

"Our Native Peoples":

*The Illegitimacy of Canadian Citizenship and the Canadian Federation
for the Aboriginal Peoples*

by

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Abstract

It is often assumed that because Aboriginal peoples reside within the boundaries of Canada they are “Canada’s Aboriginal People”. It is because of this assumption that the Aboriginal peoples face difficulties achieving the recognition of their inherent right to self-determination.

This thesis presents an examination of how Aboriginal peoples became Canadian citizens. It is argued that this inception into the Canadian definition of citizenship was done without their consent. The result is that Canadian citizenship is illegitimate for the Aboriginal peoples. It is further argued that because Canadian citizenship is illegitimate so too is the framework on which our definition of citizenship is based.

The goal is to develop a model of association which will remain consistent with Canadian values which federalism espouses, as well as ensuring the legitimacy of association for the Aboriginal nations. The framework achieved combines elements of treaty and Althusian federalism with aspects of non-territoriality and multiple citizenship status. The result is a celebration of Canada as a multi-nation state.

This model was tested for its validity and flexibility among three groups of Aboriginal nations as well as with the federal government. The model demonstrated congruency with the aspirations of the Aboriginal nations examined. However, it is not clear that the federal government is willing to accept the notion of Canada as a multi-nation state as proposed by the framework. The framework remains a goal to strive for to achieve a legitimate Canadian federation.

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Introduction

The release of the report by the Royal Commission on Aboriginal Peoples (RCAP) in 1996 has succeeded in focussing more attention on the Aboriginal peoples and their relationships with the Canadian government and with Canadian society as a whole. Despite strong support for the Aboriginal inherent right of self-government, cultural distinctiveness, and administration of justice to name a few, the Commission remained of the position that the Aboriginal people are citizens of Canada within the context of the Canadian constitution. Because of this most of the recommendations presumed that accommodation was necessary. For example, for self-government to be realized it will be formed within the context, or more appropriately at the will, of the Canadian federation. The assumption that the Aboriginal peoples are in fact citizens of Canada is one that is made by, I would suspect, most Canadians. However, this is, like so many of our assumptions, not entirely the case. This thesis argues that the stumbling blocks to self-determination may be illuminated more clearly by looking through the lens of citizenship. It is precisely because we have assumed that Aboriginal peoples are citizens of Canada, that they are "our Aboriginal people", that we assume the right to exercise control over their fate. Aboriginal peoples have a unique relationship with Canada. The Aboriginal peoples deserve control over what that relationship is to resemble: one of partnership; of citizenship, or both.

This thesis begins with a general historical survey of the relationship between the Aboriginal peoples and the British Crown and then the Canadian government. This survey examines how the Aboriginal peoples became Canadian citizens. It is argued that because the Aboriginal peoples did not outrightly consent to, in fact protested, becoming Canadian citizens, their definition as Canadian citizens is suspect.

It is further demonstrated that from this illegitimate beginning, the relationship between Canada and the Aboriginal peoples has become distorted. This has tarnished the relationship between Canada and the Aboriginal peoples which is evident by current social factors, such as a lack of efficacy and self-destruction prevalent in Aboriginal communities. Thus, it is argued that because the definition of who is a Canadian citizen illegitimately includes the Aboriginal peoples, then the citizenship code is itself illegitimate. Moreover, it is the contention of this thesis that if the citizenship code (that which defines who is Canadian and his/her rights and obligations) is illegitimate then so too is that which houses these rights and obligations--the Canadian constitutional framework.

The goal in Chapter Two, "Creating the Framework", is to evaluate various options for Canada and the Aboriginal peoples to restore the legitimacy to Canadian citizenship and the Canadian federation. This chapter remains within the framework of federalism for its survey of political options. It also investigates some pluralist, non-territorial models of association. The benefits and disadvantages, for both Canada and the Aboriginal nations, of each option is explored. The final part of this chapter presents a framework which combines aspects of treaty and Althusian federalism, along with notions of non-territoriality and multiple citizenship. It is argued that the proposed framework provides the best opportunity to restore the nation-to-nation relationship between Canada and the Aboriginal nations while remaining within the ambit of federalism.

Chapter Three defines an eleven-step test to which the proposed framework is subjected. The framework is tested for its flexibility and feasibility in Aboriginal nations as well as with the federal government. It is argued that if the proposed framework is to be completely successful

then all components of the test have to be met. However, it should be noted that the proposed framework is an ideal conceptual model. Thus all components of the test may not be met at this current time but should be considered as necessary elements for the restored relationship between Canada and the Aboriginal nations.

The following chapters (Four, Five, Six and Seven) provide the analysis of the proposed framework. Each chapter closely examines a particular Aboriginal nation or group of nations (the Mohawks of Kahnawake, the Treaty Nations of Saskatchewan, and the Nisga'a of the Nass Valley). This is necessary because of the diversity among Aboriginal nations geographically and in their traditional political philosophies. Different Aboriginal nations have different histories with respect to the relationship with Europeans and governments which affect the way they view their present and future relationship with Canada. This same test was applied to the federal government to understand what will guide its policy direction for the future.

In some cases all elements of the proposed framework were evident in either present policy initiatives by the case nations or in their identified desires for the future, such as with the Mohawk nation of Kahnawake. However, in some instances, some elements of the proposed framework were visible while others were not. This was the case with the federal government. Based in large part on the federal government's response to the RCAP report, ("Aboriginal Action Plan"), it is clear that not all elements of the test are apparent. There is not the explicit recognition of Canada as a multi-nation state by the federal government as the proposed framework elucidates.

The Conclusion to the thesis articulates what these findings mean for the proposed framework. The main argument is that if all elements of the proposed framework were already

present in some form then the current relationship between the Aboriginal nations and the federal government would not be so tenuous. Because alterations to the current Canadian framework would require fundamental (constitutional) change it is unlikely that it would be accepted automatically. However, as many Canadians will attest, negotiations for constitutional change are a reoccurring political exercise and thus, there is hope that needed change to the relationship between Canada and the Aboriginal peoples will be achieved.

Methodology

This section begins with a brief description of what has often been labelled as the "two different world views": Aboriginal and non-Aboriginal. This is significant to highlight because the author comes from a non-Aboriginal perspective. Thus, it is necessary to identify the differences in the Aboriginal and non-Aboriginal approaches to the acquisition and dissemination of knowledge as well as specifically the difference in our conceptions of the state and its roles.

It is, of course, problematic to dichotomize different ideologies into Aboriginal and non-Aboriginal categories due to the incredible diversity within both Aboriginal and non-Aboriginal societies. However, these descriptions are presented as "ideal types", and they are not intended to be seen as an exhaustive examination of the world views but as general guidelines to the differences that exist. These different world views, will then be translated into the different manners in which knowledge is generated and disseminated within their societies.

Different World Views.

Menno Boldt and Anthony Long (1984; 1985; 1993) have been interested in deciphering the differences in world views for over the past decade. They have provided us with invaluable information concerning how these differences are and are not reflected in Canadian constitutional and legal circles.¹ They explain that society in a western-liberal context is conceived as an aggregate of individuals who are governed by self-interest. The state, as an artificial construction,

¹Rupert Ross (1992. 1996) has also written on the differences between the Aboriginal and non-Aboriginal world views. His work concentrates on the Canadian justice system. He compares its focus on punishing the guilty individual with an Aboriginal view which takes into account the person's role and effect on the community. He suggests that the Aboriginal way of dealing with deviant behaviour is first to recognize what caused the person to commit a crime. Then the person guilty of the crime must begin to heal by accepting that he/she has hurt someone. Finally the person must seek help to heal the problem which caused him/her to commit the act. (Ross 1992: 5-23). The goal is to take a holistic approach to dealing with criminal acts by looking for the root problem rather than punishing the act. There is also an effort to deal with the problem within the community because the individual is an inextricable part of that community.

is in charge of mediating among self-interested individuals. The individual is considered paramount to any particular group, and in relation to the state, individuals are seen as interacting individually not as a part of a group (Boldt and Long 1984: 418).

Traditional Aboriginal society on the other hand is not centred on the individual but sees the individual as one part of the cosmos. In fact the individual is subordinate to the whole. There is an understanding of the interconnectedness of all life: animal, plant, things.... Because of this interconnectedness, there is a need for harmony, or peaceful cooperation. This cooperative notion was modelled in traditional forms of governance, where communities engaged in an extensive consultative process in order to achieve consensus. This is very different from the current electoral model imposed upon Aboriginal communities where the majority rules (Boldt and Long 1984: 419-421). Secondly, authority was not vested in the "state", but in the Creator from whom customs were derived. Boldt and Long explain that "[c]ustom carries authority of a 'moral kind'; that is, it obliges individuals, by conscience, to obey. This is quite different from law that is a dictum accompanied by an effective sanction" (Boldt and Long 1985: 338). To use a very over-used word, but one which has resonance with this explanation, Aboriginal society has a very "holistic" conception of itself in relation to the cosmos. This is in stark contrast to the western-liberal tradition which instead views individuals as compartmentalized and separate from the rest of the cosmos.

This has relevance because of the relation to the production, dissemination and retention of knowledge. In a society that views the individual as paramount, knowledge is produced by the individual and in the interest of the individual. Tony Hoare and Chris Levy (1993) have articulated the distinction between western-liberal knowledge and what they term Indigenous knowledge.

They explain that western-liberal knowledge is based on the scientific method which seeks to achieve progress within science through its experimental methods. Thus, its knowledge employs rational analytic reasoning, is measurable and tends to discount intuitive wisdom and mythology (Hoare, and Levy 1993: 47). They state that "western science continues to be guided by a mechanistic, reductionistic view of the universe which considers all living and non-living phenomena as separate parts" (Hoare and Levy 1993: 46). This reductionist notion is consistent with the view of a western-liberal society which consists of an aggregate of individuals on a linear path of progress.

Knowledge in the Western tradition then is disseminated by individuals for the sake of achieving progress. It is critical that the knowledge producer is acknowledged and it is thus preserved in written form. Knowledge that is produced generally fits into what Kuhn has coined "paradigms" (Kuhn 1970) and is disseminated through everyday structures and institutions. The medium really does become the message in that we continually reassert western-liberal knowledge and world views through the unavoidable engagement with everything.

Aboriginal knowledge systems are also reflective of the society from which they originate. The interrelation and interconnectedness of things in the cosmos is different from the mechanistic approach of western-liberal knowledge. Knowledge is not measurable but based on one's experience, thus there could be many versions of knowledge. This knowledge is often disseminated through the oral tradition. The knowledge that is passed down does not reflect any "paradigm", but again is related to the person's own experience.

This thesis has attempted to account for these differences through the methodology employed. I have chosen to remain at the conceptual level providing a critique of the current

Canadian definition of citizenship and federalism. From this point I develop a framework that will restructure the relationship between Aboriginal nations from how it is presently constituted. This framework is based on the treaty process which has its roots in both Aboriginal and non-Aboriginal societies. Another form of federalism (Althusian) is also used to expand the notions in treaty federalism. This form emphasizes critical elements of Aboriginal society such as sharing, communication, and autonomy, as well as remaining within the federal framework which may be conceptually easier for the federal government to address. I have also approached topics of non-territoriality and citizenship from the perspective that Canada is a multi-nation state and thus, it must relax, or reformulate, its previous conceptions of borders and citizenship definitions.

The framework proposed was tested with three case Aboriginal nations (the Mohawk nation of Kahnawake; the Treaty nations of Saskatchewan; and the Nisga'a of the Nass Valley) and also with the federal government to assess its feasibility and flexibility. Knowledge of the traditional political philosophies of these nations were received from Indigenous writings and testimonies. The history of the relationship between the Aboriginal and non-Aboriginal peoples was derived from a combination of Indigenous and non-Aboriginal sources. A combination of oral and written material was used. Information on the current practices and proposals of the test nations was received from the policy papers and other research studies from the case nations themselves. The information for the federal government's initiatives was taken primarily from the notes of the recent government response to the RCAP report and their published record of achievement. The goal was to use a variety of sources to test the proposed framework.

Part One
Chapter I--The Illegitimacy of Canadian Citizenship
and Canadian Federalism

Introduction

This section outlines a brief history of the Aboriginal peoples and how Canadian citizenship came to include them in its assumptions. Early relations of shared sovereignty and Aboriginal autonomy are represented in treaty arrangements. This is also reflected in the Royal Proclamation which declared tribes as "nations". However, various pieces of legislation (early forms of the *Indian Act*) began to incorporate the Aboriginal peoples as wards, then as citizens of the state. The theoretical basis from which this legal incorporation is derived is explained by the changing notion of citizenship and sovereignty. Early notions of citizenship were based on a political and social community rather than on a legal definition of who is a part of the community. Change occurred during the process of nation-building in North America. The common assumption was that one could assert sovereignty over a territory if the people were legally deemed as "citizens" of your country. What has resulted is an illegitimate Canadian citizenship in which only the legal status of citizenship has been addressed.

This split between the legal notion and the normative functions of citizenship has not gone unnoticed by many theorists concerned with the nature of community. Four theories of community that have attempted to accommodate minority groups and Aboriginal people are investigated for their insight. Liberal theorist Will Kymlicka has been recognized in recent years for his outstanding work for respecting and even promoting group affiliation within a Canadian framework. He supports certain group rights that would protect the integrity of a group as a vital component to any liberal theory. American theorist Iris Marion Young has gone further in

extending group rights to effectively change the nature of citizenship. She argues that "differentiated citizenship", where an individual has a different citizenship status based on his/her membership in a group, is how citizenship theory must be employed to ensure that the rights of minorities are protected. Gerald Alfred, a member of the Mohawk nation of Kahnawake and a professor at the University of Victoria, has used what he calls "Ethno-nationalism, Autonomy" to assert the sovereignty of the Aboriginal nation and the possibility for partnership between the Aboriginal nation and the Canadian nation-state. This effectively changes the basic assumption of Canadian citizenship. Aboriginal people become legally citizens of their nation and also, if desired, members of the Canadian nation. Work done by James Tully will also be used to explain the process through which this can be accommodated in a contemporary constitution.

From these theories, I suggest that the "ideal" is that promoted by Alfred and Tully, but it may be the most resisted solution by Canadian policy-makers because of the fear of the consequences of a multi-nation state. However, we must recognize not only the diversity of Aboriginal peoples but also the right of the Aboriginal peoples to determine their own relationships when looking at any general theoretical model.

In the Beginning

Many oral accounts of treaties illustrate the respectful relationships between the colonialists and the Aboriginal nations. The RCAP explains that "[i]n the treaties, the British Crown and the Indian nations pledged undying loyalty to one another. The Crown's honour was pledged to fulfilling solemnly made treaty promises. When these promises were dishonoured, the results were shameful" (RCAP 1996: vol. 2(1), 16). What is also noted in these accounts is that the respect and recognition of the nations was to be continually renewed. The relationship did not

have an end, it was always to exist as agreed to in the treaties. The recognition of the Aboriginal nations' autonomy was recognized and respected by the Crown.

The relationship described by the historic treaties is reflected in the 1763 *Royal Proclamation*. While it may be known as the "Magna Carta" of the Aboriginal peoples the *Royal Proclamation, 1763* did not only deal with Aboriginal nations but also with Britain's relationships with its other colonies. The significance of the Proclamation is that it recognized Aboriginal peoples' as having nation status and autonomy over land and its members. The 1763 *Royal Proclamation* marks a watershed period for Aboriginal/non-Aboriginal relations.

The proclamation not only clearly recognizes the Aboriginal peoples claim to the land that they occupy, but also differentiates Aboriginal nations from other British colonies:

"And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds" (*Royal Proclamation 1763: 5*).

Both the colonies and the Indian Nations are under the protection of the Empire which asserts the independent status of the Indian Nations or Tribes. What is also critical is that by clearly identifying that the Aboriginal peoples held sovereignty over the land, (having not ceded it), the Empire was *not* purporting the "conquest thesis" that has become so popular in many historical accounts of the relationship.

This sovereignty is further recognized by the strict policy of land transfer. The proclamation insists that:

"[w]e have thought proper to allow Settlement; but that, if at any Time any of the Said

Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians..." (*Royal Proclamation 1763*: 5).

Had the notion of Indian inferiority been present at this time, the integrity of the nation would not have been recognized.

However, despite these positive aspects, the *Royal Proclamation, 1763* has not been without its questions. There are some who argue that the Proclamation actually signified a loss of sovereignty for the Aboriginal nations. Ken Tyler (1981) has argued that the Aboriginal peoples became subjects of the British Crown at the time of the Proclamation and thus surrendered their claim to the lands they occupied. He argues that the because the Proclamation "prohibited [Aboriginal people] from disposing of their lands, except to the Crown...they came to be described and regarded as wards of the government" (Tyler 1981: 6). Thus, the view of some is that the *Royal Proclamation, 1763* did not protect the sovereignty of the Aboriginal nations. Instead, the Proclamation sealed the fate of the Aboriginal people as subjects of the British Crown.

The *Royal Proclamation, 1763* should be recognized for its double nature. The differing interpretations lend to the complexity of the argument as to the degree to which Aboriginal nations retained shared sovereignty over land they occupied. This conflict and confusion play a prominent role in the relations between Aboriginal and non-Aboriginal people. What is important to emphasize, however, is the clear recognition of the integrity of the Aboriginal nation at the time of the Proclamation and the recognition that Aboriginal consent must be received before land transfer could occur.

From the period of 1763 to 1867 these qualities of respect for sovereignty and strength would diminish substantially. Certainly, the decline in Aboriginal populations due to epidemics and the increase of colonialists to North America contributed to this changing relationship. However, it is also clear that the notion of citizenship transformed to reflect "nation-building" rather than kinship had a resonating influence on the forthcoming policies.

The notion of citizenship has Greek and Latin derivatives with a definition such as that provided by J.G.A. Pocock: "a community of citizens is one in which speech takes the place of blood, and acts of decision take the place of acts of vengeance" (Pocock 1995: 30). There is the notion of the citizen as a political or social being which participates in the ruling of the community. Thus, the "citizen rules and is ruled..." (Pocock 1995: 31). The citizen is recognized as a political being.

However, this particular political notion of the citizen was transformed into a legal definition. Pocock suggests that "[h]is relation to things was regulated by law, and his actions were performed in respect either of things or of the law regulating actions" (Pocock 1995: 35). The legal conception of citizenship altered the relationship between state and society, making the state the arbiter of conflicts.

James Tully further explains that this had a particular affect on the concept of nation. A nation now became defined by its constitutional association. In a constitutional association two sets of rights were guaranteed: equality amongst the citizens, and equality between nations (Tully 1995: 124-126). Thus, if a nation was now only identifiable as such if it had a constitutional order, then lands occupied by nations not conforming to this definition would no longer be recognized as "nations".

What now became critical in nation-building was to acquire more citizens which would then be translated into having more territory. It did not matter whether this was consensual incorporation, as long as the people of the territory were acquired in some manner. Tully quotes Hobbes to illustrate the common assumption that:

"uniformity leads to unity and so to the strength and power needed to hold out in the competition with other European powers over the wealth and labour of the non-European powers. Diversity leads to disunity, weakness, dissolution and death" (Tully 1995: 196).

Thus, expansion of the nation could only be achieved by asserting sovereignty over territory that was not occupied by other "nations".

By 1844 the nation-building exercise was in fully operational in Canada. There were significant problems, caused by this shift in the conception of "nation", between Aboriginal peoples and non-Aboriginals to warrant an onslaught of Commissions and pieces of legislation to contain the "Indian problem". This period in the mid-1800's is critical to the analysis of how Aboriginal people became Canadian citizens, because of the marked change in policy attitudes. For example, the Bagot Commission in 1844, indicated that there were significant problems on Indian lands due to alcoholism and poor administration of funds. The dominant recommendation was to centralize Indian policy. The RCAP notes that:

"[t]he commissioners were concerned that Crown protection of Indian land was contrary to the goal of full citizenship in mainstream society. In their view, maintaining a line between Indian and colonial lands kept Indians sheltered from various aspects of colonial life such as voting....The Bagot Commission therefore recommended that Indians be encouraged to adopt individual ownership of plots of land..." (RCAP 1996: vol. 1, 268).

Clearly the relationship had altered. There was not the recognition of Aboriginal sovereignty, nor

the respect of the treaty promises. What became prominent was the view that Aboriginal people should become citizens of the colonies. Not only was this what should be done, but this was also perceived to be a desired goal by Aboriginal people themselves.

But, if we remember the significant aspects of nation-building, it becomes clear that it was beneficial for the colonialists to make the Aboriginal people citizens, in some form or another, so that they could claim sovereignty to their land. It would still appear logical, though, that if the desired result is an increase in population, hence an increase in territory, then getting the consent of those affected would be the best, most just, way to proceed.

The notion of European superiority comes to the forefront. Tully uses Locke's concept of the individual to explain that Aboriginal people were identified as at the most primitive stage of development: the "state of nature" meaning that they were incapable of forming a nation. This is summarized by Tully as,

"neither nationhood nor territorial jurisdiction at this early state. Rather, Indians govern themselves on an individual and *ad hoc* basis by applying the law of nature and punishing offenders as cases arise" (Tully 1995: 72).

Thus, securing Aboriginal consent was deemed unnecessary.

This had particular ramifications on the appropriation of lands and citizens occupying those lands. Tully argues that because Aboriginal people were assumed to be in a state of nature then the assumption was that "any persons may appropriate uncultivated land without consent as long as there is enough and as good left in common for others" (Tully 1995: 72).

The conclusion derived from this explanation was that if the Aboriginal peoples have neither nationhood, nor territorial jurisdiction, then the colonialists do not have to seek consensual incorporation. Thus, at the time of nation-building, the consent of the Aboriginal people was not

felt to be a necessary factor because they were not defined by a constitutional association (or nation), and they were also considered to be in the most primitive form of development.

These sentiments were carried over to the 1858 Pennefather Commission which argued that Indians were civilizing at a slow pace, and that this was not the fault of various policies encouraging civilization but due to the apathy and laziness of Indians. Clearly, Aboriginal people were now deemed as inferior to the colonies.

The policy which precedes the Pennefather Commission but which is directly linked to its premises is the *Gradual Civilization Act, 1857*. The goal of this piece of legislation was again to civilize Indians and to make them legally apart of the colonies. The process was through voluntary enfranchisement. It is clear that the policy makers assumed that achieving full citizenship would be a positive goal for Indians to reach. However, as the RCAP reports, this policy was a complete failure. Only one man, Elias Hill, attempted to become enfranchised from 1857-1876 (RCAP 1996: vol. 1, 277). What this indicates is that although the colonists assumed that citizenship in the colonies would be a desired step for "civilized Indians", Aboriginal people still remained members of their own nations, refusing to voluntarily become citizens of the Dominion.

The 1876 *Indian Act* was a consolidation of previous legislation. Its scope and power over Aboriginal people was broad, delving into issues of band governance, justice, and membership. The range of powers evident in the *Indian Act* are significant because it ushered in a new era of legislative policy-making when it came to First Nations. Voluntary enfranchisement was replaced with legislated membership definitions. This was justified again by notions of Indian inferiority, which made them "children" or "wards", but not yet citizens of the state.

It took almost a century for Aboriginal people to become legally defined as citizens in

Canada, although as has been illustrated, legislated membership to the colony is evident. According to the *Citizenship Act*, Aboriginal people were distinctly excluded from having citizenship status until, in 1956, all Indians defined by the *Indian Act* are included as citizens (*Citizenship Act* 1956: 33). While the 1956 Code is a legal definition of citizenship status, exercising citizenship rights is not yet fully disclosed to Aboriginal peoples.

If we take what is commonly seen as a Western characteristic of citizenship status, the right to vote, Indians were not deemed citizens of Canada until the 1960 amendments to the *Canada Elections Act*. This notion that recognition of citizenship status is the ability to vote is supported by the *Canada Elections Act* which states that only citizens are allowed to vote. In the Act preceding the 1960 amendments granting Indians the right to vote, Indians were specifically disqualified from voting. The 1952 *Canada Elections Act* states that:

(2) The following persons are disqualified from voting at an election and incapable of being registered as electors and shall not vote nor be so registered, that is to say,
 (e) every Indian, as defined in the *Indian Act*, ordinarily resident on a reserve,..."
 (*Canada Elections Act* 1952: 13).

What is significant about all of these differing statutes on the issues of Indians as citizens is that Canada has had a difficult time completing the process of assimilation to the point of granting full legal citizenship status even though they had been legally defining the nature of Aboriginality for almost a century.

This brief historical account demonstrates that Canada has created an illegitimate Canadian citizenship. This is because we have legally attempted to take away Aboriginality. This is evident in our embrace of rights or legal orientation of citizenship to the detriment of all other

aspects. We have also deemed the community and social aspects of citizenship as negligible in comparison to legislated definitions of who Canadian citizens are. This was done for the purpose of nation-building, in that, incorporating the people occupying a particular territory served as an effective way of asserting sovereignty. Since, the Aboriginal people were at that point considered to be at the most primitive stage of development their consent was not necessary for their legal incorporation.

Consequences of Illegitimate Citizenship

The illegitimacy of Canadian citizenship has consequences for the Canadian community and the Canadian state. Will Kymlicka and Wayne Norman argue in a paper titled "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" (1995), that one of the dangers for a theory of citizenship is the conflation of two distinct concepts:

"citizen-as-legal-status, that is, as full membership in a particular political community; and citizenship-as-desirable-activity, where the extent and quality of one's citizenship is a function of one's participation in that community" (Kymlicka and Norman 1995: 284).

Their argument is that a theory of citizenship should remain relatively independent of legal questions. Any theory which purports to identify a good citizen is not something that can be addressed by legal definitions.

However, if the legal status is what defines the community of citizens and that community of citizens is an illegitimate one, then the legal definitions of the community are also illegitimate. Conversely, if the legal definition of who is a citizen is illegitimate then so to is the community of citizens. Thus, citizen as legal status and citizen as desired activity *are* interrelated. If this is the

case then we should expect major problems amongst the citizens of the legally defined, illegitimate community.

Legitimacy in a community is critical because it demonstrates how citizens feel toward the community they legally make up. Governments require the support, participation, and cooperation of its community, thus, legitimacy becomes ever more necessary. Alan Cairns has suggested that the "fusion of state and society locks citizens and governments in an ever tighter reciprocity in which each party develops an increasing need to influence the other" (Cairns and Williams 1985: 4). Thus, as the modern state has developed it has sought a closer relationship with the community as opposed to earlier times when the state and citizen were more insulated from one another.

Identification of legitimacy is recognized by how the community responds to those who rule over it. Charles Taylor explains that "[t]he society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. Legitimacy declines when this willingness flags or fails" (Taylor 1985: 186, 187). Thus, legitimacy in the community as well as in the legally defined notion of community must appear to be legitimate to the citizens of that community to enable the functioning of the rulers. It then becomes evident that "citizen-as-desirable-activity" is in fact inherent in "citizen-as-legal-status" if the community is a legitimately defined one.

Legitimacy must be reflected both in the definition of citizenship and in the activities of citizens if the nation-state is to perform necessary functions. It is because of the fusion between nation-state and the citizenry that the state must ensure the legitimacy of citizenship. Thus, nationalism is inextricably tied to notions of citizenship because of necessity of citizenship

participation in the functions of the state.

If legal rule is illegitimate then problems in the community will be evident. We can assess the Canadian society and the extent and quality of Aboriginal participation to determine the level of legitimacy in citizenship and community. I will illustrate that Canadian citizenship is illegitimate with several social indicators that suggest that the Aboriginal nations do not feel that the defined nation-state is legitimate.

Perhaps it is best to begin by revisiting the non-consensual legal incorporation of Aboriginal peoples into Canadian citizenship. As mentioned previously, part of the dominant thought at the time was that in order to secure sovereignty over territory, the people occupying that territory were legislated as, first, inferior members of the colonies, and then later, as citizens. Referring back to the historical background it is evident that the Aboriginal peoples did not want to become members of the colonialist society. This is demonstrated by the complete failure of the voluntary enfranchisement policy of 1857, the *Gradual Civilization Act*. Only one person tried to become enfranchised, the rest of the Aboriginal peoples had no desire to trade in their own community status. This illegitimate way of securing "citizen-as-legal status" did not, and does not achieve "citizen-as-desired-activity".

A second example is Prime Minister Trudeau's attempt at erasing the distinction between the Aboriginal and non-Aboriginal peoples in the 1969 White Paper (Government of Canada 1969: 1-13). This was vehemently rejected by Aboriginal peoples as an attempt to rid them of their distinctiveness as well as their unique relationship with the Crown (Grand Council of the Crees 1992). This shows the continued resistance to the legal incorporation of Aboriginal people into Canadian citizenship. Thus, the non-consensual legislative beginning did not create a

legitimate Canadian citizenship either as legal status or as desired activity.

More recent social factors also indicate that the Aboriginal peoples feel alienated and ineffective in the Canadian community and process. This is illustrated by the high levels of self-destruction in Native communities. For example, alcohol and drug abuse remain significant problems in many Aboriginal people. As well, suicides amongst Aboriginal people have reached such epidemic proportions that the RCAP commissioned a special report on its causes and effects.² Levels of violence amongst Aboriginal people has also become a significant problem--particularly for women and children.³ Charles Taylor suggests that "[s]ubjects without efficacy, unable to alter the world around them to their ends, would either be incapable of sustaining a modern identity or would be deeply humiliated in their identity" (Taylor 1985: 194). I would suggest that this sense of alienation and lack of efficacy can be linked to the social stresses that are occurring in most Aboriginal communities. The aspect of "citizen-as-desired-activity" in the Canadian community appears to be absent.

While Aboriginal people are suffering the negative social consequences of illegitimate rule, they are also constantly protesting the system. This is evident in the number of nationalist insurgencies and other forms of resistance over the past decade.⁴ Aboriginal people are now loud enough to cause serious problems for the Canadian government. The illegitimacy of the legally

²Please refer to the report by RCAP titled *Choosing Life: a special report on suicide* (1995).

³A study by the Ontario Native Women's Association (as reported by RCAP) found that 8 out of 10 Aboriginal women experience violence. RCAP also notes as well though that men are victims as well in terms of physical violence, whereas women more often experience sexual violence. (RCAP 1996: vol. 3, 163-165)

⁴Certainly the confrontation at Kahnawake in the summer of 1990 was one of the most media-covered events. Recently, concerns at Ipperwash and Gufstafan Lake all deal with the illegitimacy of the Canadian government in some way. Ovide Mercredi, president of the Assembly of First Nations, also called for a national day of protest against the Canadian government for April 17, 1997.

defined Canadian community has resulted in illegitimate rule by the Canadian government over the Aboriginal peoples. This has caused significant problems for the Aboriginal people as they struggle to retain their sovereignty.

The Path of Most Resistance (for Canadian Citizenship)

I have argued that Norman and Kymlicka's distinction between citizen-as-legal-status and citizen-as-desired-activity is false because the legal definition of citizenship and the community of citizens are reflexive. Thus, if one is illegitimate then the other will also lack legitimacy. However, what is apparent is the recent onslaught of theorists interested in the community aspect of citizenship.⁵ By addressing some of what have been construed as "equality concerns" in Canada about the recognition of Aboriginal sovereignty and self-governments. It will be illustrated that there is also a well-established recognition by most that any community must acknowledge and even strengthen the various groups which compose it. There is also a recognition that Canada has not been entirely successful in doing this.

This section of the thesis argues that the kind of accommodation, such as supporting special group rights, is not adequate for the Aboriginal peoples. In fact both theorists who support this, Will Kymlicka and Iris Marion Young, negate the sovereignty of the Aboriginal peoples with their forms of accommodation. What is necessary is a recognition of Aboriginal sovereignty and autonomy (Gerald Alfred) and then a process which reflects this recognition (James Tully). This is

⁵The list is virtually endless since mostly everything that is done impacts on the community. This has particular salience in Canada because of the "Quebec question". It also has global interest with the increase in civil unrest reflecting illegitimate community. The works cited provides the main Canadian theorists that are interested in this issue.

It should be noted that this thesis does not purport to extend its analysis to the question of Quebec separation.

not as simple as providing administration rights or special voting rights. What it required is a recognition of the illegitimate process by which we have come to include the Aboriginal peoples as Canadian citizens. From this starting point, a dialogic process (such as that subscribed to by James Tully) is the only step possible. Through a dialogue and negotiation, a renewed partnership can arise.

In our society the legal notion of citizenship is captured by the language of rights. This has particular resonance with seventeenth century social contract ideas put forth by Locke, as well as currently captured by contemporary individual rights theorist, Robert Nozick.⁶ In this frame, individual rights are given primacy, and only if individuals will individually benefit do they come together to form a community. It is for this reason that litigation which promotes the primacy of individual rights is necessary. Individualists accept the principle of rights as binding "[b]ut they do not accept as similarly unconditional a principle of belonging or obligation" (Taylor 1992: 30). So with reference back to citizenship, this legalized ideal of the citizen has taken the form of individual rights, where every citizen is provided with equal rights to protect his/her individual freedom.

This line of argument has been particularly powerful in our liberal democratic society. It has been used in the fight to discourage special rights for particular groups. Individual rights advocates argue that awarding special rights to particular groups produces inequality because some individuals are seen as "more equal than others". This was certainly the motivation behind the 1969 *White Paper* discussed earlier. Prime Minister Jean Chrétien, as well as former Prime

⁶ For further insight into Nozick's almost radical individualism refer to his book titled *Anarchy, State and Utopia*, 1974.

Minister Trudeau, were the chief architects of this document. Trudeau is quite well-known for his views on this issue. He views the granting of special rights as a step on the slippery slope to apartheid where some groups become second class citizens (Trudeau 1992: 12). Reform Party members have also been known to take up this line of argument. The basic conclusion is that awarding everyone identical rights is the best way to achieve equality of individual freedom.

Will Kymlicka insists that group rights are consistent with the liberal doctrine of individual freedom. He is not of the liberal view that a colour-blind, equal rights for all approach is possible. His view is, in fact, that groups are necessary for individual freedom. He argues that while every individual has the freedom to choose "the range of options can't be chosen. It is presented to us by our culture and heritage, our education and upbringing" (Kymlicka 1987: 8). He goes further to argue that "[o]ne's language and history are the media through which we come to awareness of the options available to us, and their significance, and this is a precondition to making intelligent judgements about how to lead our lives" (Kymlicka 1987: 9). In other words, the reason groups are necessary in society is because they define the choices we are to have.

Thus, Kymlicka supports strengthening groups in order to maintain individual freedom. This is also necessary to meet the requirement of providing every citizen equal respect. Thus, his view with reference to citizenship is that, "in culturally plural societies, differential citizenship rights may be needed to protect a cultural community from unwanted disintegration" (Kymlicka 1989: 152). In particular, the special status of the Aboriginal people is something which Kymlicka fully supports.

Iris Marion Young also focusses recognition of plurality in society and is motivated by a

sense of justice.⁷ She argues that "[i]n a society where some groups are privileged while others are oppressed, insisting that as citizens persons should leave behind their particular affiliations and experiences to adopt a general point of view serves only to reinforce that privilege..." (Young 1995: 183). She goes further to argue that people can maintain their group identity while still being public spirited (Young 1995: 184). Thus, she also comes to the same conclusions as does Kymlicka, that special rights are needed by particularly vulnerable groups in society.

How these two theorists' notions of differential treatment would be reflected in the Canadian society is through a variety of measures which provide the Aboriginal peoples with differential status. For example, they have both suggested that affirmative action programs be put in place (Kymlicka 1989: 191; Young 1995: 189). Secondly, special political rights would permit the Aboriginal peoples to come to negotiating tables on an equal footing with non-Native people (Kymlicka 1987: 15; Young 1995: 189). Kymlicka is also a supporter of Aboriginal self-government rights (Kymlicka 1987: 15), although it is unclear to what extent. I will revisit this issue later. The idea behind differentiated citizenship is that society becomes more legitimate (or more just) if those who are presently not represented are more included. The ultimate goal is that if society is more inclusive and more democratic then it will also be more unified.

Both Kymlicka and Young have made significant efforts in political theory to make society more inclusive for those that present structures exclude. However, this does not fundamentally challenge the legal definitions of who is a citizen of the community. This is just the problem for the Aboriginal peoples, because they have become legally incorporated without their consent or

⁷This is particularly evident in her book titled *Justice and the Politics of Difference*. 1990. Princeton: Princeton University Press.

will into Canadian citizenry. Both Kymlicka and Young not only ignore this illegitimate beginning to Canadian citizenship but they also discount the retention of sovereignty by the Aboriginal peoples.

Young commits the critical mistake of assuming that Native Americans are the same as every other minority group. She completely discounts their aboriginality as significant enough to warrant particular distinction from other minority groups. She also ignores their domestic dependent nation status that they have in the United States which was a direct response to their sovereignty. Kymlicka points this out in one of his footnotes. He states that:

"some advocates of a 'politics of difference', whose focus is primarily on disadvantaged groups, obscure the distinctive demands of national groups. I think this is true, for example, of Iris Young's influential work on the 'politics of difference'. While she ostensibly includes the demands of American Indians and New Zealand Maori in her account of group-differentiated citizenship, she in fact misinterprets their demands by treating them as a marginalized group, rather than as self-governing nations (I. Young 1990: 175-83; 1993a). The best way to ensure that neither sort of group is made invisible is to keep them clearly distinguished" (Kymlicka 1995: note 10, 199).

Thus, while Young makes an honourable effort at legitimating the community through a differentiated model, she does not acknowledge the sovereignty retained by the Native Americans.

Despite Kymlicka's correct identification of the oversight in Young's work he also commits a similar flaw. His assumption is that while Aboriginal people may be distinct from other minority groups because of their initial sovereignty, they do not retain this sovereignty. In fact he argues that the Aboriginal peoples have been "incorporated" ⁸ into Canadian society and thus the

⁸ To clear up confusion in language. I have suggested that Aboriginal people have become *legally* incorporated into Canadian citizenship. Some may still argue that this is not the case. for example, the revised written argument of Darrell Brereton, Cameron Cardinal and Samuel Lorne Bull Jr. by Priscilla Kennedy for the Provincial Court of Alberta: Criminal Division, 1996. However, my argument is based on what assumptions are made when we think of the definition of Canadian citizenship. I have said that the assumption is that Aboriginal people are Canadian citizens. This is because of the definition of citizenship which has come to mean the Aboriginal people as well.

resultant cultural diversity. He states that "cultural diversity arises from the incorporation of previously self-governing, territorially concentrated cultures into a larger state" (Kymlicka 1995: 10). Thus, Aboriginal people have become fully incorporated into Canadian society. What is necessary then is a process whereby their position in the Canadian society becomes more legitimate through inclusive legislation. However, this does not challenge that this incorporation is an illegitimate inclusion. This then means that what is needed is legislation that does not perpetuate the structures that are illegitimate, but that changes those structures.

This notion of incorporation is the main contention of Dale Turner, a PhD. student at McGill University. He argues that "[i]f we take seriously the claim that Aboriginal peoples were self-governing nations before contact then we must re-examine our understandings of Aboriginal incorporation" (Turner 1997: 17). Thus, while Kymlicka recognizes that Aboriginal people are a national minority in Canadian society, he does not recognize the retention of that sovereignty.

Secondly, Kymlicka supports self-governing rights for the Aboriginal peoples because it would be one method of ensuring that their cultural structures remain strong, thereby, ensuring a better environment from which individual choice can be made. However, Kymlicka does not view self-government rights as having the same inclusive force as either affirmative action rights or special representational rights. This is because he views these rights as nation-building which are in and of themselves not unifying. He argues that "demands for self-government reflect a desire to weaken the bonds with the larger community and, indeed, question its very nature, authority, and permanence" (Kymlicka and Norman 1995: 307). Not only then is it unclear to what extent

However, this is clearly an illegitimate definition because of the lack of consent and also because of the sovereignty that the Aboriginal people still maintain.

Kymlicka supports self-government rights for national minorities, but it is also the clearest example of how Kymlicka does not support a fundamental challenge to the structures as they are now.

It is precisely because of the illegitimacy of the legal definition of Canadian citizenship that the initial relationship based on sovereignty must be revisited. Resistance and apathy, the two characteristics described as evidence of this illegitimacy, will only increase in nature and frequency in the relationship between the Aboriginal people and the Canadian government unless the illegitimate legal definition of Canadian citizenship is exposed. Once this is achieved and the sovereignty of the Aboriginal peoples is recognized, a more legitimate relationship between the Canadian community and the Aboriginal peoples can resume. This is the only way that inclusion will be achieved and this inclusion will be one based again on a partnership between sovereign nations.

Perhaps the best discussion of this renewed partnership is that of Gerald Alfred in his book titled *Heeding the Voices of our Ancestors* (1995). Alfred distinguishes between two concepts of nationalism: ethno-nationalism (statehood) and ethno-nationalism (autonomy). He argues that:

"[c]onventional approaches to the study of non-state nationalism (Meadwell 1989) focus on what may be termed *Ethno-nationalism (Statehood)*, a form clearly oriented to the achievement of political independence and the promotion of cultural distinctiveness among a group within an existing state. This study [*Heeding the Voice of our Ancestors*] extends the analysis to what may be termed *Ethno-nationalism (Autonomy)*, a form which seeks to achieve self-determination not through the creation of a new state, but through the achievement of a cultural sovereignty and a political relationship based on group autonomy reflected in formal self-government arrangements in cooperation with existing state institutions" (Alfred 1994: 14).

While other theorists have maintained the integrity of the Canadian state while making

adjustments to it to make it more inclusive, Alfred maintains the integrity of both the Aboriginal nation and the Canadian state. This is the first theory thus far that recognizes the sovereignty of the Aboriginal nations based on the initial partnership struck between the nations.

Alfred also notes that this is the only path towards a more legitimate Canadian state. He explains that the increasing crises between Aboriginal peoples and the Canadian state have not done anything more than to magnify the illegitimacy of Canadian rule (Alfred 1994: 21). Thus, any change to the structures of the Canadian state must begin with the recognition of this illegitimacy. The process which ensues will then create greater unity, if we take that to mean understanding of one another's distinctiveness and desire to coexist.

James Tully's work, *Strange Multiplicity* (1995), identifies a process which will achieve this goal, not only as an end result, but also as a means to the end goal. He begins with the assertion that modern constitutionalism "was designed to exclude or assimilate cultural diversity and justify uniformity" (Tully 1995: 58). His thesis is "not to challenge within the picture... but to the basic assumptions of modern constitutionalism" (Tully 1995: 43). Tully begins at the beginning rather than accepting the structures as they are and working within them as Young and Kymlicka purport to do.

Tully focusses on a process to arrive at a contemporary constitution. This is achieved through an intercultural dialogue which he views as the only way to come to an understanding between Aboriginal and non-Aboriginal people. His view is that:

"a contemporary constitution can recognise cultural diversity if it is conceived as a form of accommodation of cultural diversity. It should be seen as an activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their ways of association over time in accord with the conventions of mutual recognition, consent and continuity"

(Tully 1995: 184).

Volleying back and forth in constant negotiation is the only way to come closer in understanding and thus the best way to renew the original relationship.

Even though Tully begins at a different place than do Young and Kymlicka, by challenging the structures, he too addresses and even views as goals, notions of unity, inclusion and democracy. For instance, self-government and the recognition of the sovereignty of Aboriginal peoples are, as Tully explains, consistent with the democratic principles that the Canadian society espouses. He argues that "self-government enables Aboriginal peoples, just as it enables non-Aboriginal peoples, to participate in governing their societies in accord with their own laws and cultural understandings of self-rule and so regain their dignity as equal and active citizens" (Tully 1995: 192). Thus, legitimate democratic rule is derived from the community. Tully is arguing that Canadian rule is not legitimately democratic because democracy is only achieved by respecting the will of the Aboriginal people to receive legitimate rule by their own governments.

Tully also recognizes and argues against equal rights theorists who fear that self-government will create undemocratic enclaves where individual rights are thrown by the wayside. First he argues that this is driven by an absolutist notion of rights, that uniform rights ensure democratic freedom. Conversely, sovereignty recognized in a non-absolutist manner will "allow peoples to govern themselves by their own laws and ways free from external subordination" (Tully 1995: 195). This kind of relationship is not foreign to the Aboriginal peoples as it is embodied in early treaty relationships which recognized shared sovereignty. Thus, it appears that recognizing the shared sovereignty in fact breaks away from what is presently an undemocratic

regime.

Tully also addresses concerns that we have seen expressed by authors such as Will Kymlicka, that recognizing sovereignty will not have a unifying force. I have argued that because Canadian citizenship exposes Aboriginal people to illegitimate rule there is a significant amount of resistance to it. This will only increase unless this issue is resolved through the recognition of illegitimate Canadian rule.

Tully also argues to a similar conclusion. However, his premise is with the foundation of the modern constitution, and thus, that is where his case is made. He explains that the modern constitution was founded on the principles of ensuring uniformity not equality to the members of its association. His argument is that this notion of uniformity does not create unity which was, and is, its goal. In fact, Tully suggests that the opposite is true. The imposition of unity only creates disunity (Tully 1995: 195-198). His conclusion is that:

"The mutual recognition of the cultures of citizens engenders allegiance and unity for two reasons. Citizens have a sense of belonging to, and identification with, a constitutional association in so far as, first, they have a say in the formation and governing of the association and, second, they see their own cultural ways publicly acknowledged and affirmed in the basic institutions of their society" (Tully 1995: 198).

Hence, for Tully the recognition of Aboriginal sovereignty is critical for the Canadian state. This recognition is what will end the illegitimate and undemocratic rule of the Aboriginal people by the Canadian state.

Tully's dialogic process is perhaps the closest resemblance to the original treaty relationship struck between the Crown and the Aboriginal peoples. It could achieve the goal of sovereignty recognition stressed by both Alfred and Tully while at the same time reasserting

partnership.

This section is titled "Path of Most Resistance" because while the recognition of the illegitimate rule over the Aboriginal peoples is the only way of making the legal conception of Canadian citizenship legitimate. It will be, and has proven to be, the path that is least accepted by governments. There are a variety of reasons for this reluctance, such as the perceived incapacity of Aboriginal governments and the fear of "lawlessness in Indian country". What is clearest is that these reasons are based on myth and stereotypes that have become pervasive in Canadian society. Unfortunately, what is perhaps at the basis of these myths is the recognition that Canadian rule has been and continues to be illegitimate. What both Gerald Alfred and James Tully have demonstrated is that the recognition of this illegitimacy will lead to a legitimate relationship which should be perceived as the only step possible. Making community more inclusive and democratic cannot only be achieved through various forms of accommodation, it must be initiated by a rejection of the illegitimate legal conception of citizenship which shapes the community.

Conclusion

I have demonstrated through a brief historical account that the legal definition of Canada citizenship for Aboriginal people is illegitimate. The initial arrangement struck between the Crown and the Aboriginal nations was one of partnership, not paternalism. Aboriginal people consistently refused to give up their own community status in favour of Canadian citizenship. The legal construction of citizenship however moved onwards legislating the Aboriginal peoples to the rule by the Crown. I have maintained that this did not and has not in any way removed the sovereignty held by Aboriginal people. But what I have suggested is that the legal assumption that Aboriginal people are Canadian citizens has had adverse effects on their communities. This has taken the

form of resistance.

Recognizing that the Canadian community needs work has been the focus of virtually every Canadian social scientist. This is particularly prominent because of the divisive constitutional battles that have occupied the political main stage. Some theorists, namely Will Kymlicka and Iris Young, do make significant inroads into accommodating difference in the Canadian society. However, their accounts still neglect to address the illegitimate foundation on which Canada is structured. Gerald Alfred and James Tully are theorists who have attempted to redress this problem. As I have categorized them Alfred provides the goal and Tully the process to achieve that goal. What is clear is that both recognize the sovereignty of the Aboriginal peoples as well as the partnership with Canada. However, they do not accept the rule of the Canadian crown as a legitimate rule over the Aboriginal people. Thus, as Tully suggests, a dialogic process is the best way to re-achieve the partnership as agreed to through the treaty relationship. Recognition of sovereignty is the key to this entire process. This must be seen as the only way to make what is illegitimate become legitimate.

Chapter II— Creating the Framework

Introduction

Canada's definitional absorption of the Aboriginal peoples as Canadian citizens creates an illegitimate Canadian citizenship. The historical survey of the colonial policies used to lay claim to the Aboriginal peoples and ignore the original nation to nation relationship is evidence enough to seek immediate change to the current relationship between the Aboriginal people and Canada. Although granting Aboriginal peoples special rights and privileges is necessary to improve the relationship it is not enough to effectively change the illegitimacy of Canadian citizenship and constitutional structure. What is needed is a fundamental challenge to the form of association between Canada and the Aboriginal nations.

In Canada, fundamental change will come through constitutional amendment. Previous attempts at constitutional change have been extremely difficult and thus any suggestion that the form of association be altered is bound to run into an immediate wall of opposition. What this section will demonstrate is that fundamentally changing the form of association can be done within a theory of federalism. This is different from change within the existing federal framework that Canada employs. However it does provide a viable option to the illegitimate Canadian citizenship and form of political organization that presently exists.

Having outlined the historical path that has illegitimately absorbed the Aboriginal peoples into Canadian citizenship, the second part of this thesis presents conceptual options and develops a possible framework of association. This section first explains two general streams of federalist theory: modern federalism and Althusian federalism. It then identifies several other options to organize federal political systems. Because of the territorial emphasis in federal options, I will also

explain two non-territorial models of organization. From this base I will return to the prominent political theorists used in the first section of this dissertation and illustrate where these theorists lie within the spectrum of federal options. I will then attempt to bring the strengths of all of the options together to create a workable framework specifically designed for the Canadian/Aboriginal context. This will remain at the conceptual framework stage and will not go into the organizational design of the instrument to implement it. What I hope to demonstrate is that although Canadian citizenship is not at present a legitimate one, it can be so by fundamentally altering the form of association between Canada and the Aboriginal peoples.

Federalism

The concept of federalism is one that is changing and contestable. As explained by David Elazar, federalism “involves the linking of individuals, groups and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties” (Elazar 1987:5). In general then, the theory of federalism and practice thereof, attempts to secure the cooperation of individuals and groups for the benefit of all who participate.

Federalism derives from the Latin *foedus* meaning covenant. Elazar indicates that “[i]n essence, a federal arrangement is one of partnership, established and regulated by a covenant, whose internal relationships reflect the special kind of sharing that must prevail among the partners, based on mutual recognition of the integrity of each partner and the attempt to foster a special unity among them” (Elazar 1987:5). Thus, the nature of federalism is to promote shared sovereignty and peaceful co-existence. These principles are similar to Aboriginal views of the Aboriginal/non-Aboriginal relationship in that each party is respectful of their shared sovereignty.

This general concept can be further divided into two streams of thought: modern federalism and Althusian federalism. Modern federalism is historically linked to the development of the modern nation-state. Its emphasis is on indivisible and perpetual sovereignty of the state. This may appear in stark contrast to the general principles outlined above. However, modern federalism was meant to temper the dictatorial development of the nation state . Elazar explains that,

“ [i]n a very real sense, the federal principle stands in opposition to the centralized, reified nation-state, which is the principal product of modern nationalism. At the same time, modern federalism was invented to provide either an alternative or a corrective to the classic nation-state model but one that would still be within the parameters of modern state-building” (Elazar 1987:128).

During the nation-building era it was an economic benefit to establish a central government. It provided a base for future territorial expansion and security against external threats. But it was also necessary to allow previously autonomous regions to remain sovereign in certain jurisdictional spheres. Thus, modern federalism was the new structure that would appease these demands.

The creation of the United States of America is often cited as ushering in this era of modern federalism. The fathers of the U.S. constitution created a new form of federalism that allowed for the autonomy of the states within a centralized nation-state. James Madison explained in a letter to Thomas Jefferson, dated October 24 and November 1, 1787, that:

“It may be said that the new Constitution is founded on different principles, and will have a different operation. ... In the American Constitution The general authority will be derived entirely from the subordinate authorities” (Smith 1995: 499).

Modern federalism created a new form of association between previously autonomous regions and the central government. The states retained a large amount of jurisdictional powers and were not subject to dictatorial governance by the central authority.

Modern federalism is also strongly associated with individualism. Daniel Elazar explains that,

“Madisonian federalism is based on the idea that polities are comprised first and foremost of individuals who combine themselves into peoples by choice establishing political institutions in the process by means of political covenants and constitutions” (Elazar 1994: 55).

The shift of modern federalism to individualism is consistent with trends of the time period. All federal constitutions are now in some way modeled after the U.S. Constitution and the modern epoch has embraced the notion of individualism.

Modern federalism gained prominence during the nation-building era of the 18th century displacing what is now characterized as pre-modern federalism. Pre-modern federalism was intimately linked with tribal or generational associations rather than with states. Daniel Elazar explains that,

“[p]re-modern federalism had a strong tribal or corporatist foundation, one in which individuals were inevitably defined as members of permanent, multigenerational groups and whose rights and obligations derived entirely or principally from group membership” (Elazar 1994:58).

The shift during the modern federalism era, as has already been noted, was to ignore group membership in lieu of individual rights.

Linked more closely to pre-modern federalism is Althusian federalism. Named after Johannes Althusius, Althusian federalism presents an option of political association as conceived

in the 1600's. His model is known for its emphasis on the consent and autonomy of constituent units in a consensus-building form of political association. Primarily due to the emphasis on the autonomy of the constituent units involved, Althusian federalism remained on the periphery during the nation-building era. During the time of nation-building autonomy of constituent units was identified as weakness in the union and thus undesired.

Structurally, Althusian federalism is premised on the act of covenant between constituent parts of the union. The constituent parts are the basis of any political organizational structure and retain residual powers. The state never becomes the central focus of political activity. Decisions are made through a consensus-building process amongst the constituent units instead of legislative decisions made by the central government. There is a recognition of the mutual dependency of the constituent parts while also respecting the individual members integrity and autonomy. This process of consensus building is not limited to the confines of a particular nation-state. In fact, Althusian federalism is premised on the notion that this process of communication and mutual dependency is open-ended. (Heuglin 1994: 39-42).

Although deemed inappropriate during the nation-building era, Althusian federalism has gained prominence with federalist scholars and is particularly useful in the Canadian context (Heuglin 1997: 150). The emphasis on consent of the unifying parties (Carney 1964: 19), Althusian federalism highlights one of the missing factors, and main causes of illegitimacy in Canadian citizenship and Canadian federalism. Secondly, Althusian federalism also focuses on the process of political association rather than the product or structure of the political system (Carney 1964: 12). In this way it corresponds well with James Tully's notion of an dialogic process. It also simulates the process of consensus decision-making in traditional Aboriginal governance.

The treaty relationship reached between the Crown and Aboriginal nations is reflective of this tradition of Althusian federalism. Aboriginal nations and the Crown both agreed to treat with the other nation. Consent was a necessary pre-condition to treaty-making. There was mutual respect and acknowledgment of the autonomy and sovereignty of each nation. This is reflected in the recognition by the British Crown in the *Royal Proclamation, 1763* of the nation status of Aboriginal nations. Treaty-making arrangements were not to derogate from the autonomy of the other nation. However, because of the interdependency with respect to land and resources between the Crown and the Aboriginal nations, shared decision-making was essential. The original treaty relationship is the practice of Althusian federalism.

Modern federalism differs from Althusian federalism in that Althusian federalism is generally opposed to the emphasis on centralized organization that modern federalism espouses. Because of the perceived necessity of centralization during the nation-building period to secure economic advantages and territorial expansion, Althusian federalism remained on the periphery. There is also the focus on process of governance or political association in Althusian federalism that is absent in modern federalism. The focus in modern federalism is on the structure or the delineations associated with governance not on the process on consensus-building. Although most conceptual options for federal political organization do not stem directly from Althusian federalism, it is important to recognize the diversity within the discourse.

Political Options

There are several options within the federalism umbrella. Daniel Elazar's operational framework is that federalism is analogous to the "genus" of political organization. The genus houses a variety of organizational choices, or as termed in Elazar's analogy, the "species" within

the genus (Elazar 1987). It is to these species of federal political systems that I now turn.

Federation

The United States constitution ushered in the era of modern federalism with its political system organized in the form of a federation. Currently, however, Canada presents a more recognizable case of a federation than the United States as a result of devolution of powers to the provincial governments. A federation generally has two or more levels of jurisdiction each with a certain amount of autonomy. Elazar defines a federation in the following manner:

“[A federation] is a polity compounded of strong constituent entities and a strong general government, each possessing powers delegated to it by the people and empowered to deal directly with the citizenry” (Elazar 1987: 7).

It differs from other federal political systems such as a federacy or an associated statehood in that the spheres involve co-ordinancy in decision-making (Watts 1994: 11). A federation differs from a confederal arrangement because “the component units are direct subjects of state law on the basis on a constitution, and the ‘residual power,’ (i.e. the power to create new powers and responsibilities), typically lies with the sovereign federal/national legal government. Member units can be overruled by majority vote” (Heuglin 1994: 12). Thus, although the constituent parts have a constitutionally protected jurisdictional sphere of decision-making in a federation, broader powers generally remain with the central authority.

Confederation

A confederal political arrangement is generally associated with the European Economic Union. In Canada it is also affiliated with the original treaty relationship between Canada and Aboriginal nations. In fact Thomas Heuglin argues that the confederal nature of the relationship between Aboriginal nations and Canada is recognized in Canadian law. He cites,

“[t]he affirmation of treaties as the most important if not sole basis of Aboriginal-Canadian relations, by Aboriginal themselves, indirectly by the way of the Royal Proclamation of 1763 recognized Aboriginal people as ‘Nations,’ and by Section 35(1) of the 1982 Constitution Act, clearly places these relations into a *confederal* perspective and context” (Heuglin 1994: 13) (emphasis added).

He goes further to argue that the insistence of an existing right of self-government stems from this view that the relationship was never transformed from a confederal one (Heuglin 1994: 13).

Others support the validity of this argument by Heuglin (Brown 1995; Watts 1994) such as Douglas Brown who suggests that “[i]n such arrangements, Aboriginal peoples could have a relationship with the Canadian state as judicially equal partners, with institutions to manage the confederal relationship suited specifically to Aboriginal needs and political culture” (Brown 1995: 47). Thus, the key to a confederal relationship is that of equality between partners.

By definition a confederal arrangement links several autonomous nations for purposes of a general nature such as defense. Elazar defines it in this way:

“...whereby several pre-existing polities joined together to form a common government for strictly limited purposes, usually foreign affairs and defense, which remained dependent upon its constituent polities” (Elazar 1987: 7).

The European Union, as stated earlier, represents a current example of the formation of a confederal political arrangement. However, as Elazar notes in a recent publication, the European Union is attempting to divest itself from the common problems associated with an overarching single government. Instead the European Union has erected several multi-purpose authorities to serve its states. In this way the focus is on administrative and judicial institutions that have clearly limited spheres of competence rather than legislative spheres (Elazar 1994: 54). The changing nature of a confederation is not unique to political arrangements. As with all political systems evolution and adaptation is inevitable.

The legal recognition of a confederal arrangement by most accounts already exists in Canada. However, the exercise of jurisdictional power has been dominated by the Canadian government. The Canadian government has continued to impose Canadian policies on Aboriginal nations. This is not to deny or abrogate from the continued exercise of the inherent right of self-government of the Aboriginal nations. It is meant to highlight, however, the discrepancy in the autonomy of decision-making by Aboriginal nations which is a necessary requirement of a confederation. It is also meant to emphasize that if a confederal arrangement was evident in practice, then Aboriginal nations and the Canadian government would come together for issues of a general nature. It is evident then that currently there is no balance in this relationship let alone any kind of practical exercise of a confederal relationship. Recognition of a confederal relationship in the Canadian Constitution is not enough to ensure that it is practiced.

However, many would argue that the resurrection of a type of confederal relationship may be possible and desirable in the future. Other nations may feel that another political arrangement would be more advantageous. The disadvantage of a confederal relationship is that there will be a concerted effort on the part of Canada and the Aboriginal nations to stay out of the affairs of the other. Some nations may desire and be prepared for this to occur, but others may want some influence of the Canadian government and also wish input in Canadian policies and resources. This will not occur in a confederal arrangement.

Asymmetry

Another option is a form of asymmetrical federalism. An asymmetrical relationship is one where the central (Canadian) government remains the head of the state but has different relationships with different regions. In other words an Aboriginal nation would have a different

relationship with the Canadian government than a municipality. The Aboriginal nation would have different jurisdictional powers and functions. Daniel Elazar explains that,

“[r]ather than seeking full independence, they [internal nations] have sought an asymmetrical federal association with the larger state which enables them to share in the benefits of association with a greater power without being incorporated within it, even as a constituent polity” (Elazar 1987: 54, 55).

The advantage of an asymmetrical relationship is that the Aboriginal nations would still benefit presumably from Canadian wealth which is necessary for the set up of an infrastructure in many Aboriginal nations. This does mean that Canada will still retain a great amount of influence over the development of Aboriginal nations. It does not necessarily correspond, however, to a greater amount of Aboriginal influence at the level of Canadian policy.

There are several types of asymmetrical arrangements that are present in the literature. One example is a federacy. In this relationship the smaller polity has a great deal of autonomy compared with other segments of the larger polity. However, because of this autonomy the smaller polity foregoes any significant participation in the larger polity. Any change in the relationship must be consensual between the two parties (Elazar 1987: 55). Douglas Brown has suggested that this type of arrangement is difficult when the polities share the same territory and it seems to work best when the smaller polity is an island or otherwise removed from the larger polity (Brown 1995: 48).

An associated statehood is another form of an asymmetrical relationship. The smaller polity again has a large amount of internal autonomy and in this case is institutionalized as a state. It remains associated with the larger state and therefore does not constitute a confederal arrangement. However, either party may unilaterally dissolve the relationship according to pre-

established procedures (Watts 1994: 10).

Both of these arrangements have the benefit of allowing for internal autonomy which the Aboriginal nations desire. However, as previously argued, they offer a limited amount of influence at the level of Canadian policy decision-making. Aboriginal influence at this level is critical because of the shared sovereignty between Aboriginal nations and Canada. Aboriginal people are also not confined to a particular territory and thus will come into regular contact with Canadian institutions and policies. It will be necessary for the respect of Aboriginal traditions that Aboriginal input is received at the policy-making level.

Treaty Federalism

Treaty federalism is the next option which has received significant attention because it revives the importance and status of the treaties for many Canadians. Treaties have always held a particular importance for Aboriginal peoples because of the solemn promises that are contained within its parameters. Treaties are used by the Aboriginal peoples not only in their relations with Europeans but more generally as the normal way of conducting business with other tribes. They are used as instruments to secure peaceful co-existence between nations. Heuglin explains that,

“‘treaties’ are expressions of the Aboriginal understanding that tribes, bands, nations, peoples, or, indeed individual family clans are based on diplomatic communication, not legalised codes of central and unitary authority” (Heuglin 1994: 11).

In this sense treaties were and remain a very important part of the working relationship amongst Aboriginal people.

Treaties are included as a federalism option because they are federal in their character. Predominantly they begin with a covenant or an agreement of co-existence which is an essential

starting point of a federal political structure. They also demonstrate respect for the other partner's autonomy in certain areas. Finally, they exhibit a set of mutual obligations which must be met by each party (Watts 1994: 18).

Treaty federalism is most often used in the Canadian context to distinguish it from provincial federalism which is dominant in the Canadian federation (Brown 1995; Watts 1994; Heuglin 1994). Heuglin explains that:

“...in the Canadian context [treaty federalism] pertains to the affirmation of a two-row organization of Canadian federalism from its very inception. One, originally based on the British North America Act of 1867, and perhaps best called ‘provincial federalism,’ establishes the relationship between the central government of Canada and the provinces; the other and in fact older establishes a parallel relationship between the Crown and Aboriginal peoples” (Heuglin 1994: 11,12).

The parallel nature of treaty and provincial federalism speaks to the very real potential of revitalizing this legacy of treaty-making as the basis of a new relationship between Canada and the Aboriginal peoples. It has the benefit of being a process and framework that has already been agreed to by both the Canadian government and the Aboriginal nations. However, the process of modern treaty-making has been less than pristine and thus steps would have to be taken to ensure a fair negotiation.

Non-territorial Models

A major issue that must be addressed in the process of establishing a new relationship with Canada is the notion of territoriality. It is clear that Aboriginal peoples are not confined to any one particular territory within Canada but are spread throughout North America. This raises a spectrum of questions concerning how any type of association will be struck. Pervasive throughout contemporary thought is the notion that the nation-state occupies a clearly delineated

territory. Nation-states defend the borders that they demarcate as their own. However, David Elkins (1992) has argued that this notion of territoriality is a relatively novel one, originating with the building of nation-states. He further argues territoriality need not erect any barriers to creating new relationships with the Aboriginal nations. In fact, Elkins suggests that this may be the wave of the future with increasing globalization making nation-states vulnerable (Elkins 1992: 13-16).

Mary Ellen Turpel and Peter Hogg in their research paper for the RCAP (1994) also explore the notion of non-territoriality with respect to jurisdictional issues. Their argument delineates between personal and territorial jurisdiction. Territorial jurisdiction allows the nation to have control over a given territory but not beyond that. However, personal jurisdiction allows citizens to take their rights and obligations with them when they leave territorial boundaries. The nation continues to exercise jurisdiction over its citizens despite the fact that they may reside elsewhere (Hogg and Turpel 1994: 13, 14). Thus, in the event of a non-territorial structure, this aspect of personal jurisdiction could be incorporated.

Thus, two of the most common forms of non-territorial forms of political organization (consociation and corporatism) could play a role in creating a new relationship between Aboriginal nations and Canada. It must be stated clearly that these two non-territorial forms do not fit the strict definition of federalism because they are not territorially constituted. In every major source, (Elazar 1987; Livingston 1956; Pocklington 1985; Watts 1994), territorial demarcation is a key element defining a federal political structure. However, that does not mean that non-territorial models cannot be used to broaden the scope of federalism.

Consociation

A consociation is made up of broad coalitions of people who are brought together for

linguistic and social similarities. Daniel Elazar explains that, “[c]onsociationalism emphasizes the existence of essentially permanent religious, ethnic, cultural, or social groups, ‘camps,’ or ‘pillars’ around which a particular polity is organized” (Elazar 1987: 22). There is power-sharing among these coalitions and delegated decision-making to separate units. In a consociation, as similar to a federal political system, there are different spheres which represent different areas.

Representatives are rendered through majority vote and seek to best represent their constituents in a central institution.

The differences between a federal political system and a consociation are numerous. The most evident difference, as has been noted earlier, is the notion of territoriality which is integral to a federal political system but unlikely in a consociation. Another major difference is the formality of the coalitions. A federal political system is institutionally recognized by a written constitution that documents the divisions of powers and obligations of the polities. The coalitions in a consociation, on the other hand, do not share this constitutionalized document. Daniel Elazar argues that,

“[w]hereas federalism involves both structures and processes of government, consociationalism involves processes only. These processes may be embodied in law at some point, ..., but the closest they come to being embodied in formal structures is through the party system, which is rarely constitutionalized as such” (Elazar 1987: 21).

Thus, these two major differences clearly distinguish consociationalism from federalism.

These differences may also make Aboriginal nations wary of employing a consociational model for their future relationship with the Canadian government. First because a consociation is a number of coalitions based on religious, ethnic and other social factors, Aboriginal peoples might be lumped into one large coalition. This would obviously not take into account the

differences among Aboriginal nations. More substantially, however, is that it would not recognize Aboriginal nations as such but as a minority group seeking special representation. This is contrary to Aboriginal beliefs, aspirations and history.

Consociational type government is also noted as being top-down, or elitist. This is because its form is similar to a pyramid structure where decisions are made by those at the top. This is one of its chief downfalls (Presthus 1973). It is also contrary to the consensual decision making style of many of the Aboriginal nations. In this instance it does not have the characteristics that would allow it to create a legitimate relationship between Aboriginal nations and Canada because it does not fundamentally alter the position of the Aboriginal peoples within the Canadian federation. However, what is important to note is that is a non-territorial alternative to political organization of the state.

Corporatism

The second model is corporatism. It is similar to a consociation because it is a non-territorial alternative to political organization. It also relies on informal agreements between polities. Elkins explains that “[b]oth [a consociation and corporatism] are nearly always informal arrangements, and both rest on trust and mutual respect” (Elkins 1994:21). Elkins does recognize this as a serious problem with the two models and proposes that “[they] be ‘constitutionalized’ adequately so that rules, procedures, and powers are spelled out more carefully and which relied as little as possible on trust in one’s opponents or allies” (Elkins 1994: 21). Thus, there could potentially be methods of getting around some of the problems associated with these informal, non-territorial models.

Corporatism although similar to consociationalism in many respects is different in one key

way. In a corporatist model coalitions are formed around a class basis. David Elkins explains that “[i]nstead of ‘societies’ or ‘peoples’ intermingled in the same territory, corporatism assumes an occupational or class base to public policy-making” (Elkins 1994: 20). This may not be a model that is that appropriate for the Aboriginal/Canadian relationship, however, it is meant to highlight again a non-territorial model of organization.

Political Theorists’ Choices

Both the federal political models and the pluralist forms that I have described present considerable options for the Aboriginal peoples and the Canadian government. To understand the implications of these models I will return to the prominent political theorists used in the first section of the thesis. I will locate these theorists within the spectrum of forms of political organization.

Both Iris Marion Young and Will Kymlicka support a notion of differentiated citizenship. This implies a different citizenship status for individuals based on their membership in a particular group. This would be replicated in the political system with differing representational and voting rights. Because of the lack of territorial definition these two theorists present more of a pluralist solution for the Aboriginal/Canadian relationship. From the work of Young and Kymlicka it is not clear whether this would be a consociational organization or a corporatist one. It would most likely be a combination of the two forms.

Neither fundamentally challenges Canadian citizenship nor its constitutional structures. Instead it seeks a devolution of rights and privileges for the Aboriginal peoples. This in the first instance would in no way differentiate Aboriginal peoples from other special interest groups. This is not acceptable to most Aboriginal people. Aboriginal people have struggled very hard to defend

to Canadians their “aboriginality” as opposed to their minority status.

Following this theme, because Kymlicka and Young include Aboriginal people in the same status as other minority groups, Aboriginal nations do not constitute a federal unit. If not a federal unit then special representational and voting rights would have to be devolved from a central authority to these groups. This is contrary to the nation to nation arrangement agreed to in the treaties. It is also in opposition to a federal relationship. Daniel Elazar explains that,

“[f]ederal polities are characteristically noncentralized; that is, the powers of government within them are diffused among many centers, whose existence and authority are guaranteed by the general constitution, rather than being concentrated in a single center” (Elazar 1987: 34).

In other words, if a polity is non-centralized the Canadian government cannot devolve powers to the other federal partners. Since powers would have to be devolved to Aboriginal nations the solution proposed by Kymlicka and Young does not represent a federal solution nor does it challenge the structure that currently exists in Canada.

Charles Taylor distinguishes between ethnic minorities and national minorities in his notion of “deep diversity” (Stasiulis 1995: 211, 212). He argues that “deep diversity is the only formula on which a united federal Canada can be built” (Taylor 1991: 76). He stresses the presence and enduring nature of diversity within Canada. His first level of diversity is composed of the population that have ethnic backgrounds. He suggests that these people, although diverse in their backgrounds, can nevertheless have a common Canadian goal. The second level of diversity consists of national minorities such as French Canadians and the Aboriginal peoples. This population looks at Canada through their own national lens. Second level diversity is deeper than first level diversity and must be accommodated in Canada (Taylor 1991: 75, 76). It is not clear

what type of association Taylor proposes. He could support similar ideas to that of Young and Kymlicka or he could support an association that assumes more autonomy for these national minorities. It is clear that he does deem it necessary to change the mode of association that occurs at present in Canada.

Gerald Alfred is a proponent of a fundamentally reformed federalist structure. His work argues for the recognition of “ethno-nationalist autonomy” (Alfred 1994: 14). He clearly differentiates this from “ethno-nationalist statehood” (Alfred 1994: 14) which he says is more representative of Quebec’s ambitions. Ethno-nationalist autonomy refers to the desire and belief that Aboriginal nations retain cultural sovereignty and autonomy over decision-making. This would be reflected in self-government arrangements made in cooperation with the existing Canadian state (Alfred 1994:14). Alfred carefully maintains the sanctity of the Canadian state while also reasserting the original relationship between Canada and his Mohawk nation.

His work suggests a solution within the Althusian federalist theory because of his emphasis on the constituent parts. The emphasis in Althusian federalism is on symbiosis, communication, and autonomy. All three of these characteristics seem to be critical elements of Alfred’s view on the Aboriginal/Canadian relationship.

What is important to note is that Alfred is not advocating a confederal relationship between the Mohawk nation and Canada. A confederal relationship would be achieved based on a state to state relationship. The state aspect is critical for this type of federal political structure. The benefit of not advocating a confederal relationship is that it allows for an increased rather than decreased role of Aboriginal participation at the policy-making level because of the emphasis on cooperation. Situating Alfred’s work in the tradition of Althusian federalism offers some

exciting possibilities for the future of the Aboriginal/Canadian relationship.

James Tully could also support an Althusian federalist approach because of its view that the basis of a political system is communication to reach consensus. This is similar to Tully's advocacy of dialogue. He argues that,

“[d]ialogue is the form of human relationship in which mutual understanding and agreement can be reached and, hence, consent can replace coercion and confrontation” (Tully 1995: 18).

I have argued that this process of communication of Tully's provides the necessary precursor to structural change. Althusian federalism suggests that communication, or process, is a critical and a perpetual element. Thus, Althusian federalism provides the option that this author would support.

Building a Framework

From this analysis of varying conceptual options I argue that no one option will provide the constructive base for the new relationship between the Aboriginal nations and Canada. I use concepts from a variety of options in order to create a new framework that will transform an illegitimate Canadian citizenship and constitutional structure into legitimate ones. The resurgence of the treaty-making process raises the hope that the federal government has recognized the salience of this parallel form of federalism that exists in Canada. It is clear however that Aboriginal peoples enter into relations with the Canadian government with a certain amount of trepidation. This is understandable considering, as Douglas Brown notes, that the modern federalist structure has been the colonial instrument of choice by the Canadian government (Brown 1995: 2). The goal of this framework is to change the modern federalist structure. It can be done fundamentally while remaining within the broader theory of federalism.

The Aboriginal treaty relationship reflects the characteristics of treaty federalism. The

recommendations of the RCAP suggest the treaty relationship should be the basis of the new conceptual option. There are several reasons for this but most importantly treaties should be considered a base to this relationship because of the symbolic importance and long tradition of treaty-making in the Aboriginal nations and non-Aboriginal relationship. A treaty represents the formal recognition of the promises of peaceful co-existence agreed to by the parties involved. It also enshrines the duties and obligations that each party must fulfill in this relationship. These promises are considered to be perpetual and organic. Treaties are also formally recognized by the signatories. Formalization practices vary from nation to nation but the formal nature of the treaty remains constant. This is something that is missing but could perhaps be accommodated in a consociation or corporatist arrangement which relies on the goodwill of the parties involved.

The treaty relationship also closely resembles the attributes designated by the Althusius model of federalism. Again the key characteristics of symbiosis, communication, and autonomy work well with Aboriginal traditions. This comparison is made by Thomas Heuglin (1994). He suggests that the tree of life in Aboriginal traditions is reflective of the symbiosis or sharing of the Althusian tradition. The circle's use in the process of consensus-building is analogous to the emphasis Althusius places on communication as the basis of a political system. The two row wampum symbolizing the autonomy of the Aboriginal nation and Canada is also a goal promoted by the Althusian tradition (Heuglin 1994: 54). The similarities between many of the Aboriginal traditions suggest that Althusian federalism should be the stream followed in creating a new relationship with Canada.

It is also necessary to use the notion of non-territoriality in conjunction with these other concepts of treaty and Althusian federalism. In Canada, David Elkins is the chief proponent of this

idea. His argument is that the notion of the territorial basis of political authority is a recent and not universally accepted phenomenon. Challenging territoriality does not mean however an end to the nation-state. What it does mean is that nation-states will perform fewer sovereign functions than before (Elkins 1994: 1-14). In this instance, Hogg and Turpel's (1994) notion of personal jurisdiction could be incorporated into the functions of the nations within the state. This has salience with the Aboriginal peoples because of the fact that political authority of a nation will most likely be spread out throughout the country. It also has importance for the Canadian government to assuage fears that change will mean the "break-up" of the country.

Because of the shared sovereignty over the land and the close cooperation needed between nations, citizenship status should be shared between Canada and the Aboriginal nation. Recommendations 2.3.8 and 2.3.9 of the RCAP similarly suggests that Canadian and Aboriginal nation citizenship be shared and formally recognized in Canadian passports (RCAP 1996). The Aboriginal nation may do what it wishes with its own citizenship status, but Aboriginal peoples must be able to retain their Canadian citizenship status. It must be remembered that although Althusian federalism supports autonomy, it is still a federal form, meaning that there remains a significant amount of interaction between nations. Pragmatically, because of the sharing of territory it will be necessary for extensive cooperation between nations. Other more autonomous federal forms are generally maintained because there is a territorial space between the nations.

Structure of the Framework

The purpose of this thesis is to propose some conceptual options that will rectify the relationship between the Aboriginal nations and Canada. This section will explore some of the many of the structural questions that arise from the conceptual option offered.

First, I have made an assumption as to the base of the new relationship that should be further explained and questioned. Following the recommendations put forth by the RCAP, the base of the proposed structure is the Aboriginal nation (RCAP 1996: vol. 2). The RCAP defines an Aboriginal nation as “a sizable body of Aboriginal people who possess a shared sense of national identity and constitute the predominant population in a certain territory or collection of territories” (RCAP 1996: vol. 2 Part 1, 107). The nation would, according to RCAP, be self-identifying. Partly because of this, the nation is seen as the vehicle for self-determination. The enormity of delineating nations will be compounded by the difference in size and wealth of Aboriginal communities. RCAP suggests that the development of Aboriginal nations should be guided by a process of recognition.

This process is carefully articulated in recommendation 2.3.27, the “Aboriginal Nations Recognition and Government Act” (RCAP 1996: vol. 2, Part 1). This legislation would be enacted by the Parliament of Canada and would establish the criteria needed by the government of Canada in order to recognize an Aboriginal nation. These criteria would cover aspects of language, history, culture, and ability to support itself politically and economically. RCAP suggests that the Canadian Parliament would also need to see evidence of a fair and judicial process for individuals to air disputes regarding membership status and other critical issues. According to RCAP’s recommendation there would also be provisions to provide financial resources to enable Aboriginal nations to exercise their political authority as well as provisions to permit the Canadian government to vacate its legislative authority with regards to the Aboriginal nation. The Aboriginal nation itself would similarly have concerns about the Canadian government’s trustworthiness that would have to be addressed.

There are other options to the nation to nation relationship other than that purported by the RCAP that should also be taken into account. David Elkins has suggested an Aboriginal Peoples Province (APP) which would be viewed by the Canadian government on the same level as other provincial governments. He views it as the pragmatic form of association as opposed to nations. In other words, an APP would be an association that may allow for the desired autonomy the Aboriginal peoples desire as well as less radical change than perhaps what I am suggesting. There would also presumably continue to be significant financial influence by the federal government through transfer payments. This suggestion also averts the danger of having many small Aboriginal nations that are unable to support themselves (Elkins 1994: 28-30).

Another possible solution to the problem of small nations unable to support themselves is the creation of regional governments. This would entail the pooling of political authority of several nations into one regional authority. This would be similar to what is currently done for Aboriginal broadcasting. Several nations come together in a regional organization to ensure that original broadcasting is received by all nations (Brown 1996). Significant decentralization within the regional authority is required to ensure that all Aboriginal nations are as independent as possible. If this concept is expanded further, Aboriginal nations could be designed as a confederation of nations as is evident in the traditional Haudenosaunee Confederacy.⁹ Representatives of each Aboriginal nation would come together on larger issues concerning the association with Canada. This would encourage the solidarity of the Aboriginal nations. As well, this would perhaps facilitate negotiations with the Canadian federal government in that there

⁹ The Haudenosaunee Confederacy united the five, later six Mohawk nations for the purposes of peace. Each nation selected delegates that would represent the nation at the Confederacy. The goal was to allow for the nations to retain as much autonomy as possible.

would be fewer representatives to meet with.

The principle of subsidiarity should be considered for jurisdictional issues. This principle is based on the premise that small, decentralized government is best, and thus, the smallest unit that can perform a given task claims responsibility for it (Burgess and Gagnon 1993: 27). This principle could be the base for the Aboriginal nation/Canada relationship. Depending on the formation of the Aboriginal nations, this is conceivable for regional governments as well.

Political representation of Aboriginal nations in the Canadian government also requires consideration. Because of the extensive cooperation needed between Canada and the Aboriginal nations, significant Aboriginal representation is required in the Canadian government. However, what remains in question is how much representation should Aboriginal nations have; what weight should be given to Aboriginal representatives; and for which issues. In this case, using the principle of differentiation supported by Iris Marion Young and Will Kymlicka may be appropriate. Aboriginal representatives could have more weight on issues that relate to Aboriginal nations for example.

Another interesting question posed by this proposed new association is how Canada and the Aboriginal nations solve their disputes. A possible alternative might be an internal arbitration mechanism such as in the North American trade agreements. If due process is in question reference to an international body may be necessary.¹⁰ If so, Aboriginal nations then need the ability to perform international functions.

The extent to which the Canadian Charter of Rights and Freedoms will impact on the

¹⁰ This would be similar to the Lovelace case (1973) where due process was called into question by Lovelace who referred her case to the United Nations Human Rights Commission. The UN decision did not support the Supreme Court of Canada decision and caused a major embarrassment for the government of Canada.

Aboriginal nations is always of great concern to both Aboriginal women and men, although for different reasons. Possibilities include that nations be subject to the Canadian Charter. This may not be supported by some Aboriginal peoples, who feel that the Canadian Charter represents a foreign code. On the other hand, Aboriginal women may wish for the continued protection that the Charter guarantees. The Canadian Charter could be used during the transition period when governing is most chaotic. Although, again Aboriginal women may not want to see its protections disappear. What could also occur, as suggested by an RCAP recommendation, is that the Canadian Charter could remain until such time as the Aboriginal nations develop their own similar provisions (RCAP 1996: vol. 2). Several other issues remain untouched by this brief discussion that certainly need to be researched.

Advantages and Disadvantages

To summarize, the proposed framework would combine aspects of treaty and Althusian federalism with the concept of non-territoriality and multiple citizenship to challenge the current Canadian framework. The advantages of this framework are significant in the process of restoring the relationship between the Aboriginal peoples and Canada. This framework will firstly restore the nation to nation relationship and all that it entails such as mutual respect, obligation, and the recognition of shared sovereignty. It will also reassert inherent Aboriginal autonomy which is necessary for the healing and growth process. This new framework also provides a model for the international community during the time when the sanctity of the nation-state is diminishing. It also allows for more input at the level of Canadian policy-making into matters that affect Aboriginal nations. Finally, and perhaps most importantly, this framework ends the paternalistic era.

The critiques possible are those used often to keep Aboriginal peoples in a colonized state. What consequences change will bring is unknown and thus, for some, maintaining the status quo is desirable. From the Trudeau era and rekindled by the Reform Party is the criticism that this form of association will “break-up” Canada and will lead Canada down the slippery slope to apartheid where there are race-based pockets of second-class citizens. The argument that this framework will destroy the nation-state is a significant one. With the fear of Quebec separation and the propagated disastrous consequences, many do not realize that Canada could be a model for the international community. Canada is in the position to assert the argument that the nation-state is no longer sacrosanct. Canada is not the only nation with national minorities that desire and deserve an end to colonization.

There will also be the criticism that any association that has the Aboriginal peoples at the level of Aboriginal nation as opposed to Canadian will mean that there is less willingness on the part of Canadians to provide financial aid. In other words, there will be a lowered sense of loyalty by Canadians to the Aboriginal peoples. This argument can be countered by reasserting that Aboriginal peoples never consented to be Canadian in the first place. Many deny their Canadian-ness even now. Furthermore, paternalism has been conveniently veiled as loyalty. There is a paternal/maternal need for Canadians to “help” “their” Aboriginal peoples, yet there is a growing sentiment that the Aboriginal people are “costing too much”.¹¹ I believe that Canadians would feel greater loyalty to Aboriginal peoples when they begin to view them as counterparts rather than as burdens. Aboriginal peoples, on the other hand, would certainly feel more loyalty towards

¹¹ This is evident in media reports after the release of the Royal Commission Report on Aboriginal Peoples where there was extensive coverage on how much the Commission spent to fulfill its mandate as well as how much money they recommended it would take to improve the situation of the Aboriginal peoples.

Canadians when they are viewed as recognizing the value and strength of Aboriginal nations.

Another criticism is that the Aboriginal peoples are not ready for this step. That the circumstances on the reserves, which are shocking now, will only get worse if the Aboriginal peoples are left to govern themselves. This again is a paternalistic argument that requires Aboriginal nations to achieve a higher standard of social concern than is currently practiced in Canadian society.

Conclusion

This section of the thesis has offered several organizational options that are available within the federalist theory as well as a couple within the pluralist tradition. I have brought together several of these concepts in hopes of appropriately assessing the needs and desires of both the Aboriginal peoples and Canadians. The proposed coalition may be a necessary move to further the Canadian/Aboriginal relationship in a positive manner in the future.

Chapter Three--Designing the Test

Introduction

The concepts of non-territoriality, treaty and Althusian federalism, that are used to restructure the Canada/Aboriginal nation relationship in a positive manner, are extremely broad categories. Within each of the three elements required in the proposed framework is an incredible amount of diversity in terms of how various aspects should be accomplished and incorporated into a structure. Despite the variety of ways in which certain components may be operationalized there are certain key elements that must be accepted by each group of nations and Canada in order to accomplish the feat of making an illegitimate Canadian citizenship legitimate and restructuring the relationship between Canada and the Aboriginal nations. I have constructed an eleven-step test to evaluate the proposed framework of association which reflects concrete components of the concepts of non-territoriality, multiple citizenship, treaty and Althusian federalism.

Elements of the Test

Treaty Federalism.

1.) A treaty must form the basis of any relationship between an Aboriginal nation and Canada.

The treaty is important for Aboriginal nations for many reasons, namely, because of its sacred and enduring nature. It also signifies the longstanding relationship between the Aboriginal peoples and Canada.

2.) The treaty will explicitly recognize the notions of shared sovereignty and peaceful coexistence.

These elements concern both Canada and the Aboriginal peoples and thus should be clearly outlined and identified.

3.) There must also be recognition of the organic and perpetual nature of the treaty. In other words, the nations must understand that the relationship within the treaty is not static, but must be seen as requiring constant re-evaluation.

4.) The treaty must be formally recognized in some form or another. The formalization process will vary from nation to nation. However, the formalization method(s) chosen must be understood and respected by all parties involved. Because of the insistence on formality, this element of treaty federalism will avert the dangers elucidated about pluralist models such as a consociation and/or a corporatist model.

5.) The formal treaty will contain within it the promises and obligations agreed to by the nations. It will be necessary that each nation concur with the other's depiction of the negotiations and promises.

Althusian Federalism.

6.) The principle of symbiosis will be reflected in an explicit acceptance of the sharing of resources and responsibilities between the nations. As one of the key elements highlighted previously in Althusian federalism it is necessary that the concept of symbiosis be reflected in the treaty.

7.) Communication must also be recognized as a fundamental part, not only of initial negotiations, but also of the future relationship. Because consensus decision-making is a prominent part of Althusian federalism, communication must be accepted as a method of achieving this goal.

Ongoing discussions must be a central component of any agreement.

8.) Negotiations and future discussions must occur free of coercion. This is critical if the proposed framework is to function effectively.

9.) The goal of autonomy must also be clearly recognized in the treaty. I have suggested the principle of subsidiarity may be a method of ensuring that the process of supporting and encouraging Aboriginal autonomy. However, there may be other methods that are chosen to see that this goal is achieved. This does not curtail the sharing of responsibilities and resources, but it does promote the self-sufficiency of Aboriginal nations as a goal to accomplish.

Non-territoriality.

10.) The principle of non-territoriality may require the biggest conceptual leap for a nation-state to make because it directly opposes the territorial nature of federalism and the nation-state. What is required to meet this test is an abandonment of the reserve delineation of territory. Instead, there must be a recognition of the traditional boundaries of the Aboriginal nation and personal jurisdiction of the Aboriginal nations' citizenry. This does not prohibit negotiation on the sharing of the land.

Multiple Citizenship.

11.) Canadian citizenship has come to assume Aboriginal peoples as Canadian citizens without recognition of their own citizenship status. The treaty would have to recognize the citizenship status of Aboriginal nations as a valid and separate form of citizenship.

Thus, the concepts of multiple citizenship status, non-territoriality, treaty and Althusian federalism can be broken down further into the elements which need to be accepted if this proposed framework is to create a legitimate Canadian citizenship and state. If all of these elements are accepted the Canadian citizenship would change and become more legitimate. There would be an explicit recognition of the nation to nation relationship between Canada and the Aboriginal nations. The Canadian state would become richer with complexity because of the

existence of recognized nations within the confines of the nation-state. This would create an exciting new model for political association in the global age.

Part Two

Chapter Four--The Mohawks of Kahnawake

Introduction

The Mohawks of Kahnawake are closest to the city of Montreal and are the door to the east for other Mohawk nations (See Appendix A). The Mohawks have a long history of relations with Europeans as military allies, trading and treaty partners. The assertion made by Mohawks is that this relationship has been, is, and will be a nation to nation relationship (Alfred 1995; Beauvais 1985; Dickason 1992; Mohawk Council of Kahnawake 1997). However, this nation to nation relationship has been altered since the early military and trading alliances. The proposed federal framework of this thesis which uses the concepts of treaty and Althusian federalism combined with elements of non-territoriality and multiple citizenship hopes to address the concerns of the Mohawks of Kahnawake and renew the traditional nation to nation relationship between the Canadian government and the Mohawks.

This section provides a description of traditional Mohawk political philosophy including the Great Immutable Law which governs the functioning of the Confederacy. As well, it highlights the importance of the wampum, particularly the Two Row Wampum which frames the treaty relationship. The history of the relationship between the Mohawks and their European allies is also be presented, pointing out changes to that relationship after the War of 1812. Current challenges to the Canadian/Mohawk relationship are discussed with particular attention to the continued assertion of nationhood by the Mohawks as well as the aspirations of the Kahnawake Mohawks with respect to the future of this relationship. The final section focuses on how the goals and philosophies of the Kahnawake Mohawks mesh with the proposed federal framework to

create a more legitimate Canadian federation.

Traditional Political Philosophy

The Haudenosaunee (Iroquois) Confederacy was founded by the Dekanwidah known as the Peacemaker as a means of eradicating the hostility and competition between its five founding members (Dickason 1992: 71).¹² The Confederacy was to be structured by code which is known as the Great Law or the Great Immutable Law of Peace. This code delivered by *Tekanawaita* “is deemed to contain all the rules required for all facets of Iroquois life, including law, order and morals” (Beavais 1985: 109). The law was transmitted orally through sachems of the Confederacy who made it their business to learn it (Parker 1916: 7). The Great Law continues to have special significance today as it “describes the rights, duties and responsibilities of individuals, of family clans, and of member nations” (MCK 1997: 5).

The Great Law was revealed to the members of the Confederacy under a symbolic Tree of Peace (MCK 1997: 6). The member nations gathered under the Great Tree of Peace where they were to set aside their past differences. Gerald Alfred explains that the Great Tree symbolizes “the federalist principles of the *Kaienerekowa* [Great Law]- voluntary confederation of autonomous nations, self-determination and peaceful coexistence- and the democratic spirit of the people who accept the Law” (Alfred 1995: 82). The emphasis on peace in Mohawk political philosophy is represented by the Great Law and the Great Tree of Peace.

The codification of the Great Law is represented in Mohawk tradition by the Circle Wampum. The Circle Wampum is clearly the most significant wampum because it contains the

¹²The five founding members of the Haudenosaunee are the Mohawks, Senecas, Onadaga, Oneida and Cayuga. The sixth member, the Tuscaroras, joined in the early 18th century (Beauvais 1985: 111).

teachings of the Great Law on which the political philosophy of the Confederacy is premised. The wampum is important internally because it “record[s] important events and decisions of government ...” (MCK 1997: 6). The wampum also serves as a tool for external relations. The MCK explains that it acts “...as an official protocol when communicating with member nations and other governments” (MCK 1997: 6). The white strings of the wampum signify purity and peace symbolizing the agreement of the member nations not to war against one another (MCK 1997: 7).

The wampum was used extensively by the Mohawks when entering into relations with European and other Aboriginal nations. In situations of alliance the “Two Row Wampum” was employed to “ratif[y] an agreement that cooperation and peaceful relations are to be based on a respect for the distinct and autonomous nature of both Mohawk and settler societies (MCK 1997: 12). The Two Row Doctrine can be seen from the early relations with the Dutch as well as later relations with the British/Canadian Crown. The role of the Wampum in the relationship between the Canadian and Mohawk governments is significant because of the emphasis on autonomous nation to nation relations.

Thus, the Haudenosaunee Confederacy is built on a set of codes and values known as the Great Law embodied in the Circle Wampum. The Confederacy consisted of five, later six, nations who agreed to work together in peaceful coexistence. The actual structure of the Confederacy is equally important and reflective of the traditional political philosophies of the member nations. The two pillars of the Haudenasaunee Confederacy’s structure are consensual decision making and a participatory political process. These two notions reflect the promises of peaceful coexistence of the five original member nations (MCK 1997: 13).

The ideal of participatory democracy advocated by the Confederacy is achieved through a high level of public consultation and debate. Gerald Alfred explains that “[t]he central concern of the federal system was to ensure the perpetuation of this popular sovereignty, and the entire mechanism was organized so that chiefs directly represented the will of the people” (Alfred 1995: 78). All members of the community were encouraged to participate at some level in the political process in order to ensure popular sovereignty. In this way public debate would address all cleavages that existed within the community (Alfred 1995: 78-80). Thus, at the level of the Confederacy, chiefs would act as delegates rather than as leaders of the people of his community.

At the Confederacy, each of the member nations retained its distinctiveness while remaining a part of the whole. The nations were given roles to perform in the decision making process. A.C. Parker explains that the,

“confederate council was to consist of 80 rodiyaner (civil chiefs) and was to be divided into three bodies, namely, the older brothers, the Mohawk and the Senaca; the younger brothers, the Cayuga and the Oneida; and the fire keepers, the Onondaga. Each brotherhood debated a question separately and reported to the fire keepers, who referred the matter back and ordered a unanimous report...” (Parker 1916: 10, 11).

Consensual decision making was held in the highest esteem for the Confederacy and thus there was no executive head to make final decisions. This process was seen as the best way to maintain the peaceful coexistence in the Confederacy.

The extensive form of governance of the Mohawk nation is one of the most enduring attributes of its society. The political philosophies which guide the structure and functioning of the Confederacy continue to exist today. The Mohawks remain a part of the Haudenosaunee despite the creation of borders by Canada and the United States.

History of the Relationship

As early as 1620 the Mohawks had relations with Europeans, primarily with the Dutch for the purposes of trade and as military alliances. They were also courted later by the British again as trading partners and as military allies against the French. The Iroquois found themselves in an enviable position for two reasons. First, the Iroquois now had two sources of European goods which they could use themselves as well as trade with other nations. Secondly, because the Dutch felt particularly threatened by the English and the French, they began to trade arms with the Iroquois thereby improving their status (Dickason 1992: 130). The Iroquois were considered to be an important trading and military ally by the European nations.

Mohawk relations with the French and the French Aboriginal allies, the Hurons, were hostile. Attempts had been made to neutralize them by encouraging trade relations. The Iroquois wanted to control northern trading routes, which were desired by the French, so as to contain the encroachment of settlers. For roughly the entire 17th century this hostility caused insurrections between the French, Iroquois and Hurons (Dickason 1992: 130, 131).

These early relations of the Iroquois with the Europeans are significant because they highlight the recognition by the colonial governments of the autonomy of the Iroquois nations. Gerald Alfred explains that the Kahnawake Mohawks specifically “gained that special status among Indians and Europeans by a constant assertion of independence and persistent reminders to all parties of their strategic value as an ally” (Alfred 1995: 45). The obvious political, economic, and military strength of the Iroquois during these early encounters encouraged the recognition of the Iroquois as autonomous nations.

These relations were also of significance to the Iroquois who codified their alliances in the

Two Row Wampum. The MCK argues that even the earliest relations with the Dutch and British followed the Two Row Doctrine emphasizing the autonomy of each nation and the desire for peaceful coexistence (MCK 1997: 12). The political philosophy of the Haudenosaunee Confederacy governed the relations with Europeans during this early period.

The wars of the 17th century between France, the Hurons, and the Iroquois and its allies caused a shift in the balance of power in the territory. While the Iroquois suffered losses, the Hurons suffered more, and many of the Hurons were assimilated into the Iroquois nations (Dickason 1992: 131, 155). This absorption of the Hurons into Iroquois nations altered the philosophies of the Iroquois somewhat. Gerald Alfred notes the introduction of Christianity as probably the biggest influence, as well as the use of single family dwellings instead of the traditional longhouse (Alfred 1995: 36). These changes to the Iroquois societies created difference and also adaptation which would become significant characteristics of their nations in the modern era.

The Iroquois remained allies of the British during this time period and continued to fight in the colonial wars of the 18th and 19th century. However, during these centuries a shift occurred in the perception and treatment of the Iroquois nations. Many note the War of 1812 as marking the greatest shift in attitudes towards the Iroquois nations. This is reflected in government policies made *for* the Iroquois nations. Olive Dickason explains that as long as the Iroquois were needed as military allies during the colonial wars, their position was guaranteed. However, with the end of the colonial wars in 1812, the Iroquois were placed in a disadvantaged position (Dickason 1992: 224, 225).

Government policy reflected these ideas of inferiority, and conversely, Iroquois responses

demonstrated their tenacity and belief in the autonomy of their nations. The Iroquois nations began demands for autonomy and self-determination. Their arguments were premised on the fact that they had been sovereign allies of the British since the 17th century. However, their requests to reinstate tribal laws of governance were refused by the authorities of Upper Canada (Dickason 1992: 356). The demands for sovereignty by the Iroquois had begun in earnest.

Gerald Alfred explains the particular path chosen by the Kahnawake Mohawks to diffuse the tension and continue their traditional livelihood. He notes that the Mohawks of Kahnawake,

“sought to perpetuate their nationhood and distinct culture and protect their land base by adapting traditional social and economic roles to the structure of the newly established Canadian political regime and economic system....they accepted the Canadian federal governments’ legislation redefining of the Canadian-Kahnawake relationship: the Indian Act” (Alfred 1995: 55).

The path chosen by the Mohawks of Kahnawake reflects the tradition of adaptation displayed earlier by the Mohawks with the dispersal of Huronia and the integration of Christianity into the livelihood of Mohawks.

The modern era was characterized primarily by this tension between the Mohawk’s perception of autonomy and the Canadian government’s interpretation of the Indian Act. Tension arose as to the interpretation of purpose of the Indian Act and the role of the Department of Indian and Northern Affairs. Alfred argues that,

“differing Kahnawake and Department [of Indian Affairs] views on the role of the Agency within the community were the most common source of conflict in the early states of accommodation. Whereas the Mohawks saw the Agency as a means of maintaining a relationship with the Canadian government, the government itself clearly saw the Agency as an instrument of control (Alfred 1995: 57).

Early interpretations of the relationship between Canada and the Mohawks were conflictual which

made it difficult for Mohawks to have an entirely clear idea of their loyalty and trust of the Canadian government.

The participation by Mohawks in World War One, however, demonstrated the continuing loyalty to the British Crown in military events. The Mohawks used the armistice as an occasion to heighten their demands for the recognition of their sovereignty in their protests against amendments to the Indian Act. The Canadian government countered their claims with amendments to the Indian Act prohibiting tribal governments with the aspirations of arresting political mobilization of the Mohawks and other Aboriginal nations. The Mohawks pursued their demands to the Supreme Court of Canada and also delivered an appeal to Great Britain (Dickason 1992: 356, 357). Their assertions found few sympathetic ears and the struggle continued.

In the 1950's the St. Lawrence Seaway case dominated Mohawk/Canada relations. The federal government expropriated Mohawk land to build the Seaway despite guarantees by treaties made hundreds of years earlier. Again the Mohawks appealed to the Canadian and British governments with little success. Gerald Alfred argues that "faith in the Canadian government and in the British Crown as reliable protectors of Mohawk land rights was shattered by the Seaway debacle" (Alfred 1995: 65). The Mohawks realized that promises made hundreds of years ago would not be fulfilled.

The Mohawks also protested the 1951 amendments to the Indian Act arguing that their autonomy was being further eroded. In Kahnawake factions began to emerge as to which path for the community should take whether to prevent further erosion of the community. The two main views were that the Mohawk nation should assert traditional governance or it should follow the proposals of the Canadian government (Alfred 1995: 60, 61). These divisions in the community

should not be surprising considering the differing interpretations of the Indian Act itself by Mohawks and Canada. These divisions with Kahnawake also reflect hallmark characteristics of the political philosophy of the Haudenosaunee Confederacy of difference and public debate. Nonetheless, these rifts created tension within the Mohawk community of Kahnawake that still exist.

The differences between the Mohawk communities and the Canadian government persisted throughout the next few decades. Major conflicts did not arise however until the late 1980s. The blocking of the Mercier bridge by the Kahnawake Mohawks against the raiding of cigarette stores in Kahnawake 1988 was followed closely by the 1990 Oka Crisis. Here there was united support by the Mohawks against the Sûreté du Québec, the Quebec government and the Canadian government as the Kahnawake Mohawks blocked the Mercier bridge for a second time in support of the Mohawks of Kanesatake ¹³(Dickason 1992: 359). The relations between the Mohawks and the Canadian government were strained during this period. During the 1990s attempts were made by both the Mohawks and the Canadian government to negotiate an end to some of the pressing concerns in order to avoid similar conflict in the future.

Current Relations

Within Kahnawake differing ideologies continue to dominate the political arena. Generally speaking there are two main political camps within Kahnawake: traditionalist and mainstream.

The Longhouse traditionalists consists of three delineated groups: The Mohawk Trail Longhouse;

¹³ The Kanesatake Mohawks were protesting the Quebec government's decision to allow a golf course to be constructed on the sacred burial grounds of the Kanesatake ancestors. The Kahnawake Mohawks blocked the Mercier Bridge in support of their fellow Mohawks. The Oka standoff between the Mohawk communities and the Quebec police, and RCMP lasted seventy eight days, with both the Kanesatake and Kahnawake communities being cut off from the outside. They were branded as terrorists and warriors by the Canadian media (Dickason 1992: 359).

The Warrior Longhouse; The Five Nations Longhouse.¹⁴ The general assertion of the Longhouse Traditionalists is for the strict application of the values associated with the Great Law.

The “mainstream nationalists” represent the majority of Mohawks which favour the integration of traditional principles into modern institutions (Alfred 1995: 87). Although this mainstream view dominates, the traditional approaches must be noted for their salience to the political process in Kahnawake.

The mainstream ideology does represent the future goals of the Mohawk community. The Mohawk community desires the restoration of the relationship between itself and Canada based on the elements of respect and autonomy. As argued by Alfred,

“progress in the Mohawk mind means movement towards the realignment of political relationships, with the objective of recreating a balanced and respectful sharing of powers and resources. (Alfred 1995: 88).

These elements of respect and balance must be achieved within the community as well as in the relationship with Canada. A future relationship with Canada as loyal partners is desired.

Specifically, this renewed relationship with Canada must understand the self-determination of the Mohawk nation. There is a recognition by Mohawks that any renewed relationship based on a nation to nation model must be phased in with the progress of the Mohawk nations themselves. Gerald Alfred notes that:

“Mohawks clearly see the need for cooperation with Canadian authorities in a transition to control over community affairs. It is a nearly unanimous view that the move to a restructured form of government should take place gradually rather than as immediately and wholesale” (Alfred 1995: 95).

¹⁴For more explanation about the Longhouse Traditionalists, please refer to Gerald Alfred’s book, *Heeding the Voices of our Ancestors*, 1995, pp 84-87.

Negotiations have occurred and continue to work out a suitable process.

Since 1978 the Mohawk Council of Kahnawake (MCK) and the Canadian government have been pursuing negotiations in attempts to renew the relationship between the two nations. Discussions heightened after the 1988 blockade of the Mercier Bridge and the 1990 Oka Crisis. As the primary source of authority in Kahnawake the MCK has been the main Mohawk representative during these negotiations. The MCK has been under fire in the community of Kahnawake because its inception was a result of the Indian Act, however, it has made attempts to implement traditional values with regards to leadership and accountability in its functions. Thus, it is now deemed by the majority of Mohawks at Kahnawake to be a legitimate representative.

As mentioned, the Canadian government felt an increased need for negotiations between the Mohawks and Canada in 1988. At that time, as Arnold Goodleaf of the MCK explains, a meeting was held to discuss developing a framework agreement pertaining to jurisdictional issues and the role of the Indian Act. This framework agreement was signed in 1991 (Goodleaf 1993: 510). The objective of the 1991 agreement was to “promote self-sufficiency so as to support a distinct culture, identity, economic and political system in accordance with the will of the people of Kahnawake” (MCK 1997: 48). These jurisdictional negotiations continue ten years later as a means to resolve the jurisdictional conflicts that exist between the Mohawks and Canada.

In 1994 a Mohawk Roundtable was established to unite the three Mohawk communities of Akwesasne, Kanasatake, and Kahnawake. In this way the three communities were able to create joint programs in the areas of justice and enforcement. The MCK notes that,

“perhaps the major work of the Mohawk Roundtable is in the area of intergovernmental relations, in which the Mohawk nation is attempting to build a new political and legal relationship with Canada— one based on partnership,

sharing, mutual recognition and respect, and co-existence-- principles historically reflected in the Two Row Wampum” (MCK 1997: 50).

This demonstrates an increase in political solidarity among these three Mohawk nations.

The Mohawk/Canada Roundtable followed on the heels of this Mohawk Roundtable and is composed of representatives from all three communities and the federal government. The mission,

“is to promote harmony and peaceful co-existence among the Mohawks and Canada through co-operative non-confrontational negotiations, with a view to achieving action-oriented solutions of both a short-term and a long-term nature” (MCK 1997: 50).

Again this committee continues to discuss jurisdictional issues that arise between the Mohawk communities, and the other surrounding governments.

The traditional philosophies of the Great Law are represented by the current divisions within the Mohawk community of Kahnawake. Public debate on all issues is a normal and healthy part of the Mohawk political tradition. Mainstream thoughts however are dominant and are reflected in the ongoing negotiations between the Canadian government and the MCK. The aspirations of these negotiations are that more jurisdictional power can be wielded away from the Canadian government thereby allowing the Mohawk community to reassert the philosophies of the Great Law in their daily lives. However, with ten years of negotiations there is a certain amount of frustration about the lack of inertia of the process. The results of this process are somewhat encouraging as the Mohawks of Kahnawake police and enforce laws of their community as well as use their own passports when traveling. It has yet to be seen whether this will lead to the restoration of the respect and balance of the Two Row relationship.

Testing the Framework

The eleven step test was created to examine whether the proposed framework is congruent with the political philosophies of the various Aboriginal nations as well as the Canadian government. The test focuses on aspects of treaty and Althusian federalism, combined with concepts of non-territoriality and multiple citizenship as important elements of the framework. Based on the strong political traditions of the Mohawk nation of Kahnawake, it will be determined if the proposed framework meets the criteria required by the test nation.¹⁵

There are several components to the element of treaty federalism employed by the framework that are deemed significant and therefore required components of the test. First and foremost, a formalized treaty must be the basis of the relationship between the Mohawk nation and Canada. There must be a recognition of the notions of shared sovereignty and peaceful coexistence as well as its organic and perpetual nature. Promises and principles of the treaty must be agreed to by both parties.

The Mohawk nation and the Canadian Crown are already governed by a formalized treaty in the way of the Two Row Wampum. It contains many references to these critical elements of treaty federalism. The MCK provides an excellent explanation of the agreements contained within the Two Row Wampum:

“The bed of white wampum represents the purity of the agreement. There are two rows of purple beads, separated by three rows of white beads. The three rows of white beads symbolize peace, friendship and respect. The two rows of purple beads represent the paths of two vessels traveling down the same river together. ...” (MCK 1997: 47, 48).

¹⁵ Policy papers were received from the MCK for the purpose of evaluating the proposed framework. Please refer to Appendix E for a copy of a letter sent to Arnold Goodleaf (MCK) for his cooperation in this exercise.

As articulated by the Two Row Wampum, the white beads represent the agreements to peaceful coexistence. The purple beads represent shared sovereignty because both ships will travel the same river together. What is also significant is that the two rows of purple beads never merge, they run parallel to one another, symbolizing the perpetual nature of this relationship.

The Two Row Wampum is the formal, recorded version of the treaty made between the British Crown and the Mohawk nations. These principles were agreed to hundreds of years ago, and thus, stand as the legitimate base for a renewed relationship. Speaking during one of the public consultations held for the Royal Commission on Aboriginal Peoples (RCAP), Mr. Patton of the Mohawk Trail Longhouse stated that:

“We have come here basically to say that the solution or that mechanism has already been present. It sits behind you on the wall and it is called Kahswewhtha and that is called that relationship of the Two Row Wampum” (Patton 1993: 333).

The Mohawk nation argues that a renewed relationship will have to return to the principles of the treaty that exists already and are formalized by the Two Row Wampum.

Combined with treaty federalism are elements of Althusian federalism. These are the principles of symbiosis, communication and the goal of autonomy all of which are critical components to the political philosophies of the Mohawk nation. The principle of symbiosis is reflected in current negotiations between the MCK and the federal government with respect to the sharing of jurisdiction in certain areas. The MCK argues that:

“In Canadian law, the current relationship between Canada and Kahnawake is a colonial one, governed by the outdated and obsolete Indian Act. ... In its place, a new agreement is being sought, to be implemented through reciprocal legislation (Kahnawake and Canada) which will recognize the authority, jurisdiction, culture, traditions and language of the Mohawk people” (MCK 1997: 48).

The aspirations of the Mohawk nation are clear: they desire more jurisdictional power than they currently are entitled by Canadian law.

This is not to suggest, however, that they want the Canadian government completely on the sidelines, but more of a symbiotic relationship than is the case now. Sharing of responsibilities is a critical element of the treaty relationship established between the Mohawks and the British Crown. The MCK explains how sharing of jurisdiction works in the present context:

“In keeping with the cooperative philosophy of the Two Row Wampum, the Court enforces laws such as Canada’s Criminal Code and Quebec’s Highway Safety Code, which have been incorporated by the Mohawk Council as part of Kahnawake Mohawk law” (MCK 1997: 25).

This example demonstrates the adaptation of historic agreements to their current context in a way which emphasizes the symbiotic relationship between the Canadian government and the Mohawk nation.

The second principle of Althusian federalism is communication. The aspects of communication that are a part of the test are that communication be present and free flowing between Aboriginal nation and Canadian state. The presence of communication is illustrated by the ongoing negotiations between the Mohawks of Kahnawake and the Canadian government regarding jurisdictional issues (MCK 1997).

What is of concern to most Mohawks is the threat of coercion or dishonesty during discussions. Again Mr. Patten speaking at the public hearings for RCAP stated that:

“What they [the Canadian government] have to do is come honestly. They have to come to the table and say, ‘We will begin to talk about our future where we will sit together as nations,’ putting aside all the heavy paperwork as men and women, as people of honour” (Patten 1993: 338).

Mr. Patten articulates some of the main concerns of Aboriginal nations when entering into negotiations with the federal government. The colonial history of the relationship since the 1830's speaks to this concern. What is clear is that the Mohawks of Kahnawake desire honest communication with the federal government regarding their relationship.

The final element of Althusian federalism concerns the goal of autonomy. This is reflected in the Two Row Wampum by the two rows of purple beads that never touch or cross paths. Mr. Patten explains that,

“They [the purple lines] run parallel and basically what it says in there is, ‘parallel means that your nation does not legislate over ours and we will not interfere in yours’” (Patten 1993: 333).

The Two Row Wampum is very clear about the autonomy of the Mohawk nation. In the current context, this does not mean that the Canadian government is to vacate all jurisdiction in the Mohawk nation. The Two Row Wampum is premised on cooperation and thus the goal of autonomy may be better understood as non-interference by the Canadian state. Autonomy or non-interference is a future goal desired by the Mohawk nation of Kahnawake.

The concept of non-territoriality is more difficult to test in this instance because there are no specific references to traditional territories of the Mohawk nations in the negotiations for self-determination. The MCK has outlined in its 1997 report internal land allotments with the anticipation of a burgeoning population base. However, in negotiations with the federal government expanding the land base has not been a priority, jurisdictional issues have been instead.

Despite this there are references made both at the public hearing for RCAP and by Gerald

Alfred to the spiritual connection of the Mohawks to the land. Robert Vachon, Director of Research of the Intercultural Institute of Montreal, did challenge the Commission to question the notion of territorial integrity. He states:

“Should we worry so much about territorial integrity?... Maybe we should worry a little more about the land and our custodianship and kinship relations to it” (Vachon 1993: 68).

This is congruent with both the notions of symbiosis and shared sovereignty illustrated by the Two Row Wampum.

Gerald Alfred furthers this assertion by Vachon by arguing with respect to a reformulated notion of sovereignty. He argues that, “Mohawk sovereignty is conceived of not only in terms of interest and boundaries, but in terms of land, relationships, and spirituality” (Alfred 1995: 103). Thus, inherent in the discussion of shared sovereignty and relations with Canada is the notion of sharing land. However, it would entail a re-conceptualization on the part of the Canadian government with respect to thinking of land in a spiritual way rather than in the current manner which has to do with ownership by the state.

Finally, citizenship has been an area of interest for the Mohawks of Kahnawake since 1981, when the Council refused to recognize mixed marriages (MCK 1997: 21). They have also presented draft legislation in 1996 for consideration by the community with respect to citizenship rights and responsibilities for the citizens of the Mohawk nation of Kahnawake (MCK 1997: 21). They also have been using Mohawk citizenship passports for international travel (Dickason 1992: 359). These initiatives by the Mohawks of Kahnawake are consistent with the view that they are citizens first of the Mohawk nation and then of Canada.

Some Mohawks would argue that they are only citizens of the Mohawk nation and not of Canada. This would imply that the Mohawk nation has a confederal relationship with Canada. Recalling the definitions listed in Chapter Two, a confederation is a loose union between nation-states. Thus, if the relationship were to be a confederal one, the Mohawk nation would have to be a state as well. Taking the arguments of Gerald Alfred, this is not the case presently, nor is it the desire of the Mohawk nation.¹⁶ Thus, the relationship between the Mohawk nation and Canada is still a federal one, however, it may desire a more distant relationship than some other Aboriginal nations.

Conclusion

The history of the relationship between the European settlers and the Mohawk nations is one of recognition and respect of the sovereignty of the nations. Formal relations between the British Crown and the Mohawk nations are illustrated by the Two Row Wampum. This treaty is the basis of the renewed relationship between Canada and the Mohawks of Kahnawake. The proposed framework of treaty and Althusian federalism combined with aspects of non-territoriality and multiple citizenship is represented by the relationship that is illustrated by the Two Row Wampum. The proposed framework meets the test based on the Mohawks' political philosophies and is consistent with current negotiations.

¹² Remember that Gerald Alfred argues for "ethnonationalism autonomy" not "ethnonationalism statehood" (Alfred 1995: 14) which means that the Mohawks are a nation with respect to loyalty and kinship but do not represent a state which is signaled by state structures and/or institutions.

Chapter Five—The Treaty Nations of Saskatchewan

Introduction

The Treaty nations of Saskatchewan (See Appendix B) are the next group within which the proposed framework will be examined. The history of the numbered Treaty nations shows a different pattern of trading relationship with Europeans than the Mohawks of Kahnawake. This altered how the treaty and current relationship that developed. This section details the development of the relationship first with the Hudson's Bay Company (HBC), traders and later with European settlers. This provides an understanding of the reasons for and assertions made during the treaty making period. Because of the marked influence of treaties made east of Saskatchewan, including the Robinson/Superior Treaties and Treaties One, Two and Three, these will also be briefly outlined. The Saskatchewan treaty-making period, commencing in 1874 with Treaty Four and ending in 1907 with Treaty Ten, will be examined for understandings as well as the problems caused during treaty implementation. The problems that arose during treaty implementation are prevalent in the present relationship between the Canadian government and the Federation of Saskatchewan Indian Nations (FSIN).

Current initiatives that seek to improve the relationship between these two parties which are in response primarily to the RCAP report of 1996 will be examined. From this history and contemporary examination of the Treaty nations in Saskatchewan it will be demonstrated that the proposed framework is suitable to the relationship desired. Despite the differences between the Mohawks of Kahnawake and the Treaty nations of Saskatchewan with respect to the relationship between their respective nation and the federal government, the proposed framework is adequately flexible to accommodate this diversity.

History of the Relationship

As with the Mohawk nations, the early relationship (1640-1840) between the Aboriginal peoples of the Plains and the Europeans was an equal one between mutually benefitting trading partners. This relationship was based on principles of sharing and sustenance. Gerald Friesen explains that,

“the natives’ perception of the [early fur trade] relationship was probably founded on their assumptions about reciprocity: as in many traditional societies, the natives of the western interior expected to share the product of their hunts (the pelts) with their allies, the Europeans, and to receive European goods on a similarly generous basis” (Freisen 1987: 35).

This perception by Aboriginal peoples of the interior is the basis of all relationships with Europeans to follow.

Traders with the HBC also assumed this notion of reciprocity with the Aboriginal peoples. They recognized their reliance on the abilities of the Aboriginal peoples with respect to a successful trading company. Frank Tough, et al. suggest that this was displayed by the ongoing consultative process between the HBC and the Aboriginal peoples. They explain that, “in the early fur trade, maintaining the goodwill of Aboriginal leaders and their followers through these ceremonies [including gift-giving ceremonies; calumet ceremonies; and presentation of clothing and medals to Aboriginal leaders] was the key to success for the HBC and its rivals (Tough et al. 1998: 12). Tough et al. go further to illustrate one example with respect to the granting of Rupertsland to the HBC that indicates the extent to which Aboriginal consultation was required. They argue that,

“in spite of having received title to Rupert’s Land from the English Crown, the company’s directors realized that the grant meant nothing to their Aboriginal

customers. The company had to obtain Native approval to occupy portions of Aboriginal territory” (Tough et al. 1998: 7).

Because of an awareness of the sovereignty of the Aboriginal people as well as a recognition of their required cooperation for a successful trading company, consent was sought for most issues by the HBC.

Between 1774 and 1779 the HBC moved further towards the interior at the Pas and west of Prince Albert in order to circumvent the independence of the Blackfoot and the Gros Ventre who had, up to this point, enjoyed a sustainable lifestyle without the reciprocal agreements with the HBC. The Blackfoot and Gros Ventre also did not want to risk penetrating the trading routes eastwards for fear of Cree and Assiniboine retaliation. However, by 1781 rivalries escalated to the point of war between these nations. At the same time an epidemic swept through the interior. This combination wiped out the Gros Ventre, fueling the resentment of the Blackfoot towards the Cree and Assiniboine (Dickason 1992: 197-200). This period also experienced a slowdown of the fur industry, affecting the reliance on the Aboriginal traders.

In 1817 the Selkirk Treaty was signed amidst an increasingly competitive environment between the Northwest Company and the HBC for control over the area. The Selkirk Treaty as explained by Tough et al. “involved a ‘surrender’ of lands adjacent to the Red and Assiniboine Rivers in exchange for annual presents of tobacco” (Tough et al. 1998: 37). It was recognized by the negotiators that agreement by the Aboriginal nations was necessary in order to preserve peace and prosperity in the area (Tough et al. 1998: 45). The Selkirk Treaty would be revisited during future negotiations for Treaty One in 1871.

The period between 1800 to 1840 also marked by competition between the HBC and the

NWC due to the economic downturn in the fur industry. It was also a period marked by depleting food stocks and a new interest in mining prospects (Tough et al. 1998: 39-42). The HBC and the NWC merged in 1821. This merger held special significance to the Aboriginal peoples of the plains because there was an attempt by the new company to become more cost-effective by eliminating the gift-giving ritual. However, because of the reliance on the Aboriginal peoples as trappers and traders and the significance this ritual held for them, it continued but was curtailed somewhat (Tough et al. 1998: 16). These new concerns led to a changing political situation with respect to the relationship between the Aboriginal peoples and the Britain.

The difficulties of the first half of the 19th century led to an increased interest in treaty-making to secure relations with Europeans. Treaty-making initiated in the east (Ontario and Manitoba) has particular salience for the Saskatchewan treaty-making era that commenced in 1874. It will be useful to identify some of the key elements of the Robinson Treaties 1850 as well as Treaties One, Two, and Three to give a fuller account of the treaty relationship established between the Crown and the Saskatchewan Aboriginal nations.

Negotiations for the Robinson Superior/Huron Treaties began in the late 1840's to combat the negative effects the economic downturn affecting the region. Another major topic of negotiation concerned land cessions to be made by the Aboriginal nations. These two issues were discussed in tandem at treaty negotiations and set the tone for future discussions. In fact as argued by Tough et al.,

“[t]here is little doubt that one of the primary reasons why the Native peoples wanted to reach an agreement that included the inland sections of the territory [rather than just a narrow strip along the lakeshore] was that concluding treaties only for the lakeshore tracts would not have benefited the people most in need of income to supplement that derived from hunting and trapping activities” (Tough et

al. 1998: 43).

Social security was a major concern for the Aboriginal nations negotiating with the Crown. The reciprocal benefit of sharing land and resources remains a prominent issue for the Aboriginal nations.

From the Aboriginal perspective there was no need to fear any reprisals for sharing the land as they were assured in the treaty of a continued right to their traditional livelihood. As Dickason notes, “Ameridians were to retain ‘full and free privilege to hunt over the territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, ’...’” (Dickason 1992: 254). There was not the concern that they would not be able to hunt and fish as they had been used to doing.

Secondly, the concept of ceding land as a way of giving up ownership to the land was an entirely foreign notion. Reciprocity and sharing of the land was understood to be the agreement reached in treaties, not giving up ownership thereof. Dickason argues that “[s]ince Ameridians did not claim absolute ownership of the lands,¹⁷ how could they have surrendered them to the Crown” (Dickason 1992: 255) as was stated after the treaty signing. Giving away or selling land was not a concept that the Aboriginal people understood because it was an action that in their philosophies could not be done. Thus, again the notion of sharing the land and resources was agreed to in the

¹⁷ Absolute ownership was a foreign concept because it was the Creator who could give land, not the ability of the Aboriginal nation or the Crown. In oral testimony prepared for the Office of the Treaty Commissioner, Harold Cardinal argues that,

“The Elders emphasize the sacredness of the Earth, the sacredness of the Island that was given to them to live on. The Elders say that the Creator gave them the land. The Elders maintain that the land is theirs and that it could never be sold or given away by their Nations. The Elders say that the sacred Earth given to the First Nations by the Creator will always be theirs” (Cardinal and Hildebrandt 1998: 13).

treaties by the Aboriginal nations in return for compensation by the Crown.

After the Robinson Treaties in 1850, the next major event to affect the Crown/Aboriginal relationship was the Rupertsland Transfer. This transfer of land from the HBC to the Crown came to make up 75% of Canada's land mass (Tough et al. 1998: 78). Because of the close relationship already established between the Aboriginal nations and the HBC due to trapping and trade, this transfer meant that certain obligations had to be negotiated. These relations and obligations between the HBC and then the British Crown and the Aboriginal nations were never central to the surrender agreement, however they were involved. Tough et al. cite this passage:

““And furthermore that, upon the transference of the territories in question to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines”” (Tough et al. 1998: 89).

There was an understanding that the reciprocal relationship established by the HBC and governed by the British Crown for two centuries would continue.¹⁸

Treaties One, Two and Three, made soon after the transfer beginning in 1871, 1871 and 1873 respectively, cover what is now Southern Manitoba and Northwestern Ontario. In many respects these treaties were also similar to the treaties made in Saskatchewan. The issues in these treaties reflected many of the issues in the Robinson Treaties with respect to land and compensation, as well as specific mention of a peaceful coexistence.

Frank Tough et al. note particular sections of Treaties One and Two which state that:

¹⁸There are some Treaty nation members who still see their relationship with the British Crown. This is because they do not accept that the relationship between the Treaty nations and the British Crown was transferred when Canada became an independent nation-state. However, for the most part, the Treaty nations have been willing to allow their relationship to continue with the Canadian state.

“Each of the western or numbered treaties began by stressing ‘the desire of Her Majesty to open up to settlement’ a particular tract of country by obtaining the consent of ‘her Indian subjects inhabiting the said tract’ through a treaty resulting in ‘peace and goodwill’ between the Indians and Her Majesty since they could be assured of ‘Her Majesty’s bounty and benevolence’” (Tough et al. 1998: 62).

This quotation is significant for several reasons. First, it asserts the Crown’s desire to open up the west, with the requirement that the consent of the Aboriginal nations be achieved prior to settlement. This quotation also signifies the desire of the Crown to secure and maintain peaceful relations with the Aboriginal nations and the settlers. Finally, the treaty emphasizes the reciprocal nature of their relationship as the Crown asks the Aboriginal nation to recognize its wealth and benevolence. The early numbered treaties reflect the reciprocal nature of the previous relationship as well as similarly resemble the main issues and promises in the Robinson Treaties.

The general impression left by these negotiations and formal treaty-making process was that the Aboriginal nations were still recognized by the British Crown as necessary *partners* in settlement. There was also the view that the lifestyles of the Aboriginal nations would not be deleteriously effected in any way, rather that their traditional patterns could continue. In fact, Tough et al. cite a quotation from Lieutenant Governor Archibald in *The Manitoban*, 28th July 1871:

“His Excellency explained that reserves did not mean hunting grounds, but merely portions of land set aside to form a farm for each family. A large portion of the country would remain as much a hunting ground as ever after the Treaty closed” (Tough et al. 1998: 93).

Thus, assurances were given that the lifestyles of the Aboriginal nations would continue after the treaty was made. Certainly there would be some changes, such as living on reserves, however, this

was not meant to restrict the movement of the Aboriginal peoples over their land.

The Numbered Treaties of Saskatchewan

Treaties which cover what is now known as Saskatchewan commenced with Treaty Four in 1874. Negotiations focussed on land surrender, peaceful coexistence, and financial support. Although land was an issue, Crown negotiators were relatively vague as to the future status of the lands (Tough et al. 1998: 150). Aboriginal negotiators, however, were clear that land was for shared use and not therefore to be surrendered to the Crown (Tough et al. 1998: 156). Treaty documents examined by Tough et al. also contain assurances that ““they [Aboriginal peoples] are to count upon and receive from Her Majesty’s bounty and benevolence’” (Tough et al. 1998: 167). Thus, there are similar views about the reciprocal nature of the relationship already established in the earlier treaties and reiterated in the process that began in 1874 in Saskatchewan.

In 1875 Treaty Five was created at Norway House and is primarily a Manitoba treaty. However, what is significant is the changing economic situation affecting the Aboriginal peoples on the Plains. The economy continued to worsen as settlement began to flourish and the fur trade went steadily into decline. Thus, social sustenance and unemployment became a real concerns. Witnessing the advantages being received by other Aboriginal nations who had treated, treaty making in the west grew in the 1870's.

The Plains Cree in 1876 signed Treaty Six. The main issue for the Plains Cree was securing economic benefits for its people. Tough et al. argue that the Plains Cree sought an “...agreement with Canada that would provide their basic economic security in the dawning industrial age” (Tough et al. 1998: 191). Certainly issues of sharing land and resources were also negotiated, however, the main concern came to be that of economic benefits for the Aboriginal

nations of the treaty.

The economic security that the Plains Cree were trying to achieve was congruent with the relationship they had had with the HBC previously. Frank Tough et al. explain that

“the mercantile fur trade of the HBC had provided what we today think of as a ‘social safety net.’ ... [Lieutenant Governor] Morris held out the prospect of a beneficent ‘Queen Mother’ who would look out for her Indian ‘children’” (Tough et al. 1998: 204).

The HBC felt it was a good business strategy to ensure that the trappers who supplied the goods to trade be looked after. This was the reciprocal aspect of their relationship. Thus, the Aboriginal nations wanted to secure this same type of arrangement with a new partner.

The British Crown was aware of this relationship between the Aboriginal nations and the HBC and used it as part of its negotiating strategy in that it would replace the HBC as financial partner. As argued by Tough et al., Lieutenant Colonel Morris was “telling the Indians of the Fort Pitt area that the transfer had been arranged for their benefit so the Queen could replace the HBC as their guardian and thereby take better care of them” (Tough et al. 1998: 204). Thus, there was an explicit understanding that the treaty relationship being struck between the British Crown and the Treaty Six nations would be similar to the familial-like relationship they had had with the HBC.

As the fur trade declined and settlement increased in the west, there was a growing desire to treat with the British Crown. News spread about the promises of financial compensation and social assistance by the British Crown to the surrounding Aboriginal nations on the Plains. These nations were also aware that no aid would be given to untreated nations. However, there were concerns about the ability of the Aboriginal peoples to maintain their traditional livelihood. Fears

of being confined to the reserve became the prominent issue as well as economic stability for the proceeding treaty negotiations.

Treaty Eight, finalized in 1900, covered most of northern Saskatchewan. There were provisions made by the Treaty Commissioners to assuage the fears of the Treaty nations about the loss of their livelihood. This was a necessary move by the Commissioners to gain the consent of the Aboriginal nations. Tough et al. cite Treaty Commissioner Mckenna stating that,

“as the making of the treaty will not be the forerunner of changes that will to any great extent alter existing conditions in the country, and as the Indians will continue to have the same means of livelihood as they have at present,...” (Tough et al. 1998: 229).

These assurances allowed the Aboriginal nations to treat with the British Crown.

The parts of northern Saskatchewan not covered by Treaty Eight were dealt with in the 1906-07 Treaty Ten, the last of the Saskatchewan treaties. The impetus to treat came from the Crown’s willingness to provide only aid to those treated nations. The Treaty Ten nations were surrounded by other nations who were receiving supplementary aid from the British Crown, thus making a treaty desirable.

The issues of economic aid from the British Crown and an independent livelihood present at negotiations were the same concerns voiced since the Robinson Treaties. Because of the increased fears of encroachment, the Treaty Commissioners promised autonomy. Treaty Commissioner Mckenna is quoted as stating that he “guaranteed that the treaty would not lead to any forced interference with their mode of life...” (Tough et al. 1998: 261). This citation and others like are unmistakable in their promises and meanings.

Economic aid from the British Crown was more clearly defined in the Treaty Ten

negotiations. Rather than blanket clauses of compensation for land and aid when in distress, the Treaty Ten negotiators demanded specific guarantees such as education and health care. These demands were permitted. Again McKenna is quoted as saying that he “promised that medicines would be placed at different points in the charge of persons to be selected by the Government, and would be distributed to those of the Indians who might require them” (Tough et al. 1998: 262). The notion of the Crown as the social welfare provider becomes more pronounced in the Saskatchewan treaties. However, this does not displace the notion of non-interference by the British Crown with respect to the livelihood of the Aboriginal nations by way of the treaty making process. The Aboriginal nations were clear that although financial aid was desired and in some cases necessary, it was not a means of undermining their authority, but a payment for the sharing of the land.

Conflicts with Treaties

Much of the treaty relationship has been peppered with misunderstandings due to the interpretative nature of the treaty process itself. The Saskatchewan Treaty Nations encountered the same problems with the implementation of treaty promises as other nations have previously. The focus was primarily on the extent to which the Treaty nations were to maintain their independence. From the Treaty nation perspective, the British Crown was encroaching not only on their land, but simultaneously restricting their rights to hunt and fish. There were also concerns that the terms agreed to in the original treaty negotiations were becoming outdated and that they needed to be revisited in order to continue the relationship. All treaty nations in Saskatchewan experienced the same problems with implementation. It caused significant disruptions in the relationship between the Treaty nations and the British Crown which continue currently.

The notion of sovereignty and control over the land was one of the most prominent issues. The treaty nations were unaware that they had given up their rights to the land. In fact, they believed that their continued right to the land was promised during treaty negotiations. Most importantly, however, 'surrendering' land was an alien concept to the treaty nations (Cardinal and Hildebrandt 1998; Dickason 1992: 255; Tough et al. 1998: 235). As argued earlier, the philosophies of the treaty nations allows for the Creator to give land, not the Aboriginal peoples or the Crown. Thus, the Aboriginal peoples would not have been able to surrender the land.

The ability to continue the traditional hunting and fishing lifestyle was also a point of contention as the British Crown and then Canadian government began to restrict and legislate the movement of the Aboriginal peoples. The encroachment into the autonomy of the treaty nations was not welcomed and perceived as a breach of the treaty understandings. Tough et al. explain that,

“the post-treaty incidents stretching from the late 1870's to the 1890's illustrate very clearly and consistently how a number of the bands...interpreted the agreement they had fashioned with the Crown as guaranteeing them assistance while maintaining their rights to the resources of the land and control of their own affairs” (Tough et al. 1998: 285).

The treaty nations guarded the concept of non-interference from the intrusion of the British Crown.

Also of concern was the unwillingness of the British Crown to view the treaty as an organic instrument requiring constant grooming. The Crown saw the treaty as a one time deal and did not feel the need to revisit the terms of the agreement. However, the Aboriginal perspective was quite different. They understood that if the relationship between Aboriginal and non-

Aboriginal peoples was to continue to develop, it needed help. This meant updating terms of the agreement to ensure fairness. For example, Treaty Four negotiators felt that,

“the specific terms of Treaty Four were no longer adequate to guarantee the underlying objective, livelihood, therefore, those specific terms should be modified; there should be a ‘reformation’ of the terms of Treaty Four that concerned material assistance to ensure that subsistence was what resulted” (Tough et al. 1998: 270).

Specific aspects of the negotiated treaties, such as sections dealing with compensation, needed modification if they were to remain current with the growth of the nations. This required the British Crown to take a liberal approach to its interpretation of the written treaty as well as revisiting particular sections. However, this was not the agenda of the British Crown.

During the post-treaty era, there were several violent uprisings between treaty nations and the Crown as a result of the failure of the Crown to fulfil their treaty obligations as understood by the Treaty nations. Much of the oral testimony to the Office of the Treaty Commissioner (1998) reflects a similar sentiment of distrust and frustration at the Crown’s inability to meet its promises contained in the sacred treaties. Most of the treaty nations cannot understand how the Crown can avoid their commitments. For example, Elder Alma Kytwayhat explained that,

“we are told that these treaties were to last forever. The government and the government officials, the Commissioner, told us that as long as the grass grows, and sun rises from the east and sets in the west and the river flows these treaties will last. We were given these rights, yet now we can’t enjoy them. We were also given the right to also gather our medicines and go out into those gathering lands as we have always done in our traditional times and take them so that we can heal one another and take care of one another as the old people did and taught us to” (Cardinal and Hildebrandt 1998: 23, 24).

The present frustration is clear and is the same frustration felt by the Treaty nations during initial treaty implementation.

The main issues during the treaty process focused on the subsistence of the nation with a continued sense of autonomy and control over the nation's affairs. In every Saskatchewan treaty there is mention of protecting the traditional livelihood of the nation, in terms of the right to hunt on traditional grounds, as well as the procurement of financial aid in times of need. Despite the assurances made by the Crown during the treaty negotiations, during the implementation phase of this process the Treaty nations discovered that their partner was not quite so honorable. The problems associated with treaty implementation included the loss of sovereignty over the land and autonomy in the nation's affairs. The soon outdated literal terms of the treaty were not revisited. These problems caused distrust and frustration among the treaty nations which continue presently. However, there are processes in place which are attempting to contend with these issues in order to renew the relationship as it once was; as willing partners securing a mutually beneficial relationship.

Current Negotiations

There are presently numerous negotiations and discussions between the treaty nations, represented by the Federation of Saskatchewan Indian Nations (FSIN) and the federal government with regards to the treaty relationship. The impetus for these most recent talks is the RCAP report. The federal government has responded to this report with a new "Aboriginal Action Plan" which stresses the renewal of the treaty relationship as its number one priority. It has also made a conceptual commitment to changing the perception of the modern-day relationship between Aboriginal and non-Aboriginal peoples. In essence, there is a commitment to the revival of the values of mutual respect and understanding that are associated with a treaty relationship.

In Saskatchewan the Office of the Treaty Commission (OTC) was renewed in 1996 with a

five year mandate to pursue negotiations with the FSIN. Then Chief Blaine Favel of the FSIN and then Honorable Ron Irwin, Minister of Indian Affairs and Northern Development, signed an agreement for renewal in October 1996 (OTC 1998: 4, 5). The premises of the agreement are threefold: first, to acknowledge past mistakes and injustices; second, to reaffirm the commitment to the treaty process; and third to build practical arrangements for the future (OTC 1998: 5, 6). The OTC is also committed to “be an effective intergovernmental mechanism to assist both parties in the bilateral process, and in the identification and discussion of treaty and jurisdictional issues” (OTC 1998: 5), thus emphasizing the communicative nature of the treaty process.

There have been at least seventeen explanatory treaty table meetings held with representatives from a variety of federal government departments, the FSIN representatives, as well as a representative from the province of Saskatchewan with observer status only. These meetings focused on what each party hoped to achieve from the treaty process. It also investigated the legal, financial, jurisdictional, and political issues that would be raised during this process (OTC 1998: 7).

There have also been arrangements that allow for active involvement by the province of Saskatchewan as well. For example the FSIN signed a Protocol Agreement to establish a common table on October 31, 1996 whereby trilateral dialogue is will be convened in areas concerning fiscal and jurisdictional matters (OTC 1998: 7). A Memorandum of Understanding was signed on August 5, 1997. There has been significant effort by all parties concerned with respect to the renewal of the treaty process.

Testing the Framework

The challenge of any proposed framework is to account for variations among Aboriginal

nations which will influence current and future relations. Thus, it will be argued that the framework does provide a flexible enough structure to adapt to the changes among First Nations while still meeting the eleven criteria established by the test.

The basis of the proposed framework is the treaty. This is an easy element for the treaty nations to accept. Much of the oral testimony received by Harold Cardinal and Walter Hildebrandt focuses on the treaty as the basis of the relationship as well as on sacred elements of it. Cardinal and Hildebrandt explain that, “for the Elders, the relationships created by treaties were the central purpose underlying the treaty making process” (Cardinal and Hildebrandt 1998: 17). Treaties were and are representative of a relationship according to the treaty nations’ philosophy. Thus, the treaty nations would accept the treaty as the basis of a renewed relationship with the Canadian government.

As part of the test specific elements or promises should be contained in the treaty. One critical aspect of the treaty that should be recognized is the notion of shared sovereignty. Because of the reciprocal history between the treaty nations and the Crown this is not a difficult element to meet. Cardinal and Hildebrandt argue that:

“The treaties, in their [the Elders’] view, were sovereign arrangements between nations intended to recognize, respect and acknowledge in perpetuity, the sovereign character of each of the Treaty parties, within the context of rights conferred by the Creator to the Indian nations” (Cardinal and Hildebrandt 1998: 38).

What needs to be renewed is the federal government’s belief in the sovereignty of the treaty nations.

Previous treaties already contain critical elements with respect to the functioning of that

relationship. These elements are the promises and principles that were pledged during the sacred ceremonies. Cardinal and Hildebrandt explain that,

“the values and principles underlying the doctrine of *Wak koo towin* [circle and its statement of allegiance, loyalty, fidelity and unity] represented the essential elements of an enduring and lasting relationship between First Nations, and the Crown and her subjects” (Cardinal and Hildebrandt 1998: 18).

The principles agreed to in the treaties were critical to a peaceful relationship premised on fraternity and loyalty. The promises to be contained within a treaty as the basis of the renewed relationship are, again, already present. The principles of the relationship between the treaty nations and the Crown have already been agreed to. They must be given renewed life.

The Elders also argue that the perpetual and organic aspects of treaties were agreed to in the original treaties. Elder Jacob Bill of the Jackfish Lake Lodge explains that:

“...It was the will of the Creator that the Whiteman would come here to live with us, among us, to share our lives together with him, and also both of us collectively to benefit from the bounty of Mother Earth for all time to come...” (Cardinal and Hildebrandt 1998: 6).

It is clear that the treaty nations have remembered the statements made in the historic treaties that they are to be living contracts without an expiry date. The recent negotiations between the OTC and the FSIN suggests that the federal government also recognizes the importance of this treaty attribute.

The treaty for the renewed relationship must be formally recognized in some way in order to pass the test set for this framework. Treaty nations have several ceremonies which are their method of formalizing arrangements. Historic treaties were often secured through pipe ceremonies which signified the oneness in the Treaty and placed the new relationship in the hands

of the Creator (Cardinal and Hildebrandt 1998: 32). The sweetgrass ceremony also played a role in ensuring a non-coercive negotiations and that the process would be governed in good faith (Cardinal and Hildebrandt 1998: 32). These ceremonies formalized past treaties, thus ensuring their endurance.

Because of the history of treaty making on the Plains, this aspect of the test has already been met. The historic treaties are formalized pacts between the treaty nations and the Crown. There has been agreement on the principles of shared sovereignty and peaceful coexistence. The treaty nations and the Crown have agreed to the organic and perpetual nature of the treaties as well. The key to this aspect of the test is to revive the philosophies held within the treaties in order to renew the relationship between the Crown and the treaty nations.

Althusian federalism and its elements of symbiosis, communication and the goal of autonomy must also be present within the traditional philosophies of the treaty nations if the proposed framework is to be an acceptable federal format to pursue in future negotiations. As the examination of their relations with the HBC and later the British Crown suggest, the principle of sharing is inherent in the traditions of the treaty nations. Harold Cardinal and Walter Hildebrandt explain the principles of treaties as explained to him by the Elders. He states that:

“The fourth irrevocable undertaking between and among parties was the guarantee of each other’s survival and stability anchored on the principle of ‘mutual sharing’. The principles of mutual sharing are rooted in the belief systems of the First Nations. ... mutual sharing meant first and foremost that the parties would share with one another some elements of the special gifts accorded to them by the Creator” (Cardinal and Hildebrandt 1998: 34, 35).

As also demonstrated by their reciprocal relations with the HBC and British Crown, the Althusian principle of symbiosis is a part of the traditional philosophy of the treaty nations of Saskatchewan.

There are two main criteria set for the principle of communication. First communication must occur. Second, this dialogue must be free from coercion. Certainly the treaty nations have illustrated their willingness to participate in dialogue in that it was a necessary component to treaty negotiations. It is also clear that the Crown recognized the necessity to communicate with treaty nations with respect to settlement patterns in the area. Thus, historically communication has been a big part of the relationship with the Crown. The sweetgrass ceremonies also played a large role in ensuring that the negotiations were free from coercion.

However, due to the problems experienced by the treaty nations during the implementation process, there is a great deal of trepidation when entering into negotiations with the federal government. Harold Cardinal and Walter Hildebrandt report that:

“Given their [the Elders] historical experience with regard to the manner in which these beliefs were regarded by the Canadian state, the Elders are understandably cautious with respect to the amount, kind and nature of information which they are prepared to share. This Treaty process is really the beginning of a *trust building* exercise...” (Cardinal and Hildebrandt 1998: 30).

Despite current negotiations with the FSIN the Elders are unsure how much faith they should have in the negotiators. Because of this, the communication aspect of Athusian federalism is more significant. No framework will be successful when much of it depends on trust and good will. The “trust building exercise” is exactly what the dialectic approach is intended to secure.

The concept of non-territoriality is also contained in the original treaties and the treaty process. During the treaty making process in the 1800's Aboriginal nations were wary of signing any treaty that restricted their mobility to the reserve only. These concerns were abated time and time again by the government officials whom argued that their traditional hunting patterns would

continue. Harold Cardinal and Walter Hildebrandt reflect that:

“The livelihood arrangements in treaties were intended to enable First Nations to continue their relationship to the land and to enable them to adapt to and become part of new modes of livelihood which would accompany the fruition of their treaty relationship” (Cardinal and Hildebrandt 1998: 45).

Thus, the treaty nations have a long history dealing with the contentious issue of land and territory.

The assurances were received from the Crown officials to allow Aboriginal nations to continue their relationship with the land beyond the narrow reserve confinements. This indicates a commitment to the principle of non-territoriality because although boundaries are set via the reserve structure, they are not confined to only that territory. Mobility is permitted and expected within the larger radius of the traditional Aboriginal territories. The mutual usage of the land is congruent with the reciprocal trading relationship with the HBC and carried forward into the treaty making process. The commitment to the principle of non-territoriality on behalf of the Treaty Nations of Saskatchewan has been demonstrated by the historical investigation of the treaty process.

Finally, the question of multiple citizenship is a particularly interesting one. Because of the interdependency of the treaty nations and the Crown there would be a duality of citizenship status in that the Aboriginal person would be a citizen of their own nation as well as a citizen of Canada. Harold Cardinal and Walter Hildebrandt has characterized the relationship between the treaty nations and the Crown as familial:

“The applications of these principles to the Treaty relationship meant among other things the following three characteristics: as between a mother and child- the principle of mutual respect, the duty of nurturing and caring; relationship of

brothers- the close yet independent relations between the different households as governed by the principle of non-interference within the internal affairs of one by the other; cousins- an almost celebratory relationship, respectful, yet happy, non-coercive nature” (Cardinal and Hildebrandt 1998: 34).

To define terms a little more clearly using Cardinal’s characterization the relationship between the treaty nations and Canada is that of brothers, with the British Crown as the mother. The relationship between the Mohawk nation and Canada is that of cousins, a more distant relationship, yet still a close family tie. The Mohawk nation has not sought the same type of relationship with the Crown as that sought by the treaty nations with respect to social welfare. These differences are slight between the treaty nations and the Mohawk nation, but they are significant with respect to citizenship and association. The treaty nations have pursued a closer relationship with Canada than has the Mohawk nation and thus, they must have a different form of association and different citizenship status, or a different family status, than does the Mohawk nation.

Conclusion

The proposed framework demonstrates its flexible nature by still passing the test when applied to the treaty nations who have experienced a different pattern of development than the Mohawk nation of Kahnawake. Similar to the Mohawk nation, however, most of the elements of the test are already evident in previous treaties agreed to by the Crown and the nations involved. Secondly, these treaties are entering a period of revival as demonstrated by the negotiations that have been taking place between the FSIN, the OTC, federal government, and the provincial government. The proposed framework seems to be a plausible arrangement between the treaty nations and the federal government.

Chapter Six--The Nisga'a Nation of the Nass Valley

Introduction

The Nisga'a of the Nass Valley situated in Northern British Columbia (See Appendix C) have always been noted for their fierce relationship with the land. They have struggled for recognition of their title to the Nass Valley since before the union of British Columbia to the Canadian federation. The history of relations between British Columbia and the Aboriginal peoples has been dominated by the land title struggle. The Nisga'a have been one of the champions of this cause and have coined the phrase "*Nisga'a land is not for sale*" (Nisga'a Nation). This historical relationship is different from the others presented in this thesis and is thus an important case nation to test the proposed framework.

A brief explanation of traditional Nisga'a philosophy relying primarily on the testimony of Elder Bert McKay of the Nisga'a nation will account for their oral history and summarize the moral codes and laws that govern the Nisga'a nation. The role of the traditional philosophy in the current structure of the nation is explained. Secondly, an overview of the government relations with the Nisga'a nation beginning from contact onwards is provided to demonstrate the differences in the development of Nisga'a relations with government authorities. The current era of negotiations and treaty making between the Nisga'a nation and the federal government is how the proposed framework will be assessed. It is argued that all of the elements of the proposed framework are satisfied by the proposals of the Agreement in Principle of 1996 and the Final Agreement, 1998.

Traditional Political Philosophy

The traditional philosophy of the Nisga'a people relies heavily on their relationship with

their land and with the Ayuukhl Nisga'a or the Laws of the Nisga'a. Elder Bert McKay explains that originally Nisga'a land was governed by K'amligihahlhaahl, the Supreme God. The Supreme God divided the community into four lodges: Wolf tribe; Killer Whale tribe; Raven tribe; and Eagle tribe. Within these four tribes the K'amligihahlhaahl placed a chieftain, an older sister, a matriarch and then a wife (Berger and Calder 1993: 125). Bert McKay explains that the K'amligihahaahl "taught our people through his messengers that in order to remain strong and be identified with God's creation we have to hold our family units together" (Berger and Calder 1993: 125).

K'amligihahlhaal saw the necessity of guiding principles for the Nisga'a and sent the Txeemsim, or Trickster, to help unveil these codes. McKay explains that "the Ayuukhl Nisga'a- our code of laws- with the accounts of our history, we have gleamed them from the legends, from the stories, from the examples that Txeemsim gave us" (Berger and Calder 1993: 125). The Txeemsim presented the codes through the actions of the Nisga'a people, demonstrating that every action has a consequence. McKay argues that "to ensure that hard-won lessons weren't wasted, the trickster wandered up and down the river, teaching the people he met. This was how our system of oral history began" (Berger and Calder 1993: 15). The Txeemsim plays significant role in Nisga'a traditional philosophy.

Oral history still remains a significant part of the Nisga'a philosophy. The Ayuukhl Nisga'a are still transmitted orally. Frank Calder explains that:

"Totally oral, the stories of the Ayuukhl Nisga'a retain a solid base in ritual and are enlivened with each performance- there is no fixed or authoritative version, they change in nuance....And while they resurrect a vanished world, they are deliberately and accurately historical" (Berger and Calder 1993: 4).

The role of the oral tradition is significant in passing on the Nisga'a codes. This is a practice that continues and encourages the retention of the traditional philosophies.

The Txeemsim identified ten areas in the Ayuukhl Nisga'a, or Nisga'a laws. Some have to do with the logistics of a community with respect to laws concerning marriage, divorce, and death. The first principle is that of respect. Bert McKay explains that "...when you understand the meaning of respect you have a power that emanates from you and the people around you will respond likewise, they will treat you respectfully" (Berger and Calder 1993: 125). This principle is similarly reflected in the second principle concerning education whereby "everyone, according to the Nisga'a law, has some potential to give to the Nisga'a Nation" (Berger and Calder 1993: 125). There is a clear value for all of the Nisga'a people.

Bert McKay argues that this is reflected in a single principle that arcs all ten codes. He explains that "[i]mbedded in these ten laws is that almighty force we call compassion. That's one of the gifts that each Nisga'a still carries- compassion" (Berger and Calder 1993: 129). The traditional philosophy of the Nisga'a which emphasizes a relationship with the land and with each other still remains prominent in the current evolution of the Nisga'a Nation.

History of the Relationship

Contact with the Europeans was first with the Spanish in 1774, followed closely by the British in 1778. As with other Aboriginal nations the initial relationship with Europeans was built on trade. Despite the economic benefits there were significant changes to the Aboriginal lifestyles. Relations with Europeans had an impact on original trading patterns with other nations. As trading increased with Europeans, traditional partners found themselves as competitors for goods and benefits. There was also an increase in alcohol use and disease which ravaged the Aboriginal

populations just as it had in other parts of North America (Mitchell and Tennant 1994: 13).

These changes continued throughout the century as the Aboriginal nations tried to adapt to the lifestyle that was evolving. During the 1850's elements of Aboriginal policy were being negotiated and established by the authorities in British Columbia to govern the relationship with the Aboriginal nations. The key aspects discussed concerned Aboriginal title and self-government (Mitchell and Tennant 1994: 13).

James Douglas, Governor of the Colony of Vancouver Island, negotiated treaties in the early 1850's. Settlement, although slow, was occurring in the colony and Douglas deemed treaty-making the means to secure rights of both settlers and Aboriginal people. After fourteen treaties were signed Douglas attempted to retain more gifts from the Colonial Office to continue his efforts. No gifts or financial compensation was forthcoming and this ended the early treaty-making period in British Columbia (Dickason 1992: 242).

Douglas did however establish a reserve system policy which "he believed would open the way to a future in which individual Indians could be 'prosperous, secure and equal'" (Mitchell and Tennant 1994: 14). This reserve system policy still allowed the Aboriginal peoples the power to pre-empt land on the same basis as non-Aboriginal peoples. Mitchell and Tennant argue that this was significant because "Aboriginal people outnumbered white settlers for many years and could have owned and occupied most of the arable land in the colony- a significant source of economic power" (Mitchell and Tennant 1994: 14). Douglas also later increased the size of the reserve land (although they were very small to begin with) when allotments proved insufficient (Dickason 1992: 243). James Douglas was interested in pursuing a relationship with the Aboriginal people, accepting their rights to the land they occupied and attempting to work out an amicable solution.

In 1864, James Douglas retired and was replaced by Joseph Trutch who assumed responsibility for Indian policy. Trutch also became a significant player in negotiations for British Columbia's entry into the Confederation. With the departure of Douglas came a significant shift in Aboriginal policy. As explained by Mitchell and Tennant:

“He [Trutch] denied the existence of Aboriginal title and promulgated a view of ‘Indians’ as having been primitive nomads, a characterization which neatly supported his other actions” (Mitchell and Tennant 1994: 15).

This shift in leadership was reflected in Aboriginal policy.

Trutch argued that treaties initiated by Douglas were not an acceptance of Aboriginal title, but as a means of securing friendly relations with the Aboriginal peoples. He decreased the size of many reserves and took away many of their rights with respect to their title to the land. Dickason explains that:

“Beginning in 1865, Trutch, in a program of ‘adjustments,’ took away much of the reserve land that had been set aside for Ameridians, and the following year he issued an ordinance preventing them from pre-empting land without written permission from the governor” (Dickason 1992: 261).

The shift in Aboriginal policy was quick and severe, highlighting the colonial mentality that pervaded much of the country during this period.

The Nisga'a of British Columbia responded to this shift in policy and treatment with various protests. In 1869 Nisga'a elders traveled to the capital of Victoria to press for the recognition of their Aboriginal title to the Nass Valley. They were driven away by authorities unwilling to listen to their concerns (Nisga'a Nation 10, 11). The Nisga'a then hired a British law firm to take their concerns to the King of England and the Privy Council. Again they went

unheard (Nisga'a Nation 11). These early protests by the Nisga'a people demonstrate a certain deftness in their understanding of the political system as well as an unwillingness to give up their title to the Nass Valley.

Despite these protests, or perhaps because of them, Aboriginal policy continued after British Columbia's entry into Confederation to increase its restrictions on Aboriginal self-determination. With respect to the Nisga'a one of the more damaging policies concerned the potlatch feast. This activity was prohibited in 1884 by the colonial government. As Frank Calder explains "the gift-giving feast ... anchored tribal society. The feast was, in essence, the seat of government for the Nisga'a and other west coast tribes" (Berger and Calder 1993: 10). Despite these restrictions many potlatch feasts continued to occur.

With increasing colonial encroachments into Aboriginal livelihood, Aboriginal nations in British Columbia sought to mobilize their political concerns. In 1916, the Nisga'a joined the "Allied Tribes of British Columbia" to force government recognition of Aboriginal title (Berger and Calder 1993: 11). The goal was the settlement of one big land claim for all of the Aboriginal nations in British Columbia. However, again the government effectively quashed this political solidarity by prohibiting Aboriginal fund raising thereby eliminating all channels of financial support (Berger and Calder 1993: 11). Shortly after, the Allied Tribes of British Columbia was disbanded.

After this dissolution there was an increase in tribalism amongst the Aboriginal nations in British Columbia. Instead of seeking one big land claim there were many more calls for separate land claims negotiations. The Nisga'a responded in 1923 with an outlined plan for the settlement of their land claim (Nisga'a Nation 11). It was immediately denounced as unrealistic by

government officials.

The Nisga'a went further by forming the Nisga'a Tribal Council in 1955 with Frank Calder as their first president. Calder explains that "the Nisga'a Tribal Council united the four Nisga'a clans and their four communities to work towards resolving their land claim" (Berger and Calder 1993: 11).

These efforts culminated in the suing of the government of British Columbia by the Nisga'a Tribal Council for the recognition of Aboriginal title in 1964 (Berger and Calder 1993: 11). The case was heard by the trial court in 1969 where the trial judge declared that whatever Aboriginal title they may have had originally was lost when colonial laws were enacted (Nisga'a Nation 11).

The Nisga'a nation took their case on appeal to the Supreme Court of Canada where in a four to three split decision the Nisga'a lost again. However, upon closer inspection of the judges' decisions, it is revealed that on the issue of whether Aboriginal title was extinguished, only six of the seven judges responded. The seventh judge based his decision against the Nisga'a claim on a technical jurisprudence issue, not on the issue of Aboriginal title. Thus, three of the judges supported the Nisga'a claim that they retained title to the Nass Valley. It was deemed a moral victory for the Nisga'a nation (Nisga'a Nation 12).

Following this decision, the Nisga'a people requested a meeting with Prime Minister Trudeau to discuss the issue of land claims. Trudeau obliged the Nisga'a with a meeting and committed his government to begin negotiations with the Nisga'a for a land claim settlement. The government of British Columbia denied its support for these negotiations claiming that land claims were a federal responsibility (Mitchell and Tennant 1994: 24).

By 1976, however, the government of British Columbia decided to meet with the Nisga'a and the federal government to negotiate. The Nisga'a nation, for its part, developed the "Nisga'a Declaration" as an outline of their position for negotiations (See Appendix D). This twenty-one point proposal emphasized that other agreements already made with Aboriginal nations were not acceptable to the Nisga'a nation. The declaration argued for a unique agreement reflecting the needs and desires of the Nisga'a people. It also articulated the notion of "citizens plus" identifying themselves both as Nisga'a citizens and also Canadian citizens. The final point that is highlighted by this declaration and is repeated presently, is the strong belief by the Nisga'a people that "Nisga'a land is not for sale" (Nisga'a Nation 18, 19).

What followed were negotiations among the three interested parties from 1976 to 1980. However, it took the province of British Columbia over a year to respond to the declaration of the Nisga'a nation. The Nisga'a nation quoted the provincial government position as:

"...the province bluntly stated that aboriginal rights might be the law in Canada but it certainly was not in B.C. Further, the province argued the meetings between Ottawa, Victoria and the Nisga'a were not tripartite negotiations because B.C. did not recognize any special claim to land by the Naas River inhabitants. They were simply discussions" (Nisga'a Nation 20, 21).

Again arguments between the federal and provincial governments ensued as to the nature of their participation in these discussions/negotiations: who was responsible?

After the patriation of the Constitution in 1982, Constitutional conferences ensued regarding the issues of self-determination and Aboriginal title. The province of British Columbia was one of the chief proponents against the recognition of Aboriginal title (Mitchell and Tennant 1994: 26).

The reaction of the Nisga'a and other Aboriginal nations in the province of British Columbia was swift. Many Aboriginal nations blocked logging routes to prevent the extraction of resources from their lands. This tactic was an assertion of Aboriginal title to the land that was not being heeded in negotiations. The second tack of the Aboriginal nations was to use the courts as a means of seeking injunctions and highlighting the need to resolve outstanding land disputes.

The first major court victory, which established legal precedent, granted an injunction against logging by McMillan-Bloedel Ltd. until Aboriginal title to Meares Island was resolved (Mitchell and Tennant 1994: 27). Other injunctions followed and as explained by Mitchell and Tennant, "[i]n each case the Province's legal ability to authorize resource development in land claim areas was, in effect, suspended by the courts" (Mitchell and Tennant 1994: 27). The era of litigation would pressure the provincial government to negotiate the Aboriginal title issue.

In 1986, Bill VanderZalm of the Social Credit Party was voted in as Premier of the province of British Columbia. This change would usher in better relations between the Aboriginal nations and the province. There seemed to be more of an interest in dialogue with the new government. Mitchell and Tennant argue that:

"The Social Credit administration of Premier Bill VanderZalm (1986-1991) showed greater interest in Aboriginal issues than had any of its predecessors, and began in 1987 to develop specific government machinery for developing and implementing Aboriginal policy" (Mitchell and Tennant 1994: 33).

The new administration offered hope for the Aboriginal nations that the land questions would be addressed.

Evidence that the Aboriginal concerns would be taken seriously was delivered soon after the Social Credit government took power. A Native Affairs Secretariat within the Ministry of

Intergovernmental Relations was established in 1987. A Cabinet Committee on Aboriginal Affairs was also created in 1987 to provide the Premier with annual reports on the state of Aboriginal negotiations (Mitchell and Tennant 1994: 34). The Premier also appointed the “Premier’s Council on Native Affairs” in 1989 to “review provincial policies affecting aboriginal peoples and to meet with tribal councils across the province to hear their concerns” (Mitchell and Tennant 1994: 35). These new administrative offices prepared the provincial government for negotiations.

However, despite the focus on Aboriginal issues, the provincial government still would not recognize the legitimacy of Aboriginal title to the land nor the right to self-government. In 1987 the “Native Title Project” was initiated by the Social Credit government with the mandate to, “disprove the validity of assertions of Aboriginal title and the inherent right to self-government that had been brought before the Courts by the Gitksan and Wet’suwent’en peoples” (Mitchell and Tennant 1994: 34). This project lasted until the Social Credit government was voted out of office in 1991 and replaced by the New Democratic Party.

In 1990 the Oka crisis reverberated throughout the country and Aboriginal peoples in British Columbia were no exception. Protests and blockades were held in support of the Mohawks in Quebec. These protests, as explained by Mitchell and Tennant, “came to focus on British Columbia grievances, and especially upon the continued refusal of the province to acknowledge the validity of Aboriginal assertions and agree to negotiate” (Mitchell and Tennant 1994: 35).

This wake up call for Premier VanderZalm encouraged him to ask for an interim report from his Cabinet Committee. The Committee’s findings focused not surprisingly on the land question and self-government. The overriding concern of the Committee was the outstanding

issue of land claims. The Premier accepted the findings of the Committee, however, he again restated his government's position with regards to Aboriginal title. He argued that "the government specifically rejected Aboriginal title as the basis for entering into negotiations of land claims" (Mitchell and Tennant 1994: 37). The Premier's response to this concern was to establish a Native Claims Registry within the Ministry of Native Affairs.

VanderZalm also initiated a British Columbia Claims Task Force which reported in 1991. The Task Force was an unprecedented tripartite body to make recommendations concerning the land question and how negotiations should occur. Of the nineteen recommendations, the major focus was that non-coercive dialogue was necessary between the Aboriginal nations and the provincial and federal governments. It also recommended that an independent Treaty Commission be established (Mitchell and Tennant 1994: 41).

These recommendations made by the Task Force were accepted by Michael Harcourt's New Democratic Party when it took office in 1991. The NDP election platform had endorsed a sweeping policy statement on Aboriginal issues. This policy statement was titled "Towards a Just and Honourable Settlement: Indian Land Claims in British Columbia" and called for the recognition of Aboriginal title and the inherent right to self-government, as well as a renewal of the Constitutional processes to entrench the inherent right to self-government (Mitchell and Tennant 1994: 42). Aboriginal issues became a prominent focus of the NDP government.

Recent Initiatives

The focus during the 1990's has been the negotiation and settlement of modern treaties in an effort to resolve land questions. There have been many initiatives to bring provincial, federal and Aboriginal counterparts together to increase the dialogue among them. The result has been an

opening of the decision-making process whereby Aboriginal nations are considered legitimate actors. Aboriginal peoples have considerably more bargaining power now in this process than before. However, the increased frequency and level of dialogue has still yielded few substantial results. This an ongoing frustration for some Aboriginal nations.

In 1991 the Nisga'a nation signed a Framework Agreement with the provincial and federal governments which outlined the two main areas for negotiation: self-government powers and land ownership (Mitchell and Tennant 1994: 60, 61).¹⁸ Mitchell and Tennant show that by 1994 the Treaty Commission certified that four Aboriginal nations were prepared to proceed to stage three (Negotiation of a Framework Agreement) of negotiations (Mitchell and Tennant 1994: 64). The Nisga'a Nation was one of these nations already involved in this stage of discussion with negotiators.

As these negotiations were occurring the NDP government also established "Government to Government Forums" to address other policy concerns. Mitchell and Tennant explain that "the purpose of these forums is to address broad policy issues, including those that may require changes in legislation or regulation, and to promote consistent approaches among line ministries to implementing a 'government to government' relationship with First Nations" (Mitchell and Tennant 1994: 57). Some of the issues discussed concerned the preservation of heritage and culture, and provincial powers in areas of education and child welfare (Mitchell and Tennant 1994: 57).

In 1996 the Nisga'a Nation signed an "Agreement in Principle", stage four in the treaty

¹⁸ The six stages in the process of negotiating a treaty agreement as defined by the provincial and federal governments are: Statement of Intent; Preparation for Negotiations; Negotiation of a Framework Agreement; Agreement in Principle; Negotiation of Formal Technical and Legal Aspects; and Implementation.

negotiation process, with the federal and provincial governments. Although two years past the deadline agreed to in the Framework Agreement, it nonetheless signaled a move forwards in the relationship among the Nisga'a nation and the provincial and federal governments. There were several main elements to the agreement with much of the focus on the recognition of Nisga'a rights as Nisga'a and Aboriginal peoples. The preamble to the agreement highlights these elements. First there is a recognition of the Nisga'a occupation of the Nass Valley since time immemorial. There is also a recognition that Aboriginal rights continue to exist and have not been extinguished. The entitlement of the Hereditary Chiefs to tell the oral histories to the Nisga'a in accordance with the great laws is also recognized in the preamble to the Agreement in Principle (Agreement in Principle 1996: 5).

The Agreement also prepares the Nisga'a for self-government. The section dealing with issues of self-government involves a devolution of powers to the Nisga'a government with the eventuality of a Nisga'a government outside the realm of the *Indian Act* (Agreement in Principle 1996: 8). The areas of jurisdiction centre on issues of Nisga'a citizenship, governance, culture and language, Nisga'a lands and assets (Agreement in Principle 1996: 71). There is a move towards a self-sustaining Nisga'a nation.

The land issue is of great significance to the Nisga'a nation. Importantly, in this agreement, what was previously called "Indian reserve lands" will be renamed "Nisga'a lands". The control of Nisga'a lands will remain with the Nisga'a government (Agreement in Principle 1996: 9). This is significant both for the Nisga'a nation as well as indicating a step towards the recognition of a multi-nation state whereby different nations retain jurisdiction over parts of the land.

The Agreement in Principle signed in 1996 signaled a breakthrough in the relationship between the Nisga'a nation and the provincial and federal governments. This is due to the recognitions delivered in the preamble which emphasize views of the Nisga'a people. It also demonstrates the extent to which the nature of the relationship between the Nisga'a nation, and the provincial and federal governments has progressed from a colonial style of relationship to a government to government relationship. This Agreement as well as the Final Agreement will be used as the model from which the proposed framework will be judged.

Testing the Framework

As the Final Agreement has not been fully implemented nor have the issues been fully resolved, it will be necessary to remember that it is a work in progress. Thus, from a conceptual level the ideas in the proposed framework of this thesis should match with the ideas of the Agreement in Principle and the Final Agreement, however, there may be some areas which have yet to be agreed to by the parties involved. The elements of treaty and Althusian federalism as well as notions of non-territoriality and multiple citizenship should all be present in some form in the Framework Agreement if the proposed framework is to be deemed workable with the Nisga'a Nation's goals.

The Final Agreement will be recognized as a modern treaty (Agreement in Principle 1996: 6). The treaty will be considered to be a formal agreement for the purposes of recognition and protection by the Canadian Constitution, 1982. There is no specification for the formal recognition of the Agreement by the Nisga'a nation, however, presumably their signature is a symbol of formal recognition of the agreement. The signatures also symbolize all parties' agreement to the promises and obligations held within the Final Agreement. Because this process

has yet to be completed, we can also conclude that the relationship will continue to grow until at least the Final Agreement is fully implemented. Even then, the relationship can not be severed because of the extensive sharing of powers, jurisdictions, and resources between the parties. Thus, the elements of treaty federalism that were deemed critical for the proposed framework have been met by the Final Agreement and by the discussions which continue between the parties.

Symbiosis, communication and the goal of autonomy are all components of the second main theme of the proposed framework, Althusian federalism. The Agreement in Principle demonstrates that the goals of Althusius play a major role in the renewed relationship between the Nisga'a and Canadian governments. The notion of symbiosis or sharing has been a long-standing tradition with the Nisga'a nation and has always played a prominent role in their discussions with other governments.

This commitment to the concept of sharing by the Nisga'a nation is reflected in their signing of the Final Agreement. Within its confines is the sharing of natural resources as well as the sharing of jurisdictional powers. For example, Nisga'a lands will consist of 1,930 square km, in the lower Nass Valley and will be under the jurisdiction of the Nisga'a government (Agreement in Principle 1996: 9). However, the Crown does continue to have access to those lands for the purposes of national defense and security; to deliver and manage programs and services; and to carry out inspections with respect to law enforcement (Agreement in Principle 1996: 32). Conversely, employees of the Nisga'a government may have access to lands other than Nisga'a lands for similar purposes (Agreement in Principle 1996: 32). There are numerous examples such as this which indicates the acknowledged interdependence of the signatories.

The second component to Althusian federalism is communication which should be free

flowing and free of coercion. There is evidence that the frequency and nature of dialogue between the Nisga'a Nation and the provincial and federal governments has improved (Mitchell and Tennant 1994: 109). There is also a need and a commitment by the parties to the Framework Agreement that this dialogue continue in order to deliver a Final Agreement. The Framework Agreement also specifies a significant amount of transition measures which will ensure that communication continues during the implementation phase (Agreement in Principle 1996: 6).

The transition measures are also meant to increase the autonomy of the Nisga'a Nation as they become ready for the authority. The Agreement in Principle specifies that in the evolution of Nisga'a autonomy, the *Indian Act* will cease to apply (Agreement in Principle 1996: 8). The Nisga'a nation will also own all natural and forest resources on Nisga'a lands as well as have control over issues of governance, citizenship, language and culture (Agreement in Principle 1996: 10, 19, 71). Any amendment to the agreement will come as a result of the consent of all three signatories as opposed to the arbitrary decision-making of the provincial and/or federal governments (Agreement in Principle 1996: 8).

The Nisga'a also want their agreement to be self-standing in that they do not want their agreement to effect or be affected by other agreements between governments and First Nations. They have consistently purported that the uniqueness of their traditions and aspirations be recognized in the Final Agreement (Agreement in Principle 1996: 8). The goal of autonomy was a significant aspect of the negotiations between the Nisga'a nation and the Canadian governments.

The next element of the proposed agreement, the concept of non-territoriality, has been the most difficult to articulate. However, the Agreement in Principle between the Nisga'a nation and the provincial and federal governments illustrates the concept well. To review this notion,

David Elkins has suggested that non-territoriality does not mean that there are no boundaries which to refer, but that the strict territorial definitions of who owns what land, be relaxed. He suggests that some solutions to the territorial or land question "...might include such non-territorial features as sharing land, seasonal migration, and spiritual concern for the land" (Elkins 1994: 18). Thus, his view is that some of the modern treaties are reflective of this sentiment when they recognize non-exclusive entitlement to the land.

The Agreement in Principle does account for the differences in exclusive and non-exclusive entitlement to the land. The Agreement states that, "existing Nisga'a Indian reserves...will become Nisga'a lands. ... title to Nisga'a lands will be vested in the Nisga'a government" (Agreement in Principle 1996: 9). Nisga'a lands that are not designated as Village lands by the Nisga'a government will be known as Nisga'a Public lands. There will be non-exclusive ownership/entitlement to the Public lands.

The concept of non-territoriality is pursued further by the Agreement in Principle as it addresses the issue of Nisga'a people who do not reside within the Nisga'a lands, similar to the notion of personal jurisdiction as discussed by Turpel and Hogg (1994). There will be "Urban Locals" to fulfill the needs of these members. Nisga'a Urban Locals are described by the Agreement in Principle in the following manner:

"Nisga'a Urban Locals' are entities recognized by Nisga'a government for the purpose of participation in Nisga'a Central Government by Nisga'a citizens residing outside of the Nass Area and includes the three Nisga'a locals in: Greater Vancouver; Terrace; and Prince Rupert/ Port Edward" (Agreement in Principle 1996: 3).

This furthers the concept of non-territoriality because the Agreement accepts the non-exclusivity

of Nisga'a members residing on Nisga'a lands. It expands personal jurisdiction and governance beyond the defined Nisga'a boundaries reflecting the notion of non-exclusivity.

The final element of the proposed framework is multiple citizenship. This is also been handled well by the Agreement in Principle. The Nisga'a people have a history of defining themselves as "citizens' plus" (Nisga'a Nation 27). The Agreement in Principle identifies the authority of the Nisga'a government to define its membership code. It also asserts that citizens of the Nisga'a Nation will also continue to be citizens of Canada. The Agreement states that:

"Nisga'a citizens who are Canadian citizens or person residents of Canada will continue to be entitled to all of the rights and benefits of all other Canadian citizens or permanent residents of Canada applicable to them from time to time"
(Agreement in Principle 1996: 6).

There is a recognition of the desire of the Nisga'a people to have their dual citizenship status affirmed in this way. This article also signifies the Nisga'a nation's desire to remain within the federation of Canada. The Nisga'a nation recognizes Canada as a multi-nation state.

Conclusion

The proposed framework is congruent with both the traditional philosophies of the Nisga'a people as well as with their current treaty proposals. The contemporary history of the relationship between the Nisga'a nation and the provincial and federal governments has shown great improvements. The Agreement in Principle, 1996 and the Final Agreement, 1998 signed between the three parties demonstrates that trust is building. These Agreements are such that a multi-nation state based on the treaty and Althusian federalism and elements of non-territoriality and multiple citizenship status are possible goals to achieve. It will be interesting to watch the evolution of this relationship.

Chapter Seven—The Government of Canada

Introduction

The federal government does not have a stellar record in its relations with the Aboriginal peoples of Canada. There have been domestic mishaps and international embarrassments with respect to the government policies regulating the Aboriginal peoples. This section of the paper will begin with a history of the relationship between the Crown and the Aboriginal peoples. The four stages approach to the historical relationship as developed by Mark Dockstater and employed in the RCAP report will be used. The focus is on the final stage titled “Negotiation and Renewal” catalyzed by the Hawthorn report, 1966. The major policy movements affecting the relationship between the federal government and the Aboriginal peoples from 1970 to the present will be identified such as the *Constitution Act, 1982*; the Penner report, 1983; Meech Lake; Oka; Charlottetown; and RCAP. Key recommendations of the RCAP report, 1996, and the government’s recent response to those recommendations will also be discussed. The proposed framework will be evaluated from the federal government’s response, the “Aboriginal Action Plan”, to demonstrate the feasibility of the framework from the perspective of the federal government.

The elements of treaty and Althusian federalism are comparable to themes in the government’s response. The principle of non-territoriality as proposed is also congruent with the government’s plan. However, the federal government has yet to lend its fundamental support to the notion of multiple citizenship status as proposed by the RCAP report and the proposed framework. The reasons for this failure are explained, as well as the implications for the actualization of the framework. Ultimately, the federal government will not be able to reconstitute

the nation to nation relationship unless its conception of Canadian citizenship becomes more flexible than it is currently.

History of the Relationship

The first volume of the final report of the RCAP provides an assessment of the relationship between the Aboriginal peoples and the Canadian government. The Commission uses the four stages approach taken from the Doctor of Jurisprudence thesis of Mark Dockstater titled “Towards an Understanding of Aboriginal Self-Government”. As explained in the RCAP report, the history of the relationship can be divided into four stages: Separate Worlds; Contact and Cooperation; Displacement and Assimilation; and Negotiation and Renewal. Each stage gives a general view of the relations between Aboriginal and non-Aboriginal peoples in Canada and provides an excellent backdrop to assessing the current path chosen by the federal government.

The history begins with a time when there was not contact between the Aboriginal and non-Aboriginal peoples. RCAP explains that “Aboriginal nations were then fully independent; as described by the Supreme Court of Canada, they were ‘organized in societies and occupying the land as their forefathers had done for centuries’ (RCAP 1996: vol. 1, 43). Earmarking this period is the independence of Aboriginal nations.

Relations with non-Aboriginal people go back as early as the 10th century as the Norsemen from Greenland and Iceland were exploring possible new settlements. These first contacts were sporadic and often conflicting as non-Aboriginal people attempted to set up a colony in the mid-1300's (RCAP 1996: vol. 1, 99). Other explorations occurred in the 1400's which again were brief encounters. However as patterns of trade were established in the 1500's their stays were extended. Explorers began to settle to lay claim to the territory and prevent incursions from other

countries (RCAP 1996: vol. 1, 99-100) .

This early period titled “Contact and Cooperation” was marked by infrequent and brief relations between Aboriginal and non-Aboriginal peoples. It was also characterized by a high Aboriginal population in comparison to the non-Aboriginal population. The Aboriginal peoples also had the upper hand with respect to their survival knowledge and knowledge of the land. This led to cooperation between the non-Aboriginal and Aboriginal peoples demonstrated by an increase in trading relations and military alliances between Europeans and Aboriginal peoples. Treaty making was initiated. This process, with roots in both societies, outlined the principles and obligations agreed to by both nations to ensure a peaceful co-existence.

Despite the considerable amount of cooperation that occurred during this stage, one must be careful not to romanticize the considerable changes that took place in each society. As summarized in the RCAP report:

“This stage in the relationship between Aboriginal and non-Aboriginal societies was in short, a tumultuous and often confusing and unsettled period. Although it established the working principles that were to guide relations between them, it also brought substantial changes to both societies that, at times, threatened to overwhelm them” (RCAP 1996: vol 1., 105).

The introduction of non-Aboriginal and Aboriginal peoples to one another created a difficult environment within which to operate. The traditions and patterns were no longer appropriate and considerable maneuvering was necessary to accommodate the aspirations of both parties.

Changes in the relationship became evident in the late 1700's and early 1800's. The primary among these was the tremendous population losses due to war, disease and famine. The nature of the relationship also changed. The decline of the fur trade meant that the European

traders did not need to rely upon the Aboriginal trappers. Therefore their economic base was substantially decreased as was their importance with respect to European traders. Europeans began to see the Aboriginal nations as uncivilized; Aboriginal peoples were not “progressing” and thus needed the benefit of European knowledge to become “civilized”. The Aboriginal peoples needed help to catch up to the Europeans (RCAP 1996: vol. 1, 188).

Because of the decreasing role of the Aboriginal peoples in securing the survival of the Europeans and the increasing desire of Europeans to claim land in the west, the Aboriginal peoples entered into a period of “Displacement and Assimilation” with respect to their relationship with the Crown. The RCAP report summarizes the extent of this era in the lives of the Aboriginal peoples:

“Aboriginal peoples were displaced physically- they were denied access to their traditional territories and in many cases actually forced to move to new locations selected for them by colonial authorities. They were also displaced socially and culturally, subject to intensive missionary activity and the establishment of schools... In addition they were also displaced politically, forced by colonial laws to abandon or at least disguise traditional governing structures and processes in favour of colonial-style municipal institutions” (RCAP 1996: vol. 1 , 140).

This displacement took the form of legislation, the most prominent form being the *Indian Act, 1851*, which had many pieces of earlier legislation to bring it to its 1874 form.¹⁹

The stage of “Displacement and Assimilation” continued until the 1966 Hawthorn Report titled, *A Survey of the Contemporary Indians of Canada: A report on economic, political and educational needs and policies*, which was the first comprehensive study into the lives of the

¹⁹ These included the *Gradual Civilization Act, 1857* and the *Gradual Enfranchisement Act, 1874* which both sought to civilize Aboriginal peoples by forcing them to give up their Aboriginality. For a more in depth discussion of this refer to Chapter One of this thesis as well as *Looking Forward, Looking Back*, volume one of the RCAP report 1996, specifically at chapter nine titled “The *Indian Act*”.

Aboriginal peoples, their institutions, and economic situation. Chief among its many recommendations was self-government for Aboriginal peoples (Hawthorn 1966: 18). Although premised on a municipal style rather than outright self-government, it was the first of several reports to advocate the end to the band structure that existed as a result of the *Indian Act*. The Hawthorn report was also the first to coin the phrase “citizens plus” (Hawthorn 1966: 3) meaning that Aboriginal peoples as Canadian citizens had special status because of their Aboriginality. It was not advocating a parity between Aboriginal citizenship and Canadian citizenship, however, it did recognize that special significance derived from being an Aboriginal person. It is important to note that despite the recognition of parity in citizenship statuses in the report, it remains a significant step in the evolution of the recognition of multiple citizenship status in Canada.

This report was followed soon thereafter by the 1969 White Paper on Indian Policy put forward by Trudeau’s Liberal government. The White Paper of 1969 was put forth by then Minister of Indian Affairs and Northern Development, Jean Chrétien, after consultation with national Aboriginal leaders. The consultative process was considered a step forward in Aboriginal/government relations. However, the White Paper delivered different proposals than those discussed during consultations. The White Paper called for the end of the constitutional separateness of Aboriginal peoples in section 91(24) of the British North America Act (DIAND 1969: 6, 8); the disintegration of the treaty process and the phasing out of treaties already made (DIAND 1969: 11); and the advocacy of a provincial/Aboriginal relationship in place of the federal/Aboriginal relationship (DIAND 1969: 6). These policy initiatives were proposed to ensuring the “equality” of Aboriginal peoples with other Canadian citizens. The belief was that the “special treatment” of the Aboriginal peoples had led to their impoverished situation and thus

eliminating all legislative distinction would end the discrimination (DIAND 1969: 4, 8). These results astonished and appalled Aboriginal peoples and increased their distrust of the federal government and also of the consultative process.

Within Aboriginal nations, however, it led to an increased mobilization of Canadian Aboriginal peoples as well as increased mobilization of Aboriginal peoples internationally. The 1970's is characterized by an increased number of domestic and international court cases focusing on the rights of the Aboriginal peoples.²⁰ Aboriginal peoples became more adept at playing in the political circles. This knowledge benefitted them in the proceeding constitutional negotiations. There was also an increasing awareness by non-Aboriginal peoples as to the concerns of Aboriginal peoples. This growing support for Aboriginal right of self-determination led to increased financial support by the federal government (RCAP 1996: vol. 1, 206). It is during this decade that a link is established between the constitution and Aboriginal peoples.

In 1978 constitutional negotiation became a focal point due to the election of the Parti Québécois. From 1978 until 1982 constitutional negotiations occurred. Aboriginal peoples lobbied to be included in these discussions. The result was the inclusion of three sections in the *Constitution Act, 1982* pertaining to the Aboriginal peoples. Section 25 protects Aboriginal and treaty rights from other sections of the *Constitution Act, 1982* and the *Charter of Rights and Freedoms*. Section 35 explains that before any amendment to Aboriginal or treaty rights a

²⁰The United Nations (UN) called for the decolonization of all territories distinct from the states that were administering them. Although this was not applied to North America the Aboriginal peoples made a case concerning "internal colonialism" (RCAP vol. 1 1996: 204). The Lovelace case (1973) went to the United Nations Human Rights Commission where Canada was deemed to be discriminating against Aboriginal women. This was an international embarrassment for Canada. The Inuit Circumpolar Conference was created as well as the World Council of Indigenous Peoples. The National Indian Brotherhood gained NGO status at the UN. The Calder case (1973) led to the land claims policy.

constitutional conference should be held with Aboriginal peoples. Section 37 formalizes the request for further constitutional negotiations with the Aboriginal peoples (*Constitution Act, 1982*: 9, 11, 12). The inclusion of these sections were deemed a success by Aboriginal peoples and were a precursor to their involvement in future constitutional negotiations.

The early 1980's witnessed a burgeoning field of Aboriginal rights. On August 4, 1982 the Standing Committee of the Department of Indian Affairs and Northern Development created a Sub-committee on Indian Self-Government. Commonly referred to as the Penner report, its mandate was to "...review all legal and related institutional factors affecting the status, development and responsibilities of Band Governments on Indian reserves..." (Penner 1983: v). The Penner sub-committee suspended its discussions, however, during the initial constitutional conference as dictated by section 37 of the 1982 Constitution, so that there would be no confusion between the two. By 1987 the four Constitutional Conferences had failed to come up with any agreement on the definition of the right of self-government.

When the Penner committee resumed its discussions the focus fell again to the issue of First Nation self-government. It put forth a number of recommendations recognizing the inherency of First Nations' self-government. The report states that:

"The Committee has recommended that the federal government recognize Indian First Nation governments as a distinct order of government within the Canadian federation" (Penner 1983: 133).

The report also argued that the federal government should relate to these First Nations governments on a "government-to-government basis" (Penner 1983: 134). These recommendations echoed the sentiments of the First Nations people and was heralded as another

success in the struggle for recognition of Aboriginal rights.

Despite these early successes in Stage four “Negotiation and Renewal”, tumultuous times lay ahead. The end of the 1980's witnessed a new round of constitutional negotiations to achieve Quebec's consent to the 1982 patriated Canadian Constitution. The Quebec Round and the Meech Lake Accord, 1987 consisted of constitutional amendments based on the five principles²¹ as outlined by the Quebec Liberal Party. The agreement was reached through elite accommodation and thus excluded the Aboriginal peoples as well as many others who had come to believe that their input into constitutional negotiations was necessary. Aboriginal groups joined with women's organizations to protest the exclusive process. There was also protest about the failure of the Accord to include references and/or protections for the various groups such as women and Aboriginal peoples. There was a fear that some of the clauses in the Meech Lake Accord would be used to the detriment of rights recently secured in the *Constitution Act, 1982*. The Meech Lake Accord failed to be ratified by the ten provincial legislatures, including, the Manitoba legislature where Aboriginal MLA Elijah Harper denied his support to a resolution which required unanimous support.

Although the Meech Lake Accord was not ratified it did generate widespread discontent with the state of Aboriginal/government relations. Only three years earlier the Penner report had recommended that the First Nations be recognized as a “distinct order” (Penner 1983: 133) within Canada, yet First Nations and other Aboriginal peoples were denied access to the Meech Lake negotiation process. Sentiments boiled over in the summer of 1990 with the confrontation at

²¹These conditions being: the recognition of Quebec as a distinct society; an increased role for Quebec in immigration policy; a provincial role in appointments to the Supreme Court of Canada; a limitation in federal spending power; and a Quebec veto on constitutional amendments (Hogg 1988: 2).

Kanesatake. Commonly referred to as the Oka crisis, the main issue of contention was a land dispute on-going since the 1700's (RCAP 1996: vol. 1, 208). The inability to resolve the dispute in a peaceful manner signaled a breakdown in Aboriginal/government relations.

In response to this breakdown, the Mulroney government entered into the fray of constitutional negotiations once again. The *Citizens' Forum on Canada's Future*, commonly known as the Spicer Commission, was established in 1991, to avoid the problems of exclusion that plagued the Quebec Round of negotiations.. This Commission heard a broad base of support for, among other things, Aboriginal self-government. The Commission stated that:

“We join with the Canadian people in their support for native self-government and believe that First Nations people should be actively involved in the definition and implementation of this concept” (RCAP 1996: vol. 1, 215).

Echoing the wisdom of the earlier Penner Commission and the sentiments of the Aboriginal peoples, the Spicer Commission called for the recognition of Aboriginal self-government. This recommendation by the Spicer Commission led to the full inclusion of the Aboriginal leaders in the Constitutional conferences in 1992 resulting in the constitutional recognition of Aboriginal peoples as one of three orders of government within Canada in the Charlottetown Accord. This agreement, however, was not ratified in a Canada-wide referendum.

The Mulroney government also established a Royal Commission in 1991 to study the relations between Aboriginal and non-Aboriginal people. The RCAP received the mandate to:

“...investigate the evolution of the relationship among aboriginal peoples (Indian, Inuit and Métis), the Canadian government, and Canadian society as a whole. It should propose specific solutions, rooted in domestic and international experience to the problems which have plagued those relationship and which confront aboriginal peoples today. The Commission should examine all issues which it deems to be relevant to any or all of the aboriginal peoples of Canada...” (RCAP

1996: vol. 1, 699).

The RCAP worked for five years in conjunction with Aboriginal peoples to recommend measures to restructure the relationship between Canada and the Aboriginal peoples.

The process employed by the RCAP signaled its commitment to partnership. As stated in the report,

“underpinning our approach was the partnership...Aboriginal and non-Aboriginal people working together to re-establish the association of equals that once characterized the relationship between Indigenous peoples and newcomers in North America” (RCAP 1996: 5).

This partnership was reflected in the make-up of the Commission itself where over half of the Commissioners were Aboriginal and employment was also carefully shared between Aboriginal and non-Aboriginal people. The RCAP also considered its mandate to conduct its research in a very public manner. Public hearings listened to the interpretations of various Aboriginal nations as to the meaning of the mandate. Public consultations sought the views, stories, and aspirations of Aboriginal peoples regarding the relationship and its history. The Commission encouraged participation in the process by having a member of the community facilitate the meetings as well as having an Elder sit on the Commission while in the community (RCAP 1996: 6, 7).

Participation and partnership were identified as cornerstones of the RCAP report.

Recent Initiatives

Prior to the completion of the RCAP report the Conservative party was voted out of office and replaced by Jean Chrétien and the Liberal party. The “Red Book” outlining the Liberal Party’s platform contained a specific section on Aboriginal peoples. Once voted to office, the

DIAND developed more detailed plans. Minister Ron Irwin stated that the Liberals “w[ould] be committed to building a new partnership with Aboriginal peoples...” (DIAND 1994: 1). There was specific reference to the desire to “...achieve a mutually acceptable process to interpret the treaties in contemporary terms, while giving full recognition to their original intent” (DIAND 1994: 2). These commitments from the Liberal government are significant because they indicate a willingness to pursue the recommendations of previous commissions which call for the communication and negotiation with Aboriginal peoples for a more cooperative future.

Promises, however, are only as good as the action and success that they bring. The clearest guide to the Liberal government’s commitment to ameliorate the relationship between Aboriginal and the Crown is via its record of achievement in this area. The Liberal Party put out *A Record of Achievement: A report on the Liberal Government’s 36 months in office* in 1996. The report articulates several of its initiatives to improve the relationship, including a 1995 policy guiding the implementation of inherent right to self-government. It also advocates the exercise of Aboriginal self-government within the confines of the Canadian constitution. Furthermore, it suggests that Aboriginal laws should work in concert with provincial, territorial and federal laws. Finally, the Liberal government indicates that any funding for self-government will be from a reallocation of resources already set aside for Aboriginal affairs (Liberal Party of Canada 1996: 99). The principles employed in this policy indicate the willingness of the Liberal government to accept that the inherent right of Aboriginal self-government is protected in the Constitution.

The Liberal government’s report also points to particular successes in the planning of self-government. The agreement in principle signed between the federal government and the Nisga’a Tribal Council in 1996 is heralded as a success of the self-government policy (Liberal Party of

Canada 1996: 99). The Liberals point to the agreement reached with the Assembly of Manitoba Chiefs in 1994 to begin winding down the influence of DIAND with respect to the nations in Manitoba, known as the “Dismantling Initiative” (Liberal Party of Canada 1996: 100). Also mentioned was the negotiations with the Treaty nations in Saskatchewan to re-create a Treaty Commissioner which was renewed in 1996 (Liberal Party of Canada 1996: 101). The commencement in 1994 of the Mohawk/Canada roundtable was also noted, however, these negotiations are still ongoing and their success is questionable.

Within the Liberal government’s mandate the RCAP report was released (1996). The RCAP report is significant because it frames the second mandate of the Liberal government. The DIAND under the direction of Minister Jane Stewart responded to the RCAP report in 1998 with an “Aboriginal Action Plan”. Because of this it is necessary to highlight some of the important aspects of the report.

The report with the largest mandate in the history of royal commissions, was extremely comprehensive and provided numerous recommendations to improve the Aboriginal peoples’ relationship with the Canadian government and Canadian people. The consultative approach was largely successful and lead the RCAP to prepare not only its final report but also special interim volumes that dealt with particularly pertinent issues to the Aboriginal communities.

One of these special reports was titled *Treaty Making in the Spirit of Coexistence*. This report identifies the current problems with the land claims policy and proposed a new path which would be mutually beneficial to the Aboriginal nations and the federal government. Having articulated the Aboriginal relationship with the land, the Commission argues that the current policy of requiring extinguishment as a pre-condition to a land claims agreement goes against the

philosophy of the Aboriginal peoples and also the spirit of the relationship between the Aboriginal nations and the Crown. The Commission states that:

“The major shortcoming on the current federal extinguishment policy is that it purports to extinguish rights [either by blanket extinguishment or partial extinguishment] that are part and parcel of Aboriginal identity. In doing so, it effects a radical discontinuity between on the one hand, historical Aboriginal relationship with land and, on the other hand, contemporary treaty rights” (RCAP 1994: 62).

The Commission does not shy away from identifying the main problem with the present land claims process and, thus, creates legitimacy in the eyes of the Aboriginal peoples.

The solution proposed by the Commission is more similar to the original treaty relationship whereby there is mutual sharing of the land in question. They title their proposal the “mutual recognition approach” (RCAP 1994: 60). This approach consists of dividing the land in question into different categories where each of the interested parties has a particular set of rights with respect to their ownership of the land. It is explained by RCAP in this way:

“Negotiations would aim to describe the territory in question in terms of special categories of land in order to identify as exhaustively and precisely as possible, the rights of each of the parties with respect to land and governance” (RCAP 1994: 60).

The value of the approach offered by the RCAP is that it recognizes not only governments’ interest in the land but also emphasizes and validates the Aboriginal relationship with the land which is absent in the current land claims policy.

The interim report dedicated to the issue of treaty making is one of four special reports²²

²²The others are: The High Arctic Relocation: A Report on the 1953-55 Relocation; *Choosing Life*. A Special Report on Suicide among Aboriginal people; and *Bridging the Cultural Divide*: A Report on Aboriginal People and Criminal Justice in Canada. The RCAP also prepared two constitutional commentaries to coincide with the

prepared by the RCAP that offers conscientious recommendations to improve the relationship. The final report by RCAP consists of over 100 pages of recommendations²³ and thus it would be imprudent to attempt to summarize all of them here. However, the trend of the report is to re-establish or renew the Aboriginal/government relationship. They argue for the recognition of the inherent right to self-government and that this right is vested in the Aboriginal nation. One of the more significant recommendations is the demand for an apology by the federal government for the past injustices of governments. RCAP argues that this apology “must be a profound and unambiguous commitment to establishing a new relationship for the future” (RCAP 1996: vol. 5, 4). The Commission also argues for the “recognition of Aboriginal nations within Canada as political entities through which Aboriginal people can express their distinctive identity within the context of their Canadian citizenship” (RCAP 1996: vol. 5, 1).

Minister of Indian Affairs and Northern Development, Jane Stewart, presented the government’s response to the RCAP report and its direction for the government’s second mandate in January 1998. Coming two years after the release of the report caused many people to question the impact of the RCAP. However, the “Statement of Reconciliation” did address the fundamental concerns recorded by the RCAP report. Perhaps the most significant aspect of the statement was the unambiguous apology by the federal government for past injustices:

“The Government of Canada today formally expresses to all Aboriginal people in Canada our profound regret for past actions of the federal government which have

Charlottetown constitutional negotiations. These are titled: *The Right of Aboriginal Self-Government and the Constitution* (1992); and *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (1993).

²³For a closer inspection of these recommendations please refer to Volume 5 of the RCAP report (1996). *Renewal: A Twenty-Year Commitment*, pages 141 to 255.

contributed to these difficult pages in the history of our relationship together” (Stewart 1998: 1).

This statement has tremendous significance in terms of renewing the relationship between Canada and the Aboriginal peoples because trust can only be renewed when recognition of questionable past actions are recognized by government.

From this premise the DIAND goes on to outline the government’s plan for re-establishing the relationship in its publication *Gathering Strength: Canada's Aboriginal Action Plan*. Based on the recommendations from the RCAP report Stewart highlights the four principles: renewing the partnership; strengthening Aboriginal governance; developing a new fiscal relationship; and supporting strong communities (News Release Jan. 7, 1998: 1). The elements in Stewart’s statement support the general recommendations of the RCAP report.

It is necessary to unveil what these principles entail in order to get a better idea of the government’s commitment level. The first objective of renewing the relationship initiated by the formal apology of the federal government. The DIAND also stressed healing as a major part of a renewed relationship. It states that funding will be available for initiatives to aid in the healing of those who were went through the residential school system (Stewart 1998: 3). The final element of renewal focuses on the treaty relationship and the rights contained within that relationship. Stewart argues that “treaties between the Crown and First Nations are basic building blocks in the creation of our country” (DIAND 1998: 6). The renewal of the relationship is possible based on these proposed actions.

Strengthening Aboriginal governance as a principle to improving the relationship between the Aboriginal peoples and Canada also contains specific elements worth noting. Again the

emphasis is placed on the treaty relationship and reaffirming self-government in land claims agreements (DIAND 1998: 12). Strengthening Aboriginal governance also implies building capacities within Aboriginal communities to address with the public administration of governance and implementation. Stewart also makes a commitment to continue to address land claims in a fair and equitable manner (DIAND 1998: 10).

Creating a new fiscal relationship and supporting strong communities go together in Stewart's statement. Funding, she argues, must be stable and predictable and consideration should be given to the community's own sources of revenue (DIAND 1998: 13). Stewart also commits to improving the health and public safety in Aboriginal communities; investing in Aboriginal peoples; and strengthening economic development (DIAND 1998: 15).

Testing the Framework

The response by the federal government to the RCAP report will be the basis for the direction of Aboriginal/Canada affairs for the remainder of the Liberal government's mandate. It is because of this that the proposed framework is assessed based on the initiatives of the federal government. The proposed framework does not match entirely the plan of the federal government. This is not because of the logistics of the proposed framework, but due to the inability of the federal government to truly recognize Canada as a multi-nation state because of the confines of the Canadian constitution. The federal government does accept some elements of the proposed framework but will not accept the substantive ideas that this framework raises. What this means is not that the framework fails, but that elements of it can be a starting point for the renewal of the relationship. The fulfillment of the framework will likely not be assured nor accepted during this government's mandate. However, the process can be started.

As the first element of the framework, treaties are one of the most fundamental characteristics. The federal government has stated its commitment to treaties as the basic building block to renew the relationship in its *Gathering Strength* publication (DIAND 1998: 6). There is a recognition that these are and will be formal agreements, however, it is not intimated whether the federal government is willing to accept other unwritten methods of formalization as valid. The RCAP report on which the federal government's plan for action is premised does stress the importance of oral testimony, (RCAP Appendix B 1996: 6) thus, there is the possibility that the federal government will place more emphasis on the Aboriginal formalization procedures and methods of retainment in the future, but it is not guaranteed.

The federal government also issued its support for shared responsibilities and peaceful coexistence. In *Gathering Strength* it is stated that "we need to move beyond debate and disagreements over jurisdictions and responsibilities and employ alternative approaches that support a partnership" (DIAND 1998: 7). Recognizing the notion of partnership is a significant step in the process of renewal.

Minister Stewart also recognizes that these responsibilities and obligations will be contained within the treaties that are agreed to by the federal government and the Aboriginal nations. She states that "the federal government believes that treaties and the relationship they represent, can guide the way to a shared future" (DIAND 1998: 12). The willingness appears to exist to accept the ideas of the treaty process, yet it is unclear whether the government will accept the basic tenet of treaty making: *shared sovereignty*.

Althusian federalism and its three main precepts of symbiosis, communication and the goal of autonomy are elements recognizable in the federal government's approach. The federal

government is committed to a partnership with the Aboriginal nations. The Minister also acknowledges a change in the mentality of the federal government by way of recognizing the contribution of the Aboriginal peoples to the building of Canada (Stewart 1998: 1). Sharing resources is also noted as one of the fundamentals to renewing the partnership (Stewart Jan. 7, 1998: 5).

There is commitment to communication with the Aboriginal peoples. In Jane Stewart's "Notes to an Address by the Honorable Jane Stewart" she argues that there will be a commitment on behalf of the federal government to focus more on negotiation and communication as opposed to litigation. She also commits to working out deeper solutions to problems so that they do not exacerbate and lead to more disputes. She promises prompt action to problems addressing concerns with meaningful consultation (Stewart Jan. 7, 1998: 5).

Autonomy is a goal that Minister Stewart accepts and is committed to supporting in her guidelines for strengthening Aboriginal self-government. She argues that:

"We need to ensure that Aboriginal people have the tools and capacity to improve the lives of those they serve. ... That is why we are committed to assisting Aboriginal people to design, develop and deliver the programs and services they need from their governments" (Stewart Jan. 7, 1998: 6).

There clearly is a desire to increase the autonomy of the Aboriginal nations certainly as it pertains to the expenditures on Aboriginal communities. However, it is not clear the extent to which the federal government is willing to allow this autonomy to exist.

The concept of non-territoriality is a difficult one for the federal government to contend with because much of the nation-state's stature comes from the territory it occupies. However, the federal government is moving towards this notion evident in the modern treaties currently

being negotiated. These agreements provide exclusive Aboriginal use and control over what is delineated as Aboriginal land, and then shared jurisdiction and usage over non-exclusive Aboriginal land. There are also provisions in these modern treaties that incorporate aspects of personal jurisdiction, circumscribing strictly territorial jurisdiction for the Aboriginal government. This allows Aboriginal citizens to take their citizenship with them away from the Aboriginal nation.²⁴ This would effectively resolve the issue of territoriality because the Aboriginal nation would not be restricted to a strip of land designated by the federal government, but would instead be able to maintain a relationship with their traditional territory. The federal government's path has demonstrated a commitment to incorporating notions of non-territoriality into the modern land claims agreements.

The final element of the proposed framework is multiple citizenship. The Canadian government must recognize other citizenship statuses within the confines of the Canadian borders because of the existence of multiple Aboriginal nations. This would imply that Aboriginal peoples could hold citizenship to their own nation as well as maintain their Canadian citizenship. Regardless of the particular desire of the Aboriginal nation, Aboriginal citizenships must be recognized as valid and must not detract from their ability to continue their relationship with Canadians.

The federal government has not dealt with this issue of Canadian citizenship. In fact, most commissioned reports have stayed away from this topic, with the exception of the 1966 Hawthorn report which identified the Aboriginal peoples as "citizens plus" and the 1996 RCAP report,

²⁴For a clearer example of this refer to Chapter Six--The Nisga'a Nation of the Nass Valley, which highlights some of the non-territorial aspects of this Final Agreement.

indicating an acceptance of multiple citizenship. Without the acceptance of this notion of multiple citizenship within Canada the federal government will fail to truly renew the relationship with the Aboriginal peoples. As argued in the first section of this thesis, if the citizenship of a country is illegitimate, then so to must be the constitution that frames that country. This would demand constitutional amendment which is not currently being discussed with respect to accepting the multiple citizenship status of Aboriginal people. Thus, because the concept of citizenship is not dealt with on this level, the relationship with the Aboriginal peoples will remain illegitimate. Thus, the proposed framework will not succeed in earnest until the recognition of multiple citizenship becomes a reality through constitutional amendment.

However, noting the Final Agreement with the Nisga'a Nation and provincial and federal governments, the recognition of multiple citizenship is beginning to be accepted. This signifies an important step for the Aboriginal people and the federal government--progress is being made.

Conclusion

The history of the relationship with the Aboriginal peoples has been reflected by the four stages approach developed by Mark Dockstater and employed by RCAP report. The goal of the report was to cement the "Renewal" aspect of stage four with its recommendations. The federal government has responded to the report in a superficially acceptable manner. However, upon closer inspection it is unclear as to how profound the commitment really is. Many of the terms remain ambiguous, which perhaps should not be unexpected with an initial response. It is hoped that the commitment by Minister Jane Stewart and the federal government will direct the relationship with the Aboriginal peoples in a positive way based on mutual respect and recognition.

The proposed framework was designed to generate the greatest flexibility while still maintaining certain key elements. The federal government's approach, while it is not a whole-hearted endorsement of the framework, could be seen as a preliminary step in renewing the relationship with the Aboriginal peoples based on the principles outlined in the framework. Where the federal government fails, and not where the framework fails, is the lack of a constitutional recognition of multiple citizenship status and Canada as a multi-nation state. Until this issue is on the table, the federal government will continue to battle with the Aboriginal nations for not seeing them as true partners. The framework still provides the best measure to re-establish the relationship with the Aboriginal peoples as nation-to-nation. It may take time, however, for the federal government to implement this.

Part Three Conclusion

The Aboriginal peoples' struggle for self-determination and self-government has taken its toll on many communities. It has also hindered Canada's ability to achieve true political progress in its constitutional negotiations. The crux of the problem with the relationship between the Aboriginal peoples and Canada is visible through the lens of citizenship. Citizenship status is that which defines the rights and responsibilities of the residents of Canada. A community which views these rights and responsibilities as legitimate will correspondingly have a legitimate community. Legitimacy is demonstrated by a high sense of efficacy, as well as high levels of individual and social responsibility. A community which is not legitimate will suffer from individual and social malaise. The community will feel a lack of control over its environment. The latter is indicative of the Canadian community.

By unmasking the history of Canadian citizenship with respect to how it came to include the Aboriginal peoples, this thesis has suggested that failing to obtain the consent of the Aboriginal peoples before including them as Canadian citizens was paternalistic in its truest sense. The assumption that the Aboriginal peoples desired Canadian citizenship and, moreover would benefit from it, created the illegitimacy of Canadian citizenship. This illegitimate definition of Canadian citizenship has wreaked havoc within Aboriginal communities and within the general Canadian community as well.

The goal of this thesis was to create a legitimate framework of association between the Aboriginal nations and Canada which would be reflected in citizenship status. The goal was to recognize Canada as a multi-nation state with multiple citizenship statuses. The political options

offered remained within the auspices of federalism while also including some pluralist models as well. The proposed framework derived from a combination of several of these options in order to best combine elements from Aboriginal and Canadian traditions.

Treaty and Althusian federalism framed the conceptual framework. Their notions of sharing and emphasis on the nation-to-nation relationship were critical components to the framework. The framework also adapted the principle of non-territoriality as a means of breaking free from the restrictive reserve system now in place. With respect to the Aboriginal nations this notion was used to consider traditional boundaries of each of the nations. The use of (who had rights to) the land by the Aboriginal nation was something to be negotiated. This framework also emphasized the concept of multiple citizenship within Canadian federalism. It stressed the recognition by Canada of Aboriginal nation citizenship and Canadian citizenship which would also promote the nation-to-nation relationship.

The proposed framework remained at the conceptual level and hence was tested to ensure that the concepts proposed fit with Aboriginal traditions and future desires as well as with Canadian government restraints. The test was also designed to stringently assess whether the proposed framework would be flexible enough to accommodate the variances between Aboriginal nations. The case nations were chosen from different parts of Canada to highlight some of these differences. They also experienced different patterns of development with respect to their relations with Europeans and later the Canadian government. Consequently the case nations had different views on their present and future relationship with Canada.

The proposed framework was congruent with the traditional political philosophies and the present proposals of the case nations (the Mohawks from Kahnawake; the Treaty nations from

Saskatchewan; and the Nisga'a of the Nass Valley). The concepts of treaty and Althusian federalism worked well with the general Aboriginal tradition of sharing resources while maintaining political control. The Aboriginal nations also either had a treaty (Mohawks and Treaty Nations) or were in the final stages of negotiating one (Nisga'a) as the base of their relationship with the Crown and Canada.

The notion of non-territoriality was also evident in many of the historic treaties and current proposals of the Aboriginal nation. Sharing the land, or non-exclusive usage, to part of the Aboriginal nation's traditional territory was supported by these nations. There is also a general Aboriginal tradition of viewing the land in a spiritual manner. Respecting the land and what it provides is a prominent theme in the Aboriginal nations explored. This is a different way of interpreting the land's value and use compared with the previous strict delineation of reserve territory. This non-territorial precept is in use in some of the modern treaties being negotiated (ie. Nisga'a nation Final Agreement).

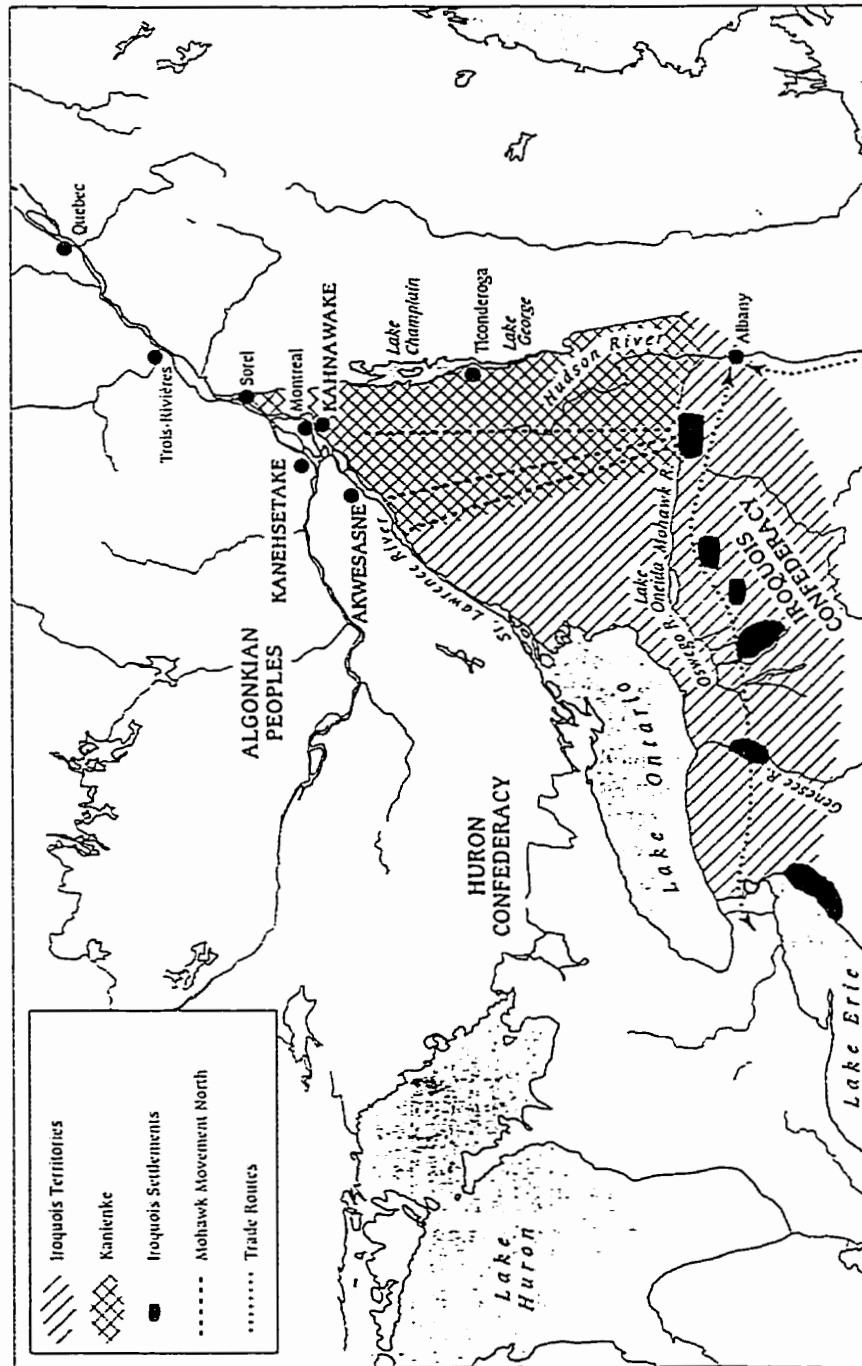
Despite the seeming endorsement of the proposed framework by the Aboriginal nations tested, the case of the federal government was somewhat different. The aspect of the treaty as being the base of the relationship between the Aboriginal nation and Canada was the easiest hurdle to cross. However, the interpretation of what a treaty should signify was somewhat questionable. Based on current federal government proposals, the federal government is willing to create a dialogue with the Aboriginal nations of the issues of self-determination and self-government. There are even hopes for the recognition of Aboriginal nation citizenship. However, the federal government is unable to accept the fundamental point that the proposed framework wished to address: that Canada is a multi-nation state. The federal government does not go far

enough in its current proposals for this recognition to occur. This is because recognition of Canada as a multi-nation state with multiple citizenship statuses would require a change to the fundamental basis of Canada: the Constitution. This has not occurred, nor is it on the table for negotiation at this point.

In the final analysis the proposed framework is largely successful because it seems suitable and flexible enough to adapt to the different traditions and histories of the Aboriginal nations. Despite the inability of the proposed framework to meet with the current goals of the federal government, this should not be seen as a reason to reject the concepts employed within it. Referring back to Chapter One, a restored nation-to-nation relationship would be best achieved by using the dialogic approach promoted by James Tully (1995). This is not a easy nor a fast process. The endurance of the players however indicates pursuing this process is manageable. It is critical that this process continue and that progress be made based on the notions of mutual respect for the nation-to-nation relationship that the proposed framework is trying to achieve. Fundamental change will only be achieved through the persistence of those involved. Constitutional negotiation and change will occur again: it is a matter of time.

Appendices

Appendix A--Map of Kahnawake



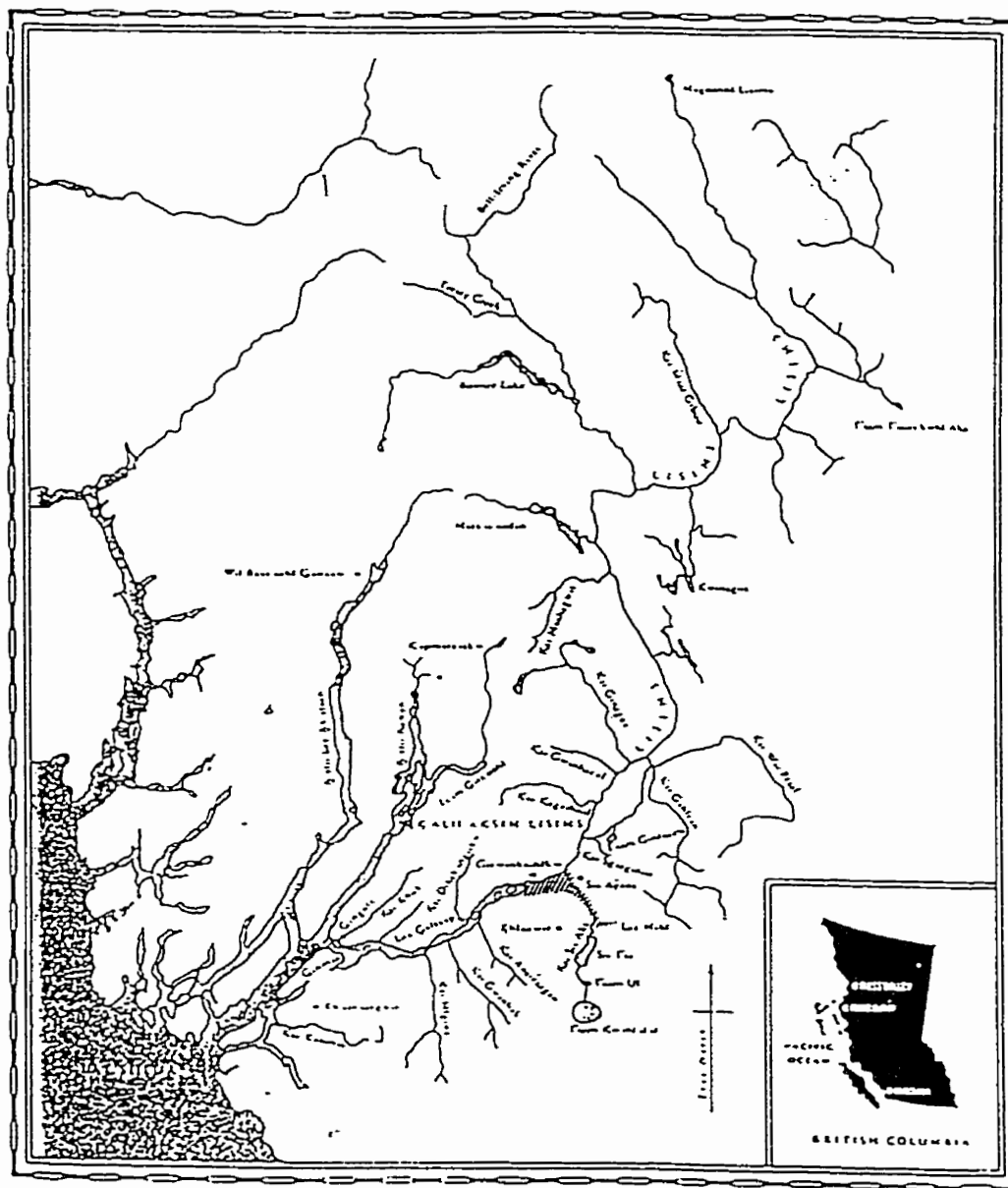
Kanienke and neighbouring territories

Alfred, Gerald. *Heeding the Voices of our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism*. 1995. Toronto: Oxford University Press.

Appendix C—Map of the Nass Valley

NISGA'A NATION

TRADITIONAL TERRITORY



Berger Thomas, and Frank Calder. *Nisga'a: People of the Nass River*. 1993. British Columbia: Nisga'a Nation and Douglas and McIntyre Ltd.

Appendix D-- Nisga'a Declaration



Nishga Declaration

The Nishga People is a distinct and unique society within the many faceted cultural mosaic that is Canada. The issue is whether the Nishga element within this mosaic will be allowed to face the "difficulties", will be allowed to become full participants contributing in a positive way to the well being of the Naas Valley in particular and the country in general. The positive aspect of this participation, we feel, must be through self determination, self determination that is dependent on the shared and mutual responsibility of governments and Nishga People.

If Canadian Society and Nishga Society of which it is part, is to be truly free, we as a distinct people and as citizens, must be allowed to face the difficulties and find the answers, answers that can only be found by determining our own social, economic and political participation in Canadian life. Governments, both Federal and Provincial, must be persuaded that Nishga self-determination is the path that will lead to a fuller and richer life for Nishga People and all Canadians.

We, as Nishgas, are living in a world where dynamic initiatives must be taken to achieve self determination especially in respect to the natural resources of the Naas Valley, in order to control our own process of development within the larger Canadian society and to make decisions that affect our lives and the lives of our children. We realize that our struggle for self determination will be a difficult one, but we refuse to believe that it is in vain, if governments and the Nishga People agree to their mutual responsibility for that growth and development. Nishga self determination of resource development within the Naas Valley is the economic base that will allow for self-determination of the other aspects of modern 20th Century society that makes up this Canada of ours.

In 1969, N.T.C. agreed in principle with the "statement of the Government of Canada on Indian Policy, in the face of strong opposition from other Native Peoples across the nation. That agreed principle was incorporated in the policy statement "true equality presupposes that the Indian people have the right to full and equal participation in the cultural, social, economic and political life of Canada". Such an agreement in principle, however, does not necessarily mean the acceptance of the steps to implement as suggested by the 1969 Policy Statement. Co-existent with the N.T.C. agreement of the stated principle is also the N.T.C. agreement with the Hawthorne Report, that "Indians should be regarded as Citizens Plus, in addition to the normal rights and duties of citizenship, Indians possess certain rights as charter members of the Canadian Community".

Undergirding the whole of the above, is the demand that, as the inhabitants since time immemorial of the Naas Valley, all plans for resource extraction and 'development' must cease until aboriginal title is accepted by the Provincial Government. Also, we, the Nishga People, believe that both the Government of B.C. and the Government of Canada must be prepared to negotiate with the Nishgas on the basis that we, as Nishgas, are inseparable from our land; that it cannot be bought or sold in exchange for "extinguishing of title".

CONCLUSION:

What we seek is the right to survive as a People and a Culture. This, we believe, can only be accomplished through free, open-minded and just negotiations with the provincial and federal authorities, negotiations that are based on the understanding that self determination is the "answer" that government seeks to the "difficulties" as they apply to the Nishga People.

Appendix E--Letter to Arnold Goodleaf of the MCK

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March 17, 1998

Mr. Arnold Goodleaf
Director
Intergovernmental Relations Team
Mohawk Council of Kahnawake
Mohawk Territory of Kahnawake
JOL 1B0

Dear Mr. Goodleaf:

I write to follow up on our telephone conversation regarding a graduate student who is studying in the field of Canadian federalism and First Nations governance. When we spoke several weeks ago, I mentioned that Jennifer Brown, a graduate student whom I am supervising in the School of Canadian Studies at Carleton University, was writing a thesis which examines how the Canadian federation might be reconstructed to better accommodate diverse forms of Aboriginal self-government. As part of her work, she is examining the potential for accommodating Mohawk governance in Kahnawake.

In this regard, I asked you if you could make available to Ms. Brown the second edition of the "Institutions of Mohawk Governance" booklet which I worked on with Bob Groves. You replied that you could make this available, if I could assure you that it would remain confidential, and not go beyond Ms. Brown. I now write to give you this assurance. I shall be contacting Mr. Groves's office to obtain a copy of the booklet, which I understand is still in draft form only.

In closing, I wish to thank you for your cooperation, and for assisting Ms. Brown in what I am sure will be an interesting thesis. She may ask you to read the part of her work which refers to Kahnawake, in order to obtain your response to her analysis. Your assistance would also be very appreciated in this regard.

I wish you and your colleagues well in your governance negotiations with the Crown, and look forward to seeing you again.

Yours sincerely



David C. Hawkes

cc Bob Groves
Jennifer Brown ✓

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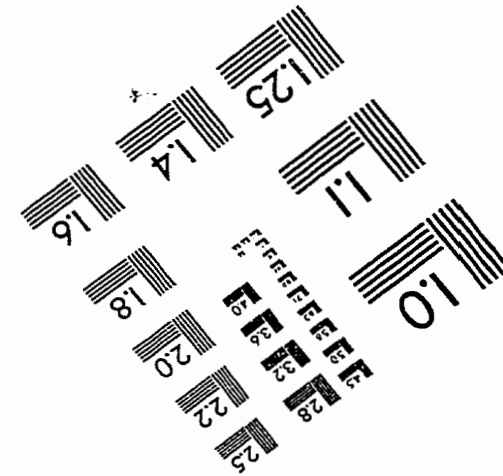
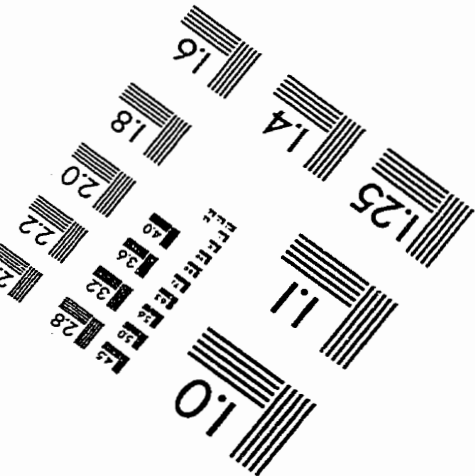
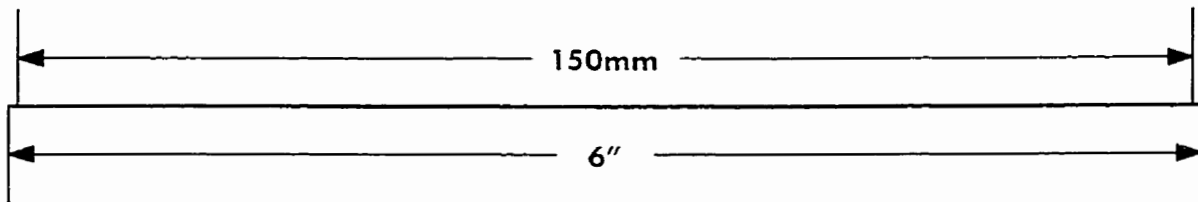
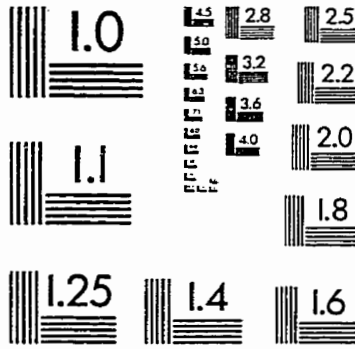
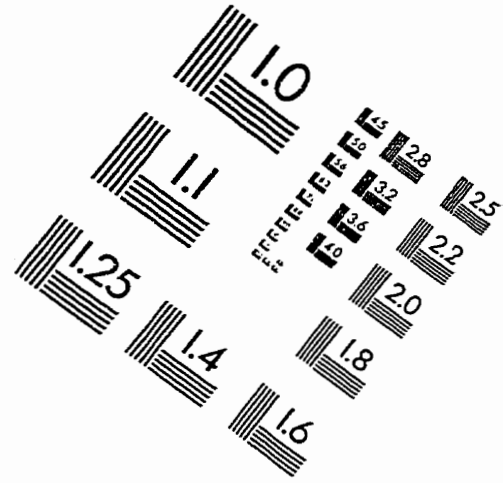
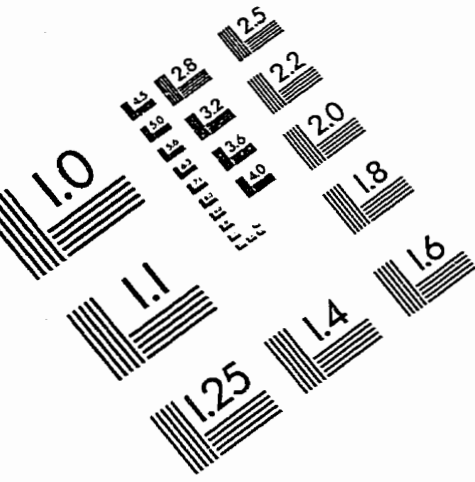
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