of guaranteed seats, affirmative redistricting must be effective with meaningful results. Otherwise, it is likely that Aboriginal peoples would see this option as little more than superficial rhetoric.

Specific Aboriginal Electoral Districts (AEDs) provide another option to increase Aboriginal representation in Canadian legislatures. This was the central recommendation made by the Committee for Aboriginal Electoral Reform in its report, discussed in Chapter Four, and was subsequently endorsed by the *Royal Commission on Electoral Reform and Party Financing* and the related Research Volume on *Aboriginal Peoples and Electoral Reform.*[5] In particular, AEDs would consist of electors who identify first and foremost as members of First Nations, Inuit or Métis. Regional residence would be a secondary consideration, with AEDs likely to overlap or be superimposed upon geographic districts. Specific voters lists would have to be created, the number of districts would be debatable and ultimately, the heterogeneous nature of Aboriginal peoples – First Nations, Inuit and Métis – would have to be considered in constructing the districts.[6] It would constitute a significantly large and potentially-onerous undertaking, but could be applied irrespective of the electoral system in place. However, as in the other instances of particularistic representation, in order to effect meaningful change,

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[5] See especially Roger Gibbins, "Electoral Reform and Canada's Aboriginal Population: An Assessment of Aboriginal Electoral Districts," in Royal Commission on Electoral Reform and Party Financing and Robert A. Milen, ed., *Aboriginal Peoples and Electoral Reform in Canada*, Vol. 9 of *The Collected Research Studies, Royal Commission on Electoral Reform and Party Financing* (Toronto: Dundurn Press, 1991) 153 at 156.

[6] *Ibid.* at 161.

AEDs could not simply serve as symbolic seats where Aboriginal representatives are given little voice or credence.

Aboriginal Nation-Based Solutions

Finally, the creation of Aboriginal parliaments or legislatures has been suggested. The Royal Commission on Aboriginal Peoples (RCAP) supported this idea, recommending an *Aboriginal Parliament Act* to first establish a representative body of all Aboriginal peoples. This would then evolve into a House of First Peoples and become part of Canadian Parliament. The primary role of the Aboriginal Parliament would be an advisory one to the House of Commons and the Senate on matters relating to Aboriginal peoples, but the RCAP was careful to specify that it did not want to circumscribe the authority of the proposed Aboriginal Parliament. Instead, the RCAP provided a fairly extensive list of advisory topics for the Aboriginal Parliament, ultimately allowing for significant involvement by Aboriginal peoples. In addition, voters would elect representatives from their respective nations, and elections would take place at the same time as federal elections. Enumeration of Aboriginal voters would also take place during the general enumeration process held across the country. Ultimately, the RCAP envisioned an Aboriginal Parliament that would eventually consist of representatives from each Aboriginal nation in Canada.[7] It is reasonable to contend that a similar

[7] Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, Volume 2, Part 1, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996), online:

implementation could occur in the context of provincial legislatures as well, although it would need to apply on a smaller scale instead of across the country.

There was a similar institution in place in Australia until recently. Various efforts have been undertaken, both historically and more recently in Australia, to improve Aboriginal voter turnout levels. The National Aboriginal Consultative Committee, in existence from 1973 to 1977, and the National Aboriginal Conference, in existence from 1977 to 1985, had limited advisory roles on matters affecting Aboriginal peoples. From 1990 to 2005, the Aboriginal and Torres Strait Islander Commission (ATSIC)[8] was a central governing body that served the interests of Aboriginal peoples in Australia with some limited executive decision-making powers.[9] It was instituted by the Labor government of Bob Hawke, but was dismantled in 2005 by the subsequent Liberal government under Prime Minister John Howard, leaving the future of Indigenous governance in the country uncertain. Prior to being dismantled, the ATSIC allowed Aboriginal peoples to be formally involved in government by electing representatives. Representatives were elected separately from Australian Commonwealth, state and

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http://www.collectionscanada.gc.ca/webarchives/20071115053257/http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html [RCAP]. The potential problems with the RCAP conception of nation were addressed at greater length in Chapter Three and would also arguably apply here in the context of Aboriginal parliaments as envisioned by the RCAP.

[8] The ATSIC was established by the *Aboriginal and Torres Straight Islander Commission Act 1989* (Cth) (1989-), Commonwealth of Australia, which took effect on March 5, 1990. As of June 30, 2005, the ATSIC Regional Councils were abolished by the *Aboriginal and Torres Straight Islander Commission Amendment Act 2005* (Cth), Commonwealth of Australia.

[9] For more discussion, see Will Sanders, "ATSIC Elections and Democracy: Administration, Self-Identification, Participation and Representation," *Democratic Audit of Australia* (Hawthorn, Victoria: Institute for Social Research and The Australian National University, 2003), online: http://democratic.audit.anu.edu.au/papers/20030724_sanders_atsic_elect%20.pdf.

territory elections. Voting was not compulsory, and Aboriginal electors did not need to self-identify prior to voting. Near its conclusion, the ATSIC consisted of 404 elected regional councillors, covering a total of 35 ATSIC regions grouped under 16 zones. In each zone, a national commissioner was also chosen from amongst the elected regional councillors.[10] Overall, this was a sizeable group representing the interests of Aboriginal peoples in Australia.

However, the central problem with this model, at least with regard to increasing Aboriginal voter turnout, is the fact that the Commission had only limited executive decision-making. In the Canadian context, such limits would do little to effectively serve the interests of Aboriginal voters. Instead, such a system could be viewed as consisting of partially-imposed electoral politics, with central authority remaining with the dominant political institutions in power. Similar contentions can be made regarding the Saami Parliaments in Finland, Norway and Sweden. Each country has a Saami Parliament, which were created in 1973, 1988 and 1992 respectively. However, the Saami parliaments in Norway and Finland do not have any legislative functions, so in this way, "parliament" is a misnomer. Additionally, the Saami were not adequately involved in the creation of any of these institutions.[11] The RCAP has asserted that a more robust Aboriginal Parliament would be needed, with the purpose of adequately serving the needs

[10] For more extensive discussion, see Will Sanders, "Participation and Representation in the 2002 ATSIC Elections" (2004) 39:1 Austl. J. Pol. Sci. 175; Will Sanders, John Taylor and Kate Ross, "Participation and Representation in ATSIC Elections: A 10 Year Perspective" (2000) 35:3 Austl. J. Pol. Sci. 493.
[11] For further discussion, see RCAP, *supra* note 7.

and interests of Aboriginal peoples. The RCAP stated that "Aboriginal parliaments can have real power, and Aboriginal peoples can be fully involved, if not primarily responsible, for the structure and processes of such institutions."[12] In this way, it would seem that the RCAP proposal constitutes the most comprehensive of the mechanisms suggested to improve overall Aboriginal electoral participation.

Respecting Aboriginal Identities and Nationalism

Ultimately, each of the mechanisms discussed above provides particularistic representation, but where does this leave Aboriginal nationalism? It is argued here that Aboriginal nationalism is an important part of any discussion on Aboriginal politics or Canadian electoral reform. Regardless of any implementation of particularistic Aboriginal representation – whether it is through guaranteed seats, affirmative redistricting, AEDs or Aboriginal legislatures – Aboriginal nationalism is likely to play a role in determining Aboriginal electoral participation, including voter turnout. More importantly, it is contended that simply improving Aboriginal representation without ample Aboriginal input is not enough to increase Aboriginal voter turnout. Some Aboriginal peoples will continue to feel that the Canadian electoral systems are foreign impositions, representing colonialism and historical dispossession, thereby lacking legitimacy. Instead, there needs to be formal and explicit recognition of Aboriginal peoples as constituting nations who are culturally different from the rest of Canada *before*

[12] *Ibid.*

any electoral mechanisms can effectively be put in place.[13] Regardless of the type of electoral system at the federal or provincial levels in Canada, recognition of Aboriginal nationalism as a viable and vibrant component of Canadian society and electoral politics is crucial. Official nation-based recognition would work to bridge the gap of alienation that exists between Aboriginal peoples and electoral systems in place and, ultimately, would help to renew and repair the relationship between Aboriginal peoples and the Canadian state. It is asserted that this sort of recognition is a fundamental first step in improving Aboriginal voter turnout across the country and in engaging Aboriginal peoples, more generally.

Yet, it must be acknowledged that this recognition may not be enough, especially if it is not attached to effective outcomes in practice. To this end, electoral options that acknowledge and respect Aboriginal nationhood would need to be put in place, whereby Aboriginal peoples could participate as distinct nations in the electoral process. For example, where particularistic Aboriginal representation is employed, Aboriginal voters would need to be assured of taking part in an electoral process where they are recognized as members of their distinct nations and where they are politically involved to affect their nations. In other words, the goal would be effective, viable Aboriginal representation

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[13] At times, First Nations have engaged in strategic block voting, or nation-based voting, in order to effect the desired electoral result. This is one way that First Nations have asserted their nationhood. However, this might not be relevant in the context of all elections and, more importantly, it does not involve formal recognition of nationhood by the Canadian state. For further discussion on nation-based voting, see Kiera L. Ladner, "The Alienation of Nation: Understanding Aboriginal Electoral Participation" (2003) 5:3 Electoral Insight 21 at 24.

within the context of official recognition of Aboriginal peoples as important contributors to the electoral process. This, in turn, would address Aboriginal alienation and potentially lead to increased Aboriginal electoral participation and voter turnout in Canadian elections, both of which are foundational in improving and reconciling the relationship between Aboriginal peoples and the rest of Canada.

Kiera Ladner puts forth similar contentions, arguing for national or treaty representation through nation-based participation. She asserts that particularistic representation could work within this context. Ladner's following statement is included at length due its relevance:

> I would argue, with absolute certainty, that national and/or treaty representation would increase Aboriginal participation in electoral politics. Providing for such representation would enable Aboriginal people to participate in Canadian electoral politics as nations and to vote as, and for, citizens of their nations. A system of guaranteed representation could liberate Aboriginal people from the forces of assimilation, as individuals would not be forced to participate in the alien system as "Canadians." Instead, they could participate in electoral politics as members of their nations and in a manner that could be designed to incorporate Aboriginal peoples as "nations within." I would argue that enabling nation-based participation in electoral politics would...[guarantee] the inclusion of Aboriginal peoples as candidates and actors in electoral politics. Moreover, it would enable Aboriginal people to participate (as voters, as candidates and in debate on issues) as members of nations... .[14]

It is argued here that the approach suggested is certainly feasible for Canada. The primary precondition is political impetus, followed by substantial resources, time and Aboriginal involvement needed to formulate the conditions for success. It may be that Canadian governments will lack the political will to undertake such a considerable task,

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[14] *Ibid.* at 25.

particularly in the face of limited resources and potential public objection. Are the federal and provincial governments willing to engage in more than symbolic tokenism by officially recognizing the role of Aboriginal communities as nations participating fully within Canadian electoral systems? Will the governments then embark on a path to secure effective Aboriginal representation and improve Aboriginal voter turnout? How would changes be applied at the federal and provincial levels and in different regions across Canada? The implications of this recognition necessarily entail increased and significant access to resources for Aboriginal peoples, thus weighing as an important consideration for any government with the perspicacity to undertake this task. This is indeed a tall order, and thus may be difficult to realize, but anything less seems arguably ineffective.

Alternative Modes of Aboriginal Engagement in Elections

Of course, there are many other types of political involvement in which Aboriginal peoples could take part, including beyond elections. For the purposes of this dissertation, the scope had to be narrowed to a specific form of political participation in order to keep the analyses manageable. However, the discussion would be remiss if it were not acknowledged that Aboriginal peoples are involved in the political landscape of Canada in other ways. Indeed, similar contentions are often raised in the context of the democratic deficit, discussed above, wherein voters are suspicious of politicians and political institutions, and thus seek to effect political change through alternative

mechanisms aside from more traditional means of political engagement. Indeed, as research has shown on mainstream Canadian youth, Aboriginal youth are less politically-engaged in traditional types of engagement, but may become involved in other ways.[15] Such involvement might entail protest activities, such as demonstrations, rallies, blockades or sit-ins among other methods, which, as noted near the start of this dissertation, are tools increasingly used by Aboriginal peoples.

Yet, at the heart of these modes of engagement is a confrontational attitude, one which is not likely to build relationships or foster trust. In fact, Martin Whittles categorizes these kinds of Aboriginal engagement as part of the "confrontational model," where "government is presented as the principle obstacle to Aboriginal objectives," and this includes the combative nature of Aboriginal rights litigation.[16] While such activities arguably draw attention to and promote public awareness of important social concerns, their potential effectiveness at promoting reconciliation or repairing relationships is questionable. This underscores the importance of developing mutual respect, trust and inclusivity in achieving Aboriginal reconciliation through increasingly-positive interactions and active engagement.

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[15] See Taiaiake Alfred, Brock Pitawanakwat and Jackie Price, *The Meaning of Political Participation for Indigenous Youth: Charting the Course for Youth Civic and Political Participation* (Ottawa: Canadian Policy Research Networks, 2007).

[16] Martin Whittles, "Degree and Kind: Civic Engagement and Aboriginal Canadians," in *Finding Their Voice: Civic Engagement Among Aboriginal and New Canadians, The CRIC Papers No. 17* (Montreal: Centre for Research and Information on Canada, 2005) 9 at 11.

LAND NEGOTIATIONS AS ABORIGINAL ENGAGEMENT: AN EFFECTIVE PATH TO RECONCILIATION?

Chapters Seven, Eight and Nine on land claims offered a different approach to reconciliation through the engagement of Aboriginal peoples in the negotiations process. While the negotiation and settlement of land claims, akin to modern-day treaty-making, have as their underlying purpose Aboriginal reconciliation, how effective at achieving reconciliation are the negotiations processes in practice? Does this form of engagement provide a valuable path to reconciliation? As with engagement through elections, the negotiation of land claims arguably provides many fruitful possibilities to repair and build the relationships between Aboriginal peoples and the rest of Canada, but the processes leading to settlement are not without faults or difficulties. How might the negotiation of land claims be improved so as to provide more effective Aboriginal reconciliation?

Power Imbalances at Play[17]

As discussed in Chapter Eight, criticisms are often levelled at the Supreme Court for being too activist in its approach, yet its hesitance with regard to Aboriginal governance is apparent. This hesitation may be due to the Court's reluctance to step into the fray on matters deemed to be more appropriately dealt with at the political level of

[17] Except for the final section in this chapter, earlier versions of portions of the remainder of this chapter were published in Jennifer E. Dalton, "Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claims Agreements?" (2006) 22 Windsor Rev. Legal & Social Issues 29 at 67-74, Copyright © 2010 Windsor Review of Legal and Social Issues.

negotiations. It can be argued that negotiations are inherently more democratic than litigation, given that they are consultative and have the purpose of reaching an understanding, as opposed to the adversarial, zero-sum nature of court litigation. There is certainly credence to this argument, but in the context of comprehensive land claims negotiations, there is still an important power imbalance at play. When taken into consideration, the more democratic nature of comprehensive land claims negotiations is somewhat questionable. "[T]wo fundamental conditions must be met for negotiation to be successful in terms of objective fairness. Both parties must exhibit the will to negotiate, and there must be relative equality between the parties. However, in Aboriginal claims negotiations, there is not equality between the parties, nor is the will to negotiate in earnest always present."[18] As a result, although negotiation may be an appealing option, "[...] the nature and extent of the power imbalance between the parties often makes it almost impossible for equitable negotiations to take place, both in terms of process and outcomes."[19]

Examples of the power imbalance at play are numerous. For instance, the Canadian government defines essentially all of the negotiations processes, including the framework for negotiations, negotiation terminology, regulations and negotiators. The negotiations process is usually set within a competitive, adversarial context, which is

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[18] Andrea Gaye McCallum, "Dispute Resolution Mechanisms in the Resolution of Comprehensive Aboriginal Claims: Power Imbalance Between Aboriginal Claimants and Governments in Negotiation" (1995) 2:1 *Murdoch U.E.J.L.*, online: http://www.austlii.edu.au/au/journals/MurUEJL/1995/13.html.
[19] *Ibid.*

often incongruous with Aboriginal approaches to consensus decision-making. Moreover, the fact that it is up to the government to determine whether a claim will be accepted or not is a significant indicator of power imbalance at the very beginning of the negotiations process.[20] Ultimately, the sovereignty of the Crown is paramount and cannot be questioned.[21]

A conflict of interest is also present, since the potential for legal redress to challenge federal government determinations is limited within the negotiations processes, ultimately requiring the federal government to determine the validity of claims brought against itself.[22] Further, there is no formal or effective means of supervising negotiation strategies of federal or provincial governments.[23] One central exception is the Indian Claims Commission,[24] which often serves, in the eyes of many Aboriginal groups, as an effective and fair appeal body outside of the judicial system.

Applied to the issue of Aboriginal engagement in the negotiation of settlements, this sort of power imbalance potentially undermines the effective functioning of the relationships between the parties involved, including between the Aboriginal

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[20] *Ibid.*

[21] Assembly of First Nations, Joint Committee of Chiefs and Advisors on the Recognition and Implementation of First Nation Governments, *Our Nations, Our Governments: Choosing Our Own Paths* (Ottawa: Assembly of First Nations, 2005) at 43.

[22] Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 272.

[23] *Ibid.*

[24] The *Specific Claims Resolution Act*, S.C. 2003, c. 23 (Bill C-6) was passed by Parliament on November 4, 2003 with the purpose of replacing the Indian Claims Commission with the new Canadian Centre for the Independent Resolution of First Nations Specific Claims. This development never occurred and instead, the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 came into effect, establishing the Specific Claims Tribunal in October 2008.

communities and their representative negotiators. Where Aboriginal peoples feel disadvantaged in the negotiation relationship, trust is apt to be impaired, possibly negatively affecting the negotiation process, as was particularly the case for the Nunavut settlement. As the scholarship and theory on belonging and trust indicate, where trust is undermined and where individuals or communities feel excluded, disengagement is more likely to occur. Conversely, trust, inclusion and respect need to be fostered in order to build participation and engagement, and thus in the context of land negotiations, the imbalance in the negotiation relationship is an issue that needs to be addressed. While it is obvious that land claims agreements may still be settled, even where trust is lacking and despite the imbalance in relations between Aboriginal claimants and governments, it is argued here that claims might be settled more expeditiously if more attention were paid by all parties to fostering mutual respect and trust. While this is not a guarantee, at the very least more meaningful reconciliation mandates such improvements in the relationships between Aboriginal peoples and the rest of Canada, particularly given the centuries of mistrust and exclusion that have characterized Aboriginal–Canada relations.

Extinguishment and the Fallacy of Certainty

Despite the Supreme Court of Canada's recognition of the doctrine of Aboriginal title, and despite various calls from task forces, commissions and scholars to end its policy of extinguishment, the federal government has done little to alter this part of its approach to comprehensive land claims agreements. Of course, as was discussed earlier,

more recent agreements have included broader land rights and removed the explicit language of extinguishment. Yet, the latter is really nothing more than a matter of semantics, wherein blanket extinguishment provisions have been replaced by "surrender," "cede" or "release" clauses and, in some cases, non-assertion clauses, whereby the affected Aboriginal peoples may not claim in the future any rights that are not outlined in the agreements.[25] Ultimately, the end result is the same – the government achieves supposed certainty in the agreement, but Aboriginal title and rights must be relinquished in order to achieve a final settlement.

Extinguishment has important ramifications for the engagement of Aboriginal peoples in the negotiation of land claims precisely because of the impact on the negotiation relationship. As was noted above in the context of the power imbalances which exist in the negotiation relationship between Aboriginal peoples and Canadian governments, extinguishment of Aboriginal and treaty rights and the language of extinguishment have consistently been significant sources of contention for Aboriginal claimants. Additionally, some instances where Aboriginal peoples refused to agree to the extinguishment of rights resulted in the collapse of negotiations. The contentious nature of extinguishment is such that it arguably undermines trust, thereby damaging the negotiation relationship between Aboriginal peoples and Canadian governments. Equally important, the extinguishment of Aboriginal and treaty rights arguably lies at the heart of

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[25] Paul Rynard, "'Welcome In, But Check Your Rights at the Door': The James Bay and Nisga'a Agreements in Canada" (June 2000) 33 Can. J. Pol. Sci. 211 at 218.

Aboriginal identities and concomitant nationalism. Where existing or inherent Aboriginal and treaty rights are relinquished, some Aboriginal peoples may feel that part of their identities are effectively dismantled and replaced by alternative rights "granted" in new settlement agreements, potentially causing further alienation or feelings of exclusion.

There are several problems with the current approach of the federal government. At the root of these problems is the goal of certainty, which the federal government has continually sought in finalizing comprehensive settlements. As noted earlier, the rationale behind achieving certainty revolves around the clear articulation of those Aboriginal rights that are included in agreements. The purpose in relinquishing rights "is to provide 'confirmation from Aboriginal groups that the rights written down in claims settlements are the full extent of their special rights related to the subjects of the agreement'."[26] However, this effectively precludes any possibility that the courts could interpret Aboriginal rights and title more broadly at a later time had the surrender of such rights not occurred.

The problem is not that Aboriginal peoples do not have land or various rights; these are outlined specifically in the agreements. The problem is that original, inherent

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[26] Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essay on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 208 at 213 [Asch and Zlotkin].

rights of Aboriginal peoples must be surrendered, leaving their futures uncertain. As asserted by Mark Stevenson,

> the approach by at least some Aboriginal peoples has been to find a new relationship with the Crown that is intended to reconcile two different perspectives of history, sovereignty, and land ownership. It is hoped that this process of reconciliation will continue to breathe life and richness into existing rights so that these rights can survive and unfold in their full splendour. Critical to this approach is the *recognition* of rights that have long been held sacred.[27]

While both Aboriginal peoples and the Canadian government want to achieve certainty,[28] their conceptions of certainty are in stark contrast to each other. For the federal government, the purpose of certainty is not a process of reconciliation between Aboriginal peoples and the rest of Canada, but instead a legal technique used to achieve a high level of specificity regarding the rights and obligations flowing from land claims agreements.[29]

Further, the title and rights that are extinguished are exchanged for an untested treaty, which will need to serve the requirements of future generations. This is particularly difficult since extinguishment is forever and any remedies respecting the extinguished rights are exhausted.[30] While recent agreements have provided for fairly

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[27] Mark Stevenson, "Visions of Uncertainty: Challenging Assumptions," in Law Commission of Canada and the British Columbia Treaty Commission, *Speaking Truth to Power: A Treaty Forum* (Ottawa: Public Works and Government Services Canada, 2001) 113 at 114 [Stevenson] (emphasis added).
[28] The need for certainty for Aboriginal peoples as well, not just the Canadian government, is reviewed in British Columbia Claims Task Force, *Report of the British Columbia Claims Task Force* (Victoria: Ministry of Aboriginal Affairs, 1991) at 28.
[29] Stevenson, *supra* note 27 at 114.
[30] *Ibid.*

extensive rights, many agreements include a "non-assertion/fall back release policy," wherein the Canadian government is

> indemnified against all violations of Aboriginal or treaty rights in perpetuity. ...The terms of such agreements limit the exercise of aboriginal rights to such an extent that they have in essence extinguished their inherent rights. Aboriginal parties retain only an inconsequential form of aboriginal title on what always amounts to a drastic reduction of their traditional territories.[31]

Yet, the federal government maintains that the fundamental rationale behind "extinguishment," or whatever the alternative term might be, is to achieve certainty. As asserted by Michael Asch and Norman Zlotkin, one of the primary causes behind failed negotiations is the drastically different perspective of Aboriginal peoples versus Canadian governments on the purpose of negotiations and settlements. They assert the following, which is quoted at length due to its relevance:

> Aboriginal people overwhelmingly view their rights and title in a framework very different from that articulated in current federal policy. Resolving the extinguishment issue ultimately rests on changes in the thinking that has produced the federal policy provisions for certainty and finality; but first it requires accommodation between two very different conceptual orientations.
> [...]
>
> As viewed by most Aboriginal peoples, Aboriginal title is a very broad concept that encompasses much more than rights to use and occupy ancestral lands. It includes rights to governance and jurisdictional rights to make laws, rendering it equivalent to the concept of underlying title in Canadian legal theory. Aboriginal people most often speak of Aboriginal title as something which is given to them by the Creator and is dependent on their relationship with the land. As Aboriginal title flows from the Creator, it is inherent; it is not something granted to Aboriginal people by an alien legal system. Aboriginal people see Aboriginal title as inextricably linked with their identity as

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[31] Congress of Aboriginal Peoples, *Background Paper for the Canada Aboriginal Roundtable Negotiations Sectoral Session* (Ottawa: Congress of Aboriginal Peoples, 2005) at 6.

> Aboriginal people. In their view, the nature of their title is very certain [... and] well defined.[32]

Many Aboriginal peoples consider the affirmation of their inherent rights as foundational to improving relations with Canada.[33] Along this line of thought, Asch and Zlotkin affirm the importance of "mutual accommodation," a term taken from the RCAP, in the context of land negotiations. They assert the importance of a "mutually legitimating partnership among equals," comparatively similar to historic treaty negotiations between nations. This approach would certainly appear to promote both reconciliation alongside recognition of Aboriginal difference, but Cairns implies that such an approach would not build cohesiveness and is actually unattainable. He notes that "[c]ontemporary treaties are situated in a federal system in which Aboriginal peoples are also part of the very communities with whom they are bargaining. The goal is not to readjust relations in an international system, but to rearrange domestic relations in a common country to which we all belong."[34]

There are also underlying problems with the certainty approach espoused by the federal government. For example, despite the extinguishment clauses included in land claims agreements, certainty has not been achieved in all cases. For example, since the implementation of the *JBNQA*, litigation and challenges have been brought against that

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[32] Asch and Zlotkin, *supra* note 26 at 214-215. For further discussion on the contrast between the perspectives of Aboriginal peoples and the Canadian government on certainty, see Stevenson, *supra* note 27 at 114-118.
[33] Asch and Zlotkin, *ibid.* at 218, 228.
[34] Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 193.

particular agreement precisely because of the disagreement and controversy caused by its uncertainty. In this instance, certainty was provided neither for the Aboriginal peoples involved nor for the Quebec government to proceed with further development. Ultimately, experience shows that legislation or agreements that extinguish Aboriginal rights will never result in certainty if there is an ongoing sense of injustice.[35] In other words, the settlements are not considered stable. This sort of injustice has contributed significantly to the negative perception that many Aboriginal peoples have of their relations with Canada. Extinguishment or relinquishment of rights is very reminiscent of assimilationist tendencies in earlier Aboriginal-Canadian relations, often serving as a disincentive for Aboriginal peoples to engage in negotiations in the first place, while proving to be "inconsistent with the Aboriginal objective of developing relationships with Canada."[36] Worse still, assimilation is usually closely connected to ethnocentrism, which, in the case of Canada, would indicate that the dominant legal, political and cultural values are considered superior to those of Aboriginal peoples. "At its most basic level, government policy on negotiations and extinguishment derives from the ethnocentric manner in which government envisions its relationship with Aboriginal peoples and asserts underlying title."[37] At best, these depictions present certainty as a fallacy, and at worst, as a misguided tool to serve assimilationist, ethnocentric motives.

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[35] For further discussion, see *ibid.* at 219.
[36] *Ibid.* at 221-222.
[37] *Ibid.* at 222.

Negotiating Land Claims: Meaningful Reconciliation Despite the Drawbacks

Despite these drawbacks and problems inherent in land negotiations, sight should not be lost of the potential for reconciliation through Aboriginal engagement in the process. Simply put, land negotiations do offer a positive alternative to the combative, all-or-nothing landscape of litigation and, at the very least, they provide Aboriginal peoples with opportunities to be involved in the development of their futures. Yet, as argued in the preceding chapters, there are many improvements to the process which must be made. This is especially so if more meaningful reconciliation is to be achieved through Aboriginal engagement in negotiations.

Nevertheless, do land negotiations provide an effective mode of engagement for Aboriginal peoples? Why do Aboriginal communities decide to submit a claim and participate in this process of reconciliation? Quite apart from the historical and legal circumstances that spur an Aboriginal community on to submit a claim, cultural predispositions unique to each community are likely to play a role. In other words, some communities may be more inclined to seek remedy especially where breaches are considered particularly grievous. However, in this context, Aboriginal nationalist sentiments as well as feelings of alienation or mistrust are apt to be involved. Conversely, other communities may simply consider it appropriate to *engage* with Canadian governments to seek restitution for wrong-doing, including the ultimate end of reconciliation. In all cases, it is reasonable to assume that the distinct identities of the

Aboriginal peoples involved are likely important in affecting the community decision to embark on the land negotiations and settlement processes.

At the same time, and despite the barriers to achieving settlement, it must be recognized that not all members of an Aboriginal community might agree with the entire substance of final agreements, irrespective of whether they were actively involved or engaged in the negotiations process. In this context, engagement should not be viewed as consisting solely of the final outcomes or the written agreements themselves. Indeed, negotiated settlements are ultimately compromises, which cannot reasonably accede to all individual preferences. For this reason, it is possible that the remedies suggested herein are not sufficient. Nevertheless, it is argued that engagement in this context ideally allows Aboriginal participants the opportunity to be involved and participate in the final outcome, regardless of what that outcome may be. The key is the *quality* of participation and involvement offered throughout the process, and this is where trust, belonging and inclusivity must be apparent in order to achieve meaningful engagement and reconciliation.

THE WAY FORWARD: ON THE ROAD TO ABORIGINAL RECONCILIATION THROUGH ENGAGEMENT

This is precisely why Aboriginal engagement, rooted in the theoretical underpinnings of trust, mutual respect and inclusivity, is advocated in this dissertation as an important and novel pathway to achieve meaningful reconciliation. Some degree of societal belonging or cohesiveness, alongside trust and cooperation, are central to

achieving reconciliation, and these sentiments can be fostered through the engagement of Aboriginal peoples. Moreover, increased frequency of social interaction that is respectful, inclusive and acknowledges Aboriginal distinctiveness arguably leads to the building of social cohesiveness. This, in turn, grows with use and promotes further trust, cooperation and a sense of belonging, thereby advancing the broader cause of Aboriginal reconciliation.[38]

Underlying these contentions is the need for *cultural sensitivity*, as examined in Chapter Three. Framed as an amalgamation of the theoretical underpinnings of social capital and social intelligence, cultural sensitivity involves a compassionate awareness and acceptance of Aboriginal distinctiveness and should be used as a foundation for repairing the relationships between Aboriginal peoples and the rest of Canada. A theoretical framework of cultural sensitivity would allow for recognition and respect of Aboriginal difference, while also embracing the inclusion of Aboriginal peoples, thereby fostering a sense of belonging and promoting increased societal cohesiveness. In this respect, such an approach arguably acknowledges the need for unity and belonging as promoted in Cairns' *citizens plus* theory or Williams' *shared fate* approach, but goes

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[38] See Robert Putnam, "Bowling Alone: America's Declining Social Capital" (1995) 6:1 J. of Democracy 65; Rachel Gibson and Ian McAllister, "Virtual Social Capital, Political Attitudes and Political Participation," paper presented at the *2009 Annual Conference of the American Political Science Association*, Toronto, Ontario, August 31, 2009, online: http:/ papers.ssrn.com/sol3/papers.cfm?abstract_id=1451462 at 1.

further, allowing for a significant degree of cultural difference, similar to Taylor's emphasis on *deep diversity* and the RCAP vision of mutual respect and sharing.

The bottom line is that an awareness of and respect for the uniqueness of Aboriginal identities must underlie the electoral and land negotiations processes in order to effectively and meaningfully engage Aboriginal peoples. When this is achieved – where such fundamental changes in attitudes, perspectives and approaches are made – the path to meaningful reconciliation will come into view, and the reparation of relationships between Aboriginal peoples and Canada will be within reach.

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